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Book Review

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Book Reviews

ANATOMY OF A TRIAL, by Alan E. Morrill, Chicago, Illinois, Commerce Clearing House, Inc., 1968. Pp. 233. \$8.50.

I am not acquainted with Alan E. Morrill, but before I reached page fifteen of his book, *Anatomy of a Trial*, I knew he was a member of the dwindling fraternity of working trial lawyers. His writing is not the work of an "old warrior," reminiscing about favorite courtroom dramas; nor is it the work of a country club advocate trying to impress the martini crowd. Alan E. Morrill's book shows him to be a capable trial lawyer who has set down on paper the lessons learned from everyday courtroom appearances in "bread and butter" cases. It is a practical work, and it makes fast and fascinating reading.

Morrill explores the jury trial step by step—from the voir dire examination to the closing arguments. He writes for both the experienced practitioner and the most recent member of the bar. The young lawyer will want to know his psychology of the voir dire examination. The old courtroom tiger will want to know how the author uses the questioning period during voir dire to put the arrogant, pompous, or incompetent judge in his proper place before the jury:

"Q. Do each of you feel that you can discharge your duty as a decider of facts, irrespective of how anyone else who is not a member of the jury may feel this case should be decided?"

"Q. And that, of course, would include the judge; wouldn't it?"

Morrill avoids the error of many legal authors, *i.e.*, the use of rambling transcripts. Instead, he uses succinct, practical examples. He expertly shares trial methods, techniques, and secrets that win cases. Probably his strongest chapters deal with the arts of cross-examination and argument. His list of ten objectives of cross-examination, and his nine point outline for closing argument, are a must for lawyers aspiring to any degree of sophistication in trial work.

Some of Morrill's ideas will be novel to Missouri lawyers. For example, he suggests that the lawyer summarize the pleadings in the opening statement. The author contends that this "will work to the advantage of the plaintiff when the defendant arbitrarily denies an allegation on which the plaintiff has abundant evidence to easily establish that issue." Probably no Missouri trial judge will allow a review of the pleadings in an opening statement without first being convinced that somehow those pleadings will be made admissible in evidence. However, the author's suggestion in this regard is worth noting.

This is a how-to book. It is by far the best work I have seen on the subject. Before I reached the last page I concluded that *Anatomy of A Trial* makes a

very real contribution to the study of adversary proceedings—that anvil against which man hammers out settlements of his many differences.

EUGENE E. ANDERECK*

THE TRIUMPH OF NATIONALISM, By William P. Murphy. Chicago: Quadrangle Books, 1967. Pp. viii, 434. \$10.00.

The subtitle of this book is *State Sovereignty, The Founding Fathers, and the Making of the Constitution*. It is a scholarly and lucid brief in support of the proposition that the states, sovereign under the Articles of Confederation, were stripped of their sovereignty—using the term to denote supremacy of governmental power—by the United States Constitution. The triumph of nationalism described in the book is not a victory won gradually by the federal government through years of political or judicial battles; the battle was won in Philadelphia at the Constitutional Convention of 1787, and victory was firmly secured for national supremacy in 1790, when the convention representing the people of Rhode Island ratified the Constitution and made its acceptance in the thirteen original states unanimous. It is Murphy's contention that those among the Founding Fathers who prevailed in Philadelphia very deliberately created a charter of government that would assure the national government supremacy over and independence from the state governments in every way then politically feasible, and their considerable skills made most of the particulars they sought feasible. Their efforts were capped by the decision to refer the final draft to the people in the several states for ratification rather than to the legislatures of the states. In this way even the political theory that the national government was the product of a compact among the several states was undermined. In the resulting scheme of things the states were intended to be subordinate to the federal government and, while few of the participants in Philadelphia contemplated or desired an ultimate withering of the states to the point of disappearance, virtually everyone understood that the states would exercise an immediately diminished and further diminishing role in governing the affairs of the people.

