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# The Jurisprudence Of American National Security Presiprudence

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## THE JURISPRUDENCE OF AMERICAN NATIONAL SECURITY PRESIPRUDENCE

Robert F. Blomquist\*

### I. INTRODUCTION

The President of the United States, by virtue of the Presidential Oath Clause in Article II, Section 1 of the Constitution (in conjunction with specific executive powers set forth in Article II), is the *national security sentinel* of the Nation.<sup>1</sup> By virtue of the Presidential Oath that the President-to-be must take before assuming the office—“to preserve, protect and defend” the Constitution, and by implication, the Nation<sup>2</sup> — the President has the paramount federal responsibility to articulate, safeguard, and watch over the American national interest.<sup>3</sup> I have previously suggested that, by analogy to existing scholarly fields of endeavor that attempt to systematize and critique the coherence and robustness of the judiciary’s legal work product (*jurisprudence*) and the legislature’s legal work product (*legisprudence*), it is appropriate to bring similar focus on the legal work product of the President—what I call *presiprudence*.<sup>4</sup> In another article, I argued that presidents in the post-

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<sup>1</sup> The unique Presidential Oath is specifically prescribed in U.S. CONST. art. II, § 1, cl. 7. Key specific executive powers relevant to the President’s national security powers are: U.S. CONST. art. II, § 1, cl. 1 (“The executive Power shall be vested in a President of the United States of America.”); art. II, § 2, cl. 1 (“The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States . . . .”); art. II, § 2, cl. 2 (“He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties . . . .”); art. II, § 3 (“he shall receive Ambassadors and other public Ministers”); art. II, § 3 (“he shall take Care that the Laws be faithfully executed, and shall Commission all the Officers of the United States”).

<sup>2</sup> U.S. CONST. art. II, § 1, cl. 7.

<sup>3</sup> Robert F. Blomquist, *The Presidential Oath, the American National Interest and a Call for Presiprudence*, 73 UMKC L. REV. 1, 51 (2004), cited in *McCreary County v. ACLU of Ky.*, 545 U.S. 844, 886 (2005) (Scalia, J., dissenting).

<sup>4</sup> Blomquist, *supra* note 3, at 50–52.

The presidential oath is properly understood as the constitutional keystone of the American Republic: it commands the President of the United States to preserve, protect and defend—as well as articulate, pursue, and achieve—the *legal embodiment of the American national interest*. A new field of inquiry, which I have coined *presiprudence*, may help scholars elaborate theoretical insights on the President’s pursuit of the legal national interest.

*Id.* at 52.

9/11 world should pursue a vigorous and proactive maximum-security American state limited by constraints of economics, psychology, politics, and law.<sup>5</sup> As part of that effort, I proposed a four-part model of American national security presiprudence (involving timing, grand strategy, communication, and balance).<sup>6</sup>

In this Essay I seek to explore some issues of interaction between jurisprudence and presiprudence in the context of American national security. In Part II, I catalog and discuss various theoretical considerations regarding how the Supreme Court of the United States should go about reviewing and interpreting national security legal determinations by the President of the United States (“POTUS”). Then, in Part III, I focus on whether the Supreme Court should ever cite foreign law when reviewing national security presiprudence.

## II. NATIONAL SECURITY PRESIPRUDENCE JURISPRUDENCE

### A. *Strategic Considerations of Institutional Design Coupled with Form and Function*

Supreme Court Justices—along with legal advocates—need to conceptualize and prioritize big theoretical matters of institutional design and form and function in the American national security tripartite constitutional system. By way of an excellent introduction to these vital issues of legal theory, the Justices should pull down from the library shelf of the sumptuous Supreme Court Library in Washington, D.C. (or more likely have a clerk do this chore) the old chestnut, *The Legal Process: Basic Problems in the Making and Application of Law* by the late Harvard University law professors Henry M. Hart and Albert M. Sacks.<sup>7</sup> Among the rich insights on institutional design coupled with form and function in the American legal system that are germane to the Court’s interpretation of national security law-making and decision-making by the President are several pertinent points. First, “Hart and Sacks’ intellectual starting point was the interconnectedness of human beings, and the usefulness of law in helping us coexist peacefully together.”<sup>8</sup> By implication, therefore, the Court should be mindful of the unique

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<sup>5</sup> Robert F. Blomquist, *American National Security Presiprudence*, 26 QUINNIPIAC L. REV. 439 (2008), reprinted in TOP TEN GLOBAL JUSTICE LAW REVIEW ARTICLES 2008, at 55 (Amos N. Guiora ed., 2009).

