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The Poverty of Posner's Pragmatism: Balancing Away Liberty After 9/11

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BALANCING AWAY LIBERTY AFTER 9/11

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BOOK REVIEW

THE POVERTY OF POSNER'S PRAGMATISM: BALANCING AWAY LIBERTY AFTER 9/11

David Cole*

NOT A SUICIDE PACT: THE CONSTITUTION
IN A TIME OF NATIONAL EMERGENCY.

By Richard A. Posner. Oxford: Oxford University Press, 2006.

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INTRODUCTION

Precommitments are most essential when we feel most compelled to break them. Constitutional law, our collective pact of precommitments, is never more important than in periods of crisis. History suggests that when democracies are captured by fear, they react in predictably troubling ways, in particular by targeting the most vulnerable for selective sacrifices that the majority would not likely be willing to endure if the sacrifices were evenly distributed. The Constitution is predicated on the paradoxical understanding that democracy's defects can be offset by compelling the majority to adhere to certain norms precisely when the democratic process would categorically reject them.

* Professor, Georgetown University Law Center. This review expands upon an earlier review that appeared in the *New York Review of Books*. David Cole, *How to Skip the Constitution*, 53 N.Y. REV. BOOKS, Nov. 16, 2006, at 20.

If it is to function as a restraint on the politics of fear, the Constitution must be interpreted not only with an eye toward its purpose and history, but with an understanding of the profound pressures that are likely to be at play when a polity in fear demands action. Otherwise, the forces that favor repression within the ordinary political channels will infect constitutional law as well. Holding the line during security crises is no simple matter. One need only think of the Supreme Court's shameful ratification of the internment of 120,000 Americans and immigrants of Japanese descent during World War II, or its validation of prosecutions for anti-war speech during World War I. Political repression during times of crisis is nearly always deeply regretted as a mistake after the fact. If we are to learn from such mistakes, constitutional law is the place to locate and instantiate those lessons, in the hope that the country will exercise restraint the next time around.

Richard Posner's *Not a Suicide Pact: The Constitution in a Time of National Emergency* reflects none of this understanding. Instead, Posner treats the Constitution as little more than an invitation to pragmatic policy judgment, and then employs that judgment through speculative cost-benefit balancing to find unobjectionable most everything the Bush Administration has done thus far in the "war on terror," including coercive interrogation, incommunicado detention, warrantless wiretapping, and ethnic profiling. One of the only initiatives he identifies as constitutionally problematic is the Administration's short-lived attempt to deny judicial review to U.S. citizens detained in military custody in the United States as "enemy combatants"—a position the Administration itself abandoned after the U.S. Court of Appeals for the Fourth Circuit, probably the most conservative federal circuit in the country, rejected it as a "sweeping proposition."¹ Indeed, Posner's Constitution would permit the Administration to go much further than it has—among other things, he defends indefinite preventive detention, banning Islamic extremist rhetoric, mass wiretapping of the entire nation, and making it a crime for newspapers to publish classified information, such as when the *Washington Post* broke the story on the CIA's secret prisons, or "black sites," or when the *New York Times* disclosed the existence of the National Security Agency's (NSA) warrantless wiretapping program. All of this is permissible, Posner argues, because unless the Constitution "bend[s]" in the face of threats to our national security, it "will break" (p. 1). When Posner is finished bending the Constitution to these conclusions, however, one might justifiably ask what is left to preserve from "breaking."

Ironically, Posner reaches these results with a constitutional theory more in keeping with Chief Justice Earl Warren than Justice Antonin Scalia. Eschewing popular conservative attacks on "judicial activism," Posner argues that given the open-ended character of many of the Constitution's most important terms—"unreasonable" searches and seizures, "due process of law," "equal protection,"

1. *Hamdi v. Rumsfeld*, 296 F.3d 278, 283 (4th Cir. 2002).

and even “liberty” itself—it is not objectionable, but inevitable, that constitutional law is judge-made. He dismisses the constitutional theories of textualism and originalism favored by many conservative judges and scholars as canards, for in his view neither the Constitution’s text nor the history of its framing and adoption are very informative on most of the hard questions of the day. Constitutional law, he insists, “is intended to be a loose garment; if it binds too tightly, it will not be adaptable to changing circumstances and will leave too little room for the play of democratic forces” (pp. 7-8).

But having rejected textualism and originalism, Posner proceeds unwittingly to offer a book-length demonstration of what textualists and originalists most fear from constitutional theorists who emphasize the document’s open-ended and evolving character. In Posner’s approach, the Constitution loses almost any sense of a binding precommitment, and is reduced to a cover for judges to impose their own subjective value judgments on others. Posner is best known as one of the founding fathers of the law and economics movement, so it is hardly surprising that his judgments are powerfully informed by an economist’s fetish for cost-benefit analysis. (One might almost say determined, except that, as we will see, the valuation of costs and benefits in this area is almost entirely indeterminate.) In the end, constitutional interpretation for Posner is little more than an all-things-considered balancing act—and when the potential costs of a catastrophic terrorist attack are placed on the scale, the concerns of constitutional rights and civil liberties are almost inevitably outweighed. The further one reads in the book, the further the Constitution fades into the background, supplanted by Posner’s ad hoc and often unsupported speculation about the putative costs and benefits of various security initiatives.

