

# Deliberative Democracy in the Trenches

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*Abstract: In the last decades, many political theorists have explored the idea of deliberative democracy. The basic claim is that well-functioning democracies combine accountability with a commitment to reflection, information acquisition, multiple perspectives, and reason-giving. Does that claim illuminate actual practices? Much of the time, the executive branch of the United States has combined both democracy and deliberation, not least because it has placed a high premium on reason-giving and the acquisition of necessary information. It has also contained a high degree of internal diversity, encouraging debate and disagreement, not least through the public comment process. These claims are illustrated with concrete, if somewhat stylized, discussions of how the executive branch often operates.*

In the last decades, a large number of political theorists have explored the idea of deliberative democracy.<sup>1</sup> The basic claim is that well-functioning democracies combine accountability with a commitment to reflection and reason-giving. They do not merely respond to popular pressures and majority sentiment. They also try to “refine and enlarge the public view” through acquisition of relevant information, attention to multiple perspectives, and careful deliberation in the public sphere.<sup>2</sup> Versions of this claim have been impressively elaborated by many people, including Joseph Bessette (who originally coined the term), Jürgen Habermas, Amartya Sen, Jane Mansbridge, James Fishkin, and the team of Amy Gutmann and Dennis Thompson.<sup>3</sup>

The idea of deliberative democracy might focus on the internal operation of government, with an emphasis on how the legislative, executive, and judiciary branches speak with one another. It could take more or less populist forms, focusing on deliberation among citizens themselves, or between citizens and public officials. And while citizen-centered conceptions focus on widespread participation, drawing on the idea of town meetings, we can also find concep-

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tions of deliberative democracy that emphasize reason-giving by elected leaders.

My goal in this essay is to explore the operation of deliberative democracy in the trenches – not as a set of abstract ideals, but as concrete practices. My central question is relatively narrow: can deliberative democracy be found within the executive branch of the U.S. government? In important ways, I will suggest, it can be, or at least there have been periods in which it has flourished.<sup>4</sup> When it is working well – and it often is – the executive branch places a large premium not only on accountability, but also on the exchange of information and reason-giving within the federal government, between that government and states and localities, and between that government and diverse citizens. This discussion draws a great deal on my own experience from 2009 to 2012, when I served as administrator of the White House Office of Information and Regulatory Affairs (OIRA), and also from 2013 to 2014, when I served as a member of the President’s Review Group on Intelligence and Communications Technologies. It is important to acknowledge that the executive branch can take different forms, with a stronger or weaker focus on deliberation, and I shall have something to say about variability over time as well.

The notion of deliberative democracy has two components, and we could easily imagine different emphases, or one without the other. A system of purely majoritarian democracy could require a high level of accountability while placing little or no premium on deliberation. Call this non-deliberative democracy. Perhaps accountability would be a sufficient safeguard for what matters, whether it is welfare, liberty, or some other value. At least if we think that the views of majorities have strong epistemic credentials, a nondeliberative democracy might work well (or at least it

would be lovely to think so). Moreover, a system of deliberative government need not be democratic at all. It might be undemocratically deliberative. Such a government could be run by a set of experts, with different perspectives, who would exchange information and ideas, without paying much attention to the public. We could also stress one or another component of the term. A *deliberative* democracy would emphasize the importance of reflection and reason-giving. A *deliberative democracy* would stress the importance of popular control. Or the two values could be given equal weight (though it is not entirely clear what that would mean).<sup>5</sup>

No one doubts that, in the United States, the executive branch is accountable for its decisions and subject to democratic constraints. The president is elected, and his basic convictions and proposals are a large part of what accounts for his position in the White House. When a president wants something to be done, it is often because most or at least many people want it to be done, though this is not always the case. Elections to one side, many of the president’s decisions, and those of people who work for him, are subject to intense public scrutiny. Accountability looms especially large in the period right after an election, when the new administration is inclined to ask, “What were our campaign promises?” The same kind of accountability also looms large right before elections, including both presidential reelections and the midterms. White House staffers and members of a president’s cabinet do not want to endanger the electoral prospects of their boss. Executive branch officials are also reluctant to undermine the campaign efforts of legislators within the president’s own party, and certainly do not want to risk losing one of the houses of Congress.<sup>6</sup> In either case, the executive branch will be subject to a continuing process of careful public scrutiny, at least for its most important decisions.

