Looking at the Law

The Constitution in a Time of National Emergency: An Interview with Judge Richard Posner

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In Not a Suicide Pact, you point out that “the Constitution is much more than the Bill of Rights” (p. 43). If you were teaching a group of high school students about the Constitution, what concepts or clauses would you emphasize? What is essential that students understand about the Constitution?

The Bill of Rights—the series of 10 amendments added two years after the Constitution was drafted—is for many people the most interesting part of the Constitution. But there are two other central aspects of the document: One is the separation of powers, which created the three separate branches of the federal government—the Congress, the executive, and the judiciary. Students should understand that the Constitution established separate but overlapping powers that result in a system of government in which the branches check each other. This combination of divided and overlapping powers is the essence of the separation of powers—the Constitution’s drafters intentionally created competitiveness and tension among the three branches. In recent years, we have seen this operating in struggles between the president and the Congress over the power to make war and defend the country. The president, on the one hand, is commander in chief of the armed forces. Congress, on the other hand, is responsible for financing and maintaining the armed forces and also for making the rules that govern them.

The second aspect is simply that the Constitution is very difficult to change, which creates a dilemma. On the one hand, we want the Constitution to be durable—we don’t want everything to be up for grabs every time a new issue arises. On the other hand, there is the risk of rigidity. The solution we have come to is to make the Constitution difficult to amend, but to allow the courts to interpret constitutional provisions in a loose fashion. In other words, we combine the difficulty of making formal amendments with a tradition of flexible judicial interpretation without which an eighteenth-century document would be totally unusable in the twenty-first century.

You suggest that “activist” judges are those judges who do not give sufficient deference to the “social policy experiments” of the other two branches—acts of Congress, for example, or executive policies. Congress and the executive branch have initiated several “policy experiments” in response to the threat of terrorism (e.g., the USA PATRIOT Act, the NSA warrantless surveillance program, and the use of military commissions to try detainees at Guantanamo Bay). Has the judiciary been premature in its review of these experiments? At what point is it appropriate for the judiciary to intervene in a legislative or executive policy experiment?

Judicial activism and judicial self-restraint are tendencies that come right out of the separation of powers. The judiciary has the power to intervene in the actions of Congress and the executive branch; at the same time, the judiciary is subject to intervention by the other branches. The judiciary always has to consider how strongly to flex its muscles. If it does it too strongly, it encounters resistance from the other branches and, potentially, from the public. If it is too weak, it is not playing its proper role in the Constitution’s structure.

Although there is no clear formula for defining the proper limits of the exercise of judicial power, one hopes that judges will at least be mindful of their
limitations. These include limitations on their knowledge and limitations on the remedies available to them to correct illegalities by other branches. Judges are now dealing with national security problems that they don’t understand very well because terrorism and national security have not been regular items on the judicial agenda. This lack of experience suggests that judges should be hesitant about intervening in these areas.

Principles and traditions have also helped to keep judges from flexing their muscles too strongly. Judges can’t just latch on to some law and say we don’t like this; they are only to decide real cases. This poses a problem for courts asked to consider the question of warrantless surveillance, for example, because it is difficult for anyone in the United States to show harm in a way that would traditionally give rise to a lawsuit—no one knows who is under surveillance. Some say, well, we can’t allow the government to insulate a warrantless surveillance program from judicial review simply by not disclosing who is under surveillance. On the other hand, we have to recognize limitations on what courts can do in such a case.

The case of Hamdan v. Rumsfeld, decided by the Supreme Court this past June, offers an interesting perspective on judicial activism. One way in which courts restrain their powers is by having a lively sense of prematurity—they don’t jump in, in other words, until they have to. What is surprising about Hamdan is that the Supreme Court really didn’t have a case, because no one had yet been tried by military commission—Hamdan was just someone the government wanted to try. Ordinarily, the only time a court reviews a criminal case is after the trial, conviction, and sentence. This policy reflects more than just an abstract concern with principles of judicial review. Had there been a trial, the justices would have had a much more concrete sense of the defects, if any, in the procedures governing trial by military commission. What if Hamdan had been tried and acquitted by a military commission? It wouldn’t have generated a case, but it would have suggested that maybe the commission was not simply a kangaroo court. Or, if Hamdan had been convicted, the Court would have been able to review a trial record that would have shown whether basic protections for the defendant—access to the government’s evidence against him, for example—had been in place.

