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COUNTERING THE PROMINENCE EFFECT: HOW U.S. NATIONAL SECURITY LAWYERS CAN FULFILL NON-PROMINENT HUMANITARIAN OBJECTIVES[†]

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INTRODUCTION

How do nations decide whether to intervene militarily to prevent or stop genocide? How do military and intelligence officers determine the severity of physical or psychological harm to inflict on terrorism suspects? Should a nation escalate troop deployments during an armed conflict that is assessed to be unwinnable? Public officials confronting policy challenges like these must decide among many interests related to transnational security, morality, politics, and the rule of law. Historical evidence and findings from decision research suggest that officials will often decide in favor of security, even when that choice contradicts stated values and otherwise leads to suboptimal welfare outcomes. This Article explores opportunities for lawyers advising the U.S. president and other national security officials to change those outcomes.

The prominence effect describes challenges in making quantitative tradeoffs among competing attributes and the likelihood that individuals will decide in favor of the more

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inherently important, defensible – i.e., prominent – attribute. This Article presents prominence as an impediment to faithful application of transnational humanitarian law because security considerations are more defensible than humanitarian considerations for decision makers and their advisors. Part I describes the research behind prominence and instances when it has been observed or hypothesized in global crises. Part II provides an overview of the national security attorney's roles in a variety of U.S. national security settings. Part III proposes ways for those attorneys to help policy makers overcome prominence. Part IV discusses other opportunities to mitigate prominence in strategic decision-making processes.

I. THE PROMINENCE EFFECT IN U.S. NATIONAL SECURITY AND HUMANITARIAN DECISION MAKING

Given the attorney's role in shaping the content, interpretation, and application of law that regulates transnational security issues, it should be expected that psychological factors affecting attorneys, the public officials they advise, and other advisors will have bearing on decision outcomes and, ultimately, societal understandings of the rule of law. The psychology of the environments in which attorneys provide advice on national security issues is therefore as vital to study as the psychology of intelligence analysis,[1] military communities,[2] and other security fields.[3] This Part provides an overview of the prominence effect and hypothesizes its operation in presidential transnational security decisions.

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[1] *See, e.g.*, RICHARDS J. HEUER, JR., CIA, PSYCHOLOGY OF INTELLIGENCE ANALYSIS (1999), https://www.cia.gov/library/center-for-the-study-of-intelligence/csi-publications/books-and-monographs/psychology-of-intelligence-analysis/PsychofIntelNew.pdf; ROB JOHNSTON, CIA, ANALYTIC CULTURE IN THE U.S. INTELLIGENCE COMMUNITY: AN ETHNOGRAPHIC STUDY (2005), https://www.cia.gov/library/center-for-the-study-of-intelligence/csi-publications/books-and-monographs/analytic-culture-in-the-u-s-intelligence-community/analytic_culture_report.pdf.

[2] *See, e.g.*, LEONARD WONG & STEPHEN J. GERRAS, LYING TO OURSELVES: DISHONESTY IN THE ARMY PROFESSION, STRAT. STUD. INST. & U.S. ARMY WAR COLL. PRESS (2015).

[3] *See, e.g.*, James M. Goldgeier, *Psychology and Security*, 6 SECURITY STUD. 137 (1997).

A. Origins of the Prominence Effect

Economists, philosophers, and other students of choice have long been interested in the influence on decisions of *expressed* or stated values as compared to values that are *revealed* through choices. Rational choice theories typically assume that choices are consistent with expressed values. However, a great deal of empirical research has shown that the values indicated by these two modes of assessment often differ. One explanation for the inconsistency has centered on the weighting of the various attributes or objectives of decision options and the evidence for systematic discrepancies in weighting associated with expressed and revealed preferences.

For example, an empirical study by Slovic found that difficult choices were consistently decided in favor of the alternative that was superior on the most important attribute.[4] Tversky, Sattath, and Slovic used this finding as a springboard to a general theory of choice called the "contingent weighting model."[5] At the heart of this model was the "prominence effect," which recognized that the values revealed through choices or decisions often differ predictably from directly expressed or stated values. The essence of this effect is that, although we may have a qualitative sense of the importance of valued attributes, we may not have a sense of the appropriate quantitative tradeoffs when these attributes compete with one another. For example, we highly value the lives of American military personnel, other U.S. public officials, aid workers, and others involved in humanitarian intervention.[6] But deciding how many of those lives we are willing to put at risk in an intervention to prevent a foreign government from

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[4] Paul Slovic, *Choice Between Equally Valued Alternatives*, 1 J. EXPERIMENTAL PSYCHOL.: HUM. PERCEPTION & PERFORMANCE 280, 280 (1975).

[5] Amos Tversky, Shmuel Sattath & Paul Slovic, *Contingent Weighting in Judgment and Choice*, 95 PSYCHOL. REV. 371, 371 (1988).

[6] Humanitarian intervention is not synonymous with armed conflict or even the deployment of military forces. In this Article, the term "military intervention" refers to the use of armed force at one extreme end of a continuum of acts to achieve humanitarian objectives.

murdering its citizens in a genocide is not easy. We struggle with making tradeoffs and seek a simple, defensible way to choose among options with important but conflicting attributes. Here is where the prominence effect enters, influencing us, in effect, to eschew performing difficult quantitative calculations in which we weigh and compare valued objectives, and instead choose what is best according to the most prominent – that is the most defensible – attributes. You can't go wrong. You can well defend your choice to yourself and others. Moreover, this choice likely "feels" right.

B. Prominence and Related Concepts in Transnational Security Decision Making

We view the prominence effect as playing an important but insufficiently understood role in U.S. public policy decisions, particularly in the field of national security and foreign affairs. The prominence effect can be thought of as an attentional spotlight on the most inherently defensible attributes of a decision, driving those attributes to assume greater, and sometimes extreme, priority and importance in a decision maker's thinking. Slovic has argued that this effect may underlie the apparent discrepancy between expressed and revealed values regarding whether or not to act to protect large numbers of civilian lives under attack in foreign countries.[7] Specifically, he hypothesizes that security interests of the nation contemplating intervention are the prominent considerations in this context.[8] As chosen actions need to be justified, deciding in favor of these security interests likely makes a stronger argument to the public, Congress, and other nations than deciding in favor of protecting nameless, faceless foreign lives, no matter how many thousands or millions of those lives are at stake.

[7] Paul Slovic, *When (In)Action Speaks Louder than Words: Confronting the Collapse of Humanitarian Values in Foreign Policy Decisions*, 2015 U. ILL. L. REV. SLIP OPINIONS 24, 28-31.
[8] *Id*. at 28.

Academic support for this hypothesis comes from a study by Shnabel, Simantov-Nachlieli, and Nadler who found that people first seek to satisfy their needs for safety and security and only then do they authorize themselves to seek the satisfaction of higher-order needs including maintaining a positive moral image and social relatedness with others.[9] Similarly, Mikulincer, Shaver, Gillath, and Nitzberg found that people who have secure social attachments find it easier to perceive and respond to other people's suffering.[10]

In political and military arenas, there are many discussions of the threat to human rights posed by security objectives.[11] For example, with decisions pertaining to the development and use of nuclear weapons (and indeed for most decisions involving the use of military force), the historical record suggests that the spotlight will be on the perceived contributions to national security interests, as in the decision to drop atomic bombs on Hiroshima and Nagasaki to protect our military personnel in the waning days of World War II, despite the likely loss of vast numbers of Japanese lives.

But if the prominence effect is indeed infiltrating top-level policy decisions and causing decision makers to devalue humanitarian actions, the decision makers are likely not consciously aware of this. The prominence mechanism assumed to be driving the decision-making process is not a consciously expressed devaluation of distant lives; this would be abhorrent to leaders who truly do value those lives. Rather, we believe that prominent objectives, in particular those

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[9] Nurit Shnabel, et al., Tel Aviv Univ., Sensitivity to Moral Threats Increases When Safety Needs are Satisfied: Evidence of Hierarchical Organization of Psychological Needs, Panel Discussion at the Hebrew University of Jerusalem on Conflict and Moral Concern (June 6, 2012).

[10] Mario Mikulincer & Phillip R. Shaver, *Attachment Security, Compassion, and Altruism*, 14 CURRENT DIRECTIONS IN PSYCHOL. SCI. 34, 34 (2005); Mario Mikulincer, Phillip R. Shaver, Omri Gillath, & Rachel A. Nitzberg, *Attachment, Caregiving, and Altruism: Boosting Attachment Security Increases Compassion and Helping*, 89 J. PERSONALITY AND SOC. PSYCHOL. 817, 818 (2005).

[11] *See, e.g.*, U.N. Office of the High Commissioner for Human Rights (UNHCR), Global Report 2008 19 (2008) (identifying domestic national security concerns as a factor in governments' decisions to protect asylum seekers under international law).

offering enhanced security for the intervening nation, draw attention away from less prominent goals.

This concept of national safety and security may be perceived or expressed in numerous ways. For example, policy makers focused on domestic security objectives likely give far less consideration to the number of people left to die in foreign humanitarian crises than to the safety of those at home. Alternatively, officials deciding between the use of military force to stop a humanitarian crisis in one region or to advance counterterrorism security interests in another region may struggle to compare abstract benefits. Another possibility is that officials expressing a consensus desire to stop a humanitarian crisis decide not to do so because incurring U.S. casualties – a negative safety and security value – is more prominent than the benefits U.S. forces can achieve for other communities. In each of these different circumstances, compensatory weighing of costs and benefits associated with seeking security and protecting distant lives is not carefully addressed.