<sup>6</sup> *Id.* at 491–95, reprinted in TOP TEN GLOBAL JUSTICE LAW REVIEW ARTICLES 2008 55, 104–05 (Amos N. Guiora ed., 2009).

<sup>7</sup> HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994).

<sup>8</sup> William N. Eskridge, Jr., *Interpretation of Statutes*, in A COMPANION TO PHILOSOPHY OF LAW AND LEGAL THEORY 200, 203 (Dennis Patterson ed., 1996).

constitutional role played by the POTUS in preserving peace and should prevent imprudent judicial actions that would undermine American national security. Second, Hart and Sacks, continuing their broad insights of social theory, noted that legal communities establish “*institutionalized*” procedures for the settlement of questions of group concern<sup>9</sup> and regularize “different procedures and personnel of different qualifications . . . appropriate for deciding different kinds of questions”<sup>10</sup> because “every modern society differentiates among social questions, accepting one mode of decision for one kind and other modes for others—*e.g.*, courts for ‘judicial’ decisions and legislatures for ‘legislative’ decisions”<sup>11</sup> and, extending their conceptualization, an executive for “executive” decisions.<sup>12</sup> Third, Professors Hart and Sacks made seminal theoretical distinctions between rules, standards, principles, and policies.<sup>13</sup> While all four are part of “legal arrangements

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<sup>9</sup> HART & SACKS, *supra* note 7, at 3.

<sup>10</sup> *Id.* at 4.

<sup>11</sup> *Id.* at 360. Interestingly, Hart and Sacks make a distinction between *adjudicative facts*, “facts relevant in deciding whether a given general proposition is or is not applicable to a particular situation (that is, facts ordinarily, although not always, about what happened in the particular case),” and *legislative facts*, “facts relevant in deciding what general propositions should be recognized as authoritative (that is, facts, ordinarily, although not always, about what generally happens in a class of cases).” *Id.*

<sup>12</sup> I contend, by extrapolating Hart and Sacks’ typology, that it is appropriate to distinguish *presiprudential facts*—facts relevant in deciding what general propositions, recognized as authoritative, are of such importance at a given time for the paramount national interest so as to require special executive arrangements to ensure their expeditious achievement. See *supra* note 11 and accompanying text. Moreover presiprudential facts would also encompass general propositions that are not yet recognized as authoritative, but that in the President’s judgment, should be recognized as authoritative for the paramount national interest. While any substantive area of domestic law and policy (*e.g.*, environmental, energy, education, health) or international law and policy (*e.g.*, trade, diplomacy, war) is potentially subject to presiprudential fact-finding, national security law and policy is of unusual importance because of the special constitutional responsibility of the president to preserve, protect and defend the Nation. See *supra* notes 1–6 and accompanying text.

<sup>13</sup> HART & SACKS, *supra* note 7, at 139 (rules); *id.* at 140 (standards); *id.* at 141–42 (principles and policies). Congress might prescribe rules, standards, principles and policies for the President to consider in executing national security. But the relatively abstract and generalized nature of congressional principles and policies is a more likely legal arrangement as addressed to the President to consider in executing national security, because of the more complex quality of national security issues, the independent constitutional power of the President in national security matters and the need for dispatch in responding to national security emergencies. Moreover, because of the President’s independent constitutional power in national security affairs, it is likely that the President will on his or her own initiative develop or direct the promulgation of national security principles and policies or even national security rules and standards to guide the discretion of civilian and military officials under presidential command.

in an organized society,"<sup>14</sup> and all four of these arrangements are potentially relevant in judicial review of presidential national security decisions, principles and policies<sup>15</sup> are of special concern because of the sprawling, inchoate, and rapidly changing nature of national security threats and the imperative of hyper-energy in the Executive branch in responding to these threats.<sup>16</sup>

The Justices should also consult Professor Robert S. Summers's masterful elaboration and amplification of the Hart and Sacks project on enhancing a flourishing legal system: the 2006 opus, *Form and Function in a Legal System: A General Study*.<sup>17</sup> The most important points that

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<sup>14</sup> *Id.* at 141.

