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WARTIME AMERICA AND *THE WIRE*:
A RESPONSE TO POSNER'S POST-9/11
CONSTITUTIONAL FRAMEWORK

By Dawinder S. Sidhu*

INTRODUCTION

In the groundbreaking legal text *The Common Law*, Justice Oliver Wendell Holmes observed that “[t]he life of the law has not been logic: it has been experience.”¹ Years later, fellow pragmatist Richard A. Posner similarly noted that there is undoubtedly “a considerable residue of cases . . . against which logic and science will be unavailing and practical reason will break its often none-too-sturdy lance.”² “Practical reason,” according to Posner, consists of “anecdote, introspection, imagination, common sense, empathy, imputation of motives, speaker’s authority, metaphor, analogy, precedent, custom, memory, ‘experience,’ intuition, and induction,” among other things.³ It lies, Posner adds, somewhere “[b]etween the extremes of logical persuasion and emotive persuasion.”⁴

Posner, a well-regarded law professor and circuit court judge, is also a prolific scholar who has offered to the academy profound ideas on some of the law’s most vexing problems.⁵ In his recent book, *Not a Suicide Pact: The Constitution in a Time of National Emergency*, Posner presents a “pragmatic response”⁶ to the pressing, unsettled ques-

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¹ OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* 1 (1881).

² RICHARD A. POSNER, *THE PROBLEMS OF JURISPRUDENCE* 78 (1990).

³ *Id.* at 73.

⁴ RICHARD A. POSNER, *LAW AND LITERATURE* 272 (rev. & enlarged ed. 1998).

⁵ See, e.g., Jeffrey Rosen, *Overcoming Posner*, 105 YALE L.J. 581, 610 (1995) (“Richard Posner is the most prolific and creative judge now sitting on the federal bench.”).

⁶ RICHARD A. POSNER, *NOT A SUICIDE PACT: THE CONSTITUTION IN A TIME OF NATIONAL EMERGENCY* 147 (2006) [hereinafter POSNER, *NOT A SUICIDE PACT*]. The pragmatic, individualized character of the book is plain. For example, Posner acknowledges that “constitu-

tion of how national security and constitutional rights should intersect in this perilous, post-9/11 age.⁷ He specifically argues that in a balance between national security and competing constitutional interests such as individual liberty, the former invariably takes precedence during times of war.⁸ Viewed from this lens, Posner indicates that civil libertarians must tolerate security measures—including torture⁹—implemented to protect the homeland from catastrophic terrorist events, even if those measures infringe upon constitutional rights or depart from established legal rules.¹⁰ Posner also contends that the boundaries of executive power are expansive and that the role of the judiciary as a check on the executive is limited in times of war. Surveillance and profiling of Muslims, he argues, is constitutional, as are coercive interrogation techniques. Posner's pragmatic response culminates with the assertion that the Constitution is flexible to the extent that the executive may permissibly invoke a "law of necessity" to authorize extra-constitutional acts.¹¹

This Article challenges *Not a Suicide Pact* by using a single component of practical experience that has factored into legal reasoning: television.¹² In particular, it will invoke various themes from *The Wire*—an HBO series that explores the relationship between the drug

tional theory is inherently subjective," and that constitutional decision-making is informed by "life experience and other personal factors." *Id.* at 26; *see also id.* at 19 ("[I]t comes naturally to [the Justices] to make constitutional law rather than just apply preexisting rules.").

⁷ *See id.* at 125 ("[T]his is not a book about how best to respond to the terrorist threat. It is a book about the limitations that constitutional law places on the government's responses to the threat.").

⁸ *See id.* at 6 ("Rooting out an . . . enemy . . . might be fatally inhibited if we felt constrained to strict observance of civil liberties . . .").

⁹ *See id.* at 86 (arguing that there may be situations in which a president has "the moral and political duty" to authorize torture); *see also id.* at 81 ("[There is] abundant evidence that torture is often an effective method of eliciting true information . . ."); *id.* at 83 ("[A]lmost everyone . . . accepts the necessity of resorting to [torture] in extreme situations."); *id.* at 81 ("[O]nly a die-hard civil libertarian will deny the propriety of using a high degree of coercion to elicit the information.").

¹⁰ *See id.* at 41 ("Civil libertarians . . . are reluctant to acknowledge that national emergencies in general, or the threat of modern terrorism in particular, justify *any* curtailment of civil liberties that were accepted on the eve of the emergency. They deny that civil liberties should wax and wane with changes in the danger level.").

¹¹ *See generally id.* at 111-25, 158.

¹² *See, e.g.,* *Muscarello v. United States*, 524 U.S. 125, 144 n.6 (1998) (Ginsburg, J., dissenting) (quoting an episode of the television series *M*A*S*H*); *id.* at 148 n.11 (referring to the children's television program *Sesame Street*).

trade and law enforcement in Baltimore, Maryland¹³—to demonstrate the problematic nature of the aforementioned arguments set forth in Posner's book.¹⁴

The application of *The Wire* to *Not a Suicide Pact* suggests that the promises of Posner's constitutional framework, however intuitively appealing, are unlikely to be a satisfactory direction of our constitutional development in the post-9/11 world. In particular, this Article argues that liberty and security are not locked in a zero-sum game in which the former must be sacrificed for the latter: Both interests can and must be preserved at all times. This Article further contends that the judiciary must robustly perform its role as a check on the executive in order to safeguard individual rights against possible overreaching, that surveillance and profiling of Muslims absent any evidence of wrongdoing are discriminatory and inconsistent with lessons from America's wartime past, and that the use of torture not only is counterproductive from a security standpoint but also conflicts with the nation's assumed legal obligations. Finally, this Article asserts that the executive has no legal or moral authority to "preserve" the Constitution by breaking its solemn strictures.

As noted above, the post-9/11 liberty-security dynamic is largely undefined in the United States. The use of "enhanced interrogation techniques" and the suitability of civilian courts to try suspected terrorists, for example, remain contentious and unresolved questions.¹⁵

¹³ See generally Home Box Office, *The Wire: About the Show*, <http://www.hbo.com/thewire/about/>.

¹⁴ It is worth noting that *The Wire* has previously been invoked in judicial decisions, see, e.g., *United States v. Fiasche*, 520 F.3d 694, 695 n.1 (7th Cir. 2008); *Twentieth Century Fox Film Corp. v. Cablevision Sys. Corp.*, 478 F. Supp. 2d 607, 615 (S.D.N.Y. 2007), and in academic legal argument, see e.g., D. Marvin Jones, *The Original Meaning of Brown: Seattle, Segregation and the Rewriting of History*, 63 U. MIAMI L. REV. 629, 651 (2009); Ronald J. Krotoszynski, Jr., *The Perils and the Promise of Comparative Constitutional Law: The New Globalism and the Role of the United States in Shaping Human Rights*, 61 ARK. L. REV. 603, 611 (2009); Colin Miller, *Even Better than the Real Thing: How Courts have been Anything but Liberal in Finding Genuine Questions Raised as to the Authenticity of Originals Under Rule 1003*, 68 MD. L. REV. 160, 213 (2008).

¹⁵ Compare George's Bottom Line, <http://blogs.abcnews.com/george/2009/01/obama-on-cheney.html> (Jan. 11, 2009, 9:12 EST) (containing a statement from President Barack Obama that, "Vice President Cheney I think continues to defend what he calls extraordinary measures or procedures and from my view waterboarding is torture. I have said that under my administration we will not torture"), with *Cheney Defends Enhanced Interrogation Techniques* (National Public Radio broadcast May 13, 2009), available at <http://www.npr.org/templates/story/story.php?storyId=104079567&ft=1&f=1001> (quoting Vice President Dick Cheney regarding the Obama administration's ban on the Bush administration's interrogation program as saying, "I

To be sure, Posner's particular attempt in *Not a Suicide Pact* to frame how these and other relevant issues may be examined and perhaps settled serves as a useful contribution to the legal field. This Article aims to offer additional thoughts on the recommended course of constitutional law advanced by Posner, thoughts that may give pause to those initially in agreement with Posner's formulation in *Not a Suicide Pact*. In that sense, this Article, though critical of Posner's proffers, hopes to modestly advance the state of our understanding of national security and individual rights such that the nation may be closer to reaching a consensus on the permissibility and propriety of important post-9/11 policies and programs.

Given Posner's stature in American law, when he speaks, people listen. Unsurprisingly, then, prominent judges, scholars, and others in the legal community responded in short order to *Not a Suicide Pact*.¹⁶ This Article differs from those responses in at least two critical respects. First, Posner penned his book in 2006 with the Bush administration's post-9/11 constitutional model as the canvas for his conversation on civil liberties and wartime governance. While others reacted to *Not a Suicide Pact* during the administration,¹⁷ those efforts may be considered premature, particularly as details of the security techniques employed by the administration and the legal cover prepared by administration attorneys have come to light only after the end of

think that we are stripping ourselves of some of the capabilities that we used in order to block, if you will, or disrupt activities by al-Qaida that would have led to additional attacks."'). Compare Matthew G. Olsen, Executive Director of the Guantanamo Review Detainee Taskforce, Remarks at Georgetown University Law Center Panel Discussion: Are Military Commissions the Right Answer? (Sept. 10, 2009) (noting, as the official responsible for assessing whether over two hundred remaining Guantanamo detainees are to be tried or released, that Article III courts, courts martial, and military commissions are viable options for where Guantanamo detainees may be tried), with Major Jon Scott Jackson, Defense Counsel, Office of Military Commissions, Remarks at Georgetown University Law Center Panel Discussion: Are Military Commissions the Right Answer? (Sept. 10, 2009) (arguing in his personal capacity that military commissions are a "failure" and thus, are not an appropriate forum to administer justice with respect to these detainees).

¹⁶ Reviews of *NOT A SUICIDE PACT* include Stephen Reinhardt, *Weakening the Bill of Rights: A Victory for Terrorism*, 106 MICH. L. REV. 963 (2008); Thomas P. Crocker, *Torture, with Apologies*, 86 TEX. L. REV. 569 (2008); Major Matthew R. Hover, *Not a Suicide Pact: The Constitution in a Time of National Emergency*, 197 MIL. L. REV. 164 (2008); David Cole, *How to Skip the Constitution*, 53 N.Y. REV. BOOKS, Nov. 16, 2006, at 20.

¹⁷ It appears that there are no articles dedicated to exploring *NOT A SUICIDE PACT* in the aftermath of the Bush administration's policies that necessarily formed the landscape for Posner's discussion.

Bush's second term in 2009.¹⁸ With the Bush administration's security efforts and accompanying legal approach behind us, it is now appropriate to consider the merits of Posner's proposed paradigm. Second, aside from timing, the content of this Article is undoubtedly unique in that it extracts information from a source that has garnered praise for its commentary on the law and crime, but that has not yet been comprehensively applied as an instrument to illuminate open areas within the law.

Before discussing how *The Wire* should lead one to reconsider *Not a Suicide Pact*, it would be helpful to briefly introduce the reader to this critically acclaimed show, particularly for those unfamiliar with the series, and examine why *The Wire* is a valuable resource or reservoir of ideas for examining the course of constitutional law urged by Posner.

I. *THE WIRE*

"It's a thin line 'tween heaven and here."¹⁹

– Bubbles, *The Wire*

"Perhaps no city in the United States is more closely identified with drug addiction than Baltimore, Maryland[,]” observed Ellen M. Weber, law professor at the University of Maryland and head of the university's Drug Policy Clinic.²⁰ Although Baltimore has had a long history of widespread drug problems,²¹ reviewing statistics on the city's drug trade in 2002-2003—around when *The Wire* first premiered in mid-2002²²—provides a useful window into the underlying subject matter of the series.

¹⁸ For example, official Bush administration memoranda that have been declassified and released during the Obama administration are providing new and insightful information on the Bush government's security response and related legal views. Some of these documents are discussed in the context of torture, *infra* Part VIII.

¹⁹ *The Wire: Old Cases* (HBO television broadcast June 23, 2002).

²⁰ Ellen M. Weber, *Bridging the Barriers: Public Health Strategies for Expanding Drug Treatment in Communities*, 57 RUTGERS L. REV. 631, 702 (2005).

²¹ See, e.g., William D. McColl, *Baltimore City's Drug Treatment Court: Theory and Practice in an Emerging Field*, 55 MD. L. REV. 467, 478 (1996) (“[F]ifty percent of felony prosecutions in Baltimore City were direct drug offenses, while eighty-five to ninety-five percent of all felony prosecutions were drug-driven offenses . . . [f]ifty-five percent of all murders were drug related.”) (citing THE BAR ASS'N OF BALTIMORE CITY, *THE DRUG CRISIS AND UNDERFUNDING OF THE JUSTICE SYS. IN BALTIMORE CITY* 3 (1990)).

²² The series' first episode was: *The Wire: The Target* (HBO television broadcast June 2, 2002).

A 2003 Grand Jury Charge Committee Report commissioned by the Circuit Court for Baltimore City contained several staggering figures on the degree to which the drug trade factored into the city's existence.²³ According to the court's factual determination, there were "approximately sixty thousand substance abusers in the city, primarily addicted to heroin and cocaine";²⁴ that "equates to about nine percent of city residents needing drug treatment."²⁵ With respect to heroin alone, an Urban Institute Justice Policy Center study ascertained that "Baltimore has the highest concentration of heroin use in the country"²⁶ and that "about forty percent of arrested males and nearly half of arrested females test positive for heroin."²⁷

The report addressed not only pure drug use in the city but also its impact on Baltimore's criminal justice system. The Maryland State's Attorney's Office found that an estimated "5,867 individuals were charged with felony narcotics violations in the City of Baltimore in 2002,"²⁸ which "represents 51.2% of the total number of defendants charged for all felony crimes."²⁹ Moreover, "at least seventy percent of *all* cases heard in the Circuit Court for Baltimore City were directly or indirectly related to drug abuse."³⁰ A Justice Policy Institute study ascertained that "[t]he arrest rate in Baltimore for drug crimes was nearly *triple* the rate for other large U.S. cities, with heroin and cocaine arrests *ten times* the national average."³¹

When it comes to drug-related crime, what is most disturbing is the number of "bodies"—that is, the number of homicides:

²³ GRAND JURY FOR THE CIRCUIT COURT FOR BALTIMORE CITY, GRAND JURY CHARGE COMMITTEE REPORT (Jan. 2003), *available at* http://www.courts.state.md.us/baltgrandjuryreport_03.pdf.

