

Not a Suicide Pact

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THE CONSTITUTION IN A
TIME OF NATIONAL EMERGENCY

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Introduction

THIS IS A BOOK ABOUT THE CONSTITUTIONAL RIGHTS that impinge on the measures for the protection of national security that the U.S. government has taken in response to the terrorist attacks of September 11, 2001. It is thus about the marginal adjustments in such rights that practical-minded judges make when the values that underlie the rights—values such as personal liberty and privacy—come into conflict with values of equal importance, such as public safety, suddenly magnified by the onset of a national emergency. Like any brittle thing, a Constitution that will not bend will break.

The history of the United States has been punctuated by these emergencies. The greatest, after the early years of the Republic, was the Civil War; the crisis of constitutionalism that emergencies beget remains a legacy of that desperate struggle. The number of national emergencies accelerated in the twentieth century as the United States became a world power and then a nuclear power confronting other nuclear powers. There were the two world wars; the nation's greatest economic depression, coinciding with the rise of totalitarianism abroad in the 1930s; the Cold War, which lasted from 1948 to

1989 and was punctuated by episodes of espionage, war, and near war (for example, the Cuban missile crisis); and, embedded within the Cold War, the Vietnam War and the domestic unrest and governmental overreactions that the war sparked in the late 1960s and early 1970s.

All these episodes placed pressure on existing constitutional understandings. Now, in the early years of the twenty-first century, the nation faces the intertwined menaces of global terrorism and proliferation of weapons of mass destruction. A city can be destroyed by an atomic bomb the size of a melon, which if coated with lead would be undetectable. Large stretches of a city can be rendered uninhabitable, perhaps for decades, merely by the explosion of a conventional bomb that has been coated with radioactive material. Smallpox virus bioengineered to make it even more toxic and vaccines ineffectual, then aerosolized and sprayed in a major airport, might kill millions of people. Our terrorist enemies have the will to do such things and abundant opportunities, because our borders are porous both to enemies and to containers. They will soon have the means as well. The march of technology has increased the variety and lethality of weapons of mass destruction, especially the biological, and also, critically, their accessibility. Aided by the disintegration of the Soviet Union and the acquisition of nuclear weapons by unstable nations (Pakistan and North Korea, soon to be joined, in all likelihood, by Iran), technological progress is making weapons of mass destruction ever more accessible both to terrorist groups (and even individuals) and to hostile nations that are not major powers. The problem of proliferation is more serious today than it was in what now seem the almost halcyon days of the Cold War; it will be even more serious tomorrow.

I am not a Chicken Little, and I agree with those who argue that our vigorous campaign against al-Qaeda and our extensive if chaotic efforts at improving homeland security have bought us a breathing space against terrorist attacks on U.S. territory. But how long will

this breathing space last? The terrorists, their leadership decimated and dispersed, may be reeling, but they have not been defeated. In January 2006 Osama bin Laden declared that there would be further terrorist attacks on the United States; it would be reckless to dismiss his declaration as idle boasting. This is not the time to let down our guard.

David Luban asks: “What sacrifice in our rights would we be willing to undergo to reduce the already-small probability of another September 11 by a factor of, say, one in ten? From, let us say, one percent annually to point-nine percent—an annual saving of less than half a statistical life?” Those are not good questions. We have no idea whether the probability of another 9/11 (or worse) is only 1 percent.

The research that I have been conducting for the past several years on catastrophic risks, international terrorism, and national security intelligence has persuaded me that we live in a time of grave and increasing danger, comparable to what the nation faced at the outset of World War II. The insights from that research, combined with my long-standing interest and (as a judge) activity in constitutional law, have moved me, and I hope equipped me, to write this book.

Not all national emergencies are consequences of war or terrorism. I mentioned the Great Depression. Natural disasters, too, can create emergency conditions that invite legally and even constitutionally problematic responses. Imagine strict quarantining and compulsory vaccination in response to a pandemic, or the imposition of martial law in response to a catastrophic earthquake, volcanic eruption, tsunami, or asteroid strike. When New Orleans was inundated as a result of Hurricane Katrina in the late summer of 2005, proposals to use soldiers to help maintain law and order met objections based on long-standing fears of military intervention in domestic crises, fears that had been codified in an 1878 law called the Posse Comitatus Act. The act had signaled the end of the post-Civil War Reconstruction era by making it a crime to use the federal armed

forces (as distinct from the state militias—the National Guard) for law enforcement unless an act of Congress expressly authorizes such use. Invocation of the Posse Comitatus Act was actually just an excuse for inaction in the New Orleans emergency because an act of Congress (the Stafford Act) *does* authorize the use of the armed forces to assist in emergencies. More fundamentally, in conditions of great danger legalistic limitations fall by the wayside; officials act, leaving the legal consequences to be sorted out later.

