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JUDICIAL DEFERENCE AND DEMOCRATIC VALUES

Scott M. Sullivan*

DAVID RUDENSTINE, THE AGE OF DEFERENCE: THE SUPREME COURT, NATIONAL SECURITY, AND THE CONSTITUTIONAL ORDER (OXFORD UNIVERSITY PRESS 2016). PP. 344. HARDCOVER $31.95.

CHRISTOPHER KUTZ, ON WAR AND DEMOCRACY (PRINCETON UNIVERSITY PRESS 2016). PP. 344. HARDCOVER $39.95.

I. INTRODUCTION

If anything, the first year of Donald Trump's presidency has confirmed that a variety of cultural, economic, and legal norms, once considered sacrosanct, are in a state of flux. In foreign policy, the internationally active posture of the U.S. under every president since World War II, and the ideas underlying that posture, is not only being challenged, it is slowly being deconstructed. The longstanding American policy of encouraging political reform and the opening up of international markets in exchange for U.S. economic and military assistance during times of crisis has collapsed. But if America is embracing a new vein of isolationism, the values underlying this new approach are unclear.

As the reformulation of the foundational values driving American foreign policy nebulously, inconsistently, and slowly take shape, there are deep rumblings on the ground. The institutions carrying out U.S. foreign policy, like an ocean liner, are poorly suited for sharp changes in direction. Likewise, while the legal rules supporting and limiting such institutions prize flexibility, they were built upon certain presumptions that, if fractured, create structural instability.

Major foreign policy and national security related questions, including President Trump's travel ban, are now entering the courts and existing legal doctrines suddenly seem constructed for a different era with different goals and a different kind of president.[1] Nowhere is the incongruity more manifest than long-standing rules and norms calling for judicial deference to executive branch actions, interpretations, and findings of fact.

Periods of exceptional social transition are taxing. As broad principles of longstanding foreign policy practices are on the decline, deep discord at home on issues both foreign and domestic makes the emergence of a new consensus seem far off. Conflict,

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1. *See* Trump v. Int'l Refugee Assistance Project, 137 S. Ct. 2080 (2017).

whether explicitly violent or not, is endemic. This conflict is the product of the fact that political entities require at least broad-brush agreed-upon values to engage in the filtering and prioritizing required of effective governance. Significant departures from long-standing norms simultaneously force the judiciary, an institution highly dependent upon its perceived legitimacy, into highly public judgments as to established precedent and contemporary sentiment.

Recent books by Christopher Kutz and David Rudenstine bravely enter into this arena of social, political, and legal flux offering useful insight for both academics and the engaged public. While both books were first published prior to the advent of the Trump administration, they concentrate on long percolating issues made increasingly urgent by a public weary of international engagement and a mercurial president without an identifiable set of ideological commitments.

Christopher Kutz's *On War and Democracy* dissects and then reconstructs the ethical and political philosophy underlying the relationship between war and the democratic state.[2] The fundamental theme of *On War and Democracy* addresses the ethical obligations of states in deciding whether to engage in armed conflict. Drawn to the question by the reality of U.S. involvement in intractable conflicts in Iraq and Afghanistan, the collection of essays centers on a reorientation of the norms and values democracies seek to build and protect. Specifically, a movement away from emphasizing institutional mechanics and toward the values of collective work and responsibility in institution building and maintenance.

While Kutz operates in the more abstract atmosphere of political philosophy, *The Age of Deference* by David Rudenstine operates at the gritty front lines of the most pertinent legal doctrine of the Trump administration to date, judicial deference to the executive branch in matters invoking national security.[3]

II. THE DEFERENCE PROBLEM AND DEMOCRATIC GOVERNANCE

Deference is an omnipresent issue in contemporary legal scholarship. A variety of factors, such as the increasingly specialized and atomized nature of the academy and the favored media of journal articles, have led most scholarship to focus on very narrow contexts and circumstances.

