

1 Security Versus Civil Liberties

2 Richard A. Posner

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5 In the wake of the September 11 terrorist attacks have come many proposals for
6 tightening security; some measures to that end have already been taken. Civil
7 libertarians are troubled. They fear that concerns about national security will lead
8 to an erosion of civil liberties. They offer historical examples of supposed
9 overreactions to threats to national security. They treat our existing civil
10 liberties—freedom of the press, protections of privacy and of the rights of criminal
11 suspects, and the rest—as sacrosanct, insisting that the battle against international
12 terrorism accommodate itself to them.

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14 I consider this a profoundly mistaken approach to the question of balancing liberty
15 and security. The basic mistake is the prioritizing of liberty. It is a mistake about
16 law and a mistake about history. Let me begin with law. What we take to be our
17 civil liberties—for example, immunity from arrest except upon probable cause to
18 believe we've committed a crime, and from prosecution for violating a criminal
19 statute enacted after we committed the act that violates it—were made legal rights
20 by the Constitution and other enactments. The other enactments can be changed
21 relatively easily, by amendatory legislation. Amending the Constitution is much
22 more difficult. In recognition of this the Framers left most of the constitutional
23 provisions that confer rights pretty vague. The courts have made them definite.
24 Concretely, the scope of these rights has been determined, through an interaction
25 of constitutional text and subsequent judicial interpretation, by a weighing of
26 competing interests. I'll call them the public-safety interest and the liberty interest.
27 Neither, in my view, has priority. They are both important, and their relative
28 importance changes from time to time and from situation to situation. The safer the
29 nation feels, the more weight judges will be willing to give to the liberty interest.
30 The greater the threat that an activity poses to the nation's safety, the stronger will
31 the grounds seem for seeking to repress that activity, even at some cost to liberty.
32 This fluid approach is only common sense. Supreme Court Justice Robert Jackson
33 gave it vivid expression many years ago when he said, in dissenting from a free-
34 speech decision he thought doctrinaire, that the Bill of Rights should not be made
35 into a suicide pact. It was not intended to be such, and the present contours of the
36 rights that it confers, having been shaped far more by judicial interpretation than
37 by the literal text (which doesn't define such critical terms as "due process of law"
38 and "unreasonable" arrests and searches), are alterable in response to changing
39 threats to national security.

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41 If it is true, therefore, as it appears to be at this writing, that the events of
42 September 11 have revealed the United States to be in much greater jeopardy from
43 international terrorism than had previously been believed—have revealed it to be

untouchable

inflexible

44 threatened by a diffuse, shadowy enemy that must be fought with police measures
45 as well as military force—it stands to reason that our civil liberties will be
46 curtailed. They *should* be curtailed, to the extent that the benefits in greater
47 security outweigh the costs in reduced liberty. All that can reasonably be asked of
48 the responsible legislative and judicial officials is that they weigh the costs as
49 carefully as the benefits. It will be argued that the lesson of history is that officials
50 habitually exaggerate dangers to the nation's security. But the lesson of history is
51 the opposite. It is because officials have repeatedly and disastrously
52 underestimated these dangers that our history is as violent as it is. Consider such
53 underestimated dangers as that of secession, which led to the Civil War; of a
54 Japanese attack on the United States, which led to the disaster at Pearl Harbor; of
55 Soviet espionage in the 1940s, which accelerated the Soviet Union's acquisition of
56 nuclear weapons and emboldened Stalin to encourage North Korea's invasion of
57 South Korea; of the installation of Soviet missiles in Cuba, which precipitated the
58 Cuban missile crisis; of political assassinations and outbreaks of urban violence in
59 the 1960s; of the Tet Offensive of 1968; of the Iranian revolution of 1979 and the
60 subsequent taking of American diplomats as hostages; and, for that matter, of the
61 events of September 11.