Indeed, if interpreted to prevent the president from responding effectively to a major emergency, the Posse Comitatus Act might be deemed an unconstitutional limitation on sovereign power and executive prerogative. In *United States v. Curtiss-Wright Export Corp.* (1936), the Supreme Court held that the United States acquired the powers of a sovereign nation by its successful revolution against Great Britain rather than by a grant in the Constitution; the nation is prior to the Constitution. National defense, not limited to defense against human enemies, is a core sovereign power and moreover one that traditionally is exercised by the executive. The particular context of *Curtiss-Wright* was the nation's foreign relations. But the principle of the case—that national power is not limited to the powers explicitly granted by the Constitution—is broader, and anyway our main terrorist enemies are foreign nonstate groups that pose a threat to the nation greater than that of most foreign states.

The Katrina-begotten controversy over the Posse Comitatus Act illustrates how emergencies can squeeze civil liberties. The national security measures adopted after the 9/11 attacks provide many other illustrations of the squeeze; I have sought to anchor my analysis in them.

The core meaning of “civil liberties” is freedom from coercive or otherwise intrusive governmental actions designed to secure the nation against real or, sometimes, imagined internal and external enemies. The concern is that such actions may get out of hand, cre-

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ating a climate of fear, oppressing the innocent, stifling independent thought, and endangering democracy. Civil liberties can even be thought of as weapons of national security, since the government, with its enormous force, is, just like a foreign state, a potential enemy of the people. Civil liberties are also means of bringing the judiciary into the national security conversation, with a perspective that challenges that of the national security experts. The separation of powers has epistemic as well as political significance: competition among branches of government can stimulate thought, correct errors, force experts to explain themselves, expose malfeasance, and combat slack and complacency.

But the more numerous or dangerous the nation's enemies are believed to be, the greater the pressure to curtail civil liberties in favor of executive discretion and unity of command, in order to enable the government to wield its great power more effectively, if less responsibly. The traditional internal enemies are criminals, though in the Civil War they were rebels. The traditional external enemies are foreign states. But at present, with U.S. crime rates well below their historic highs and no major power posing a significant military threat to the nation, the external enemies whom Americans mainly fear are Islamist terrorists. And with good reason: they are numerous, fanatical, implacable, elusive, resourceful, resilient, utterly ruthless, seemingly fearless, apocalyptic in their aims, and eager to get their hands on weapons of mass destruction and use them against us. They did us terrible harm on September 11, 2001, and may do us worse harm in the future. We know little about their current number, leaders, locations, resources, supporters, motivations, and plans; and in part because of our ignorance, we have no strategy for defeating them, only for fighting them. Although our invasion of Afghanistan shortly after the 9/11 attacks and our subsequent vigorous counterterrorist efforts have scattered the leadership of al-Qaeda, as well as depriving the movement of its geographic base (though it has

obtained a quasi-sanctuary in Pakistan), we are far from victory. Indeed, it is arguable that we have lost ground since 9/11—that the spectacular success of the 9/11 attacks did more to turn the Muslim world against the West than the vigorous military and police response to Islamist terrorism has done to weaken the terrorist movement. Yet all this is speculation. For all we know, we may be quite safe. But we cannot afford to act on that optimistic assumption.

I call the Islamist terrorists external enemies because very few of them, it appears, are American citizens or even residents of the United States (though the few who are may be especially dangerous). They are neither rebels nor common criminals. But they differ from our previous external enemies, such as the Axis powers in World War II and the Soviet Union during the Cold War, and even for that matter the Confederacy in the Civil War, because those enemies opposed us with organized military forces. They operated through subversion as well as military confrontation—quite serious subversion during the Civil War and the early years of the Cold War (and before—in fact, Soviet penetration of the U.S. government peaked during World War II). But the primary threats were military. A military enemy can usually be fought with minimal impairment of civil liberties beyond conscription and the censorship of militarily sensitive information. But terrorists do not field military forces that we can grapple with in the open. And they are not content to operate against us abroad; they penetrate our country by stealth to kill us. Rooting out an invisible enemy in our midst might be fatally inhibited if we felt constrained to strict observance of civil liberties designed in and for eras in which the only serious internal threat (apart from spies) came from common criminals.

