

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

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I.

The war on terrorism presents any thinking person with what appears to be an irresolvable dilemma. [1] On the one hand, as citizens, we claim to have inalienable rights that protect us against force, whether initiated by terrorists or by the state. On the other hand, by insisting that the state assiduously respect our rights, we can in practice weaken its power to deal with terrorism. If we ratchet back our commitment to the rights we hold against the state, we court the dangers of totalitarianism. But if we insist on an inflexible commitment to those rights, we court the dangers of mass murder. We could of course simply *deny* the dangers of either totalitarianism or terrorism, but if we acknowledge them, as we should, it's clear that there is a difficult problem here in need of a resolution.

Richard Posner's *Not a Suicide Pact* is a distinguished jurist's attempt to resolve this problem by way of the time-honored American expedient of a resort to 'pragmatism.' 'The core meaning of "civil liberties,"' Posner argues, 'is freedom from coercive or otherwise intrusive governmental actions designed to secure the nation against real, or sometimes, imagined internal and external enemies' (p. 4). 'The central question addressed in this book,' he continues, 'is how far civil liberties based on the Constitution should be permitted to vary with the threat level,' where the threat arises from 'terrorism that has the potential to create a national emergency' (p. 7) – i.e., Islamist terrorism of the al-Qaeda variety. Unfortunately, if we look to the Constitution for an account of our liberties, we find a text that is too 'vague or obsolete' to determine the 'scope' of those liberties. We find an eighteenth-century document which, though eloquent, is fundamentally out of touch with the realities of the world we currently face. Confronted with the relative indeterminacy of the Constitution, judges are obliged, Posner says, to 'create' rights rather than discover them in the text.

According to Posner, rights are 'created' by engaging in a pragmatic cost-benefit analysis and tying this analysis in a very loose way to the generalities we find in the Constitution. In other words, when it comes to national emergencies like the

current one, pragmatism requires us to ‘balance’ the interests of liberty against those of security, choose an arrangement that gets us the optimal amount of both, and find a (rough) textual rationale for doing so. ‘Ideally,’ he writes,

in the case of a right (for example the right to be free from unreasonable searches and seizures) that could be asserted against government measures for protecting national security, one would like to locate the point at which a slight expansion in the scope of the right would subtract more from public safety than it would add to personal liberty and a slight contraction would subtract more from personal liberty than it would add to public safety. That is the point of balance, and it determines the optimal scope of the right. (p. 31)

Unfortunately (Posner continues) American judges, with the connivance of civil libertarian ideologues, have pushed things away from the ‘point of balance,’ that is, too far in the direction of personal liberty and too far away from the requirements of national security. Though problematic enough in the case of ordinary crime, in the case of Islamist terrorism, this ‘rights fetish’ (p. 150) imperils our very existence. The time has therefore come to push things in the reverse direction (albeit *only* as regards Islamist terrorism). To this end, Posner argues, we should reinterpret the principle of habeas corpus to allow for the indefinite detention of suspected terrorists (p. 56); reinterpret the Fourth Amendment to the U.S. Constitution so as to deny its applicability to suspected terrorists (pp. 88-91); allow torture for purposes of intelligence-related information gathering (pp. 86-7); allow unlimited electronic surveillance (and perhaps physical searches) without warrants or probable cause (pp. 99-101); and reinterpret the First Amendment so as to allow for the censorship of ‘hate speech’ by and against Muslims (p. 124).

To some, Posner’s recommendations will sound like a sober resolution of the problem with which I opened this review. To others, the same recommendations will sound like an outright apology for dictatorship. I incline toward the latter interpretation. Despite the sobriety and sincerity of his prose, Posner’s book amounts in the end to a wild and incoherent defense of dictatorship. His arguments are premised on tacit claims he does not defend, and explicit claims he cannot defend. Once we consider and reject these claims, there turns out to be little left of the book.

II.

Before we deal with Posner's arguments as such, we need to attend to three crucial (sets of) assumptions that lurk in the background of the book without quite being made explicit. The first set concerns the concept of a *constitutional right/liberty*, the second concerns the concept of an *emergency*, and the third, the concept of *terrorism*. For all of Posner's complaints about the 'vagueness' of the Constitution, it is astonishing how imprecise he is in his use of these three concepts.

