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“QUOTIDIAN” JUDGES vs. AL-QAEDA

Mark S. Davies*

TERROR IN THE BALANCE: SECURITY, LIBERTY, AND THE COURTS. By Eric A. Posner and Adrian Vermeule. Oxford and New York: Oxford University Press. 2007. Pp. 3, 307.

INTRODUCTION

In *Terror in the Balance: Security, Liberty, and the Courts*, University of Chicago law professors Eric A. Posner¹ and Adrian Vermeule² invite those of us worried about the American response to al-Qaeda to consider the proper role of judges.³ Judges, of course, are not being dispatched to the hills of Pakistan nor are they securing our borders or buildings. But as the executive seeks to implement a range of new policies in the name of protecting us from al-Qaeda, the judicial treatment of these policies shapes the American response.

Posner and Vermeule suggest a kind of Hippocratic view of the judicial response to the executive’s antiterrorist measures: First, do no harm. Judges, the authors argue, should let the executive do what it wants, both because the executive has the expertise to act and because there is no reason to believe judicial intervention will improve matters. Furthermore, Posner and Vermeule argue, judges in practice do stand aside and let the expert executive agencies do their jobs. The authors offer a blend of a normative view (that judges should not interfere) and a descriptive account (that judges will never meaningfully interfere).

In this Review, I suggest that the proper judicial role in the fight against al-Qaeda is the mundane one of improving executive performance through judicial review for arbitrary agency action. I don’t mean to say that judges’ only involvement in any terrorism case is to review for agency arbitrariness under the Administrative Procedure Act. The point is a more general one: regardless of the precise legal context, judges should and in fact often do

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1. Kirkland and Ellis Professor of Law, University of Chicago Law School.
2. At the time he co-authored the book, Professor Vermeule was at the University of Chicago Law School; he is now at Harvard Law School.
3. By “al-Qaeda,” I mean to include all violent Islamic fundamentalists who target the United States.

seek only to assure that the executive has a reasonable explanation for its actions.

Part I of this Review describes the authors' arguments for complete judicial deference to the executive's antiterrorism measures. The authors assume that the government is as well motivated in implementing security measures as it is in implementing any other government function. Emphasizing comparative institutional competence, the authors claim that there is no reason to believe that judicial intervention will improve those measures. The authors illustrate these points with the World War II *Korematsu* case, the possibility of government-sanctioned torture, and the regime of detention of enemy combatants.

Part II argues for a "quotidian" form of judicial review of the executive's antiterrorism actions. The essential task in the fight against al-Qaeda is, first and foremost, effective executive action. Although some have proposed that a specialized court like the Foreign Intelligence Surveillance Court offers a sound model of judicial review in this context, the FISA court does not appear to have improved executive performance in the fight against our enemies. Accepting the authors' view that the motivations behind government antiterrorist measures are at least as well intentioned as the motivations behind any other agency action, judges still have a vital if ordinary role: Judges should do nothing more and nothing less than assure that the proposed agency action is reasonable.

I. (COMPLETELY) "DEFERENTIAL" JUDGES

As Posner and Vermeule see it, the fundamental question raised by the threat from al-Qaeda is how to balance "liberty" and "security" (p. 27). Under their "tradeoff thesis," neither liberty nor security can be maximized independently from the other (p. 28). The problem for society "is one of optimization: to choose the point along the frontier that maximizes the joint benefits of security and liberty" (pp. 26–27). So, for example, the authors see tradeoffs between security and liberty in the decisions of whether to permit military commissions rather than courts to try noncitizen detainees charged as enemy combatants, and whether to prohibit the government from torturing suspected terrorists (p. 26). More technically, the authors describe a "security-liberty frontier," in which "any increase in security will require a decrease in liberty, and vice versa," a frontier that may change over time as the relative threats increase or diminish (p. 26).

