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## Profile: Learned Hand; Learned Hand

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Flesher; Profile: Learned Hand; Learned Hand  
**PROFILE: LEARNED HAND**

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Contributions to accounting theory and knowledge have come from a vast variety of sources both from within and outside the accounting profession. One individual who deserves recognition for his work was a member of the legal profession, Judge Learned Hand. An analysis of Hand's judicial opinions should add much to the study of accounting and tax history and in turn to educational objectives.

Tax history has been a neglected study. According to a list of doctoral dissertations in taxation published in an American Taxation Association publication, there were no dissertations written in tax history from 1969 until 1979 and from 1940-1969, only four were listed. The *Accountant's Index* for 1950 to the present lists only 9 articles under the heading of Tax History. This lack of attention is interesting in light of the fact that two American Accounting Association Committees have recommended historical research. The 1961 Committee on Tax Instruction advised the inclusion of the background and historical developments of many of the more important parts of tax law and the evolution of our tax system. The reasoning offered by the Committee was that "It is often easier to understand our present law if one knows something of the background and development of particular provisions of the Internal Revenue Code. A person should be better able to judge the merits of proposed changes if he is aware of what has been tried in the past." The 1972 Committee on Federal Taxation recommended that the first tax course should cover the historical evolution of the more important provisions and sources of tax law as two major areas. Even though the value of tax history has been recognized, the research efforts have not met these needs. The purpose of this narrative is to use one example of an historical study of the principles of taxation to encourage further studies in tax history.

Judge Learned Hand provides an excellent example for study because he was a pioneer in the area of taxation. Four years after Learned Hand became a judge the Sixteenth Amendment ushered in the origin of our federal tax system. He wrote his first opinion in a tax case in 1918. During his judicial career, Hand wrote over 290 opinions in tax

cases and sat on hundreds of others in which he did not author the opinions. This period, which extended over forty years, marked the formative years in tax administration. A study of Judge Learned Hand and a view of his cases reveals much about the development of the principles of taxation.

Before analyzing the contributions of Judge Learned Hand to the American tax system, a brief look at the man would be enlightening. Billings Learned Hand was born in Albany, New York, on January 27, 1872, into a family of judges. Both his father and grandfather were lawyers and judges and as anticipated, Learned went to Harvard to eventually pursue a law career. He was Phi Beta Kappa and graduated summa cum laude with a degree in philosophy. Hand received a master of arts degree from Harvard in 1894 and then entered Harvard Law School. Hand was an editor for the *Harvard Law Review* and graduated with honors in 1896. After admission to the bar, he practiced law from 1897 until 1909. In 1909, President William Howard Taft appointed Hand to the Federal District Court for Southern New York. At 36 years of age, Hand was one of the youngest men ever appointed as a U.S. judge in a federal district up to that time. He served on that court for fifteen years. His cousin and best friend, Augustus Noble Hand, was appointed to the same Federal District bench in 1914. In 1924, President Calvin Coolidge appointed Learned to the Federal Court of Appeals for New York, Connecticut, and Vermont. Coolidge appointed Augustus Hand to this same court in 1927. Learned became the Chief Judge of the Second Circuit Court of Appeals in 1939. During his career, Learned Hand wrote nearly 3,000 opinions on nearly every conceivable subject. He retired in 1951. At the time of his death in 1961, he had served on the federal bench longer than any other man.

After a brief look at the individual, it is important to study the environment in which he worked. The Circuit Court of Appeals hears appeals from the district courts. Hand served at both of these levels. The decisions of the Circuit Court can be overturned by the Supreme Court. The Circuit Court of Appeals for the Second

Circuit where Hand sat heard appeals from federal courts in New York, Connecticut, and Vermont. The Second Circuit Court was located in New York City and became known as the "Top Commercial Court" during Hand's tenure. Hand was fortunate to serve most of his career with an illustrious panel of judges, including his cousin Augustus. The personnel and the performance record of Hand's court earned the Second Circuit Court a place of achievement. The greatness of Hand's court is marked by the influence it had on other courts. Even the Supreme Court respected Hand and his court, and this recognition prompted the press to call Hand the tenth Supreme Court justice. The fact that Hand was passed over for appointment to the Supreme Court has only served to compound the myth surrounding the man. The second Circuit Court under the leadership of Hand had a tremendous impact on the federal judicial system and became the most esteemed court in the nation.

Were courts ranked like baseball teams, no expert in judging could be found to rank the Supreme Court first, if only because of the number of rookies on its nine. Most expert judges would choose the Court of Appeals for the Second Circuit as the ablest court in the U.S. (Frank, p. 92).

"If Learned Hand be the great judge that great men of the bench united in designating him, an analysis of his opinions should show forth his greatness." (Lancaster, p. 443). His income tax cases covered the total spectrum of income tax issues. Hand followed a rigorous and logical process in deciding a case. The important step in this process was his analysis of the legislative intent behind the law. Hand was a leader in moving away from a literal interpretation of the law, but he would apply such a reading if he suspected a tax avoidance scheme. However, Hand's views on tax avoidance are among his most often quoted, as the following sampling indicates.