Decision making on such issues is, of course, more complex than described in these few points of comparison. We also note that U.S. national safety and security interests may be defined in humanitarian terms. Research indicates that intervening to prevent a state from failing can minimize the spread of terrorist groups and the political violence that comes from poor social and economic conditions.[12] Senior U.S. military officers often advocate for a strong foreign aid budget that helps stabilize states.[13] But U.S. government and public support for military intervention to achieve similar humanitarian outcomes and national security benefits is not

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[12] TIFFANY HOWARD, FAILED STATES AND THE ORIGINS OF VIOLENCE: A COMPARATIVE ANALYSIS OF STATE FAILURE AS A ROOT CAUSE OF TERRORISM AND POLITICAL VIOLENCE 151-62 (Ashgate 2014).

[13] *See, e.g.*, Michael Mullen & James Jones, *Why Foreign Aid is Critical to U.S. National Security*, POLITICO (June 12, 2017, 5:41 AM), https://www.politico.com/agenda/story/2017/06/12/budget-foreign-aid-cuts-national-security-000456 (asserting that "development aid is critical to America's national security" and "American security is advanced by the development of stable nations that are making progress on social development, economic growth and good governance . . . .").

consistent.[14] However "security" and "humanitarian" interests may be defined in a given decision-making moment, the essence of the prominence inquiry is whether public officials have the opportunity to more closely align the nation's revealed values with the nation's expressed values.

Michael Mazarr identifies a concept similar to prominence: nonconsequentialist decision making driven by strategic, political, or personal imperatives – "decision makers under the influence of an imperative are scratching an immediate itch, not thinking about the possible outcomes of their actions." [15] He describes the U.S. national security field and large corporations as operating under similar pressures and constraints that leave decision makers with inadequate time for deliberate thinking and "classic outcome-oriented utility calculations."[16] Mazarr hypothesizes that the following concerns can arise:

- imperative-driven thinking is likely to obstruct careful analysis of utilities or objectives;
- imperatives are likely to generate subjective and shifting utilities rather than constant and objective ones;
- imperatives will be a function of personality, style, and strategic culture more than an objective assessment of utilities;
- decision-makers responding to imperatives will not engage in a legitimate comparison of alternatives;

[14] *See, e.g.*, SAMANTHA POWER, A PROBLEM FROM HELL: AMERICA AND THE AGE OF GENOCIDE (Basic Books 2002); Ryan L. Benitez, Making the Case for Humanitarian Intervention: National Interest and Moral Imperative (March 2015) (published M.A. thesis, Naval Postgraduate School) (on file with Calhoun Institutional Archive of the Naval Postgraduate School).
[15] MICHAEL J. MAZARR, RETHINKING RISK IN NATIONAL SECURITY: LESSONS OF THE FINANCIAL CRISIS FOR RISK MANAGEMENT 81 (2016).
[16] *Id.* at 83.

- decision-makers under the influence of an imperative will be blinded to many potential consequences and risks outside the scope of the imperative; and
- discussion of potential risks and second-order effects is likely to be downplayed and even actively discouraged.[17]

Delaney has observed that prominence and imperative-driven thinking are aspects of a broader "behavioral U.S national security environment" that must be understood more holistically to consider how public officials deliberate and implement policies with the most optimal welfare outcomes.[18] This line of analysis extends Cass Sunstein's broad approach to "welfare"—whatever people believe makes their lives go well.[19] Security and humanitarian interests contribute to this notion of welfare, but neither category is inherently greater than the other. Thus, framing the discussion in terms of welfare does not express a preference for military intervention, providing financial aid, or any particular transnational security policy option. Drawing on behavioral public choice theory, Delaney urges that welfare outcomes be articulated through quantitative assessments of welfare interests addressed by transnational law – that is, the collective body of international law and national laws that apply to a specific topic like torture, humane treatment of combatants and prisoners, and refugees.[20] He further recommends that public officials can achieve more optimal welfare outcomes by designing decision-making environments differently[21] and developing their leadership skills.[22]

Taken together, Slovic's, Mazarr's, and Delaney's perspectives suggest that more rigorous study of U.S. decision-making environments can reveal important data to guide public

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[17] *Id.* at 83-4.
[18] David G. Delaney, *Behavioral Public Choice, U.S. National Security Interests, and Transnational Security Decision Making*, 24 IND. J. GLOBAL LEGAL STUD. 429, 438-46 (2017).
[19] CASS R. SUNSTEIN, WHY NUDGE?: THE POLITICS OF LIBERTARIAN PATERNALISM 71-75, 102-4 (2012).
[20] *Id.* at 446-52.
[21] *Id.* at 448.
[22] *Id.* at 453-56.

officials in specific ways to align their security decisions with humanitarian values that they and their predecessors have enshrined in law and policy pronouncements. Designing and conducting that research can be difficult given the secrecy that attends U.S. national security deliberations, often long after they occur. The starting point, however, is unquestionably the formal and informal processes that presidents use for those discussions.

As the principal organ of formal U.S. national security decision making, the National Security Council (NSC) is the starting point to consider how prominence affects U.S. policy. Congress established the NSC in 1947 with three functions:

> (1) advise the President with respect to the integration of domestic, foreign, and military policies relating to the national security so as to enable the Armed Forces and the other departments and agencies of the United States Government to cooperate more effectively in matters involving the national security;
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> (2) assess and appraise the objectives, commitments, and risks of the United States in relation to the actual and potential military power of the United States, and make recommendations thereon to the President; and
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> (3) make recommendations to the President concerning policies on matters of common interest to the departments and agencies of the United States Government concerned with the national security.[23]

The president specifies issues for the NSC to address and establishes a committee structure to facilitate decisions at multiple levels.[24] The NSC's membership, staffing, and processes are just the starting point, however. Much informal decision making within agencies, among sub-groups

[23] National Security Act of 1947, Pub. L. No. 80-253, 61 Stat. 495 (codified at 50 U.S.C. § 3021(b)).
[24] National Security Presidential Memorandum-4, Organization of the National Security Council, the Homeland Security Council, and Subcommittees, 82 Fed. Reg. 16, 881 (Apr. 6, 2017).

of expert advisors, among the most senior officials, or with senior members of Congress supplements the formal NSC processes.[25] Other consultative bodies and processes may be involved when economic, trade, or other policy issues are deliberated. The remainder of this Article considers how attorneys and policy officials working in these environments might mitigate prominence and implement policies that align more closely with humanitarian values expressed in transnational law.

II. THE U.S. NATIONAL SECURITY ATTORNEY IN SECURITY AND HUMANITARIAN DECISION MAKING

This Part provides an overview of attorney roles in national security policy-making environments. It also presents an argument for attorneys to mitigate prominence and other decisional pathologies in policy decisions. Viscusi and Gayer define these pathologies as "behavioral failure," that is, phenomena "that often involve departures from the individual rationality assumptions incorporated in economists' models of consumer choice."[26] We adopt that term here and focus on attorneys for several reasons. First, government lawyers support national security decision making at all levels, from the president in the White House to office directors in federal departments and agencies. The role of attorneys is thus a constant in otherwise variable decision-making processes. Second, lawyers have specialized education and training in national security and humanitarian fields, particularly the law that regulates those fields. In contrast, policy officials who are elected, appointed by the president, or promoted in civil service ranks need not have such expertise. Engaging well-prepared attorneys in policy

[25] For a rich discussion of the practice of national security law in these different processes see JAMES E. BAKER, IN THE COMMON DEFENSE: NATIONAL SECURITY LAW FOR PERILOUS TIMES, 63-69, 310-17 (2007).
[26] W. Kip Viscusi & Ted Gayer, *Behavioral Public Choice: The Behavioral Paradox of Government Policy*, 38 HARV. J. L. & PUB. POL'Y 973, 974 (2015).

deliberations provides the opportunity to fill gaps in decision makers' knowledge, historical treatment of the issues, and other relevant topics. Finally, lawyers are subject to a code of professional ethics requiring them to temper their service to the client with concurrent ethical obligations to serve justice and the public. Unlike elected or appointed officials who consider their actions through a lens of voter accountability and legitimacy, attorneys may be said to have wider rule-of-law apertures because of the profession's ethical obligations. In sum, studying the attorney's role in transnational security decision making provides unique opportunities to consider both how prominence *may* be mitigated and how a wide range of decision-making processes *can* be adjusted to enable public officials to advance more welfare-enhancing public policies.

A. Operational and Administrative Law Functions

Lawyers in the U.S. intelligence community,[27] the armed forces, and divisions of other federal agencies address a variety of operational issues that are central to the nation's security. Legal and policy issues in this operational field relate to, among other things, the law of war, treaty law and practice, criminal investigations, intelligence surveillance, clandestine operations, seizure of foreign financial assets, and disaster preparedness and response. Operational attorneys may also address a range of related administrative issues, including employment, contracting, fiscal, and ethics matters that advance their agency's national security activities. In some cases, however, other attorneys address these administrative law issues. In this Article, "national security attorney" refers to any lawyer involved in an operational or administrative issue that the government considers to relate to national security.

[27] Exec. Order No. 12,333, 3 C.F.R. § 200 (1982).

B. Civil Servants and Political Appointees

By a large margin, national security attorneys are career civil servants, not appointees of the sitting president. Over the course of a career, civil servants may alternate between operational and administrative legal roles, work in multiple agencies, or serve short-term assignments outside their employing agency – e.g., to advise the White House-based NSC staff or apply or develop their expertise in another agency with a similar need. Some civil servants alternate between legal and policy positions for periods of months or years.

National security attorneys joining the government with a new president are comparatively few. They include the White House counsel; the general counsel of departments, agencies, and the military services; and senior staff attorneys helping these officials deliver legal services and oversee legal support functions. Many of these attorneys have experience as federal or state civil servants, congressional staff members, or judicial clerks. Others bring experience only from the private sector, the president's campaign, or political party activities.

