Behavioral Public Choice, U.S. National Security Interests, and Transnational Security Decision Making

Introduction

In 2002 the CIA and U.S. military sought approval from senior Bush-Cheney administration officials to interrogate known or suspected terrorists using coercive physical and psychological techniques that were then prohibited under international law, U.S. law, or U.S. policy. The CIA request arose during the interrogation of Abu Zubaydah, a top Al-Qaeda planner. The military request came from those questioning Mohammad al-Qahtani—the so-called 20th hijacker in Al-Qaeda's September 2001 attack against the United States—who was being held at the U.S. military base at Guantánamo Bay, Cuba. Internal military and CIA reviews led to coordination with the Department of Justice, the White House, and other government entities. Based on legal, medical, and other expert advice, President George W. Bush, Vice President Dick Cheney, and other senior administration officials approved new policies that many national and international communities regarded as ineffective, unlawful, immoral, and otherwise detrimental to national and global welfare.

This Article considers these decisions in the context of global counterterrorism policies and human rights concerns to further the symposium's exploration of the diverse ways executive power both shapes and is shaped by globalization.[1] More specifically, the symposium proceeded with a focus on how transnational law restructures domestic executive authority where executive authority has had to face new problems by adapting conventional forms of authority to the new context, or to face old problems with new means. In this Article the term "transnational executive" refers to public officials in national governments or intergovernmental organizations.

[1] "The Transnational Executive," Indiana Journal of Global Legal Studies, March 3-4, 2016, Bloomington, Indiana.

While the U.S. decision making processes involved only U.S. government officials, the decisions regarding torture and other coercive interrogation techniques[2] directly or indirectly affected many transnational executives addressing global counterterrorism and human rights issues. From the behavioral public choice perspective, the transnational legal and policy regime regulating torture is a form of paternalism designed to avoid behavioral failures of individual public officials and institutions. The behavioral component of this emerging field applies the lessons of cognitive science and psychology to consider how biases, heuristics, and other factors affect decisions of public officials.[3] Daniel Kahneman's descriptions of System 1 (automatic, quick, effortless, involuntary) and System 2 (effortful, deliberate, subjective) mental processes facilitate the discussion.[4] The public choice component is rooted in economic analysis of public decision making. The focus is on welfare considerations, incentives of public officials and interest groups, and constitutional and other institutional factors that shape policy outcomes.

Recent public choice analysis of international legal issues has focused on economic and trade issues. Daniel Sokol has called for greater attention to human rights, the complex factors that operate across multiple levels of international decision making, and institutional design.[5] And notwithstanding the challenges of assessing both terrorism risk and the soundness of related security decisions, Cass Sunstein[6] and W. Kip Viscusi and Ted Gayer[7] anticipate opportunities to

[2] This Article uses the term "torture decisions" as shorthand for this broad category issues.
[3] CASS R. SUNSTEIN, WHY NUDGE?: THE POLITICS OF LIBERTARIAN PATERNALISM, 100 (2014); W. Kip Viscusi & Ted Gayer, *Behavioral Public Choice: The Behavioral Paradox of Government Policy*, Working Paper Number 15-2, available at http://ssrn.com/abstract=2559408.
[4] DANIEL KAHNEMAN, THINKING, FAST AND SLOW, 20-30 (2011).
[5] *See, e.g.*, D. Daniel Sokol, *Explaining the Importance of Public Choice for Law*, 109 MICH. L. REV. 1029, 1040-1048 (2011) (reviewing MAXWELL L STEARNS & TODD J. ZYWICKI, PUBLIC CHOICE CONCEPTS AND APPLICATIONS IN LAW (2009) and discussing the importance of public choice analysis of international legal issues, *available at* http://scholarship.law.ufl.edu/facultypub/227).
[6] Sunstein, *supra* note 3 at 31.
[7] Viscusi & Gayer, *supra* note 3 at 25-6.

develop the behavioral public choice field to improve national security policy decisions. This Article proceeds with those goals in mind.

As with interrogation techniques that may amount to torture, sovereigns and other transnational actors may view humanitarian dimensions of lethal drone strikes, human trafficking, cyber operations, and other transnational issues as secondary considerations. Traditional economic analysis of such issues may lead to important insights in these areas; however, the approach may appear to marginalize humanitarian considerations due to the focus on economic values and market impacts. Behavioral public choice presents an opportunity to approach them more completely because it can account for decision makers' System 1 and System 2 experiences with those issues. Ethics and morality, for example, may be important elements of the transnational executive's personal or institutional objectives. In some cases, public officials may need to act in accordance with professional ethics codes or other institutional requirements. Acknowledging and specifying those interests and obligations individually or in group settings becomes an essential attribute of formal and informal decision making processes. A behavioral public choice framework thus encourages and enables policy makers and their advisors to examine, and perhaps adjust, a wide range of personal or institutional characteristics to reach more optimal outcomes.

