EXCHANGE

Indefinite Detention of Mega-terrorists: A Road We Must Not Travel

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Introduction

In his thought-provoking, carefully crafted, and impressively researched article, Don Scheid makes a compelling argument for an indefinite detention paradigm for “mega-terrorists.” Scheid’s proposal will undoubtedly fall on welcoming and critical ears alike. Whether one supports or opposes the proposal, however, it is one worthy of serious debate and consideration. The Obama administration’s continued inability to articulate, develop, and implement a coherent and consistent counterterrorism policy accentuates the proposal’s relevance.

Generous terms to describe the Obama administration’s inability to develop policy regarding detention, interrogation, and proper judicial forums for suspected terrorists are missteps, convoluted explanations, and, ultimately, failure. Into that disturbing breach Scheid has stepped.

Scheid’s thesis can be summarized as follows: indefinite detention is essential to prevent mega-terrorism that threatens society. A number of assumptions underlie his theory: terrorism is fundamentally different from the criminal law, terrorists are distinguishable from criminals, and mega-terrorists are distinct from “mere” (my term) terrorists. In accord with those assumptions, Scheid proposes indefinite detention as a legitimate counterterrorism measure.

Offering modifications or alternatives, such as indefinite detention, to replace existing legal structures—in whole or in part—raises a fundamental question: have sufficient controls been created? Although creating alternatives, even if justifiable, is risky, any expansion of executive power—the net result of Scheid’s proposal—must be tempered by both independent judicial review and robust congressional oversight. Restraining the executive branch is essential, especially when alternatives are created.

When Scheid asked if I would consider commenting on his paper (before I had a chance to read it) I...
instinctively agreed. My reasons were simple. I first met Scheid when he graciously attended a public lecture I gave at the William Mitchell Law School (hosted by my good friend and colleague, John Radson). His questions were particularly engaging and our subsequent communications—including Scheid’s insightful and critical blog postings in response to my writings—have invariably been interesting and thought-provoking.

When Scheid explained the article’s thesis I was intrigued, largely because of my own efforts to grapple with how to create alternative legal infrastructures relevant to the post 9/11 world. As a consistent advocate for the creation of a National Security Court, I have probed the limits of many of the issues Scheid addresses. Friends and colleagues have criticized various aspects of my proposal; similarly, members of the U.S. Senate Judiciary Committee were skeptical of my proposal when I testified before the committee.

Precisely for the above reasons, I feel well suited to respond to Scheid’s proposal. Perhaps I have an insider’s perspective of proposing an alternative and then responding to the inevitable criticism. Experience has taught me that any alternative that involves an expansion of executive powers is only as good as the limits it also imposes.

Scheid’s proposal does not conjure up images of President Bush’s “by all means necessary” approach to counterterrorism because it wisely includes independent judicial review in accordance with constitutional principles of checks and balances and separation of powers. The key question, however, is: “how much judicial review”? Not enough to ensure effective external restraints on the executive. Although Scheid clearly incorporates some control measures, the overall sense is of insufficient restraint.

To push the issue: we must ask whether there are controls, whether they are sufficiently defined, and whether they can be implemented. Simply put, suggesting an alternative alone is not sufficient, particularly when its intended purpose is to create an infrastructure specifically designed to limit rights rather than protect them.

Therefore, although I support Scheid’s proposal in principle, I have concerns regarding its details and particulars—after all, the devil is in the details. In the following pages, I briefly address the primary areas of concern: defining threats and mega-terrorists, the use of intelligence in a detention regime, and judicial review.

Threats

Creating an alternative in response to a temporary—albeit serious—threat poses a danger. Analyzing the degree of the threat is essential; after all, not all threats justify alternatives. In order to determine whether the relevant threat merits an alternative, it is critical that we ascertain whether it is a viable or perceived threat. The two are very distinct, and yet, unfortunately, insufficient attention is paid to nuance.
Although Scheid’s article does not delve into the intelligence gathering and analysis aspect of operational counterterrorism, determining whether a threat is perceived or viable is dependent on the intelligence community and its sources. A perceived threat suggests a potential danger, though its chances of its coming to fruition are unclear. A viable threat is either present or future but it has been deemed to be “likely to occur.” Suffice to say, this distinction is enormously significant and has critical ramifications.

Herein lies the risk: does terrorism pose a sufficient threat to society to justify an alternative legal model? To hone the point in accordance with Scheid’s proposal: does mega-terrorism justify indefinite detention?

Scheid discusses mega-terrorism at some length, seeking to distinguish it from both “regular” terrorism and criminal law. His efforts are admirable, but, given that terrorism targets innocent individuals, possible objections to a distinction between terrorism and mega-terrorism will be legitimate and justified. I agree with the distinction between terrorism and criminal law, but remain less convinced of the relevance and practicality of differentiating between terrorism and mega-terrorism. Defining terrorism itself presents a significant challenge. As Scheid correctly points out, there are 109 commonly accepted definitions of the term. The existing disagreement among different agencies in the U.S. federal government that cannot find a common definition surely demonstrates the complexity of the definitional challenge.

