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Deliberative Constitutionalism in the National Security Setting

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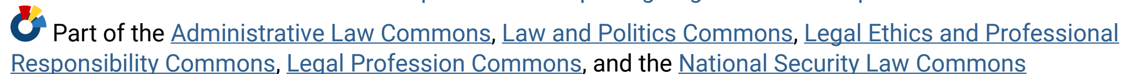
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DELIBERATIVE CONSTITUTIONALISM (2018)
(Cambridge University Press, Jeff King, Hoi Kong, Ron Levy & Graeme Orr eds.)

Chapter 2: Deliberative Constitutionalism in The National Security Setting

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A. INTRODUCTION

Deliberative democracy may seem both especially important and especially unsuited for application to national security matters. On the one hand, decisions relating to national security often involve issues of life, death and the fate of political communities. This suggests that it is especially crucial that decisions reflect the core values of deliberative democracy.

Two particularly important values in this setting are deliberative rigor and transparency, or public reason-giving. Deliberative rigor requires that decisions are made thoughtfully, with full assessment of the widest range of considerations, by persons who are genuinely open to other viewpoints and who make decisions based on the force of the better argument.[1] Transparency requires that officials publicly explain the reasons for their decisions in terms that citizens can endorse as acceptable grounds for acting in the name of the political community – even if some citizens disagree with the outcomes of the decision making process.[2] This requirement furthers the perceived legitimacy of decisions, which provides 'moral grounds for obedience to power as opposed to grounds of self-

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[1] Jurgen Habermas, *Legitimation Crisis* (Beacon, Cambridge, MA 1975) 108. On the importance of deliberative rigor, see Zsuzanna Chappell, *Deliberative Democracy: A Critical Introduction* (Palgave Macmillan, 2012) 8 ('*Deliberative Democracy*').

[2] 'All theories of deliberative democracy contain something that could be called a publicity principle. The principle has many forms but almost always involves a claim about the salutary effects of going public with the reasons and arguments backing up a policy, proposal, or claim' (Simone Chambers, 'Behind Closed Doors: Publicity, Secrecy, and the Quality of Deliberation' (2004) 12 *Journal of Political Philosophy* 389, 390).

interest or coercion.'[3] Both deliberative rigor and transparency seem especially important in light of the potentially momentous decisions that need to be made in the national security setting. We want those decisions to be made thoughtfully, and we want citizens who may have to make significant sacrifices to trust that decisions that require this have been made for the right reasons.

National security decisions, however, tend to be less transparent than most other exercises of power. Officials may regard it as imprudent to provide complete details of decisions they have made, to offer a full description of the reasons for those decisions, or, in some cases, to make any disclosure at all about certain decisions. This circumspection may occur not only with respect to the public, but with members of Congress and even the judiciary. The national security decision-making process therefore often may fall short of the requirement of fully transparent public reason-giving.

While such reason-giving is especially important to the perceived legitimacy of a decision, anticipating the need for it also can enhance deliberative rigor. Limited transparency thus creates the risk both that decisions will not be regarded as legitimate and that the deliberative process will not be as robust as it should be. In addition, there is typically little opportunity to include citizens in the decision-making process, which some theorists regard as an essential feature of deliberative democracy.[4] The limited transparency that often characterises national security decision-making thus may suggest that the insights of deliberative democracy have minimal, if any, application in this setting.

Notwithstanding these challenges, we believe that the critically important nature of national security decisions makes realising the goals of deliberative democracy especially important in this field. Given limits on transparency and fitful oversight by other branches, as well as minimal opportunities for direct citizen participation, we maintain that ensuring robust internal deliberative processes on national security questions within the executive branch is crucial in achieving these goals. This view reflects a version of what Neal Katyal calls reliance on 'internal separation of powers' to compensate for limitations of external oversight.[5] Deliberative theory can be especially helpful in determining how to structure such processes to help realise deliberative values.

Our focus in this chapter is on one example of a US government deliberative process, which is the use in some administrations of what is called the 'Lawyers Group'. This Group consists of lawyers from all national security agencies who regularly meet to discuss how to advise the President and senior national security officials.

We suggest that this Group has the potential to compensate to some extent for the limited transparency that often distinguishes decision-making in the national security

[3] John Parkinson, 'Legitimacy Problems in Deliberative Democracy' (2003) 51 *Political Studies* 180, 182.
[4] Seyla Benhabib, 'Toward a Deliberative Model of Democratic Legitimacy,' in Seyla Benhabib (ed), *Democracy and Difference: Contesting the Boundaries of the Political* (Princeton University Press, 1996) 67, 68.
[5] Neal Katyal, 'Internal Separation of Powers: Checking Today's Most Dangerous Branch from Within' (2006) 115 *Yale Law Journal* 2314.

setting, thereby enhancing both deliberative rigor and the perceived legitimacy of decisions. With respect to deliberative rigor, we suggest that the Lawyers Group can help ensure wide-ranging deliberation on national security issues that have legal dimensions. With regard to perceptions of the legitimacy of decisions, we argue that the operation of the Lawyers Group can help achieve this goal by helping generate justifications that meet the requirement of legality. Perceived compliance with the law's publicly accessible set of reasons can foster confidence that decisions have been made on the basis of broad public-regarding concerns. Such decisions still may be subject to criticism on grounds other than legality. As we will describe, however, perceptions of legality and legitimacy are especially closely intertwined in American culture.

Abstracting from the example of the Lawyers Group, our discussion seeks to make two distinctive contributions to deliberative theory. First, we focus on its application to a field in which full transparency and public justification often may not be feasible. Second, we discuss the particular role that legal analysis may play in the deliberative process. In what follows, we describe the way in which the US Constitution seeks to further deliberative democracy and how the Lawyers Group can help realise this aim in the national security setting.