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63 It is true that when we are surprised and hurt, we tend to overreact—but only with
64 the benefit of hindsight can a reaction be separated into its proper and excess
65 layers. In hindsight we know that internment of Japanese-Americans did not shorten
66 World War II. But was this known at the time? If not, shouldn't the Army have
67 erred on the side of caution, as it did? Even today we cannot say with any
68 assurance that Abraham Lincoln was wrong to suspend habeas corpus during the
69 Civil War, as he did on several occasions, even though the Constitution is clear
70 that only Congress can suspend this right. (Another of Lincoln's wartime measures,
71 the Emancipation Proclamation, may also have been unconstitutional.) But Lincoln
72 would have been wrong to cancel the 1864 presidential election, as some urged: by
73 November of 1864 the North was close to victory, and canceling the election
74 would have created a more dangerous precedent than the wartime suspension of
75 habeas corpus. This last example shows that civil liberties remain part of the
76 balance even in the most dangerous of times, and even though their relative weight
77 must then be less. Lincoln's unconstitutional acts during the Civil War show that
78 even legality must sometimes be sacrificed for other values. We are a nation under
79 law, but first we are a nation. I want to emphasize something else, however: the
80 malleability of law, its pragmatic rather than dogmatic character. The law is not
81 absolute, and the slogan "*Fiat iustitia ruat caelum*" ("Let justice be done though
82 the heavens fall") is dangerous nonsense. The law is a human creation rather than a
83 divine gift, a tool of government rather than a mandarin mystery. It is an
84 instrument for promoting social welfare, and as the conditions essential to that
85 welfare change, so must it change. Civil libertarians today are missing something
86 else—the opportunity to challenge other public-safety concerns that impair civil

widespread

reduced

routinely

triggered

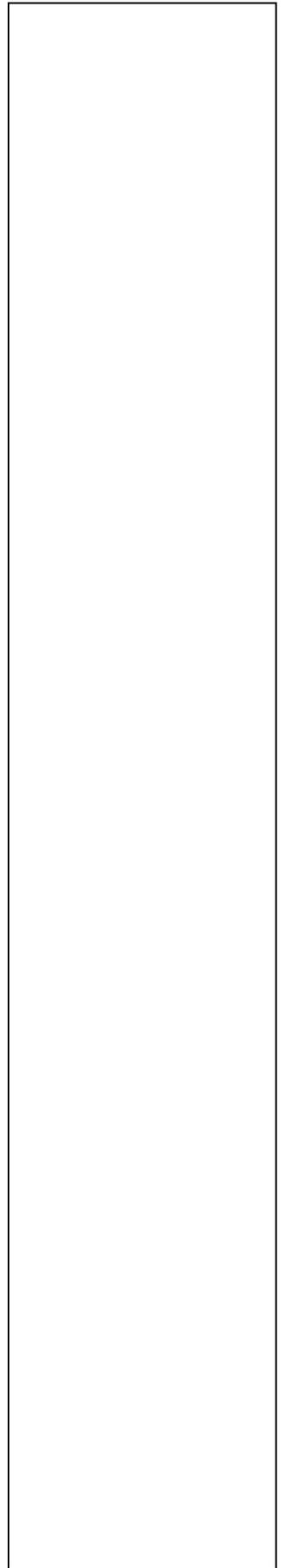
A hearing to
determine if
detainment is lawful

flexibility/practical/
inflexible

87 liberties. I have particularly in mind the war on drugs. The sale of illegal drugs is a
88 "victimless" crime in the special but important sense that it is a consensual activity.

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90 Usually there is no complaining witness, so in order to bring the criminals to
91 justice the police have to rely heavily on paid informants (often highly paid and
92 often highly unsavory), undercover agents, wiretaps and other forms of electronic
93 surveillance, elaborate sting operations, the infiltration of suspect organizations,
94 random searches, the monitoring of airports and highways, the "profiling" of likely
95 suspects on the basis of ethnic or racial identity or national origin, compulsory
96 drug tests, and other intrusive methods that put pressure on civil liberties. The war
97 on drugs has been a big flop; moreover, in light of what September 11 has taught
98 us about the gravity of the terrorist threat to the United States, it becomes hard to
99 take entirely seriously the threat to the nation that drug use is said to pose. Perhaps
100 it is time to redirect law-enforcement resources from the investigation and
101 apprehension of drug dealers to the investigation and apprehension of international
102 terrorists. By doing so we may be able to minimize the net decrease in our civil
103 liberties that the events of September 11 have made inevitable.

