Deference, Power, and Emerging Security Threats

THE AGE OF DEFERENCE. By David Rudenstine. New York, New York: Oxford University Press, 2016. 344 pages. $29.95.

THE FUTURE OF VIOLENCE: ROBOTS AND GERMS, HACKERS AND DRONES. By Benjamin Wittes & Gabriella Blum. New York, New York: Basic Books. 336 pages. $29.99.

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Introduction

Discussing tradeoffs between liberty and security in matters of national security, and the proper role of the Court in counterbalancing the Executive Branch are not new territory in legal scholarship. Nevertheless, two recent books on these topics address these issues from very different perspectives, but together provide a launching point for a discussion about how to structure the whole of government in light of new threats. David Rudenstine's work, *The Age of Deference*,[1] is a tour de force of constitutional history. Rudenstine recounts the myriad cases involving surveillance, civil liberties, secret courts, and secret laws that have evolved since World War II. Through this historical overview, Rudenstine finds that the courts have not only deferred to the Executive, but have entrenched their position of deference. Rudenstine's focus is inward, looking at the structure of our balance-of-power system and finding over the span of a seven-decade period of time that the courts have come up largely lacking—his prescription is a more active judiciary.

Benjamin Wittes and Gabriella Blum, on the other hand, cast much of their attention on the emergent threats that the nation faces. In *The Future of Violence: Robots and Germs, Hackers and Drones*,[2] Wittes and Blum paint a picture of a future filled with many threats, and a society replete with many vulnerabilities. Drones, biological weapons, and cybertechnology are advancements that challenge the security of the nation and endanger lives. Their prescription is to embrace governmental surveillance and increase regulation—their view is not one of liberty and security tradeoffs in the

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1. DAVID RUDENSTINE, THE AGE OF DEFERENCE (2016).

2. BENJAMIN WITTES & GABRIELLA BLUM, THE FUTURE OF VIOLENCE: ROBOTS AND GERMS, HACKERS AND DRONES (2015).

calibration of effective security policy but rather one in which democracies should review and revisit their policies from time to time.[3]

This Review attempts to harmonize and draw insights from these two very different but important books. They do not fit neatly together, but the ideas drawn from them can provide a way of thinking about emerging threats and the structure of American government. The Review proceeds in three parts. Part I describes Rudenstine's book, highlighting what he deems to be the "Age of Deference" and what the consequences of that deference are.[4] This Part also addresses his recommendations for a judiciary that is far more involved in reviewing cases and controversies that arise out of national security-related matters. Part II describes the work of Wittes and Blum, attempting to situate their views on emergent threats and the powers, regulations, and structures that are necessary to counter such emergent threats. Part III attempts to harmonize the themes presented in both works, ultimately arguing that a less deferential judiciary and a more protective national security state both require significant congressional involvement if rights are to be protected.

I. The Age of Deference

Rudenstine paints a compelling picture of a judiciary that for seven decades has slowly given up on engaging with the other branches of government on matters related to national security. From the outset, Rudenstine seeks to convince the reader that the Age of Deference is a "serious and very harmful distortion in the governing scheme, and the Supreme Court and the judges who preside over the lower federal courts need to strike a new balance in cases implicating national security so the executive is accountable, individuals secure relief, and the rule of law is upheld."[5] Judicial deference has not, in Rudenstine's mind, come about as a function of the structure of the Constitution, nor has it come about "as part of a comprehensive jurisprudential plan;" rather, "judicial voices—one by one—pointed the way, and in time profound judicial deference took root and sprouted across a very broad doctrinal landscape."[6]

Why has deference come about? In his mind there is no true way to explain it, but to Rudenstine, the consequences are clear.

> [T]he state secrets privilege is supported in large part by the claim that judges lack the competence to decide national security issues. The

3. *See id.* at 127–29 (arguing that functional democracies may fail to optimize their blending of security and liberty interests by missing opportunities that "enhance both liberty and security," and emphasizing that functional democracies may choose different liberty–security "blends" and revisit that balance from time to time).

4. RUDENSTINE, *supra* note 1, at xiv.

5. *Id.* at 23.

6. *Id.* at xiv–xv.

> demise of the *Bivens* doctrine is mainly supported by the claim that courts should respect Congress's failure to pass a statute that authorizes a remedy and thus refrain from implying a remedy. The quasi-immunity doctrine is mainly upheld on the ground that the nation is better off when senior officials are immunized from liability and thus are more inclined to vigorously discharge their responsibilities. Some judges today argue that the law of standing that closes the courthouse door is warranted by separation-of-powers considerations.[7]

Are there any benefits to judicial deference? Security is not enhanced, Rudenstine argues, as he sees "little to no evidence that such extreme judicial deference substantially protects this security."[8] In fact, not only has security not been enhanced, but there is, in Rudenstine's view, very little hope that the preference for deference amongst jurists will ever subside because the national security threats and interests that have prompted deference "are unrelenting and unending, and as a result, there is no end in sight to the era of judicial abdication."[9]

Stated more clearly, Rudenstine notes:

> Judicial deference in national security cases rests on a dominating juristic mind driven by an unbending way of thinking that resists serious engagement over the merits of its premises. As a result, the legal doctrines that insulate the executive in cases implicating national security have expanded incrementally over many decades, gathering precedent after precedent in support of the mindset that in turn further insulates the mindset from a reexamination of its premises. This unfortunate dynamic makes it unlikely that the mindset will in fact be reconsidered before many of today's judges leave the bench and are replaced by judges not afraid to reassess accepted premises.[10]

Harms have flowed from judicial deference as well: Rudenstine claims that "the Court's deferential stance has substantially harmed the nation—and done so needlessly—by compromising individual liberty, the rule of law, and the democratic process."[11] A functioning democracy requires "the Supreme Court as a third and coequal branch of government that functions as a meaningful check on the powers of the presidency and the Congress, and as the most important governing body that upholds individual liberty and the national commitment to the rule of law."[12]

