

Matters of State

— *A Political Excursion* —

Philip Hamburger

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Matters of State

Also by Philip Hamburger

The Oblong Blur and Other Odysseys

J.P. Marquand, Esquire

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Our Man Stanley

An American Notebook

Curious World

Friends Talking in the Night

To Nicholas & Sylvan
The future

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Are you lost daddy I asked tenderly. Shut up he explained.

RING LARDNER

The Young Immigrants

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Foreword

I AM NOT NOW AND NEVER HAVE BEEN a pundit. But I have been around a long time, seen many large public events, talked with any number of public figures, and have a special fondness for the pageantry and significance of presidential Inaugurations. I have been to so many of these, that I get mixed up reaching an exact count (Fourteen, I think.). For this book, I have gathered together pieces dealing with public matters. What follows are the observations of one man who has tried to keep his eyes and mind open. I have never forgotten some words said to me years ago by Harold Ross, the miraculous first editor of *The New Yorker*. We were correcting proofs in his office one evening when he suddenly looked up and said, "Never go cosmic on me, Hamburger." The admonition has been invaluable, especially for diminishing self-importance. Nonetheless, I have certain fundamental convictions: I loathe communism and fascism. The United States Constitution is the greatest political document ever written, with special emphasis on the Bill of Rights. I believe in the separation of church and state, universal health care, environmental protection a capitalism of social responsibility, the right of a woman to control her body, racial justice, and the inviolable right to privacy. In some quarters, such thoughts are labeled "liberal" or "left-leaning," To me, they have nothing to do with labels or directions (Turn right! Turn left!) but simply with common sense and decency.

Random Notes on Washington, D.C.

I FIRST SAW WASHINGTON when I was about ten or eleven, sometime in the mid-Twenties. Throughout the land there was a sense of never-ending prosperity. My father had long promised me a trip to the nation's capital, and one fine day down we went from New York, by train. My father was a proud Baltimorean ("People make fun of the row houses and white marble stoops, but they are spotless and beautiful," he would say), a proud Democrat, and a passionate believer in social progress. The only quarrel I ever had with this good man was his fervent defense of President Roosevelt's plan to pack the Supreme Court. I dissented, considering it a dangerous, impatient assault on the Court. But I digress. I still vividly recall my sense of wonderment when I first caught sight of the spatial grandeur of Union Station, at the broad boulevards and graceful traffic circles. I felt that I was in a sleepy Southern city, an unhurried and comfortable place. My father hired a car and driver who drove us from one end of the place to the other—past the unforgettable and haunting Lincoln Memorial, past the White House (at that time the incumbent was the man H. L. Mencken always referred to as Dr. Coolidge; he was probably napping, but did wake up from time to time to presciently remark that "the business of America is business."), past the myriad embassies, the imposing Capitol and the tree-lined streets. We were sightseers, eager ones, and as we drove from place to place, and stopped to talk with various guards, there was a distinct, healthy, and pleasant sense of courtesy and dignity. The outward manifestations of government seemed vibrant and admirable.

Skip some years. It is 1935, the depth of the Depression, I am twenty-one and have just graduated from Johns Hopkins University. I need a job. So does my father. The mystical ship he has relied upon all his life, the one that is 'just about to come in' has sunk, a chimeric vessel lying somewhere in the briny deep. Miracle! Thanks to the father of a classmate I am offered a temporary job in the press department of the newly established Social Security Administration, headed by John Winant, former Governor of New Hampshire. Here was a golden op-

portunity to become a tiny cog in a vast, innovative life-saving government adventure. In a stroke of political genius, Roosevelt had picked Winant, a Republican, to demonstrate the bi-partisan nature of this desperately needed program at aiding the elderly, the sick, the disabled, both the haves and the have nots. Social Security began to work, and has worked, miraculously, to this day, bringing hope to millions. My job was a simple one: I rose at the crack of dawn, left a stifling rented room (no air-conditioning in those days in a tropical city), proudly walked past the White House, arrived at the Social Security office and pored over tens of newspapers from all parts of the country. My job was to summarize any item that mentioned Social Security and place the entire compilation on Governor Winant's desk by 9 A.M. The adage that history repeats itself is all too true: The same sorts of things were being said in 1935 about Social Security that are being said today. For one thing, it was "socialistic." Americans, said the critics, were a hardy breed, fully capable of handling their own money (The fact that practically everybody was stony broke did not appear important). Clipping after clipping spoke of the administration's intention to tattoo numbers on the hands of each social security recipient. Most poignant of all were items claiming that the government intended permanently to place the number of each newborn babe on the baby's tender backside. Ludicrous? Lest we forget, Nazis methodically and heinously stamped numbers on the limbs of their concentration camp victims.

