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Not a Suicide Pact
The Constitution in a Time of National Emergency
by Richard A. Posner
Oxford, 208 pp., $18.95

In late June, Linda Greenhouse of the *New York Times* breathlessly reported on the front page, above the fold and under a big headline, that in the just-announced case of *Hamdan* v. *Rumsfeld*, the Supreme Court "shredded each of the administration's arguments." The decision--which held that, as organized, the military tribunals the Bush administration had created to try unlawful combatants seized on the battlefield in Afghan istan, were contrary to federal law and a provision of the Geneva Conventions--was, Greenhouse gushed, "a sweeping and categorical defeat for the Bush administration."

Indeed, she proclaimed, the decision was a "historic event, a definitional moment in the ever-shifting balance of power among the branches of government that ranked with the court's order to President Nixon in 1974 to turn over the Watergate tapes or with the court's rejection of President Harry S. Truman's seizing [in 1952] of the nation's steel mills."

Never mind that the Court had not questioned the government's right to detain Salim Ahmed Hamdan, allegedly Osama bin Laden's driver and bodyguard, without charge or trial, as an unlawful combatant, until such time as the conflict between the United States and al Qaeda comes to an end. Never mind that, in a paragraph-long concurring opinion, Justice Breyer emphasized that much, if not all, of the military tribunal procedures designed by the Bush administration would pass legal muster if explicitly authorized by Congress. Never mind that the Court's opinion commanded only a narrow five-justice majority. And never mind that Justices Scalia, Thomas, and Alito each authored powerful dissents that elaborated serious objections to which the majority's principal legal arguments are exposed. (Chief Justice Roberts did not participate in the case because, as judge on the D.C. Court of Appeals, he joined the opinion, which *Hamdan* reversed, upholding the administration's military tribunals.)

What was truly remarkable about Greenhouse's performance--her lengthy article was not an op-ed column or piece of "news analysis" but a news story of the sort customarily intended to provide a dispassionate and well-rounded account of the facts--was the omission of a single reference to the features of America's national security situation that motivated the Bush administration to turn to the use of military tribunals. In this failure to put national security considerations into the balance, let alone give them their due weight, Greenhouse and her

editors at the *Times* typify the complacency and shortsightedness in thinking about constitutional rights and the war on terror that Judge Richard Posner's trenchant new book seeks to correct.

Rarely ceasing to amaze over the last three decades or so with the range of his intellectual interests and the acuteness of his analytical powers (and occasionally with the irreverence of his observations and unconventionality of his conclusions), Posner has, in the last several years, turned his attention to questions of national security. In 2004 he published *Catastrophe*, a book on the regulation of grave but remote risk: For example, what policy should government adopt if a physics experiment poses a truly extraordinary harm--say, the destruction of the planet--but the harm has an exceedingly remote likelihood, perhaps a one-in-fifty-million chance, of coming to pass? And in the last year, Posner published *Preventing Surprise Attacks*, and a sequel, *Uncertain Shield*, which explore the nature of intelligence-gathering and analysis, the strengths and weaknesses of our pre-9/11 intelligence system, and post-9/11 reform efforts. (Both volumes appear under the imprint of Hoover Studies, a series for which I serve as co-general editor.)

With his new book, Posner carries forward his analysis of national security questions into the sphere of constitutional law. True to the pragmatic approach to judging that he has long championed, Posner grounds his analysis of national security law and the Constitution in an appreciation of concrete circumstances. The danger posed by jihadist terror, according to Posner, is novel, grave, and growing. As he explains with characteristic vigor, this is partly because of the weapons increasingly at our enemies' disposal:

> [I]n the early years of the twenty-first century, the nation faces the intertwined menaces of global terrorism and proliferation of weapons of mass destruction. A city can be destroyed by an atomic bomb the size of a melon, which if coated with lead would be undetectable. Large stretches of a city can be rendered uninhabitable, perhaps for decades, merely by the explosion of a conventional bomb that has been coated with radioactive material. Smallpox virus bioengineered to make it even more toxic and vaccines ineffectual, then aerosolized and sprayed in a major airport, might kill millions of people. Our terrorist enemies have the will to do such things and abundant opportunities, because our borders are porous both to enemies and to containers. They will soon have the means as well. The march of technology has increased the variety and lethality of weapons of mass destruction, especially the biological, and also and critically their accessibility. Aided by the disintegration of the Soviet Union and the acquisition of nuclear weapons by unstable nations (Pakistan and North Korea, soon to be joined, in all likelihood, by Iran), technological progress is making weapons of mass destruction ever more accessible both to terrorist groups (and even individuals) and to hostile nations that are not major powers. The problem of proliferation is more serious today than it was in what now seem the almost halcyon days of the Cold War; it will be even more serious tomorrow.

The danger is further defined by the jihadists' character, ideology, and tactics. We know that "they are numerous, fanatical, implacable, elusive, resourceful, resilient, utterly ruthless, seemingly fearless, apocalyptic in their aims, and eager to get their hands on weapons of mass destruction and use them against us." But because they do not represent a nation-state, and thus have neither territory nor population for which they are responsible, we do not know very much about "their current number, leaders, locations, resources, supporters, motivations, and plans; and in part because of our ignorance, we have no strategy for defeating them, only for fighting them."