Rudenstine doesn't hold out much hope for a change in the judiciary's deferential mindset either:

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7. *Id.* at 293.
8. *Id.* at 4.
9. *Id.*
10. *Id.* at 307.
11. *Id.* at 12.
12. *Id.*

> The fact that the high court's attitude toward the privilege seems so impenetrable to change, especially given that the privilege is so convincingly criticized, is best understood as a manifestation of a lengthy era of judicial deference. For decades, the Supreme Court has adopted a hands-off attitude toward the executive in national security cases, and although there are notable exceptions to this pattern, those exceptions remain just that—exceptions. The general rule is one of deference, and while the past suggests that now and then a majority of justices will break ranks with tradition, all signals indicate that no one currently on the Court will challenge the general rule of deference in the near future. As a result, there is little reason to expect that the Court will any time soon revise the privilege, and moreover, even if the Court did revise the privilege, absent a substantial shift in the Court's deferential disposition, the balloon effect created by the cluster of doctrines of deference would sharply minimize the importance of the restructuring.[13]

In light of this dim outlook, how then does Rudenstine believe change may come about? The bulk of his book focuses on, chapter by chapter, setting up examples of judicial deference, demonstrating ways the courts have erred, and then suggesting alternate ways in which jurists can chip away at judicial deference in each of its manifestations. His goal is courts that "can be properly respectful of the executive and the Congress in national security matters"—not of all matters—"while still exercising meaningful judicial review," and not in a way that represents judicial supremacy, but rather by tweaking the "broad spectrum of doctrinal choices [that exist] between judicial abdication and usurpation."[14]

Rudenstine writes:

> Arguing for a different perspective on the question of deference is not premised on an idealization of the judiciary. Instead of idealizing the judiciary, the evidence and the analysis set forth herein portray the judiciary in a very sobering and disturbing light. Nonetheless, the Supreme Court should reshape the doctrines of deference to assure more meaningful judicial review, and this can be accomplished without replacing judicial abdication with judicial usurpation. No one should want government by the judiciary. At the same time, no one should want government without meaningful judicial review. Fortunately, these are not the only alternatives. There is a substantial spectrum separating abdication and usurpation that permits the Court to exercise a form of review that is both meaningful and respectful.[15]

Deference, in Rudenstine's view, is so problematic because in many instances it forecloses judgment, which, to him, is a decision just as

13. *Id.* at 106–07.
14. *Id.* at 23.
15. *Id.* at 12–13.

consequential as a decision on the merits. It "vests the executive with judicially unreviewable discretion on the matter at hand, and that has serious, harmful consequences. As a result, it is more illusion than reality that a judge completely avoids responsibility in cases implicating national security by employing deferential doctrines to dismiss a case."[16] In light of this view of reality, Rudenstine believes that we should dispense with the fiction of a detached court not making a decision in matters that some might think are best left to the Executive because the decision not to make a judgment on the merits is one that effectively empowers the Executive.[17]

Much of Rudenstine's proposed shift away from judicial deference requires concerted action from disconnected actors. It is a well-thought-out and purposeful argument that could be acted upon by judges who read his work or advocates who try to chip away at deference wherever they may see it. But that is a generation-long slog and does not present a guarantee of change. In this respect, Rudenstine is at his best when he recognizes—albeit in passing—that Congress has an important role to play in the debate over deference.

For example, when Rudenstine speaks of the shared responsibilities across branches of government, he notes that

> [t]here is merit to the claim that the courts are not the only institution that can check executive power, and there is special merit to the claim that Congress has far more potential authority to check the executive than do the courts. But conceding those important points is not the end of the analysis. In the constitutional scheme, courts have primary responsibility that neither of the other branches of government can perform effectively to provide wronged individuals with a remedy.[18]

In fact, where Rudenstine finds courts lacking in their evaluation of the Executive in national security matters, the answer is oftentimes not a clarification or expansion of the role of the courts but greater clarity in the specifics of the law courts analyze. In Rudenstine's view, given the power to interpret a statute, courts tend to interpret them in favor of officials involved in national security decisions and to the detriment of those aggrieved by the government's national security officials.[19] Why? To Rudenstine, the answer is ideological. He writes,

> The fact that the Court did not apply the standard to protect individual rights as it does to the exercise of federal power suggests that the

16. *Id.* at 299.

17. *See id.* at 298–99 (asserting that employing a doctrine of deference is in itself a decision to vest the Executive with judicially unreviewable discretion, and it is therefore "more illusion than reality that a judge completely avoids responsibility" for national security matters).

18. *Id.* at 306.

19. *See id.* at 235–37 (contrasting the divergent legal standards in quasi-immunity doctrine and antiterrorism cases to illustrate the Supreme Court's deference to executive power).

> immunity doctrine rests on more than a balance of federal power versus individual remedies and is driven by a more broadly based ideological commitment to depressing the scope of rights and remedies while immunizing executive power from accountability.[20]

But if we recognize that courts may have some ideological or analytical bent that leads them toward deferring to the Executive when faced with ambiguity, isn't stripping away that ambiguity more likely to yield changes than hoping that judges change their ways? After all, as Rudenstine notes, "Congress has substantial control over the jurisdiction of the courts"[21] and can use that control for both good and ill. For example,

> In times of stress, the Court is not only vulnerable, to some extent, to the emotions of our people, but also to action by Congress in restricting what that body may consider judicial interference with the needs of security and defense. Following the Civil War, Congress actually exercised its constitutional powers to provide for the rules governing the appellate jurisdiction of the Supreme Court, for this very purpose.[22]

Importantly, Rudenstine doesn't dismiss the role of Congress; in fact, he laments that body's lack of action, noting that

> it is gravely disappointing that Congress so frequently fails to assert its own responsibilities over specific military and foreign affairs as well as more general national security matters. But no matter what Congress may do in the future to rebalance authority and responsibility with the executive over military and foreign affairs matters, it cannot fulfill the special role in the governing scheme the Supreme Court is assigned. Thus, it is the Supreme Court that is ultimately responsible for stating what the law is, and because of that responsibility the Court has ultimate responsibility for assuring that the United States is a "government of laws, not of men."[23]

This is all true, but then Rudenstine continues by minimizing the role of Congress by stating, "No matter how much oversight the legislature exercised over the executive and the functioning of the National Security State, the legislature cannot fulfill this exceptionally important function within the governing scheme."[24]

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20. *Id.* at 237.