<sup>15</sup> According to Hart and Sacks:

Principles and policies are closely related, and for many purposes need not be distinguished from each other. A *policy* is simply a statement of objective. *E.g.*, full employment, . . . national security, conservation of natural resources, etc. . . . A *principle* also describes a result to be achieved. But it differs in that it asserts that the result *ought* to be achieved and includes, either expressly or by reference to well-understood bodies of thought, a statement of *the reasons why* it should be achieved. *E.g.*, *pacta sunt servanda* agreements—should be observed; no person should be unjustly enriched; etc. . . .

Policies usually have reasons behind them, but they are likely to be less closely thought out and justified. At least in the extremes and for some purposes, there seems to be a significant difference between a mere statement of objective, which may be a matter of unreasoned preference, and a statement that a certain objective ought to be sought or a certain course of action followed, which necessarily involves a rationale founded on human experience of why this is so.

Principles and policies, like rules and standards, are general directive propositions, or elements of them. But unlike rules and standards they are not expressed in terms of the happening or non-happening of physical or mental events or of qualitative appraisals of such happenings drawn from ordinary human experience. They are on a much higher level of abstraction, and obviously involve a vastly larger postponement of decision. A policy leaves to the addressee the entire job of figuring out how the stated objective is to be achieved, save only as the policy may be limited by rules and standards which mark the outer bounds of permissible choice. A principle gives the addressee only the additional help of a reason for what he is to try to do.

*Id.* at 141–42.

<sup>16</sup> See generally JAMES E. BAKER, IN THE COMMON DEFENSE: NATIONAL SECURITY LAW FOR PERILOUS TIMES (2007) (discussing how the United States faces the threat of catastrophic terrorist attacks and whether the Nation is successful in preventing nuclear, biological or other security breaches depends especially on the POTUS and POTUS advisers applying and making law in a manner that enhances security and upholds our core constitutional values).

<sup>17</sup> ROBERT S. SUMMERS, FORM AND FUNCTION IN A LEGAL SYSTEM: A GENERAL STUDY (2006).

Summers makes that are relevant to judicial review of American national security presiprudence are three key considerations. First, a “conception of the overall form of the whole of a functional [legal] unit is needed to serve the founding purpose of defining, specifying, and organizing the *makeup* of such a unit so that it can be brought into being and can fulfill its own distinctive role”<sup>18</sup> in synergy with other legal units to serve overarching sovereign purposes for a polity. The American constitutional system of national security law and policy should be appreciated for its genius in making the POTUS the national security sentinel with vast, but not unlimited, powers to protect the Nation from hostile, potentially catastrophic, threats. Second, “a conception of the overall form of the whole is needed for the purpose of organizing the internal *unity* of relations between various formal features of a functional [legal] unit and between each formal feature and the complementary components of the whole unit.”<sup>19</sup> Thus, Supreme Court Justices should have a thick understanding of the form of national security decision-making conceived by the Founders to center in the POTUS; the ways the POTUS and Congress historically organized the processing of national security through institutions like the National Security Council and the House and Senate intelligence committees; and the ways the POTUS has structured national security process through such specific legal forms as Presidential Directives, National Security Decision Directives, National Security Presidential Decision Directives, Presidential Decision Directives, and National Security Policy Directives in classified, secret documents along with typically public Executive Orders.<sup>20</sup> Third, according to Summers, “a conception of the overall form of the whole functional [legal] unit is needed to organize further the *mode of operation* and the *instrumental capacity* of the [legal] unit.”<sup>21</sup> So, the Supreme Court should be aware that tinkering with national security decisions of the POTUS—unless clearly necessary to counterbalance an indubitable violation of the text of the Constitution—may lead to unforeseen negative second-order consequences in the ability of the POTUS (with or without the help of Congress) to preserve, protect, and defend the Nation.<sup>22</sup>

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<sup>18</sup> *Id.* at 6.

