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WE’RE ALL EXPERTS NOW:
A SECURITY CASE AGAINST SECURITY DETENTION

Deborah Pearlstein*

While a range of U.S. and international law scholars have criticized the United States’ current approach to counterterrorism detention operations, some of the same voices are now recommending the development of a more formally sanctioned “preventive” regime for detaining terrorist suspects going forward. With a view both to resolving current dilemmas like the status of detainees held at the U.S. Naval Base at Guantanamo Bay, and to meeting the anticipated ongoing security interests of the United States, scholars like Jack Goldsmith, Robert Chesney, and others have emphasized the legitimate national interest in the “preventive incapacitation of uniformless terrorists who have the capacity to inflict mass casualties and enormous economic harms and who thus must be stopped before they act.” This essay reviews the basis for the current interest in “preventive” detention regimes, and considers whether such a program is consistent with effective U.S. counterterrorism strategy writ large. The essay concludes that even if it were possible to construct a preventive detention regime that satisfies U.S. and international legal restrictions, it is not at all clear such a scheme would advance the security interest its proponents identify.

I. INTRODUCTION

The legal lesson that emerges from the articles in this volume—sometimes express, sometimes implied—is that there is no categorical international law prohibition of administrative detention. Perhaps better put, there is no categorical prohibition against states’ depriving individuals of liberty for reasons other than their having committed criminal offenses or engaged in armed conflict. Such a proposition could hardly be doubted. In the United States, for example, the federal government operates a vast and vigorous program of immigration detention. The sovereign states operate their own civil commitment regimes, which generally authorize them to

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detain, subject to various procedural restrictions, those who by reason of mental illness or incapacity are found to pose a danger to themselves or others. The U.S. Supreme Court consistently has embraced such detention systems, provided that the systems comply with a set of procedural safeguards far more detailed—and in some respects more exacting—than anything set forth expressly in international human rights or humanitarian law.¹

Such detention regimes, of course, are not without controversy. What constitutes fair process in non-criminal detention systems remains the subject of steady litigation on both domestic and international law grounds. There are complex questions regarding what circumstances justify detention and how long a detainee may be permissibly held.² But these issues exist to one degree or another, no matter what kind of detention regime a state has in place. The task of determining what process is due is a fraught one, and inescapable, whether the task falls to a traditional Article III court, an executive branch administrative court, or some hybrid tribunal created by the judicial, executive, or legislative body.

Given the general acceptability of non-criminal detention for purposes of regulating immigration and the like, if a state chooses to construct a new detention regime with a rigorous set of procedures to safeguard against arbitrariness, then why should one object to such a system for the plausibly sensible, separate purpose of achieving “the legitimate preventive incapacitation of uniformless terrorists who have the capacity to inflict mass casualties and enormous economic harms and who thus must be stopped before they act”?³ This essay is devoted to considering that question.

It is important to note, however, that the answer offered here turns far more on international security policy than on international security law. It is a chronic feature of courts’ and lawyers’ writing in the realm of security matters to begin by disclaiming any expertise in the area, thereby excluding from their deliberation all but the most passing consideration of whether a particular security policy is a good idea, or whether it is even rationally related to a legitimate state interest. As Eric Posner and Adrian Vermeule have explained:

> Whether the government justifiably detains al Qaeda suspects without charging and trying them depends to a large extent on the magnitude of the threat, the importance of secrecy, and other factors that few people outside

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of government are in a position to evaluate.... [W]e have no opinion about the merits of particular security measures adopted after 9/11.... Our point is that we are not well positioned to judge the merits of those policies, nor are the civil libertarian critics of those policies.4

Posner and Vermeule assert that they do not know enough about security decisions regarding detention or the use of force to evaluate whether such decisions are good or bad. Yet they are able to determine that: (1) good responses are necessarily “swift, vigorous, and secretive”; (2) power should be concentrated in an emergency and should “move up from the states to the federal government”; (3) limiting liberties will reliably enhance security; and (4) it is not possible for anyone (presumably including the real experts) to evaluate whether decisions, when made in an emergency, are good or bad.5 Such self-refuting positions help ensure that the merits of such programs remain assumed rather than explained.

