
POSNER ON SECURITY AND LIBERTY:
ALLIANCE TO END REPRESSION V. CITY OF CHICAGO

*Adrian Vermeule**

Judge Richard Posner is a leading commentator on national security and terrorism. He has recently produced an overview of the constitutional aspects of national security law,¹ as well as a string of books on the optimal design of intelligence agencies and the political and institutional problems that block access to the optimum;² his work on catastrophes includes an analysis of the risks of catastrophic terrorism.³ It thus seems fitting to examine his most prominent judicial encounter with themes of security and liberty: the litigation in which a group of civil liberties organizations — the Alliance To End Repression — obtained consent decrees to constrain the antiterrorism efforts and investigative practices of the United States and the City of Chicago, only to have the consent decrees narrowly construed or modified by Judge Posner and his colleagues. Two major decisions resulted (“the *Alliance To End Repression* cases”), one in 1984,⁴ the other in 2001.⁵ I focus on the 2001 decision, which contains a more expansive discussion of Judge Posner’s views on security and liberty.

I begin with a positive claim. The *Alliance To End Repression* cases are best understood as a judicial contribution to a larger trend in national security law: the loosening of constraints on executive power set in place after Watergate. Turning then to normative questions, the largest claim of the *Alliance To End Repression* cases is that, as of 2001, increasing the risk of executive abuse of civil liberties is the inevitable byproduct of moving toward the best overall set of security policies. Executive abuses are just a cost; they should not be minimized, but optimized. This approach — what we may call the trade-

* Professor of Law, Harvard Law School. Thanks to Martha Minow and Bill Stuntz for helpful comments and to Dan Klaff for excellent research.

¹ RICHARD A. POSNER, *NOT A SUICIDE PACT: THE CONSTITUTION IN A TIME OF NATIONAL EMERGENCY* (2006).

² RICHARD A. POSNER, *UNCERTAIN SHIELD: THE U.S. INTELLIGENCE SYSTEM IN THE THROES OF REFORM* (2006); RICHARD A. POSNER, *PREVENTING SURPRISE ATTACKS: INTELLIGENCE REFORM IN THE WAKE OF 9/11* (2005); RICHARD A. POSNER, *REMAKING DOMESTIC INTELLIGENCE* (2005).

³ RICHARD A. POSNER, *CATASTROPHE: RISK AND RESPONSE* 171–75 (2004).

⁴ *Alliance To End Repression v. City of Chicago* (*Alliance I*), 742 F.2d 1007 (7th Cir. 1984) (en banc).

⁵ *Alliance To End Repression v. City of Chicago* (*Alliance II*), 237 F.3d 799 (7th Cir. 2001). Another opinion in the litigation, which I shall not discuss, involved attorneys’ fees. See *Alliance To End Repression v. City of Chicago*, 356 F.3d 767, 768–79 (7th Cir. 2004).

off theory of security and liberty — is conceptually problematic but has pragmatic appeal. It is thus authentically Posnerian.

Finally, and more broadly, I use the *Alliance To End Repression* opinions to illustrate the strengths and weaknesses of the pragmatic approach to adjudication that Posner the legal theorist has championed. The 2001 opinion that liberated Chicago officials to take more aggressive antiterrorist measures seems not only forward-looking but almost prescient in light of the events of 9/11. However, the opinion may not have had an adequate basis in then-extant evidence about terrorist threats; there is a whiff of armchair empiricism about it. Relatedly, the opinion embodies a style of judging that may well misfire in the hands of judges of average competence. Despite these concerns, Judge Posner was undeniably right, in hindsight, and being right is the ultimate pragmatic virtue.