This first Article to link behavioral public choice and U.S. counterterrorism policy has a modest goal—to demonstrate how the field can be applied to U.S. national security decision making processes to inform the study of transnational issues. Part I reviews the key elements of the CIA and military decision making processes that led to new U.S. torture policies. It also summarizes the transnational legal and policy environment and related transnational decision making processes. Part II draws upon behavioral and public choice literatures to describe the

U.S. national security decision making environment and summarize key aspects of an evolving behavioral public choice field as it relates to the Bush-Cheney administration decisions. Part III identifies a number of scholarly literatures that supplement the behavioral public choice consideration of U.S. and transnational security decision making processes. Part III also suggests how public officials can draw upon these literatures to improve welfare outcomes as the behavioral public choice field develops. [CONSLUSION FORTHCOMING]

I. U.S. Torture Policies and Transnational Executive Interests

In 2001 U.S. federal government policies on torture and other forms of coercive interrogation techniques by public officials were shaped by numerous laws, moral considerations, and institutional interests that had evolved over generations. In the executive branch an army field manual provided guidance to military communities, FBI directives and guidelines instructed interrogators on the use of coercive techniques in traditional law enforcement and national security investigations, and the Justice Department provided guidance to prosecutors on construing the criminal law that prohibited torture committed by U.S. public officials. The CIA had no formal policy on these topics. Until 2005, Congress's only major treatment of torture was limited to a 1994 criminal law implementing the 1984 U.N. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("Torture Convention").[8] This federal torture law regulated the conduct of U.S. and other public officials by specifically prohibiting acts inflicting "severe physical or mental pain and suffering (other than pain and suffering incident to lawful sanctions) upon another person."[9]

[8] Sec. 506 of Pub. L. No. 103-236 (Apr. 30, 1994), 108 Stat. 463, 18 U.S.C. 2340 et seq.
[9] 18 U.S.C. § 2340A.

Al-Qaeda's September 2001 attack prompted reconsideration of U.S. torture policy under the Bush-Cheney administration's public declaration "to use any means at our disposal, basically, to achieve our objective."[10] As summarized further in this Part, the CIA and Department of Defense developed and implanted new programs in 2002 and 2003 hoping to obtain credible information about past and future terrorist threats to the United States. These decisions rested almost exclusively on the advice of government attorneys that certain techniques would not violate the federal torture law, the Torture Convention, or other applicable laws.

Although the administration's decisions about torture policy had direct and indirect effects on foreign governments and other transnational executives, these decisions did not involve any of those entities. This poses challenging questions for those who anticipate that transnational legal and policy regimes governing criminal, humanitarian, and related issues will be implemented in good faith in accordance with transnational norms. The remainder of this Part explores those issues to enable discussion of related behavioral public choice issues in national and transnational environments.

A. Creating a CIA Interrogation Policy

The CIA's interest in changing U.S. torture policy reportedly began in March 2002 with the capture and interrogation of Abu Zubaydah, a top Al-Qaeda operative who had been found in Pakistan.[11] According to CIA general counsel John Rizzo, CIA counterterrorism, interrogation, psychologist, and other experts developed the so-called "enhanced interrogation program" to obtain reliable information about threats to U.S. interests. That same month CIA lawyers presented the proposal to Rizzo, who briefed director George Tenet and sought discussions with

[10] Remarks of Vice President Richard Cheney, *Meet the Press*, NBC (Sept. 16, 2001).
[11] CHARLIE SAVAGE, TAKEOVER: THE RETURN OF THE IMPERIAL PRESIDENCY AND THE SUBVERSION OF AMERICAN DEMOCRACY 154, 219 (2007).

John Bellinger, the legal advisor to the National Security Council. Within ten days Rizzo had briefed Bellinger and several Justice Department attorneys on the CIA's policy interest. He also requested a legal memorandum describing the limits of CIA authority specifically under the 1994 federal torture law.

In July the Justice Department's Office of Legal Counsel (OLC) delivered a draft legal memorandum to Rizzo and the other attorneys for review and input. By then FBI director Robert Mueller had decided not to allow FBI employees to participate in interrogations involving the enhanced techniques. He cited contradictory FBI directives and policies and a belief among FBI interrogators that they were making progress with Zubaydah. The Justice Department finalized the legal memorandum August 1, 2002, after briefings to Vice President Cheney and President Bush's national security advisor, Condoleeza Rice. The CIA began to implement the new policy upon receipt of the memorandum.

B. Changing Defense Department Policy on Torture and Interrogations

The military's interest in changing U.S. torture policy reportedly began in October 2002.[12] Interrogators at the U.S. Naval Base at Guantánamo Bay sought permission to use more severe tactics on Mohammad al-Qahtani. He had been captured in Afghanistan ten months earlier and was believed to be a 9/11 hijacker who was denied entry to the U.S. via the Orlando International Airport in August 2001. The legal advisor to the interrogation team, Lieutenant Colonel Diane Beaver, wrote a legal opinion concluding that harsher techniques were permissible. Her advice rested on a determination that the Geneva Conventions would prohibit the tactics, but the president had previously determined that they did not apply to suspected terrorists.[13]

[12] Savage, *supra* note 11, at 177-8.
[13] *Id.* at 178.

In December 2002 Defense Department general counsel Jim Haynes advised secretary Donald Rumsfeld to approve all requested techniques except waterboarding and mock executions, which he viewed as "not warranted."[14] Secretary Rumsfeld accepted the recommendation and approved the new policy based solely on internal Defense Department advice. Later that month Alberto Mora, general counsel of the Navy, learned of the new policy from Navy psychologists and investigators reviewing interrogation logs.[15] He disagreed with Haynes' legal advice and sought to have the policy rescinded. In January 2003 he presented Haynes with a draft memorandum expressing his legal determinations and recommendations. He threatened to finalize the memorandum to create a permanent record of his views that afternoon if the policy remained in place. Haynes reported that secretary Rumsfeld was already planning to rescind his decision to allow a new working group to review various Guantánamo prisoner policies.