B. DELIBERATION AND THE US CONSTITUTION

The US Constitution is notable for its reliance on a sharp separation of powers among the executive, Congress, and the judiciary. This arrangement is designed to prevent the concentration of power within government by 'giving to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others'.[6] The prospect of close vigilance by the other branches over the exercise of authority also serves deliberative values. It requires that each branch provide justifications for acting that the other two branches, and the public, find persuasive. This can improve the quality of deliberations, since each branch must anticipate potential counter-arguments to its claims of authority by branches that jealously guard their prerogatives. To the extent that officials successfully address such objections, their actions are likely to be perceived as legitimate.

As this description suggests, perceived legality and legitimacy are closely connected in US political culture. De Tocqueville famously noted at an early point the tendency of US citizens to frame political issues as legal ones.[7] With respect to the executive branch, Richard Pildes has observed that the public often evaluates presidential performance in terms of whether the President is acting in accordance with the law. As he notes:

> the world of public and political responses to political action is filtered through law itself. In so many contexts, no separation between law and public judgment exists: public judgment is constantly refracted through

[6] Alexander Hamilton, James Madison and John Jay, 'Federalist No. 51,' in *The Federalist Papers* (Signet 1961) 321-2.
[7] Alexis de Tocqueville, *Democracy in America* (J P Mayer & Max Lerner (eds), Harper & Row, 1966) 248.

> judgments about whether various actors, including the President, are acting lawfully.[8]

The account above of the relationship among deliberation, reason-giving, and perceived legitimacy indicates that legal justification can play an especially important role in furthering deliberative goals in the US constitutional system. Law provides a publicly accessible set of grounds on which decisions must rely, and thus a common vocabulary of justification. The requirement to defend actions in terms that are acceptable within this vocabulary creates an incentive to engage in thorough analysis that anticipates plausible objections. Decisions that are the product of such a process also are more likely to be regarded as legitimate because such rigour suggests to the public that officials have been open to all relevant points of view. The more that citizens believe that the decision-making process has featured such receptivity to different perspectives, the more confident they are likely to be that it has taken into account a wide range of public-regarding considerations rather than simply narrow or self-interested ones. The result is that they are more likely to accept a decision as made thoughtfully in the national interest.[9]

However, how robust can legal justification be with respect to national security decisions? Fully transparent legal justification enhances accountability and thereby can generate support for a presidential decision – but the President may be constrained in the reasons he or she can offer in support of that decision. Assessing the legality of presidential action often depends on knowledge of the underlying facts, but disclosing all the facts may create risks to national security. Yet failing to fully describe reasons and to disclose important facts weakens the persuasiveness of the President's justification. This can create suspicion that the head of the executive branch is transgressing the bounds of authority or that he or she is not acting solely on the basis of public-regarding reasons.

This state of affairs can create a dilemma for other branches of government on national security matters. A President's declaration of the need to act to address a threat to the country, even if based on information that the President cannot fully disclose, may make Congress reluctant to resist lest it incur blame if the threat materialises. In addition, courts have a variety of doctrines that they employ to avoid review of national security decisions, as well as to limit disclosure of sensitive information even when they do accept jurisdiction. Some observers suggest that these dynamics have eroded legal constraints on presidential national security power,[10] while others acknowledge expansion of such power, but contend that some meaningful constraints nonetheless remain.[11]

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[8] Richard Pildes, 'Law and the President' (2012) 125 *Harvard Law Review* 1381, 1411.

[9] '[C]itizens are more likely to accept defeat in democratic politics if they feel that their views have received a fair hearing and if they find the reasons offered for this decision acceptable' (Chappell, *Deliberative Democracy*, above n 1, 49). See also Robert Goodin, *Motivating Political Morality* (Blackwell, 1992) 132-3; Amy Gutmann and Dennis Thompson, *Why Deliberative Democracy?* (Princeton University Press, 2004) 3.

[10] Bruce Ackerman, *The Decline and Fall of the American Republic* (Belknap, 2010); Eric A Posner and Adrian Vermeule, *The Executive Unbound: After the Madisonian Republic* (Oxford University Press, 2010).

[11] Jack Goldsmith, *Power and Constraint* (W W Norton, 2012).

We do not fully assess these claims here. We believe that the executive continues to face some constraints, but we also accept that presidential national security power has expanded in recent decades. We also acknowledge the risks that limited external oversight can pose to deliberative democracy. If the executive knows it will not have to offer rigorous justifications for its decisions to other branches and the public, the decision-making process may not be as robust as it should be. As Simone Chambers describes, the requirement to justify oneself to others creates

> 'the necessity to articulate one's position carefully, to defend it against unexpected counter arguments, to take opposing points of view into consideration, to reveal the steps of reasoning one has used, and to state openly the principles to which one appeals'.[12]

If there is minimal likelihood that other branches or the public will demand a full well-reasoned explanation for a decision, the quality of the deliberation that precedes it may suffer. This in turn can impair its perceived legitimacy.

The close connection between perceptions of legality and legitimacy in US political discourse may address this risk to some extent. This means that the executive is likely to continue to feel obligated to frame justifications in legal terms. This obligation can create an incentive to ensure that such justifications are regarded as legitimate because they are grounded in rigorous and persuasive legal analysis. In the next section, we suggest that reliance on the Lawyers Group in arriving at decisions can help serve this function.

C. LEGAL DELIBERATION IN NATIONAL SECURITY DECISION-MAKING

In this section, we discuss the role of legal deliberation in the national security decision-making process and describe the operation of the Lawyers Group.

1. *The Role of Legal Analysis*

Lawyers and law are integral to day-to-day national security policy and operational decision-making in the United States, to a degree that some might find surprising. Perhaps the most significant reason is that there are few policy questions that do not involve significant legal issues. Jack Goldsmith, for instance, has criticised a trend toward what he regards as undue intrusion of law into foreign policy matters, resulting in what he calls the 'judicialization of international politics' and the 'criminalization of warfare'. He also points to the growth of a 'human rights culture' and the expansion of international law enforcement through universal jurisdiction and international courts, as well as an increase in domestic laws that relate to military and intelligence operations.[13]

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[12] Chambers, above n 2, 391.
[13] Jack Goldsmith, *The Terror Presidency* (W W Norton, 2007) 53-63.