That the national government was intended to be supreme in relation to the states—that exercises of power granted to the national government cannot trammel states' "rights"—is not a seriously debatable proposition. Surely knowledgeable and open-minded citizens now accept its validity. Professor Murphy knows this, but he feels many Americans "who accept the necessity of an increased centralization of authority in order to cope with the problems of today's world" nevertheless have misgivings and are "apprehensive that we are departing from the original grand design of the Constitution. . . ."¹ Professor Murphy has addressed his book

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1. W. MURPHY, THE TRIUMPH OF NATIONALISM 416 (1967) [hereinafter cited as MURPHY].

to those among this group who have an interest in acquiring knowledge about the structure of our constitutional federal government by studying the thoughts and purposes of the architects who designed it and prepared the original blueprint. His purpose is to assure these readers that there has been "no departure from our ancient moorings."²

But there is another, hopefully more limited, audience for whom this book is clearly intended—the "diehards" (as Professor Murphy calls them, recognizing the probability that they will remain unpersuaded) who in the cause and name of states' rights have resisted and maligned many exercises of national power with charges that the national government was flouting state sovereignty, the Tenth Amendment, and the federal system created by the Constitution. Murphy has a special interest in seeking some intellectual conversions among this audience; but they will probably find his conclusions debatable, for a number of them in Mississippi held contrary views with sufficient emotion and rigidity to cause them to seek Murphy's discharge from the law faculty of the University of Mississippi a few years ago. This resulted largely from his expression of the conclusions he has now published in *The Triumph of Nationalism*.³

If large numbers from the first-described audience would give Murphy's book a thoughtful reading—a very large "if"—the ability of members of the second audience to use their private and largely unfounded interpretations of constitutional law and history for political advantage would be destroyed. As it is, the presidential candidate of the American Independent Party can cater to the misgivings and apprehensions of a substantial number of voters who can hardly be expected to possess thorough knowledge of constitutional history by trumpeting that the federal government has "seized" and "usurped" many powers not delegated to it in "derogation and flagrant violation" of the Tenth Amendment.⁴

Many of the alleged events⁵ cited to illustrate this general charge relate to federal action taken pursuant primarily to the Fourteenth Amendment, adopted some few years after the Founding Fathers had passed into history. But all of the events alleged reflect a stubborn unwillingness to see or admit the logic of the document born of the Founding Fathers' deliberations. The logic is simply that the Tenth Amendment means what it says, reserving not a fixed bundle of powers to

2. *Id.* at 417.

3. Professor Murphy, who is now a member of the faculty of the University of Missouri School of Law, describes his encounter with Mississippi state and university officials in the preface. It should be noted that while this personal experience preceded publication of his book, he had begun his research before joining the University of Mississippi faculty. It was publication of parts of an earlier version of his study in the *Mississippi Law Journal*, along with his agreement with the *School Segregation* cases, that sparked attacks on his status as a university faculty member in the state.

4. American Independent Party Platform, *Minneapolis Tribune*, October 14, 1968, p. 36, col. 1.

5. For example, action by the federal government allegedly taking over "the operation and control of the public school system of the several states"; telling "the property owner to whom he can and cannot sell or rent his property"; forcing "the states to reapportion their legislatures." *Ibid.*

the states, but only those not preempted by national powers whose exercise and authoritative definition were committed by the Founding Fathers to the various organs of the *national* government.

In short, the best evidence of the designed supremacy of the national government and the error of the above charges is the Constitution itself. It demands no little ingenuity to escape the plain thrust of: its supremacy clause,⁶ its judiciary article,⁷ providing the means for the national government to bring its powers to bear directly upon the people; a taxing power independent of the state legislatures;⁸ and the several prohibitions on the exercise of important "sovereign" powers by the states.⁹ Murphy's book enables the reader to appreciate the full force and significance of this constitutional language by tracing in abundant but interesting and engaging detail the acknowledged flaws in the Articles of Confederation (Chapters I and II), the backgrounds and attitudes of the delegates to the drafting convention (Chapters IV-XVI), the debates and proceedings of the convention (Chapters XIX-XXIV), and the process of ratification in the states (Chapters XVII-XXXIII). His treatment makes it perfectly clear that the logical implications of the Constitution were not in any sense accidental or fortuitous.