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Teacher's Guide

Name of Text: *Security Versus Civil Liberties*, Richard A. Posner, 2001

Question Composers: Tierney Cahill, John Linton, Phillip Kaiser, Christine Hull

Related Standards:

- NV State Social Studies, 2008 [9-12]: C16.2, C16.3, C15.5, C14.2
- Common Core History/Social Science Reading: RH.1, RH.2, RH.4, RH.10
- Common Core History/Social Science Writing: WHST.1, WHST.2, WHST.4, WHST.9, WHST.10
- Common Core Speaking and Listening: SL.1a, SL.1b, SL.1c, SL.1d, SL.2, SL.4

| Text Dependent Questions | Teacher Notes and Possible Textual Evidence for Student Answers |
|---|---|
| 1. According to the first paragraph, what are civil libertarians troubled by? | a. Rationale-Drawing attention to the basic argument of civil liberties versus security b. Possible Answers-students should draw their attention to lines 5 and 6 to begin to answer this question, regarding measures to tighten security. Lines 7 and 8 go on to describe that concerns of national security will take away civil liberties. |

Text Dependent Questions

Teacher Notes and Possible Textual Evidence for Student Answers

2. How does Posner suggest the nation should balance liberty versus security and explain why he believes in this fluid approach? Use lines 14-39 to support your answer.

- a. Rationale-In this very lengthy paragraph the author is laying out his philosophy, which he will back up in later paragraphs with specifics. Students must be able to take apart this paragraph in order to see the author’s point of view and claim in this article.
- b. *Possible Answers*-The answers will draw from various places in this paragraph but should include citations of the purposeful vagueness of the constitution: the ability to amend legislation easily versus amending the constitution; judicial interpretation and the time context that will determine how much liberty is given. The author’s main claim in this paragraph is stated in lines 28-31. Students should be able to narrow down their answer to explain “that the safer the nation feels the more weight judges will be willing to give to the liberty interest. The greater the threat that an activity poses to the nation’s safety, the stronger will the grounds seem for seeking repress to that activity, even at some cost to liberty.”

3. According to the author in lines 52-78 he states that during the time of the Civil War, citizens felt that Lincoln’s suspension of Habeaus Corpus was considered an overreaction to the “concerns of national security.” Posner argues that in fact the bigger problem was the secession of the southern states. Explain other examples Posner gives of over and under reaction to concerns of National Security.

- a. Rationale- Students are expected to begin to see the various ways in which our government did not react or under reacted to a possible “concern of national security.”
- b. Possible Answers-

| Event | Reaction |
|-----------------|---|
| Civil War | The government underreacted to the danger of secession |
| Pearl Harbor | The government underestimated the possibility of a Japanese Attack |
| Nuclear Weapons | The government underreacted to the possibility of espionage and threats |
| Stalin | The government underreacted to the possibility of espionage and threats |
| N. Korea | The government underreacted to the |

Text Dependent Questions

Teacher Notes and Possible Textual Evidence
for Student Answers

| | | | | |
|---|--|---|---|--|
| | | Invasion | possibility of espionage and threats | |
| | | Soviet Missile Crisis | The government underestimated the possibility of this which led to the Cuban Missile Crisis | |
| | | Tet Offensive | Vietnam | |
| | | Iranian Revolution | Hostages | |
| <p>4. In line 82, what is Posner referring to when he uses the phrase “dangerous nonsense”?</p> | | <p>a. Rationale- the author is synthesizing his argument and making a statement about law being a human creation, not something miraculous or divine.</p> <p>b. Possible Answers- Students should point to line 82 where the author states “law is a human creation” and to believe it is a “divine gift” is a dangerous notion. Law is merely a tool to promote “social welfare” and must change as conditions change.</p> | | |

Writing Prompt:

In the wake of September 11th, Posner argues that Civil Libertarians are troubled. The author gives historical examples of supposed overreactions to threats of national security, as well as under reactions. Take a position on Civil Liberties vs. security, and use evidence from the text to support your answer.

Checklist identifying key points that will assist in measuring student success and/or difficulty with the close reading and/or writing prompt:

This question is a continuation of question #3 that asks students to explain how the over/under reactions to threats of national security can be viewed by the public and Civil Libertarians. This question is asking students to understand the concept of hindsight and use evidence from the text that backs up Posner's argument. Students should be able to take a position regarding Civil Liberties versus security and use evidence from the text to support their argument.