<sup>19</sup> *Id.*

<sup>20</sup> BAKER, *supra* note 16, at 109.

<sup>21</sup> SUMMERS, *supra* note 17, at 6.

<sup>22</sup> *Cf. Boumediene v. Bush*, 128 S. Ct. 2229, 2279 (2008) (Roberts, C.J., dissenting) (“Today the Court strikes down as inadequate the most generous set of procedural protections ever afforded aliens detained by this country as enemy combatants. The political branches crafted these procedures amidst an ongoing military conflict, after much careful investigation and thorough debate. . . . And to what effect?”), *with Boumediene*, 128 S. Ct. at

B. *Geopolitical Strategic Considerations Bearing on Judicial Interpretation*

Before the United States Supreme Court Justices form an opinion on the legality of national security decisions by the POTUS, they should immerse themselves in judicially-noticeable facts concerning what national security expert, Bruce Berkowitz, in the subtitle of his recent book, calls the “challengers, competitors, and threats to America’s future.”<sup>23</sup> Not that the Justices need to become experts in national security affairs,<sup>24</sup> but every Supreme Court Justice should be aware of the following five basic national security facts and conceptions *before* sitting in judgment on presprudential national security determinations.

(1) “National security policy . . . is harder today because the issues that are involved are more numerous and varied. The problem of the day can change at a moment’s notice.”<sup>25</sup> While “[y]esterday, it might have been proliferation; today, terrorism; tomorrow, hostile regional powers”<sup>26</sup>, the twenty-first century reality is that “[t]hreats are also more likely to be intertwined—proliferators use the same networks as narco-traffickers, narco-traffickers support terrorists, and terrorists align themselves with regional powers.”<sup>27</sup>

(2) “Yet, as worrisome as these immediate concerns may be, the long-term challenges are even harder to deal with, and the stakes are higher. Whereas the main Cold War threat—the Soviet Union—was brittle, most of the potential adversaries and challengers America now faces are resilient.”<sup>28</sup>

(3) “The most important task for U.S. national security today is simply to retain the *strategic advantage*. This term, from the world of military doctrine, refers to the overall ability of a nation to control, or at least influence, the course of events.”<sup>29</sup> Importantly, “[w]hen you hold

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2294 (Scalia, J., dissenting) (“The game of bait-and-switch that today’s opinion plays upon the Nation’s Commander in Chief will make the war harder on us. It will almost certainly cause more Americans to be killed. That consequence would be tolerable if necessary to preserve a time-honored legal principle vital [to the Nation]. But it is this Court’s blatant *abandonment* of such a principle that produces the decision today.”).

<sup>23</sup> BRUCE BERKOWITZ, *STRATEGIC ADVANTAGE: CHALLENGERS, COMPETITORS, AND THREATS TO AMERICA’S FUTURE* (2008).

<sup>24</sup> Although, it wouldn’t hurt if the Justices regularly read national security journals such as *Foreign Affairs*, *The National Interest*, *The Journal of International Security Affairs*, *The World Policy Journal*, and *Current History*. While it seems unlikely, the POTUS and the Congress should seriously consider changing laws and policies to provide Supreme Court Justices with select national security briefings.

<sup>25</sup> BERKOWITZ, *supra* note 23, at 1.

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> *Id.* at 1–2 (footnote omitted).

the strategic advantage, situations unfold in your favor, and each round ends so that you are in an advantageous position for the next. When you do not hold the strategic advantage, they do not.”<sup>30</sup>

(4) While “keeping the strategic advantage may not have the idealistic ring of making the world safe for democracy and does not sound as decisively macho as maintaining American hegemony,”<sup>31</sup> maintaining the American “strategic advantage is critical, because it is essential for just about everything else America hopes to achieve—promoting freedom, protecting the homeland, defending its values, preserving peace, and so on.”<sup>32</sup>

(5) The United States requires national security “agility.”<sup>33</sup> It not only needs “to refocus its resources repeatedly; it needs to do this faster than an adversary can focus its own resources.”<sup>34</sup>

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<sup>30</sup> *Id.* at 2.

