

# *Why Learned and Augustus Hand Became Great*

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The following words were spoken by Associate Justice Robert H. Jackson of the United States Supreme Court at the Association's Annual Bar Dinner at the Hotel Waldorf-Astoria on December 13, 1951.

They are being published here now because of the feeling of many judges and lawyers that they constitute not only an appreciation of the professional attainments of two great judges but also express a pointed philosophy to explain the quality of legal greatness.

By ROBERT H. JACKSON

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I SHOULD not want to be silent when my profession is paying tribute to the two Judges Hand. However, I am a little embarrassed by the President's\* suggestion that I pronounce the benediction—a function usually reserved for the clergy. If I am to take on ecclesiastical pretensions, I would choose for the evening the task of devil's advocate.

I never was quite sure that the legal profession is the place to find a saint. As I read the story, some of the saints have made very significant contributions to the law, but the lawyers are not notable for their contributions to saintship. Perhaps our saintless condition will be remedied by the canonization of the two Hands this evening.

The presence of my friend James A. Farley reminds me of an occasion some years ago when we were both privileged to be present at a canonization in St. Peter's. We did not keep very close together, because I did not want to be suspected of being partial to soft drinks and he did not want to be suspected of being in Rome attended by a Protestant. But I think he will agree that the clergy knows how to conduct a canonization more considerately than we lawyers do. In the first place, as I gather from the expression I have seen on their faces, the Hands would approve that feature of the church ceremony by which its object is not present and required to sit through the eulogies. In the second

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place, the Church does not venture to pronounce a judgment of saintliness until it has heard from the devil's advocate. It conducts a genuinely adversary proceeding and, like a good judge, hears both sides, even if the decision has already been made. If I were to contribute anything to this evening's proceedings, I would choose the rather futile but familiar function of dissent and appear here as the devil's advocate.

We have been told that these two men are great judges. It has been said over and over and always wins your applause. But no one has said why. What virtue makes them great? By what sign do we recognize greatness in them?

Much has been said of their decisions and we have heard quotations from their opinions. I take it that you think they have decided many cases correctly. But I recall that many years ago I was a delegate from Upstate New York to a State Convention and was advocating the nomination of a judge for office. I was trying to persuade a wise old practical politician. He asked, "What has he done that would get any votes in your county?" I mentioned some of his more important decisions. "Well," he said, "were those cases decided right?" I assured him they were, feeling that cinched the argument, when he countered: "Can you run a judge for office on the ground that he has made some right decisions?" That view of a judicial candidacy had never occurred to me.

So I put it to you whether it is enough to qualify a judge as a saint that he has made many right decisions.

Besides that, how do you know that the Hands' decisions have been right? Supreme Court might have reversed them if it had a chance. Of course, that would not prove that the Hands were wrong, because I might have dissented. So, I submit, we cannot prove this case by the right-and-wrong test for want of really decisive standards.

Then, of course, it may be urged that they are recognized as judicial leaders, especially by the district judges of the Second Circuit. I think it would be possible to prove statistically that district court judgments, in harmony with the views of the Hands, have more often stood up in the Court of Appeals than have their opposites. In fact, if I were to write a prescription for becoming the perfect district judge, it would be always to quote Learned and always to follow Gus.

Another test has been brought forward by some of the journalists who rate the work of judges. It is a sort of box score test. He counts their opinions and sees who has written the most and sets it down that he is the best judge. When it occurs to the journalist that all cases are not exactly alike, he counts the number of pages, and he who turns out the most pages is the greatest judge.

Then there is still another test that has become very popular, even with some Law Review authorities on court work. That is the simple test whether "our side" wins. If "our side" nearly always wins with him, he must be a great judge. It is a very natural test, because I have never heard a lawyer speak disrespectfully of a decision that was in his favor or fail to find some defect in a decision that went against him. But I don't think it helps much in appraising the Hands, because you can't tell what their decision on a question of law will be just by seeing who the parties are.

So, as Satan's advocate I am bound to protest that the Attorney General has not carried the burden of proof to establish that these two guests of honor are entitled to canonization. At the same time, truth compels me to admit that if the legal profession is to have any saints, these are as nearly worthy as any that I have known. And if I may be serious for just one moment, I will tell you why.

I think that their attitude to the law and to the judicial office has been much more important than any cases they have decided or any opinions they have written. These men love the law. They were bred in that family tradition in Upstate New York, a geographical fact that I do not think should be held against them. Love of the law led them to Harvard—another thing I would not hold against them. But Harvard did not make the Hands. It is men like the Hands who have made Harvard. They believed in the law. That does not mean that they thought everything that happened to be law is right or enduring. They have not regarded it as a closed body of learning. But they believed in the law as the foundation of the whole structure of an ordered and free society.

These men found their highest satisfaction in judicial work. It fulfilled their every ambition. They put all they had into it—they have not shirked even its drudgery. They wrote their opinions with no appeal for applause and sought only to merit the ultimate approval of their profession. They have not been looking over their shoulders to see whom they please. They have represented an independent and intellectually honest judiciary at its best. And the test of an independent judiciary is a simple one—the one you would apply in choosing an umpire for a baseball game. What do you ask of him? You do not ask that he shall never make a mistake or always agree with you, or always support the home team. You want an umpire who calls them as he sees them. And that is what the profession has admired in the Hands.

That high-minded attitude toward their professional work and toward the judicial function is the priceless tradition that these men have established on our bench. We hope they may enjoy many years of health and that we may continue to profit by their teaching and example. I am happy that I have been able to be present when you reassure them, if ever they were in doubt, that they are deep in our affections and high in our respect.