

BEHAVIORAL PUBLIC CHOICE, U.S. NATIONAL SECURITY INTERESTS,  
AND TRANSNATIONAL SECURITY DECISION MAKING

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INTRODUCTION

In 2002 the CIA and Department of Defense sought approval from senior officials in the administration of President George Bush and Vice President Richard Cheney 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 suspected 20th hijacker in Al Qaeda’s September 2001 attacks against the United States—who was being held at the U.S. military base at Guantánamo Bay, Cuba. Internal CIA and Defense Department reviews ultimately led officials to coordinate with the Department of Justice, the White House, and other government entities. Based on legal, medical, and other expert advice, President Bush, Vice President Cheney, and other senior 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. The term “transnational law of torture” is used to refer to the body of international law and national laws that regulate the use of torture and other coercive acts by public officials. “Transnational executives” are those performing executive government functions relative to this body of law in national governments or intergovernmental organizations. The Article focuses on U.S. transnational executives—the president, vice president, and other executive branch officials—and the decision processes they used.

Behavioral public choice theory provides the lens to consider how U.S. officials assessed the legal, moral, and other welfare interests embodied in the transnational law of torture. 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.<sup>1</sup> That discussion is facilitated by the common heuristic describing the different experiential and analytical modes of thinking as System 1 (automatic, quick, effortless,

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<sup>1</sup> 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>.

involuntary) and System 2 (effortful, deliberate, subjective).<sup>2</sup> The public choice component is rooted in economic analysis of public policy making. The focus is on welfare considerations, incentives of public officials and interest groups, and constitutional and other institutional factors that shape policy outcomes.

Behavioral public choice accounts of national security policy and transnational security issues are few. Daniel Sokol has observed that greater attention is needed on human rights, the complex factors that operate across multiple levels of international decision making, and institutional design.<sup>3</sup> Numerous scholars have critiqued the methods that U.S. security agencies use to determine cost values and assess risk to mitigate terrorism and other security concerns. Notwithstanding the challenges of assessing both terrorism risk and the soundness of related security decisions, Cass Sunstein<sup>4</sup> and W. Kip Viscusi and Ted Gayer<sup>5</sup> anticipate opportunities to develop the behavioral public choice field to improve national security policy decisions.

This Article proceeds with those goals in mind to demonstrate how the field can advance the study of transnational issues by assessing U.S. national security decision making processes. Part I provides an overview of the transnational law of torture that applied to the CIA and Defense Department decisions. It also summarizes key moments in those decision timelines. Part II draws upon behavioral and public choice literatures to identify behavioral failures that can contribute to suboptimal U.S. national security decisions. Part III suggests a number of opportunities to improve U.S. decision making processes and transnational law. With a focus on the role of lawyer in transnational security decisions, it is based on recommendations by Paul Slovic<sup>6</sup> and Cass Sunstein to improve decision making environments.<sup>7</sup>

## I. TRANSNATIONAL TORTURE LAW AND POLICY

Morality and law are inseparable, and the relationship between them has never been more broadly and closely scrutinized than following the global security crises of the past century.<sup>8</sup> Transnational public law formed during that period stems from those global events. It codifies lines between lawful and unlawful behavior for courts to adjudicate. It also embodies moral principles of the drafting communities that reflect their collective lived experiences and aspirations for future societies.

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<sup>2</sup> See, e.g., Keith E. Stanovich & Richard F. West, *Individual Differences in Reasoning: Implications for the Rationality Debate?*, 23 BEHAVIORAL AND BRAIN SCIENCES 645 (2000); DANIEL KAHNEMAN, THINKING, FAST AND SLOW, 20-30 (2011).

<sup>3</sup> 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>).

<sup>4</sup> SUNSTEIN, *supra* note 1 at 31.

<sup>5</sup> Viscusi & Gayer, *supra* note 1 at 25-6.

<sup>6</sup> Paul Slovic *et al.*, *Psychic Numbing and Mass Atrocity* 126-142 (in ELDAR SHAFIR, ed. THE BEHAVIORAL FOUNDATIONS OF PUBLIC POLICY (2013)).

<sup>7</sup> Cass R. Sunstein, *If Misfearing is the Problem, is Cost-Benefit Analysis the Solution?* 231-45 (in ELDAR SHAFIR, ed., THE BEHAVIORAL FOUNDATIONS OF PUBLIC POLICY (2013)).

<sup>8</sup> See, e.g., JONATHAN GLOVER, HUMANITY: A MORAL HISTORY OF THE 20TH CENTURY (2012).

The legal and moral objectives of the transnational law of torture present tangible and intangible welfare interests for political communities to define and advance. Faithful execution of the law urges respect for both categories, which include reductions in human suffering and retributive forms of justice, as well as increases in government accountability, effectiveness, and legitimacy. International treaties and federal laws speak to these interests and guide U.S. officials when physical and psychological coercion arise as policy interests to accomplish law enforcement, military, intelligence or other public functions. This Part summarizes that body of law and key decisions of the Bush-Cheney administration that created a new global counterterrorism program involving at least sixty-nine nations to detain and interrogate terrorist suspects.<sup>9</sup>

#### A. *International and U.S. Law*

The 1899 and 1907 Hague Conventions and the Geneva Conventions of 1949 articulate clear legal and moral imperatives for humane treatment of combatants and non-combatants during armed conflict.<sup>10</sup> For the last half-century transnational executives have sought to promote humane conduct by public officials in a wider variety of circumstances. What begins with the 1945 United Nations Charter as a general statement of respect for human rights and fundamental freedoms<sup>11</sup> evolves rapidly into more specific legal definitions and obligations.

Within three years the U.N. Universal Declaration of Human Rights expressly states the policy and moral objective: “No one shall be subject to torture or to cruel, inhuman or degrading treatment or punishment.”<sup>12</sup> By 1966 the International Covenant on Civil and Political Rights codifies these terms in international law.<sup>13</sup> With the 1984 U.N. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (“CAT”) the legal obligations for public officials become more explicit.<sup>14</sup> The prohibition against torture—now defined as intentional infliction of severe physical or mental pain or suffering—is nonderogable: “[n]o exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture.”<sup>15</sup> Nations incur responsibility to prevent, investigate, and adjudicate incidents as violations of national law, not just international law. The prohibition applies to any law enforcement, military, civil, medical, or other public official “who may be involved in the custody, interrogation or treatment of any individual subjected to any form of arrest, detention or imprisonment.”<sup>16</sup>

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<sup>9</sup> Rebecca Cordell, *The U.S. Carried Out Extraordinary Rendition Flights from 2001-2005. Here Are 15 More Countries That Helped*, WASHINGTON POST (Mar. 14, 2017), [https://www.washingtonpost.com/news/monkey-cage/wp/2017/03/14/the-u-s-carried-out-extraordinary-rendition-flights-from-2001-2005-here-are-15-more-countries-that-helped/?utm\\_term=.5e2fe7fb2ca8](https://www.washingtonpost.com/news/monkey-cage/wp/2017/03/14/the-u-s-carried-out-extraordinary-rendition-flights-from-2001-2005-here-are-15-more-countries-that-helped/?utm_term=.5e2fe7fb2ca8).

