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Stephen Reinhardt
U.S. Court of Appeals for the Ninth Circuit

WEAKENING THE BILL OF RIGHTS: A VICTORY FOR TERRORISM

*Stephen Reinhardt**

NOT A SUICIDE PACT: THE CONSTITUTION IN A TIME OF NATIONAL EMERGENCY. By *Richard A. Posner*. New York: Oxford University Press. 2006. Pp. xiv, 178. $18.95.

INTRODUCTION

What is most remarkable about Richard Posner's[1] latest book—and he has written many—is that he argues that we should repose full confidence in the executive branch to handle the most sensitive constitutional issues of our time without once mentioning the flagrant breaches of law and critical falsehoods with which President Bush and his administration have deluged the public since 9/11. This only seven years after he composed a lengthy tome regarding President Clinton's impeachment in which he appropriately, if harshly, condemned the president for his unethical and illegal conduct, principally his deliberate lies and purposeful lack of candor with the American people.[2] Nor, although perhaps less directly relevant to his present book, does Posner discuss at any point the lawlessness and deception of President Nixon and his high aides and advisors, let alone the Iran-Contra affair under the Reagan administration or the countless other executive branch abuses of power we have suffered in the past twenty-five years.

Posner's omissions critically undermine the central argument of *Not a Suicide Pact: The Constitution in a Time of National Emergency*. Posner advocates a shrinking Constitution whenever the country faces a national emergency; he advises that in such times, we should look exclusively to the executive branch, not the courts, to safeguard our most valued freedoms because judges "know[] little about the needs of national security" (p. 9). Apparently Posner's answer to the problem of balancing national security with liberty is to simply leave the fate of our Constitution to George W. Bush and Dick Cheney. Although Posner writes eloquently about history, he seems to have learned little from it—or from current events that appear on the front pages of our newspapers daily. The problem with Posner is not his writing, which is excellent. The problem is his judgment, which is not.

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* Judge, U.S. Court of Appeals for the Ninth Circuit. Thanks are due to Brook Hopkins, my law clerk, who assisted in the preparation of this Review.

1. Judge, U.S. Court of Appeals for the Seventh Circuit.

2. RICHARD A. POSNER, AN AFFAIR OF STATE: THE INVESTIGATION, IMPEACHMENT, AND TRIAL OF PRESIDENT CLINTON (1999).

I. THE NEVER-ENDING EMERGENCY

One fundamental difficulty with Posner's thesis is that the current national emergency that evoked his latest outpouring of advice to the citizenry[3] is unlike all other national emergencies in the history of our country. Most emergencies have occurred in times of declared war or civil war; all could be seen clearly from the outset as being of limited duration. Today's national emergency—whether it be viewed as the continuing threat from al-Qaeda or, more broadly, as the threat from the potential actions of Islamic fundamentalist terrorist groups—has no temporal boundaries. Nor is the state of crisis likely to end, like more traditional wars, with a peace treaty or other formal negotiated agreement. In fact, there may be no clear way of determining if and when the type of national emergency that now confronts us has in fact come to an end, if it ever does in our lifetime. In short, we face an indefinite or semipermanent state of national emergency, which requires us to ask, Do we really want to surrender our constitutional rights, or even turn them over to the tender mercies of the executive branch (including those who advocate jailing American citizens without court approval), when the changes that are made may indeed become permanent? In practical reality, given the indeterminate length of the current emergency, the subtitle of Posner's book could well be simply *The Constitution* rather than *The Constitution in a Time of National Emergency*.

Although few would doubt that we presently face a serious threat to our national well-being from outside forces or that the prospect of further attack by foreign terrorist forces must be of critical concern to any national administration, recent history reveals that an unchecked executive branch and an amorphous national threat are a dangerous combination. No more need be said about how the nation was cajoled into an unnecessary and undesirable war in Iraq, not only by the deliberate creation of fears over nonexistent nuclear weapons, but by false representations concerning the presence of al-Qaeda in that country—or that the nonpartisan head of our top intelligence agency simply told the president what he knew his client wanted to hear when he said, "It's a slam dunk."[4] The use of terrorism to promote a president's political agenda, unfortunately, is not a practice limited to President Bush. President Clinton used the bombing of the Oklahoma City federal building by two members of an otherwise harmless militia movement to have attached a little-noticed provision to an antiterrorism bill.[5] The provision drastically limited the rights of state prisoners to present constitutional challenges to their state convictions and sentences, especially death sentences. Commonly referred to by the name of the statute as a whole, the Antiterrorism and Effective Death Penalty Act ("AEDPA"), the provision,

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3. Posner states that the main purpose of his book is to explain the law in a way that will persuade the Supreme Court to adopt his views. That is a rather odd way for a sitting judge to seek to influence the Court. But Posner has never been noted for his intellectual modesty.