Constitutional rights. Posner tells us early on that his analysis in *Not a Suicide Pact* is 'limited' to American constitutional law (p. 8). This stipulation narrows the topic of the book in at least two significant ways. First, being limited to *American* law, the book discusses a specifically American as opposed to international context. Second, being limited to *constitutional law*, the book has little to say about rights that have their source in statutes, treaties, conventions, or non-legal moral principles that go beyond the text of the U.S. Constitution. What the book discusses, then, is one narrowly legal aspect of the specifically American response to terrorism. It therefore cannot function as a guide to what, all things considered, we ought to do (*pace* Posner's claim at p. 150).

Posner's narrowly legal focus would be a perfectly legitimate approach to the topic *if* he'd been consistent about staying on topic as he defines it. But he's not consistent. Thus some parts of the book consist of narrowly legal analysis intended to show us that a particular provision of the U.S. Constitution can, in the name of 'pragmatist balancing,' be stretched without requiring the literal violation of the text of the Constitution. Other parts of the book, by contrast, consist of appeals to 'moral duty' and 'non-legal necessity' intended to justify the need to *override* the text of the Constitution in the name of non-legal values. The result is a conflation of two different topics: (i) how to bend the text of the Constitution so as nominally to comply with it, and (ii) when to *violate* the text of the Constitution so as to preserve the values that it (the Constitution) tacitly aims to secure. The first issue is within the announced scope of Posner's topic; the second is not. Unfortunately, Posner frequently runs the two things together in confusing ways (pp. 12, 38-40, 85-6, 150, 153).

National emergencies. A large part of Posner's argument turns on the extra-constitutional concept of a 'national emergency.' We are, he says, justified in bending and/or violating the Constitution because we face a national emergency in which the usual legal rules cannot be thought to apply. Despite the colossal role

it plays in the book, Posner devotes no serious analytic attention to the concept of an 'emergency.' He neither notes the equivocality of the concept, nor defines it, nor notes the (remarkable) distance of his use of it from the dictionary definition.

On the dictionary definition, an 'emergency' is 'a sudden, generally unexpected occurrence or set of circumstances which requires immediate action,' usually (but not always) putting life and limb in jeopardy. It's worth noting that by the dictionary definition (and by conventional understanding); an emergency is strictly limited in time. Emergencies begin without warning and require immediate correction, but once corrected, come to an end. It stretches things to speak of an emergency that is years or decades in duration, and the concept of an 'indefinite emergency' is simply a contradiction in terms.

Posner stretches the concept of 'emergency' well past its breaking point. He begins the book by offering an account of twentieth-century American history that turns most of it into an unbroken series of emergencies encompassing the two World Wars, the Depression, the Cold War, and the war on terrorism (pp. 1-4). He also tacitly assumes throughout the book that the U.S. will *remain* in a state of emergency for as long as it remains at war with terrorism. Since there is no obvious terminus to that war, it follows that there is no obvious terminus to what Posner regards as a state of emergency, and so it follows that there is no obstacle to our indefinitely using the phrase 'state of emergency' to scale back civil liberties. A 'state of emergency' (or even a relatively unbroken string of emergencies) that began with the sinking of the *Lusitania*, continued through Pearl Harbor, the Cuban Missile Crisis, and 9/11, and threatens to stretch indefinitely into the future is a bit much.

Terrorism. Terrorism, Posner argues, is a 'sui generis' phenomenon, reducible neither to crime nor to war despite its similarities to both, and so requires *a sui generis* response by those who wish to confront it (pp. 11, 28, 73). Islamist terrorism is yet more unique, as Islamist terrorists (unlike any other) aspire to commit mass murder, and, given access to weapons of mass destruction, could well realize their aims (pp. 2, 5-6, 63). Given the extreme nature of his policy prescriptions, Posner is at pains throughout the book to emphasize that his proposals apply *exclusively* to Islamist terrorists, and not to ordinary terrorists (e.g. eco-terrorists), ordinary criminals (e.g. murderers and kidnappers), or ordinary soldiers. He insists that his prescriptions, properly circumscribed, would not affect the ordinary workings of the criminal law.