Posner and Vermeule argue that when thinking about the judicial role, we should assume that the executive is making policy decisions at the security-liberty frontier (p. 29). The authors assume that although the executive may not always choose the best policies, "it does choose accurately on average" (p. 29). Their "theory of emergency politics" likewise assumes "a *rational and well motivated government*" in the sense that its mistakes exhibit a random distribution (pp. 20, 27, 29). Thus, the "decision to infringe civil liberties for security purposes may be right or wrong, but it is no more

likely right or wrong that the quotidian decision to construct a highway or reduce funding for education" (p. 30).

Posner and Vermeule argue that when, as now, the country faces a national emergency, judges should step aside and let the president and his executive branch act to address the crisis. Put bluntly, "[i]n times of emergency, judges should get out of the government's way . . ." (p. 12). On this "deferential view," judicial review of government action "should be relaxed or suspended during an emergency" (p. 15). "If dissent weakens resolve, then dissent should be curtailed If domestic security is at risk, intrusive searches should be tolerated" (p. 16).

The final two sentences of the book distill the authors' point:

"We hope merely to clear the ground for government to react to emergencies, enabling it to adopt whatever policies survive review by national security experts and the political process. Such policies will often be mistaken, . . . [but] nothing in the lawyer's expertise supplies the necessary tools for improving on the government's choices).

As that last sentence indicates, the authors justify their deferential view with claims of comparative institutional competence: "If courts were perfectly informed and well-motivated, then they might weed out bad emergency policies chosen by irrational or ill-motivated governments. But we just do not have courts of that sort" (p. 31). "Judges are generalists, and the political insulation that protects them from current politics deprives them of information, especially information about novel security threats and necessary responses to those threats" (p. 31). When judges or academic commentators say that government has wrongly assessed the net benefits or costs of some security policy or other, "they are amateurs playing at security policy, and there is no reason to expect that courts can improve upon government's emergency policies in any systematic way" (p. 31). In short, "there is an institutional dilemma facing judges who must review the executive's emergency policies; the problem is that the judges lack competence to evaluate those policies" (p. 49).

Based on these general concerns, the authors offer the following assessment of the "notorious" *Korematsu* case, which upheld the government's internment of Japanese aliens and Japanese-American citizens during World War II.⁴ In the authors' view, "decisions like *Korematsu* are inevitable" (p. 122). Judges cannot adequately "evaluate the need for facially discriminatory policies in times of emergency, and because the judges know this, there is little point asking them to apply genuinely strict scrutiny to such policies" (p. 122). "[W]hen the next emergency comes around, the judges will defer again—not to the exact same policy, because circumstances will always be different, but to a new emergency policy whose justification the judges know themselves unable to evaluate."

Take the question of government-sanctioned torture or "coercive interrogation" (p. 187). Describing torture as a "tragic choice" (p. 187), the

4. *Korematsu v. United States*, 323 U.S. 214 (1944).

authors argue that “coercive interrogation should be legalized and subjected to regulatory oversight” (p. 184). Just as police are allowed to use deadly force, and just as the government will put murderers to death, the law should at times permit the use of torture. The authors argue that “coercive interrogation” can be beneficial because it “produces information that prevents harms, in a nontrivial range of cases” (p. 195). In their view, torture should be “subject to a standard set of regulations” that would include “rules that state what is permitted,” “immunity for officials who obey the rules,” and “internal regulatory oversight by executive branch officials” (pp. 185–86). In short, law has a “strategy for coping with grave evils that sometimes produce greater goods,” and that strategy should apply to permit coercive interrogation (p. 214). And, consistent with their “deferential view,” the authors purport to see no role for judges in this coercive interrogation scheme. “Nonjudicial politics may or may not strike the optimal balance between the costs and benefits of interrogation, but there is no reason to think the judges will do better . . .” (p. 207). Further, “if a government is intent on engaging in interrogation to protect national security there is little the judges can do about it anyway” (p. 208).