4. BOB WOODWARD, PLAN OF ATTACK 249 (2004).

5. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 104, 110 Stat. 1214, 1218 (codified as amended at 28 U.S.C. § 2254 (2000)).

enacted only months before the 1996 presidential election, had nothing to do with terrorism—but it did allow Clinton to argue that he was tough on crime, a law-and-order president, and deserving of reelection. Given this history, it is important that we define national threats circumspectly and not permit them to be used as a cover for other, more political goals a president may have.

In one peculiar passage, Posner lumps foreign and domestic assaults on life and property, both major and minor, under a large umbrella of terrorism. His approach is similar to President Clinton's blatant political action with respect to AEDPA in 1996, but it is less understandable because Posner is both a judge and a scholar. After announcing the curious and heretofore unrecognized proposition that it was the Soviet Union's theft of atomic secrets that "emboldened Stalin to encourage North Korea to invade South Korea, precipitating a war that killed thirty-six thousand American soldiers," Posner proceeds to charge that "terrorism by Puerto Rican separatists, neo-Nazis, the Jewish Defense League, left-wing radicals such as the Weathermen, and al-Qaeda culminated in" the 9/11 attack (p. 46). What the Jewish Defense League or the other groups have to do with al-Qaeda or 9/11 is beyond me, but Posner's treatment of all these groups in a similar manner illustrates the danger of failing to limit our definition of national emergency to specific occurrences that truly threaten our nation's security. It also makes one shudder at the idea of our national policy being guided by those sharing Posner's sweeping and indiscriminate views of terrorism.

II. WHAT JUDGES DO

Before discussing the major points of *Not a Suicide Pact*, as well as some less significant tangents on which Posner leads us, I should note that he is truly an unusual figure in the world of judges. Posner and I would probably disagree strongly on the qualities that make a good judge: in my view they include compassion, sensitivity, empathy for others, and a commitment to the pursuit of justice. (It goes without saying, of course, that they also include other, more "technical" qualities such as intellectual ability, a knowledge of the law, and the capacity to persuade others to accept one's views regarding a legal proposition or case.) I very much doubt that Posner believes that the former set of qualities is important to judging, let alone that one must possess them in order to be a first-rate judge. But perhaps I underestimate him. I hope so.

Leaving aside that question, however, one has to admire Posner for the contributions he has made to legal thought. It's not easy to be a federal appellate court judge. Some of us work long hours, six to seven days a week, and take only limited vacations, just trying to handle our caseload. Of course we try to make some additional contributions by writing occasional law review articles or book reviews; judging a few moot courts a year; and speaking to groups of law students, especially groups like the American Constitution Society and the Federalist Society. Many of us are overwhelmed by the effort to keep up. Posner, however, not only does his normal

work as an appellate court judge, writing opinions that frequently attract much attention, but he also retains his job as a law professor at one of the nation's top law schools, the University of Chicago, and is a prolific author of popular books and articles. He has written thirty-seven books alone. Any one of these three jobs would be as much as most of us could handle. This book, like his other work I recently read—*An Affair of State: The Investigation, Impeachment, and Trial of President Clinton*—is extremely well written, thorough, clear, and demonstrates a firm grasp of the legal and political issues involved.