KHAWAJA | The Constitution and National Emergency

While there is an element of truth in Posner's claims, his attempt to circumscribe his prescriptions is ultimately unconvincing. For one thing, he never defines 'terrorism,' much less 'Islamist terrorism,' and so leaves it a bit of a mystery how those categories would be defined in a legal context. Second, while he limits his analysis to 'terrorism that has the potential to create a national emergency' (p. 7), it's unclear whether he means this to include 'Islamist terrorism' as a single unified category or some further-subdivided part of this category; in the latter case, it's equally unclear how he would mark the distinction between emergency-producing Islamist terrorism and its non-emergency-producing counterpart. In any case, since Posner concedes that non-Islamist terrorism could rise to the level of a national emergency, he implicitly concedes that what is applicable to Islamist terrorism could well be applicable to non-Islamist terrorism (pp. 63-4). So the circumscription of Posner's proposals is hardly as tight as he wants to argue.

Beyond this, Posner ignores the ways in which some crime (e.g. gang violence in the cities) might *already* be regarded as meeting the (vague) criteria of a Posnerian 'national emergency,' and so ignores the possibility that his prescriptions might *already* apply outside the scope of his stipulations (see e.g. p. 72). He also ignores the fact that some violence cuts across the categories of 'crime,' 'terrorism,' and 'national emergency' and so ignores the possibility that his prescriptions could apply to cases that straddle his categories. Were the anthrax killings of fall 2001 'crimes' – or were they 'terrorism?' Did the panic they created rise to the level of a 'national emergency,' or not? What about the pair of Muslim snipers who stalked the Washington, D.C. metropolitan area in the fall of 2002 (recall the near panic that they created)? What about petty crime (e.g. fraud, arms dealing, counterfeiting) that facilitates large-scale terrorism? It's not clear how Posner would answer these questions, or whether he has the conceptual resources to do so. In that case, his prescriptions could, contrary to his protestations, apply to non-Islamist domestic crime.

III.

I turn now to Posner's argument proper. The argument begins with the rather implausible claim that '[j]udges create rights because constitutional rights are vague or obsolete' (pp. 17-8). It's not clear to me what it means to 'create' a right, but leave that aside. The relevant point is that the supposed need to 'create rights' gives Posner the licence to appeal to 'pragmatism' as a solution to the problem of the indeterminacy of the Constitution.

What, then, is 'pragmatism?' Despite a few glib remarks about its quintessential Americanness, Posner has little of substance to say about it. At a very general level, we learn that pragmatism is a species of cost-benefit analysis that tells us to balance 'the anticipated consequences of alternative outcomes and [pick] the one that creates the greatest preponderance of good over bad effects' (p. 24). This is not by itself a particularly helpful description. Every act, after all, has innumerable consequences; the real questions are which ones to single out as 'costs' and 'benefits,' how to reckon the preponderance of good over bad effects, and on what basis. Unfortunately, despite its centrality to his thesis, Posner has nothing useful to say on this subject anywhere in the book. [2] What he does instead is to appeal repeatedly to quasi-mathematical metaphors of weighing, balancing, and calculation. Pressed to give these metaphors literal meaning Posner cheerfully concedes that he can't.

The most explicit and fatal concession comes in a discussion intended to demonstrate the benefits of indefinite detention of terrorist suspects:

No explicit constitutional text or precedent blocks the suggested resolution of the dilemma of what to do with terrorist suspects. ... Assessing the relevant needs and dangers requires a weighing of imponderables. The subjectivity of the process, which I have acknowledged and indeed emphasized in the preceding chapters, is underscored by the etymology of 'imponderable;' it comes from ponderare, Latin for 'to weigh.' To weigh the un-weighable is at once a contradiction and an inescapable duty. (p. 66)

Posner is indeed correct to say that he emphasizes the subjectivity of judicial deliberation in the preceding chapters. For that matter, he does the same in the subsequent ones. He makes judicial assessment a matter of 'feeling' (pp. 11, 40, and 148), 'imagination' (p. 31), and 'intuition' (p. 151). He tells us that it is 'inescapably subjective...' (p. 24), and admits forthrightly that there is, on his view, no reason to accept either objectivity or precision in any given instance of 'balancing.' Objectivity, we are told, is a myth (pp. 24-5), and deliberative precision is impossible (p. 31).