To inform the group's work Haynes asked OLC for a memorandum "that would settle how far military interrogators legally could go inflicting suffering on detainees."[16] Mora and other senior military attorneys objected to Assistant Attorney General John Yoo's draft opinion, which replicated the analysis and advice delivered to the CIA in August. Concerns that Mora and other attorneys in the military services expressed were not addressed in the final OLC analysis. It was delivered to the working group on Guantánamo policies and, ultimately, the Guantánamo commander.

[14] *Id.*
[15] *Id.*
[16] *Id.* at 179.

C. Shades of Torture under Law

The international and national law of torture was clearly an important element of the new policies. Indeed, although the individual and institutional influences shaping the administration's decisions were numerous, OLC's interpretation of the lawfulness of the coercive techniques was the central issue in the CIA's 2002 decision and the Defense Department's 2003 decision. Knowledge of the law had prompted CIA and military interrogators to seek guidance from legal and non-legal experts. Initial CIA and military reviews involved attorneys, doctors, and other experts almost immediately. Both inquiries extended to lawyers and other experts at the White House, cabinet agencies, and sub-cabinet agencies through traditional interagency review processes. That is, from the start, government's System 2 decision making processes were engaged to consider legal, medical, and other issues deliberately.

For the CIA the legal question focused exclusively on the U.S. torture law, in part because international law does not regulate intelligence agencies as it does other public officials.[17] For the Defense Department the legal question was whether the new tactics were prohibited as "torture" or permitted as "cruel, inhuman, or degrading treatment" under the Geneva Conventions. It is beyond the scope of this Article to review the many diverse critiques of these narrow questions and the Justice Department's formal legal guidance. It is, however, helpful to review the contours of the legal issues presented under the Geneva Conventions, the Torture Convention, and U.S. law.

Jeannine Bell's categories of coercive interrogation practices point to the challenges experts confront attempting to draw clear legal lines for policy makers in the field of intelligence,

[17] W. MICHAEL REISMAN & JAMES E. BAKER, REGULATING COVERT ACTION: PRACTICES, CONTEXTS, AND POLICIES OF COVERT ACTION IN INTERNATIONAL AND AMERICAN LAW __ (1992).

military, law enforcement, or other national security activities.[18] To use her descriptions, the CIA and military interests of 2002 fell along a continuum that extends from "classic torture" to "cruel, inhuman, and degrading treatment," "torture lite," and "psychologically coercive interrogation practices." In practice, this is "a continuum characterized by degrees of intensity and duration."[19] Only psychologically coercive interrogation practices—which Bell identifies with traditional federal and state law enforcement practice in the United States—are not prohibited by some element of international law.

The practice of nations in terrorism and other national security matters since the 1970s indicates that transnational policy makers frequently seek great flexibility to challenge the legal prohibition against imposing severe pain or suffering. The blending of physically and psychologically coercive techniques that ensues leaves international and national courts in dispute about whether they are prohibited as torture or some other form of criminal act. Coercion in interrogations is, in short, the kind of issue that is not well suited to decision making processes that focus on the state of the law at the expense of institutional, moral, and other considerations.

To accept that institutions subject to law are constantly shaping and developing the law around key concepts enshrined in treaty, statute, regulation, or other sources of law is to expect those institutions to reach suboptimal outcomes in a variety of ways. How that occurs and how interested institutions respond becomes an essential part of the broader analysis. The assertion here is that input from U.S. and other interested institutions is an essential part of applying and evolving transnational law to achieve more welfare-enhancing outcomes in counterterrorism and global security concerns.

[18] Jeannine Bell, "*Behind This Mortal Bone:" The (In)Effectiveness of Torture*, 83 IND. L. J. 339, 342-346. (2008).
[19] *Id.* at 346.

Consider, for example, that the Bush-Cheney administration did not inform or consult Congress when deliberating the new policies. *The New York Times* published the first public information on the policies in May 2004. By December 2005 Congress had passed new legislation explicitly prohibiting all practices adopted in 2002 and 2003.[20] One view of this response is that it created new, clear legal requirements as a matter of U.S. law that the executive branch could not or should not have presumed to be binding in earlier years. Alternatively, the law may be viewed as a more specific legislative expression of 2002 legal requirements under U.S. and international law. Under this view of the transnational law of torture, engaging Congress in some way when the policy is first proposed would be prudent because Congress could not have foreseen the executive's specific 2002 policy interests in 1994 when implementing the Torture Convention. One need not accept that perspective, however, to acknowledge that Congress is, in an important sense, a transnational legislature with both exclusive constitutional authority to legislate on the matter and an essential role in faithfully applying and shaping national and international law in the United States.

D. Transnational Communities Regulating Torture

While the well-planned attack that U.S. government institutions confronted was shocking and catastrophic in many ways, particularly to the American public, it was clearly a new jihadi manifestation of an old terrorism problem. With the more recent spread of the Islamic State and its preference for decentralized attacks by individuals and small groups using available resources, the 2001 manifestation continues to morph as transnational executives respond to and attempt to prevent further attacks.

