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Procedural Justice Post-9/11: The Effects of Procedurally Unfair Treatment of Detainees on Perceptions of Global Legitimacy

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I. INTRODUCTION

The Global War on Terror[1] has been ideologically framed as a struggle between the principles of freedom and democracy on the one hand and tyranny and extremism on the other.[2] Although this war has arguably led to a short-term disruption of terrorist threats such as al-Qaeda, it has also damaged America's image both at home and abroad.[3] Throughout the world, there is a growing consensus that America has "a lack of credibility as a fair and just world leader."[4] The perceived legitimacy of the United States in the War on Terror is critical because terrorism is not a conventional threat that can surrender or can be defeated in the traditional sense. Instead, this battle can only be won through legitimizing the rule of law and undermining the use of terror as a means of political influence.[5]

Although a variety of political, economic, and security policies have negatively impacted the perceived legitimacy of the United States, one of the most damaging has been the detention, treatment, and trial (or in many cases the lack thereof) of suspected terrorists. While many scholars have raised constitutional questions about the

1. The term "War on Terror" became widely used during the presidency of George W. Bush, however this term has proved difficult to define. *See* Guy Raz, *Defining the War on Terrorism*, NPR (Nov. 1, 2006), http://www.npr.org/templates/story/story.php?storyId=6416780. The meaning of the "War on Terror" has evolved during conflicts in Afghanistan and Iraq. *See id.* With no clear beginning or end, and no traditional enemy to defeat, the "War on Terror" is more comparable to the "War on Drugs" or the "War on Poverty" than armed conflicts like World War I or World War II. *Id.*

2. Kevin E. Lunday & Harvey Rishikof, *Due Process Is a Strategic Choice: Legitimacy and the Establishment of an Article III National Security Court*, 39 CAL. W. INT'L L.J. 87, 87 (2008).

3. *See* STEVEN R. CORMAN ET AL., CONSORTIUM FOR STRATEGIC COMMC'N, CREDIBILITY IN THE GLOBAL WAR ON TERRORISM: STRATEGIC PRINCIPLES AND RESEARCH AGENDA 3 (2006), *available at* http://comops.org/article/117.pdf.

4. *See id.* at 3–4.

5. Lunday & Rishikof, *supra* note 2, at 89–90.

legality of U.S. detention procedures,[6] this article offers a psychological perspective of legitimacy in the context of detention.

I begin with a discussion of the psychology of terrorism. Next, I argue that the U.S. response to terrorism has been largely perceived as excessive, which has undermined global perceptions of U.S. legitimacy. I address this issue by drawing on a well-established body of social psychology research that proposes "a causal chain in which procedural fairness leads to perceived legitimacy, which leads to the acceptance of policies."[7] In other words, the fairness of the procedures through which individuals are detained and tried will significantly affect the perceived legitimacy of U.S. conduct in the War on Terror. In contrast to current detention policies, which have largely been implemented in an ad hoc manner, I suggest that procedural fairness can be increased through the establishment of a domestic terror court specifically designed to try detainees. Finally, I balance fairness with the competing values of effectiveness and efficiency to provide a framework through which U.S. legitimacy in the War on Terror can be enhanced.

II. THE PSYCHOLOGY OF TERRORISM

Terrorism can be defined as "politically motivated violence, perpetrated by individuals, groups, or state-sponsored agents, intended to instill feelings of terror and helplessness in a population in order to influence decision making and to change behavior."[8] Contrary to common belief, terrorism cannot be explained by economic deprivation, lack of education, or increased psychopathology.[9] Instead, "terrorism can best be understood through a focus on the psychological

6. *See, e.g.*, Richard H. Fallon, Jr. & Daniel J. Meltzer, *Habeas Corpus Jurisdiction, Substantive Rights, and the War on Terror*, 120 Harv. L. Rev. 2029, 2031 (2007); Tamara Huckert, *The Undetermined Fate of the Guantanamo Bay Detainees' Habeas Corpus Petitions*, 9 GONZ. J. INT'L L. 236, 237 (2006); Johan Steyn, *Guantanamo Bay: The Legal Black Hole*, 53 INT'L & COMP. L.Q. 1, 1 (2004).

7. Robert J. MacCoun, *Voice, Control, and Belonging: The Double-Edged Sword of Procedural Fairness*, 1 ANN. REV. L. & SOC. SCI. 171, 180 (2005).

8. Fathali M. Moghaddam, *The Staircase to Terrorism: A Psychological Exploration*, 60 AM. PSYCHOLOGIST 161, 161 (2005).

9. *Id.*

interpretation of material conditions and the options seen to be available to overcome perceived injustices, particularly those in the procedures through which decisions are made."[10] In the context of radical Islamist terrorism, the United States is viewed as a threat to Islamic identity and culture in a world that is becoming increasingly secularized and modernized.[11]

Though the root structural, motivational, and triggering causes of terrorism are multifaceted and nuanced, scholars generally agree that acts of terrorism can be traced back to "perceived intolerable injustice."[12] Fathali M. Moghaddam conceptualizes the psychological process leading to terrorism as a journey up a narrowing staircase that culminates in a terrorist act.[13] On the ground floor exists a large group of individuals who are experiencing injustice and relative deprivation.[14] Consequently, a few of these individuals begin to climb the staircase in search of solutions.[15] If these individuals are unable to address their needs through legitimate means, they will experience anger and frustration that they will seek to displace against those perceived to be responsible.[16] As individuals climb higher, they begin to see terrorism as a legitimate strategy reflecting their only means to address injustice.[17] Ultimately, individuals become fully engaged in an "us versus them" mindset that justifies acts of violence against civilians to further a cause.[18] In the same way that

10. *Id.*; *see also* TOM R. TYLER & YUEN J. HUO, TRUST IN THE LAW: ENCOURAGING PUBLIC COOPERATION WITH THE POLICE AND COURTS 218 (2002).

11. *See* Michael Freeman, *Democracy, Al Qaeda, and the Causes of Terrorism: A Strategic Analysis of U.S. Policy*, 31 STUD. CONFLICT & TERRORISM 40, 41 (2008).

12. Laurence Miller, *The Terrorist Mind*, 50 INT'L J. OFFENDER THERAPY & COMP. CRIMINOLOGY 121, 121 (2006); *see also* Andrew Silke, *Fire of Iolaus: The Role of State Countermeasures in Causing Terrorism and What Needs to Be Done*, *in* ROOT CAUSES OF TERRORISM: MYTHS, REALITY, AND WAYS FORWARD 246 (Tore Bjorgo ed., 2005); Freeman, *supra* note 11, at 41; Tim Krieger & Daniel Meierrieks, *What Causes Terrorism?* 4 (Ctr. for Int'l Econs., Working Paper No. 12, 2008).

13. Moghaddam, *supra* note 8, at 161.

14. *Id.* at 162.

15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.*

soldiers depersonalize the enemy, terrorists are instructed to overcome the inhibitory mechanisms that would normally prevent violence against innocent civilians.[19]

This psychological model for understanding terrorism is critical in responding to individuals at different points on the hypothetical staircase. The use of criminal law as a response to terrorism has been widely criticized for addressing individuals only on the top step who have already committed a terrorist act.[20] In response, the preventive military detention model originally implemented by the Bush Administration has cast a wide net over thousands of individuals alleged to have any sort of terrorist connection.[21] Nevertheless, as former Secretary of Defense Donald Rumsfeld noted, terrorist organizations are "churning out new terrorists faster than the United States can kill or capture them."[22] Paradoxically, some research suggests that U.S. detention policies have actually served to legitimize, rather than deter, extremists.[23] In the next section, I suggest that the United States has alienated an essential group: the millions of individuals near the bottom of the staircase who are weighing the legitimacy of terrorist organizations on the one hand against the legitimacy of U.S. policies in the War on Terror on the other hand.

III. THE CURRENT U.S. DETENTION REGIME: WHEN EXCESS CREATES INJUSTICE

History has demonstrated that in times of crisis, nation-states frequently err by allowing national security to trump individual liberties.[24] In such situations, political leaders rush to modify or discard the normal rules of law.[25] As Justice Brennan noted:

19. Moghaddam, *supra* note 8, at 162.

20. *See, e.g.*, Lunday & Rishikof, *supra* note 2, at 101–03.

21. *See* Jules Lobel, *The Preventive Paradigm and the Perils of Ad Hoc Balancing*, 91 MINN. L. REV. 1407, 1420–21 (2007).

22. Dave Moniz & Tom Squitieri, *After Grim Rumsfeld Memo, White House Supports Him*, USA TODAY, Oct. 22, 2003, http://www.usatoday.com/news/washington/2003-10-22-defense-memo-usat_x.htm.