For those focused on issues of foreign relations and national security, the question is broadened and deepened by a judicial reticence not present in the domestic or general administrative law context. The presence of deference in issues touching foreign relations spans the entire scope of litigation. Some abstention doctrines, like the act of state doctrine, are only applicable when foreign policy is at issue.[4] Others, like the political question doctrine, hold much greater poignancy than when presented within the domestic context.[5]

2. CHRISTOPHER KUTZ, ON WAR AND DEMOCRACY (2016).

3. DAVID RUDENSTINE, THE AGE OF DEFERENCE: THE SUPREME COURT, NATIONAL SECURITY, AND THE CONSTITUTIONAL ORDER (2016).

4. The act of state doctrine "generally prohibits courts from questioning the validity of an act of a foreign state within its own territory." Carlos Vazquez, *Customary International Law as U.S. Law*, 86 NOTRE DAME L. REV. 1495, 1536 (2011).

5. *See* Scott M. Sullivan, *Interpreting Force Authorization*, 43 FLA. ST. U. L. REV. 241, 259 n.90 (2015). *See also* Rachel E. Barkow, *More Supreme Than Court? The Fall of the Political Question Doctrine and the Rise*

If the court decides to hear the case, canons of construction such as the presumption against extraterritoriality narrow the opportunity for cases with foreign relations angles to seriously progress.[6] If jurisdiction is satisfied, courts often explicitly put their thumb on the scale in favor of executive branch interpretations of foreign relations legal instruments or the existence of facts.[7] Failing all this, sometimes the courts engage in what can only be called ad hoc deference to executive branch action in foreign affairs, invoking highly questionable constitutional mantras such as that the nation must speak with "one voice" in foreign affairs.[8]

Assessing the impact of judicial deference is made even more convoluted by the ambiguous manner in which it often asserts itself. Not only can deference to the executive branch arise explicitly at multiple stages of litigation and through multiple vehicles, but it can often bear weight implicitly in the judiciary's consideration of a case.[9] In other words, as often as deference may be explicit and visible, it is just as likely to be present yet invisible or absent yet visible as it is likely to be explicitly active. With both, while "deference" is often not explicitly referenced, the court is passing an opportunity to exercise its authority, often pursuant to the unmistakable wishes of executive branch actors.[10]

A. *The Development of Deference in National Security*

In *The Age of Deference*, Rudenstine broadens the lens of the judiciary's deference to the executive in assessing both its historical development and its contemporary consequences. In a sense, his description of the historical trend is simultaneously surprising but intuitive. As he carefully lays out in the book, the predominant view of the judicial deference in national security is a rhythmic process of erosion and retrenchment.[11] Cases from the Civil War onward are cornerstones of an "ingrained narrative" that describes the Supreme Court as willingly but unenthusiastically expanding its deferential posture during time of war with a retrenchment of rights, albeit always incompletely, in

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of Judicial Supremacy, 102 COLUM. L. REV. 237, 273–317 (2002) (detailing the fall of the political question doctrine in domestic-oriented cases).

6. The presumption against extraterritoriality is one of a variety of such canons often used to preclude judicial review or to effectuate deference to the executive branch, which collectively limit the ability of litigants to seek redress in U.S. courts for foreign conduct.

7. For example, an executive branch interpretation of an international agreement is due "great weight." *See* Scott M. Sullivan, *Rethinking Treaty Interpretation*, 86 TEX. L. REV. 777, 785 (2008). Meanwhile, executive branch assertions of "national security fact[s]" arise "across an array of doctrinal settings, often with dispositive effect." Robert M. Chesney, *National Security Fact Deference*, 95 VA. L. REV. 1361, 1367 (2009).

