

2009

## Augustus Noble Hand / Charles Merrill Hough

Roger J. Miner '56

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### Recommended Citation

Miner '56, Roger J., "Augustus Noble Hand / Charles Merrill Hough" (2009). *Legal History*. 5.  
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*The Yale  
Biographical  
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American Law*

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Roger K. Newman

Hand, Augustus Noble (1869-1954) Judge, United States District Court for the Southern District of New York 1914-1927; Judge, United States Court of Appeals for the Second Circuit 1928-1954. Augustus N. Hand was born and raised in Elizabethtown, in rural Essex County, New York, where his father practiced law. It was there that he spent the summers of his youth with his cousin, Billings Learned Hand, whom he would later join on the United States Court of Appeals for the Second Circuit. Augustus graduated from Harvard College in 1890 and from Harvard Law School in 1894. Following graduation, he practiced law successfully in New York City, dealing with important cases in antitrust, international, and constitutional law. Among his more prominent clients was the Government of Venezuela.

Appointed by President Wilson to a seat on the United States District Court for the Southern District of New York, Augustus served in that position until his recess appointment to the Second Circuit in 1927 by President Calvin Coolidge. In 1928, he received his permanent appointment to the seat vacated by Charles Merrill Hough on the court of appeals, where Augustus joined his formidable cousin on the bench. Although they remained the best of friends and maintained a mutual respect throughout their lives together on and off the bench, each had a different style and took different approaches to the cases they decided. They customarily agreed on the disposition of appeals, but Augustus referred to himself as the "balance wheel in the Hand combination." The opinions of Augustus were direct and to the point and without extended discussion, while the writings of

Learned, upon which he lavished great attention, were marked by a florid and exotic style. No less a figure than Justice Robert Jackson said that he had been taught to "quote Learned, but follow Gus."

Although Augustus may on occasion have expressed his preference for the work of a district judge over the work of a judge of the court of appeals, he was known as a cooperative colleague who valued teamwork in the opinion-writing process. Indeed, he frequently commented on the failure of the Supreme Court to work as a cooperative team, a notion that resonates to this day.

The author of nearly eight hundred appellate opinions, Augustus Hand's opinion in Birnbaum v. Newport Steel Corporation, 193 F.2d 461 (2d Cir. 1952), has been described as the single most influential decision issued during the first thirty years of federal securities law. The Birnbaum opinion, holding that only the purchasers and sellers of securities could sue for fraud, was cited by hundreds of reported cases in the lower federal courts. The issue was not addressed by the Supreme Court until twenty-three years later, when the Court expressly adopted the Augustus Hand precedent.

Another widely cited opinion of Augustus involved his resolution of the controversy surrounding the importation of the book Ulysses by James Joyce. A statute prohibited the importation of obscene matter. Rejecting the contention that the now-classic work was obscene, Hand wrote: "That numerous long

passages in Ulysses contain matter that is obscene under any fair definition of the word cannot be gainsaid; yet they are relevant to the purpose of depicting the thoughts of the characters and are introduced to give meaning to the whole, rather than to promote lust or portray filth for its own sake." United States v. One Book Entitled Ulysses by James Joyce (Random House, Inc., Claimant), 72 F.2d 705, 706-07 (2d Cir. 1934). He concluded: "We think that Ulysses is a book of originality and sincerity of treatment and that it has not the effect of promoting lust. Accordingly it does not fall within the statute, even though it justly may offend many." Id. at 708-09.

In another case of consequence in the First Amendment area, Augustus was constrained to deal with a statute prohibiting the mailing of obscene matter. In that case, United States v. Dennett, 39 F.2d 564 (2d Cir. 1930), the matter in question was a sex-education pamphlet intended for children. Hand wrote: "It . . . may reasonably be thought that accurate information, rather than mystery and curiosity, is better in the long run and is less likely to occasion lascivious thoughts than ignorance and anxiety." Id. at 569. In Sacher v. United States, 182 F.2d 416 (2d Cir. 1950), an opinion that generated much controversy when it was issued, Judge Hand upheld the contempt convictions of attorneys who had represented certain organizers of the Communist Party of the United States. The attorneys' tactics were said to have interfered with the conduct of the trial. The Supreme Court affirmed.

Long obscured by the shadow of his illustrious cousin, Augustus Hand has emerged as a most worthy colleague of his cousin and a significant contributor to national jurisprudence in his own right.