It's no surprise that a view of this sort would lead in the end to just the sort of contradiction that Posner so candidly avows in the quoted passage. Alas, a contradiction candidly avowed is no less a contradiction for that and no less fatal to one's thesis. If something is un-weighable, it cannot be weighed; if something cannot be done, it cannot be prescribed. Posner is telling us here that constitutional interpretation is a matter of pragmatic balancing. He is also admitting that there is

KHAWAJA | The Constitution and National Emergency

no rational way to pull off the balancing act. Thus the balancing, which was brought in to remedy the Constitution's 'vagueness,' leads by way of yet greater vagueness, to a contradiction that merely compounds the original problem – assuming that it was a problem. It's hard to think of a better illustration of the old joke: the problem with pragmatism is that it doesn't work.

Having offered up this conception of pragmatist balancing, Posner asserts, inexplicably, that it gives us a uniquely defensible procedure for constitutional decision-making. Judges, he claims, can on pragmatist grounds fairly be criticised for having 'placed the wrong weights on particular consequences,' or being 'too much in thrall to precedents that either were unsound when created or have become obsolete...' (p. 28). 'Accurate balancing of competing values,' he asserts 'requires courts to pay serious attention to risks...' (p. 34). '*[P]roper* balancing of competing values in constitutional decision making is *not shortsighted*' (pp. 38-9). '[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*. Civil libertarians tend to *exaggerate* the costs...' (pp. 50-1). '[T]he *lower the cost* to the person searched or seized, the *less important* it is to insist on strongly grounded suspicion' (pp. 89-90). 'It is *more important* that the public tolerate extensive national security surveillance of communications rather than an occasional run-of-the-mill crime go unpunished...' (p. 99). Radical Islamist discourse has lower '*social value*' than communist discourse or chit-chat (pp. 113-14, 131). And so on.

Each of the phrases I have italicised in the preceding paragraph involves a normative judgement of some kind: about wrongness, rightness, accuracy, importance, costs, benefit, or value. Each presupposes that we have some objective way of distinguishing costs from benefits, of measuring benefits against costs, and of identifying optimal courses of action. Posner admits that he has no such objective procedure in hand; in fact, he concedes just the reverse. It follows that he is not entitled to make any of the normative judgements quoted above. But if we subtract those judgements from the book, little remains.

Posner's pragmatism, then, will not get him to his policy prescriptions. Indeed, it won't get him anywhere. But it's also worth going back to challenge his formulation of the issue right from the start, a formulation he happens to share with his civil libertarian adversaries. Almost everyone in the contemporary debate, Posnerian or anti-Posnerian, supposes that 'liberty' and 'security' are distinct and incommensurable values that somehow have to be 'balanced' or 'traded off' against

each another. One side in the debate wants to sacrifice liberty to security, the other, security to liberty. Few have questioned the premise that motivates the need for sacrifice.

Is it really so obvious that 'liberty' and 'security' *are* distinct and incommensurable values? The answer depends on how we define our terms, and I for one don't find Posner's definitions very perspicuous. 'The core meaning of "civil liberties,"' to repeat his definition, 'is freedom from coercive or otherwise intrusive governmental actions designed to secure the nation against real, or sometimes, imagined internal and external enemies' (p. 4). One obvious problem with this definition is that it implies that government is the *only* entity capable of violating liberty. But that's absurd; it implies that my liberties are not violated when I'm the victim of crime or terrorism. A second problem, perhaps less obvious, is that the definition conceives of liberty in such a way as potentially to make it incompatible with any conception of security, whether justified or not. But this, while not quite absurd, stacks the deck. Why should liberty be defined in such a way as to imply that my liberties *must* be violated by the sheer existence of the very thing that preserves them?

To think clearly about the relation of liberty to security, we need to step away from contemporary discourse and start from scratch. [3] Suppose we define 'liberty' as the set of actions I have an enforceable right to perform in an unthreatened and unimpeded way. So if I have the *right to life*, I have the right to take those actions required to preserve myself (compatible with everyone else's like right), and my liberty is violated if, for instance, you kill me (or threaten to). If I have a *right to bodily integrity*, I have the right to act in ways that preserve my bodily integrity (compatible with everyone else's like right), and my liberty is violated if, for instance, you attack me (or threaten to). If I have a *right to property*, I have a right of use and disposal over my belongings (compatible with everyone else's like right), and you violate my liberty if, for instance, you destroy or take my property. In each of these cases, 'liberty' is a norm that defines the *boundaries* between what is mine and what is not: *my* life, *my* body, *my* property, and so on. Liberty consists of the sanction to act within one's boundaries without crossing anyone else's. Another way of putting this point is that my liberty consists in my capacity to take actions within certain boundaries, and *is only secure if my boundaries are secure*. 'Security' on this view refers not to something incommensurable with liberty but to a feature of it. 'Security' is the feature of liberty in virtue of which each person's boundaries are safeguarded from external boundary-crossings, be it by criminals, terrorists, wayward police officers, or bureaucrats.

