TARGETED KILLING, PROCEDURE, AND FALSE LEGITIMATION

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INTRODUCTION

With the nomination of John Brennan for CIA director in the spring of 2013 came one of the most contentious confirmation processes of the post-September 11 period. It prompted a rare talking filibuster by Republic Senator Rand Paul, which, though unsuccessful, generated unprecedented congressional attention to the U.S. targeted killing program.[1]

For all the questions on targeted killing that Brennan's confirmation hearing raised, one answer stood out as particularly surprising. Senator Angus King asked for Brennan's reaction to the idea of a court that would approve targeted killings of American citizens.[2] It was an idea "certainly worthy of discussion," Brennan responded.[3] Indeed, he continued, the Obama administration had already "wrestled" with the possibility.[4]

Even if Brennan ultimately expressed skepticism over the feasibility of such a court,[5] the suggestion that the government had considered the idea was remarkable. Years, even months, earlier many would have found laughable the idea of creating an Article III court to approve names for a U.S. government kill list. Yet, as Robert Chesney has observed, "[w]e've gone from people scoffing at this to it becoming a fit subject for polite conversation."[6] Indeed, such a court, at least for U.S. citizens, "is no longer beyond the realm of political possibility."[7]

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1 Peter Finn & Aaron Blake, *CIA Chief Confirmed After Debate over Drones*, WASH. POST, Mar. 8, 2013, at A1.

2 *Open Hearing on the Nomination of John O. Brennan to Be Director of the Central Intelligence Agency Before the S. Select Comm. on Intel.*, 113th Cong. 122–23 (2013) [hereinafter *Brennan Hearing*] (statement of Sen. Angus King).

3 *Id.* at 123 (statement of John O. Brennan); *see also* Scott Shane, *A Court to Vet Kill Lists*, N.Y. TIMES, Feb. 9, 2013, at A1.

4 *Brennan Hearing*, *supra* note 2, at 124 (statement of John O. Brennan).

5 *Id.* ("[O]ur judicial tradition is that a court of law is used to determine one's guilt or innocence for past actions, which is very different from the decisions that are made on the battlefield, as well as actions that are taken against terrorists, because none of those actions are to determine past guilt for those actions that they took. The decisions that are made are to take action so that we prevent a future action, so that we protect American lives. That is an inherently Executive Branch function to determine, and the Commander-in-Chief and the Chief Executive has the responsibility to protect the welfare, well-being of American citizens.").

6 Shane, *supra* note 3 (quoting Professor Robert M. Chesney, University of Texas School of Law).

7 *Id.*

Previously, the legal literature paid relatively little attention to the procedural aspects of targeted killing.[8] From the Bush administration's first known drone strike in 2002[9] through the Obama administration's rapid expansion of the practice,[10] the thrust of the targeted killing literature has concerned questions of legality.[11] Is targeted killing legal? And if so, under what conditions?[12] These substantive questions have proven divisive.

Only recently have scholars paid much attention to the procedural question of how the U.S. government should determine whether particular targeting operations are permissible.[13] The early scholarship

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8 This Article adopts the definition of targeted killing developed by Philip Alston: "[T]he intentional, premeditated, and deliberate use of lethal force, by States or their agents acting under color of law, or by an organized armed group in armed conflict, against a specific individual who is not in the physical custody of the perpetrator." Philip Alston, *The CIA and Targeted Killings Beyond Borders*, 2 HARVARD NAT'L SECURITY J. 283, 298 (2011). Alston argues that a workable definition of targeted killing encompasses three elements:

> The first is that it be able to embrace the different bodies of international law that apply and is not derived solely from either [international human rights law] or [international humanitarian law]. The second is that it should not prejudge the question of the legality or illegality of the practice in question. And the third is that it must be sufficiently flexible to be able to encompass a broad range of situations in relation to which it has regularly been applied.

Id. at 297–98.

9 Gabriella Blum & Philip Heymann, *Law and Policy of Targeted Killings*, 1 HARVARD NAT'L SECURITY J. 145, 150 (2010).

10 *See, e.g.*, Adam Entous, *Special Report: How the White House Learned to Love the Drone*, REUTERS (May 18, 2010, 5:03 PM), http://www.reuters.com/article/2010/05/18/us-pakistan-drones-idUSTRE64H5SL20100518.

11 *See, e.g.*, PHILIP ALSTON, HUMAN RIGHTS COUNCIL, REPORT OF THE SPECIAL RAPPORTEUR ON EXTRAJUDICIAL, SUMMARY OR ARBITRARY EXECUTIONS: STUDY ON TARGETED KILLINGS (2010); Robert P. Barnidge, Jr., *A Qualified Defense of American Drone Attacks in Northwest Pakistan Under International Humanitarian Law*, 30 B.U. INT'L L.J. 409 (2012); Blum & Heymann, *supra* note 9; Robert Chesney, *Who May Be Killed: Anwar al-Awlaki as a Case Study in the International Legal Regulation of Lethal Force*, 13 Y.B. INT'L HUMANITARIAN L. 3 (2010); David Kretzmer, *Targeted Killing of Suspected Terrorists: Extra-Judicial Executions or Legitimate Means of Defence?*, 16 EUR. J. INT'L L. 171 (2005); Jordan J. Paust, *Self-Defense Targetings of Non-State Actors and Permissibility of U.S. Use of Drones in Pakistan*, 19 FLA. ST. J. TRANSNAT'L L. & POL'Y 237 (2010).

12 Even the most ardent critics of targeted killings appear to recognize the propriety of targeted killings under certain conditions, often those most resembling traditional warfare. *See, e.g.*, ALSTON, *supra* note 11, ¶ 10 ("Although in most circumstances targeted killings violate the right to life, in the exceptional circumstance of armed conflict, they may be legal."); Kretzmer, *supra* note 11, at 173 n.13 (discussing Human Rights Watch Director Kenneth Roth's statement of support for drone strike on a suspected terrorist in Yemen).

13 This Article understands procedure to encompass a broad set of mechanisms that impose requirements on state actors in order to promote or facilitate compliance with substantive law. Procedure includes, but is not limited to, accountability mechanisms, through which an actor has a particular obligation to another and failure to comply can lead to sanction. *See generally* Kathleen Clark, *The Architecture of Accountability: A Case Study of the Warrantless Surveillance Program*, 2010 BYU L. REV. 357 (developing a typology of accountability mechanisms that could constrain executive actions in national security realm). Other procedural protections might include decisional rules and transparency.

raised the issue of procedural protections at most as an afterthought, a possible way to navigate thorny legal issues identified by the authors.[14] Recent works have taken a more robust look at procedure. A number of scholars have attempted to provide a broad framework for procedural discussions moving forward.[15] Many more scholars have begun to advocate particular procedural mechanisms, ranging from intraexecutive decisional rules to judicial oversight, to govern the U.S government's use of drones and other targeting methods.[16] As a result,

14 *See* Vincent-Joël Proulx, *If the Hat Fits, Wear It, If the Turban Fits, Run for Your Life: Reflections on the Indefinite Detention and Targeted Killing of Suspected Terrorists*, 56 HASTINGS L.J. 801, 893–94 (2005) (suggesting either greater involvement of lawyers to advise military personal on a real-time basis or a presumption of illegality for targeted killings that can be overcome by the killing party ex post); Jonathan Ulrich, Note, *The Gloves Were Never On: Defining the President's Authority to Order Targeted Killing in the War Against Terrorism*, 45 VA. J. INT'L L. 1029, 1062 (2005) (suggesting decisional rules by which the president reports to certain members of Congress regarding questions of imminence and alternatives to the use of force).

15 Alston, *supra* note 8, at 287 ("Rather than revisiting most of those [substantive] issues, the focus of this Article is on the hitherto largely neglected dimensions of transparency and accountability."); Gregory S. McNeal, *Targeted Killing and Accountability*, 102 GEO. L.J. 681, 685–86 (2014) ("This Article fills a gap in the literature, which to date lacks sustained scholarly analysis of the accountability mechanisms associated with the targeted killing process. The Article makes two major contributions: (1) it provides the first comprehensive scholarly account of the targeted killing process, from the creation of kill lists through the execution of targeted strikes; and (2) it provides a robust analytical framework for assessing the accountability mechanisms associated with those processes.").

16 Susan Breau & Marie Aronsson, *Drone Attacks, International Law, and the Recording of Civilian Casualties of Armed Conflict*, 35 SUFFOLK TRANSNAT'L L. REV. 255 (2012) (arguing that customary laws of war require governments to report all casualties of drone strikes); Carla Crandall, *Ready . . . Fire . . . Aim! A Case for Applying American Due Process Principles Before Engaging in Drone Strikes*, 24 FLA. J. INT'L L. 55, 86–88 (2012) (arguing, based on due process, in favor of a "pre-strike review tribunal" comparable to Combatant Statute Review Tribunals (CSRTs)); Toren G. Evers-Mushovic & Michael Hughes, *Rules for When There Are No Rules: Examining the Legality of Putting American Terrorists in the Crosshairs Abroad*, 18 NEW ENG. J. INT'L & COMP. L. 157, 159–60, 179–82 (2012) (proposing two procedural rules—presidential sign-off on all targeted killings of Americans and independent ex-post investigation that reports to Congress—to ensure that targeting does not operate unchecked); Alberto R. Gonzales, *Drones: The Power to Kill*, 82 GEO. WASH. L. REV. 1, 52–53 (2013) (suggesting CSRTs provide a model of a neutral proceeding that could satisfy the due process required when placing American citizens on a kill list); McNeal, *supra* note 15, at 758–93 (making numerous suggestions for bureaucratic, political, and professional accountability mechanisms); Richard Murphy & Afsheen John Radsan, *Due Process and Targeted Killing of Terrorists*, 31 CARDOZO L. REV. 405, 440, 446 (2009) [hereinafter Murphy & Radsan, *Due Process*] (suggesting *Bivens*-style judicial review of targeting operations as well as ex post investigation); Afsheen John Radsan & Richard Murphy, *Measure Twice, Shoot Once: Higher Case for CIA-Targeted Killing*, 2011 U. ILL. L. REV. 1202, 1233 [hereinafter Radsan & Murphy, *Measure*] (proposing an ex post investigatory model similar to what is seen in Israel); Stephen Vladeck, *Targeted Killing and Judicial Review*, 82 GEO. WASH. L. REV. ARGUENDO 11, 26 (2014) (arguing that the "least-worst [procedural] solution" would be an ex post judicial remedy created by Congress that resembled the cause of action available under the Foreign Intelligence Surveillance Act); Amos N. Guiora, *Targeted Killing: When Proportionality Gets All Out of Proportion* 6 (Univ. of Utah Coll. of Law Research Paper No. 1, 2013), *available at* http://ssrn.com/abstract=2230686 (arguing for a court similar to the Foreign Intelligence Surveillance Court (FISC) to review proposed targets ex ante); *see also* Jane Y. Chong, Note, *Targeting the Twenty-First-Century Outlaw*, 122 YALE L.J.

the legal literature on targeted killing has begun to resemble other areas of national security scholarship, in which procedure features heavily.[17]

Such a turn may be unsurprising, as support for increased targeting procedures can be celebrated across divergent perspectives, from targeted killing's enthusiasts to its harshest critics. Those who are concerned that the United States falls short of its legal obligations with respect to targeted killing can celebrate procedure as a way to achieve more just substantive results.[18] Indeed, lawyers representing Guantanamo detainees explicitly adopted process-oriented approaches, avoiding litigation strategies premised on individual substantive rights.[19] Given that judicial review of U.S. targeting policies has remained out of reach,[20] other procedural mechanisms may offer better opportunities to achieve compliance with applicable laws.[21]

Those who are uncertain as to the propriety of U.S. targeted killings also can find solace in procedure. Reflecting on procedure in the national security realm, Jenny Martinez has observed an "enduring (and not entirely unwarranted) appeal in the promise that if we can just figure out a good process for making decisions, the hard policy questions of the time will be resolved correctly."[22] If it is true that "many norms of international law [related to targeted killing] are vague and

724 (2012) (proposing outlawry proceedings as a way to provide due process to prospective U.S. citizen drone targets); Benjamin McKelvey, Note, *Due Process Rights and the Targeted Killing of Suspected Terrorists: The Unconstitutional Scope of Executive Killing Power*, 44 VAND. J. TRANSNAT'L L. 1353 (2011) (proposing a FISC-style court or other federal court with special procedures for classified information to oversee targeted killings).

17 Jenny S. Martinez, *Process and Substance in the "War on Terror,"* 108 COLUM. L. REV. 1013, 1064 (2008).

18 *Cf. id.* at 1080 (tracing a dominant conceptualization of procedure as a way to achieve efficient application of substantive law).

19 *See* Neal Katyal, *Equality in the War on Terror*, 59 STAN. L. REV. 1365, 1366–68 (2007).

20 *See, e.g.*, Al-Aulaqi v. Obama, 727 F. Supp. 2d 1 (D.D.C. 2010) (dismissing suit brought on behalf of Anwar Al-Aulaqi over inclusion on government kill list).

21 In the military detention context, Amos Guiora has criticized the tendency of human rights advocates to focus single-mindedly on judicial review as the only procedural protection available. Amos N. Guiora, *The Quest for Individual Adjudication and Accountability: Are International Tribunals the Right Response to Terrorism?*, 24 EMORY INT'L L. REV. 497, 498 (2010) ("The intellectually conservative argument put forth by human rights advocates who support Article III trials even in the face of the apparent inability to actually conduct them for all the detainees is, of course, delicious in its irony. By rigidly adhering to an argument predicated on inflexibility, they are proactively contributing to what purportedly most concerns them: violations of human rights." (footnote omitted)). While this Article does not adopt Guiora's criticism, it does understand procedure to encompass more than judicial review. In some settings, judicial review may be an insufficient, ineffective, or even undesirable procedure. *See, e.g.*, Beth George, Note, *An Administrative Law Approach to Reforming the State Secrets Privilege*, 84 N.Y.U. L. REV. 1691, 1716 (2009) (suggesting that judicial review without administrative reform is insufficient to curb executive abuse of the state secrets privilege).

22 Martinez, *supra* note 17, at 1064.

even border on the vacuous,"[23] increased procedure may help resolve questions about which many individuals are uncertain.

Even those who believe that the United States largely complies with its legal obligations can welcome additional procedure as a way to counter claims of illegitimacy[24] and to confirm one's own beliefs regarding the legality of the U.S. targeted killing program.[25] If procedure seeks to ensure the legality of targeted killing operations, those who already claim legal compliance have no reason to reject procedure forthwith.[26]

Perhaps given the ubiquity of procedure's appeal, the conventional wisdom seems to hold that greater procedure begets greater compliance with the substantive law of targeted killing. While critics might question the efficacy of a particular procedure, the relationship between procedural and substantive justice is invariably cast as positive.

This Article argues that the conventional wisdom is incomplete—and perhaps dangerously misleading.[27] Procedure stands to confer legitimacy on the policies and practices of the government without reference to their actual substantive legality. To the extent that procedure works (i.e., ensures compliance with legal obligations), the fact that it confers legitimacy is unremarkable.[28] However, it is possible that procedure can legitimate a practice irrespective of any attendant improvement in the substantive legality of the practice. *False* legitimation occurs where procedure inspires positive but faulty beliefs about substantive outcomes.

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23 Afsheen John Radsan & Richard Murphy, *The Evolution of Law and Policy for CIA Targeted Killing*, 5 J. NAT'L SECURITY L. & POL'Y 439, 447 (2012) [hereinafter Radsan & Murphy, *Evolution*].

