Leveling the Deference Playing Field

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LEVELING THE DEFERENCE PLAYING FIELD
By Kathryn E. Kovacs¹
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ABSTRACT

Judicial deference to federal agency expertise is appropriate. What is not appropriate is the judicial tendency to give the military more deference than other agencies not only in cases that directly implicate military expertise, but also in administrative law cases raising constitutional, environmental, and employment issues. This article argues that the military should receive no greater deference than other agencies under the Administrative Procedure Act. The APA established a single standard of judicial review for all agencies. Recent empirical studies have confirmed, however, what the case law has long revealed: that courts often apply different standards of review to different agencies, and specifically a “super-deference” standard to the military. This article demonstrates that the APA’s exception for “military authority exercised in the field in time of war,” interpreted correctly, insulates core military functions from judicial review, thus removing any basis for giving the military heightened deference as a matter of course. That exception accommodates separation of powers concerns raised by judicial interference with the President’s authority as Commander in Chief, and it removes concern about courts second-guessing military expertise in particular by making actions that directly implicate that expertise unreviewable.

¹ Assistant Professor, Rutgers School of Law - Camden. Thanks to John Oberdiek and Beto Juarez for reading drafts of this article.
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INTRODUCTION

Courts give federal agencies substantial deference in cases challenging agency action. That deference appropriately credits agency expertise. The military, however, tends to get more deference than other agencies, and not only in cases that directly implicate military expertise, but also in administrative law cases raising constitutional, environmental, and employment issues, among others. Given that the Department of Defense is the largest agency in the federal government, the judicial practice of giving the military excessive deference in administrative law cases has a profound effect on the courts’ ability to fulfill their critical function of ensuring that agencies comply with federal law. I argue here that the judicial practice of giving the military more deference than other agencies in administrative law cases should end. All agencies are entitled to the courts’ respect, but there is no ground for insulating the military from searching judicial review any more than other agencies.

This article falls at the intersection of two debates that have engaged academics, courts, and practitioners alike. First is the long-running and lively debate about the extent to which courts should defer to the military when reviewing military action. Second is the equally long-running and lively debate about the role of common law in administrative law. More than sixty years after Congress codified the basic tenets of administrative law in the Administrative Procedure Act of 1946 (APA), the courts...
continue to rely on judicially created doctrines of administrative common law, supplying ample fodder for scholarly discussion.\(^7\)

This article examines the courts’ application of an extraordinary level of deference to the military in APA cases, even though Congress made a deliberate decision to subject the military to the same standard of review as other federal agencies under the APA. For all federal agency actions that are reviewable under the APA, Congress established a single standard of review: “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.”\(^8\) The APA’s history shows that the decision to subject all agencies to the same level of judicial inquiry was deliberate. Congress gave the military special treatment, but not with regard to the standard of review. Yet, courts continue to apply different standards of review to different agencies. The military continues to enjoy “super-deference,”\(^9\) even for actions reviewed under the APA. This article explains why that is a problem and why there is no satisfactory explanation for that distinction.

In the APA, Congress carved out exceptions for some actions, including “military authority exercised in the field in time of war.”\(^10\) I have previously demonstrated that the scope of the “military authority” exception was intended to be broad and argued that it should continue to be interpreted broadly because it is a condition on a waiver of federal sovereign immunity.\(^11\) In light of that, I argue here that the “military authority” exception insulates core military functions from judicial review under the APA, and thus there is no basis for the courts’ tendency to give the military greater deference than other agencies. The exception already accommodates separation of powers concerns raised by judicial interference with the President’s authority as Commander in Chief, and it removes concern about courts second-guessing military expertise in particular by making actions that directly implicate that expertise unreviewable. This article therefore concludes that the military should receive the same level of

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\(^11\) Kovacs, *supra* n.10, at 676 n.21, 720.
deference as other agencies under the arbitrary or capricious standard. My goal here is not to take on the entire concept of administrative common law or to argue that the military’s administrative actions are never entitled to increased deference. Rather, I seek only to prove the narrow point that, under the APA, all agencies should receive deferential review; the military should receive no more or less deference than any other agency.

Part I of this article describes the APA’s single standard of review and briefly recounts the history of the Act, which highlights the deliberateness of Congress’s choice to subject the military to the same standard of review as other agencies. This discussion provides some perspective as to why the practice of giving the military super-deference causes particular concerns beyond textualist and originalist arguments. Part II examines the evidence that, despite the plain language of the APA, the courts frequently apply different standards of review to different agencies, specifically a super-deference standard to the military, and gives some examples of such cases. Part III then discusses the problematic aspects of that practice: the separation of powers concerns raised by unauthorized federal common law generally, as well as the additional concerns raised by the extra-ordinary nature of the APA, administrative common law, and the way in which this practice undermines the goals of the APA and contradicts the Supreme Court’s increasing tendency to respect the text of the APA.

Part IV turns to the question of whether there is an adequate justification for giving the military super-deference instead of arbitrary or capricious review.\(^\text{12}\) I contest the arguments that judicial review under the APA would interfere with the President’s authority as Commander in Chief and that the military’s expertise and information entitle it to a more deferential standard of review than other agencies. I discuss briefly the impact of ideology on the courts’ deference practice and the procedural distinctions that may merit increased deference and that would benefit from further study. Part V closes with a discussion of how judicial candor might counteract the courts’ tendency to give the military more deference than other agencies under the APA.

I. THE APA’S SINGLE STANDARD OF REVIEW

Some federal statutes provide the cause of action and waiver of sovereign immunity necessary to sue the federal government.\(^\text{13}\) Other statutes are actionable only through the APA,\(^\text{14}\) which provides a cause of

\(^{12}\) I leave open the possibility that there may be an adequate justification for giving other agencies heightened deference under the APA.

\(^{13}\) E.g., Clean Air Act, 42 U.S.C. 42 U.S.C. §§ 7418, 7604.

\(^{14}\) E.g., the National Environmental Policy Act, 42 U.S.C. §§ 4321-4370h. See Daniel R. Mandelker et al., NEPA Law and Litigation § 3:3.1 (2d ed. 2009).
action for “a person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute” and waives the government’s immunity from suits “seeking relief other than money damages.” Section 10(e) of the APA provides a uniform standard of review for all agency action that is subject to judicial review under the Act. What is now codified at 5 U.S.C. § 706(2)(A) authorizes courts to set aside agency action that is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” The debate over the meaning of those phrases continues. For purposes of this discussion, it suffices to say that Congress intended for that standard to be quite deferential. The Supreme Court has held that, under what is now generally referred to as the “arbitrary or capricious standard,” courts “must consider whether the decision was based on a consideration of relevant factors and whether there has been a clear error of judgment.”


16 Section 706(2) of the APA sets forth several other standards of review as well, including the “substantial evidence” standard for factual determinations. 5 U.S.C. § 706(2)(E). For purposes of this article, I use the arbitrary or capricious standard as a shorthand for the various standards set forth in section 706(2), as do many courts and commentators. See Independent Acceptance Co. v. California, 204 F.3d 1247, 1248 n.1 (9th Cir. 2000); Patricia M. Wald, Judicial Review in Midpassage: The Uneasy Partnership Between Courts and Agencies Plays On, 32 TULSA L.J. 221, 232 n.70, 233 (1996); see also Association of Data Processing Service Organizations, Inc. v. Board of Governors of Federal Reserve System, 745 F.2d 677, 683 (D.C. Cir. 1984) (“Paragraph (A) of subsection 706(2)-the “arbitrary or capricious” provision-is a catchall, picking up administrative misconduct not covered by the other more specific paragraphs.”).

17 See, e.g., Kathryn A. Watts, Proposing a Place for Politics in Arbitrary and Capricious Review, 119 YALE L.J. 2 (2009); Adrian Vermeule, Our Schmittian Administrative Law, 122 HARV. L. REV. 1095, 1118 (2009) (arguing that the arbitrary or capricious standard is an “adjustable parameter[,]” the intensity of which may be adjusted “as wars, security threats, and emergencies come and go”); id. at 1134; Peter L. Strauss, Overseers or “The Deciders”--The Courts in Administrative Law, 75 U. CHI. L. REV. 815, 820-21 (2008).

18 “To state the matter very broadly, judicial review is generally limited to the inquiry whether the administrative agency acted within the scope of its authority. The wisdom, reasonableness, or expediency of the action in the circumstances are said to be matters of administrative judgment to be determined exclusively by the agency.” COMM. ON ADMINISTRATIVE PROCEDURE, Administrative Procedure in Government Agencies, S. Doc. 77-8, at 87 (1941), cited in ADMINISTRATIVE PROCEDURE ACT: LEGISLATIVE HISTORY, 1944-46 (hereinafter “LEGISLATIVE HISTORY”), at 39; see also Scott A. Keller, Depoliticizing Judicial Review of Agency Rulemaking, 84 WASH. L. REV. 419, 430 (2009); Metzger, supra note 7, at 491; John F. Manning, Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules, 96 COLUM. L. REV. 612, 663 n.246 (1996); Heath A. Brooks, American Trucking Associations v. EPA: The D.C. Circuit’s Missed Opportunity To Unambiguously Discard The Hard Look Doctrine, 27 HARV. ENVTL. L. REV. 259, 270 (2003).

This “narrow” standard requires only a “rational” foundation for the agency action.\textsuperscript{20}

The military also enjoys an exemption from the APA’s judicial review provisions for “military authority exercised in the field in time of war.”\textsuperscript{21} That exemption encompasses a somewhat broader range of military action than a modern reader might suppose from the plain language. It may apply, for example, to action taken within the United States, far removed from the locus of combat, and without a congressional declaration of war.\textsuperscript{22} But much military action falls outside the scope of the “military authority” exemption and thus is subject to judicial review under the same arbitrary or capricious standard as other federal agency actions.\textsuperscript{23}

The history of the APA demonstrates that the practice of giving the military greater deference than other agencies is not just another case of the courts playing fast and loose with statutory text. Congress spent seventeen years constructing the APA. Professor George Shepherd has provided an award-winning history of that legislative process,\textsuperscript{24} and I have examined the history of the “military authority” exception in depth elsewhere.\textsuperscript{25} Here, I provide a brief summary of the process that led Congress to subject all final agency action, including military action, to the same standard of judicial review.

The drive for administrative reform began early in the Twentieth Century with the growth of administrative agencies and faith in the power of expertise to cure the ills of a rapidly industrializing society.\textsuperscript{26} The first administrative reform bill was submitted in 1929, but it was not until Franklin Roosevelt took office in 1933 and kicked off the New Deal that the American Bar Association formed a Special Committee on Administrative Law, which would play a key role in the development of the APA.\textsuperscript{27} And it

\textsuperscript{22} See Kovacs, supra note 10, at 712-14, 719.
\textsuperscript{23} See Captain John B. McDaniel, The Availability and Scope of Judicial Review of Discretionary Military Administrative Decisions, 108 MIL. L. REV. 89, 94 (1985) (“By specifically excluding only certain military functions, Congress must have intended by negative implication that, in the exercise of other functions, the military should be included within the term ‘agency’ and therefore subject to the judicial review provisions of the APA.”).
\textsuperscript{25} Kovacs, supra note 10.
\textsuperscript{26} Id. at 681.
\textsuperscript{27} Id. at 681-82.
was not until the Supreme Court began to uphold New Deal programs in 1937 that things really took off.\textsuperscript{28} That year, the ABA Committee submitted a bill proposing to subject agency action to judicial review, but its proposal contained numerous agency-specific exemptions for, among others, the Federal Reserve Board, the Comptroller of the Currency, the Interstate Commerce Commission, and internal revenue, customs, and patent matters.\textsuperscript{29} Senator Mills Logan and Congressman Francis Walter introduced the ABA’s proposed bill in 1939, and it came to be known as the Walter-Logan bill.\textsuperscript{30} In Congress, the list of exempted agencies grew to include the Federal Deposit Insurance Corporation and trademark, copyright, and Indian lands matters, among others.\textsuperscript{31} The original bill exempted “the conduct of military and naval operations in time of war or civil insurrection.”\textsuperscript{32} In the final bill, which passed Congress in 1940 as Hitler occupied Paris and bombed London, the military exemption had broadened to encompass “any matter concerning or relating to the military or naval establishments.”\textsuperscript{33}

President Roosevelt vetoed the Walter-Logan bill.\textsuperscript{34} He expressed concern that the military exemption was not broad enough because it did not insulate non-military agencies engaged in defense-related functions. He also felt the bill would spur excessive litigation, and he was awaiting the report of the Attorney General’s Committee on Administrative Procedure, which the Committee submitted about a month after the House failed to override the President’s veto.\textsuperscript{35}

Things changed during the war. Congressional democrats grew politically weaker, Roosevelt began to back away from the New Deal, and the federal judiciary shifted to the left. The size of the federal bureaucracy exploded – 26 new agencies were formed related to the war effort – and rationing, inflation, and chronic shortages were blamed on agencies. The cult of expertise lost its allure, and in its place arose a concern about administrative power paving the road to totalitarianism.\textsuperscript{36}

Two weeks after D-Day in 1944, Congress returned to the task of administrative reform.\textsuperscript{37} In the bill that eventually became the APA,
derived from the Attorney General’s Committee report, Congress abandoned the exemptions for individual agencies. The Senate Judiciary Committee’s report emphasized that the bill exempted “functional classifications,” rather than “administrative agencies by name,” and did not “distinguish between ‘good’ agencies and others.” The House Report highlighted this point.

The bill is meant to be operative “across the board” in accordance with its terms, or not at all. Where one agency has been able to demonstrate that it should be exempted, all like agencies have been exempted in general terms. (See sec. 2 (a)). Where one agency has shown that some particular operation should be exempted from any particular requirement, the same function in all agencies has been exempted. No agency has been favored by special treatment.

Although the APA’s legislative history is somewhat opaque, one of the few things that is clear is that uniformity was among Congress’s primary goals. In particular, it is clear that Congress intended to subject all agencies to the same standards of review.

Of course, the military did receive special treatment in the bill. The original bill contained broad military exemptions from the public information and rulemaking provisions, but no military exemption whatsoever from the judicial review provisions. The War Department urged Congress to exempt the War Department, the Army, and the Navy from the bill altogether. Congress declined that suggestion, however, and instead carved out a narrow exemption from the judicial review provisions for “military authority exercised in the field in time of war or in occupied territory.”

The final bill passed both houses of Congress on voice votes, and President Truman signed the bill into law promptly.

38 S. Rep. No. 79-752 (1945), reprinted in LEGISLATIVE HISTORY, at 191; see also LEGISLATIVE HISTORY at 302; ATTORNEY GENERAL’S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT, at 26 (1947) (“The exemption for military and naval functions [in the rulemaking provisions] is not limited to activities of the War and Navy Departments but covers all military and naval functions exercised by any agency.”); id. at 45 (similar statement regarding adjudication provisions).
39 LEGISLATIVE HISTORY, at 191.
40 Id. at 250 (emphasis added).
41 Kovacs, supra note 10, at 696-97.
42 Id. at 697.
43 Id. at 700-701.
44 Id. at 703-704.
II. THE COURTS’ MANY STANDARDS OF REVIEW

The history encapsulated above shows that the APA represents a 17-year effort to codify basic principles of administrative law. The Supreme Court has emphasized the unusual effort that went into constructing this statute and the monumental compromise it entailed. Yet, the courts often disregard the statute and apply common law doctrines instead. For example, the history shows that Congress treated all agencies alike for purposes of judicial review and that that was a central feature of the Act, but the courts apply different levels of deference to different agencies. The military often receives a higher level of deference than other agencies.

