

Wall Street Journal

'The Spirit of Liberty'

[Michael B. Mukasey](#). [Wall Street Journal](#). (Eastern edition). New York, N.Y.: [May 10, 2004](#). pg. A.16

Learned Hand, among the last century's greatest judges, defined the spirit of liberty 60 years ago as "the spirit which is not too sure that it is right." We must consider what message we can take from those words today.

We are now in a struggle with an extremism that expresses itself in the form of terror attacks, and in that we face what is probably the gravest threat to this country's institutions, if not to its physical welfare, since the Civil War. When one tries to assess people who can find it in themselves to fly airplanes into buildings and murder 3,000 of us in a single morning, whatever else you can say about such people, they are very sure that they are right; and wouldn't it be music to their ears to hear that our spirit says we're not too sure that we are right?

What measures we should take to protect ourselves, both abroad and at home, is now the subject of heated debate as we participate in a war against extremism, not so much to make the world safe for democracy as to achieve a more modest-sounding, but, I would suggest, no less important goal -- to make the world safe for us. Regrettably, like many debates, our current one already has seen its share of half-truths and outright falsehoods.

They began right after Sept. 11, when some claimed that FBI agents were rounding up Muslim Arabs wholesale and holding them incommunicado. That accusation seems dubious on its face when you consider that the FBI has only about 12,000 agents world-wide. That is not many when you realize that they investigate not only terrorism, but also every other federal crime aside from counterfeiting, tax evasion and mail fraud; that they share responsibility for drug investigations with the Drug Enforcement Administration -- a pretty hefty set of assignments -- and that they had numerous leads as to those responsible for the attack on Sept. 11. Under those circumstances -- with many leads to work on and relatively few agents to do that work -- does it really stand to reason that they spent their time rounding people up based on nothing other than religion and ethnicity?

No doubt there were people taken into custody, whether on immigration warrants or material witness warrants, who in retrospect should not have been. If those people have grievances redressible under the law, those grievances can be redressed. But we should keep in mind that any investigation conducted by fallible human beings in the aftermath of an attack is bound to be either over-inclusive or under-inclusive. There are consequences both ways. The consequences of over-inclusiveness include

condemnations. The consequences of under- inclusiveness include condolences.

More recently, a statute called the USA Patriot Act has become the focus of a good deal of hysteria, some of it reflexive, much of it recreational.

My favorite example is the well-publicized resolution of the American Library Association condemning what the librarians claim to believe is a section of the statute that authorizes the FBI to obtain library records and to investigate people based on the books they take out. Some of the membership have announced a policy of destroying records so that they do not fall into the hands of the FBI.

First a word on the organization that gives us this news. The motto of this organization is "Free people read freely." When it was called to their attention that there are 10 librarians languishing in Cuban prisons for encouraging their fellow countrymen to read freely, an imprisonment that has been condemned by Lech Walesa and Vaclav Havel, among others, this association declined to vote any resolution of condemnation, although they did find time at their convention to condemn their own government.

In addition to the library association, many towns and villages across the country, notably Berkeley and Amherst, have announced that they will not cooperate with any effort to gather evidence under the statute. A former vice president has called for the statute's repeal, and a former presidential candidate has called the act "morally wrong," "shameful" and "unconstitutional."

I think one would have to concede that the USA Patriot Act has an awkward, even an Orwellian name, which is one of those Washington acronyms derived by calling the law "Uniting and Strengthening America by Providing Appropriate Tools Required to Interrupt and Obstruct Terrorism." You get the impression they started with the acronym first, and then offered a \$50 savings bond to whoever could come up with a name to fit. Without offering my view on any case or controversy, current or future, I think that that awkward name may very well be the worst thing about the statute.

Most of the provisions have nothing to do with the current debate, including provisions authorizing purchase of equipment for police departments and the like, and provisions tightening restrictions on money laundering, including restrictions on the export of currency, which is the life-blood of terrorists. Recall that when Saddam Hussein was captured, he had with him \$750,000 in \$100 bills.

The statute also breaks down the wall that has separated intelligence gathering from criminal investigation. It allows intelligence information to be shared with criminal investigators, and information that criminal investigators unearth to be shared with those conducting intelligence investigations. I think many people would believe this makes sense,

although a series of bureaucratic decisions and a stark misreading of the Foreign Intelligence Surveillance Act for years made this impossible, and thus prevented the government from fulfilling its most basic responsibility under the Constitution: "to provide for the common defense [and] promote the general Welfare."

What difference would this make? Well, there is one documented incident involving an FBI intelligence agent on the West Coast who was trying to find two men on a watch list who he realized had entered the country. He tried to get help from the criminal investigative side of the FBI, but headquarters intervened and said that was not allowed. That happened in August 2001. The two men he was looking for were named Khalid al-Midhar and Nawaf al-Hazmi. A few weeks later, on Sept. 11, they were at the controls of the airplane that struck the Pentagon. This provision of the statute, permitting information sharing, could not pass Congress without an agreement that it would sunset on Dec. 31, 2005, and so unless that provision is changed, come Jan. 1, 2006, we will be back to the rules that prevailed in August 2001.

