Remembering Learned Hand

Advocate for Judicial Restraint

By Allen Mendenhall

THE NAME LEARNED HAND MAY NOT LEAP READILY off the tongue if one were asked to list the conservative luminaries of the 20th century. Few people today outside the legal profession have any idea just how profound his influence as a jurist was and continues to be more than half a century after his death. His advocacy for judicial restraint, his unflagging and bold defense of the First Amendment, his commitment to the legal prerogatives of the states, and the nuanced brilliance of his decisions—these all still claim our attention, especially at a time when judicial activism is promoted by legal minds on both the left and the right.

Learned Hand was an elusive, straitlaced figure whose complicated views are difficult to pigeonhole. Yet his beliefs and methods were, if not conservative, then at least temperate, discerning, cautious, and fastidious.

Born in Albany, New York, on Jan. 27, 1872, to a distinguished political family, Hand was classically educated and attended Harvard College, where he studied under Charles Eliot Norton, William James, Frank W. Taussig, Josiah Royce, and George Santayana (whom he considered a mentor), and contemplated a career as a philosopher before deciding to devote himself to the law. In 1893, Hand entered Harvard Law School, where he happily discovered that, unlike in his undergraduate classes, his unadventurous, scholarly manner attracted both friends and dates.

His devotion to study, however, remained paramount; he resigned as an editor of the *Harvard Law Review*, for instance, because that extracurricular responsibility, though it carried prestige, did nothing to expand his knowledge or refine his analytical skills. In fact, it inhibited his learning, taking precious time away from his assigned reading and private contemplation.

Among those law professors at Harvard who most deeply influenced Hand was James Bradley Thayer, the principal proponent at that time of the doctrine of judicial restraint, a mode of judging characterized by deference to the legislative branch, narrow rather than broad decisions, strict adherence to case precedent, and incremental rather than sweeping change. At that time legal hermeneutics were not bifurcated into "conservative" or "liberal" camps, and constitutional law—in the sense of a developed body of federal appellate cases regarding issues directly implicated by express provisions of the Constitution—had not yet grown into the dense and complex interpretive field that it is today.

Given his academic bent, Hand did not excel as a lawyer. He was, arguably, more interested in scholarly writing and part-time teaching than in his clients' irritating predicaments. His elevation as a federal judge involved, not his talent as a practitioner, but the growing renown of his intellect and his reputation for candor and integrity within the legal community. He inserted himself increasingly into politics, supporting the gubernatorial bid of Teddy Roosevelt, as well as opining on the power of state government to regulate the safety and welfare of local communities.

Despite his support for Roosevelt, he eschewed his imperialistic foreign policy and didn't cast his vote for him in the 1904 presidential election. Instead, Hand voted Democrat, realigning himself with his family's political heritage in part because he feared Roosevelt, as president, could influence foreign policy in a militaristic direction.

above left: Learned Hand in 1893, the year he graduated from Harvard College (public domain)
above right: Judge Learned Hand in 1924 (U.S. Library of Congress/public domain)

In 1907, Hand made known his budding interest in a position on the federal bench. Over the next two years he nurtured friendships with successful attorneys, both Republicans and Democrats. His supportive socialite wife, Frances, whom he had married in 1902, helped him to entertain prominent guests at dinner parties and to gain name recognition. Hand plunged himself into local politics, giving speeches and joining civic groups. He authored a law review article criticizing the Supreme Court's controversial decision in *Lochner* v. *New York* (1905), adopting the position expressed in Oliver Wendell Holmes, Jr.'s, dissent.

The 5-4 majority in *Lochner* held that the liberty to contract, though not enumerated in the Constitution, was a fundamental right protected by the due process clause of the Fourteenth Amendment, and, therefore, that a New York statute regulating the number of hours that bakers could work per week and per day was unconstitutional. Holmes disliked this federal judicial intervention into state law. "I think that the word liberty in the Fourteenth Amendment is perverted," he stated in his dissent, "when it is held to prevent the natural outcome of a dominant opinion, unless it can be said that a rational and fair man necessarily would admit that the statute proposed would infringe fundamental principles as they have been understood by the traditions of our people and our law."

Like Holmes, Hand favored the certainty of tradition and precedent, as well as the sovereignty of the states over their internal governance, while rejecting federal judicial innovations that struck down state laws on the basis of theories about liberty that were nowhere mentioned in the Constitution. Both men rejected the airy "substantive due process" approach which the Supreme Court would later employ to strike down a state law prohibiting the sale or use of contraceptives (*Griswold* v. *Connecticut*), a state law banning abortion (*Roe* v. *Wade*), and a state law prohibiting homosexual activity (*Lawrence* v. *Texas*). Hand called Holmes "the epitome of what a judge should be."

Nudged by Attorney General George W. Wickersham, President William Howard Taft nominated Hand to the federal bench, despite the initial opposition of Chauncey Depew, the U.S. Senator from New York, who was put out because the Taft administration had not consulted him first. Taft nominated judges principally for intellectual and professional merit rather than cronyism, so Hand got the nod even though Depew's pride had been wounded.