<sup>10</sup> Hague (II), arts. 3-4, July 29, 1899; Hague (IV), arts. 3-4, Oct. 18, 1907; Geneva (III) arts. 3, 13, 20, Aug. 12, 1949.

<sup>11</sup> Art. 55.

<sup>12</sup> G.A. Res. 217 (III) A, Universal Declaration of Human Rights, art. 5 (Dec. 10, 1948).

<sup>13</sup> Art. 7, Dec. 16, 1966, 999 U.N.T.S. 171.

<sup>14</sup> Dec. 10, 1984, 1465 U.N.T.S. 85.

<sup>15</sup> *Id.* at art. 2 ¶ 2.

<sup>16</sup> *Id.* at art. 10 ¶ 1.

The CAT also requires nations to “undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture.”<sup>17</sup> To accomplish this broad prevention goal all public officials involved in custody, interrogation, or treatment must receive education, information, and training on torture and these other acts.<sup>18</sup> Nations must also review rules, instructions, methods, and practices on a regular basis to prevent torture and other acts.<sup>19</sup>

This common treatment of torture and other acts underscores the CAT’s undifferentiated moral condemnation of state-sponsored human suffering, notwithstanding the legal distinction that emerged between severe harm and other forms of treatment or punishment. More practically, the education, review, and other administrative steps required to implement the CAT evidence the drafters’ expectations that institutional design is an essential element of achieving the law’s broad welfare interests. The starting point within states party to the CAT is expected to be a common base of knowledge and training from which public officials can develop policy options to address a wide variety of complex transnational security and human rights issues.

The CAT and Geneva Conventions are not self-executing in many nations, including the United States. The 1994 Federal Torture Act<sup>20</sup> implements the CAT by specifically prohibiting acts inflicting “severe physical or mental pain and suffering (other than pain and suffering incident to lawful sanctions) upon another person.”<sup>21</sup> The War Crimes Act of 1996 penalizes certain violations of the Geneva Conventions of 1949, common article 3 of those conventions, and the Hague Convention of 1907 with sentences ranging from fines and imprisonment to death.<sup>22</sup> “Torture” and “cruel or inhuman treatment” as defined in common article 3 are among the war crimes Congress included in this law.

Jeannine Bell’s conceptual framing of torture on one end of a continuum brings important analytical clarity and mental framing to the way international and national elements of transnational torture law can be shaped.<sup>23</sup> She describes as “classic torture” those acts that inflict severe, lasting harm in violation of the CAT and Geneva Conventions. In her view international treaties also prohibit or significantly constrain two other groups of practices forming the middle ranges of the continuum. The first group is cruel, inhuman, and degrading treatment or punishment; she describes the second as “torture lite.” Only the least intrusive end of the spectrum—psychologically coercive interrogation practices—is not regulated by international law. In the United States this activity includes traditional interrogation techniques employed by law enforcement officials that are regulated by federal and state law. It is the CAT, however, that now requires public officials to be educated and trained on the entire continuum of harmful investigative techniques and the opportunity to face criminal sanction under international and

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<sup>17</sup> *Id.* at art. 16 ¶ 1.

<sup>18</sup> *Id.* at arts. 10 ¶ 1, 16 ¶ 1.

<sup>19</sup> *Id.* at arts. 11, 16 ¶ 1.

<sup>20</sup> Sec. 506 of Pub. L. No. 103-236 (Apr. 30, 1994), 108 Stat. 463, 18 U.S.C. § 2340 *et seq.*

<sup>21</sup> 18 U.S.C. § 2340A.

<sup>22</sup> 18 U.S.C. § 2441.

<sup>23</sup> Jeannine Bell, “*Behind This Mortal Bone: The (In)Effectiveness of Torture*,” 83 *IND. L. J.* 339, 346 (2008).

U.S. law if they move up the continuum. This example demonstrates how international and national law must be understood and implemented as a collective whole not only to discern clear legal requirements but also to identify opportunities to shape executive action toward greater welfare outcomes.

When confronted with security threats, law enforcement, intelligence, military, or policy officials may find it challenging to inventory and quantify more specifically the many direct and indirect welfare interests advanced by this body of law. Yet that kind of parsing and assessment is an unavoidable System 1 process in individuals and groups. In extreme cases there may be little opportunity for System 2 processing that brings more formal weighing of tradeoffs among interests, outcomes, and values.

Specifying the circumstances of the threat directs the transnational executive's mind to a host of reference points that may shape System 1 and 2 determinations: money is never a reason to inflict even mild psychological harm, let alone extreme physical harm; some crimes require public officials to push the legal and moral limits; it is never acceptable to violate a citizen's constitutional liberty interests, but there should be different rules for others; society needs public officials to inflict some degree of physical or psychological harm to prevent a terrorist from injuring or killing people in my country. Culture, politics, and other social factors are clearly at work in this array of judgments that senior or junior officials may make as they shape policy. So are fear and other emotions. If transnational torture law is to be implemented to maximize legal, moral, and other welfare interests then its international and national components must guide executives toward mechanisms that help them avoid lesser outcomes.

### *B. New U.S. Torture Policies for the Global War on Terror*

The remainder of this Part provides an overview of the decision making environments as a wide range of executive officials shaped new torture policies for the CIA and Defense Department. President Bush's September 12, 2001, charge to the nation's senior law enforcement official, Attorney General John Ashcroft, to ensure such an attack would never happen again is among the first clear policy directives to follow the September 11 attacks.<sup>24</sup> While general in nature, the imperative conveys the gravity of the president's concern and urges preventive law enforcement, in not also a "do whatever it takes" mindset. That same week Vice President Cheney set the tone for public debate by asserting during a televised interview that government would "use any means at our disposal, basically, to achieve our objective."<sup>25</sup> That frame of reference was conveyed to public officials in many ways, including Cheney's November 2001 statement to CIA officials that "low-probability threats must be treated like a certainty."<sup>26</sup>

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<sup>24</sup> JACK GOLDSMITH, *THE TERROR PRESIDENCY: LAW AND JUDGMENT IN THE BUSH-CHENEY ADMINISTRATION* 74-5 (2007).

<sup>25</sup> Remarks of Vice President Richard Cheney, *Meet the Press*, NBC (Sept. 16, 2001).

<sup>26</sup> GOLDSMITH, *supra* note 24 at 75 (citing RON SUSKIND, *THE ONE PERCENT DOCTRINE: DEEP INSIDE AMERICA'S PURSUIT OF ITS ENEMIES SINCE 9/11* (2006)).

By February 2002 this posture was reflected in President Bush's decision to accept the recommendation of Justice Department, State Department, Defense Department, and White House lawyers that the Geneva Conventions did not protect Al Qaeda or other terrorist actors captured by U.S. officials because they were not "combatants" as defined in those agreements.<sup>27</sup> The president decided not to extend the protections of the Conventions to detainees as a matter of policy, and he accepted a recommendation that his constitutional role as commander in chief permitted him to disregard the CAT.<sup>28</sup>

### *1. 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.<sup>29</sup> According to CIA acting General Counsel John Rizzo, CIA counterterrorism, interrogation, psychologist, and other experts developed the "enhanced interrogation program" to break Zubaydah's resistance and elicit information about threats to U.S. interests.<sup>30</sup> Within weeks CIA lawyers and officials from the Counterterrorist Center presented the proposal to Rizzo, who briefed Director Tenet and sought discussions with John Bellinger, the legal advisor to the National Security Council (NSC).<sup>31</sup> Within ten days Rizzo had briefed Bellinger, several Justice Department attorney, and FBI Director Robert Mueller on the CIA's policy interest.<sup>32</sup> He also requested a legal memorandum describing the limits of CIA authority specifically under the Federal Torture Act.