The knowledge of concrete circumstances emphasized by pragmatists, Posner stresses, is critical when it comes to understanding the Constitution and the rights to which it gives rise. Constitutional rights, he argues, are not specified by the text of the Constitution, nor are they derivable from it by a single governing principle or a unique scientific or logical method. Rather, constitutional rights are created by justices interpreting the Constitution with a view to the moral and political consequences of their rulings.

Take the First Amendment. To be sure, it provides rights to freedom of speech, religion, press, and association. But it is the Supreme Court, over the centuries, that has determined the shape and scope of these rights, concluding, for example, that generally government may restrict speech on the basis of time, place, and manner, but not on the basis of content or viewpoint, and that the free exercise of religion is not wide enough to include prayer in school.

Posner's writings can give the disconcerting impression that sufficiently clever judges are free to reach whatever results they like. That is not his argument here. He recognizes that many legal controversies are resolved by straightforward application of the law. But in hard cases, where traditional legal materials--constitutional text, history, structure, and the holdings of previous cases--fail to yield a single lawful answer, justices ought to craft legal rules that serve the nation's moral and political requirements. Or rather, Posner believes that justices should do this more deliberately and forthrightly.

In reality, he argues, in the difficult and divisive constitutional cases, the very ones to which the public pays the most attention and which appear to have the largest political implications, justices reach their decision in much the same way that ordinary citizens make nonlegal decisions, "by balancing the anticipated consequences of alternative outcomes and picking the one that creates the greatest preponderance of good over bad effects."

Because the Supreme Court's legal conclusions about constitutional rights are, and ought to be, "heavily influenced by contemporary needs and conditions," they involve, in the final analysis, substantial policy judgments that result in the making of new law.

This may sound like an endorsement of judicial activism, but, according to Posner, it isn't. Indeed, he thinks that the pragmatic approach favors judicial restraint. Precisely because of the inevitably large pragmatic element in the adjudication of constitutional rights, justices should be restrained in invalidating the acts of the political branches. This is because Congress and the president are better equipped to weigh the actual or likely consequences of laws and policies, and they are better positioned to bring failed social and political experiments to an end.

Much of Posner's writing about the practice of judging over the last decade has been calculated to rile moral philosophers who believe that reason itself can decide hard cases, and to provoke law professors who insist on the autonomy of legal reasoning. However, this time around, his exposition of the pragmatic dimension of judicial decision-making has an eminently practical purpose: to show the path that national security law should take in the war against Islamic extremism. The key is to appreciate that the Constitution itself requires courts to balance two competing interests or goods, individual liberty and public safety.

Drawing on central insights of the law and economics school, of which he is a founding father, and translating them into terms suitable for dealing with hard constitutional cases, Posner sets forth the appropriate balancing test:

> Ideally, in the case of a right (for example, the right to be free from unreasonable searches and seizures) that could be asserted against government measures for protecting national security, one would like to locate the point at which a slight expansion in the scope of the right would subtract more from public safety than it would add to personal liberty and a slight contraction would subtract more from personal liberty than it would add to public safety. That is the point of balance, and determines the optimal scope of the right. The point shifts continuously as threats to liberty and safety wax and wane. At no time can the exact point be located. Yet to imagine it the object of our quest is useful in underscoring that the balance between liberty and safety must be struck at the margin. One is not to ask whether liberty is more or less important than safety. One is to ask whether a particular security measure harms liberty more or less than it promotes safety.

Of course, different justices will attach different weights to liberty and security, and come to different conclusions about the impact of specific measures on liberty and security. Posner does not deny or fear these difficulties. The purpose of his balancing test is not to eliminate but to refine the role of judgment in constitutional adjudication.

It follows that, at the margins, constitutional rights will and should vary with the threat that the nation faces. Posner recognizes that libertarians of both the left and right will decry this approach. They will prefer clear rules with very few exceptions--that, for instance, political speech can only be prohibited if it involves an incitement to crimes. They will also tend to

discount the national security threat by treating terrorism as a species of crime. And they will warn darkly of the historical tendency of the government to chip away steadily at civil liberties in wartime in the name of dangers that eventually turn out to be farfetched.

To these libertarian objections, Posner replies that the rigidity of rules is disadvantageous when the constitutional terrain is as rocky and unfamiliar as it is in the case of jihadist terror. Further, he contends, unlike criminals but like traditional armies, Muslim extremists seek to cripple the state, and increasingly will have the means to do so, and thus pose a quantitatively and qualitatively different sort of threat than that for which the criminal law was designed.

Posner notes that what American history actually reveals is that, early on, when the enemy is poorly understood, government does truncate civil liberties--Lincoln's suspension of habeas corpus, FDR's internment of Japanese citizens, McCarthyite purges of suspected Communists--but that, as wars wear on, and well before they end, the government acquires an understanding of the adversary that allows it to continue to fight without further circumscribing civil liberties.

