

NOT A SUICIDE PACT: THE CONSTITUTION IN A TIME OF  
NATIONAL EMERGENCY<sup>1</sup>

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*This is a book about the constitutional rights that impinge on the measures for the protection of national security that the U.S. government has taken in response to the terrorist attacks of September 11, 2001.*<sup>3</sup>

**Introduction**

With this ironically drafted first sentence of *Not a Suicide Pact*, author Richard A. Posner immediately impresses upon the reader his perspective that constitutional civil liberties are impeding national security measures, not vice versa.<sup>4</sup> Judge Posner then quickly communicates his thesis that practical-minded judges should modify individual constitutional rights, if necessary, after pragmatically balancing a security measure's negative effect on personal liberty against its positive effect on public safety.<sup>5</sup>

Judge Posner uses this approach to analyze several national security measures that will continue to be relevant as the United States and its allies fight the Global War on Terror. Some of the measures, such as detention of suspected terrorists,<sup>6</sup> military tribunals,<sup>7</sup> and interrogations<sup>8</sup> could directly or indirectly affect military lawyers. Deployed military lawyers will also face a dilemma very similar to one that Judge Posner explains in *Not a Suicide Pact*. He states that constitutional provisions "do not make a good match with the distinctive characteristics of modern terrorism, which defies conventional constitutional categories such as

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<sup>1</sup> RICHARD A. POSNER, *NOT A SUICIDE PACT: THE CONSTITUTION IN A TIME OF NATIONAL EMERGENCY* (2006).

<sup>2</sup> U.S. Army. Written while assigned as a student, 56th Judge Advocate Officer Graduate Course, The Judge Advocate General's Legal Ctr. and School, Charlottesville, Va.

<sup>3</sup> POSNER, *supra* note 1, at 1.

<sup>4</sup> Judge for the U.S. Court of Appeals for the Seventh Circuit and Senior Lecturer in Law at the University of Chicago Law School. See The University of Chicago Law School, Faculty—Richard Posner, <http://www.law.uchicago.edu/faculty/posner-r> [hereinafter University of Chicago Law School, Faculty—Richard Posner ] (last visited May 13, 2008).

<sup>5</sup> POSNER, *supra* note 1, at 1.

<sup>6</sup> *Id.* at 53–75.

<sup>7</sup> *Id.* at 57, 75.

<sup>8</sup> *Id.* at 77–103.

war and crime.”<sup>9</sup> Similarly, military lawyers often face novel questions during counterinsurgency (COIN) operations in Iraq or Afghanistan, the answers to which do not fit neatly within the law of armed conflict.<sup>10</sup> To determine whether military lawyers should use the balancing method to analyze a novel tactic, technique, or procedure (TTP)’s compliance with the law of armed conflict, this book review will examine Judge Posner’s method, how he conceived it, and whether the method is appropriate for legal analysis.

This review will conclude that while Judge Posner’s balancing method and his legal analyses of national security measures provide an interesting and provocative perspective, recent activity by the Supreme Court makes it highly unlikely that courts will adopt them to conduct their constitutional analysis. Similarly, military lawyers must apply available or analogous law, precedent, and policy to unique COIN issues instead of Posner’s approach, or they will risk finding themselves on the wrong side of an investigation. Consequently, *Not a Suicide Pact* is a thought-provoking read, but neither civilian nor military practitioners will ultimately find much pragmatic value in it. Ironically, pragmatism is the value that Judge Posner claims to cherish the most.<sup>11</sup>

### Judge Posner’s Pragmatic Method

Judge Posner advocates “restrik[ing] the balance between the interest in liberty . . . and the interest in public safety, in recognition of the grave threat that terrorism poses to the nation’s security.”<sup>12</sup> He recommends that judges modify constitutional rights accordingly when analyzing national security measures.<sup>13</sup> To do this, one must try 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.”<sup>14</sup>

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<sup>9</sup> *Id.* at 18.

<sup>10</sup> This view of the issues faced by military lawyers during counterinsurgency operations is based on the reviewer’s personal experiences during Operation Iraqi Freedom in 2005 to 2006 while assigned as both a Brigade Combat Team Operational Law attorney and as the Chief of Operational Law for the Multi National Division–Baghdad.

<sup>11</sup> POSNER, *supra* note 1, at 1.

<sup>12</sup> *Id.* at 31.

<sup>13</sup> *Id.* at 147.

<sup>14</sup> *Id.* at 32.