Regardless of one's view of this trend, it has increased the importance of lawyers in national security decisions.[14] Policy-makers may fear exposure to criminal laws, or, more commonly, they are aware that the public perception of illegality will undermine support for policies. A President and his or her national security team confronting questions about, for example, the use of force or intelligence operations therefore must navigate legal requirements and prohibitions with implications for them and the long-term success of their policy.

In addition, the line between law and policy is not always clear. It is often difficult to separate international relations and international law, since customary behaviour can become law. For example, a state's decision about how to respond to a novel provocation can, over time, affect the law in that area, particularly if other states follow suit. Similarly, countries will react to a policy or action in part based on their perception of its legality. The roles of lawyers and policy-makers are closely related on issues such as these, and decision-makers therefore typically have little choice but to consult their lawyers.

This close relationship between national security policy-makers and their lawyers creates the possibility that distinctive features of the legal reasoning process can enhance the quality of decision-making on policy issues. As Ian Johnstone suggests, legal reasoning can serve as a 'disciplining force' in national security deliberations: 'Legal deliberations are bounded: certain types of argument and styles of reasoning are acceptable and accepted; others are not'. Legal analysis can limit the terms in which justification can be offered to those for which there are common evaluative criteria. As Johnstone observes: 'Any language, including the language of the law, can plausibly be stretched only so far'.[15]

We do not suggest that legal analysis is able to provide unqualified, clear answers and therefore plays this role. In fact, many legal questions do not have a single, correct answer. Rather, the purpose of legal reasoning is, as Edward Levi describes, to 'provide[] for the participation of the community in resolving … ambiguity by providing a forum for discussing policy in the gap of ambiguity'.[16] Levi describes the basic pattern of legal reasoning as a three-step process: 'similarity is seen between cases; next the rule of law inherent in the first case is announced; then the rule of law is made applicable to the second case'.[17] This basic formulation conveys how lawyers are trained to deliberate. The process is linear, sensitive to factual context, and looks to precedent and generally applicable rules.

Lawyers therefore have an opportunity to enhance national security policy decisions because lawyers are integral to the policy-making process. They will only realise this potential, however, if their advice is based on rigorous and thoughtful analysis. For several reasons, engaging in such analysis is especially challenging in the national security setting.

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[14] For a discussion of this trend during the past several years, see Charlie Savage, *Power Wars: Inside Obama's Post-9/11 Presidency* (Little Brown & Co, 2015).
[15] Ian Johnstone, 'Legislation and Adjudication in the UN Security Council: Bringing Down the Deliberative Deficit' (2008) 102 *American Journal of International Law* 275, 280 ('Legislation and Adjudication').
[16] Edward Hirsch Levi, 'An Introduction to Legal Reasoning' (1948) 15 *University of Chicago Law Review* 501, 501.
[17] Ibid 501-2.

First, there are very few fields in which the stakes are as high. If policy-makers believe that a course of action will save lives, lawyers will feel tremendous pressure to find legal justification for it. At the same time, for security reasons, only a small circle of people is privy to the most important matters. This can force lawyers to be more insular than is healthy. They have few peers with whom they can discuss the issues, and often feel uncomfortable reaching out to others to vet legal arguments and analysis. This deprives them not only of the benefit of different perspectives and expertise, but of the reinforcement that peers can provide in support of advice that may be difficult for policy-makers to accept.

In addition, there are fewer external checks on legal advice in the national security area than there are in most other fields, and less judicial precedent on which to rely. Members of Congress have less insight into the legal advice provided in this area than they do in other settings, and, when they do, they are constrained in how widely they can discuss it. US courts are reluctant to become involved in national security legal matters, relying on various doctrines to avoid review in sensitive matters. Legal analysis is also less available to the public for comment and criticism. All this can threaten to diminish the quality of legal advice on some of the most sensitive matters that a decision-maker must consider.

2. *The Lawyers Group*

One mechanism that has developed within the executive branch to address these challenges is the Lawyers Group. This Group comprises the senior lawyers from the major national security agencies who meet regularly to deliberate and reach consensus on legal advice for the President and his senior national security advisers.[18]

The only formal reference to the Lawyers Group has been in an earlier classified directive from President George H W Bush, which set out a process for consideration of covert action proposals. In the presidential administrations of William Clinton and Barack Obama, the Lawyers Group has been used regularly to address a wide range of legal questions relating to national security issues that require a presidential decision.[19] The Group might consider legal questions regarding intelligence or military operations, questions about imposing or implementing economic sanctions, cyber operations or cyber defence, issues related to treaty interpretation or treaty negotiation, immigration law, criminal law and process, sovereign immunity, or any other legal issues that relate to national security or foreign policy.

The Lawyers Group's core participants include the National Security Counsel (NSC) Legal Adviser, who is the President's senior national security lawyer; the Assistant Attorney General in charge of the Justice Department's Office of Legal Counsel (OLC), the Justice Department office charged with providing legal advice to the executive branch; the chief legal officers of the State and Defense Departments, the Office of the Director of

[18] The discussion that follows of the operation of the Lawyers Group is based on Professor DeRosa's experience as legal adviser to the National Security Council from 2009-2011.
[19] The George W Bush Administration used the Lawyers Group sporadically and primarily for intelligence matters.

National Intelligence (DNI) and the Central Intelligence Agency (CIA); and the Legal Adviser to the Chair of the Joint Chiefs of Staff.

The Lawyers Group typically will convene at the request of the NSC Legal Adviser to consider legal issues relating to policy issues before the President. Often, it must resolve legal questions on time-sensitive matters and members must work quickly. The Lawyers Group originally met mostly in person, in the office of the NSC Legal Adviser. As secure communications technology has advanced, more meetings are held virtually, using secure video teleconference. On most major issues, the meetings will include all Lawyers Group participants, but some meetings will involve a subgroup. For example, if the issue involves no intelligence matters, the NSC Legal Adviser might not invite the DNI or CIA General Counsels, or Defense Department participants might not be included in a meeting involving purely intelligence issues (although they would always be included in a discussion of covert action). The Lawyers Group can also be expanded on occasion if the issue involves a matter on which another office has particular expertise. For example, it might include lawyers from the Treasury Department if the topic relates to financial sanctions.