In July the Justice Department's Office of Legal Counsel (OLC) delivered a draft legal memorandum to Rizzo and the NSC and Justice Department attorneys for review and input.<sup>33</sup> By then Director Robert Mueller had decided, as a matter of policy, not to allow FBI employees to participate in interrogations involving the enhanced techniques because they violated U.S. legal and policy standards for criminal investigations.<sup>34</sup> The Justice Department finalized the legal memorandum<sup>35</sup> August 1, 2002, after briefings to Vice President Cheney and national security advisor Condoleeza Rice.<sup>36</sup> Rizzo and Tenet dispute President Bush's claim that he was aware of and approved the policy.<sup>37</sup> The CIA began to implement the new policy upon receipt of the memorandum.<sup>38</sup>

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<sup>27</sup> GOLDSMITH, *supra* note 24 at 39-40; CHARLIE SAVAGE, TAKEOVER: THE RETURN OF THE IMPERIAL PRESIDENCY AND THE SUBVERSION OF AMERICAN DEMOCRACY 146-7 (2007).

<sup>28</sup> SAVAGE, *supra* note 27 at 154-5.

<sup>29</sup> *Id.* at 154, 219; JOHN RIZZO, COMPANY MAN: THIRTY YEARS OF CONTROVERSY AND CRISIS INSIDE THE CIA 3 (2014).

<sup>30</sup> RIZZO, *supra* note 29 at 183, 187, 189.

<sup>31</sup> *Id.* at 187-88.

<sup>32</sup> *Id.* at 189-90.

<sup>33</sup> *Id.* at 191.

<sup>34</sup> *Id.*

<sup>35</sup> Memorandum for John Rizzo, Acting General Counsel of the Central Intelligence Agency, "Interrogation of al Qaeda Operative" (Op. O.L.C., Aug. 1, 2002).

<sup>36</sup> RIZZO, *supra* note 29 at 196.

<sup>37</sup> *Id.* at 197-99.

<sup>38</sup> *Id.* at 193.

## 2. *The 2002 Defense Department Policy*

The military's interest in changing U.S. torture policy reportedly began in October 2002.<sup>39</sup> 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 based on the president's earlier decisions not to afford Geneva Convention protections to suspected terrorists.<sup>40</sup>

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."<sup>41</sup> Secretary Rumsfeld accepted the recommendation and approved the new policy based on this internal Defense Department advice. Later that month Navy General Counsel Alberto Mora learned of the new policy from Navy psychologists and investigators reviewing interrogation logs.<sup>42</sup> He disagreed with Haynes's 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.<sup>43</sup> Haynes reported that Secretary Rumsfeld was already planning to rescind his decision to allow a new working group to review various Guantánamo prisoner policies.

## 3. *The 2003 Defense Department Policy*

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."<sup>44</sup> Mora and other senior military attorneys objected to Assistant Attorney General John Yoo's draft opinion, which was based on the analysis and advice delivered to the CIA in August.<sup>45</sup> Concerns that Mora and other Defense Department attorneys expressed to OLC were not addressed in the final memorandum, and Yoo advised Mora that his only recourse was to advance his legal and other arguments through Defense Department policy discussions.<sup>46</sup> It was delivered to the working group on Guantánamo policies and, ultimately, the Guantánamo commander.

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<sup>39</sup> SAVAGE, *supra* note 27 at 177-78.

<sup>40</sup> *Id.* at 178.

<sup>41</sup> *Id.*

<sup>42</sup> *Id.* at 178.

<sup>43</sup> *Id.* at 179.

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*; GOLDSMITH *supra* note 24 at 150-54.

<sup>46</sup> *Id.* at 180.

## II. A BEHAVIORAL PUBLIC CHOICE PERSPECTIVE ON TORTURE LAW AND POLICY

The public choice field considers the interests and influences that shape public officials' actions to explain government policies. Adding a behavioral component to the analysis provides the opportunity to consider how biases, heuristics, and other cognitive shortcuts in individual and group decision making contribute to public policy. This Part draws upon the 2002-2003 U.S. torture decisions to suggest how behavioral failures can contribute to suboptimal policies.

### A. *Historical Context*

While different in many ways, catastrophic security events like 9/11 or Japan's December 1941 attack on Pearl Harbor both instill public fear, motivate protective policy interests, and present executive officials with short decision timelines. These points of similarity require deeper consideration as relationships among behavioral failures, transnational security decisions, and legal frameworks are explored. System 1 responses may include fight-or-flight choices like the decision Vice President Cheney and President Bush faced as United Airlines flight 93 flew toward Washington. When the vice president learned of the flight path he authorized military forces to shoot down the aircraft; he subsequently reported flight 93's path to the president, who made the same decision.<sup>47</sup> While a shoot-down proved unnecessary, the Constitution and international law provide a firm legal foundation for such protective responses to sudden, ongoing attacks. The law may be viewed as according with System 1 preservation instincts and some range of moral and welfare interests, at least when elected executives believe they are confronting existential threats to a head of state or system of government. However, in an age of smaller-scale threats and greater security cooperation among nations, national and global communities may find it more appropriate to circumscribe executive officials' prerogative differently.

More complex, deliberate policy decisions taken over longer periods of time are more common for elected executives and other executive branch officials, but the mere opportunity for such System 2 deliberation does not prevent behavioral failures that can lead to poor balancing of security risks and human rights interests. President Roosevelt's 1942 directive authorizing the Secretary of War and other military officials to intern Americans and others is one example.<sup>48</sup> The president's order made no reference to citizenship, ancestry, geographic origin, religion, or other personal characteristics. But it enabled military officials to issue orders depriving individuals of Japanese, Italian, German, and Jewish descent or origin of their liberty. The behavioral public choice question is why Roosevelt chose this policy when FBI Director J. Edgar Hoover and Attorney General Francis Biddle advised him on intelligence, legal, and civil liberties grounds against it.<sup>49</sup>

Whatever similar behavioral failures Roosevelt and Bush-Cheney administration officials may have exhibited throughout World War II and the Global War on Terror, they drew upon

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<sup>47</sup> SAVAGE *supra* note 27 at 4-5.

<sup>48</sup> Exec. Order No. 9,066 (1942).

<sup>49</sup> GOLDSMITH *supra* note 24 at 44-48.

very different transnational legal frameworks to guide their policy choices. As summarized in Part I, much of the current law regulating war, intelligence, and law enforcement practices emanated from the World War II and Cold War experience. If there has been some discernable advance in the rule of law, it may be for the field of behavioral public choice to show how executive officials overcome specific decision making failures to achieve greater welfare outcomes for national and international communities than they would otherwise achieve.