Posner and Vermeule are hardly alone in this approach. When the U.S. Supreme Court considered in Johnson v. Eisentrager whether non-citizens held in U.S. military custody abroad had a right to habeas corpus, the Court peppered its opinion with reasoning about the security costs that would attend an affirmative finding.6 Of course, if the Eisentrager Court had the functional competence to determine as a matter of fact that review of military detention “would hamper the war effort and bring aid and comfort to the enemy[, and] ... would diminish the prestige of [the U.S.’s] commanders, not only with enemies but with wavering neutrals,”7 then it

5 Id. at 15–16, 18, 21–22. Indeed, the authors regularly offer substantive evaluations of the effectiveness of various security decisions. See, e.g., id. at 22 (positing a “tradeoff thesis” as the idea that neither liberty nor security can be “maximized without regard to the other”).
7 Id. at 779; see also Hamdi v. Rumsfeld, 542 U.S. 507, 534–35 (2004) (“We think it unlikely that this basic process will have the dire impact on the central functions of war making that the Government forecasts.”); id. (“What are the allowable limits of military discretion, and whether or not they have been overstepped in a particular case, are judicial questions.”) (quoting Sterling v. Constantin, 287 U.S. 378, 401 (1932)); Home Bldg. & Loan Ass’n v. Blaisdell, 290 U.S. 398, 426 (1934) (the war power “is a power to wage war successfully ...”). While the Court’s rejection of the presidentially created military commissions at Guantanamo Bay was in key respects driven by its interpretation of a statutory command, see Hamdan v. Rumsfeld, 548 U.S. 557, 620 (2006) (Uniform Code of Military Justice requires that “the rules applied to military commissions must be the same as those applied to courts-martial unless such uniformity proves impracticable”), the extraordinarily detailed attention the Court gave to evaluating the practical need for the commissions’ alternative trial procedures should leave little question that the majority justices had constitutional separation of powers concerns in mind, see Hamdan, 548 U.S. at 638 (Kennedy, J., concurring) (“Trial by military commission raises separation-of-powers concerns of the highest order. . . . Inso-
would be surprising to assume it lacks the institutional competence to evaluate similar facts and conclude under other circumstances that the exercise of habeas would not diminish the prestige of command, or that wavering potential terrorists would be most galvanized by the absence of judicial review.\textsuperscript{8} Either way, there can be little doubt that even as lawyers deny their ability to consider such matters, legal judgments in this field are rife with independent affirmative assertions about what is necessary to combat a threat in theory and what works in practice.

To be clear, there is utility in analyses of administrative detention that do not engage in their own assessment of security effectiveness. Many fine pieces reasonably assume a particular state of affairs—for example, that states are exercising such powers already—and seek to understand the legal consequences under those circumstances. It is a great service to identify the best procedural practices for states that choose to pursue a regime of security detention.\textsuperscript{9} It is equally a service to look for legitimate legal compromise on such questions in states struggling to correct the failings of security detention practices extant.\textsuperscript{10} But it is no service to endorse the lasting adoption of such a regime, even one with sterling procedural credentials, purely as the least-worst alternative chosen from an existing array of policies that may or may not have any merit as a matter of counterterrorism security. Put differently, it is not enough to endorse administrative security detention because it is, for example, easier to detain more people that way than under the traditional criminal or military detention. One must also explain why it will be a net help in preventing terrorism. Those who advocate adopting a “third-way” security system have not effectively made this case. Indeed, as discussed below, there remain reasons to believe such a regime would do U.S. national security more harm than good.

\textsuperscript{8} See infra text accompanying notes 17–18 (noting strategic disadvantages a “preventive” detention regime might pose).