8. David H. Moore, *Beyond One Voice*, 98 MINN. L. REV 953, 954–57 (2014).

9. It is also not unusual for foreign policy concerns to arise without warning at oral argument. In the 2013 case of *Bond v. United States*, Justice Breyer remarked, "So I had asked you, isn't there an easier way to deal with this case? And you tell me, no, no, because it will interfere with some problem of foreign affairs that was never mentioned in any brief – or at least hit me for the first time when you said it." *See* Transcript of Oral Argument at 64, Bond v. United States, 134 S. Ct. 2077 (2014) (No. 12-158).

10. In such circumstances, it is common for the court to suggest that it is not required to follow the wishes of the executive branch, but that it "gives due weight" or "takes into consideration" the executive branch's stated position. However articulated, one institution ceding its authority in favor of another's is the core of judicial deference. Sullivan, *supra* note 7, at 780 ("At its core, deference is the ceding of one power in favor of another."); Robert Knowles, *American Hegemony and the Foreign Affairs Constitution*, 41 ARIZ. ST. L.J. 87, 99 (2009).

11. RUDENSTINE, *supra* note 3, at 24.

subsequent periods of peace.[12]

Rudenstine argues that this "ingrained narrative" both over and under states the deferential posture of the judiciary to executive branch action. The narrative overstates the level of deference afforded to the executive during time of "war."[13] After all, some of the Supreme Court's most respected judicial decisions must be understood as, in part, limiting executive action in the midst of ongoing armed conflict.[14] However, by focusing on deference levels during periods of active armed conflict, the conventional wisdom fails to recognize a broad judicial deference in response to internal, often speculative, threats to order and stability during peacetime.

More importantly, Rudenstine argues, the cycle of deference and retrenchment set out in the conventional narrative erroneously uncouples "judicial abdication in national security cases from the rise of the National Security State and the Imperial Presidency."[15]

This broader lens of analysis suggests the contemporary era of judicial deference is not the product of particular challenges related to terrorism but instead the natural outgrowth of forces manifesting themselves at the conclusion of World War II. In this telling, the end of the War ushered in an emerging American hegemony creating global national security interests. The globalization of American national security interests across the world has, naturally, made threats to those interests ubiquitous. So long as the U.S. could not impose order everywhere in the world, the danger of disorder loomed.

An enormous "national security state" has risen as a consequence of perpetual threats to U.S. national security interests.[16] The threat to these interests, coupled with the globalizing influence of technological innovation, have shattered the nation's long-held tendency toward isolationism and prompted the creation of the governmental and legal infrastructure of an enormous contemporary "National Security State."[17]

B. *Institutionalism Out of Balance*

The claim that courts should defer to the executive branch in national security is difficult to establish as a historical matter. As *The Age of Deference* outlines, there is little evidence that the broad structures of judicial deference present today existed as entrenched practices prior to World War II.[18] Instead, the case for deference tends to be most persuasively made as an institutional matter. Advocates for judicial deference to the

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12. *Id.* at 24–40 (describing prominent cases such as *Ex Parte Merryman*, 17 F. Cas. 144 (C.C.D. Md. 1861) (No. 9487), *Ex Parte Milligan*, 71 U.S. (4 Wall.) 2 (1866), and *Korematsu v. United States*, 319 U.S. 432 (1943)).

13. *Id.* at 41–52.

14. The most famous example being *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952), which occurred within the context of the Korean War. However, many scholars, including myself, believe it says more about the problem of characterizing powers as "foreign" or "domestic" in nature than it represents a willingness to regulate those powers the Court considers foreign. *See generally* Ganesh Sitaraman & Ingrid Wuerth, *The Normalization of Foreign Relations Law*, 128 HARV. L. REV. 1897 (2015) (describing the rise and sources of foreign relations "exceptionalism").

15. RUDENSTINE, *supra* note 3, at 40.

16. *Id.* at 7.

17. *Id.* at 64.