I. BACKGROUND

Here is Judge Posner's arresting description of the historical background of the *Alliance To End Repression* litigation:

From the 1920s to the 1970s the intelligence division of the Chicago Police Department contained a unit nicknamed the "Red Squad" which spied on, infiltrated, and harassed a wide variety of political groups that included but were not limited to left- and right-wing extremists. Most of the groups, including most of the politically extreme groups, were not only lawful, and engaged in expressive activities protected by the First Amendment, but also harmless. The motives of the Red Squad were largely political and ideological, though they included a legitimate concern with genuine threats to public order. Demonstrations against U.S. participation in the Vietnam War that climaxed in the disruption of the Democratic National Convention in Chicago in 1968, race riots in Chicago and other major cities in the same period, and the contemporaneous criminal activities of the Black Panthers, the Weathermen, and Puerto Rican separatists, all against a backdrop of acute racial and Cold War tensions, political assassinations (notably of President Kennedy, Senator Robert Kennedy, and Martin Luther King, Jr.), and communist subversion, fueled a widespread belief in the need for zealous police activity directed against political militants.⁶

To curtail the executive abuses of the era, the Alliance sued the United States and the City of Chicago in 1973.⁷ The basic consent decree in the case was entered in 1981.⁸ The consent decree, among other things, required the defendants to adhere to rules resembling the

⁶ *Alliance II*, 237 F.3d at 801.

⁷ *Alliance I*, 742 F.2d at 1009.

⁸ *Alliance To End Repression v. City of Chicago*, 561 F. Supp. 575, 576 (N.D. Ill. 1983).

Levi Guidelines⁹ — internal Justice Department guidelines that attempted to rein in the FBI's investigation of subversive groups, as a reaction to Nixon-era abuses.

In later litigation, the government asked the courts to modify the consent decree or interpret it narrowly. Two important opinions followed, almost twenty years apart; both had the effect of freeing the government's hands. In the first decision, issued in 1984, Judge Posner wrote for the Seventh Circuit sitting en banc.¹⁰ The court reversed a district court order that had enjoined, in Chicago, the operation of Attorney General William French Smith's revised and more permissive guidelines for FBI investigations of potential terrorist groups.¹¹ Almost two decades later, in 2001, Judge Posner again wrote for the court to modify the consent decree that had come to restrict the City of Chicago's antiterrorism investigations.¹² Although the latter decision involved local rather than national government, Judge Posner did not treat this distinction as central. As we shall see, for Judge Posner the central consideration in both opinions involved, not federalism or local government, but the scope of civil liberties against any level of government and the scope of executive authority to investigate potential terrorist groups.

Perhaps the most obvious context in which to situate the *Alliance To End Repression* cases is the rise and fall of institutional reform litigation after *Brown v. Board of Education*.¹³ On this view, the decisions are instances of the trend, accelerating in the past few decades, in which judges have modified and abrogated consent decrees in institutional reform cases, thereby returning substantial authority to governmental authorities, especially at the state and local level.¹⁴

However, I want to suggest a different historical context, one that is compatible with the larger trends in institutional reform litigation and is also more specific to the issues in these cases. I suggest that we should see the court's pro-security tilt in the *Alliance To End Repression* cases as a phase in the larger demise of the post-Watergate model of national security law — a process that has included the de facto demise both of framework statutes constraining the Executive and of self-imposed executive constraints.

⁹ OFFICE OF THE ATTORNEY GEN., DEP'T OF JUSTICE, THE ATTORNEY GENERAL'S GUIDELINES ON DOMESTIC SECURITY INVESTIGATIONS (1976), reprinted in *FBI Statutory Charter: Hearing Before the S. Comm. on the Judiciary*, 95th Cong. 20–26 (1978).

¹⁰ *Alliance I*, 742 F.2d at 1007.

¹¹ See *id.* at 1010, 1020.

¹² *Alliance II*, 237 F.3d at 799.

¹³ 347 U.S. 483 (1954).

¹⁴ See Charles F. Sabel & William H. Simon, *Destabilization Rights: How Public Law Litigation Succeeds*, 117 HARV. L. REV. 1015, 1021–53 (2004).

After Watergate, with revelations of executive abuses by both federal and state governments multiplying, all three branches of government acted to reduce the scope of executive discretion in matters touching on security and antiterrorism. In the mid- to late 1970s, Congress imposed a range of constraints on the national security powers and activities of the Executive, principally through framework legislation. The most prominent examples are the War Powers Resolution,¹⁵ which constrained executive use of force abroad; the National Emergencies Act,¹⁶ which limited executive declarations of emergency; the International Emergency Economic Powers Act,¹⁷ which limited the Executive's power to impose various economic sanctions and controls; the Ethics in Government Act,¹⁸ which created independent counsels to investigate government wrongdoing; and the Foreign Intelligence Surveillance Act,¹⁹ which limited executive surveillance in the domestic arena, even when justified on national security grounds. Other constraints were imposed by litigation and judicial decree, as in the *Alliance To End Repression* cases. Finally, some constraints were self-imposed by executive guidelines such as the restrictive Levi Guidelines of 1976, which curtailed FBI authority to investigate groups with the potential to engage in terrorism.