This Review will first discuss Posner’s analysis of several specific security-liberty issues, in order to illustrate how his “econ-stitutional” method works in concrete scenarios. I will then turn to the broader implications his theory has for constitutional law, which in my view are quite dangerous. In his hands, the Constitution’s “loose garment” appears to do no “binding” work whatsoever, and its only function is to obscure the subjective value judgments made in its name.

I. CASE STUDIES

A. *Electronic Surveillance*

Shortly after the terrorist attacks of September 11, 2001, President Bush authorized the NSA to conduct wiretapping of telephonic communications between al Qaeda suspects abroad and persons within the United States. Such surveillance would not have been controversial had the program proceeded under the auspices of the Foreign Intelligence Surveillance Act (FISA), which expressly authorizes national security and foreign intelligence wiretapping of

“foreign agents,” including members of international terrorist organizations, as long as the wiretapping is approved by a federal judge.² But President Bush decided to bypass the judicial review required by FISA, and instead authorized the NSA to conduct the surveillance without warrants, in contravention of a provision in FISA that makes such warrantless surveillance a criminal offense.³ In 2006, a federal court declared the NSA program unconstitutional, and in January 2007, Attorney General Alberto Gonzalez announced that the NSA program would be terminated, and that any future surveillance would be carried out pursuant to, rather than in contravention of, FISA.⁴

Posner not only has no problem with the NSA program, but would deem constitutional a far more sweeping initiative that subjected *every phone call and email in the nation, domestic as well as international*, to initial computer screening for patterns of suspicious words, and then to human agents’ review in order to follow up on all communications that the computer deemed suspicious (pp. 95-101).

How does Posner reach the conclusion that the Constitution would permit such a scheme, far beyond anything the Bush administration has instituted—or at least admitted instituting? In a word, balancing. In Posner’s view, the costs of such a program are minimal. Subjecting all of the polity’s phone conversations to computer analysis is no big deal, he asserts, as long as the computer is looking only for terrorists, and not for other embarrassing or private information (p. 97). Posner admits that the human beings who follow up on the computer’s “suspects” might abuse the information, but considers that risk minimal because he is confident that any such abuse would be likely to come to light and to be widely criticized (he fails to note that disclosure would be much less likely if he had his way and an Official Secrets Act were passed, making it a crime to publish leaked government secrets) (pp. 97-98). On the benefits side of the ledger, Posner surmises that such a program might sweep up all kinds of data that could permit intelligence agents to “connect the dots” and prevent a catastrophic attack. Even if the program did not actually succeed in “connecting the dots,” he adds, its mere existence would have the salutary effect of chilling terrorists from communicating by telephone and email (pp. 95-96).

Every aspect of Posner’s balancing analysis is open to serious question. He undervalues privacy, which is essential to political freedom: if everyone knows that their every electronic communication is subject to government monitoring, even by a computer, it would likely have a substantial chilling effect not only on terrorist communications, but also on any communications that the

2. Foreign Intelligence Surveillance Act of 1978, 50 U.S.C. §§ 1801, 1804, 1805 (2007).

3. 50 U.S.C. § 1809(a) (2007).

4. *ACLU v. NSA*, 438 F. Supp. 2d 754 (E.D. Mich. 2006); Letter from Alberto R. Gonzales, U.S. Attorney General, to Senator Patrick Leahy (Jan. 7, 2007), available at <http://www.cdt.org/security/20060117agletter.pdf>.

government might find objectionable. Moreover, given the many ways in which the government can harass individuals without its ill intent ever coming to light—from selective prosecution of minor infractions to tax investigations and blackmail, all perfected by FBI Director J. Edgar Hoover—one cannot trust public scrutiny to forestall such tactics, even without an Official Secrets Act. (Most of Hoover's abuses were not disclosed until years or decades after the damage was done.)

Finally, it is far from clear that such a program would be an effective counterterrorism measure. The sheer volume of "dots" generated would make connecting them virtually impossible. There is not likely to be an algorithm that can identify terrorist activity, for unlike credit card theft, terrorist activity is not sufficiently routine to develop useful indicators.⁵ And given the rich possibilities of language, computer programs would likely be relatively easy to evade through the use of code words.

But the real answer to Posner's approach is not to strike an alternative ad hoc balance, but to return to long-established Fourth Amendment principles. The Fourth Amendment requires that all searches be "reasonable," and has long been interpreted to require that searches must generally be justified on a particularized basis, by a showing of objective, individualized suspicion approved by a neutral judge through the issuance of a specific warrant.⁶ The warrant and "probable cause" requirements are designed to protect privacy absent fairly specific objective grounds for interference—reason to believe that evidence of crime will be found. The requirements of specificity and particularity reflect the fact that the principal evil that the Fourth Amendment was intended to avert was the "general warrant," which permitted government officials to search any and every home.⁷ Posner's nationwide computer surveillance program would be a twenty-first century version of exactly what the Fourth Amendment was designed to forbid. Through an open-ended and inevitably subjective balancing of privacy and security, in other words, Posner manages to turn the Fourth Amendment on its head.