18. While Rudenstine nicely aggregates the question, this reality has likewise been set out as to particular deference doctrines by other scholars. David Sloss, for example, has done exceptional work on the question of treaty interpretation deference. *See, e.g.*, David Sloss, *Judicial Deference to Executive Branch Treaty Interpretations: A Historical Perspective*, 62 N.Y.U. ANN. SURV. AM. L. 497 (2007).

executive branch tend to focus on comparative institutional advantages possessed by the executive branch in conducting foreign affairs generally, and national security in particular. Among the branches of government, the executive branch is best suited to act quickly, efficiently, and secretly—all advantages in national security matters. But these specific advantages might only counsel that the affirmative power of foreign policy be placed within the executive branch, whereas courts are engaged in the ex post review of executive action.[19] The primary institutionalist justification for the judiciary to defer to executive decisions claims that the executive branch possesses superior competency borne of superior information.

There is no doubt that the executive branch has much greater access to information than any other branch of government, especially the judiciary. As Rudenstine notes, judges are concerned they lack the necessary expertise to understand information and that, in any event, "judicial processes—the rules of evidence and procedure—may not permit them to have access to all of the relevant and important information."[20]

Rudenstine does not challenge the fact that the executive branch possesses more information; instead he argues that this "advantage" does not lend itself cleanly to a claim to greater competency. Worse, the executive branch's control of information ought to reduce deference rather than enhance it to avoid presidential malfeasance.

The Age of Deference is permeated with examples and warnings regarding the power of the executive branch's monopoly of information. In the most benign sense, the executive branch can utilize the exceptionally broad rules regarding "state secrets" to ensure litigation is dismissed and misdeeds are never examined.[21] In regard to Japanese internment during World War II, Rudenstine notes that Fred Korematsu, a party to the Supreme Court's most infamous ruling on the topic, later had his conviction overturned based upon "governmental misconduct in the submission of false information to the Supreme Court in the 1940s."[22]

Rudenstine argues that, collectively, the doctrines mandating secrecy and imposing special deference regarding national security are the product of a state of institutional judicial insecurity he calls the "mind of deference."[23] This "mind of deference" is personal, procedural, and institutional.

Personally, judges view themselves as "not competent to assess matters implicating national security."[24] Viewing themselves as lacking experience, education, and specialization, they fear erring in a manner that compromises the national security of the United States.[25] And yet there is little reason to believe that national security questions

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19. There are exceptions. The state secrets privilege is an evidentiary rule which permits the government to block the release of any information that, if disclosed, would cause harm to national security. *See* United States v. Reynolds, 345 U.S. 1, 7–10 (1953).

20. RUDENSTINE, *supra* note 3, at 9.

21. *Id.* at 71.

22. *Id.* at 38.

23. *Id.* at 9.

24. *Id.* at 294.

25. This particular concern ebbs and flows in a manner further undermining the "mind of deference" identified by Rudenstine. When judges feel comfortable in their assessment of the foreign relations effects of their decision, they are much less likely to defer. Of course, that implies a competency at predicting the foreign relations effects that is at odds with the judiciary's more generalized concern regarding competency. *See* Jack L.

require any greater specialization than a host of other highly important matters upon which the judiciary passes judgment without hesitation. Put simply, "if competence is the determinative factor in deciding whether judges should greatly defer to the executive in security cases, it is likely that judges would be disqualified in many other types of cases, and that is not the nation's practice."[26]

Procedurally, there is the concern that inadequacies within judiciary procedures also compromise the institution's ability to keep information secret, a notion that wilts under even a cursory appreciation of the volume of leaks and mishandling of classified information endemic to the national security establishment.