KHAWAJA | The Constitution and National Emergency

If this is right, it makes sense to ditch the liberty/security dichotomy in favor of something like the *security of liberty*. As it happens, this is precisely the formulation employed by many of the American founders. Thus Alexander Hamilton, in *Federalist* #1, tells us that '[a]n enlightened zeal for the energy and efficiency of government [is often] stigmatized as the offspring of a temper fond of despotic power and hostile to the principles of liberty.' But, Hamilton continues, such people forget 'that the vigor of government is essential to the *security of liberty*... in the contemplation of a sound and well-informed judgment, their interests can never be separated...' [4] On a view like Hamilton's, there is no need to trade 'security' against 'liberty' as though the two things were pitted against each other in a zero-sum game. What we need instead is a better understanding of liberty and the conditions for its preservation, for in preserving liberty (rightly understood), we *ipso facto* preserve security. Posner comes close to recognising this at one point (pp. 45-6), but not close enough to alter his basic conception of the issue.

IV.

I've focused my criticisms here on the earlier and more theoretical part of Posner's book (chapters 1-3) rather than on the policy prescriptions in the latter part (chapters 4-6) mostly because I take the theoretical issues to be fundamental, but also because the more theoretical issues have gone ignored even by Posner's most severe critics. Once we see in general what's wrong with Posner's pragmatism, we can, I think, see with relative ease what is wrong with its applications to the issues of detention, torture, censorship, and the like. In each case, Posner engages in a balancing act that gives the appearance of objectivity while consisting almost entirely of undefended assertions about costs and benefits.

In fairness, I should add that Posner *does* on occasion challenge orthodox civil libertarian wisdom in important ways. He makes a convincing case to the effect that the Foreign Intelligence Surveillance Act, as currently written, threatens national security and ought to be modified (pp. 94-103). He also makes a good case in defence of an American equivalent of Britain's Official Secrets Act (pp. 106-11). Orthodox civil libertarians have had little to say in response to these more sensible parts of Posner's book, and it's fair to say that a response is in order. But it's also fair to say that the more sensible parts of the book are few and far between, sandwiched as they are between an avowedly contradictory pragmatism and a wild-eyed defence of unlimited government.

'Wild-eyed' is perhaps a strong term, but, frankly, it fits. I looked in vain in this book for a single text that unequivocally committed the author to a principle *limiting* the scope of government. Contrary to appearances, there is none there to be found. A case in point is Posner's putative defence of the writ of habeas corpus. The writ of habeas corpus is a legal principle that gives a detained person the right to be brought before an impartial court or magistrate to decide the legality of his or her imprisonment. It is a controversial question in the United States whether suspected terrorists, classified as 'unlawful combatants,' are entitled to habeas corpus, and the Bush Administration has argued that they are not. Posner makes a rather conspicuous (and heavy-handed) point of disagreeing with the Bush Administration on this issue (pp. 67-8), and one might regard this (mild) outburst on Posner's part as evidence of a (mild) attachment to limited government. It turns out on closer inspection to be no such thing.

Suppose that Khawaja, an American citizen, takes a trip to northern Pakistan, and by mischance finds himself accused by the authorities there of terrorist activities. He is subsequently, let us say, handed over to the American CIA, which classifies him as a person with suspicious 'links' to terrorism. He is now, let's say, put in prison somewhere but not charged with a crime. He protests this and demands a legal justification for his detention via the writ of habeas corpus. According to the Bush Administration, Khawaja is not entitled to habeas corpus: he is an enemy combatant, and enemy combatants have no such right. By apparent contrast, Posner says that Khawaja *is* entitled to habeas corpus. Why? Because the costs of compliance with habeas corpus are low, and the costs of suspension are high:

The risk of a false positive (that is, of detaining an innocent person) is great and the cost of such a false positive (indefinite detention) also great. The government interest, in comparison, is slight. There is always the risk that a federal district judge, seconded by the court of appeals, will make a mistake and release a terrorist thinking him innocent (the false negative). But this risk can be minimized by placing a heavy burden on the detainee to prove that he is not a terrorist. It is because burdens of proof can be adjusted that the mere granting of the right to seek habeas corpus, without specifying the content of the habeas corpus proceeding, neither endangers national security nor imposes significant costs on the judicial system. (p. 61)