A. CASE LAW

A few comparisons exemplify this phenomenon. In Cone v. Caldera, an army officer filed suit to correct his military record. The court of appeals applied an “unusually deferential” standard of review to the military even though it had failed to consider evidence submitted by a rating officer. In Butte County v. Hogen, in contrast, the court of appeals considered a Department of the Interior decision about Indian gaming. As in Cone v. Caldera, the agency failed to consider certain evidence, but the court refused to defer. Cone v. Caldera was essentially a statistical dispute; the court of appeals held that the district court should not have engaged in its own statistical analysis. But in Cherokee Nation v. Norton, the court of appeals engaged in its own historic analysis, refusing to defer to the Department of the Interior’s decision to extend federal acknowledgement to the Delaware Tribe of Indians. And compare Custer County Action Association v. Garvey, in which the court of appeals invoked political question doctrine to avoid second-guessing a Federal Aviation Administration determination about military airspace, with U.S. Air Tour Association v. FAA, in which the same agency’s determination about noise impacts at the Grand Canyon received no deference. Those cases were

45 Id. at 705; Wong Yang Sung v. McGrath, 339 U.S. 33, 40-41 (1950).
46 223 F.3d 789 (D.C. Cir. 2000).
47 Id. at 793 (internal quotes omitted), 794-95.
48 613 F.3d 190 (D.C. Cir. 2010).
49 Id. at 194-95.
50 223 F.3d at 792, 793, 795.
51 389 F.3d 1074, 1079-80 (10th Cir. 2004).
52 256 F.3d 1024, 1031 (10th Cir. 2001).
decided under the same arbitrary or capricious standard, but the courts were more deferential in the military cases.54

A recent example of the Supreme Court expressly applying a heightened deference standard to the military in an APA case55 is Winter v. Natural Resources Defense Council in which environmental groups obtained a preliminary injunction limiting the Navy’s use of mid-frequency active sonar in training exercises.56 The injunction was premised on the Navy’s alleged violation of the National Environmental Policy Act (NEPA),57 which requires federal agencies to examine the potential environmental impacts of their proposals before implementing them.58 NEPA is actionable only through the APA.59 Yet, the Supreme Court did not mention the arbitrary or capricious standard or the “military authority” exception. Instead, the Court applied a super-deference standard. The Court held that the preliminary injunction constituted an abuse of discretion, regardless of whether the lower courts were correct on the merits,60 because the lower courts “significantly understated the burden the preliminary injunction would impose on the Navy’s ability to conduct realistic training exercises, and the injunction’s consequent adverse impact on the public interest in national defense.”61 The Court held that the “lower courts failed

54 The APA cases in which courts give the military super-deference appear to fall into three categories: cases in which the courts expressly apply a heightened deference standard; cases in which the court applies a heightened standard of deference sub silentio while giving lip service to the arbitrary or capricious standard; and cases in which the courts use other doctrines to bypass the APA.
55 For an in-depth history of the federal courts’ hesitation to review military administrative actions, see Peck, supra note 91.
57 Id. at 372-74 & n.4.
60 129 S. Ct. at 376, 381.
61 Id. at 377; see also Water Keeper Alliance v. U.S. Department of Defense, 271 F.3d 21 (1st Cir. 2001) (affirming denial of an injunction against Navy training that was alleged to violated the Endangered Species Act). In National Audubon Society v. Department of the Navy, 422 F.3d 174 (4th Cir. 2005), the court affirmed the district court’s holding that the Navy violated NEPA in its analysis of the impacts of constructing a landing field for the Super Hornet aircraft, but vacated the district court’s injunction as overly broad. Id. at 181. The court observed that it’s judgment rested

upon two important separation of powers principles. First, Executive decisionmaking must fully comply with the environmental policy mandate that Congress has expressed through NEPA.… Second, the judiciary must take care not to usurp decisionmaking authority that properly belongs to the Executive or unduly hamper the Executive’s ability to act within its constitutionally assigned sphere of control. The Navy’s failure to take a hard look at the environmental effects of its proposed OLF violated the first of these principles. The second-guessing
properly to defer to senior Navy officers’ specific, predictive judgments about how the preliminary injunction would reduce the effectiveness of the Navy’s … training exercises.”

Unlike the lower courts, which found the Navy’s allegations of harm “speculative,” the Supreme Court was willing to accept the assertions of Navy officers in affidavits unquestioningly. For the Supreme Court, it was sufficient for the Navy to have “credibly alleged” that the preliminary injunction would “pose a serious threat to national security.”

Not only did the Court fail to acknowledge the applicability of the APA’s standard of review in Winter, it relied on earlier statements in non-APA cases about the judicial role in reviewing military decisions. In Goldman v. Weinberger, a Jewish Air Force officer alleged that prohibiting him from wearing a yarmulke on duty violated his First Amendment rights. The Supreme Court held in favor of the Air Force, stating “[j]udicial deference … is at its apogee when legislative action under the congressional authority to raise and support armies and make rules and regulations for their governance is challenged.” In Winter, the Court reiterated the statement from Goldman that it would give “great deference to the professional judgment of military authorities concerning the relative importance of a particular military interest.” The Court in Winter also relied on Gilligan v. Morgan in which former Kent State University students alleged that the National Guard violated their rights of free speech and assembly when responding to civil disorder at the University. The Supreme Court ruled for the National Guard, holding that the controversy was not justiciable.

of the Navy in matters of military readiness and the overly broad grant of injunctive relief violated the second.

Id. at 207.
62 129 S. Ct. at 378.
63 Id. at 378.
64 Id. at 377.
65 Id. at 381. Professor Masur argues that “[c]ourts have diverged drastically from the principles outlined in Supreme Court administrative law jurisprudence when confronted with cases they understand as involving military or wartime matters.” Masur, supra note 4, at 443. He asserts that the courts’ excessive deference is manifest in the failure “to require the Executive to put forth any meaningful quanta of proof in support of its determinations” or “to examine or challenge the local reasoning and inferences … used by the Executive.” Id. at 447.
66 475 U.S. at 506.
67 Id. at 507 (quoting Rostker v. Goldberg, 453 U.S. 57, 70 (1981)).
68 129 S. Ct. at 377 (quoting Goldman v. Weinberger, 475 U.S. 503, 507 (1986)).
69 413 U.S. at 3.
70 Id. at 11-12.
“the composition, training, equipping, and control of a military force” are committed to the elected branches of the government.\footnote{129 S. Ct. at 377 (quoting Gilligan v. Morgan, 413 U.S. 1, 10 (1973)).}

The courts of appeals have relied on the same language from \textit{Gilligan} when affording military decisions super-deference under the APA. In \textit{Custer County Action Association v. Garvey}, the Tenth Circuit addressed a NEPA challenge to the Federal Aviation Administration’s approval of changes to military airspace designed to accommodate F-16 training.\footnote{256 F.3d 1024, 1028 (10th Cir. 2001).} The court reviewed the FAA’s decision under the APA,\footnote{Id. at 1029.} and acknowledged that the military “is not excepted from [NEPA] requirements.”\footnote{Id. at 1029 n.5.} Nonetheless, the court gave “the political branches of [the] government a particularly high degree of deference” because the case concerned “military affairs.”\footnote{Id. at 1031.} The court went so far as to extend the military’s super-deference to the FAA and hold that political question doctrine precluded the court from interfering with the FAA’s decision that the airspace changes were necessary.\footnote{Id.}

The courts’ applications of super-deference in military cases under the APA are often more subtle than in \textit{Winter} and \textit{Custer County}. In cases concerning the correction of military service records, however, the courts expressly employ “an unusually deferential application of the arbitrary or capricious standard of the [APA] … calculated to ensure that the courts do not become a forum for appeals by every soldier dissatisfied with his or her ratings.”\footnote{Cone v. Caldera, 223 F.3d 789, 793 (D.C. Cir. 2000) (internal quotes omitted); see also Henry v. U.S. Department of the Navy, 77 F.3d 271, 272 (8th Cir. 1996) (“Review of a military agency’s ruling, moreover, must be extremely deferential because of the confluence of the narrow scope of review under the APA and the military setting.”).} When the D.C. Circuit adopted that standard, it recognized that “the terms of § 706 of the APA apply alike to all agency actions subject to review thereunder.”\footnote{Kreis v. Secretary of the Air Force, 866 F.2d 1508, 1514 (D.C. Cir. 1989).} Nonetheless, the court held that the military is entitled to super-deference because the statute that delegates the authority to correct military records gives the Secretary of Defense broad discretion,\footnote{Id.} as do so many non-military statutes.\footnote{For example, the D.C. Circuit recognized that the International Emergency Economic Powers Act “shows Congress’ willingness to give the President wide discretion in dealing with issues affecting foreign assets during periods of international crisis.” American Intern. Group, Inc. v. Islamic Republic of Iran, 657 F.2d 430, 443 (D.C. Cir. 1981) (quoting Chas. T. Main International, Inc. v. Khuzestan Water & Power Authority, 651}
standing on firmer ground when it based the application of super-deference in military records cases on “pragmatic limitations on the judiciary’s institutional competence” and separation of powers doctrine.81

B. EMPIRICAL EVIDENCE

Empirical studies support the observation that, despite Congress’s deliberate and well-considered decision to subject all agency action that is reviewable under the APA to the same standard of review, the courts continue to apply different standards of review to different agencies. Studies have long confirmed that courts apply different levels of deference to different agencies.82 Recently, Professor William Eskridge and Lauren Baer confirmed this finding in an empirical study of over one thousand Supreme Court cases between 1984 and 2006 “in which a federal agency interpretation of a statute was at issue.”83 The Court did not apply the familiar two-part test of Chevron, U.S.A., Inc. v. Natural Resources Defense Council84 across the board, but instead “employed a continuum of deference regimes”85 ranging from “super-deference” in cases implicating foreign affairs and national security to “anti-deference” in criminal cases and cases

81 Falk v. Secretary of the Army, 870 F.2d 941, 945 (2d Cir. 1989).
82 Thomas J. Miles & Cass R. Sunstein, The Real World of Arbitrariness Review, 75 U. Chi. L. Rev. 761, 778 n.86 (2008) (“Researchers have long observed wide differences across agencies in the rate at which the Supreme Court validates their decisions.”); Donald W. Crowley, Judicial Review of Administrative Agencies: Does the Type of Agency Matter?, 40 W. Polit. Q. 265, 267 (1987) (“the Court is not uniformly deferential and shows substantial variation in support from agency to agency”); Bradley C. Canon & Michael Giles, Recurring Litigants: Federal Agencies Before the Supreme Court, 25 W. Polit. Q. 183, 190 (1972) (“the Supreme Court was considerably more receptive to the claims of some” agencies than others); Roger Handberg, The Supreme Court and Administrative Agencies: 1965-1978, 6 J. Contemp. L. 161, 167, 173 (1979) (finding “variations among agency support rates” and above average success rate for the Department of Defense). But see Reginald S. Sheehan, Administrative Agencies and the Court: A Reexamination of the Impact of Agency Type of Decisional Outcomes, 43 W. Polit. Q. 875, 881 (1990) (“There were no significant differences in levels of support for economic agencies as compared to social agencies.”).
83 Eskridge and Baer, supra note 9, at 1094.
84 467 U.S. 837 (1984). First, if “Congress has directly spoken to the precise question at issue,” the agency must effectuate Congress’ express intent. Id. at 842. Second, if the statute is “silent or ambiguous with respect to the specific issue,” the court should defer to the agency’s interpretation, if it is reasonable. Id. at 843.
85 Eskridge and Baer, supra note 9, at 1090 (emphasis in original).
in which the agency’s interpretation raised serious constitutional concerns. Agencies won an average of 68.8% of all of the cases included in the study. In cases implicating foreign affairs and national security, however, agencies won 78.5% of the time. Eskridge and Baer concluded that “super-strong deference to the government in the areas of foreign affairs and national security remains a prominent part of the Court’s deference practice.”

In other subject areas, the agency fared nearly as well or better than in foreign affairs and national security cases. In energy cases, for example, the agency prevailed 93.3% of the time. Agency win rates in intellectual property and pensions cases were also above 80%. At the opposite end of the spectrum were cases concerning Indian affairs and federal lands, in which the agencies prevailed 51.6% and 50% of the time respectively, well below the average.

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86 Id. at 1098-99.
87 Id. at 1127, 1129 (Table 7).
88 Id. at 1102. In his study of court of appeals decisions implicating national security in the seven years following September 11, 2001, Professor Sunstein found that the government prevailed in 85% of the cases. Cass R. Sunstein, Judging National Security Post-9/11: An Empirical Investigation, 2008 SUP. CT. REV. 269, 277 (2008). He observed that “very few areas of the law have been found to be so lopsided,” id., but found his data insufficient to determine whether that high validation rate was due to “the selection of cases for litigation.” Id. at 282. Professor Sunstein found it “clear,” however, that the courts are “usually giving the government the benefit of the doubt.” Id. at 283. Professor Steven Lichtman calculated a success rate of 66.3% in Supreme Court military cases between 1918 and 2004. Steven B. Lichtman, The Justices and the Generals: A Critical Examination of the U.S. Supreme Court’s Tradition of Deference to the Military, 1918-2004, 65 MD. L. REV. 907, 914 (2006). He found it not debatable that “the Supreme Court adopted an explicitly obeisant posture towards military judgment.” Id. at 915.
89 Eskridge and Baer, supra note 9, at 1102. Eskridge and Baer’s study thus bears out Professor Masur’s observation that “Article III courts have come to view military questions as a taxonomic grouping they are simply incapable of navigating.” Masur, supra note 4, at 519.
90 Eskridge and Baer, supra note 9, at 1145 (Table 16). For a discussion of whether super-deference to agency scientific determinations is justified, see Emily Hammond Meazell, Super Deference, the Science Obsession, and Judicial Review of Agency Science, __ MICH. L. REV. __ (forthcoming), available at http://ssrn.com/abstract=1640010.
91 Eskridge and Baer, supra note 9, at 1145 (Table 16). This finding is consistent with Professor Huq’s assertion that, when examined from the perspective of the remedy provided, the courts do not treat national security cases differently than other public law cases. Aziz Z. Huq, Against National Security Exceptionalism, 2009 SUP. CT. REV. 225, 265 (2009) (arguing that theories that rely on the descriptive claim that national security cases are distinctive are flawed); see also Colonel Darrell L. Peck, The Justices and the Generals: The Supreme Court and Judicial Review of Military Activities, 70 MIL. L. REV. 1, 60 (1975) (asserting that limitations on judicial review are not unique to the military). Whether excessive deference to non-military agencies is justifiable is beyond the scope of this article.
92 Eskridge and Baer, supra note 9, at 1145 (Table 16).
Eskridge and Baer found that, “regardless of subject area, ad hoc judicial reasoning reigns,” and the Court’s deference practice was “wildly inconsistent.” In 16.7% of the foreign affairs and national security cases, the Court invoked the highly deferential standard of United States v. Curtiss-Wright Exp. Corp., and the agencies won across the board. In half of the foreign affairs and national security cases, the Court employed “consultative deference,” which “relies on some input from the agency (for example, amicus briefs, interpretive rules or guidance, or manuals) and uses that input to guide its reasoning and decisionmaking process.” And in the remaining one-third of foreign affairs and national security cases, the Court invoked no deference regime at all. The variety of deference regimes employed in other subject areas was similar. Although the empirical studies have not been limited to APA cases, their observation that agencies typically enjoy super-deference in national security cases appears to hold true for the military under the APA. I turn next to the question of whether that is a problem.

III. WHY GIVING THE MILITARY SUPER-DEFERENCE UNDER THE APA IS PROBLEMATIC

At first blush, the fact that agencies do not play on a level playing field under the APA is unremarkable. It seems intuitive that courts should defer to the military. But the judicial practice of giving the military heightened deference does not arise from an interpretation of the terms “arbitrary” or “capricious.” Certainly those terms leave room for interpretation, but not relative to which agency is the defendant. Thus, courts that give the military super-deference apply a common law overlay that is inconsistent with the statutory text and as such raise separation of powers concerns.

