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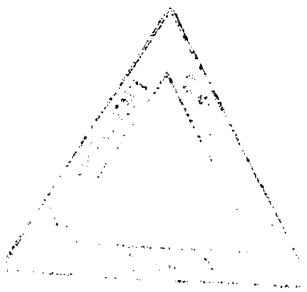

ADDRESS

BY

HONORABLE J. HOWARD McGRATH

ATTORNEY GENERAL OF THE UNITED STATES

Prepared for Delivery

at

NEW YORK COUNTY LAWYERS ASSOCIATION

ANNUAL BAR DINNER

Honoring

JUDGES AUGUSTUS N. and LEARNED HAND

Waldorf-Astoria Hotel

New York, New York

Thursday, December 13, 1951

7:00 P.M.

Mr. Chairman, Ladies and Gentlemen:

Taking one consideration with another, the lot of an Attorney General is not always a happy one. But tonight it is. I am deeply grateful to the New York County Lawyers Association for the opportunity to join you this evening in paying tribute to Judges Augustus N. and Learned Hand, two of the most distinguished members of our Federal Judiciary. In nearly a half century of judicial service in this Circuit they have gained the profound gratitude and respect of our Country, their State, and our profession.

It seems to me peculiarly fitting that this testimonial dinner should be tendered by the New York County Lawyers Association, numbering, as it does in its membership, past and present, the most eminent members of the New York bar. Your Association was founded in 1908, a year before Judge Learned Hand began his career on the District Court bench, and your activities as a vital organization of members of the bar have extended over the entire period in which both Judges have served in this Circuit. You need no introduction to their careers or catalogue of their virtues. Indeed, being modest men, they must be spared the indignity of such a listing. You know their work and their distinctions of mind and spirit directly; they have lived and worked among you for decades, and most, if not all, of you, undoubtedly, have had the inestimable privilege of professional service with them as members of the bar of their court. Your presence here tonight attests to the value you place upon them. And this life affords to a man - particularly a professional - few joys more sweet than the freely-given but discriminating appreciation of his fellow professionals.

Although not advantaged as you are, I share your esteem for them,

both privately and in my representative capacity as Attorney General. Indeed, the latter is my only license to speak when this gathering of informed and able lawyers must, perforce, remain silent. And my difficulties, my hesitations, my sense of inadequacy evoked by the nature of the occasion are only outweighed by my feeling that I have been accorded a great privilege to speak of truly great men.

When we encounter greatness, we want to know the sources from which it springs. That inquiry, however, must be reserved to others better equipped than I to pursue it. I would only remind you that in their cases heredity and environment effected a notable union to produce them. They both have their roots deep in colonial America. Their earliest American ancestor settled in Long Island in 1640. From Long Island the family moved to Vermont and ultimately settled in the small Adirondack County seat of Elizabethtown, New York. Their grandfather, Augustus, took to the law in the early Nineteenth Century and served in many important public offices, among them Surrogate of Essex County, member of the New York Senate, Congressman, Justice of the New York Supreme Court, and ex officio member of the Court of Appeals. His three sons followed in his footsteps. Augustus N. Hand's father, Richard L. Hand, established a substantial country law practice in Elizabethtown and was one of the leading members of the bar in his section of the State. Learned Hand's father, Samuel Hand, moved to Albany, where he was reporter for and active practitioner before the New York Court of Appeals on which he served briefly. Their uncle, Clifford A. Hand, came to New York City and had a distinguished career at your local bar. It was into this family that our honored guests were born within three years of each other - Augustus N. in 1869 and Learned in 1872. In this

genealogical climate, they apparently never developed a healthy immunity to the law but probably were in the ranks of its disciples from an early age. In any event, we find that upon graduation from Harvard in the Class of 1890, Augustus N., after a year in his father's office, entered the Harvard Law School Class of 1894. Learned Hand fared no better, and the record tells us he emerged, not unscathed, from Harvard Law School in the Class of 1896. After graduation from law school, there followed a period of private practice for each of them - Augustus at your bar and Learned at the Albany bar and your bar - before they began the judicial careers which have earned them their unique place among our American judges.

Their judicial service almost spans the first half of this century. As you will recall, Judge Learned Hand was appointed a judge of the United States District Court for the Southern District of New York in April 1909 and after fifteen notable years on that bench was appointed to the Circuit Court of Appeals by President Coolidge in 1924. Judge Augustus N. Hand was appointed a judge of the same District Court in 1914 and after thirteen years of distinctive service on that Court was made a Circuit Judge in 1927. Neither of their careers has ended. Even though one of them has formally retired, we still have the benefit of both of them right now. And it is of the pressing now that I wish to speak to you tonight.