\textsuperscript{9} See, e.g., Monica Hakimi, International Standards for Detaining Terrorism Suspects: Moving Beyond the Armed Conflict-Criminal Divide, 33 Yale Int’l L. J. 369, 373; Jelena Pejic, Procedural Principles and Safeguards for Internment/Administrative Detention in Armed Conflict and Other Situations of Violence, 858 Int’l Rev. of the Red Cross 375, 375 (2005), available at http://www.icrc.org/web/eng/siteeng0.nsf/htmlall/review-858-p375?opendocument (proposing a set of procedural safeguards to be applied in all cases of deprivation of liberty for security reasons).

\textsuperscript{10} See, e.g., Chesney & Goldsmith, supra note 3, at 1081.
II. COUNTERTERRORISM DETENTION IN CONTEXT

When it comes to discussions of the task of preventing catastrophic terrorist attacks, the contrast between legal literature and security literature is striking. Based on the legal scholarship, one could hardly be blamed for concluding that the principal weapons any state uses to prevent terrorist attacks are custodial detention and coercive interrogation. If a state fails to detain the right person or fails to elicit the essential information, the argument goes, one may as well give up all hope of imagining we can avoid losing a city (or more) to terrorist attack. Not that we legal scholars are entirely at fault; such practices are certainly at the heart of legal debates over terrorism prevention.

But as prevalent as detention and interrogation topics are in the legal scholarship, they are as noticeable for their absence in security scholarship. The principal recommendations of the vast majority of post-9/11 reports in the security literature that address prevention of or response to a nuclear terrorist attack propose rights-neutral measures entirely unrelated to detention and interrogation. For example, experts generally agree that efforts to prevent nuclear terrorism must centrally include efforts to prevent illicit trafficking or theft from one of the known facilities capable of producing fissile material, or known stockpiles of such material. As a result, the wide assortment of official and expert recommendations regarding the prevention of nuclear proliferation (other than those related to bureaucratic reorganization) place top priority on urging greater international cooperative efforts to inventory, secure, deter, and track the disposition of these materials.


12 See WMD COMMISSION REPORT, supra note 11, at 527–32 (recommending that the United States pursue additional bilateral ship-boarding agreements to help tag, track, and locate vessels of proliferation concern); 9/11 COMMISSION REPORT, supra note 11, at 380–81 (making three recommendations to guard against WMD proliferation: (1) “work with the international community to develop laws and an international legal regime with universal jurisdiction to enable the capture, interdiction, and prosecution” of nuclear smugglers; (2)
The foregoing is not intended to suggest that detention and interrogation never matter in the prevention of terrorism. Rather, it is to place the discussion of detention schemes in context—a context in which the detaining state is constantly balancing not only liberty and security interests, but also, for example, strategic interests in “winning hearts and minds” against shorter term tactical goals like preventing a particular attack. Indeed, there is substantial consensus that the United States would be better served by a counterterrorism policy that deploys a range of instruments of national power—including economic, diplomatic, cultural, and educational measures—all, ideally complementarily, geared toward diminishing the terrorist threat. That military force may be a useful element of this strategy is broadly recognized; the U.S. conventional military invasion of Afghanistan in 2001, for instance, won broad support in the United States and in Europe. At the same time, intelligence collection, public diplomacy, and traditional criminal justice remain regularly used tools against the threat to expand U.S. engagement with international partnerships using military, economic and diplomatic tools to interdict shipments of concern, including by expanding partners to include Russia and China; and (3) expand the 1991 Cooperative Threat Reduction Program and related efforts in partnership with Russia to secure fissile and related materials in the former Soviet Union; see also, e.g., SECURING THE BOMB, supra note 11, at 121–37 (describing various U.S. security measures); ALLISON, supra note 11, at 143–56; Brooks, supra note 11, at 104–07.


16 See United States Department of Justice, Counterterrorism White Paper 36 (June 22, 2006), available at
of terrorism. In such a complex environment, where tools deployed with one hand may have a significant impact on the likely success of tools held by the other, it would be foolish to imagine that operations as significant, and inevitably public, as detention and interrogation can operate in an effectiveness vacuum.