Even if this judicial practice were premised on statutory interpretation of the “arbitrary or capricious” standard, it would raise democratic accountability concerns. The adoption of a single standard of review for all agencies in the APA is a deliberate, express statutory command that was reached after years of hard-fought compromise with

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93 Id. at 1098, 1137.
94 Id. at 1140 (Table 14).
95 299 U.S. 304, 320 (1936) (“congressional legislation … within the international field must often accord the President a degree of discretion and freedom from statutory restriction which would not be admissible were domestic affairs alone involved”).
96 Eskridge and Baer, supra note 9, at 1099.
97 Id. at 1140 (Table 14).
98 Id. at 1098.
99 Id. at 1140 (Table 14).
100 Id. at 1139-41 (Table 14).
overwhelming support, and that has had a broad normative effect on the law. In these circumstances, Congress’s statement displaces the courts’ authority not just to fashion a common law overlay, but also to interpret the statutory text in a way that shifts the balance Congress reached through the political process.

The courts’ practice of giving the military super-deference in APA cases also undermines two of the APA’s basic goals — enhancing uniformity and augmenting judicial review — which Congress saw as critical to protecting individual liberties and avoiding totalitarianism. Its unpredictability causes doctrinal confusion, which does not do agencies, plaintiffs, or regulated industries any favors. It raises concerns related to the hypocrisy of courts purporting to keep agencies within the bounds of their delegated authority through rules of administrative common law that may exceed the courts’ authority and the hypocrisy of courts that emphasize the rule of law defying rule of law values by singling out one agency for special treatment and leaving little restraint on the agency’s discretion. And it is inconsistent with the Supreme Court’s slow but steady trend toward closer adherence to the text of the APA.

A. COMMON LAW OVERLAY

Following Professor Merrill’s lead, I refer to “federal common law” as “any federal rule of decision that is not mandated on the face of some authoritative federal text.” Federal common law was recognized to be “theoretically and constitutionally troubling” even before the Supreme Court’s declaration in *Erie Railroad v. Thompkins* that “[t]here is no federal general common law.” Among other things, judicial lawmaking raises

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101 Thomas W. Merrill, *The Common Law Powers of Federal Courts*, 52 U. Chi. L. Rev. 1, 5, (1985); see also id. at 7 (“In short, federal common law, as I define it, refers to legal rules (substantive or procedural) that (1) are propounded by courts, that is, are not found on the face of an authoritative federal text, and (2) have the status of federal law.”); see also Martha A. Field, *Sources of Law: The Scope of Federal Common Law*, 99 Harv. L. Rev. 881, 890-96 & n.58 (1986) (adopting a similarly broad definition of “federal common law”); Erwin Chemerinsky, *Federal Jurisdiction* § 6.1, at 363 (5th ed. 2007) (“The phrase federal common law refers to the development of legally binding federal law by the federal courts in the absence of directly controlling constitutional or statutory provisions.”). *But see* Bradford R. Clark, *Separation of Powers as a Safeguard of Federalism*, 79 Tex. L. Rev. 1321, 1403 n.504 (1996) (declining to follow Merrill’s definition because it does not draw the “theoretical distinction between judicial interpretation and judicial lawmaking”).


103 304 U.S. 64, 78 (1938); see also Chemerinsky, *supra* n.101, § 6.1, at 364 (“There long has been a strong presumption against the federal courts fashioning common law to decide cases.”). Professor Chemerinsky explains that the Rules of Decision Act of 1789 directs federal courts to apply state law where positive federal law is lacking. *Id.*
separation of powers concerns. The federal courts exercise authority conferred by Congress; without statutory authority, they are not authorized to craft a common law rule of decision. The Supreme Court emphasized in *TVA v. Hill* that our government is “a tripartite one, with each branch having certain defined functions delegated to it by the Constitution.” The lawmaking power is vested in the legislative branch and is separated from the power to interpret the law, which is assigned to the judicial branch. That separation of functions was designed to avoid judicial tyranny and “safeguard[] liberty by dispersing government power.” Congress may, of course, delegate some lawmaking power to executive branch agencies, but “institutionalization of lawmaking by federal courts would represent a major shift in policymaking power away from Congress and toward the federal judiciary, in violation of the constitutional scheme.”

To be sure, federal common law survives “in limited circumstances.” Professor Chemerinsky posits that “[f]ederal common law always has existed and always will exist” for at least three purposes: to fill in statutory gaps, to fulfill congressional intent, and “to protect the interests of the federal government.” Federal common law of the statutory-gap-filling variety may be “easily justified” given the impossibility of drafting a truly complete statute, but it is hard to distinguish between statutory interpretation and common law. Professor Merrill referred to the practice of filling in the blanks of “broad, vague, or open-textured provisions” as “delegated lawmaking.” He posited that federal common law is permissible where the statute reveals Congress’s

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105 Chemerinsky, *supra* n.101, § 6.1, at 365. Federal common law also raises federalism concerns in that, under the Constitution, the states reserved the powers that were not expressly given to federal government. *Id.*
107 Merrill, *supra* note 101, at 19; *see also* The Federalist No. 78, at 466 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (“the general liberty of the people can never be endangered” by the judiciary, so long as it “remains truly distinct from both the legislature and the executive”); The Federalist No. 81, at 485 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (vesting the power of impeachment in the legislature guards against judicial usurpation of legislative authority).
109 Merrill, *supra* note 101, at 23.
111 *Id.* at 367.
112 *Id.* at 366.
113 *Id.* § 6.3.1, at 387.
114 *Id.* § 6.1, at 367; *see also* id. § 6.3.2, at 388.
115 Merrill, *supra* note 101, at 34, 35.
intent to delegate lawmaking power to the courts and circumscribes that delegation “with reasonable specificity.” To avoid “confusing legislative with judicial authority,” however, courts engaging in delegated lawmaking must be “scrupulously attentive” to the text of the statute and candid about whether they are interpreting the statute or filling in its gaps with common law.

Those theories are consistent with current jurisprudence. In the Eighteenth and Nineteenth Centuries, federal judicial common law was assumed to exist. In the Twentieth Century, the duty to elaborate on statutes shifted to federal agencies. Since Erie pronounced the death of the general common law in 1938, the Supreme Court has permitted federal common law in only a “few and restricted” areas in which “a federal rule of decision is necessary to protect uniquely federal interests, and those in which Congress has given the courts the power to develop substantive law.”

The “new federal common law” is acknowledged to be a “judicial creation,” but it must have a textual basis in the constitution or a statute, it may only fill in the gaps left in those texts, and it must be consistent with the policy expressed in those texts.

116 Id. at 41; see also Peter L. Strauss, On Resegregating the Worlds of Statute and Common Law, 1994 SUP. CT. REV. 429, 436-37 (1994) (arguing that common law extends legislative influence when it replicates statutory purposes).
117 Strauss, supra note 116, at 441.
119 Guido Calabresi, A COMMON LAW FOR THE AGE OF STATUTES 45 (1982); Eskridge, Vetogates, surpa note 118, at 1455.
122 Atherton v. F.D.I.C., 519 U.S. 213, 218 (1997) (internal quotes omitted); see also Sosa v. Alvarez-Machain, 542 U.S. 692, 741 (2004) (Scalia, J., concurring in part) (“Unlike the general common law that preceded it, however, federal common law was self-consciously ‘made’ rather than ‘discovered.’”).
123 See Duffy, supra note 7, at 117; Andrew W. Davis, Federalizing Foreign Relations: The Case For Expansive Federal Jurisdiction In Private International Litigation, 89 MINN. L. REV. 1464, 1466 (2005); Curtis A. Bradley, Jack L. Goldsmith, and David H. Moore, Sosa, Customary International Law, and the Continuing Relevance of Erie, 120 HARV. L. REV. 869, 879 (2007) (“While there is much scholarly debate about the proper contours of federal common law, there is widespread agreement that federal common law must be grounded in a federal law source.”); Chemerinsky, supra n.101, § 6.3.2, at 390 (“The federal judiciary will formulate a body of common law rules only pursuant to clear congressional intent for such action.”).
124 Bradley, et al., supra note 123, at 880 (“the post-Erie federal common law must be interstitial; that is, courts are to develop it only in retail fashion to fill in the gaps, or interstices, of federal statutory or constitutional regime”).
125 Id.
The judicial practice of giving the military heightened deference under the APA is not a matter of statutory interpretation or gap-filling. Professor Duffy pointed out correctly that the use of “open-ended language” like “arbitrary” and “capricious” left room for judicial interpretation that “presents no conflict with the theoretical constraints on federal common law.” While Section 706 of the APA leaves ample room for the judiciary to engage in gap-filling, however, it leaves no room to interpret its terms relative to which agency is the defendant. In providing a uniform standard of review for all final agency action, Congress left the judiciary no discretion to apply different common law standards of review to different agencies. As Professor Duffy said, “[w]ith the enactment of the APA in 1946, the judicial method in most administrative law cases should have shifted to the task of interpreting the new statute, rather than continuing to formulate and apply judicially-created doctrines.” In particular, the enactment of the APA should have changed the scope of review, at least insofar as the statute subjected all agencies to the same standards. Just as the Supreme Court held in FCC v. Fox Television Stations, Inc. that agency action may not be subjected to a stricter standard of review than that set forth in the APA, so too should it not be subjected to a lesser standard of review, or excused from review altogether, based on a doctrine that has no “basis in the text of the statute.”

Like all federal common law, administrative common law implicates separation of powers concerns. By ignoring the plain language of the APA and instead fashioning a judge-made rule, the practice

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126 Duffy, supra note 7, at 153.
127 Then-Professor Scalia argued that the APA’s failure to address informal adjudication procedures opened the door for federal courts to fashion common law to fill that gap. Scalia, supra note 7, at 385, 391-92.
128 Duffy, supra note 7, at 121; see also id. at 119 (“Things should have changed in 1946 … because the courts’ method of analysis should have changed: Statutory law should have assumed the dominant position in cases covered by the APA.”)
129 Id. at 130.
130 129 S. Ct. at 1811.
131 I use the phrase “administrative common law” to refer to judge-made law. The phrase has also been used to refer to “agency-developed interpretations of law.” See Richard W. Murphy, Hunters for Administrative Common Law, 58 Admin. L. Rev. 917, 920 n.16 (2006) (citing Alaska Prof’l Hunters Ass’n v. FAA, 177 F.3d 1030, 1035 (D.C. Cir. 1999)).
132 Professor Wright argues, for example, that in applying the common law timing doctrines of exhaustion, ripeness, and finality, the courts focus on Article III concerns and pay little heed to the Article II concerns raised by the courts’ intrusion on the executive branch’s autonomy. See R. George Wright, The Timing of Judicial Review of Administrative Decisions: The Use and Abuse of Overlapping Doctrines, 11 Am. J. Trial Advoc. 83, 91, 93 (1987). Professor Manning argues that deference to an agency’s interpretation of its own regulations under Bowles v. Seminole Rock & Sand Co., 325 U.S. 410 (1945), violates separation of powers principles. Manning, supra note 18, at 631-54.
of applying a super-deference standard in military cases under the APA undermines separation of powers.\textsuperscript{133} Congress chose to use narrow language in the “military authority” exception, obviously intending for military actions falling outside the scope of the exception, and not otherwise excluded, to be subject to judicial review. The plain language of the APA itself mandates judicial review in appropriate cases.\textsuperscript{134} By giving the military super-deference, the courts excuse the military from meaningful judicial review in precisely the cases Congress determined should be reviewable.\textsuperscript{135}

\textbf{B. DEMOCRATIC ACCOUNTABILITY}

Closely related to the separation of powers concerns raised by the common law nature of the super-deference standard are concerns related to the courts’ responsiveness to the democratic process. Even if the courts attempted to justify their practice of giving the military heightened deference under the APA as statutory interpretation, it would be deeply troubling. The history described in part I above demonstrates that Congress’s decision to subject all agencies to the same standard of review and to provide only a narrow military exception in the judicial review provisions of the final enactment resulted from a long and hard-fought legislative process and a monumental compromise. The Supreme Court emphasized this when it adhered strictly to the statute’s text soon after its enactment.

The Act thus represents a long period of study and strife; it settles long-continued and hard-fought contentions, and

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\item \textsuperscript{133} Cf. J. Lyn Entrikin Goering, \textit{Tailoring Deference To Variety With A Wink And A Nod To Chevron: The Roberts Court And The Amorphous Doctrine Of Judicial Review Of Agency Interpretations Of Law}, 36 J. Legis. 18, 35 (2010) (“The ‘uneasy coexistence’ of federal common law deference doctrines and the APA’s plain language raised provocative questions about the balance of powers between Congress, the federal judiciary, and the executive branch.”).
\item \textsuperscript{134} 5 U.S.C. §§ 702 (“A person suffering legal wrong because of agency action … is entitled to judicial review thereof.”), 704 (“Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review.”), 706 (“To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action.”); Duffy, supra note 128 at 130.
\item \textsuperscript{135} One might object that the APA merely codified the common law, and therefore any pre-existing practice of giving the military heightened deference would inform the meaning of the statute. The APA, however, did not merely codify the common law, particularly not the provision of a single standard of review for all agencies. \textit{See} Kovacs, supra n.10, at 707-708.
\end{itemize}
enacts a formula upon which opposing social and political forces have come to rest. It contains many compromises and generalities and, no doubt, some ambiguities. Experience may reveal defects. But it would be a disservice to our form of government and to the administrative process itself if the courts should fail, so far as the terms of the Act warrant, to give effect to its remedial purposes where the evils it was aimed at appear.\textsuperscript{136}

Judge Posner has long contended that, “where the lines of compromise are discernable,” courts interpreting statutes should “follow them, to implement not the purposes of one group of legislators but the compromise itself.”\textsuperscript{137} Professor Clark agrees that where “compromise produces relatively clear and precise provisions … courts pursuing interpretive fidelity should strive to uphold the specific compromises incorporated into enacted legal texts.”\textsuperscript{138} Expanding the “military authority” exception beyond its bounds by giving super-deference to the military would “defeat the purpose (and benefits) of a multi-member, multihouse legislature checked by the executive”\textsuperscript{139} and disenfranchise “all who use the political process to register the democratic will.”\textsuperscript{140}

The APA, however, is far from a typical legislative compromise. It resulted from seventeen years of legislative activity and passed with overwhelming support, and since its enactment, the APA has had a broad normative effect on the law. In those circumstances, the courts should be particularly chary of interpreting the statutory text in a way that shifts the balance Congress reached through the political process. Professors Eskridge and Ferejohn conceived of statutes that are enacted “after lengthy normative debate” and that “prove robust as a solution, a standard, or a

\textsuperscript{138} See Bradford R. Clark, Constitutional Compromise and the Supremacy Clause, 83 NOTRE DAME L. REV. 1421 (2008); cf. Thomasson v. Perry, 80 F.3d 915, 921 (4th Cir. 1996) (upholding “Don’t Ask, Don’t Tell” policy governing gays in the military; “What Thomasson seeks to upset here is a carefully crafted national political compromise, one that was the product of sustained and delicate negotiations involving both the Executive and Legislative branches of our government.”); id. at 923 (emphasizing that policy is entitled to “judicial respect” because it resulted from “exhaustive efforts of the democratically accountable branches” and “month upon month of political negotiation and deliberation”).
\textsuperscript{139} See Clark, Constitutional Compromise, supra note 137, at 1424.
\textsuperscript{140} Thomasson v. Perry, 80 F.3d 915, 923 (4th Cir. 1996).
norm over time” as “super-statutes.” Whether the APA qualifies as a “super-statute” under Eskridge and Ferejohn’s conception of the term is fodder for future inquiry. For purposes of this discussion, it suffices to observe that the APA has many qualities of an Eskridgian “super-statute”: it was enacted during “the golden age of the super-statute,” 1938-1969; it emerged from a “lengthy period of public discussion and official deliberation”; the principles it established, including the idea that agency action should be subject to judicial review, have become “foundational or axiomatic to our thinking”; it has “passe[d] the test of time”; and whether or not the entire statute “alter[ed] substantially the then-existing regulatory baselines with a new principle or policy,” certainly the concept of applying a uniform standard of review to all federal agencies was something new.