This framework for national security law has not endured. Indeed, a large part of the story of national security law in ensuing decades, and especially after 9/11, has involved efforts by various institutions and groups to loosen the constraints of the post-Watergate framework. The looseners have won, broadly speaking and with some exceptions.²⁰ I cannot substantiate this assertion in detail here; a few brisk examples must suffice:

War Powers Resolution (1973). The Resolution has by many accounts become a dead letter, especially after President Clinton's clear breach of its terms during the Kosovo conflict.²¹ Congress has proven unable to enforce the Resolution by ex post punishment of executive violations. The courts, for their part, have invoked various doctrines

¹⁵ Pub. L. No. 93-148, 87 Stat. 555 (1973) (codified at 50 U.S.C. §§ 1541-1548 (2000)).

¹⁶ Pub. L. No. 94-412, 90 Stat. 1255 (1976) (codified as amended at 50 U.S.C. §§ 1601-1651 (2000 & Supp. III 2003)).

¹⁷ Pub. L. No. 95-223, 91 Stat. 1626 (1977) (codified as amended at 50 U.S.C. §§ 1701-1706 (2000 & Supp. III 2003)).

¹⁸ Pub. L. No. 95-521, 92 Stat. 1824 (1978) (codified as amended at 28 U.S.C. §§ 591-598 (2000)).

¹⁹ Pub. L. No. 95-511, 92 Stat. 1783 (1978) (codified as amended at 50 U.S.C. §§ 1801-1863 (2000 & Supp. III 2003)).

²⁰ See, e.g., *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006) (holding that the President must comply with federal statutes and treaties requiring minimum procedural protections in trials by military commission).

²¹ See Geoffrey S. Corn, *Clinton, Kosovo, and the Final Destruction of the War Powers Resolution*, 42 WM. & MARY L. REV. 1149 (2001).

of justiciability to avoid claims for enforcement of the Resolution by soldiers and others.²²

National Emergencies Act (1976). This statute abolished all preexisting states of emergency declared by executive order²³ and substituted a process for congressional review of new declarations.²⁴ The process has proven largely ineffective. In practice, “anything the President says is a national emergency is a national emergency.”²⁵

International Emergency Economic Powers Act (1977). Enacted to regulate and constrain executive action during international economic crises, this statute has been construed by the courts to grant broad executive power. The Supreme Court held that it implicitly authorized the President to suspend claims pending in American courts against Iranian assets as part of a deal to free hostages.²⁶ And a lower court said that the President had unreviewable discretion to determine that the government of Nicaragua satisfied the statutory requirement of “an unusual and extraordinary threat,” thus triggering enhanced executive powers.²⁷

Levi Guidelines (1976). These internal investigatory policies of the Department of Justice were successively diluted by ever-more permissive guidelines, or interpretation of the guidelines, under Attorneys General Smith (1983),²⁸ Reno (1995),²⁹ and Ashcroft (2002).³⁰

²² See, e.g., *Campbell v. Clinton*, 203 F.3d 19, 19 (D.C. Cir. 2000) (dismissing, for lack of standing, congressmen’s suit against President Clinton claiming violation of the War Powers Resolution); *Ange v. Bush*, 752 F. Supp. 509, 510 (D.D.C. 1990) (finding the legality under the War Powers Resolution of a presidential deployment order to be a nonjusticiable political question in a suit brought by a National Guard sergeant); *Dellums v. Bush*, 752 F. Supp. 1141, 1152 (D.D.C. 1990) (denying, on ripeness grounds, congressional plaintiffs’ request for preliminary injunction to prevent executive offensive action in Iraq absent congressional approval).

²³ 50 U.S.C. § 1601 (2000).

²⁴ See *id.* §§ 1621–1622.

