# REJOINDER

*Richard A. Posner**

My reply is brief; I do not try to recapitulate the arguments in my book, and the *précis* that accompanies the comments. There are many good points made in the comments, which I do not repeat either; my focus is on the areas of disagreement emphasized in the comments.

*Segev*. I am puzzled by the reference on the first page of his comment to distributive justice.[1] I understand the term to refer to the principles for allocating wealth or other goods across persons, and I do not think those principles are engaged by efforts to balance concerns of security against concerns of civil liberties.

When I said that "what counts as justification is no part of habeas corpus,"[2] I did not mean that the detention of a person cannot be challenged by asking for habeas corpus, or that the detention need not be justified. I meant merely that the creation of a right of habeas corpus does not indicate how great a showing of necessity to detain a person the government must demonstrate. Justification is a separate issue from the existence of a right of habeas corpus. Obviously if little or no justification is required, the right becomes nugatory.

I do believe that emergencies are not limited to terrorist attacks; at present the world is in the grip of an economic emergency. But the proper responses to different kinds of emergency are usually quite different, and my attention in the book was focused on national-security emergencies. Segev is correct, however, that the basic principles of cost-benefit analysis—which include recognition that a probability, even if small, of a very large loss can justify incurring substantial costs to eliminate or reduce the danger—are applicable to a wide variety of emergencies, not limited to national

* Judge, U.S. Court of Appeals for the Seventh Circuit; Senior Lecturer, University of Chicago Law School.

[1] See in this issue, Re'em Segev, *Balancing, Judicial Review and Disobedience: Comments on Richard Posner—Not a Suicide Pact*, 42 ISR. L. REV. 234, 234 (2009).

[2] RICHARD A. POSNER, NOT A SUICIDE PACT: THE CONSTITUTION IN A TIME OF NATIONAL EMERGENCY 61 (2006).

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security.[3] I also agree with him that the costs of detention and other antiterrorist measures are not limited to infringements of liberty and privacy, but include physical and emotional harms that detention can cause.[4] He is also correct to emphasize that such costs are not limited to persons who turn out to have been wrongfully detained;[5] and that is a point I should have made in the book. But whether foreign terrorists captured outside the United States should have the right to seek habeas corpus in a U.S. court cannot be answered in the affirmative just by observing that we should not treat such people with complete indifference to their welfare.

I agree that there should be an absolute *legal* prohibition of torture, but I also agree with Senator McCain, one of the United States' strongest opponents of torture, that there might conceivably arise a case in which officials would have to violate the legal prohibition.[6] I am thinking of the "ticking time bomb" case, which though so far, fortunately, purely hypothetical, cannot be ruled out as a possibility, given nuclear proliferation and technological advances in radiation shielding and miniaturization.

*Harel.* I do not agree that "in fifty years historians will look at our era in a way similar to the way we look at the destructive global hysteria which led to the First World War."[7] The terrorist attacks of September 11, 2001, were not instances of "hysteria," but real killings that have had enormous consequences both direct and indirect. There have been a number of serious terrorist attacks since and terrorism remains a threat that we dare not make light of.

At the same time that he belittles the terrorist threat, he exaggerates the threat that antiterrorist activities pose to civil liberties. His thesis that "once rights are eroded," even judges "lose the very capacity to value the right because the sensitivities required for appreciating its value are lost"[8] is incorrect as a matter of history. The United States, Britain, France, and countless other countries have infringed civil liberties in times of actual or perceived menace to national security, yet after the perceived menace passed, the rights have been restored—and indeed expanded.

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[3] *Segev*, *supra* note 1, at 237.

[4] *Id.* at 239.

[5] *Id.* at 240.

[6] Senator McCain, *cited in* POSNER, *supra* note 2, at 83.

[7] See in this issue, Alon Harel, *Cost-Benefit Analysis and National Emergencies: A Review of Richard Posner's Not a Suicide Pact: The Constitution in a Time of National Emergency*, 42 ISR. L. REV. 225 (2009).

[8] *Id.* at 231.

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Harel regards balancing as a mere "metaphor" that should not guide decisions.[9] Well, let's not say balancing—let's just say weighing pros and cons. How else does one decide rationally whether to embark on a proposed course of action? If the weights are intangible, the decisional process may be no better than a rough guess. But decide we must, even under uncertainty, and I am left wondering how Harel would propose that issues of optimal antiterrorist strategy be resolved. Can security be ignored? If not, how can it be factored into an analysis that is also sensitive to civil liberties?

*Kremnitzer and Levanon.* This paper is almost entirely about torture, and it takes the same absolutist stand as Segev's paper. I will not repeat my criticism of that position. But I do take exception to being represented as "recommend[ing] permitting torture."[10] As I said, I think torture should be illegal, and should therefore occur only when officials are willing to violate the law, accepting all the consequences, both political and legal, that may ensue; and these will be extremely rare situations. It is also misleading to say that I would "be willing to use torture even in 'standard' criminal cases."[11] The example, which is not as hypothetical as the ticking time bomb, is the kidnapping of a child in which the kidnapper refuses to reveal the child's whereabouts.[12] I would be surprised if Kremnitzer and Levanon would think it outrageous if the police slapped the kidnapper in an effort to coerce him to reveal those whereabouts.

As is typical in condemnations of torture, the authors are unwilling to confront the ticking time bomb hypothetical. They will not say whether the death of 100,000 people would be a reasonable price to pay for an absolute refusal ever to torture. In refusing to confront that case, they engage in what psychologists call "denial." In fairness, they do say that "it is far from obvious that even the possibility of saving lives significantly outweighs the evils of torture";[13] what is far from obvious is not necessarily incorrect. I wish they would elaborate their discussion of that point, which I read as a semi-concession to realism.

And again, I do not agree that as "an act of pure de-humanization, torture threatens our ability to remain committed to this core democratic essence and to democracy as a whole."[14] The "third degree," which I imagine the authors would classify as a form

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[9] *Id.* at 227.

[10] See in this issue, Mordechai Kremnitzer, Liat Levanon, *Not a Suicide Pact: A Comment on Preventative Means in General and on Torture in Particular*, 42 ISR. L. REV. 248, 255 (2009).

[11] *Id.* at 258.

[12] POSNER, *supra* note 2, at 81.

[13] Kremnitzer & Levanon, *supra* note 10, at 267.

[14] *Id.*

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of torture, was a routine police practice in the United States until about a half century ago, and many other democratic countries, including Israel, have practiced torture, sometimes extensively. However strongly one opposes torture, the opposition cannot be justified by claiming that the practice of torture dooms democracy.

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