<sup>31</sup> *Id.* (internal quotation marks omitted).

<sup>32</sup> *Id.* (internal quotation marks omitted).

<sup>33</sup> *Id.* at 4.

<sup>34</sup> *Id.* By way of illustration, Berkowitz examines the “dozen or so events that were considered at one time or another,” over the past fifteen to twenty years, “the most pressing national security problem facing the United States—and thus the organizing concept for U.S. national security.” *Id.* at 2. Remarkable strategic agility was required for the POTUS, and other American national security officials under his command or direction, to nimbly shift from one crisis to the next. These national security crises, in rough chronological order, included the following:

- regional conflicts—such as Desert Storm—involving the threat of war between conventional armies;
- stabilizing “failed states” like Somalia, where government broke down in toto;
- staying economically competitive with Japan;
- integrating Russia into the international community after the fall of communism and controlling the nuclear weapons it inherited from the Soviet Union;
- dealing with “rogue states,” unruly nations like North Korea that engage in trafficking and proliferation as a matter of national policy;
- combating international crime, like the scandal involving the Bank of Credit and Commerce International, or imports of illegal drugs;
- strengthening international institutions for trade as countries in Asia, Eastern Europe, and Latin America adopted market economies;
- responding to ethnic conflicts and civil wars triggered by the reemergence of culture as a political force in the “clash of civilizations”;
- providing relief to millions of people affected by natural catastrophes like earthquakes, tsunamis, typhoons, droughts, and the spread of HIV/AIDS and malaria;
- combating terrorism driven by sectarian or religious extremism;
- grassroots activism on a global scale, ranging from the campaign to ban land mines to antiglobalization hoodlums and environment crazies;
- border security and illegal immigration;

As further serious preparation for engaging in the jurisprudence of American national security jurisprudence in hotly contested cases and controversies that may end up on their docket, our Supreme Court Justices should understand that, as Walter Russell Mead pointed out in an important essay a few years ago,<sup>35</sup> the average American can be understood as a Jacksonian pragmatist on national security issues.<sup>36</sup> “Americans are determined to keep the world at a distance, while not isolating ourselves from it completely. If we need to take action abroad, we want to do it on our terms.”<sup>37</sup> Thus, recent social science survey data paints “a picture of a country whose practical people take a practical approach to knowledge about national security. Americans do not bother with the details most of the time because, for most Americans, the details do not matter most of the time.”<sup>38</sup> Indeed, since the American people “do know the outlines of the big picture and what we need to worry about [in national security affairs] so we know when we need to pay greater attention and what is at stake. This is the kind of knowledge suited to a Jacksonian.”<sup>39</sup>

Turning to *how* the Supreme Court should view and interpret American presidential measures to oversee national security law and policy, our Justices should consider a number of important points. First, given the robust text, tradition, intellectual history, and evolution of the institution of the POTUS as the American national security sentinel,<sup>40</sup> and the unprecedented dangers to the United States national security after 9/11,<sup>41</sup> national security jurisprudence should be accorded wide latitude by the Court in the adjustment (and tradeoffs) of trading liberty and security.<sup>42</sup> Second, Justices should be aware that different presidents

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- the worldwide ripple effects of currency fluctuations and the collapse of confidence in complex financial securities; and
  - for at least one fleeting moment, the safety of toys imported from China.

*Id.* at 2-3. See also THOMAS P.M. BARNETT, GREAT POWERS: AMERICA AND THE WORLD AFTER BUSH (2009) (cogent synoptical analyses of rapidly emerging national security trends).

<sup>35</sup> Walter Russell Mead, *The Jacksonian Tradition*, NAT'L INTEREST, Winter 1999/2000, at 5 (cited in BERKOWITZ, *supra* note 23, at 96).

<sup>36</sup> BERKOWITZ, *supra* note 23, at 97-98.

<sup>37</sup> *Id.* at 97.

<sup>38</sup> *Id.*

<sup>39</sup> *Id.* For an excellent human portrait of Andrew Jackson in the White House and a lucid account of Jackson's pivotal influence as an American leader who created an enduring change in the presidency, see JON MEACHAM, AMERICAN LION: ANDREW JACKSON IN THE WHITE HOUSE (2008).