I want to emphasize here a different point: within the executive branch, deliberation about policies has often been a fact of daily life. When the system is working well (and I will leave that important qualification implicit for most of the remaining discussion), it is the best place in government to see deliberative democracy in practice. And critically, its discussions are largely substantive and technical rather than political, at least if we understand the term *political* to refer to attention to electoral considerations, to the views of various interest groups, or to issues of fundraising and campaign finance. For the most part (though not always), such political considerations are entirely irrelevant, and the exchange of reasons about different policies has often been the coin of the realm. There is intense focus on consequences: What would this policy do? What are the alternatives? Would they be worse, or better, in terms of their effects?<sup>7</sup>

Of course, in some cases, political constraints matter. They then become part of a deliberative process, in the sense that political deliberation is the art of the possible. If a proposal must be enacted by Congress, the executive branch will think hard about what is most likely to receive congressional support. But there is a great deal that the executive branch can or must do on its own, and when this is so, the role of politics weakens and often evaporates. In my own experience, and much of the time, substance often turns out to be all that matters.<sup>8</sup>

The process of deliberation involves diverse people with a great deal of knowledge. Within any cabinet-level department, there are numerous experts who have been working on the relevant issues for many years and through multiple administrations. Most of them do not care at all about elections, politics, or interest groups; they are policy specialists, not political animals. To be sure, they might well have their institu-

tional biases. They might be mired in existing practices. They might be (and sometimes are) resistant to significant change. They tend to be Burkeans, wedded to traditions, sometimes displaying an acute form of status quo bias. But they also have an immense stock of knowledge.

With respect to deliberation, the central point is that these officials will also work and exchange facts and views with numerous people within the executive branch, at least on the most significant questions. For multiple issues, this process of interagency collaboration is formalized and routinized.<sup>9</sup> With respect to both domestic and international affairs, deliberation typically takes something like the following (highly stylized) form: participants in an interagency process, including representatives of various parts of government, work together on some issue, whether short-term (in need of resolution within, say, three weeks) or long-term (not requiring resolution for many months).

Sometimes these discussions take months or more, and can have a high degree of intensity and animation. Diverse people, with different knowledge and perspectives, are frequently involved. In one discussion, there might be participants from the National Economic Council, the Council of Economic Advisers, the Office of Management and Budget, the Department of the Treasury, the Office of the United States Trade Representative, the Department of State, and the Department of Energy. The participants might be “policy” officials; some might have been chosen by the president and confirmed by the Senate. But those officials will be staffed and, to some extent, guided by people without any evident political affiliation; they are specialists and technocrats. Of course, it is also true that policy officials, and not their staffs, are entitled to make the ultimate call.

At the same time, the participants will have distinctive “equities,” understood as

perspectives and inclinations that grow out of special concerns and roles. The Office of Management and Budget, for example, will be particularly concerned about budgetary implications and might well be focused on the possibility of excessive costs to taxpayers. Meanwhile the Office of the United States Trade Representative will focus on the implications for international trade, and the Environmental Protection Agency (EPA) will typically be concerned with the effects on clean air and water. Because of their own equities, participants are unlikely to be silent if the issue raises serious concerns from the standpoint of their office. As a result, a great deal of information is likely to be exchanged. A failure to include someone with a relevant perspective, or an utter disregard of what they have argued, counts as a “process foul”: a violation of the internal morality of executive branch operations.

It is true that the public might not know what perspectives have been represented in a process. Even more important, it would also be extravagant to say that “all” relevant perspectives have been included. (To avoid absurdity, a judgment about the meaning of “all” would require normative criteria, which might well be contested.) Some perspectives will undoubtedly lack representation in any such process, and that might be a serious problem. The only point is that the range of views is very wide, and the construction of the executive branch is such that many competing perspectives, with diverse priorities and concerns, will be heard.