The Social Security job ended in about a year, and I felt no deep sense of loss. Government interested me, but work in a bureaucracy did not. I had set my sights on becoming a writer, starting out as a newspaperman, and went back up to New York. I haunted every paper in town. No luck. No luck anywhere. The Depression was still in full force. I landed a job as a sort of secretary-gofer with a remarkable man, J. M. Kaplan, a businessman of great wealth and many philanthropies. He was one of the most complex and fascinating people I have ever known, but I could not then and cannot now delineate exactly what I did for him. He was kind, generous, and a lifesaver. He was paternalistic: Fridays we received free haircuts and lunch at a fancy French restaurant across from our offices on lower Fifth Avenue. One of his many properties was Welch's grape juice, and each Friday the small force in his office (a bookkeeper, an accountant, a fancy lawyer, and myself) received a case of grape juice. Since I lived on the upper West Side the trip from office to home, with a

carton of grape juice, required a cab. The Friday journey pretty much wiped out my week's mighty stipend. But the business of business was not my forte and, still applying on a persistent basis for newspaper work (without success) I received a partial scholarship to the Graduate School of Journalism at Columbia. Mr. Kaplan applauded the move, and up I went to Morningside Heights. The year was a stimulating one, and marked a critical turning point. Thanks to Henry F. Pringle, a professor at the school, a celebrated historian who had won the Pulitzer Prize for his biography of Theodore Roosevelt, and who had been one of *The New Yorker's* first Profile writers, I received a recommendation to St. Clair McKelway, then the brilliant managing editor of *The New Yorker*. McKelway hired me in 1939, and Washington seemed far away. So did grape juice. But war was approaching. I had been excluded from the draft (4-F) because of bad eyesight. I was thrilled one day late in 1941 to receive a call from Archibald MacLeish, then Librarian of Congress. Could I meet with him in his office on Saturday afternoon, December 6? Yes, sir, I most certainly could. I met this elegant and articulate man in his bijou office in the Library at the appointed hour. He said that President Roosevelt was anxious to form a group of writers who could explain to the public why so much money was being spent on defense. Could I get a leave of absence from Mr. Ross, perhaps in February, and come down to Washington? I jumped at the idea. The following day was of course, Sunday. But it was Sunday December 7, 1941, "a day that will live in infamy", and America was at war. The next day I went in to say goodbye to Mr. Ross, who rose from behind his desk with a look both of sadness and encouragement, gave me a warm embrace, accompanied by his signature sendoff "God Bless."

The Washington work was fascinating, my colleagues a most extraordinary group including Arthur Schlesinger, Jr., McGeorge Bundy, Milton MacKaye, Robert Kintner, and, in beneficent charge of the writers, my mentor, Henry Pringle. Wartime Washington was a dedicated place. We worked long hours. We felt, (I always felt), a sense of guilt at performing deskwork while others were fighting. My task was the writing of pamphlets published by the government and distributed in millions of copies throughout the country. One of these, *Divide and Conquer*, outlined in great detail Nazi propaganda methods: the spreading of lies from one end of the earth to the other. The pamphlet was well received and reprinted in hundreds of newspapers throughout the

country. The staid *Saturday Evening Post*, which had never reprinted anything before in its long history, printed every word I had written. I did not consider it appropriate in wartime to sign the piece. Somehow it came to the attention of President Roosevelt who asked MacLeish who had written it. To my utter amazement and stupefaction the President phoned me one day at the office to tell me how pleased he was with *Divide and Conquer*. The brief talk with him is, of course, a highlight of my life. MacLeish was succeeded by the learned, impressive Elmer Davis, the original Office of Facts and Figures became the Office of War Information, there was bureaucratic infighting, and I found myself back at *The New Yorker*.

Hold on! The wide-eyed sightseeing boy is now a man in his mid-eighties. He still goes to Washington from time to time (always by train), still loves the pomp and circumstance of an Inauguration, still treasures the peaceful transfer of power. He knows that the sleepy Southern city of his youth is now a metropolis of almost unimaginable world power. But something happens as that train slows down in the approach to Union Station. He can't help himself. He rushes to the right side of the car to catch a glimpse of the white dome of the Capitol and the tip of the Washington Monuments. He knows there is a feeling of meanness that he had not felt before. But he cannot wait to walk past the White House, shed a tear at the Vietnam Wall, and pay his respects to the Lincoln Memorial.

Philip Hamburger,
May, 2000

The Great Judge

THE BEDROCK OF OUR LIBERTIES LIES, I feel, in the independence of the Federal judiciary. Absent that, all is lost. And a bedrock was Learned Hand, the legendary judge who presided over the United States Court of Appeals, Second Circuit. I knew of his monumental defense of freedom of speech and the First Amendment, but little more, until Sunday afternoon, May 21, 1944. I was at home listening to a radio broadcast from Central Park. One hundred and fifty thousand new citizens were to be sworn in by Judge Hand, before a million and a half people—the largest crowd ever gathered in the park. We were in the midst of a shattering war, but the tide had turned and D Day was just a few weeks ahead. Shortly after 4 P.M. he began to speak on “The Spirit of Liberty.” I was transfixed. The words had such clarity, beauty and meaning that I had the curious sensation that I was at Gettysburg, listening to Lincoln. And, like Lincoln, he spoke briefly, barely more than five hundred words. The next morning not a newspaper in town printed a word of the speech. I called the judge in his chambers and said I would like a copy of the speech. He seemed pleased. “You *heard* it?” he said. “Come on down.” Down I went. We had a long talk and I wrote a piece for the Talk of the Town, quoting from the speech. An avalanche of attention followed, and the speech has gone into the canon of great American utterances. The judge and I became friendly. I went to dinner at his home, he came to mine. The moments with him are among the most important of my life. This piece was written for *Life* a few years after our first meeting.