<sup>40</sup> See Blomquist, *supra* note 5, at 441-57.

<sup>41</sup> *Id.* at 457-75.

<sup>42</sup> ERIC A. POSNER & ADRIAN VERMEULE, TERROR IN THE BALANCE: SECURITY, LIBERTY AND THE COURTS 6 (2007) [hereinafter TERROR IN THE BALANCE]. See RICHARD A. POSNER,

institute changes in national security presiprudence given their unique perspective and knowledge of threats to the Nation.<sup>43</sup> Third, Justices should be restrained in second-guessing the POTUS and his subordinate national security experts concerning both the existence and duration of national security emergencies and necessary measures to rectify them. “During emergencies, the institutional advantages of the executive are enhanced”;<sup>44</sup> moreover, “[b]ecause of the importance of secrecy, speed, and flexibility, courts, which are slow, open, and rigid, have less to contribute to the formulation of national policy than they do during normal times.”<sup>45</sup> Fourth, Supreme Court Justices, of course, should not give the POTUS a blank check—even during times of claimed national emergency; but, how much deference to be accorded by the Court is “always a hard question” and should be a function of “the scale and type of the emergency.”<sup>46</sup> Fifth, the Court should be extraordinarily deferential to the POTUS and his executive subordinates regarding questions of executive determinations of the international laws of war and military tactics. As cogently explained by Professors Eric Posner and Adrian Vermeule,<sup>47</sup> “the United States should comply with the laws of war in its battle against Al Qaeda”—and I would argue, other lawless terrorist groups like the Taliban—“only to the extent these laws are beneficial to the United States, taking into account the likely response of

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COUNTERING TERRORISM: BLURRED FOCUS, HALTING STEPS 177 (2007) [hereinafter COUNTERING TERRORISM]. Moreover:

We should also bear in mind the tradition of flexible interpretation of the Constitution that permits judicial departures from, as well as judicial elaborations of, the actual language of the document, and the balancing of competing interests as a technique of flexible constitutional interpretation. We should remember too that there is nothing novel or illiberal in trading liberty off against safety. We do it all the time, for example in limiting the ownership of guns or requiring seatbelts and infant seats in automobiles.

*Id.*

<sup>43</sup> See, e.g., Paul Richter, *Cheney: Obama Put U.S. at Risk*, CHI. TRIB., Mar. 16, 2009, at 1 (“Since entering office, [President] Obama has announced plans to eventually close the Guantanamo Bay detention facility; banned water-boarding, an interrogation technique that makes a prisoner believe he is in imminent danger of drowning; said he would require CIA interrogators to abide by rules in the Army Field Manual; and ordered the closure of secret intelligence interrogation sites.”).

<sup>44</sup> TERROR IN THE BALANCE, *supra* note 42, at 5.

<sup>45</sup> *Id.* But see Paul D. Carrington & Roger C. Cramton, *Judicial Independence in Excess: Reviving the Judicial Duty of the Supreme Court*, 94 CORNELL L. REV. 587 (2009) (criticizing a broad spectrum of cases over the last several years decided by the Supreme Court acting as a superlegislature devoted to the questionable role of making new law to govern future events).

<sup>46</sup> TERROR IN THE BALANCE, *supra* note 42, at 5–6.

<sup>47</sup> See *id.* at 260–72.

other states and of al Qaeda and other terrorist organizations,"<sup>48</sup> as determined by the POTUS and his national security executive subordinates.