²⁴ *Id.* at *5 (citing NANCY G. LA VIGNE ET AL., URBAN INS. JUSTICE POLICY CTR., A PORTRAIT OF PRISON REENTRY IN MARYLAND, 51-52 (2003), *available at* http://www.urban.org/UploadedPDF/410655_MDPortraitReentry.pdf).

²⁵ *Id.* (citing LA VIGNE ET AL., *supra* note 24, at 52).

²⁶ *Id.* (citing LA VIGNE ET AL., *supra* note 24, at 52).

²⁷ *Id.* at *6 (citing LA VIGNE ET AL., *supra* note 24, at 52).

²⁸ *Id.* at *3.

²⁹ GRAND JURY FOR THE CIRCUIT COURT FOR BALTIMORE CITY, GRAND JURY CHARGE COMMITTEE REPORT, at *5 (Jan. 2003), *available at* http://www.courts.state.md.us/baltgrandjuryreport_03.pdf.

³⁰ *Id.* (citing GRAND JURY FOR THE CIRCUIT COURT FOR BALTIMORE CITY, GRAND JURY CHARGE COMMITTEE REPORT, (Sept. 2002)) (emphasis added).

³¹ *Id.* at *6 (citing JUDITH GREENE & TIMOTHY ROCHE, JUSTICE POLICY INS., CUTTING CORRECTLY IN MARYLAND 13 (Feb. 2003), *available at* http://www.prisonpolicy.org/scans/jpi/cc_md.pdf) (emphasis added).

“[A]pproximately 90% of homicides in Baltimore are drug related.”³² The Baltimore-based Johns Hopkins University published an article noting that, for a decade, the city was home to at least 300 homicides per year and that, in 2002, Baltimore was “the second most violent big city in America” with the murder rate “at *seven times* the national average.”³³

These numbers provide a snapshot of the city that David Simon, a thirteen-year veteran of the *Baltimore Sun*,³⁴ and Edward Burns, a former Baltimore police detective and Baltimore city public school teacher,³⁵ intended to portray when they created *The Wire*.³⁶ The drugs, crime, and resultant law enforcement response are not a loose backdrop for *The Wire* but form the basis for the actual plots and characters in the series. As Simon noted after the series’ fifth and final season aired, “All the things that have been depicted in *The Wire* over the past five years—the crime, the corruption—actually happened in Baltimore The storylines were stolen from real life.”³⁷

The Wire begins by focusing on police efforts to crack down on a major Baltimore drug ring through the use of surveillance technology and street-level interactions.³⁸ As the series unfolds, Simon and Burns delve deeper into the investigation of the Baltimore drug trade while adding into the mix its impact on the city’s blue collar working class and on the political leadership called upon to reduce crime.³⁹ *The Wire* then takes us into the city’s public schools and introduces us to four Baltimore middle-school students contending with the appeal of the “corners,” the street locations at which drugs are sold, and the limited benefits of a broken school system and imperfect family settings.⁴⁰ Finally, the series brings us into the media, commenting on the

³² *Id.* (citing CITY OF BALTIMORE, BALTIMORE CITY POLICE DEPT., HOMICIDE UNIT, GRAND JURY TOUR, (Jan. 24, 2003)).

³³ *Baltimore Finally Has a Reason to Believe*, THE JOHNS HOPKINS NEWS-LETTER, (The Johns Hopkins Univ., Baltimore, Md.), Dec. 6, 2002, available at <http://media.www.jhunewsletter.com/media/storage/paper932/news/2002/12/06/Features/Baltimore.Finally.Has.A.Reason.To.Believe-2247801.shtml> (emphasis added).

³⁴ See Home Box Office, *The Wire: About the Show*, <http://www.hbo.com/thewire/about/>.

³⁵ See *id.*

³⁶ See *id.*

³⁷ *The Wire: Arguably the Greatest Television Programme Ever Made*, DAILY TELEGRAPH, Apr. 2, 2009, available at <http://www.telegraph.co.uk/news/uknews/5095500/The-Wire-arguably-the-greatest-television-programme-ever-made.html>.

³⁸ See Home Box Office, *supra* note 34.

³⁹ See *id.*

⁴⁰ See *id.*

sad state of newspaper journalism and depicting the *Baltimore Sun* as more interested in winning Pulitzer prizes than in reporting the nuanced truth on the ground.⁴¹

Although *The Wire* explores tragedies of individual characters and circumstances throughout its five-season run, perhaps the ultimate tragedy is that the significant drug trade, related crime, ineffective criminal justice approaches, poor schools, and corrupt political practices in a major American city had gone so unnoticed by those outside Baltimore's city limits. Simon explained in 2008 that "[e]verything that you know about *The Wire* up to this point never appeared in the newspaper. . . . Watching a TV drama to get the truth, that's the real joke."⁴² In that sense, *The Wire* functions as a documentary on the city of Baltimore. It informs the blissfully oblivious about the hell that is Baltimore, Maryland.

What converts *The Wire* into an attractive and useful repository of raw information is that it highlights the complexities and realities of law enforcement efforts to curb the serious and seemingly endless criminal, legal, and societal problem of the drug trade. In doing so, *The Wire* knowingly and necessarily draws parallels between the war on drugs and the war on terror, as others have recognized.⁴³ Accordingly, the series' depiction of Baltimore's wide-ranging struggle with this pandemic is a helpful tool by which we may analyze a proposed response to a broader criminal, legal, and social predicament—terrorism.⁴⁴

⁴¹ See *id.*

⁴² Show Tracker: *The Wire*, http://latimesblogs.latimes.com/showtracker/the_wire/ (Mar. 4, 2008, 9:07 PST).

⁴³ See, e.g., Aziz Z. Huq & Christopher Muller, *The War on Crime as Precursor to the War on Terror*, 36 INT'L J.L. CRIME & JUST. 215, 215 (2008) (alluding to *The Wire* in introducing its discussion on the war on crime and the "war on terror"); Robert David Sullivan, *Slow Hand*, THE BOSTON PHOENIX, Aug. 15-22, 2002 ("Series creator [David] Simon, who developed the story line with Edward Burns, isn't the first to express skepticism toward the War on Drugs, but *The Wire* has a fresh resonance because of its implicit parallels to the new War on Terrorism."), available at <http://www.bostonphoenix.com/boston/arts/tv/documents/02394694.htm>; see also Daniel R. Williams, *Who Got Game?* Boumediene v. Bush and the Judicial Gamesmanship of Enemy-Combatant Detention, 43 NEW ENG. L. REV. 1, 2 (2008) (discussing "the game" as it pertains to the drug trade and as it is portrayed in *The Wire*, and noting the comparisons between the war on drugs and the war on terror).

⁴⁴ It should be noted that a number of substantive points emerge from *The Wire* and that while this Article references a defined set of themes from the show, it does not purport to present an exhaustive account of the possible ways in which the series may be applied to NOT A SUICIDE PACT, or to the anti-terrorism debate more generally. Moreover, I readily acknowledge that even those themes which I selected are open to interpretation and may have different mean-

II. COMMON GROUND

“This is what makes a good night on my watch. Absence of a negative.”⁴⁵

– Major Howard “Bunny” Colvin, *The Wire*

On September 11, 2001, nineteen Muslim men hijacked commercial airplanes and used them to attack the World Trade Center and the Pentagon; in all, the attacks killed close to three thousand civilians.⁴⁶ The Supreme Court noted, “Americans will never forget the devastation wrought by these acts.”⁴⁷ The attacks upon the United States triggered a military conflict⁴⁸ and placed the nation under a specter of future acts of terrorism.⁴⁹

ings for others. I have attempted, however, out of an unwavering respect for the creators and through meticulous research, to be as faithful as possible to the purpose of the series as I understand it to be. In working with the editors of this publication, who share my significant interest and appreciation for *The Wire*, I am confident that my understanding of the series is well within reason. To the extent others disagree, it is my hope that this Article may serve as a useful starting point for further conversations on *The Wire* and contemporary issues within the American legal system, including the post-9/11 relationship between national security and individual rights.

⁴⁵ *The Wire: All Due Respect* (HBO television broadcast Sept. 27, 2004).

⁴⁶ See *Hamdi v. Rumsfeld*, 542 U.S. 507, 511 (2004) (“On September 11, 2001, the al Qaeda terrorist network used hijacked commercial airliners to attack prominent targets in the United States. Approximately 3,000 people were killed in those attacks.”).

⁴⁷ *Hamdan v. Rumsfeld*, 548 U.S. 557, 568 (2006).

⁴⁸ On September 18, 2001, Congress authorized the President to “use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks” or “harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.” Authorization for Use of Military Force, Pub. L. No. 107-40, § 2, 115 Stat. 224, 224 (2001). Although it did not formally declare war, Authorization for Use of Military Force (AUMF) arguably “activated the President’s traditional war powers in the conflict against al Qaeda.” David J. Barron & Marty Lederman, *The Commander in Chief at the Lowest Ebb—Framing the Problem, Doctrine, and Original Understanding*, 121 HARV. L. REV. 689, 731 (2008) (citing *Hamdan*, 548 U.S. at 594 (citing *Hamdi*, 542 U.S. at 507 (plurality opinion))). AUMF also “helps satisf[y] modern de jure and de facto requirements for a state of war.” J. Andrew Kent, *A Textual and Historical Case Against a Global Constitution*, 95 GEO. L.J. 463, 536 (2007) (citing Authorization for Use of Military Force, §2). Indeed, President George W. Bush invoked his authority under the AUMF to, among other things, deploy “Armed Forces into Afghanistan to wage a military campaign against al Qaeda and the Taliban regime that had supported it.” *Rasul v. Bush*, 542 U.S. 466, 470 (2004). President Bush also invoked his authority under the AUMF to designate individuals, including Jose Padilla, as “enemy combatants” and thereby hold them in a military—not civilian—detention system. *Rumsfeld v. Padilla*, 542 U.S. 426, 431 (2004).

⁴⁹ See Cass R. Sunstein, *On the Divergent American Reactions to Terrorism and Climate Change*, 107 COLUM. L. REV. 503, 516 (2007) (“In the period shortly after the 9/11 attacks, 88%

There is little doubt that those in charge of the security of the nation were pressed with an awesome responsibility: To keep America safe by thwarting a relatively obscure, scattered, global network of fundamentalists from attacking again. In his memoir, Jack Goldsmith, a former Assistant Attorney General under President George W. Bush, wrote that the administration was “under pressure to stop a second attack by an enemy it couldn’t see and didn’t fully understand,” that the President held the “ultimate obligation” to ensure another attack did not take place, and that the government was “largely in the dark about where or how the next terrorist attack [would] occur.”⁵⁰ David Addington, legal counsel to Vice President Dick Cheney, warned Goldsmith that if a second attack occurred, “the blood of the hundred thousand people who die[d]” would be on his hands.⁵¹ To Goldsmith, then, the success of his efforts and those of his colleagues would be evidenced by “the absence” of a second attack.⁵²

Posner uses the unimaginably dire national situation in which Goldsmith and others were operating as the starting point for his analysis, reminding the reader of the urgent and gripping nature of their task.⁵³ He writes, for example, that “terrorist leaders may even now be regrouping, and preparing an attack that will produce destruction on a scale to dwarf 9/11”⁵⁴ and “wielding nuclear bombs, dirty bombs, biological weapons capable of killing millions of people, or other weapons of mass destruction.”⁵⁵ Posner stresses that the threat of terrorism faced by the United States is very real, and Goldsmith explains that those public servants who assumed the mantle of American security attempted, in good faith and under trying circumstances, to

of Americans believed that it was either very likely or somewhat likely that there would be ‘another terrorist attack . . . within the next few months’—with about half of Americans worrying about the possibility that a family member might ‘become a victim of a terrorist attack,’ and over 40% worrying that ‘terrorist attacks might take place where [they] live or work.’” (quoting PROGRAM ON INT’L POLICY ATTITUDES, AMS. AND THE WORLD, TERRORISM, http://www.americans-world.org/digest/global_issues/terrorism/terrorism_perception.cfm) (alteration in original)).

⁵⁰ JACK GOLDSMITH, *THE TERROR PRESIDENCY* 67-69, 75 (2007).

⁵¹ *Id.* at 71. Similarly, in *The Wire*, an acting police commissioner rather ominously reminds his district commanders that their satisfactory performance is expected regardless of how difficult their tasks on the streets may seem by stating, “[T]he Gods will not save you.” *The Wire: Dead Soldiers* (HBO television broadcast Oct. 3, 2004).

⁵² GOLDSMITH *supra* note 50, at 188.

⁵³ POSNER, *NOT A SUICIDE PACT*, *supra* note 6, at 148.

⁵⁴ *Id.*

⁵⁵ *Id.* at 47.

prevent subsequent terrorist catastrophes from taking place on the homeland.⁵⁶

There can be little doubt that security branches of the government are faced with an outstanding duty for which the only measure of success may be “nothing”—that is, the non-existence of an event. Such was the case with the Baltimore law enforcement community’s response to the war on drugs in *The Wire*.⁵⁷ In one particularly telling scene, when the city police’s creative and frustrated efforts to cripple the drug trade are coming to a head, a police officer attempting to effectuate a drug bust is shot by his criminal targets.⁵⁸ The officer’s commander, Howard “Bunny” Colvin, learns of the shooting in the middle of the night, and shortly thereafter reflects, “Tonight is a good night. Why? Because my shot cop didn’t die. And it hit me . . . This is what makes a good night on my watch: Absence of a negative.”⁵⁹ Whether in the war on terror or the war on drugs, the powers that be may be oddly reassured by non-existence of anything “bad” occurring during their tenure.