Those who attend the meetings ideally will have considered the issues beforehand, although if an issue arises quickly, that may not be possible. They will often bring additional lawyers with expertise in the issues under consideration. Sometimes one or more of the participants will have prepared papers that the Lawyers Group reviews during the meeting. Led by the NSC Legal Adviser, the Group will work through the issues and attempt to reach a consensus, which each member can communicate to his or her respective organisations. Sometimes the results of the deliberations will be recorded in a paper that is approved by all parties.

Participants bring distinct legal expertise and perspectives to the discussion. This permits them to raise questions and concerns that others might not have considered. When someone identifies an unanswered factual question, the lawyer whose agency is closest to the facts will seek out the answer. Sometimes the groups will meet with non-lawyer subject matter experts, such as intelligence analysts, to ask questions relevant to the legal issue.

Members of the group derive their authority from their organisations, which creates an environment in which all members are on equal footing. Although the NSC Legal Adviser convenes the meetings and generally chooses the topic, he or she does not have any greater voice in the deliberations than other members. Nor does the Adviser have the authority to decide between two competing legal views. This is because NSC staff members, although they have significant influence based on their proximity to the President, have no authority of their own. Although the President has the authority to overrule his cabinet officers on a question of policy or law, his NSC staff does not. This enhances the ability of members to interact on a relatively equal footing, with their influence determined by the persuasiveness of their arguments rather than their formal positions. While particular agencies may receive more deference with regard to specific issues on which they have more expertise or operational involvement, no agency is in a position to assert superior formal authority over the others.

The one complication in the equality among Lawyers Group participants involves OLC. This office assists the Attorney General in his or her statutory function as legal adviser to the President and executive branch agencies. Although this authority generally has not extended to purely international law questions,[20] OLC at least theoretically has the authority to provide a definitive executive branch interpretation of any domestic law questions that come to the Lawyers Group. While this does not reflect a formally binding decision on legality such as a court would render, nonetheless it is influential because of the relative rarity of judicial review of national security matters. OLC does not automatically assume this role in the Lawyers Group, however, because its role in the Group differs somewhat from its role in other areas. Typically, OLC does not become involved in the day-to-day formulation of legal advice by agency lawyers. The White House and agencies have discretion about when to reach out to OLC, and do so primarily when a question is particularly difficult or controversial, or to resolve legal disagreements between agencies. OLC may provide its advice orally or in a written opinion, but it does so on discrete questions and only after a formal request from an agency.

The Lawyers Group process broadens OLC's role by involving it more in the development of legal advice. The Group benefits from this because OLC has long institutional experience in many of the key areas of law and its lawyers are usually highly qualified. In addition, OLC lawyers tend to have less of an institutional stake in a particular outcome and can play a useful neutral role. OLC benefits as well because it is involved in legal discussions at an earlier stage. In the course of Lawyers Group discussions, OLC representatives operate much as other participants do — they give the benefit of their expertise and perspective, but, until asked otherwise, provide informal contributions, rather than definitive legal opinions. Nonetheless, all other participants understand OLC's unique role and tend to see the OLC representative as the most important person to persuade.

D. THE LAWYERS GROUP AND DELIBERATIVE THEORY

The Lawyers Group process we have described above provides a form of deliberation that we believe can enhance the quality and perceived legitimacy of national security decisions.

1. *Deliberative Rigor*

Deliberative theory emphasises several conditions for rigorous deliberation. One is equality among members of a deliberative group.[21] The Lawyers Group provides a non-hierarchical and inclusive environment that encourages the kind of reciprocal, other-regarding debate that theorists consider critical. Each member derives his or her authority from his own institution and no one participant has the power to force a particular result.[22]

[20] The State Department Legal Adviser has historically played this role for purely international law issues. During the George W Bush Administration, however, the international law responsibility shifted to OLC as well.

[21] Chappell, *Deliberative Democracy*, above n 1, 26.

[22] There are potential tie-breaking mechanisms, but they are unappealing. One of the lawyers could request a formal legal opinion from OLC, but in addition to being divisive and potentially quite slow, there is no guarantee that OLC will come out the way they want. It is also possible to have the clients bring the

These features encourage all members to express their views and to believe that their reasoning will be taken seriously.

Theories of deliberative democracy also suggest that '[t]he aim of ideal deliberation is to arrive at consensus',[23] even though they recognise that actual practice will rarely attain this ideal. Lawyers Group participants share the aim of achieving consensus in part because they must. They understand that without doing so, they cannot serve their clients effectively. Clients need answers to the questions the lawyers are considering; if they do not reach a consensus the policy-makers are left without answers or must wait for a formal OLC opinion. In addition, legal debates may occupy considerable time during policy discussions, which delays the ability to make a decision. Neither of these scenarios reflects well on the lawyers.

Another incentive for consensus is the powerful influence of the group identity that Lawyers Group participants develop. The Group provides the participants a community with which to identify. This strengthens each member's relationship with his or her own organisation. If legal advice is unwelcome, the lawyer is not alone; the backing of peers in the Lawyers Group strengthens his or her position.

Jane Mansbridge et al maintain that a 'healthy deliberative system is one in which relevant considerations are brought forth from all corners, aired, discussed, and appropriately weighed'.[24] The fact that participants identify with their organisations' concerns brings a broad base of knowledge into the discussions. Although they are all national security lawyers, participants can differ significantly in terms of expertise and perspectives. As Neomi Rao suggests, for instance:

> [A] number of legal departments have responsibility for international law interpretation [and]… each of these agencies has a particular institutional perspective, culture, and set of incentives with regard to providing advice about the interpretation and application of [such] law.[25]

Thus, the Defense Department tends to look at questions through the lens of their impact on military operations and its commitment to the law of armed conflict, while the State Department is especially attentive to the views and reactions of other nations.