C. Specific Roles

1. White House Attorneys

Presidents have discretion to establish and organize their legal team to suit their interests. The White House counsel, vice president's counsel, and NSC legal advisor are the three primary attorneys managing legal work to support the president. The NSC legal advisor addresses any issue arising through the NSC process to support the president, national security advisor, and NSC members. In contrast, the White House counsel and vice president's counsel perform a wide range of legal and policy functions to support the president. The president may assign them specific NSC roles to regularly address some range of national and transnational security

issues.[28] Alternatively, the president may consult them informally or on a case-by-case basis outside the normal NSC processes.

The flexibility a president may wish to exercise to alter established transnational security decision processes within the NSC or with individual departments is exemplified by the post-9/11 White House. Consider the roles played by White House Counsel Alberto Gonzales and Vice President Cheney's counsel David Addington in advising President Bush, the vice president, CIA Director George Tenet, and NSA Director Michael Hayden following al Qaeda's 2001 attacks.[29] Ordinarily, the Justice Department handles Foreign Intelligence Surveillance Act (FISA)[30] matters and all foreign intelligence surveillance is conducted pursuant to a court order. Neither the NSC nor White House attorneys are involved in related policy or legal decisions. In this instance, however, the president asked the White House counsel's office to be involved in assessing the legality of new surveillance activity that would be conducted without FISA warrants.[31]

2. The Attorney General and Assistant Attorney General for Legal Counsel

The attorney general's role of providing "advice and opinion on questions of law when required by the President" dates to the Judiciary Act of 1789.[32] An assistant attorney general supervising the office of legal counsel (OLC) prepares the attorney general's formal opinions, renders informal opinions and legal advice to government agencies, and assists the attorney general as legal advisor to the president and as a member of, and legal advisor to, the president's

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[28] 50 U.S.C. § 3021(c) (2012).
[29] *See, e.g.*, The FRONTLINE Interview: Michael Hayden, FRONTLINE, PBS (Jan. 2, 2014), http://www.pbs.org/wgbh/pages/frontline/government-elections-politics/united-states-of-secrets/the-frontline-interview-michael-hayden/ (describing David Addington's role as Vice President Cheney's counsel drafting the government's first legal opinion regarding new surveillance programs).
[30] 50 U.S.C. §§ 1801-1885c (2012).
[31] GEORGE W. BUSH, DECISION POINTS 163-64 (2010).
[32] 28 U.S.C. § 511-513 (2012).

cabinet.[33] Other than requests from the president or vice president, national security legal questions may reach this assistant attorney general directly from the attorney general, the heads of other justice department offices, the head of an agency (regardless of whether the official is a member of the NSC), or a White House attorney. As the Bush administration considered options to capture and interrogate known or suspected terrorists following the 9/11 attacks, CIA General Counsel John Rizzo made such a request seeking clarification on whether a federal torture law[34] prohibited certain proposed techniques.[35]

3. Agency General Counsel

The general counsel supervises all legal functions in an agency, advises on matters of law and legal policy, and resolves legal disputes that arise within the agency under statutory authority from Congress[36] or authority delegated from the agency head. Agency general counsel advise their NSC members – e.g., cabinet secretary or deputy secretary – to prepare them for policy deliberations and decision meetings. In rare circumstances, the national security advisor or NSC member may invite the general counsel to participate in a decision meeting. More frequently, the NSC legal advisor invites agency attorneys to participate in preliminary working groups to develop common legal policy perspectives on topics that will be presented to NSC members.

Although the scope of NSC responsibilities and number of NSC staff members have greatly expanded over seventy years, the NSC does not address all multi-agency national security policies. General counsel of NSC member agencies like the departments of state, defense,

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[33] 28 C.F.R. § 0.25(a) (2017).
[34] 18 U.S.C. § 2340A (2012).
[35] Jay S. Bybee, Memorandum for John Rizzo Acting General Counsel of the Cent. Intelligence Agency Interrogation of al Qaeda Operative (Aug. 1, 2002).
[36] 10 U.S.C. § 140 (2012) (establishing the position of general counsel to server as the chief legal officer of the defense department charged to "perform such functions as the Secretary of Defense may prescribe"); 6 U.S.C. §113(a)(1)(J) (establishing the position of general counsel to serve as the chief legal officer of the homeland security department).

energy, and homeland security therefore spend considerable time addressing national security issues outside NSC processes. They work within their agencies or directly with other agencies to resolve disagreements or harmonize legal issues and operational concerns.

D. Behavioral Aspects of National Security Legal Roles

These decision-making environments have many elements in common. However, it would be a mistake to adopt a static understanding of them given the diversity of personalities and institutional and cultural norms. Rather, Slovic, Mazarr, and Delaney suggest that improved behavioral understanding of these environments is essential to analyzing specific decision-making processes.

1. *Prominence*

Slovic emphasizes two elements of prominence as it affects policy decisions on the use of military force to promote transnational humanitarian interests: 1) the public official tends toward inaction because it is more defensible than risking U.S. lives to advance values and welfare outcomes that are difficult to calculate; and 2) the public's psychological posture on the issues accords with inaction.[37] That is, neither the public official nor the general public has the information, tools, and cognitive capacity to weigh and compare the different sets of interests; so public officials do nothing, and the public does not argue against this inaction.[38]

This insight can inform the analysis of the attorney's role in numerous ways. For example, an attorney who knows that limits on human cognition can explain decision makers' inclinations toward inaction enables the attorney to engage public officials from a neutral platform. That is, attorneys and other experts developing policy options or advising decision

[37] Slovic, *supra* note 7, at 30 (pointing specifically to psychological numbing when the policy issue is genocide or a mass atrocity).
[38] Slovic, *supra* note 7, at 26.

makers need not see political motivations as the official's primary interest. Advisors must be prepared to provide input that helps officials overcome prominence so they can see welfare interests more clearly and political factors as just one category of public interest.

The public's related incapacity to assess diverse welfare interests is also relevant to national security attorneys because attorneys help develop public statements on crisis issues and may be expected to make public statements to the media, Congress, courts, or others. Attorneys must therefore be prepared to convey complex security and humanitarian issues in simple, direct terms. Attorneys effectively become spokespersons for the administration on the specific requirements of transnational law as well as the law's weighing of security and humanitarian welfare interests.

2. *Decision by Imperative*

The fast-paced, high-stress environment that Mazarr describes for senior U.S. national security officials points to the need to consider strategic, political, and personal imperatives that affect national security attorneys. Of particular concern are Mazarr's hypotheses that nonconsequentialist thinking reduces objective assessment of utilities, limits comparison of alternatives, blinds officials to consequences and risks unrelated to the imperative, and downplays or discourages consideration of risks and second-order effects. Attorneys must consider how these concerns affect their own approach to a crisis, as well as their colleagues' approaches to collaborative deliberations.

If imperatives eliminate a range of legal issues and options from policy discussions then attorneys are in a disfavored position to fully advise decision makers. Discerning how imperatives operate in any specific government decision-making environment therefore becomes an essential activity at organizational and individual levels. Agency general counsel are

responsible for that work, and they can establish norms and policies that enable attorneys and policy officials to conduct consequentialist thinking. Individual attorneys must also develop the ability to discern imperatives outside their organizations because they work across organizations and institutions with a constant flow of new attorneys and policy officials.

3. Behavioral Public Choice

Delaney argues that policy officials and the attorneys supporting them must be able to focus on non-prominent welfare interests embodied in a field of transnational law.[39] Consider, for example, the 1984 United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("Torture Convention") as a cornerstone of the transnational law of detention, interrogation, and torture.[40] This treaty becomes effective in the United States through the 1996 Torture Statute.[41] National security attorneys of various experience levels in numerous federal agencies may be called on to advise policy officials on a wide range of specific parameters in this body of law, including the definition of torture,[42] the requirement to educate public officials on the law,[43] or decisions of courts applying the law or interpreting similar terms.[44] The most senior and experienced national security attorneys advising the president, cabinet members, and other senior officials serve broader organizational and institutional interests. Adopting a behavioral public choice perspective on a body of transnational law can help them assess and advise officials on its broader welfare interests.

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[39] David G. Delaney, *Behavioral Public Choice, U.S. National Security Interests, and Transnational Security Decision Making*, 24 IND. J. GLOBAL LEGAL STUD. 429, 446-57 (2017).
[40] Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85 [hereinafter Torture Convention].
[41] 50 U.S.C. § 3021(c) (2012).
[42] Torture Convention, *supra* note 40, art. 1.1; 10 U.S.C. § 2030(1).
[43] Torture Convention, *supra* note 40, art. 10.1
[44] *See, e.g.*, HCJ 5100/94 Pub. Comm. Against Torture in Isr. v. Israel [1999] IsrSC 53(4) 817, *reprinted* in 38 I.L.M. 1471, 1488 (1999); Ireland v. United Kingdom, App. No. 5310/71, 2 Eur. H.R. Rep. 25 (1978). No international or U.S. court has yet interpreted the Torture Convention or U.S. Torture Statute.

There are two essential components of a behavioral public choice perspective on transnational law. The first is a behavioral economic analysis of the law to identify and quantify relevant welfare interests that policy and legal officials may find difficult to describe with particularity and then balance through quantitative tradeoffs. This approach builds on behavioral understandings of how law is created, interpreted, applied, and enforced. Behavioral accounts of international law, like those of U.S. law, should be expected to explain the content and purposes of law better than traditional economic theory.[45] These accounts involve new formulations of the law's goals and parameters, for example, by quantifying the liberty interests of detainees or the harms to rule-of-law principles that national and international communities seek to avoid. Thus, the welfare benefits of banning or making criminal certain behaviors – e.g., torture, crimes against humanity, genocide – can be expressed in behavioral economic terms to help officials make tradeoffs between security interests and other interests.