This bench and bar, probably better than most, knows that we are engaged in a bitter conflict - with our civilization the stake and ourselves and our children the prizes. You know, too, the kind of fight it is - to the finish with no holds barred. It has other generally recognized characteristics which tend to differentiate it from other

fights we have had. The area of combat is at once local and coextensive with the globe; the basic weapons are ideas as well as men and armaments and commodities; the internal maintenance of the proclaimed values of our society is at once our assurance against a Pyrrhic victory and the measure of our external proselytizing power; and our success in so proselytizing may mean the difference between victory, with limited armed conflict, and Armageddon.

What may not be so readily apparent is the role of the law and its servants in this fight. I would turn to what our honored guests have taught us, to point our direction.

As Judges, they have enabled the law to fulfill its basic dual functions - to permit our orderly growth and adaptations as a people to meet the exigencies of our time and to conserve our fundamental freedoms which give our individual lives their meaning and dignity. Reason and detachment have been the fine tools of their craftsmanship.

I am no legal philosopher; I am only a worker in the vineyards. I am not going to attempt an ultimate refinement of my terms - not only because it is properly the work of my peers, but also because, in a sense, it is unnecessary. We know when we get a judgment, which is the product of reason and disinterestedness - rather than their opposites - even when we lose a case. We know when a case is decided on the facts of record. We know when reason, informed by knowledge and abetted by courage, controls judicial appraisal of the facts and ascertainment of the applicable law. We know when the entire process is, by deliberate choice of the judge, as free as is humanly possible from the intrusion of his political, economic or social views, or any other extraneous consideration - sometimes euphemistically called his predilections.

Those are the kind of judgments the Hands have been giving us over the years. Although the controversies, which have occupied them, have been diverse in subject matter and magnitude, and presented against changing times, legislative policies and constitutional emphases, the tools of decision - reason and detachment - have been the same. Illustrations might be taken at random from their work in any field of the law since the method is endemic to them. But, by the same token, a mastery of the details of their cases, which I could not hope to convey, would be necessary to appreciate fully the nature and efficacy of their method. Hence, I shall limit myself to a few abbreviated case references in a probably abortive attempt to focus my meaning.

Both judges constituted the majority of a three-judge court in United States v. Associated Press,[1/] with Learned writing the majority opinion. The case involved, among other things, a challenge to certain restrictive provisions of the by-laws of the Associated Press as constituting an unreasonable restraint of trade within the meaning of the antitrust laws. The material facts were taken as agreed upon plaintiff's motion for summary judgment, limiting the decisional question to the applicable law. The Court stated at the outset the nature of its quest in giving content to the concept of an "unreasonable" restraint. "* * * It must be 'unreasonable' in the sense that the common law understood that word; and that never has been, and indeed in the nature of things never can be, defined in general terms. Courts must proceed step by step, applying retroactively the standard proper for each situation as it comes up, just as they do in the case of negligence, reasonable

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1/ 52 Fed. Supp. 362 (S.D. N.Y., 1943).

notice and the like."[2] After an exhaustive examination of the relevant antitrust cases, the court reasons that the public interest, in the elimination of the challenged restrictions, productive of monopoly, out-weighs the private interest in their maintenance and concludes that they are unreasonable and within the interdiction of the antitrust laws. Here, the statutes required judicial supplement and the court unfolds the objective process of supplementation for us.

The dictate of reason, coupled with detachment from the public excitement attendant on World War I, led each of them at an early date to important affirmations concerning our freedoms. In the espionage trial of Max Eastman before District Judge Augustus N. Hand, he charged the jury, in part, as follows:[3]

> "It is the constitutional right of every citizen to express his opinion about the war or the participation of the United States in it; about the desirability of peace; about the merits or demerits of the system of conscription, and about the moral rights or claims of conscientious objectors to be exempt from conscription. It is the constitutional right of the citizen to express such opinions, even though they are opposed to the opinions or policies of the administration; and even though the expression of such opinion may unintentionally or indirectly discourage recruiting and enlistment."

In the same period, Judge Learned Hand was called upon to construe the Espionage Act of 1917 in Masses Publishing Co. v. Patten.[4] The

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2/ Ibid., at p. 368.

3/ Quoted by Chafee, "Free Speech in the United States," 78-79 (1941).

