

## Leveling the Deference Playing Field

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### INTRODUCTION

Courts give federal agencies substantial deference in cases challenging agency action. That deference appropriately credits agency expertise.<sup>1</sup> The military, however, tends to get more deference than other agencies, and not only in cases that directly

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implicate military expertise, but also in administrative law cases raising constitutional, environmental, and employment issues, among others.<sup>2</sup> 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.<sup>3</sup> Second is the equally long-running and lively debate about the role of common law in administrative law.<sup>4</sup> More than sixty years after Congress codified the basic tenets of administrative law in the Administrative Procedure Act of 1946 (APA),<sup>5</sup> the courts continue to rely on judicially created

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<sup>1</sup> See, e.g., *Alaska Dep't of Envtl. Conservation v. EPA*, 540 U.S. 461, 487 (2004) ("We 'normally accord particular deference to an agency interpretation of longstanding duration,' recognizing that 'well-reasoned views' of an expert administrator rest on 'a body of experience and informed judgment to which courts and litigants may properly resort for guidance.'") (citations and internal quotation marks omitted).

<sup>2</sup> See *infra* Part II.

<sup>3</sup> See, e.g., Robert M. Chesney, *National Security Fact Deference*, 95 VA. L. REV. 1361, 1363 (2009) (concluding that "many arguments in favor of deference are unpersuasive, but . . . deference nonetheless may be justified in limited circumstances"); Jonathan Masur, *A Hard Look or a Blind Eye: Administrative Law and Military Deference*, 56 HASTINGS L.J. 441, 445 n.16 (2005) (listing articles). Compare, e.g., Christina E. Wells, *Questioning Deference*, 69 MO. L. REV. 903 (2004), with Robert J. Pushaw, Jr., *Defending Deference: A Response to Professors Epstein and Wells*, 69 MO. L. REV. 959 (2004). A notable new addition to this debate is *A More Perfect Military: How the Constitution Can Make Our Military Stronger*, in which Diane H. Mazur argues that excessive judicial deference to the military contributed to the erosion of civil-military relations. DIANE H. MAZUR, *A MORE PERFECT MILITARY: HOW THE CONSTITUTION CAN MAKE OUR MILITARY STRONGER* 190-91 (2010).

<sup>4</sup> See *Monsanto Co. v. Geertson Seed Farms*, 130 S. Ct. 2743, 2767 n.5 (2010) (Stevens, J., dissenting) ("There is an ongoing debate about the role of equitable adjustments in administrative law.").

<sup>5</sup> Administrative Procedure Act of 1946, Pub. L. No. 79-404, 60 Stat. 237 (codified as amended at 5 U.S.C. § 500).

doctrines of administrative common law, supplying ample fodder for scholarly discussion.<sup>6</sup>

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."<sup>7</sup> The APA's history shows that the decision to subject all agencies to the same level of judicial inquiry was deliberate. Yet, courts continue to apply different standards of review to different agencies. The military continues to enjoy "super-deference,"<sup>8</sup> even for actions that are 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 exceptions that gave the military special treatment. The APA does not apply to actions taken pursuant to "military authority exercised in the field in time of war."<sup>9</sup> In my article, *A History of the Military Authority Exception in the Administrative Procedure Act*, I 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.<sup>10</sup> 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

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<sup>6</sup> See, e.g., John F. Duffy, *Administrative Common Law in Judicial Review*, 77 TEX. L. REV. 113 (1998); Ronald M. Levin, "Vacation" at Sea: *Judicial Remedies and Equitable Discretion in Administrative Law*, 53 DUKE L.J. 291 (2003); Gillian E. Metzger, *Ordinary Administrative Law as Constitutional Common Law*, 110 COLUM. L. REV. 479 (2010); Antonin Scalia, *Vermont Yankee: The APA, the D.C. Circuit, and the Supreme Court*, 1978 SUP. CT. REV. 345.

<sup>7</sup> Administrative Procedure Act, 5 U.S.C. § 706(2)(A) (2006).