The Court did exercise a type of restraint in Hamdan, especially in Justice Breyer’s concurrence. He expressed concern that the executive branch had acted unilaterally, but suggested that if Congress approved the commissions, the Court would be inclined to look favorably on them. I would have preferred the Court to have waited so that it could, on the basis of a full trial, identify specific problems with the commissions and thus provide more guidance to Congress. Now that Congress has acted, the Court may find itself under pressure to retrench and accept the procedures Congress has enacted, even if they seem inadequate. (It is hard to tell Congress to act, and then when it does act, invalidate its action.) In that event, the Court’s decision to hear Hamdan when it did may boomerang on the Court.

You show strong support for preserving the right to seek habeas corpus (i.e., the right of a detainee to challenge the legality of his detention). You also argue that the right should be balanced by placing a heavy burden of proof on those seeking
the writ to prove that they are not terrorists. Isn’t there a danger that a heavy burden of proof would, in effect, eliminate the right to seek habeas corpus?

All I wanted to do in the book was to endorse the principle that anybody—citizen, tourist, visitor, illegal immigrant—seized in the United States should have a right of access to a judge to test the legality of his detention. Now, what exactly the government should have to show in order to be permitted to continue to detain a person is the difficult question. If you say the government can’t detain someone unless it proves the case for detention beyond a reasonable doubt, you are imposing too demanding a standard. On the other hand, if you say that all the government has to do is to announce that it suspects that someone may be a terrorist, that is too lax. Where to locate the standard between these extremes is unclear, and I would look to someone with fuller knowledge of the problems than I do, to offer a concrete answer to the question.

You argue that we should maintain a clear prohibition on the use of torture, even though there may be times when a public officer perceives a need to violate this prohibition to avert an imminent threat to national security. Congress has just passed the Military Commissions Act of 2006, which provides that statements made under torture cannot be used as evidence in the trial of a detainee. It does, however, allow statements obtained from a detainee “in which the degree of coercion is disputed” to be admitted as evidence if the judge believes the statement is reliable, of sufficient probative value, and would serve the best interests of justice. What do you make of these provisions?

With the Military Commissions Act of 2006, just enacted, Congress has tried to respond to the Hamdan decision in the sense of setting forth, in great detail, many procedures that mirror standard rules of evidence and procedure, but with modifications here and there that could, in practice, prove to be quite critical.

In the ordinary judicial context, coerced confessions are inadmissible even if the coercion falls short of torture. The problem, I believe, is that the government wants to try terrorist suspects who may have been subject to coercive interrogation and the government wants to use the evidence obtained by that interrogation at their trial. To do that requires relaxing the standard prohibition on the use of coerced confessions as evidence, which presents a very sensitive issue.

This issue underscores a serious mismatch between our criminal justice system and the terrorist problem. The tendency is to try to place the terrorist problem in one of two bins. One is the military bin; the other is the criminal-justice bin. The terrorist problem doesn’t fit either bin neatly. When fighting the Taliban in Afghanistan, we are in a situation very much like conventional war. But when the emphasis shifts to prosecuting the people you’ve captured, thus placing them in the criminal-justice bin, one may find that this doesn’t work very well, because one may have done things to these persons to get information in order to prevent another terrorist attack that carry us over the line of what is normally permitted in a trial.

We should be asking how much utility there is to prosecuting terrorist leaders. In Hamdi v. Rumsfeld, 542 U.S. 507 (2004), the Supreme Court said that you can detain these people indefinitely, as long as they are dangerous (at least if they are not U.S. citizens). So the question becomes whether there is incremental utility in going beyond detention to trial. If you try them, you can’t do that very well in criminal courts, as I have just suggested. So you must create a special regime—in this case, military commissions. But is that worth doing, given the difficult procedural issues that are bound to arise? To repeat an earlier point, what do you do with a confession that is coerced—not necessarily the product of torture, but of rough tactics that would ordinarily not be permitted to produce evidence usable in a trial? You try to bend the rules, and find yourself bumping into the question of whether that is consistent with the Geneva Conventions. It just becomes terribly complicated.