24 *See, e.g.*, Kevin E. Lunday & Harvey Rishikof, *Due Process as a Strategic Choice: Legitimacy and the Establishment of an Article III National Security Court*, 39 CAL. W. INT'L L.J. 87 (2008) (arguing that the legitimacy gained through the provision of greater process to alleged terrorists serves long-term U.S. interests); Cassandra Burke Robertson, *Due Process in the American Identity*, 64 ALA. L. REV. 255, 284 (2012) (highlighting policy benefits of "offering heightened level of due process" for targeted killing including increasing "the perceived legitimacy of U.S. government action"); *see also* Eric A. Posner & Adrian Vermeule, *The Credible Executive*, 74 U. CHI. L. REV. 865, 894 (2007) (discussing instances in which the executive has an interest in binding itself).

25 *See* Jack Goldsmith, *Fire When Ready*, FOREIGN POL'Y (Mar. 19, 2012), http://www.foreignpolicy.com/articles/2012/03/19/fire_when_ready ("The government needs a way to credibly convey to the public that its decisions about who is being targeted—especially when the target is a U.S. citizen—are sound.").

26 Of course, other factors such as cost and balance of powers could provide grounds for opposing a particular procedure. Nonetheless, these factors do not warrant opposition to proceduralization generally.

27 The legal literature has long examined the relationship between procedure and substance, and many scholars have warned that overemphasis on procedure can have negative effects on substantive outcomes. For a review of this literature, see Martinez, *supra* note 17, at 1025–27.

28 Moral opposition to legally permissible targeted killings, however, presents separate issues of legitimation.

The danger with the conventional wisdom on targeted killing procedures becomes apparent when one considers the potential cost of false legitimation in the long-term. Procedures that legitimate without improving substantive outcomes might nonetheless reduce support for or otherwise hinder efforts to address continuing targeted killing issues. For example, a procedure that purports to reduce the number of civilian deaths that result from targeting operations might inspire beliefs that the issue of excessive collateral damage is being addressed; even if the procedure is ultimately ineffective, the existence of the procedure might nonetheless cause reduced public support for, or limit public attention paid to, additional measures aimed at preventing civilian casualties. In short, false legitimation can hinder solutions to the very problems that drive the turn to procedure in the first place.

If the ultimate goal of procedure is to ensure the legality of targeted killings, false legitimation is a problem with which to be concerned. This Article asks how to avoid false legitimation in the targeted killing context.

The discussion here is not only relevant to targeted killing, but to national security in general. Particular characteristics of national security make the risk of false legitimation much greater than in other legal contexts. First, the lack of nondeferential judicial review throughout the national security realm puts tremendous pressure on procedure to serve as the bulwark against unjust and unlawful national security policies.[29] Second, secrecy makes it all the easier to rest one's assessment of national security programs on the procedural protections in existence, rather than on the programs' operation in practice. Thus, the lessons that this Article offers may inform efforts to avoid false legitimation elsewhere.

Before continuing, a few words on the scope of this Article: First, this Article assumes that the ultimate goal of procedure is to ensure compliance with applicable legal obligations.[30] It leaves for another day debates over whether the executive is justified in departing from the rule of law in certain emergency situations.[31]

Second, this Article focuses solely on compliance with substantive international law.[32] The U.S. government asserts that its targeting

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29 For a review of courts' wartime jurisprudence, see Lee Epstein et al., *The Supreme Court During Crisis: How War Affects Only Non-War Cases*, 80 N.Y.U. L. REV. 1 (2005).

30 Some individuals may recognize moral obligations that are distinct from, or go beyond, a state's legal obligations. This Article does not evaluate procedures from such a perspective, though the concept of false legitimation could be adjusted to account for moral, rather than legal, concerns.

31 *See generally* Alston, *supra* note 8, at 420–31 (reviewing, and ultimately disagreeing with, arguments that consider targeted killing a "legal grey hole" in which the executive is free from some or all legal constraints).

32 There may be *procedural* requirements under international law as well. *See, e.g.*, Breau &

operations comply with the country's international legal obligations,[33] and these obligations may be a component of domestic law.[34] While there certainly are domestic legal constraints on targeted killing,[35] international law is arguably more restrictive than domestic law vis-à-vis the majority of targets (i.e. non-U.S. citizens). In addition, the relevance of this Article to other countries with targeted killing programs would be reduced if it had as its objective ensuring compliance with U.S. domestic law.

Third, while recognizing debates over various international legal obligations, this Article makes no attempt to determine the exact nature of the legal norms that govern targeted killings. Rather, it presents the substantive legal debates and addresses how these relate to the question of false legitimation. Admittedly, the entire exercise presumes some room for improvement in the United States' targeting practices. Nonetheless, this Article does not take, nor does acceptance of its arguments demand, a more explicit position on the legality of U.S. targeted killing practices.

This Article proceeds as follows. Part I will elaborate on the concept of false legitimation. It considers the psychology of legitimation to explain exactly why the risk of false legitimation exists. It then attempts to understand the various mechanisms by which false legitimation can occur, using the U.S. military detention experience as a way to illustrate the phenomenon in operation. Given that false legitimation is driven by three distinct ways in which procedure fails to address substantive issues, Part II identifies the particular substantive

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Aronsson, *supra* note 16, at 298 (arguing that "there is a legal requirement to record the casualties that result from drone use, regardless of whether these result from an international conflict, a non-international conflict, or a non-conflict law enforcement situation"). *But see* Radsan & Murphy, *Evolution*, *supra* note 23, at 459–60 (critiquing arguments identifying procedural requirements imposed by international law).

33 Harold Hongju Koh, Legal Adviser, U.S. Dep't of State, Speech to American Society of International Law (Mar. 25, 2010), *available at* http://www.state.gov/s/l/releases/remarks/139119.htm ("[I]t is the considered view of this Administration . . . that U.S. targeting practices, including lethal operations conducted with the use of unmanned aerial vehicles, comply with all applicable law, including the laws of war."). It is worth noting that despite debates over the binding nature of international human rights norms, the United States is unlikely to claim the right to kill arbitrarily (i.e., kill without justification under self-defense or the laws of war). *See* Evers-Mushovic & Hughes, *supra* note 16, at 183.

34 It is an open question whether international law informs the scope of the Authorization for Use of Military Force (AUMF), which authorizes war against al Qaeda and associated groups. *See* Al-Bihani v. Obama, 619 F.3d 1, 1 (D.C. Cir. 2010) (Sentelle, C.J., and Ginsburg, Henderson, Rogers, Tatel, Garland, & Griffith, JJ., concurring in the denial of rehearing en banc).

35 *See, e.g.*, Murphy & Radsan, *Due Process*, *supra* note 16, at 437 (arguing that due process limits the executive's ability to undertake targeted killings across the world). *But see* William C. Banks & Peter Raven-Hansen, *Targeted Killing and Assassination: The U.S. Legal Framework*, 37 U. RICH. L. REV. 667 (2003) (reviewing possible domestic restraints on targeted killing and concluding that targeted killing of suspected terrorists is largely permissible under U.S. law).

legal issues involved in targeted killing. A general understanding of these issues is a necessary foundation for the procedural discussion to follow. Finally, Part III seeks to answer the principle question of this Article: how to avoid false legitimation in the targeted killing context.

I. CONCEPTUALIZING FALSE LEGITIMATION

A. *What Is Legitimation and When Is It "False"*

As understood here, legitimacy is often desirable. Defined as "the belief that authorities, institutions, and social arrangements are appropriate, proper, and just,"[36] legitimacy confers many benefits to society. Individuals who perceive a legal system as legitimate are more likely to obey the law,[37] and generally speaking, the government's ability to govern increases as the citizenry views it as more legitimate.[38]

Starting in the late 1990s, legal scholars and psychologists began to understand that people's assessment of legitimacy is informed by not only the substance of the law, but also the process by which law affects individuals. Reviewing the burst of literature on the topic, Tom Tyler concludes that "[a] core finding of that literature is that authorities and institutions are viewed as more legitimate and, therefore, their decisions and rules are more willingly accepted when they exercise their authority through procedures that people experience as being fair."[39] Procedure not only affects the assessment of legitimacy by those directly affected by a particular law, but also informs the level of support for legal institutions held by the broader population.[40]

In some instances, the factors that inform one's judgment of procedural fairness (e.g., the neutrality of an arbitrator) may also contribute to substantive fairness.[41] But this is not necessarily the case. It is possible that procedure legitimates, thus suggesting improvements in substantive outcomes, when, in fact, substantive change does not actually follow. When this occurs, legitimation is false.[42]

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36 Tom R. Tyler, *Psychological Perspectives on Legitimacy and Legitimation*, 57 ANN. REV. PSYCHOL. 375, 376 (2006).

37 TOM R. TYLER, WHY PEOPLE OBEY THE LAW (2006).

38 Tyler, *supra* note 36, at 377–78 (describing ways in which legitimation facilitates effective governance).

39 *Id.* at 379.

40 Martinez, *supra* note 17, 1026–27.

41 *See* Rebecca Hollander-Blumoff & Tom R. Tyler, *Procedural Justice and the Rule of Law: Fostering Legitimacy in Alternative Dispute Resolution*, 2011 J. DISP. RESOL. 1 (suggesting that people's assessment of procedural fairness is informed by four basic considerations: voice, neutrality, respectful treatment, and trustworthy authorities).

42 Other scholars have noted the possibility of false legitimation, albeit without the label, in the national security context. *See* Alexandra D. Lahav, *Rites Without Rights: A Tale of Two*

The dangers of false legitimation lie in the possibility that such legitimation renders procedure counterproductive in the long run. This can occur in myriad ways. For instance, in the targeted killing context, false legitimation could lead the general public to be less critical of government officials, even in the face of reports of high numbers of civilian deaths as a result of drone strikes; absent criticism, the government might have less incentive to address the problem of excess collateral damage. Or, false legitimation might slow donations to organizations whose mission it is to report on the government's compliance with legal obligations related to targeted killing; reduced civil society pressure might allow the legally imperfect status quo to persist. Or, false legitimation could result in decreased media coverage of targeted killings; noncompliance with the country's legal obligations might simply go unappreciated, and thus uncontested.

The harms might occur wholly within the government as well. For example, false legitimation could affect the views of a government official with a broad national security portfolio; how she allocates her time and political capital might be based on the robustness of the procedures in place, rather than the actual legality of various counterterrorism practices. False beliefs inspired by procedure also could cause her to resist efforts of other government actors (e.g., inspectors general) to provide further oversight of targeted killing.

In general, procedure stands to inform the beliefs of individuals who can influence, either directly or indirectly, the scope of the U.S. targeted killing program. Where procedure falsely legitimates, efforts to ensure the legality of targeting operations falter. Thus, if one agrees on the desirability of legality, she also can agree on the undesirability of false legitimation.

One's diagnosis of false legitimation certainly will vary in light of her understanding of the substantive law that governs targeted killing. There nonetheless should exist a shared interest in understanding how to avoid false legitimation. Although it might be possible to counter false legitimation once it occurs (e.g., educating the public on the shortcomings of a particular procedure), the question for this Article is how to prevent false legitimation from occurring in the first place.

Efforts to avoid false legitimation will benefit from a more precise understanding of how procedure and substance interact. So far, this Part

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Military Commissions, 24 YALE J.L. & HUMAN. 439, 470 (2012) (suggesting that the experience of U.S. military commissions after September 11 illustrates "the risk that the performance of certain types of procedures . . . may serve to signal procedural justice (rights) when it is in fact absent"); Martinez, *supra* note 17, at 1027 (arguing that the "good design of procedural systems . . . raises the possibility that the importance people attach to procedural justice may distract them from the failure of the legal system to provide substantively fair outcomes"). Yet, these Articles stop short of addressing the process by which this phenomenon occurs and offer no prescription for how false legitimation can be avoided in the targeted killing context.

has established that false legitimation arises from situations in which procedure inadequately deals with a substantive legal issue. To be lawful, every government action, including targeted killing, must satisfy numerous legal requirements; procedure helps ensure the relevant legal questions are answered correctly. There are three specific ways in which a particular procedure may fail to do so. First, a procedure can presume the answer to a legal question unjustifiably. Second, a procedure can purport to address a legal question, but do so insufficiently.[43] Third, a procedure can disregard a legal issue entirely.

Thus, there are three distinct mechanisms by which false legitimation can occur: *presumption*, *insufficiency*, and *disregard*. This Article now turns to the U.S. military detention experience, which serves to illustrate these different mechanisms of false legitimation in practice.

B. *An Overview of the U.S. Military Detention Experience*

The trio of cases informing the procedural protections for alleged terrorists detained by the U.S. government is well known.[44]

Hamdi v. Rumsfeld concerned the detention of a U.S. citizen, raised in Saudi Arabia and captured on the battlefields of Afghanistan, allegedly armed.[45] The government originally imprisoned Yaser Hamdi at Guantanamo Bay, but transferred him to a naval brig in Virginia upon realizing he was a U.S. citizen.[46] Hamdi's father filed a habeas position on behalf of his son, and the district court determined him to be a proper next friend.[47] The government's attempts to avoid adjudication of Hamdi's case were unsuccessful, and the Supreme Court

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43 It may be that procedure cannot prevent all erroneous deprivations of individuals' rights. Indeed, inherent in the American conception of due process itself is the notion that the risk of erroneous deprivation is to be balanced against other interests. *See* Mathews v. Eldridge, 424 U.S. 319, 335 (1976) ("[T]he specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail."). The impossibility of perfection, however, is no reason to ignore the problem of insufficiency.

44 The case of *Rasul v. Bush*, 542 U.S. 466 (2004), concerned military detention as well. The Supreme Court held that federal courts had jurisdiction to hear habeas petitions from Guantanamo detainees under the general habeas statute, 28 U.S.C. § 2241. *Rasul*, 542 U.S. at 483–84. Though the decision itself concerned a narrow question of statutory interpretation, *Rasul* may have signaled the Court's views about the rights of alleged terrorists at Guantanamo and elsewhere. *See* Martinez, *supra* note 17, at 1049 (arguing that the *Rasul* decision reflects the use of "process as signaling").

45 542 U.S. 507, 510 (2004) (plurality opinion).

46 *Id.*

47 *Id.* at 511–12.

was thus tasked with determining whether the executive has authority to detain citizens deemed as "enemy combatants" and what process is due to those individuals who contest their enemy combatant designation.[48]

A plurality of the Court answered the first question by turning to the Authorization for Use of Military Force (AUMF), which authorizes the use of "necessary and appropriate force against those nations, organizations, or persons [the President] determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons."[49] The plurality found that "[b]ecause detention to prevent a combatant's return to the battlefield is a fundamental incident of waging war, . . . Congress has clearly and unmistakably authorized detention in the narrow circumstances considered here."[50] Though relying on U.S. wartime case law,[51] the plurality also pointed to international humanitarian law (IHL) provisions indicating that while indefinite detention is permitted, it may not outlast active hostilities.[52] The plurality confined the scope of its decision to a narrow definition of enemy combatants, namely those individuals who "w[ere] part of or supporting forces hostile to the United States or coalition partners in Afghanistan and who engaged in an armed conflict against the United States there."[53]

On the due process question, the plurality turned to the balancing test of *Mathews v. Eldridge*[54] and concluded that the government's national security interests justified deviation from those procedural protections afforded in criminal proceedings.[55] In Hamdi's case, due process required at least "notice of the factual basis for his classification, and a fair opportunity to rebut the Government's factual assertions before a neutral decisionmaker."[56]

The *Hamdi* decision left many open questions regarding the specific procedural protections that must be afforded to alleged enemy combatants.[57] Following *Hamdi*, the Pentagon created Combatant Status Review Tribunals (CSRTs), permitting non-attorney representatives of Guantanamo detainees to present evidence before a three-officer panel in order to challenge a detainee's enemy combatant

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48 *Id.* at 516, 524.

49 Authorization for Use of Military Force, Pub. L. No. 107-40, § 2(a), 115 Stat. 224, 224 (2001).

50 *Hamdi*, 542 U.S. at 519 (plurality opinion).