Each point of view itself may be limited; focusing solely on any one of them can lead to a myopic disregard of broader concerns. Bringing all these perspectives into the group, however, leads to a productive tension and creates the possibility of harmonising

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disagreement to the President to decide, but it would reflect badly on the lawyers to impose on the President's time in this way.

[23] Chappell, *Deliberative Democracy*, above n 1, 26.

[24] Jane Mansbridge et al, 'A Systemic Approach to Deliberative Democracy' in John Parkinson and Jane Mansbridge (eds), *Deliberative Systems: Deliberative Democracy at the Large Scale* (Cambridge University Press, 2012) 1, 11 ('A Systemic Approach').

[25] Neomi Rao, 'Public Choice and International Law Compliance: The Executive Branch is a "They", not an "It"' (2012) 96 *Minnesota Law Review* 194, 199.

them into a fuller comprehension of all relevant considerations. This produces stronger, more informed and more useful legal analysis. As Katyal has suggested:

> [A] well-functioning bureaucracy contains agencies with differing missions and objectives that intentionally overlap to create friction. … When the State and Defense Departments have to convince each other of why their view is right, for example, better decision-making results.[26]

This process can play out in a variety of ways. Often the participants begin with different views, tracking the interests and perspective of their organisation. Participants may coax, advocate, and argue. They may look for ways around the disagreement or seek ways to frame a conclusion in terms with which all can agree. When they cannot reach agreement, the participants may put the question aside or try to address those parts of it on which they can agree.

The differing perspectives of Lawyers Group participants thus contribute to the kind of communicative rationality that Jürgen Habermas describes, in which actors share knowledge with each other in order to arrive at a mutual understanding.[27] The nature of the community and incentives for consensus lead participants away from their parochial perspectives. The participants do not abandon their interests, but they open themselves up to the reasoned arguments of others and find common ground that is informed and enhanced by those individual perspectives. This is what Mansbridge et al describe as an 'expansion of the classic ideal', in which the goal is not complete consensus, but mutual justification. In this version of the idea, 'participants in deliberation advance "considerations" that others "can accept" – considerations that are "compelling" and "persuasive" to others and that can be justified to people who reasonably disagree with them'.[28] This criterion of 'mutual justifiability' has become central to the concept of deliberation.[29]

Johnstone has suggested that law is a distinctive form of discourse that can fulfil deliberative values through the work of interpretive communities 'who – by arguing and reasoning with each other – in effect pass judgment on what constitutes a good legal claim'.[30] Thus, anyone engaging in legal analysis:

> is a participant in a particular field of practice and is engaged in interpretive activity that must be persuasive to others. In that capacity, he or she acts as an extension of an institutional community; failure to act in that way would

[26] Katyal, above n 5, 2317.
[27] Jürgen Habermas, *The Theory of Communicative Action* (Thomas McCarthy trans, Beacon Press, 1984) vol 1: 'Reason and the Rationalization of Society'.
[28] Jane Mansbridge et al, 'The Place of Self-Interest and the Role of Power in Deliberative Democracy' (2010) 18 Journal of Political Philosophy 64, 66.
[29] Jane Mansbridge et al, 'The Place of Self-Interest and the Role of Power in Deliberative Democracy' (2010) 18 *Journal of Political Philosophy* 64, 67 (citations omitted).
[30] Johnstone, 'Legislation and Adjudication', above n 15, 281.

> be stigmatised as inconsistent with the conventions and purposes of that community.[31]

The Lawyers Group serves as an interpretive community whose work is influenced in turn by a larger such community. While practical and policy considerations are relevant, all participants understand that legal advice is the goal and that the way to prevail in a discussion is to present the best legal argument. Thus, although lawyers often begin by promoting the interests of their agencies, as the discussion progresses this instinct is tempered by their desire to maintain credibility in the group. The views of others in this interpretive community matter to its members, and one loses respect in that community by persisting in a flawed legal argument solely because it supports the lawyer's agency's interests.

Discussion in the Lawyers Group in turn is influenced by a broader interpretive community: experts in academia and practice who comment on and critique the legality of government actions in blogs, articles, conferences, and other fora. Because of the sensitivity of the issues they consider, participants in the Lawyers Group are rarely able to reach out directly to this broader national security interpretive community. Increasingly, however, Lawyers Group participants are aware of this discussion and can draw on it in their own deliberations. In addition, they know that this community may well learn about their analysis and pass judgement on it. This larger interpretive community thus has a positive, if indirect, influence on the quality of Lawyers Group deliberations.

The degree to which this broader interpretive community represents the views of the public at large should not be overstated, however. The legal community outside of the government is relatively small and the views of those who have previous national security experience in government can have outsized influence. Although the community provides more diverse input, it is not a perfect substitute for the kind of broad citizen participation that represents the ideal in deliberative theory.

In sum, features of deliberation in the Lawyers Group give it the potential to contribute to a thorough and well-reasoned national security decision-making process. In the next section, we discuss the extent to which the Group can also help enhance the perceived legitimacy of the outcomes of that process.

2. *Perceived Legitimacy*

As we have described, an important reason for deliberative democracy's emphasis on transparent reason-giving is to ensure that those who are subject to decisions accept them because they perceive that the reasons are legitimate. Such a perception is grounded in the belief that decisions have been made on the basis of appropriate public-regarding considerations that citizens can endorse, even if they may disagree with particular decisions. Deliberative democracy has focused mainly on the perception of legitimacy with respect to the particular political jurisdiction on whose behalf decisions are made.

[31] Ian Johnstone, 'Security Council Deliberations: The Power of the Better Argument' (2003) 14 *European Journal of International Law* 437, 445.

Considerable scholarship, however, underscores the crucial role of perceptions of legitimacy on the international level as well.[32] Indeed, Ian Clark suggests that such perceptions serve in an important way to '*constitute international society'.*[33] Our suggestion that the Lawyers Group helps further deliberative values therefore must evaluate the extent to which it enhances the perceived legitimacy of national security decisions to both domestic and international audiences.