²⁵ Glenn E. Fuller, Note, *The National Emergency Dilemma: Balancing the Executive’s Crisis Powers with the Need for Accountability*, 52 S. CAL. L. REV. 1453, 1458 (1979).

²⁶ See *Dames & Moore v. Regan*, 453 U.S. 654, 669–74 (1981).

²⁷ *Beacon Prods. Corp. v. Reagan*, 633 F. Supp. 1191, 1192, 1199 (D. Mass. 1986), *aff’d*, 814 F.2d 1 (1st Cir. 1987).

²⁸ See OFFICE OF THE ATTORNEY GEN., DEP’T OF JUSTICE, THE ATTORNEY GENERAL’S GUIDELINES ON GENERAL CRIMES, RACKETEERING ENTERPRISE AND DOMESTIC SECURITY/TERRORISM INVESTIGATIONS (1983), *reprinted in* 32 CRIM. L. REP. (BNA) 3087 (1983).

²⁹ See *Combatting Domestic Terrorism: Hearing Before the Subcomm. on Crime of the H. Comm. on the Judiciary*, 104th Cong. 27–28, 32 (1995) (testimony of Louis J. Freeh, FBI Director) (describing agreement between the FBI and the Attorney General to change the interpretation of the Guidelines so as to give the FBI “more confidence” to use broad authority).

³⁰ See OFFICE OF THE ATTORNEY GEN., DEP’T OF JUSTICE, THE ATTORNEY GENERAL’S GUIDELINES ON GENERAL CRIMES, RACKETEERING ENTERPRISES AND TERRORISM ENTERPRISE INVESTIGATIONS (2002), *available at* <http://www.usdoj.gov/olp/generalcrimes2.pdf>. For discussion of the expansion of the Levi Guidelines over subsequent administrations, see Laura K. Donohue, *Anglo-American Privacy and Surveillance*, 96 J. CRIM. L. & CRIMINOLOGY 1059, 1118–20 (2006).

In this context, the *Alliance To End Repression* decisions look like a judicial parallel to the loosening of the post-Watergate statutory constraints. Just as courts and Congress helped the Executive of recent decades to undo various statutory constraints imposed by earlier Congresses, or at least acquiesced in executive fait accompli, so too courts undid the nonstatutory restrictions imposed by earlier courts in the form of consent decrees. Although these larger legal currents involved the national government, it is irrelevant for these purposes that the 2001 opinion involved not national, but state and local governments. As I suggest below, that fact forms no part of the rationale for the decision, which is about the costs and benefits of civil liberties, not about which level of government takes action to protect security. The place of the *Alliance To End Repression* decisions in the overall pattern is clear: Judge Posner did his part, for good or for ill, to unshackle the constrained Executive envisioned by legislators, judges, and civil liberties organizations in the 1970s.

II. RATIONALES

Let us turn to the normative questions. On what grounds might one argue for relaxing the post-Watergate constraints on executive antiterrorism efforts? In the 2001 *Alliance To End Repression* opinion, Judge Posner summarized his objections to the consent decree binding the Chicago police in a passage that he later quoted in academic commentary.³¹ It thus seems sensible to take it as our basic text. The passage runs:

The era in which the Red Squad flourished is history, along with the Red Squad itself. The instabilities of that era have largely disappeared. Fear of communist subversion, so strong a motivator of constitutional infringements in those days, has disappeared along with the Soviet Union and the Cold War. Legal controls over the police, legal sanctions for the infringement of constitutional rights, have multiplied. The culture that created and nourished the Red Squad has evaporated. The consent decree has done its job. . . .

. . . .
. . . The City wants flexibility to meet new threats to the safety of Chicago's citizens. In the heyday of the Red Squad, law enforcers from J. Edgar Hoover's FBI on down to the local level in Chicago focused to an unhealthy degree on political dissidents, whose primary activity was advocacy though it sometimes spilled over into violence. Today the concern, prudent and not paranoid, is with ideologically motivated terrorism. The City does not want to resurrect the Red Squad. It wants to be able to keep tabs on incipient terrorist groups. New groups of political extremists,

³¹ See RICHARD A. POSNER, LAW, PRAGMATISM AND DEMOCRACY 301-02 (2003).

believers in and advocates of violence, form daily around the world. If one forms in or migrates to Chicago, the decree renders the police helpless to do anything to protect the public against the day when the group decides to commit a terrorist act. . . .