The second component of a behavioral public choice perspective on transnational law is understanding the behavioral influences that lead public officials and the general public to suboptimal policy choices under the law. A national public seized by security fears may exhibit the prominence effect unless news reports, public discourse, and political dialogue mitigate it. As public officials seek to implement the law or carry out the public interest, their own personal biases and other behavioral influences can affect the policy and legal positions they develop – what Viscusi and Gayer term the "behavioral paradox."[46]

There are thus three different formulations of transnational law's welfare interests. The first is the behavioral economic assessment of welfare interests the law expressed when it was

[45] *See* Christine Jolls, Cass R. Sunstein, & Richard Thaler, *A Behavioral Approach to Law and Economics*, 50 STAN. L. REV. 1471, 1546-48 (1998).
[46] Viscusi & Gayer, *supra* note 26, at 974.

created. The second is the general public's assessment at some future time – measured perhaps through polls or surveys – revealing a polity's interests in those same welfare interests during a crisis moment. The third is provided by public officials whose policy choices reveal differences from the first two assessments.

Viscusi and Gayer's paradox describes the difference between the second and third welfare assessments. For example, there may be strong public support for intervening with military force to stop a genocide, but government officials decide not to do so. Behavioral failures of public officials contribute to those decisions resulting in welfare-reducing policies. Of equal behavioral public choice interest is what we term the "humanitarian paradox." This is the difference between transnational law's expressed humanitarian interests (the first assessment) and the policies adopted by a national government or the international community (third assessment).

These issues require deeper exploration than can be accomplished in this Article. The essential point in identifying a humanitarian paradox here is that government officials' behavioral failures contribute to the welfare-reducing policies in ways that can be quantified and analyzed. As government's primary experts on the law, national security attorneys are in positions of responsibility to identify the concerns for client officials and practice law in ways that minimize prominence and other behavioral failures.

Well-established prohibitions like those against torture, war crimes, or genocide, all of which have evolved since the late nineteenth century, emerge because those acts have occurred with sufficient regularity, significance, and horror to mobilize political communities and heads of state to record the human experience and promote humanitarian interests against competing physical security concerns. Rule-of-law objectives among nations thus include the desire to resist

prominent safety and security interests arising in crisis moments. National security attorneys have opportunities to help reduce the humanitarian paradox and improve democratic governance by engaging their client officials in discussions that emphasize the law's expressed values.

It is, however, the unusual national security attorney who will possess the expertise to advise on transnational law this way, let alone conduct economic and behavioral assessments of the law themselves. Attorneys are also unlikely to understand how prominence, imperatives, biases, and other behavioral failures affect the judgments and decisions that they, their supervisors, and policy makers bring to deliberative processes. That base of knowledge is essential to understand how any public official involved in a policy decision can introduce – or fail to mitigate – individual or systemic behavioral failures that influence outcomes.[47]

National security attorneys, however, are familiar with describing the risks involved in violating legal norms, consequences for the communities involved, and otherwise framing legal and policy issues in rule-of-law terms. As well-prepared advisors they are also accustomed to addressing moral, social, political, and other issues that relate to the client's policy choices.[48] Behavioral public choice analysis of foreign policy decisions builds on that foundation to describe more specifically the rule-of-law interests and variables in a given policy choice. Whether attorneys are able to provide that perspective themselves or draw on outside expertise, those who embrace this understanding can envision how they can be most effective mitigating prominence in their own actions and within their decision-making environments.

[47] Delaney, *supra* note 18, at 440-46.
[48] MODEL RULES OF PROF'L CONDUCT r. 2.1 (AM. BAR ASS'N 1983).

III. MITIGATING PROMINENCE IN U.S. NATIONAL SECURITY DECISION MAKING

This Part proposes steps national security attorneys can take to advance the less prominent, highly desirable humanitarian welfare interests embodied in transnational law. The primary focus is on presidential decisions and the institutional outlook that attorneys can provide when advising the president. Section B describes three types of decision tools that can help mitigate prominence in policy decisions. Part III concludes with five recommendations to help national security attorneys use these tools to fulfill their obligations under professional ethics rules.

A. Mitigating Prominence in Presidential Decisions

The Constitution empowers and authorizes the president to provide for the nation's security in numerous ways. Article II authorizes the president to repel sudden attacks to preserve the nation's physical security even without a declaration of war from Congress. As commander in chief the president issues orders and sets military policy prescribing operational and administrative parameters for many security functions. As chief diplomat the president enters into international security agreements and concludes treaties with the Senate's advice and consent. Federal courts reviewing presidential security decisions give significant deference to the executive's perception of security needs,[49] and it is the rare moment when judges find presidential overreach soon after the executive's policy decision.[50] Security values are thus well

[49] *See, e.g.*, Korematsu v. United States, 323 U.S. 214 (1944) (holding that the exclusion of American citizens of Japanese ancestry from their homes was permissible under the President's and Congress's war powers because "when, under conditions of modern warfare, our shores are threatened by hostile forces, the power to protect must be commensurate with the threatened danger"); Trump v. Hawaii, 585 U.S. 248 (2018) (observing after seventy-four years that "*Korematsu* was gravely wrong the day it was decided, has been overruled in the court of history, and – to be clear – 'has no place in law under the Constitution.'" (citing Korematsu, 323 U. S. at 248 (Jackson, J., dissenting))).

[50] Significant national security cases in which the Supreme Court invalidated presidential action within months or a few years include Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952) (holding that the president exceeded his constitutional authority by acting as lawmaker); N.Y. Times Co. v. United States, 403 U.S. 713, 714

expressed in the Constitution and revealed in public decision making. When the nation confronts truly existential threats, policy tradeoffs understandably weigh in favor of at least some security interests. However, behavioral public choice analysis of such moments would bring greater understanding of the relative tradeoffs, improve deliberation, and should result in fewer welfare-reducing policies.

Lawyers serving the president can prepare to mitigate prominence by considering their role from institutional, organizational, and individual perspectives. An institutional approach takes particular account of the office of the presidency and the executive's functions advancing international and national rule-of-law interests. The organizational perspective focuses the presidential lawyer on her opportunity to design decision-making environments and participate in organizational activities to improve decisions. The individual perspective emphasizes the attorney's ability to mitigate prominence both in herself and in those she advises.

Serving as an effective attorney in all three dimensions presents different challenges. An effective institutional advisor draws on many relevant sources of law to consider trends and objectives in society. The institutional attorney helps government overcome the humanitarian paradox when the Constitution's humanitarian values are greater than those revealed in other applicable law. Thurgood Marshall was an effective institutional attorney in advocating constitutional equality in education when state laws required segregated education.[51] In the realm of domestic security, attorney general Francis Biddle's recommendation against evacuating Americans of Japanese ancestry from the West Coast during World War II

(1971) (holding that the President could not prevent the New York Times and Washington Post from publishing classified national security information relating to U.S. decision-making processes on Vietnam policy); Boumediene v. Bush, 553 U.S. 723, 771 (2008) (holding that the President could not deny noncitizen detainees at the U.S. Naval Base at Guantanamo Bay, Cuba, the right to petition for the writ of habeas corpus because the U.S. Constitution has full effect there).

[51] *See* Brown v. Board of Education, 347 U.S. 483 (1954).

demonstrates the complex balancing of liberty interests, security, and rule-of-law norms that fall to the attorney advising the president. Whether as attorney general, White House counsel, or other attorney advising the president or vice president, the accomplished institutional lawyer similarly recognizes that while security interests are always present, threats are rarely matters of state survival[52] and truly existential risks are few.[53] The attorney is thus an essential discussant when seemingly paramount security threats are offered to justify welfare-reducing policies.

The White House counsel, NSC legal advisor, attorney general, and agency general counsel set policy for the delivery of legal support to the president and other senior policy makers, thus they are primarily responsible for organizational steps to mitigate prominence. Among other things, they determine how public officials obtain legal advice, whether that advice is committed to writing, and how legal disputes are resolved among government entities. Knowing how the prominence effect operates would enable these senior political appointees and civil-service attorneys to identify it and work with other organizational leaders to mitigate it.

Mitigating prominence at the individual level is an important foundation for improving outcomes at the organizational and institutional levels. But it requires a regard for and grounding in behavioral science and leadership that is not common in legal education or the legal profession. Attorneys may therefore resist the kind of reflection and development opportunities that prepare them to bring such issues into discussion with other public officials.

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[52] *See, e.g.*, BAKER, *supra* note 25, at 8-12 (describing "jihadist terrorism" as "perilous," "perpetual," and capable of leading to catastrophic attack but not a state-survival threat akin to nuclear conflict, the U.S. Civil War, or the War of 1812).

[53] *See, e.g.*, Nick Bostrom, *Existential Risks: Analyzing Human Extinction Scenarios and Related Hazards*, 9 J. EVOLUTION & TECH., (2002) (defining "existential risk" as "one where an adverse outcome would either annihilate Earth-originating intelligent life or permanently and drastically curtail its potential."), https://nickbostrom.com/existential/risks.html. For a discussion of existential risk in the context of international governance frameworks, *see* Sebastian Farquhar, et al, *Existential Risk: Diplomacy and Governance*, (Global Priorities Project) (2017) https://www.fhi.ox.ac.uk/wp-content/uploads/Existential-Risks-2017-01-23.pdf.