What must be disputed is not the starting point of Posner’s analysis, but his logical progression.⁶⁰ For starters, Posner makes two improvident leaps from the accepted propositions that the terrorist dangers to America are clear and that the security arm of the American government is performing a daunting task. First, he argues that identifying whether security responses to 9/11 are constitutional requires a straight balancing of civil liberties and security.⁶¹ Second, he effectively contends that ensuring security is more important than

⁵⁶ See GOLDSMITH *supra* note 50, at 175 (“Despite our many fights, and despite what I view as [Addington’s] many errors of judgment, large and small, I believe he acted in good faith to protect the country.”).

⁵⁷ See *The Wire: All Due Respect* (HBO television broadcast Sept. 27, 2004).

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ See, e.g., Richard A. Clarke, *The Trauma of 9/11 is No Excuse*, WASH. POST, May 31, 2009, available at <http://www.washingtonpost.com/wp-dyn/content/article/2009/05/29/AR2009052901560.html> (rejecting the notion that the trauma of 9/11 and the high-level responsibilities that arose from the attacks justify the government’s response to the terrorist threat).

⁶¹ Posner argues that the terrorist attacks of 9/11 have created an opportunity in which the balance between liberty and security must be modified. “The challenge,” he writes, “is to [strike at] the balance between liberty and safety.” POSNER, NOT A SUICIDE PACT, *supra* note 6, at 31. Posner also noted that “[a] national emergency, such as war, creates disequilibrium in the existing system of constitutional rights.” *Id.* at 147.

safeguarding civil liberties.⁶² Put differently, according to Posner, the post-9/11 world requires a balancing of civil liberties and security responses which must come out in favor of enhancing security at the cost of limiting liberty.

III. THE ZERO SUM GAME

“No one wins. One side just loses more slowly.”⁶³

– Roland “Prez” Pryzbylewski, *The Wire*

Posner suspects that Supreme Court Justices generally “base their decisions on a balancing of anticipated consequences, pro and con.”⁶⁴ In *Not a Suicide Pact*, he explores one particular type of judicial balancing: The extent to which “civil liberties based on the Constitution should be permitted to vary [based on] the threat level.”⁶⁵ Posner suggests that “readjustment[s]” between liberty and security occur “from time to time as the weights of the respective interests change.”⁶⁶ The terrorist attacks of 9/11, according to Posner, demand a recalibration of the “constitutional balance between liberty and safety.”⁶⁷ In short, in the context of post-9/11 America, Posner believes that “the proper way to think about constitutional rights in a time such as this is in terms of the metaphor of a balance.”⁶⁸ An important consequence of this balancing paradigm is that it necessarily presumes that tipping the balance to enhance one side must harm the other. Posner admits this, stating, “The scope of governmental power to take actions to protect national security is the reciprocal of the individual’s rights to liberty and privacy.”⁶⁹

Relatedly, throughout *Not a Suicide Pact*, Posner describes the debate about the relationship between liberty and security as a purely

⁶² That liberty must recede in the post-9/11 climate is an effective afterthought in the Posner analysis. Posner’s inquiry therefore boils down to the extent to which liberty must wane. See *id.* at 50-51 (“[T]he relevant question is not whether curtailing civil liberties imposes costs, to which the answer is obvious; it is whether the costs exceed the benefits.”).

⁶³ *The Wire: Refugees* (HBO television broadcast Oct. 1, 2006).

⁶⁴ POSNER, *NOT A SUICIDE PACT*, *supra* note 6, at 28.

⁶⁵ *Id.* at 7.

⁶⁶ *Id.* at 148; see also *id.* at 152 (“Constitutional law is a looser garment, continually rewoven by Supreme Court Justices mindful (one hopes) of the need to balance security and liberty concerns as the weights of these concerns shift.”).

⁶⁷ *Id.* at 148.

⁶⁸ *Id.*

⁶⁹ *Id.* at 8.

bifurcated tussle between two players: civil libertarians and national security hawks.⁷⁰ He appears to do this, at least in part, to simplify the discussion and to label and criticize, with greater ease, any who express concerns for liberty in times of war. Posner defines civil libertarians as those who believe that: (1) “[T]he Constitution is about protecting individual rights rather than about promoting community interests”;⁷¹ (2) “[P]ast curtailments of civil liberties were gratuitous responses to hysterically exaggerated fears”;⁷² (3) The Bush administration abused civil liberties without any evidence;⁷³ (4) “[G]overnment always errs on the side of exaggerated threats to national security;”⁷⁴ (5) The current threat is exaggerated, and post-9/11 security measures require no changes in order to adequately cope with the current threat;⁷⁵ and (6) Any curtailment of civil liberties during an emergency will continue once the emergency has passed,⁷⁶ and, thus, any curtailment of civil liberties will lead to a “slippery slope.”⁷⁷

The zero-sum game frame of reference, however sensible on its face when two parties are in apparent opposition, does not comport with the complex realities of actual law enforcement. *The Wire* illustrates the folly of using a win-loss scorecard in the wartime context. Baltimore City public middle school teacher and former City police officer Roland “Prez” Pryzbylewski, comments on the plight of urban Baltimore’s war on drugs.⁷⁸ He states that tradeoffs between seemingly competing interests do not yield a positive result for one side but rather degrade both to different degrees, thereby permitting the impression that one side is a legitimate beneficiary of any exchanges between the two.⁷⁹ For example, the Baltimore City police invested significant resources and time into infiltrating drug camps, only to capture mid-level operatives and low-end dealers who shield those higher in the food chain from prosecution by “taking” charges and not

⁷⁰ See POSNER, NOT A SUICIDE PACT, *supra* note 6, at 67.

⁷¹ *Id.* at 41-42.

⁷² *Id.* at 42.

⁷³ See *id.* at 47.

⁷⁴ *Id.* at 42.

⁷⁵ *Id.*

⁷⁶ POSNER, NOT A SUICIDE PACT, *supra* note 6, at 47 (“[Civil libertarians] are also being inconsistent, for they consider the post-9/11 security measures particularly ominous because the struggle against terrorism may never end.”).

⁷⁷ *Id.* at 44.

⁷⁸ *The Wire: Refugees* (HBO television broadcast Oct. 1, 2006).

⁷⁹ *Id.*

“snitching” or divulging information about others in the enterprise; these bottom-drawer dealers will simply be replaced by other “soldiers.”⁸⁰ Although removing some dealers from the streets may suggest that the police have hurt the drug trade, in truth they have only temporarily interrupted the normal operations of the drug ring and, in the process, diverted its attention from more productive techniques.⁸¹ In short, there is no outright winner.

Just as the loss by one side in *The Wire* does not translate into an actual gain to the other, liberty and security in the post-9/11 America are not necessarily mired in a zero-sum game. Our liberties, for instance, would certainly wane if al Qaeda used weapons of mass destruction to kill innocent civilians on American soil, but security programs and practices may just as surely threaten to erode individual liberties.⁸² Accordingly, Posner’s “either-or” proposition wrongly implies that the people must choose between safety and individual rights; by doing so, it condones Posner’s preferred option, that security may be maintained at the expense of civil liberties.

As the National Commission on Terrorist Attacks Upon the United States (9/11 Commission) noted, “The choice between security and liberty is a *false* choice.”⁸³ On one hand, as the 9/11 Commission observed, “[N]othing is more likely to endanger America’s liberties than the success of a terrorist attack at home.”⁸⁴ On the other, “[I]f our liberties are curtailed, we lose the values that we are struggling to defend.”⁸⁵

The latter concern has resounded in the post-9/11 Supreme Court. In 2004, the Court made clear that “[i]t is during our most challenging and uncertain moments that . . . we must preserve our

⁸⁰ See *The Wire: Old Cases* (HBO television broadcast June 23, 2002).

⁸¹ See e.g., *The Wire: One Arrest* (HBO television broadcast July 21, 2002) (demonstrating that, when a street-level dealer is arrested with a large quantity of drugs, the Barksdale gang stops doing business over pay-phones; otherwise, it continues dealing drugs as normal).

⁸² For example, the use of torture, the indefinite detention of individuals without formal charge, warrantless domestic surveillance of Americans, and blanket profiling of Muslims and those perceived to be Muslim may be part of a security response, but may diminish individual liberties. More specifically, these security practices suggest that several American values and constitutional protections may be compromised, including an insistence on humane treatment for all, habeas rights, providing due process in the deprivation of liberty, Fourth Amendment’s prohibitions on warrantless searches, and equality under the law.

⁸³ NAT’L COMM’N ON TERRORIST ATTACKS UPON THE U.S., *THE 9/11 COMMISSION REPORT* 395 (2004) (emphasis added), available at <http://www.9-11commission.gov/report/>.

⁸⁴ *Id.*

⁸⁵ *Id.*

commitment at home to the principles for which we fight abroad.”⁸⁶ It is also shared by those in the security community. For example, Royce C. Lamberth, the presiding judge of the United States Foreign Intelligence Surveillance Court (FISA Court) at the time of 9/11 and current chief judge of the U.S. District Court for the District of Columbia, advised that, “We have to understand you can fight the war [on terrorism] and lose everything if you have no civil liberties left when you get through fighting the war.”⁸⁷ He further pointed out that the FISA Court has “worked to protect civil liberties while protecting the country itself. The judges asked themselves: Are we going to lose our liberties if we approve this kind of surveillance?”⁸⁸ Indeed, Tom Ridge, the first head of the Department of Homeland Security—the agency formed after 9/11 to assemble relevant information from federal, state, and local governmental bodies to detect and dismantle terrorist operations—noted in his farewell remarks to the Pennsylvania General Assembly, “We must reject the false choice of liberty versus security. We can and must have both. We will be safe. And we will not let the terrorists change our essential way of life.”⁸⁹ Edwin Meese, Attorney General of the United States during the Cold War, likewise remarked after 9/11, “Government’s obligation is a dual one: to protect civil safety and security against violence and to preserve civil liberty. *This is not a zero-sum game.*”⁹⁰ The nation’s ability to serve the “dual” interests of national security and individual rights refutes Posner’s insistence that a balancing test must be employed.⁹¹

⁸⁶ *Hamdi v. Rumsfeld*, 542 U.S. 507, 532 (2004) (citing *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 164-65 (1963)).

⁸⁷ Michael J. Sniffen, *Ex-Surveillance Judge Criticizes Warrantless Taps*, WASH. POST, June 24, 2007, at A07, available at <http://www.washingtonpost.com/wp-dyn/content/article/2007/06/23/AR2007062301125.html>.

⁸⁸ Mary Jo Patterson, *A View from Inside the FISA Court*, THE STAR-LEDGER, Aug. 21, 2005, available at <http://www.nj.com/news/ledger/index.ssf?/news/ledger/stories/patriotact/insidefisa.html>.

⁸⁹ *Federally Speaking* (W. Pa. Chapter of the Fed. Bar Ass’n & Allegheny County Bar Ass’n, Pittsburgh, Pa.) at 1, available at <http://www.pawd.uscourts.gov/Documents/Misc/fsp09.pdf>.

⁹⁰ Edwin Meese, *Patriot Act’s Bum Rap*, WASH. TIMES, July 8, 2004, at A17 (emphasis added), available at <http://www.washingtontimes.com/news/2004/jul/07/20040707-090159-8291r/print/>.

⁹¹ Both the security of the people and the principles to which the American people subscribe can be upheld in concert. Allow me to use the security practices noted in footnote 82 as the operative examples. Regarding torture, interrogation techniques that do not rise to the level of torture may be used to extract information from detainees; as to indefinite detention of detainees, such detainees should proceed through some civilian or quasi-legal system that safe-

The concept that a secure nation may be maintained and individual rights simultaneously preserved dates back before 9/11. In 1962, Chief Justice Earl Warren declared that “as always, the people, no less than their courts, must remain vigilant to preserve the principles of our Bill of Rights, lest in our desire to be secure we lose our ability to be free.”⁹² In fact, the concept extends to the time of the Framers, men fresh from their experiences with the oppressive King George III who were intent on creating a lasting experiment in political order that derived its powers from the consent of the governed. Benjamin Franklin, an elder statesman among them, famously wrote in a letter to a state official, “Those who would give up essential Liberty, to purchase a little temporary Safety, deserve neither Liberty nor Safety.”⁹³

Furthermore, Posner’s dichotomy of civil libertarians and national security hawks serves as an inaccurate representation of the manner in which the debate regarding liberty and security actually takes place. One cannot reasonably claim that the 9/11 Commission, which was composed of former lawmakers, judges, and others of different political stripes—a former presiding judge of the FISA court and Reagan-appointee to the federal bench, an attorney general appointed by and who worked directly under President Reagan, a former chief justice, a principal American Revolutionary of the very system of governance in which we now live—was a group of either civil libertarians or national security hawks. Rather, just like Posner, they were quite simply Americans interested in the welfare of the nation.⁹⁴

guards classified information while still providing them with basic legal rights to ensure a fair and just trial; concerning surveillance, information gathering in America may take place pursuant to tailored warrants provided by a specialized national security court or the existing FISA court; and lastly regarding profiling, intelligence measures should rely on evidentiary behavior, not race or religion, as the touchstone for a finding that an individual should be subject to additional scrutiny.

⁹² Earl Warren, *The Bill of Rights and the Military*, 60 A.F. L. REV. 5, 27 (2007) (article was delivered as the third James Madison Lecture at the New York University Law Center on February 1, 1962).

⁹³ Respectfully Quoted: A Dictionary of Quotations Requested from the Congressional Research Service 73 (Suzy Platt ed., 1989) (quoting Benjamin Franklin, Pennsylvania Assembly: Reply to the Governor (Nov. 11, 1775), in 6 THE PAPERS OF BENJAMIN FRANKLIN, at 242 (Leonard W. Labaree ed., 1963), available at <http://www.bartleby.com/73/1056.html>).

