17.245 The Supreme Court, Civil Liberties, and Civil Rights
Fall 2006

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Discussion 17: From "War on Crime" to "War on Terror"

Discussion of the Stone-Posner Debate

Background

- Both Geoffrey Stone and Richard Posner are on the faculty at the University of Chicago Law School.
- Stone has recently written Perilous Times: Free Speech in Wartime
- Posner is a federal appeals court judge (7th Circuit).

The main point of this debate is to flesh out how constitutional matters related to criminal procedure should be dealt with in the age of terrorism.

Stone:
Certain powers provided by the Patriot Act allow various searches that are unconstitutional under the 4th Amendment.
"[S]ection 215 of the [Patriot] [A]ct…authorizes Executive Branch officials to demand records from businesses and other institutions and organizations without any showing of reasonable grounds to believe that terrorist activity is afoot. This includes not only business records, but personal medical records, bank records, educational records, and library and bookstore records." (Stone, Debate Club 10/3/05, p2)

The Court has held that you are only protected from such searches of records for which you have a "reasonable expectation of privacy." It has held that you do not have a reasonable expectation of privacy of library records because the librarian knows what books you check out. A similar reasoning applies regarding the privacy of bank records. The danger of such power is in the chilling effect it creates. People may not want to do certain things they should have every right to do for fear that the government is looking over their shoulder or might confuse them with real criminals.

Posner:
There must be a balancing act between civil liberties and security. We cannot look at history to determine how to deal with the threat of terrorism. It is too different from anything else we've ever seen before. The nature of anti-terrorism investigation is to piece together records that have patterns that might indicate a greater likelihood of linkages to terrorism. You need access to all this information in order to find these patterns.

One way to address the problem as to what records can be used in what trials would just be to specify it in the law. This avoids some of the dangers of infringing on liberty, but security should still be our primary concern.

How can justices evaluate the terrorist threat without access to the information that intelligence experts have?

- We know the potential devastation we are confronted with. The impact of the use of a weapon of mass destruction would be millions of deaths. Preventing this should come well before the protection of privacy.

Discussion of William Stuntz, *"Local Policing after the Terror"*
Stuntz proposes a trade-off that would restrict police authority in cases where they currently have more power than necessary and offer more power to conduct searches and combat terror in places where civil rights protections are too prohibitive of useful police tactics.

The rationale is that crime comes and goes in waves and the courts have changed the meaning of the powers of police to investigate in response to crime trends. Therefore, when crime increases, police power must increase. 9/11 was a crime wave that now needs to be dealt with.

The "trans-substantive" nature of criminal procedure: The Constitution must apply to both terrorism and normal policing. When a court considers how to interpret the 4th, 5th and 6th Amendments, it must consider the effects of its decisions on criminal procedure in both types of investigations.

How do judges adopt rules of criminal procedure that are neutral across types of investigations, whether they be "ordinary" criminal law investigations or terrorism investigations?

We currently allow police to do some things they shouldn't be allowed to do, and don't allow them to do things that they should be able to do. A set of rules specifying procedure for terrorism investigations must be created and the rules of evidence need to be specified to ensure that broader investigative authority won't be abused for prosecution of unrelated, less serious crimes.

What is this trade?

- Increase police power to conduct suspicion-less searches of groups
- Regulate the manner of individual searches: give police the power to stop and question based on only the slightest suspicion, but regulate the manner in which they are searched. Prevent police from being overly and unnecessarily intrusive.
- Give police more power to gather information, but restrict the types of cases it can be used
    - Currently, the exclusionary rule applies, preventing use of evidence in cases where there was no probable cause or no warrant
    - Adjust exclusionary rule protections to reflect seriousness of crime
- Overturn *Miranda*, and replace it with audio and video records so that judges can see if a confession was coerced

The last point is the problem of racial profiling. You can't decide racial profiling in absolute terms because the police will always target certain persons belonging to groups that are widely considered suspect. If we adopt the trade-off proposals, then everyone will bear the costs of searches, and we will be more likely to find criminals because the latter will not be able to anticipate and evade the methods being used.

This doesn't appear to deal with the problem that if the police know about something and discovered it through an investigation without probable cause, then they can find a way to obtain the evidence they want legally. How does the exclusionary rule apply?

There is a doctrine called the "fruit of the poisonous tree". It provides that if an initial illegal search leads to knowledge of criminal activities that results in additional searches, all of the

evidence thereby obtained is considered illegally obtained and thus subject to the exclusionary rule.