21. *Id.* at 302.

22. *Id.* at 302 n.15 (quoting Earl Warren, *The Bill of Rights and the Military*, 37 N.Y.U. L. REV. 181, 192 n.29 (1962)).

23. *Id.* at 315.

24. *Id.*

Congress doesn't just exercise oversight; Congress can create processes and procedures that bind courts and the Executive.[25] Congress can force structure around doctrine and can even force a conversation about what deference doctrines are constitutionally mandated.[26] Courts can set the circumstances for Congress to create such structure, too, as was seen in *Olmstead*;[27] Rudenstine explains: "The consequence of [*Olmstead*] was to leave the regulation of electronic surveillance to the Congress and the executive. Indeed, the high court all but invited the Congress to enact legislation addressing the matter by making evidence secured from a wiretap inadmissible into evidence in a federal criminal court."[28]

In other contexts Congress plays an important role. One example is in the national security-surveillance context, where Congress

> impos[es] on the NSA responsible legislative boundaries and . . . exercis[es] meaningful oversight to assure that the NSA activities remain within constitutional and legislative boundaries. But Congress alone cannot assure that NSA activities remain lawful. The courts have an important role to fulfill in keeping executive surveillance consistent with the law of the land.[29]

While Rudenstine is correct that Congress alone can't keep the Executive at bay, in arguing for judges to reject deference he sometimes leaves the reader wondering if he believes that the judiciary alone can solve its problems. For example, he writes about how the Court in *Schweiker v. Chilicky*[30] narrowed the "special factors" test to include congressional silence, and quotes from the dissent:

> The mere fact that Congress was aware of the prior injustices and failed to provide a form of redress for them, standing alone, is simply not a "special factor counseling hesitation" in the judicial recognition of a remedy. Inaction, we have repeatedly stated, is a notoriously poor indication of congressional intent, all the more so where Congress is legislating in the face of a massive breakdown calling for prompt and sweeping corrective measures.[31]

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25. *See, e.g.*, Louis Fisher, *Judicial Review of the War Power*, 35 PRESIDENTIAL STUD. Q. 466, 470 (2005) (noting that the language in early Supreme Court cases implied that "any act of war, to be entitled to judicial recognition as such, must be ascribed to congressional authorization").

26. *See* Max Baucus & Kenneth R. Kay, *The Court Stripping Bills: Their Impact on the Constitution, the Courts, and Congress*, 27 VILL. L. REV. 988, 990–92 (1982) (chronicling congressional attempts to limit judicial jurisdiction); *see also* C. HERMAN PRITCHETT, CONGRESS VERSUS THE SUPREME COURT 1957–1960, at 25–27 (1973) (describing the "weapons" available to Congress when it "undertakes to engage in controversy with the Supreme Court").

27. Olmstead v. United States, 277 U.S. 438 (1928).

28. RUDENSTINE, *supra* note 1, at 133.

29. *Id.* at 149–50.

30. 487 U.S. 412 (1988).

31. RUDENSTINE, *supra* note 1, at 216 (quoting Schweiker v. Chilicky, 487 U.S. 412, 440 (1988) (Brennan, J., dissenting)).

Rudenstine's view is that the conservative members of the Court were hostile to the *Bivens* remedy, and that some members of the Court, by adopting a less proactive posture, left "the future of the *Bivens* doctrine . . . in the hands of those who wanted to relegate the doctrine to the dustbin."[32] This critique though, seems to have less to do with any particularly deferential stance on the part of the judiciary, and more to do with displeasure about the outcome of the case. After all, had Congress legislated and created some more clear guidelines for the judiciary to follow, the acceptable bounds of judicial action, and by virtue of that, inaction, would be necessarily constrained. Stated differently, if Congress acts to give guidance to the courts, we will likely see fewer opportunities for juridical freelancing into doctrines of deference.

Rudenstine almost admits as much when he writes, quoting the Court in *Malesko*,[33] "it is the Court's 'primary duty' to 'apply and enforce settled law, not to revise that law to accord with our own notions of sound policy.'"[34] Thankfully, Rudenstine rarely makes detours like this, where it seems he is more concerned with the outcome of a case than how doctrines of deference lead to those outcomes. For example, in an illustrative passage where Rudenstine compares the Court's analysis of immunity to the Court's interpretation of the scope of a criminal statute, he makes clear the point that sometimes the Court hedges in favor of the government over defendants. He writes:

> [T]he idea that Congress makes law, not the courts, and that in the absence of a statute authorizing the courts to grant a damage remedy the court should refrain from crafting a remedy. If this analysis were applied to the executive's claim of quasi-immunity, the Supreme Court should have reached the opposite result. Instead of exercising its own common law powers to fashion a quasi-immunity defense, the Court should have stayed its hand on the ground that Congress makes the nation's law.[35]

Taken together, Rudenstine's description of the costs of judicial deference in matters of national security is compelling. However, his prescription seems incomplete. Relying on judges to change their ways when the root of their deferential stance may be grounded in timidity, ideological commitment, or incorrect understandings of legal doctrine seems an unsatisfying and improbable path forward. Rather, to truly effectuate change in doctrines of judicial deference will require a concerted effort not only on the part of judges and advocates before those judges, but also targeted

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32. *Id.*

33. Corr. Servs. Corp. v. Malesko, 534 U.S. 61 (2001).

34. RUDENSTINE, *supra* note 1, at 217 (quoting Corr. Servs. Corp. v. Malesko, 534 U.S. 61, 83 (2001) (Stevens, J., dissenting)).