Particularly in the challenge of counterterrorism detention policy, the United States has had to face the reality that programs it has pursued principally for tactical purposes have resulted in significant strategic setbacks. As one recent and striking poll of a bipartisan group of leading U.S. foreign policy experts found, eighty-seven percent of experts polled believed that features of the U.S. detention system had hurt more than helped in the fight against Al Qaeda. Indeed, detention programs have at times resulted in significant tactical losses. Britain, America’s close ally, pulled out of planned joint counterterrorism operations with the CIA because it could not obtain adequate assurances that U.S. agents would refrain from rendition or cruel treatment. The costs of such trade-offs may be especially acute in some circumstances—for example, if securing international cooperation for the disposition of fissile material is central to a state’s strategic counterterrorism plan.


17 Guantanamo’s Shadow, ATLANTIC MONTHLY, Oct. 2007, at 40, available at http://www.theatlantic.com/doc/200710/guantanamo-poll (“Nothing has hurt America’s image and standing in the world—and nothing has undermined the global effort to combat nihilistic terrorism—than the brutal torture and dehumanizing actions of Americans in Abu Ghraib and in other prisons (secret or otherwise). America can win the fight against terrorism only if it acts in ways consistent with the values for which it stands; if its behavior descends to the level employed by the terrorists, then we have all become them instead of us.”).

18 See Raymond Bonner and Jane Perlez, British Report Criticizes U.S. Treatment of Terror Suspects, N.Y. TIMES, July 28, 2007, at A6 (“Britain pulled out of some planned covert operations with the Central Intelligence Agency, including a major one in 2005, when it was unable to obtain assurances that the actions would not result in rendition and inhumane treatment, the report said.”). The full report of the Committee is available at http://www.cabinetoffice.gov.uk/upload/assets/www.cabinetoffice.gov.uk/publications/intelligence/20070725_isoc_final.pdf (follow link for “Report into Rendition”). See also Craig Whitlock, Testimony Helps Detail CIA’s Post-9/11 Reach, WASH. POST, Dec. 16, 2006, at A1 (quoting State Department legal adviser John B. Bellinger III as indicating that ongoing disputes with U.S. allies have “undermined cooperation and intelligence activities”). Indeed, a survey conducted by the Pew Research Center found global public opinion of the United States, and particularly support for U.S. counterterrorism efforts, dropping in 2006. Brian Knowlton, Global Image of the U.S. is Worsening, Survey Finds, N.Y. TIMES, June 14, 2006, at A1. Perhaps most poignant, as one U.S. Army intelligence officer who served in Afghanistan put it in his subsequent book: “[t]he more a prisoner hates America, the harder he will be to break. The more a population hates America, the less likely its citizens will be to lead us to a suspect.” CHRIS MACKEY & GREG MILLER, THE INTERROGATORS: TASK FORCE 500 AND AMERICA’S SECRET WAR AGAINST AL QAEDA, at xxii, xxv, 44–45 (2004).
These few examples cannot, of course, lead one conclusively to reject a “preventive” detention regime. They should, however, suggest that the most one might reliably say about such a regime is that its effectiveness in preventing more terrorism than it promotes is uncertain. In addition, for those interested in determining what structural allocation of power might be most appropriate in operating a detention regime, it should also suggest the need to incorporate consideration of such trade-offs into the design of the regime from the outset. A decision-making structure that invariably favors tactics over strategy, or systematically forecloses the consideration of either tactical or strategic consequences, will fail to rationally evaluate such trade-offs— an outcome in no one’s security interest. Finally, these examples may suffice to put the burden of persuasion on those seeking to promote a new approach to security detention. Since the strategic costs of any such system may well be high, it is necessary to conduct a rigorous assessment of its benefits.

III. WHEN DETENTION HELPS PREVENTION

States unquestionably have a legitimate interest in preventing harm to innocent civilians. Thus, detaining individuals who plan or have taken steps to involve themselves in a criminal conspiracy is a central example of a function the criminal law performs. Criminal conspiracy laws (and inchoate offenses such as attempt) aim to prevent threats that are far enough along in their development to amount to “direct participation” in a criminal act, as well as threats so far along as to be actually imminent.