23. *See* Lunday & Rishikof, *supra* note 2, at 90–93.

24. Lobel, *supra* note 21, at 1411–14.

25. *Id.*

> After each perceived security crisis ended, the United States has remorsefully realized that the abrogation of civil liberties was unnecessary. But it has proven unable to prevent itself from repeating the error when the next crisis came along.[26]

Consequently, when the current legal framework appears insufficient, the stage is set for impromptu, crisis-based decision-making. Inevitably, a sort of ad hoc balancing is substituted in place of formal rules of law leading to excess in the forms of "judgments based on suspicion and not hard evidence" and the jettisoning of "checks on unilateral decision making."[27] The internment of over 100,000 Japanese Americans without an evidentiary basis during World War II is one of the most notorious examples of governmental overreach in a period of crisis.[28] However, the later congressional acknowledgement that these "actions were taken without adequate security reasons" and instead were primarily based on "racial prejudice, wartime hysteria, and a failure of political leadership" reflects the current sentiment of millions of Muslims towards U.S. detention policies.[29]

Today, many individuals throughout the world question whether the United States has engaged in excess in response to the attacks of 9/11. A 2004 poll suggests that many people in France (57%), Germany (49%), and Britain (33%) felt that the United States overreacted in response to terrorism.[30] Among Middle Eastern countries, as many as three-fourths of individuals stated that the United States overreacted in the War on Terror.[31] Additionally, approximately two-thirds of citizens in France, Germany, Turkey, and Pakistan questioned the sincerity of the United States in the War on Terror.[32] Within the United States, nationwide confidence in the White House

26. William J. Brennan, Jr., Assoc. J., U.S. Sup. Ct., The Quest to Develop a Jurisprudence of Civil Liberties in Times of Security Crises, Speech at the Law School of Hebrew University, Jerusalem (Dec. 22, 1987), http://www.hofstra.edu/PDF/law_civil_hafetz_article1.pdf.

27. Lobel, *supra* note 21, at 1413.

28. *See id.* at 1411–12.

29. Steyn, *supra* note 6, at 1–2, 8.

30. THE PEW RESEARCH CTR. FOR THE PEOPLE & THE PRESS, A YEAR AFTER IRAQ WAR, MISTRUST OF AMERICA IN EUROPE EVER HIGHER, MUSLIM ANGER PERSISTS 2 (2004), http://people-press.org/reports/pdf/206.pdf.

31. *Id.*

32. CORMAN ET AL., *supra* note 3, at 3.

dropped 40% between 2002 and 2004 while confidence in Congress fell by 25% during this period.[33] Although this worldwide drop in legitimacy is the result of multiple factors beyond the scope of this paper, such as the U.S. decision to invade Iraq, detention remains a controversial topic that continues to negatively affect global perceptions of the United States.

Although this paper focuses specifically on the detention of suspected terrorists at the Guantanamo Bay Detention Camp (Guantanamo Bay),[34] this facility is but one of many detention centers holding suspected terrorists on behalf of the United States.[35] Today, approximately 250 prisoners (out of approximately 800) remain at this U.S.-run military base in Cuba that is outside U.S. legal jurisdiction.[36] However, it is critical to note that these 250 individuals represent a mere 1% of "approximately 25,000 detainees worldwide held directly or indirectly by or on behalf of the United States."[37] Prisoners have alleged torture, sexual degradation, religious persecution,[38] and many other specific forms of mistreatment while being detained.[39] In many detention facilities including Guantanamo Bay, Abu Ghraib, and Bagram, these allegations are substantiated by significant evidence and have gained worldwide attention.[40]

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33. *Id.*

34. *See generally Guantanamo Bay [GTMO] "GITMO,"* GLOBALSECURITY.ORG, http://www.globalsecurity.org/military/facility/guantanamo-bay.htm (last visited Feb. 17, 2011) (discussing the history of Guantanamo Bay).

35. *See, e.g.*, Kal Raustiala, *Is Bagram the New Guantánamo? Habeas Corpus and Maqaleh v. Gates*, ASIL INSIGHTS (June 17, 2009), http://www.asil.org/insights090618.cfm.

36. *See Officials: Taliban's New Top Operations Officer Is Former Guantanamo Bay Detainee*, FOX NEWS (Mar. 10, 2009), http://www.foxnews.com/story/0,2933,508506,00.html.

37. Amos N. Guiora, *Creating a Domestic Terror Court*, 48 WASHBURN L.J. 617, 625 (2009).

38. Adam Zagorin, *Exclusive: Charges Sought Against Rumsfeld Over Prison Abuse*, TIME, Nov. 10, 2006, http://www.time.com/time/printout/0,8816,1557842,00.html.

39. *See, e.g.*, *Tipton Three Complain of Beatings*, BBC NEWS (Mar. 14, 2004), http://news.bbc.co.uk/2/hi/uk_news/3509750.stm.

40. *See, e.g.*, SEYMOUR M. HERSH, CHAIN OF COMMAND: THE ROAD FROM 9/11 TO ABU GHRAIB 20 (2004).

While some graphic and shocking cases of abuse have been brought to light,[41] a more typical example is the prosecution of sixteen-year-old Mohamed Jawad by Lt. Col. Darrel Vandeveld at Guantanamo Bay.[42] At first, the case against Jawad looked straightforward, as he had confessed to throwing a grenade that injured two U.S. soldiers and a translator in December 2002.[43] However, a deeper investigation "uncovered a confession obtained through torture, two suicide attempts by the accused, abusive interrogations, the withholding of exculpatory evidence from the defense," and other procedural problems.[44] Vandeveld discovered that the military had obtained confessions from two other individuals for the same offense; he ultimately left his post after attempts to provide "basic fair trial rights" failed.[45]

In February 2006, the United Nations Working Group on Arbitrary Detention spoke out against international law and human rights violations at Guantanamo Bay, stating that the facility should be closed "without further delay."[46] This report paralleled earlier criticism from Amnesty International that Guantanamo Bay violates minimum standards for the treatment of individuals.[47] In response, the United States has argued that detainees are not prisoners of war but are rather "unlawful combatants" who are not entitled to the protections of the Geneva Convention because they do not act in accor-

41. *See id.* at 39–40.

42. Andy Worthington, *Former Insider Shatters Credibility of Military Commissions, Describes Brutal Treatment of Teenage Detainee*, ALTERNET (July 13, 2009), http://www.alternet.org/rights/141267/former_insider_shatters_credibility_of_military_commissions,_describes_brutal_treatment_of_teenage_detainee.

43. *Id.*

44. *Id.*

45. *Id.*

46. *Commission on Human Rights: Independent Experts Issue Report on Guantanamo Detainees*, UN NEWS CENTER (Feb. 16, 2006), http://www.un.org/apps/news/story.asp?NewsID=17523&Cr=Guant%E1namo&Cr1=Bay.

47. AMNESTY INT'L, UNITED STATES OF AMERICA, THE THREAT OF A BAD EXAMPLE: UNDERMINING INTERNATIONAL STANDARDS AS "WAR ON TERROR" DETENTIONS CONTINUE 21 (2003), http://www.amnesty.org/en/library/asset/AMR51/114/2003/en/48a8fe0c-d6a7-11dd-ab95-a13b602c0642/amr511142003en.pdf [hereinafter THREAT OF A BAD EXAMPLE].

dance with the accepted rules of war.[48] Yet, regardless of the debatable legal merit of this argument, legitimacy is an "elusive quality" grounded in worldwide opinion that will not let the United States off the hook on a mere technicality when moral duties and international customs have been violated.[49] In the next section, I discuss the importance of legitimacy and the ways in which it has been undermined by U.S. conduct in the War on Terror. By understanding what drives global perceptions of U.S. legitimacy, current detention policies and their ramifications can be more accurately assessed and restructured.

IV. LEGITIMACY: THE CRITICAL MISSING ELEMENT IN THE WAR ON TERROR

In the context of the War on Terror, legitimacy is the critical missing element under the current U.S. detention regime. Legitimacy can be defined as "a psychological property of an authority, institution, or social arrangement that leads those connected to it to believe that it is appropriate, proper, and just."[50] As far back as Plato and Aristotle, philosophers have recognized that influencing others merely through coercion and power is costly and inefficient.[51] Today, empirical evidence suggests that legitimacy, rather than deterrence, is primarily what causes individuals to obey the law.[52] Thus, while legal authorities may possess the immediate power to stop illegal action, long-term compliance requires that the general public perceives the law to be legitimate.[53] Terrorism is primarily an ideo-

48. Pamela M. von Ness, *Guantanamo Bay Detainees: National Security or Civil Liberty*, U.S. ARMY WAR C. 5 (2003), http://www.pegc.us/archive/DoD/docs/vonness.pdf.