<sup>8</sup> See William N. Eskridge, Jr. & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from Chevron to Hamdan*, 96 GEO. L.J. 1083, 1098 (2008).

<sup>9</sup> 5 U.S.C. § 701(b)(1)(G). For a historiographic analysis of that provision, see Kathryn E. Kovacs, *A History of the Military Authority Exception in the Administrative Procedure Act*, 62 ADMIN. L. REV. 673 (2010).

<sup>10</sup> Kovacs, *supra* note 9, at 676 n.21, 720.

Commander in Chief, and it removes concern about courts second-guessing military expertise in particular by making actions that directly implicate that expertise unreviewable.

Because, under the APA, courts may not review *core* military functions, this Article concludes that, in APA cases, the military should receive the same level of 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 and 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, highlighting 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. Part III then discusses the problematic aspects of that practice. Unauthorized federal common law generally raises separation-of-powers concerns. The extraordinary nature of the APA and administrative common law raise additional concerns. And the practice of giving the military super-deference 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 reviewing military cases under the arbitrary or capricious standard.<sup>11</sup> 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

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<sup>11</sup> I leave open the possibility that there may be an adequate justification for giving other agencies heightened deference under the APA.

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.<sup>12</sup> Other statutes are actionable only through the APA,<sup>13</sup> which provides a cause of 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.”<sup>14</sup> 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.”<sup>15</sup> The debate over the meaning of that phrase continues.<sup>16</sup> For purposes of this discussion, it suffices to say that Congress intended for that standard to be quite deferential.<sup>17</sup> The Supreme Court has held that,

<sup>12</sup> *E.g.*, Clean Air Act, 42 U.S.C. §§ 7418, 7604 (2006).

<sup>13</sup> *See* DANIEL R. MANDELKER ET AL., NEPA LAW AND LITIGATION § 3:3.1 (2d ed. 2011); *e.g.*, National Environmental Policy Act, 42 U.S.C. §§ 4321–4370f.

<sup>14</sup> 5 U.S.C. § 702.

<sup>15</sup> 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, e.g.*, *Indep. 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* *Ass’n of Data Processing Serv. Orgs., Inc. v. Bd. of Governors of the Fed. Reserve Sys.*, 745 F.2d 677, 683–84 (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.”).

<sup>16</sup> *See, e.g.*, Peter L. Strauss, *Overseers or “The Deciders”—The Courts in Administrative Law*, 75 U. CHI. L. REV. 815, 820–21 (2008); 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.

<sup>17</sup> S. DOC. NO. 77-8, at 87 (1941) (“To state the matter very broadly judicial review is generally limited to the inquiry whether the administrative agency acted within the scope

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.”<sup>18</sup> This narrow standard requires only a “rational” foundation for the agency action.<sup>19</sup>

In addition to the regular deference given under the APA, the military also enjoys an exemption from the APA’s judicial review provisions for “military authority exercised in the field in time of war.”<sup>20</sup> 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.<sup>21</sup> 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.<sup>22</sup>

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,<sup>23</sup> and I have examined the history of the “military authority”

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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.”); see also 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); Scott A. Keller, *Depoliticizing Judicial Review of Agency Rulemaking*, 84 WASH. L. REV. 419, 430 (2009); John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 COLUM. L. REV. 612, 663 n.246 (1996); Metzger, *supra* note 6, at 491.

<sup>18</sup> *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971).

<sup>19</sup> *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42–43 (1983); see also *FCC v. Fox Television Stations, Inc.*, 129 S. Ct. 1800, 1810 (2009); *In re Gartside*, 203 F.3d 1305, 1312 (Fed. Cir. 2000).

<sup>20</sup> 5 U.S.C. § 701(b)(1)(G) (2006). The same exception applies to the rest of the Act pursuant to 5 U.S.C. § 551(1)(G). The military enjoys exemptions from the rulemaking and adjudication provisions as well. See 5 U.S.C. §§ 553(a)(1), 554(a)(4).

<sup>21</sup> See Kovacs, *supra* note 9, at 712–14, 719.

<sup>22</sup> 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.”).