51 *Id.* at 518–19 (citing *Ex parte* Quirin, 317 U.S. 1 (1942)).

52 *Id.* at 520–21.

53 *Id.* at 516 (internal quotation marks omitted).

54 424 U.S. 319 (1976).

55 *Hamdi*, 542 U.S. at 529–35 (plurality opinion).

56 *Id.* at 533.

57 *See* Martinez, *supra* note 17, at 1048 (identifying procedural questions undecided by *Hamdi*).

designation.[58] Congress also passed the Detainee Treatment Act of 2005 (DTA), which amended the statutory habeas provision to bar habeas petitions brought by non-citizens at Guantanamo Bay.[59] The Act permitted only limited judicial review of CSRTs and military commissions. Such review would take place in the D.C. Circuit and was confined to the procedural aspects of the military adjudication.[60]

It was in this context that the Supreme Court heard the case of *Hamdan v. Rumsfeld*.[61] Salim Ahmed Hamdan, who allegedly had served as Osama Bin Laden's personal driver, was captured in Afghanistan in 2001 and detained at Guantanamo.[62] After the government brought criminal charges before a military commission established by then-President Bush in 2001, Hamdan's lawyers filed a habeas petition to enjoin his trial before the military commission.[63]

Though the Supreme Court considered the case after Congress passed the DTA, the Court refused to find that the Act stripped the Court of jurisdiction over existing habeas claims.[64] Thus, the Court faced the question of whether the president had authority to establish the military commissions at issue.[65] The Court rejected the government's claim that the AUMF or DTA provided the authority sought by the government,[66] instead holding that, absent clear indication otherwise, the president was bound by the scope of Article 21 of the Uniform Code of Military Justice (UCJM), which along with the AUMF and DTA, only allowed military commissions "justified under the Constitution and laws, including the law of war."[67]

Ultimately, the Court rejected the creation of the military commission on two distinct grounds. First, it held that the president had to provide more than a blanket assertion of impracticability to satisfy the statutory requirement that military commissions operate under the UCMJ rules "insofar as practicable."[68] Second, the Court held that the military commissions violated Common Article 3 of the Geneva Conventions, which the Court recognized as part of the laws of war

58 Memorandum from Paul Wolfowitz, Deputy Sec'y of Def., to the Sec'y of the Navy (July 7, 2004), *available at* www.defense.gov/news/jul2004/d20040707review.pdf (regarding "Order Establishing Combatant Status Review Tribunal").

59 Detainee Treatment Act of 2005, Pub. L. No. 109-148, Title X, § 1005(e)(1), 119 Stat. 2680, 2739, 2741–42.

60 *Id.* § 1005(e)(2), 119 Stat. at 2742.

61 548 U.S. 557 (2006).

62 *Id.* at 566, 570.

63 *Id.* at 567.

64 *Id.* at 584.

65 *Id.* at 592.

66 *Id.* at 593–94.

67 *Id.* at 594–95 (internal quotation marks omitted).

68 *Id.* at 622–23 (quoting 10 U.S.C. § 836(b) (2012)) (internal quotation marks omitted).

incorporated by the UCMJ.[69] The Court first determined that the conflict with al Qaeda was a conflict "not of an international character" and thus was covered by the Geneva Convention.[70] It then found that the military commission did not meet the requirement that combatants be tried by a "regularly constituted court."[71] A plurality went on to find that the commission violated a provision of Additional Protocol I, mandating that defendants receive "all the judicial guarantees which are recognized as indispensable by civilized peoples."[72]

Congress responded to *Hamdan* by passing the Military Commission Act of 2006 (MCA), which looked to cut off all access to the courts for any "alien detained by the United States who has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination," except for the limited CSRT review proved by the DTA.[73] The passage of the MCA marked the lowest level of procedural protections available to Guantanamo detainees since the period leading up to *Hamdi*. No question remained that for all non-citizen detainees at Guantanamo, statutory habeas had disappeared.

In this context came *Boumediene v. Bush*, which asked whether the Constitution extends the writ of habeas corpus to non-citizens at Guantanamo.[74] Tracing the history of the Suspension Clause and examining the particular circumstances of Guantanamo Bay, the Court held that constitutional habeas was available to Guantanamo detainees.[75] It examined the existing procedural protections afforded to the detainees by the CSRT system, finding them "well short of the procedures and adversarial mechanisms that would eliminate the need for habeas corpus review"[76] and concluding that CSRT hearings are "an inadequate substitute for habeas corpus."[77] The Court set forth general requirements regarding what would constitute an adequate substitute for habeas,[78] though it left much for later determination.[79]

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69 *Id.* at 631–33 (citing Geneva Convention Relative to the Treatment of Prisoners of War art. 3, Aug. 12, 1949, 6 U.S.T. 3316, 3318 [hereinafter Common Article 3]). The Court referred to the relevant treaty provision as Common Article 3 since the same language appears in all four Geneva Conventions. *Id.* at 629.

70 *Id.* at 631 (quoting Common Article 3, 6 U.S.T. at 3318) (internal quotation marks omitted).

71 *Id.* at 631–32 (quoting Common Article 3, ¶ 1(d), 6 U.S.T. at 3320) (internal quotation marks omitted).

72 *Id.* at 634–35 (quoting Common Article 3, ¶ 1(d), 6 U.S.T. at 3320) (internal quotation marks omitted).

73 Military Commissions Act of 2006, Pub. L. No. 109-366, § 7, 120 Stat. 2600, 2635–36 (codified as amended at 28 U.S.C. § 2241(e) (2012)).

74 553 U.S. 723 (2008).

75 *Id.* at 771.

76 *Id.* at 767.

77 *Id.* at 792.

78 *Id.* at 779 ("We do consider it uncontroversial, however, that the privilege of habeas

In the wake of *Boumediene*, habeas became the primary procedural protection available to Guantanamo detainees; the District Court of the District of Columbia and the D.C. Circuit continue to adjudicate habeas petitions from detainees today. Many have found the D.C. Circuit's burgeoning detention jurisprudence to contain broad interpretations of the government's detention authority and narrow constructions of detainee procedural rights. Stephen Vladeck, for instance, has evaluated the D.C. Circuit detention cases in light of the somewhat indefinite Supreme Court opinions in *Hamdi*, *Hamdan*, and *Boumediene*.[80] While finding critiques of the D.C. Circuit overblown in some respects, he suggests that

> on the "merits" of the detainee cases, the analysis and the holdings reflect a profound tension with both *Boumediene* and *Hamdi*, and a fundamental unwillingness by the D.C. Circuit—especially Judges Brown, Kavanaugh, Randolph, and Silberman—to take seriously the implications of the Supreme Court's analysis in either case. Between them, *Hamdi* and *Boumediene* do not just require *some* judicial review of the government's evidence; rather, they compel a "meaningful" opportunity on the detainee's part to challenge the factual and legal basis for his detention. If every inference is being drawn against the detainee, or if the use of the "mosaic" theory is having the effect of watering down the burden of proof, it is difficult to conclude how such review satisfies that command.[81]

Despite these potential flaws, the Supreme Court, with one unremarkable exception,[82] has declined to grant certiorari in every post-*Boumediene* case that has come its way.[83]

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corpus entitles the prisoner to a meaningful opportunity to demonstrate that he is being held pursuant to 'the erroneous application or interpretation' of relevant law. And the habeas court must have the power to order the conditional release of an individual unlawfully detained—though release need not be the exclusive remedy and is not the appropriate one in every case in which the writ is granted." (citation omitted)); *id.* at 783 ("The habeas court must have sufficient authority to conduct a meaningful review of both the cause for detention and the Executive's power to detain."); *id.* at 786 ("For the writ of habeas corpus, or its substitute, to function as an effective and proper remedy in this context, the court that conducts the habeas proceeding must have the means to correct errors that occurred during the CSRT proceedings. This includes some authority to assess the sufficiency of the Government's evidence against the detainee. It also must have the authority to admit and consider relevant exculpatory evidence that was not introduced during the earlier proceeding.").

79 *Id.* at 786 ("Consistent with the historic function and province of the writ, habeas corpus review may be more circumscribed if the underlying detention proceedings are more thorough than they were here."); *id.* at 787 ("The extent of the showing required of the Government in these cases is a matter to be determined. We need not explore it further at this stage.").

80 Stephen I. Vladeck, *The D.C. Circuit After* Boumediene, 41 SETON HALL L. REV. 1451 (2011).

81 *Id.* at 1488–89.

82 In *Kiyemba v. Obama*, the Court issued a brief per curiam opinion simply remanding the case to the D.C. Circuit for reconsideration in light of changed factual circumstances. 559 U.S. 131 (2010).

C. *False Legitimation in the Detention Context*

The U.S. military detention experience allows false legitimation to be explored through three different questions: Has the military detention system at Guantanamo been legitimated? Is this legitimation false? And what contributed to this legitimation? Even if complete answers to these questions are beyond the scope of this Article, the U.S. detention example is sufficient to illustrate how false legitimation occurs in practice.

There certainly are indications that the Supreme Court's detention cases helped to legitimate the military detention system. Each case was met with an initial chorus of praise from those who seemed most concerned with the detention regime. The ACLU suggested that *Hamdi* "will long be remembered for its emphatic repudiation of the Bush administration's claim that it can conduct the war on terrorism as it sees fit with virtually no opportunity for meaningful judicial review."[84] Walter Dellinger called *Hamdan* "the most important decision on presidential power and the rule of law ever."[85] And two years later, Ronald Dworkin declared *Boumediene* "one of the most important Supreme Court decisions in recent years," marking the moment when "[t]he Supreme Court . . . declared that this shameful episode in our history must end."[86]

Though the perspectives of close observers such as the ACLU may have changed with time, the initial euphoria of those cases, and the procedures they spawned, certainly appears to have translated into greater acceptance of military detention by the general public. As described by Jack Goldsmith, military detention "has become more legitimate and less controversial in part because another branch of

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83 As of publication, the most recent denial of certiorari came in *Hussain v. Obama*, 718 F.3d 964 (D.C. Cir. 2013), *cert. denied*, 134 S. Ct. 1621 (2014).

84 Press Release, American Civil Liberties Union (June 29, 2004), *available at* https://www.aclu.org/organization-news-and-highlights/supreme-court-ends-term-reaffirmation-rule-law-during-times-nationa.

85 Walter Dellinger, *A Supreme Court Conversation: The Most Important Decision on Presidential Power. Ever.*, SLATE (June 29, 2006, 5:59 PM), http://www.slate.com/articles/life/the_breakfast_table/features/2006/a_supreme_court_conversation/the_most_important_decision_on_presidential_power_ever.html.

86 Ronald Dworkin, *Why It Was a Great Victory*, N.Y. REVIEW OF BOOKS, Aug. 14, 2008; *see also* Muneer I. Ahmad, *Resisting Guantanamo: Rights at the Brink of Dehumanization*, 103 NW. U. L. REV. 1683, 1684 (2009) ("When the Supreme Court issued its decision in *Boumediene v. Bush* in June 2008—the latest of several cases regarding the rights of terrorist suspects held at Guantánamo Bay—it was hailed by progressive commentators and human rights advocates as a landmark in rights jurisprudence." (footnote omitted)); Press Release, American Civil Liberties Union (June 12, 2008), *available at* http://www.aclu.org/national-security/supreme-court-restores-rule-law-guantanamo (claiming that *Boumediene* "forcefully repudiates the essential lawlessness of the Bush administration's failed Guantánamo policy [and] should also mark the beginning of the end of the military commission process").

government, the judiciary, has looked at the detentions and agreed with the executive's assessment."[87] Though incomplete, the data revealing the public's waning support for closing Guantanamo is consistent with Goldsmith's evaluation.[88] Admittedly, numerous other factors may have contributed to American indifference to the detention status quo, including issue fatigue, the election of President Barack Obama, and recidivism of former Guantanamo detainees. It is worth noting as well that the United States continues to suffer legitimacy problems abroad as a result of Guantanamo[89]—though the illegitimacy with which the international community views U.S. detention practices perhaps reveals the legitimacy that the detention cases have engendered domestically.

It is a separate question whether such legitimation is properly labeled "false." While pinpointing the exact degree of false legitimation of the detention system is beyond the scope of this Article, there are certainly general indications that procedural requirements that have been added over the years have done little to affect substantive outcomes at Guantanamo. *Boumediene*, perhaps the most celebrated detention opinion, appears to have had very little effect at all.[90] Indeed, five years after that case, there languished eighty-six detainees at Guantanamo who had long been cleared for release, but for whom release remained unscheduled.[91]

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87 Goldsmith, *supra* note 25; *see also* Jack Goldsmith, Op-Ed., *On Counterterrorism, The System Worked*, WASH. POST, Feb. 15, 2012, at A23 (arguing that high support for the Obama administration's counterterrorism policies can be explained by the fact that "our constitutional system of checks and balances has worked extraordinarily well in the past decade to legitimize these policies and to generate a national consensus in support of them"); Jack Goldsmith, Long-Term Terrorist Detention and Our National Security Court 6 (Feb. 4, 2009) (unpublished manuscript), *available at* http://www.brookings.edu/~/media/research/files/papers/2009/2/09%20detention%20goldsmith/0209_detention_goldsmith.pdf ("Article III judges will be in the detention game, helping to regularize, legalize, and legitimize the detention process . . . .").

88 *Compare* Andrew Rosenthal, *Hurray for Guantanamo*, N.Y. TIMES (Feb. 9, 2012, 10:06 PM), http://takingnote.blogs.nytimes.com/2012/02/09/hurray-for-guantanamo-bay (discussing a poll that found that seventy percent of Americans approve the continued operation of the Guantanamo Bay prison), *with* Jon Cohen & Jennifer Agiesta, *Public Supports Closing Guantanamo; In Poll, Most Agree with President's Plan to Shutter the Facility Within a Year*, WASH. POST, Jan. 22, 2009, at A6 (reporting on a poll that found forty-two percent of Americans approve of continued detention at Guantanamo, while fifty-three percent support the closing of the prison).

89 *See* Lunday & Rishikof, *supra* note 24, at 99–100 (indicating that since *Boumediene*, the United States continues to suffer legitimacy problems abroad).

90 Aziz Huq analyzes the aftermath of *Boumediene* to understand the effect of habeas on U.S. detention policies. Aziz Z. Huq, *What Good is Habeas?*, 26 CONST. COMMENT. 385 (2010). While he finds the overall record somewhat mixed, *id.* at 386–87, Huq concludes that the data "strongly suggests that the effect of *Boumediene* on detention policy was not significant," *id.* at 421.

91 Max Fisher, *Kafka at Gitmo: Why 86 Prisoners Are Cleared for Release but Might Never Get It*, WASH. POST (Apr. 25, 2013, 12:45 PM), http://www.washingtonpost.com/blogs/worldviews/wp/2013/04/25/kafka-at-gitmo-why-86-prisoners-are-cleared-for-release-but-might-never-get-it.

Accepting that, at least to a degree, the detention system has been legitimated and that this legitimation is false, one can ask how such false legitimation occurred. Examples of all three mechanism discussed above—presumption, insufficiency, and disregard—can be seen here.

Presumption. The detention cases embody a presumption that the United States' treatment of all individuals allegedly associated with al Qaeda is governed by the laws of war. Though the existence of an armed conflict was important to the Court's decision in *Hamdi*,[92] it is *Hamdan* that solidified this presumption in the procedural requirements related to military detention.