An additional complicating factor is the likelihood that public officials view legal and policy issues through theoretical lenses that magnify the prominence effect rather than mitigate it. A presidency won on a platform of military intervention or non-intervention surely bounds the attorney's ability to contribute to policy and legal deliberations. Likewise, a national security team comprising White House and agency officials who subscribe to a neoconservative, neoliberal, or other theoretical framing of global affairs is likely to approach any new event with theoretical parameters – perhaps imperatives – in mind regarding the meaning of the law or the policy options available to public officials.

In an extreme case, physical security concerns are so prominent in the elites' theoretical framing of issues that both the behavioral economic and public assessments of law's values are deemed irrelevant. For example, a policy of first-use nuclear weapons or cyberwar to deter or respond to disproportionately low security threats signals that the balance of welfare interests embodied in the United Nations Charter, the international law of armed conflict, and nuclear non-proliferation treaties leans too heavily toward humanitarian and other non-security welfare interests. In this environment, policy and legal officials with different perspectives have limited opportunity to influence individual, organizational, and institutional efforts to recalibrate the welfare assessment. The law and the national security attorney are largely irrelevant.

B. Tools to Overcome Prominence

Attorneys who approach decision making both as a discipline and with a view to mitigating prominence and other behavioral failures in transnational security decisions can do so in a variety of ways. Gregory, Harstone, and Slovic have begun assessing specific methods to improve welfare outcomes in the context of genocide interventions.[54] The following discussion

[54] Robin Gregory, et al., *Improving Intervention Decisions to Prevent Genocide: Less Muddle, More Structure*, 11 GENOCIDE STUD. & PREVENTION 109, 111-14 (2018), http://scholarcommons.usf.edu/gsp/vol11/iss3/12/.

of decision analysis, value-focused thinking, and choice architecture describes three specific ways to make welfare benefits of transnational law more prominent in these and other foreign policy decisions.

1. Decision Analysis

A primary goal of decision analysis is to bring simplifying structures and processes to complex decision environments. Objectives hierarchies, means-ends networks, consequence tables, and expert elicitations are tools that can provide such simplicity, and former senior government officials have found them useful as they considered alternative responses to a hypothetical genocide.[55] More rigorous study of government decision-making environments is needed to improve the ways decision tools are used to address specific transnational issues.

Existing decision tools and processes provide an important starting point for that research. Military and intelligence communities, for example, have long used decision analysis to make fiscal and operational policy choices within agencies, among multiple agencies, and with Congress. To the extent that those predominate in NSC and other processes where non-prominent humanitarian issues arise, they provide an opportunity to consider how public officials consider risk, security concerns of various types, and welfare interests of transnational law. The attorney's engagement in such processes is vital to consider, and ideal studies will focus on the life cycle of policy development from the White House to all involved government agencies.

2. Value-Focused Thinking

Value-focused thinking is "a style of thinking that concentrates more and earlier on values" to generate creative alternatives that are consistent with those values.[56] Value-focused

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[55] *Id.* at 111-14, 121.

[56] Ralph L. Keeney, *Value-Focused Thinking and the Study of Values*, *in* DECISION MAKING: DESCRIPTIVE, NORMATIVE, AND PRESCRIPTIVE INTERACTIONS 465-66 (David E. Bell, Howard Raiffa & Amos Tversky, eds. 1988).

thinking by national security attorneys has at least three important attributes. It broadens attorneys' field of vision to include law's values, not just its permissions and prohibitions; it promotes organizational awareness of these values in government agencies; and it enables sophisticated discussion of those values with other U.S. public officials and international partners. Each of these attributes helps overcome prominence.

Dwelling on law's values instead of its narrow prohibitions and permissions is the foundational aspect of value-focused thinking for attorneys. Prosecutors perform general values-focused assessments when they decide whether to pursue investigations, seek indictments for specific offenses, and retry cases that have ended in a hung jury. They are concerned with broad notions of justice and the public interest.

For national security attorneys this means understanding the historical events that led to international treaties and U.S. laws. It means seeking to understand the value objectives of those sources of law as much as their specific terms. It also means understanding relevant policy issues and the advance of legal theory over generations.

National security attorneys taking a value-focused perspective on the Geneva Conventions of 1949, for example, would identify a trend to promote humane treatment and reduce suffering of those affected by conflict. A values-focused perspective of this sort may be common in the departments of state and defense where the conventions are negotiated, applied, and advanced with international stakeholders. Civil servants in other agencies and political appointees may have only faint historical awareness of the conventions and their function advancing humanitarian principles. To overcome prominence, public officials addressing policy

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For a more expansive treatment of value-focused thinking see Ralph L. Keeney, VALUE-FOCUSED THINKING: A PATH TO CREATIVE DECISIONMAKING (1996).

issues related to the conventions must be able to obtain a value-focused perspective on them on short timelines.

3. Choice Architecture

Choice architecture is a decision design tool that can be used to shape decision environments.[57] Where prominence or other behavioral failures prevent policy officials from considering humanitarian interests and moral dimensions of policy issues, choice architecture makes them salient and overcomes the cognitive shortcomings that emphasize physical security. It is a tool that attorneys and policy officials can use to improve decision making in many ways.

The NSC legal advisor and assistant attorney general for legal counsel play the most consequential legal roles in many national security policy decisions. The formal and informal processes they use to develop their advice for the president and other executive branch officials are, in turn, the most important to design to overcome behavioral failures. How those officials gather information, conduct legal analysis, formulate legal options, and convey their advice are all relevant considerations.

The general counsel of a national security agency is no less important than the president's legal team. Given their authority to set policy on the delivery of legal services and the way policy decisions incorporate legal issues, the chief legal officers of these agencies are in positions to review procedures with a view to making changes based on choice architecture and other design tools. The general counsel also has extraordinary opportunity to affect how the agency head and other senior advisors address humanitarian interests and values in that agency's national security work.

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[57] *See generally*, RICHARD H. THALER & CASS R. SUNSTEIN, NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS (2008).

C. Professional Ethics and the National Security Legal Advisor

The American Bar Association's Model Rules of Professional Conduct and the enforceable ethics codes of each state provide important reference points for the ways individuals and organizations design the national security legal support environment. The attorney's role as advisor and the attorney's responsibilities serving a public organizational client are two critical components of overcoming prominence. There are many more relevant areas to explore than can be addressed here, but these two enable lawyers and their public clients to consider norms for sound ethical practice, their own behavioral influences on policy decisions, and opportunities to improve decision environments.

Model Rule 2.1 addresses the attorney's role as advisor in two important respects. The first is the explicit duty for attorneys to "exercise independent professional judgment and render candid advice."[58] Most national security attorneys work in hierarchical organizations that place explicit or implicit pressures on the attorney's independence. The attorney general, agency general counsel, NSC legal advisor, or assistant attorney general for legal counsel may feel those pressures in cabinet meetings, NSC meetings, or agency meetings during which policy officials challenge the attorney's judgment on the scope of the law, the risks of various courses of action, or the plausibility of legal arguments that enable certain policy options. Junior attorneys may feel similar pressures from client officials they serve, more senior attorneys, or supervisory attorneys or senior colleagues with greater responsibility for a court case or other legal issue.

The independence and candor of the national security attorney's advice has proven to be consequential in any number of recent historical moments. From the internment of Japanese-

[58] MODEL RULES OF PROF'L CONDUCT r. 2.1 (AM. BAR ASS'N 2018).

Americans[59] to post-9/11 security programs,[60] government attorneys have struggled to perform their assigned public duties in ways that fulfill their duty to render independent, candid advice. Their challenges are undoubtedly more complicated than those of other government attorneys because helpful information may be classified and therefore kept from them. Since the uninformed attorney is certainly less likely to be able to serve as an effective legal advisor, the issue of attorney access to classified information warrants further inquiry, and perhaps special treatment under the Model Rules and state ethics codes.[61]

The second and equally important dimension of Model Rule 2.1 is that "[i]n 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." The language is permissive and allows flexibility as to how an attorney draws on non-legal issues to help a client solve complex problems. It also helps guide national security lawyers away from serving public officials – a president, cabinet official, senior appointed advisor, or career civil servant – as mere tools of the political trade.[62] Rule 2.1 makes it proper for national security attorneys to inquire

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[59] *See, e.g.*, PETER IRONS, JUSTICE AT WAR 202-04 (1983) (describing Justice Department attorney Edward Ennis's efforts to inform the Solicitor General that the Office of Naval Intelligence determined that selective evacuation of Japanese-American security threats was preferable to large-scale removal to detention camps).

[60] *See, e.g.*, Michael Isikoff, *The Whistleblower Who Exposed Warrantless Wiretaps*, NEWSWEEK, (Dec. 12, 2008, 7:00 PM), http://www.newsweek.com/whistleblower-who-exposed-warrantless-wiretaps-82805 (describing Justice Department attorney Thomas Tamm's concerns that his work supporting warrant applications to the Foreign Intelligence Surveillance Court was tainted by illegally obtained evidence); CHARLIE SAVAGE, TAKEOVER: THE RETURN OF THE IMPERIAL PRESIDENCY AND THE SUBVERSION OF AMERICAN DEMOCRACY 179-81 (2007) (describing Navy General Counsel Alberto Mora's efforts to ensure that his independent advice on interrogation and torture policies reached senior Defense Department, Justice Department, and White House officials); FRONTLINE, *supra* note 29 (reporting on the different roles played by the National Security Agency general counsel, vice president's counsel, White House counsel, attorney general, and other lawyers advising the president and other senior public officials on surveillance programs).

[61] We envision and encourage robust debate on this issue about the scope of attorney access to classified information that is relevant to assigned duties and the government client's policy decisions. In theory, no attorney – especially those directly supporting the president – should accept a client's statement that the attorney is not permitted to access such information. In practice – especially within departments and agencies – the hierarchy of national security attorney-client relationships means that some attorneys may not possess the requisite clearance level, know the full scope of a client's decision context, or appreciate that more highly classified information is in play.