From a security perspective, criminal law should be a highly attractive tool for securing the “preventive” detention of individuals falling into one of these categories. Assuming a state has adequate evidence (a significant assumption at times), the criminal justice system offers an unquestionably legitimate means for securing the (sometimes prolonged) pre-trial detention and (potentially lifelong) post-trial incapacitation of a proven threat. Moreover, contrary to one of the oft-asserted but rarely supported policy arguments in legal literature, there is substantial evidence showing that the criminal justice process has been a significant source of intelligence information. Indeed, the coercive power accompanying the threat of criminal

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19 See, e.g., NORMAN ABRAMS, ANTI-TERRORISM AND CRIMINAL ENFORCEMENT 287 (2005).
20 See Hakimi, supra note 9, at 411 (proposing a “direct participation” test, among other standards, as a means of guarding against arbitrariness in administrative detention). In this regard, though, Professor Hakimi’s scheme is indistinguishable (and perhaps more rigorous) than traditional criminal justice liability bases for detention.
21 See, e.g., DANIEL BENJAMIN AND STEVEN SIMON, THE AGE OF SACRED TERROR: RADICAL ISLAM’S WAR AGAINST AMERICA xii–xiii (2003) (crediting transcripts from the major terrorism trials of recent years as a “treasure trove” of information related to the rise of terrorism
prosecution has proven successful many times over in securing information in exchange for favorable treatment.\textsuperscript{22}

The more complicated question, however, is when it is in the security interests of a state to detain individuals to prevent them from causing harm, but not in the state’s interest to prosecute them. The most commonly offered answers are: (1) where there is some evidence that an individual is planning or engaging in conduct of concern, but successful prosecution is in doubt because of procedural rules that, for example, restrict the admissibility of hearsay evidence or require the revelation of classified information; and (2) when the only evidence (admissible or no) giving rise to the question of detention is an individual’s association with or membership in a terrorist group.\textsuperscript{23} These circumstances pose somewhat different challenges, as discussed below.


\textsuperscript{23} See, e.g., Chesney & Goldsmith, supra note 3, at 1080–1081. While these two arguments are the most uniformly advanced, there are certainly others, including the possibility of custodial interrogation—interviews purely for the purpose of gathering information. A full response to detention for that purpose is beyond the scope of this brief essay. But without veering too broadly into the extraordinary debates about the use of torture to extract information, it may suffice to note that, according to the U.S. Government’s most thorough study to date into the use of coercive techniques to elicit information, “knowledge of behavioral indicators that might assist in the detection of deception is very limited and provides little reliable information that could assist intelligence collectors” with current populations of interest. Gary Hazlett, \textit{Research on Detection of Deception: What We Know vs. What We Think We Know}, in \textit{ProducING INFORMATION – INTERROGATION: SCIENCE AND ART – FOUNDATIONS FOR THE FUTURE} 45, 52 (U.S. Intelligence Science Board, ed., 2006). Put differently, it is entirely
A. Preventing Terrorist Acts

Since 9/11, more than one set of scholars has argued that “[r]elatively strict evidentiary and procedural rules make it very hard, and sometimes impossible, for the government to prosecute some terrorists that it has good reason to think may be very dangerous.”24 Such arguments have prompted precisely the right kind of legal questions. Specifically, such arguments raise questions as to whether: (1) strict hearsay exclusion rules are required to satisfy due process; (2) some accommodation can be made to satisfy state classification interests as well as defendants’ confrontation rights; and (3) witnesses can be adequately protected. Those who cite such issues as grounds for supporting a system of “preventive” detention for suspected terrorists do so in order to argue that an alternative forum could offer adjusted burdens of proof and evidence, geared toward accommodating the special challenges of terrorism cases.