Hamdan, on its face, is a purely procedural decision that demands certain steps be followed in the creation of military commissions to try detainees.[93] Yet, these procedural requirements stem from a specific legal framework—IHL—which is less protective than the framework that would govern outside of a conflict situation. Jenny Martinez has recognized this feature of *Hamdan*:

> In *Hamdan*, . . . certain substantive findings were embedded in the decision. One such finding was that the United States' interactions with al Qaeda constitute a noninternational armed conflict covered by the law of war, including Common Article 3 of the Geneva Conventions. While the Court discussed the difference between international and noninternational armed conflict, it did not actually consider the possibility that some aspects of the "war on terror" do not legally constitute an armed conflict at all, and that the law of war therefore might not be the appropriate framework for evaluating the legality of detention and trials. . . . [This conclusion was] reached without the benefit of full briefing or argument on the underlying substantive issues. Moreover, the exact reasoning behind these substantive decisions was not transparent.[94]

While perhaps strategically beneficial for Hamdan's counsel to advance arguments that presumed the application of IHL, the process-oriented victory for Hamdan came at the cost of embedding this presumption in the procedures relevant to alleged terrorist detainees.

Insufficiency. While the relatively uncontested acceptance of the laws of war framework may have taken place in *Hamdan*, *Boumediene* further legitimized the detention system by giving judicial imprimatur—indeed, of constitutional stature—to the system of indefinite detention. At the same time, *Boumediene* left many open questions about the scope

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92 Hamdi v. Rumsfeld, 542 U.S. 507, 518 (2004) ("We conclude that detention of individuals falling into the limited category we are considering, for the duration of the particular conflict in which they were captured, is so fundamental and accepted an incident to war as to be an exercise of the 'necessary and appropriate force' Congress has authorized the President to use.").

93 *See supra* text accompanying notes 61–72.

94 Martinez, *supra* note 17, at 1058–59 (footnotes omitted).

of habeas, and the strength of the writ in practice fell far short of what the initial euphoria would have suggested.

One particular challenge has been allowing detainees to contest the evidence against them in such a way that gives meaning to the Court's promise of "meaningful review."[95] The D.C. Circuit seems to have tipped the scales in favor of the government. It has criticized the district court for "display[ing] little skepticism about [the detainee's] explanations for his actions,"[96] while at the same time creating evidentiary presumptions in favor of the government.[97] Judge Tatel has highlighted the potential problem of such steps, expressing

> fear that in practice [a presumption of regularity for the government's evidence] comes perilously close to suggesting that whatever the government says must be treated as true. In that world, it is hard to see what is left of the Supreme Court's command in *Boumediene* that habeas review be 'meaningful.'[98]

While habeas was thought to remedy problems that emerge from the CSRT process where a detainee's "ability to rebut the Government's evidence against him is limited,"[99] habeas may well be an insufficient procedure in this regard.

Disregard. Even where habeas has worked to clear detainees for release, there is no procedure that ensures release actually takes place.[100] The Supreme Court has disregarded this remedial issue, and as public support for keeping Guantanamo open has increased since *Boumediene*, the number of detainees cleared for, but awaiting, release has risen.[101] False legitimation may help explain how these two trends can co-exist.

Overall, the U.S. detention experience illustrates how the different types of procedural shortcomings (presumption, insufficiency, and disregard) could render false any legitimation that detention procedures might have spurred. What is more, the current stagnation on detention issues reveals the dangers of false legitimation in the long run.

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95 Boumediene v. Bush, 553 U.S. 723, 783 (2008); *see* Sarah Lorr, Note, *Reconciling Classified Evidence and a Petitioner's Right to a "Meaningful Review" at Guantanamo Bay: A Legislative Solution*, 77 FORDHAM L. REV. 2669 (2009) (discussing this challenge).

96 Al-Adahi v. Obama, 613 F.3d 1102, 1111 (D.C. Cir. 2010).

97 *See* BENJAMIN WITTES ET AL., THE EMERGING LAW OF DETENTION 2.0: THE GUANTÁNAMO HABEAS CASES AS LAWMAKING 53–63 (Apr. 2012), *available at* http://www.brookings.edu/~/media/research/files/reports/2011/5/guantanamo%20wittes/chesney%20full%20text%20update32913.pdf.

98 Latif v. Obama, 666 F.3d 746, 779 (D.C. Cir. 2011) (Tatel, J., dissenting) (citation omitted) (quoting *Boumediene*, 553 U.S. at 783) (some internal quotation marks omitted).

99 *Boumediene*, 553 U.S. at 767.

100 Ryan Firestone, Comment, *The* Boumediene *Illusion: The Unsettled Role of Habeas Corpus Abroad in the War on Terror*, 84 TEMP. L. REV. 555, 573 (2012) (discussing how the majority of detainees whose habeas petitions were granted continued to be incarcerated at Guantanamo).

101 *See supra* note 91 and accompanying text.

Guantanamo remains open, Congress spends little time addressing the issue, and the Supreme Court seems to have wiped its hands clean of any further involvement in detention.[102] Though this Article has not provided a complete account for all contributing factors, it is clear how false legitimation could help maintain the military detention status quo.

It is now time to return to targeted killing. Because the three mechanisms of false legitimation represent distinct ways in which procedure inadequately addresses substantive issues, the following Part explores the substantive targeting issues to which procedure must respond in the first place. After that, this Article attempts to answer the question of how to avoid false legitimation in the targeting context.

II. THE SUBSTANTIVE ISSUES ON WHICH THE LEGALITY OF TARGETED KILLING TURNS

Targeted killings have taken place in a variety of contexts, from counterinsurgency operations on the battlefield in Afghanistan to isolated drone strikes in the countryside of Somalia.[103] "Personality strikes" involve the killing of identified individuals, typically alleged to play a leadership role in terrorist groups.[104] "Signature strikes," on the other hand, involve the targeting of individuals whose behavior, the government believes, reveals their membership in a terrorist organization, but whose identities are ultimately unknown.[105] During the first Obama administration, signature strikes became the most common form of targeted killing in Pakistan;[106] more recently, reports have suggested that signature-type strikes have taken place in Yemen and Somalia as well.[107]

The array of factual circumstances underlying any particular targeted killing implicates a host of legal questions. This Part sets forth three paradigms under which a particular targeted killing might be justified: The armed conflict paradigm requires the existence of an

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102 In 2012 alone, the Supreme Court refused to grant certiorari in Al-Bihani v. Obama, No. 10-5352, 2011 WL 611708 (D.C. Cir. 2011), *cert. denied*, 132 S. Ct. 2739 (2012); Uthman v. Obama, 637 F.3d 400 (D.C. Cir. 2011), *cert. denied*, 132 S. Ct. 2739 (2012); Al-Madhwani v. Obama, 642 F.3d 1071 (D.C. Cir. 2011), *cert. denied*, 132 S. Ct. 2739 (2012); Almerfedi v. Obama, 654 F.3d 1 (D.C. Cir. 2011), *cert. denied*, 132 S. Ct. 2739 (2012); Al Alwi v. Obama, 653 F.3d 11 (D.C. Cir. 2011), *cert. denied*, 132 S. Ct. 2739 (2012); Latif v. Obama, 666 F.3d 746 (D.C. Cir. 2011), *cert. denied*, 132 S. Ct. 2741 (2012); and Al-Kandari v. Obama, 462 F. App'x 1 (D.C. Cir. 2011), *cert. denied*, 132 S. Ct. 2741 (2012).

103 *See* Blum & Heymann, *supra* note 9, at 148, 150–51.

104 Adam Entous, Siobhan Gorman & Julian E. Barnes, *U.S. Tightens Drone Rules*, WALL ST. J., Nov. 4, 2011, at A1.

105 *Id.*

106 *Id.*

107 Scott Shane, *Election Spurred a Move to Codify U.S. Drone Policy*, N.Y. TIMES, Nov. 25, 2012, at A1.

armed conflict and compliance with international humanitarian law (IHL). The self-defense paradigm requires, at least, satisfaction of the conditions under which international law permits the use of force on the territory of another state. Finally, the law enforcement paradigm, applicable whenever force is not justified by the armed conflict or self-defense rationales, requires compliance with international human rights law (IHRL).[108]

Debates over applicable paradigm have proven highly contentious, particularly for targeting killings that take place outside of Afghanistan. In a May 2013 speech, President Obama made clear that even the U.S. government, which has claimed a robust power to undertake targeted killings wherever suspected terrorists may be found, believes that not every targeted killing is subject to the same criteria.[109] President Obama may not have grounded his distinctions between targeting "[i]n the Afghan war theater" and targeting "[b]eyond the Afghan war theater" in legal terms.[110] Nevertheless, his speech only underscores the need for targeted killing procedures to be attuned to the myriad substantive rules that might apply.

While attempting to capture the numerosity and complexity of these rules, this Part makes no attempt to resolve existing substantive debates.[111] Rather, it simply seeks to provide the background understanding necessary for the discussion in Part IV. To this end, this Part concludes by identifying distinct *types* of substantives issues that are implicated by these three regimes. This rough typology will help facilitate the procedural analysis to follow.

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108 These paradigms involve questions of jus ad bellum, regarding *whether* force can be used, and questions of jus in bello, regarding *how* force can be used.

109 Barack Obama, Remarks at the National Defense University (May 23, 2013), *available at* http://www.whitehouse.gov/the-press-office/2013/05/23/remarks-president-barack-obama.

110 *Id.*

111 The legal discussion in this Part does not address the ability of non-military actors (e.g., the CIA) to undertake targeted killing operations. In situations of armed conflict, CIA agents involved in the use of lethal force—at least—lack the combatant's privilege and may be subject to prosecution in the state where the targeted killing took place. *See Rise of the Drones II: Examining the Legality of Unarmed Targeting: Hearing Before the Subcomm. on Nat'l Sec. & Foreign Affairs*, 111th Cong. 6 (2010) (testimony of Mary Ellen O'Connell, Professor of Law, Univ. of Notre Dame), *available at* http://www.fas.org/irp/congress/2010_hr/042810oconnell.pdf; John E. Murphy, *Mission Impossible? International Law and the Changing Character of War*, 87 INT'L L. STUDIES 13, 14 (2011); Gary Solis, Op-Ed., *America's Unlawful Combatants*, WASH. POST, Mar. 12, 2010, at A17. Others go further and view CIA participation as a *violation* of IHL. *See* Mary Ellen O'Connell, *Unlawful Killing with Combat Drones: A Case Study of Pakistan*, 2004–2009, at 8 (Notre Dame Law School Legal Studies Research Paper No. 09-43, 2010), *available at* http://ssrn.com/abstract=1501144 ("[O]nly lawful combatants have the right to use force during an armed conflict. Lawful combatants are the members of a state's regular armed forces. The CIA is not part of the U.S. armed forces."). Ensuring the legality of U.S. targeted killings ultimately requires resolution of the questions implicated by the latter position. While this Article largely cabins this issue, the discussion of false legitimation through disregard would be particularly relevant. *See infra* Part III.B.3.

A. *The Armed Conflict Paradigm*

IHL governs the use of force in situations of armed conflict.[112] IHL distinguishes between international armed conflicts and non-international armed conflicts.[113] The existence of the former is easier to identify; it involves any fighting between states, with the possible exception of skirmishes along borders and other low-level military confrontations.[114] The latter includes conflicts between states and non-state actors even where those conflicts are not contained within a state.[115]

The first threshold question in determining whether IHL governs the use of force against an alleged terrorist is whether a non-international armed conflict exists. The Geneva Conventions offer little guidance on this question, but customary international law suggests that the existence of such a conflict turns on: (i) the level of organization of the armed groups, (ii) the scale and intensity of the fighting, and (iii) the participants' ambitions and perceptions of the violence against the opposing state.[116] Such factors are notoriously difficult to apply. For instance, some individuals claim a conflict with al Qaeda began in the 1990s, when the organization was behind numerous attacks, including the bombing of U.S. embassies in Kenya and Tanzania, attacks to which the United States responded by bombing a factory in Sudan and al Qaeda camps in Afghanistan.[117] Most observers, however, point to September 11 as the beginning of the conflict between the United States and al Qaeda.[118]

Even if an armed conflict exists somewhere, there may be a second threshold question that must be answered before IHL is deemed the governing legal regime for a particular targeted killing: whether the location of the planned targeted killing falls within the geographic scope of that conflict. One view holds that once a conflict exists somewhere, IHL permits targeted killing anywhere. There may be limitations

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112 Beth Van Schaack, *The Killing of Osama Bin Laden & Anwar Al-Aulaqi: Uncharted Legal Territory*, 14 Y.B. INT'L HUMANITARIAN L. 255, 282–83 (2011).

113 *Id.*

114 *Id.* at 283.

115 *See* Kretzmer, *supra* note 11, at 189–90 (recognizing, but disagreeing with, arguments that the conflict between United States and al Qaeda may not constitute a conflict within international law).

116 Monica Hakimi, *A Functional Approach to Targeting and Detention*, 110 MICH. L. REV. 1365, 1374 (2012); *see also* Mary Ellen O'Connell, *Combatants and the Combat Zone*, 43 U. RICH. L. REV. 845, 854 (2009). *See generally* Derek Jinks, *September 11 and the Laws of War*, 28 YALE J. INT'L L. 1 (2003).

117 O'Connell, *supra* note 116, at 857 (tracing opposing views over the beginning of a conflict between the United States and al Qaeda).

118 *Id.*

imposed by other bodies of law,[119] but these may represent only a slight obstacle to the targeted killings that the United States currently undertakes.[120] Scholars that take this position suggest that an armed conflict narrowly confined to "the battlefield" would simply create a "safe haven" for militants in areas removed from active hostilities.[121] A contrary view argues that IHL itself constricts the geographic scope of permissible targeted killings. Robert Barnidge, for instance, argues that IHL restricts the use of force to areas with a "substantial relationship" to the core conflict.[122] This requirement must be read in conformity with the definitional elements of an armed conflict—"intensity" and "organization."[123]

Once an armed conflict exists that allows the use of force in a particular area, IHL constrains targeting operations by multiple principles. First, the principle of distinction requires that parties to a conflict "at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives."[124] Though enshrined in the Geneva Conventions, distinction, as well as the presumption that an individual is a civilian,[125]

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119 *See* Chesney, *supra* note 11, at 35–36 (countering arguments that IHL poses geographic limitations on the use of force and suggesting instead that the way to address the anxieties underlying the narrower view of IHL is to demand "rigorous adherence" to jus ad bellum principles and to the principle of distinction).

120 Indeed, it appears that all states where the United States undertakes targeting operations have consented, at some point, to such uses of force. *See id.* at 15–18 (reviewing various reports suggesting Yemeni approval of U.S. targeting operations in Yemen); Entous, *supra* note 10 (discussing Pakistan's support of drone operations, but noting political pressure to refrain from expressing such support publically); Charlie Savage, *Secret U.S. Memo Made Legal Case to Kill a Citizen*, N.Y. TIMES, Oct. 9, 2011, at A1 (citing secret cable that revealed Yemeni president's ex ante approval of Al-Aulaqi strike); Jeremy Scahill, *The CIA's Secret Sites in Somalia*, THE NATION (July 12, 2011), http://www.thenation.com/article/161936/cias-secret-sites-somalia (discussing cooperation between CIA and Somali intelligence agents).

121 *See* Laurie R. Blank, *Defining the Battlefield in Contemporary Conflict and Counterterrorism: Understanding the Parameters of the Zone of Combat*, 39 GA. J. INT'L & COMP. L. 1, 26–27 (2010) (tracing objections to arguments in favor of geographically confined armed conflicts).

122 Barnidge, *supra* note 11, at 437–38 ("The effect of this is that international humanitarian law applies both to the immediate area of hostilities, that is, within Afghanistan, and 'further afield,' the only requirement being, to use the ICTY's language in its 2002 *Prosecutor v. Kunarac* judgment, one of 'substantial[] relat[ion].'" (alternations in original)); *see also* Blank, *supra* note 121, at 11; O'Connell, *supra* note 116, at 858 ("In addition to exchange, intensity, and duration, armed conflicts have a spatial dimension.").

123 *See supra* note 116 and accompanying text.

