How to Skip the Constitution

David Cole
Georgetown University Law Center

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David Cole
Professor of Law
Georgetown University Law Center
cole@law.georgetown.edu

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How to Skip the Constitution

By David Cole

Not a Suicide Pact: The Constitution in a Time of National Emergency
by Richard Posner
Oxford University Press, 171 pp., $18.95

Like everything else, the Constitution has changed since September 11. So Richard Posner argues in his latest book, Not a Suicide Pact: The Constitution in a Time of National Emergency. Posner, a distinguished judge on the US Court of Appeals for the Seventh Circuit and the most prolific legal scholar of his generation, insists that the Constitution has changed sufficiently since September 11 to sanction virtually all of the Bush administration's counterterrorism measures, including coercive interrogation, incommunicado detention, warrantless wiretapping, and ethnic profiling.

The only action by the Bush administration that Posner finds unconstitutional is its short-lived attempt to deny judicial review to US citizens in military custody in the US on grounds that they are "enemy combatants"—a position the administration itself abandoned after the US Court of Appeals for the Fourth Circuit, the most conservative court in the country, dismissed the argument as a "dangerous" proposition. Indeed, Posner's Constitution would permit the administration to go even further than it has—among other things, he defends indefinite preventive detention, the banning of Islamic jihadist rhetoric, mass wiretapping of the entire nation, and making it a crime for newspapers to publish classified information, as when The Washington Post broke the story of the CIA's "black sites" or when The New York Times disclosed the existence of the National Security Agency's warrantless wiretapping program. All of these are permissible, Posner argues, because unless the Constitution "bends" in the face of threats to our national security, it "will break." When Posner is finished bending the Constitution to reach these results, however, one might justifiably ask what is left to preserve from breaking.

Other federal judges, deciding actual cases or controversies, have found plenty that they concluded was unconstitutional about the administration's anti-terror campaign since September 11. Courts have declared unconstitutional statutes making it a crime to provide "expert advice," "services," and "training" to groups designated by the government as terrorist. A provision of the Patriot Act authorizing the FBI to demand information by sending "national security letters," a form of administrative subpoena issued without court review, was ruled unconstitutional because it barred recipients from informing anyone—including a lawyer or a court—of the fact that they had been subpoenaed. Several courts held unconstitutional Attorney General John Ashcroft's directive to try hundreds of immigrants in secret proceedings closed to the public, the press, legal observers, and even their families.

Other judges held unconstitutional a regulation issued shortly after September 11 permitting immigration prosecutors to keep immigrants locked up even after immigration judges had found no basis for their detention and had ordered their release. Most significantly, the Supreme Court held unconstitutional the administration's refusal to allow Yaser Hamdi, a US citizen captured in Afghanistan, a hearing in which he could challenge the official determination that he was an "enemy combatant." And in August, a court declared unconstitutional President Bush's secret order authorizing the NSA to conduct warrantless wiretapping within the United States.

Judge Posner is not troubled by any of these measures, at least as a constitutional matter. His theory of
the Constitution is at once candid and cavalier. Rejecting popular conservative attacks on "judicial activism," he argues that in view of the open-ended character of many of the document's most important terms—"reasonable" searches and seizures, "due process of law," "equal protection," and even "liberty" itself—it is not objectionable but inevitable that constitutional law is made by judges. He dismisses the constitutional theories of textualism and originalism favored by many conservative judges and scholars as canards, arguing that neither the Constitution's text nor the history of its framing gives much guidance in dealing with most of the hard questions of the day. Constitutional law, he maintains, "is intended to be a loose garment; if it binds too tightly, it will not be adaptable to changing circumstances."

But Posner then goes on to treat the Constitution as essentially a license to open-ended "balancing" of interests by the political branches and the courts. His thinking is informed largely by an economist's predilection for cost-benefit analysis and a philosophical enthusiasm for pragmatism. Posner's reputation as a scholar rests not on his contributions to constitutional theory, but on his role as one of the founding fathers of the movement that applied economic analysis to law. His new book might just as well have been called "An Economist Looks at the Constitution." In the end, constitutional interpretation for Posner is little more than a balancing act, and when the costs of a catastrophic terrorist attack are placed on the scale, he almost always feels they outweigh concerns about individual rights and liberties.