. . . The decree impedes efforts by the police to cope with the problems of today because earlier generations of police coped improperly with the problems of yesterday.³²

This passage is an amalgam of good arguments and bad, all compressed by Judge Posner's typically vigorous prose. It cannot be sufficient to say that "[t]he decree impedes efforts by the police to cope with the problems of today because earlier generations of police coped improperly with the problems of yesterday."³³ That statement describes the function of all constitutional constraints (including constraints arising from consent decrees issued by courts, where such decrees are themselves based on the parties' constitutional claims). The Takings Clause hampers the property regulators of today because earlier generations of property regulators coped improperly with the problems of yesterday, and so on.

To explain why the relevant legal constraints should be diluted through interpretation or modified outright, one of three basic arguments must be offered.

(1) *Bad Then and Bad Now*. On this account, the decrees represent an overreaction to the abuses of the Nixon era, both at the time and today.

(2) *Good Then and Bad Now (Diminishing Benefits)*. The decrees' benefits diminished over time. The executive institutions governed by the decrees had so improved their performance — perhaps as a result of the decrees themselves — as to render the decrees obsolete and unnecessary.

(3) *Good Then and Bad Now (Increasing Costs)*. The security costs of maintaining the decrees increased over time, requiring that a new balance be struck.

These three rationales have very different implications for evaluating antiterrorism policy. The first rationale suggests that, both in the Nixon era and today, the risk of executive abuses is systematically exaggerated. The second suggests that there were real abuses in the Nixon era, but that the legal system has since become progressively more capable of eliminating them. The third suggests that there were abuses then and will be now, but that now (unlike in the past) the abuses are a price worth paying for increased security. All three rationales are theoretically coherent, whether or not correct in fact, but

³² *Alliance II*, 237 F.3d at 801–02.

³³ *Id.* at 802.

only the last evinces the tough-mindedness often associated with Judge Posner. Not surprisingly, it also has the best exegetical support in the opinions. Let us examine these possibilities in turn.

Bad Then and Bad Now. First, one can argue that the constraint was misguided from its inception because the original governmental abuses were exaggerated or nonexistent. The risk of executive abuse might have been blown out of proportion due to emotional and cognitive mechanisms, amplified by social influences of various kinds. The resulting decree might reflect a “libertarian panic,”³⁴ in which an over-reaction to salient abuses produces excessively tight constraints on the Executive — with “excessiveness” defined by the very theory, whatever it may be, that civil libertarians use to argue that constraints on the Executive are too loose. Perhaps this account provides a plausible diagnosis of some of the post-Watergate framework legislation, particularly the independent counsel statute. The law was in part a reaction to the Saturday Night Massacre, in which President Nixon fired the special prosecutor who was investigating him; but as political pressure soon forced Nixon to appoint a new investigator, it is hardly clear that there was any problem to solve.³⁵

However, there is no basis for attributing a view of this sort to Judge Posner. As an exegetical matter, both of the *Alliance To End Repression* opinions take the allegations of Nixon-era executive abuses very seriously.³⁶ As a doctrinal matter, the governing standard for modification of consent decrees, set out by the Supreme Court in the 1992 *Rufo v. Inmates of Suffolk County Jail*³⁷ decision, requires that the government show a change in factual or legal circumstances.³⁸ But the “bad then and bad now” rationale supposes that the consent decrees were unjustified from their inception; on this account, there is no relevant change in circumstances. The second *Alliance To End Repression* opinion says very little about *Rufo*, but by the principle of interpretive charity, we should construe the opinion to respect the governing law if possible. We may thus put aside any claim that the decrees were always mistaken, and instead focus on arguments from changed circumstances, as *Rufo* requires.

Good Then and Bad Now (Diminishing Benefits). A second basis for relaxing the constraints could be that the decree, although desirable

³⁴ See Adrian Vermeule, *Libertarian Panics*, 36 RUTGERS L.J. 871 (2005).