A look at his background reveals that “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.”<sup>15</sup> Indeed, Judge Posner has written several books and articles on economic analysis of the law and related topics.<sup>16</sup> He was also the founding editor of the *American Law and Economics Review* and the President of the American Law and Economics Association from 1995 to 1996.<sup>17</sup>

Judge Posner also doesn’t hide his belief in judicial activism and the “dynamic character of constitutional law.”<sup>18</sup> He explains that constitutional rights are “more the handiwork of Supreme Court justices than of the Constitution’s framers,”<sup>19</sup> and the Justices “find themselves making decisions in much the same way that other Americans do—by balancing the anticipated consequences of alternative outcomes and picking the one that creates the greatest preponderance of good over bad effects.”<sup>20</sup> These beliefs were likely cultivated during his clerkship for Supreme Court Justice William J. Brennan Jr., widely known as a leading judicial activist.<sup>21</sup>

Posner uses his balancing approach to reach the following conclusions regarding seven national security measures. First, a terrorist suspect could be detained incommunicado for a reasonable time before a federal court would be required to review his detention.<sup>22</sup> Second, the Constitution permits increasing amounts of coercive interrogation as the value of the information sought from a terrorist suspect increases.<sup>23</sup> Third, the government could conduct practically warrantless interception of all electronic communications inside or outside the United States without violating the Fourth Amendment, as long as computers screened the initial data instead of humans.<sup>24</sup> Fourth, the government should be allowed to criminalize or enjoin the media’s dissemination of known

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<sup>15</sup> David Cole, *The Poverty of Posner’s Pragmatism: Balancing Away Liberty After 9/11*, 59 STAN. L. REV. 1735, 1737 (2007).

<sup>16</sup> University of Chicago Law School, Faculty—Richard Posner, *supra* note 4.

<sup>17</sup> *Id.*

<sup>18</sup> POSNER, *supra* note 1, at 40.

<sup>19</sup> *Id.* at 21.

<sup>20</sup> *Id.* at 24.

<sup>21</sup> DAVID E. MARION, THE JURISPRUDENCE OF JUSTICE WILLIAM J. BRENNAN JR.: THE LAW AND POLITICS OF “LIBERTARIAN DIGNITY” 26 (1997).

<sup>22</sup> POSNER, *supra* note 1, at 63–75.

<sup>23</sup> *Id.* at 80.

<sup>24</sup> *Id.* at 99–100.

classified material as long as the material was properly classified by the agency.<sup>25</sup> Fifth, the Federal Bureau of Investigation (FBI) could conduct surveillance of extremist imams in U.S. mosques despite the potential curtailment of free speech.<sup>26</sup> Sixth, the government can conduct security measures based on racial profiling of persons of Middle Eastern descent.<sup>27</sup> Finally, Congress could pass a law criminalizing the advocacy of terrorism.<sup>28</sup>

### Heavy on Pragmatism, Light on Law?

Judge Posner's practical, weights-and-balances reasoning and his conservative conclusions will resonate with national security hawks and infuriate civil libertarians. Many non-lawyers will likely be persuaded. Lawyers on the other hand, constitutional law experts or otherwise, will likely raise an eyebrow or two as they read the book. Professor David Cole states in his rather scathing review of *Not a Suicide Pact*, "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."<sup>29</sup> Professor Cole deftly counters some of Judge Posner's conclusions with precedent rather than policy, and sharply criticizes Posner's constitutional analyses and conclusions.<sup>30</sup> Most lawyers will likely have the same reaction.

But Cole may be missing the point of *Not a Suicide Pact*. Judge Posner tells the reader from the beginning that the "main task of this book" is "to suggest the direction that the law *should* take, by assessing the relevant consequences and hoping that the Supreme Court will be convinced by the assessment and shape the law accordingly."<sup>31</sup> Therefore, one would think that this is a book about one judge's policy beliefs regarding national security law. But Judge Posner clouds things for the reader at different points by stating some of his conclusions as the constitutionally correct outcome (based on text, history, and precedent)

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<sup>25</sup> *Id.* at 110.

<sup>26</sup> *Id.* at 112.

<sup>27</sup> *Id.* at 119.

<sup>28</sup> *Id.* at 121–22.

<sup>29</sup> Cole, *supra* note 15, at 1737.

<sup>30</sup> *Id.* at 1737–45.

<sup>31</sup> POSNER, *supra* note 1, at 29 (emphasis added).

instead of his own policy belief.<sup>32</sup> Other times, it is clear that Posner's conclusion is based primarily on the outcome of his policy-based balancing test and nothing else.<sup>33</sup> Moreover, at other times it is unclear whether Posner is making a legal or policy conclusion.<sup>34</sup> This uncertainty is the main frustration of *Not a Suicide Pact*.