35. *Id.* at 236.

changes from Congress that at a minimum force moments for issues of deference to be discussed, and better yet, clarify and direct the courts to behave in certain ways when dealing with matters of national security.

II. The Future of Violence

Where Rudenstine's work is a comprehensive examination of how judicial deference has empowered the Executive Branch, Wittes and Blum's work is a comprehensive examination of how new and emergent threats will challenge the Executive Branch's capacity to deal with them. Wittes and Blum see a world filled with threats; to counter these threats will require more creative and nuanced powers of regulation and investigation. They do not shy from their view, explicitly stating, "[t]he development of technologies of mass empowerment, as we have seen, creates vast new arenas for human activity. One does not necessarily maximize freedom in such circumstances by minimizing governance and governmental power."[36]

Wittes and Blum largely reject the metaphor that assumes a balance between liberty and security:

> The idea of balance . . . described reality badly even centuries before technologies of mass empowerment began lessening the governability of individuals worldwide. . . .
>
> While the balance metaphor is misleading under the best of circumstances, it is particularly so as applied to technologies of mass empowerment in an environment in which threats and defenses are widely distributed.[37]

Rather than thinking in terms of balance, Wittes and Blum offer up ideas that are intended to pull multiple underused levers of government, incrementally increasing the government's power to combat threats.[38] Where Rudenstine seeks to chip away, bit by bit, at judicial deference, Wittes and Blum seek to ratchet up governmental power, bit by bit, thus decreasing the universe of security threats. Where Rudenstine critiqued the Jacksonian view of executive overreach,[39] Wittes and Blum embrace it, favorably quoting his views on liberty and order:

> This Court has gone far toward accepting the doctrine that civil liberty means the removal of all restraints from these crowds, and that all local attempts to maintain order are impairments of the liberty of the

36. WITTES & BLUM, *supra* note 2, at 134.

37. *Id.* at 133.

38. *Id.* at 133–34; *see also id.* at 140–45 (rejecting a balance-based understanding of privacy rights in the security context).

39. *See* RUDENSTINE, *supra* note 1, at xv–xvi (critically describing Justice Jackson's opinion in Chicago & S. Air Lines, Inc. v. Waterman S.S. Corp., 333 U.S. 103 (1948), which espoused judicial deference to national security decisions in the political branches, as "a new and profoundly troubling era in American judicial history").

> citizen. The choice is not between order and liberty. It is between liberty with order and anarchy without either. There is danger that, if the Court does not temper its doctrinaire logic with a little practical wisdom, it will convert the constitutional Bill of Rights into a suicide pact.[40]

Building around this juridical launching point, Wittes and Blum contend that there are a few concrete steps that can be taken to counter a world of multiple complex threats. Each suggestion offered by the duo revolves around either more laws, greater powers, or broader distribution of responsibility for countering those threats.[41]

They offer up the power of direct regulation as one of the most straightforward ways of countering threats, writing:

> The magnitude of the problem posed by a world of many-to-many threats, when one faces it squarely, is so overwhelming that it is tempting to simply ignore the most direct and simple tool governments have in influencing their citizens: the ability to compel people to do things and forbid them from doing other things through what one might call direct regulation.[42]

Explaining why direct regulation works, they note that direct regulation includes "the power not only to forbid and require conduct but also to investigate conduct that might not comply with rules, to define the conditions under which conduct is tolerated, to license people to engage in certain behaviors, and to punish noncompliance with the rules."[43] Direct regulation brings with it the benefit of establishing strong behavioral norms, and oftentimes those norms are "far stronger than government's power actually to enforce those norms."[44] Direct regulation also empowers the Executive Branch by creating "the legal basis for investigation and enforcement action that can play an important role in deterring abuse of highly empowering technologies, stopping and incapacitating those who misuse them, and letting potential bad actors know that authorities are watching."[45]

These arguments have an air of overregulation and overcriminalization to them that should concern civil libertarians. Direct regulation that is so comprehensive that citizens are in constant fear that they are in violation of rules that the government can't enforce except by choosing whom to enforce against may be perfectly acceptable in a traffic context, but when dealing with security-related offenses where the punishment may be years in prison,

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40. WITTES & BLUM, *supra* note 2, at 147 (quoting Terminiello v. Chicago, 337 U.S. 1, 37 (1949) (Jackson, J., dissenting)).

41. *See id.* at 133, 206–18 (proposing various options for domestic governance that aim to protect liberty and security without relying on a balance-based rationale for justification).

42. *Id.* at 206.

43. *Id.*

44. *Id.* at 207.

45. *Id.* at 208.

the analogy tends to fall apart. Thus, while Wittes and Blum's argument that "having a complex set of civil and criminal regulations . . . [can provide] a hook [to support an investigation]"[46] is compelling, that hook is one that likely requires more carefully calibrated procedures to protect against abuse. Wittes and Blum focus heavily on countering threats, but don't spend much time on articulating how to protect against overreach.

They write: "In the world of many-to-many threats and defenses, the power of direct regulation will continue to serve as a frontline lever for deterring, punishing, and smoking out abuses—and policy makers should not underestimate it."[47] Indeed, policymakers should not underestimate the power of direct regulation, but they similarly should consider how that power might be structured and organized to prevent its abuse. Wittes and Blum hint at this by stating "[t]he trick here is to regulate well, mindfully of the realistic benefits of new rules, of their costs for innovation and benign use, and of their likely effectiveness,"[48] but more insight into how to structure a policymaker's thinking, and ultimately a court's thinking, about the costs of innovation, or the potentially benign uses of a technology would have been a welcome addition to the text.