³⁵ For background, see K.A. McNeely-Johnson, *United States v. Nixon, Twenty Years After: The Good, the Bad and the Ugly — An Exploration of Executive Privilege*, 14 N. ILL. U. L. REV. 251, 265–66 (1993). For the claim that “[t]he true lesson of the Watergate scandal is that political safeguards and ordinary prosecutors are perfectly sufficient,” see Cass R. Sunstein, *Bad Incentives and Bad Institutions*, 86 GEO. L.J. 2267, 2281 (1998).

³⁶ See *Alliance II*, 237 F.3d at 801; *Alliance I*, 742 F.2d at 1019.

³⁷ 502 U.S. 367 (1992).

³⁸ See *id.* at 384.

when issued, is no longer so because the benefits of the consent decree have decreased. The principal reason that the benefits might decrease is that the Executive has become less likely to violate civil liberties in any event, in which case the costs of the decree may no longer be worth incurring.

An argument of this sort might take one of two forms. In an exogenous variant, some change in institutional behavior unrelated to the consent decree might have reduced the risk of executive abuses. In an endogenous variant, the consent decree itself might have done so, perhaps by nourishing a culture of compliance and respect for civil liberties within the government. Both variants of the argument are hinted at in Judge Posner's terse statement that "[l]egal controls over the police, legal sanctions for the infringement of constitutional rights, have multiplied. The culture that created and nourished the Red Squad has evaporated. The consent decree has done its job."³⁹

The ambiguity here is problematic, because it matters very much whether the exogenous or endogenous variant is correct. If exogenous changes in law, institutions, or culture have resolved the problem to which the decree was addressed, then the decree itself is useless and should be eliminated; in fact, it is positively harmful if there are costs of maintaining it. However, suppose the endogenous variant is correct. Then the consent decree itself, and the efforts of civil liberties groups to monitor executive compliance and enforce the decree, are what have diminished the risk of executive abuses. If so, eliminating or modifying the decree might bring about an executive relapse.

One might add some further texture to the endogenous variant by arguing that although the desirable changes were produced by the decree, those changes have become self-sustaining and would not disappear if the decree were modified. Someone who climbs a ladder to the roof will not fall if the ladder is later kicked away. But it is unclear what mechanisms might produce such an effect in this setting,⁴⁰ and Judge Posner's opinion does not adduce any.

Good Then and Bad Now (Increasing Costs). Finally, one might argue that the changed circumstances are on the cost side, not the benefit side. On this view, if the threat to public safety from subversive organizations — principally terrorist organizations — has increased, then the decree is producing increased costs, by cramping the Executive's power to respond to an increasing threat, and should be modified even if the risk of executive abuse has not diminished. Of

³⁹ *Alliance II*, 237 F.3d at 801.

⁴⁰ One candidate is a selection effect: perhaps the necessity to comply with the decree caused executive leaders to select lower-level personnel who are sincerely committed to respecting civil liberties, and who would continue to do so even if the decree were modified. See Adrian Vermeule, *Selection Effects in Constitutional Law*, 91 VA. L. REV. 953 (2005).

course, it may be true both that the costs of the decree have increased and that the benefits have diminished. As discussed above, however, the latter claim is materially ambiguous, and in any event it is not Judge Posner's central concern. What is central is the argument that "[t]he City wants flexibility to meet new threats to the safety of Chicago's citizens. . . . Today the concern, prudent and not paranoid, is with ideologically motivated terrorism."⁴¹

The implicit theory here must run something like this: To modify the consent decree is to license an increased rate of executive abuses, with "abuses" being defined in legal terms as violations of domestic constitutional rights, or perhaps human rights under international law. Such abuses are just costs, and in current circumstances the security benefits of unshackling the Executive will be greater than the costs.⁴² Reflexive opponents of the post-9/11 shift in security policies seemingly assume that executive abuses should be minimized, to zero if possible, although they sometimes admit that it would be infeasible to do so. Still, given the logic of their view, the simplest way to minimize executive abuses would be to eliminate the executive branch altogether, which is crazy. Some level of executive abuse of civil liberties is the inevitable byproduct of the optimal overall package of security policies — although the composition of the overall package, and thus the level of executive abuses, will change over time with changing circumstances.