III. LEARNING FROM FOREIGN EXPERIENCE (BUT AVOIDING THE TEMPTATION OF CITING FOREIGN CASES AS PRECEDENT)

Our Supreme Court Justices should carefully distinguish between salutary and legitimate uses of apt foreign national security law and policy, on the one hand, and problematic and illegitimate citation of foreign judicial holdings as precedent.<sup>49</sup> Salutary and legitimate uses of relevant foreign national security law and policy by the Supreme Court might include our Justices cogitating on: persuasive legal and policy arguments contained in foreign judicial opinions; discussions of international legal principles mentioned in foreign decisions; and reflection on the substance, structure and wisdom of foreign national security legislation and executive policies by way of edifying comparison to American national security legislation and policy.<sup>50</sup> Speaking, by implication, to the POTUS, American legislatures, executive policymakers, national security intellectuals as well as Supreme Court Justices (and subordinate federal judges), Richard A. Posner persuasively argues that Americans "should be able to learn, and benefit from learning, how other democratic countries, especially those with more experience than we have with terrorism, tailor their counterterrorism measures. The literature is extensive and much of it in English."<sup>51</sup> He goes on to suggest that "[w]ithout violating the letter or even the spirit of our Constitution we could experiment with trying terrorists [like several European countries do] in specialized courts or with using investigatory magistrates empowered to compel testimony from suspected terrorists under pain" of contempt of court sanctions.<sup>52</sup> Likewise, Posner summarizes pragmatic foreign legal counterterrorism measures gleaned from the United Kingdom and Canada "from which we might want to borrow ideas for combating terrorism more effectively,"<sup>53</sup> or simply to

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<sup>48</sup> *Id.* at 261.

<sup>49</sup> I am at work on a more extended and in-depth analysis of this problem in a draft tentatively entitled *The Constitutional Jurisprudence of American National Security Presiprudence: The Folly of Supreme Court Citation of Foreign Judicial Precedent* (on file with the author). My thoughts in the present Essay are concise and impressionistic given the limitations of space.

<sup>50</sup> Cf. RICHARD A. POSNER, *HOW JUDGES THINK*, ch. 12 (2008) (for a discussion of these and other comparative law judicial learning techniques).

<sup>51</sup> COUNTERING TERRORISM, *supra* note 42, at 183 (footnote omitted).

<sup>52</sup> *Id.* at 183-84 (footnote omitted).

<sup>53</sup> *Id.* at 179, n.13.

better understand the global context of national security law of other democratic industrialized sister sovereigns. Nine ideas taken from the United Kingdom's playbook, as explained by Posner are:

- (1) conducting criminal trials without a jury if there is fear of jurors' being intimidated by accomplices of the defendant;
- (2) placing persons suspected of terrorism under "control orders" that require consent to being questioned or monitored electronically or forbidden to associate with certain persons, and that limit their travel;
- (3) detaining terrorist suspects for up to [twenty-eight] days (with judicial approval) for questioning, without charges being lodged;
- (4) conducting deportation proceedings from which the alien and his lawyer may be excluded—the alien is not entitled to be fully informed of the reasons for deporting him; "his" lawyer is appointed by and, more important, is responsible to the government rather than to the defendant; and evidence that is classified may be concealed from the defendant;
- (5) indefinitely detaining aliens who have been ordered deported but cannot actually be removed from the country (there may be no country willing to take them);
- (6) criminalizing persons who encourage terrorism by "glorifying" it in words that imply that the listener should engage in the glorified activity;
- (7) authorizing the issuance of search warrants by security officials rather than just by judges;
- (8) conducting "traffic analysis" and other data mining of Internet communications without a warrant (Internet service providers are required to install devices to enable Internet communications to be intercepted in transit); a warrant must be obtained to read an intercepted communication; but it may be granted by an executive official rather than a judge;

(9) Authorizing judges to issue “Public Interest Immunity Certificates” to intelligence agencies, allowing them to withhold from public judicial proceedings highly sensitive information concerning informants or techniques.<sup>54</sup>

To the contrary, citations by our Supreme Court Justices (and other federal judges) to foreign holdings involving national security law and policy (and related human rights jurisprudence) as *precedent*<sup>55</sup> is illegitimate and problematic for two sets of reasons. The initial set of reasons against American Judicial citation of foreign precedents is generic and has been articulated by Judge Posner.