49. Robert W. Tucker & David C. Hendrickson, *The Sources of American Legitimacy*, 83 FOREIGN AFFS. 18, 18–19 (2004), *available at* http://www.jstor.org/pss/20034134.

50. Tom R. Tyler, *Psychological Perspectives on Legitimacy and Legitimation*, 57 ANN. REV. PSYCH. 375, 375 (2006) [hereinafter Tyler, *Psychological Perspectives*].

51. *Id.* at 376.

52. TOM R. TYLER, WHY PEOPLE OBEY THE LAW 60 (1990) [hereinafter TYLER, OBEY THE LAW].

53. *Id.* at 63.

logical war that cannot be won by technology that is more sophisticated or increased military force.[54] While nations combating terrorism must continue to address immediate threats by detaining suspected terrorists, they must also consider the prevention of future threats by analyzing how their policies are perceived by individuals throughout the world. Ultimately, in the War on Terror, "the benefits to be derived from maximizing legitimacy are too important to neglect."[55]

Over time, perceptions of legitimacy create a "reservoir of support" for an institution that goes beyond mere self-interest.[56] In the context of government:

> Legitimacy is [an] endorphin of the democratic body politic; it is the substance that oils the machinery of democracy, reducing the friction that inevitably arises when people are not able to get everything they want from politics. Legitimacy is loyalty; it is a reservoir of goodwill that allows the institutions of government to go against what people may want at the moment without suffering debilitating consequences.[57]

The widespread acceptance of highly controversial decisions by the U.S. Supreme Court illustrates the power of institutional legitimacy.[58] The Court itself noted that it "cannot buy support for its decisions by spending money and, except to a minor degree, it cannot independently coerce obedience to its decrees."[59] "The Court's power lies, rather, in its legitimacy . . . ."[60] For example, by emphasizing "equal treatment," "honesty and neutrality," "gathering information before decision making," and "making principled, or rule based, decisions instead of political decisions," the Court maintained

54. Moghaddam, *supra* note 8, at 168.

55. Gregory S. McNeal, *Institutional Legitimacy and Counterterrorism Trials*, 43 U. RICH. L. REV. 967, 967 (2009).

56. Tyler, *Psychological Perspectives*, *supra* note 50, at 381.

57. JAMES L. GIBSON, OVERCOMING APARTHEID: CAN TRUTH RECONCILE A DIVIDED NATION? 289 (2004).

58. Tom R. Tyler & Gregory Mitchell, *Legitimacy and the Empowerment of Discretionary Legal Authority: The United States Supreme Court and Abortion Rights*, 43 DUKE L.J. 703, 780 (1994).

59. *Id.* at 714.

60. *Id.*

legitimacy through the controversial abortion case *Planned Parenthood of Southeastern Pennsylvania v. Casey* in 1992.[61] Thus, although approximately half of Americans oppose abortion,[62] the vast majority of these individuals give deference to the Court's ruling on this issue.[63]

In the post-World War II era, the United States built up a worldwide reservoir of support based upon four pillars: "its commitment to international law, its acceptance of consensual decision-making, its reputation for moderation, and its identification with the preservation of peace."[64] Although some U.S. policies between 1950 and 2001 did not align with these pillars, on a whole the United States legitimized itself as a world superpower during this period.[65] In the 1980s, President Ronald Reagan spoke of America as a "shining city on a hill," suggesting that it was a model for the nations of the world to look to.[66] While the United States received a virtually unprecedented outpouring of support from the international community following 9/11, a nation's reservoir of support will quickly evaporate when its government overreacts. Across the globe, individuals have expressed a growing dissatisfaction with U.S. conduct in the War on Terror, and by 2006, even western allies of the United States lobbied for the immediate closure of Guantanamo Bay, calling it "an embarrassment."[67] Former Secretary of State Colin Powell proclaimed that "Guantanamo has become a major, major problem . . . in the way the world perceives America and if it were up to me I would close Guantanamo not tomorrow but this afternoon . . . ."[68] Similarly,

61. 505 U.S. 833 (1992); Tyler & Mitchell, *supra* note 58, at 749.

62. *Abortion and Birth Control*, POLLING REPORT, http://www.pollingreport.com/abortion.htm (last visited Feb. 17, 2011).

63. *See id.*

64. Tucker & Hendrickson, *supra* note 49, at 24.

65. *See id.* at 19–23.

66. RONALD REAGAN, A SHINING CITY: THE LEGACY OF RONALD REAGAN 178 (D. Erik Felten ed., 1998).

67. *France Calls Guantanamo 'An Embarrassment,'* EXPATICA (Feb. 20, 2006), http://www.expatica.com/fr/news/local_news/france-calls-guantanamo-an-embarrassment-27768.html.

68. *Colin Powell Says Guantanamo Should Be Closed*, REUTERS (June 10, 2007), http://www.reuters.com/article/idUSN1043646920070610.

President Obama noted in his campaign that "Guantanamo has become a recruiting tool for our enemies."[69]

Current U.S. detention policies erode each of the four pillars on which the United States established global legitimacy. In fact, critics have argued that the "United States has assumed many of the very features of the 'rogue nations' against which it has rhetorically—and sometimes literally—done battle over the years."[70] While legitimacy cannot be regained overnight, the recent election of President Barack Obama presents a critical opportunity for a re-articulation of U.S. detention policies. Although President Obama issued an executive order calling for the closure of Guantanamo Bay only two days after being sworn into office,[71] significant controversy remains about the kind of alternate detention system that will replace it.[72] In contrast to the current model, which has largely rendered inefficient decisions based on ad hoc policies, I argue for the establishment of a domestic terror court (DTC) created specifically to deal with the unique procedural issues created by a growing number of suspected terrorists.

V. THE IMPORTANCE OF PROCEDURAL JUSTICE

In the context of detentions, "the fairness of the procedures" through which the United States exercises authority is the key element driving both national and international perceptions of U.S. legitimacy, and legitimacy ultimately determines the extent to which individuals comply with U.S. policies.[73] Robust empirical evidence has "repeatedly documented a pattern of correlations consistent with a causal chain in which procedural fairness leads to perceived legitimacy, which leads to the acceptance of policies."[74] Research also

69. *Promises to Keep: Candidate Obama vs. President Obama*, FOX NEWS (Nov. 1, 2009), http://www.foxnews.com/politics/2009/10/23/pub-obama-campaign-promises/ [hereinafter *Promises to Keep*].

70. Tucker & Hendrickson, *supra* note 49, at 28.

71. *See Promises to Keep*, *supra* note 69.

72. *See id.*

73. Tyler, *Psychological Perspectives*, *supra* note 50, at 382.

74. MacCoun, *supra* note 7, at 180; *see also* Lawrence B. Solum, *Procedural Justice*, 78 S. CAL. L. REV. 181, 183 (2004) (noting that the concept of procedural justice is "deeply entwined with the old and powerful idea that a process that guar-

suggests that procedural justice creates a "willingness to empower legal authorities to resolve issues of public controversy."[75] An analysis of how procedural justice has been applied in legal and institutional settings provides a framework for addressing the specific legitimacy problems associated with Guantanamo Bay and how fair process can be effectively incorporated into a DTC model.

Thirty-five years ago, the formal study of procedural justice was born when researchers discovered that individuals "care deeply about the fairness of the process that is used to resolve their encounter or dispute, separate and apart from their interest in achieving a favorable outcome."[76] This research indicates that individuals with control over the process (e.g., telling their side of the story, presenting evidence, and controlling the order and timing of presentation) view the process itself as fair.[77] This outcome, known as the fair process effect, "is one of the most replicated findings in the [procedural] justice literature."[78] A meta-analysis of 120 empirical justice studies covering a twenty-five year period revealed that procedural justice is highly correlated with outcome satisfaction (.48), institutional commitment (.57), trust (.61), and evaluation of authority (.64).[79] These findings indicate the degree of significance that procedural justice has on individuals.

In the legal setting, an exploration of procedural justice in felony cases revealed that defendants' evaluations of the judicial system did not depend exclusively on the favorability of sentencing.[80] Even when verdicts involved incarceration and serious sanctions, litigant

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antees rights of meaningful participation is an essential prerequisite for the legitimate authority of action-guiding legal norms").

75. Tyler & Mitchell, *supra* note 58, at 799.

76. Rebecca Hollander-Blumoff & Tom R. Tyler, *Procedural Justice in Negotiation: Procedural Fairness, Outcome Acceptance, and Integrative Potential*, 33 L. & SOC. INQUIRY 473, 477 (2008). *See generally* JOHN THIBAUT & LAURENS WALKER, PROCEDURAL JUSTICE: A PSYCHOLOGICAL ANALYSIS (1975).