But just as attacks by terrorists or foreign nations are not the only source of national emergencies, so not all forms of terrorism create national emergencies warranting the curtailment of existing rights. The tendency to equate any politically motivated violent crime with

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terrorism should be resisted. Many such crimes, such as those committed by animal-rights fanatics, are no more dangerous than run-of-the-mill crimes. My concern is limited to terrorism that has the potential to create a national emergency. This qualification should be borne in mind throughout the book.

Subversive activities during the Civil War and the Cold War begot severe responsive measures, such as suspension of habeas corpus in the earlier struggle and the prosecution of communist leaders in the later one. In the wake of 9/11 the federal government adopted measures that at first encountered little resistance from the public or politicians but since have become controversial as the attacks recede in time and the anxiety caused by them concomitantly diminishes. The measures and the initial acquiescence in them by the public were the predictable responses to a sudden sharp increase in a perceived threat to the nation's safety. The central question addressed in this book is how far civil liberties based on the Constitution should be permitted to vary with the threat level.

The qualification "based on the Constitution" requires emphasis. Many protections of civil liberties are of purely statutory origin. The Posse Comitatus Act is one example. The right of convicted criminals to obtain judicial review by means of habeas corpus is another; the Constitution limits suspension of habeas corpus, but the right of habeas corpus thus presupposed is, as we'll see in Chapter 3, more limited than the statutory right. A third example is the statutory right of a college student to insist that his grades not be disclosed to a prospective employer. Some civil liberties protections originate in treaties, such as the Convention Against Torture, to which the United States is a party. It is a mistake to think that "constitutional" is a compliment. Much that the government is permitted by the Constitution to do it should not do and can be forbidden to do by legislation or treaties. Constitutional law is intended to be a loose garment; if it binds too tightly, it will not be adaptable to changing

circumstances and will leave too little room for the play of democratic forces. The analysis in this book is limited to constitutional law, so from now on, unless otherwise indicated, when I use the term “civil liberties” I mean “civil liberties derived from the Constitution.”

A related point is the distinction between right and power. One way to oppose an exertion of legislative or executive power is to argue that it violates rights. But another is to argue that it simply exceeds the lawful power of the legislature or the executive. A local business firm that Congress attempts to regulate can object that Article I of the Constitution, which authorizes Congress to regulate interstate and foreign commerce, doesn’t authorize it to regulate a purely local business. But it would be a stretch to argue that the regulation invaded a constitutional *right*. Unauthorized action is not necessarily the infringement of a right. My subject is constitutional rights, so I shall not be concerned with limitations on government power that do not protect such rights. But I will be very concerned with constitutionally conferred powers of government that limit those rights. The scope of governmental power to take actions to protect national security is the reciprocal of the individual’s rights to liberty and privacy. So this is a book about the Constitution, not just about constitutional rights.

Although the title of this book evokes a history of emergency measures that goes back to the founding of the nation, this is not a work of history. Thus I am not much interested in what rights rebels and their sympathizers might have in a civil war. The threat of another civil war is not what is placing pressure on constitutional rights today. The pressure is coming mainly, though not entirely, from the threat of terrorism in a world increasingly menaced by weapons of mass destruction. (I shall generally term this the threat of “modern terrorism.”) The question is how far this pressure should be resisted.

Chapter 1 discusses how constitutional rights are created and argues that the principal creators are not the actual draftsmen or ratifiers

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of the constitutional text but the justices of the Supreme Court, and that the justices are heavily influenced by the perceived practical consequences of their decisions rather than being straitjacketed by legal logic. As a result, constitutional law is fluid, protean, and responsive to the flux and pressure of contemporary events. The elasticity of constitutional law has decisive implications for the scope of constitutional rights during an emergency.