After the participants are done with their own process of deliberation, they might be able to resolve the issue in a way that is essentially final. But if that issue is very important, or if agreement proves impossible, it might be “elevated” to some kind of “deputies’ committee,” consisting, for example, of the deputy secretary of state, the deputy secretary of defense, the deputy secretary of

energy, and the deputy director of the Office of Management and Budget (who might, as the highest-ranking White House official, run the meeting and have special authority over resolution of the issue). After that, the issue might be resolved, or it might be elevated to a “principals’ committee,” consisting of cabinet-level officials.

If the issue is a very important one, the principals’ committee might be chaired by one of the highest-ranking officials in the White House, such as the national security adviser or the chief of staff, who is often, next to the president, the most important person within the executive branch of the government, effectively in charge of the cabinet. The principals’ committee might well be able to resolve the question; many issues are settled at this level. But if there is an internal division, or if the issue is very important, it is likely to go to the president. The president sometimes resolves issues on the basis of some kind of paper briefing, which ends by asking him for a decision. Or he might resolve an issue as a result of, or in, a meeting, in which competing perspectives are explored in considerable detail. In some cases, a principal, having been badly outnumbered in a principals’ committee, requests an individual meeting with the president, so as to ensure that he hears all relevant arguments and ultimately makes the decision personally.

Stylized and brief though it is, this account should be sufficient to suggest that, within the executive branch, there has typically been a great deal of deliberation, and it often involves people with diverse perspectives and high levels of technical expertise. Everyone within the executive branch works for the president, of course, but there is often a surprising level of heterogeneity and disagreement that has to be worked through, typically as a result of substantive exchanges that place a high premium on acquisition of relevant information.<sup>10</sup> On important environmental



questions, for example, there might well be differences in the views of the Environmental Protection Agency, the Council on Environmental Quality, the National Economic Council, the Council of Economic Advisers, and the Office of Management and Budget; some process has to be used to work out different perspectives and underlying disagreements.

To take an example with which I am familiar: In 2009 – 2010, an interagency working group produced a “social cost of carbon,” meaning the economic cost of a ton of carbon emissions, suitable for use in regulatory impact analyses.<sup>11</sup> The group included representatives of the Council of Economic Advisers, the Council on Environmental Quality, the Department of Agriculture, the Department of Commerce, the Department of Energy, the Department of Transportation, the Environmental Protection Agency, the National Economic Council, the Office of Energy and Climate Change, the Office of Management and Budget, the Office of Science and Technology Policy, and the Department of the Treasury. Members of this group, like members of countless others, had different information and different equities.

The EPA, for example, is a crucially important participant in discussions of the social cost of carbon, and it sees environmental protection as its major equity, while the Office of Science and Technology Policy also knows a great deal about the underlying science (but might have a somewhat different perspective from the EPA). The Department of Commerce seeks to promote commercial activity; the Department of Energy has a great deal of expertise on the effects of carbon emissions; and the Council of Economic Advisers and the National Economic Council have expertise on the appropriate discount rate. The efforts of the working group involved the aggregation of a great deal of scientific, economic, and legal expertise, with agree-

ments being forged through substantive arguments. And notably, for this decision, politics – understood as electoral considerations, the views of interest groups as such, or possible press reactions – did not play the slightest role in determining the working group’s substantive choices.<sup>12</sup>

Here, then, was a practice of *deliberative* democracy. It was democratic because the ultimate decision was under and by appointees of an elected official, the president. It was deliberative for the reasons I have given. And while the ultimate product has certainly been subject to reasonable dispute, it seems fair to say that the effort was both reasonable and highly professional. In this respect, the process was hardly unique.<sup>13</sup>

With respect to the regulatory process, the system of internal review takes a somewhat different but also standard form, one that has been worked out over several decades.<sup>14</sup> For example, suppose that the EPA wishes to issue a new regulation involving particulate matter. If the regulation is submitted to the Office of Information and Regulatory Affairs (and it almost certainly would have to be),<sup>15</sup> it will be scrutinized by numerous offices within the Executive Office of the President, including the Office of Management and Budget, the Domestic Policy Council, the National Economic Council, the Council of Economic Advisers, the Office of the Vice President, and the Office of the Chief of Staff. If it has international implications, it will be scrutinized as well by the Department of State, the National Security Council, and the Office of the United States Trade Representative.