This theory — the tradeoff theory — is the best reading of the second *Alliance To End Repression* opinion.⁴³ There are important conceptual, moral, and empirical questions about the tradeoff theory, of which I will mention only a few. At the conceptual level, the security-liberty tradeoff is philosophically controversial.⁴⁴ One important worry is that security is on both sides of the issue, because a citizenry whose liberties can be invaded at will experiences insecurity in a real sense.⁴⁵ Morally, there is a serious question about the just distribution of liberty in cases in which a majority infringes the liberties of a minority in order to increase the majority's security.⁴⁶ Despite these questions, however, some implicit cost-benefit balancing, with recognizable versions of security and liberty on opposite sides of the balance, inheres in the most routine decisions of government, down to the

⁴¹ *Alliance II*, 237 F.3d at 802.

⁴² For a model detailing this sort of tradeoff, see Philippe Aghion et al., *Endogenous Political Institutions*, 119 Q. J. ECON. 565 (2004).

⁴³ It is also the central theory of POSNER, *supra* note 1.

⁴⁴ See Jeremy Waldron, *Security and Liberty: The Image of Balance*, 11 J. POL. PHIL. 191 (2003).

⁴⁵ Jeremy Waldron suggested this point at the 2006 Mellon Seminar at Columbia University.

⁴⁶ See Waldron, *supra* note 44, at 200–04.

issuance of parking tickets. Empirically, the view that executive abuses are costs that trade off against security benefits is supported (though not proven) by the important finding that, across polities, fewer constraints on Executives are associated with lower levels of terrorist violence.⁴⁷

The overall thrust of the tradeoff view is that civil libertarians who deny the coherence or moral status of a security-liberty tradeoff end up contradicting themselves when they admit, for example, that granting the Executive some instruments of control is justifiable. Because all such instruments create the potential for abuse, civil libertarians do not really believe that executive abuses should be minimized, rather than optimized. On this view, the only respectable form of civil libertarian argument, which may be right or wrong in any given case, is that particular government policies trade off security and liberty incorrectly, by sacrificing civil liberties for inadequate security benefits or no benefits at all.

III. SECURITY, LIBERTY, AND PRAGMATIC ADJUDICATION

I do not attempt to evaluate the merits of the tradeoff view here, although I believe it is basically correct.⁴⁸ My concern here is not directly with the law and policy of national security, but with Judge Posner's contributions to that subject and to legal theory generally. So I conclude with the question how the tradeoff theory, as embodied in the *Alliance To End Repression* cases, illuminates Judge Posner's conception of the judicial role.

That conception is self-professedly "pragmatic" — with pragmatism to be understood, according to Posner the legal theorist, in its "everyday" sense as opposed to its "philosophical" sense.⁴⁹ There is a serious question whether there is any such thing as everyday pragmatism, which may just be a form of consequentialism that is coy about its theory of value, that is, about what counts as a good consequence.⁵⁰ However, I put aside that issue here and instead ask whether the opinions show pragmatic judging in a flattering light.

An easy caricature of pragmatic judging is that it devolves into "Khadi justice" — freewheeling, case-specific discretion exercised by

⁴⁷ See Quan Li, *Does Democracy Promote or Reduce Transnational Terrorist Incidents?*, 49 J. CONFLICT RESOL. 278, 294 (2005).

⁴⁸ See ERIC A. POSNER & ADRIAN VERMEULE, *TERROR IN THE BALANCE: SECURITY, LIBERTY AND THE COURTS* (2007). We describe the tradeoff theory and credit it to academic works by Judge Posner and others. The claim here is that the earliest articulation of the theory in Judge Posner's oeuvre is in the *Alliance To End Repression* cases.

⁴⁹ POSNER, *supra* note 31, at 49–56, 65.