[20] Detainee Treatment Act of 2005, Pub. L. No. 109–148, div. A, tit. X, §§ 1001-1006, 119 Stat. 2680, 2739-44 (2005).

The transnational legal and policy regime regulating torture includes at least two definable groups whose interests should factor into behavioral public choice analyses. The first includes allied nations joined in counterterrorism operations with the United States after 9/11. At the time of the CIA policy proposal, numerous nations were hosting "black sites" for the CIA to interrogate detainees as part of the rendition program. Several other nations known to permit torture received and interrogated other detainees at the request of the United States. The numerous national intelligence institutions that undertook these programs constitute a unique network of transnational executive entity. Public international law does not define the relationships that form this network. Rather, the network operates as an extension of military or security relationships that may be established through formal or informal agreements. The growth of and reliance on this network places unique burdens on the torture regime that transnational executives developed to regulate military forces as the predominant expression of hard national power.

The second group includes nations and organizations that create, implement, or administer the international law of torture and other cruel, inhuman, or degrading treatment. The United Nations is the primary institution in this group due to its sponsorship of the Torture Convention and the creation of a special rapporteur position for torture through its Commission on Human Rights. States party to the Geneva Conventions and its additional protocols constitute distinct categories in this group. Given its special role implementing the Geneva Conventions the International Committee of the Red Cross is also in this group.

The global intelligence network may have had some ability to influence operational U.S. counterterrorism goals, but the members' institutional interests were aligned closely with the U.S. administration. The United Nations might be perceived to have some influence, but issues

like interrogation policy would not be expected to rise to the level of the Security Council. There were thus few opportunities for transnational legal and policy norms on torture to influence U.S. officials, let alone restructure domestic U.S. authority. The greater concern for transnational communities is that the U.S. decision to circumvent the transnational torture regime through a robust operational intelligence network foreshadows the decline of other transnational regimes. These communities' interests in behavioral public choice are threefold: maintaining vitality in existing regimes, developing ways to influence transnational intelligence interests, and minimizing incentives for nations to define and pursue global welfare outcomes independently.

II. Framing the Behavioral Public Choice Analysis of the U.S. Torture Decisions

Complex national and transnational security issues are often presented as existential issues that present many competing bureaucratic goals, political interests, and other public choice incentives.[21] To inform the study of these issues and transnational executive authority, a behavioral public choice literature must develop to inform three broad issues: 1) how domestic institutions improve System 2 national security processes generally; 2) how these institutions account for welfare outcomes of transnational System 2 processes; and 3) how domestic and foreign transnational institutions integrate their respective welfare assessments and policies. This Part provides an overview of the U.S. national security decision making environment to contextualize key features of the public choice and behavioral economics fields that help assess the CIA and military decisions.

[21] GORDON TULLOCK, ARTHUR SELDON & GORDON LO BRADY, GOVERNMENT FAILURE: A PRIMER IN PUBLIC CHOICE (2002).

A. The Behavioral U.S. National Security Environment

Today's U.S. national security environment is the result of a seventy-year evolutionary process that has shaped a paramount executive branch in the U.S. constitutional order. Its key features are a White House-led National Security Council of cabinet officials and other senior political appointees; a standing NSC staff to develop and coordinate policies with interested institutions; a structured community of intelligence agencies that stand alone (like the CIA) or reside within other agencies (like the Defense Intelligence Agency and National Security Agency within the Defense Department) under the general direction of a Director of National Intelligence; and flexible legislative[22] and executive[23] authorities to adjust the interagency policy making system.

Broadly understood, the decision making environment may expand or contract from several individuals to dozens of groups or even thousands of officials contributing analysis, recommendations, operational information, and subordinate decisions on a given national security issue. The more complex environments may be expected on policy matters delegated to cabinet officials or other senior leaders where robust bureaucracies in one or more agencies exist to implement programs. Border security and immigration programs, for example, are carried out by the Department of Homeland Security, but significant military and intelligence resources in other agencies are allocated to support those efforts. That prompts many levels of planning, operational, and policy coordination that can lead to the NSC and the president on the most significant matters. A behavioral public choice understanding of the U.S. national security environment thus relies on a sophisticated understanding of the formal and informal processes shaping the decisions on specific transnational security issues. The behavioral component is an

[22] Cite to the National Security Act of 1947.
[23] Cite to Presidential Directives from various administrations.

effort to identify System 1 and System 2 behavioral failures of individuals and groups to help define the bounded rationality of those decisions.

1. Behavioral Failures in U.S. National Security Institutions

All government entities have System 1 and System 2 equivalents that can institutionalize rather than overcome behavioral anomalies.[24] Sunstein asserts that government's large coterie of subject matter experts is a relative good that helps ensure welfare-enhancing System 2 decisions.[25] If they do, it is only through effortful steps to ensure that behavioral failures are identified, understood, and addressed.

A well-developed behavioral public choice literature will both identify behavioral failures and recommend ways to minimize them in specific settings. Viscusi and Gayer use the term "behavioral failures"[26] for the collective cognitive limitations and psychological biases "that lead people to make choices that cause self-harm" because "they often involve departures from the individual rationality in economists' models of consumer choice."[27] This is a broad field. They draw upon Congdon, Kling, and Mullainathan to urge attention to failures of imperfect optimization, bounded self-control, and nonstandard preferences.[28] Further research exploring these concepts would ideally help national security officials improve decisions concerning the public's well-being, act on interests they know they want for the public, and value policy means as much as ends.