Some deliberative theorists focus on the inclusion of citizens in the decision-making process as an especially significant means of enhancing the perceived legitimacy of decisions.[34] If people believe that they have had an opportunity to express their concerns and views, and that others have genuinely listened to and taken them into account, they are likely to regard the ultimate decision as legitimate even if it does not fully reflect their preferences. Inclusion thus can be a valuable way of bolstering perceptions of legitimacy. Various types of face-to-face 'micro' decision-making processes that feature a combination of officials and citizens are examples of such inclusion.[35]

Other deliberative theorists suggest that, while such inclusion can be valuable, obtaining the involvement of all persons who will be affected by a decision is simply infeasible.[36] Even experiments in 'micro' decision-making settings can include only a small number of persons, who may not be representative of the larger relevant population. The ideal of full inclusion is even less feasible in the national security setting in light of the often-sensitive nature of the information that is relevant to effective decision-making. The Lawyers Group does nothing directly to correct for this. Is there some other way in which the Group can contribute to the perceived legitimacy of decisions that incorporate its recommendations?

We can best assess the contribution of the Lawyers Group to perceptions of legitimacy by viewing it as one part of a larger deliberative system, whose overall deliberative capacity it strengthens. John Dryzek suggests that: 'Different sites can contribute to deliberative capacity in different proportions, in different societies and systems. We should not fixate on any one institutional contributor to this mix and assume that it is the key to deliberative capacity'.[37] Similarly, another prominent group of scholars argues: 'To understand the larger goal of deliberation…it is necessary to go beyond the study of individual institutions and processes to examine their interaction in the system as a whole'.[38] Indeed, they suggest: 'What might be considered low quality or undemocratic

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[32] Thomas M Franck, *The Power of Legitimacy Among Nations* (Oxford University Press, 1990); Ian Clark, *Legitimacy in International Society* (Oxford University Press, 2007).
[33] Clark, above n 32, 6 (emphasis in original).
[34] Iris Marion Young, *Inclusion and Democracy* (Oxford University Press, 2000); Benhabib, above n 4; Bernard Manin, 'On Legitimacy and Political Deliberation' (1987) 15 *Political Theory* 338.
[35] Zsuzsanna Chappell, 'A Tension between Ideal and Practice: Re-Evaluation of Micro and Macro Models of Deliberation' (2010) 46 *Representation* 295 ('A Tension').
[36] John Dryzek, 'Legitimacy and Economy in Deliberative Theory' (2001) 29 *Political Theory* 651; John Parkinson, 'Legitimacy Problems in Deliberative Democracy' (2003) 51 *Political Studies* 180.
[37] John Dryzek, 'Democratization as Deliberative Capacity Building' (2009) 42 *Comparative Political Studies* 1379, 1383.
[38] Jane Mansbridge et al, 'A Systemic Approach', above n 24, 2.

deliberation in an individual instance might from a systems perspective contribute to an overall healthy deliberation'.[39]

This perspective allows us to see the Lawyers Group as one site of micro deliberation in a larger national security decision-making system. The question therefore is the extent to which its distinctive features contribute to the deliberative capacity of this larger system so as to enhance the perceived legitimacy of that system's outcomes.

Work by deliberative theorists on the conditions under which private micro deliberation may be appropriate suggests how the Group may further this goal. First, Chappell argues that micro deliberation 'has special importance as a source of well-reasoned judgment in the political decision-making process' because it 'follows the ideal model of deliberative democracy more closely' than deliberation in larger public settings.[40] She suggests that micro deliberation works best when the number of participants is limited and 'the topic of deliberation has been well defined in advance'.[41] This is consistent with Habermas's 'two-track' theory of deliberation, in which macro deliberation serves to identify broad guiding principles, which micro deliberation then translates into specific decisions.[42]

The Lawyers Group represents micro deliberation that plays a specific role in a larger deliberative process by focusing on relatively discrete issues that require legal analysis, rather than on wide-ranging policy issues. Consistent with Chappell's prescription, participants have a specific agenda to frame their discussions, and aim to arrive at a definite recommendation on a particular issue. The goal is limited and concrete, focusing not on the articulation of broad values but on arriving at an answer to a specific question. The Group's deliberations thus respect the role of the macro, or larger public sphere as 'the background from which normative values, preferences and attitudes emerge and where they are discovered'.[43]

Deliberative theory acknowledges that there are some instances in which 'the quality of deliberation improves if debate takes place behind closed doors'.[44] As Chambers suggests, 'there is something about going public, opening up deliberation to a broad audience and mass media, that has a deleterious effect on deliberation'.[45] The result may be what she calls 'plebiscitory reason', which is a form of 'shallow public reason' that reflects speakers' desire to 'please the largest number of people possible or wanting to appear firm and decisive in the public's eye'.[46] Mansbridge and her co-authors also note: 'Particularly when faced with life and death decisions, experts sometimes need deliberative protection from the ignorance, emotional volatility, and myopia of the non-expert'.[47]

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[39] Ibid 3.
[40] Chappell, 'A Tension', above n 35, 295.
[41] Chappell, *Deliberative Democracy*, above n 1, 11.
[42] Jürgen Habermas, *Between Facts and Norms* (MIT Press, 1996) 307-8.
[43] Chappell, *Deliberative Democracy*, above n 1, 15.
[44] Chambers, above n 2, 392.
[45] Ibid.
[46] Ibid 394.
[47] Mansbridge et al, 'A Systemic Approach', above n 24, 14.

Private deliberation may improve the quality of deliberation by avoiding these risks, thereby leading to decisions more likely justified on grounds perceived as legitimate.

The secrecy of the Lawyers Group helps avoid what may be an especially significant risk of plebiscitory reason on national security matters. Such matters can elicit highly emotional reactions because of fears about safety and security, anger over perceived transgressions, and desires for vengeance. Legal analysis cannot occur in a vacuum that is insensitive to the larger political context, but deliberation in private among a group of peers can at least minimise the extent to which reasoning is affected by such influences.