⁹⁴ It is ironic that Posner would resort to the use of such broad labels in the first instance. In previous works, Posner decried the invocation of value-laden sentiments precisely because they serve merely as restatements of one’s views and therefore do not enrich or advance the legal debate at hand. See generally Dawinder S. Sidhu, *The Immorality and Inefficiency of an Efficient Breach*, 8 TRANSACTIONS: TENN. J. BUS. L. 61, 81-82 (2006) (summarizing Richard A.

Positioning the debate as one between civil libertarians and aggressive defenders of national security programs is problematic not only in its characterizations but also in its practical consequences with respect to formulating relevant policy. To assign certain recommendations to a civil libertarian or national security camp will legitimize the two-camp system to which all policymakers are assigned and soil those very substantive ideas with preconceived, fixed notions regarding what the recommendations entail. The ultimate result will be a reflexive support or disdain for the ideas, and policymaking will be robbed of an open, impartial, and thorough discussion process.

Daniel B. Prieto, Director of the Independent Task Force on Civil Liberties and National Security at the Council on Foreign Relations, notes, “[I]ssues of national security and civil liberties are akin to theological issues. That is, opinions are so strongly held that they are non-negotiable.”⁹⁵ As a result, “Divides over national security and civil liberties have become so deep that they stand in the way of America’s ability to forge a critical national foreign policy consensus on how to deal with the strategic challenge of transnational terrorism and defeat al Qaeda.”⁹⁶ Prieto adds, “[A]lthough security considerations and civil liberties protections are often in tension, the two need not exist in zero-sum, something that is too readily implied when policymakers discuss the need to balance security and civil liberties.”⁹⁷

Robert Chesney, who served on the Detainee Policy Task Force, describes the real-life problems of a polarized debate with respect to the government’s detention policy. He writes, “[T]he national dialogue has been dominated by a pair of dueling narratives that together reduce the space available for nuanced, practical solutions that may require compromise from both camps.”⁹⁸ Put differently, “[T]he public receives the message that detention policy . . . involves a binary choice between black-and-white alternatives, with apocalyptic stakes.

Posner, *The Problematics of Moral and Legal Theory*, 111 HARV. L. REV. 1637 (1998), and POSNER, *THE PROBLEMS OF JURISPRUDENCE*, *supra* note 2, in so far as Posner addresses the unhelpfulness of making value judgments in legal argument).

⁹⁵ DANIEL B. PRIETO, COUNCIL ON FOREIGN RELATIONS, *WAR ABOUT TERROR: CIVIL LIBERTIES AND NATIONAL SECURITY AFTER 9/11 2* (2009), available at http://www.cfr.org/content/publications/attachments/Civil_Liberties_WorkingPaper.pdf.

⁹⁶ *Id.* at 6.

⁹⁷ *Id.*

⁹⁸ Robert Chesney, *A Detention Debate in Black and White*, WASH. POST, Sept. 12, 2009, available at <http://www.washingtonpost.com/wp-dyn/content/article/2009/09/09/AR2009090902214.html>.

The net effect is to shrink the political space within which reasonable, sustainable policies might be crafted with bipartisan support.”⁹⁹ As a result, the possibility of achieving a resolution over the detention policy diminishes: “The path to sound and sustainable detention policy almost certainly will require compromises and a willingness to incur political risk at both ends of Pennsylvania Avenue; however, today’s culture of distrust and polarization makes this far more difficult than it needs or ought to be.”¹⁰⁰

If Posner continues to insist that post-9/11 homeland policies are decided by pushes and pulls between civil libertarians and national security hawks as they trade off liberty for security and vice versa, one side may appear to realize a short-term gain, as *The Wire*’s Prez observed with respect to the war on drugs. But with an absence of a cohesive perspective that embodies liberty and safety considerations and that is the product of meaningful, flexible debate, those who will ultimately suffer both in the present and in the eyes of posterity are the American people.

IV. RIGGING THE GAME

“Juking the stats.”¹⁰¹

– Roland “Prez” Pryzbylewski, *The Wire*

In *Not a Suicide Pact*, Posner not only presents an unhelpful balancing scheme between liberty and security, a contest that is attended only by civil libertarians and hawkish security folks, but then also stacks the deck against the preservation of liberty such that security will invariably be dominant and liberty must consequently give way.¹⁰² In particular, Posner posits that in times of war, greater weight is to be placed on security measures due to the heightened interest in protecting the homeland. He writes, “In times of danger, the weight of concerns for public safety increases relative to that of liberty concerns, and civil liberties are narrowed.”¹⁰³ He continues, “[A] decline in

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *The Wire: Know Your Place* (HBO television broadcast Nov. 12, 2006).

¹⁰² Posner discusses the fate of several individual liberties, including freedom from torture, surveillance, airport profiling, and chilled religious speech, which will be examined, *infra* Parts VI, VIII.

¹⁰³ POSNER, *NOT A SUICIDE PACT*, *supra* note 6, at 9.

security causes the balance to shift against liberty,”¹⁰⁴ and “the more endangered we feel, the more weight we place on the interest in safety.”¹⁰⁵

Moreover, according to Posner, elevating security concerns above liberty interests may be necessary to ward off future terrorist activity. He speculates that “[a] minor curtailment of present civil liberties, to the extent that it reduces the probability of a terrorist attack, reduces the likelihood of a major future curtailment of those liberties.”¹⁰⁶ Otherwise, “rooting out” the enemy “might be fatally inhibited if we felt constrained to strict observance of civil liberties.”¹⁰⁷ From the government’s point of view, Posner simply notes, “[I]t is better to be safe than sorry.”¹⁰⁸

Prez and others in *The Wire* often expressed their disappointment with the concept of “joking the stats.”¹⁰⁹ This refers to a situation in which the powers that be—police commanders, high-level public school officials, or politicians—would manipulate perspectives or information to ultimately achieve a predetermined, preferred outcome.¹¹⁰ It refers to the rigging of the system; it is result-oriented decisionmaking by those at the top of the power structure to the detri-

¹⁰⁴ *Id.* at 46-47.

¹⁰⁵ *Id.* at 148.

¹⁰⁶ *Id.* at 46.

¹⁰⁷ *Id.* at 6.

¹⁰⁸ *Id.* at 45.

¹⁰⁹ See *The Wire: The Wire* (HBO television broadcast July 7, 2002); see also *The Wire: Misgivings* (HBO television broadcast Nov. 19, 2006) (involving an example of “joking the stats” where students were “taught” the standardized test, rather than the underlying skills, to ensure satisfactory test scores so as to indicate high teaching quality and student achievement).

¹¹⁰ *The Wire* co-creator David Simon expressed his views on the concept of “joking the stats”:

You show me anything that depicts institutional progress in America, school test scores, crime stats, arrest reports, arrest stats, anything that a politician can run on, anything that somebody can get a promotion on. And as soon as you invent that statistical category, 50 people in that institution will be at work trying to figure out a way to make it look as if progress is actually occurring when actually no progress is In the same way that a police commissioner or a deputy commissioner can get promoted, and a major can become a colonel, and an assistant school superintendent can become a school superintendent, if they make it look like the kids are learning, and that they’re solving crime. And that was a front row seat for me as a reporter. Getting to figure out how the crime stats actually didn’t represent anything, once they got done with them.

See generally Bill Moyers *Journal*, Interview with David Simon (PBS television broadcast Apr. 17, 2009) [hereinafter PBS-Simon Interview], available at <http://www.pbs.org/moyers/journal/04172009/transcript1.html>.

ment of those stakeholders with little or no bargaining ability.¹¹¹ For example, in an effort to appease the city's political leadership and the public to which the politicians were accountable, the high-level police officials implemented a strategy to increase the absolute number of arrests; in essence, they manufactured the impression that they were making a dent in city crime.¹¹² Although the number of arrests did increase, the arrests were of minor users and offenders; as such, police resources were drawn away from infiltrating the primary sources of the city's drug and related crime problems.¹¹³ Even when the police furnished statistics that supported the suggestion that they were successful in addressing crime, in actuality the drug camp was unfazed and the public remained vulnerable to widespread drug trafficking and associated criminal activities.¹¹⁴ The campaign, though successful on its face, was in truth ineffective and counterproductive.

Just as information could be "joked" to support a self-fulfilling outcome in *The Wire*, legal commentators recognize that the constitutional equation suggested by Posner is not objectively calibrated, but instead will yield only one pre-determined answer: Civil liberties must defer to security programs or policies. David Cole of the Georgetown University Law Center observed that "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."¹¹⁵ Two others criticize Posner's law and economics approach to security issues because his "method works largely through a cost-benefit analysis where equality and antisubordination never quite measure up to the concerns against

¹¹¹ As reflected in Simon's comments, PBS-Simon Interview, *supra* note 110, the illegitimate furtherance of a goal by the powerful and the simultaneous disservice to the powerless spans various contexts of *The Wire*, from the schoolhouse, to the police station, to city hall. It is also consistent with the operations of the drug trade. See *The Wire: Final Grades* (HBO television broadcast Dec. 10, 2006) (including a soliloquy by Preston "Bodie" Broadus, a lower-level drug dealer, in which he comments on his steadfast loyalty to senior drug bosses and their reluctance to reciprocate: "This game is rigged, man.").

¹¹² See, e.g., *The Wire: Time After Time* (HBO television broadcast Sept. 19, 2004).

¹¹³ See, e.g., *The Wire: Straight and True* (HBO television broadcast Oct. 17, 2004).

¹¹⁴ See, e.g., *The Wire: Moral Midgetry* (HBO television broadcast Nov. 14, 2004).

¹¹⁵ David Cole, *The Poverty of Posner's Pragmatism: Balancing Away Liberty After 9/11*, 59 STAN. L. REV. 1735, 1737 (2007) (book review).

which they are being measured.”¹¹⁶ Similarly, another commentator writes that Posner’s “method . . . tilts in the favor of security more often than not.”¹¹⁷

In proposing that post-9/11 constitutional questions implicating the security of the nation be reduced to a balancing of purportedly competing interests, Posner offers a mechanism that is not only faulty in design, as both security and liberty can be simultaneously managed, but also troublesome in its application, as security invariably subjugates other constitutional interests, specifically individual rights. Accordingly, Posner’s recommendation is consistent with the “rigging” exhibited and discredited in *The Wire*—giving the impression of an objective approach to produce a pre-determined outcome, but in essence depriving the people of a legitimate debate on the proper relationship between national security and individual rights.

V. EXECUTIVE AUTHORITY

“The king stay the king.”¹¹⁸

– D’Angelo Barksdale, *The Wire*

Thus far, Posner has argued that constitutional questions implicating national security are to be decided through a balancing of liberty and security, whereby security invariably is the prevailing American interest. What role does Posner envision for the courts—the institution charged with preventing the executive from encroaching on the Constitution—in his balancing scheme? In short, for Posner, it is one of judicial abdication.

Himself an appellate judge, Posner claims the courts are incompetent to perform their function as arbiters of the law in national security cases and, thus, effectively asks judges to trust those advancing the security programs or policies under review. In particular, he writes that judges “[know] little about the needs of national security” and thus will be “unlikely” to substitute their judgment for “that of the executive branch.”¹¹⁹ For example, in the context of indefinite

¹¹⁶ Mario L. Barnes & F. Greg Bowman, *Entering Unprecedented Terrain: Charting a Method to Reduce Madness in Post-9/11 Power and Rights Conflicts*, 62 U. MIAMI L. REV. 365, 387 (2008).

¹¹⁷ Jarrod Stuard, Book Review, 39 N.Y.U. J. INT’L L. & POL. 475, 504 (2006) (reviewing POSNER, NOT A SUICIDE PACT, *supra* note 6).

¹¹⁸ *The Wire: The Buys* (HBO television broadcast June 16, 2002).

¹¹⁹ POSNER, NOT A SUICIDE PACT, *supra* note 6, at 9.

detention, Posner candidly states that “the greater the *perceived* terrorist menace, the greater will be, and should be, the judges’ inclination to resolve doubts in favor of detention and its continuation unless and until the danger diminishes significantly.”¹²⁰ Moreover, Posner claims that it is Congress that should serve as the more effective check on executive authority.¹²¹

In the third episode of *The Wire*, the writers created a scene that co-creator David Simon called the “preamble” of the series.¹²² In it, D’Angelo Barksdale, a mid-level operative in a major Baltimore drug ring led by his cousin, teaches two “hoppers” (younger, low-level dealers) how to play the game of chess, using characters in “the game” (the code within the drug universe) as reference points the youngsters would understand.¹²³ Barksdale explains that the pawns are like the “soldiers,” the loyal low-level dealers on “the front lines.”¹²⁴ The pawns, Barksdale continues, can become queens if they proceed to the other end of the chessboard; however, pawns do not survive long and are killed off by way of jail or death—in Barksdale’s words, the pawns “get capped quick,” and they are “out of the game early.”¹²⁵ Accordingly, without any rivals, “the king stay the king.”¹²⁶ Simon states that the scene is a comment on the stratified system in which “nobody moves” and “there is no improvement in anyone’s station.”¹²⁷ As those on the bottom possess insufficient power to correct those at the top, and given the absence of any moderating agents of comparative power, the king remains in full control.

The existence of an all powerful monarch is fundamentally what the American constitutional tradition seeks to avoid. It is one of checks and balances—the existence of co-equal branches of government empowered to prevent impermissible overreaching by the other two. As James Madison, quoting Montesquieu, declared in *Federalist* No. 47, “There can be no liberty where the legislative and executive

¹²⁰ *Id.* at 66 (emphasis added).

¹²¹ *See id.* at 150 (“Congress knows more about national security and so may perform a more effective checking function on the president than the courts are able to do.”).

¹²² PBS-Simon Interview, *supra* note 110.

¹²³ *The Wire: The Buys* (HBO television broadcast June 16, 2002).