Eskridge and Ferejohn posited that “super-statutes” should be treated as “more normatively powerful than ordinary statutes.” Accordingly, they argued that “super-statutes” should be interpreted liberally and dynamically, “in a common law way” to implement “statutory purpose and principle as well as compromises suggested by statutory


142 See Eskridge, Super-Statutes, supra n.141, at 1227.

143 Id. at 1231.

144 Id. at 1231.

145 Id. at 1273.

146 Id. at 1230.

147 Then-Professor Scalia observed in 1978 that “the Supreme Court regarded the APA as a sort of superstatute, or subconstitution, in the field of administrative process: a basic framework that was not lightly to be supplanted or embellished.” Scalia, supra n.7, at 363. Other commentators agree that the APA has taken on quasi-constitutional status, though they do not necessarily agree about what implications that should have for its interpretation. See, e.g., Thomas W. Merrill, Capture Theory and the Courts: 1967-1983, 72 CHI.-KENT L. REV. 1039, 1039 (1997) (opining that “our experience with the APA parallels that with the Constitution” and thus “the judicial gloss on the APA has taken on a large significance over time”); Alan B. Morrison, The Administrative Procedure Act: A Living and Responsive Law, 72 Va. L. Rev. 253, 253 (1986) (“My thesis is a simple one: the APA is more like a constitution than a statute.”); William R. Andersen, Chevron in the States: An Assessment and a Proposal, 58 ADMIN. L. REV. 1017, 1033 (Fall 2006) (“The federal APA would be difficult to amend because it has acquired something like constitutional status.”); Michael Asimow, The Spreading Umbrella: Extending the APA’s Adjudication Provisions to All Evidentiary Hearings Required By Statute, 56 ADMIN. L. REV. 1003, 1004 (Fall 2004) (“The Administrative Procedure Act (APA) has achieved virtually constitutional status.”); Bruce Ackerman, The Emergency Constitution, 113 YALE L.J. 1029, 1077 (2004) (“Although it is packaged as a statute, the APA is the product of constitutional thought, and the courts have given quasi-constitutional status to its provisions.”).

148 Eskridge, Super-Statutes, supra n.141, at 1217.
texts.”

Courts must also be mindful, they cautioned, “of cross-cutting costs and countervailing policies.” If the APA is treated as a “super-statute,” then, the “military authority” exception should be interpreted “broadly and evolutively.” The courts’ interpretation of the phrase “time of war,” for example, focuses on the nature of combat operations, correctly reflecting the modern dearth of formal declarations of war. Likewise, the phrase “in the field” should encompass any site of military operations, as Congress would have understood the term in 1946, and as reflects the nature of modern warfare. Interpreting the “military authority” exception broadly implements an important legislative compromise and, as explained below, prevents the statute from encroaching on the President’s constitutional turf.

By the same token, the terms of the APA as a whole should be interpreted to implement its “greatest public purposes”: uniformity and judicial review. Applying a “super-deference” standard to the military singles out the military for special treatment and dilutes the standard of review, thus contradicting not only the plain language of the statute, but also the principles this extra-ordinary statute embodies. Thus, that judicial practice is problematic on a deeper level than a simple error of statutory interpretation; it represents the courts’ failure to respect the democratic process.

C. THE VALUES OF THE APA

Putting aside the unusual nature of the APA, excusing the military from meaningful judicial review is also problematic simply because it undermines the values Congress sought to pursue in the APA. The history of the APA’s enactment demonstrates that Congress believed judicial review of administrative action, including military action, was one of the keys to protecting individual liberties and avoiding totalitarianism and administrative bias and overreaching. Congress intended “to retrench the
administrative state and to reassert legislative and judicial control over administrative action.” The Act was also designed to increase uniformity in agency practices and procedures. The Supreme Court held in *Dickinson v. Zurko* that “grandfathered common law variations” based only on ambiguous authority would undermine Congress’ desire “to bring uniformity to a field full of variation and diversity.”

Applying super-deference in military cases under the APA distorts the incentives Congress created in the Act to enhance judicial review and uniformity. If the courts are unwilling to engage in meaningful review of military action, litigants are less likely to file suit. The agencies, in turn, adjust their actions to the “intensity of judicial review” and the “likelihood of judicial invalidation.” The Supreme Court in *Vermont Yankee* observed that allowing courts to impose extra-textual procedural requirements on agencies would make judicial review “totally unpredictable” and would lead agencies to adopt the fullest procedures. Conversely, excusing the military from meaningful judicial review may lead the defense agencies to give only nominal attention to administrative requirements. Agencies are motivated to expand their own authority. They “tend toward tunnel vision, where they pursue their statutory mission

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157 Vermeule, *supra* note 17, at 1138; see also Universal Camera Corp. v. National Labor Relations Board, 340 U.S. 474, 483-89 (1951) (reviewing the legislative history of the APA and concluding that Congress intended to strengthen judicial review of agency action).


160 Miles & Sunstein, *The Real World, supra* note 82, at 803 (“If litigants are rational, the likelihood of success will affect their decision whether to litigate, and that likelihood will depend on the aggressiveness of arbitrariness review.”); Sunstein, *Judging National Security, supra* note 88, at 271 (“litigants are responsive to the likelihood of victory”).

161 Miles & Sunstein, *The Real World, supra* note 82, at 803 (intensity of review impacts “both the rate of challenges to agency decisions and the content of agency decisions”); see also id. at 781 (“litigants are likely to adjust their decisions in accordance with the intensity of review”); Sunstein, *Judging National Security, supra* note 88, at 283 (“Perhaps the government is especially troubled by the prospect of judicial invalidation in national security cases, and perhaps it has taken strong steps to avoid losses in court.”).

162 Vermont Yankee Nuclear Power Corporation v. Natural Resources Defense Council, 435 U.S. 519, 546-47 (1978); see also Scalia, *supra* note 7, at 371 (“it would almost always be preferable, in the individual case, to provide the additional procedures which one had reason to believe the Court of Appeals would require, rather than to gamble on Supreme Court review”).

with varying degrees of diligence, but often without sufficient regard to a larger normative framework.”164 The APA was designed to counterbalance that tendency through judicial review. Super-deference to the military shifts that balance and risks the dangers Congress sought to avoid in the APA.

D. DOCTRINAL CONFUSION AND JUDICIAL HYPOCRISY

Applying federal common law in judicial review of agency actions raises additional concerns. In our federal system, all government action must be justified by some constitutional or statutory grant of authority.165 Courts reviewing administrative action thus require it to be authorized by some legislative grant.166 “Judicial oversight of administrative agencies is itself justified in terms of forcing governmental agencies to heed limitations on their authority.”167 “Under our separation-of-powers regime,” Judge Wald explained, Congress delegates powers to agencies, and the courts “ensure that the agencies do what Congress has told them to do and that they exercise discretionary power in a reasonable fashion.”168

That judicial role entails some limitations. Federal courts that force agencies to justify their actions by reference to some text may be expected to impose the same requirement on themselves.169 “[F]or federal courts policing the bounds of legitimate authority against other government

164 Eskridge and Baer, supra note 9, at 1174.
165 Marbury v. Madison, 5 U.S. 137, 176 (1803) (“The powers of the legislature are defined, and limited; and that those limits may not be mistaken, or forgotten, the constitution is written.”); Ex parte Quirin, 317 U.S. 1, 25 (1942) (“Congress and the President, like the courts, possess no power not derived from the Constitution.”); Akhil Reed Amar, Of Sovereignty and Federalism, 96 YALE L.J. 1425, 1439-40 (1987); Kevin M. Stack, The Statutory President, 90 Iowa L. Rev. 539, 579 n.184 (2005) (“The limited powers doctrine requires that federal government action be authorized either by statute or the Constitution.”).
166 See Stephen G. Breyer, et al., ADMINISTRATIVE LAW AND REGULATORY POLICY: PROBLEMS, TEXT, AND CASES, at 20 (5th ed. 2002) (ensuring that administrative action is authorized by statute supports the “traditional rule of law values” of equal treatment and predictability); The Honorable David S. Tatel, The Administrative Process and The Rule of Environmental Law, 34 HARV. ENVTL. L. REV. 1, 2 -3 (2010) (“the two primary elements of judicial review – ensuring that agency action is authorized by law and is neither arbitrary nor capricious – work together to substitute for the constitutional requirements that govern congressional action”); Richard B. Stewart, The Reformation of American Administrative Law, 88 HARV. L. REV. 1669, 1669-70 (1975) (“The traditional model of judicial review ... affords judicial review in order the cabin administrative discretion within statutory bounds ....”).
167 Duffy, supra note 7, at 120.
168 Patricia M. Wald, Judicial Review in the Time of Cholera, 49 ADMIN. L. REV. 659, 662 (1997) (expressing doubts about whether courts should “loosen up” on agencies that do not have the resources to comply with statutory requirements).
169 Duffy, supra note 7, at 144.
officials, it is only fair that they similarly police the legitimate bounds of their own authority.”

Additionally, if an agency cannot meet the standards Congress has established, “the showdown ought to be between the agency and Congress, where the problem originates.” The courts should not adjust their standard of review to accommodate agencies that fall short. Thus, courts should not apply a super-deference standard in military cases under the APA absent some textual grant of authority. If the military cannot meet the lenient standards established in the APA, Congress may address the situation, but the courts should not fashion common law to rules to bypass the statutory strictures.

Administrative common law also raises rule of law concerns. Though the dimensions of “the rule of law” and, indeed, the concept itself are contested, the main formulations of the Rule of Law do agree upon an assumption that law consists of rules. Commentators also generally agree that, under the rule of law, “[t]he same rules should apply to everyone” and the law should restrain government discretion. Administrative common law may defy those strictures. One commentator argued, for example, that the judicial practice of deferring to agency interpretations of their own regulations “should have no place in a system of

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170 Id. at 145.
171 Wald, supra note 168, at 662.
172 Id. at 662.
173 See infra text accompanying notes 334-341.
175 Radin, supra note 174, at 782; Fallon, supra note 174, at 8; see also Katie R. Eyer, Administrative Adjudication and the Rule of Law, 60 ADMIN. L. REV. 647, 655 (2008) (“any system hoping to achieve the ideal of rule of law must have fixed general rules by which individual and government conduct can be judged”).
176 Eyer, supra note 175, at 655; see also Masur, supra note 4, at 493 (arguing that the rule of law requires all agencies to receive the same standard of review); Radin, supra note 174, at 789-90 (identifying “consistency” as an element shared by different conceptions of the “rule of law”).
177 Eyer, supra note 175, at 655; Masur, supra note 4, at 491 (the rule of law requires agencies to act within the bounds of their statutory authority); John C. Reitz, Export of the Rule of Law, 13 TRANSNAT’L L. & CONTEMP. PROBS. 429, 444 (2003) (“One must concede, however, that there is a tension between the rule of law and administrative discretion.”).
limited government under the rule of law.”178 The courts’ practice of giving the military super-deference in APA cases defies the rule of law tenet that rules should be applied consistently; the APA provides that all agencies are subject to the same standard of review, but the courts fashion agency-specific standards. Super-deference also leaves the military more room to maneuver than Congress contemplated thus violating the rule of law tenet that rules should cabin government discretion.179

One might argue that stability is also a rule of law value,180 and abandoning the longstanding practice of deferring to the military would upset settled expectations. Professor Strauss criticized the Supreme Court’s tendency to interpret statutes as “static, isolated instructions” instead of as part of a unified system of statutes and developing common law.181 He pointed out that administrative law changes constantly and courts, like agencies, should interpret statutes not solely by reference to their meaning at the time of enactment, but also in light of subsequent developments in the law.182 Doing so, he posited, furthers the purposes of the statute and avoids defeating expectations that have arisen in the interim between enactment and judicial review.183 Professor Strauss applauded the courts for having “kept the APA more or less in step with developing understandings,”184 but he cautioned that courts should avoid “judicial adventurism.”185

178 Robert A. Anthony, The Supreme Court and the APA: Sometimes They Just Don’t Get It, 10 ADMIN. L. J. AM. U. 1, 12 (1996); see also id. at 24 (stating with regard to Chevron’s failure to mention Section 706 of the APA, “[i]n a democracy ever striving to achieve a rule of law, the Court’s laconic stance seems arrogant and dysfunctional”).

179 See United States v. Lindh, 212 F. Supp. 2d 541, 555 (E.D. Va. 2002) (“it is central to the rule of law in our constitutional system that federal courts must, in appropriate circumstances, review or second guess, and indeed sometimes even trump, the actions of the other governmental branches”); Masur, supra note 4, at 452 (“adherence to the rule of law requires greater involvement than courts currently undertake”); id. at 501 (“Meaningful judicial scrutiny of the factual predicates for administrative decisions is a necessary condition for ensuring that the rule of law prevails, even as applied to expert executive agencies acting within their assigned fields.”).

180 Fallon, supra note 174, at 8 (“The law should be reasonably stable, in order to facilitate planning and coordinated action over time.”); Eyer, supra note 175, at 655 (“The law should be relatively consistent and stable, so as to facilitate the ability of those governed by it to plan for the future.”).

181 Strauss, supra note 116, at 436-37; see also Radin, supra note 174, at 818-19 (advocating a “pragmatic, normative” conception of the rule of law).

182 Strauss, supra note 116, at 437; see also Metzger, supra note 7, at 508 (noting “the evolving nature of ordinary administrative law”).

183 Strauss, supra note 116, at 437, 505-6; see also Levin, supra note 7, at 298-302 (arguing that remand without vacatur should be available under the APA because, inter alia, inflexibility “can upset a legal regime on which many citizens depend” and around which citizens “will have already … arranged their expectations”).

184 Strauss, supra note 116, at 491.

185 Id. at 442.
While we might argue about the meaning of the terms “arbitrary” and “capricious” or the phrase “military authority exercised in the field in time of war,” the APA is clear that all final agency action that is reviewable under the statute is to be assessed using the same standard of review. To the extent that the military has grown to rely on the courts’ tendency to give it super-deference, reliance on that “judicial adventurism” is misplaced. Administrative common law is “inherently unstable” in that it lacks any statutory grounding.\(^\text{186}\) Implementing the plain language of the APA, on the other hand, would lend some predictability to this constantly morphing area of the law.

E. THE SUPREME COURT’S NARROWING OF APA COMMON LAW

The Supreme Court has refused to supplement the APA on several notable occasions beginning around the time the Court started to pull back on federal common law.\(^\text{187}\) In *Vermont Yankee Nuclear Power Corporation v. Natural Resources Defense Council*,\(^\text{188}\) the Court observed that the APA “was not only ‘a new, basic and comprehensive regulation of procedures in many agencies,’ … but was also a legislative enactment which settled ‘long-continued and hard-fought contentions, and enacts a formula upon which opposing social and political forces have come to rest.’”\(^\text{189}\) The rulemaking provisions, the Court held, “established the maximum procedural requirements which Congress was willing to have the courts

\(^{186}\) Duffy, *supra* note 7, at 141; *see also* id. at 142 (“Inconsistent with statute, inconsistent with itself, this administrative common law can no longer be considered stable.”); id. at 161 (“even time-honored judicial doctrines supported by decades of precedent cannot be considered stable law if they lack a foothold in statutory or constitutional text”); Kieran Ringgenberg, United States v. Chrysler: *The Conflict Between Fair Warning and Adjudicative Retroactivity in D.C. Circuit Administrative Law*, 74 N.Y.U. L. REV. 914, 930 (1999) (“the expansive fair warning rule is unmoored common law, legally unstable, and suitable for such modification as experience demonstrates is appropriate”); Robert G. Natelson, *Running with the Land in Montana*, 51 MONT. L. REV. 17, 87 (1999) (“The result of judicial disregard for clear statutory meaning has been that the law as applied is more unstable, unpredictable, inaccessible, and, perhaps, more unfair than it would have been in a pure common law system.”).