77. Jason A. Colquitt et al., *Justice at the Millennium: A Meta-Analytic Review of 25 Years of Organizational Justice Research*, 86 J. APPLIED PSYCHOL. 425, 426 (2001).

78. *Id.*

79. *Id.* at 434–35.

80. *See* Jonathan D. Casper et al., *Procedural Justice in Felony Cases*, 22 L. & SOC. REV. 483, 483 (1988).

evaluations went beyond distributive outcomes to analyze their perceptions of the procedural fairness of the legal system.[81] Additionally, while judges handling minor cases believed that litigants would ignore procedural issues when granted favorable outcomes, litigants' concerns over process led to unanticipated hostilities when procedural shortcuts were used by the court to resolve cases.[82] Thus, while outcomes cannot be entirely disregarded, the fairness of the process used to reach a given outcome is critical to perceptions of legitimacy.

Recent research highlights two reasons why procedural justice may be particularly important in the context of detentions. First, judgments of procedural fairness are particularly important to individuals experiencing uncertainty.[83] Detainees lack the procedural certainties guaranteed in a regular criminal proceeding in that they frequently do not know how long they will be held, why they are being held, what evidence exists against them, and what degree of punishment they may face.[84] Second, the greater the unfavorableness of the outcome and the larger the potential harm, the more individuals care about fair process.[85] These findings are reflected in U.S. criminal law provisions requiring certain elements of procedural due process when serious sanctions are involved.[86]

It is also critical to extend procedural justice judgments beyond the individual detainee to the perspective of a worldwide audience. While it is easy to overlook how an alleged terrorist feels about the degree of procedural fairness he or she is receiving, the perceptions

81. *Id.* at 503.

82. Tom R. Tyler, *The Role of Perceived Injustice in Defendants' Evaluations of Their Courtroom Experience*, 18 L. & SOC. REV. 51, 69–71 (1984) [hereinafter Tyler, *Perceived Injustice*].

83. E. Allan Lind & Kees van den Bos, *When Fairness Works: Toward a General Theory of Uncertainty Management*, 24 RES. IN ORGANIZATIONAL BEHAV. 181, 184 (2002).

84. *See Some Guantanamo Bay Detainees May Be Held Indefinitely*, VOANEWS (July 10, 2009), http://www.voanews.com/english/news/a-13-2009-07-10-voa6-68789562.html.

85. JOEL BROCKNER, A CONTEMPORARY LOOK AT ORGANIZATIONAL JUSTICE: MULTIPLYING INSULT TIMES INJURY 75 (2010).

86. RHONDA WASSERMAN, PROCEDURAL DUE PROCESS: A REFERENCE GUIDE TO THE UNITED STATES CONSTITUTION 99–100 (2004).

of governments, human rights organizations, political groups (including terrorist organizations), and millions of individuals (particularly those who closely identify with that individual's race, religion, or nationality) cannot be ignored. Individuals become upset when they observe unfairness, and such observations motivate them to help victims of this unfairness.[87] Thus, it would be a mistake to think that procedural injustice against a single individual will affect the perceptions of that individual alone.[88] Additionally, efforts to hide procedural injustices, such as the abuse of detainees by U.S. soldiers,[89] have only backfired by creating sympathy for the types of individuals that the United States seeks to dehumanize.[90] In the next section, I identify six rules of procedural justice, evaluate the current detention regime based on these rules, and make recommendations about how these rules could be implemented in a DTC model.

VI. APPLYING PROCEDURAL JUSTICE TO U.S. DETENTION POLICIES

While an extensive theoretical review of procedural justice is beyond the scope of this paper, I use six rules of procedural justice as defined in *Beyond Fairness: A Theory of Allocation Preferences*,[91] in analyzing procedural justice under the current detention regime. These rules are as follows: (1) the consistency rule—allocation procedures should be consistent across persons and over time; (2) the bias suppression rule—personal self interest in the allocation process should be prevented; (3) the accuracy rule—decisions must be based on accurate information; (4) the correctability rule—opportunities must exist to enable decisions to be modified; (5) the representativeness rule—the allocation process must represent the concerns of all recipients; and (6) the ethicality rule—allocations must be based on prevailing moral and ethical standards.[92]

87. BROCKNER, *supra* note 85, at 33.
88. *Id.* at 33–35.
89. HERSH, *supra* note 40, at 19–20.
90. *See* LARRY J. SIEGEL, INTRODUCTION TO CRIMINAL JUSTICE 179–80 (12th ed. 2010).
91. Gerald S. Leventhal et al., *Beyond Fairness: A Theory of Allocation Preferences*, *in* JUSTICE AND SOCIAL INTERACTION 167 (Gerold Mikula ed., 1980).
92. *Id.* at 195–96; TYLER, OBEY THE LAW, *supra* note 52, at 118.

An examination of each of these procedural rules reveals a variety of ways in which the procedural justice accorded detainees can be enhanced. Given the growing nature of terrorism as a persistent global threat, additional strategic consideration must be given to how these rules will be applied to a more permanent judicial process for detainees. The DTC model that I propose is a hybrid court incorporating many of the procedural safeguards of the U.S. criminal justice system into a model specifically designed to meet the unique challenges posed in trying alleged terrorists.[93] While other scholars have already laid out the legal framework of the DTC model,[94] I consider the degree to which this model incorporates the six rules of procedural justice. Ultimately, the DTC model provides a concrete framework of fair process, while also maximizing effectiveness and efficiency to a greater extent than either the current U.S. detention regime or competing detention models.

A. *Consistency*

The rule of consistency requires that all parties have the same rights and that individuals receive equal treatment.[95] Consistency over time is also important, and, thus, procedural changes must be made carefully in a way that puts individuals on notice.[96] Consequently, two defendants prosecuted with identical evidence should ultimately receive the same outcome regardless of any differing, but irrelevant, personal characteristics or the timing of the crime.[97] However, the terrorist attacks of 9/11 shocked the world and instantly changed U.S. policies on terrorism.[98] While significant steps to increase national security were certainly warranted, a rapid discard of traditional rules of law undermined the principle of consistency.

For example, the "Post-9/11 Immigrant Roundup" in the United States of over 1,200 Arab and Muslim immigrants marked a dramat-

93. *See* Guiora, *supra* note 37, at 619.
94. *See id.*
95. Leventhal et al., *supra* note 91, at 195.
96. *See* TYLER, OBEY THE LAW, *supra* note 52, at 118–19.
97. *See id.*
98. Lobel, *supra* note 21, at 1419–420.

ic legal change fueled by perceived necessity.[99] In this instance, Attorney General John Ashcroft "substituted a vague standard for a clear rule in order to justify holding [these immigrants] without charges for extended periods of time."[100] Under U.S. criminal law, these individuals would have been charged within twenty-four hours, while the more expansive Patriot Act allows for a seven-day detention based on reasonable grounds in the belief that an immigrant is engaged in terrorist activities.[101] However, new regulations permitted many of these individuals to be held for months.[102] Nevertheless, two years later, an analysis of the roundup by the Michigan Policy Institute revealed that "[w]e haven't learned anything about preempting terrorism in America, but we have intimidated, antagonized and alienated many (minority) communities . . . ."[103]

Similarly, the United States sidestepped international laws relating to the detention of prisoners of war by labeling suspected terrorists as "unlawful enemy combatants."[104] "Until 2001, this term appeared nowhere in U.S. criminal law, international law, or the law of war," however, it has subsequently been vaguely construed and applied to hold individuals indefinitely without charges.[105] An additional consistency problem is that this ambiguous definition would cover Osama bin Laden, as well as "a 'little old lady in Switzerland who writes checks to what she thinks is a charity that helps orphans in Afghanistan but really is a front to finance al-Qaeda activities,' [and] a person who teaches English to the son of an al-Qaeda member."[106]

The principle of equal rights suggests that individuals suspected of terrorism should be treated in the same manner whether they are U.S. citizens or citizens of another nation.[107] In *Boumediene v.*

99. *See* Jim Lobe, *Post-9/11 Immigrant Roundup Backfired—Report*, INTER PRESS SERVICE (June 26, 2003), http://ipsnews.net/interna.asp?idnews=19000.
100. Lobel, *supra* note 21, at 1419–420.
101. *Id.* at 1420.
102. *Id.*
103. Lobe, *supra* note 99.
104. Lobel, *supra* note 21, at 1420.
105. *Id.* at 1420–22.
106. *Id.* at 1421.
107. *See* OFFICE OF THE UNITED NATIONS HIGH COMMISSIONER FOR HUMAN RIGHTS, THE RIGHTS OF NON-CITIZENS, at 7–13, U.N. Sales No. E.07.XIV.2

Bush,[108] the U.S. Supreme Court challenged two previously accepted distinctions that undermine the principle of consistency.[109] "The first is the distinction between the constitutional rights of American and alien prisoners; the second is the distinction between the rights of those we imprison on American soil and those we imprison everywhere else in the world."[110] As a result, the idea that there is "no moral justification for discriminating against foreigners" in detention procedures is gaining momentum.[111] However, to some extent this principle has been overshadowed by separate agreements regarding the treatment of individuals from certain nations.[112] For example, the Attorney General has promised the British government that its citizens will not face the death penalty.[113] While special treatment may induce the cooperation of an ally, it does so with an associated cost imposed on the citizens of other nations. In contrast, efforts by the U.S. Supreme Court to grant habeas corpus rights to all detainees regardless of citizenship or place of capture enhance perceptions of consistency.[114]

To further improve perceptions of U.S. consistency, I suggest: (1) that traditional rules of law may need to be modified, but cannot be abruptly discarded in periods of crisis; (2) a general uniformity among military commissions must exist as required by the U.S. Supreme Court; and (3) detainees of different nations, ethnicities, and religions must be given equal treatment and equal rights. The DTC model addresses each of these three concerns.