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ PBS-Simon Interview, *supra* note 110.

powers are united in the same person, or body of magistrates.”¹²⁸ The Supreme Court has echoed this concept, stating, “The Constitution sought to divide the delegated powers of the new federal government into three defined categories, legislative, executive, and judicial”¹²⁹ and “[e]ven a cursory examination of the Constitution reveals . . . that checks and balances were the foundation of a structure of government that would protect liberty.”¹³⁰ Justice Robert H. Jackson—a man whose words on the interplay of liberty and security from the mid-twentieth century have come to be viewed as highly instructive in today’s post-9/11 America¹³¹—understood that the purpose of separating federal power into three co-equal parts was to “diffus[e] power the better to secure liberty.”¹³² Put differently by the full Court decades later, “[T]he greatest security against tyranny . . . lies . . . in a carefully crafted system of checked and balanced power within each Branch.”¹³³

Constitutional scholar Akhil Reed Amar has perhaps described the constitutional design most clearly: “The structure of separation of powers . . . protects constitutional values by providing three separate, overlapping, and mutually reinforcing remedies—legislative, executive, and judicial—against unconstitutional federal conduct.”¹³⁴ This structure calls for the active participation of each branch; otherwise, a branch asleep at the switch may permit the others to infringe upon the liberty of the people and thus degrade the entire republic. As Alexan-

¹²⁸ THE FEDERALIST NO. 47 (James Madison); *see also* THE FEDERALIST NO. 51 (James Madison) (“[T]he great security against a gradual concentration of the several powers in the same department, consists in giving to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others This policy of supplying, by opposite and rival interests, the defect of better motives, might be traced through the whole system of human affairs, private as well as public. We see it particularly displayed in all the subordinate distributions of power, where the constant aim is to divide and arrange the several offices in such a manner as that each may be a check on the other”). This was a viewpoint seemingly followed in practice by the Framers. *See e.g.*, DAVID McCULLOUGH, 1776 80 (Simon & Schuster 2005) (discussing George Washington’s decision to confer with Congress regarding the extent of his powers, as Washington “was not fond of ‘stretching’ his powers;” opining that it was Washington’s “sensitivity to and respect for the political ramifications of his command” that made him such a remarkable political general).

¹²⁹ *INS v. Chadha*, 462 U.S. 919, 951 (1983).

¹³⁰ *Bowsher v. Synar*, 478 U.S. 714, 722 (1986).

¹³¹ *See, e.g.*, Eric L. Muller, *12/7 and 9/11: War, Liberties, and the Lessons of History*, 104 W. VA. L. REV. 571, 592 (2002) (“Justice Jackson’s instruction from sixty years ago must guide our steps today.”).

¹³² *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring).

¹³³ *Mistretta v. United States*, 488 U.S. 361, 381 (1989).

¹³⁴ Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1504 (1987).

der Bickel wrote, "Our government consists of discrete institutions, but the effectiveness of the whole depends on their involvement with one another, on their intimacy, even if it often is the sweaty intimacy of creatures locked in combat."¹³⁵ This is particularly true in the context of wartime decisions. As the 9/11 Commission noted in this respect, a "shift of power and authority to the government calls for an *enhanced* system of checks and balances to protect the precious liberties that are vital to our way of life."¹³⁶ Justice Holmes's colleague on the Supreme Court, Justice Louis D. Brandeis, similarly said, "Experience should teach us to be *most on our guard* to protect liberty when the government's purposes are beneficent."¹³⁷ More recently, Justice Sandra Day O'Connor memorably wrote in 2004 that "a state of war is not a blank check for the President."¹³⁸

With respect to Posner's proposition that Congress be an energetic check on the executive in wartime situations, the constitutional concept of the separation of powers among three co-equal branches does not contemplate that Congress alone or primarily be entrusted to protect the people from improper federal conduct. Indeed, in *Federalist* No. 78, Alexander Hamilton declared that "the courts were designed to be an intermediate body between the people and the legislature, in order, among other things, to keep the latter within the limits assigned to their authority."¹³⁹ Thus, it is only through the robust performance of the respective functions of *each* arm of the federal government that the nation as a whole may properly move forward in times of peace as well as uncertainty.¹⁴⁰

Posner's view of the judiciary's function in national security cases hardly reflects the notion that the courts are an essential part of the checks and balances constitutional design. By suggesting that judges should respond not to the law and the proven facts of a particular case

¹³⁵ ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 261 (Yale Univ. Press 2d ed. 1986) (1962).

¹³⁶ NAT'L COMM'N ON TERRORIST ATTACKS UPON THE U.S., *THE 9/11 COMMISSION REPORT* 191 (2004) (emphasis added); *but see* POSNER, *NOT A SUICIDE PACT*, *supra* note 6, at 149 ("[T]he cornerstone of judicial interpretation of the Constitution in emergency situations . . . is judicial modesty.").

¹³⁷ *Olmstead v. United States*, 277 U.S. 438, 479 (1928) (Brandeis, J., dissenting) (emphasis added).

¹³⁸ *Hamdi v. Rumsfeld*, 542 U.S. 507, 536 (2004).

¹³⁹ *THE FEDERALIST* NO. 78 (Alexander Hamilton); *see also id.* ("The interpretation of the laws is the proper and peculiar province of the courts.").

¹⁴⁰ *See* BICKEL, *supra* note 135, at 261.

but rather to *perceptions* of threats, Posner would have the judiciary limit its role due to threats that may be speculative and inherently subjective. Moreover, these perceptions of threats will be projected by the very party purportedly seeking to counter the threats. The judge's decision may as well be determined by the government's color-coded threat chart.¹⁴¹

Rather than rely on others, the courts should perform their traditional, independent¹⁴² duty to ascertain the constitutionality of the government's programs or policies, even if they are in the realm of national security. The courts are routinely presented with complicated cases, such as ERISA matters, challenges to environmental regulations, and intellectual property disputes. In those instances, it is incumbent upon the parties to provide the courts with accessible, reliable information that will enable them to reach an appropriate decision. The importance or intricacy of the national security programs or policies at issue should not discharge the courts from determining the constitutionality of the government's actions, but rather should compel the parties to take greater care in presenting their legal arguments and the factual predicates for their contentions to the courts.

The notion that the courts should play a vital role in constitutional questions of a national security nature is more than a theoretical hope or abstract goal. It is a function that the courts have traditionally performed without any evidence that doing so has harmed the security pursuits of the other coordinate branches. As former constitutional law professor and current Obama administration official Cass Sunstein observed in 2005, "American practice suggests that judges are most unlikely to err by protecting civil liberties; in our history, it is hard to find even a single case in which judicial protection of freedom seriously damaged national security."¹⁴³

For Posner, the courts are ill-suited to decide national security issues and should therefore rely on Congress to serve the legitimate checking function. The federal judiciary, however, is the very branch entrusted by the people and designed by the Framers to safeguard

¹⁴¹ See DEP'T OF HOMELAND SEC., HOMELAND SECURITY PRESIDENTIAL DIRECTIVE 3 (March 11, 2002), available at http://www.dhs.gov/xabout/laws/gc_1214508631313.shtm (creating the Homeland Security Advisory System).

¹⁴² See *Marbury v. Madison*, 5 U.S. 137 (1803) (asserting the independence of the judicial branch by reviewing and ultimately nullifying the congressionally-enacted Judiciary Act of 1789).

¹⁴³ Cass R. Sunstein, *National Security, Liberty, and the D.C. Circuit*, 73 GEO. WASH. L. REV. 693, 702 (2005).

liberty against legislative overreaching, even in difficult national circumstances. Without a meaningful role for the courts in national security matters, the executive, like a “king” over security decisions and the fate of individual rights, will remain the king.¹⁴⁴ With a powerful executive unrestrained by the federal judiciary or legislature, the “pawns” in modern American society will be without recourse and may have their rights abridged.¹⁴⁵ This is a result that, as will be examined in the next section, Posner is willing to accept.

VI. PROFILING

“They’re dead where it doesn’t count.”¹⁴⁶

– Mike Fletcher, *The Wire*

Posner finds little trouble equating the terrorist threat with Muslims. By doing so, he finds that Muslims in America are appropriate targets of national security measures. He writes, “Terrorism and religion are highly entwined in Muslim extremism today; the juncture cannot be ignored by our security services.”¹⁴⁷ Furthermore, because it is Muslims who pose the terrorist threat to the United States, it is prudent for those security services to track the Muslim-American community for suspicious behavior: “[W]hen one reflects that there are several million Muslims in the United States and that a tiny number of terrorists may be able to cause catastrophic harm to a nation, the government should not have to stand by helplessly” while extremism

¹⁴⁴ The “King” is, in effect, the executive branch as a whole. More specifically, if the policy arm of the executive (e.g., the president, Cabinet, senior executive agency officials) is relatively free to design its security policies at will, those implementing the policies (e.g., homeland security and immigration agents at borders, transportation authority officials in airports, spies in mosques) similarly may carry out their security functions without fear of legal resistance or accountability. See *The Wire: Misgivings* (HBO television broadcast Nov. 19, 2006) (“The patrolling officer on his beat is the one true dictatorship in America.”). President Harry Truman’s impermissible seizure of steel plants during the Korean War reflects the dangers of an unfettered wartime executive to private rights. See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952) (striking down the President’s executive order to seize privately owned steel mills, in the course of the American conflict in Korea, holding that the President did not act pursuant to an act of Congress or constitutional grant of authority). *Youngstown* illustrates the judicial limitation placed on the President’s powers during the Korean War. *Youngstown*, thus, serves as a contrast to Posner’s arguments that the judicial branch is ill-equipped to judge, or should refrain from interfering with, the executive’s decisions concerning national safety.

¹⁴⁵ See discussion *infra* Part IX on the inadequacy of a political check on the executive by the right to vote.

¹⁴⁶ *The Wire: Not for Attribution* (HBO television broadcast Jan. 20, 2008).

¹⁴⁷ POSNER, NOT A SUICIDE PACT, *supra* note 6, at 116.

spreads.¹⁴⁸ Posner therefore argues that the government may, without running afoul of constitutional mandates, surreptitiously intercept and sift through a Muslim-American's electronic communications and personal information, subject Muslim-Americans to additional security procedures in the airport setting, and shadow Muslim priests in American mosques to listen for provocative religious lectures.

With respect to electronic communications, Posner claims that "surreptitious eavesdropping need impose no costs at all on people who don't know they're being eavesdropped on, or who know but don't care because they have nothing they particularly care to hide from the eavesdropper."¹⁴⁹ He also contends that any constitutional complications with surreptitious eavesdropping of electronic communications can be eased with a two-pronged system in which a computer program first filters the communications, and a human then reviews only those aspects of the communications identified by the computer.¹⁵⁰

Concerning the effect on those subjected to the surveillance, Posner argues, "An electronic search no more invades privacy than does a dog trained to sniff out illegal drugs, though the dog's 'alerting' to the presence of drugs in a container provides probable cause for a (human) investigator to search the container."¹⁵¹ Posner suggests that even if an individual's privacy is invaded, the individual is not truly "harmed . . . in any practical sense."¹⁵² It "might," according to Posner, "cause . . . at least transitory emotional distress, and that is a harm even if it has no rational basis."¹⁵³

Finally, Posner argues that the government's intelligence entities may "want to maintain a close watch on radical imams in the U.S. Muslim community of several million people . . . *even if there is no basis* for thinking that *any* of these imams has yet crossed the line that separates advocacy [which may not be constitutionally suppressed] from incitement" of violence, which may be constitutionally suppressed.¹⁵⁴ Posner acknowledges that roaming the mosques for such incitement may chill the speech of Muslim worshippers, who may be

¹⁴⁸ *Id.* at 124.

¹⁴⁹ *Id.* at 90.

¹⁵⁰ *See id.* at 99-100.

¹⁵¹ *Id.* at 130.

¹⁵² *Id.* at 131.

¹⁵³ POSNER, NOT A SUICIDE PACT, *supra* note 6, at 131.

¹⁵⁴ *Id.* at 111-12 (emphases added).

less inclined to express themselves or to join the congregation in the first place.¹⁵⁵ Posner contends, however, that the cost to speech may be worth it depending “on the importance of the investigative activities to national security.”¹⁵⁶

It is doubtless that those who count least today, the “pawns” in the American post-9/11 security chessboard, are the innocent Americans who are Muslim or are perceived to be Muslim.¹⁵⁷ *The Wire* powerfully speaks to the absence of consideration for the “pawns” in Baltimore, including those without the political clout or the social status to be taken seriously by others. In the series’ final season, a *Baltimore Sun* reporter was disappointed to learn that her article on a triple murder, which had been slotted as a front-page story, was instead buried deep inside the paper and edited down considerably.¹⁵⁸ A fellow reporter explained the article’s placement by stating that the victims were “dead where it doesn’t count.”¹⁵⁹ In other words, they were pawns in the blighted parts of Baltimore whose lives had been marginalized in the existing social structure. In condoning the minimized constitutional protections to be afforded to Muslim-Americans, Posner targets a people who have been placed on the fringe of our collective conscience when it comes to a full recognition of individual rights in the post-9/11 world. Posner’s proposition that infringements upon the constitutional rights of Muslim-Americans do not count, however, cannot be squared with the basic legal system within which we live.

Even if Muslim-Americans are not cognizant of the fact that they are being eavesdropped on, they may still have a sense that they are being profiled on the basis of their religion. In a recent article, I released the results of a study that shows that 70.7% of Muslim-American respondents believe, 45.0% strongly, that their online activities

¹⁵⁵ *Id.* at 112.

¹⁵⁶ *Id.* at 112-13.

¹⁵⁷ See Leti Volpp, *The Citizen and the Terrorist*, 49 UCLA L. REV. 1575, 1576 (2002) (“Th[e] article suggests that September 11 facilitated the consolidation of a new identity category that groups together persons who appear ‘Middle Eastern, Arab, or Muslim,’ whereby members of this group are identified as terrorists and disidentified as citizens.”); see also Muneer I. Ahmad, *A Rage Shared by Law: Post-September 11 Racial Violence as Crimes of Passion*, 92 CAL. L. REV. 1259 (2004) (discussing the extent of the public and private racial violence against Muslims, Arabs, South Asians, and Sikhs after 9/11).

¹⁵⁸ *The Wire: Not for Attribution* (HBO television broadcast Jan. 20, 2008).