### *B. The Behavioral U.S. National Security Environment*

This section draws upon foundational behavioral public choice scholarship to identify opportunities to extend the field to U.S. transnational security policy. Regarding government policy generally, Viscusi and Gayer observe that officials frequently misperceive risks, are averse to risk ambiguity and losses, and make inconsistent tradeoffs in policy decisions.<sup>50</sup> In many areas of government decision making they emphasize problems assessing risk and dealing with risk ambiguity when the risks are newly discovered.<sup>51</sup>

Similar behavior should be expected in the national security arena.<sup>52</sup> Exploring ways in which transnational executives depart from decisions based on expected utility—and may have done so to implement the 2002-2003 policies—provides a descriptive account of important decision making moments and processes that warrant closer examination in laboratory and field settings. The objective is to suggest how the bounded rationality of U.S. national security decisions can be understood and further studied. As in many other public policy fields, such examination should be expected to reveal specific opportunities to improve decisions shaped by errors in judgment, mental shortcuts, and other phenomenon that lead to suboptimal welfare outcomes.

#### *1. Errors of Judgment*

Behavioral understandings of individual and group decision making identify many ways that suboptimal outcomes are reached. Biases, heuristics, and other errors in judgment affect both System 1 and System 2 processes.<sup>53</sup> These errors must be understood in specific national security environments to describe boundedly rational decision making. The following short discussion of biases and heuristics suggests how errors in judgment may have shaped CIA, Defense Department, White House, and other actions.

Availability bias is particularly relevant. Low-probability events that are recent in one's memory or experience are weighted more heavily than higher-probability events that are not.<sup>54</sup> Between 2001 and 2003 availability bias would be expected to affect the American public, not just national security executives. During that time there were numerous terrorist attacks in

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<sup>50</sup> Viscusi & Gayer, *supra* note 1 at 5.

<sup>51</sup> *Id.* at 17-26.

<sup>52</sup> *Id.*

<sup>53</sup> See, e.g., Christine Jolls, *A Behavioral Economics Analysis of Employment Law* 264-280 at 274-275 (in ELDAR SHAFIR, ed., *THE BEHAVIORAL FOUNDATIONS OF PUBLIC POLICY* (2013)).

<sup>54</sup> Amos Tversky & Daniel Kahneman, *Judgment Under Uncertainty: Heuristics and Biases* 185 *SCIENCE* 1124, 1127; Sunstein, *supra* note 7 at 232.

Europe, and American public attention was drawn to the investigative work of the 9/11 Commission and a string of mailings of deadly (and in some cases innocuous) substances to government officials and members of the media. A series of sniper shootings in the Washington, D.C., suburbs also heightened concerns about security and safety. President Bush, Vice President Cheney, and senior Pentagon officials who were attacked or thought to be targets on September 11 may be particularly prone to availability bias in their decisions.

Kahneman describes terrorism as effective because it “induces an availability cascade” in which “System 1 cannot be turned off.”<sup>55</sup> The fear that is generated and socialized by catastrophic attacks is a System 1 result that requires extraordinary effort and information to overcome. The public at large may have limited ability to mitigate fear and the availability cascade since they have little information about terrorist threats and government counterterrorism programs. National security communities will have better information on threats and risks, but whether they are individually and collectively better able to mitigate availability bias is an open question.

Single-action bias may also be evident in government responses to crises. It is a reliance on just one response action when multiple actions may be required or preferable.<sup>56</sup> Following a security crisis public officials may gravitate toward a response action they control most easily or that reassures the public or that appears most likely to deliver immediate results. When U.S. officials captured two key suspects within 6 months of 9/11 the bias may have focused them on developing a detention-interrogation program to the exclusion of other welfare-enhancing outcomes.

Transnational executives should also be concerned about self-serving bias. It can lead to decisions about legal and moral norms that support or benefit personal, organizational, or institutional interests while appearing wholly unjustified from other perspectives. As conflicting policy, legal, or moral positions emerge between national governments, among U.S. government agencies, or even within an agency, transnational executives must be attuned to this bias and have ready opportunities to resolve them. The president’s constitutional role fuses policy, legal, and moral authority that can help resolve subordinate U.S. government conflicts. To effectively counter self-serving bias in agency-sponsored policy proposals, however, the president, vice president, and White House officials must be looking for opportunities to mitigate it. They must also be able to consider how the bias shapes their own policy orientations and decision making roles.

Present bias describes a focus on near-term issues when it may be more beneficial to address future issues. It may contribute to decisions to apply counterterrorism resources (and redirect other public resources) to guard against near-term terrorist strikes even though there is equal or less probability of such an attack. Officials may also favor policies that provide immediate or near-term results: a detention-interrogation program instead of a surveillance

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<sup>55</sup> KAHNEMAN, *supra* note 2 at 322-323.

<sup>56</sup> Elke U. Weber, *Doing the Right Thing Willingly: Using the Insights of Behavioral Decision Research for Better Environmental Decisions* 380-397 at 383 (in ELDAR SHAFIR, ed., *THE BEHAVIORAL FOUNDATIONS OF PUBLIC POLICY* (2013)).

program; harsh interrogation techniques instead of building rapport with detainees over time; or pursuing military action instead of diplomatic engagement. Posing short-term policy options directly against long-term options presents opportunities to consider how fiscal, life-saving, rule-of-law, humanitarian, and other welfare outcomes may vary. If the default transnational security interest is understood to be “near-term security, whatever it takes” then significant System 2 processes will be required to overcome it.

The social aspect of transnational security decision making is informed by considering conformity bias. As security executives contemplate their roles proposing, reviewing, advising on, or deciding a new interrogation policy they look to others for cues on proper behavior.<sup>57</sup> Senior officials who explicitly or implicitly set parameters for new policies establish standards against which junior officials will assess their contributions. Peers in a military unit or intelligence agency expressing personal or organizational views may embolden those with similar views and dissuade those with dissenting views. Professionals subject to ethical codes of conduct must be particularly cognizant of this bias since their objectivity and service to broader public communities may suffer.

The bias blind spot—denying one’s own biases while imputing bias to others—is also a primary consideration for transnational executives because it has been identified as a factor in cycles of violence and retribution related to terrorism.<sup>58</sup> Transnational executives may impute unfounded biases to terrorists’ actions and be blind to the biases shaping their own views of a conflict. The unintended result is that intelligence, military, and other officials seeking to resolve conflict take steps that promote further violence and other harms. Policy options developed by one government may reflect national notions of retributive justice when international law may require or urge forms of corrective, distributive, or procedural justice. An important question for national governments is thus whether their decision making processes can overcome this blind spot and promote policies that accord with broad transnational objectives.

From a more bureaucratic perspective the bias blind spot may also undermine effective multi-agency decision making. Officials from one agency may impute biases to those in other agencies when policy recommendations do not apply or strengthen one’s own institution. At the same time those officials may overlook the biases that lead them to believe that their recommended course of action is most favorable. The blind spot thus perpetuates any interagency conflict and prevents officials working in different law enforcement, intelligence, defense, or other specialty agencies from working toward mutual interests.