I’d like to see an explanation from someone in government as to why it is thought important to place terrorist suspects on trial. The British, following the 1916 Easter Rebellion in Ireland, tried and executed the rebellion’s leaders, and this turned out to be a fearful mistake. The executed leaders became martyrs, which intensified resistance to British rule. If we execute terrorist leaders, will that help us in our struggle against terrorism, or hurt us? Somebody ought to make that judgment before the system becomes entangled in the procedural complexities that result when you try to modify our criminal justice system to adapt it to novel problems.

The United Kingdom has had more experience with terrorism than the United States, particularly in its decades of conflict with the Irish Republican Army. What could the U.S. learn from the U.K.’s response to threats of terrorism? What barriers, if any, might the U.S. Constitution pose to counter-terrorism measures used in the U.K.?

England has a long history of serious terrorist problems, stretching back to the sixteenth century. At that time, the major Catholic powers of Europe—Spain, France, and the Vatican—made tremendous efforts to overthrow the Protestant monarchy. These efforts included sending priests disguised as ordinary people into England to attempt to assassinate Queen Elizabeth and sow rebellion. The terrorist threat, like the present one, was motivated by religious fanaticism, because the priests were told that although they were quite likely to be caught and killed, that was nothing to worry about—they would be martyrs and go to heaven. England fought back with a domestic security apparatus led by Queen Elizabeth’s expert spymaster, Sir Francis Walsingham.

England has a longer history of fighting serious terrorism than the United States does, and it stands to reason that
they have learned tricks that we can borrow, given our shared legal and political culture. A good example is the British practice of allowing the detention of terrorist suspects for up to 28 days without a probable-cause hearing. A judge still has to approve the detention, but the suspect doesn’t have a public hearing where the government would have to disclose evidence that might compromise an ongoing investigation.

It is unclear whether our Constitution would preclude such a measure. The Constitution is vague and is subject to vicissitudes of interpretation by judges whose identity changes. The Supreme Court has said that you have to give an arrested person a hearing within 48 hours, but it has also said that if the government can show a bona fide emergency or other exceptional circumstances, the period can be extended. This opens the door to something like the 28-day rule. One would, of course, want Congress to prescribe a definite exception, rather than leaving it open-ended.

Critics say that we can’t do what the British do because they don’t have a written constitution. But our Constitution is, in practice, malleable, and although the U.K. doesn’t have a written constitution, it subscribes to the European Convention on Human Rights, which imposes civil liberties requirements similar to those of our Constitution; so it is not clear that Britain’s legal regime is that different from ours anymore.

You argue that the press “should not enjoy a blanket immunity from measures sensibly designed to protect national security by the least restrictive means possible” (NSP, p. 111). Do you think the Supreme Court has been too strong in its defense of press freedoms? Don’t we depend on a free press to ensure transparency in government?

In my book, I was looking at issues from a constitutional standpoint. People have prematurely concluded from the Pentagon Papers case (*New York Times v. United States*, 403 U.S. 713 (1971)) that newspapers cannot be censored.

I don’t think that’s true. The Supreme Court left open the possibility that *The New York Times* could be prosecuted for complicity in revealing classified data. It doesn’t make much sense to say that you can prosecute someone for publishing classified data but you can’t prevent the actual publication. If publication is sufficiently harmful to justify criminal prosecution, then it is sufficiently harmful to be prevented. There is also something shortsighted about making such a distinction. Suppose you say the government can prosecute people but it can’t enjoin publication. Then the government can simply impose extremely severe penalties that will terrify publishers into not publishing, which will have the same effect as an injunction.

We say the press can publish anything, but everyone agrees that if it wants to publish something really dangerous—the recipe for a hydrogen bomb, for example—the publication could be enjoined. If, however, the government wants to make a prohibition against leaking classified data effective by forbidding not just the leaking of data, but its publication, then publishers ought to have a defense that the material should not have been classified and that the government is just trying to stifle criticism of activities that it doesn’t want the public to learn about. Such a defense would provide a way of
balancing the public and press interest in transparency against the government’s legitimate need to conceal certain information.