[62] Timothy L. Hall, *Moral Character, the Practice of Law, and Legal Education*, 60 MISS. L.J. 511, 533 (1990) ("Rule 2.1 relieves an attorney of any notion that serving as a client's 'yes man' is required.").

into a client official's motives, related policy interests and goals, and awareness of broader contextual factors, including the meaning and objectives of relevant transnational law. In this respect the national security attorney's ethical duty as an advisor encompasses a duty to be prepared to advise on non-legal issues and to develop the courage and capacity to do so even in the most challenging circumstances.[63]

As a general rule, national security attorneys are advisors to organizational government clients, not individual public officials. Most are employed by the secretary or general counsel of a department or agency and so obligated to serve the organization as a whole. Model Rule 1.13 guides national security lawyers in this area, as it does private attorneys advising non-government organizations.[64] Even the attorney general, NSC legal advisor, White House counsel and vice-president's counsel – who may view their function as personal counselor or confidant to the president or vice president – must consider their obligations to the office of the presidency or vice presidency, or the entire executive branch, or the government as a whole when considering their ethical responsibilities.[65]

Key provisions for the national security attorney include: referring violations of law that can substantially injure the organization to higher authorities in the organization for resolution;[66] disclosing confidential information to the extent necessary to prevent substantial injury to the organization;[67] and explaining the identity of the attorney's client when discussing matters with organization officials whose interests are adverse to the organization.[68] These rules have

[63] For a discussion of courage that can be understood to inform this point, see BAKER, *supra* note 25, at 310.
[64] MODEL RULES, *supra* note 58, r. 1.13(a).
[65] *Id.* at cmt 9.
[66] *Id.* r. 1.13(b).
[67] *Id.* r. 1.13(c).
[68] *Id.* r. 1.13(f).

important consequences for how attorneys work individually and collaboratively to deliver national security legal support.

Determining the proper way to resolve suspected violations of law can be fraught with peril, particularly when disclosing confidential information to prevent unlawful activity and substantial injury to the government or the public. Justice Department national security attorney Thomas Tamm's experience working on post-9/11 electronic surveillance programs points to some of the challenges. Upon learning in 2004 that the government had conducted electronic surveillance outside the procedures established by the Foreign Intelligence Surveillance Act, Tamm asked attorney colleagues and senior policy officials to explain the lawful basis for obtaining and using the information to petition the Foreign Intelligence Surveillance Court for approval to conduct broader electronic surveillance.[69] His level of security clearance did not entitle him to higher-level information, namely that President Bush had approved the program on legal advice from White House attorneys and the attorney general. Tamm faced a choice about how to inquire into government action that appeared to be unlawful: report the activity, possibly by disclosing confidential information, or accept assurances that the attorney general had satisfactorily resolved the legal issue.

Given Tamm's opportunity to report the suspected wrongdoing to the Justice Department inspector general or other government official, his decision to reveal the information to The New York Times[70] is not clearly lawful or preferred. Indeed, the Justice Department conducted a criminal investigation into his actions and waited until 2010 to decide not to file charges.[71] The

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[69] Isikoff, *supra* note 60.
[70] Charlie Savage, *Whistle-Blower on N.S.A. Wiretapping Is Set to Keep Law License*, N.Y. TIMES, (July 12, 2016), https://www.nytimes.com/2016/07/13/us/politics/thomas-tamm-nsa-wiretapping-law-license.html.
[71] Josh Gerstein, *Wiretapping Leak Probe Dropped*, POLITICO (Apr. 27, 2011, 10:59 AM), https://www.politico.com/story/2011/04/wiretapping-leak-probe-dropped-053718.

District of Columbia Board on Professional Responsibility continued to review the circumstances of Tamm's disclosure for another six years, at which point the District of Columbia Court of Appeals approved[72] a negotiated disciplinary agreement resulting in public censure for violating Rule 1.6 of the District of Columbia Rules of Professional Conduct[73] relating to attorney-client confidences.

The episode demonstrates that faithful adherence to professional ethics rules can be particularly murky and difficult in the national security field. Organizational and institutional pressures and constraints include the national security classification system that limits attorney access to important information. The prominence effect may also be a factor. For example, the security benefits of programs that attorneys support on a day-to-day basis may be tangible and highly salient to the attorney compared to seemingly abstract, remote welfare benefits involving civil liberties protections or notions of good governance. And when the lawfulness of organizational activity is in question, the responses of legal supervisors or senior policy officials may reveal individual, organizational, or institutional balances between prominent and non-prominent welfare interests that preclude the attorney's full exploration, reporting, and resolution of the questionable activity. As in Tamm's case, officials may assume or describe national security imperatives for certain policies, regardless of how non-prominent values may be assessed. All of these factors contribute to the behavioral paradox and humanitarian paradox. Professional ethics rules provide a basis for attorneys to initiate discussion with senior attorneys and policy officials to fully explore and resolve ethics concerns of the sort Tamm identified. But

[72] *In re* Thomas M. Tamm, 145 A.3d 1022 (D.C. 2016).
[73] DISTRICT OF COLUMBIA RULES OF PROFESSIONAL CONDUCT RULE 1.6 (1992).

attorneys and clients likely need decision analysis, value-focused thinking, choice architecture, or other tools to minimize the paradoxes and improve compliance with ethics rules.

The theoretical frameworks an attorney brings to policy and legal deliberations also contribute to the behavioral paradox. The scope of the president's authority in domestic and international law viewed through the lens of the unitary executive theory[74] or the humanitarian justification for the use of military force under international law[75] are but two of the many ways the attorney influences policy outcomes. Model Rules 1.2 and 1.3 provide guideposts in this area by requiring, respectively, that clients make certain decisions in the course of legal representation[76] and by specifying that a lawyer's duty of diligence includes a duty to advocate with zeal on the client's behalf.[77] But these rules may exacerbate the paradoxes when attorneys and clients share similar theoretical views because their behavioral influences are not checked through discussion and debate. Most troubling are the circumstances when policy officials either seek legal advice that favors a particular course of action or simply adopt a course of action that the likeminded attorney is expected to approve. These approaches to national security decisions operate like imperatives and greatly increase the opportunity for non-prominent values to be marginalized or discounted in the delivery of legal support.

National security attorneys can take the following five steps both to mitigate prominence and promote compliance with professional ethics rules. The recommended steps draw on decision analysis, value-focused thinking, and choice architecture to suggest how lawyers and policy officials can begin assessing and improving legal support to foreign policy decision-

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[74] For a recent historical overview of this theory see STEPHEN G. CALABRESI & CHRISTOPHER S. YOO, THE UNITARY EXECUTIVE: PRESIDENTIAL POWER FROM WASHINGTON TO BUSH (2008).
[75] SEAN MURPHY, HUMANITARIAN INTERVENTION: THE UNITED NATIONS IN AN EVOLVING WORLD ORDER 7-33 (1996).
[76] MODEL RULES, *supra* note 58, r. 1.2.
[77] *Id.* r. 1.3 cmt. 1.

making processes. Since attorneys are typically not taught or trained to accomplish such steps, these recommendations also serve as a proposal for improving the academic and professional development paths for attorneys fulfilling public duties.

1. Specify the individual, organizational, or institutional client.

Attorneys who specify the client or clients to whom they direct their legal advice enable more meaningful deliberation among public officials at different levels and across government entities. This enables officials to determine whether additional expertise or different client perspectives need to be brought into discussion. The simplest way to specify the client is to address a legal memo to named individuals—the president, agency head, or office director. This focuses officials' attention on the realm of legal and policy questions associated with individual, organizational, and institutional policy interests. Attorneys delivering oral legal advice will need an opportunity to clearly state the client they are serving, and perhaps how the advice may differ for other organizational clients involved in the decision.

2. Provide written advice on humanitarian and other non-prominent welfare interests.

Written legal advice promotes attention to non-prominent welfare interests of relevant law when the document directly addresses those interests. Separating that discussion from other parts of the attorney's memorandum makes the issues more salient. At a minimum, written legal advice can include a short statement of the law's non-prominent welfare objectives and the attorney's candid advice on related policy interests. The attorney who views the advisory function as strictly constrained to legal issues may prefer to draft such a statement narrowly. Those who believe the client's interests call for consideration of other related interests might draft more robust advice. Similarly, the attorney inquiring into the lawfulness of an

organization's actions to resolve a concern under Model Rule 1.13 may need to include this kind of advice in written materials submitted to supervisors and more senior organization officials.

3. Establish an organizational ethics review process.

Attorneys serving public organizational clients on national security issues confront unique ethics issues that do not arise in other practice settings. Creating an organizational process to explore attorneys' concerns can help them resolve those issues in ways that enhance the effectiveness of both the ethics rules and public policy processes. A diverse panel of attorneys that can be consulted in confidence enables deeper exploration of the attorney's concern, particularly if there is concern about a senior official's involvement in unlawful conduct. While each attorney remains responsible for complying with applicable ethics rules, the group can be engaged to develop courses of action and help navigate organizational and institutional processes. For example, when the ethics rules require an attorney to seek resolution of the issue from a senior organizational client, the ethics panel could facilitate that process and recommend additional steps if the concern is not resolved.

4. Develop value-focused cultural norms on legal and policy issues.

Value-focused thinking enables groups of public officials addressing common issues of transnational law to identify common values and policy objectives. It pervades an organization when it creates a culture centered on core values and leads to organizations and processes reflecting those values. Independently or in concert with client offices, attorneys can formalize processes and norms around common values articulated by relevant law. Rather than mandating or precluding any particular policy outcome, the goal is to help keep prominent interests from dominating debate.