\(^{187}\) Duffy, *supra* note 7, at 139 (citing Cannon v. University of Chicago, 441 U.S. 677 (1979), and Touche Ross & Co. v. Redington, 442 U.S. 560 (1979)); *see also* Levin, *supra* note 7, at 309 (observing that the Supreme Court “has adopted literal or otherwise inflexible readings of other sections of the APA, even in the face of longstanding lower court interpretations pointing in a contrary direction”). Then-Professor Scalia opined that, by 1973, it was “obvious even to the obtuse” that the Supreme Court believed the APA “was not lightly to be supplanted or embellished … by continually evolving judge-made common law not based upon constitutional prescriptions or rooted in the language of the APA itself.” Scalia, *supra* note 7, at 363.

\(^{188}\) 435 U.S. 519 (1978).

\(^{189}\) *Id.* at 523 (quoting Wong Yang Sung v. McGrath, 339 U.S. 33, 40 (1950)).
impose upon agencies.”

The circumstances in which a court may impose procedural requirements beyond those enumerated in the statute “are extremely rare.” Then-Professor Scalia said that the issue in Vermont Yankee was the “fundamental question of the status of the APA as the basic charter of judicially enforceable administrative procedure” and that the Supreme Court “definitively rejected” the courts’ “common law power” to supplement the APA. Scalia opined that Vermont Yankee set “a new tone… of judicial restraint and of great deference to the text” of the APA.

Darby v. Cisneros, in turn “ended the judge-made [exhaustion] doctrine’s domination over the APA.” Again, the Court refused to engraft procedural requirements that were not mandated by the plain language of the APA. The following term, the Court stayed the course of adhering to the text of the APA when it invalidated a Department of Labor burden-shifting rule in Director, Office of Workers’ Compensation Program v. Greenwich Collieries, declaring that “the Department cannot allocate the burden of persuasion in a manner that conflicts with the APA.”

In Dickinson v. Zurko, the Court held that the standards of review in Section 706 of the APA guide Federal Circuit review of Patent and Trademark Office findings of fact, despite years of contrary practice. Most recently, in FCC v. Fox Television Stations, Inc., the Supreme Court held that agency action that reverses course may not be subjected to a stricter standard of review than that set forth in the APA, because “[t]he Act mentions no such heightened standard.”

There are, of course, notable exceptions to this trend. In Chevron, for example, the Court made no effort to reconcile its holding that agency interpretations of statutes are entitled to deference with the text of the

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190 Id. at 524.
191 Id.; see also Miles & Sunstein, The Real World, supra note 82, at 770-71 (Vermont Yankee “emphasized that judges had no business burdening agencies with duties that could not be found in the APA or some other source of law.”); Meazell, supra note 90, at 39 (discussing separation-of-powers concerns underlying Vermont Yankee).
192 Scalia, supra note 7, at 359.
193 Id. at 389-90; see also id. at 395 (Vermont Yankee “has put to rest the notion that the courts have a continuing ‘common-law’ authority to impose procedures not required by the Constitution in areas covered by the APA”).
194 Scalia, supra note 7, at 396. Of course, not all commentators agree with Scalia’s assessment of Vermont Yankee. See, e.g., Duffy, supra note 7, at 182.
196 Duffy, supra note 7, at 153.
197 509 U.S. at 146-47.
APA. The Supreme Court’s failure to even attempt to reconcile its analysis in *Chevron* with the text of the APA stands in stark contrast to its earlier allegiance to the text in *Vermont Yankee*. But the Supreme Court has begun in recent decades to pay closer attention to the text of the APA, at least in some circumstances. I turn next to the question why the federal courts have clung so tenaciously to administrative common law when reviewing military action under the APA and whether affording the military super-deference is justified.

IV. POTENTIAL JUSTIFICATIONS FOR SUPER-DEFERENCE TO THE MILITARY

Is there an adequate justification for departing from the plain text of Section 706 in APA cases against the military that overrides the concerns discussed above? The APA itself already protects the military from judicial oversight by exempting “military authority exercised in the field in time of war” from the Act’s judicial review provisions. That exemption provides much of the cover the military is entitled to under the Constitution, and no other concern is sufficient to justify the broad application of a common law standard of review that is inconsistent with the statutory standard and that singles out the military for exceptional treatment despite Congress’s deliberate decision to treat all agencies alike.

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201 Duffy, *supra* note 7, at 191, 192; Thomas W. Merrill and Kristin E. Hickman, *Chevron’s Domain*, 89 Geo. L. J. 833, 868 (2001) (“If *Chevron* is a judicially developed norm, it is particularly difficult to explain why the doctrine supercedes the instruction in the APA that courts are to ‘decide all relevant questions of law.’”); Manning, *supra* note 18, at 621; Goering, *supra* note 133, at 36. *Chevron* has been criticized on other grounds as well. *E.g.*, Clark, *Separation of Powers*, *supra* note 101, at 1434 (arguing that *Chevron* is in tension with “the traditional presumption against preemption”); Eskridge, *Veto gates*, *supra* note 118 (suggesting that *Chevron* should be read narrowly in preemption cases); Manning, *supra* note 18, at 621 (observing that *Chevron* is in tension with *Marbury v. Madison*).

202 Cf. Metzger, *supra* note 7, at 494 n.48 (“The Court’s refusal [in *State Farm*] to address whether extensive substantive scrutiny accords with the intentions of Congress in adopting the APA stands in particular contrast to its insistence that courts not impose procedural controls beyond those in the APA.”).

203 Asking this question reveals that I do not intend to present an originalist argument. Rather, I assume that there may be reasons for courts to bypass the plain language of a statute, see, *e.g.*, William N. Eskridge, Jr. & Philip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. 321 (1990) (arguing that statutory interpretation is and should be grounded in a practical reasoning process), and argue that there is no sufficient justification for doing so here.

204 Other commentators have called on the courts to abandon super-deference to the military, but none have recognized that the breadth of the “military authority” exception answers constitutional concerns with judicial review of quintessentially military decisions. Eskridge and Baer “urge the Supreme Court to abandon” the super-deference standard of *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 320 (1936) (“congressional
A. CONSTITUTIONAL STATUS

The most obvious and potentially compelling justification for giving
the military super-deference under the APA is to avoid intruding on the
President’s power as Commander in Chief. For Congress to permit the
judiciary to second-guess the President’s substantive judgment when acting
in his role as Commander in Chief or to impose procedural impediments to
his actions raises separation-of-powers concerns and potentially harms
national security. As former Solicitor General Ted Olson said:

legislation ... within the international field must often accord the President a degree of
discretion and freedom from statutory restriction which would not be admissible were
domestic affairs alone involved”), and instead subject agency decisions in foreign affairs
and national security cases to the same standard of review as decisions in other subject
matter areas. Eskridge and Baer, supra note 9, at 1185. They point out that other
deference regimes are already sufficiently protective of the executive branch’s discretion.
Id. Professor Masur urges the courts not “to invoke ‘national security’ as a shibboleth” to
avoid applying basic principles of administrative law to the military in wartime. Masur,
supra note 4, at 521.

205 The Commander in Chief Clause provides: “The President shall be Commander in Chief
of the Army and Navy of the United States, and of the Militia of the several States, when
called into the actual Service of the United States.” U.S. CONST. art. II, § 2, cl. 1. The
scope of that authority is subject to intense academic and judicial debate. See, e.g., David
J. Barron and Martin S. Lederman, The Commander in Chief at The Lowest Ebb – Framing
The Problem, Doctrine, and Original Understanding, 121 HARV. L. REV. 689 (2008); Ingrid
Wuerth, The Captures Clause, 76 U. CHI. L. REV. 1683 (2009); Heidi Kitrosser,
Symposium: It Came From Beneath The Twilight Zone: Wiretapping and Article II
Imperialism, 88 Tex. L. Rev. 1401 (2010); Hamdan v. Rumsfeld, 548 U.S. 557, 591-92
(2006); id. at 679-81 (Thomas, J., dissenting).

206 See Department of the Navy v. Egan, 484 U.S. 518, 526-27 (1988) (suggesting that
judicial review of decisions committed to the President as Commander in Chief is
circumscribed); Peck, supra note 91, at 74 (“The fact that a decision is within the discretion
of the military, and therefore of the executive branch of government, brings into play the
principle of separation of powers, the major basis of the entire concept of nonreviewability.”); Vermeule, supra note 17, at 1133 (“There are too many domains
affecting national security in which official opinion holds unanimously, across institutions
and partisan lines and throughout the modern era, that executive action must proceed
untrammeled by even the threat of legal regulation and judicial review, no matter how
deferential that review might be on the merits.”); John F. O’Connor, The Origins and
the Constitution did not explicitly indicate any involvement by the judiciary in governing
the armed forces, there was considerable doubt initially as to whether the courts should have
any role in reviewing the military judgments of the political branches”). But see
separation of powers principles mandate a heavily circumscribed role for the courts” in
reviewing military detentions of citizens); Jared A. Goldstein, Habeas Without Rights,
2007 WISC. L. REV. 1165, 1215-16 (2007) (arguing that judicial review of facts supporting
detention of enemy combatants does not violate separation of powers).
The judiciary is not equipped to evaluate combat decisions, to decide how to deploy troops to counter or deter enemy combatants, to make fast-paced decisions on which the outcome of a battle may determine, or to micromanage the infinite number of daily decisions that the Commander in Chief and his subordinates must make. And the Executive cannot possibly conduct those decisions with energy and dispatch if his every wartime decision is subject to real-time judicial review.\textsuperscript{207}

Those concerns counter-balance the separation-of-powers concerns raised by giving the military super-deference in APA cases.

The President, however, cannot be sued under the APA. In \textit{Franklin v. Massachusetts}, the Supreme Court held that the President is neither expressly included nor expressly excluded from the APA.\textsuperscript{208} “Out of respect for the separation of powers and the unique constitutional position of the President,” the Court refused to subject the President to the APA’s requirements based on “textual silence.”\textsuperscript{209} Of course, the rule that the President is not amenable to suit under the APA is a common law rule in that it is not mandated by the text of the APA.\textsuperscript{210} But the \textit{Franklin} rule is permissible because it is gap-filling that does not contradict any explicit provision of the APA, and the Court acknowledged that it was reaching beyond the plain text of the statute.\textsuperscript{211}

The \textit{Franklin} rule provides a complete answer to concerns about APA review interfering with the President’s authority as Commander in Chief. As then-Professor Elena Kagan explained,\textsuperscript{212} \textit{Franklin} concerned an action that Congress had committed to the President’s sole discretion: calculation and transmittal to Congress of the census.\textsuperscript{213} In cases concerning actions that Congress has delegated to an agency head, in contrast, even if the President directs the action, he “effectively has stepped

\begin{footnotes}
\item[207] Theodore B. Olson, \textit{Tex Lezar Memorial Lecture,} 9 TEX. REV. L. & POL. 1, 15 (2004) (concluding that separation of powers insulates the President’s decisions as Commander in Chief from judicial review).
\item[208] 505 U.S. 788, 800 (1992).
\item[209] \textit{Id.} at 800-801; \textit{see also} Dalton v. Specter, 511 U.S. 462, 470 (1994); \textit{see generally} Jonathan R. Siegel, \textit{Suing the President: Nonstatutory Review Revisited,} 97 COLUM. L. REV. 1612, 1617-21 (1997) (analyzing \textit{Franklin v. Massachusetts}).
\item[210] \textit{See supra} note 101 and accompanying text; \textit{see also} Vermeule, \textit{supra} note 17, at 1108 (the rule that the President is not an “agency” under the APA “is not obvious from the text of the APA’s definition”).
\item[211] \textit{See supra} text accompanying notes 126-125.
\item[213] 505 U.S. at 800.
\end{footnotes}
into the shoes of an agency head, and the review provisions usually applicable to that agency’s action should govern.”

Other proponents of the unitary executive theory might disagree. Some commentators posit that all executive power is vested in the President, and the President’s appointees merely “help[ him exercise his constitutional authority.” On that theory, judicial review of any executive branch officer has the potential to interfere with the President’s power as Commander in Chief. Thus, further analysis is required to convince proponents of a strong unitary executive theory that super-deference to the military under the APA is unwarranted.

The President’s power as Commander in Chief generally bears some nexus to combat. The Supreme Court has defined the President’s power to include the “command of the forces and the conduct of campaigns.”

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214 Kagan, supra note 212, at 2351; see also id. at 2369 ("when the President directs or otherwise involves himself in action taken pursuant to a delegation to an agency official … the APA’s judicial review provisions should apply"); see also Kevin M. Stack, The President’s Statutory Powers to Administer the Laws, 106 COLUM. L. REV. 263, 290 & n.121 (2006); Daniel P. Rathbun, Irrelevant Oversight: “Presidential Administration” from the Standpoint of Arbitrary and Capricious Review, 107 Mich. L. Rev. 643, 645-46 (2009) (“arbitrary and capricious review can be easily and appropriately applied to agency decisions, even in cases of presidential involvement”).

215 See Steven G. Calabresi and Saikrishna B. Prakash, The President’s Power to Execute the Laws, 104 Yale L.J. 541, 595 (1994); see also Stack, The President’s Statutory Powers, supra note 214, at 302-3 (“defenders of a strongly unitary conception of the executive argue that the Constitution requires that the President control all power vested in the executive branch”); Mark Tushnet, A Political Perspective on the Theory of the Unitary Executive, 12 U. Pa. J. Const. L. 313, 318-25 (2010) (describing emergence of a strong unitary executive theory under which all executive power must be within the President’s control).


217 See Masur, supra note 4, at 493, 448 (asserting that the Supreme Court has read the Commander in Chief Clause broadly “to encompass nearly any necessary war-related actions”); cf. Barron and Lederman, supra note 205, Lowest Ebb – Framing The Problem, at 696 (“the text and evidence of original understanding provide substantial support only for the recognition of … a prerogative of superintendence when it comes to the military chain of command itself”); id. at 750-51 (“One prominent contention regarding the nature of the President’s central war powers prerogatives is that the Commander in Chief Clause, at its core, establishes that ‘the president has tactical command once Congress decides troops should be used.’”)

218 Ex parte Milligan, 71 U.S. 2, 139 (1866); see also Hamdan v. Rumsfeld, 548 U.S. 557, 591-92 (2006).
and “the power to wage war.”\textsuperscript{219} Thus, many APA cases against executive branch officers concerning military action will be insulated from judicial review by the exception for “military authority exercised in the field in time of war.” For example, because “in the field” may encompass domestic training locations\textsuperscript{220} and a “time of war” can exist without a congressional declaration of war,\textsuperscript{221} \textit{NRDC v. Winter} fell within the scope of the “military authority” exception.

I previously advocated a generous reading of the “military authority” exception due to its status as an exception to a waiver of federal sovereign immunity.\textsuperscript{222} The separation-of-powers concern about judicial review intruding on the President’s Commander in Chief power provides another reason to read the exception generously. A broad interpretation of the exception might avoid constitutional infirmity and avoid the need to decide the extent to which the Commander in Chief power insulates the military from judicial review.\textsuperscript{223} Read broadly, the “military authority” exception will often protect the President’s power as commander in chief from judicial interference. Hence, in most cases, the federal common law of giving super-deference to the military “is no longer ‘necessary’ and should be deemed to have been displaced” by the APA.\textsuperscript{224}

\textsuperscript{219} Ex parte Quirin, 317 U.S. 1, 26 (1942); see also Fleming v. Page, 50 U.S. 603, 615 (1850) (“His duty and his power are purely military. As commander-in-chief, he is authorized to direct the movements of the naval and military forces placed by law at his command, and to employ them in the manner he may deem most effectual to harass and conquer and subdue the enemy.”).