Wittes and Blum's arguments that "in the world of many-to-many threats, the user of a platform cannot bear all the risk associated with that platform" and "those who introduce new vulnerabilities to a shared global system on which we all depend need to bear some of the risk too"[49] is an interesting call to policymakers to develop and force into complex systems incentives to balance risk and growth. They come to this conclusion after summarizing the work of Steven Bucci, Paul Rosenzweig, and David Inserra. Those authors believe that shifting responsibility onto platform developers may very well lead to the creation of a liability system, and to "the development of an insurance system against liability. The insurance function allows a further spreading of risk in a way that fosters broad private-sector responsiveness."[50]

Wittes and Blum hope to encourage policy makers to write laws that "extend liability from a primary wrongdoer to some other party—a 'gatekeeper' or 'an enabler'—who is in a position to disrupt the wrongdoing by withholding her services or cooperation, or by taking some preventive

46. *Id.* at 209.

47. *Id.*

48. *Id.*

49. *Id.* at 218.

50. *Id.* (quoting Steven P. Bucci et al., *A Congressional Guide: Seven Steps to U.S. Security, Prosperity, and Freedom in Cyberspace*, HERITAGE FOUND. (Apr. 1, 2013), http://www.heritage.org/research/reports/2013/04/a-congressional-guide-seven-steps-to-us-security-prosperity-and-freedom-in-cyberspace [https://perma.cc/XY94-RQHB]).

measure."[51] Drawing an analogy to the world of health and safety, Wittes and Blum note how intermediary regulation is in fact "one of the principle tools" in those spheres.[52] Shifting away from direct regulation and instead thinking about protecting national security by attempting to influence mass behavior is, in their mind, a necessary change in thinking to counter "the world of many-to-many threats."[53] Stated simply, they write "we are going to have to learn to think about national security as an area not all that different from the many others in which government seeks to push all people toward a safer, healthier environment."[54] Their view is that it is necessary to create a

> legal system to distribute risk so as to incentivize the expenditure of resources—however marginal they may turn out to be—so as to encourage the design and implementation of safer systems and to discourage the headlong technological drift toward enhanced vulnerability. At the most fundamental level, this means ensuring that parties who negligently or recklessly introduce vulnerabilities into platforms will be liable for the damages those actions inflict on others.[55]

While pulling the multiple levers of government in this way can create a distributed and incremental increase in security, Wittes and Blum recognize that the condition precedent for such changes is a series of decisions about whether potential threats are actually threats that require governmental attention. In other words, "[b]efore government can decide how to protect you from a particular threat, it has to decide whether to protect you from that threat. It has to decide whether even to define the conduct at issue as a threat at all. These are values questions, and they do not answer themselves."[56] While the values questions will require greater discussion and evaluation, and I would argue, greater analysis of the checks to be placed on greater governmental powers, Wittes and Blum attempt to offer a message of hope. They state:

> While there is no magic policy solution to the security problems of the world we are entering, neither is society without power—in the form of government, in the form of industry, and in the form of loose collections of individuals—to make the environment safer. There are a lot of levers, and cumulatively they are highly significant.[57]

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51. *Id.* at 211 (citing Daryl J. Levinson, *Collective Sanctions*, 56 STAN. L. REV. 345, 365 (2003)).

52. *Id.* at 213.

53. *See id.* at 90 (arguing that security is not only dependent on "how big and strong a grizzly bear one can deploy," but also on "whether one can incentivize one's own swarm of bees").

54. *Id.* at 213–14.

55. *Id.* at 215–16.

56. *Id.* at 219.

57. *Id.* at 232.

III. The Role of Congress

Is it possible to harmonize the views offered by Rudenstine, Wittes, and Blum? On the one hand, we see an argument that policy makers should ramp up the nation's defenses by pulling multiple levers of governance, increasing the effective reach of the Executive Branch. On the other hand, we see a judiciary that has been heretofore unwilling to do anything other than defer to the Executive Branch as its powers expand. One possible way to reconcile these competing interests is to assume that each new power, law, or regulation that Wittes and Blum think is required, should bring with it enhanced powers of judicial review. Drawing from Rudenstine, we may find that

> a judiciary that holds the executive more accountable than it has in the past will enhance the nation's security because the possibility of such judicial review might cause the executive to proceed with greater deliberateness than it might otherwise do and that such deliberateness may in turn result in wiser decisions.[58]

In Rudenstine's view,

> if the governing scheme is to be righted so that the executive is not above the law, so that an unlawful executive is not exempted from judicial accountability, so that allegedly wronged individuals have legal remedies and are not sacrificed because of a judicial utilitarian calibration in the name of national security, so that the rule of law is not only an ideal but a reality, then the courts will need to abandon a posture of acquiescence in favor of shaping legal doctrines that make the executive toe the legal line and respect the rule of law.[59]

Mapping that worldview onto Wittes and Blum's recommendations would lead us to increased powers, coupled with increased processes for legal remedies and judicial review. The difference between what Rudenstine proposes and what I propose is that we need not wait for courts to "abandon a posture of acquiescence"[60]; instead, we need only tie new governmental powers to new powers of judicial review.

For example, if greater surveillance powers are necessary to capture suspected national security threats, then Congress could by statute make it clear that judges will play an important part in reviewing those surveillance powers. We have seen this in the case of the FISA Court and in the Wiretap Act.[61] While both statutes may require reforms, they have given clear guidance about the role of the judiciary in reviewing these executive

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58. RUDENSTINE, *supra* note 1, at 20–21.

59. *Id.* at 19.