124 Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, art. 48, 1125 U.N.T.S. 3 [hereinafter Additional Protocol I]; *see also* Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, June 8, 1977, art. 13(2), 1125 U.N.T.S. 609 [hereinafter Additional Protocol II] ("The civilian population as such, as well as individual civilians, shall not be the object of attack.").

125 Additional Protocol I, *supra* note 124, art. 50(1).

has become one of the primary customary laws of war, applicable in all conflicts.[126]

Though the general rule against targeting civilians is uncontroversial, states have found it difficult to implement the distinction principle in conflicts with non-state actors, who draw ranks directly from the civilian population. IHL protects civilians "unless and for such time as they take a direct part in hostilities."[127] Yet, states worry that a narrow reading the of the "direct participation" requirement will create a "revolving door that allows a fighter by night to be immune from attack while a baker by day."[128]

Two variations on the distinction principle have developed in response. Some states have interpreted "direct participation" broadly.[129] Israel, for instance, uses a "chain of hostilities" concept that would allow targeting of terrorists at anytime.[130] A second response distinguishes among privileged combatants (i.e., uniformed soldiers), members of armed groups with a continuous combat function (CCF),[131] and civilians taking direct participation in hostilities. According to the International Committee of the Red Cross (ICRC):

> Continuous combat function requires lasting integration into an organized armed group acting as the armed forces of a non-State party to an armed conflict. Thus, individuals whose continuous function involves the preparation, execution, or command of acts or operations amounting to direct participation in hostilities are assuming a continuous combat function. An individual recruited, trained and equipped by such a group to continuously and directly participate in hostilities on its behalf can be considered to assume a

126 Though Additional Protocol I applies only to international armed conflicts, its distinction principles are considered customary international law for both international and non-international armed conflicts. *See* Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, ¶ 78–79 (July 8) (identifying distinction as one of the "intransgressible principles of international customary law"); Laurie R. Blank, *Targeted Strikes: The Consequences of Blurring the Armed Conflict and Self-Defense Justifications*, 38 WM. MITCHELL L. REV. 1655, 1670 & nn.45–46 (2012); Michael N. Schmitt, *The Interpretative Guidance on the Notion of Direct Participation in Hostilities: A Critical Analysis*, 1 HARVARD NAT'L SECURITY J. 5, 11 (2010).

127 Additional Protocol II, *supra* note 124, art. 13(3). That the "direct participation in hostilities" principle is customary international law is "beyond dispute." Schmitt, *supra* note 126, at 12.

128 Radsan & Murphy, *Evolution*, *supra* note 23, at 454.

129 *Id.* at 454–55.

130 HCJ 769/02 Pub. Comm. Against Torture in Isr. v. Gov't of Isr. (*Targeting Decision*), 62(1) PD 507, ¶¶ 33, 37, 39 [2006] (Isr.).

131 It is a separate issue whether a set of fighters form an armed group. "[T]o qualify, a fighting force need only be: capable, on the one hand, of planning and carrying out sustained and concerted military operations, and on the other, of imposing discipline in the name of a de facto authority." Radsan & Murphy, *Measure*, *supra* note 16, at 1211–12.

> continuous combat function even before he or she first carries out a hostile act.[132]

The ICRC suggests that while the combatant concept does not exist in non-international armed conflicts, certain individuals may be treated as such for the purposes of distinction.[133]

In practice, broad interpretations of direct participation in hostilities and the notion of CCF may well converge.[134] This Article makes no attempt to resolve this debate, but simply suggests that procedures addressing the issue of distinction will need to distinguish between functional combatants (e.g., CCF or "chain of hostilities" direct participation), who may be targeted at anytime (subject to other limitations); civilians involved sporadically in terrorism, who may be targeted "for such time" as they directly participate in hostilities; and all other individuals, who may never be targeted.[135]

Second, the principle of proportionality requires that targeting operations not produce excessive collateral damage. As set forth in Additional Protocol I, IHL prohibits "an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated."[136] Elsewhere, Additional Protocol I defines "excessive loss of life, injury to civilians or damage to civilian objects" as a grave breach of the Geneva Conventions.[137]

Finally, there may be a least harmful means requirement that is applicable in some or all armed conflicts. The conventional view is that IHL permits an individual to be targeted at any time as long as he is not *hors de combat*.[138] In its public statements regarding targeted killing, the U.S. government appears to disregard the notion that a least harmful

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132 NILS MELZER, INT'L COMM. OF THE RED CROSS, INTERPRETIVE GUIDANCE ON THE NOTION OF DIRECT PARTICIPATION IN HOSTILITIES UNDER INTERNATIONAL HUMANITARIAN LAW 1007 (Dec. 2008) [hereinafter ICRC INTERPRETIVE GUIDANCE], *available at* http://www.icrc.org/eng/assets/files/other/irrc-872-reports-documents.pdf.

133 *See* INT'L COMM. OF THE RED CROSS, COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, at § 4789 (1987) ("Those who belong to armed forces or *armed groups* may be attacked at any time." (emphasis added)); *see also* Kretzmer, *supra* note 11, at 197–98.

134 Radsan & Murphy, *Measure*, *supra* note 16, at 1211–12.

135 Murphy & Radsan, *Due Process*, *supra* note 16 at 422 ("To summarize, where IHL applies, the United States may kill terrorists either as 'civilians' who are directly participating in hostilities or, possibly, as 'combatants' provided their commitment to terrorism is sufficiently active and deep.").

136 Additional Protocol I, *supra* note 124, art. 51(5)(b).

137 *Id.* art. 85(3)(b).

138 *Id.* art. 41(1) ("A person who is recognized or who, in the circumstances, should be recognized to be 'hors de combat' shall not be made the object of attack.").

means requirement exists[139]—though its position might be different with respect to the targeted killing of U.S. citizens.[140]

Two contrary views have been advanced. Ryan Goodman argues that "if enemy combatants can be put out of action by capturing them, they should not be injured; if they can be put out of action by injury, they should not be killed; and if they can be put out of action by light injury, grave injury should be avoided."[141] He finds this least harmful means requirement to be rooted in Article 35 of Additional Protocol I, which limits the means of warfare and prohibits the use of weapons and methods "to cause superfluous injury or unnecessary suffering."[142] Elucidating the text are voluminous historical sources that Goodman claims have been disregarded by other scholars.[143] Goodman nonetheless stops short of claiming that the customary laws of war include a least harmful means requirement.[144]

The ICRC also argues that a least harmful means requirement exists, though it roots such a requirement in the general principle of necessity.[145] The ICRC position argues that necessity requires an individualized inquiry for each targeting operation, resulting in a capture-if-possible requirement for military operations.[146] While this would not eliminate the practice of targeted killing, it would require the United States to capture its targets as long as the operation would not pose an "undue" risk to U.S. forces.[147]

B. *The Self-Defense Paradigm*

When or where an armed conflict is not already in existence, a state may be justified in using lethal force in the territory of another state as a

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139 *See* Koh, *supra* note 33 (discussing relevant IHL considerations, including distinction and proportionality, but excluding necessity as a separate factor).

140 *See* Savage, *supra* note 121.

141 Ryan Goodman, *The Power to Kill or Capture Enemy Combatants*, 24 EUR. J. INT'L L. 819, 819–20 (2013).

142 *Id.* at 848 (quoting Additional Protocol I, *supra* note 124, art. 35) (internal quotation marks omitted).

143 *See id.* at 822, 823–24.

144 *See id.* at 824.

145 ICRC INTERPRETIVE GUIDANCE, *supra* note 132, at 1041–42.

146 *See id.* at 1043–44; NILS MELZER, TARGETED KILLING IN INTERNATIONAL LAW 288 (2008) (finding obligation to attempt arrest when there is reasonable probability of success without undue risk).

147 MELZER, *supra* note 146, at 288. For a criticism of the ICRC position, see Schmitt, *supra* note 126, at 41 ("No state practice exists to support the assertion that the principle of military necessity applies as a separate restriction that constitutes an additional hurdle over which an attacker must pass before mounting an attack. The operation is lawful so long as the target qualifies as a lawful military objective, collateral damage will not be excessive, and all feasible precautions are taken.").

matter of self-defense. Before such force will be permissible, a number of conditions must be met.

First, the attacking state must be confronted, or imminently threatened, with an armed attack of a sufficient magnitude. The right to use force in self-defense finds its roots both in Article 51 of the U.N. Charter[148] and customary international law.[149] Though the existence of the right is uncontroversial, there is significant debate over what constitutes an armed attack and the extent to which the right permits actions that are preemptive in nature.[150]

Second, where the armed attack, or threat thereof, comes from a non-state actor, the responding state cannot respond within the territory of another state unless the targeted state consents or the targeted state is unwilling or unable to address the threat posed by the non-state group operating within its territory.[151]

Third, the use of force must be proportionate and necessary.[152] Proportionality requires that force be defensive and used only to the extent necessary to meet defensive military objectives.[153] Necessity demands that there be no alternatives to the use of military force in response to the attack or threat.[154] In situations where a state looks to use force preemptively, the necessity prong gives rise to the requirement that any threat to which the state responds be imminent as well.[155]

Even where an armed attack has occurred, or one is imminently threatened, and where the use of force would be necessary and proportionate, additional constraints on the use of force may exist. Debates over the additional requirements largely turn on the relationship between the law of self-defense and IHL. One view maintains a sharp distinction between the jus ad bellum requirements of

148 U.N. Charter art. 51 ("Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security.").

149 Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14, ¶ 176 (June 26).

150 *Compare, e.g.*, Derek Bowett, *Reprisals Involving Recourse to Armed Force*, 66 AM. J. INT'L L. 1, 4 (1972) ("It was never the intention of the Charter to prohibit anticipatory self-defense and the traditional right certainly existed in relation to an 'imminent' attack."), *with* IAN BROWNLIE, INTERNATIONAL LAW AND THE USE OF FORCE BY STATES 275–78 (1963) (arguing that Article 51 forbids anticipatory self-defense). For a recent summary of this debate, see ALSTON, *supra* note 11, ¶¶ 39, 41.

151 *See* ALSTON, *supra* note 11, ¶ 35; Blank, *supra* note 126, at 1665; Ashley S. Deeks, *"Unwilling or Unable": Toward A Normative Framework for Extraterritorial Self-Defense*, 52 VA. J. INT'L L. 483, 499 (2012). In addition, it should be noted that "[a] consenting State may only lawfully authorize a killing by the targeting State to the extent that the killing is carried out in accordance with applicable IHL or human rights law." ALSTON, *supra* note 11, ¶ 37.

152 ALSTON, *supra* note 11, ¶ 39; Blank, *supra* note 126, at 1665.

153 Blank, *supra* note 126, at 1665.

154 *Id.*

155 *Id.*

self-defense and the jus in bello requirements embodied in IHL, arguing that IHL governs *any* use of force.[156] A second perspective holds that not every use of force rises to the level of an armed conflict and thus IHL, governing the use of force in situations of armed conflict, is inapplicable.[157] This "robust" view of self-defense has been criticized as enabling overbroad uses of force, only limited by the self-defense criteria above.[158] However, other scholars point to an intimate relationship between the self-defense requirements of necessity and proportionality and constraints on the use of force under IHL;[159] a core meaning shared by self-defense and IHL principals could render the inapplicability of IHL in certain instances less consequential. A third, composite view recognizes the possibility of "naked" self-defense (i.e., where the use of force does not give rise to the existence of an armed conflict), but suggests that rules of distinction and proportionality apply as a matter of customary international law.[160]

C. *The Law Enforcement Paradigm*

The applicability of IHL or the law of self-defense does not mean that IHRL has no place. It is generally accepted that IHL and IHRL apply during armed conflicts, but that the nature of a state's obligation is determined in accordance with the principle of lex specialis.[161] For instance, while military operations might be subject to IHL's rules governing the use of force, a law enforcement operation that happened to take place within a country at war would still need to comply with IHRL. Nevertheless, it may well be that if the armed conflict or self-

156 ALSTON, *supra* note 11, ¶¶ 42–43.

157 *Id.* ¶ 42.

158 *Id.* ¶¶ 42–43.

159 *See* Mary Ellen O'Connell, *Remarks: The Resort to Drones Under International Law*, 39 DENV. J. INT'L L. & POL'Y 585, 592 (2011); Radsan & Murphy, *Evolution*, *supra* note 23, at 450 ("Self-defense is not, of course, a license to unlimited violence; it could not justify dropping a nuclear bomb on bin Laden's compound. Rather, customary law insists on 'necessity and proportionality,' and, in applying these standards, decisionmakers should regard IHL's parallel standards as 'highly persuasive.'").

160 Kenneth Anderson, *Targeted Killing and Drone Warfare: How We Came to Debate Whether There is a 'Legal Geography of War'* 8 (Wash. Coll. of Law Research Paper No. 2011-16, 2011), *available at* http://ssrn.com/abstract=1824783 (interpreting Harold Koh's targeted killing speech as envisioning "self-defense uses of force against nonstate actors . . . which do not (yet) rise the [non-international armed conflict] threshold" but that still must "meet the customary standards of necessity, distinction, and proportionality in carrying it out, even if not formally part of an armed conflict").

161 *See* Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), 2005 I.C.J. 168, ¶ 216 (Dec. 19); Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136, ¶ 106 (July 9); Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J 226, ¶ 25 (July 8).

defense paradigms apply, targeted killings are not further restricted by IHRL.

Outside of these paradigms, however, targeted killings must comply with the relevant IHRL provisions in full. The primary restriction on targeting under IHRL is the right to life.[162] The right to life permits targeted killings only in "the most extreme circumstances, such as to prevent a concrete and immediate danger of death or serious physical injury."[163] Furthermore, it imposes a clear requirement that there be no non-lethal means available that could prevent such harm.[164] Though the applicability of IHRL is not entirely dispositive of the question of the legality of a particular targeted killing, much of U.S. targeting practice would be unlawful under IHRL.

D. *A Typology of Problems for Procedure to Solve*

Before turning to the question of false legitimation, it is worth noting the distinct types of substantive targeting issues that procedure could seek to address. First, there are issues whose resolution is necessary in order to determine the proper legal paradigm in which to assess the legality of a particular targeted killing. Second, there are issues regarding the proper interpretation of specific legal standards within each paradigm identified above. Third, there are issues related to noncompliance with legal standards as a result of intelligence errors and other factual problems. And fourth, there are issues regarding the mere existence of a norm.

Immediately, one can see that these distinct types of problems might require distinct types of procedures. Asking whether an armed conflict exists, and thus whether the armed conflict paradigm applies, is a very different inquiry than asking whether IHL includes a least harmful means requirement. Similarly, procedures related to intelligence gathering would have vastly different secrecy implications than, say, procedures focused on mere legal interpretations of IHL norms. Such differences will inform the discussion below.

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162 International Covenant on Civil and Political Rights art. 6, Mar. 23, 1976, 999 U.N.T.S. 171 [hereinafter ICCPR] ("No one shall be arbitrarily deprived of his life."). While the United States does not accept the applicability of the ICCPR beyond U.S. borders, most scholars assume that no administration would claim a right to commit extrajudicial killings. *See, e.g.*, Chesney, *Who May Be Killed?*, *supra* note 11, at 50; Radsan & Murphy, *Evolution*, *supra* note 23, at 463 n.21.

163 MELZER, *supra* note 146, at 59.

164 Alston, *supra* note 8, at 303.

III. AVOIDING FALSE LEGITIMATION IN THE TARGETED KILLING CONTEXT

This Article began by observing that false legitimation occurs when procedure legitimates despite one of three substantive shortcomings: Procedure might improperly presume answers to legal questions, insufficiently address substantive problems, or disregard legal issues in their entirety. This Article also reviewed the various legal issues implicated by the U.S. targeted killing program, distinguishing among four general types of issues for procedure to address. It is now time to bring these two discussions together and ask how to avoid false legitimation in the targeting context.