Creating too fine a distinction leads to one of the great dangers in the terrorism discussion: the slippery slope of an imbalance between rights and liberties. If we follow Scheid’s argument to its logical conclusion, we reach the following result: because terrorists (who endanger national security) are distinct from criminals, minimizing their rights is legitimate; therefore, because mega-terrorists are really dangerous, their rights must really be minimized.

Scheid seeks to resolve the problem of how to define the three distinct categories he proposes. The proposed distinction between terrorism and mega-terrorism is nonetheless unconvincing for three reasons. First, it creates the all-but-inevitable slippery slope. Second, the distinction is artificial. The failure to engage precisely in a difficult discussion about criteria and standards compounds the fallout from this artificiality. In the absence of any such discussion, indefinite detention is a ticking time bomb from the perspective of society and the individual alike. Third, the distinction automatically implies some level of guilt on the part of the mega-terrorist, a problematic approach when—given that we are specifically discussing detention in advance of or even in lieu of individual trials—the detainees remain innocent until proven guilty.

Indefinite detention of suspected mega-terrorists is thus a potentially
dangerous tool in the executive branch’s toolbox. Scheid’s judicial review component softens the blow. However, the proposal does not sufficiently articulate standards of judicial review or criteria by which requests for indefinite detention are to be assessed by a reviewing judiciary. To that end, the proposal’s primary weakness is its failure to articulate standards and criteria. Devoid of clearly articulated standards and protections, a proposal to recommend alternatives to preexisting legal structures is enormously, perhaps fatally, weakened.

### Detention and Intelligence Information

In a two-step process, initial detention and subsequent indefinite detention are lawful only if based on sufficient evidence or intelligence information subject to robust and rigorous judicial review. With respect to intelligence information, it is essential to create rigorous tests to ensure reliability. When terrorism-related detentions rely overwhelmingly on intelligence information, the failure to articulate and implement standards is a “recipe for disaster.”

In my own writings, I have advocated minimizing the unknown in intelligence information by articulating concrete tests to determine when the information can be legitimately used. Standardization of intelligence information—an attempt to create an empirical approach to intelligence analysis—would significantly lessen misuse of intelligence information both with respect to the initial detention and subsequent remand requests. However, the danger of misuse is accentuated in the indefinite detention paradigm precisely because, as in the model proposed by Scheid, the standards for continued detention remain vague.

The intelligence community is generally divided into two distinct categories: gathering and analysis. The former gathers the information from sources whereas the latter analyzes and “translates” the information for different audiences, including “operators” and decision makers.

In the traditional criminal law paradigm, intelligence information can be the basis for an initial or continuing investigation, including wiretapping, stakeouts, search warrants, and arrest warrants. Intelligence information, as “translated” by law enforcement, can be the basis both for arrest—whether as the result of a search or arrest warrant issued by a “detached and neutral magistrate” or in exigent circumstances—and subsequent requests for remand extension. In both instances, neither the suspect nor counsel is privy to the confidential information reviewed in camera by the court with respect both to the initial warrant and subsequent remand requests.

Intelligence information is the basis for a wide range of counterterrorism measures and sanctions including detention for interrogation, administrative detention, house demolition, assigned residence, drone attacks, and targeted killing (whether by drone or other operational measures). Without intelligence information—employed based on the four-part test set forth below—counterterrorism efforts are nothing
more than a “crap shoot,” with all the risks the term implies. Lawful operational counterterrorism is premised on legitimate self-defense and respect for core international law principles including military necessity, distinction, and proportionality, as well as minimization of collateral damage and recognition of alternatives. Respect for these principles and values requires that intelligence be at the core of operational counterterrorism.

However, in order to use the information effectively and in accordance with domestic and international legal obligations, decision makers must develop effective filters before acting on the information, or run the risk of violating civil and political rights. Doing so starts with a four-part test: is the information reliable, valid, viable, and corroborated? This framework is the starting point for imposing standards, criteria, and guidelines on the use of intelligence information, which is the first step in creating a detention regime based on the rights of the suspected terrorists and the restraint of the executive.

This, then, is my fundamental concern with respect to Scheid’s proposal: the failure to articulate rigorous standards for determining whether available intelligence information justifies indefinite detention. That concern is magnified by the difficulty—albeit understandable but nevertheless demanding attention—in clearly articulating what threats justify imposition of the indefinite detention paradigm.

### Judicial Review

My concern would be alleviated if robust judicial review of the executive in time of conflict was an inherent feature of American history and culture. Unfortunately, perhaps tragically, the opposite is in fact the case: *Korematsu*, the *Prize Cases*, and *Quirin* are but a few examples of the Supreme Court’s failure to directly engage the executive. Rather than vigorously engaging the executive, the Supreme Court historically has deferred to the executive, raising significant questions about review standards for indefinite detention requests.