4/ 244 Fed. 535 (S.D. N.Y., 1917), rev'd., 246 Fed. 24 (C.C.A. 2, 1917).

publication "The Masses" had been excluded from the mails on the ground that it was violative of the provisions of the Espionage Act of 1917, which made it an offense willfully to make false reports with intent to interfere with the operation of the military forces, or willfully to attempt to cause disloyalty in the military forces or willfully to obstruct recruiting or enlistment. He recognized that the material published might well have the effect condemned by the statute, but he did not construe it as a willfully false statement within the meaning of the statute, saying:[5/]

> "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. The distinction is not a scholastic subterfuge, but a hard-bought acquisition in the fight for freedom, and the purpose to disregard it must be evident when the power exists. If one stops short of urging upon others that it is their duty or their interest to resist the law, it seems to me one should not be held to have attempted to cause its violation. If that be not the test, I can see no escape from the conclusion that under this section every political agitation which can be shown to be apt to create a seditious temper is illegal. I am confident that by such language Congress had no such revolutionary purpose in view."

Wherever the field has been open the Hands have not hesitated, as in the Associated Press case, to fill in the so-called interstitial spaces in the law. But authoritative constitutional, legislative, and

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5/ Ibid., at p. 540.

administrative determinations have been decisive upon them, even though the substantive result may not have been one which the Judge would have reached, if unconstrained, by controlling precedent or plain legislative policy. Two cases involving specialized agencies highlight my point, since in both the court explicitly disapproved the result, but deferred to the agency determination. Brooklyn National Corp. v. Commissioner of Internal Revenue[6] involved the proper interpretation of a tax statute. Although the facts in the case were not distinguishable, the Tax Court declined to follow an earlier ruling of the Appellate Court. In explaining the reason for adopting what was deemed the erroneous view of the Tax Court, Judge Learned Hand said:[7] "It seems to us that the right answer to whether section 115(c) is controlling here is not so certain that we should be justified in following our own beliefs; and therefore, although personally we are of the same mind as before, we think that we should yield to the insistence of the Tax Court, which within these limits is really the court of last appeal." But, although according the Tax Court ruling the finality thought to be required under Supreme Court decisions, Judge Hand was not inhibited from questioning the validity of the rule, since he added:[8] "That finality depends, as we understand, upon the added competency which inevitably follows from concentration in a special field. Why, if that be so, we--or indeed even the Supreme Court itself--should be competent to fix the measure of the Tax Court's competence, and why we

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6/ 157 F. (2d) 450 (C.C.A. 2, 1946).

7/ Ibid., at p. 452.

8/ Ibid., at p. 452.

should ever declare that it is wrong, is indeed an interesting inquiry, which happily it is not necessary for us to pursue." In that case, Judge Augustus Hand dissented, not because of unwillingness to submit to the constraint of the rule, but rather because he did not think it applied to the case before the court. In N.L.R.B. v. Universal Camera Corp.,[9] because of his views concerning the scope of review, Judge Learned Hand accorded the same finality to a determination of the National Labor Relations Board with which he disagreed. But in so doing, Judge Hand's question mark was apparent for all to see.[10] On certiorari, it may be noted, the Supreme Court lifted the constraint by redefining the scope of judicial review.

To multiply examples would only be to illumine different facets of the method. Perhaps the foregoing will suffice to convey its gist. It is not pretentious; it does not claim perfection or infallibility, but, in effect, says it is the best we have come by in the everlasting quest for justice under law. It questions all its own premises and anyone else's, but is tolerant of other reasoned views because it knows its own limitations. It bespeaks a faith which is the essence of the democratic--a trust in the ultimate validity of the judgments of the people as expressed in their representative organs of government. Hence, it displays humility and does not seek to make its will the common will. It tries to safeguard against such usurpation by deliberate self-discipline achieved through what Mr. Justice Cardozo described as resort to the methods of philosophy, history, and sociology in seeking to know and declare the law. In short, it is the opposite of the arbitrary.

9/ 179 F. (2d) 749.

10/ Universal Camera Corp. v. N.L.R.B., 340 U.S. 474.

Since it stands between us and the tyrannical imposition of law we never made, it is, in fine, a true bulwark of our freedom.