First, citation of decisions opens up the promiscuous practice of “troll[ing] deeply enough in the world’s corpus juris,” increasing “the amount of research that lawyers and judges would have to do, but without conducing to better decisions.”<sup>56</sup> Second, citation of foreign decisions by American jurists is really just “one more form of judicial fig-leaving” by judges “timid about speaking in their own voices lest they make legal justice seem too personal,”<sup>57</sup> involving a further mystification of the judicial process in an effort to hide the *real* bases for difficult decisions in politically-charged matters of national security law which intersect with civil liberties law. Third, citation of foreign opinions has the unattractive potential of opening up “a wasteful arms race” of dueling foreign case citations between competing judges.<sup>58</sup> Fourth, “foreign decisions emerge from a complex social, political, historical, and institutional background of which most of our judges and Justices are ignorant.”<sup>59</sup> Fifth, “[t]o cite foreign law as authority is to suppose fantastically that the world’s judges constitute a single community of wisdom and conscience,” that is simply not the case.<sup>60</sup> Sixth, “sophisticated cosmopolitans” as judges, with a desire to cite foreign judicial precedents are “arrogant, even usurpative, in trying to impose their cosmopolitan values on Americans in the name of our eighteenth-

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<sup>54</sup> *Id.* at 178–79 (footnotes omitted).

<sup>55</sup> The most problematic use of a foreign decision would be citation of the decision as precedent by federal judges “searching for a global consensus on an issue of U.S. constitutional law.” POSNER, *supra* note 50, at 348.

<sup>56</sup> *Id.* at 349–50.

<sup>57</sup> *Id.* at 350.

<sup>58</sup> *Id.* at 351 (quotation marks omitted).

<sup>59</sup> *Id.*

<sup>60</sup> *Id.* at 351–52.

century Constitution” and complex political and legal culture.<sup>61</sup> Seventh, the constitutional and political incentives of foreign jurists are to issue “audaciously progressive opinions”; yet, these incentives are fundamentally different from American jurists.<sup>62</sup> Eighth, “[t]he decisive objection,” on a generic level, in Posner’s view, “to citing foreign decisions as authority [by American judges] is the undemocratic character of the practice” since “[t]he judges of foreign countries, however democratic these countries may be, have no democratic legitimacy in the United States.”<sup>63</sup> Ninth, American jurists should not confuse the largely harmless *philosophical* concept of cosmopolitanism—learning from and being open to edifying knowledge from other lands—with the dangerous and pernicious notion of *judicial* cosmopolitanism (importing inappropriate and alien foreign case law into the finely-tuned American political and legal system).<sup>64</sup>

A second set of reasons militating against precedential citation of foreign case holdings is focused on national security presiprudence considerations. First, unlike other national constitutions (e.g. Germany and South Africa) that invite the reception of international and comparative law in domestic courts, the American constitutional tradition is much more conservative in allowing the use of foreign law into our corpus juris.<sup>65</sup> Second, ethos—what makes the American people distinctive—is critical to the American constitutional system; foreign court precedents in the realm of national security law are inapposite to the unique national security ethos of the United States<sup>66</sup> (a nation that has and does bear a vast and disproportionate financial and human burden of responding to aggressive wars and trying to maintain the peace of the modern world). Finally, instead of seeking to hide from and obfuscate the vexing legal issues in reviewing national security presiprudence set in motion by the POTUS, Supreme Court Justices should seek to apply and perfect the excellent and flexible corpus of United States national security precedent.<sup>67</sup>

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<sup>61</sup> *Id.* at 352.

<sup>62</sup> *Id.* at 352–53.

<sup>63</sup> *Id.* at 353.

<sup>64</sup> *Id.* at 361–62, 366.

<sup>65</sup> See Jan M. Smits, *Comparative Law and Its Influence on National Legal Systems*, in THE OXFORD HANDBOOK OF COMPARATIVE LAW 513, 513–30 (Mathias Reimann & Reinhard Zimmermann eds., 2006).

<sup>66</sup> See MICHAEL J. GERHARDT, THE POWER OF PRECEDENT 170–72 (2008). See also Mark Tushnet, *Comparative Constitutional Law*, in THE OXFORD HANDBOOK OF COMPARATIVE LAW 1225, 1255 (Mathias Reimann & Reinhard Zimmermann eds., 2006).

<sup>67</sup> See, e.g., *Dep’t of the Navy v. Eagan*, 484 U.S. 518 (1988); *Dames & Moore v. Regan*, 453 U.S. 654 (1981); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952); *United States v. Curtis-Wright Export Corp.*, 299 U.S. 304 (1936).