This Part proceeds in four steps. First, it sets forth three current proposals for targeting procedures that will serve as background for the analysis to follow. Second, this Part turns to the heart of this Article's analysis. Organized around the three mechanisms by which false legitimation occurs, it assesses the degree to which current procedural proposals entail false legitimation and explores possible ways targeting procedures could avoid false legitimation in the first place. Third, after considering the ways in which legitimation becomes false, this Part considers whether, and to what degree, different targeting procedures stand to confer legitimacy on targeted killing at all. Finally, this Part concludes by considering the possible inevitability of false legitimation and discusses the value that the false legitimation concept nonetheless continues to have.

A. *The Current Proposals*

Numerous internal procedures appear to govern targeted killing already, though reports suggest these have varied both over time and with regard to the characteristics of the target.[165] For those targets that appeared on a government kill list, the general process appears to be as follows: Before appearing on a kill list, a name passes through numerous agencies, each analyzing intelligence and assessing the propriety of the target.[166] For at least some targets, the president must give his approval.[167] Those weighing in on the nomination process include

165 For detailed accounts of the intraexecutive procedures believed to be currently in operation, see McNeal, *supra* note 15, at 730–58 (relying, in part, on the belief that CIA procedures resemble those used by the military), and Alston, *supra* note 8, at 341–65; *see also* DANIEL KLAIDMAN, KILL OR CAPTURE: THE WAR ON TERROR AND THE SOUL OF THE OBAMA PRESIDENCY (2012).

166 McNeal, *supra* note 15, at 701–29.

167 *Id.* at 729.

intelligence analysts, policy and military strategists, and lawyers.[168] Before the actual execution of a targeted killing, there are other procedures through which additional legal and policy issues are considered.[169]

Despite these intraexecutive procedures, commentators have begun to advance proposals for additional targeted killing procedures, often responding to a perceived lack of accountability or legitimacy.[170] The following section will set forth the basic contours for two ex ante mechanisms (an Article III "drone court" and an intraexecutive pre-strike panel) and two ex post (a post-strike investigative body subject to some form of independent oversight and *Bivens*-style damages actions). An analysis of these proposals through the lens of false legitimation will follow.

1. Ex Ante Approval by an Article III Court

Proposals for a judicial body that would approve individuals for targeted killings have garnered much attention, particularly in the media[171] and, more recently, in Washington.[172] Proponents of such a

168 *Id.* at 728–29.

169 *Id.*

170 *See supra* note 16.

171 *See, e.g.*, David Byman, *Do Targeted Killings Work?*, FOREIGN AFFAIRS, Mar.–Apr. 2006, at 111 (suggesting that to add legitimacy to targeting operations, a "small court appointed by the chief justice of the Supreme Court could be created to review suspects' names and the evidence against them"); Editorial, *A Court for Targeted Killings*, N.Y. TIMES, Feb. 14, 2013, at A26 (proposing FISC-like court for "suspected terrorists that the executive branch chooses to kill overseas, particularly in the case of American citizens"); Editorial, *The Power To Kill*, N.Y. TIMES, Mar. 11, 2012, at SR10 (suggesting the "decision to kill an American citizen should have judicial review, perhaps by a special court like the Foreign Intelligence Surveillance Court"); Editorial, *When the Government Kills*, L.A. TIMES (July 29, 2012), http://articles.latimes.com/2012/jul/29/opinion/la-ed-drone-killings-lawsuit-20120729 ("[I]f the United States is going to continue down the troubling road of state-sponsored assassination, Congress should, at the very least, require that a court play some role, as the Foreign Intelligence Surveillance Court does with the electronic surveillance of suspected foreign terrorists.").

172 *See, e.g.*, Shane, *supra* note 3 ("An administration official who spoke of the White House deliberations on the condition of anonymity said President Obama had asked his security and legal advisers a year ago 'to see how you could have an independent review' of planned strikes. 'That includes possible judicial review.'"). Senators Feinstein, Leahy, Grassley, and King, among others, also have spoken approvingly of such a court. *Open Hearing on the Nomination of John O. Brennan to be Director of the Central Intelligence Agency Before the S. Select Comm. on Intel.*, 113th Cong. 122–23 (2013) (statement of Sen. Angus King); Carlo Muñoz, *Sens. Feinstein, Leahy Push for Court Oversight of Armed Drone Strikes*, THE HILL (Feb. 10, 2013), http://thehill.com/blogs/defcon-hill/policy-and-strategy/282033-feinstein-leahy-push-for-court-oversight-of-armed-drone-strikes-. Former Defense Secretary Robert Gates has indicated support for the idea as well. State of the Union with Candy Crowley, *Robert Gates: I'm a "Big Advocate" of Drones*, CNN.COM (Feb. 10, 2013), http://sotu.blogs.cnn.com/2013/02/10/robert-gates-im-a-big-advocate-of-drones.

court draw inspiration from the Foreign Intelligence Surveillance Court (FISC), which oversees the special process by which the government obtains orders (i.e., warrants) for foreign intelligence surveillance.[173] The intuition is that if the FISC can accommodate the national security interests of the executive (e.g., the need for speedy decisionmaking) in one setting, a similar court should be able to do so in the targeting context.[174]

The proposed operation of the court is straightforward. The government would present evidence regarding a particular individual it wanted to kill in a closed setting. The target's interests would be represented in some fashion, either through the advocacy of an appointed independent representative or through the cross-examination of the government by the court itself.[175] After consideration of the evidence, the court either would approve the target for inclusion on a kill list or would authorize a specific operation against him.[176]

Many proponents of such a court envision that only targeted killings of U.S. citizens would fall within its purview.[177] While such a restriction would entail a host of additional legitimation concerns, this Article will consider proposals for ex ante judicial review as if they covered all targeted killings.

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173 *See* 50 U.S.C. § 1803 (2012).

174 Guiora, *supra* note 16, at 6 (arguing logistics of ex ante judicial review are "far less daunting than might seem" and proposing that existing FISA court take on the role of approving targeted killing operations).

175 *Id.* ("While the model is different—a defense attorney cannot question state witnesses—the court will assume a dual role. In this dual role capacity the court will cross-examine the representative of the intelligence community and subsequently rule as to the information's admissibility."). *But see* Benjamin Wittes, *Carrie Cordero on FISA Court Lessons for a "Drone Court,"* LAWFARE (Feb. 18, 2013), http://www.lawfareblog.com/2013/02/carrie-cordero-on-fisa-court-lessons-for-a-drone-court ("The FISC is an active, scrutinizing, deliberative body, and that fact may not blend well with operational demands [of targeted killing]."). Following the surveillance revelations of Edward Snowden, Senator Richard Blumenthal introduced a bill that called for the appointment of "special advocate" to oppose the government in FISC proceedings. FISA Court Reform Act, S. 1467, 113th Cong. (2013). Interestingly, former NSA Director Michael Hayden himself saw the potential for false legitimation in such a proposal, calling the appointment of an advocate a "cosmetic change" that would "make people feel better" without affecting the substance of surveillance programs. Andrea Peterson, *The House is Divided over Almost Everything. But FISA Court Reform Might Be Able to Unite It*, WASH. POST (Oct. 1, 2013, 5:37 PM), http://www.washingtonpost.com/blogs/the-switch/wp/2013/10/01/the-house-is-divided-over-almost-everything-but-fisa-court-reform-might-be-able-to-unite-it.

176 *See* Robert Chesney, *A FISC for Drone Strikes? A Few Points to Consider*, LAWFARE (Feb. 7, 2013, 9:11 PM), http://www.lawfareblog.com/2013/02/a-fisc-for-drone-strikes-a-few-points-to-consider (noting the distinction between these two variations of ex ante approval and suggesting that current proposals largely envision judicial review of the kill-list nomination process).

177 *E.g.*, Editorial, *The Power To Kill*, *supra* note 171.

2. Ex Ante Approval by an Intraexecutive Panel

A second proposal is the Article II corollary to the Article III drone court. The government would need to prove the legality of a proposed targeted killing to a panel of national security officials.[178] The president would appoint "an ombudsman or personal representative with advocacy responsibilities for each potential drone target."[179] Neal Katyal suggests that the decisions of the panel would go to Congress; if the president wanted to overrule the panel, he could, though he would have to explain such a decision to Congress as well.[180] Such proposals build off of a number of the critiques of proposals for ex ante judicial review; some argue that a FISC-like targeted killing court would violate separation of powers, while others find judges ill-equipped to deal with decisions of a military nature.[181]

3. Ex Post Investigation with Independent Oversight

In Israel, targeted killings are followed by an independent and (presumptively) public investigation "regarding the precision of the identification of the target and the circumstances of the attack," which is subject to judicial review in "appropriate cases."[182] A number of American scholars have used the Israeli model as a basis for similar proposals in the United States.[183] Behind these proposals is the notion

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178 Crandall, *supra* note 16, at 86 (identifying CSRT-type procedure as a way to satisfy due process); Neal K. Katyal, Op-Ed., *Who Will Mind the Drones?*, N.Y. TIMES, Feb. 21, 2013, at A27 (proposing panel made up primarily of national security advisors).

179 Crandall, *supra* note 16, at 87; *see also* Katyal, *supra* note 178 (suggesting that lawyers would represent both sides).

180 Katyal, *supra* note 178.

181 *See, e.g.*, *id.* ("[T]here is no true precedent for interposing courts into military decisions about who, what and when to strike militarily. Putting aside the serious constitutional implications of such a proposal, courts are simply not institutionally equipped to play such a role.").

182 HCJ 769/02 Pub. Comm. Against Torture in Isr. v. Gov't of Isr. (*Targeting Decision*), 62(1) PD 507, ¶ 40 [2006] (Isr.) (requiring objective, ex post executive review of targeted killings); *id.* ¶ 54 (requiring judicial review in "appropriate cases").

183 Evers-Mushovic & Hughes, *supra* note 16, at 181 & n.132 (drawing on the Israeli *Targeting Decision* to suggest that "Executive Branch should conduct an independent and impartial investigation of all operations that target an American terrorist off a recognized battlefield to ensure that the [rules of engagement] and administrative procedures we have proposed are followed"); Murphy & Radsan, *Due Process*, *supra* note 16, at 446 ("But if due process for a targeted killing should not take the form of pre-deprivation notice and an opportunity to be heard, what form should it take? . . . The Supreme Court of Israel's [*Targeting Decision*] is again informative."); Radsan & Murphy, *Measure*, *supra* note 16, at 1233 ("Scrutiny of the CIA can take many forms. Some might be too weak to do any good; others might be so strong as to unduly expose intelligence sources and methods or to cause decision makers to become unduly risk averse. Once again, we confront the Goldilocks problem of selecting a

that an ex post investigation can promote compliance with governing legal norms by assessing whether the correct questions were asked ex ante,[184] similar to U.S. courts' largely procedural review of agencies in order to protect against arbitrary decisionmaking.[185] Oversight of executive-led investigations, whether by congressional intelligence committees, inspectors general, or courts, would help ensure impartiality.[186]

Proposals for an ex post investigatory body envision that an investigation would begin with a set of standards against which to evaluate a specific targeted killing. Murphy and Radsan, for instance, propose an investigation into the following:

> (1) all grounds for concluding the target is a combatant member of [Al Qaeda/Taliban]; (2) any grounds for doubting this status; (3) whether killing the target creates a concrete and direct military advantage; (4) whether that advantage is sufficient to justify any risk of collateral damage, and, if any, how much; and (5) any military or political disadvantages that might result from a strike against the target.[187]

Others indicate that the investigation should inquire into compliance with IHL.[188]

4. Ex Post Damages Actions

Finally, some argue that the best—or "least-worst"[189]—check on the executive's targeting authority is judicial review through damages actions.[190] Certain proponents suggest such a remedy is already available

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model that is 'just right' for balancing competing concerns. The Israeli Supreme Court's analysis of targeted killing provides a useful starting point for this model.").

184 *E.g.*, Blum & Heymann, *supra* note 9, at 159.

185 Radsan & Murphy, *Measure*, *supra* note 16, at 1235 (comparing ex post investigatory model to judicial review of agencies, which is deferential but makes sure the right questions were asked).

186 Evers-Mushovic & Hughes, *supra* note 16, at 181–82 ("Once the investigation is completed it should be delivered to both the U.S. Senate and House of Representatives Committees on Intelligence in order for Congress to wield its oversight powers."); Radsan & Murphy, *Measure*, *supra* note 16, at 1236–37.

187 Radsan & Murphy, *Measure*, *supra* note 16, at 1235.

188 Evers-Mushovic & Hughes, *supra* note 16, at 176 ("We believe the [law of armed conflict] applies when combating transnational terrorist organizations.").

189 Vladeck, *supra* note 16, at 26.

190 *Id.* at 24–27; Jameel Jaffer, *Judicial Review of Targeted Killings*, 126 HARV. L. REV. F. 185 (2013) (arguing that *Bivens* actions are superior to ex ante review by a specialized targeted killing court); Jameel Jaffer, *Targeted Killing and the Courts: A Response to Alan Dershowitz*, 37 WM. MITCHELL L. REV. 5315, 5318–19 (2011) ("[T]he courts should play a role in overseeing the targeted killing program. They should do this by articulating the legal standards under which the government can permissibly use lethal force against individuals who have not been charged with crimes, and by reviewing, after lethal force has been used, whether the

to U.S. citizens under *Bivens*[191]—a strategy that the ACLU and the Center for Constitutional Rights have pursued in the case of Anwar Al-Aulaqi, Samir Khan, and Abdulrahman Al-Aulaqi, citizens confirmed to have been killed in U.S. drone strikes.[192] Stephen Vladeck, on the other hand, urges Congress to create an explicit cause of action that would make such ex post judicial review available in the case of non-citizen targeted killings.[193] Regardless of the particulars, supporters of ex post judicial review envision that through careful adjudication of specific cases, courts would articulate the rules with which the targeted killing program must comply more broadly.

B. *How to Avoid False Legitimation in the Targeting Context*

This Article already illustrated how false legitimation occurs through three distinct mechanisms: presumption, insufficiency, and disregard. It now asks how to avoid false legitimation by accounting for these three pitfalls in the design of targeted killing procedures. It does so by identifying the risks of false legitimation in the procedural proposals outlined above and by exploring alternative procedures that might better account for the various substantive issues at stake.

1. False Legitimation Through Presumption

Legitimation will be false when the legitimating procedure improperly presumes answers to legal questions from which legal consequences flow. The typology of targeting issues above included a category for those issues that bear on the legal framework governing a particular targeted killing. Procedures that presume that a particular legal paradigm (armed conflict, self-defense, or law enforcement) applies stand to falsely legitimate through such a presumption.

Through an exploration of current targeted killing procedural proposals, one can better understand how such false legitimation might occur. All three of the proposals above presume that a clear, and

government has complied with the legal standards."); Murphy & Radsan, *Due Process*, *supra* note 16, at 446.

191 Bivens v. Six Unknown Named Agents, 403 U.S. 388 (1971).

192 Plaintiffs' Opposition to Defendant's Motion to Dismiss at 15–16, Al-Aulaqi v. Panetta, No. 12-1192 (D.D.C. Feb. 5, 2013), *available at* https://www.aclu.org/files/assets/tk2_opposition_filed_plus_declaration.pdf. In April 2014, the district court dismissed the lawsuit concluding that the ongoing military conflict and Anwar Al-Aulaqi's status as a terrorist leader were "special factors" that "preclude the implication of a *Bivens* remedy." Al-Aulaqi v. Panetta, No. 12-1192, slip op. at 27–38 (D.D.C. Apr. 4, 2014), *available at* https://www.aclu.org/sites/default/files/assets/tk_2_opinion.pdf.