¹⁵⁹ *Id.*

are being monitored by the government.¹⁶⁰ The same study reveals that 8.4% of Muslims have altered their online behavior as a result of the belief that their electronic activities are being monitored by the government.¹⁶¹ Even if Muslim-Americans are not monitored, they are nevertheless chilled in their speech. Extrapolating these numbers to the “several million” Muslims in the United States figure that Posner references, yields a large number of Muslims who believe that they are under surveillance and who have chosen to limit their online activities as a consequence.¹⁶² Furthermore, people with “nothing to hide” do not become indifferent towards the government’s eavesdropping on them. This is why the Fourth Amendment to the Constitution¹⁶³ generally requires the *government* to possess an appropriate basis to search an individual and does not first require that the *individual* establish that he has nothing to hide.¹⁶⁴

¹⁶⁰ Dawinder S. Sidhu, *The Chilling Effect of Government Surveillance Programs on the Use of the Internet by Muslim-Americans*, 7 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 375, 390-91 (2007).

¹⁶¹ *Id.* at 391.

¹⁶² U.S. DEP’T OF STATE, MUSLIMS IN AMERICA – A STATISTICAL PORTRAIT (2008), available at <http://www.america.gov/st/peopleplace-english/2008/December/20081222090246jmnandeirf0.4547083.html> (“The size of the Muslim-American population has proved difficult to measure because the U.S. Census does not track religious affiliation. Estimates vary widely from 2 million to 7 million. What is clear, however, is that the Muslim-American population has been growing rapidly as a result of immigration, a high birth rate, and conversions.”).

¹⁶³ The Fourth Amendment provides:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend. IV.

¹⁶⁴ See, e.g., Leslie A. Maria, *Investigation and Police Practices: Overview of the Fourth Amendment*, 86 GEO. L.J. 1187, 1187 (1998) (“The Fourth Amendment of the United States Constitution governs all searches and seizures conducted by government agents. The Amendment contains two separate clauses: A prohibition against unreasonable searches and seizures, and a requirement that probable cause support each warrant issued.”); Orin S. Kerr, *Lifting the “Fog” of Internet Surveillance: How a Suppression Remedy Would Change Computer Crime Law*, 54 HASTINGS L.J. 805, 811 (2003) (“[T]he Fourth Amendment . . . generally requires a search warrant or special factual circumstances for the government to go into private spaces that are protected by a reasonable expectation of privacy.”). See generally Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 195 (1890) (expressing the view that a “right to be let alone” exists). To the extent that the concept of consent in Fourth Amendment jurisprudence captures an individual’s affirmative willingness to allow the government to search him, consent is inapplicable to Posner’s argument, which is premised on surreptitious eavesdropping—one cannot consent to what one does not know. See, e.g., *Katz v. United States*, 389 U.S. 347, 358 (1967) (“[O]f course, the very nature of electronic surveillance precludes its use pursuant to the suspect’s consent.”).

Posner's creative suggestion regarding a bifurcated computer/human review of communications does not resolve the possibility that harmless speech may be flagged by the electronic part of the surveillance mechanism and thereafter transmitted to a human reviewer. Although the computer, as a filter of communication, is an inanimate entity and preserves some semblance of privacy, it is still fallible. In particular, it is susceptible to overinclusiveness of allegedly suspicious communications. Thus, a human may ultimately read electronic information of a legitimate or personal nature. In this respect, Posner's two-pronged system may, at best, reduce the number of false positives, but it does not eliminate the constitutional difficulties with respect to surreptitious eavesdropping.

Posner's comparison of electronic surveillance to a dog sniffing for drugs, although perhaps reasonable on the surface, does not upon deeper inspection alleviate any genuine constitutional concerns. The surreptitious eavesdropping contemplated by post-9/11 security measures is not random; it is targeted at members of one community or those perceived to be members of that community. To use a more apt metaphor, a police car that stops some people, but not all, for speeding is fine so long as the officer is genuinely attempting to survey all cars or, say, every tenth car for speeding. The situation becomes problematic when the officer stops some people because the officer is looking only at cars driven by certain people, based on characteristics such as ethnicity or skin color.¹⁶⁵ The selective application by government security or investigative efforts on one class of individuals—even if initially conducted by a non-human—is unjust because it is based on actual or perceived race, religion, or national origin.¹⁶⁶

Contrary to Posner's assertion that any harm suffered by stricter airport security measures is at most "transitory emotional distress," such harm extends beyond the targeted individual to all members of that community who may realize that they are now subject to different rules and to the prospect of being treated less than equally on account of their actual or perceived race, religion, or national origin. Not only is this harm more extensive in scope, it is also more expansive in depth; a Muslim profiled in an airport walks away with more than hurt

¹⁶⁵ See STEPHEN NATHANSON, *AN EYE FOR AN EYE: THE IMMORALITY OF PUNISHING BY DEATH* 64 (Rowman & Littlefield Publishers 2d ed. 2001) (1992) (postulating that such enforcement punishes people based on appearance and constitutes an abuse of power).

¹⁶⁶ See *id.*

emotions. The qualitative and quantitative aspects of his experiences with a public accommodation supposedly open on equal terms to all Americans are significantly affected, a situation reminiscent of the African-American plight with public accommodations in the 1960s.¹⁶⁷ As a result, Muslims may use other modes of transportation to avoid harassment or may not travel at all.

With regard to Posner's acceptance of surveilling Muslim clerics, the importance of such investigative activities can be determined only after the fact, after the government has scoured mosques and chilled the speech of adherents to Islam. In other words, it is acceptable in Posner's formulation to chill the speech of Muslims at mosques, even without any evidence that the speech contains incitement or a resemblance of incitement on the spectrum of religious rhetoric. Such curtailment would be justified if it is later found that objectionable speech was uttered. Although such justification would extend to those mosques at which radical teachings took place, it would not apply to those mosques innocent of such teachings, making those mosques victims of an unnecessary, presumptive invasion. The approach offered by Posner presumes that a Muslim mosque is a potential breeding ground for incitement of violence against the United States.¹⁶⁸

Posner acknowledges that generally "more speech" is preferable to the chilling of speech but writes, "[I]t is unclear what counterarguments are available to opponents" of instructional, appealing rhetoric from imams.¹⁶⁹ What is the antidote to such speech, Posner asks.¹⁷⁰ Posner underestimates the attractiveness of the fundamental principles of liberty and religious freedom that form the intellectual foundation of the American republic. The concept, that man is free to live in America and develop a relationship with God in accordance with the dictates of his conscience and without government interference or coercion, is one that should be offered in response to those who "hate" the United States.¹⁷¹ American values and ideals can resonate

¹⁶⁷ See Sidhu, *supra* note 160, at 379 (drawing parallels between the civil rights findings in the landmark case of *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964), and the post-9/11 climate facing Muslims and others).

¹⁶⁸ A more constitutionally accepted alternative would be one requiring investigative powers to possess some degree of evidence that particular imams should be monitored.

¹⁶⁹ POSNER, *NOT A SUICIDE PACT*, *supra* note 6, at 122.

¹⁷⁰ See *id.*

¹⁷¹ See *Abington Sch. Dist. v. Schempp*, 374 U.S. 203, 226 (1963) ("The place of religion in our society is an exalted one, achieved through a long tradition of reliance on the . . . inviolable citadel of the individual heart and mind. We have come to recognize through bitter experience

with the hearts and minds of all men and can commensurately diminish the misguided intention to cripple the greatest experiment in liberty and religious freedom ever known.¹⁷²

The arguments put forth by Posner with respect to profiling Muslims in the United States do not pass constitutional muster. They are not only legally infirm, but may also be counterproductive as a practical matter. First, and perhaps most evident, these arguments if implemented would alienate the very community from which cooperation is necessary for the threat of terrorism to be properly averted.¹⁷³ Posner recognizes this possibility but nonetheless contends that the benefits of his suggestions outweigh the costs and, thus, must be brought within the Constitution.¹⁷⁴ Second, such profiling would induce terrorists to recruit and employ individuals who defy the operative “Muslim male” profile.¹⁷⁵

There are doctrinal as well as pragmatic reasons to dispute Posner’s proposals, which are predicated on the notion that Muslim-Americans are a rightfully marginalized community whose constitutional rights are less meaningful in the post-9/11 context.¹⁷⁶ In ensuring that the rights of Muslim-Americans “count” in the modern constitutional design, we will not only safeguard our legal principles but will also aid our anti-terrorism efforts moving forward.

that it is not within the power of the government to invade that citadel”); *Schneider v. Smith*, 390 U.S. 17, 25 (1968) (“The First Amendment[] . . . create[s] a preserve where the views of the individual are made inviolate.”); see also JON MEACHAM, *AMERICAN GOSPEL: GOD, THE FOUNDING FATHERS, AND THE MAKING OF A NATION* 6 (Random House 2006) (positing generally that the American “public religion” is one in which the Founders believed there was a Creator God, but that the individual was free to decide whether there was a God, gods, or no God at all).

¹⁷² It is this appeal to conscience that, regrettably, is not part of the battle against fundamentalists. See POSNER, *NOT A SUICIDE PACT*, *supra* note 6, at 5 (“[W]e have no strategy for defeating them, only for fighting them.”).

¹⁷³ See Kevin R. Johnson, *Protecting National Security Through More Liberal Admission of Immigrants*, 2007 U. CHI. LEGAL F. 157, 187-88 (2007) (“The many measures the U.S. government directed at Arabs and Muslims after September 11 estranged these communities, thereby damaging the nation’s efforts to collect necessary intelligence.”).

¹⁷⁴ See POSNER, *NOT A SUICIDE PACT*, *supra* note 6, at 50, 117-19. The temptation for and danger of the authorities viewing the people they are to serve as the enemy has been explored in *The Wire*. See *The Wire: Reformation* (HBO television broadcast Nov. 28, 2004) (“[W]hen you’re at war, you need a fucking enemy. And pretty soon, damn near everybody on every corner is your fucking enemy. And soon the neighborhood that you’re supposed to be policing, that’s just occupied territory.”).

¹⁷⁵ See POSNER, *NOT A SUICIDE PACT*, *supra* note 6, at 117-18.

¹⁷⁶ See *id.* at 50.

VII. DISCRIMINATION

“Deserve got nuthin’ to do with it.”¹⁷⁷

– Felicia “Snoop” Pearson, *The Wire*

Posner suggests that due to the terrorist threat, the government can permissibly surveil the communications and information of Muslims in the United States, profile Muslims in airports, and stake out mosques for inflammatory teachings.¹⁷⁸ These suggestions are based solely on shared religious identity, not on any evidence of terrorism.¹⁷⁹ Posner writes that inevitably “some of the personal information gathered by intelligence agencies pertains to people who have no links to terrorism”¹⁸⁰ and that “radical imams” should be monitored “even if there is no basis for thinking” that they have incited violence against the United States.¹⁸¹ To justify his position, Posner states that profiling of Muslims is “mild” in comparison to other civil rights violations, such as the internment of the Japanese and the segregation of African-American students.¹⁸² To diminish the actual or perceived burden on Muslims, Posner volunteers that non-Muslims should be subject to heightened surveillance as well so Muslims do not feel singled out.¹⁸³

Posner’s suggestions call into question what may constitute an acceptable basis for negative treatment and specifically whether religion may be the sole factor in a judgment that surveillance and profiling of Muslims is permissible legally or sensible practically. In the penultimate episode of *The Wire*, Michael Lee, a teenage product of the Baltimore streets, asks a superior in his drug crew’s hierarchy, Felicia “Snoop” Pearson, why he’s been singled out by the drug ring’s leader to be executed even though he did not violate any internal code of conduct warranting any punishment, much less death.¹⁸⁴ Snoop

¹⁷⁷ *The Wire: Late Editions* (HBO television broadcast Mar. 2, 2008).

¹⁷⁸ See POSNER, NOT A SUICIDE PACT, *supra* note 6, at 117-20 (suggesting that profiling of “Islamic terrorism” is less problematic compared to “ordinary crimes”).

¹⁷⁹ See *id.* at 111-12, 130.

¹⁸⁰ *Id.* at 130.

¹⁸¹ *Id.* at 111-12.

¹⁸² *Id.* at 119.

¹⁸³ See *id.* at 118.

¹⁸⁴ See *The Wire: Late Editions* (HBO television broadcast Mar. 2, 2008). Michael’s alleged transgression was providing the police with information that led to the arrest of the principals of a drug organization. *Id.* In truth, Michael was not a “snitch” or police informant. *Id.*

curtly responds, “[D]eserve got nuthin’ to do with it.”¹⁸⁵ In other words, actual guilt is an irrelevant consideration. It is enough that the powers that be, the “king” in this case, suspected that Michael was guilty.¹⁸⁶

Especially in times of crisis, mere suspicion has served as the basis for adverse actions and decisions irrespective of evidence. Such suspicion generally is premised on a single characteristic—race, ethnicity, or national origin—that individuals share with America’s enemies. When the judiciary fails to meaningfully check the other two branches, race, religion, or national origin may be legitimized as a proxy for suspicion, and the adverse actions or decisions consequently attain the imprimatur of the Constitution.

This was perhaps most evident during World War II. In response to the attack on Pearl Harbor, over 100,000 individuals of Japanese descent on the West Coast of the United States were taken from their homes and were placed into internment camps pursuant to an executive order signed by President Franklin D. Roosevelt.¹⁸⁷ In the infamous 1944 case *Korematsu v. United States*, the Supreme Court upheld the constitutionality of the executive order that had given rise to the internment, deferring significantly to the government’s arguments regarding the military necessity of the relocation.¹⁸⁸ The Court noted that the petitioner, who was born in California to Japanese parents, was subject to the order and interned not because of any racial animus towards the Japanese, but rather:

[B]ecause we are at war with the Japanese Empire, because the properly constituted military authorities feared an invasion of our West Coast and felt constrained to take proper security measures, because they decided that the military urgency of the situation demanded that

¹⁸⁵ *Id.*

¹⁸⁶ See *id.* Bodie, another character on *The Wire*, encountered a similar issue, as he was suspected of wrongdoing (in his case sharing confidential information with the police, even though he did no such thing) and was executed as a result. *The Wire: Final Grades* (HBO television broadcast Dec. 10, 2006).