Jurists are by nature argumentative, and nothing delights them more than to consider the qualities that constitute lasting greatness on the bench. Is the important factor the literary style and grandeur of a judge’s opinions? Zeal for uniting the law with the economic realities of life? Sturdy defense of the *status quo*?

Debates of this nature frequently end in an atmosphere of mellow

agreement at the mention of Learned Hand, senior judge of the United States Circuit Court of Appeals for the Second Circuit (New York, Connecticut and Vermont), a robust, stocky man with thick eyebrows and a voice like the crackle of lightning. An impressive number of judges and lawyers consider him the outstanding member of the federal judiciary, the spiritual heir of such judicial giants as Marshall, Holmes, Brandeis and Cardozo.

Judge Hand was seventy-five in January, 1947, and many of his colleagues and friends, more than anxious to pay him tribute, planned testimonial dinners and the presentation of a bust. Typically the Judge tried to keep one step ahead of them in an attempt to scotch their plans. It is his modest and reasoned decision that public tributes have small place in the life of a judge. Nonetheless he could not stop thousands of lawyers and judges the world over from turning their thoughts in his direction, re-examining his opinions and papers and evaluating his life-work. "Learned Hand is the most distinguished living English-speaking jurist," a Supreme Court justice has remarked with deep feeling. Those who insist that a judge must write with the pen of a master will accept no substitute for his prose. "There is a lovely tune in his head," said one of his colleagues on the bench, "and somehow he translates it into words."

To Judge Hand each individual is sacred and entitled to his day in court. His roots are embedded in the deepest and healthiest soil of American democracy. To discover the essence of that soil he has devoted a lifetime of inquiry, both on and off the bench. "The only America you can love," he once wrote, "is one whose citizens have learned the self-discipline of compliance in the face of truth; the only country which any man has a right to love is one where there is a balanced judgment, justice founded on wisdom, a free spirit and a temperate mind." He conceives of the law as a living organism and of interpretation as an imaginative exercise. Statutes are the result of legislative compromise, he holds, and judges must therefore discover what the authors had in mind while framing them.

Broad generalizations leave him in a cold intellectual fury. Lawyers who attempt to impress him by reminding the court of "those eternal principles of justice ringing down the ages" do so only once. His broad jaw drops in anguish. His bushy gray eyebrows rise in horror. His face, a moment ago as serene and inquiring as Cardozo's, becomes as fierce as

Daniel Webster's at the height of a peroration. The courtroom echoes with a sharp crack as he slaps a hand to his brow and leans far back in a tall leather armchair. "Rubbish!" he shouts, almost disappearing from view behind the bench.

The casual observer, watching Judge Hand charge up the front steps of the federal courthouse in New York or preside on the bench with majestic authority, would conclude that he was a tower of self-assurance. Actually he is torn by doubts and constantly re-examines his first principles. "What are the values? Do you know? Believe me, I do not," he will suddenly say to his law clerk during the discussion of a case. Although convinced that permanent solutions to the problems of life do not exist, he belies the thought by a ceaseless pursuit of solutions. "Shakespeare had Learned in mind when he wrote *Hamlet*," a distinguished corporation lawyer said recently. "Twenty-four hours a day he is a thinking being."

His moods are unpredictable. Some months ago he stepped into an elevator at the courthouse deep in thought and with a dejected expression. "Pardon me, Judge Hand," said a stranger, as the elevator started up, "but I thought your opinion yesterday was wonderful." Judge Hand beamed. "Thank you, sir, thank you very much indeed," he said, stepping off at the twenty-fourth floor. Humming, he walked briskly through his suite of offices. He waved to his bailiff and Mrs. Berna Lohrman, his secretary. He stopped by the desk of his law clerk to repeat what the man in the elevator had said. "Splendid morning, splendid!" he said, entering his chambers. For the next ten minutes those outside heard him gaily whistling a tune from *The Pirates of Penzance*. Suddenly all sounds ceased, followed by an insistent buzz for the law clerk, who entered and found the Judge looking as though he had passed through the valley of the shadow of death. "I cannot fathom," said Judge Hand, "why I allowed myself to care *what* that fellow thought of my opinion!"

No other federal judge has been on the bench as long as Judge Hand. President Coolidge appointed him to the Circuit Court in 1924, directly from the District Court for the Southern District of New York, where he had sat for fifteen years. Since 1939 he has held the title of senior judge, a matter of seniority. In the hierarchy of the federal judiciary, the ten Circuit Courts of Appeals and the Court of Appeals for the District