193 Vladeck, *supra* note 16, at 24.

invariable, legal framework governs U.S. targeting operations. In reviewing proposals for ex ante judicial review, former Pentagon Chief Counsel Jeh Johnson presumes that they seek to ensure compliance with the "criteria for targeting a U.S. citizen set forth in the Attorney General's speech" in March 2011, a primary element of which is the laws of war.[194] Similarly, Amos Guiora argues that the benefits of a FISC-like court would derive from its ability to reduce operational errors related to the proportionality requirements of IHL and self-defense.[195] Yet, not a single iteration of the ex ante judicial review proposal involves a mechanism by which the court would determine if the armed conflict or self-defense paradigms are the proper legal framework. The Article II corollary to ex ante judicial review appears to suffer from the same flaw.[196]

Proposals for an ex post investigatory body all assume that the investigation begins with a set of standards against which to evaluate a specific targeted killing. While the standards set forth by Murphy and Radsan, for instance, do not map perfectly on to any legal paradigm discussed above,[197] the authors elsewhere suggest that they hew to the requirements of IHL.[198] Other proponents of such a body explicitly presume that IHL applies.[199] Unsurprisingly, the inspiration for these proposals—the Israeli model—embodied the same presumption.[200]

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194 Jeh Johnson, A "Drone Court": Some Pros and Cons, Keynote Address at the Center on National Security at Fordham Law School (Mar. 18, 2013), *available at* http://www.lawfareblog.com/2013/03/jeh-johnson-speech-on-a-drone-court-some-pros-and-cons (citing Eric Holder, Address at Northwestern University School of Law (Mar. 5, 2011), *available at* http://www.justice.gov/iso/opa/ag/speeches/2012/ag-speech-1203051.html).

195 Guiora, *supra* note 16, at 3 ("In the current environment, the international principle of proportionality is out of proportion. Expanded notions of imminence, flexibly and broadly defined, married with increasing reliance on sleek new technology, lie at the heart of re-conceptions of proportionality capacious enough to encompass nearly all targeting decisions."); *id.* at 12 ("Effective counterterrorism requires the state to apply self-imposed restraint, otherwise violations of both international law and morality in armed conflict are all but inevitable."); *id.* at 13 ("Targeted killing rests on the specific identification of individuals who pose an imminent threat to the state's national security and are, therefore, legitimate targets within the framework of lawful self-defense.").

196 For example, Carla Crandall indicates that an intraexecutive panel's ex ante approval would render an individual "subject to unlimited military force" in the future. Crandall, *supra* note 16, at 86. This presumes the applicability of the armed conflict paradigm, without appreciation for its limits in the current national security context as well as the fact that the current armed conflict will end at some point in the future.

197 *See supra* text accompanying note 187.

198 *See* Radsan & Murphy, *Measure*, *supra* note 16, at 1224 ("[T]his Article focuses on what these standards and procedures should be to comply with IHL.").

199 Evers-Mushovic & Hughes, *supra* note 16, at 176.

200 The Israeli *Targeting Decision* itself has been criticized for legitimating the armed conflict framework. The Israeli Supreme Court premised its development of the investigatory procedure on a finding that the laws applicable to international armed conflicts applied. *See* HCJ 769/02 Pub. Comm. Against Torture in Isr. v. Gov't of Isr. (*Targeting Decision*), 62(1) PD 507, ¶¶ 18, 21 [2006] (Isr.); Alston, *supra* note 8, at 417 ("The final question that needs to be considered by U.S. policy-makers contemplating the adoption of Israel's approach is the legal

While these proposals' presumption of the applicable legal paradigm is clear, such a presumption will only lead to false legitimation if (i) the procedure actually provides greater legitimacy to the U.S. targeted killing program and (ii) the presumption will lead to "false" outcomes. Regarding the former, while the notion that procedure legitimates is the starting point for this paper, variation in the legitimating effect of particular procedures will be discussed below.[201] The latter issue is likely more divisive; as long as commentators debate the applicability and scope of the armed conflict, self-defense, and law enforcement paradigms, there will be disagreement over the extent to which the presumptions at issue here lead to false findings of legality. If one believes that IHL governs all targeted killings, a procedure that simply presumes the application of IHL will not raise false legitimation concerns.

At the core, however, most would agree that the armed conflict and self-defense paradigms are not limitless. War is not perpetual, and the threat of armed attack is not constant. A procedure that presumes otherwise risks false legitimation. It is thus necessary to return to the issue at the heart of this Article and ask how to avoid false legitimation in the targeted killing context.

To explore this question as it applies to false legitimation through presumption, this Article considers the temporal limits of the armed conflict paradigm, leaving aside any geographic limitations on targeted killing that IHL may or may not impose. Simply put, armed conflicts do not last forever. Even from the helm of the U.S. targeted killing program, John Brennan has expressed his belief that al Qaeda is "on the road to destruction" and has expressed his desire that "this war against al-Qa'ida . . . be over as soon as possible, and not a moment longer."[202]

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basis on which such a policy can be justified. The Israeli situation is highly unusual in that it is grounded in a finding by the Supreme Court that the rules applicable are those governing international armed conflicts."). Years later, in *Anonymous v. State of Israel*, the Supreme Court considered the legality of the Unlawful Combatants Law, which aimed to ensure Israel's compliance with IHL detention requirements. CrimA 6659/06 Anonymous v. State of Isr., 62(4) PD 329 [2008] (Isr.). The legality of the law turned on the applicable legal framework, and the court was satisfied in citing to its *Targeting Decision* to establish the existence of an international armed conflict and applicability of IHL. *Id.* ¶ 9; *see* Henning Lahmann, *The Israeli Approach to Detain Terrorist Suspects and International Humanitarian Law: The Decision* Anonymous v. State of Israel, 69 ZAÖRV 347, 350 (2009) (discussing citation to *Targeting Decision* in later case upholding Israeli Unlawful Combatant Law and asserting that "this meager reference to its own jurisprudence on this matter might not be sufficient to determine the governing legal regime. In fact, it bears serious problems and is ultimately not convincing."). The possibility that factual differences between the two cases might have required the application of different legal frameworks underscores the risk of false legitimation that the procedure entails. *See id.* at 353 (discussing how the logic of *Targeting Decision* cannot withstand scrutiny in later case assessing detention in Gaza).

201 *See infra* Part III.C.

202 John O. Brennan, The Ethics and Efficacy of the President's Counterterrorism Strategy, Remarks to the Woodrow Wilson International Center for Scholars (Apr. 30, 2012), *available*

When this occurs, the armed conflict paradigm, at least as it involves al Qaeda, no longer applies. Yet, if the mechanism for determining the legality of targeting operations presumes the existence of an armed conflict, targeted killing may continue unabated. Because the end of an armed conflict would have a significant effect on the scope of permissible targeted killing, any procedure looking to avoid false legitimation must allow for a determination that an armed conflict satisfying the criteria set out above[203] does not exist.

The current proposals for targeted killing procedures do not allow for such a determination. A number of factors bear on whether they could be modified to remedy this flaw. First, ex post mechanisms may be more appropriate than ex ante mechanisms given the broad and consequential nature of finding that an armed conflict does or does not exist. Many of the current proposals seek to facilitate consideration and review of case-specific issues, the implications of which are more limited than the question of an armed conflict's existence. In a context where swift action is theoretically needed, ex ante decisionmaking may be insufficient to address more consequential issues. Courts considering the armed conflict question amidst exigent circumstances may simply defer to the executive's identification of an armed conflict. Thus, ex post procedures may offer more fertile ground for actual deliberation of such a far-reaching legal question.

Second, an adversarial procedure may be more likely to address the armed conflict question than an investigatory process. Whether an armed conflict exists is a legal question that is tied to, but distinct from, the conception that political actors have regarding the national security threats a country faces. Government officials arguably have less incentive to question the armed conflict-based architecture of U.S. counterterrorism than they do to reduce operational errors and minimize collateral damage, as it will never be politically harmful to address the latter two issues. Appointment of a government official to serve as a stand-in representative, as in both ex ante proposals explored above, may be preferred to the investigatory model. However, a willingness to contest the armed conflict paradigm may only come from a true representative of the targeted individual's interests.

Putting these two observations together, one might think that an ex post, adversarial procedure, such as damages actions,[204] is most appropriate to address the armed conflict question. However, a third factor gives reason for pause. The existence (or not) of an armed conflict

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at http://www.lawfareblog.com/2012/04/brennanspeech; *see also* Obama, *supra* note 109 (recognizing the need "to determine how we can continue to fight terrorists without keeping America on a perpetual war-time footing").

203 *See supra* Part II.A.

204 *See supra* Part III.A.4.

does not necessarily vary by case; that is, an armed conflict identified in one case will likely hold for many cases to follow, and vice versa. The ideal procedure for inquiring into the existence of a conflict may not attach to every proposed targeted killing. Yet, the current proposals operate on such a case-by-case basis. One possible risk of modifying the current proposals to include the armed conflict question is that the adjudicator may adopt an overbroad form of res judicata: After the armed conflict question has been answered once, it is settled for all cases in the future. While possible that the adjudicator may choose to revisit the question, it may be desirable to have a procedure that guarantees such review.[205]

One possible procedural solution is a revisit-and-revise mechanism, under which a renewed finding of an armed conflict is required for the case-by-case procedural mechanism (e.g., ex post judicial review) to continue in operation. Sunset clauses are used throughout the national security realm, often where legislation is passed in response to emergencies.[206] In general, they put an expiration date on laws or policies authorizing governmental action; expiration is thought to lead to deliberation over and reassessment of whether the policy is wise or still needed.[207]

While often imbedded in legislation, sunset clauses can be self-imposed by the executive branch and even result in changed policies without public awareness.[208] For instance, the Terrorist Surveillance Program (TSP)—the Bush administration's secret wiretapping program—required that the president reauthorize the program every forty-five days and that the attorney general certify the legality of the program with each reauthorization.[209] As a result of this sunset clause, then-Assistant Attorney General Jack Goldsmith reviewed the earlier legal memos that the Justice Department had written regarding the legality of the TSP.[210] Legal concerns pushed the Justice Department to decide to withdraw its approval of the program, a decision made by

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205 Similar considerations might arise with respect to status-based determinations. For example, a court might determine that membership in a particular terrorist group justifies the targeted killing of any individual member in self-defense. It is likely that the court would want to avoid relitigation of group-specific questions for every targeted killing where organizational membership was proven. However, given that the threat posed by a particular terrorist group varies over time—and the legality of targeting would vary with it—it would appear necessary to guarantee reevaluation of the group with some degree of frequency.

206 John E. Finn, *Sunset Clauses and Democratic Deliberation: Assessing the Significance of Sunset Provision in Antiterrorism Legislation*, 48 COLUM. J. TRANSNAT'L L. 442, 443–44 (2010).

207 *Id.* at 445 (identifying logic behind sunset clauses).

208 For example, on the day that its brief was due in *Rasul v. Bush*, the Bush administration decided to implement a system of annual review of the status of Guantanamo detainees. Martinez, *supra* note 17, at 1050.

209 *E.g.*, Clark, *supra* note 13, at 392–93.

210 *Id.* at 394.

Deputy Attorney General James Comey while Attorney General John Ashcroft was in the hospital.[211] The pending decision prompted White House Counsel Alberto Gonzales to rush to Ashcroft's hospital room, leading to a dramatic confrontation between Gonzales and Justice Department attorneys.[212] Though the Bush administration initially moved to reauthorize the TSP without the attorney general's approval, threats of Justice Department resignations prompted the president to modify the program to accommodate the Justice Department's concerns.[213]

While the TSP sunset clause ultimately facilitated substantive changes, however limited, the example also suggests sunset clauses may be a fragile and limited tool. Indeed, many sunset clauses fail to realize the benefits they promise.[214] Sunset clauses may even present their own legitimation concerns, as the supposed temporary nature of a provision may justify expansive government powers that later become "normalized" and permanent.[215]

Nevertheless, there are reasons that sunset clauses on the existence of an armed conflict are worth further consideration in the targeted killing context. First, reassessment of this legal question is distinct from reconsideration of the policy question of whether to continue emergency counterterrorism measures. Depending on who was involved in the decision, it might be less susceptible to the political pressures that often stunt sunset clauses.[216] Second, to make the legal case for the continued existence of an armed conflict, the executive would be legally required to present *new* information; in contrast, to make the policy case for continued need for emergency powers, policymakers can choose not to avail themselves of new and improved information.[217]

Ultimately, this Article makes no claim as to the superiority of sunset clauses, but points to this procedural mechanism to illustrate a more basic claim: Avoiding false legitimation through presumption may require a procedural mechanism far different from those that have been advanced so far.

Yet, the temporal limits of an armed conflict present the only issue for which false legitimation through presumption might occur. The legal paradigms discussed above may be geographically constrained, or the standards within a particular legal framework could vary based on

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211 *Id.*

212 *Id.*

213 *Id.*

214 *See* Finn, *supra* note 206, at 501.

215 *Id.* at 490.

216 *Cf. id.* at 501 ("In most cases, the potential deliberative benefits of sunset clauses are not realized. They are instead the victim of a more powerful political dynamic.").

217 *Id.* at 497–98.

the location of the targeted killing.[218] Geographic presumptions may risk false legitimation, though would appear to demand a procedural solution distinct from sunset provisions.

In general, the legal paradigms under which targeted killing occurs are susceptible to challenge and may vary on a case-by-case basis. Avoiding false legitimation requires paradigm-specific issues be taken into account.

2. False Legitimation Through Insufficiency

Legitimation can also be false when the targeted killing procedure insufficiently addresses the legal issues that it purports to solve.[219] At its most basic level, false legitimation through insufficiency is simply the result of bad procedure. For example, a procedure that seeks to ensure compliance with the IHL principle of proportionality may well legitimate the practice of targeted killing; yet, if that procedure allows massive collateral damage to persist, such legitimation will be false because the procedure itself is insufficient.

The solution to this problem of insufficiency is straightforward—design a better procedure—yet deceptively so. Indeed, the entire area of scholarship from which this Article emerges purports to offer better procedural solutions. Nevertheless, the preceding section already demonstrated how attention to the nature of the substantive issue at hand could help to prevent false legitimation through presumption; the same lesson applies here as well.

The typology in Part II.D identified a broad division between compliance issues resulting from legal errors (e.g., incorrect interpretations of governing legal standards) and factual errors (e.g., intelligence failures).[220] To explore how distinguishing between these two types of errors assists in preventing false legitimation, assume that the armed conflict paradigm governs, and the objective is to ensure compliance with the IHL principle of distinction. The United States might fall short of its obligations for two distinct reasons: First, the government might operate under an unsound and permissive

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218 *See* Jennifer C. Daskal, *The Geography of the Battlefield: A Framework for Detention and Targeting Outside the "Hot" Conflict Zone*, 161 U. PA. L. REV. 1165, 1172 (2013) (proposing that even if "the conflict extends to wherever the enemy threat is found . . . more stringent rules of conduct outside zones of active hostilities" should apply); Obama, *supra* note 109.

219 In some instances, it may be difficult to distinguish insufficiency from situations in which the type of procedure influences the interpretation of legal norms. For example, an ex ante procedure might well have a different effect on norms with a temporal element (e.g., imminence) than would an ex post procedure. Whether the ex ante procedure is insufficient or whether it simply informs the meaning of a general norm will depend on the prevailing understanding of the norm prior to the procedure's adoption.

220 *See supra* Part II.D.

interpretation of the legal standard of distinction. Second, intelligence errors might lead to instances of mistaken identity, causing the government to wrongly target a civilian. Though both related to distinction, the two types of errors would call for drastically different procedures.