First, the DTC model sets a clear standard of consistency in contrast to current ad hoc policies that have fluctuated in the political winds of this crisis and have been vaguely applied. The DTC model provides clear definitions and specific criteria for determining who is a threat based on information that is "(1) reliable; (2) viable; (3) va-

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(2006), *available at* http://www.ohchr.org/Documents/Publications/noncitizensen.pdf.

108. 553 U.S. 723 (2008).

109. *See id.* at 739.

110. Ronald Dworkin, *Why It Was a Great Victory*, 55 N.Y. REV. BOOKS, No. 13, Aug. 14, 2008, at 2.

111. *See id.*

112. *See* Steyn, *supra* note 6, at 9.

113. *Id.*

114. *See generally* Boumediene v. Bush, 553 U.S. 723 (2008).

lid; and (4) corroborated."[115] When individuals are not on notice about how they will be treated, they respond negatively when the law appears to implicate their conduct without adequate warning.[116] Outside observers such as human rights groups and citizens of other nations will similarly be dissatisfied by a system that generates unpredictable results.

Second, the DTC model provides a system of uniformity as required by the U.S. Supreme Court. In *Hamdan v. Rumsfeld*,[117] the Court proclaimed the need for a uniform system of courts-martial and military commission procedures.[118] As a result, procedural rules must be consistent with the Uniform Code of Military Justice, and rules must be the same between military commissions and courts-martial "insofar as practicable."[119] The DTC model proposes uniformity in terms of sentencing as well as procedure. Like the U.S. criminal justice system, the DTC model utilizes maximum and minimum sentencing terms.[120] Additionally, the DTC model rejects the death penalty in all cases rather than providing exceptions to the citizens of certain nations.[121]

Third, the DTC model provides the same treatment for citizens and non-citizens. A 2006 poll suggests that even Americans generally do not feel that their fellow citizens deserve preferential treatment.[122] Sixty-three percent of respondents indicated that the detention policies should be the same for citizens and non-citizens, while 33% felt that policies should be different.[123] When granting U.S. citizens additional rights that are not applied to individuals of other nations, a tradeoff is clearly being made. One of the fears surrounding U.S. treatment of foreign detainees is that other nations will reci-

115. Guiora, *supra* note 37, at 631.
116. *See generally* Tyler, *Perceived Injustice*, *supra* note 82.
117. 548 U.S. 557 (2006).
118. McNeal, *supra* note 55, at 999.
119. *Id.* at 972–73, 999.
120. Guiora, *supra* note 37, at 631–32.
121. *Id.* at 632.
122. *Americans Support Full Due-Process Rights for Terrorism Suspects*, WORLD PUBLIC OPINION (July 17, 2006), http://www.worldpublicopinion.org/pipa/articles/home_page/228.php?nid=&id=&pnt=228&lb=hmpg1.
123. *Id.*

procate by treating U.S. prisoners with disrespect.[124] The application of standard rights and procedures to similarly situated individuals under the DTC model comports with universal conceptions of fairness and also enhances the next procedural justice factor: bias suppression.

B. *Bias Suppression*

The prevention of favoritism, prejudice, and external bias is a critical aspect of procedural justice.[125] Two types of biases are: (1) "a vested interest in the outcome" and (2) "[reliance] on prior views rather than evidence."[126] To illustrate, a judge conducting the trial of a close family member has a strong personal interest in the trial's outcome. Similarly, a jury member who believes all criminal defendants are probably guilty will likely render a biased decision that is not based on evidence.[127] Perhaps what is most critical to the bias-suppression analysis in the context of terrorism is the extent to which the deck is stacked against the detainee from the beginning. Under U.S. criminal law, a defendant can present his or her case to a jury of peers, remove biased individuals from the jury pool, examine all the evidence presented by the prosecutor, object to certain forms of prejudicial evidence such as hearsay, cross examine witnesses, and require that the charges be proved beyond a reasonable doubt.[128] In a detainee's trial, none of these procedural safeguards exist, and, thus, an important concern arises as to how impartiality can be maintained.[129]

At the start of this analysis, a government must ask itself whether it is willing to let an individual go if the evidence required for a conviction is not present. For example, one of the questions surround-

124. *See* SUE MAHAN & PAMALA L. GRISET, TERRORISM IN PERSPECTIVE 324 (2nd ed. 2008).
125. *See* TYLER, OBEY THE LAW, *supra* note 52, at 119.
126. *See id.*
127. *See id.*
128. *See generally* PAUL BERGMAN & SARA J. BERMAN, THE CRIMINAL LAW HANDBOOK: KNOW YOUR RIGHTS, SURVIVE THE SYSTEM (Richard Stim ed., 11th ed. 2009).
129. *See* Harold Hongju Koh, *The Case Against Military Commissions*, 96 AM. J. INT'L L. 337, 341 (2002).

ing the famous Nuremberg trials of Nazi leaders following World War II was the extent to which the international tribunal was driven by victor's justice.[130] While many argued for "show trials" or proceedings that were "not too judicial,"[131] others, such as Justice Robert Jackson, believed that procedural fairness was essential to ultimate victory (in contrast to the punitive Treaty of Versailles at the end of World War I).[132] Ultimately, the tribunal rendered a wide range of verdicts from death sentences to acquittals.[133] However, questions yet remain as to whether Justice Jackson's ideal of fairness was obtained or whether bias nevertheless crept into the system.[134] Regardless, the Nuremberg trials illustrate that bias suppression demands neutral justice that is not driven by unbridled retribution, political power, or crisis-based fear.

Under the current detention regime, there appears to be little in the way of procedural guarantees to prevent the U.S. government from using indefinite detentions to subvert justice. In the event that a detainee is put on trial, the evidence is evaluated and a decision is reached as to whether that individual will be held or released. However, when no such trial takes place, the detainee can be held without an evaluation of the charges or evidence. Such procedures incentivize bias against those detainees whom the United States speculates are "really bad" but lacks the evidence to convict. Similarly, during precarious periods there is a subtle motivation to keep all the alleged "bad guys" off the streets for long enough to turn the tide of the war effort. Perhaps there is also the cynical viewpoint that even innocent detainees have now mingled with actual terrorists, endured significant mistreatment, and, thus, now pose a threat to the United States.

One of the biggest challenges that the United States faces in the War on Terror is to effectively fight terrorism without simultaneously stereotyping millions of individuals associated with particular religions, nationalities, or ethnic groups. President Obama addressed this issue by declaring that "[t]he United States is not, and never will

130. Steyn, *supra* note 6, at 9–10.
131. *Id.* at 9.
132. *See* BRADLEY F. SMITH, REACHING JUDGMENT AT NUREMBERG 300 (1977).
133. *Id.* at 151.
134. *See* Amy Ross, *The Body Counts: Civilian Casualties and the Crisis of Human Rights*, *in* HUMAN RIGHTS IN CRISIS 39 (Alice Bullard ed. 2008).

be, at war with Islam."[135] He also noted that America's "partnership with the Muslim world is critical in rolling back a fringe ideology that people of all faiths reject."[136] These broad policy statements set the right tone for the minimization of bias in detention trials. Yet, more specific procedural guarantees are needed as a check on the potential bias of a military system driven by effectiveness rather than justice.