<sup>23</sup> George B. Shepherd, *Fierce Compromise: The Administrative Procedure Act Emerges from New Deal Politics*, 90 NW. U. L. REV. 1557 (1996).

exception in depth elsewhere.<sup>24</sup> 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.<sup>25</sup> 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.<sup>26</sup> And it was not until the Supreme Court began to uphold New Deal programs in 1937 that things really took off.<sup>27</sup>

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 agencies such as the Federal Reserve Board, the Comptroller of the Currency, the Interstate Commerce Commission, and for internal revenue, customs, and patent matters.<sup>28</sup> 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."<sup>29</sup> In Congress, the list of exempted agencies grew to include the Federal Deposit Insurance Corporation and trademark and copyright matters, among others.<sup>30</sup> The original bill exempted "the conduct of military or naval operations in time of war or civil insurrection."<sup>31</sup> 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 conduct of the military or naval establishments."<sup>32</sup>

President Roosevelt vetoed the Walter-Logan bill.<sup>33</sup> He expressed concern that the military exemption was not broad enough because it

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<sup>24</sup> Kovacs, *supra* note 9.

<sup>25</sup> *Id.* at 681.

<sup>26</sup> *Id.* at 681–82.

<sup>27</sup> *Id.* at 683–84.

<sup>28</sup> SPECIAL COMM. ON ADMIN. LAW, AMERICAN BAR ASSOCIATION, REPORT OF THE SPECIAL COMM. ON ADMIN. LAW 850 (1937).

<sup>29</sup> Kovacs, *supra* note 9, at 685.

<sup>30</sup> S. REP. NO. 76-442, § 7(b) (1939); *see also* Shepherd, *supra* note 23, at 1618.

<sup>31</sup> SPECIAL COMM. ON ADMIN LAW, *supra* note 28.

<sup>32</sup> H.R. 6324, 76th Cong. § 7(b) (3d Sess. 1940); Kovacs, *supra* note 9, at 689.

<sup>33</sup> 86 CONG. REC. 13,942–43 (1940).



did not insulate non-military agencies engaged in defense-related functions.<sup>34</sup> 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.<sup>35</sup>

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.<sup>36</sup> The size of the federal bureaucracy exploded—twenty-six new agencies were formed related to the war effort—and rationing, inflation, and chronic shortages were blamed on agencies.<sup>37</sup> The cult of expertise lost its allure, and in its place arose a concern about administrative power paving the road to totalitarianism.<sup>38</sup>

Two weeks after D-Day in 1944, Congress returned to the task of administrative reform.<sup>39</sup> 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,"<sup>40</sup> and did not "distinguish between 'good' agencies and others."<sup>41</sup> 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

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<sup>34</sup> *Id.* at 13,943.

<sup>35</sup> Kovacs, *supra* note 9, at 690–91.

<sup>36</sup> *Id.* at 694.

<sup>37</sup> *Id.* at 695.

<sup>38</sup> *Id.* at 695–96.

<sup>39</sup> *Id.* at 696.

<sup>40</sup> S. COMM. ON THE JUDICIARY, ADMINISTRATIVE PROCEDURE ACT, S. Rep. No. 79-752 (1945), reprinted in ADMINISTRATIVE PROCEDURE ACT: LEGISLATIVE HISTORY (1946), at 191 [hereinafter LEGISLATIVE HISTORY]; see also *id.* at 302; TOM C. CLARK, U.S. DEP'T OF JUSTICE, ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 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 (making a similar statement regarding adjudication provisions).