This sounds great. Unfortunately, it's meaningless. How, precisely, does Posner set the weights that determine the costs and benefits in this passage? The risks/costs of

KHAWAJA | The Constitution and National Emergency

a false positive are great, we are told, because it is hard to figure out which detainees are bona fide terrorists, and if we get that determination wrong, we indefinitely detain an innocent person. The risks/costs of a false negative are *slight*, we are told, because we can always ‘adjust the burden of proof’ so as to minimize the number of false positives.

But Posner ignores complexities that would give us precisely the reverse answers in both cases. It may be true that the risk of a false positive is high to Khawaja and his ilk, but Posner is the first to tell us that there are precious *few* Americans in that situation (p. 127). How can high risks and costs to a few people add up to ‘great’ costs for anyone *but them*? And why do they matter when national security is at stake? For it is at stake. Posner tells us that the risks/costs of a false negative are *slight* because if we ‘adjust the burden of proof,’ *very few* terrorists will go free. But it is Posner himself who tells us that ‘a *tiny number* of terrorists may be able to cause catastrophic harm to a nation’ (p. 124, my italics). In that case, the risks and costs of a single false negative may be *great*, not slight. What Posner has not reckoned with is the following reasoning: If the risks of a false positive are lower than he thinks and the risks of a false negative are higher, it makes sense on pragmatist grounds to minimize the false negatives to the vanishing point by suspending habeas corpus and altogether ignoring the costs of the false positives.

As it happens, that is more or less what Posner’s cavalier ‘adjustment’ of the burden of proof means anyway. If, as Posner supposes, we can fool around with the burden of proof so as to achieve some preconceived result, we can in principle set the burden of proof so high as to be impossible to meet—in which case we would achieve the Orwellian result of seeming to preserve habeas corpus while actually suspending it. Posner tells us that we should ‘adjust’ the burden of proof to make it difficult for a detainee to prove that he is not a terrorist while admitting on the preceding page that there is, in any given case, great ‘uncertainty’ about whether someone is a terrorist or not. The claim here is that we ought to make it easier to be certain about whether someone is a terrorist precisely when we can’t know whether he is one. This claim bears an uncomfortable relation to the Orwellian maxim that ‘ignorance is strength.’ Whatever it is, it is not a successful defense of habeas corpus.

V.

Posner ends the book with a passage from Hume's *Enquiry Concerning the Principles of Morals*:

The safety of the people is the supreme law: All other particular laws are subordinate to it, and dependent on it: And if, in the common course of things, they be followed and regarded; it is only because the public safety and interest commonly demand so equal and impartial an administration.
(p. 158)

It's a pity that Posner omits Hume's next sentence: 'Sometimes both utility and analogy fail, and leave the laws of justice in total uncertainty.' [5] I can think of no better epigraph for this book. It's a strange irony of a book that purports to defend 'national security' that it leaves us in the end with a legal regime so utterly uncertain and *insecure* in its capacity to safeguard our rights. Is there a right to habeas corpus? Not really. How about a right against unlimited powers of search and seizure? Well, sometimes. Do we have security against the possibility of being tortured by the government? Not if a judge doesn't 'feel' like granting any. And a right to free speech? Well, yes – *unless* your speech has 'low social value' by an unspecified standard of value. If the 'safety of the people' is the 'supreme law,' it is hard to see how that safety can be preserved in a regime of the sort that Posner envisions, where in fact nothing is *ever* safe. Posner is right to say that the Constitution is not a 'suicide pact.' I wonder, however, whether that phrase might not accurately describe the jurisprudence he defends in his book.

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KHAWAJA | The Constitution and National Emergency

Notes

- [1] Thanks to Carrie-Ann Biondi for helpful discussion and editorial suggestions.
- [2] I have not read the entire *Corpus Posneria* – few mortals have – but the claim in the text applies to everything I have read. For an extended discussion ranging over Posner’s earlier work, see Somin 2004.
- [3] For a more elaborate defence of the sort of view I sketch in the text, see Smith 1995.
- [4] Hamilton 1961, p. 35 (my italics).
- [5] Hume 2004, pp. 29-30.