B. *Coercive Interrogation*

Posner's analysis of coercive interrogation is similarly flawed. Here, he asserts that the prohibition of coerced confessions is predicated on the Fifth Amendment privilege against compelled self-incrimination, and reasons correctly that that privilege would not apply if coerced testimony is used only for intelligence purposes, and not to incriminate. But while *Miranda v.*

5. JEFFREY ROSEN, *THE NAKED CROWD: RECLAIMING SECURITY AND FREEDOM IN AN ANXIOUS AGE* 104-08 (2004); see also Craig Whitlock, *Terrorists Proving Harder to Profile; European Officials Say Traits of Suspected Islamic Extremists Are Constantly Shifting*, WASH. POST, Mar. 12, 2007, at A1.

6. See, e.g., *Katz v. United States*, 389 U.S. 347, 357 (1967).

7. TELFORD TAYLOR, *TWO STUDIES IN CONSTITUTIONAL INTERPRETATION* 23-50 (1969).

*Arizona*⁸ rests on the privilege against self-incrimination, Posner disregards a long line of Supreme Court decisions banning “involuntary” confessions not on self-incrimination grounds, but because the methods of interrogation themselves were found to violate due process of law.⁹ Under this due process “voluntariness” test, which predates *Miranda* but remains good law, the Court has consistently ruled that any tactics that compelled the suspect to speak against his will, including any physical harm or threat of physical harm, violated due process, even where other evidence showed that the confession was reliable.¹⁰

Posner ignores this line of cases, and instead discusses only *Rochin v. United States*,¹¹ which held that due process was violated by pumping a suspect’s stomach in the hospital to search for drugs that he had allegedly swallowed. The Court found that such tactics “shock the conscience,” because they were “too close to the rack and screw.”¹² As Posner concedes, if stomach-pumping in a hospital violates due process because it is too close to the rack and screw, most coercive interrogation tactics would seem to be impermissible as well. But he nonetheless finds *Rochin* distinguishable, noting that it constituted a search, not an interrogation, that the information was used to incriminate, and that the case involved the investigation of drug smuggling, a relatively minor crime. He argues that greater coercion may be permissible where terrorism is the subject of investigation. In his balance, the greater the value of the information sought, the more coercion we should find acceptable without shocking our consciences (p. 80). But one generally does not know the value of any information that might be obtained *before* coercion is applied. This is especially true where interrogation is being conducted for intelligence gathering purposes, where the inquiry is generally much more open-ended than investigation of a completed crime.

On the matter of interrogation, there is some limit to Posner’s balancing. He would draw a bright line at torture, at least as a formal legal matter, though he forgoes any attempt to explain why he is willing to draw the line there and not at lesser forms of coercion. Moreover, he quickly takes away with one hand what he has given with the other, arguing that “[i]n the present context, this is a compelling argument for defining torture extremely narrowly, so that necessary violations of the law against torture do not become routine” (p. 87). That is exactly what John Yoo and Jay Bybee did for Alberto Gonzales in the now infamous August 2002 Office of Legal Counsel “torture memo.”¹³ Yoo and

8. 384 U.S. 436 (1966).

9. *Rogers v. Richmond*, 365 U.S. 534, 540-41 (1961); *Ashcraft v. Tennessee*, 322 U.S. 143, 152-53 (1944); *Brown v. Mississippi*, 297 U.S. 278, 285 (1936).

10. *See, e.g., Rogers*, 365 U.S. at 540-41.

11. 342 U.S. 165 (1952).

12. *Id.* at 172.

13. Memorandum from Jay S. Bybee, U.S. Assistant Attorney Gen., Office of Legal Counsel, to Alberto R. Gonzales, Counsel to the President, Re: Standards of Conduct for

Bybee defined the criminal ban on torture extremely narrowly, freeing the CIA to use harsh interrogation tactics on terror suspects. They opined that the ban on torture did not, for example, proscribe threatening suspects with death, as long as the death threatened was not imminent, and did not bar the imposition of extreme physical pain, as long as the pain fell short of the level associated with organ failure or death. The Administration was forced to rescind the memo when it became public and was widely condemned.¹⁴ But Posner's approach might well yield the same results given his emphasis on the need to "define torture extremely narrowly" (p. 87).

In other recent work, Posner has explained why a balancing approach to coercive interrogation is dangerous. Posner opposes judicial authorization of torture even where the need is extremely grave—the classic example being the need to find a "ticking time bomb"—on the ground that officials would soon press the outer bounds of the permission, "and the practice of torture, once it was thus regularized by judicial demarcation of those bounds, would be likely to become regular within them, ceasing to be an exceptional practice and setting the stage for further extension."¹⁵ It is a short ride down the slippery slope:

One begins with the extreme case—the terrorist with plague germs or an A-bomb the size of an orange in his Dopp kit, or the kidnapper who alone can save his victim's life by revealing the victim's location. So far so good; but then the following reflections are invited: if torture is legally justifiable when the lives of thousands are threatened, what about when the lives of hundreds are threatened, or tens. And the kidnap victim is only one. By such a chain of reflections one might be persuaded to endorse a rule that torture is justified if, all things considered, the benefits, which will often be tangible (lives, or a life, saved), exceed the costs, which will often be nebulous.¹⁶

What is true of torture is equally true of physical coercion short of torture. Posner's advocacy of a balancing approach, allowing officials to calibrate their coercion to the expected value of the information sought, would create the very risks he warned of in his earlier work.