Consider, for example, his views on electronic surveillance. The Bush administration currently faces several dozen lawsuits challenging various aspects of its NSA spying program, which, according to the administration, involves the warrantless wiretapping of international phone calls and e-mails where one of the participants is thought to be connected with al-Qaeda or affiliated groups. That program, as I and many other constitutional scholars have argued, violates a provision in the Foreign Intelligence Surveillance Act (FISA) specifying that it is a crime for officials not to seek a warrant from the appropriate court before engaging in such wiretapping. The Bush administration seeks to justify this violation of law by invoking an inherent presidential power to ignore congressional legislation, echoing President Richard Nixon's defense of his own decision to authorize warrantless wiretapping during the Vietnam War: "When the president does it, that means that it is not illegal." Posner not only sees nothing wrong with the NSA program; he would also find constitutional a far more sweeping measure that subjected every phone call and e-mail in the nation, domestic as well as international, to initial computer screening for patterns of suspicious words, and then permitted intelligence agents to follow up on all communications that the computer treated as suspicious.

How does Posner reach the conclusion that the Constitution would permit such an Orwellian scheme, far more invasive than the Bush administration, if it is to be believed, has been willing to undertake so far? In a word, balancing. In Posner's view, the costs to personal liberty of such a program are minimal, and are outweighed by the benefits to our security. Having a computer analyze one's phone calls is no big deal, he claims, as long as we know it's only looking for terrorists. He admits that there might be a danger of misuse of the information by the agents who follow up on the computer's "suspects," but he considers that risk minimal because he is confident that any such abuse would likely come to light and be widely criticized. (He fails to acknowledge that whistleblowing would be far less likely if he had his way and an Official Secrets Act were passed making it a crime to publish leaked government secrets.) As for the benefits of such surveillance, Posner surmises that such a program might sweep up sufficient data to permit intelligence agents to "connect the dots" and prevent a catastrophic attack. Even if it didn't, he writes, it would at least have the salutary effect of discouraging terrorists from communicating by telephone and e-mail.

Every aspect of Posner's analysis is open to question. He ignores that privacy 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 on communications that the government might conceivably find objectionable, not just terrorist planning, and not just criminal conduct. Moreover, Posner ignores the myriad ways in which the government can harass people without
its ill intent ever coming to light. For example, the government can selectively prosecute minor infractions of the law, launch arbitrary tax investigations, and engage in blackmail, all methods perfected by FBI Director J. Edgar Hoover. Contrary to Posner's claims, one cannot, as the FBI's abuses showed, trust public scrutiny to forestall such tactics, even in the absence of an Official Secrets Act. Finally, it is far from clear that such a program would be effective—the sheer volume of "dots" generated would make connecting them virtually impossible. In any case, computer programs would be relatively easy to evade through the use of code words.

The real answer to Posner's notion of balance, however, is not to show that a different balance can be struck, but to return to established Fourth Amendment jurisprudence, which has long required that searches must generally be justified by a showing of objective, specific suspicion approved by a judge who is willing to issue a specific warrant. The requirements that a warrant be issued and that it be based on "probable cause" are designed to protect privacy unless there are fairly strong grounds for official intrusion. The principal evil that the Fourth Amendment was drafted to avoid was the "general warrant," which permitted government officials to search anyone's home, without suspicion of specific individuals. Posner's program is nothing less than 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, he has managed to turn the Fourth Amendment on its head.

Posner's analysis of coercive interrogation is similarly flawed. Here he incorrectly asserts that the prohibition on coerced confessions is predicated on the Fifth Amendment privilege against compelled self-incrimination; this privilege, he believes, would not apply if coerced testimony is used only for intelligence purposes, and not to incriminate the person interrogated. Here Posner disregards a long line of Supreme Court decisions banning "involuntary" confessions not on grounds of self-incrimination but because the methods of interrogation themselves were found to violate due process of law. Applying this due process test, the Court has consistently ruled that any tactics that compelled a suspect to speak against his will violated due process, even where other evidence showed that the coerced confession was reliable.

Ignoring these cases, Posner discusses only *Rochin v. California*, which held that the Fifth Amendment's due process clause 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 are "too close to the rack and screw." As Posner concedes, if stomach-pumping in a hospital is too close to the rack and screw, most coercive interrogation tactics would seem to be impermissible as well. But he seeks to distinguish the *Rochin* decision from coercive questioning of suspected terrorists primarily on the ground that it involved the investigation of drug smuggling, which he considers a relatively minor crime. He maintains that greater coercion may be permissible where terrorism is the subject of investigation. According to his idea of balance, the greater the value of the information sought, the more coercion we should find acceptable without shocking our conscience. But of course one generally does not know the real value of the information before the coercion is applied; and Posner is talking about interrogations for intelligence-gathering purposes, which are by their nature much more open-ended than investigation of suspected criminals.

