Book Reviews

Not a Suicide Pact: The Constitution in a Time of National Emergency

by Richard A. Posner

*Reviewed by Margaret D. Stock**

Judge Richard A. Posner of the Seventh Circuit Court of Appeals is perhaps the most prolific writer among sitting federal judges today. An ardent advocate of cost-benefit analysis, he has often used a law-and-economics approach to shed new light on a variety of subjects. In *Not a Suicide Pact,* Judge Posner brings a similar approach to national security issues, arguing that cost-benefit analysis should also be applied to thorny questions of civil liberties and constitutional rights in the current global terrorism conflict.

Applying such analysis to anti-terrorism measures is a worthy undertaking, but Judge Posner's latest book will likely frustrate many conservatives and libertarians—even those who are fans of the law and economics approach. Posner does not provide sources for many of his more controversial assertions, and the book is devoid of citations and footnotes (it has a brief bibliography). In offering a sketchy yet lively defense of many of the Bush Administration's initiatives in the war on terrorism, Judge Posner also seemingly embraces the idea of a "living Constitution," rejects out-of-hand the arguments of civil libertarians on both sides of the aisle, and—without citing much evidence—argues that in the war on terrorism, cost-benefit analysis almost always favors the Government's preferred approach. Explaining this short shrift, Posner opines that the costs and benefits of a trade-off between liberty and security can rarely be quantified, calling them "imponderables" that must be left to the "subjective" judgment of judges. Surely, however, liberty and security are no more difficult to analyze in this fashion than marriage, sex, crime, or torts—and Judge Posner has shown no hesitation there. Without sufficient explanation of the rationale for disregarding hard analysis of national security issues, the reader is left unpersuaded.

The title, of course, recalls Abraham Lincoln, but actually comes from a quote from Justice Robert H. Jackson in his dissent in *Terminiello v. Chicago. Terminiello* was a free speech case in which the United States Supreme Court reversed a disorderly conduct conviction arising out of a meeting of the Christian Veterans of America (the defendant had provoked the listening crowd to violence by making racially offensive remarks). In dissenting from the Court's decision to overturn the conviction, Justice Jackson opined that "[t]he 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." Posner's title implies that he will argue that longstanding constitutional restrictions on the power of the federal government in favor of individual liberty must yield to security-related demands in the current war. And indeed, Judge Posner affirms this view repeatedly throughout the book.

He describes this "pragmatic" approach as "the usual way that practical people make decisions: on the basis of anticipated consequences refracted through life experiences and other personal factors." The question becomes "whether a particular security measure harms liberty more or less than it promotes safety." This approach sounds much like the *Mathews v. Eldridge* procedural due process balancing test created by the Burger Court and applied most recently by Justice Sandra Day O'Connor in *Hamdi v. Rumsfeld*. Judge Posner does not discuss the *Mathews v. Eldridge* test explicitly, but he does favor a cost-benefit analysis that considers the private interest (civil liberties) of the affected individual, the public interest (national security), and the risk of error for both.

Where he departs from the usual *Mathews* approach is in viewing the public interest as nearly always overriding the individual's interest—at least in cases involving Islamic terrorists (he specifically excludes other types of terrorists). His main justification is that the current Islamic terrorist threat is unique. He argues that because modern Islamic terrorists fall within a gray area, as between criminals and legitimate international warfighters, modifying traditional constitutional doctrine to defeat them is justified. Critics will respond that global terrorism and weapons of mass destruction have been around for more than fifty years—what is new today is the decentralized, stateless, and self-destructive nature of the current terrorist threat, which makes it difficult to contain many modern terrorists through the traditional mechanisms of law enforcement, diplomacy, and war. While those mechanisms may need updating or alteration, it is not so evident, as Judge Posner assumes, that the current threat is altogether different from past ones (e.g., a fanatic, nuclear-armed Soviet Union), such that traditional methods of interpreting the Constitution are obsolete. The Constitution was able to deal with these old threats; why not this one? Posner does not explain the incomparable contrast.

There are some limits and exceptions to his mostly pro-Government stance, however. Posner does disagree with the Administration's assessment of its ability to decide the initial fate of unlawful enemy combatants, arguing that such persons should be permitted to have their status determined by a civilian tribunal. He also goes after former Justice Department attorney and now Berkeley law professor John Yoo's views of presidential war powers, "an extravagant interpretation of Presidential authority [that] confuses commanding the armed forces with exercising dictatorial control over the waging of war, the kind of control exercised by a Napoleon or a Hitler or a Stalin, or by dictators in the Roman Republic…." Such qualifications and characterization of other strong federal power advocates, however, are hard to square with the book's main thrust.