Of course, the challenges of evaluating what kinds of evidence are sufficiently reliable to be credited, how to protect properly classified information, and the like, are challenges that exist in any detention scheme—criminal, administrative, or military. The U.S. criminal justice system has handled such special needs cases in the context of organized crime, drug trafficking, and national security. In those contexts, the U.S. criminal justice system has retained the overall contours and organizational structure of the criminal justice process, and incorporated modified procedural rules such as current provisions for the treatment of classified evidence.25 Such rules are generally designed to leave the decision-makers significant flexibility, maximizing the likelihood that a reasonable balance will be struck in a particular case.26 Despite arguments that such adjustments inevitably bleed into procedures governing mainline criminal prosecutions,27 there is little evidence that this has been the case in existing examples. The rules governing conspiracy prosecutions, for instance, remain noticeably different from those in non-conspiracy prosecutions, but courts are quite adapted to handling both.

Given that such accommodations could be made for terrorism cases either within the existing criminal or military justice systems, or in a new “preventive” detention system, the central question of concern for security

26 See ABRAMS, supra note 19, at 441–42.
27 See Hakimi, supra note 9, at 407–16.
policy-makers should be which institutional forum likely will be the most effective in helping to prevent terrorism overall. While there will be errors, of course, no matter what system one chooses, there are at least two reasons to expect the criminal justice process to be more effective in handling relevant procedural accommodations. The first reason is structural in nature. Terrorism trials within the criminal justice system are conducted against a broad and deep array of background rules, norms, and professional ethics—rules that help guide the inevitable exercise of discretion by the decision-maker tasked with making judgments about reliability, secrecy, and safety in an individual case. Such guidance flows not just from judges’ individual experience, but also from the well-understood norms of the range of professionals involved in the process (from investigators to attorneys), from well developed training and professional guidelines, and from the substantial body of decisional law involving procedural accommodations in analogous situations. The absence of such a professional infrastructure has been among the key failings of the military commission system at Guantanamo Bay, now in its seventh year of operation with just two completed trials. Indeed, studies of organizations tasked with managing high-risk decision-making (like the military) urge the importance of regular operating procedures and professional norms as a way of offsetting cultural and individual instincts that tend to skew decision-making and produce more errors, especially in times of crisis.

Those who advocate a new “preventive” detention system in the United States would no doubt respond that their system would be designed to avoid the pitfalls of the Guantanamo regime. Specifically, those advocates envision a regime under which rules and procedures would be set forth clearly in advance and, at least over time, participants in the system would develop the same (or indeed greater) set of professional commitments that agents in the criminal justice system now enjoy. To be sure, some of the mistakes made in the 2001 military commission venture seem as if they could have been avoided had there been even somewhat more attention to design and drafting from the outset. It is conceivable that a new administrative apparatus might, over some length of time, develop a set of institutionalized professional commitments comparable to those available today in the


criminal system. But given the apparently immediate policy need for a high-functioning detention system in the face of a terrorist threat broadly understood as both tactically urgent and strategically complex, it is not obvious why a security policy-maker would care to wait. This is especially true as it is not evident which direction the presence of background criminal justice norms would tend to skew (if at all) the operation of a “preventive” scheme, whether in favor of greater attention to individual rights or public risk.\textsuperscript{30} It does, however, seem clear that the risk of decision-making error is higher where there is little professional infrastructure to inform discretion exercised in any direction.\textsuperscript{31}

The second reason security policy-makers interested in terrorism prevention should favor dealing with detention through a criminal justice approach (with appropriate procedural accommodations) relates to one of the potential trade-offs between strategy and tactics attending many state counterterrorism efforts, in particular the high strategic price that may be paid by a system perceived as illegitimate. If recent history teaches any lesson, it is that a modified proceeding in an otherwise accepted forum raises fewer legitimacy concerns than a modified proceeding in a novel forum.\textsuperscript{32} Indeed, as noted above, there is a growing body of evidence suggesting that post-9/11 detainee policy has produced significant negative consequences for U.S. national security.\textsuperscript{33}

Particularly in the case of “preventive” detention, it is difficult to imagine a hypothetical system that yields anything other than a reality of \textit{indefinite} detention. It is true that most administrative detention schemes...
contemplate regular review so that “detention is calibrated to last no longer than necessary.”