Institutionally, there is a sense that the judiciary, due to lifetime appointments, is insulated from democratic accountability and that such accountability is especially important in national security issues. Rudenstine correctly rejects both claims. Judges are not immune from popular opinion either in their appointment or during their tenure. They are appointed through democratic processes, are part of the public themselves, and can face real consequences when issuing decisions that are manifestly contrary to public will. The judicial process offers some of the only opportunities for individual people to engage in a formal and consequential dialogue with their government and, as such, is one of a multitude of "vehicles for self-government" that Rudenstine asserts has been lost when considering national security.[27]

C. Comparative Competency and the National Security State

Age of Deference cites the Supreme Court's post-World War II deference as a product and perpetuator of the centralizing power of the presidency and the growing authority of the "National Security State," a host of administrative agencies residing within an executive branch headed by the president, thus compromising the rule of law.[28] More dangerously, it clothed this growing presidential power and National Security State apparatus with constitutional legitimacy.[29]

The interplay between the "Imperial Presidency" and the National Security State and their impact on principles of separation of powers, lies at the heart of *The Age of Deference*. If a foundational argument in favor of judicial deference to the executive branch is comparative competency, the backbone of special presidential competency is made up of administrative agencies and the private entities supporting them. Rudenstine views this Imperial Presidency and its National Security State components as acting hand-in-glove:

> The operational apparatus of the Imperial Presidency has grown so much since its

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Goldsmith, *The New Formalism in United States Foreign Relations Law*, 70 U. COLO. L. REV. 1395 (1999) (discussing judges acting on a "foreign relations effects" test).

26. RUDENSTINE, *supra* note 3, at 297.

27. *Id.* at 303.

28. *Id.* at 9, 15 (stating that deference "has not just denied individuals a judicial remedy, but . . . has bolstered the Imperial Presidency and the National Security State, diminished the potential transparency of the executive, permitted if not encouraged unlawful conduct by executive officials, and undermined the rule of law and the constitutional order.").

29. *Id.* at 5 ("Initially the Supreme Court's judicial deference in national security cases merely reflected the seminal worldwide changes that followed the last world war. But in time this deference did more than mirror it; it reinforced those changes and vested constitutional legitimacy in the Imperial Presidency and the rise of the National Security State.").

> first days that the scope and size of the agencies that comprise the nation's security front line dwarf what went before . . . . [An investigation by the Washington Post] concluded that about "1,271 government organizations and 1,931 private companies work on programs related to counterterrorism, homeland security and intelligence in about 10,000 locations" across the United States; approximately 854,000 individuals "hold top-secret security clearances"; since 9/11, 33 building complexes for "top-secret intelligence work" have been built or are being built, and together they are in size "the equivalent of almost three Pentagons or 22 U.S. Capitol buildings."[30]

Rather than focusing concern over the departments and agencies that make up the National Security State itself, Rudenstine is concerned that placement of the power afforded to these entities under the executive branch distorts the separation of powers regime envisioned by the Framers. The power afforded the president through the National Security State, coupled with perpetual threats to U.S. security means the nation is operating "more or less continually in a state of emergency" in which there exists a "national climate that distorted the constitutional order by facilitating the powerful dominance of the presidency over the other two coequal branches of the federal government."[31]

Without question, an efficient and strongly coordinated presidency and National Security State operating in sync would represent an existential threat not only to judiciary power but to the nation more broadly. The reality, however, is that the relationship between the presidency and the National Security State is neither efficient nor well-coordinated.

The term National Security State evokes an image of a sleek, seamless vehicle of governance capable of instantaneous force and surveillance omniscience. However, the realities of what several scholars identify as the "national security bureaucracy" are characterized by the classic challenges that adhere to any bureaucracy. The ability of any president to direct the national security bureaucracy to act along any principled lines of coherency and uniformity is deeply limited. The vast majority of the bureaucracy is professionalized and cannot be displaced by political appointment. For example, "of the 668,000 civilian employees in the Department of Defense and related agencies in 2004, only 247 were political appointees."[32] Political appointees are themselves often drawn from the group of careerists that make up the national security establishment.

As a result of the sheer number of agencies, stakeholders, policies, and individuals involved over which he has little to no direct authority, a president can only hope to slowly alter the ship of state. As President Trump found in several instances early in his presidency, demanding the national security bureaucracy sharply deviate from past practices rarely goes well.[33]

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30. *Id.* at 65.