<sup>41</sup> S. COMM. ON THE JUDICIARY, ADMINISTRATIVE PROCEDURE ACT, S. Rep. No. 79-752 (1945), reprinted in LEGISLATIVE HISTORY, *supra* note 40, at 191.

particular requirement, the same function in all agencies has been exempted. *No agency has been favored by special treatment.*<sup>42</sup>

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.<sup>43</sup> The War Department urged Congress to exempt the War Department, the Army, and the Navy from the bill altogether.<sup>44</sup> Congress declined that suggestion, however, and instead carved out a narrow exemption from the judicial review provisions for "military or naval authority exercised in the field in time of war or in occupied territory."<sup>45</sup>

The final bill passed both houses of Congress on voice votes, and President Truman promptly signed the bill into law.<sup>46</sup>

## II

### THE COURTS' MANY STANDARDS OF REVIEW

The history encapsulated above shows that the APA represents a seventeen-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.<sup>47</sup> 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 uniformity was a central feature of the Act, but the courts currently apply different levels of deference to various agencies. The military often receives a higher level of deference than other agencies.

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<sup>42</sup> H.R. COMM. ON THE JUDICIARY, ADMINISTRATIVE PROCEDURE ACT, H.R. Rep. No. 79-1980 (1946), reprinted in LEGISLATIVE HISTORY, *supra* note 40, at 250 (emphasis added).

<sup>43</sup> Kovacs, *supra* note 9, at 696–97.

<sup>44</sup> *Id.* at 697.

<sup>45</sup> *Id.* at 700–01.

<sup>46</sup> *Id.* at 703–04.

<sup>47</sup> *Id.* at 705; see also *Wong Yang Sung v. McGrath*, 339 U.S. 33, 40–41 (1950).

### A. Case Law

A few comparisons exemplify this phenomenon. In cases in which agencies have failed to consider evidence, the courts have given more deference to the military than other agencies. In *Cone v. Caldera*, an army officer filed suit to correct his military record.<sup>48</sup> 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.<sup>49</sup> In *Butte County v. Hogen*, in contrast, the court of appeals considered a Department of the Interior decision about Indian gaming.<sup>50</sup> As in *Cone v. Caldera*, the agency failed to consider certain evidence, but the court refused to defer.<sup>51</sup>

The courts have also given more deference to the military’s analysis of facts than that of other agencies. *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.<sup>52</sup> 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.<sup>53</sup>

The courts have gone so far as to invoke doctrines unrelated to the APA to bypass meaningful review of the military under the APA. In *Custer County Action Ass’n v. Garvey*, for example, the Tenth Circuit invoked the political question doctrine to avoid second-guessing a Federal Aviation Administration (FAA) determination about military airspace.<sup>54</sup> By contrast, in *United States Air Tour Ass’n v. FAA*, the same agency’s determination about noise impacts at the Grand Canyon received no deference.<sup>55</sup> Those cases were decided under the same arbitrary or capricious standard, but the courts were more deferential when the agency’s analysis related to the military.<sup>56</sup>

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<sup>48</sup> 223 F.3d 789 (D.C. Cir. 2000).

<sup>49</sup> *Id.* at 793–95.

<sup>50</sup> 613 F.3d 190 (D.C. Cir. 2010).

<sup>51</sup> *Id.* at 194–95.

<sup>52</sup> 223 F.3d at 792, 793, 795.

<sup>53</sup> 389 F.3d 1074, 1079–81 (10th Cir. 2004).

<sup>54</sup> 256 F.3d 1024, 1031 (10th Cir. 2001).

<sup>55</sup> 298 F.3d 997, 1018–19 (D.C. Cir. 2002).

<sup>56</sup> 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 *sub silentio* a heightened standard of deference while giving lip service to the arbitrary or capricious standard, and cases in which the courts use other doctrines to bypass the APA. There may also be APA cases against the

Recently, the Supreme Court expressly applied a heightened deference standard to the military in an APA case.<sup>57</sup> In *Winter v. Natural Resources Defense Council, Inc.*, environmental groups obtained a preliminary injunction limiting the Navy's use of mid-frequency active sonar in training exercises.<sup>58</sup> The injunction was premised on the Navy's alleged violation of the National Environmental Policy Act (NEPA),<sup>59</sup> which requires federal agencies to examine the potential environmental impacts of their proposals before implementing them.<sup>60</sup> NEPA is actionable only through the APA,<sup>61</sup> yet the Supreme Court did not mention the arbitrary or capricious standard or the "military authority" exception.<sup>62</sup> Instead, the Court applied a super-deference standard.<sup>63</sup>

The Court held that the preliminary injunction constituted an abuse of discretion, regardless of whether the lower courts were correct on the merits,<sup>64</sup> 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."<sup>65</sup> The

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military in which the courts pronounce a super-deference standard but actually apply normal arbitrary or capricious review. Those cases do not concern me here. Rather, my concern is with cases in which the courts give the military more deference than they would give to other agencies.