Hand flirted with progressivism in his early forties, contributing to *The New Republic* magazine and befriending its editor, Herbert Croly, whose "New Nationalism" philosophy, which advocated for a strong federal government, he admired. Hand also served Teddy Roosevelt as a ghostwriter and informal advisor regarding economics and the separation of powers when Roosevelt challenged Taft's re-nomination as the Republican candidate for president. Hand even ran, unsuccessfully, as a Progressive Party candidate for chief judge of the New York Court of Appeals in 1913. His species of populist progressivism, which prioritized farmers and the common man over big business, harkened back to an agrarianism and localism that resisted the centralizing effects of corporate industrialism.

Hand served as a federal district judge in New York from 1909 until President Calvin Coolidge nominated him to fill a seat on the U.S. Court of Appeals for the Second Circuit in 1924. Hand served in that capacity—including as chief judge for his last three years there—until 1951, when he took senior status. He continued writing and handling cases for the next decade, passing away on Aug. 18, 1961, having lived 89 years—remarkably long for that time.

Much confusion arises from the fact that Hand (who never sat on the Supreme Court) and Supreme Court justices like Holmes, Louis Brandeis, and Felix Frankfurter—often labeled progressives—practiced judicial restraint. During the Warren Court era, judicial restraint became the rallying cry of conservatives, especially of Robert Bork, whose originalism contrasted sharply with judicial activism, or the rulings of judges based on personal political convictions that are not clearly apparent in the law.

Led by self-proclaimed libertarians, the current trend on the right is towards "judicial engagement," which advocates a robust federal judiciary that vigorously enforces the alleged guarantees of individual rights that purportedly are embodied, but not articulated, in the Bill of Rights. Ju-

above left: U.S. Supreme Court Justice Oliver Wendell Holmes, Jr., circa 1930 (U.S. Library of Congress/public domain)
above right: William Howard Taft in 1908 (U.S. Library of Congress/public domain)

dicial engagement smacks of the activism that Borkian conservatives decried. It champions a return to the robust *Lochner*-like interventionism into state matters that Justice Clarence Thomas, former Attorney General Edwin Meese, and the late Justice Antonin Scalia vehemently opposed.

Hand is widely known as a heroic defender of freedom of speech and expression. In *Masses Publishing Co.* v. *Patten* (1917), he faced the daunting task of interpreting the Espionage Act of 1917 only a few weeks after President Woodrow Wilson had signed it into law. The Espionage Act prohibited the transmission of texts that conveyed false reports or statements that undermined the U.S. military or assisted its enemies.

Hand ruled that the New York postmaster violated the First Amendment's protections of speech when he refused to circulate the socialist antiwar magazine *The Masses*. "Detestation of existing policies is easily transformed into forcible resistance of the authority which puts them in execution, and it would be folly to disregard the causal relation between the two," he wrote. "Yet to assimilate agitation, legitimate as such, with direct incitement to violent resistance, is to disregard the tolerance of all methods of political agitation which in normal times is a safeguard of free government."

Late in his career, by contrast, Hand held, in *Dennis* v. *United States* (1950), that a statute prohibiting the overthrow of government by force or violence did not abridge freedom of speech or otherwise violate the Constitution when it was applied against conspirators who had organized the Communist Party to teach and effectuate the overthrow of the government. In reaching this conclusion, he stressed the context in which the offending utterances occurred. Since in the summer of 1948 war across the planet involved communism to some degree or another, "We must not close our eyes," he cautioned, "to our position in the world at that time."

Judge Learned Hand in 1953 (U.S. Library of Congress/public domain)

Hand twice voted for Herbert Hoover for president, but three times for Franklin D. Roosevelt. Still later, he cast his presidential ballot for Dwight D. Eisenhower. Although he had once feared Teddy Roosevelt's expansionist foreign policy, he hungered for U.S. intervention during World War II, and seemed glad that the bombing of Pearl Harbor had mobilized Americans for battle. He despised both Stalinism and the militant anti-Communism of Senator Joseph McCarthy.

A darling of young leftists during the 1950s, Hand nevertheless criticized, in his powerful 1958 Oliver Wendell Holmes Lectures, the *Brown* v. *Board of Education* (1954) decision that made state-mandated segregation in public schools unconstitutional. He accused the Supreme Court of acting as a "third legislative chamber." The judicial restraint that had once characterized him as a progressive now seems to make him a reactionary.

Hand was a faithful husband who was more devoted to his wife than she was to him. He was a diligent worker and an industrious researcher. What he lacked in élan he made up for in earnestness and tenacity. He could be insecure, harsh, and demanding. His principled commitment to method over outcomes has muddied his legacy in our cut-to-the-chase era of soundbite, summary, and simplicity. A restrained mode of judging, after all, may yield practical results that comport with widely differing political programs. Were it not for his memorable name, and frequent citations of his work, decent law students at even the best schools might be unfamiliar with Hand. Enough time has gone by that, from the perspective of a 22-year-old in an unlettered, post-Christian age, Hand has become but another name in the immeasurable records of past lives.

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above left: *The Masses* magazine, August 1917 issue (public domain)
bottom left: Eugene Dennis, General Secretary of the Communist Party USA (public domain)