Posner and Vermeule also apply their “deferential view” to the question of executive detention of “enemy combatants” (p. 251). In discussing the Supreme Court’s decision in *Hamdi v. Rumsfeld*,⁵ they criticize the Court’s suggestion that indefinite detention of combatants may not be constitutionally permissible (p. 252). In their view, it is “unlikely” that the government would not release a combatant who “no longer poses a threat” (p. 255). The authors also criticize the *Hamdi* Court’s requirement that the executive provide detainees with additional due process. The majority “does not explain why the judges should apply the [due process] balancing test themselves, rather than simply deferring to the balance the government had previously struck” (p. 256). In their view, “judges can do no better than the government on average, and will probably do worse from lack of information and expertise” (p. 256). As to the noncitizen enemy combatants detained in Guantanamo Bay, the authors again argue for complete judicial deference, criticizing the *Rasul v. Bush*⁶ decision (p. 258), which permitted lawsuits to challenge enemy combatant status. The authors also note, but do not appear to approve of, the Detainee Treatment Act of 2005,⁷ which gives the District of Columbia Circuit exclusive jurisdiction to determine the validity of the executive’s conclusion that an individual is an enemy combatant (p. 259).

In sum, the authors claim that judges have little if any role in the fight against al-Qaeda. The authors argue that only the executive has the policy expertise to implement sound antiterrorism policies. In other words, we are at our safest when our judges stand aside.

5. 542 U.S. 507 (2004).

6. 542 U.S. 466 (2004).

7. 42 U.S.C. § 2000dd, 2000dd-1 (2000); see also 10 U.S.C. § 801 (2000) (delineating procedures for review).

II. "QUOTIDIAN" JUDGES

When deciding the proper role, if any, for judges in the fight against al-Qaeda, I assume, for the purposes of this essay, that the authors are correct that the key question is what form of judicial review will lead to the best antiterrorist policies. In so assuming, I bracket other reasons for judicial review, such as vindicating democratic values. Others have made these points. Here, my interest is solely in how best to protect against imminent attack. Thus, the principal difficulty is assuring that our national security agencies act based on accurate facts and logical thinking. So, the question is what form of judicial review is most likely to assure that we get the best possible performance from our security agencies.

Many point to the FISA Court as a possible model for judicial review in the terrorism context.⁸ The authors, for example, discuss a "torture warrant" proposal. Under this "judicial review writ small," "coercive interrogation should be permitted only after officials have obtained a 'torture warrant' from a judge" (p. 208). The authors, though, see a "serious concern" that the torture warrant "will simply be an empty formality," with the government eventually obtaining those warrants with something like the ninety-nine percent success rate it has in obtaining warrants in the FISA court (p. 209). Many have voiced similar concerns.

To further illustrate problems with the FISA court model, consider the executive's handling of Brandon Mayfield, an Oregon lawyer and convert to Islam.⁹ In March 2004, violent Islamic fundamentalists—inspired by al-Qaeda—blew up four commuter trains in Madrid. A judge on the Foreign Intelligence Surveillance Court, reviewing evidence obtained by the Federal Bureau of Investigation and presented by the Office of Intelligence Policy Review ("OIPR"), authorized electronic surveillance of Mayfield. Two weeks later, however, the FBI concluded that no real evidence linked Mayfield to the bombings, and the FBI soon apologized. The extensive review by the Office of Inspector General found, at bottom, a lack of FBI rigor.¹⁰

The Mayfield example demonstrates that the FISA court may not provide a judicial check that advances the effectiveness of the executive's response to terrorism. The reasons for this judicial ineffectiveness probably include that only the government presents its side of the story (though OIPR tries to consider all sides), that the procedural complications (timing and signature requirements, for example) overwhelm consideration of the factual substance of the application, and that there is a lack of meaningful appellate

8. The Foreign Intelligence Surveillance Court was established by the Foreign Intelligence Surveillance Act of 1978, 50 U.S.C. §§ 1801–1862 (2000). The Court may approve electronic surveillance to "obtain foreign intelligence information" if there is "probable cause" to believe the target is an "agent of a foreign power." *Id.* § 1805.