There is some limit to Posner's attempts at balancing. He would draw the line at torture, at least as a formal legal matter. But he does not explain why he's willing to draw a bright line there while balancing away all coercion short of torture if the information sought is sufficiently valuable. Moreover, he quickly takes away with one hand what he has given with the other, arguing that "in the present context, [there] is a compelling argument for defining torture extremely narrowly, so that necessary violations of the law against torture do not become routine." That's exactly what John Yoo did for Alberto Gonzales in the now infamous August 2002 Office of Legal Counsel "torture memo," in which Yoo defined the criminal ban on torture extremely narrowly, in order to free the CIA to use harsh interrogation tactics on terror suspects. Yoo claimed that the ban on torture did not, for example, forbid
interrogators to threaten suspects with death, as long as the death threatened was not imminent. Nor did the ban on torture bar US officials from inflicting extreme physical pain, as long as it fell short of the level associated with organ failure or death.

In an earlier book, *Catastrophe: Risk and Response*, which similarly advocated extensive sacrifices of civil liberties in the hope of averting catastrophic attacks, Posner himself convincingly explained why a balancing approach to coercive interrogation is dangerous. There, as here, he drew the line at torture, but failed to offer any rationale for distinguishing torture from lesser forms of coercive interrogation. In *Catastrophe*, Posner argued against creating an exception to the rule against torture, even where necessary to defuse a "ticking time bomb," on the ground that officials would soon press the outer limits 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 extensions." It is, he writes, 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.[3]

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 book.

Here, too, the Constitution does not trust 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 suspect, on themselves, and on society at large. Instead, due process has long been understood to identify certain fundamental rights that are integral to civilized society. One of those is the prohibition on torture and cruel, inhuman, and degrading treatment—a principle reflected in the Geneva Conventions, an international treaty that virtually every nation in the world has ratified, and the Supreme Court's own rulings on due process, which have for decades prohibited coercive interrogation in criminal investigations.

More generally, the problem with Posner's approach is that it does away with the animating idea of the Constitution—namely, that it represents a collective commitment to principles. The genius behind the Constitution is precisely the recognition that "pragmatic" cost-benefit decisions will often appear in the short term to favor actions that may turn out in the long term to be contrary to our own best principles. Just as we may be tempted to smoke a cigarette tonight despite the fact that 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 a humane democratic society. 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 committed ourselves to a set of constitutional constraints on open-ended pragmatic balancing. Posner's view that the Constitution must be bent to the point of sanctioning coercive interrogation and mass warrantless wiretapping reduces the Constitution to a commitment to balance costs and benefits as he (and Attorney General Gonzales) sees them. If that were all there was to it, we would not need a Bill of Rights.
Constitutional theory, in other words, demands more than mere ad hoc balancing. While differing interests and inevitable trade-offs among those interests mean that at some level a balance must be struck between competing claims, constitutional analysis is not an invitation to the freewheeling calculations 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 take precedence over the decisions of democratically elected officials. 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.

In Harlan's view, the balance to be struck is not simply the economist's best estimate of the costs and benefits associated with a particular government practice—that, after all, is what politicians do—but the judge's attempt, informed by text, tradition, precedent, and reason, to identify and enforce those principles that rise above day-to-day cost-benefit analysis. Posner's method would discard the constitutional tradition evoked by Harlan and substitute a balancing approach that he admits ultimately involves the weighing of imponderables, and looks remarkably like the "unguided speculation" Harlan correctly rejected.

Posner's rejoinder 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 situation, in which, as Alberto Gonzales said of the Geneva Conventions, the old rules now appear "quaint" or "obsolete." But each new generation faces unforeseen issues. The advent of modern weapons in the early twentieth century changed war as we know it; so did development of the nuclear bomb. International communism backed by the Soviet Union posed a "new" threat of totalitarian takeover. This is not to deny that there is now a real threat that terrorists may get their hands on weapons of mass destruction. But it is to insist that we should be skeptical of claims that because the threat is in some sense "new," history is irrelevant. The principles developed and applied over two centuries to questions of liberty and security should still be central in guiding us as we address the threats of modern terrorists.

The corollary to Posner's pragmatic and utilitarian balancing approach to the Constitution is that judges should defer to the elected legislators and to government officials acting under orders of the president. Judges have no special expertise in national security, he argues, while the political branches of government do. Decisions invalidating security measures as unconstitutional reduce our flexibility, since they are extremely difficult to change through the political process, and may prevent the government from undertaking some kinds of investigation and interrogation. But the Constitution was explicitly meant to reduce our flexibility by cutting off certain questionable actions by government. Trying terrorist criminals 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 these measures might make the terrorists' task more difficult. But because of our Constitution, they are off limits. The Constitution may not be a "suicide pact," but nor is it a license to do
anything our leaders think on balance might improve our safety.