But even if it were possible to resolve as a theoretical matter how long was “necessary” to detain a would-be terrorist avowedly committed to the destruction of the U.S., it is not clear what kind of showing (and what kind of evidence) a detainee would ever be able to present during such a “periodic review” that would properly convince a detaining power that circumstances have changed enough to eliminate the threat posed by the detainee. Would a review drawing on a psychological assessment, shared with a neutral judge-like arbiter, be sufficient? Would a finding of whether political conditions are sufficiently changed be necessary? Given the logical impossibility of proving a negative, it is not at all clear what kind of factual showing would suffice to establish that “preventive” detention of a suspect is no longer required.

Or consider the matter in terms of the incentives likely to shape the decisions of the detaining state. Imagine that a state detains someone for a single, time-limited period of “preventive” detention, with the possibility of seeking a renewal period of detention following some (more or less rigorous) degree of review. The state’s options following the first of such periods include: (1) releasing the detainee; (2) seeking a continuation of the detention; or (3) charging the detainee with a crime. Political incentives in a democracy seem likely to disfavor release. That is, the potential short-term tactical advantage of detaining an individual will always outweigh strategic goals like winning hearts and minds (particularly goals whose realization may be beyond the political event horizon). By comparison, continued detention may seem an attractive option. But then the detaining state must bear the significant strategic costs of an effectively indefinite scheme, including the cost of losing the support of allies and “wavering neutrals.”

34 See Hakimi, supra note 9, at 410.

35 See Hakimi, supra note 9, at 394 (“Unlike detentions predicated on deportation, however, pure security-based detentions have no intrinsic mechanism for establishing an end-date to detention.”).

36 See Amy B. Zegart, Spying Blind: The CIA, the FBI, and the Origins of 9/11, at 103–04 (2007) (attributing CIA’s failure in 2000 to track known Al Qaeda operatives from Malaysia to Thailand in part to short-term needs crowding out even slightly longer term requirements) (“Without strong incentives to reward analysts for peering over the horizon, following cases over time, and developing strategic intelligence, the urgent crowded out the important.”); see also WMD COMMISSION REPORT, supra note 11, at 4–5 (“Across the board, the Intelligence Community knows disturbingly little about the nuclear programs of many of the world’s most dangerous actors. In some cases, it knows less now than it did five or ten years ago. . . . The Intelligence Community we have today is buried beneath an avalanche of demands for ‘current intelligence.’”).

37 Johnson v. Eisentrager, 339 U.S. 763, 779 (1950) (“Such trials would hamper the war effort and bring aid and comfort to the enemy. They would diminish the prestige of our commanders, not only with enemies but with wavering neutrals. It would be difficult to devise more effective fettering of a field commander than to allow the very enemies he is
Detention followed by prosecution thus seems a comparatively advantageous choice.

The foregoing should suggest that there are strong security reasons to favor the limited pre-trial detention regime the U.S. has now. One might certainly argue in favor of a more extended period of permissible pre-trial detention to permit evidence gathering, and one could imagine relatively modest amendments to the Bail Reform Act or particular terrorism-related offenses with respect to this time period. The key challenge attending such a system—namely, deciding when to seize a suspect and when to watch-and-wait in the hope of gaining more information—is a problem that has long plagued those who enforce existing laws of criminal conspiracy. But as with other such balancing problems, it cannot be solved by describing the detention as “preventive” rather than pre-prosecution in nature.

B. Preventing Terrorist Associations

A second case in which a state might contemplate administrative detention arises when the only evidence of a threat is an individual’s membership in a terrorist or otherwise suspect organization. Consider for present purposes a particularly tough case, recognizing that there will be far less certainty surrounding the detention of many who might be subject to a scheme of “preventive” detention. The putative detainee here is an individual who is not particularly “guilty” or “innocent,” but rather is a self-described Al Qaeda terrorist, discovered in a known Al Qaeda safe house, who (he tells anyone who will listen) “looks forward to the day when he has the chance to kill innocent civilians.” There is no evidence he has committed any criminal act. Would detaining such an individual help prevent terrorism?