My quarrel is unfortunately with Posner's conclusions and, more particularly, his judgment. To use his words, I admire his skills as a "technician" but not as a "policy maker" (p. 19). Recently, for example, he wrote a review of a book by the world's leading jurist, Aharon Barak, the former president of the Israeli Supreme Court who teaches with some regularity in his spare time at Yale Law School.[6] Posner ends the review with the incredible statement, "No wonder he frightens Robert Bork."[7] Talk of bad taste, let alone bad judgment. It would be tough to match. Bork is a bitter figure still licking his wounds from his public rejection. Barak is a giant in the law, admired throughout the world. Shame on Posner! On a more fundamental level, I do not agree with Posner that sensitive constitutional issues—ranging from affirmative action, abortion, free speech and the separation of church and state to the Fourth or even the Second Amendment—can be decided with cold mathematical equations or the myopic application of cost-benefit analysis. In a messy world of irreconcilable moral debates, imperfect information, irrational actors, and unequal distribution of resources, I find the promise of the tidy and purportedly objective tenets of Law and Economics to be hollow. I much prefer to look to a more traditional and humane approach involving Law and Society or Law and Justice.

Posner takes a swipe at the traditional approach when he writes that the Warren-Brennan Court's decisions were "exercises of political will rather than of professional judgment" (p. 22). Posner's idea of professional judgment is to measure the extent of appropriate constitutional protections by applying a form of cost-benefit analysis. As far as I can tell, in the end his approach requires the same application of subjective values as does any good-faith attempt to determine how the words of a document written over two-hundred years ago should be applied to the unimagined and unforeseen problems of the drastically changed society in which we live today. Posner believes a judge presented with a national security case should always ask "whether a particular security measure harms liberty more or less than it promotes safety" (p. 32). There is no way for a judge to answer this question other than by applying his best judgment: first by examining all the pertinent facts and reviewing the relevant constitutional and statutory provisions, the legislative history, the applicable caselaw, and any articles or treatises on

6. Richard A. Posner, *Enlightened Despot*, NEW REPUBLIC, Apr. 23, 2007, at 53 (reviewing AHARON BARAK, THE JUDGE IN A DEMOCRACY (2006)).

7. *Id.* at 56.

the subject; and then by exercising sound judicial judgment, which will be influenced by the judge's judicial philosophy as well as by his view of the role and purpose of the Constitution, his knowledge and understanding of history, and perhaps other social or even physical sciences, his own personal experiences, and sometimes his religious views. The confluence of all these elements will lead the judge to perform the balancing that Posner deems necessary and then to determine what he believes to be the right answer. Whether this is the professional judgment that Posner admires or the "exercise[] of political will" that he deplores is largely in the eye of the beholder (p. 22). One thing it is clearly not, however—it is not simply "call[ing] balls and strikes," as our Chief Justice told the Senate Judiciary Committee his function would be.[8] In fact, as the last term of the Supreme Court demonstrates, his function is quite the opposite.

Posner arrives at the same conclusion I do: pragmatic concerns play a major role in judicial decision making. We both view legal questions in light of real problems, not simply as abstract concepts. But he gets to that point by a rather roundabout method. After he poses the question of harm to liberty versus increase in safety, he offers an example of a mathematical formula:

> Suppose liberty is worth 1,000 and security only 100; nevertheless, a 20 percent reduction in security as a result of invalidating some defensive measure (such as detaining terrorist suspects incommunicado) will cause more harm (100 x .20 = 20) than a 1 percent reduction in liberty as a result of upholding the measure (1,000 x .01 = 10). (pp. 32–33)

This, of course, is a wholly unrealistic form of analysis. Concepts like liberty and security are simply not susceptible to such measurements. After nine pages of wandering through the forest of judicial decision making, Posner ends by saying:

> It may be objected that a decision process based on a balancing of risks and harms is unworkable if the risks and harms cannot be measured. It is true that in the present setting they cannot be quantified. But we make pragmatic utility-maximizing decisions all the time without being able to quantify the costs and benefits of the alternatives among which we are choosing. . . . [W]e cannot avoid making such judgments and there is no good alternative to making them pragmatically. (p. 41)

Making decisions pragmatically is precisely what the Warren-Brennan Court did. The Warren-Brennan Court pragmatically concluded that segregation was contrary to our constitutional principles, that persons accused of felonies should have the right to counsel, that there should be a strict separation between church and state, and that democracy meant that each person's vote should be counted equally—and it did so without mathematical formulas or the benefit of law and economics. The members of the Court simply exercised sound judgment using the method I describe above. And a

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8. *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 56 (2005).