9. Susan Schmidt & Blaine Harden, *Lawyer is Cleared of Ties to Bombings*, WASH. POST, May 25, 2004, at A2.

10. See U.S. DEP'T OF JUSTICE, OFFICE OF THE INSPECTOR GEN., A REVIEW OF THE FBI'S HANDLING OF THE BRANDON MAYFIELD CASE 17, 205, 269 (2006).

oversight (the FISA appeals court has sat only once¹¹). Of course, we might consider certain reforms to the FISA court, such as a formal system for non-governmental groups to present legal arguments to the court, or perhaps even a public defender type of office that would have the necessary security clearances to challenge the government in these proceedings. Other measures could include simplified procedural requirements that would keep the focus on the executive's factual claims, and perhaps a supervisory role for the D.C. Circuit. Nevertheless, if we are seeking a model of judicial review that advances security, there is little reason to think that the FISA Court, at least as currently set up, advances that goal.

Although the FISA model assumes that terrorism issues raise distinctive concerns warranting a special court, the opposite is probably closer to the truth. Recall the authors' statement that the "decision to infringe on civil liberties for security purposes may be right or wrong, but it is no more likely to be right or wrong than the quotidian decision to construct a highway or reduce funding for education" (p. 30). More generally, the authors contend that executive actions against al-Qaeda are no more or less suspect than other types of executive actions. A judge, however, does not "get out of the way" of, for example, the latest highway regulations or Department of Education plan. Instead, the judiciary engages in the familiar review for arbitrary agency action. That the executive response to al-Qaeda is, at bottom, "quotidian" agency action leads to the view that the ordinary judicial review of agency action should obtain.¹²

Consider the following example: A principal component of the domestic response to al-Qaeda has been the creation of the Department of Homeland Security ("DHS").¹³ As the authors write, an "emergency calls for large-scale organization and a change in bureaucratic routines" (p. 119). Creation of the Department was not straightforward, and Congress struggled mightily with the question of collective-bargaining rights of federal employees at the new agency.¹⁴ The executive issued regulations setting up a human resources scheme, and the labor unions challenged the scheme under the Administrative Procedure Act. Regardless of the ultimate outcome of the litigation, there can be no question of the judges' competence to evaluate whether the executive's regulations made sense. There is little connection between the

11. *In re Sealed Case*, 310 F.3d 717 (FISA Ct. Rev. 2002).

12. The reasons why the judiciary needs to review executive action taken in the name of fighting al-Qaeda are the same reasons the judiciary reviews any executive action. For various reasons, agencies sometimes get things wrong. Courts can sometimes fix this. In the real world, of course, different agencies may receive more or less intrusive judicial review based on a judge's sense of the agency's credibility. But there is no reason to think that judges cannot find the right level of review to apply to security agencies so that those agencies learn to provide well thought-out explanations for their actions.

13. The Homeland Security Act of 2002 created the Department of Homeland Security and assigned it the mission to "prevent terrorist attacks within the United States" and "reduce the vulnerability of the United States to terrorism." 6 U.S.C. § 111(a)–(b) (Supp. III 2003).

14. The statutory language authorizes DHS to create a human resources management system that is "flexible" and ensures that employees may "bargain collectively." 5 U.S.C. § 9701 (Supp. III 2003).

D.C. Circuit's actual consideration of the DHS regulations and the picture of the judge set forth by Posner and Vermeule. The questioning from the panel was informed, and the judges seemed well able to "weed out bad emergency policies chosen by irrational or ill-motivated governments" (p. 31). There was no question of judicial competence.¹⁵ Likewise, there are other instances in which the judiciary has engaged in what can only be described as a meaningful evaluation of the executive's security claims.¹⁶

Under the "quotidian" judicial review scheme suggested here, the judicial role in the coercive interrogation context is to assure that the agency's actions are not arbitrary. As noted, the authors propose that torture should be "subject to a standard set of regulations" that would include "rules that state what is permitted," "immunity for officials who obey the rules," and "internal regulatory oversight by executive branch officials" (p. 185-86). Any such regulations should provide for the type of judicial review that is always available when regulations are issued and applied. Thus, the judiciary should decide whether the proposed coercive regulations are rational. And, within the confines of the necessary security measures, the judiciary should verify that a particular application of coercive measures is not arbitrary.