As these and other biases are understood better in U.S. national security communities it is likely that systemic bias can also be identified. Maxwell Stearns identifies systemic bias as an outgrowth of the challenges of quantifying and assessing different kinds of risk. He points to empirical studies of administrative regulatory agencies showing that officials avoid short-term,

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<sup>57</sup> Robert Prentice, *Behavioral Ethics: Can It Help Lawyers (and Others) Be Their Best Selves?*, 29 NOTRE DAME J.L. ETHICS & PUB. POL’Y 35, 43 (2015), available at: <http://scholarship.law.nd.edu/ndjlepp/vol29/iss1/2>.

<sup>58</sup> Emily Pronin & Kathleen Schmidt, *Claims and Denials of Bias and Their Implications for Policy* 195-216 at 195, 203-4 (in ELDAR SHAFIR ed., *THE BEHAVIORAL FOUNDATIONS OF PUBLIC POLICY* (2013)).

tangible harms even when long-term costs are equivalent.<sup>59</sup> The System 1 or System 2 processes that lead those regulatory systems to that outcome may be difficult to ascertain. But knowing that public officials are inclined to certain policy choices provides an important reference point for studying systemic transnational security bias.

## 2. *Other Behavioral Considerations*

There are many more (and more complex) behavioral dimensions of national security decision making that warrant consideration than can be explored here. Officials may have been averse to losing benefits from reliable detainee information in comparison to greater benefits realized on longer timeframes. The certainty effect—overweighting a low-probability event because it has occurred—may be expected following a catastrophe like 9/11, and it appears central to Vice President Cheney’s 2001 guidance to CIA officers to treat low-probability threats as certainties. Attribute substitution—answering an easy question as a substitute for a more complex one—is a mechanism for heuristics to operate<sup>60</sup> and may explain officials’ efforts to implement the president’s decisions regarding the CAT and Geneva Conventions to the fullest instead of exploring transnational law’s broader welfare interests more fully. Officials may decide to implement protective, proactive security programs like coercive interrogations that contradict their professed value objectives due to the prominence effect.<sup>61</sup> And imperative policy pronouncements from the president, vice president, and other senior officials may undermine efforts to develop courses of action.<sup>62</sup>

Security policies that evolved over many months with input from dozens or hundreds of officials should be expected to be shaped in important ways by these or other behavioral influences. Anticipating them and structuring day-to-day and crisis decision making environments to minimize or eliminate them holds promise for improving the implementation of transnational law. But failures of human decision making are not the only source of suboptimal policies.

## 3. *Saliency*

Sunstein observes that “a lack of saliency can be its own behavioral market failure.”<sup>63</sup> 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. In these examples law’s function is to enable decisions based on information that is directly related to long-term welfare interests but otherwise hidden from or unavailable to the decision maker.

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<sup>59</sup> 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).

<sup>60</sup> Jolls, *supra* note 52 at 274-275.

<sup>61</sup> Paul Slovic, *et al.*, *Is a Picture Worth More Than a Quarter of a Million Lives? The Ebb and Flow of Empathic Response to Humanitarian Disasters*, draft manuscript on file with the author.

<sup>62</sup> MICHAEL J. MAZZAR, RETHINKING RISK IN NATIONAL SECURITY: LESSONS OF THE FINANCIAL CRISIS FOR RISK MANAGEMENT 77-88 (2016).

<sup>63</sup> SUNSTEIN, *supra* note 1 at 40.

Improving salience thus promotes many personal benefits like better health and quality of life as well as public benefits like lower long-term public health spending.

Article 10 of the CAT provides a very broad requirement for public officials to be informed about torture and related issues:

Each State Party shall ensure that education and information regarding the prohibition against torture are fully included in the training of law enforcement personnel, civil or military, medical personnel, public officials and other persons who may be involved in the custody, interrogation or treatment of any individual subjected to any form of arrest, detention or imprisonment.<sup>64</sup>

This promotes awareness of the transnational law of torture and makes international law a salient issue for many public officials working directly with those in custody. But there is no more specific legal provision guiding national-level executives to specific information that helps them achieve the law's broader welfare interests.

At one level transnational torture law was highly salient to Bush-Cheney administration officials. The CIA and Defense Department identified the relevant law then began broad System 2 debates about its meaning and application. Once they drew lines between lawful and unlawful techniques they developed employee training materials and expanded a global program to implement their decisions with other nations' transnational executives. A deeper inquiry into salience would consider whether decision makers possessed adequate information that would help them decide in favor of broader, longer-term welfare interests of the law itself.

The FBI's 2002 decision not to participate in the CIA interrogations and the 2003 internal Defense Department dissent by political appointees and career officials may be viewed as efforts to present such salient information to senior officials. The FBI pointed to law, policy, and organizational culture as reasons not to participate. The military dissenters drafted memorandums on legal and policy issues. In both circumstances decision makers did not closely examine the detailed information they cited or offered.

#### *4. Judgments of Value*

The foregoing discussion does not imply that behavioral failures are the only explanation for policy decisions that do not maximize welfare. Public officials should certainly place a high value on investigating and stopping domestic or international attacks. The question is how to accomplish those goals when the methods implicate other interests and values.

In the domestic setting the Constitution, Torture Statute, War Crimes Act, and other elements of federal and state law collectively prohibit law enforcement and other public officials from interrogating criminal suspects with the techniques the CIA and Defense Department proposed for detainees at Guantánamo Bay and elsewhere outside the United States. Those who contemplate using those techniques draw upon a wealth of experience and information to make many System 1 and System 2 judgments. Even if a detective or police department were to take no formal steps to assess the prospects of a new interrogation policy, their legal, moral, and

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<sup>64</sup> *Supra* note 14.

cultural references lead to welfare assessments and value judgments that discourage torture or other acts. In these circumstances, as with the FBI's 2002 decision, the public official's decision not to torture is primarily a judgement of value that is rooted in many constitutional rule of law considerations.

### III. IMPROVING TRANSNATIONAL SECURITY DECISION MAKING

Two proposals to mitigate behavioral failures in public policy guide the discussion in this Part. The first is Paul Slovic's framework to ensure that psychic numbing does not inhibit military or other interventions to prevent or stop mass atrocities.<sup>65</sup> His proposal has four main elements: 1) insulate institutions from the effects of psychic numbing; 2) remove or restrict institutional features that foster psychic numbing; 3) promote System 2 deliberation directly; and 4) employ System 1 to channel actors toward System 2 processes. The focus is on the behavioral dimension of public policy making—System 1 and System 2 processes of individuals, organizations, and institutions that can be shaped to improve outcomes under transnational law. This level of abstraction suggests that Slovic's proposal can be applied in other areas where transnational security and human rights issues overlap, even if psychic numbing is not the behavioral phenomenon of concern.

The second guiding proposal is Cass Sunstein's argument for cost-benefit analysis in risk-related administrative regulations "as a means of responding to the general problem of *misfearing*, which arises when people are afraid of trivial risks and neglectful of serious ones."<sup>66</sup> Many of his eight propositions can be viewed as specific ways to accomplish at least one of Slovic's four steps. For example, the first three of Sunstein's propositions all promote System 2 deliberation directly (Slovic's third element): identify advantages or disadvantages of a course of action, including a statement of the full range of beneficial effects; use quantitative descriptions to supplement qualitative descriptions of relevant effects; and attempt to convert nonmonetary values (e.g., lives saved, health gains, aesthetic values) into dollar equivalents.<sup>67</sup> And these three propositions echo Slovic's interest in institutional improvements (first and second elements): law should set floors and ceilings for agency valuations of life; agencies should publicly articulate valuation adjustments and choices; agencies should be free to adjust valuations based on qualitative factors; judicial review should require a general showing that the regulation has produced more good than harm.