Within the Executive Office of the President, the initial comments will likely come from staff, not from high-level officials. The principal focus will be intensely substantive rather than political, and at most stages, and often all of them, political considerations – including reactions of interest groups, congressional committees, or the

media – will not be raised at all except insofar as they suggest legitimate substantive questions and concerns. (When they bear directly on the merits, those questions and concerns can turn out to be quite important.) If political considerations are raised, for example, it might be to make relevant communications and legislative affairs offices aware of what is coming. The White House Office of Legislative Affairs might have to manage congressional questions, certainly on high-visibility matters, and it is important to ensure that it is prepared.

Draft rules, both proposed and final, are certainly subject to scrutiny by other departments within the executive branch, at least when they raise issues within the legal authorities or policy-making expertise of those departments. For example, if a regulation has implications for the energy supply, it will be assessed by the Department of Energy, which will have information relating the risk of energy price increases or power outages. The Departments of Commerce and Treasury might be involved, especially if the regulation raises economic issues. To the extent that there are labor implications, the Department of Labor will comment. If agriculture is affected, the Department of Agriculture will comment as well. And for regulations with environmental implications, the Department of the Interior might also be involved. Within the agencies, it is important to see that the initial analysis is typically done by people with no political affiliation: they will be civil servants, specialists in the issues at hand. (Hence again we are speaking here of *deliberative* democracy.)

With respect to regulations, this process of internal scrutiny can be intense. Issues of policy and law might receive detailed attention. Perhaps people will disagree. There might be legal objections from lawyers within the Department of the Treasury or the Department of Justice. Someone in the Department of Energy could

suggest that some of the policy choices are wrong. Perhaps the economic analysis will be seen, by someone in the Council of Economic Advisers, to contain a serious mistake. Perhaps the benefits or the costs will appear to have been inflated. (As administrator of the Office of Information and Regulatory Affairs, my own position was that, in the face of reasonable disagreement, the views of the Council of Economic Advisers are presumed to be authoritative on technical economic issues, just as the views of the Department of Justice are presumed to be authoritative on technical legal issues. Of course, there can be a back-and-forth on such issues.) Any analysis of benefits and costs will likely be seen and scrutinized by numerous people.

With respect to the law, here is a relevant fact, based on my own experience, and casting light on the operation of deliberative democracy in the trenches: General counsels within agencies are usually excellent, but in at least some cases, their legal judgments are influenced by the substantive goals and hopes of their own cabinet secretaries. Lawyers in other parts of government – the Department of Justice, the White House Counsel's Office, the Office of Management and Budget General Counsel – often have greater objectivity even if they have less specialized expertise. What is true of legal issues can be true of policy questions as well, including predictions of likely consequences (such as costs and benefits).

Frequently, issues and concerns can be worked out at the staff level, as a result of brief or extended substantive conversation. OIRA staff will convene staff-level discussions, and most of the issues are indeed resolved in that way, whether they involve economics, policy, or law. But here as well, issues might be “elevated.” For example, an assistant secretary of one department might engage with the assistant secretary at the rule-making agency and with the OIRA's deputy administrator to explore interagen-

cy concerns. Sometimes the issue will be raised with the OIRA administrator himself. If (and this is quite rare) agreement is not possible at that level, further discussions will be required, with ultimate resolution by a group of principals or (this is very rare indeed) by the president personally. If the attorney general has a clear view on the law, for example, that will ordinarily dispose of legal questions, just as the president's science adviser will have a great deal of authority on issues of pure science.