\textsuperscript{220} See Kovacs, supra note 10, at 712-13.

\textsuperscript{221} See id. at 719.

\textsuperscript{222} See id. at 720.

\textsuperscript{223} See Metzger, supra note 7, at 519, 531. Professor Metzger advocates the use of the doctrine of constitutional avoidance, among others, as a means of getting agencies “to take constitutional concerns seriously.” Id. at 531. She recognizes, though, that this doctrine has been subject to scholarly criticism. Id. at 531-32; see also Merrill, supra note 101, at 54 (“a body of common law rules ‘inspired’ but not ‘required’ by the Constitution presents … serious problems of legitimacy” in that it violates principles of federalism, separation of powers, and electoral accountability); Frederick Schauer, Ashwander Revisited, 1995 SUP. CT. REV. 71, 98 (1995) (advocating abandonment of doctrine of constitutional avoidance and urging courts to “focus directly on whether, in any particular case, judges should substitute their judgment for that of Congress, instead of invoking the unwarranted assumption that by ‘merely’ interpreting a statute they have been respectful of the prerogatives and the status of a coordinate branch of government”).

\textsuperscript{224} See Merrill, supra note 101, at 57 (arguing that codification of a constitutionally adequate common law rule removes the courts’ authority to continue to develop the common law); see also Darby v. Cisneros, 509 U.S. 137, 153-54 (1993) (recognizing that Congress “effectively codified the doctrine of exhaustion of administrative remedies” in the APA and thus removed the courts’ power to “impose an exhaustion requirement as a rule of judicial administration”).
Even if the “military authority” exception is read broadly, however, some cases may slip through the cracks and into the courtroom. The Constitution grants the President the power to act as Commander in Chief not only in times of war, but also in peacetime.225 Actions taken in times of peace, however, are not covered by the “military authority” exception because the exception is limited to actions taken in “time of war.”

The precise scope of the President’s Commander in Chief power during peacetime is debatable,226 but for many actions that are potentially subject to an APA claim, Congress has concurrent227 and superceding power.228 The Constitution assigns Congress the power to “declare War … and make Rules concerning Captures on Land and Water,”229 “raise and support Armies,”230 “provide and maintain a Navy,”231 and “make Rules for

225 Saikrishna Prakash, Regulating the Commander in Chief: Some Theories, 81 IND. L.J. 1319, 1322 n.13 (2006) (“the President is CINC whether we are at war or not”); Training of British Flying Students in the U.S., 40 Op. ATT’Y GEN. 58, 61 (1941) (“These powers exist in time of peace as well as in time of war.”); Christopher Kutz, Torture, Necessity, and Existential Politics, 95 CAL. L. REV. 235, 247 n.46 (“the President is Commander in Chief in peace as well as war”); Vanessa Patton Sciarra, Congress and Arms Sales: Tapping the Potential of the Fast-Track Guarantee Procedure, 97 YALE L. J. 1439, 1443 (1988) (“The commander-in-chief clause has historically been seen to provide the Executive with wide-ranging power over military matters even in peacetime.”); Barron and Lederman, supra note 205, Lowest Ebb – Framing The Problem, at 771 n.260 (“the Commander in Chief Clause itself does not distinguish between war and peace”).


227 See Barron and Lederman, supra note 205, Lowest Ebb – Framing The Problem, at 726 (describing the “reciprocity model” pursuant to which “the war powers of each political branch are presumed to be extensive and, for that reason, blended and overlapping with those of the competing branch’’); Geoffrey Corn, Triggering Congressional War Powers Notification: A Proposal To Reconcile Constitutional Practice With Operational Reality, 14 LEWIS & CLARK L. REV. 687, 696-97 (2010) (noting consensus that “the authority to initiate, sustain, and execute war was deliberately diffused between Congress and the President”); Luban, supra note 216, at 542 (“the argument for overlapping or concurrent powers appears a lot more appealing’’).

228 See Barron and Lederman, supra note 205, Lowest Ebb – Framing The Problem, at 771 n.260 (“not many would argue that Congress cannot regulate the way in which, for instance, affairs at the Pentagon are arranged in peacetime’’); Kutz, supra note 225, at 246-47 & n.46 (criticizing “the extraordinary claim that statutes cannot be construed, as a matter of constitutional law, to restrain the Commander in Chief’s war powers’’).

229 U.S. CONST. art. I, § 8, cl. 11.


the Government and Regulation of the land and naval Forces.” The Supreme Court has held that “the Constitution contemplates that Congress has ‘plenary control over rights, duties, and responsibilities in the framework of the Military Establishment, including regulations, procedures, and remedies related to military discipline.’” Congress also has “broad and sweeping” spending powers that give it the authority “to determine not only how money shall be spent on military functions, but also how appropriated funds shall not be spent.” Even more far-reaching is Professors Barron and Lederman’s argument that the Necessary and Proper Clause gives Congress the authority to “exercise its best judgment in the selection of measures to carry into execution the constitutional powers of the government’ as a whole, including the powers that the Constitution vests in the President.” Thus, Congress had the authority to enact the Uniform Code of Military Justice, which among other things requires the President as Commander in Chief to comply with the laws of war.

Most APA cases against the military in peacetime do not implicate military readiness, but instead, concern run-of-the-mill administrative activities concerning personnel and facilities – areas in which Congress may override the President. The military records cases discussed above, for example, are within Congress’s purview. Congress may establish standards of review for agency action taken pursuant to power it has delegated and may put the military on par with other agencies in cases within Congress’s preclusive range without raising constitutional concerns.

232 U.S. CONST. art. I, § 8, cl. 14. Congress also has the authority to call forth, organize, arm, and discipline the militia. U.S. CONST. art. I, § 8, cl. 15, 16.
235 Barron and Lederman, supra note 205, Lowest Ebb – Framing The Problem, at 734.
236 Id. at 735 (quoting McCulloch v. Maryland, 17 U.S. 316, 420 (1819)).
238 See Peck, supra note 91, at 3 (“Cases involving purely military activities, such as preparation for and conduct of combat operations, are relatively rare.”); cf. Chesney, supra note 4, at 1420 (“not all ‘national security’ cases are alike … Some interests may truly be paramount, others quite ordinary”).
239 Eskridge and Baer, supra note 9, at 1164 (Article I “accords Congress primacy in the regulation of … the governance of the armed forces”).
240 See supra text accompanying notes 77-81.
The courts’ practice of giving the military super-deference in peacetime cases gives the military more protection than Congress specified in the APA and more protection than the military requires to safeguard its interests.\(^{242}\)

There potentially remains a sliver of actions taken pursuant to the Commander in Chief powers in peacetime which Congress may not override. Professors Barron and Lederman refer to such powers as “preclusive” in that “they would supersede any effort by Congress to use its own constitutional authorities to enact statutes that would limit the discretion the President would otherwise be constitutionally entitled to exercise.”\(^{243}\) In the very least, this narrow category includes the President’s authority to act “as civilian superintendent of the military.”\(^{244}\) Thus, Congress may not “delegate the ultimate command of the army and navy … to anyone other than the President.”\(^{245}\) An APA claim implicating the President’s preclusive powers in peacetime might be covered by another exception, such as the exception for action “committed to agency discretion by law,”\(^{246}\) or political question doctrine.\(^{247}\) If a sliver of cases implicating the President’s power as Commander in Chief remains subject to judicial review under the APA, however, those few cases do not justify the broad application of super-deference to the military under the APA, particularly not if courts apply the arbitrary or capricious standard in the deferential manner Congress intended.

### B. Expertise

As explained above,\(^{248}\) the arbitrary or capricious standard is not defined, and its terms leave room for judicial interpretation. Such common law is permissible so long as it does not contradict the statute and the court

\(^{242}\) Cf. Peck, supra note 91, at 68 (“To preclude judicial review altogether when abuse of discretion is alleged would be to extend to the military greater deference than is necessary to safeguard its legitimate interests.”).

\(^{243}\) Barron and Lederman, supra note 205, Lowest Ebb – Framing The Problem, at 694.

\(^{244}\) Id. at 737; see also id. at 767 (the Commander in Chief clause removed the legislature’s “power to appoint, and to remove, the military commander”).

\(^{245}\) Id. at 769; see also Barron and Lederman, Lowest Ebb – A Constitutional History, supra note 226, at 1102 (“it is difficult to construe the words of the Commander in Chief Clause not to establish some indefeasible core of presidential superintendence of the army and the navy”); Luban, supra note 216, at 485 (“No ‘war powers’ beyond the narrow power of military command are implicit in the Commander in Chief Clause.”); id. at 566 (arguing that only “the power of command” is preclusive); Saikrishna Bangalore Prakash, Imperial and Imperiled: The Curious State of the Executive, 50 Wm. & MARY L. REV. 1021, 1038 (2008) (“Congress cannot establish independent military officers, for if it did, the President would not be Commander in Chief of the entire armed forces”).

\(^{246}\) 5 U.S.C. § 701(a)(2).


\(^{248}\) See supra text accompanying notes 126-127.
acknowledges that it is filling in a statutory gap. The Supreme Court has elaborated on the arbitrary or capricious standard in that manner, holding that it requires only a “rational foundation” for agency action. Rationality review may sweep various considerations into the courts’ analysis. I turn now to an examination of whether any of those considerations warrant giving the military super-deference in APA cases.

Agency expertise commonly enters into arbitrary or capricious review. The Supreme Court held in *State Farm* that an agency action will not satisfy that standard if its decision “is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.” The Court looks to the agency’s “relative expertness” when reviewing the agency’s interpretation of a statute it administers, and the Court is particularly deferential in cases concerning complex, technical areas that “require significant expertise.” Most recently, Justice Kennedy, in his concurrence in *FCC v. Fox Television Stations, Inc.*, opined that an agency’s change of policy is not arbitrary or capricious when its proffered reasons, “viewed in light of the data available to it, and when informed by the experience and expertise of the agency, suffice to demonstrate that the new policy rests upon principles that are rational, neutral, and in accord with the agency’s proper understanding of its authority.” The dissenting Justices agreed that agency expertise is central to the arbitrary or capricious inquiry in cases concerning an agency’s change of policy. Eskridge and

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249 See supra text accompanying note 117.
250 See supra note 20.
251 Normally, an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.


256 Id. at 1826 (Stevens, J., dissenting) (“should be a strong presumption that the FCC's initial views, reflecting the informed judgment of independent commissioners with expertise in the regulated area, also reflect the views of the Congress that delegated the Commission authority to flesh out details not fully defined in the enacting statute.”), 1830
Baer suggest that agency expertise—“the comparative institutional advantage of the Court vis-à-vis the relevant agencies”—explains some of the variation in agency win rates in different subject areas. An agency’s access to relevant expertise and information, as well as its “capacity … reliably to integrate these inputs,” implicates the accuracy of the agency’s decisions, and thus is a relevant and permissible consideration for courts reviewing agency action.

The military’s expertise is commonly invoked as a justification for affording the military super-deference. Colonel Peck urged the courts to consider the nature of the military action at issue and the extent to which military expertise is involved. He cautioned courts to avoid the danger that they will not understand the ramifications of judicial interference, including the impact of increasing the administrative burden on the military. Professor Luban found it “self-evident that legislators and judges lack institutional competence to kibitz commanders about military matters” and posited that “[t]heir meddling would invite disaster.” Judge Wilkinson, in the Fourth Circuit’s decision upholding the “Don’t Ask, Don’t Tell” policy, said: “While Congress and the members of the Executive Branch have developed a practiced expertise by virtue of their day-to-day supervision of the military, the federal judiciary has not.” Eskridge and Baer do not endorse the practice of giving the military super-deference, but they posit that the Justices perceive the Court as having “an institutional disadvantage” in national security-related cases, “where interpretations are often based upon sensitive political calculations.”

Along a related line, some commentators suggest that the military is entitled to super-deference because it has better access to relevant information. Professor Sunstein advises that courts should be deferential when national security is implicated because courts “lack information about the potentially serious consequences of their judgments, and the elected branches are in the best position to balance the competing considerations.” The Fourth Circuit in the “Don’t Ask, Don’t Tell” case deferred to the military in part because courts lack “access to intelligence

(Breyer, J., dissenting) (“An agency’s policy decisions must reflect the reasoned exercise of expert judgment.”).

257 Eskridge and Baer, supra note 9, at 1144.
258 See Chesney, supra note 4, at 1394.
259 Peck, supra note 91, at 75.
260 Id. at 75.
261 Luban, supra note 216, at 478.
262 Thomasson v. Perry, 80 F.3d 915, 925 (4th Cir. 1996).
263 See Eskridge and Baer, supra note 9, at 1185.
264 Id. at 1144; see also id. at 1173 (“agencies are usually better informed than courts along several dimensions.”).
265 Sunstein, Judging National Security, supra note 88, at 270.
and testimony on military readiness.” And Professor Vermeule proposes that “[j]udges defer because they think the executive has better information than they do.”

The military’s expertise, however, does not justify departing from the APA’s rule that all agencies are subject to the same standard of review under Section 706. Many agencies’ actions require expertise and deserve deference, deference that they should receive under the arbitrary or capricious standard. Moreover, most military actions in wartime are insulated from judicial review under the “military authority” exception. Captain McDaniel advocates varying the degree of deference “proportionally with the inherently ‘military’ nature of the challenged discretionary action” and giving greater deference in cases concerning “military readiness.” He also acknowledges, though, that the “military authority” exception insulates many such actions from judicial review. In the remainder of cases, the executive branch may have no greater institutional competence than any other branch of government. Indeed, affording the military super-deference in cases that do not fall within the scope of the “military authority” exception may encourage the military to “cloak policy decisions” that do not actually require any special knowledge “in a shroud” of expertise.