For the same reasons tactical detention may be in tension with strategic success, it is not clear that detaining such a person would ultimately prevent more terrorist acts than detention would promote. Imagine that the

ordered to reduce to submission to call him to account in his own civil courts and divert his efforts and attention from the military offensive abroad to the legal defensive at home. Nor is it unlikely that the result of such enemy litigiousness would be a conflict between judicial and military opinion highly comforting to enemies of the United States.”).  

38 18 U.S.C. § 3142 (1993) (affording magistrate judges substantial discretion in determining whether a suspect should be held in custody pending trial). As it stands, the Act establishes a rebuttable presumption that nothing but detention will reasonably ensure the safety of the community where the defendant is facing federal terrorism charges. 18 U.S.C. § 3142(e) (1993). Federal courts have been remarkably generous in terrorism cases in upholding pre-trial detention under the statute against constitutional due process challenges. See generally United States v. El-Hage, 213 F.3d 74 (2d Cir. 2000) (approving against due process test a thirty to thirty-three month pre-trial detention period of a suspect in the bombings of U.S. embassies in Africa on the grounds, among others, of the gravity of the charges and the risk of flight).
man who looks forward to the day when he “has the chance to kill innocent civilians” has not yet (to the knowledge of the relevant law enforcement authority) involved himself in an ongoing plot. Releasing him might allow intelligence to track him and gain otherwise unavailable information about any plot, if it exists. Detaining him, on the other hand, might prevent him from participating in any particular plot. But if security analyses of the nature of al Qaeda and associated jihadist threats are to be believed, the whole problem is that men like this grow on the proverbial trees.39 He is replaceable. Worse, if the U.S. detains too many such men, or detains the wrong men, or detains men under a system believed to be illegitimate, we trade his particular incapacitation for the need to incapacitate many more.40 What this vision describes is an approach to detention that fails ultimately to prevent an attack, but that succeeds in enhancing terrorist recruiting efforts overall. Whatever law might make doable, it cannot explain why this approach is desirable.

IV. CONCLUSION

Beyond its particular policy arguments, this essay also aims to provoke a different kind of debate among legal scholars—a debate that wades more critically into the substantive claims underlying security arguments for legal change. Lawyers are constantly called on to become instant experts in the partially discretionary business of government policy—from drug regulation to agricultural protection. There is no categorical difference in the analytical skills required to evaluate policies affecting national security policies and policies in other complex areas of government work. And there is a substantial degree of commonality: government policy-makers have broad discretion, but it is discretion that may be exercised only within the limits set by law.

Particularly given the prominent role lawyers have played in security policy in recent years—both for good and for ill—it seems lawyers bear some particularly acute responsibility for engaging the merits of the security

39 See, e.g., DANIEL BENJAMIN & STEVEN SIMON, THE NEXT ATTACK: THE FAILURE OF THE WAR ON TERROR AND A STRATEGY FOR GETTING IT RIGHT 6–7 (2005) (arguing that 2005 Madrid train bombings, which killed 191 and wounded more than 1,800, by Islamic extremists demonstrated that “terrorism is not the exclusive province of the membership of al Qaeda and its affiliated groups, that it requires no special al Qaeda training, equipment, indoctrination, or experience”); see also id. at 7 (“All that is necessary are the most portable, least detectable tools of the terrorist trade: ideas. And Madrid shows all too plainly that people who hold these ideas and want to act on them live in the heart of the West. Their number is growing, and so too is the danger they pose.”).

40 See Daniel Benjamin & Gabriel Weimann, What the Terrorists Have in Mind, N.Y. TIMES, Oct. 27, 2004, at A21 (describing how jihadist websites have used images from Abu Ghraib to promote recruitment efforts).
case before again diving, security waters untested, into the legal swamp that will surely continue to attend the deployment of any such system, particularly by the United States. More directly, it seems that those who advocate for further expansion of government power (such as would accompany a new security detention regime) should bear the burden of persuasively making the security case.