Indeed, in advocating a hands-off approach to judicial review of the legality of executive actions related to armed conflict, the late Chief Justice William Rehnquist believed that any examination should wait until the crisis has passed. In that vein, although Chief Justice Rehnquist did not propound *inter arma silent leges* (in time of war laws are silent), he stated that the laws “will speak with a somewhat different voice” during a time of war.

Distinct, for example, from the direction taken by the Israeli Supreme Court under President Aharon Barak’s leadership, the U.S. Supreme Court has never interpreted laws equally during times of war and peace. Chief Justice Rehnquist pointed out that the Supreme Court traditionally gave the executive branch more leeway during war or crisis, particularly World War II. Although recognizing that “the government’s authority to engage in conduct that infringes civil liberty is greatest in time of declared war,” Chief Justice Rehnquist argued that
the judiciary should not review all executive actions, especially during a crisis.

Even if a court examines the actions of the executive, the timing of the examination is critical. Courts have a general reluctance “to decide a case against the government on an issue of national security during a war.”

Although Israeli President Barak strongly believed an essential duty of the judiciary is to interpret the law identically during war and peace, Chief Justice Rehnquist argued for recognition of “the human factor that inevitably enters into even the most careful judicial decision.” He implied, therefore, that postponing decisions until the crisis has passed may be the best option.

As an example, Chief Justice Rehnquist referred to Duncan v. Kahana-moku, in which the Supreme Court voted to uphold civil liberties after World War II ended. By waiting until the completion of World War II to rule on Duncan, the Supreme Court was able to uphold civil liberties on record. Similarly, the Supreme Court ruling that Japanese internment was illegal came well after martial law had already ended and American citizens were no longer living in internment camps.

Chief Justice Rehnquist questioned whether it may “actually be desirable to avoid decision on” civil liberties during a war or time of national crisis.

That tradition, then, poses significant concern regarding what standards courts will adopt and apply when reviewing indefinite detention requests. If federal courts—either U.S. District Court or Foreign Intelligence Surveillance Act (FISA) courts at first instance and U.S. Courts of Appeal or the Supreme Court on appeal—were to implement the Rehnquist model, then the decision to detain an individual indefinitely will go largely unchallenged and unchecked. This concern is exacerbated greatly by the fact that the current struggle against terrorism has no identifiable end, meaning that a court would essentially never review the detention.

By analogy and as a concrete example: Judge John D. Bates held in Maqaleh v. Gates (2009) that some prisoners captured outside the zone of combat and detained by the U.S. in Afghanistan have a right to challenge their imprisonment. However, the DC Circuit Court overturned Judge Bates’s decision, holding in part that detainees held in an “active theater of war in a territory under neither the de facto nor de jure sovereignty of the United States and within the territory of another de jure sovereign” are not entitled to habeas corpus. The reality is that thousands of detainees are presently held—directly or indirectly—by the U.S. in a detention paradigm that can, at best, be described as indefinite.

Indefinite detention may sound attractive because it removes—indefinitely—individuals suspected of involvement in terrorism from the zone of combat. The qualifier “may” is essential to the discussion because indefinite detention’s inherent unconstitutionality has a pervasive, negative effect on U.S. counterterrorism efforts. The reality is that intelligence-based (as compared to “in the act”) detentions went largely unchallenged, either by Congress or the Supreme Court, until the Supreme Court’s rulings, initially in Hamdan (2006) and subsequently in Boumediene (2008). In both cases, the Court addressed the question of habeas corpus in extending the right to
detainees. While Judge Bates’s decision was of the utmost importance—more important than any Supreme Court holding of the past 8 years addressing counterterrorism, save Boumediene—it has not resulted in either a significant rearticulation of U.S. policy or in the granting of habeas corpus to thousands of detainees.

Conclusion

Scheid’s proposal is certainly worthy of discussion and attention because he directly and unflinchingly addresses an issue of critical importance. The concerns I have raised regarding the lack of rigorously articulated intelligence, detention, and judicial review standards are intended to highlight points of discussion in moving forward. The reality of terrorism and the question of how to respond to its continuing threat creatively, legally, and effectively require thinking “outside the box.” For that, Scheid is to be congratulated; the next step is to ensure that alternatives do not facilitate executive excess. Standards and review are essential to that effort.

Notes


9 HCJ 769/02 The Public Committee Against Torture in Israel et al. v. Israel et al., [2005], available at: http://elyon1.court.gov.il/files_eng/02/690/007/A34/0207690.a34.htm; Amos N. Guiora, “License to Kill,”
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10 Guiora, “License to Kill.”


12 Prize Cases, 67 U.S. 635 (1863).

13 Ex Parte Quirin, 317 U.S. 1 (1942).


15 Ibid., 221.

16 Ibid., 218.

17 Ibid., 221.

18 Ibid., 222.

19 Ibid., 221 (citing Duncan v. Kahanamoku, 327 U.S. 304 [1946]).

20 Ibid. (citing Ex Parte Misuye Endo, 323 U.S. 283 [1944]).

21 Ibid., 222.