Posner admonishes those libertarians who would brook no trade-offs in civil liberties, in exchange for heightened security measures, for missing the larger picture. Nothing, he points out, is more sure to bring about a severe restriction of civil liberties in America than the backlash following the failure to prevent another 9/11, or worse.

Posner puts his balancing test to work on several of the novel and difficult legal issues raised by the war on terror, including questions concerning detention, interrogation, search and surveillance, speech, and privacy. Posner's reasoning, though debatable, is invariably illuminating, and overall demonstrates that the Constitution, pragmatically interpreted, is both sturdy and flexible, capable in the war we are now waging of protecting liberty and maintaining security.

Consider his treatment of the detention and interrogation of enemy combatants. To determine the minimum protections, under the Constitution, to which terrorists are entitled, it is necessary to classify terrorists correctly. Because they are making war on the United States by threatening the nation's political sovereignty and territorial integrity, they are not criminals, and therefore they are not entitled to the procedural protections that the Constitution provides those accused of criminal wrongdoing.

However, because they violate the laws of war by fighting without a regular command structure, without uniforms, without carrying their weapons openly, and by targeting civilians, terrorists are not entitled to the procedural protections that cover prisoners of war, or lawful enemy combatants, under international law. So what rights does the Constitution provide for unlawful enemy combatants?

It depends, argues Posner. If unlawful combatants are foreigners and are captured and detained abroad, the case is simple: They have no rights under the Constitution. If a U.S. citizen is detained on suspicion of being an unlawful combatant, then, as *Hamdi* v. *Rumsfeld* concluded, the Constitution protects his right to habeas corpus, which gives him the chance to challenge the grounds of his detention in front of an impartial decision-maker.

If the noncitizen, unlawful combatant is captured abroad, but transferred to U.S. territory, then (according to the Court's 1946 *Yamashita* decision) he, too, is entitled to the writ of habeas corpus. In 2004, the Supreme Court held in *Rasul* v. *Bush* that foreign persons detained as unlawful combatants at Guantánamo, which technically is not U.S. territory, also had the right to contest their detention.

Is this good constitutional law? For the most part, Posner thinks that protecting the right of habeas corpus for citizens held as unlawful combatants strikes the proper balance between security and liberty. He would extend that protection to foreigners captured and detained in the United States on suspicion of being terrorists. After all, he points out, there is a much greater risk of mistakenly ascribing to an individual membership in a terrorist organization than of mistakenly ascribing to him membership in a nation-state's armed forces. And giving detainees a limited opportunity to convince an impartial decision-maker that they have been wrongly detained poses only a small threat to national security. (Limits on this opportunity may include permitting the holding of a suspected terrorist for a reasonable period before any hearing and, at the hearings, placing a heavy burden of proof on the detainee.)

Once detained, what methods of interrogation does the Constitution permit the government to employ to elicit information from unlawful enemy combatants? Does the Constitution permit torture? Setting aside for the moment America's international law obligations under the Convention against Torture, Posner points out that the Constitution, which regulates the gathering of evidence, interrogations, trials, and punishments in criminal cases, has very little to say about the acquisition of information from terrorists for the purpose of preventing death and destruction.

The currently applicable constitutional rule is that methods of interrogation that "shock the conscience" are unlawful. But, as Posner points out, this test is sensitive to context: "What shocks the conscience depends on circumstances. In life-and-death circumstances the use of even highly coercive methods of interrogation is unlikely to shock the conscience of most people, even thoughtful and humane ones."

Yet not all highly coercive methods of interrogation rise to the level of torture, which, according to the Convention against Torture, is defined as the infliction of severe physical or mental suffering. Nevertheless, Posner is convinced that "torture is warranted to avert a greater evil." But warranted is not the same as constitutional or lawful.

Even though he believes that many consciences would not be shocked by the decision to shove knives under a person's fingernails to obtain knowledge about the location of a nuclear weapon set to explode in a few hours in Washington, Posner concludes that it would be unwise to hold that the Constitution permits torture. In cases of emergency, where torture is warranted but not constitutional, Posner the pragmatist prefers "to trust public officers to perceive and act on a moral duty that is higher than their legal duty." This approach regards torture as a form of morally and politically justified civil disobedience. In the event, it requires public officials to explain the necessity of their conduct in a court of law, and counts on judges to take account of the necessity under which public officials acted in ordering torture.

The alternative is codifying the circumstances in which torture is lawful. Posner believes that the costs of codification are too high. The costs include the constraint security officials will feel in confronting novel circumstances not dreamt of by the lawmakers, and the open invitation to lawmakers created by codification to constantly expand the boundaries of the legally permissible.

As with his analysis of detention and interrogation, Posner's explorations of surveillance, speech, privacy, and sundry other legal issues raised by the war on jihadist terror reflect the view that "law must adjust to necessity born of emergency." It is Posner's large achievement in this small book to show that this adjustment--difficult and contentious though it may be--is necessary, just, and constitutional.

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