The regulatory process is not only an internal one: it involves citizens, not merely public officials. In this respect, the process of deliberative democracy, in the trenches, has more than an indirect democratic pedigree. (Now we are speaking of deliberative *democracy*, at least in the sense that the public is both engaged and influential.) For regulations, public comment is usually involved, and it can make a large difference. The Administrative Procedure Act calls for a process of "notice and comment" on proposed rules, which means that agencies must ordinarily submit those rules to the public and take comments on their contents. This is central to the process of deliberative democracy; it enables a dialogue between citizens and public officials.

Among law professors and political scientists, public comments are often thought to be irrelevant, a kind of outlet, display, or show, not much affecting what government actually does. Nothing could be further from the truth. Public comments sometimes make a large difference in the content of what emerges from the national government, whether the issue involves climate change, health reform, occupational safety, or homeland security. Time and again, proposed rules are changed as a result of what government learns from citizens.

The strong institutional inclination of the Office of Information and Regulatory Affairs is to make it entirely clear to the public

that comments are invited on a wide range of choices that have been made in a proposed rule, and also on alternatives to those choices. Agencies often think, and the OIRA often urges them to think, that their own judgments are provisional and that the role of the comment process is to learn whether or not they are right. For that learning to occur, the public must be asked to comment on the provisional choices and on alternatives to them. It is not much of a stretch to see the inspiration for this form of deliberative democracy in the work of economist Friedrich Hayek and, in particular, his emphasis on the dispersed nature of knowledge in society.<sup>16</sup> Of course, Hayek was not a great fan of the modern regulatory state – he liked markets, not regulators – but his work on widely dispersed information has helped spur the effort, in both Democratic and Republican administrations, to go outside of government to learn from others.

To be sure, the public as a whole does not comment on proposed rules; only certain members do. In this light, it is reasonable to ask whether the comment process reflects a harmful kind of skew. Here is one concern: Comments often come from well-organized interest groups with resources that can support a team of experts who are willing and able to attack what the government seeks to do. If the issue involves the environment, those who own and manage power plants may be in the best position to engage in advocacy, running numbers and making claims of policy and law that are self-serving and wrong, but likely to make officials nervous. If the issue involves regulation of the transportation sector, the airline and railroad industries will predictably make a series of objections, and because of the incentives and immense skill of those who work on behalf of those industries, the objections might end up convincing those who work for the public. If so, we have a form of "capture," not in the simplest form, and not through anything

that is easily described as corruption, but in epistemic terms: public officials learn from those who speak, and those who speak are likely to have both money and self-interest at stake.

This concern can hardly be ruled out in the abstract. If it accurately depicts reality, we have a cruel parody of the ideal of deliberative democracy. Moreover, no one should doubt that comments are most likely to come from those with resources and organization. The extent of epistemic capture, if any, will vary with context and time. But the concern should not be overstated.<sup>17</sup> Often resources and organization come from more than one side. Environmental groups, for example, often have a great deal to say, and their experts are also well-trained; the same is true for civil rights organizations and labor unions. In addition, and even more important, the government has strong “filters” by which to test the plausibility and reasonableness of public comments. Self-serving claims about economics, policy, and law are often easy to dismiss. It is true that the public comment process can suffer from a kind of epistemic skew, but it is also true that as a result of what is learned, outcomes are both more democratic and more deliberative than they would be otherwise.

One reason for the great length of final rules is that their preambles engage with comments, frequently in considerable detail. And in many cases, public comments help produce substantial changes. Sometimes agencies learn that their proposals need to be withdrawn.<sup>18</sup> Sometimes they learn that a fundamentally different approach, saving costs, is best.<sup>19</sup> Sometimes they learn that a more expansive approach, increasing benefits, is justified.<sup>20</sup> A great deal of deliberation thus occurs between public officials and citizens, not only as a result of meetings, but perhaps most fundamentally through the process of public comment. It might not live up to the very highest

ideals, but much of the time it is worthy of the idea of deliberative democracy.