And, if anyone is disposed to put this down to fantasy, they have forgotten the lessons of contemporary history through which we have lived. In our time we have seen the degradation of justice in Nazi Germany as a vital instrument of Hitler's tyranny. I would commend to you the judgment in the so-called Justice case[11/] tried in Nuernberg, if you do not already know it. It shows how it was done. I quote a brief excerpt from that judgment, describing the initial steps in the corruptive process as follows:[12/]

"Beginning in 1933, there developed side by side two processes by which the Ministry of Justice and the courts were equipped for terroristic functions in support of the Nazi regime. By the first, the power of life and death was ever more broadly vested in the courts. By the second, the penal laws were extended in such inconclusive and indefinite terms as to vest in the judges the widest discretion in the choice of law to be applied, and in the construction of the chosen law in any given case. In 1933, by the law for the 'Protection against Violent Political Acts,' the death sentence was authorized, though not required, as to a number of crimes 'whenever milder penalty has been prescribed hitherto.'"

When the Russians reconstituted the German courts in their zone and sector of Berlin they were at pains to staff them predominantly with indoctrinated laymen. They preferred the administration of justice by those intuitively familiar with the wishes and purposes of the state

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11/ United States v. Altstoetter et al., Case 3, Trials of War Criminals

12/ Ibid., p.988.

rather than through the more sophisticated organ of a professional judiciary. We may be sure that the method of those courts is not the method of our honored guests.

The Hands' method has had its influence beyond the confines of their own judgments. The same elements that have lent strength to those judgments have inevitably accorded the Hands an influential place among their colleagues, and have made the Second Circuit the strongest appellate court in our Federal system. Its judgments by their intrinsic worth carry substantial weight with equal and inferior courts and command more than formal respect from the Supreme Court. A strong court in this Circuit is and has been peculiarly fortunate, since the Circuit outstrips all others in terms of volume, variety, and magnitude of its legal business.

Again the qualities the Hands have brought to their judicial work made inevitable their enlistment in the work of the American Law Institute. When first organized, in February 1923, the Institute set itself the monumental task of a scientific and accurate restatement of the law in selected fields. The purpose was to bring certainty and order out of what Mr. Justice Cardozo described as "the wilderness of precedent." It has been a unique, cooperative, venture of bench, bar, and law schools, with many of the ablest members of our profession devoting substantial time and energy to the project. Both judges have had an active part in many phases of the restatement, and have made major contributions in several fields, including evidence, torts, especially its labor law aspects, and conflict of laws. If time permitted I would discuss other aspects of their public service, but it must suffice to say that they have long exercised significant influence in educational circles and in

the other enterprises which have been fortunate enough to command their interest and services. I must add a caveat. In talking of them and their work tonight, I have stressed to the exclusion of all else what for me is a common denominator. I have felt free to do this in the knowledge that for anyone familiar with them, as you are, it could in nowise obscure the differences in their richly individual minds and persons, which inform all their work and thinking.

I have said earlier that the Hands' teaching would afford us a guide in the fight we are now making - and it does. I would remind you that for them reason and detachment are the workaday tools of workaday problems. Today we are faced anew with the imperative need to maintain our security without the loss of our freedom. But it is a practical problem susceptible of practical solution. We have done it before and we can do it again. And, with the same tools, though not necessarily with the same expertise, that the Hands would apply to the job.

In conclusion, I should like to quote from the contents of a letter President Truman wrote to Judge Learned Hand on the occasion of his acceptance of the Judge's retirement last summer.

In my judgment, the President speaks for all of us and in words most apt, to express our esteem to both of these distinguished jurists who are our guests this evening:

> "Your impending retirement comes as sad news to me and to the American people. It is hard to accept the fact that after forty two years of most distinguished service to our Nation, your activities are now to be narrowed.
>
> "It is always difficult for me to express a sentiment of deep regret; what makes my present task so overwhelming is the compulsion

I feel to attempt, on behalf of the American people, to give in words some inkling of the place you have held and will always hold in the life and spirit of our country. Your profession has long since recognized the magnitude of your contribution to the law. There has never been any question about your place among the great American jurists. In your writings, in your day to day work for almost half a century, you have added purpose and hope to man's quest for justice through the process of law.

"You have had few equals in all our history. As judge and philosopher, you have expressed the spirit of America and the highest in civilization which man has achieved. America, and the American people, are the richer because of the vigor and fullness of your contribution to our way of life.

"We are consoled in part by the fact that you are casting off only a part of the burdens which you have borne for us these many years, and by our knowledge that you will continue actively to influence our life and society for years to come. May you enjoy many happy years of retirement, secure in the knowledge that no man, whatever his walk of life, has ever been more deserving of the admiration and the gratitude of his Country and, indeed, of the entire free world."