pragmatic decision as to how much the country is harmed by reducing its civil liberties and whether that loss of liberty is more or less important to the nation than the increase in security that might result is necessarily based in large measure on the constitutional values of the person making the decision and his evaluation of what the long-range and short-range consequences might be. Justice Brennan might well have come to one decision in such a case; Chief Justice Rehnquist another. Neither would have been more or less "professional" than the other. The difference is likely to depend instead on the individual's values, his estimate of the world's political dangers, and his view of the nature and purpose of our Constitution. As Posner acknowledges openly at one point in his book, justices are "policy makers," not "technicians" (p. 19). In this context, it is difficult to see how Posner's equations and other mathematical formulas advance the course of judicial decision making.

III. The Role of the Executive and the Judiciary During Emergencies

I will now proceed to the two major premises (and two of the lesser ones) of *Not a Suicide Pact*. First, Posner urges an essentially noncontroversial point—noncontroversial in theory, that is, but highly controversial in application. He tells us that the Constitution is a flexible document and that the nature and extent of individual rights must be evaluated in the context of the times (pp. 31–32). That is true. In times of national emergency, courts are likely to view issues almost entirely from a pragmatic standpoint and to give even greater deference to the judgment of the executive branch than in peacetime.

But deference does not mean abdication. As is so often the case in the law, it is the application of the principles that divides judges—it is the extent of the deference to be afforded as well as the values and judgments that the individual judges apply to the particular problems we confront. In the case of the rather typical problem that Posner posed earlier, "whether a particular security measure harms liberty more or less than it promotes safety" (p. 32), the answer, of course, will be influenced by the extent of the danger to the country that exists at the time the issue comes before the court. This follows from the fact that courts answer real and not abstract questions—they deal with real and not abstract problems. Still, in some cases, the resolution may depend in part on the degree of skepticism the judge may feel regarding the executive branch's representations, based upon his and the country's experience with similar official declarations. It will depend upon the value the judge attaches to security and to liberty, and it will depend upon the degree to which the judge is willing to trust the future of the Constitution to the particular administration in power—especially as some constitutional protections once lost may be difficult ever to regain. So in short, yes, the Constitution is likely to be construed as more protective of individual rights in ordinary times than in times of national emergency, but how much so? The answer depends in part on who is "the decider"—who makes the de-

termination—and it is here that I have my greatest disagreement with Posner.

Posner minimizes the role of courts in times of national emergency—for several reasons, all erroneous in my opinion. First, he writes, judges are reluctant to act because they are ignorant of national security issues (pp. 35–36). But federal judges are generalists. It is no harder to learn the issues and facts regarding national security cases than those regarding copyright matters or a host of other new questions related to the Internet and other emerging technologies—no harder if the judge is willing to stand up to the executive branch and compel the government to provide the information necessary to informed decision making. Furnished with that information, a judge has all the tools necessary to evaluate national security matters, bearing in mind the deference he owes to the judgments of the executive branch. Judges are, moreover, the officials best able to make an evaluation of the facts—to look only to what is truly relevant. They need not be concerned about political considerations or their own reelection or careers. Only judges have lifetime tenure, a factor that reflects the wisdom and foresight of the drafters of our Constitution. And judges are certainly better informed regarding the other half of the equation: how much liberty will we lose in the event of a decision favoring the government, and what will be the long-term impact on our constitutional rights?

Next, Posner suggests that in times of national emergency, judges tend to become shrinking violets—they refuse to challenge the executive branch's view of the need to shrink constitutional rights (p. 36). This may be so in some cases, but it should not be. Times of national emergency are when courts are needed most, when judges should rise to the occasion, fulfill their role, and do their full job. This is the time of greatest danger to constitutional rights, and so it is the time that courts should be most vigilant. Judges should rise to the occasion, not plead a lack of ability to act like judges. Judges have sometimes wrongly given the executive branch its head only to have the country strongly regret it when the crisis was over. Such occasions include the Alien Sedition Act of 1798, the suspension of habeas corpus by Abraham Lincoln in 1862, the Mitchell Palmer red scare raids during World War I, the internment of Japanese Americans in World War II, and the McCarthy-era witch-hunt investigations of Communists and left-wingers. The Courts failed in these cases, but the country can learn—and so can judges. We need not continue making the same errors over and over again. It is in times of crisis that judges should recognize that they are members of the only branch of government not subject to political pressure and that they belong to the branch best equipped to perform the necessary balancing of sensitive constitutional and national security interests.