<sup>57</sup> For an in-depth history of the federal courts' hesitation to review military administrative actions, see Darrell L. Peck, *The Justices and the Generals: The Supreme Court and Judicial Review of Military Activities*, 70 MIL. L. REV. 1 (1975).

<sup>58</sup> 129 S. Ct. 365, 373 (2008).

<sup>59</sup> *Id.* at 372-74 & n.4.

<sup>60</sup> 42 U.S.C. § 4332(2)(C) (2006).

<sup>61</sup> MANDELKER ET AL., *supra* note 13.

<sup>62</sup> *See Winter*, 129 S. Ct. at 377-78.

<sup>63</sup> *Id.* at 378.

<sup>64</sup> *Id.* at 376, 381.

<sup>65</sup> *Id.* at 377; *see also* *Water Keeper Alliance v. U.S. Dep't of Def.*, 271 F.3d 21 (1st Cir. 2001) (affirming denial of an injunction against Navy training that was alleged to have violated the Endangered Species Act). In *National Audubon Society v. Department of the Navy*, the Fourth Circuit 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. 422 F.3d 174, 181 (4th Cir. 2005). The court observed that its 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.

Court held that the “lower courts failed 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.”<sup>66</sup> Unlike the lower courts, which found the Navy’s allegations of harm “speculative,”<sup>67</sup> the Supreme Court was willing to accept the assertions of Navy officers in affidavits unquestioningly.<sup>68</sup> 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.”<sup>69</sup>

Granted, the question before the Supreme Court in *Winter* concerned the propriety of injunctive relief, a matter the APA leaves to the courts’ discretion.<sup>70</sup> But the Supreme Court should have reviewed the Navy’s action as it would any other agency’s action and not given the Navy super-deference. Compare, for example, the Court’s more recent decision in *Monsanto Co. v. Geertson Seed Farms*, in which the Court also overturned a lower court’s entry of injunctive relief for a NEPA violation, but grounded its decision on the law of equity rather than on a super-deference standard of review.<sup>71</sup> That traditional mode of analysis would have been appropriate in *Winter*.

Not only did the Court in *Winter* fail to acknowledge the applicability of the APA’s standard of review, but it also 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.<sup>72</sup> The

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

*Id.* at 207.

<sup>66</sup> *Winter*, 129 S. Ct. at 378.

<sup>67</sup> *Id.*

<sup>68</sup> *Id.* at 377.

<sup>69</sup> *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 3, 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 logical reasoning and inferences . . . used by the Executive.” *Id.* at 447.

<sup>70</sup> See 5 U.S.C. § 702 (2006) (“Nothing herein (1) affects . . . the power or duty of the court to . . . deny relief on any other appropriate legal or equitable ground . . .”).

<sup>71</sup> 130 S. Ct. 2743 (2010).

<sup>72</sup> 475 U.S. 503, 506 (1986).

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.”<sup>73</sup> In *Winter*, the Court reiterated a 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.”<sup>74</sup> 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.<sup>75</sup> There the Supreme Court ruled for the National Guard, holding that the controversy was not justiciable.<sup>76</sup> In *Winter*, the Court reiterated its observation from *Gilligan* that the “essentially professional military judgments” concerning “the composition, training, equipping, and control of a military force” are committed to the elected branches of the government.<sup>77</sup>