Likewise, the military’s access to information should not hinder the courts from reviewing military action under the arbitrary or capricious standard. In the administrative setting, the military likely has records documenting its action, and “requiring a knowledgeable affiant to summarize these records to an independent tribunal is a minimal [imposition].” As Professor Chesney points out, if the military shares its information with the court – which it is more likely to do in an adversarial setting – the court will be at no disadvantage “in terms of the quantity and quality of data available to it.” Just as super-deferential review may

266 Thomasson v. Perry, 80 F.3d 915, 925 (4th Cir. 1996).
267 Vermeule, supra note 17, at 1135.
268 See supra text accompanying notes 217-224.
269 McDaniel, supra note 23, at 127.
270 Id. at 126.
271 Luban, supra note 216, at 542-43; Chesney, supra note 4, at 1409-11 (arguing that whether agency expertise justifies greater deference to agency factfinding depends on the circumstances of the case); Masur, supra note 4, at 509 (“many so-called ‘wartime’ cases may turn on issues … about which military administrators hold no particular expertise”).
272 See Meazell, supra note 90, at 27 (discussing the “science charade,” which “posits that agencies cloak policy decisions in a shroud of science, exaggerating the role of science to the detriment of administrative law values, statutory goals, and science itself”).
274 Chesney, supra note 4, at 1406, 1407; see also Masur, supra note 4, at 509 (“To the extent that [war and national security] are impenetrable to judges, it is often because military authorities have simply refused to share relevant and necessary information”).
incentivize agency obfuscation, so too may meaningful judicial review incentivize the military to be forthcoming with the information underlying its decision.\(^{275}\)

Moreover, Congress had the opportunity to consider whether military expertise should play a role in judicial review under the APA.\(^{276}\) Certainly, the Congress of 1946 was well aware of the need to respect military judgments.\(^{277}\) Yet, that Congress decided to exempt only “military authority exercised in the field in time of war” and to subject all other military action to the same standard of review as other federal agencies. Thus, the assertion that courts should consider “the special requirements of military society” arising from the involuntary quality of military service and the need for discipline\(^{278}\) is misplaced, as such balancing is already accounted for in the APA.\(^{279}\)

Eskridge and Baer suggest that, regardless of whether the agency or the court has greater expertise in the subject matter, judicial “second-guessing” of agency decisions “produce[s] unpredictable results and often undermine[s] the agency’s ability to carry out the statutory scheme…. [T]wo heads are often not as good as one when it comes to public administration.”\(^{280}\) Perhaps the courts are of the view that the military can

Professor Chesney also points out that an agency’s superior expertise and information should only warrant greater deference where the decisionmaker “actually exploits them.” Chesney, supra note 4, at 1411.\(^{275}\) See Meazell, supra note 90, at 70 (discussing incentives created by hard-look review of agency scientific determinations).\(^{276}\) See Kovacs, supra note 10, at 697-703 (discussing APA’s legislative history regarding judicial review of military action); cf. COMM. ON ADMINISTRATIVE PROCEDURE, Administrative Procedure in Government Agencies, S. Doc. 77-8, at 61 (1941) (“expertness and expedition are two major justifications for the administrative process”); id. at 71 (“The desire for expertness is one of the reasons for the utilization of the administrative process.”).\(^{277}\) See Vermeule, supra note 17, at 1138 (“Consider that the drafters of the APA had just lived through a global hot war and were on the verge of a global cold one.”); Kovacs, supra note 10, at 691-96 (discussing changes in Congress’s view of the military during World War II).

\(^{278}\) Peck, supra note 91, at 76; see also McDaniel, supra note 23, at 124 (“the military imperatives of discipline and combat readiness demand a judicial deference unlike that due other governmental agencies”); Thomasson v. Perry, 80 F.3d 915, 926 (4th Cir. 1996) (“The need for deference also derives from the military’s experience with the particular exigencies of military life.”); cf. United States v. Johnson, 481 U.S. 681, 691 (1987) (“In every respect the military is, as this Court has recognized, ‘a specialized society.’” (quoting Parker v. Levy, 417 U.S. 733, 743 (1974))).

\(^{279}\) Cf. Chrysler Corp. v. Brown, 441 U.S. 281, 313 (1979) (Courts upset that balance when they override informed choice of procedures and impose obligations not required by the APA. By the same token, courts are charged with maintaining the balance: ensuring that agencies comply with the “outline of minimum essential rights and procedures” set out in the APA.”).

\(^{280}\) Id. at 1172.
least afford this sort of disruption. Professor Vermeule presumes that judges “fear the harms to national security that might arise if they erroneously override executive policies.” Courts may also fear that their judgments may not engender the same respect as decisions of the elected branches. But again, Congress presumably considered these factors when it enacted the APA and exempted the most sensitive military actions from judicial review in the “military authority” exception. Congress’s judgment that, outside that realm, the military is no more sensitive to regulatory disruption than other agencies should trump the courts’ unexpressed concerns.

Moreover, Professor Masur demonstrates that the potential harms from judicial misjudgment in military cases “are not always demonstrably larger than in quotidian civilian administrative lawsuits.” He points out that the rule at issue in State Farm would have saved thousands of lives and thus may have carried “utilitarian consequences of the same order of magnitude as prototypical wartime adjudications.” Similar, the decisions of the Fish and Wildlife Service and the National Marine Fisheries Service under the Endangered Species Act carry the weight of an entire species’ existence. Judicial disruption has potentially disastrous consequences in that context as well, as it does in many others. As Professor Masur said, “[m]ilitary cases do not always hold the threat of substantially greater national peril, nor offer more pressing exigencies, no present more intractable fact or policy questions than do typical administrative law adjudications.”

C. PROCEDURAL DISTINCTIONS

Differences in the form of agency decisions merit different levels of deference under Supreme Court precedent. The weight the Court affords an agency’s interpretation of a statute it administers, for example, “depend[s] upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all

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281 Vermeule, supra note 17, at 1135.
282 See Thomasson v. Perry, 80 F.3d 915, 926 (4th Cir. 1996) (“the imprimatur of the President, the Congress, or both imparts a degree of legitimacy to military decisions that courts cannot hope to confer”).
283 Masur, supra note 4, at 503.
284 Id. at 503-4.
285 E.g., TVA v. Hill, 437 U.S. 153, 171 (1978) (“We begin with the premise that operation of the Tellico Dam will either eradicate the known population of snail darters or destroy their critical habitat.”); id. at 173-74 (“Accepting the Secretary's determinations, as we must, it is clear that TVA's proposed operation of the dam will have precisely the opposite effect, namely the eradication of an endangered species.”).
286 Masur, supra note 4, at 519.
those factors which give it power to persuade, if lacking power to control,”
as well as the “formality” of the decision. 287

The extent to which the military elicits super-deference because it satisfies those factors more often than other agencies is a question for future empirical research. The formality of the military’s decisions is not likely to explain the courts’ tendency to give the military super-deference, however, because few military decisions involve formal proceedings. 288 The military records cases, for example, arise from informal adjudications. 289 The Navy decision at issue in Winter to continue training despite the environmental impacts of the Navy’s activities was no more formal than other agency decisions under the National Environmental Policy Act that earned little or no deference. 290 Eskridge and Baer found that, in cases concerning agency interpretations of statutes, the Supreme Court tends to prefer rulemakings to adjudications, 291 and that agency interpretations presented in informal rules, guidance, manuals, and amicus briefs all resulted in higher-than-average win rates. 292 Thus, the formality of the military’s decisions may provide a justification for super-deference on a case-by-case basis, but it does not appear to warrant such deference across the board.

Consistency, on the other hand, may weigh in the military’s favor. Eskridge and Baer found that the consistency of an agency’s interpretation over time played “a significant role in predicting agency success.” 293 Courts may be less inclined to defer to agencies they perceive as biased. 294 Perhaps the military is perceived as more consistent and less politically variable than other agencies and gets more deference because of that. Again, whether that factor explains the broad application of super-deference in military cases is fodder for empirical study. As discussed below,

288 Peck, supra note 91, at 68.
290 E.g., Native Ecosystems Council v. Tidwell, 599 F.3d 926, 937 (9th Cir. 2010); South Fork Band Council Of Western Shoshone Of Nevada v. U.S. Dept. of Interior, 588 F.3d 718, 725-28 (9th Cir. 2009); New Mexico ex rel. Richardson v. Bureau of Land Management, 565 F.3d 683, 706-715 (10th Cir. 2009).
291 Eskridge and Baer, supra note 9, at 1147 (finding “markedly higher win rates for agency interpretations embodied in rulemaking as opposed to adjudications”).
292 Id. at 1148.
293 Id.; see also id. at 1149 (“the Court has a strong preference for supporting interpretations that are stable.”); Eskridge, Vetogates, supra note 118, at 1481-83. The presence or absence of a clear delegation of rulemaking authority from Congress was not a good predictor of agency win rates. Eskridge and Baer, supra note 9, at 1129.
294 Eskridge and Baer, supra note 9, at 1173.
however, courts applying a higher level of deference to the military than to other agencies should explain their departure from Congress’s judgment that all agencies are entitled to the same level of deference under the arbitrary or capricious standard.

Another possible explanation for the courts’ practice of giving the military super-deference in APA cases is the judicial tendency to “reward[] agencies when they provide useful information about the history of the statutory scheme, real-world facts and context, and the consequences of different interpretations for the effectuation of complicated congressional purposes.” Eskridge and Baer refer to this as “consultative deference.” In cases in which the Supreme Court employed consultative deference, which Eskridge and Baer found was “by far the most frequent deference regime actually followed by the Court,” the agency won 80.6% of the time, well above the average of 68.8%. Even if one could show that the military tends to provide more of this sort of useful information in its briefs than other agencies, however, that would not justify the broad application of super-deference in all military cases. Indeed, since this factor has nothing to do with the quality of the agency’s decision, but only its representation in court, it is not a permissible common law interpretation of the “arbitrary or capricious” standard.

D. IDEOLOGY

A final factor that probably explains, but does not justify, the courts’ tendency to give the military super-deference in APA cases is ideology. Eskridge and Baer concluded that “the ideological characterization of the agency interpretation” is the strongest indicator of agency success. Other studies have confirmed that ideology plays a significant role in judicial review of agency decisions. Professors Miles and Sunstein demonstrated

295 See infra text accompanying notes 343-367.
296 Eskridge and Baer, supra note 9, at 1143-44; see also id. at 1114 (“useful information” like legislative or regulatory history, relevant data and facts, or “experience-based analysis”).
297 Id. at 1113; see also id. at 1111 (under consultative deference, “the Court relies on some input from the agency … to shape its reasoning and influence its decision”).
298 Id. at 1113.
299 Id. at 1142 (Table 15).
300 Id. at 1127, 1129 (Table 7).
301 Cf. SEC v. Chenery Corp., 318 U.S. 80, 87 (1943) (“The grounds upon which an administrative order must be judged are those upon which the record discloses that its action was based.”).
302 Eskridge and Baer, supra note 9, at 1156.
that Democratic appointees vote to validate agency decisions significantly more often than Republican appointees and are “far more likely to uphold liberal decisions than conservative ones.” Republican appointees “show the opposite pattern.” Eskridge and Baer agree that “across the board, the ideology of the agency interpretation matters to Justices – and the way it matters depends on the political inclinations of the Justice.” Indeed, this phenomenon may be more pronounced in cases implicating national security than other areas of the law. Significantly, the standard of review does not dampen the effect of ideology. Miles and Sunstein observed that, whether courts reviewed agency action under *Chevron* or under the arbitrary or capricious standard, ideology had a similar effect. They concluded that “judicial policy judgments play an unquestionable role under arbitrariness review.”

Typically, the makeup of the appellate panel significantly impacts voting behavior. Democratic appointees tend to vote more liberally as the number of Democratic appointees on the panel increases, and Republican appointees do the same. Conversely, judges tend to moderate their voting when they are in the minority on a three-judge panel. In some areas, however, such as abortion and capital punishment, panel probability that they will validate agency determinations”); Richard L. Revesz, *Environmental Regulation, Ideology, and the D.C. Circuit*, 83 Va. L. Rev. 1717 (1997) (“ideology significantly influences judicial decisionmaking on the D.C. Circuit”); Crowley, *supra* note 82, at 276 (finding “rather striking support for the hypothesis that agency support is a function of the policy direction of that agency”); Canon & Giles, *supra* note 82, at 190 (the Supreme Court’s “willingness to support an agency … stems largely from the justices’ attitudes towards the agency’s substantive policies”); Sheehan, *supra* note 82, at 884 (“the policy position of the agency is an important factor”).

304 Miles & Sunstein, *The Real World*, supra note 82, at 767.
305 Id. at 785; see also Sunstein, *Judging National Security*, supra note 88, at 272.
306 Id.
307 Eskridge and Baer, *supra* note 9, at 1155.
308 See Sunstein, *Judging National Security*, supra note 88, at 279 (finding that the difference in voting behavior between majority Democrat and majority Republican panels is more pronounced in national security cases than “in any other area of federal law”).
309 Miles & Sunstein, *The Real World*, supra note 82, at 768 (“ideology influences judges’ decisionmaking to the same extent regardless of the judicial task or the standard of review”).
310 Id. at 768 (“the role of political judgments appears to be strikingly similar when courts are reviewing agency interpretations of law under *Chevron U.S.A. Inc. v. NRDC* and when judges are addressing questions of fact and policy under arbitrariness review”).
311 Id. at 780; see also id. at 784 (“Arbitrariness review is being applied in a way that shows a large influence from judicial policy preferences.”).
312 Id. at 784.
313 Id. at 785; see also Revesz, *Environmental Regulation*, supra n.303 at 1764 (“the ideology of one’s colleagues is a better predictor of one’s vote than one’s own ideology”); Sunstein, *Judging National Security*, supra note 88, at 273.
composition does not impact voting behavior.\textsuperscript{315} Professor Sunstein found a similar absence of panel impacts in national security cases, presumably because judges’ “convictions are deeply held.”\textsuperscript{316} Eskridge and Baer similarly suggested that the “\textit{intensity of (judicial) preferences}” might explain differential win rates.\textsuperscript{317}

The empirical evidence suggests, then, that the courts’ practice of giving super-deference to the military may simply reflect judicial ideological preferences.\textsuperscript{318} Professor Steven Lichtman concluded that “the military’s success rate is an instance in which there is an ‘ideology’ backstopping the success of this particular repeat player.”\textsuperscript{319} Obviously, that is not a permissible common law exegesis of the arbitrary or capricious standard.\textsuperscript{320}

Commentators agree that, normatively, it would be desirable to reduce the impact of ideology in administrative judicial review,\textsuperscript{321} but how that should be accomplished is the subject of academic debate.\textsuperscript{322} Some

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\begin{itemize}
\item \textsuperscript{315} Id. at 274-75.
\item \textsuperscript{316} Id. at 279-80, 290.
\item \textsuperscript{317} Eskridge and Baer, supra note 9, at 1146 (emphasis in original). Eskridge and Baer found that, where the Justices have strongly held views about the subject matter, they are more likely to overturn the agency. \textit{Id.} at 1146-47; see also Eskridge, \textit{Vetogates}, supra note 118, at 1480-81.
\item \textsuperscript{319} Lichtman, supra note 88, at 945. Lichtman also points out that 35 out of 110 Supreme Court Justices included in his analysis served in the military. \textit{Id.} at 949.
\item \textsuperscript{320} Similarly, a super-deference rule premised \textit{sub silentio} on the desire to “shield the judiciary from … institutional harms in the form of lost prestige, legitimacy, or political capital,” Chesney, \textit{supra} note 4, at 1397, would not be within the scope of the arbitrary or capricious standard. \textit{See also id.} at 1429 (“We cannot expect judges to attribute deference decisions to this motivation, of course, but we must account for the possibility – even the likelihood – that such concerns play some role.”).
\item \textsuperscript{321} \textit{E.g.}, Miles & Sunstein, \textit{The Real World}, \textit{supra} note 82, at 802; \textit{id.} at 814 (arguing that judicial review of agency action should not provide “a method of substituting judicial policy preferences for agency policy preferences”); \textit{see also} Miles & Sunstein, \textit{Do Judges Make Regulatory Policy?}, \textit{supra} note 303, at 827 (“the meaning of federal statutory law should not be based on whether a litigant has drawn a panel of judges appointed by a president from a particular party”).
\item \textsuperscript{322} \textit{See} Eskridge and Baer, \textit{supra} note 9, at 1193-95 (describing various academic proposals). Professor Chesney simply proceeds on the assumption that some judges decide cases based on the law and prudential factors, rather than their own ideological and value preferences. Chesney, \textit{supra} note 4, at 1402.
\end{itemize}
commentators advocate formalist rules.\textsuperscript{323} Eskridge and Baer point out, however, that even the most ardent textualist judges vote along ideological lines and that textualist approaches “are too thin to overwhelm judicial preconceptions.”\textsuperscript{324} Other commentators advocate turning to legislative history.\textsuperscript{325} Eskridge and Baer agree that legislative history “offers a greater chance of supplanting the judge’s own preconceptions,”\textsuperscript{326} but they show that Justices who rely on legislative history also vote ideologically.\textsuperscript{327} Professor Sunstein advocates the use of non-delegation canons.\textsuperscript{328} Eskridge and Baer counter that canonical approaches are no more effective at overcoming judicial ideology than textualist approaches; Justices employ such canons to reach ideologically driven results as well.\textsuperscript{329} Ultimately, Eskridge and Baer suggest simply that the Supreme Court should “clearly announce” its deference rule based on several factors that Eskridge and Baer advocate “and then stick to it.”\textsuperscript{330} As detailed below, I agree that the courts should explain their reasoning clearly and stick to the balance Congress struck in the APA.