The Constitution ought not be read to leave government officials to balance in some ad hoc fashion the value of the information they hope to obtain from suspects against the harms their tactics may inflict—on the individual, on themselves, and on society at large. Rather, due process has long been understood to identify certain fundamental rights as integral to civilized society. One of those is the prohibition on torture and cruel, inhuman, and

Interrogations under 18 U.S.C. §§ 2340-2340A (Aug. 1, 2002), *available at* 2002 OLC LEXIS 19.

14. See Memorandum from Daniel Levin, U.S. Acting Assistant Attorney Gen., Office of Legal Counsel, to James B. Comey, U.S. Deputy Attorney Gen., Re: Legal Standards Applicable Under 18 U.S.C. §§ 2340-2340A (Dec. 30, 2004), *available at* <http://www.usdoj.gov/olc/18usc23402340a2.htm>.

15. RICHARD A. POSNER, *CATASTROPHE: RISK AND RESPONSE* 240 (2004).

16. *Id.* at 240-41.

degrading treatment—a principle reflected in an international treaty that virtually every nation in the world has ratified, and in the Court’s own decades of due process jurisprudence prohibiting coercive interrogation in criminal investigations.

C. *Preventive Detention*

Posner employs similar economic reasoning to defend the constitutionality of incommunicado preventive detention—without judicial oversight—for a “reasonable” period of time, but when it comes to defining what is reasonable he offers an economist’s graph: “The benefits [of incommunicado detention] diminish with time and the costs increase with time; when the curves cross, the detainee should be brought before a judicial officer for a determination of whether further detention is necessary” (p. 64). But how is one to know “when the curves cross”? One would first have to somehow quantify the “benefits” of incommunicado detention, which Posner defines as avoiding tipping off accomplices, increasing the likelihood of “turning” the suspect into an informant, and “facilitat[ing] forms of coercive interrogation that do not quite [constitute torture]” (p. 63). The costs would then also need to be quantified, including the deprivation of liberty of a presumptively innocent (and indeed, not even charged) person, the terrorizing effects of a system of such official “disappearances” on the community at large, and the likelihood that such practices would breed substantial distrust and resentment within the community targeted by such tactics, the very communities whose trust law enforcement needs in order to encourage voluntary cooperation. Posner concedes that this balancing exercise is literally impossible: “Assessing the relevant needs and dangers requires a weighing of imponderables To weigh the unweighable is at once a contradiction and an inescapable duty” (p. 66). But if it is an impossible task, how is the equation workable? And why should we entrust this task to law enforcement officials, who will have strong institutional incentives to favor security interests over liberty and who by definition would be making these judgment calls without independent judicial oversight?

Posner insists that once the curves cross, any continued detention without judicial oversight would constitute a suspension of the writ of habeas corpus, and at that point the suspect would have to be brought before a judge. But Posner’s version of habeas corpus is nearly an empty formality: he says it requires “a judicial determination that the government had a justification for detaining [a terrorist suspect],” but immediately qualifies that by noting that “what might count as a justification is no part of habeas corpus” (pp. 60-61). Having robbed habeas corpus of any meaning, he then fails to specify what standard the government would have to meet to justify detention. However, he suggests that the burden could be placed on the defendant to prove that he is not a terrorist, and that the government could rely on secret evidence presented

to the judge *ex parte* and *in camera*, thereby denying the detainee any meaningful opportunity to defend himself (pp. 64-65).

At the end of his “balancing” exercise, Posner has concluded that persons suspected of terrorism can be swept off the streets in secret, held incommunicado without any judicial oversight for an unspecified “reasonable” period of time, and held indefinitely thereafter on the basis of secret evidence and without charges as long as there is an undefined “persuasive showing to a judge in an adversary hearing that the suspect really is a terrorist” (pp. 65-66). What does it mean to say that someone “really is a terrorist” who cannot be criminally charged with any terrorist crimes? Posner never says. If due process forbids the deportation of a foreign national without affording him a meaningful opportunity before a neutral tribunal to confront the evidence against him,¹⁷ how can it be permissible to hold suspects *indefinitely* on secret evidence and without charges? If the Constitution requires that anyone arrested without advance judicial approval be brought before a judge for a probable cause hearing as soon as possible after being taken into custody, and presumptively within forty-eight hours,¹⁸ why should the government be permitted to hold “suspected terrorists” incommunicado for longer periods of time? Beyond an assertion that the balance is to be struck differently with respect to the undefined category of “suspected terrorists,” these questions go unanswered.

Posner also pays little attention to the history of preventive detention. During the Palmer Raids of 1919-1920, sparked by a series of terrorist bombings, thousands of foreign nationals were rounded up, detained, and interrogated without lawyers, and hundreds were ultimately deported—but none was charged with involvement in the bombings.¹⁹ During World War II, not one of the 120,000 Americans and immigrants of Japanese descent interned was convicted of sabotage.²⁰ And of the more than 5000 foreign nationals that the government has admitted to placing in preventive detention in the first two years after September 11, none has been convicted of a terrorist crime.²¹ Again, this history seems of little interest to Posner, who prefers to do his own ad hoc balancing.