Chapter 2 applies the approach sketched in Chapter 1 to civil liberties, arguing that they are the point of balance between concerns for personal liberty and concerns for public safety. The former concerns are the basis of constitutional rights; the latter are the basis of government powers, which limit some rights (while, of course, creating many others, but statutory rights are not my subject) but which are as firmly grounded in constitutional values as constitutional rights are. It would be odd if the framers of the Constitution had cared more about every provision of the Bill of Rights than about national and personal survival. In times of danger, the weight of concerns for public safety increases relative to that of liberty concerns, and civil liberties are narrowed. In safer times, the balance shifts the other way and civil liberties are broadened. Civil libertarians disagree with this method of determining the scope of civil liberties; I explain in Chapter 2 why I think their approach flawed and their fears of a more flexible, practical approach unfounded.

Most civil libertarians look almost exclusively to the courts, and to constitutional law fashioned and enforced by courts, to safeguard civil liberties in periods of national emergency as at other times. Their court-centric approach is shortsighted. Judges, knowing little about the needs of national security, are unlikely to oppose their own judgment to that of the executive branch, which is responsible for the defense of the nation. They are especially unlikely to interpose *constitutional* objections because of the difficulty of amending the Constitution to correct judicial error. Conservative judges are particularly

unlikely to resist claims of national security—and the federal judiciary may be more conservative today than at any other time in the last half century.

Fortunately, when national security measures are agreed on by Congress and the president, the need for judicial intervention diminishes. The legislative and executive branches are rivalrous even when nominally controlled by the same political party; the Republican Congress has not been a rubber stamp for the national security initiatives of the Bush administration. To an extent not acknowledged by civil libertarians, the Court can sit back and let the other branches duke it out, for when the competitive branches agree on a measure, the likelihood of its being an exaggerated response to a perceived danger is diminished.

The four succeeding chapters, Chapters 3 through 6, analyze the three principal sets of constitutional rights that come under pressure in times of real or imagined national emergency. I concentrate on the post-9/11 counterterrorist measures, actual and contemplated, that have engendered the most controversy. They include the attempt to deny the right of habeas corpus to captured terrorist suspects; the interception of phone calls and other electronic communications, such as e-mails, of U.S. citizens by the National Security Agency outside the limits set by the Foreign Intelligence Surveillance Act; ambitious data-mining projects such as the military's Able Danger project; demands by the FBI under section 215 of the USA PATRIOT Act for records of library borrowings; monitoring of the constitutionally protected speech of radical imams; torture or quasi-torture of terrorist suspects; and establishment of military tribunals to try suspected terrorists, including U.S. citizens apprehended in the United States rather than on a foreign field of combat such as Afghanistan or Iraq.

The general argument of these chapters is that the scope of constitutional liberties is rightly less extensive at a time of serious ter-

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rorist threats and rapid proliferation of means of widespread destruction than at a time of felt safety, but that the degree of curtailment required to protect us is not so great as to impair the feeling of freedom that is so important to Americans. It would leave intact the essential structure of constitutional liberties that the Supreme Court has been building since the 1950s and 1960s. That essential structure is one we can inhabit comfortably until the terrorist menace abates, however long that may be.

Chapters 3 and 4 discuss constitutional rights against the use of physical (and to a lesser extent psychological) coercion, whether to arrest or intern a person, deport or relocate him, search him or his home or seize his possessions, or obtain information from him by brutal measures up to and including torture. Chapter 3 examines the constitutional rights of people detained on suspicion of being terrorists to challenge their detention, particularly the right of habeas corpus and the right to due process of law. Chapter 4 examines constitutional rights that bear on the interrogation of detainees and on searches of terrorist suspects preceding detention. That chapter also discusses surreptitious electronic searches that, though they do not involve physical force or trespass, are generally though perhaps mistakenly considered to be subject to the same limitations that the Fourth Amendment to the Constitution places on conventional searches and seizures.

Much of the debate over how much force the government can employ against terrorists, how much snooping it can do, and so forth, without violating the Constitution, has revolved around the question of whether the United States is at war with terrorists or whether they are simply a particularly noxious form of political criminal. I argue that the terrorist threat is *sui generis*—that it fits the legal category neither of “war” nor of “crime.” It requires a tailored regime, one that gives terrorist suspects fewer constitutional rights than people suspected of ordinary crimes, though not no rights. In

particular, such suspects should have a constitutional right to demand, by applying to a court for habeas corpus, that a judicial officer determine whether their detention has a legal basis—the right, in other words, to due process of law.