The provisions in the law that have generated the most opposition have to do with investigative techniques, including electronic surveillance and the gathering of business records. The electronic surveillance provisions give investigators access to cable-based communications, such as e-mail, on the same basis as they have long had access to telephone communications, and give them access to telephone communications in national security cases on the same basis on which they already have such access in drug cases.

I think most people would have been surprised and somewhat dismayed to learn that before the Patriot Act was passed, an FBI agent could apply to a court for a roving wiretap if a drug dealer switched cell phones, as they often do, but not if an identified agent of a foreign terrorist organization did; and could apply for a wiretap to investigate illegal sports betting, but not to investigate a potentially catastrophic computer hacking attack, the killing of U.S. nationals abroad, or the giving of material support to a terrorist organization. Violations like those simply were not on the list of offenses for which wiretaps could be authorized.

The statute also codifies the procedure for issuing and executing what are called "sneak and peek" warrants that allow agents, with court authorization, to enter premises, examine what is there and then leave. These warrants had been issued by courts before the Patriot Act was passed, including my own court -- although I have never issued one myself -- on the fairly simple logic that if it is reasonable under the Fourth Amendment to enter premises and seize things, it should also be reasonable to enter premises and not seize things. The statute permits agents to delay disclosure of their presence to the person who controls the premises, again with court authorization. Here too, the logic seems obvious: If you leave behind a note saying "Good

afternoon, Mr. bin Laden, we were here," that might betray the existence of an investigation and cause the subjects to flee or destroy evidence. There are analogous provisions that were in existence long before the Patriot Act permitting a delay in notifying people who are overheard on wiretaps, and for the same reason.

What about the section the librarians were so concerned about, Section 215? Well, it bears some mention that the word library appears nowhere in that section. What the section does authorize is the issuance of subpoenas for tangible things, including business records, but only upon approval by the Foreign Intelligence Surveillance Court. Such a subpoena can direct everyone, including the record keeper, not to disclose the subpoena to anyone, including to the person whose records were obtained. That section also specifically forbids investigation of a citizen or a lawful alien solely on the basis of activity protected by the First Amendment. It requires that the Justice Department report to Congress every six months on subpoenas issued under it. At last report, there have been no such subpoenas issued to libraries. Indeed, there have been no such subpoenas, period.

Let me hasten to add that it is not impossible to imagine how library records might prove highly relevant, as they did in one case, very much pre-9/11 -- the case of the "Unabomber," Ted Kaczynski. Some of you may recall that Kaczynski was apprehended soon after a newspaper agreed to publish his manifesto, and was caught based principally on a tip from his brother, who read the manifesto, and recognized the rhetoric. But one of the ways that tip was proved accurate was through examination of library records, which disclosed that the three arcane books cited in the manifesto had been checked out to Ted Kaczynski from a local library -- a devastating bit of corroborative circumstantial evidence.

Like any other act of Congress, the Patriot Act should be scrutinized, criticized and, if necessary, amended. But in order to scrutinize and criticize it, it helps to read what is actually in it. It helps not to conduct the debate in terms that suggest it gives the government the power to investigate us based on what we read, or that people who work for the government actually have the inclination to do such a thing, not to mention the spare time.

As we participate in this debate on what is the right course to pursue, I think it is important to remember an interesting structural feature of the Constitution we all revere. When we speak of constitutional rights, we generally speak of rights that appear not in the original Constitution itself, but rather in amendments to the Constitution -- principally the first 10. Those amendments are a noble work, but it is the rest of the Constitution -- the boring part -- the part that sets up a bicameral legislature and

separation of powers, and so on, the part you will never see mentioned in any flyer or hear at any rally, that guarantees that the rights referred to in those 10 amendments are worth something more than the paper they are written on.

A bill of rights was omitted from the original Constitution over the objections of Patrick Henry and others. It may well be that those who drafted the original Constitution understood that if you give equal prominence to the provisions creating the government and the provisions guaranteeing rights against the government -- God-given rights, no less, according to the Declaration of Independence -- then citizens will feel that much less inclined to sacrifice in behalf of their government, and that much more inclined simply to go where their rights and their interests seem to take them.

So, as the historian Walter Berns has argued, the built-in message -- the hidden message in the structure of the Constitution -- is that the government it establishes is entitled, at least in the first instance, to receive from its citizens the benefit of the doubt. If we keep that in mind, then the spirit of liberty will be the spirit which, if it is not too sure that it is right, is at least sure enough to keep itself -- and us -- alive.

Mr. Mukasey is chief judge of the U. S. District Court, Southern District of New York. This is adapted from a speech he gave last Wednesday, on his acceptance of the Learned Hand Medal for Excellence in Federal Jurisprudence.