Any one may so arrange his affairs that his taxes shall be as low as possible; he is not bound to choose that pattern which will best pay the Treasury; there is not even a patriotic duty to increase one's taxes (*Helvering v. Gregory*, p. 811)  
There is nothing sinister in so arranging one's affairs to keep taxes as low as possible. Everybody does so, rich and poor; and all do right, for nobody owes any public duty to pay more than the law demands; taxes are enforced exactions, not voluntary contributions.

To demand more in the name of morals is mere cant (*Commissioner v. Newman*, p. 850-1).

Hand's struggle with interpretation of the Internal Revenue Code was the hallmark of his tax opinions. Hand was to break away from the traditions of the time. First, he refused to follow the rule of interpreting the statutes in favor of the taxpayer. Secondly, he broke from the practice of two decades of literal interpretation of the statutes. His philosophy on interpretation is best expressed in his own words from his most famous opinion:

As the articulation of a statute increases, the room for interpretation must contract; but the meaning of a sentence may be more than that of the separate words, as a melody is more than the notes, and no degree of particularity can ever obviate recourse to the setting in which all appears, and which all collectively create (*Helvering v. Gregory* p. 810).

Once Hand had opened the door to liberal interpretation of the statute, he then began the struggle of placing limits on this freedom. Throughout his career he attempted to explain his position and establish guidelines to be used by the courts in the struggle of literalism versus liberalism.

One phase of Hand's efforts in the area of interpretation was the development of the business purpose test. This test, originated by Hand and now widely applied in all areas of taxation, requires that the transaction be a part of the conduct of business. If a transaction fails the business purpose test, it will be viewed as a sham. The intent and substance of the transaction were important points of Hand's examination of the circumstances.

Hand attempted to develop a complete structure of income taxation by developing concepts or principles. With regard to income, Hand would recognize income when the taxpayer who possessed control had experienced a change in status due to a certain realization of income. Since deductions were a benefit to be gained by the taxpayer, Hand generally required more proof from the taxpayer. However, the Cohan rule, developed by Hand, has been used as an escape by negligent taxpayers since the formulation of the rule in the case involving the "Yankee Doodle Dandy". In this case, the famous entertainer, George M. Cohan claimed large deductions for travel and entertainment expenses without any receipts to substantiate his deductions.

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Hand allowed the deductions since it was reasonable to expect that Cohan would have incurred such expenses. (*Cohan v. Commissioner*, 39 F. 2d 540 (2d Cir., 1930))

Valuable historical insights can be gained from an analysis of Hand's opinions. First, since Hand was so close to the origins of most of the U.S. tax laws, he was in touch with the original and basic purposes behind the legislation. These basics are much easier to understand and should be used by instructors of taxation to simplify major points of the existing complex system. Secondly, the judicial and administrative struggles over interpretations of points, many of which are now taken for granted, reveal the development of the U.S. tax structure. Also of interest to historians are the power struggles which were waged in the judiciary system.

A relatively high percentage of Hand's opinions in taxation were dissenting opinions. This indicates Hand's novel approaches to tax issues. Or as another author has explained, the high number of dissents by Hand in tax cases reflect "his irritation over the complexity and confused language of the Internal Revenue Code, which was revised in the late 1930's." (Schick, p. 325)

Another measure of Hand's influence in the area of taxation is the acceptance of his views by the Supreme Court. His record shows that the higher court respected the views coming from his court. Further, many of Hand's innovations have been adopted by Congress and the Internal Revenue Service.

An analysis of Judge Learned Hand's tax opinions reveal much about the developmental process of thought, practices, and institutions in the federal tax system due to the quantity of cases and vast span of time and issues covered. As verification of this assertion, note the remark about Hand made in 1951:

The parade of tax problems that has passed before him has been so long and the components of that parade so varied that it can be truthfully said no other living federal judge has had comparable experience in the judicial resolution of tax controversies. (Diamond, pp. 81-82).

The most valuable application of an analysis of Judge Learned Hand's opinions is in the area of education and expansion of knowledge. The value of the study of tax history is borne out by the example of Learned Hand. The origin of many of our current practices may be traced to an opinion by Hand. A search for the roots of tax law should

add to the depth of understanding of these rules. The source of tax disputes lies in the interpretation of statutes. No better guide than Learned Hand can be sought in navigating this complex maze. His continued leadership is evidenced by his many opinions which have remained the ruling authority. Further proof of his continuing significance is reflected by the extensive use of Hand's opinions in textbooks and casebooks adopted in law schools and other tax education courses. In addition to the direct contributions made by Hand, his influence has spread through indirect avenues as well, and this influence is difficult to measure. However, many traces of Hand's impact may be seen in the decisions of other courts and in the tax literature. His ideas have been dispersed, cultivated, and perpetuated without bounds. This example of tax history should not be viewed as merely a look into the past, but a vista of the future.

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#### POETRY FOR THE PRESIDENT

A recent article in TIME magazine stated that President Ronald Reagan's favorite poet was Robert Service (Author of "The Shooting of Dan McGrew" and "The Cremation of Sam McGee"). Readers may recall that the previous issue of THE NOTEBOOK contained an article by Paul Garner on Robert Service's early banking career. We wonder if the President knows that his favorite poet was once a British banker who temporarily embezzled petty cash.