60. *Id.*

61. Title III of the Omnibus Crime Control and Safe Streets Act of 1968 (Wiretap Act), 18 U.S.C. §§ 2510–22 (2012); Foreign Intelligence Surveillance Act of 1978, Pub. L. No. 95-511, 92 Stat. 1783 (codified as amended in scattered sections of 50 U.S.C.).

actions.[62] Pulling the levers of governance in this way ensures that jurists don't have the opportunity to engage in their deferential dance. When a statute calls for specific procedures and judicial review, it is difficult for the court to accept an argument that "judges are not competent to assess matters implicating national security."[63] My argument here is that to counter the view advanced by Supreme Court Justice Robert Jackson that certain matters

> are "political, not judicial" in nature; they are "delicate, complex, and involve large elements of prophecy"; and they are decisions for which the "judiciary has neither aptitude, facilities nor responsibility and which has long been held to belong in the domain of political power not subject to judicial intrusion or inquiry"[64]

requires direct action to remove those matters from the realm of politics and place them in the realm of judicial inquiry.

Rudenstine almost admits as much when he notes how the literature has focused more "on Congress than on the courts because Congress has substantially more power than the courts to balance off the executive, but also because it is generally thought that Congress has over time abdicated its power."[65] But he then retreats from the position when he writes, "as much constitutional room as may exist for Congress to change its ways and to assert control over executive conduct, Congress alone cannot solve the distortions in the governing scheme that have developed in the postwar decades."[66] Of course, Congress can't do it alone, but neither can the judiciary.

Consider how such an approach might work in the context of targeted killings, an area that Rudenstine critiqued. Rather than assuming that judges are capable of exercising judicial review at any stage of a complex military process, instead Congress could mandate points at which the judiciary could play an important role and should be entitled to greater information. It may be the case that there are multiple problems with *ex ante* review of targeting decisions. For example, if the process were to prove itself as too burdensome,

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62. 18 U.S.C. § 2518 (stating that a judge may issue a warrant authorizing the interception of communication upon a showing of probable cause to believe "that an individual is committing, has committed, or is about to commit" an enumerated crime; probable cause to believe "that particular communications concerning that offense will be obtained through such interception"; probable cause to believe "that the facilities from which, or the place where, the wire, oral, or electronic communications are to be intercepted are being used, or are about to be used, in connection with the commission of such offense, or are leased to, listed in the name of, or commonly used by such person"; and that "normal investigative procedures have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous" to obtain a court order to intercept wire, oral, and electronic communications); Foreign Intelligence Surveillance Act §§ 103–05 (creating the Foreign Intelligence Surveillance Court and establishing the standard of judicial review for various types of foreign intelligence surveillance).

63. RUDENSTINE, *supra* note 1, at 294.

64. *Id.* (quoting Chicago & S. Air Lines, Inc. v. Waterman S.S. Corp., 333 U.S. 103, 111 (1948)).

65. *Id.* at 18.

66. *Id.* at 19.

the Executive Branch may decide to shift its tactics to less accurate but more opaque forms of strikes, potentially increasing harm to civilians.[67] There may also be political-accountability problems. For example, the Executive Branch could shield itself from blame by noting that a target was approved by a judge:

> [I]f a judge failed to approve a target, and that individual later attacked the United States or its interests, the Executive Branch could claim that it sought to target the individual, but the Judiciary would not allow it—laying blame for the attack at the feet of a judge with life tenure."[68]

Finally, there is the possibility that Executive Branch expertise combined with politically aware judges may make for very deferential *ex ante* review process—something akin to a rubber stamp.[69]

On the other hand, *ex post* review may be justifiable if carefully calibrated. How to carefully calibrate the role of the courts in such circumstances is so complex that it is unlikely to be adequately decided by judges alone. In fact, judges not inclined to take a deferential stance would nevertheless face a host of politically charged questions that would likely lead them to defer judgment. Consider the following questions raised by *ex post* review of drone strikes.

It certainly seems more judicially manageable for a court to review a strike and the details associated with that strike after it occurs. However, many of the same questions of expertise will arise, particularly those related to the process the government follows for creating kill lists and determining whether a strike will successfully impact an enemy organization.[70] Assuming

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67. *See* Jens David Ohlin, *Would a Federal District Court for Drones Increase Collateral Damage?*, LIEBER CODE (Feb. 13, 2013), http://www.liebercode.org/2013/02/would-federal-district-court-for-drones.html [https://perma.cc/4U32-LGPP] (discussing how the Executive Branch's "targeted killings program" could add a "willful[ly] blind[]" system of "signature strikes," putting citizens in danger because "ignorance would maintain the legality of the strike").

68. Gregory S. McNeal, *Targeted Killing and Accountability*, 102 GEO. L.J. 681, 791 (2014).

69. *See* RUDENSTINE, *supra* note 1, at 132 (describing the FISA court as "fairly characterized as little more than a 'rubber stamp'"); Robert Chesney, *A FISC for Drone Strikes? A Few Points to Consider . . .*, LAWFARE (Feb. 7, 2013), https://www.lawfareblog.com/fisc-drone-strikes-few-points-consider [https://perma.cc/5YXC-LTUC] (describing how some judges do not want any involvement in targeted-killings decisions, and noting that "[a] core benefit to judicial review, presumably, is that judges might detect and reject weak *evidentiary* arguments for targeting particular persons. I wouldn't bet on that occurring often, however. Judges famously tend to defer to the executive branch when it comes to factual judgments on matters of military or national-security significance."). For discussion on the Executive Branch's national security expertise, see generally Gregory S. McNeal, *The Pre-NSC Origins of National Security Expertise*, 44 CONN. L. REV. 1585 (2012) (explaining "America's contemporary security state," detailing its historical origins, and describing its current place in national security-policy debates and decisions).