Similarly, the right judicial role in the detention of "enemy combatants" is to assure that the designation is not arbitrary. Indeed, that is the very role the Supreme Court may have in mind: "Any process in which the Executive's factual assertions go *wholly* unchallenged or are simply presumed correct without any opportunity for the alleged combatant to demonstrate otherwise falls constitutionally short."¹⁷ So too, Congress has not seen fit to eliminate the judiciary in this context. Rather, Congress granted to the District of Columbia Circuit exclusive jurisdiction to "determine the validity of any final decision,"¹⁸ including whether the government's conclusion is "supported by a preponderance of the evidence"¹⁹ by the executive that an alien is an enemy combatant.

CONCLUSION

In *Terror in the Balance: Security, Liberty, and the Courts*, University of Chicago law professors Eric A. Posner and Adrian Vermeule focus our attention on the role of judges in the fight against al-Qaeda. The authors argue

15. P. 65. After I submitted this essay, the D.C. Circuit issued its fifty-page opinion in *Nat'l Treasury Employees Union v. Chertoff*, 452 F.3d 839 (D.C. Cir. 2006).

16. For example, Section 302 of the Antiterrorism Act authorized the Secretary of State to designate an entity as a "foreign terrorist organization" if the Secretary found that certain conditions were met. 8 U.S.C. § 1189(a)(1) (Supp. III 2003). Although the D.C. Circuit has not set aside an executive designation, neither has the Court accepted all of the government's claims. *See, e.g.*, *Nat'l Council of Resistance of Iran v. Dep't of State*, 251 F.3d 192 (D.C. Cir. 2001) (finding that a foreign terrorist organization designation had not comported with due process).

17. *Hamdi v. Rumsfeld*, 542 U.S. 507, 537 (2004).

18. *See* Detainee Treatment Act of 2005, Pub. L. No. 109-148 § 1005(e)(2)(A), 119 Stat. 2680 (2006).

19. *Id.* § 1005(e)(2)(C)(i).

that judges should never invalidate antiterrorism policies because the executive is expert and the judges are not. Assuming, with the authors, that the executive's antiterrorism measures are essentially routine agency action, there is no reason to abandon the ordinary forms of judicial review over agency action. Judges are perfectly capable of evaluating whether a proposed antiterrorism action is reasonable.

POSTSCRIPT

A few weeks after I completed this essay, the Court handed down *Hamdan v. Rumsfeld*.²⁰ There, the dispute concerned special military commissions that the President had proposed for trying individuals who were believed to be members of al-Qaeda. Justice Stevens, writing for four Justices, found common ground with Justice Kennedy: "We agree with Justice Kennedy that the procedures adopted to try Hamdan deviate from those governing courts-martial in ways not justified by any 'evident practical need,' and, for that reason, at least, fail to afford the requisite guarantees."²¹ The *Hamdan* decision turns on a judgment that the executive may not reduce liberty without a corresponding meaningful gain in security.

Hamdan is an example of the type of the quotidian judicial decision-making advocated in this essay. The Court rejected Posner and Vermeule's view that the judiciary should stand aside and let the executive do as it wishes. Instead, as suggested above, the Court insisted on the traditional yet limited judicial role of asking whether an agency has a rational reason for its actions. In this way at least, *Hamdan* contributes to the defense of our country by invalidating executive policies not grounded in practical need.

20. 126 S. Ct. 2479 (2006).

21. *Id.* at 2797-98.