5. Redesign decision spaces and processes.

Choice architecture and decision analysis offer many ways to mitigate prominence. Considerations include the appearance of the physical space, the membership of the decision group, the ways participants contribute to discussions, and the ways supporting staffs develop and present options and supporting information. The meeting room might include displays of legal text (e.g., "No exceptional circumstances whatsoever…may be invoked as a justification of torture"[78]), visual images of those protected by law (e.g., photos of refugees), or even professional ethics rules (e.g., "a lawyer may refer…to moral, economic, social and political factors, that may be relevant to the client's situation") to focus participants on non-prominent considerations. Asking participants to write down their preferred policy choice before discussion begins provides an opportunity to discuss diverse views instead of allowing group members to be swayed by early speakers. Staff members can also develop agendas, sequence policy options, and use presentation formats that avoid imperatives and do not emphasize prominent interests.

These recommendations for attorneys draw on behavioral studies, and client officials can take similar or reciprocal steps to mitigate prominence. Nevertheless, the precise benefits of these and other decision tools in foreign policy decisions cannot be known without studying unique national security decision making environments. We anticipate, for example, that studying the environments in which humanitarian intervention options are formulated, deliberated, and decided will identify numerous opportunities to mitigate prominence and reduce or eliminate the need for military intervention. Until such work can be undertaken, attorneys and policy makers can also consider other ways to mitigate prominence.

[78] Torture Convention, *supra* note 40, art. 2.2.

IV. OTHER OPPORTUNITIES TO OVERCOME PROMINENCE

As the foregoing discussion suggests, existing research on prominence and other behavioral issues enables public officials to improve foreign policy decision-making in large and small ways. However, officials may feel that they lack expertise to apply that research in their organizations. Conducting formal studies of policy, legal, classification, and other decision-making activity by the NSC, Joint Chiefs of Staff, or other inter-agency or intra-agency national security entities can specify ways attorneys and other public officials can overcome prominence. But additional research takes time, and officials may be unlikely to make changes unless they are made throughout the national security system. This Part discusses three ways officials may be inclined to proceed: employing experts to mitigate prominence; framing humanitarian values as security values; and waiting for Congress to reform the national security system.

A. An Advocate for Humanitarian Values in Transnational Law[79]

Given the diffusion of national security decision making across many government entities, culture and practice in many of those environments would have to change significantly for attorneys or others to overcome prominence in meaningful ways. One opportunity to begin that work is to identify an expert to participate in national security decision-making forums to help public officials overcome prominence in a variety of ways. This expert's primary role would be to serve as an advocate for transnational law's humanitarian and other non-prominent expressed values in discussions with decision makers and key advisors. The advocate's secondary role would be to identify and recommend changes to policy-making processes.

[79] Former national security attorneys and scholars proposed this idea during a workshop conducted on December 11, 2017 in conjunction with the annual meeting of the Society for Risk Analysis. A summary of the workshop appears at http://www.mdchhs.com/how-we-think/articlesresources/national-security-decision-making-workshop-overcoming-the-prominence-effect/. This discussion reflects our independent description and assessment of the idea.

To fulfill these roles, the advocate serving the president, cabinet secretary, or other national security agency would ideally have expertise in three core areas: 1) prominence and related behavioral factors; 2) relevant humanitarian and other transnational law and policy; and 3) emotional intelligence to develop and deliver advice most effectively. Supplemental expertise in behavioral economics and decision design tools is desirable. This is an uncommon set of expertise and skills to find in one person, but legal, human rights, decision science, leadership, and other fields are fertile grounds to identify and develop individuals with this role in mind.

B. Presidential Decisions

The effective advocate serving the president as decision maker would have to be a full-time or "special" government employee[80] to comply with ethics laws[81] and hold a security clearance in order to participate in all policy discussions with the president, coordinate regularly with the national security advisor and senior staff members, and have the ability to call and design meetings to mitigate prominence. The president can define and formalize the advocate's roles in a policy directive along with other NSC processes, as is common at the start of each administration. Alternatively, Congress can create such a position by amending the National Security Act.[82] Both branches have recently deliberated similar ways to make institutional improvements to national security processes, albeit in different fields and forms.

In 2012 President Obama brought greater attention to genocide and other humanitarian crises by assembling a group of government officials to form an Atrocities Prevention Board that operated within the NSC staff.[83] They brought deep expertise on genocide and mass atrocities to

[80] 18 U.S.C. §§ 202, 203, 205, 207-209 (2014).
[81] *See, e.g.*, Ethics in Government Act of 1978, Pub. L. No. 95-521, 92 Stat. 1824 (1978).
[82] National Security Act of 1947, ch. 343, 61 Stat. 495-510 (1947).
[83] Office of the Press Sec'y., *Fact Sheet: A Comprehensive Strategy and New Tools to Prevent and Respond to Atrocities*, THE WHITE HOUSE (Apr. 23, 2012), https://obamawhitehouse.archives.gov/the-press-office/2012/04/23/fact-sheet-comprehensive-strategy-and-new-tools-prevent-and-respond-atro.

NSC discussions, thereby raising awareness of non-prominent humanitarian values in presidential decision processes. In 2016 President Obama issued an executive order to formalize the Board's structure, responsibilities, and protocols.[84] If continued, the Board's work could help mitigate prominence and accomplish part of the task of a non-government advocate for humanitarian values.

There are two key differences between the Board and the advocate role proposed here. Of greatest importance is the advocate's specified role participating directly in discussions with the president and other principal NSC members. The well-prepared advocate can mitigate prominence in the decision-making moment as a complement to the Board's work improving the NSC staff's knowledge and day-to-day activities. Additionally, the advocate proposed here would have responsibility to advise on refugee crises, interrogation and torture, and other transnational legal issues, not just genocide and mass atrocities. The advocate for humanitarian values thus improves on the Board's ability to mitigate prominence in presidential foreign policy decisions.

Congress's consideration of outside experts to improve national security decisions and welfare outcomes has arisen in the context of reforming U.S. foreign intelligence surveillance procedures, specifically by changing practices of the Foreign Intelligence Surveillance Court (FISC). Like the president, the FISC assesses a host of legal norms and welfare interests under relevant law. Domestic and global U.S. security interests constitute the primary aim of the executive branch's request for a warrant to conduct foreign intelligence surveillance. The FISC's institutional role, which Congress determined to be necessary to check the executive branch, is to strike a balance between the prominent security values the Department of Justice advocates and

[84] Exec. Order No. 13,729, 81 Fed. Reg. 32611 (May 23, 2016).

the broader, less prominent welfare interests and values embodied in applicable law and rule-of-law processes themselves. The privacy, civil rights, and civil liberties interests of individuals subject to surveillance are primary considerations. But the FISC's purview extends to broader notions of good governance in a rule-of-law society that are presumed to be formulated and presented by a security agency.

In 2014 the President's Privacy and Civil Liberties Oversight Board (PCLOB) recommended two specific ways non-government experts could improve FISC practices.[85] The appointment of "special advocates" and "special masters" to advise the FISC on technology, surveillance authority, privacy, civil rights, civil liberties, and other issues became two of the PCLOB's three most important proposed surveillance reforms.[86] In essence, the recommendation is that the FISC needs significant additional expertise to serve as an adequate institutional check on the executive's balancing of welfare interests. These conclusions expanded similar FISC-specific recommendations from a review group comprising scholars and former government officials.[87] Such changes have garnered broad public support, but the president cannot implement them without new law and funding, and Congress has not acted on them. The recommendations of both bodies nevertheless serve as valuable analogs to demonstrate how outside experts can improve government decision making.

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[85] THE PRESIDENT'S PRIVACY & CIVIL LIBERTIES OVERSIGHT BD., REPORT ON THE TELEPHONE RECORDS PROGRAMS CONDUCTED UNDER SECTION 215 OF THE USA PATRIOT ACT AND ON THE OPERATIONS OF THE FOREIGN INTELLIGENCE SURVEILLANCE COURT 8-9 (2014) [HEREINAFTER PCLOB SECTION 215 REPORT].

[86] *Id.* at 14, 17-19.

[87] RICHARD A. CLARKE ET AL., PRESIDENT'S REVIEW GRP. ON INTELLIGENCE & COMM'CS TECHS., LIBERTY AND SECURITY IN A CHANGING WORLD: REPORT AND RECOMMENDATIONS OF THE PRESIDENT'S REVIEW GROUP ON INTELLIGENCE AND COMMUNICATIONS TECHNOLOGIES 200-208 (2013), https://obamawhitehouse.archives.gov/sites/default/files/docs/2013-12-12_rg_final_report.pdf.

C. Other National Security Decision Environments

Departments and agencies may wish to use experts as advocates in similar ways for the many national security decisions that never reach the president or the NSC. To be most effective serving a cabinet secretary at the department level, the advocate should have access to policy development, deliberation, and decision-making forums across the agency and with other collaborating agencies. The agency head can designate the advocate to participate in all departmental activity and even represent the department in other government forums like the Atrocities Prevention Board. But as an expert serving a single department, she would not necessarily be permitted to participate in policy forums convened by other agencies. This limits the advocate's effectiveness and demonstrates the importance of developing integrated approaches to mitigating prominence across the executive branch.