Slovic's framework to address global inaction in the face of mass human suffering cannot, of course, be conflated with Sunstein's argument for cost-benefit analysis in U.S. regulatory programs. Nevertheless, the similar approaches they take to improving public policy provides an important guidepost for future behavioral public choice research. Drawing upon Parts I and II, this Part identifies opportunities for transnational communities to improve public policy decisions involving security and human rights interests.

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<sup>65</sup> Slovic, *supra* note 6 at 134-139.

<sup>66</sup> Sunstein, *supra* note 7 at 239-40.

<sup>67</sup> *Id.* at 239.

A. *Mitigating Behavioral Failures of Individuals*

Overcoming behavioral failures is an organizational and institutional undertaking, but it begins at the individual level. Officials who are aware that availability bias, present bias, loss aversion, or other behavioral failures can result in policy options that achieve only modest welfare outcomes are, in theory, able to mitigate them and help others do so as well. Slovic and Sunstein provide opportunities to consider how those efforts by any level of public official can be successful and integrated into organizational and institutional norms.

Slovic's first two recommendations—insulate institutions from the behavioral failure and remove or restrict institutional features that foster those conditions—anticipate that public officials can independently or collaboratively identify the relevant failures shaping their actions. A workforce educated on these issues or trained to identify them in specific settings may do this with little direction or guidance. More likely, however, an organization must assess its decision processes to form an evolving understand of behavioral failures affecting policy. Armed with such knowledge the organization can consider default rules, precommitment devices, or other design features recommended to mitigate the concerns.<sup>68</sup>

National security officials may be more likely than other public officials to experience certain failures given the constant stream of threat information they see, day-to-day concerns about preventing attacks, and a wide variety of professional and political post-attack concerns. Insulating individual agencies from such failures at numerous policy development levels is a significant undertaking. Accomplishing that task in multi-agency decision making environments like those involving the NSC, OLC, or Joint Chiefs of Staff adds an additional level of complexity.

Common approaches may be found in mitigating behavioral failures in similar ways. To counter loss aversion, for example, prospect theory encourages shifting officials' reference points away from near-term losses, distancing decision makers from recent events, and identifying long-term welfare outcomes that are more beneficial than near-term interests. The theory is a design tool that helps organizations both articulate welfare outcomes related to a body of transnational law and identify decision points when those outcomes are pursued or rejected.<sup>69</sup> Senior officials must harmonize many views to do this effectively within any one federal agency. Accomplishing that task across agencies and with the White House presents additional challenges, not least because individual, organizational, and institutional interests can vary considerably among civil servants, elected officials, and political appointees.

Scaling the task back to System 1 and System 2 reference points along the lines Slovic recommends may help bound these efforts considerably. His recommendation to promote System 2 deliberation directly might be applied by establishing policies that all critical decisions be made through deliberative System 2 processes rather than informal System 1 consultations. His recommendation to employ System 1 to channel actors to System 2 processes is perhaps more challenging to envision.

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<sup>68</sup> Slovic *et al.*, *supra* note 7 at 134-135.

<sup>69</sup> *See, e.g.*, Weber, *supra* note 56 at 384.

Slovic's example for officials deciding whether to use armed force to stop mass atrocities is to present them with affective imagery so their System 1 judgments bring future welfare interests into direct discussion. In this scenario a rich body of transnational law regulates the use of force, the treatment of combatants and non-combatants, and the protection of civilians. Images of physical destruction and victims of atrocities bring these welfare interests directly into the policy debate so the law's forward-looking moral objectives can be debated as much as its present-day formal requirements. As with the transnational law of torture, one broad category of interests in this area is humane treatment by public officials.

Sunstein's arguments for cost-benefit analysis give further shape to organizational and institutional steps that help officials achieve optimal welfare outcomes. Converting nonmonetary values to dollar equivalents is among the more challenging of his recommendations. On first consideration it may seem repugnant to attempt to value (let alone compare) lives that may be saved in a future terrorist attack or harmed through the use of torture when officials contemplate interrogation policies. However, statistical value of life calculations are an essential element of health and safety regulatory programs like airline passenger screening, and they are already common in counterterrorism security programs. As a complement to other System 2 steps by which officials attempt to state the full range of a policy's benefits, such steps are no doubt as valuable to evaluating operational programs as they are for regulatory programs.

The second significant contribution from Sunstein's list is the role that law can play. In the same way that he views federal law as a check on valuations of life in administrative regulatory programs, federal law can also check the executive branch's valuations as used in counterterrorism programs and policy debates. Norms that evolve even informally between the legislative and executive branches often become part of executive decision making processes. This kind of multi-branch engagement could thus prove helpful as agencies and White House officials attempt to create System 2 processes using common reference points.

### *B. Improving U.S. National Security Decisions*

Two focal points of behavioral public choice theory are the definition and assessment of welfare outcomes and the effect of behavioral failures on achieving those outcomes. As described in Part II, welfare outcomes in transnational security fields are not identified as rigorously as they may be in administrative regulatory fields, and behavioral failures are endemic to all human decision making. This creates the presumption that behavioral failures and corresponding welfare shortfalls can be found in all transnational security policies. While the specific failures that shaped past policy decisions may be difficult to discern with certainty, historical events can help identify areas for immediate improvement or further study. The following discussion draws upon the formation of the 2002-2003 policies to consider opportunities for lawyers to contribute to improved welfare outcomes under transnational law.

#### *1. CIA Decision Processes*

Attorneys may be an agency's first source of expertise on relevant law, but a legal department is an incomplete resource for such undertakings. Security crises, policy interests of

newly elected executives, and other circumstances may bring new bodies of law into consideration that exceed the office's expertise. Attorneys may also feel that they are not permitted or incentivized to raise moral considerations or other policy factors in decision making processes. Rule 2.1 of the American Bar Association's Model Rules of Professional Conduct makes it clear that attorneys may do so:

In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation.<sup>70</sup>

But whether and how an attorney takes this step depends heavily on personal relationships, organizational processes, and institutional norms. The more specific area of inquiry to improve CIA welfare assessments is therefore how attorneys and other professionals collectively reach organizational decisions regarding transnational law.

Upon first hearing of the new interrogation program General Counsel Rizzo walked the CIA campus alone to contemplate the gravity of the legal, moral, and other aspects of the interrogation methods the counterterrorism division proposed for Abu Zubaydah. His System 1 response nearly led him to disapprove the proposal without further analysis or broader debate:

I was confident that I could squelch at least the more aggressive proposed [enhanced interrogation techniques], then and there, if I wanted to. Besides being the Agency's chief legal officer, I had the experience, credibility, and influence to have made that call, and to have made it stick with the [Deputy Director of Operations], Jim Pavett, and George Tenet. ... I have no doubt that if I had said the word, much if not all of the [enhanced interrogation technique] initiative would have quietly died before it was born. It would have been a relatively easy thing to do, actually.<sup>71</sup>

He decided it was not his policy decision to make; therefore, he began an organizational System 2 process that included the CIA director and, at Rizzo's encouragement, the Justice Department and White House.