Chambers observes that secret deliberation avoids the danger of plebiscitory reason, but creates the risk of private reason.[48] This may involve participants reaching an outcome simply by bargaining rather than reason-giving, or appealing to narrow reasons not shared by the larger public. Chambers argues that we can reduce the risk of reliance on private reason by ensuring that, 'on fundamental questions that affect the broad public, the more secret and closed is the debate, the more important it is that all possible points of view are represented'.[49] A secret deliberative process that features such diversity can earn greater perceived legitimacy despite the absence of citizen involvement.

The fact that the Lawyers Group includes lawyers from all agencies with interests in the national security decision at hand is consistent with this requirement. The Group neither perfectly mirrors the populace as a whole nor persons outside the United States, so we cannot claim that it fully compensates for the absence of participation by persons affected by presidential decisions. Our more limited claim is that it at least ensures the inclusion of viewpoints from a large number of national security agencies, each of which has its own perspective, expertise, and constituencies. While we should explore how other components of the larger deliberative system might arrange for inclusion of broader public views, the Group at least attempts to maximise inclusion of all parties with an interest and expertise in national security law.

Deliberative theory also suggests that when issues are highly technical, awareness that experts have engaged in a robust deliberative process can produce 'a second-order reason to trust its conclusions when the first-order reasons for and against the different choices required expertise beyond the grasp of most citizens'.[50] Expert authority 'is itself often conditionally earned through deliberative means and within specialised deliberative communities'.[51] When this form of accountability operates, 'we may trust experts because we can ask them to explain and to justify their advice or decisions, if not to us directly then to a group of their peers who in turn have earned their credentials in a deliberatively trustworthy manner'.[52]

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[48] Chambers, above n 2, 405.
[49] Ibid 408.
[50] Mansbridge et al, 'A Systemic Approach', above n 24, 16.
[51] Ibid 15.
[52] Ibid.

Members of the Lawyers Group possess specialised expertise that requires familiarity with a wide range of domestic and international legal sources, an understanding of how they interact, and an appreciation of how they have been applied. It is important for the Executive to be aware of the best interpretation of these sources of legal authority in considering different courses of action. As we have argued, the prospect of accountability to peers in the broader national security law community can discipline this process. The expertise of Lawyers Group members has been earned through engagement in this deliberative community. The operation of the Group can affect the standing of its members within this community and thereby constrain any attempt to rely on reasons unrelated to the best reading of the law.

While it may be desirable for secret micro deliberation to occur in certain settings within a larger deliberative system, theorists emphasise that the outcomes of that process ultimately need to be publicly articulated to be regarded by the public as legitimate. As Chappell says, 'even if deliberation takes place privately, not only do its decisions need to be publicized, but also the reasoning that underlies the decisions'.[53] To the extent that the President publicly justifies his or her decisions, the analysis of the Lawyers Group often will be reflected to some degree in those justifications. The public thus will have an opportunity to evaluate the quality of this analysis as they assess the persuasiveness of the President's justifications.

Lawyers Group participants therefore must anticipate how the larger public will react to the reason-giving that incorporates the Group's work. The President needs to convince coordinate branches and the public that he or she is acting lawfully for the best interest of the country. Robust deliberation by the Group enhances the quality of these justifications and the perception that they reflect serious consideration of all relevant issues. In this way, the work of the Group can enhance the perceived legitimacy of decisions by linking micro deliberation to macro justification.

Furthermore, to the extent that the President is able to provide only a limited substantive justification for his or her decision, he or she can point to the expansiveness of the decision-making process itself as an indication that the decision is a public-regarding one that takes into account a wide range of concerns. As Chappell notes: 'If it can be shown that the judgement of the deliberative group was reached through reasoned, equal, inclusive and other-regarding debate, this gives people a strong incentive to consider this judgement carefully'.[54]

For these reasons, the Lawyers Group can be seen as one site of micro deliberation that can enhance the perceived legitimacy of the overall national security deliberative system. Our analysis suggests that much of its ability to further this goal is based on the perceived quality and thoroughness of its decision-making process. This can be a crucial source of public acceptance of the legitimacy of decisions on the issues of life and death that often arise in this arena. As Chappell states:

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[53] Chappell, *Deliberative Democracy*, above n 1, 116.
[54] Chappell, 'A Tension', above n 35, 302.

> one of the major normative appeals of deliberative democracy is that it captures our intuition that political decisions that affect a large number of people, if not the entire society, need to be considered carefully. We must devote sufficient time and attention to such policies. We should discuss them and not make hasty or arbitrary choices.[55]

Finally, one distinctive aspect of perceived legitimacy in national security decision-making is the concern that decisions are seen as legitimate not only by a state's citizens, but by the wider international community. As in US culture, perceptions of legitimacy in this community are closely tied to assessments of legality. As Abram and Antonia Chayes suggest, relations among states are conducted in large part through 'diplomatic conversation – explanation and justification, persuasion and dissuasion, approval and condemnation .... In this discourse, the role of legal norms is large'.[56] Similarly, Andrew Hurrell maintains, 'being in a political system, states will seek to interpret their obligations to their own advantage. But being in a legal system that is built on the consent of other parties, they will be constrained by the necessity of justifying their actions in legal terms'.[57]

In the ways we have described, deliberation within the Lawyers Group thus helps enhance the perceived legitimacy of national security decisions in both the domestic and international arenas.

3. *Deliberative Failure*

The interrelated risks for both deliberative rigor and perceived legitimacy of failing to provide for robust internal legal deliberation are starkly illustrated by contrasting the Lawyers Group with the process that was used in 2002 to determine if the CIA's use of certain proposed interrogation techniques would violate the Convention against Torture[58] and the US criminal statute that implements it.[59]

The CIA and the White House sought advice from OLC on the interrogation question. John Yoo, the lawyer given the assignment, did not consult with the State Department, which possesses expertise on the Convention against Torture and international law more generally. Nor did he consult with the Judge Advocates General (JAGs) of any of the military branches, lawyers who have extensive familiarity with detention, torture and the law of armed conflict. Instead Yoo worked most closely with the Vice-President's counsel and the White House Counsel. He issued two opinions, one an interpretation of the US torture statute, and another applying that interpretation to the interrogation techniques. He concluded that the techniques did not violate the statute.