Because Murphy's method is to place heavy reliance upon original sources, using the recorded expressions of the participants in the drafting and ratifying conventions to prove his thesis, the book contains a massive amount of quoted material. But the end product displays Murphy's talent for providing this type of material within a cohesive narrative, remarkable for its flow and continuity. He has been selective in his choice of materials and the book does not purport to be a summary of all the issues that arose in the convention. Matters of interpretation and original intention are explored only as they relate to the relationships and distributions of power between the states and the national government. He admits to some selectivity in his choice of materials within this narrower compass, but as I noted at the outset, the book is not just a brief but a scholar's brief. Professor Murphy sums up the difference in the introduction when he answers his own suggestion that historians may feel that he, as a lawyer, is more inclined to advocacy than objectivity: "My defenses are that even impartial judges write opinions in the form of argument and that even impartial historians, once they form an opinion, seek to marshal their evidence and arguments as persuasively as possible."¹⁰

That the triumph of nationalism is constitutionally secure and legitimate can hardly be doubted. Murphy's book should remove any trace of doubt remaining in the mind of the citizen willing to understand the Constitution and thus willing to separate his constitutional interpretations at this level from whatever non-constitutional values he happens to hold most firmly from time to time. As Murphy

6. U. S. CONST. art. VI.

7. U. S. CONST. art. III.

8. U. S. CONST. art. I, sec. 8.

9. *E.g.*, U. S. CONST. art I, sec. 10.

10. W. MURPHY, *op. cit. supra* note 1, at 7.

concludes: "Future debates over the respective roles and functions of nation and states will increasingly turn on questions of policy rather than power."¹¹

This is always a welcome reminder in a book devoted to constitutional law and history. It is clear from Murphy's book that the framers labored under no pretense that they had created a rigid and precise formula to govern for all time the *exercise* of governmental power. What they sought was a formula that would commit ample power to the national government to deal with "national" problems. Though they defined powers delegated to the national government in vaguely precise terms that would meet with greater acceptability,¹² the overall allocation followed lines of projected national and state-local needs.¹³

This general conception of problems and powers as national or local in nature was serviceable in the beginning and it has been kept in repair for much of our later history by the imaginative use of grants-in-aid programs which combine national standards and goals with a measure of local administration. The load of programs we have piled on the grant-in-aid vehicle to compromise the alternatives of assigning exclusive responsibility for given problems either to state-local governments or the national government reflects varying aspects of the tension between extremes that dominated the Philadelphia Convention. The overriding challenge to the Convention delegates was to devise a workable relationship between a central government and the diverse state governments. It was early assumed even by most of the delegates who opposed strong national government that a central government stronger than the Articles of Confederation provided was needed. On the other hand, the idea that the states should be abolished or reduced to mere subdivisions of the national government, as distinguished from autonomous political units, seems never to have been seriously entertained by more than a handful of the nationalists. Recurring themes were that small states would be unruly, faction-ridden and unable to act in unison on problems of common concern (even if they could agree on what such matters were from time to time), while an exclusively central government would be unable to govern such a "vast" territory as the country was even then, and would inevitably tend towards undemocratic control of power.

It is interesting—though not surprising, given the nature of public debate—that it was the opponents of strong national government and thus of the Constitution, who stressed predictions that the states would disappear or become appendages of the national government¹⁴ while the proponents of a supreme and

11. *Id.* at 414.

12. The Virginia plan, authored principally by Madison, and providing the essential ingredients from which a Committee of Detail structured a first draft of the Constitution, provided for a national legislature with power to "regulate in all cases to which the separate states are incompetent, or in which the harmony of the United States may be interrupted by the exercise of individual legislation"; and for a national judiciary with jurisdiction over "questions which may involve the national peace and harmony." *The Triumph of Nationalism*, pp. 145-149. The Committee of Detail substituted specific grants of legislative power and specific subjects of jurisdiction for this broad language.