There are encouraging signs in the past half century. There is the *Steel Seizure* case, in which the Supreme Court limited the president's power to seize private property during wartime without specific constitutional authority or congressional authorization.[9] There is the unanimous Watergate

9. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952).

decision, in which the Supreme Court ordered President Nixon to turn over his secret tapes, a decision that brought down his presidency.[10] There are more recent signs that the Court may be willing to perform its job with respect to the terrorism issues that Posner (and the current administration) believes to be the sole prerogative of the executive branch. In *Hamdan v. Rumsfeld*, for example, the Court imposed constraints on the executive branch's ability to set up military commissions to try war-on-terror detainees.[11] The Court will be considering this critical issue further this term in the consolidated cases of *Boumediene v. Bush* and *Al Odah v. United States*.[12] Nor should we underestimate the strength and independence of lower-court judges on both ends of the political spectrum, including those who have already exhibited these qualities during our present national emergency—those who have had the fortitude and courage to stand up to the executive branch and say no when it attempted to exceed its lawful authority.

Finally, Posner asserts that the executive branch is better equipped to decide issues of security versus liberty than the courts. Here Posner's position simply reflects his view that we should trust the executive branch in times of war:

> It is better that the president assume the full responsibility for national security surveillance than that responsibility be diffused by enlisting the participation of judges under conditions in which they would be unable to exercise an effective check on executive power. We are not well served by judicial fig leaves. (p. 102)

There are two answers to this. Judicial review need not and should not consist of "fig leaves," and leaving these issues solely to the executive branch jeopardizes our interest in constitutional government. The heart of the problem is whom America should trust to balance the need for both security and liberty in times of national emergency. Posner says judges don't know enough about security—a premise I squarely reject. Even if Posner were right that judges have only a limited understanding of national security issues, at least the courts would be aware of the need to consider fully *both* the liberty and security issues. Without the intervention of judges, would the president and his administration be willing to give the proper attention to liberty? Posner demonstrates surprisingly naïve confidence in the executive branch—those officials who have the primary responsibility to implement our national security interests. Would we let police chiefs decide when the Fourth Amendment should apply, when *Miranda* warnings should be given, when defendants are entitled to have lawyers at their trials? I would hope not. I would also not trust most presidents or CIA directors to decide when our constitutional rights should be abridged without their decision being subject to the checks and balances that judicial review affords.

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10. United States v. Nixon, 418 U.S. 683 (1974).

11. 126 S. Ct. 2749 (2006).

12. 127 S. Ct. 3078 (2007).

Posner stresses that it was Lincoln who suspended the writ of habeas corpus during the Civil War. He is fascinated by this occurrence, and while he would not quite authorize modern presidents to follow in Lincoln's footsteps, Posner appears tempted to justify the authority of presidents not only to suspend the writ but to suspend the Constitution (pp. 153–54). Perhaps it is time to return to a point I made at the outset. We cannot discuss these issues intelligently without considering the human equation. How much power can we safely put in the hands of fallible, and sometimes incompetent and less than truthful, leaders? Courts are a different matter. There is no single chief. There is a process that usually involves the participation of a number of highly trained, well-educated, and comparatively neutral lifetime public servants. A president, on the other hand, may be irresponsible, deceptive, politically motivated, and without any particular concern for the perpetuation of constitutional principles. We are all familiar with the character and record of Abe Lincoln; we are also aware that some of the more recent occupants of the White House are clearly no Abe Lincolns. They are not even Jimmy Carters. (Although Carter may not have been the most effective president, he was at least a person of principle and integrity.) Can we take the risk of an executive branch with no checks on its power and the authority to suspend our rights on its own? Here I disagree flatly with Posner. I do not think we can.