A positive step in removing bias from detentions is increased process transparency. For example, the Department of Defense has implemented a media-visit program at Guantanamo Bay allowing members of the media to tour the facilities.[137] More recently, the Department of Defense has even gone so far as to create a "Virtual Tour" of the Guantanamo Bay facilities.[138] Instead of seeing dark images of coercion chambers that one might imagine in a secretive detention facility, viewers are greeted with images of basketball courts, libraries, and medical facilities.[139] This voluntary act was no doubt "prompted by a desire to avoid an adverse impact on societal perceptions of Guantanamo Bay's organizational legitimacy."[140] While some evidence relating to detainees is classified and should not be made available to the public, general information about procedures, living conditions, and the detainees themselves helps turn conceptions of Guantanamo Bay from a concentration camp into a more standard prison facility.

Another way to remove bias from a system is to introduce checks and balances to govern the process as proposed by the DTC model. Here, all three branches are involved in the judicial process as the President is given the authority to nominate DTC judges while the Senate retains the power to confirm them. While current U.S. detention procedures were originally enacted by the executive branch with

135. Mark Tran, *US Is Not at War with Islam, Says Barack Obama*, GUARDIAN (Apr. 6, 2009), http://www.guardian.co.uk/world/2009/apr/06/barack-obama-turkey-armenia.

136. *Id.*

137. McNeal, *supra* note 55, at 975–76.

138. *Virtual Tour—Camp Five*, JOINT TASK FORCE GUANTANAMO, http://www.jtfgtmo.southcom.mil/virtualvisit/camp_5.html (last visited Feb. 17, 2011).

139. *Id.*

140. McNeal, *supra* note 55 at 977.

little congressional or judicial oversight, clear rules for each branch of government are laid out by the DTC model.[141] For example, the executive branch is responsible for setting the criteria for a formal vetting process used by judges to determine who should be detained.[142] Transparency combined with this system of checks and balances helps to prevent one branch of government from having too much of a vested interest in a particular outcome and allows the appointment of qualified judges to make unbiased judgments based on evidence and not prejudice. By minimizing bias, a major roadblock to reaching accurate decisions is cleared.

C. *Accuracy*

Accuracy requires that decisions be made using correct information. For example, the U.S. criminal justice system prevents individuals from being convicted on mere speculation. Instead, a formal process in which evidence is introduced and testimony is recorded ensures that an informed decision will ultimately be reached. However, obtaining accurate information about hundreds of individuals captured all over the globe presents an overwhelming obstacle to traditional rules of evidence. In contrast, the specialization of the DTC model makes it well suited to handle classified evidence, confrontation clause requirements, and other unique evidentiary problems faced in detainee trials.

Currently, evidentiary issues remain a significant problem, as even the somewhat lax standards of U.S. military tribunals have proved difficult to meet.[143] To date, hundreds of Guantanamo Bay detainees have been released without charges.[144] In fact, one of the challenges delaying President Obama's plan to shut down Guantanamo Bay within one year of taking office is the lack of comprehen-

141. *See id.* at 992–93.

142. Guiora, *supra* note 37, at 619.

143. *See, e.g.*, Christopher Flavelle, *You Can Check Out Anytime You Like, But You Can Never Leave: At Least 17 Detainees Have Been Ordered Released from Guantanamo But are Stuck There*, SLATE (Oct. 12, 2009), http://www.slate.com/id/2232000/.

144. *See generally USA: Detainees Continue to Bear the Costs of Delay and Lack of Remedy*, AMNESTY INT'L (Apr. 9, 2009), http://www.amnestyusa.org/document.php?id=ENGAMR510502009&lang=e.

sive files on detainees.[145] The Obama Administration recently declared that it plans to charge approximately fifty of the roughly 250 remaining detainees and set the other 200 free.[146] On the one hand, this broad net is subjecting about four "innocent" individuals to prolonged detention for every individual that will be tried. On the other hand, at least some degree of accuracy is eventually being reached in which a large number of individuals are being set free by the U.S. government.

To address the evidentiary problems involved in prosecuting detainees, the DTC model requires that

> the judge will wear two hats: one as the court and the other as defense counsel. The information and the source must be held to be: (1) reliable; (2) viable; (3) valid; and (4) corroborated. If the intelligence meets the four-part test, then and only then is it admissible and available for use against the defendant at trial. However, a defendant's conviction may not be based solely on confidential intelligence information.[147]

Thus, while the DTC model necessarily allows admission of certain evidence that would not be admitted in a traditional criminal court, it does so only when this evidence meets specific assurances of accuracy in the eyes of a judge who is cognizant of the defendant's interests. Yet, since accuracy is never guaranteed, correctability is the next important element of procedural justice.

D. *Correctability*

Correctability requires the availability of procedures to correct unfair or inaccurate decisions.[148] The idea of multiple layers of appeal is fundamental to U.S. criminal law.[149] However, the application of this right to detainees has led to a lengthy foray between the President, Congress, and the U.S. Supreme Court that only recently

145. *Id.*
146. Peter Baker, *Obama to Use Current Law to Support Detentions*, N.Y. TIMES, Sept. 23, 2009, at A23.
147. Guiora, *supra* note 37, at 631.
148. *See* TYLER, OBEY THE LAW, *supra* note 52, at 119.
149. *See, e.g.*, SUP. CT. R. 10.

appears to have been resolved. The constitutional concept of habeas corpus requires that a court inquire into the legitimacy of a detainee's custody and brings up an important correctability issue as to whether only a final outcome (as opposed to the detention itself) can be appealed. If a detainee must wait to be charged and tried, a fundamental correctability problem exists when he or she is held for a significant period of time without legal recourse.

A brief overview of the habeas corpus battle begins with a Presidential Military Order issued on November 13, 2001 by President Bush, asserting that unlawful "enemy combatants" may be held indefinitely without charges or a court hearing.[150] However, in the 2004 case *Hamdi v. Rumsfeld*, the U.S. Supreme Court declared that defendants who are U.S. citizens have a right to habeas corpus protections.[151] This led Congress to enact the Detainee Treatment Act of 2005[152] and the Military Commissions Act of 2006,[153] which again stripped the habeas corpus rights from detainees and asserted that they had no right of appeal.[154] In 2008, the U.S. Supreme Court fired back in *Boumediene v. Bush*, holding the Detainee Treatment Act unconstitutional and declaring that detainees have a right to seek a writ of habeas corpus in U.S. Federal Court.[155] On January 21, 2009, President Obama affirmed this right of appeal in an executive order.[156]

In *Boumediene*, the Court overturned the notion "that the Constitution as a whole offers substantially less protection against American tyranny to foreigners than it does to America's own citizens."[157] As a result, detainees can now appeal not only the final verdict they receive but also the government's right to hold them.[158] The seven-year debate described above is itself an important illustration of the principle of correctability, as each branch of government worked to

150. *See* Dworkin, *supra* note 110, at 2.
151. *See id.*
152. Pub. L. No. 109-148, § 1005, 119 Stat. 2739, 2742 (2005).
153. Pub. L. No. 109-366, § 7, 120 Stat. 2600, 2636 (2006) (amended 2009).
154. *See* Dworkin, *supra* note 110, at 2.
155. *See id.*
156. Mark Mazzetti & William Glaberson, *Obama Issues Directive to Shut Down Guantánamo*, N.Y. TIMES, Jan. 21, 2009, at A1.
157. Dworkin, *supra* note 110, at 2.
158. *Id.*

overturn the decision of another branch until an appropriate solution was finally reached by all three branches.

Under the DTC model, detainee appeals are filed directly to the U.S. Court of Appeals.[159] The DTC model also mirrors certain procedures implemented by Israel and the United Kingdom in which the classified information holding a detainee is subject to periodic review.[160] This policy ensures that correctability cannot be sidestepped by indefinite detention. Thus, the justification for an individual's detention must be continually evaluated and his or her procedural rights cannot be indefinitely waived.

E. *Representativeness*

Representativeness means "that the concerns of those affected should be represented in all phases of the allocation process."[161] In this context, I suggest that representativeness involves the extent to which the individual detainee's concerns and interests are represented. Procedures that provide legal representation to detainees are one example of how this principle has been applied. This element is critical in the Global War on Terror in which broad government concerns about terrorism readily overshadow the interests of the individual.

I suggest that detainee representativeness occurs both internally (by citizens of the United States) and externally (by citizens of other nations). However, there is an important legitimacy distinction between these two sources of representation. Only when a government internally limits its own self-interest to look out for the interests of the individual can representativeness enhance legitimacy. Thus, while an attorney (internal) who vigorously defends the rights of a detainee probably enhances global perceptions of U.S. legitimacy, a report by Amnesty International (external) arguing for detainee rights is likely to reduce perceptions of U.S. legitimacy. Although non-governmental organizations, foreign governments, and citizens of other nations are all concerned about detainees' interests, only an internally manifested concern by U.S. citizens and political leaders

159. *See* Guiora, *supra* note 37, at 632.
160. *See id.* at 619.
161. *See* TYLER, OBEY THE LAW, *supra* note 52, at 118.

can enhance perceptions of legitimacy. While America's longstanding commitment to individual rights and liberties has been shaken by 9/11,[162] it appears that these values are beginning to reemerge.