31. RUDENSTINE, *supra* note 3, at 65.

32. Michael J. Glennon, *National Security and Double Government*, 5 HARV. NAT'L SEC. J. 1, 23 (2014).

33. A prominent early example of President Trump attempting to buck established norms of the national security establishment was his executive order creating a space on the National Security Council for Steve Bannon. After immediate and continuing outcry by national security experts, the move was rescinded. *See* Glenn Thrush & Maggie Haberman, *Bannon Is Given Security Role Usually Held for Generals*, N.Y. TIMES (Jan. 29, 2017), https://www.nytimes.com/2017/01/29/us/stephen-bannon-donald-trump-national-security-council.html; Peter Baker, Maggie Haberman & Glenn Thrush, *Trump Removes Stephen Bannon from National Security Council Post*, N.Y. TIMES (Apr. 5, 2017), https://www.nytimes.com/2017/04/05/us/politics/national-security-

This rough, ill-fitting coordination between the presidency and the National Security State makes it difficult to understand institutional competencies and identify where judicial oversight is especially necessary. The expertise possessed by those within the national security bureaucracy is real. However, the transference of that expertise, and the information underlying it, into action and policy is slow, uncertain, and often misunderstood or misinterpreted within the executive branch itself.[34]

Michael Glennon characterizes the national security bureaucracy as united by "loyalty, collective-responsibility, and—most importantly—secrecy."[35] It is the unforeseen consequences of this secrecy eating away at the judicial branch that Rudenstine lays bare through his systematic examination of secret decisions, secret evidence, and secret law.

> As a general idea, the fact that some law is secret is an oxymoron and undemocratic. After all, how are the people to have an effective voice in governing themselves if the laws themselves are secret? And how is the average person to comply with the law if the law itself is secret?[36]

III. RETHINKING DEMOCRATIC NORMS IN ARMED FORCE

At initial examination, the institutional and doctrinal focus on judicial operation in *The Age of Deference* feels untethered to the normative perspective and political philosophy brought to bear by Kutz. In a deeper sense, however, the basic difference is that while Rudenstine is sounding the alarm of an erosion of democratic values through judicial deference, Kutz is considering how democratic values can be rebuilt from the root up in *On War and Democracy*.

A. Beyond Democratic Institutions

The interplay of democracy and war has long been examined, typically through the lens of empiricism. Does democracy make war more likely, less likely, and if so, in what circumstances? Kutz, while recognizing the importance of the empirical question, trains his eye on normative questions surrounding the relationship between democratic states and armed conflict.

Central to *On War and Democracy* is that "democracy" has become a good, in and of itself, resulting in an unquestioning adherence to spreading democracy. As the potency of the moral value of exporting democracy has increased, Kutz argues, democracies have increasingly lost sight of the norms underlying democracy.[37]

In a world where "state-building" has become a regularized element of U.S. foreign policy, *On War and Democracy* argues that democratic institutions cannot be effectively

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council-stephen-bannon.html.

34. The entire intelligence gathering apparatus is built around speculation, and professional intelligence officers understand the tremendous differences relating to the verifiability and validity of information entering the system. Of course, understanding those differences and operationalizing them, much less articulating such that others can operationalize them is enormously difficult.

35. Glennon, *supra* note 32, at 30.

36. RUDENSTINE, *supra* note 3, at 120.

37. KUTZ, *supra* note 2, at 1–8.

built without a solid basis in the values they intend to perpetuate.[38] Kutz looks beyond the mechanics and existing institutions of democratic governance, elections and legislatures, to a definition of democracy focusing on agency. His "agentic democracy" emphasizes "how individuals conceive of their actions in relation to each other, and in relation to a broader set of goals involving building or defending open political institutions."[39]

Once conceived in this manner, Kutz examines the relationship between democracy and violence. Internally, the use of force is monopolized by the state and generally prohibited between private parties. Externally, the state, legitimized and celebrated as an extension of the public, faces few such constraints and so long as domestic costs remain relatively low, can use its monopoly of force to mobilize political support.[40]

B. *The Importance of State Self-Awareness*

Whereas Rudenstine focuses on the instruments of secrecy held by the executive branch through the systemic abdication of the judiciary as an institution, Kutz explains the deeper harms secrecy—especially secret law—pose to democratic norms.