Hon. Roger J. Miner

Gerald Gunther, Learned Hand: The Man and the Judge (New York: Alfred E. Knopf, 1994); Jeffrey B. Morris, Federal Justice in the Second Circuit (New York: Second Circuit Historical Committee, 1987); Joseph Barbash, James W. Cooper, Arthur Dougan, Weaver W. Dunnan, Herman Finkelstein, Milton R. Friedman, Daniel M. Gribbon, Gerald Gunther, William B. Matteson, and Eugene H. Nickerson, "Reminiscences of Former Law Clerks," in The Remarkable Hands: An Affectionate Portrait, ed. Marcia Nelson (New York: Federal Bar Council, 1983); Thomas Reed Powell, "Augustus Noble Hand," in The Remarkable Hands: An Affectionate Portrait, ed. Marcia Nelson (New York: Federal Bar Council, 1983); "Colleagues for Justice: One Hundred Years of the United States Court of Appeals for the Second Circuit," 65 St. John's Law Review 938 (1991).

Hough, Charles Merrill (1858-1927) Judge, United States District Court for the Southern District of New York 1906-1916; Judge, United States Court of Appeals for the Second Circuit 1916-1927. Born in Philadelphia in 1858, Hough graduated from Dartmouth College in 1879. After reading law in Philadelphia, he joined a law firm there, but later moved to New York, where he practiced law for twenty years. He was appointed by President Theodore Roosevelt to a newly created seat on the United States District Court for the Southern District of New York and served in that office until appointed by President Woodrow Wilson to the seat that had been vacated by Emile Henry Lacombe on the United States Court of Appeals for the Second Circuit.

During his service in the district court, Hough was known as a prodigious worker, conducting 1200 trials and filing 1809 written opinions. He was highly regarded for his expertise in commercial and maritime matters. It is said that Professor Karl Llewelyn of Harvard, a commercial law expert and major jurisprudential scholar of his day, regarded Hough as one of the nine greatest commercial judges in the English-speaking world. The son of a Brigadier General, Judge Hough's personality has been described as "gruff, conservative, yet witty and warm."

In one of his best-known opinions, Masses Publishing Company v. Patten, 245 F. 102 (2d Cir. 1917), Hough was constrained to disagree with a district court opinion that had been authored by his future, and better-known, colleague on the court of appeals, Learned Hand. A "revolutionary" journal had brought an action against the Postmaster of the City of New York to enjoin

enforcement of a provision that barred from the mails publications made illegal by the Espionage Act of 1917. Hand granted the injunction on First Amendment grounds. Masses Publishing Company v. Patten, 244 F. 535, 543 (S.D.N.Y. 1917). In continuing a stay barring enforcement of Hand's order, Hough wrote that "it [was] at least arguable whether there can be any more direct incitement to action than to hold up to admiration those who do act." 245 F. at 106. Hough's pronouncement has not stood the test of time, but it is telling that Hough and Hand became close friends on the court of appeals. In fact, Hough later wrote to Hand: "I want you to know how many years of my life have been made more pleasurable by knowing you."

Judge Hough's extrajudicial writings included law review articles on such subjects as due process, law in wartime, and the legal profession. With regard to the latter, he wrote: "[W]e [are] the priests who enforce the law, which every [layperson] dislikes except when it serves [his or her] turn. The governing class regards us as servants, disliked but indispensable."

An important work of historical significance by Judge Hough was his compendium of maritime cases, entitled Reports of Cases in the Vice Admiralty of the Province of New York and in the Court of Admiralty of the State of New York 1715-1788 (1925). In it, Judge Hough resurrected reports of cases that otherwise would have been lost to posterity. His lasting legacy as a historian was a work entitled The United States District Court for the Southern District of New York: Its Growth, and the Men Who Have



Done its Work 1789-1919 (1934). This history was found among Judge Hough's papers after his death. It was subsequently published by the Maritime Law Association, of which he was President from 1919 until the end of his life.

Hon. Roger J. Miner

Gerald Gunther, Learned Hand: The Man and the Judge (New York: Alfred E. Knopf, 1994); Jeffrey B. Morris, Federal Justice in the Second Circuit (New York: Second Circuit Historical Committee, 1987); "Colleagues for Justice: One Hundred Years of the United States Court of Appeals for the Second Circuit," 65 St. John's Law Review 938 (1991); Charles Merrill Hough, "Concerning Lawyers," 5 Ohio State University Law Journal 1 (1939).

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Yale University Press (publication date: May 2009)

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Younger, Irving	Stephen Gillers
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