The DTC model upholds the principle of representativeness by requiring a "degree of government self-restraint."[163] If an individual is held, the purpose of the detention is to indict and prepare for trial, as opposed to an indefinite substitute for justice. By granting detainees certain rights, and by requiring judges to look out for these rights, the principle of representativeness is upheld and the individual is not overlooked in the midst of a global conflict.

F. *Ethicality*

Ethicality means "the degree to which the decision-making process accords with general standards of fairness and morality."[164] Thus, conduct such as bribery, spying, and deception are all widely recognized as violating general standards of fairness.[165] However, ethicality is the most difficult rule to define in the context of terrorism because there is an inherent tension between individual standards of morality, the laws of nations, and international laws and customs. Crisis exacerbates these tensions, as moral and legal standards often appear to be at odds with effectiveness and necessity. The use of torture and other coercive measures against detainees provides a vivid illustration of this conflict that will be discussed later in more detail. However, the use of torture is but one example of a failure to take the "moral high ground" in the War on Terror.[166] When the United States acts unilaterally or declines to follow the laws governing international conflict, it loses the moral high ground that ideologically separates legitimate governments from terrorist organizations that ignore the rule of law. Once on the same moral ground as the terrorists, the United States can no longer rely on legi-

162. THREAT OF A BAD EXAMPLE, *supra* note 47, at 1.
163. Lunday & Rishikof, *supra* note 2, at 101.
164. *See* TYLER, OBEY THE LAW, *supra* note 52, at 119.
165. *See id.*
166. Gerard P. Fogarty, *Guantanamo Bay—Undermining the Global War on Terror*, U.S. ARMY WAR C. 10 (2005), http://www.dtic.mil/cgi-bin/GetTRDoc?Location=U2&doc=GetTRDoc.pdf&AD=ADA434467.

timacy but must focus entirely on coercion and force in a "might makes right" scenario rather than utilizing legitimacy's more effective "right makes might" paradigm of voluntary compliance.

While ethicality invokes moral arguments and may rightly be considered an end in itself, this paper constrains ethicality by primarily analyzing only the extent to which it enhances procedural justice and legitimacy. Ethical treatment of detainees is not merely a moral obligation, but also a strategic choice.[167] Consider Sherman et al.'s observation:

> One of the most striking recent findings is the extent to which the police themselves create a risk factor for crime simply by using bad manners. Modest but consistent scientific evidence supports the hypothesis that the less respectful police are towards suspects and citizens generally, the less people will comply with the law.[168]

Similarly, the U.S. military puts itself in harm's way when it fails to follow international rules of war. "Guantanamo has become a liability. The real and perceived injustices occurring there have given our enemies an easy example of our failures and alleged ill intent," stated Homeland Security Committee member Rep. Jane Harman.[169] The graphic beheading of U.S. citizen Nicholas Berg is one of many retaliatory attacks by terrorist groups in response to perceived abuses of their captured associates.[170] Justified or not, terrorist groups often claim that immoral U.S. conduct has legitimized their actions.[171]

One of the most heated debates about the treatment of detainees surrounds the use of torture and other methods of coercion to extract

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167. *See generally* Lunday & Rishikof, *supra* note 2, at 87.

168. LAWRENCE W. SHERMAN ET AL., NAT'L INST. OF JUSTICE, PREVENTING CRIME: WHAT WORKS, WHAT DOESN'T, WHAT'S PROMISING, at ch. 8 (1997), *available at* http://www.ncjrs.gov/works/wholedoc.htm.

169. Michael Roston, *Congress Members Sponsor Bill to Shutter Guantanamo Bay*, RAW STORY (May 8, 2007), http://rawstory.com/news/2007/Congress_ members_sponsor_bill_to_shutter_0508.html.

170. John O'Sullivan, *Left Eye's View: Seeing Through the Abu Ghraib Coverage*, NAT'L REV. ONLINE (May 18, 2004), http://www.nationalreview.com/jos/jos2004 05181427.asp.

171. *See id.*

information from detainees. President Obama's decision to ban certain types of torture, such as waterboarding, reflects his belief that the United States lost its "moral bearing" by utilizing such practices.[172] Empirical evidence similarly reveals that America lost legitimacy through the torture of alleged terrorists. A 2006 poll of more than 27,000 individuals in twenty-five different countries indicated that 59% of respondents felt that clear rules against torture should be maintained, while 29% said governments should be allowed to use some degree of torture.[173] Opposition to torture was strongest in Western Europe, Canada, and Australia, with approximately three-quarters of individuals in these regions opposing torture.[174]

In contrast, the United States was more divided, as 58% of citizens opposed torture while 36% indicated that some degree of torture should be allowed.[175] Going back to the earlier discussion about the tendency for governments to overreact during periods of crisis, it is interesting to note that countries that have experienced recent terrorist attacks or political violence are, on average, more willing to allow torture.[176] Even though all twenty-five countries that participated in this survey are parties to the Geneva Convention, which forbids torture under Common Article 3 and the more recent Convention Against Torture, these findings provide evidence that nations are increasingly likely to jettison not only traditional rules of law but also ethical standards when under attack.[177]

Even as the debate over torture begins to wind down (now that the practice has been explicitly outlawed by President Obama), there remains an apprehension about the extent to which the "[p]rocess is

172. David Gardner, *U.S. Lost Its Moral Bearing Over Torture, Says Obama—and Warns Bush Officials Could Be Charged*, MAILONLINE (April 21, 2009), http://www.dailymail.co.uk/news/worldnews/article-1172239/U-S-lost-moral-bearings-torture-says-Obama--warns-Bush-officials-charged.html.

173. Press Release, BBC World Service, World Citizens Reject Torture, Global Poll Reveals 1 (2006), http://www.globescan.com/news_archives/bbctorture06.

174. *See id.* at 3.

175. *Id.* at 1.

176. *Id.* at 2.

177. *Id.* at 2 (noting that India has signed, but not ratified, the Convention Against Torture).

the [p]unishment" in the context of detentions.[178] I borrow this phrase from Brenda Sims Blackwell and Clark D. Cunningham, who documented a number of criminal cases in which individuals spent up to twelve days in jail for minor offenses such as jaywalking before their cases could be resolved.[179] However, this concept is magnified in the context of detentions. When an individual is taken from his or her homeland and placed in Guantanamo Bay for an indefinite period, the punishment, independent of ultimate guilt or innocence, has already begun. This is particularly salient because, as mentioned previously within the discussion of accuracy, U.S. detention procedures result in the roundup of a significant number of "innocent" individuals that is well in excess of those whom will ultimately be tried and convicted. Add potential mistreatment, coercion, and depravation, and suddenly the treatment of uncharged detainees looks worse than the lifestyle afforded many convicted criminals. In a legal system that presumes guilt, this outcome might be an acceptable reality. However, it stands in stark contrast to the constitutional notion of innocent until proven guilty.

A consideration of ethicality reveals several ways in which procedural justice can be enhanced by the DTC model. First, the DTC model sets clear ethical limits against "unconstitutional interrogation methods . . . which are illegal, immoral, and do not contribute to 'actionable intelligence.'"[180] Not only is torture prohibited, but evidence obtained through torture is excluded from trial.[181] I address this apparent tradeoff between effectiveness and fairness later in more detail, by arguing that this evidence is not only of questionable reliability but comes at too high a cost to the United States. By setting moral boundaries, the United States is in a better position to avoid the sorts of prisoner abuse scandals that have occurred at Abu Ghraib and Guantanamo Bay which have significantly undermined U.S. legitimacy.

178. *See* Brenda Sims Blackwell & Clark D. Cunningham, *Taking the Punishment Out of the Process: From Substantive Criminal Justice Through Procedural Justice to Restorative Justice*, 67 L. & CONTEMP. PROBS. 59, 60 (2004).
179. *Id.* at 59–60.
180. Guiora, *supra* note 37, at 628.
181. *Id.*

Second, a re-articulation of detention policies under the DTC model will limit procedural burdens on detainees to a greater degree. The DTC model requires that detainees be brought before a judge without unnecessary delay.[182] This should occur within seven days unless exigent circumstances arise.[183] Detentions must be independently reviewed at periodic intervals to ensure that the process is progressing either toward trial or release.[184] Fairness and efficiency are maximized by a system adapted specifically to detainees, and holding individuals for years without trial would become the rare exception under this model rather than the norm.