Judge Posner does use constitutional text, precedent, and other legal sources to begin all of his analyses. Indeed, he offers six pages of "Further Readings" in the back of the book, which include cases, statutes, articles, and books that he either relies upon or mentions in *Not a Suicide Pact*.<sup>35</sup> However, Posner is then often required to stretch text and precedent, or disagree with it and ignore it, to reach his desired conclusion.<sup>36</sup> As he says, "[l]anguage and drafters' intent are not the only, or even, in my judgment, the best guides to constitutional rule making; they are merely the most orthodox ones."<sup>37</sup> An example is his position that despite the Supreme Court's holding in *Brandenburg*, which distinguishes advocacy of violence (protected speech) from incitement of violence (unprotected speech), it should be constitutional for Congress to pass a law that criminalizes advocating terrorism against the United States.<sup>38</sup> This conclusion is pragmatic from a national security standpoint, but it is in contravention of clear precedent regarding First Amendment freedom of speech. Judge Posner also makes analogies to support his conclusions and highlight the absurdity in certain areas of the law. An example, again from criminalizing the advocacy of terrorism: "A rule that in the name of freedom of speech forbids punishing preachers of holy war against the West while allowing the punishing of false advertising of a weight-loss pill is excessively lacking in nuance."<sup>39</sup> Unfortunately, the analogy is a policy argument and not a legal argument.

The major problem with Judge Posner's balancing approach is its subjectivity, which makes it impossible to apply uniformly. Each person applying the test will assign different weights to the importance of liberty and security, and come to differing results. For example, Posner believes

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<sup>32</sup> See *supra* text accompanying note 22.

<sup>33</sup> See *supra* text accompanying note 28.

<sup>34</sup> See *supra* text accompanying note 23.

<sup>35</sup> POSNER, *supra* note 1, at 159–64.

<sup>36</sup> *Id.* at 121–22.

<sup>37</sup> *Id.* at 129.

<sup>38</sup> *Id.* at 120–25 (discussing *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (per curiam)).

<sup>39</sup> *Id.* at 123.

that civil libertarians exaggerate the negative effects on personal liberties,<sup>40</sup> while Posner's opponents believe he undervalues civil liberties.<sup>41</sup> But beyond its subjectivity, the test is really not an appropriate legal test at all. Professor Cole states:

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 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.<sup>42</sup>

This is the primary flaw with the balancing approach and with *Not a Suicide Pact*. It is disconcerting that a federal judge may subscribe to such a "non-legal" way of deciding the constitutionality of executive and congressional acts. It would be interesting to see if Judge Posner would actually attempt to decide these issues in this manner if they came before his court.

### Checks and Balances

Judge Posner advances two other related themes throughout the book that are puzzling coming from a federal judge. The first is his call for the judiciary to defer to the political branches in times of national crisis.<sup>43</sup> He reasons that Congress has much more knowledge about national security than the judiciary does, so Congress can perform better as the check against executive power.<sup>44</sup> If the executive and legislative branches agree on a particular measure, there is even less need for

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<sup>40</sup> *Id.* at 51.

<sup>41</sup> Cole, *supra* note 15, at 1738.

<sup>42</sup> *Id.* at 1747.

<sup>43</sup> POSNER, *supra* note 1, at 149–50.

<sup>44</sup> *Id.* at 150.

judicial intervention.<sup>45</sup> The courts should “decid[e] cases narrowly, preferably on statutory grounds, hesitating to trundle out the heavy artillery of constitutional invalidation.”<sup>46</sup> This recommendation is overly deferential to the political branches of government, especially in light of the potential for overreaction in times of emergency. Posner himself admits that professionals responsible for national security are unlikely to value civil liberties unless the judiciary forces them.<sup>47</sup> The bottom line is that if a congressional statute or an executive act is unconstitutional, the judiciary must have the backbone to strike it down. That is what the judiciary is for, current events notwithstanding.<sup>48</sup>

Judge Posner’s discussion of the “law of necessity” is also of concern.<sup>49</sup> He postulates that the President, in desperate and extreme circumstances, could authorize torture or other violations of constitutionally held civil liberties to avoid a catastrophic attack.<sup>50</sup> The action would be based on a *moral* and *political* justification, quite possibly an obligation, instead of a legal justification.<sup>51</sup> Posner acknowledges that there is no constitutional basis to allow the President to unilaterally assume dictatorial authority, but he still endorses the concept.<sup>52</sup> Categorizing the President’s right to violate the Constitution as a power instead of a legal right is really a distinction without a difference.<sup>53</sup> A violation is a violation, and either way it is unconstitutional. Judicial acknowledgment of any such authority, which would arm the Executive with the knowledge that he or she can sometimes act in contravention of the Constitution, is extremely dangerous and overly deferential due to the potential for abuse. It could also potentially strain the citizens’ respect for the rule of law and for the democratic system of checks and balances, both of which are essential to maintaining order.