D. Ethnic Profiling

Efficiency concerns also dominate Posner's analysis of ethnic profiling. He correctly observes that whether profiling a suspect group will actually make us

17. *Landon v. Plasencia*, 459 U.S. 21, 26 (1982).

18. *County of Riverside v. McLaughlin*, 500 U.S. 44, 60 (1991); *Gerstein v. Pugh*, 420 U.S. 103, 125 (1975).

19. DAVID COLE, *ENEMY ALIENS: DOUBLE STANDARDS AND CONSTITUTIONAL FREEDOMS IN THE WAR ON TERRORISM* 116-28 (rev. ed. 2005).

20. *Id.* at 88-100.

21. *Id.* at xx, 25-26.

safer depends in part on so-called “substitution effects”: to what extent will paying closer attention to Arab and Muslim men, for example, make it easier for people who do not fit that profile to elude detection, and how likely is it that terrorists will find willing recruits among the non-profiled group?²² But after raising these questions, Posner simply asserts, without an iota of empirical support, that “[t]he balance is close enough to warrant leaving the matter to be governed by policy rather than prohibited as a matter of constitutional law” (p. 119). In other words, because he has somehow concluded that the substitution effects are a close call, ethnic profiling is constitutional. On this reasoning, there would be no equal protection problem if the United States officially subjected all persons of Arab descent to intrusive searches that no one else had to suffer. We have seen such reasoning before: *Korematsu v. United States*.²³ But few defend it today.

Equal protection doctrine, which Posner barely mentions, would almost certainly require a very different analysis. Any official consideration of ethnicity or race triggers strict scrutiny, as the Court’s recent decisions on affirmative action reaffirmed.²⁴ Strict scrutiny is required because of the history of invidious reliance on race and ethnicity, and the judgment that racial generalizations will rarely if ever be justified in light of the stigmatic harms they inflict and their offense to notions of individualized justice. Unless the state can show that a race- or ethnicity-based distinction is necessary, or narrowly tailored, to further a compelling government interest, it fails strict scrutiny.²⁵ Under this analysis, preventing terrorism would surely be deemed a compelling government interest, but ethnic profiling would be permissible only if it were necessary to further that interest. Where alternatives not based on race or ethnicity exist, the government is barred from using those criteria as a proxy. Using race as an identifying feature to narrow the scope of a search for suspects in connection with a specific crime is permissible where an eyewitness has identified the perpetrator by race, but reliance on racial generalizations about who is “more likely” to commit certain kinds of crimes is not.

Constitutional law, in other words, does *not* leave the question of ethnic profiling to the political process, precisely because the political process has historically done such a poor job of ensuring equity for members of racial minority groups. But that history and that doctrine are nowhere to be found in Posner’s account; he prefers to resolve the question by the ad hoc weighing of

22. For a more elaborate development of this point, see Bernard E. Harcourt, *Muslim Profiles Post-9/11: Is Racial Profiling an Effective Counterterrorist Measure and Does It Violate the Right to Be Free from Discrimination?* (Univ. of Chi. John M. Olin Law & Econ. Working Paper No. 288, 2006), available at <http://ssrn.com/abstract=893905>.

23. 323 U.S. 214 (1944).

24. See, e.g., *Grutter v. Bollinger*, 539 U.S. 306, 326 (2003).

25. *Id.*; *Bush v. Vera*, 517 U.S. 952, 980 (1996); *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 230 (1995).

imponderables, and ultimately to leave minority rights, at least on this issue, to a political process that is exceedingly unlikely to provide any protection.²⁶

II. THE DISAPPEARING CONSTITUTION

The general problem with Posner's approach is that it does away with the animating idea of the Constitution—namely, that it is a form of collective precommitment. The genius behind the Constitution is precisely the recognition that “pragmatic” cost-benefit decisions of the type Posner favors will often appear in the short term to favor actions that in the long term are contrary to our own best principles. Just as we may be tempted to smoke a cigarette tonight