13. W. MURPHY, *op. cit. supra* note 1 at 177-203.

14. *Id.* at 267-284.

strong central government repeatedly emphasized the important role of the states in providing local self-government. In his support of the Constitution, Madison argued that the "attachment of the people" to local government would provide a check on the drift of power to the central government.¹⁵ The nationalists nevertheless perceived an essential need to provide strong national power to ensure control over factional and territorial jealousies and to develop uniform minimum standards for action as necessary to combat state tendencies towards favoritism of various shades.

In many ways the tension between local and central government is stronger now than ever before in our history. Our commitment to national standards of fairness and an equitable distribution of the nation's available resources has gained tremendous strength in the last decade. At the same time, for some of our most pressing problems—of education and environment in the inner cities, for example—there is a growing demand for solutions that satisfy the needs of people not in the mass but as individuals or groups comprising regions, municipalities or even neighborhoods, so there is a concomitant requirement for governmental methods than can be swiftly and sensitively responsive in the creation of programs tailored to specific but changing needs. Thus we can expect to see a sharp increase in the number of problems best described as having both national and local characteristics. For problems of this dual nature we seem to be conditioned to making the conditioned response—a grant-in-aid program. Yet there is surely little or nothing in the current condition of our cities to convince us that traditional methods of attacking national-local problems, dominated by the grant-in-aid, are as flexible and modern as they need to be.

This dilemma is complicated by the evolution of an overall tax structure that now exercises a powerful and independent influence on the practical allocation of power and characterization of problems as "national" or "local" in nature. Perspective on this problem is provided by statistics cited by Professor Walter Heller in his call for a federal income-sharing program with the states.¹⁶ Since World War II state and local government expenditures have grown more rapidly than any other sector of the economy. In the decade 1955-65 state-local expenditures rose at a rate 80 per cent faster than the GNP and double the rate of federal increase, which lagged GNP in rate of growth. In absolute figures state-local expenditures for "civilian government" were double those of the federal government, and allocation of the federal grants-in-aid to the states increases their share of expenditures to three times those of the federal government.¹⁷ But the other side of the ledger presents a bleak picture. Despite fiscal efforts by state-local governments that Heller described as "remarkable" and "Herculean"¹⁸ though not perfect or all that they should exert, the bulk of state-local taxes (property, sales and gross receipts) lag in growth slightly behind the GNP while the federal taxes are

15. *Id.* at 305.

16. W. HELLER, *NEW DIMENSIONS OF POLITICAL ECONOMY* (1966), Chap. 3.

17. *Id.* at 128.

18. *Id.* at 131, 132.

largely those that grow proportionately faster than the GNP.¹⁹ As Heller concludes:

Meanwhile, *prosperity* generates demands for *better* schools, roads, and parks, for new and better services. And it generates them faster than it produces added state-local revenues. Further, the growth that confers such a bountiful harvest of revenues on the Federal government leaves the states and their subdivisions a bitter harvest of air and water pollution, disappearing green space, and urban rot. Truly, prosperity gives the national government the affluence and the local governments the effluents.²⁰

The picture drawn by Professor Heller is a sharp reminder that state and local governments continue to play a vital role, despite the fact that they have displayed a number of non-financial inadequacies through the years. These inadequacies are being or can be met through the grant-in-aid, national action exclusive of the states, and direct regulation. But now local government faces the prospect of fighting a losing battle on the front where resources are pitted against legitimate demands to solve local problems that are always in the process of becoming national problems. If we had better evidence that the national government acting alone or through state administration could meet the rising demands satisfactorily there would be no cause for concern. As it is, the non-constitutional triumph of nationalism may well require a greater national willingness than has been displayed to explore new methods of governmental cooperation, methods which will develop and exploit the creative potential that resides in responsible local government.

Two conclusions seem quite clear: Ultimate decisions about the allocation of power and resources to meet local problems of national significance themselves involve the exercise of national power. And if ultimate decisions are made to reinforce local government, the decisions should be prompted by a desire to maintain the positive virtues of local government for progressive action, not by the demands of the old breed of state politicians, the "diehards" to whom, among others, Professor Murphy addressed his book, who "stand on their states' rights so they can sit on them."²¹

THOMAS P. LEWIS*

19. *Id.* at 127.

20. *Id.* at 129.

21. The quoted phrasing is Heller's, *id.* at 125.

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