These points suggest strong reasons to reject the view, offered energetically by some law professors, that courts should be less willing to defer to executive action when that action is not a product of the autonomous decision-making of the particular agency involved, but of numerous officials within the executive branch.<sup>21</sup> Put to one side the fact that courts will not ordinarily know about the internal process of deliberation and will not be able to sort out the precise role of various officials. The much deeper problem is that this view has things exactly backwards. If an agency is acting on its own, there might well be reason to worry about myopia, mission orientation, and tunnel vision, potentially compromising the ultimate judgment. If multiple officials are involved, there are of course no guarantees, but the risks are reduced by the safeguards provided by multiple perspectives. The case for judicial deference to executive action is far stronger if the action is supported and produced by numerous officials, and not only by the rule-making agency. That process of support, and that kind of production, ensure more in the way of both deliberation and democracy.

The picture I have presented might well be an idealized one. Not every executive branch, and not every issue in the executive branch, is the same. Some people will be deeply skeptical about any picture of the Obama administration as embodying an appealing form of deliberative democracy. Others will point to their own preferred examples, real or imagined, in which it seems misleading, incomplete, or worse to depict the executive as an embodiment of deliberative democracy. And whatever we think of the Obama administration, it is easy to find or to envision other administrations, past, present, or future, that draw that characterization into serious doubt.



To put the point most vividly: imagine your least favorite presidential candidate of the past few elections; now imagine he is president. Perhaps he has terrible but fixed convictions and is unwilling to listen to reason; perhaps he does not much care about the facts; perhaps he is indifferent to public comments; or perhaps he is unduly influenced by well-organized interest groups. During a Republican administration many years ago, I emailed some tentative suggestions about how to deal with climate change to a high-level public official, who was (and is) a committed conservative and was (and is) also a good friend. My suggested approach did not involve the imposition of high costs. I was puzzled to receive no answer (though after my own experience in government, learning about the potentially acute risks of using email, my puzzlement dissipated). When I next saw him at the White House, he came right up to me and said: “Cass, you have absolutely no idea how conservative my colleagues are!”

Note, however, that even if the president were your least favorite candidate, many decisions of the executive branch would not be likely to be affected. They would involve relatively routine (even if important) decisions, and they would be settled by something like the process I have described here. But it must be acknowledged that with such a president, or anyone with the characteristics described above, deliberative democracy would work far less well in the trenches, at least on high-profile questions, on which relevant interest groups are able to exert their influence, or on which the antecedent convictions of the president, and of his high-level advisers, are fixed and firm.

If such officials believe that climate change is a myth, a technical process on the social cost of carbon is unlikely to go well. If such officials favor stringent regulation of ozone, mercury, and particulate matter – whatever the facts show – decisions will not reflect a well-functioning

process of deliberation. If such officials are enthusiastic about renewable fuels and want to maximize their use, it is useless to emphasize that executive officials are listening to one another and to the public.

This essay was originally written long before the 2016 presidential election, and at least in the early months of the administration of President Donald J. Trump, many people believed that the executive branch was not working in a highly deliberative fashion. Critical observers think that the Trump administration is sometimes or often bypassing the time-honored processes sketched here, in which diverse people explore, in great detail, policy options and the substantive arguments for and against them. Whether or not that is so, it must be acknowledged that the arguments I am making here depend on a picture of the executive branch that may not always be accurate. I believe that it is indeed accurate under most Democratic and Republican presidents, certainly outside of the context of the most politicized questions (and frequently enough, in that context as well). But under any president, the influence of interest groups cannot be discounted, and the risk of politicized decision-making or excessive domination by antecedent convictions is well above zero.

The theoretical literature on deliberative democracy has made significant contributions not only to theory but to practice as well. My main goal here has been to make some progress in understanding deliberative democracy in the trenches, in part by offering an account of practices that I wish, in retrospect, I had known before starting to work in the federal government.

The major lesson is that, much of the time, the executive branch itself combines both democracy and deliberation, and places a high premium on reason-giving and the acquisition of information. Perhaps surprisingly, it often contains a

high degree of internal diversity, encouraging debate and disagreement, not least through the public comment process.

I have not argued that this basic picture holds in all times and places. Some executive branches are different from others, and even within a year or a month, internal processes can be different from one another.