⁵⁰ See ADRIAN VERMEULE, *JUDGING UNDER UNCERTAINTY: AN INSTITUTIONAL THEORY OF LEGAL INTERPRETATION* 84 (2006).

judges who attempt, perhaps amateurishly, to evaluate the costs and benefits of alternative rulings.⁵¹ Posner the theorist quite explicitly disavows this. He says that systemic goods, like the stability of law over time and the legal certainty afforded by hewing close to clear texts, are themselves pragmatically valuable, so that the pragmatic judge will often behave like an orthodox judge, especially in easy cases.⁵² Neither Posner the judge nor Posner the theorist, however, says much about the possible pragmatic virtues of judicial deference to executive branch institutions; there are grounds for suspecting that he has a low opinion of administrative agencies as a general matter. And there is a real concern that pragmatic judging works well only in the hands of its champion. Judges less intellectually sophisticated than Posner might well make a hash of the forward-looking and empirically informed style of judging that pragmatism requires. In other words, it might be systemically best, even from the pragmatic perspective, if judges do not think pragmatically at all, in which case pragmatism is a self-defeating theory of adjudication.

The second *Alliance To End Repression* opinion illustrates all these virtues and vices of pragmatic adjudication. Let us begin with the most obvious virtue. It is seemingly prescient that Judge Posner should write an opinion early in 2001 loosening constraints on terrorism investigations by executive officials. Although the decision was, as I said above, part of a larger, long-term trend toward loosening post-Watergate constraints, trends always end sometime; what seems prescient is that Judge Posner and his colleagues kept the trend going just when it was most necessary to do so.

However, the decision must be evaluated strictly *ex ante*, not in hindsight. It is plausible to worry that the decision merely turned out to be correct, but was not justifiable *ex ante*, in the sense that the decision did not rest on the amount and type of evidence that an optimizing or rational decisionmaker would have collected. Although Judge Posner briefly indicated an empirical basis for thinking that the terrorist threat was much greater in 2001 than in the 1970s, when the consent decree was entered, the evidence he marshalled was thin and impressionistic;⁵³ and it is very difficult to reconstruct, with all the distortions of hindsight, whether a rational decisionmaker who had collected a cost-justified amount of information before 9/11 would have thought that terrorist threats were rising or falling during that period. There were attacks on American forces and embassies abroad

⁵¹ See MAX WEBER, *LAW IN ECONOMY AND SOCIETY* 350–51 (Max Rheinstein ed., Edward Shils & Max Rheinstein trans., 1967).

⁵² See POSNER, *supra* note 31, at 11–13.

⁵³ See *Alliance II*, 237 F.3d at 802 (noting that “[n]ew groups of political extremists, believers in and advocates of violence, form daily around the world” with no stated evidence).

throughout the 1990s, as well as the 2000 attack on the U.S.S. Cole; but there was little public fear of terrorism in the homeland, despite the 1993 bombing of the World Trade Center, which mostly misfired. Perhaps the snippets Judge Posner adduced in the opinion were the best information available at the time, but the opinion offers no general grounds for confidence that pragmatic judges will usually get policy right.

Nor is there much in the opinion that suggests an institutional division of labor in the form of judicial deference to the views of other institutions. Even if the tradeoff theory of security and liberty is intrinsically correct, there is an entirely separate question whether judges should themselves attempt to evaluate changing circumstances over time, or instead defer to the views of other institutions. Although the 2001 opinion allowed a modification that government officials sought, and in that sense deferred to them, the expressed basis for the modification remained that Judge Posner thought the threat of terrorism had increased.⁵⁴ There is no real suggestion that he had consulted the views of outside experts or executive officials or even legislators on the relevant questions. The worry about pragmatic judging, accentuated by opinions like this, is that it encourages or even requires a form of armchair empiricism about costs and benefits. Because poorly informed empiricism is itself a cost, at least when the alternative of deference to more expert institutions is available, there is a real risk that the costs of pragmatic judging could systemically exceed the benefits, particularly in the hands of judges less knowledgeable and sophisticated than Judge Posner.

Still, being right covers over a multitude of sins, and Judge Posner was right about the terrorist threat, whether or not he arrived at his conclusion on adequate grounds. Judge Posner rises above criticism from the sidelines, in this case as in so many others, precisely because so many of his beliefs and views and intuitions turn out to be true or successful, whether or not they are justified. In my view, this quality, a sort of intellectual instinct for the winning play, is what drives some of Judge Posner's critics near to madness and also what makes Judge Posner a uniquely influential figure in American law.

⁵⁴ *See id.*