As with presidential-level advocates, those serving department heads must have adequate access to classified information that informs risk decisions. Ideally, the advocate works with the president, department head, and other "original classification authorities" to mitigate prominence when they first balance threat, risk, and welfare interests to decide how information is classified to prevent specific harms related to unauthorized public disclosure of the information.[88] Such interactions may build sufficient trust for the advocate to receive "top secret" and "compartmented" information about covert action, intelligence collection programs, and other activities to identify and advise on welfare interests and policy outcomes associated with those foreign policy functions. Even with access to "secret" or "confidential" classified information (the public release of which is linked to national security harms perceived to cause, respectively, "serious damage" and "damage" to the nation's security)[89] advocates can influence a wide range

[88] Exec. Order No. 13,526, 75 Fed. Reg. 707, 707-10 (Dec. 29, 2009).
[89] *Id.* at 707-8.

and significant volume of policy and legal deliberations within the departments of state, defense, homeland security, and justice. Therefore, it is valuable for all national security entities to seek opportunities for an advocate to improve their most important decision processes.

D. Potential Drawbacks to Using an Advocate for Humanitarian Values

Hiring an expert to advocate for law's humanitarian values is not without potential negative consequences. The first is that public officials who work with the advocate may cede to the advocate all responsibility for quantifying and advocating for non-prominent interests. Instead of attempting to balance the law's various interests when developing policy options, public officials may dwell exclusively on security concerns. This places an excessive burden on the advocate, and prominence is reinforced in these policy officials rather than mitigated. To guard against this, the advocate's role must be understood to complement and improve officials' work, not substitute for their own efforts to fulfill the Constitution's charge that the executive "take care that the laws be faithfully executed."[90]

The second significant concern is that the advocate's presence will be used as false proof that an administration's decisions take humanitarian interests as seriously as security interests. To guard against this, the advocate must be as highly regarded and trusted as others advising the decision maker. The advocate must also have real opportunities to present and discuss transnational welfare interests. She may need authority to present her advice independently to peer advisors and decision makers instead of being just another participant in a large meeting.

To be clear, overcoming the prominence effect does not have specific policy outcomes that can be forecasted in advance. That is, there is no expectation that an advocate will always recommend the use of military force for a peacekeeping mission, to provide relief in an emerging

[90] art. 2, § 3.

refugee crisis, or to intervene when genocide is a concern. Rather, the advocate will increase attention to the overall welfare benefits of those options and other opportunities to advance transnational law's humanitarian objectives. She will help quantify and make salient in humanitarian and rule-of-law terms the values the international community has expressed in law and aspires to achieve. Decision makers will be better able to compare options according to criteria included in behavioral economic analyses of transnational law – perhaps lives saved, suffering avoided, peace maintained, or other factors.

As described here, an advocate for humanitarian interests has a good opportunity to rapidly mitigate the prominence effect at individual, organizational, and institutional levels. Taking this step along with others enables U.S. political appointees and civil servants to assess and improve their decision processes and outcomes. It also enables advocates and public officials to learn from each other, promote insightful dialogue, and engage international actors in new ways. As a starting point, the White House, cabinet agencies, and other NSC member agencies would identify advocates to work with and through the NSC, Joint Chiefs of Staff, Atrocities Prevention Board, and similar existing decision-making bodies.[91]

E. Humanitarian Values as Security Values

Like the government attorney who can effectively advise on non-prominent dimensions of transnational law, an advocate for humanitarian values speaks directly to rule-of-law considerations other than security. An alternative approach to discussing non-prominent welfare interests with legal and policy officials is to present them in terms of their security value. This

[91] As of the publication date, the Donald Trump administration had made no public statements regarding the continuation of the Atrocities Prevention Board.

alternative approach borrows from securitization theory, which posits that presenting policy issues in terms of security garners government attention and resources.[92]

A lawyer or policy official who securitizes transnational torture law may recommend strict compliance with the Torture Convention, U.S. Torture Statute, and implementing materials like the U.S. Army Field Manual because to do otherwise would result in detrimental security outcomes – perhaps less reliable intelligence, similar techniques used against captured U.S. service members, or long-term animosity toward the United States. While this approach may seem appealing and plausible, particularly if decision makers will not otherwise consider non-prominent values and interests, it does not overcome prominence. Instead, it reinforces the cognitive attention to security, even where other interests are demonstrably greater. It is therefore a disfavored method of approaching the law and mitigating behavioral failures like prominence.

One rationale for encouraging a behavioral public choice approach to humanitarian values over securitization theory is rooted in cognitive science and democratic theory.[93] The prominence effect describes the cognitive inclination toward defensible positions as against some competing set of interests, however defined. Proposing to securitize humanitarian values to gain government attention and resources ignores the cognitive reality that people will still reveal preferences for the stronger security cases and more defensible positions. For example, when balancing the security benefits of obtaining useful intelligence through torture against the security benefits of not using torture, prominence almost certainly inclines executive branch officials toward using torture because it is the more defensible position for those exercising exclusive government authority to prevent harm to the public. It is also challenging for officials

[92] For an introduction to securitization theory see BARRY BUZAN, OLE WAEVER & JAAP DE WILDE, SECURITY: A NEW FRAMEWORK FOR ANALYSIS (1998).

[93] Other rationales may be found in instances when non-intervention in atrocities destabilizes a region, allows terrorism to flourish, or presents other adverse security outcomes.

to envision the circumstances when the security benefits of not using torture would be realized and outweigh the benefits of using torture.

The importance of advancing behavioral public choice studies in this area is clarified when considering that such government choices may differ from the public's preferences that accord with legal prohibitions. This behavioral paradox is evident in the public's opinion of the government's post-9/11 interrogation programs. Gallup surveys in October 2001 and January 2005, respectively, reveal that 53% and 59% of Americans were not willing to have U.S. government officials "torture known terrorists if they know details about future terrorist attacks in the U.S."[94] Compare these results with Pew Research Center surveys between 2004 and 2007 in which 49-54% of Americans said that torture can never (27-32%) or rarely (17-25%) be "justified against suspected terrorists to gain key information."[95] There are fundamental questions of democratic legitimacy and governance to explore when public officials make decisions that are contrary to the public's embrace of humanitarian and rule-of-law principles. In addition to better understanding prominence and other behavioral factors that lead government officials astray, it is essential to define this humanitarian paradox in more specific terms.

Giving shape to the humanitarian paradox is an exercise in understanding rule-of-law instruments more precisely. Individually and collectively, constitutions, treaties, statutes, and other sources of law express a polity's security interests as one dimension of democratic values. Separate from their security value, constitutional values like freedom of expression, freedom of religion, and other individual and societal liberties are worthy of government efforts to adequately define, preserve, and promote. Likewise, the humanitarian and rule-of-law values

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[94] Gallup Historical Trends, "Terrorism," https://news.gallup.com/poll/4909/terrorism-united-states.aspx.
[95] The Pew Research Center for the People & the Press, "Trends in Political Values and Core Attitudes: 1987-2007," 25 (March 22, 2007), http://www.pewresearch.org/wp-content/uploads/sites/4/legacy-pdf/312.pdf.

embodied in international law on issues like genocide and torture stand independent of their security value.

F. Strategic Reform of National Security Decision Making Processes

Congress and the president share constitutional responsibility for creating government structures that generate sound foreign policy strategies and implementing policies. Since the 90th Congress passed the National Security Act of 1947 to formally establish the NSC system, Congress has occasionally reformed large parts of the national security community. The Foreign Intelligence Surveillance Act of 1978,[96] Goldwater-Nichols Department of Defense Reorganization Act of 1986,[97] Homeland Security Act of 2002,[98] and Intelligence Reform and Terrorism Prevention Act of 2004[99] stand out.

Beginning with President Clinton in 1993,[100] presidents have routinely involved many more officials in NSC processes than Congress specified in 1947. This reflects, in part, both a desire to include subject matter experts and a need to accommodate new entities like the Department of Homeland Security and the Office of the Director of National Intelligence. The Joint Chiefs of Staff[101] and Joint Intelligence Community Council[102] are but two additional entities that Congress created to accomplish important national security functions.

This more expansive and complex national security community is essentially a system of systems that is challenging to operate, let alone improve. Officials may determine that mitigating behavioral failures in their organizations is ineffective or counterproductive absent systemic

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[96] Foreign Intelligence Surveillance Act of 1978, Pub. L. No. 95-511, 92 Stat. 1783 (1978).
[97] Goldwater-Nichols Department of Defense Reorganization Act of 1986, Pub. L. No. 99-433, 100 Stat. 992 (1986).
[98] Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135 (2002).
[99] Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. No. 108-458, 118 Stat. 3638 (2004).
[100] Presidential Decision Directive/NSC-2, Organization of the National Security Council (Jan. 20, 1993), https://fas.org/irp/offdocs/pdd/pdd-2.pdf.
[101] 10 U.S.C. § 151 (2016).
[102] 50 U.S.C. § 3022 (2004).

reform. This places a burden on Congress to look beyond functional and structural national security needs. Pursuing reforms to simplify national security processes and improve rule-of-law outcomes makes behavioral failures an essential area of inquiry.

CONCLUSION

The field of decision science provides insights into human behavior that are essential to apply to government organizations and national and international governance institutions. This Article demonstrates both the benefits of applying existing research to U.S. foreign policy decisions and the need for new research to better understand those decision-making environments. As the prominence effect and other behavioral failures are better understood, policy makers, attorneys, and other public officials can mitigate them more effectively.

Improvements in U.S. foreign policy decisions can be measured as increases in welfare outcomes under transnational law. Mitigating behavioral failures brings policy decisions closer to the humanitarian welfare goals expressed in law, thereby reducing the humanitarian paradox and promoting the rule of law. As theoretical frameworks develop in this area, legal and other professional communities are uniquely situated to identify and mitigate prominence. Such academic and professional undertakings are inherently interdisciplinary and interconnected. The hope is that advancing those undertakings together can more fully achieve the constitutional aspiration to "secure the blessings of liberty to ourselves and our posterity."[103]

[103] U.S. CONST. pmbl.