A thorough understanding of national security environments will include common and unique ways that biases, errors, heuristics, and other failures lead to welfare-reducing outcomes.

[24] Sunstein, *supra* note 3; Viscusi & Gayer, *supra* note 3 at 5-6.
[25] Sunstein, *supra* note 3.
[26] Viscusi and Gayer, *supra* note 3 at 3.
[27] *Id.*
[28] *Id.* at 3-4 (citing WILLIAM J. CONGDON, JEFFREY R. KLING & SENDHIL MULLAINATHAN, POLICY AND CHOICE: PUBLIC FINANCE THROUGH THE LENS OF BEHAVIORAL ECONOMICS (2011)).

Policy interests assessed through the affect heuristic are decided on emotions, not calculated probabilities. Regarding government policy generally, Viscusi and Gayer point to "misperception of risks, unwarranted aversion to risk ambiguity, inordinate aversion to losses, and inconsistencies in tradeoffs reflected in individual decisions"[29] as concerns because public officials exhibit the biases and public pressures may reinforce them. Devoting inordinate attention to worst-case scenarios, overestimating small probabilities and the risk reduction that comes from eliminating them, and responding in extreme ways to newly discovered risks is both common in administrative fields and particularly consequential in the national security arena.[30]

Variation in the way these problems occur should be expected based on the types of officials involved in the processes. Elected officials and their political appointees experience public and institutional pressures very differently from career civil-service employees and military officers. This variation would also be expected across legal and other professional groups contributing to the decisions. Mitt Regan describes the national security lawyer as likely to reach "a premature sense of certainty" based on behavioral failures. While that may help explain some aspects of the legal work that OLC and the Defense Department delivered, it is neither an accurate description of the way other attorneys acted nor a complete description of the professional challenges attorneys face.

2. Bounded Rationality in U.S. National Security Institutions

With a focus on U.S. or transnational security issues an expanding behavioral literature will begin to describe the boundaries of rational decision making in related institutions. The contours of that rationality may bear similarities to administrative, health, transportation, and

[29] Viscusi & Gayer, *supra* note 3 at 5.
[30] *Id.* at 17-26.

other U.S. government environments, but they may differ in important ways. The following discussion identifies salience and risk assessment as important focal points for future research.

a) Salience

Sunstein observes that "a lack of salience can be its own behavioral market failure."[31] Laws or regulations requiring that calorie counts appear on restaurant menus or that nutritional information appear on packaged food make that information salient to consumers. Behavioral public choice asks what was salient to the public officials who identified relevant welfare considerations and public interests, developed policy options, developed new laws or regulations, and implemented the policies.

The law of torture was clearly salient to the CIA and military officials who sought permission to use more coercive techniques. It was also salient to the medical, legal, and other experts who reviewed and shaped the new policies during the 4-month CIA and Justice Department reviews and the subsequent Defense Department reviews. But there was inadequate legal salience in the view of Navy general counsel Mora, many military attorneys, FBI director Mueller, and presumably other lawyers and decision makers during that time.

The motivations for the initial requests must be considered among the most salient issues that were balanced against the law. Whether to prevent impending attacks, advance operational counterterrorism programs, preserve the reputation of national security agencies and other institutions, appeal to perceived public interest, or advance political objectives, it is clear that law was simply one of many factors the various decision making groups confronted. The highest degree of salience should be demonstrated on key issues that would demonstrate success, namely obtaining useful information and applying that information to improve security. In this area the

[31] Sunstein, *supra* note 3 at 40.

threat assessments and risk calculations are particularly difficult, which should prompt great interest in establishing norms that help define publicly acceptable norms for System 2 national security decision making.

U.S. national security officials have many opportunities to correct salience problems. Indeed, one explanation for the various steps that FBI director Mueller, Navy general counsel Mora, and others took to express personal and institutional opposition is that they were seeking to properly balance the degrees of salience that officials were giving to important issues. Director Mueller noted that FBI interrogators believed they were making progress toward obtaining useful information from Zubaydah. He, Mora, and the uniformed lawyers also pointed to policies, manuals, and other institutional norms they believed to be more salient than the strict legality of the proposed techniques.

In administrative fields when the public's salience of policy interests is low, the preferred solution may be to disclose information about the issues and proposed policies.[32] Sunstein draws upon cognitive research to suggest more generally that salience can be promoted in any group through surveys, reminders, personalized emails, checklists, and other mechanisms.[33] The ease of improving salience presents great opportunity for officials to find suitable ways to identify key issues jointly and address their salience across a decision timeline.

b) Risk Assessment

Behavioral failures related to risk perception, risk assessment, and risk ambiguity are evident in many areas of government decision making.[34] Addressing such behavioral concerns in

[32] *Id.* at 44.
[33] *Id.* at 41.
[34] *See, e.g.*, VISCUSI & GAYER *supra* note 3 at 17-26 (discussing failures of risk perception and risk assessment evident in newly discovered risks.)

administrative agencies has long been linked to public choice theory.[35] As with national security institutions, administrative agencies like the Food and Drug Administration address issues of life and death when testing and approving new drugs. The biases and other behavioral failures involved in assessing health risks identified through scientific study include systematic bias to avoid near-term harms. This and other failures theorized and observed in administrative fields may be found in national security institutions as well.