But no one should doubt that it is possible to operate national institutions in a way that insists not only on accountability, but also on careful considerations of the human consequences of potential courses of action. When the executive branch is working well, that possibility is not fanciful; it is a lived reality.

#### ENDNOTES

- <sup>1</sup> See, for example, Jon Elster, ed., *Deliberative Democracy* (Cambridge: Cambridge University Press, 1998); Jürgen Habermas, *Between Facts and Norms* (Cambridge, Mass.: The MIT Press, 1998); and Amy Gutmann and Dennis Thompson, *Why Deliberative Democracy* (Princeton, N.J.: Princeton University Press, 2004).
- <sup>2</sup> See James Madison, “The Same Subject Continued: The Union as a Safeguard against Domestic Faction and Insurrection,” *The Federalist Papers* No. 10, November 23, 1787, accessed at <https://www.congress.gov/resources/display/content/The+Federalist+Papers#TheFederalistPapers-10>.
- <sup>3</sup> See Joseph Bessette, *The Mild Voice of Reason* (Chicago: The University of Chicago Press, 1994); Habermas, *Between Facts and Norms*; Amartya Sen, *Development As Freedom* (Oxford: Oxford University Press, 1999); Jane Mansbridge, *Beyond Adversary Democracy* (Chicago: University of Chicago Press, 1980); James Fishkin, *Democracy and Deliberation* (New Haven, Conn.: Yale University Press, 1993); and Gutmann and Thompson, *Why Deliberative Democracy*.
- <sup>4</sup> A great deal of valuable information to this effect can be found in Michael Morrell, *The Great War of Our Time: The CIA’s Fight Against Terrorism from Al Qa’ida to ISIS* (New York: Twelve, 2015).
- <sup>5</sup> This is the tendency in Fishkin, *Democracy and Deliberation*.
- <sup>6</sup> A small story: When I was in the government, I helped write a “checklist” for regulatory impact analyses to promote accountability and make it easier to produce such analyses. (See Office of Information and Regulatory Affairs, “Agency Checklist: Regulatory Impact Analysis,” October 28, 2010, [https://obamawhitehouse.archives.gov/sites/default/files/omb/inforeg/regpol/RIA\\_Checklist.pdf](https://obamawhitehouse.archives.gov/sites/default/files/omb/inforeg/regpol/RIA_Checklist.pdf).) Within the Executive Office of the President, some people, especially those with “Hill experience,” were actually concerned: Perhaps the checklist could have adverse political effects? Perhaps it should not be released before the midterms? These questions seemed to me absolutely absurd, and eventually the checklist was released, midterms or no midterms. Within an hour after the Democrats lost the House in 2010, in a crushing defeat, a cabinet official emailed me: “It was the checklist.” (I wrote back immediately: “That saved the Senate.”)
- <sup>7</sup> See *ibid.*
- <sup>8</sup> A little story from my own experience: On a difficult regulatory issue, a very sharp and highly influential member of the White House communications staff weighed in heavily on the substance. In my view, that person’s conclusions were, in this particular case, entirely without merit; they had a political motivation and lacked evidentiary support. I communicated my concerns (less than politely, I fear) to the relevant person. The response was as unexpected as it was priceless, roughly: “I am just a political hack. Ignore me! Do the right thing.”
- <sup>9</sup> See Morrell, *The Great War of Our Time*; and Cass R. Sunstein, *Valuing Life: Humanizing the Regulatory State* (Chicago: The University of Chicago Press, 2014).
- <sup>10</sup> I am bracketing questions raised by the independent regulatory commissions, such as the Federal Reserve Board and the Federal Communications Commission.