Even torture may sometimes be justified in the struggle against terrorism, but it should not be considered *legally* justified. A recurrent theme of the book is that a nonlegal “law of necessity” that would furnish a moral and political but not legal justification for acting in contravention of the Constitution may trump constitutional rights in extreme situations. The limits of legal codification as a method of social control are especially acute in the context of national security; that is the lesson of the controversy over the scope and application of the Foreign Intelligence Surveillance Act to modern terrorism, as we shall see in Chapter 4.

Chapter 5 discusses three issues of free speech. The first is the propriety of investigating political extremists in this country, such as Muslim clergy who preach holy war against the United States, even if they do not actually recruit or incite terrorists. The second is whether to suppress rather than merely monitor such extremist speech. The third is how far newspapers, television, and other media should be forbidden to publicize sensitive information, including information concerning the rough tactics sometimes used by the government to fight terrorism, when the media learn about the tactics from government officials who disclosed classified information in violation of law.

I argue that it is constitutionally permissible to base noncoercive investigations on a group’s political beliefs, provided that those beliefs are likely to endanger national security by encouraging terrorist activity. The effect of such investigations in deterring the free expression of political beliefs is undeniable but probably modest. Nor would such investigations or other forms of national security “profiling” constitute unconstitutional religious or ethnic discrimination.

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It might even be constitutional to criminalize the expression of terrorism-promoting beliefs, rather than just conducting surveillance of their promoters, if such expression posed a serious, even though not imminent, threat to public safety. But that is an issue for the future; the case for punishing extremist Islamic expression in this country has not yet been made.

Regarding the third issue, that of censoring the media, I argue that an American version of the British Official Secrets Act may be needed in order to seal leaks of classified material that are harmful to national security or that invade personal privacy, and that such a law would not violate the Constitution. I also note that it may become necessary to censor the scholarly publication of biological research that might provide terrorists with detailed recipes for biological weapons.

Chapter 6 examines rights of privacy, with particular attention to the question whether a private individual should have a constitutional right to conceal from the government personal information that he has already disclosed voluntarily to strangers, such as banks, insurers, online bookstores, and other vendors of goods or services. I argue that the fact that an individual has surrendered some of his privacy to a vendor or other entity with which he deals need not be treated as a blanket waiver of all claims that he might want to make to the privacy of the information thus disclosed. The courts have not yet recognized the distinction because they do not think of informational privacy as a constitutional right separate from the rights conferred by constitutional provisions, such as the Fourth Amendment, that forbid particular methods of invading privacy. I argue further in that chapter, picking up a theme first sounded in Chapter 4, that mining the vast amount of personal information stored in public and private computer databases is a critical weapon against modern terrorism and can be employed with minimal harm to the types of privacy that people value most.

Chapters 5 and 6 are related because people require a degree of privacy in order to be able to develop and express politically unpopular beliefs that may have significant social value, as distinct from the beliefs of advocates of holy war against the United States. Those beliefs—the contentions of relativists notwithstanding—have no value, at least to us.

The Conclusion explores further the distinction between power in the sense of authority and power in the sense of raw ability to implement a policy choice. The government could be authorized by a constitutional amendment to curtail particular civil liberties in times of national emergency. But alternatively it could continue to be (as at present it is) denied that legal authority yet acknowledged to possess the power, and even the moral duty, to violate legal, including constitutional, rights when necessary to avoid catastrophic harm to the nation. Civil disobedience can be a duty of government in extreme circumstances to its citizens, even if not a right.

This is a book about law, and so it is for lawyers; it is about national security, and so it is also for students of national security and members of the national security community who are not lawyers. But it is also a book for the general reader. The issues it covers are important to all Americans, and there is nothing to prevent the issues from being made accessible to intelligent nonspecialists except the specialist's habit of communicating with other specialists in a private vocabulary. I have tried to fight the habit in this book, and in earnest of my intentions have eschewed footnotes and endnotes. The "Further Readings" suggested at the end of the book direct the reader to cases, statutes, books, and articles that either are mentioned in the book or provide helpful amplification or critique.

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