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<sup>45</sup> *Id.* at 10.

<sup>46</sup> *Id.* at 34.

<sup>47</sup> *Id.* at 61.

<sup>48</sup> See *supra* text accompanying note 42.

<sup>49</sup> POSNER, *supra* note 1, at 158.

<sup>50</sup> *Id.* at 38.

<sup>51</sup> *Id.* at 12, 38.

<sup>52</sup> *Id.* at 39.

<sup>53</sup> *Id.* at 38.

### Conclusion

*Not a Suicide Pact* is a thought-provoking book, but it will likely miss its intended goal of influencing the Supreme Court's constitutional analysis of national security measures.<sup>54</sup> Judge Posner may instead want to shift his focus to Congress, a branch of the government that would likely be more apt to follow his politician-like balancing approach. Congress's reaction to the Supreme Court's holding in *Hamdan v. Rumsfeld* may also be an indication that Posner should focus his efforts on Congress.<sup>55</sup>

The Supreme Court in *Hamdan* declined the opportunity to defer to the Executive on a matter of national security, counter to what Judge Posner recommends in *Not a Suicide Pact*.<sup>56</sup> The Court held that President Bush did not have the authority to convene military commissions for detainees held at Guantanamo Bay.<sup>57</sup> The commissions were further flawed because they did not provide the rights and protections required pursuant to the Uniform Code of Military Justice (UCMJ) and the Geneva Conventions.<sup>58</sup> So, not only did the Court refuse to defer to the executive, it also provided a foreign terrorist suspect with more rights and protections for his trial. This certainly appears to contravene Judge Posner's recommended course of action for the Court.

However, Congress reacted with the Military Commissions Act (MCA) of 2006, which provides for detainee prosecutions at military commissions almost identical to the President's original commissions.<sup>59</sup> The MCA also weakens the criminal prohibitions for coercive interrogations of detainees, which falls in line with Judge Posner's

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<sup>54</sup> See *supra* text accompanying note 31.

<sup>55</sup> *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006).

<sup>56</sup> *Id.* at 587–90.

<sup>57</sup> *Id.* at 593–95.

<sup>58</sup> *Id.* at 566–67.

<sup>59</sup> Cole, *supra* note 15, at 1750; see also Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (Oct. 17, 2006). In 2008, pursuant to the Military Commissions Act, Hamdan was tried by a military commission at Guantanamo Bay. On 7 August 2008, he was sentenced to five and a half years confinement after being found guilty of “providing material support to Al Qaeda by continuing to serve as a driver and body guard to Bin Laden—even after he learned [Al Qaeda] was involved in terrorism.” Warren Richey, *Hamdan Sentenced in First Terror Tribunal*, THE CHRISTIAN SCIENCE MONITOR, Aug. 8, 2008, available at <http://www.csmonitor.com/2008/0808/p25s29-usju.html>.



opinions regarding the use of coercive tactics when the situation warrants.<sup>60</sup>

Finally, in addition to missing its intended goal, *Not a Suicide Pact* lacks utility for the military practitioner. As mentioned, military lawyers could find themselves on the wrong side of the law if they use Judge Posner's method to tackle novel COIN issues that do not fit squarely into the law of armed conflict (of which there are plenty).<sup>61</sup> Force protection and mission accomplishment, like national security from *Not a Suicide Pact*, are not bottom lines that provide "a license to do anything our leaders think might improve our safety."<sup>62</sup> Just as judges must adhere to the Constitution's "articulate[d] . . . fundamental principles . . . enshrine[d] . . . above the everyday pragmatic judgments of politicians," military lawyers must adhere to the law of armed conflict's fundamental principles when analyzing the legality of an innovative and ostensibly pragmatic TTP.<sup>63</sup> Military lawyers must enforce the fundamental principles in their advice to commanders and staff, even if the advice is unpopular. They cannot ignore a TTP that bypasses established law simply because it may lead to a desirable effect. Unfortunately, Judge Posner seems to advocate precisely that in *Not a Suicide Pact*.

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<sup>60</sup> Cole, *supra* note 15, at 1750.

<sup>61</sup> See *supra* note 10.

<sup>62</sup> Cole, *supra* note 15, at 1748.

<sup>63</sup> *Id.* at 1747.