- <sup>11</sup> See Interagency Working Group on Social Cost of Carbon, U.S. Government, “Technical Support Document: Social Cost of Carbon for Regulatory Impact Analysis Under Executive Order 12866,” February 2010, [https://www.epa.gov/sites/production/files/2016-12/documents/scc\\_tsd\\_2010.pdf](https://www.epa.gov/sites/production/files/2016-12/documents/scc_tsd_2010.pdf). See also the discussion in Cass R. Sunstein, “On Not Revisiting Official Discount Rates: Institutional Inertia and the Social Cost of Carbon,” *American Economic Review* 104 (5) (2014).
- <sup>12</sup> This is the conclusion of the U.S. Government General Accountability Office, *Regulatory Impact Analysis: Development of Social Cost of Carbon Estimates* (Washington, D.C.: U.S. Government Accountability Office, July 2014), <http://www.gao.gov/assets/670/665016.pdf>. I can attest to the correctness of that conclusion. At various stages, of course, public comments were also considered on the merits. See, for example, Interagency Working Group on Social Cost of Carbon, U.S. Government, “Response to Comments: Social Cost of Carbon for Regulatory Impact Analysis Under Executive Order 12866,” July 2015, <https://obamawhitehouse.archives.gov/sites/default/files/omb/inforeg/scc-response-to-comments-final-july-2015.pdf>.
- <sup>13</sup> For similar examples, see The Office of Management and Budget, “Circular A-4,” September 17, 2003, <https://www.transportation.gov/sites/dot.gov/files/docs/OMB%20Circular%20No.%20A-4.pdf>. The analysis of the value of a statistical life is available at U.S. Department of Transportation, Office of the Secretary of Transportation, “Revised Departmental Guidance 2014: Treatment of the Value of Preventing Fatalities and Injuries in Preparing Economic Analysis,” memorandum, June 17, 2015, [https://www.transportation.gov/sites/dot.gov/files/docs/VSL2015\\_0.pdf](https://www.transportation.gov/sites/dot.gov/files/docs/VSL2015_0.pdf).
- <sup>14</sup> For a detailed account, see Cass R. Sunstein, “The Office of Information and Regulatory Affairs: Myths and Realities,” *Harvard Law Review* (126) (2013).
- <sup>15</sup> See Executive Order 12866, incorporated in The White House, Office of the Press Secretary, “Executive Order 13563 – Improving Regulation and Regulatory Review,” January 18, 2011, <https://obamawhitehouse.archives.gov/the-press-office/2011/01/18/executive-order-13563-improving-regulation-and-regulatory-review>.
- <sup>16</sup> See Friedrich Hayek, “The Use of Knowledge in Society,” *American Economic Review* 4 (1945).
- <sup>17</sup> See also Daniel Naurin, *Deliberation behind Closed Doors: Transparency and Lobbying in the European Union* (Colchester, United Kingdom: ECPR Press, 2007). Naurin found that, in the European Union, business lobbyists who acted under closed-door conditions in their relationships with the European Commission had realized “that in order to promote their interests they have to argue carefully with reference to public interests and ideals rather than bargain from self-interest” and that “the industry lobbyists studied here sounded better, with respect to self-interest, behind closed doors than in public” due to constituency pressure toward a self-interested stance in public settings.
- <sup>18</sup> See, for example, U.S. Department of Labor, “U.S. Department of Labor’s OSHA Withdraws Proposed Interpretation on Occupational Noise,” OSHA National News Release, January 19, 2011, [https://www.osha.gov/pls/oshaweb/owadisp.show\\_document?p\\_table=NEWS\\_RELEASES&p\\_id=19119](https://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=NEWS_RELEASES&p_id=19119).
- <sup>19</sup> See, for example, Environmental Protection Agency, *Effluent Limitations Guidelines and New Source Performance Standards for the Airport Deicing Category*, Federal Register vol. 77, no. 95, May 16, 2012, <http://www.gpo.gov/fdsys/pkg/FR-2012-05-16/pdf/2012-10633.pdf>.
- <sup>20</sup> See, for example, U.S. Food & Drug Administration, “FDA Finalizes Menu and Vending Machine Calorie Labeling Rules,” FDA news release, November 25, 2014, <http://www.fda.gov/NewsEvents/Newsroom/PressAnnouncements/ucm423952.htm> (last archived February 28, 2017).
- <sup>21</sup> See Daniel A. Farber and Anne Joseph O’Connell, “The Lost World of Administrative Law,” *Texas Law Review* 92 (2014).