Many of the proposals discussed above seem to focus on ensuring that quality intelligence is used to justify targeted killings.[221] Amos Guiora argues that the benefit of a FISC-like court derives from "the process of preparing and submitting available intelligence information to a court [which] would significantly contribute to minimizing operational error that otherwise would occur."[222] Carla Crandall also suggests that factual issues lie at the heart of her proposed pre-strike tribunal, indicating that one of the "most difficult aspects" is "determining the standard of proof that would be required to legitimize the targeting of an individual."[223] Similarly, many of the public speeches and strategic leaks by government officials regarding existing intraexecutive procedures emphasize the various stages of factual review of the evidence on which targeting operations are justified.[224]

However, if the problem lies not in faulty intelligence but in the U.S. government's interpretation of the legal principle of distinction,[225] then these intelligence-improving mechanisms may be insufficient to prevent protected civilians from being improperly targeted. That is, targeted killing procedures that only address factual errors might legitimate, but they would do so falsely.

In contrast, other commentators have called for public disclosure of the legal rationales justifying targeted killing, while supporting continued secrecy surrounding the evidentiary basis for particular targeting operations. Jack Goldsmith has argued that the U.S. government should offer a

> thorough public explanation of the legal basis for [targeted killings that] would allow experts in the press, the academy, and Congress to scrutinize and criticize it . . . . In a real sense, legal accountability for

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221 *See supra* Part III.A.

222 Guiora, *supra* note 16, at 6.

223 Crandall, *supra* note 16, at 87.

224 *See, e.g.*, Entous, Gorman & Barnes, *supra* note 106; Mark Hosenball, *Secret Panel Can Put Americans on "Kill List,"* REUTERS (Oct. 5, 2011, 7:59 PM), http://www.reuters.com/article/2011/10/05/us-cia-killlist-idUSTRE79475C20111005.

225 For example, some observers believe that the United States presumes that all military-aged males in certain areas satisfy the principle of distinction. *See, e.g.*, *Civilian Harm from Drone Strikes: Assessing Limitations & Responding to Harm: Hearing Before the Cong. Progressive Caucus*, 113th Cong. 5 (May 8, 2013) (statement of Naureen Shah, Lecturer-in-Law & Acting Director of Columbia Law School Human Rights Clinic), *available at* http://cpc.grijalva.house.gov/uploads/Naureen%20Shah%20DronesHearingWrittenTestimony1.pdf

> the practice of targeted killings depends on a thorough public legal explanation by the administration.[226]

Yet, Goldsmith suggests that such a disclosure can be done without revealing the underlying intelligence information[227]—in effect, proposing a process that emphasizes legal issues over factual ones. Such a "public rules, private facts" approach to transparency could engender false legitimation as well, as the public may feel more comfortable with targeted killing knowing the rules that govern such operations.[228] Yet, if intelligence errors lead the U.S. government to target civilians, transparency of legal rules will be insufficient to ensure compliance with the principle of distinction.

The factual/legal distinction is but one consideration that might bear on the sufficiency of any given procedure. Again, this Article does not identify the ideal procedure to govern targeted killings, but rather seeks to exemplify the problem of false legitimation and illustrate ways in which accounting for the phenomenon can facilitate better procedural design.

3. False Legitimation Through Disregard

This Article has looked at targeted killing procedures that presume answers to legal questions as well as procedures that purport to answer legal questions, but do so insufficiently. Sometimes, however, a procedure will simply ignore a legal issue in its entirety, resulting in false legitimation through disregard.

The ease with which such false legitimation can be identified appears to suggest a simple avoidance solution: Identify all relevant legal issues and ensure that the procedure in place (sufficiently) addresses each one. Indeed, part of the reason that this Article reviewed the substantive issues implicated by targeted killing was to illustrate that the current procedural proposals fall short of addressing all of these issues.

A more challenging issue emerges where there is debate over whether a legal norm exists at all. For instance, Part II.A recognized conflicting positions as to whether IHL imposes a least harmful means requirement.[229] A procedure that ensures that the United States does not undertake a targeted killing when a nonlethal means is available is very

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226 Jack Goldsmith, *Release the al-Aulaqi OLC Opinion, or Its Reasoning*, LAWFARE (Oct. 3, 2011, 7:45 AM), http://www.lawfareblog.com/2011/10/release-the-al-aulaqi-olc-opinion-or-its-reasoning.

227 *Id.*

228 *Cf.* Goldsmith, *supra* note 25 ("The criticisms of targeted killing have produced public debate . . . of targeted killings that ha[s] enhanced the legitimacy of the practice.").

229 *See supra* Part I.A.

different than a procedure that facilitates debate over whether a least harmful means requirement exists at all. Indeed, this Article has focused on procedures that implement recognized legal obligations, rather than procedures that seek to determine what these obligations might be in the first place. Yet, attention to the latter seems to be essential to the avoidance of false legitimation through disregard.

C. *Limiting Legitimation Itself*

Thus far, this Article has discussed how to avoid false legitimation by addressing the pitfalls of presumption, insufficiency, and disregard. There is yet another factor that informs whether a particular procedure leads to false legitimation: The degree to which the procedure legitimates the practice of targeted killing in the first place. A procedure rife with the problems discussed in the previous section might be an ineffective procedure, but if the procedure does not legitimate, there is no problem of false legitimation.

Attention to the "legitimation" prong of false legitimation can inform efforts to avoid false legitimation. For example, a nonjudicial procedural mechanism may be, unexpectedly, *more* attractive to those who are particularly concerned about false legitimation. Certain types of procedures are perhaps inherently more legitimating than others. *Boumediene*'s guarantee of habeas to Guantanamo detainees, for instance, seems to have been much more celebrated than the CSRT process, even though there are some suggestions that *Boumediene* itself did not have much of an independent effect on indefinite detention in practice.[230] In the targeted killing context, one might look for a similar phenomenon. Where a procedure more closely aligns with typical conceptions of due process, the procedure might legitimate the practice of targeted killing to a greater degree. Nonjudicial procedures would display the opposite tendencies; indeed, an intraexecutive pre-strike panel resembles in some ways the internal checks that already exist within the Executive Branch, and there is little indication that these procedures have had much of a legitimating effect.[231]

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230 Huq, *supra* note 90, at 421.

231 *See* Jo Becker & Scott Shane, *Secret 'Kill List' Proves a Test of Obama's Principles and Will*, N.Y. TIMES, May 29, 2012, at A1; Jack Goldsmith, *Neal Katyal on a Drone "National Security Court" Within the Executive Branch*, LAWFARE (Feb. 21, 2013, 8:49 PM), http://www.lawfareblog.com/2013/02/neal-katyal-on-a-drone-national-security-court-within-the-executive-branch (arguing that it is "hard to see how [Katyal's inter-executive tribunal proposal] is much different from what Klaidman and Becker-Shane describe as the extant and pretty robust executive branch process for high-value target list decisions (and targeting criteria more generally)"); *see also* McNeal, *supra* note 15, at 791 ("The experts' presentations would be nearly identical to the expert presentations currently being reviewed within the Executive Branch, with the exception that the judge has no familiarity with the issues."). For further

If two procedures suffer the same flaws and permit unlawful targeted killings to go unremedied, adopting the less legitimating, but equally ineffective, procedure would result in less false legitimation. It is difficult to say in the abstract when this would be the case. However, a deferential, even secret, court might be more legitimating, but no more effective, at policing targeted killing operations than an intraexecutive pre-strike tribunal.[232] In such circumstances, there may be reason to avoid procedural protections that, in the abstract, sound most robust.

Another reason to pay attention to the *type* of procedural mechanism is that legitimation, not legality, drives some procedural proposals.[233] Jeh Johnson argues that "[m]ost people, I think, do not have a quarrel with the bottom-line conclusions and results" of U.S. targeted killing operations.[234] "The problem is that the American public is suspicious of executive power shrouded in secrecy," and greater procedural protections are need for "added credibility."[235] An evaluation of procedural proposals through the lens of false legitimation should inspire skepticism toward those procedures that primarily seek to confer legitimacy, rather than ensure legality.

D. *The Value of the False Legitimation Concept Where Such Legitimation Is Inevitable*

Part III.B discussed how to avoid false legitimation by accounting for the three mechanisms by which legitimation becomes false. Part III.C discussed how efforts to avoid false legitimation also must consider the legitimating potential of a particular procedure. Throughout, this Article has taken account of the practical reality of targeted killing in an important way: by discussing procedure with an eye to the substantive legal issues that continue to divide commentators.

This Article has yet to account fully, however, for the factors that influence the plausibility of adopting any particular targeting procedure. Does the current substantive debate over targeted killing render it

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discussion of procedures currently in place, see *supra* notes 165–69 and accompanying text.

232 The ex ante nature of the proposed judicial review might be particularly responsible for the limited effect on substantive outcomes. Judges are remiss to prevent the government from responding to what it deems a credible threat. The result is greater deference or relaxation of legal standards, "add[ing] legitimacy to operations the legality of which might have otherwise been questioned ex post." Steve Vladeck, *Why a "Drone Court" Won't Work—But (Nominal) Damages Might . . .*, LAWFARE (Feb. 10, 2013, 5:12 PM), http://www.lawfareblog.com/2013/02/why-a-drone-court-wont-work.

233 *Cf.* Lunday & Rishikof, *supra* note 24, at 89 (arguing that long-term success in counterterrorism requires "legal legitimacy supremacy"); Charles J. Dunlap, Jr., *Lawfare: A Decisive Element of 21st-Century Conflicts?*, 54 JOINT FORCE Q. 34 (2009).

234 Johnson, *supra* note 194.

235 *Id.* Johnson ultimately questions how much credibility a secret court can provide. *Id.*

inevitable that any implemented procedure will involve some degree of false legitimation? And if false legitimation cannot be avoided, what benefits does the false legitimation lens offer to the current procedural debate?

A number of factors make the complete avoidance of false legitimation unlikely, at least in the short term. First, substantive disagreements may stand in the way of procedures that address all possible substantive issues of concern. For example, this Article already has discussed the possibility that false legitimation occurs as a result of the presumed applicability of IHL. Yet, many individuals believe a broad conflict with al Qaeda and associated groups exists, and will continue to exist; therefore, there is nothing invalid about presuming the applicability of the armed conflict paradigm. A procedure that contests this paradigm may be as undesirable to these individuals as the procedure that presumes the paradigm is to those individuals with differing understandings of the conflict with al Qaeda. In addition, many procedures may be ill suited to resolve disagreements over the existence of a norm itself. Without adequately spelled out substance, it is unlikely that procedure can simultaneously garner enough support for implementation and adequately address the myriad substantive legal issues identified above.

Second, there are a number of reasons a procedure might be unfeasible even if it would account perfectly for all substantive concerns related to targeted killing. A procedure might run into constitutional constraints, expose sensitive national security information, or be prohibitively costly, all of which are legitimation neutral. This Article does not argue that false legitimation should be the sole criterion when adopting a particular procedure, and there are numerous external factors that constrain the menu of possible procedural options.

This political and legal reality may mean that if any procedure is to be implemented by the U.S. government, it will be one of compromise, entailing some degree of false legitimation. For some critics of targeted killing, this may be the end of the inquiry; for them, any procedure that legitimates unlawful actions may itself be illegitimate.

Others, however, may prefer an imperfect procedure to no procedure at all. In the U.S. detention context, for example, some commentators have argued that the Supreme Court's jurisprudence has a "'least worst' quality to it."[236] Similarly, attorneys for the detainees tailored their arguments to particular tendencies courts have shown in times of crisis.[237] Such decisions reflect a calculation that the Court was

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236 Stephen I. Vladeck, *The Passive-Aggressive Virtues*, 111 COLUM. L. REV. SIDEBAR 122, 139 (2011); *see* Joseph Landau, *Muscular Procedure: Conditional Deference in the Executive Detention Cases*, 84 WASH. L. REV. 661 (2009).

237 *See, e.g.*, Katyal, *supra* note 19, at 1366–68.

unlikely to afford more robust procedural protections and that a more modest approach, despite some of the false legitimation concerns identified above, was thus preferable. Indeed, as a result, Lakhdar Boumediene himself was released after the district court reviewing his habeas petition found insufficient evidence to detain him as an enemy combatant.[238] In a world of divergent interests and compromise, the status quo may be preferable to the pre-*Boumediene* (or pre-*Hamdan* or pre-*Hamdi*) alternative; some individuals who worried about false legitimation may nevertheless accept the current habeas procedures as better than nothing.[239]

A similar, though ultimately opposite, dynamic can be seen in Alan Dershowitz's "torture warrants" proposal.[240] Soon after September 11, Dershowitz purposed that the government be allowed to seek a torture warrant for use in extraneous circumstances, such as the "ticking bomb" scenario.[241] His idea rested on the belief that torture would occur regardless, and "a formal requirement of a judicial warrant as a prerequisite to nonlethal torture would decrease the amount of physical violence directed against suspects" in the long-run.[242] Implicit in his proposal is a belief that the legitimating effects of the torture warrant procedure, stemming from the faulty presumption that torture is sometimes justified, were outweighed by the benefits of having such a procedure in place. The majority of commentators rejected his assessment of the costs and benefits of torture warrants, and, unlike what was seen in the detention context, Dershowitz's purposed procedure was seen to be worse than having no procedure at all.[243]

The concept of false legitimation continues to be useful even where the "ideal" procedure is off the table. First, it facilitates evaluation of whether the benefits of an imperfect procedure outweigh the costs. The most natural way to evaluate a proposed procedure is against what it claims to achieve: A procedure designed to reduce civilian casualties will be evaluated on how likely it is to achieve such a result. Evaluating the

238 Boumediene v. Bush, 579 F. Supp. 2d 191, 197–98 (D.D.C. 2008).

239 *But see, e.g.*, Lahav, *supra* note 42, at 468 (quoting JAG lawyer who argued that counsel for *Hamdan* "wrote their petition in a way that was bad for the system but was good for their guy—which I suppose is a good thing. They wanted to win, they wanted the win so they filed the petition—and their petition essentially invited the court to invite Congress into the party. And I think that they certainly knew that if they did win and Congress was invited to the party, that the system would be much harder to win . . . later down the road" (omission in original) (internal quotation marks omitted)).

240 Alan M. Dershowitz, *Is There a Torturous Road to Justice?*, L.A. TIMES, Nov. 8, 2001, at B19.

241 *Id.*

242 ALAN M. DERSHOWITZ, WHY TERRORISM WORKS 158 (2002).

243 Seth F. Kreimer, *Too Close to the Rack and the Screw: Constitutional Constraints on Torture in the War on Terror*, 6 U. PA. J. CONST. L. 278, 322–23 (2003); Richard A. Posner, *The Best Offense*, NEW REPUBLIC, Sept. 2, 2002, at 28 (reviewing Dershowitz's proposal and arguing that "having been regularized, the practice [of torture] will become regular").

same procedure through the lens of false legitimation reveals the broader costs of procedure, particularly those costs resulting from disregarded legal issues and presumptions embedded in the procedure itself. An imperfect procedure can have collateral consequences, and the concept of false legitimation aims to account for these in a systematic way.

Second, in addition to facilitating more robust analysis of the costs and benefits of a particular procedure, the concept of false legitimation can help to reveal ways in which false legitimation can be *minimized*. The preceding analysis identified the various ways in which false legitimation can occur. Not only does this allow an appreciation for the costs of false legitimation, but also allows efforts to reduce these costs by improved procedural design.

Lastly, the concept can inform non-legal responses to imperfect procedure. While this Article has focused on solving problems of false legitimation through changes in procedural design, other solutions may be available. For instance, educational campaigns or media strategies can counteract the costs of a particular procedure by drawing attention to its shortcomings and paving the way for other solutions to problems of legality. The concept of false legitimation reveals the harms that procedure can cause, helping to identify the issues on which non-legal efforts should focus.

CONCLUSION

Debates over procedure and targeted killings will likely continue, and procedural proposals may evolve into procedural solutions actually implemented by the U.S. government. This Article has sought to reveal the complexities and risks inherent in any effort to ensure the legality of targeted killings through procedural mechanisms. The concept of false legitimation can contribute to one's understanding of these risks and underscores that for all that procedure promises, poorly designed procedures may ultimately undermine the quest for legal compliance in the long term.