V. IMPLICATIONS

Since there is no justification for broad application of a super-deference standard of review in military cases under the APA, the courts should cease this practice. Commentators have long called on the courts to halt the creation of unauthorized common law.\textsuperscript{331} Professor Duffy focused his plea on administrative common law that exceeds the bounds of the APA and urged the courts to “require of themselves the same authorization in law to support their own creations, and the same respect for statutory law, that they require of executive agencies in defending their programs.”\textsuperscript{332} The Supreme Court has already acknowledged that the APA supplants judicial common law, at least in part.\textsuperscript{333} The courts should now acknowledge that judicially crafted standards of review that have no grounding in the APA may exceed the courts’ authority. The Supreme Court recognized shortly after the enactment of the APA that, in the Act, “Congress expressed a mood. And it expressed its mood not merely by oratory but by legislation.

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\textsuperscript{323} See Eskridge and Baer, supra note 9, at 1193-94.
\textsuperscript{324} Id. at 1194, 1195.
\textsuperscript{325} Id.
\textsuperscript{326} Id. at 1195.
\textsuperscript{327} Id. at 1194.
\textsuperscript{328} Sunstein, Beyond Marbury, 115 Yale LJ 2580, 2607-10.
\textsuperscript{329} Eskridge and Baer, supra note 9, at 1195.
\textsuperscript{330} Id. at 1196.
\textsuperscript{331} See, e.g., Merrill, supra note 101.
\textsuperscript{332} Duffy, supra note 7, at 213.
\end{flushleft}
As legislation that mood must be respected.”

Any lingering concerns about the potential for judicial review of administrative military action to interrupt military priorities should be alleviated by the recognition that Congress can and does add military exemptions to substantive statutes. In 2002, the District of Columbia district court enjoined Navy training on the island of Farallon de Medinilla based on the Navy’s violation of the Migratory Bird Treaty Act (MBTA), which is enforceable only through the APA. Although the “military authority” exception already precluded APA review of the Navy’s training, Congress responded by exempting certain “military readiness activities” from the MBTA. Again, in 2003, Congress responded to a district court injunction by exempting “military readiness activities” from certain provisions of the Marine Mammal Protection Act, the relevant provisions of which are actionable only through the APA. These statutes spurred debate, but regardless of whether they were necessary or not, they demonstrate that Congress can protect the military from judicial overreaching.

Judicial candor may provide a mechanism for bringing an end to the practice of giving the military more deference than it is due under the APA.

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Commentators have long extolled the benefits of judicial candor. In his seminal essay on the topic, Professor Shapiro argued that “candor is the sine qua non of all other restraints on abuse of judicial power, for the limitations imposed by constitutions, statutes, and precedents count for little if judges feel free to believe one thing about them and to say another.” Professor Shapiro posited that the nature of the judicial process mandates that judges provide reasons for their decisions that can be “debated, attacked, and defended.” That argument is particularly salient in the context of judicial review of administrative action. When courts take on the task of cabining agencies within the bounds of their statutory authority, they should be equally forthcoming about the limits of their own authority.

Professor Merrill advocates judicial transparency as a means to “promote rigor and clarity in judicial thinking about the appropriate role of federal common law.” He believes that candor yields “predictability and stability,” which are goals of the APA and values of the rule of law. Predictability in the law “appeals to basic notions of fairness” by giving notice to potential litigants of what the law requires. By the same token, giving agencies notice of what to expect from judicial review may prevent arbitrary agency action. It cannot be gainsaid that the military requires

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343 See, e.g., Eskridge and Frickey, supra note 203, at 365-71, 383 (urging courts to be more candid regarding methods of statutory interpretation); Micah Schwartzman, Judicial Sincerity, 94 VA. L. REV. 987 (2008). Indeed, “[s]ystematic criticism of judicial candor is a fairly recent phenomenon.” Id. at 988 n.2.

344 David L. Shapiro, In Defense of Judicial Candor, 100 HARV. L. REV. 731, 737 (1987); see also id. at 750 (“candor is to the judicial process what notice is to fair procedure”).

345 Shapiro, supra note 344, at 737. But see Scott C. Idleman, A Prudential Theory of Judicial Candor, 73 TEX. L. REV. 1307, 1335-50 (1995) (critiquing the notion that candor is required to make the judiciary accountable and keep it within the bounds of its authority).

346 See supra text accompanying notes 169-170. Cf. Nicholas S. Zeppos, Judicial Candor and Statutory Interpretation, 78 GEO. L. J. 353, 402 (1989) (“A court that lays claim to the power to pronounce legal rights and remedies cannot expect obedience if its process is corrupted by lying.”). But see id. at 404-5 (arguing that candor may threaten judicial integrity).

347 Merrill, supra note 101, at 72; see also Idleman, supra note 345, at 1350 (“candor [may] serve to increase the soundness of the judiciary’s decisionmaking and in turn the quality-e.g., the coherence, the clarity, and even the choice of reasons-of its written opinions”).

348 Merrill, supra note 101, at 72; see also Stack, The Statutory President, supra note 165, at 568.


350 Zeppos, supra note 346, at 401. But see id. at 402-3 (arguing that judicial candor does not yield greater predictability).

351 Cf. Manning, supra note 18, at 674 (“transparent [agency] rules have a salutary effect on the control of arbitrariness”); Stack, The Statutory President, supra note 165, at 568.
predictability to fulfill its mission of protecting the nation.\textsuperscript{352} To the extent that being forthright about the standard of review applicable to administrative military action under the APA would enable the military to anticipate the outcome of legal challenges and thus enhance military readiness, it is certainly something to be desired.

Professor Metzger endorses transparency in acknowledging the role of constitutional common law in administrative law because it is difficult to hold agencies accountable for their decisions if “judicial obfuscation” masks the standard of review.\textsuperscript{353} She posits that a “lack of transparency is a serious impediment to both judicial and administrative accountability.”\textsuperscript{354} Without some acknowledgment of and explanation for giving the military super-deference, there is no means for testing the courts’ application of or the military’s pleas for that standard.\textsuperscript{355}

Judicial candor may have other salutary effects in this context as well. It may prevent the “spillover effects” of excessively lenient judicial review of administrative military actions in other areas of the law.\textsuperscript{356} By explicating the circumstances in which super-deference is warranted, courts may minimize the chances that national security concerns will impact the analysis of otherwise routine administrative issues. Moreover, judicial transparency enables both the public and Congress to understand and respond to judicial decisions through the democratic process.\textsuperscript{357} Finally, to the extent that judicial ideology provides the motivation for deferring

\textsuperscript{352} Peck, supra note 91, at 80 (“the increased degree of predictability would itself have a salutary effect on the entire subject area [reviewability of challenges to military administrative activities]”).

\textsuperscript{353} Metzger, supra note 7, at 486; see also id. at 506, 534-37.

\textsuperscript{354} Id. at 535.

\textsuperscript{355} Cf. Masur, supra note 4, at 506 (“there exists no internal mechanism to prevent executive branch actors from simply alleging generalized threats to national security at the outset of any wartime adjudication”).

\textsuperscript{356} See Huq, supra note 91, at 271 (“Spillover effects that result from the convergence of national security with general public law, such as in \textit{Iqbal}, may create an incrementalist avenue to across-the-board abrogation of the federal courts’ liberty-protecting function.”); see also Dickinson v. Zurko, 527 U.S. 150, 162 (1999) (“The Federal Circuit’s [clearly erroneous] standard would require us to create … precedent that itself could prove disruptive by too readily permitting other agencies to depart from uniform APA requirements.”).

\textsuperscript{357} See Kagan, supra note 212, at 2331-33; Stack, \textit{The Statutory President}, supra note 165, at 568 (“without a general framework, Congress has no baseline around which to legislate and specifically to indicate when it seeks to grant broad deference to the president and when it does not”).
excessively to the military in APA cases, judicial candor may counteract that tendency to some extent.358

Judicial candor may not always be “desirable,” much less required.360 It “may reveal unpalatable value choices, raise obstacles to securing the agreement of multimember bodies, or have worrying implications for future decisions.”361 It may be ineffective if the court’s audience is unable or unwilling to respond to the court’s transparency, and it may even threaten the judiciary’s institutional legitimacy.363 None of those concerns, however, diminish the value of courts acknowledging the extent to which they depart from the APA’s standard of review in military cases.364

The first step, then, is for courts to state explicitly when they apply a standard of review to the military under the APA that exceeds the already deferential arbitrary or capricious standard. In acknowledging that they are

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358 See David McGowan, Judicial Writing and the Ethics of the Judicial Office, 14 GEO. J. LEGAL ETHICS 509, 514 (2001) (advocating a rule of judicial ethics that would require candor in judicial opinions; “An ethical judge must demand of herself that she identify and understand her own biases and how they affect her reaction to a case.”); Michael Wells, Naked Politics, Federal Courts Law, and The Canon of Acceptable Arguments, 47 EMORY L.J. 89, 138-42 (1998) (urging courts to be candid about the role of “naked politics” in federal courts jurisprudence). Of course, this notion is not without controversy. See Zeppos, supra note 346, at 406-12 (arguing that calls for judicial candor may be unrealistic because judges may not be aware of the real reasons for their decisions). Compare Scott Altman, Beyond Candor, 89 MICH. L. REV. 296 (1990) (arguing that too much judicial introspection about the extent to which the law actually constrains the courts could reduce judicial candor) with Gail Heriot, Way Beyond Candor, 89 MICH. L. REV. 1945 (1991) (critiquing Altman’s thesis and arguing that courts should adhere to the moral precept to seek the truth).

359 See Idleman, supra note 345, at 1383-84.

360 See Vermeule, supra note 17, at 1132.

361 See Metzger, supra note 7, at 535; see also Idleman, supra note 345, at 1384, 1386 (avoiding candor may be justified “by the need to reach a consensus among factions within any given case” or “to mask a fundamental value conflict”); Shapiro, supra note 344, at 739-50 (refuting arguments that judicial candor is not always preferable).

362 Idleman, supra note 345, at 1388-94.

363 Professor Vermeule posits that “hypocritical lip-service to the rule of law” may be best “in the long run” because acknowledging the black holes in administrative law explicitly may undermine rule of law values. Vermeule, supra note 17, at 1132; see also id. at 1136. He argues that it is preferable to “preserve the façade of law so that one day, when the crisis has passed, a real building may be constructed behind it.” Id. at 1132-33. But super-deference to the military is not limited to times of national emergency. Rather, there is an express black hole, the “military authority” exception, that insulates the military from judicial review at such times. In the case of judicial review of administrative military action under the APA, it is hard to see how judicial honesty about the standard of review would be unwelcome.
applying a standard of review that has no foundation in statutory text, the courts may think more carefully about why they are doing it and limit that common law standard to the few cases in which it is truly justified.

Professor Vermeule might object that my aim here is “hopelessly utopian.”\textsuperscript{365} He contends that black holes – like the “military authority” exception – and gray holes – like the tendency to give the military super-deference – are inevitable.\textsuperscript{366} Here, however, I seek merely to substitute one judicially created gray hole – super-deference to the military – for another congressionally established gray hole – the arbitrary or capricious standard, which applies alike to all federal agencies. I do not quibble with Professor Vermeule’s assertion that the intensity of review under the arbitrary or capricious standard can be adjusted to the circumstances.\textsuperscript{367} I merely assert that the standard should be adjusted alike for all agencies, as Congress in 1946 – a Congress that was well aware of the need for strong executive action during times of national emergency – intended.

\textbf{CONCLUSION}

Congress subjected the military to the same standard of review under the APA as other federal agencies: the deferential arbitrary or capricious standard. Yet the courts have continued to give the military more deference than most other agencies. Like all unauthorized federal common law, that practice raises separation of powers concerns. The failure of the unelected judiciary to adhere to the political bargain embodied in the APA is particularly problematic, given the unusual history of the APA and the stature it has attained over time. The practice of giving the military heightened deference under the APA also brings into focus the hypocrisy of courts limiting agency discretion through rules that exceed judicial authority, and it implicates the rule of law values associated with applying rules consistently to restrain government discretion. It also undermines two of the APA’s primary purposes: to increase uniformity in administrative law and augment judicial review of agency action. And it runs against the current of the Supreme Court’s increasing adherence to the text of the APA.

Departing from the text of the APA is not necessarily impermissible, but there is no justification for the broad application of a super-deference standard of review to military action under the APA. The Commander in Chief himself is not amenable to suit under the APA, and even if the Commander in Chief power extends to executive branch officers, the

\textsuperscript{365} Vermeule, supra note 17, at 1097.
\textsuperscript{366} Id. at 1097.
\textsuperscript{367} Id. at 1134.
exception for “military authority exercised in the field in time of war” insulates core military activities from judicial review. In peacetime, Congress generally has paramount authority over the military and may authorize judicial review of military action without raising constitutional concerns. A sliver of cases implicating Presidential powers may remain subject to judicial review under the APA in peacetime, but the deferential arbitrary or capricious standard belies the need for an even more deferential standard of review. The military’s expertise entitles it to no greater respect than many other agencies. The empirical evidence indicates that judicial ideology may be a driving force behind the tendency to give the military super-deference. If so, that certainly does not justify departing from the plain command of the statute.

Judicial candor may provide a means of counteracting the tendency to give the military excessive deference. Acknowledging explicitly when courts apply a standard of review that is more deferential than the arbitrary or capricious standard might make both courts and agencies more accountable, promote stability and predictability in the law, and counteract ideological tendencies. It would also leave Congress free to provide the military more protection from the judiciary if necessary.

The APA is not a complete codification of administrative law. Such an enormous undertaking would be beyond the scope of such a short piece of legislation, and perhaps beyond Congress’s capacity. Congress left numerous holes that have required judicial filling. Thus, the question of whether administrative common law survived the passage of the APA is not an either/or proposition. For example, the APA did not prohibit the federal courts from employing equitable doctrines to fashion appropriate remedies. But some areas of the law are completely codified. Where Congress provided clear direction for agencies and courts to follow, agencies and courts should follow, and the courts should cease reliance on

368 See LEGISLATIVE HISTORY, at 250 (“The bill is an outline of minimum essential rights and procedures.”); Vermeule, supra note 17, at 1108 (“the administrative state is too varied and complex to be regulated by crisp legal standards formulated in advance”). But see LEGISLATIVE HISTORY, at 191 (Senate Judiciary Committee aimed to “make sure that the bill [wa]s complete enough to cover the whole field”).

369 See 5 U.S.C. § 702 (“Nothing herein ... affects ... the power or duty of the court to ... deny relief on any other appropriate legal or equitable ground.”); Levin, supra note 7; see also Duffy, supra note 7, at 128 (the Judiciary Act of 1875 “should be viewed as an authorization or the federal courts to administer a federal common law of equitable remedies without further statutory authorization”). Professor Huq focused his analysis of whether national security cases are unique on the remedy because it provides “a more fine-grained tool for assessing the consequences of judicial action than dichotomous metrics such as win/loss rates or tendencies to deference.” Huq, supra note 91, at 229. Perhaps the Supreme Court was willing to defer so broadly in Winter because the APA expressly preserves the courts’ equitable discretion to fashion a remedy appropriate to the case.
common law doctrines that do not comport with Congress’ stated intent absent a sufficient reason to do so, and certainly not without even acknowledging that they are doing so. All agencies of the federal government are entitled to deference under the arbitrary or capricious standard, not just the military, and not based on unexamined assumptions. The practice of giving different agencies different levels of deference is contrary to Congress’s considered judgment and should come to an end.