American consumers everyday surrender vast amounts of personal information to private companies when they use the Internet, shop with a credit card, etc. Yet, as you note, “privacy of information is a highly valued commodity” (NSP, 138), and Americans are troubled by the possibility of government surveillance of their private communications and actions. Given the government’s powers to arrest and prosecute, aren’t these concerns well founded? Can warrantless surveillance of persons within the United States be reconciled with the Fourth Amendment?

There are two ways to think about privacy concerns or interests. One is psychological, the other instrumental. The psychological concern or interest is that people do have a sense of privacy and don’t like other people to know about everything they do. But that sense of privacy is relatively weak, because we observe that people are willing to give up this privacy for very small conveniences.

The real problem is the instrumental concern—the worry that private information may be used against you. In the case of private companies, people don’t worry much because they realize that companies don’t want to hurt them, just sell them things. If it’s the government, of course people worry, because the government may want to prosecute you.

One thing I emphasize in the book is that the Supreme Court has never recognized the privacy interest as such. It has said that if you give away your privacy to a particular vendor, it’s gone, and the vendor can do whatever it wants. So people who give away privacy to commercial entities, thinking the worst they have to fear is being besieged by advertising, and then find out that the government is pulling together all this information and creating a dossier on their political views—well, the Supreme Court has never recognized this as a problem. Privacy of information has been protected only against specific ways of taking it away, such as a search or seizure that violates the Fourth Amendment.

Legitimate privacy concerns are presented by extensive electronic surveillance. If you think, as I do, that electronic surveillance is important for security, then you will find the means of protecting privacy by making sure the government doesn’t use information it gathers through surveillance outside the narrow scope of national security. Because the Court hasn’t recognized a pure constitutional interest in informational privacy, and because courts are not in a good position to balance national security needs against privacy, it is for Congress to try to figure out where to strike the balance.

The title of your book, Not a Suicide Pact, is drawn from the closing lines of Justice Robert Jackson’s dissent in Tanimnello v. Chicago, 337 U.S. 1 (1949), which involved the balance between First Amendment free speech rights and public order when speech provokes violence. Justice Jackson wrote, “The choice is not between order and liberty. It is between liberty with order and anarchy without either. There is danger that, if the Court does not temper its doctrinaire logic with a little practical wisdom, it will convert the constitutional Bill of Rights into a suicide pact.”

How do Justice Jackson’s words relate to the arguments you make in Not a Suicide Pact? When looking at issues of national security and constitutional liberties, what choices do we face as a nation today?

The passage you read from Justice Jackson’s opinion really sums up my approach very well. One can’t say “I prefer order” or “I prefer liberty”—clearly, there has to be a balance. And balance is a matter of practical wisdom rather than doctrinaire logic. There is nothing in the Constitution or in the Court’s constitutional decisions that provides a logical answer to where the balance should be struck. It’s a practical judgment, it requires practical wisdom, and
TEACHING ACTIVITY

The ABA Division for Public Education has produced "Conversations on National Security and the Constitution," a companion guide to Richard Posner's book, Not a Suicide Pact: The Constitution in a Time of National Emergency (Oxford University Press, 2006). The guide, which is available for free download at www.abanet.org/publiced/features/home.html, is designed to foster discussion of key arguments made in the book. The following excerpt, adapted from the guide, uses two primary source documents and focus questions to discuss concerns over government intelligence activities and informational privacy.

1. Ask students to read the two following excerpts:

A. In 1975, the U.S. Senate established the Select Committee to Study Governmental Operations with Respect to Intelligence Activities, chaired by Sen. Frank Church (D-ID). The Church Committee's task was to examine the legality of intelligence gathering activities by various government agencies. The following excerpt is from Book II of the Church Committee's Final Report on Intelligence Activities and the Rights of Americans (U.S. Government Printing Office, 1976, pp. 3-4).

We have seen segments of our Government, in their attitudes and action, adopt tactics unworthy of a democracy, and occasionally reminiscent of the tactics of totalitarian regimes. We have seen a consistent pattern in which programs initiated with limited goals, such as preventing criminal violence or identifying foreign spies, were expanded to what witnesses characterized as "vacuum cleaners," sweeping in information about lawful activities of American citizens.