Third, the DTC model is but one aspect of a broader strategic objective designed to retake the moral high ground in the War on Terror. While the United States has frequently asserted its sovereignty in opposition to international law,[185] it would gain much through international cooperation as opposed to unilateral action. While an extensive discussion of the limits of state sovereignty is beyond the scope of this paper, the United States should consider the legitimacy of international laws and customs even in situations where it has the power to go against global norms. By recognizing these universal principles of procedural fairness, the United States gains legitimacy in the War on Terror.

VII. BALANCING FAIRNESS, EFFECTIVENESS, AND EFFICIENCY

Although enhancing procedural justice is critical to U.S. success in the War on Terror, fairness is not an absolute and must be carefully balanced with other strategic objectives including effectiveness and efficiency. Yet, weighing these elements is not inherently a zero-sum game in which one objective can only be maximized at the expense of the others. While some degree of balance is required, a zero-sum mentality is often the result of short-term thinking as opposed to long-term strategy. In this section, I argue that the DTC

182. *Id.* at 627.
183. *Id.* at 626–27.
184. *See id.* at 619.
185. *See, e.g.*, Letta Tayler, *U.S. at Odds over World Tribunal*, NEWSDAY 1–6 (Oct. 17, 2004), http://www.amicc.org/docs/Newsday%2010-17-04.pdf.

model collectively maximizes effectiveness, efficiency, and fairness to a greater extent than either the current U.S. detention regime or competing detention models. I also caution against the misuse of procedural justice and legitimacy to present a front of credibility that is used to manipulate and exploit individuals.

A. *Efficiency*

The DTC model represents a method of bringing efficiency and fairness to the detention system. Efficiency suggests that with limited resources, procedural protections cannot be an absolute. Yet, some unfair policies with a guise of efficiency, like a shoot-on-sight policy against suspected terrorists, would actually be incredibly costly when long-term effects on U.S. legitimacy are considered. At the other end of the spectrum, the trial of thousands of suspected terrorists under the U.S. criminal model is also tremendously inefficient.[186] Implementing traditional evidence and jury requirements would be extremely costly and would create significant delays. Critics of Article III courts and international treaty-based terror courts note the impracticability and inefficiency of this system in the context of terrorism.[187]

Referring back to the problem of "the process as the punishment," weighing the additional delays and complications required under alternate models such as the traditional criminal justice system eclipses the marginal benefit of any additional rights provided by these models. Under the DTC model, efficiency and fairness work together, as both the detainee and the United States have an interest in expediting the judicial process. Of course, resources could be poured into the criminal system to allow a significantly larger caseload, yet, the proposed DTC model strikes a more suitable balance between efficiency and fairness that does not stretch either of these ideals beyond the point of diminishing returns. Just as judicial statutes allow courts to efficiently provide justice without reinventing the wheel on a case-by-case basis, the DTC framework is an efficient alternative to current ad hoc policies used to try terrorists.

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186. *See, e.g.*, Guiora, *supra* note 37, at 620.
187. *See, e.g.*, *id.*

B. *Effectiveness*

While short-term effectiveness often appears to be hampered by fair process, procedural justice and legitimacy are the building blocks of long-term effectiveness in the War on Terror. The famous ticking time bomb scenario, in which a terrorist is apprehended after hiding a bomb, is often used as an example justifying torture (procedural injustice) in the name of effectiveness. Choosing not to torture the suspected terrorist appears to compromise effectiveness and potentially sentence thousands of innocent civilians to death. Torture supporters argue that in such a situation the ends justify the means. However, substantial evidence suggests that torture marks the beginning of a slippery slope that ultimately undermines both fairness and effectiveness.[188]

Before analyzing the scenario itself, it is worth noting the improbability of a situation in which the terrorist is apprehended during this short window of time by government agents who understand the plot, but do not yet have enough information to find the bomb.[189] While television dramas frequently show the capture of a terrorist immediately before a massive attack, the reality is that such a situation is highly unlikely.[190] Yet, even in such a scenario, experts question the assumption that torture will be the most effective way to get information from this individual.[191] Professor John Langbein notes that, "[h]istory's most important lesson is that it has not been possible to make coercion compatible with truth."[192] Similarly, empirical evidence suggests that

> [e]ven if the terrorist begins to talk under torture, interrogators have a hard time figuring out whether he is telling the truth or not. Testing has found that professional interrogators

188. Amos N. Guiora, *Military Commissions and National Security Courts After Guantanamo*, 103 NW. U. L. REV. COLLOQUY 199, 201 (2008).
189. *See* Alfred W. McCoy, *The Myth of the Ticking Time Bomb*, PROGRESSIVE (Oct. 2006), http://www.progressive.org/mag_mccoy1006.
190. *Id.*
191. *Id.*
192. *Id.*

> perform within the 45 to 60% range in separating truth from lies—little better than flipping a coin.[193]

Next, this approach is problematic because it casts a wide net that potentially allows the torture of anyone that may have some knowledge of the bomb.[194] "[Y]ou end up going down a slippery slope and sanctioning torture in general," states Professor David Cole.[195] With the lives of thousands of individuals on the line, how far should this individual be tortured? Are any means off limits in such a scenario? What if torturing the alleged terrorist does not produce results, but it is suspected that this individual will talk if the government tortures his six-year-old daughter in front of him? Inevitably, the ticking time bomb scenario leads full circle back to questions about legitimacy and fairness. If the United States is willing to venture down this slippery slope, it will, as the United States Army Field Manual section on torture indicates, "bring discredit upon the U.S. and its armed forces while undermining domestic and international support for the war effort."[196]

While this scenario represents the extreme example, all attempts to circumvent fairness in the name of effectiveness inevitably begin to move down this slippery slope. In a regime without clear rules, effectiveness becomes subsumed in necessity, and in a period of crisis, long-term costs are easily overshadowed by perceived short-term gains. It is possible to conceptualize a regime in which bureaucratic procedural red tape ties the hands of the military to a point where effectiveness is undermined. However, this is not the lesson of the last seven years. In contrast, U.S. policymakers are seeking to set rules and limits on a regime that has run largely unregulated and unchecked in the War on Terror.[197] The DTC model maintains effectiveness by recognizing inherent differences between suspected terrorists and domestic criminals. Yet, it also enhances fairness by granting specific procedural rights to detainees. Thus, under the

193. *Id.*
194. *Id.*
195. McCoy, *supra* note 189.
196. *Id.*
197. David Abraham, *The Bush Regime from Elections to Detentions: A Moral Economy of Carl Schmitt and Human Rights*, 62 U. MIAMI L. REV. 249, 267 (2008).

DTC model, if Osama bin Laden was captured today, he would not receive a full Miranda warning or be immediately brought to trial before a jury, as a domestic criminal defendant would be. Yet, he also would not be indefinitely placed in a "black hole" but would be brought before a judge within seven days. He would be guaranteed certain rights that would allow non-abusive interrogation but not torture. Regardless of whether valuable information is obtained through questioning, to go beyond the rules in this scenario would ultimately undermine both effectiveness and fairness in the long term. The DTC model establishes the correct balance by providing the tools to convict bin Laden without losing sight of his rights as a human being. In the eyes of a global audience, this model of guaranteed rules and rights enhances both legitimacy and long-term effectiveness in the War on Terror.

C. *The Limits of Procedural Justice and Legitimacy*

An important limitation of legitimacy is that it "does not address normative issues concerning whether people ought to defer to legal authorities and generally obey the law."[198] Thus, while legitimacy offers a way for the United States to obtain compliance with its policies, legitimacy fails to address whether these policies are inherently good or bad. Under a corrupt regime, legitimacy has the power to manipulate and exploit individuals by overshadowing questionable outcomes under the guise of fair process.[199] While recognizing that legitimacy and procedural justice can combat extremism, protect individual rights, and promote worldwide peace, they can also be misconstrued to achieve less desirable outcomes. Thus, while this paper has focused almost exclusively on process, we must ultimately also consider whether the outcomes derived from a given process align with the values that we want to pursue.

198. Tom R. Tyler, *Procedural Justice, Legitimacy, and the Effective Rule of Law*, 30 CRIME & JUST. 283, 285 (2003).
199. *See* MacCoun, *supra* note 7, at 189–90.

VIII. CONCLUSION

The War on Terrorism is an ideological struggle that can only be won through legitimizing the rule of law and undermining extremism. While governments often overreact in periods of crisis by trampling individual rights in the name of national security, governmental excess undermines the principle of legitimacy. In the context of terrorism, legitimacy, rather than deterrence, is primarily what shapes compliance with government policies. The DTC model enhances perceptions of legitimacy by providing a procedurally fair process designed specifically to try detainees. By properly balancing fairness, effectiveness, and efficiency, this model provides a workable solution that is better suited to the unique challenges involved in trying suspected terrorists than the vague standards employed by the current U.S. detention regime.