In some respects Rizzo's actions are in line with Slovic's framework. His System 1 judgments channeled him first to a multi-day System 2 deliberative process then to a more formal System 2 process with other senior CIA officials.<sup>72</sup> The opportunity to raise such issues with other agencies and the president through established procedures of the NSC and OLC promotes System 2 deliberation directly. But it is an open public choice question whether those mechanisms helped the CIA director identify relevant welfare interests to reach an optimal outcome. It is equally plausible that Justice Department or White House officials used those processes to advance personal, organizational, or institutional interests by substituting their own, less robust, welfare assessments for the CIA's.

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<sup>70</sup> MODEL RULES OF PROF'L CONDUCT r. 2.1. (AM. BAR ASSN 1983), *available at* [http://www.americanbar.org/groups/professional\\_responsibility/publications/model\\_rules\\_of\\_professional\\_conduct/rule\\_2\\_1\\_advisor.html](http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_2_1_advisor.html).

<sup>71</sup> RIZZO, *supra* note 29 at 186.

<sup>72</sup> *Id.* at 187.

A holistic view of the decision making process is therefore required to consider how Slovic's framework improves welfare outcomes in U.S. transnational security decision making. It is, for example, insufficient to insulate any one agency from behavioral failures if OLC or senior decision makers in the NSC process will reintroduce them. Likewise, removing or restricting institutional features that foster behavioral failures must be in place throughout multi-agency and interagency processes to be most effective.

Acknowledging the need for systemic improvements outside an agency does not, however, preclude agencies from applying Slovic's framework in beneficial ways. Establishing a list of former senior officials with security clearances for on-call consultations would promote System 2 deliberation. So would an internal ethics panel charged to formulate welfare assessments, advise senior officials, or consult with outside experts. The qualitative and quantitative aspects of this work implement some of Sunstein's recommendations. Robust welfare assessments might have the added benefit of minimizing influence from other parts of government that propose policies with less optimal welfare outcomes.

However agencies decide to improve welfare assessments on transnational security interests, the underlying objective is to recognize that each agency official is in a position to contribute as a behavioral and moral agent. They have opportunities to add to or detract from the welfare outcomes that result from the agency's legal and policy decisions. Three key functions for attorneys in the intelligence community are to begin the inquiry into moral, social, and other aspects of applicable law; identify salient information for decision makers; and prompt officials to study, improve, and use System 2 decision processes.

## *2. Defense Department Decision Processes*

Secretary Rumsfeld's decision to implement a new policy quickly in late 2002 without consulting OLC, NSC, or other White House officials, at least formally, contrasts sharply with the CIA's interest in securing both a formal legal opinion about the bounds of lawful interrogations and a separate commitment that the Justice Department would not prosecute CIA employees for applying the proposed techniques.<sup>73</sup> This difference may reflect a different level of awareness of or commitment to identifying and advancing employees' psychic, financial, career, and other welfare interests in high-risk policy areas. More likely, however, is the possibility that the rapid approval process followed from tacit understandings or informal coordination processes among the president, vice president, and their senior political appointees at the White House and Defense Department.

Another critical focus area is the outside role that mid-level organizational experts can have in transnational security decisions. If Colonel Beaver's memorandum was the predominant source of expertise guiding Secretary Rumsfeld, General Counsel Haynes, and other senior officials then the failure of that memorandum to advise on moral and other welfare interests as encouraged by Model Rule 2.1 prepared those officials poorly for their respective decisions. The opportunity for organizational expertise from career officials to shape consequential human

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<sup>73</sup> *Id.* at 192.

rights issues can be a hallmark of sound System 2 processes. This process stands as a cautionary tale, however. A requirement for written legal opinions to address moral and other dimensions of a body of transnational security and human rights law would promote salience of transnational law's welfare interests and improve attorney implementation of Rule 2.1.

Navy General Counsel Mora's efforts to influence legal and policy discussions warrant particular consideration because they give full effect to Rule 2.1 and touch on many of Slovic and Susnein's recommendations. As a senior political appointee of the Bush-Cheney administration it would be prudent for Secretary Rumsfeld or General Counsel Haynes to consult or inform Mora and the other appointed general counsel of the military services, if only to ensure that they could respond to inquiries arising from military service members involved in the interrogations. That their expertise and assistance were not welcomed points to institutional, bureaucratic, personal, or political motivations of Rumsfeld or White House officials. Deeper public choice analysis to identify the motivations and methods of constraining System 2 processes this way may help legal and policy officials consider how they can be most effective applying transnational law. At a minimum, Mora's experience helps educate officials on the tenacity that may be required to improve System 2 processes during a crisis.

### *3. Lawyers and Leadership*

Attorneys play critical roles in transnational security decisions, and the bounded rationality of the national security environment affects them as much as other expert advisors and policy officials.<sup>74</sup> In planning to mitigate behavioral failures national security lawyers must be prepared to see themselves as both legal service providers and institutional leaders. These different roles call for different kinds of preparation to enable them to fulfill public legal functions effectively.

Developing and providing subject matter expertise on the state of the law is a *sine qua non* of the legal function. Developing expertise and comfort advising on a body of law beyond its specific mandates may be more challenging for attorneys. To many attorneys and policy officials, input from lawyers on moral issues, the welfare objectives of a statute or treaty, or historical trends in transnational security and human rights fields intrudes on the policy making function. But developing expertise and comfort in those areas is a vital component of the attorney's professional ethical duties, including Rule 2.1. Government legal offices must therefore develop attorneys to help them fulfill this obligation as a core component of the agency's basic legal services.

Accomplishing that task is a leadership challenge for which senior legal officials must prepare. They may have to overcome institutional inertia and strong personalities to shape a vision for effective relationships between policy officials and lawyers who serve as advisors on moral, social, and other factors. Junior attorneys must be prepared to identify those issues as readily as they identify rules of law. They must also develop the interpersonal skills to form effective relationships with the officials they serve. Collectively the attorneys in a government

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<sup>74</sup> See, e.g., Prentice, *supra* note 57 at 39.

legal office must also be prepared to study and understand the complex boundedly rational environment in which they work. One dimension of that undertaking is to explore the ways in which sound decisions on policy and ethics are made by individuals they serve.<sup>75</sup> A second is to understand and mitigate the ways they themselves are prone to behavioral failures, including ethical lapses that contribute to suboptimal legal services and, as a result, suboptimal policy outcomes.<sup>76</sup>

Of course, attorneys do not bear full responsibility for such outcomes. It is both unwise and an abdication of one's own moral and behavioral agency for an official to regard the attorney as the sole or primary systemic moral check on policy interests or the implementation of a body of transnational law. Lawyer leaders exercising moral courage in the most ideal ways may be successful in those undertakings.<sup>77</sup> But society's rule-of-law interests in sound implementation and evolution of a field like transnational torture law require transnational executives to improve accountability and leadership for all public officials in their institutions and organizations.