¹⁸⁷ See *Korematsu v. United States*, 323 U.S. 214, 216-18 (1944); see also Exec. Order No. 9066, 7 Fed. Reg. 1407 (Feb. 19, 1942).

¹⁸⁸ See *Korematsu*, 323 U.S. at 218 (“Nothing short of apprehension by the proper military authorities of the gravest imminent danger to the public safety can constitutionally justify [the exclusion] The military authorities, charged with the primary responsibility of defending our shores, concluded that curfew provided inadequate protection and ordered exclusion. They did so . . . in accordance with Congressional authority to the military to say who should, and who should not, remain in the threatened areas.”).

all citizens of Japanese ancestry be segregated from the West Coast temporarily¹⁸⁹

In another case upholding the conviction of an American citizen of Japanese ancestry for violating the exclusion order and curfew requirements imposed after the attack on Pearl Harbor, the Court observed, “We cannot close our eyes to the fact, demonstrated by experience, that in time of war residents having ethnic affiliations with an invading enemy may be a greater source of danger than those of a different ancestry.”¹⁹⁰

Justice Jackson dissented from the Court’s ruling in *Korematsu*, forewarning that the majority had validated a principle of racial discrimination that:

[L]ies about like a loaded weapon ready for the hand of any authority that can bring forward a plausible claim of an urgent need. Every repetition imbeds that principle more deeply in our law and thinking and expands it to new purposes. All who observe the work of courts are familiar with what Judge [Benjamin] Cardozo described as “the tendency of a principle to expand itself to the limit of its logic.” . . . [I]f [the courts] review and approve, that passing incident becomes the doctrine of the Constitution. There it has a generative power of its own, and all that it creates will be in its own image.¹⁹¹

Posner’s suggestions that Muslims can be singled out for surveillance and additional security measures, which absent any evidence of

¹⁸⁹ *Id.* at 223.

¹⁹⁰ *Hirabayashi v. United States*, 320 U.S. 81, 101 (1943). Recently, the Supreme Court issued a decision in a case brought by a Muslim detained after 9/11 who alleged discrimination by high-level government officials. See *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009). In the course of its discussion on whether the detainee’s complaint satisfied the pleading standard of Federal Rule of Civil Procedure 8(a)(2), the majority noted:

The September 11 attacks were perpetrated by 19 Arab Muslim hijackers who counted themselves members in good standing of al Qaeda, an Islamic fundamentalist group. Al Qaeda was headed by another Arab Muslim—Osama bin Laden—and composed in large part of his Arab Muslim disciples. It should come as no surprise that a legitimate policy directing law enforcement to arrest and detain individuals because of their suspected link to the attacks would produce a disparate, incidental impact on Arab Muslims, even though the purpose of the policy was to target neither Arabs nor Muslims.

Id. at 1951. Given that the ruling centered around the sufficiency of the complaint (i.e., did the complaint comply with Federal Rule 8(a)(2)) and did not pass on the merits of the claims of discrimination (i.e., were the detainee’s constitutional rights violated), it is unclear what the import of this excerpt is, if any. This question will require resolution elsewhere.

¹⁹¹ *Korematsu*, 323 U.S. at 246 (Jackson, J., dissenting) (footnote omitted).

wrongdoing or suspected wrongdoing amount to blanket racial discrimination, are difficult to reconcile with Justice Jackson's guidance from another wartime moment in America's history.

Posner's proposition that the profiling of Muslims is somehow less severe than the discriminatory measures faced by Japanese- and African-Americans is unconvincing.¹⁹² That the form of the discrimination may seem less invidious does not deflect the fact that profiling is discriminatory in substance. Profiling in the post-9/11 may not seem as unfavorable as other practices, but this comparison does not change the nature of profiling from discriminatory to non-discriminatory.

Regarding the idea that security measures applied to Muslims should be applied to non-Muslims to furnish the appearance of equal treatment,¹⁹³ the result would be just that—nothing more than an appearance. Tricking Muslims into believing they are subject to non-discriminatory security policies does not change the intent of the policies in the first instance, namely to target Muslims. Posner's proposal may not only fail to alter the discriminatory content of the security efforts, it may also make things worse. The pernicious effects would be to conceal discrimination from its victims, to effectively prohibit any resultant complaints, and, therefore, to immunize the government from having to answer for its discriminatory tactics.

The terrorist attack upon the United States necessitated a response both internal and external to America's borders. The clear threat to national security required the government to determine how best to prevent a subsequent attack from occurring. As modern as the attack was, the security elements of the government do not operate on a blank slate. It has its own history from which to glean the proper limits of America's security measures. A lesson from the World War II era applies today despite social, economic, and technological advancement in the interim: Suspicion of guilt premised on race, religion, or national origin alone is impermissible and runs against the very Constitution and pluralistic republic we seek to defend. Posner suggests that Muslim rights may be sacrificed on the margins even in the absence of any evidentiary support for suspecting Muslims of wrongdoing.¹⁹⁴ This is a fate they do not deserve and that our system of laws should not permit.

¹⁹² See POSNER, *NOT A SUICIDE PACT*, *supra* note 6, at 119.

¹⁹³ *Id.* at 118.

¹⁹⁴ *Id.* at 130.

VIII. TORTURE

“You play in dirt, you get dirty.”¹⁹⁵

– James “Jimmy” McNulty, *The Wire*

Posner’s post-9/11 constitutional construct, in which liberty may be sacrificed if marginal gains to national security may result, allows for the mistreatment of people as well as the use of a highly controversial practice: torture. Posner supports the notion that torture may be used in “extreme situations” or in an “extreme emergency” where information can be elicited.¹⁹⁶ He contends that the “propriety” of using a “high degree of coercion” cannot be reasonably denied and that the reply of those who do entertain such a denial is that torture never works.¹⁹⁷ Posner further states that while some may have moral objections to torture, they “should not be allowed to occlude consideration of instrumental considerations.”¹⁹⁸

The propriety of using aggressive tactics with suspects is another theme present in *The Wire*. For example, Baltimore city officer Eddie Walker employed questionable deterrent methods in dealing with younger troublemakers in the community: Breaking the fingers of a youth who routinely stole cars and pocketing the money of another who was fleeing police.¹⁹⁹ A number of the youth sought revenge and were successful in pouring yellow paint on Officer Walker, publicly embarrassing him.²⁰⁰ His colleague, James “Jimmy” McNulty, later commented on the situation, “You play in dirt, you get dirty.”²⁰¹ The motive to retaliate was understandable given the manner in which Officer Walker engaged those subject to his authority. *The Wire* thus touches on the practical realities of the abuse of power and the natural inclination to contemptuously respond to it.²⁰²

¹⁹⁵ *The Wire: A New Day* (HBO television broadcast Nov. 26, 2006).

¹⁹⁶ POSNER, NOT A SUICIDE PACT, *supra* note 6, at 83.

¹⁹⁷ *Id.* at 81.

¹⁹⁸ *Id.* at 83; *see also id.* at 85 (suggesting that whether torture “shocks the conscience” is a subjective, relative judgment).

¹⁹⁹ *The Wire: Misgivings* (HBO television broadcast Nov. 19, 2006).

²⁰⁰ *The Wire: A New Day* (HBO television broadcast Nov. 26, 2006).

²⁰¹ *Id.*

²⁰² Ironically, Officer McNulty later conceived a plan to make it seem as if there was a serial killer on the loose in Baltimore so as to ensure that greater resources would be dedicated to the police department, resources that could be used in the apprehension of a drug “king.” *The Wire: Not for Attribution* (HBO television broadcast Jan. 20, 2008). Officer McNulty’s efforts, although well-intended, were clearly illegal. He not only lost his job, but the “king” was

With respect to torture, it is quite clearly impermissible on legal, principled, and practical grounds. Professor Jordan J. Paust notes:

[C]ustomary and treaty-based human rights law requires, *without exception*, that no persons shall be subjected to torture or to cruel, inhumane, or degrading treatment. The same absolute prohibition exists in customary and treaty-based laws of war. For example, common Article 3 of the Geneva Conventions requires that all persons detained “shall in all circumstances be treated humanely,” and that “[t]o this end . . . at any time and in any place . . . cruel treatment and torture” are proscribed in addition to “outrages upon personal dignity, in particular, humiliating and degrading treatment.” Article 5 of the Geneva Civilian Convention reiterates that “[i]n each case” persons detained as security threats shall “be treated with humanity,” a requirement that is also reflected in Article 27. Additionally, Article 31 requires that “[n]o physical or moral coercion shall be exercised against protected persons, in particular to obtain information from them,” and Article 33 prohibits “all measures of intimidation.”²⁰³

The United States is a signatory of the Geneva Conventions.²⁰⁴ As such, these prohibitions are not simple pronouncements of international human rights norms that lie in ether beyond the borders of the United States. Rather, they are commitments the nation has obligated itself to comply with and brought well within the realm of the American legal landscape.²⁰⁵

not prosecuted due to the inadmissibility of the evidence produced by the plan. *The Wire*: -30- (HBO television broadcast Mar. 9, 2008).

²⁰³ Jordan J. Paust, *Judicial Power to Determine the Status and Rights of Persons Detained Without Trial*, 44 HARV. INT'L L.J. 503, 530-31 (2003) (alteration in original) (internal footnotes omitted) (emphasis added).

²⁰⁴ See INTERNATIONAL HUMANITARIAN LAW, INTERNATIONAL COMMITTEE OF THE RED CROSS (ICRC), STATES PARTY TO THE GENEVA CONVENTIONS (2005), available at <http://www.icrc.org/ihl.nsf/WebSign?ReadForm&id=375&ps=P>.

²⁰⁵ See *United States v. Khadr*, CMCR 07-001, at 4 n.4 (Ct. Mil. Comm'n Rev. Sept. 24, 2007), available at <http://www.scotusblog.com/movabletype/archives/CMCR%20ruling%209-24-07.pdf>. (“The United States is a signatory nation to all four Geneva Conventions. The Geneva Conventions are generally viewed as self-executing treaties (i.e., ones which become effective without the necessity of implementing congressional action), form a part of American law, and are binding in federal courts under the Supremacy Clause.” (citing U.S. CONST. art. VI, § 2) (“This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land . . .”)).

Furthermore, the problem is not that torture never works. Instead, it is that information extracted from the use of torture can be obtained by other means that do not rise to the level of torture and therefore allow the American intelligence services to stay within the bounds of applicable American legal obligations and comply with the prevailing views of the international human rights community. As President Obama noted after reviewing materials on waterboarding, “[W]e could have gotten this information in other ways,”²⁰⁶ ways that perhaps would not run afoul of those obligations. President Obama added, “[W]e can still get information” using other techniques, even though “[i]n some cases, it may be harder” to do so.²⁰⁷

Posner likely does not accept President Obama’s view that the use of torture “corrodes the character of [our] country” and stands in opposition to “our ideals.”²⁰⁸ If only arguments related to the success or failure of torture—again, a simple cost-benefit analysis—are admissible, then it would be necessary to bring to the balance the distinct possibility that the use of torture by the United States serves as a recruitment tool for terrorist elements.²⁰⁹ If the nation employs techniques that are known to be considered by the enemy as contemptible or “dirty,” we essentially shroud ourselves in the very dirt that exists as a marker for hatred and violence. This is true irrespective of our own subjective value judgments of the usefulness of that investigative practice. That taint will be difficult to undo, the hate commensurately difficult to neutralize.²¹⁰

The adoption of an official policy permitting the executive to authorize torture in some situations—even in “extreme” ones—may prove counterproductive and ultimately more harmful to American security than information elicited from torture. Given that the infor-

²⁰⁶ President Barack Obama, 100th-Day Press Briefing (Apr. 29, 2009) (transcript available on Westlaw at 2009 WL 1145265).

²⁰⁷ *Id.*

²⁰⁸ *Id.*

²⁰⁹ See e.g., Louis Fisher, *Extraordinary Rendition: The Price of Secrecy*, 57 AM. U. L. REV. 1405, 1446 (2008) (discussing *El-Masri v. United States*, 479 F.3d 296 (4th Cir. 2007), and arguing that when the Executive Branch authorizes unconstitutional actions, such as torture, it actually undermines national security because it recruits terrorists and proliferates hate against the United States).

²¹⁰ See, e.g., *The Wire: All Prologue* (HBO television broadcast July 6, 2003) (“[T]he past is always with us. Where we come from, what we go through, how we go through it, all this shit matters [Y]ou can change up . . . , you can say you’re somebody new, and you can give yourself a whole new story. But, what came first is who you really are and what happened before is what really happened, and it don’t matter that some fool say he different”).

mation may be obtainable by less drastic means, means that may not lead to terrorist recruitment or the retaliation that *The Wire* portends, it seems imprudent based on a purely pragmatic analysis to bring torture under the standard of the Constitution.

IX. EXTRA-CONSTITUTIONALISM

“The tree that doesn’t bend breaks.”²¹¹

– Marla Daniels, *The Wire*

Francis Biddle, President Roosevelt’s Attorney General during World War II, once opined, “[T]he Constitution has never greatly bothered any wartime President.”²¹² Biddle expressed the practical reality that presidents will do whatever it takes to defend the United States even if those actions technically transgress the established limits of the Constitution.²¹³ For his part, Posner endorses the view that, in times of war, the executive is empowered to act outside the law if doing so would help ensure the preservation of the nation.²¹⁴ Indeed, the title of the book, *Not a Suicide Pact*, is derived in part from the Supreme Court’s statement in *Kennedy v. Mendoza-Martinez*: “[W]hile the Constitution protects against invasions of individual rights, it is not a suicide pact.”²¹⁵ In the opening paragraph of the book, Posner writes that civil liberties are flexible and must give way to public safety interests because “a Constitution that will not bend will break.”²¹⁶ Elsewhere, Posner echoes Biddle’s observation and writes that those responsible for the nation’s security will not, on their own, give much weight to individual rights in reaching security decisions;²¹⁷ the executive will use torture to gain information even if there is no cognizable right to do so.²¹⁸

In reference to President Abraham Lincoln’s decision to suspend habeas corpus rights during the Civil War, Posner notes that “to violate one constitutional provision (the suspension provision) in order to save the Constitution as a whole” is “not a legal argument” because

²¹¹ *The Wire*: -30- (HBO television broadcast Mar. 9, 2008).