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." The record suggests otherwise, and it is troubling that Posner ignores it. Congress has largely stood by passively in the face of sweeping assertions of executive power, and when it has intervened, it has either been to give the executive branch more power or to enact toothless symbolic measures that pose no obstacle to the administration. Thus Congress took no action even when President Bush claimed the power to lock up US citizens indefinitely without charges or trial as "enemy combatants"; it took the Supreme Court, in *Hamdi v. Rumsfeld*, to step in and demand due process. Shortly after September 11, Congress passed the Patriot Act, giving the executive broad new powers and reducing judicial oversight, and imposed only a few minor modifications on the administration's initial proposal. Such actions might seem excusable in the intense heat of the moment—but four years later, with plenty of time for deliberation, Congress calmly reenacted the Patriot Act virtually unchanged, just as many of its surveillance provisions were about to expire. Last summer, when Congress passed the McCain Amendment with majorities too large to veto, it seemed to block the president from imposing cruel, inhuman, and degrading treatment on foreign nationals held abroad. But that law included no mechanism for enforcement of violations, and it simultaneously denied prisoners the ability to seek habeas corpus review to challenge such treatment.

The historical record 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, as well as the anti-Communist laws that laid the groundwork for the McCarthy era. Congress took no action to prevent President Roosevelt's internment of Japanese-Americans during World War II. In fact, one is hard-pressed to identify a single instance in which Congress has imposed a significant constraint on the president during a national security crisis.

Most recently, the Republican Congress again proved itself precisely the rubber stamp that Posner says it is not, when it enacted the Military Commissions Act (MCA). The law was a response to the Supreme Court's landmark decision in *Hamdan v. Rumsfeld*, which declared that the tribunals that President Bush created to try alleged war criminals at Guantánamo violated both congressional statutes and the Geneva Conventions. Some Republican senators—especially John McCain and Lindsay Graham—made a big show of standing up to the administration. But they ultimately capitulated, giving the administration almost everything it wanted. In the end, it seemed that the senators' stand was largely for show.

The new law permits the president to try foreign nationals as enemy combatants before military tribunals that will consider coerced testimony, hearsay, and summaries of classified information that the defendant will have no effective opportunity to confront—just as the rules previously struck down by the Supreme Court had permitted. Instead of requiring the president to make US tribunals conform to the Geneva Conventions, Congress simply declared that in its view the procedures fully satisfy the Geneva Conventions. If courts would disagree, we may never know it. Congress insulated its declaration from judicial review by barring anyone from invoking the Geneva Conventions in court 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 of the Geneva Conventions a criminal offense, including any "cruel treatment" of a detainee. Congress has now amended the War Crimes Act to limit its reach to specified "grave breaches" of the law, notably not including all "cruel treatment" of prisoners. Instead, the MCA limits criminal sanctions to those who torture prisoners of war or inflict suffering virtually identical to that associated with torture. As if reflecting the views of John Yoo and Richard Posner, Congress narrowly defined "war crimes" in order to free the CIA to resume its practice of "disappearing" suspected terrorists into undisclosed "black sites"
and subjecting them to harsh interrogation tactics, including long periods of being forced to stand naked in frigid rooms while being doused regularly with ice-cold water.

Finally, the new law seeks to prevent courts from exercising any authority over most aspects of US treatment of war prisoners. 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," a term defined in wholly circular language as anyone found to be an unlawful enemy combatant by a "competent tribunal" established by the president. The cases of such persons are relegated to limited judicial review in the US Court of Appeals for the D.C. Circuit—review that cannot consider claims that the prisoners are being tortured or otherwise abused, and that may not be able to engage in any factual inquiry into whether the prisoners were in fact fighting for the enemy.

Whether the Supreme Court will accept that it has no right to question Congress's rubber stamp of executive power remains to be seen. If it were up to Richard Posner, we could be sure of the result. The Constitution for him is a flexible document; al-Qaeda poses a grave threat; and the courts should defer to the political branches on the balance to be struck. But the Constitution embodies a commitment to principle over ad hoc judgments alleged to be pragmatic, and in particular to the principles of liberty, equality, and dignity, which cannot easily be balanced away. It is precisely because the political branches are so quick to forget this central consideration, 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 will not take the easy road of deference to other branches or the subjective method of open-ended balancing. Whether judges today are willing to stand up for principle against power has become one of the most urgent questions facing our nation.

Notes


[5] As I have argued in these pages, however, many of these shortcuts actually help the terrorists and make us more vulnerable, primarily because of the backlash they create. See "Are We Safer?," The New York Review, March 9, 2006.

Letters

January 11, 2007: Richard Posner, 'How to Skip the Constitution': An Exchange