



Learned Hand's *Spirit of Liberty*: A Lesson for Our Times

It was May 21, 1944, and over a million people had gathered in New York City's Central Park for an event that was hailed as "I Am an American Day." World War II continued to rage in Europe and the Pacific, and notably, the large crowd assembled in Manhattan included a huge number of new citizens who would recite the Pledge of Allegiance for the first time. Brief remarks were to be offered by Learned Hand, then a judge on the United States Court of Appeals for the Second Circuit. As Gerald Gunther notes in a sprawling biography, Hand, "despite his thirty-five years on the federal bench, was not a widely known public figure." What became known as the "Spirit of Liberty" speech would change that.

It is often overlooked that much of the message of "Spirit of Liberty" was foreshadowed by an earlier address Hand delivered in Philadelphia in 1930 entitled "Sources of Tolerance" (and published in the *University of Pennsylvania Law Review*). In that address, Hand identified two competing conceptions of liberty: one Jeffersonian, the other Hamiltonian.

Hand was hardly a disciple of Jefferson, whose views eschewed most forms of authority in favor of "free expression of the individual." In Hand's view, Jefferson's vision of liberty was ill-equipped to deal with modern American life. Yet Hand also found flaws in Hamiltonian notions of liberty. To him, Hamilton's vision limited "the

possibility of the individual expression of life on the terms of him who has to live it."

So Hand did not choose sides in a historical rivalry that continues to bubble up in various forms to this day. In "Spirit of Liberty," Hand alluded instead to the challenges that must necessarily be faced no matter which philosophy of governance prevails. "Jefferson is dead," he declaimed, yet "[t]he victory is not all Hamilton's."

Hand did not draw on John Locke's distinction between liberty and license: that liberty is not the unbounded freedom to do what one wishes without regard to "the liberty, health, or goods of another."¹ Yet such excesses surely troubled him. "A society in which men recognize no check upon their freedom," Hand admonished the crowd, "soon becomes a society where freedom is in the possession of only a savage few." Rather than limiting himself to the language of political philosophy, Hand reached for something much harder to express. He invoked, first in 1930, "that *spirit* of liberty without which life is insupportable. . . ."²

Like those among the Founders who publicly expressed concerns about the dangers of factionalism in the emerging Republic, Hand himself was "troubled by the spirit of faction" in his own day. And he famously invoked that ethereal concept again in 1944:

—*What then is the spirit of liberty? I cannot define it; I can only tell you*

my own faith. The spirit of liberty is the spirit which is not too sure that it is right; the spirit of liberty is the spirit which seeks to understand the minds of other men and women; the spirit of liberty is the spirit which weighs their interests alongside its own without bias. . . .

How refreshing it would be these days to hear such expressions of uncertainty — perhaps, on occasion, even agnosticism — in matters of politics and policy — yet they are not the order of the day. Hand, were he with us now, would be witnessing not simply factionalism but "tribalism."

And Hand was calling upon his fellow Americans for something more than simple tolerance. He summoned men and women to listen to one another. He saw mutual understanding as a value that allows the human race to overcome its desire to realize only narrow self-interest. He was reaching far beyond the jurisprudential. His words were evocative of Lincoln summoning a divided people to look to "the better angels of their nature." Looking toward the crowd of 150,000 new citizens, Hand concluded: "[I]n that spirit of liberty and of America I ask you to rise and with me pledge our faith in the glorious destiny of our beloved country."

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