²¹² FRANCIS BIDDLE, IN BRIEF AUTHORITY 219 (1962).

²¹³ See *id.*

²¹⁴ See POSNER, NOT A SUICIDE PACT, *supra* note 6, at 158, 170.

²¹⁵ *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 160 (1963).

²¹⁶ POSNER, NOT A SUICIDE PACT, *supra* note 6, at 1.

²¹⁷ See *id.* at 61.

²¹⁸ See *id.* at 38.

there is “no such grant of authority” to violate the Constitution.²¹⁹ Instead, it is a pragmatic response to the dire conditions precipitating the extra-constitutional action.²²⁰ There is a “law of necessity” that “supersedes the law of the Constitution.”²²¹ Put differently, the “law of necessity” is not a “law” but the “trumping of law by necessity.”²²² As Lincoln himself asked rhetorically, “[A]re all the laws, *but one*, to go unexecuted, and the government itself to go to pieces, lest that one be violated?”²²³

With regard to such extra-constitutional acts, Posner thinks it unwise to codify situations or moments when the government may sidestep the Constitution because those rules may be ill-defined and may be tested to their outer limits.²²⁴ Instead, Posner finds it preferable to let stand an implicit, default rule that the executive can suspend the laws when necessary.²²⁵ He reasons that prescribed rules generally are meant to be broken and that a president will pay a higher political price if he abuses the default rule.²²⁶

Posner dedicates the “main task” of his book “to suggest[ing] 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.”²²⁷ In *Not a Suicide Pact*, however, Posner argues that the executive can engage in extra-constitutional acts because it has a “moral duty to violate positive law.”²²⁸ To that end, Posner claims that presidents who disobey the law are engaging in “civil disobedience” much in the same way that “Gandhi and Martin Luther King, Jr.” did in their situations.²²⁹

In the final episode of the series, Marla Daniels, an aspiring local politician and ex-wife of Cedric Daniels, a deputy commissioner in city police department, asks Cedric to consider resigning due to a

²¹⁹ *Id.* at 40.

²²⁰ *See id.*

²²¹ *Id.* at 70 (quoting Martin Sheffer).

²²² POSNER, *NOT A SUICIDE PACT*, *supra* note 6, at 158.

²²³ *See* DORIS KEARNS GOODWIN, *TEAM OF RIVALS: THE POLITICAL GENIUS OF ABRAHAM LINCOLN* 355 (2005).

²²⁴ *See* POSNER, *NOT A SUICIDE PACT*, *supra* note 6, at 86-87, 154.

²²⁵ *See id.* at 154.

²²⁶ *See id.*

²²⁷ *Id.* at 29.

²²⁸ *Id.* at 85.

²²⁹ *Id.*

potential scandal in order to save her career.²³⁰ She reminds Cedric of the need to be flexible in the face of unfavorable and emerging circumstances: "The tree that doesn't bend breaks," she advises.²³¹

Chief Justice William H. Rehnquist once noted, "The laws will . . . not be silent in time of war, but they will speak with a somewhat different voice."²³² The courts called upon to resolve constitutional questions during these difficult times will likely cede the point that the executive possesses great power and greater power when it acts with congressional approval.²³³ Accordingly, Posner's opening salvo—that "a Constitution that will not bend will break"²³⁴—is relatively innocuous, but his additional step of declaring that the law may be permissively disregarded in favor of the "law of necessity"²³⁵ must be disputed.

Although Posner suggests that there exists a law of necessity that may be invoked even if it violates the Constitution,²³⁶ the fact remains that, since its founding, the United States has been a nation of laws. Chief Justice John Marshall, writing for the nascent Supreme Court in *Marbury v. Madison*, proclaimed, "The government of the United States has been emphatically termed a government of laws, and not of men."²³⁷ Marshall, in that same case, declared famously, "It is emphatically the province and duty of the judicial department to say what the law is."²³⁸

The Supreme Court has spoken to the question of whether the Constitution is a straightjacket on government action in the security realm. In *Aptheker v. Secretary of State*, the Court, quoting *Mendoza-*

²³⁰ *The Wire*: -30- (HBO television broadcast Mar. 9, 2008).

²³¹ *Id.*

²³² WILLIAM H. REHNQUIST, *ALL THE LAWS BUT ONE: CIVIL LIBERTIES IN WARTIME* 225 (1998).

²³³ See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635-37 (Jackson, J., concurring) ("When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate When the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter.").

²³⁴ POSNER, *NOT A SUICIDE PACT*, *supra* note 6, at 1.

²³⁵ See *id.* at 158.

²³⁶ *Id.*

²³⁷ *Marbury v. Madison*, 5 U.S. 137, 163 (1803).

²³⁸ *Id.* at 177.

Martinez, said that “‘while the Constitution protects against invasions of individual rights, it is not a suicide pact.’”²³⁹ But the Court added in the very next sentence that “[a]t the same time the Constitution requires that the powers of government ‘must be so exercised as not, in attaining a permissible end, unduly to infringe’ a constitutionally protected freedom.”²⁴⁰ In other words, legitimate governmental ends, such as securing the nation, cannot be pursued by means that infringe an individual right.²⁴¹

Moreover, even if a “law of necessity” were to be considered an inherent source of authority that existed outside American positive law, in practice this “law” should not be advanced because of the expediency within which it can be invoked and the dangers that may result from its improvident use. Indeed, in reflecting on the *Korematsu* decision, Justice Jackson stated that the executive order “was an unconstitutional one which the Court should not bring within the Constitution by any doctrine of necessity, a doctrine too useful as a precedent.”²⁴²

Posner’s preference for an implicit rule that the President may suspend laws when necessary is also untenable. Although it may be the case that rules are meant to be broken, this proposition cannot be held with respect to the Constitution. The Constitution was not intended to be read as having holes in it or to be disregarded on a whim.²⁴³ To the contrary, it is the binding and highest law of the land.²⁴⁴

²³⁹ *Aptheker v. Sec’y of State*, 378 U.S. 500, 509 (1964) (quoting *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 160 (1963)).

²⁴⁰ *Id.* (quoting *Cantwell v. Connecticut*, 310 U.S. 296, 304 (1940)). Although *Mendoza-Martinez* gave rise to the “suicide pact” language, it was similar to *Aptheker* in that it concerned an act of Congress.

²⁴¹ The Court in *Aptheker* addressed the relationship between congressional power and the right to travel. 378 U.S. at 507. One can imagine that the Court’s pronouncement would be more compelling with other individual rights that may be at stake in the context of 9/11, including the right of equal protection under the law.

²⁴² Robert H. Jackson, Associate Justice, United States Supreme Court, *Wartime Security and Liberty Under Law*, Address at the Buffalo Law School (May 9, 1951) in 1 BUFF. L. REV. 103, 116 (1951).

²⁴³ See, e.g., Saikrishna Prakash, *The Constitution as Suicide Pact*, 79 NOTRE DAME L. REV. 1299, 1300 (2004) (“I doubt that the Constitution grants the President a latent and more powerful authority to sacrifice constitutional provisions in order to preserve and defend the Constitution and nation as a whole. In my view, though the Constitution creates a powerful chief executive, it does not empower the President to suspend the Constitution in order to save it.”).

²⁴⁴ See e.g., THE FEDERALIST NO. 78 (Alexander Hamilton) (“Until the people have, by some solemn and authoritative act, annulled or changed the established form, [the federal Con-

It is the belief in the rule of law that distinguishes the American republic from other forms of government and that serves as a vital tool in the post-9/11 campaign against extremist elements. As Deputy Solicitor General Neal Katyal observed, “[I]f we’re going to win the war on terror, we are going to win it through our soft power, we’re going to win it through saying to the world that we actually have a better model than you because in your countries you settle these things through force and fiat, and here we settle them through law, we settle them through law.”²⁴⁵ An executive bypassing the law would deny the country this instrument of international diplomacy and of attraction to American principles and interests.

With regard to Posner’s contention that the executive will be subject to political costs for extra-constitutional acts, even if an executive suffers voter retribution for abusing his power, there are additional costs that go beyond a political death. These externalities include the precedent set for successive executives to take risky steps outside of the bounds of the Constitution and the loss of public confidence in the executive office (not just in the administration of a single executive). More fundamentally, winning a subsequent election or staying in relatively good public graces does not serve as ad hoc approval of any extra-constitutional conduct. As the Supreme Court noted in *Aptheker*, a legitimate end does not sanction impermissible means,²⁴⁶ and the public cannot, through political speech, bring executive action within the law. Independent courts insulated from popular will, not popular will by itself, are charged with the duty to define what is legal. The law is not an entity subservient to the executive; to the contrary, the executive is sworn to “preserve, protect and defend the Constitution of the United States,” not the nation.²⁴⁷ In other words, the president is duty-bound to preserve the Constitution, irrespective of any political consequences.

stitution] is binding upon themselves collectively, as well as individually; and no presumption, or even knowledge, of their sentiments, can warrant their representatives in a departure from it, prior to such an act.”). To the extent that the question is one of a default rule or established rules, the people should favor a situation in which there are expressly enumerated constitutional provisions that the executive can ignore in times of war, as opposed to one in which all provisions are up for grabs and can be potentially transgressed. To limit the universe of areas in which the executive can frolic would be to circumscribe the possible abuses of extra-constitutional executive action.

²⁴⁵ Neal Katyal, Comments at the American Enterprise Institute (May 24, 2006).

²⁴⁶ *Aptheker*, 378 U.S. at 509 (quoting *Cantwell v. Connecticut*, 310 U.S. 296, 304 (1940)).

²⁴⁷ U.S. CONST. art. II, § 1.

Turning to Posner's moral imperative argument, there are critical differences between presidents, such as Lincoln, and individuals like Gandhi and Dr. King.²⁴⁸ The former have authority not only to execute laws but also to change them through the political process and through their exercise of constitutional power. The latter are those challenging discriminatory laws and the oppressive effects of the use of power by institutions and officials with power and authority. The former have many legal tools at their disposal, while the latter are forced to rely on civil disobedience precisely because they lack political clout. The former are elected by way of the majoritarian democratic process, while the latter represent marginalized members of society without the rights enjoyed by others. Ultimately, the former are kings, and the latter are pawns.²⁴⁹

In sum, the Constitution may bend in times of crisis, although there are limits on the degree to which it is flexible. Perhaps most important are the inherent limits set forth by the law itself. Practical considerations also cut against Posner's proposition that the extra-constitutionality is permissible in the wartime era. Specifically, as Justice Jackson pointed out, stepping outside the Constitution establishes a dangerous precedent subject to executive abuse.²⁵⁰ In addition, an element of "soft power" in the current war is denied if we fail to remain faithful to the Constitution. Finally, the moral underpinnings for civil disobedience do not support an alleged executive duty to act outside of the law, but rather entitle the relatively powerless to object to oppressive laws through non-compliance.

CONCLUSION

Justice Felix Frankfurter observed, "The words of the Constitution . . . are so unrestricted by their intrinsic meaning or by their history or by tradition or by prior decisions that they leave the individual Justice free, if indeed they do not compel him, to gather meaning not from reading the Constitution but from reading life."²⁵¹ This Article has attempted to invoke one aspect of my life—knowledge of *The*

²⁴⁸ See POSNER, NOT A SUICIDE PACT, *supra* note 6, at 85.

²⁴⁹ Posner's moral argument seems odd, not only because of the stated legal purpose of the book, but also because in other works Posner has likened morality to purely subjective, value-judgments that lack intrinsic value in ascertaining objective truths. See Sidhu, *supra* note 94, at 81-82.

²⁵⁰ See *Korematsu v. United States*, 323 U.S. 214, 246 (1944) (Jackson, J., dissenting).

²⁵¹ Felix Frankfurter, *The Supreme Court*, 3 *Parliamentary Affairs* 55, 68 (1949).

Wire—to challenge Judge Richard A. Posner’s book, *Not a Suicide Pact*.

Posner characterizes his book as an attempt “to suggest the direction that the law should take.”²⁵² Posner’s book, therefore, is one about the law—particularly, about how the courts should decide questions of constitutional law that implicate national security and individual rights in the post-9/11 world. To more fully appreciate Posner’s arguments, this article has offered additional thoughts from a legal and practical perspective on some of the major contentions in Posner’s wartime constitutional framework.

The most disquieting aspect of Posner’s overall analysis is the extent to which he views executive authority in times of war. Posner allows for the executive to not only stretch the law but also ignore it when any allegedly troublesome circumstances or subjective moral views tempt the executive to do so.²⁵³ In Posner’s scheme, there are no meaningful checks on the executive, even with the knowledge that the executive is significantly inclined to serve national security without regard for protected rights. In a nation of laws and not men, and in a nation where the Constitution is the supreme law of the land, Posner’s framework allows the law to be reduced to a nullity if the practical benefits outweigh the “costs” of exhibiting faithfulness to the law. This is not an exercise in law so much as a recipe for executive abuse, judicial abdication, and constitutional meaninglessness.

“The tree that doesn’t bend breaks,”²⁵⁴ Marla Daniels noted to Cedric. We must not forget his response: “Bend too far, and you’re already broken.”²⁵⁵ This is an outcome that Posner blesses yet one this Article hopes this constitutional republic will avoid.

²⁵² POSNER, *NOT A SUICIDE PACT*, *supra* note 6, at 29.

²⁵³ *See supra* Part IX.

²⁵⁴ *The Wire*: -30- (HBO television broadcast Mar. 9, 2008).

²⁵⁵ *Id.*