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Kathryn Griffith, Judge Learned Hand and the Role of the Federal Judiciary

Russell A. Willis

BOOK REVIEW

JUDGE LEARNED HAND AND THE ROLE OF THE FEDERAL JUDICIARY. By Kathryn Griffith. Norman: University of Oklahoma Press. 1973. Pp. 251. $8.95.

Essentially an essay on the concept of judicial restraint, the book is as well an able synthesis by a non-lawyer[1] of the opinions of Learned Hand as they touch upon that concept. The result is an understandable presentation of the life work product of an incisive judicial mind. Hand developed and practiced a philosophic reluctance to exercise the judicial power beyond his finely focused perception of that power given to judges by the Constitution. Reflected consistently in his opinions and his other legal exposition, the touchstone of his approach to a proper exercise of that power was his often articulated question as to the acceptable dimensional implementation of the judicial power in a tripartite form of government.[2] Central to his answer to that question was his thesis that a judge should by discreet interpretation implement legislative intent constitutionally expressed, and not, by judicial fiat, act as a third house of the legislature. He saw our American experience to be an evolving and imperfect realization of the ideal society as postulated in the Consti-

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1. The author, Kathryn Griffith, is Professor of Political Science at Wichita State University, Wichita, Kansas. She holds the Bachelor's Degree from that University, the Master's Degree from Syracuse University and the Ph.D. from the University of Chicago.

2. If an independent judiciary seeks to fill them [the "stately admonitions" of the Bill of Rights] from its own bosom, in the end it will cease to be independent. And its independence will be lost, for that bosom is not ample enough for the hopes and fears of all sorts and conditions of men, nor will its answers be theirs; it must be content to stand aside from these stately battles.

. . . I believe that for by far the greater part of their work it is a condition upon the success of our system that the judges should be independent; and I do not believe that their independence should be impaired because of their constitutonal functon. But the price of this immunity, I insist, is that they should not have the last word in those basic conflicts of "right and wrong—between whose endless jar justice resides." You may ask what then will become of the fundamental principles of equity and fair play which our constitutions enshrine; and whether I seriously believe that unsupported they will serve merely as counsels of moderation. I do not think that anyone can say what will be left of those principles . . . but this much I think I do know —that a society so riven that the spirit of moderation is gone, no court *can* save, that a society where that spirit flourishes, no court *need* save.

L. Hand, *The Contribution of an Independent Judiciary to Civilization*, in THE SPIRIT OF LIBERTY 163-64 (3d ed. I. Dillard 1960). *See* K. GRIFFITH, JUDGE LEARNED HAND AND THE ROLE OF THE FEDERAL JUDICIARY 139 (1973) [hereinafter cited as GRIFFITH].

tution by the Founding Fathers in which the single function of the judiciary is the balancing, but not the thwarting, of the interests of competing elements of a pluralistic societal corpus.

A pragmatist in the finest Jamesian sense,[3] Hand, giving full recognition to the force of precedent established by the Supreme Court and his own Second Circuit court, used judicial power to accomodate the legitimate needs of a complex industrial society, while at the same time preserving full opportunity for deviation within it. He dealt with precedent with which he disagreed respectfully, but usually with a straight forward statement of what decision might and should have been made had a different approach initially been taken. The author perceptively delineates the many areas of the law where such "non-dissenting dissents"[4] worked changes in the decisional web when his analyses were later adopted as the proper bases for decisions by the Supreme Court.

On balance, his many decisions contained lucid implementation of his belief that coherent philosophy is necessarily the essence of the practical life. While well-versed in the content of western philosophic tradition, he remained detached from the compulsion of any particular structured approach and permitted his fundamental concept of rightness to work pragmatic solutions[5] to the myriad

3. Judge Hand majored in Philosophy at Harvard and studied under a brilliant faculty including William James, Josiah Royce and George Santayana.

4. In *Seelig v. Baldwin*, Hand said that the Constitution might have been interpreted to permit the state freedom to regulate all commerce, except for the taxation of imports and exports (prohibited by Article I, Section 10), until Congress acted. However, his decision in that case held invalid a part of a law forbidding sale in New York of milk produced in New Jersey under conditions less favorable to farmers than those required in New York. While he thus limited state power to regulate interstate commerce in the absence of congressional action, his reasoning reaffirmed his obedience to precedent rather than the appropriateness of substituting the court's judgment for that of the state legislature. He said: "It might have been held that this [taxation of imports and exports] was the measure of the state's incapacity until Congress chose to act. But the contrary is now . . . thoroughly established." Since the practice was well established, he felt compelled to follow the tradition and lead of the higher court, although he was critical of it.

GRIFFITH at 121.

5. It would be, I think, disingenuous to pretend that the ratio decidendi of such decisions is susceptible of statement in general principles. That no doubt might give a show of necessity to the conclusion, but it would be insincere and illusory, and appears formidable only in case the conclusion is surreptitiously introduced during the reasoning. The truth really is that where the border shall be fixed is a question of degree, dependent upon the consequences in each case.

United States v. A.L.A. Schecter Poultry Corp., 76 F.2d 617, 625 (1935).

great problems presented to him during his long tenure on the Second Circuit.

The book contains but a modicum of orthodox biographical material in which Hand does not emerge as a person or a personality. He comes alive, however, in the bulk of the book which is a full drawn portrait of the sophisticated and coherent mind of a man who, perhaps beyond all others, had the capacity to be an outstanding Justice of the Supreme Court of the United States but who was deprived of that opportunity, to our lasting detriment, apparently by political accident.[6] The author, of course, did not intend a biography but instead postulated a well developed thesis—organizing her material by first stating the philosophic underpinnings of Hand's judicial approach and then relating that statement to the effect his opinions and other legal writings have had upon American law and upon the democratic experience. We are greatly indebted to Learned Hand, lawyers and laymen alike, and the author has given

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6. Shortly after his appointment he committed what he must have later come to believe was a great indiscretion for a federal judge. He not only became an active Bull Mooser, supporting Theodore Roosevelt's candidacy against the incumbent Taft, who had appointed him to office, but became the Progressive Party's candidate for chief judge of the state of New York, challenging the regular Republican candidate. Later he explained his action by saying that he "knew that we had to break away from the Hanna thing—the control of the nation by big business." This was Hand's sole political venture, and while he did not change his mind about the "Hanna thing," one can only guess how much he must have regretted his action in light of his subsequent position regarding the necessity of judges to remain uncommitted in political matters. Moreover, it may well have been the overriding reason why he was deprived of a place in the Supreme Court. Traditonal Republicans, and especially William Howard Taft, would long remember what he did then.

GRIFFITH at 5.

It has been suggested that Hand's failure to win this high office was due to bad luck, political distrust, and geographical accident. The circumstances which deprived him of his honor were doubtless many and varied, but one of them seems apparent. When he was considered and rejected for the vacancy created by the resignation of Justice Mahlone Pitney, former President Taft—who had appointed Hand to the federal bench and against whom Hand had supported Theodore Roosevelt—was then Chief Justice Taft. He wrote to President Warren Harding, saying:

> There is a United States District Judge of proper age, Learned Hand. He is an able Judge and a hard worker. I appointed him on Wickersham's recommendation, but he turned out to be a wild Roosevelt man and a progressive, and though on the bench, he went into the campaign. If promoted to our Bench, he would most certainly herd with Brandeis and be a dissenter. I think it would be risking too much to appoint him.

GRIFFITH at 9.

a complete definition of the service Learned Hand rendered to justify that debt.

Russell A. Willis*

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* Professor of Law, Valparaiso University School of Law.