The lack of empirical studies in those areas, however, urges caution proceeding from that assumption. Risk related to terrorist activity and other global security threats is not necessarily understood through the kind of public, peer-reviewed studies that inform decisions about new drugs, highway deaths, or nutrition. To the contrary, risk information in many national security institutions may be obtained and assessed in discrete communities. Classifying the information out of concern its disclosure will harm national security limits dissemination. In addition, each national security agency or interagency policy making group operates with unique institutional norms.

On key risk-related justifications for the interrogation policies—e.g., that coercive techniques were in the public interest and sufficiently likely both to yield useful information and then also stop an impending attack—the risk assessments and determinations by the CIA, military, Justice Department, NSC staff, and elected executives may never have been harmonized or pointedly discussed. While this is also an issue of salience, there is equal concern that behavioral failures of individuals and institutions led to poor risk products and policy options.

[35] *See* Part II B, *infra*.

B. Public Choice Issues in the Torture Decisions

A rich empirical understanding of the behavioral U.S. national security environment would enable insights to be translated to agencies and other institutions immediately. Information that can be disclosed to the public may also promote trust, improve legitimacy, and otherwise improve governance through those institutions. For scholarly communities there is great benefit in linking the additional knowledge to the long history of public choice research that has produced important insights on many legal and policy fields since the 1980s.[36]

In the United States the field provides important critiques of voting and other public decision making systems, the structure and functioning of government institutions (e.g., Congress, the judiciary, and administrative agencies), the study of interest groups affecting legal policy issues, and the U.S. criminal procedure regime. The following discussion identifies ways to extend the scholarly field into national security agencies and transnational decision making environments.

1. Paternalism

National and international communities have addressed torture as a behavioral market failure in order to achieve greater societal goods. The criminal law regime that national governments and intergovernmental organizations have created over generations seeks both to deter those wishing to perform the prohibited acts and punish those who do. In this respect the Geneva Conventions, Torture Convention, U.S. torture law, and similar laws negotiated and implemented by transnational executives or passed by legislatures are forms of paternalism. This transnational torture regime seeks to ensure better welfare decisions by those who might be

[36] *See, e.g.*, Frank H. Easterbrook, *Ways of Criticizing the Court*, 95 HARV. L. REV. 802 (1982); *Symposium on the Theory of Public Choice*, 74:2 VA. L. REV. 167, *et seq* (March 1988); Daniel A. Farber and Philip B. Frickey, *The Jurisprudence of Public Choice*, 65 TEX. L. REV. 873 (1987).

influenced to make sub-optimal choices for themselves, their government agency, and various polities. In effect, these laws and policies seek to elevate the welfare calculation to the level of the law making power and the institutions that implement them.

The regime may be viewed as a form of hard paternalism because it seeks to impose high costs on individuals.[37] Torture laws should also be viewed as both means and ends paternalism. They are ends paternalism because they seek the absence of torture and cruel, inhuman, or degrading treatment by public officials. The laws also operate as means paternalism because they have subordinate objectives like regulating the means by which public officials detain and interrogate individuals.

A behavioral objective of paternalistic laws is to eliminate or minimize System 1 errors that individuals and groups bring to decision making. They rely upon processes that distance the decision from emotions, intuitions, biases, heuristics, and other familiar references points. Cost-benefit analysis, for example, is a step that helps policy makers avoid such errors.[38]

2. National Security Welfare Considerations

Traditional welfare theories of the public sector identify public goods and bads as topics of concern.[39] The view of national defense and domestic law enforcement as public goods helps frame one discussion of welfare interests. Consider how three different perspectives on national security inform the study of the 2002 decisions.

First, an abstract or absolute view of national security as the desirable public good may prompt public officials to rely on System 1 processes or consider only remote, intangible national security benefits. Under this view, the public official pursues instinctual protective

[37] Sunstein, *supra* note 3 at 55-61.
[38] *Id.* at 30, 101.
[39] *See, e.g.*, Peter H. Aranson, Ernest Gellhorn & Glen O. Robinson, *A Theory of Legislative Delegation*, 68 CORNELL L. REV. 1 (1982).

policies and acts as society's representative to prevent attacks, save lives, or obtain useful information. Actions with low probabilities of success are preferable to inaction or slow action. Elected officials and political appointees may be more prone to operate from this view reflecting the constitutional role of the federal government, the electorate's perception of the risk of attacks, or their own personal interests. When national security is viewed this way, individuals and institutions must deliberately engage System 2 processes to value externalities and public bads.

A more nuanced approach to national security as a public good might focus on the specialized roles that intelligence, military, law enforcement, and other communities perform. Agencies define national security differently and bring unique public and private interests to policy discussions about their programs. This may enable more specific definitions and accountings of public goods and bads than the abstract view of national security, but much depends on the process that brings these perspectives into discussion. The FBI director's decision emphasizes this point. In refusing to allow FBI officials to carry out the new policies he demonstrated personal and institutional willingness to tolerate some number of attacks, loss of life, or other externality that the CIA and military policies might have enabled government to prevent.