B. Following the terrorist attacks on September 11, 2001, the New York-based Markle Foundation established a Task Force on National Security in the Information Age. The following excerpt is from the task force's second report, Creating a Trusted Network for Homeland Security (2003, p. 30).

In the past decade, we have seen an explosion in the quantity of personal information held by the private sector... All of this data is collected not under government mandate, but as a consequence of the more or less voluntary decision of citizens to avail themselves of services that require (or allow) private companies to collect information on their activities. In other words, customers appear willing to give up a certain amount of privacy in exchange for better service.

Check for comprehension by asking students to summarize the key points in these excerpts.

2. In small groups, have the students discuss the following questions. Ask each small group, as part of its discussion, to try to reconcile disagreements among members of the group to arrive at answers to the questions that all members of the group can agree to.

A. In the 1970s, the Church Committee highlighted a tendency of government intelligence activities to gradually expand into "vacuum cleaners" that swept in information about the lawful activities of American citizens. Today, as the Markle Foundation report notes, Americans freely surrender personal information to private sector organizations for the sake of convenience. Have Americans become less concerned about maintaining a "zone of privacy" around their personal activities and interests?

B. The Church Committee was concerned with government access to information about the private activities of American citizens. The excerpt from the Markle Foundation report concerns information held in the private sector. Is private access to personal information of less concern than government access? Why or why not?

C. Part of our concern over privacy issues comes from the sense that we are losing control of our ability to control who knows what about our personal information and activities. Would you be concerned if you learned that government agents had searched the records of credit card purchases made at a bookstore where you regularly shop? What if government agents had monitored your participation in a political demonstration? Your phone conversations with persons overseas? Would you feel differently if you knew that these government activities had been tied to legitimate national security concerns?

3. Have the small groups report back to the class on their answers to the questions. Ask the groups to report on whether there were significant disagreements between members of the group, and whether they were successfully able to reach a compromise on their answers. After each of the groups has reported back, discuss similarities and differences among the groups' answers.
that's the essence of my argument. That means it is up to the nation to decide these issues anew in light of current problems rather than to look back to constitutional decisions that dealt with very different issues.

One way to finesse the choice between order and liberty is to de-emphasize the use of the criminal justice system, because it is there that you have the most acute conflicts. We have an elaborate tradition of procedural rights for criminal defendants and very great difficulty in using that system against terrorism without substantial modifications that, of course, bother people. If we focused more on detection and less on prosecution, the constitutional issue would be narrowed pretty much to surveillance.

When we think about ordinary criminal activity and law enforcement, we think punishment is extremely important because we're not going to prevent all crimes. What we can do is use the threat of punishment to deter people who are on the brink of criminal activity and incapacitate with prison sentences the people we catch who can't be deterred. We have 30,000 or so murders a year, which seems like a lot, but we've adjusted to that, and we think that our system keeps crime rates tolerably low.

We will not, however, tolerate 30,000 terrorist deaths a year. The 9/11 attacks did terrible damage to the country, much of it extremely indirect, having to do with Iraq, for example, and all sorts of political and economic and social consequences that ensued from that. Terrorism is a danger of a completely different order of magnitude from ordinary crime. Prevention is absolutely critical, and much more important than punishment.

Prevention of terrorism, in one sense, is extremely difficult because it is so hard to find out what is being planned and who the terrorists are. In another respect it is easy, because if we do detect a plot, it is much easier to prevent something that you know is planned from happening than it is to catch people after they've done it. I think we're over-invested in the criminal justice approach, partly because we're angry with these people, and we want to punish them. The British, in 1916, acted savagely, partly because they were upset. They were in the middle of a world war and suddenly had an Irish rebellion on their hands, and they committed a serious political error in executing the ringleaders. I think we need to look ahead to what the trials of terrorist suspects are going to be like and whether they will result in net benefits or detriments to our campaign against terrorism.

The views expressed in this article are those of the author and have not been approved by the House of Delegates or the Board of Governors of the American Bar Association and, accordingly, should not be construed as representing the policy of the American Bar Association.

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