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[55] Chappell, *Deliberative Democracy*, above n 1, 161-2.

[56] A. Chayes and A. H. Chayes, *The New Sovereignty: Compliance with International Regulatory Agreements* (Harvard University Press, Cambridge, MA 1998) 118

[57] Andrew Hurrell, 'International Society and the Study of Regimes: A Reflective Approach', in Volker Rittberger and Peter Mayer eds. *Regime Theory and International Relations* (Oxford University Press 1993) 49, at 61.

[58] *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, opened for signature 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987).

[59] 18 USC §§ 2340-2340A (1994) ('the torture statute').

When the first memo became public in 2004 in the wake of the Abu Ghraib prison torture revelations, it was widely criticised as reflecting both poor legal analysis and insensitivity to the moral concerns that animate the prohibition on torture. The Justice Department Office of Professional Responsibility recommended that both Yoo and the head of OLC be referred for professional discipline because the memos violated their ethical obligation to provide competent independent legal advice,[60] although this recommendation ultimately was rejected by a senior Department official.[61] A group of over 100 lawyers, retired judges and legal scholars signed a statement condemning the memo on the ground that it was an effort to 'circumvent long established and universally acknowledged principles of law and common decency'.[62] The memos and the conduct that they authorised seriously damaged the standing of the United States in both domestic and international eyes, undermining the perceived legitimacy of the administration's counter-terrorism policy.[63]

The fact that the memos were prepared through a process that excluded lawyers from other departments was not simply an oversight. The State Department had objected earlier when Yoo concluded that the Geneva Conventions did not apply to Al Qaeda and Taliban detainees, but the President had sided with Yoo's interpretation. Both State Department and military lawyers are strongly committed to abiding by international law, and the JAGs are especially familiar with the potential consequences for US service members of US engagement in torture. Indeed, military lawyers strenuously objected a few months later when the Defense Department General Counsel sought essentially to adopt OLC's reasoning with respect to interrogations by that Department.[64] The OLC memos, however, neither anticipated nor engaged with the views of these parties.

Failure to include all knowledgeable agencies in deliberations about the torture statute thus resulted in what is regarded as a remarkably poorly reasoned and unpersuasive example of legal analysis. The poor quality of the memo in turn led observers to conclude that the United States was not genuinely concerned about complying with the prohibition against torture, but simply wanted an ostensible justification for engaging in conduct that officials knew was forbidden. In these ways, the constricted deliberative process produced a result that was regarded as both unpersuasive and illegitimate.

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[60] Department of Justice, Office of Professional Responsibility Report, *Investigation into the Office of Legal Counsel's Memoranda Concerning Issues Relating to the Central Intelligence Agency's Use of 'Enhanced Interrogation Techniques' on Suspected Terrorists* (29 July 2009), 260.

[61] Memorandum for the Attorney General and Deputy Attorney General from David Margolis, Associate Deputy Attorney General, *Memorandum of Decision Regarding the Objections to the Findings of Professional Misconduct in the Office of Professional Responsibility's Report of Investigation into the Office of Legal Counsel's Memoranda Concerning Issues Related to the Central Intelligence Agency's Use of 'Enhanced Interrogation Techniques' on Suspected Terrorists (January 5 2010), 2.*

[62] Harold Bruff, *Bad Advice: Bush's Lawyers in the War on Terror* (University of Kansas Press, Lawrence, KN 2009) 249.

[63] Douglas A Johnson, Alberto Mora and Averill Schmidt, 'The Strategic Costs of Torture: How "Enhanced Interrogation" Hurt America', *Foreign Affairs* (online), September/October 2016, www.foreignaffairs.com/articles/united-states/strategic-costs-torture.

[64] Committee on Armed Services, United States Senate, *Report: Inquiry into the Treatment of Detainees in U.S. Custody* (20 November 2008) xviii-xix.

E. CONCLUSION

There are few areas in which deliberative values are more important than national security, but there are also few areas that face as many challenges in realising them. The US Constitution attempts to further such values through separation of powers, but this does not always operate effectively to constrain presidential power. The Lawyers Group can help compensate for this by providing for robust deliberation on legal issues within the executive branch that can enhance the quality and perceived legitimacy of national security decisions. There are limits to what the Group can accomplish, but we should assess it in terms of its contribution to the larger national security deliberative system of which it is a part. From this perspective, the Group's compliance with several prescriptions of deliberative theory helps it strengthen the rigor and persuasiveness of the justifications for decisions that the President offers.

Presidents have varied in terms of how they use the National Security Council, and there is no guarantee that every administration will organise and use the Lawyers Group in the ways that we have described. Even if they do, the process is highly dependent on good leadership and on its members and leaders supporting it. We believe, however, that establishing a tradition of using it as we have described can contribute to the realisation of deliberative values within the US Constitutional system.

More generally, we believe that our analysis of the Lawyers Group suggests that deliberative theory can provide insight into deliberation that does not include public participation. After all, much government decision-making does not directly include citizens. Furthermore, even when the public has an opportunity to participate in the overall process, there will still be stages that involve deliberation only by government actors. Deliberative theory can inform how such deliberation should be structured in those settings to enhance the quality and perceived legitimacy of decisions. It has the potential to inform all phases of a multi-faceted process, not simply those that include citizens.

Finally, it would be fruitful to examine more closely the role of legal analysis in the deliberative process. As perceived adherence to the rule of law becomes a more prominent, if imprecise, consideration in perceptions of the legitimacy of decisions, democratic theory may help illuminate the circumstances under which decisions are most likely to be regarded as meeting this standard.