26. While Posner generally prefers his own cost-benefit judgments to constitutional precedent, at other points, he simply announces constitutional conclusions without any attempt to defend them through cost-benefit (or indeed any other) analysis. For example, he asserts that the Constitution protects citizens within the United States and abroad, and foreign nationals within the United States, but not foreign nationals abroad. This is a roughly accurate summary of Supreme Court holdings and dicta on the subject, although the Court has not in fact resolved whether foreign nationals enjoy constitutional protections abroad. It has held that foreign nationals at the border seeking the privilege of admission are not entitled to due process when denied entry, *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206 (1953), but that holding is fully consistent with precedents holding that U.S. citizens are not entitled to due process when merely denied a privilege. *Olim v. Wakinekona*, 461 U.S. 238, 248-49 (1983). See generally GERALD L. NEUMAN, *STRANGERS TO THE CONSTITUTION: IMMIGRANTS, BORDERS, AND FUNDAMENTAL LAW* (1996); David Cole, *In Aid of Removal: Due Process Limits on Immigration Detention*, 51 EMORY L.J. 1003 (2002). It has ruled that the Fourth Amendment does not govern the search of a foreign national's home abroad, *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1989), but Justice Kennedy cast the decisive vote in that case, and he rejected the notion that foreign nationals simply are not protected by any aspect of the Constitution abroad, preferring instead to take a right-by-right approach, asking whether application of the right would be “anomalous.” *Id.* at 277-78 (Kennedy, J., concurring). And while the Court held that the Fifth and Sixth Amendments do not protect prisoners of war captured, tried, and convicted during World War II, it carefully limited its holding to “enemy aliens” during wartime (defined as nationals of the country with which we are at war), and warned against broadening the holding to foreign nationals generally. *Johnson v. Eisentrager*, 339 U.S. 763, 772 (1950). In the Guantánamo detainees case, *Rasul v. Bush*, 542 U.S. 466 (2004), the Court cited Justice Kennedy's concurrence in *Verdugo-Urquidez* and suggested that foreign nationals held at Guantánamo might well be protected by the Constitution. *Id.* at 484 n.15. Thus, the question is actually far more nuanced than Posner's assertions suggest.

For all his cost-benefit commitments, Posner offers no economic analysis to defend the proposition that foreign nationals being detained by the United States abroad should be denied constitutional protections. Their liberty interests are every bit as valid and valuable as those of a United States citizen who has been detained. And those liberty interests are not in any way diminished by the fact that they are detained in Guantánamo rather than Atlanta. Moreover, a foreign national suspected terrorist poses no greater danger to the United States than a citizen who is a suspected terrorist. Thus, neither the liberty nor the security side of the equation varies with the passport or location of the detainee. Rather than subject this question to the balancing he so freely employs in other areas—to find permissible indefinite preventive detention, coercive interrogation, and nationwide computer surveillance—Posner simply asserts his conclusions without any real effort to question or analyze them.

even though in the long term we are likely to suffer as a result, so we know collectively that in the short term we are likely to empower government to suppress unpopular speech, invade the privacy of “dangerous” minorities, and abuse suspected criminals, even though in the long term such actions undermine the values of free speech, equality, and privacy that are necessary to democracy and human flourishing. If we were always capable of rationally assessing the costs and benefits in such a way as to maximize our collective well-being, short-term and long-term, we might not need a Constitution. But knowing that societies, like individuals, will be tempted to act in ways that undermine their own best interests, we have precommitted to a set of constitutional constraints on pragmatic balancing. Posner’s view that the Constitution must bend to the point of authorizing virtually any initiative that seems pragmatic to him reduces the Constitution to a precommitment to balance costs and benefits, and that is no precommitment at all.

Constitutional theory demands more than ad hoc balancing.²⁷ While the nature of competing interests means that at some level of generality, a balance must be struck, constitutional analysis is not an invitation to the freewheeling, all-things-considered balance of the economist. Instead, it requires an effort, guided by text, precedent, and history, to identify the higher principles that guide us as a society, principles so important that they trump democracy itself (not to mention efficiency). The judge’s constitutional duty was perhaps best captured by Justice John Marshall Harlan, writing about the due process clause:

Due process has not been reduced to any formula; its content cannot be determined by reference to any code. The best that can be said is that through the course of this Court’s decisions it has represented the balance which our Nation, built upon postulates of respect for the liberty of the individual, has struck between that liberty and the demands of organized society. If the supplying of content to this Constitutional concept has of necessity been a rational process, it certainly has not been one where judges have felt free to roam where unguided speculation might take them. The balance of which I speak is the balance struck by this country, having regard to what history teaches are the traditions from which it developed as well as the traditions from which it broke. That tradition is a living thing. A decision of this Court which radically departs from it could not long survive, while a decision which builds on what has survived is likely to be sound. No formula could serve as a substitute, in this area, for judgment and restraint.²⁸

Instead of looking to the Constitution and its jurisprudence as a reflection of our collective effort to determine the higher principles that should guide us, as Harlan suggests, Posner would start from scratch, assessing what is best from a pragmatic, open-ended balancing approach that he admits ultimately involves weighing imponderables.

27. See T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943, 980-91 & n.231 (1987).

28. *Poe v. Ullman*, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting).

Posner insists that to declare a practice constitutional is not the same as saying that it is desirable as a policy matter: "Much that the government is permitted by the Constitution to do it should not do and can be forbidden to do by legislation or treaties" (p. 7). That is certainly true as a theoretical matter, at least where one's constitutional theory is not reducible to one's policy preferences. But Posner appears to view questions of constitutionality as simply a matter of weighing all the costs and benefits, which is surely the same utilitarian calculus the policymaker would use to determine whether a practice is desirable. Under Posner's approach, then, it is difficult to see why there would be any room between what is desirable and what is constitutional.