A third view encourages a closer focus on the specific issues, in this case the interrogations themselves and relevant surrounding circumstances. CIA and military officials separately requested policy changes hoping to obtain useful information from specific detainees and perhaps also establish long-term policies for a global, long-term campaign. While these intelligence and military communities were carrying out public roles to achieve national security goals, there were important differences in their institutional postures. CIA interrogations were

performed outside the United States, sometimes in concert with allied nations; military interrogations were on U.S. territory at Guantánamo Bay and in Iraq where the United States exercised a degree of control and responsibility under the Geneva Conventions. The CIA never had a policy on interrogations; longstanding military policies and manuals implemented the parameters of international law and the Uniform Code of Military Justice. These and other differences point to great variation in the ways officials would be expected both to define public goods and bads and to bring institutional and personal interests into their respective decision making environments. For example, the CIA legal request focused on the prohibitions of the federal torture law. The military request focused on the Geneva Conventions. From this perspective the agencies asked different national security questions that present different considerations of public goods and bads.

3. Social Costs in Criminal Systems

Public choice approaches to issues of criminal law and procedure tend to focus on the social cost of government policies.[40] In their public choice analysis of the U.S. criminal justice system Hylton and Khanna assert that the "superior explanation for pro-defendant procedural protections" is found by considering both "traditional error" costs and "costs associated with abuses of prosecutorial or punishment authority." Traditional errors include denial of liberty, harm to reputation, and weakened moral authority of the law. Hylton and Khanna refer to the second category as "public choice costs." Their approach roughly equates to grouping the costs as systemic failures (traditional errors) or individual failures (public choice errors). This approach provides a helpful analog to describe some of the social costs of a transnational legal regime like the one regulating torture and coercive interrogations.

[40] *See, e.g.*, Keith N. Hylton & Vikramaditya Khanna, *A Public Choice Theory of Criminal Procedure*, 15 SUP. CT. ECON. REV. 61 (2007).

The traditional error costs certainly include similar system-oriented costs like liberty deprivation, reputational harm, and weakened moral authority of the law. The public choice costs that would be expected relate to individual abuses of recognized authority. These would include the acts of military officials operating under the Geneva Conventions (e.g., the 2003 Abu Ghraib abuses), public officials of states party to the Torture Convention, or any U.S. or foreign public official subject to the U.S. torture law.

While Hylton and Khann's public choice costs might be expected to include acts that are without legal authority or exceed an official's legal authority, accounting for them separately as "transnational security costs" makes transnational legal and policy issues more salient and enables closer examination of policy practices. CIA general counsel Rizzo effectively identified the possibility of such costs arising for the CIA given that a new policy would ask or require civil servants or contract employees to take actions implicating the U.S. torture law. The harms these employees might suffer—e.g., psychic harms from administering the more coercive techniques or the financial costs of defending against criminal charges—would follow from decisions that are not mere abuses of recognized authority. Rizzo responded by consulting the NSC legal adviser and Justice Department to engage a broader range of experts on the relevant considerations. In contrast, the Defense Department's readiness to decide the issue internally in 2002 indicates a lack of salience on certain transnational security costs.

4. Systematic Bias in National Security Institutions

Quantifying and assessing different kinds of risk is central to the primary functions of national security agencies and administrative regulatory agencies alike. Maxwell Stearns points to empirical studies of the latter showing systematic biases by public officials.[41] When risks to

[41] MAXWELL L. STEARNS & TODD J. ZYWICKI, PUBLIC CHOICE CONCEPTS AND APPLICATIONS IN LAW 358-61 (2009) (citing DENNIS C. MUELLER, PUBLIC CHOICE III (2003) and other works).

life and other costs of two policy options are equal, the officials chose the policy that avoided certain tangible harms—perhaps death or injury to those taking drugs approved after short testing periods. When the harms are more distant or difficult to observe the officials choose against them, even if the long-term costs are equivalent. The data show that officials are advancing institutional or personal interests through System 1 or System 2 processes. Similar studies in national security agencies have not been reported, but it would be valuable to have empirical data on systematic biases to enable comparison across security issues, times, and responses by other governments.

III. Supplementing the Behavioral Public Choice Framework

Behavioral and public choice perspectives on the torture decisions identify important national security issues warranting further study. But they require further context to consider the first two broad issues introduced in Part II. This Part returns to those issues and identifies recent legal scholarship on government structure, leadership, and behavioral ethics to consider how U.S. national security institutions might improve System 2 decision making and account for welfare outcomes in transnational security issues.

A. Double-Government and U.S. National Security Institutions

Michael Glennon proposes that Walter Bagehot's theory of double-government explains a great deal of U.S. national security policy making and practice. To Glennon, a "Trumanite network" of bureaucratic elites promotes secrecy, exaggerates threats, maintains the status quo, and resists change in an anti-democratic usurpation of power of elected executives.[42] Even when

[42] MICHAEL J. GLENNON, NATIONAL SECURITY AND DOUBLE GOVERNMENT 11-28 (2015).

the public seems to seek dramatic change in national security policies during election cycles, the public accepts stability and status quo that the Trumanite network constructs and implements.