The foundational academic scholarship to draw upon in this interdisciplinary area is scant. Deborah Rhode,<sup>78</sup> James Baker,<sup>79</sup> Robert Prentice,<sup>80</sup> and others<sup>81</sup> provide important insights on leadership, ethics, and attorney education to guide future behavioral public choice studies in transnational security fields. Combined with a trend in social science to view leadership as a systemic property rather than an individual attribute,<sup>82</sup> such work presents the promise of developing specific guidance for legal professionals to help apply and further develop transnational law.

### C. *Improving International Law*

Specific recommendations to improve treaties and the international institutions and organizations that implement them should be reserved until more rigorous review of the Bush-Cheney administration's global detention-interrogation networks can be performed. New details about those networks continue to come to light from U.S. government,<sup>83</sup> media, and other inquiries. Based on the discussion points presented in this Article it is nevertheless possible to

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<sup>75</sup> Paul K. Piff, *et al.*, *Higher Social Class Predicts Increased Unethical Behavior* 109 PROCEEDINGS OF THE NATIONAL ACADEMIES OF SCIENCE 4086 (2012) (reporting that "upper-class individuals behave more unethically than lower-class individuals), available at <http://www.pnas.org/content/109/11/4086.full>.

<sup>76</sup> Prentice, *supra* note 57 *passim*.

<sup>77</sup> JAMES E. BAKER, IN THE COMMON DEFENSE: NATIONAL SECURITY LAW FOR PERILOUS TIMES 306 (2007).

<sup>78</sup> *See, e.g.*, LAWYERS AS LEADERS (2013); BARBARA KELLERMAN & DEBORAH RHODE, WOMEN AND LEADERSHIP: THE STATE OF PLAY AND STRATEGIES FOR CHANGE (2007).

<sup>79</sup> *See, e.g.*, BAKER, *supra* note 77.

<sup>80</sup> *See, e.g.*, Prentice, *supra* note 57.

<sup>81</sup> *See, e.g.*, PAULA MONOPLI & SUSAN MCCARTY, eds., LAW AND LEADERSHIP: INTEGRATING LEADERSHIP STUDIES INTO THE LAW SCHOOL CURRICULUM (2013).

<sup>82</sup> RICHARD BOLDEN, ET AL., EXPLORING LEADERSHIP: INDIVIDUAL, ORGANIZATIONAL, & SOCIETAL PERSPECTIVES 6 (2011).

<sup>83</sup> REPORT OF THE SENATE INTELLIGENCE COMMITTEE STUDY ON CIA DETENTION AND INTERROGATION PROGRAM (2014), available at <http://www.feinstein.senate.gov/public/index.cfm/senate-intelligence-committee-study-on-cia-detention-and-interrogation-program>.

point to education and behavioral ethics as areas for international law and organizations to look for improvements.

### *1. Educating Transnational Executives*

The CIA and Defense Department torture decisions involved a variety of professional groups from numerous government organizations. Lawyers, psychologists, counterterrorism analysts, intelligence officers, criminal investigators, military commanders, civilian policy officials, and others contributed to them. Given the officials' very different experiences with interrogation, they undoubtedly had different degrees of knowledge about the Geneva Conventions, CAT, and the legal and moral norms of the broader transnational torture regime. How U.S. officials dealt with this information imbalance is an important area of inquiry, particularly if there is an expectation that all public officials have equal knowledge about the law. It is also useful to consider broadening education programs under the CAT and Geneva Conventions to ensure that senior policy officials—not just those involved in detention and interrogation—are informed about the law of torture.

The U.S. decisions also provide an opportunity to consider how education on legal and moral norms relates to the formation and deliberation of dissenting policy views. Education on torture and other acts pursuant to Article 10 would have been similar in the FBI and the military services, and those agencies were the sources of clear, strong dissent from career officials and political appointees alike. In contrast, System 2 dissent within the CIA and White House appeared comparatively weak and correlated with a lack of required education on transnational torture law.

CAT Article 10 provides an opportunity to address both issues. If senior officials did not receive information that is common in most education programs there is a strong behavioral argument for creating a requirement specific to senior officials, up to and including heads of state. Slovic's framework suggests ways to do this, and nations seeking opportunities to provide moral leadership on this issue may be inclined to proactively insulate their institutions from behavioral failures. Article 10 might also be supplemented with reporting obligations so the U.N. Committee on Torture can review and advise on national programs.

### *2. Behavioral Ethics*

While abstract moral norms are not enforceable through legal processes in international or national law, they are intrinsic to the law's faithful implementation. Professional codes for attorneys, doctors, and other professionals provide opportunities to consider how those groups will implement the law. If they are expected to improve welfare outcomes then international or national law can help achieve them by establishing requirements for their implementation and enforcement.

International and national law may also improve welfare outcomes if it requires decision making bodies to designate a moral agent to make those issues salient in decision processes. As noted above, attorneys may be able to fill that role, but they are not necessarily the best choice. To be effective the agent's role must be designed thoughtfully, in full recognition of pressures that may arise during any crisis due to behavioral or public choice factors.

The general approach in these recommendations is to address the behavioral nature of ethical decision making. Recognizing that context affects ethical decisions as much as it shapes policy, legal, and other judgments creates opportunities to improve the law well beyond its prohibitions and judicial enforcement mechanisms. At the international or national level executive and legislative officials can seek greater understanding of those dynamics so law can be equally effective promoting broader societal interests.

#### CONCLUSION

This Article has proposed that behavioral public choice theory provides important analytical perspectives to inform the study of transnational security decision making in national and international forums. Such inquiry is a critical component of 21<sup>st</sup>-century rule-of-law analysis because complex global relationships defined in public law are increasingly central to the efficient and effective conduct of security strategies and human rights initiatives. Whether those strategies are intended to thwart nation-state or other threat actors, economic and behavioral perspectives can reveal strengths and frailties in efforts to design, implement, and evolve transnational law as a source of both legal and moral norms.

The U.S. experience reconsidering national-level torture policy in the Bush-Cheney administration suggests that welfare interests advanced by transnational torture law were poorly defined and regarded in numerous U.S. national security communities. Behavioral science provides many possible reasons for this. This Article proposes that significant rule-of-law benefits can be identified by advancing behavioral public choice analysis of transnational security and humanitarian considerations, not just state-level security interests. Formal studies of transnational security decision making environments and legal frameworks can produce a deeper understanding of the bounded rationality of transnational security decision making. Such knowledge can, in turn, lead to specific recommendations for transnational executives in intergovernmental organizations like the U.N., heads of state, senior political appointees, and a wide variety of career officials to account for behavioral failures. In concert with those steps, the design of treaties, constitutions, and national laws and regulations must also be considered to maximize global welfare interests.

The U.S.-led global response to Al Qaeda's 2001 attacks demonstrates that national executive power can greatly undermine transnational public law constructs and multigenerational efforts to advance the rule of law. The full harm of security programs like global detention-interrogation programs or domestic internment camps can never be fully calculated or remedied. It can only be foreseen and avoided. As the international community confronts old and new global security problems, executives have the opportunity to face them with improved laws and decision frameworks that more perfectly anticipate humanity's many cognitive and behavioral shortcomings.