If constitutionalism is to have any bite, it must be distinct from mere policy preferences. In fact, our Constitution gives judges the authority to declare acts of democratically elected officials unconstitutional on the understanding that they will not simply engage in the same cost-benefit analyses that politicians and economists undertake. The very sources Judge Posner dismisses—text, precedent, tradition, and reason—as unhelpful in the face of the threat of catastrophic terrorism are absolutely essential to principled constitutional decision-making. It is true that text, precedent, tradition, and reason do not determine results in some mechanistic way. That is why we ask judges, not machines, to decide constitutional cases. But these sources are nonetheless critically important constraints on and guides to constitutional decision-making. They are what identify those principles that have been deemed fundamental—and therefore constitutional—over our collective history.

The Framers of the Constitution did not simply say "the government may engage in any practice whose benefits outweigh its costs," as Judge Posner would have it. Instead, they struggled to articulate a limited number of fundamental principles and enshrine them above the everyday pragmatic judgments of politicians. They foresaw what modern history has shown to be all too true—that while democracy is an important antidote to tyranny, it can also facilitate a particular kind of tyranny—the tyranny of the majority. Constitutional principles protect those who are likely to be the targets of such tyranny, such as terror suspects, religious and racial minorities, criminal defendants, enemy combatants, foreign nationals, and, especially in this day and age, Arabs and Muslims. Relegating such individuals to the mercy of the legislature denies the existence of that threat. The Constitution is about more than efficiency and more than democracy; it is a collective commitment to the equal worth and dignity of all human beings. To fail to see that is to miss the very point of constitutional law.

Posner's trump card is that because terrorism in the twenty-first century poses the risk of truly catastrophic harm, it renders constitutional precedent and history largely irrelevant. Everything has changed. We are in a new paradigm, in which, as Alberto Gonzales said of the Geneva Conventions, the old rules (apparently including even those enshrined in the Constitution) are now

“quaint” or “obsolete.”²⁹ But each new generation faces unforeseen challenges. The advent of modern weaponry changed war as we knew it. Communism backed by the Soviet Union posed a “new” threat of totalitarian takeover. The development of the nuclear bomb ushered in yet another new era. This is not to deny that there is a real threat that terrorists may get their hands on weapons of mass destruction, and that this threat must be taken very seriously. But it is to insist on what is a truly conservative point—that principles developed and applied over two centuries still have something important to say in guiding us as we address the threat of modern terrorism.

The corollary to Posner’s pragmatic and utilitarian balancing approach to the Constitution is that judges should defer to the political branches on national security questions. Judges have no special expertise in national security, he argues, while the political branches do (p. 9). Decisions invalidating security measures as unconstitutional reduce our flexibility, for they are extremely difficult to change through the political process, and may cut off avenues of experimentation (p. 27). But the Constitution was meant to cut off certain avenues. Trying suspected terrorists without a jury, locking them up without access to a judge, convicting them without proving guilt beyond a reasonable doubt, searching them without probable cause or a warrant, and subjecting them to torture all might make terrorists’ tasks more difficult (although, as I have argued elsewhere, many of these shortcuts actually help the terrorists and make us more vulnerable, because of the backlash they provoke).³⁰ But while the Constitution may not be a “suicide pact,” neither is it a license to do anything our leaders think might improve our safety.

Posner himself recognizes one reason why deference to the political branches is ultimately inadequate. As he puts it, “people whose profession is to protect national security are unlikely to give a great deal of weight to civil liberties unless required to do so by some outside force, such as the judiciary” (p. 61). Justice Souter made a similar point in *Hamdi v. Rumsfeld*, writing that:

In a government of separated powers, deciding finally on what is a reasonable degree of guaranteed liberty whether in peace or war (or some condition in between) is not well entrusted to the Executive Branch of Government, whose particular responsibility is to maintain security. For reasons of inescapable human nature, the branch of the Government asked to counter a serious threat is not the branch on which to rest the Nation’s entire reliance in striking the balance between the will to win and the cost in liberty on the way to victory; the responsibility for security will naturally amplify the claim that security legitimately raises.³¹

29. Alberto R. Gonzales, Counsel to the President, Memorandum for the President, Decision Re Application of the Geneva Convention on Prisoners of War to the Conflict with Al Qaeda and the Taliban (Jan. 25, 2002), available at http://msnbc.com/modules/newweek/pdf/gonzales_memo.pdf.

30. See David Cole, *Are We Safer?*, N.Y. REV. BOOKS, Mar. 9, 2006, at 15.

31. *Hamdi v. Rumsfeld*, 542 U.S. 507, 545 (2004) (Souter, J., concurring).

The political dynamics of fear in a democracy provide yet another fundamental reason for not deferring to the political branches. The majority typically targets a vulnerable minority for the sacrifices in liberty it decides should be borne to further its security interests. Because the majority, and the representatives who answer to it, are balancing the majority's security interests against the liberty interests of a select (and typically unpopular) minority, the political process is especially unlikely to get the balance right, whatever that means.

But while Posner acknowledges the danger of relying on executive officials to balance liberty and security, he ultimately argues for substantial deference to the political branches, both because he thinks judges lack expertise in national security matters, and because he insists that the Constitution should allow the government the flexibility to respond to terrorist threats.