70. *But see Drones and the War on Terror: When Can the U.S. Target Alleged American Terrorists Overseas?: Hearing Before the H. Comm. on the Judiciary*, 113th Cong. 66 (2013) (statement of Stephen I. Vladeck, Professor of Law, American University Washington College of Law) (arguing that judges have sufficient expertise in national security litigation). Professor Vladeck argues:

that a court could properly conduct such a review, who should be entitled to sue the government after the fact? Should lawsuits be limited to Americans killed or wounded in strikes? If so, why should the line be drawn based on citizenship? What about persons whose property is damaged, as it was in *El-Shifa Pharmaceuticals*?[71] What about foreign governments whose property is damaged? As these questions indicate, how the lines are drawn for *ex post* review of targeting decisions presents a host of questions that raise serious separation-of-powers and diplomatic concerns—the exact foreign-relations interests that have prompted courts to stay out of these types of decisions in the past. Those foreign-relations concerns would not be remedied by even the best statutory framework for governing the review. Furthermore, what is to stop judicial review in other conflicts involving far more air strikes and far greater casualties? For example, it is estimated that a potential conflict on the Korean peninsula might cause "hundreds of thousands of civilian deaths."[72] Even assuming that only a small percentage of those deaths would be caused by American air strikes, this nonetheless demonstrates the impracticability of *ex post* judicial review in anything but a small category of U.S. airstrikes. Limiting the right of judicial review, based merely on potential caseload, raises questions as to the propriety of the right in the first place.

Narrowly and carefully defining the acceptable scope of judicial engagement here is a necessity if courts are to play a greater role in targeting decisions, or in any of the other levers that Wittes and Blum might want to activate in favor of greater national security powers.[73]

Outside of targeting, Rudenstine critiqued the FISA Court for its secrecy,[74] while Wittes and Blum called for greater surveillance powers,

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> [I]f the Guantánamo litigation of the past five years has shown nothing else, it demonstrates that judges are also more than competent to resolve not just whether individual terrorism suspects are who the government says they are (and thus members of al Qaeda or one of its affiliates), but to do so using highly classified information in a manner that balances . . . the government's interest in secrecy with the detainee's ability to contest the evidence against him.

Id.

71. El-Shifa Pharm. Indus. Co. v. United States, 607 F.3d 836, 838–39 (D.C. Cir. 2010) (describing a 1998 missile strike that destroyed a Sudanese pharmaceutical plant that the Clinton administration believed to be manufacturing chemical weapons). For a discussion of the *El-Shifa Pharmaceuticals* case and judicial review, see McNeal, *supra* note 68, at 764–68 (recounting the various claims asserted by the *El-Shifa* plaintiffs and the courts' response that their claims were nonjusticiable).

72. Scott Stossel, *North Korea: The War Game*, ATLANTIC (July 2005), http://www.theatlantic.com/magazine/archive/2005/07/north-korea-the-war-game/304029/ [https://perma.cc/YN9N-ZU46].

73. *See* RUDENSTINE, *supra* note 1, at 300 ("The idea that it would be unacceptable for courts to participate in a process that injured national security might be plausible if the concept of national security was very narrowly and carefully defined, and if there was broad agreement on the concept. But these conditions do not exist.").

74. *Id.* at 131–32.

albeit with limits on how the data gathered could be used.[75] How might we reconcile the desire for chipping away at deference with the need for enhanced powers? On this front, it seems that Congress must also play a role. In fact, Congress has on multiple occasions updated the FISA Court's governing rules, and with each change, Congress alters the way the FISA Court functions.[76] For example, in the Intelligence Reform and Terrorism Prevention Act of 2004 (IRTPA),[77] Congress required the Attorney General to provide a "summary of significant legal interpretations" of FISA "involving matters before" the FISC or the Court of Review.[78] The summary must include "interpretations presented in applications or pleadings filed with the Foreign Intelligence Surveillance Court or the Foreign Intelligence Surveillance Court of Review by the Department of Justice."[79] The law requires disclosure of opinions or orders if they "include significant construction or interpretation" of FISA.[80] Congress engages in this type of shaping of judicial review in enough instances that we shouldn't shy away from demanding it in the national security context. For example, under the Administrative Procedure Act "final agency action" is a prerequisite to most causes of action.[81]

When it comes to concerns that courts may be forced to make judgments in secret, here too, Congress can play a role. Congress can mandate, for example, that in national security-related cases handled by the FISA Court, "opinions are to be published, subject to appropriate redactions."[82] Such careful calibrations of incentives and mechanisms of judicial review are entirely possible, as even Rudenstine notes that the original FISA has evolved over the years: "Since the passage of the original statute, FISA has been amended to address the use of pen registers and trap devices for conducting telephone or email surveillance . . . ."[83] In fact, Rudenstine himself reconciles his views on the judiciary with a more congressionally centric set of reform proposals when he writes,

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75. WITTES & BLUM, *supra* note 2, at 144–45.

76. The following passages are drawn from Gregory S. McNeal, *Reforming the Foreign Intelligence Surveillance Court's Interpretive Secrecy Problem*, 2 HARV. J.L. & PUB. POL'Y: FEDERALIST EDITION 77 (2015), http://www.harvard-jlpp.com/wp-content/uploads/2015/02/McNeal_Final.pdf [https://perma.cc/43GG-4TZG].

77. Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. No. 108-458, 18 Stat. 3638, 3743 (codified as amended in scattered sections of U.S.C.).

78. 50 U.S.C. § 1871(a)(4) (2012).

79. *Id.*

80. *Id.* § 1871(a)(5).

81. 5 U.S.C. § 704 (2012); Lujan v. Nat'l Wildlife Fed'n, 497 U.S. 871, 882 (1990); *see also* Bennett v. Spear, 520 U.S. 154, 177–78 (1997) (describing an agency action as final if it "mark[s] the 'consummation' of the agency's decisionmaking process" and is one "by which 'rights or obligations have been determined,' or from which 'legal consequences will flow[]'").