The CIA, Department of Defense, NSC staff, and OLC are core elements of Glennon's Trumanite network. Collectively they overemphasize government's role protecting people from transnational security threats, diminish Congress's various roles, and reduce the constraints and meaningful effect of international law.[43] Like much of public choice theory, Glennon's is a report on constitutional and other institutional failures that regard national security policies as welfare reducing and undemocratic. In the face of many failed systematic corrections,[44] his encouragement is to cultivate civic virtue and an engaged electorate to change government.[45]

Such long-term, low-probability proposals suggest that U.S. national security institutions cannot be meaningfully improved as global security concerns and national governments shape transnational executive power. This view discounts the possibility that change will occur as a matter of presidential direction, self-interest, or new insights. President Obama's second-term initiatives on open government and transparency have required the intelligence community to think and act differently in many areas. CIA Director John Brennan has implemented a personnel reform project that breaks down barriers among professional communities and operational activities. National Security Agency Director Michael Rogers has similarly moved to merge professional communities by integrating the signals intelligence and information assurance directorates. While relatively modest compared to the long history of iterative change that formed the Trumanite network over 70 years, these are potentially game-changing in how

[43] *Id.* at 99, 105.
[44] *Id.* at 99-109.
[45] *Id.* at 101-102 ("What is needed, if Bagehot's theory is correct, is a fundamental change in the very discourse within which U.S. national security policy is made. For the question is no longer: What should the *government* do? The questions now are: What should be done *about* the government? What *can* be done about the government? What are the responsibilities not of the government but of *the people*?"); 109-112.

national security institutions regard themselves and the way they engage domestic and transnational communities.

B. Leadership in U.S. National Security Institutions

For James Baker, there is ample opportunity for lawyers and decision makers in the national security environment to overcome individual and institutional failures. "[T]he human factor—leadership and the moral courage to face hard risks and make hard choices"[46] is paramount when it comes to implementing sound intelligence, homeland security, military command and other national security policies. In attorneys' relationships with senior military leaders and other senior officials he cautions against "too much focus on the law rather than on leadership" since successful relationships have "more to do with personality, leadership, and style than the law."[47] He encourages lawyers and policymakers to apply formal and informal processes to ensure that security policies are implemented lawfully, ethically, and thereby honorably. Rejecting too much emphasis on structural and bureaucratic models, he observes that "[l]aw and process provide an opportunity for success, but do not guarantee result. Leadership, culture, personality, and sometimes good luck are as important as law."[48] In his model, U.S. laws like the 1994 torture law would "mark[] a beginning of the process, not its conclusion."[49] So, too, with international law except that from any national government's perspective "core national security interests are as likely to shape international law as take shape from it."[50]

The legal academy has dedicated remarkably little attention to leadership.[51] Like behavioral public choice, this field requires significant attention to identify additional contours to

[46] JAMES E. BAKER, IN THE COMMON DEFENSE: NATIONAL SECURITY LAW FOR PERILOUS TIMES, 306 (2007).
[47] *Id. at* 229.
[48] *Id.* at 309.
[49] *Id*. at 306.
[50] *Id.* at 20.
[51] The exception is Deborah L. Rhode, whose most significant contribution is LAWYERS AS LEADERS (2013).

guide scholarly and professional communities. The academic field is experiencing a shift in which leadership is viewed as "a property of the system" rather than an individual attribute.[52] Baker's perspective suggests that both approaches are important in the national security setting because lawyers play an essential role helping policy makers understand broadly defined welfare interests of national security policies.

Baker is urging a sophisticated role for attorneys. In addition to advising on the state of national and transnational law, his national security attorneys must also be agents of social influence with moral character and sensitivity to many institutional factors governing any particular issue. It is a set of knowledge, skills, and abilities that does not coalesce on its own. But if they are cultivated in attorneys or other officials they present opportunities to improve processes that behavioral public choice insights encourage.

C. Behavioral Ethics and Choice Architecture

The bounded rationality of the national security environment will affect decision makers, attorneys, and other expert advisors in some similar ways.[53] Attorneys must understand and address those issues to fulfill their roles effectively. One set of responsibilities includes the professional services due to the officials they advise, their agency, and the decision making groups involved. This set of responsibilities includes providing advice on non-legal issues. Policy makers may be disinterested in hearing about transnational welfare interests from national security attorneys, but doing so is a valid—perhaps even obligatory—exercise of the attorney's professional ethical obligation.

[52] RICHARD BOLDEN, BEVERLEY HAWKINS, JONATHAN GOSLING & SCOTT TAYLOR, EXPLORING LEADERSHIP: INDIVIDUAL, ORGANIZATIONAL, & SOCIETAL PERSPECTIVES 6 (2011).
[53] *See, e.g.*, Robert Prentice, *Behavioral Ethics: Can It Help Lawyers (and Others) Be Their Best Selves?*, 29 NOTRE DAME J.L. ETHICS & PUB. POL'Y 35, 39 (2015), *available at*: http://scholarship.law.nd.edu/ndjlepp/vol29/iss1/2.

A second set of responsibilities relates to understanding the decision making environment itself. Understanding the bounded rationality of ethical decision making prepares attorneys to check their own behavior as well as their colleagues.[54] It is an area that calls for focused attention of many types of public officials and research communities to determine how choice architecture can help improve welfare outcomes.

[54] Paul K. Piff, *et al.*, *Higher Social Class Predicts Increased Unethical Behavior* 109 PROCEEDINGS OF THE NATIONAL ACADEMIES OF SCIENCE 4086 (2012), *available at* http://www.pnas.org/content/109/11/4086.full.