In defense of judicial deference to the political branches, Posner reassures his readers, "the Republican Congress has not been a rubber stamp for the national security initiatives of the Bush administration" (p. 10). The record suggests otherwise. Since 9/11, Congress has largely stood quiescently by in the face of sweeping assertions of executive power, and when it has intervened, it has either given the executive branch more power or enacted toothless symbolic measures that pose no real obstacle to the Administration. Thus, Congress took no action when the President claimed the power to lock up U.S. citizens indefinitely without charges or trial as "enemy combatants"; it took the Supreme Court to step in and demand due process. Shortly after 9/11, Congress passed the Patriot Act, giving the executive broad new powers and reducing judicial oversight; in doing so, it imposed only a few minor modifications on the administration's initial proposal.³² Of course, the Patriot Act might be excused by the intense heat of the moment—but four years later, with all the time in the world for deliberation, Congress calmly reauthorized the Patriot Act virtually unchanged, as many of its surveillance provisions were set to expire. In 2006, Congress did stand up to the President on the imposition of cruel, inhuman, and degrading treatment on foreign nationals held abroad, passing the McCain Amendment with overwhelming majorities. But that law included no mechanism for enforcement of violations, and expressly barred prisoners in the war on terror from filing habeas corpus petitions to challenge such abuse.

If there was any doubt about the general unwillingness of Congress to check the President on matters of national security and civil liberties, particularly when it comes to the liberties of foreign nationals, that doubt was resolved by Congress's response to the Supreme Court's decision in *Hamdan v. Rumsfeld*.³³ In *Hamdan*, the Court declared the President's military tribunal

32. Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 (codified in scattered titles of U.S.C.).

33. 126 S. Ct. 2749 (2006).

rules to be in violation of both federal statute and the Geneva Conventions. As nearly its last act, the Republican Congress in 2006 enacted the Military Commissions Act (MCA).³⁴ Again, some Republicans—especially Senators John McCain and Lindsay Graham—made a show of standing up to the Administration, but ultimately capitulated, giving the Administration almost everything it wanted. The new law permits the President to try foreign nationals as enemy combatants before military tribunals that may consider coerced testimony, hearsay, and summaries of classified information that the defendant will have no real opportunity to confront. Instead of requiring the President to conform his tribunals to the Geneva Conventions, Congress simply declared, as if saying it makes it so, that the procedures it authorized fully satisfy the Geneva Conventions. Just to make sure, Congress insulated its action from judicial review by barring anyone from invoking the Geneva Conventions against a federal official or the United States government.

The MCA also weakens the prohibitions on coercive interrogation of war prisoners. Before enactment of the MCA, the federal War Crimes Act made any violation of Common Article 3 a criminal offense, including any “cruel treatment” of a detainee. The MCA amended the War Crimes Act to limit its reach to specified “grave breaches,” notably *not* including all “cruel treatment.”³⁵ The MCA limits criminal sanctions to those who torture prisoners of war or inflict suffering virtually identical to that associated with torture. Taking a page from John Yoo and Richard Posner, Congress narrowly defined “war crimes” in order to free up the CIA to resume its practice of disappearing suspected terrorists into undisclosed “black sites” and subjecting them to harsh interrogation tactics.

Finally, the MCA seeks to remove courts from the picture. In addition to barring prisoners from invoking the Geneva Conventions in court, the law eliminates habeas corpus jurisdiction for those held as “unlawful enemy combatants,”³⁶ a term defined in circular terms as anyone found to be an unlawful enemy combatant by a “competent tribunal” established by the President, without regard to objective criteria. Such persons are relegated to limited judicial review in the D.C. Circuit—review that cannot consider claims that they are being tortured or otherwise abused, and that may not be able to engage in any factual inquiry into whether the individuals before it were in fact fighting for the enemy.³⁷

34. Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600.

35. *Id.* § 6.

36. *Id.* § 950j(b).

37. In February, the D.C. Circuit held that the MCA had indeed eliminated habeas corpus jurisdiction for enemy combatants held at Guantánamo, and further held that this poses no constitutional problem because foreign nationals held outside our borders—even in areas over which we exercise complete jurisdiction and control, such as Guantánamo—have no right to habeas corpus review even when they are being indefinitely detained by United States authorities. *Boumediene v. Bush*, 476 F.3d 981 (D.C. Cir. 2007).

The historical record on legislative checks is no better. Congress, after all, passed the Alien and Sedition Acts, the World War I statutes that made it a crime to speak out against the war, and the anti-communist laws that laid the groundwork for the McCarthy era. Congress took no action to block President Roosevelt's internment of the Japanese during World War II. In fact, one is hard-pressed to identify a single instance in which the Congress has imposed a significant constraint on the President during a national security crisis.

CONCLUSION

In short, deference to the political branches is not the answer; that is why we have a Constitution. Posner's approach ensures that the Constitution is "not a suicide pact," but only by making it not a "pact" at all. Properly understood, the Constitution signifies a commitment to principle over pragmatism, and in particular to principles such as liberty, equality, and dignity, which cannot easily be balanced away. It is precisely because the political branches are so quick to forget that, especially when fear is high and the rights (and here, lives) of nonconstituents are on the line, that we must insist on a Constitution of principle, enforced by judges who eschew the easy road of deference and the subjective method of open-ended balancing for the hard road of standing up for principle against power.