Transparency is the Derek Jeter of law.[41] That transparency possesses value is immediately apparent, but despite its sterling reputation the amount of value it contributes is often very difficult to discern. Speaking with the passion of certainty, advocates of transparency proclaim its general societal benefits, but do not identify its concrete contributions. Skeptics of transparency, demanding proof, point out the advocates' failure to identify policy gains or the specific problems transparency purportedly alleviates.

Kutz rejects a simplistic embrace of transparency or repudiation of secrecy. Acknowledging that secrecy of the law is damaging to the governmental accountability required for citizens to make informed choices, he presents an even more persuasive argument that secrecy of law imposes existential damage.

> [L]aw's secrecy hurts us existentially, because it deprives us of the way in which, once we are organized as a polity, law tells us who we are, by constituting our *orientation* in moral and political space—what values and acts we project into the world. This orientation is law's subjective contribution to our moral personality, complementary to the objective contribution it makes in the form of incentives and disincentives to align one's behavior with interpersonal norms. Understanding and probing the nature and threat of secret law is important because it exposes a deeper epistemological dimension of democratic agency: the need for a self-governing people to know its own mind and will. The threat is not just to a democratic people's capacity on particular occasions to police its executive and legislative agents, but

38. *Id.* at 4–11.

39. *Id.* at 4.

40. *Id.* at 5–6.

41. Jeter, the recently retired Yankees star, was widely considered the "the most overrated/underrated player of our time." Joe Posnanski, *No. 57: Derek Jeter*, MEDIUM (Jan. 26, 2014), https://medium.com/joeblogs/57-derek-jeter-159a46b479d3. Even when his traditional statistics (such as batting average, runs batted in, etc.) were down, his fans were hyperbolic in their praise of his "intangible" contributions to the Yankees. Detractors argued that even when his traditional statistics were up, those statistics overvalued his contributions and that new sabermetric analytics, particularly in fielding, suggested that Jeter, especially toward the conclusion of his career, was uniquely poor in the field. *Id.*

to its being a democratic people at all.[42]

At its core, this is a call for state self-awareness, asking the people of a state to search their political heart to determine what they value and desire, and then ask how far they are willing to compromise those values to vanquish real or imagined demons.

Kutz identifies the United States' slide into torture as demonstrative of the current lack of self-awareness within its foreign policy. The example is appropriate and clean. The U.S. Constitution venerates individual rights to protect the people from a tyrannical government. Instead of repudiating these rights or explicitly qualifying them, human rights were paid lip service while they were obliterated behind closed doors.

It would be comforting to say that these societal and governmental errors were made in a time of compromised judgment and that the U.S. has retrenched its system of rights in a manner more consistent with the principles upon which the republic was founded. That story would fit nicely with the "ingrained narrative" described in *The Age of Deference*. Unfortunately, as Rudenstine made so plain, the narrative of rights retrenchment is largely a fiction, and placing Kutz's work within the contemporary era makes it apparent that any narrative of democratic norm retrenchment would be similarly flawed.