Now to two of Posner's more specific points, both in my view based at least in part on a misunderstanding of the current state of affairs in this country. Posner believes that we need more restrictive laws preventing the press from publishing classified material and punishing leakers and publishers of leaks. He writes that there is a "national culture of nosiness, and of distrust of government bordering on paranoia" (p. 108). Aside from the problem of enforcing such antipress laws in a society in which the Internet is an increasingly dominant force and bloggers are rapidly replacing reputable reporters, Posner has the problem exactly backward. The difficulty in our country today is not that we know too much about what our government is doing but that we know too little. Had we known more, we might not be in Iraq today. The newspapers—including the nation's finest, the *New York Times*—failed us when we were being led into the wrong war at the wrong time. They were misled by deliberate propaganda leaks by the government and failed to view official releases with sufficient skepticism and to probe for the truth in a more than superficial manner.[13] The remainder of the problem is the overclassification of documents and the excessive claims of executive privilege. It is not only affairs of international relations of which the public remains ignorant but also corruption in the award of government contracts and malfeasance in the general conduct of domestic affairs. Instead of advocating laws to silence the press, Posner would do well to lend his highly respected voice to calls for more openness in government and more truthfulness from our top officials.

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13. For a discussion of this failure, see Michael Massing, *Now They Tell Us*, N.Y. REV. BOOKS, Feb. 26, 2004, at 43.

Similarly, Posner believes that concern about governmental invasion of privacy is largely unwarranted in current times. He tells us that the days of J. Edgar Hoover are over and that now terrorism, not privacy, should be our concern (pp. 144–45). Given the constant improvement in techniques for electronic spying and the development of new methods of obtaining and storing the most detailed information regarding every aspect of the average citizen's existence, I am not nearly so sanguine about what our government may be doing. And I am even more concerned with what they will do if privacy legislation does not keep up with new information-gathering techniques. Certainly it is essential to allow the government to collect information about the activities of terrorist groups. But it's far too early to stop worrying about the protection of our privacy and of our civil liberties while it does so.

Posner has some other interesting ideas that time and space preclude me from discussing. He suggests the reclassification of offenses from two (war and crime) to three (war, crime, and terrorism) (p. 72). He advances a view of the use of torture that is, oddly, very similar to that of Aharon Barak.[14] Unlike Barak, however, he approves of violations of Muslims' free speech rights, especially in their mosques, if they are adherents of radical fundamentalism (pp. 112–13). He differentiates such violations from investigations of Communists in the Cold War era on the interesting ground that the Communists advocated a "legitimate" view that was acceptable in Western culture (pp. 113–14). Despite his general antiprivacy attitude, he even comes down on the side of privacy once when he strongly criticizes the Supreme Court's view in *United States v. Miller*[15] that disclosures of one's medical information to a doctor or financial data to a bank constitute a general waiver of one's right to privacy in that material; here Posner is clearly right (pp. 136–37).

CONCLUSION

All in all, *Not a Suicide Pact: The Constitution in a Time of National Emergency* is well worth reading. It could have been labeled *A Bulwark of Liberty*, however, followed by the same subtitle. Posner, able writer that he is, could then have explained how the Constitution stands between the people and the loss of our liberty, especially in times of war and strife. Such a tome would fill a national need far more than a book that plays into the fears of terrorism to which we are all so regularly subjected. There is one final point, however, that we need no book to help us understand. Posner repeatedly notes that it is the Supreme Court that tells us from time to time what the Constitution means and what rights we have, that Justices are "policy makers" (p. 19), that our protections are "realistically regarded as more the handiwork of Supreme Court justices than of the Constitution's framers"

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14. *See* pp. 81–85. For Barak's view on torture, see HCJ 5100/94, Pub. Comm. Against Torture v. Israel [1999] IsrSC 53(4) 817.

15. 425 U.S. 435 (1976).

(p. 21). That is why the battle over the appointment of members of the Court is so critical and why the Democrats—belatedly, and possibly too late—may finally be awakening to the importance of the Supreme Court confirmation process, something that the right wing well understood many years earlier.

I feel more confident in judges than in elected officials safeguarding our constitutional liberties. But I would feel even better were there some Warrens, Brennans, Marshalls, Douglases, Blackmuns, or even more Stevenses currently making the decisions that will determine the nature of our rights and freedoms—and indeed the nature of our society—for years to come. I would even feel more comfortable with a Richard Posner making such decisions than a George W. Bush—but not by much.