One is, of course, hard-pressed to argue with Judge Posner's basic premise that cost-benefit analysis should be applied to the war on terrorism. Surely, in most cases, the Government should be forced to so justify its decisions. Where most rational people disagree, however, is in the details—the

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actual calculation of costs and benefits. Here, Judge Posner rarely gets down to specifics, assuming for the most part, again, that the Government's assessment of the benefits of a given "national security" measure *must* be accurate. But it is exactly here that many people—including many conservatives—would disagree with him. How do we know that the Government's assessment of the benefit of a particular policy is correct? The Government has repeatedly mistaken the benefits of particular security policies—witness the miscalculations in Iraq, the U.S. VISIT entry-exit program for foreigners, or even the imprisonment of U.S. citizens Brandon Mayfield and Donald Vance. How do we know whether the Government's assessment is accurate unless the Government is forced to make its case publicly? Or at least in camera, in an adversarial court setting (perhaps under the tried-and-true methods of the Classified Intelligence Procedures Act)? Posner favors the Government's position because he doubts the ability of judges to "bone up" on modern terrorism, but he understates the case when he says that "the judiciary… has no machinery for systematic study of a problem [like terrorism]." In fact, the adversarial system is such a problem-solving process—one that is used successfully to solve new and complex problems every day.

Early in the book, Posner briefly discusses his theory of constitutional decision-making; then turns to the individual topics of detention, interrogation, electronic surveillance, free speech, and profiling. In very cursory treatments of these complex topics, he raises many questions, but rarely brings the discussion to a satisfying conclusion. He dismisses, for example, the idea of an alternative to traditional habeas corpus proceedings for suspected terrorists, arguing that civilian courts should decide in the first instance whether someone is an enemy combatant subject to a trial by military tribunal. Why are civilian courts better able to decide whether a person captured on the battlefield is a combatant? We are not told. Posner does not mention the traditional forum for such decisions—the Article 5 hearings authorized by the Uniform Code of Military Justice.

It is perhaps Judge Posner's chapter on constitutional and judicial decision-making that will cause the most angst for conservative readers. Rejecting such venerable theories as Originalism and deference to precedent, Judge Posner argues that constitutional rights are not created by the constitutional text; rather, "the principal creators are . . . the justices of the Supreme Court… heavily influenced by the perceived practical consequences of their decisions rather than [] straitjacketed by legal logic." This statement appears to be a plug for result-oriented jurisprudence, which may not be a comfort to those who prefer less "subjective" approaches. Judge Posner's statement that "constitutional law is fluid, protean, and responsive to the flux and pressure of contemporary events" sounds much like Justice William Brennan's constitutional philosophy.

Posner's stance on other controversial issues is perhaps worthy of the label "pragmatic," but not comforting to those who prefer clear rules. He seemingly favors coercive interrogation techniques and torture when "necessity" requires it—but unlike Alan Dershowitz, who has famously argued that courts should ratify this use in advance, prefers the approach taken by Jack Bauer of "24"—act first and ask the lawyers later. Judge Posner approvingly terms this kind of "pragmatic" approach to obtaining information "civil disobedience." (Query whether sitting federal judges should be hinting that it is acceptable for federal officials to break the law in this fashion.)

There are other highly tendentious assertions in the book. Posner states, for instance, that "[a]lthough there is a history of misuse by the FBI, the CIA, and local police forces of personal information collected ostensibly for law enforcement and intelligence purposes, it is not a recent history." In fact, such misuse is relatively common and growing as database-sharing increases and more government agents have access to valuable personal information. Government employees are no more trustworthy today than in the past. Convicted FBI Special Agent Robert Phillip Hanssen, one of the national security professionals Judge Posner trusts to make better decisions than federal judges, was not a product of the World War II era but the modern era of computers and the Internet.

The most interesting part of the book for those desiring a substantive discussion of emergency powers is actually the conclusion, wherein Judge Posner races through several theories of how democracies (and Constitutions) should handle the problem of national emergencies. The brevity of the discussion, however, leaves the reader wishing this section were larger, not relegated to an abbreviated conclusion.

Is it always true that one must trade liberty for security? Or are there security benefits to civil liberties? In the end, Judge Posner never confronts this argument. He hints at the idea ("Civil liberties can even be thought of as weapons of national security, since the government, with its enormous force, is, just like a foreign state, a potential enemy of the people."), but throughout the book fails to confront the matter squarely. In fact, there is a growing body of evidence that there are substantial security benefits to maintaining civil liberties, and that these benefits are overlooked by those who adopt a narrow view of security. Despite these drawbacks, it must be said, *Not a Suicide Pact* is provocative and eminently readable. It has the flavor of a stimulating and timely dinner conversation with one of America's leading intellectuals. And that Judge Posner is.

The Chosen: The Hidden History of Admission and Exclusion at Harvard

BY JEROME KARABEL

*Reviewed by Gail Heriot**

The modern university got its start on September 2, 1945, on the decks of the U.S.S. Missouri, when representatives of Emperor Hirohito and the Imperial Japanese Army unconditionally surrendered to the Allied Forces. The end of the war meant that millions of American men and women would be coming home to resume lives that had been interrupted by war. Many hoped to enter college. Thanks to the G.I. Bill, signed into law a year earlier by President Franklin Delano Roosevelt, their hopes were within reach.

Some observers worried that America's colleges and universities would be overcrowded. These worries were, of

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