C. Democracy, Collective Agency, and Collective Values

Consistent with the timing in which the series of essays composing *On War and Democracy* were first written, they evince a palpable concern that democratic states were sliding into a reactionary sense of righteous interventionism around the world. Following the displacement of a disfavored regime, the customary practice was to construct the familiar institutions and processes of democracy. It is with this concern regarding "democratic holy wars" that Kutz establishes his agentic conception of democracy:

> The agentic (or active) conception of democracy looks to the form of collective agency exercised in a democracy, not to the particular institutional form of its exercise. On the agentic conception of democracy, democratic agency can be honored, perhaps fostered, but it cannot be designed or imported. It is a flower that must grow from its own soil.[43]

In the contemporary era, however, it seems it is time for the United States to tend to its own democratic garden. Everywhere one turns there is growing evidence that the American public has lost consensus on the collective norms and identity that once provided the basic fabric of American life. An intense cultural war is underway with issues of gender, race, citizenship, and even the basic elements of national history on the firing line.

Simultaneously, there exists a less visible but equally intense battle regarding the norms and practices of our governing democratic institutions. The judiciary is reconsidering established precedent in light of a president whose competence was publicly questioned by an elected senator of his own party.[44] In the middle is a president with no

42. KUTZ, *supra* note 2, at 106.
43. *Id.* at 168.
44. Maggie Haberman & Thomas Kaplan, *Bob Corker, Often an Ally of Trump, Is Latest Republican to Be Attacked by Him*, N.Y. TIMES (Aug. 25, 2017), https://www.nytimes.com/2017/08/25/us/politics/bob-corker-often-an-ally-of-trump-is-latest-republican-to-be-attacked-by-him.html.

governing experience who seems to have little regard for objective facts and uses a call for the imprisonment of political opponents as a rallying cry. Hundreds of white supremacist groups are carrying torches and marching while chanting explicitly racist and anti-Semitic slogans.[45] A substantial number of Americans identify themselves as part of the "resistance" to the Trump administration based on their views of his administration as a burgeoning fascist regime.[46] In this environment, what is the "collective agency" that can be identified and celebrated in furtherance of America's own democracy?

This collective agency, which Kutz identifies as the "crucial component of democracy" is "our mutual orientation in collective action: how individuals conceive of their actions in relation to each other, and in relation to a broader set of goals involving building or defending open political institutions."[47] Fundamentally, this understanding of community identifies and appreciates "a foundation of shared, intersecting, and competing loyalties" within "a body of people doing politics—in success or failure."[48]

On War and Democracy is about reconceptualizing democratic values as they relate to using armed force internationally, and yet for the United States, it may be most instructive for thinking about how to avoid violence at home. Given Kutz's focus on military force it is ironic that among a variety of groups and professions, the only group rated highly favorable by both Republicans and Democrats were members of the military.[49] Perhaps the military's high rating is due to its outward facing mission and the personal risks associated with those missions; regardless, it provides an opportunity for Americans to both identify shared values and act collectively toward the fulfilment of those values. During these days of discord, *On War and Democracy* suggests that America would be well-served to look more often for such opportunities.

IV. CONCLUSION

The simplest argument promulgated against judicial deference has always been that the responsibility of the courts is to "say what the law is" and that deference, by definition, compromises that core mission. In the context of an America at war with itself, *The Age of Deference* and *On War and Democracy* together make the compelling case that citizens ought not rely merely upon government institutions, but instead should engage in the democratic dialogue of defining the law in order to protect the values that enable the "united" nature of the United States.

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45. Matt Stevens, *White Nationalists Reappear in Charlottesville in Torch-Lit Protest*, N.Y. TIMES (Oct. 8, 2017), https://www.nytimes.com/2017/10/08/us/richard-spencer-charlottesville.html.
46. Kenneth P. Vogel, *The Resistance, Raising Big Money, Upends Liberal Politics*, N.Y. TIMES (Oct. 7, 2017), https://www.nytimes.com/2017/10/07/us/politics/democrats-resistance-fundraising.html.
47. KUTZ, *supra* note 2, at 4.
48. *Id.* at 13.
49. *Partisans Differ Widely in Views of Police Officers, College Professors*, PEW RES. CTR. (Sept. 13, 2017), http://www.people-press.org/2017/09/13/partisans-differ-widely-in-views-of-police-officers-college-professors.