82. McNeal, *supra* note 76, at 98.

83. RUDENSTINE, *supra* note 1, at 139 (citation omitted).

> To restore public confidence in the FISC requires the enactment of proposed legislative changes. . . .
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> . . . Unfortunately, the courts have severely undermined their own legitimacy, and whether the FISC, or some reformed version of the FISC, can redeem itself and regain the public's trust cannot be answered in the absence of meaningful reform legislation and sufficient disclosures by the FISC that establish that it is in fact insisting upon meaningful judicial accountability.[84]

Finally, how else might we find ways of calibrating and enhancing the powers of the government, as Wittes and Blum suggest, while also protecting from executive overreach? One approach might be to require careful risk-based decisions, the analysis of which is subject to judicial review. For example, Wittes and Blum discuss how "[i]n [a] world of many-to-many threats," drones and other robotic systems may become a security threat.[85] Well, what is the magnitude of that threat? And what is the likelihood that the threat will manifest itself?

Congress could mandate that any new powers related to countering national security threats be tied to risk assessments that analyze not only the possibility of a threat but also the probability of a threat. By focusing on probabilities, Congress can force discussions away from a universe of potential national security threats to a constrained discussion about those risks that actually warrant a response.[86] As security analyst Bruce Schneier has written, focusing on the worst possible outcome "substitutes imagination for thinking, speculation for risk analysis, and fear for reason."[87] It substitutes ill-informed, possibilistic thinking for careful, well-reasoned, probabilistic thinking, forcing us to focus on what we don't know and what we can imagine, rather than what we do know. "By speculating about what can possibly go wrong, and then acting as if that is likely to happen, worst-case thinking focuses only on the extreme but improbable risks and does a poor job at assessing outcomes."[88] While public attention to national security threats may create a sense of urgency amongst members of the public and some agency officials, this "does not relieve those in charge of the requirement, even the duty, to make decisions about the expenditures of vast

84. *Id.* at 149–50.

85. WITTES & BLUM, *supra* note 2, at 12, 209.

86. *See* Cass R. Sunstein, *Terrorism and Probability Neglect*, 26 J. RISK & UNCERTAINTY 121, 122 (2003) (asserting that government should not only respond to terrorism, but also attempt to assuage fear when the costs of said fear outweigh the benefits of not responding).

87. Bruce Schneier, *Worst-Case Thinking*, SCHNEIER ON SECURITY (May 13, 2010, 6:53 AM), https://www.schneier.com/blog/archives/2010/05/worst-case_thin.html [https://perma.cc/AC7H-MKLM].

88. *Id.*

quantities of public monies in a responsible manner" that is disconnected from emotions and focused on probabilities.[89]

In addition to looking at probabilities and accepting that not all threats can be countered, Congress can also mandate that every agency action taken to address national security threats be preceded by a formal risk assessment.[90] Assessing risks is the first managerial step in decision making about potential threats, and it is one that is readily subject to congressional oversight, and perhaps even judicial review in the event a party is aggrieved by government action. Forcing agencies to conduct a risk assessment is the first step toward ensuring that agencies efficiently and effectively use taxpayer funds and control costs. A risk assessment is also the first step toward ensuring that agencies make hard choices with limited resources—every possible threat cannot be guarded against, therefore agencies must focus on the riskiest threats. By limiting the number of actions an agency can take, we force, as Rudenstine suggests in the case of judicial review, a focus on "deliberateness [, which] may in turn result in wiser decisions."[91]

Conclusion

From Rudenstine, we are presented with a compelling view of the costs of judicial deference. But it's a circumstance that is unlikely to change given factors such as timidity, ideological commitment, or incorrect understandings of legal doctrine. To truly effectuate change in doctrines of judicial deference, it seems, will require a concerted effort not only on the part of judges and advocates before those judges but also targeted changes from Congress. Congress must force judicial moments and create circumstances whereby the courts may review certain matters dealing with national security. This is, perhaps, where Wittes and Blum's lever pulls come into play. By crafting a future in which policy changes create distributed and incremental increases in security, Wittes and Blum suggest forcing functions that may compel judicial review. As Congress creates enhanced powers for the Executive, Congress can simultaneously consider what role courts should take in reviewing such powers. After all, Rudenstine admits the FISA Court

89. JOHN MUELLER & MARK G. STEWART, TERROR, SECURITY, AND MONEY: BALANCING THE RISKS, BENEFITS, AND COSTS OF HOMELAND SECURITY 17 (2011).

90. The analysis to follow draws from Mueller and Stewart's excellent book, TERROR, SECURITY, AND MONEY, *supra* note 89, which explains in detail the benefits of following the methodology set forth here. *See id.* at 16 (discussing the relative benefits of risk assessment); *see also Unmanned Aerial System Threats: Exploring Security Implications and Mitigation Technologies: Hearing Before the Subcomm. on Oversight and Mgmt. Efficiency of the H. Comm. on Homeland Sec.*, 114th Cong. (2015) (statement of Dr. Gregory S. McNeal, Associate Professor of Law and Public Policy, Pepperdine University), http://docs.house.gov/meetings/HM/HM09/20150318/103136/HHRG-114-HM09-Wstate-McNealG-20150318.pdf [https://perma.cc/XTQ3-UWNG] (recommending that the Department of Homeland Security engage in risk assessment to evaluate the use of unmanned aerial systems).

91. RUDENSTINE, *supra* note 1, at 21.

is a creation of Congress, and other similar review bodies and mechanisms could be created by Congress that will force judges into the conversation around the new powers Wittes and Blum suggest are necessary. Whatever path the nation chooses, the futures that these three authors hope for all require Congress to assert itself—to cabin existing national security excesses and to create new, carefully calibrated national security powers.