The courts of appeals have relied on the same language from *Gilligan* when affording military decisions super-deference under the APA. In *Custer County Action Ass’n v. Garvey*, the Tenth Circuit addressed a NEPA challenge to the FAA’s approval of changes to military airspace designed to accommodate F-16 training.<sup>78</sup> The court reviewed the FAA’s decision under the APA<sup>79</sup> and acknowledged that the military “is not excepted from [NEPA] requirements.”<sup>80</sup> Nonetheless, the court gave “the political branches of [the] government a particularly high degree of deference” because the case concerned “military affairs.”<sup>81</sup> The court went so far as to extend the military’s super-deference to the FAA and hold that the political question doctrine precluded the court from interfering with the FAA’s decision that the airspace changes were necessary.<sup>82</sup>

The courts’ applications of super-deference in military cases under the APA are often more subtle than in *Winter* and *Custer County*. In

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<sup>73</sup> *Id.* at 508 (quoting *Rostker v. Goldberg*, 453 U.S. 57, 70 (1981)).

<sup>74</sup> 129 S. Ct. at 377 (quoting *Goldman*, 475 U.S. at 507).

<sup>75</sup> 413 U.S. 1, 3 (1973).

<sup>76</sup> *Id.* at 11–12.

<sup>77</sup> *Winter*, 129 S. Ct. at 377 (quoting *Gilligan*, 413 U.S. at 10).

<sup>78</sup> 256 F.3d 1024, 1028 (10th Cir. 2001).

<sup>79</sup> *Id.* at 1029.

<sup>80</sup> *Id.* at 1029 n.5.

<sup>81</sup> *Id.* at 1031.

<sup>82</sup> *Id.* The court of appeals went on to review whether “the FAA acted within the scope of its powers, followed its own regulations, and complied with the Constitution.” *Id.*

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.”<sup>83</sup> 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.”<sup>84</sup> 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,<sup>85</sup> as do so many non-military statutes.<sup>86</sup> The Second Circuit may have been 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 the separation-of-powers doctrine.<sup>87</sup>

### 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.<sup>88</sup> Recently, Professor William Eskridge and Lauren Baer

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<sup>83</sup> *Cone v. Caldera*, 223 F.3d 789, 793 (D.C. Cir. 2000) (internal quotation marks omitted); *see also Henry v. U.S. Dep’t 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.”).

<sup>84</sup> *Kreis v. Sec’y of the Air Force*, 866 F.2d 1508, 1514 (D.C. Cir. 1989).

<sup>85</sup> *Id.* at 1514–15.

<sup>86</sup> 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.” *Am. Int’l Grp., Inc. v. Islamic Republic of Iran*, 657 F.2d 430, 443 n.15 (D.C. Cir. 1981) (quoting *Chas. T. Main Int’l, Inc. v. Khuzestan Water & Power Auth.*, 651 F.2d 800, 809 n.13 (1st Cir. 1981)). Reviewing an agency action taken pursuant to that Act under the APA’s arbitrary or capricious standard, the D.C. Circuit later “reiterate[d] that [its] review—in an area at the intersection of national security, foreign policy, and administrative law—is extremely deferential.” *Islamic Am. Relief Agency v. Gonzales*, 477 F.3d 728, 734 (D.C. Cir. 2007).

<sup>87</sup> *Falk v. Sec’y of the Army*, 870 F.2d 941, 945 (2d Cir. 1989).

<sup>88</sup> *See Bradley C. Canon & Michael Giles, Recurring Litigants: Federal Agencies Before the Supreme Court*, 25 W. POL. Q. 183, 190 (1972) (“[T]he Supreme Court was considerably more receptive to the claims of some” agencies than others.); Donald W. Crowley, *Judicial Review of Administrative Agencies: Does the Type of Agency Matter?*, 40 W. POL. Q. 265, 267 (1987) (“[T]he Court is not uniformly deferential and shows substantial variation in support from agency to agency.”); Roger Handberg, *The Supreme Court and Administrative Agencies: 1965–1978*, 6 J. CONTEMP. L. 161, 167, 173 (1979)

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.”<sup>89</sup> The Court did not apply the familiar two-part test of *Chevron, U.S.A., Inc. v. Natural Resources Defense Council*<sup>90</sup> across the board, but instead “employed a continuum of deference regimes”<sup>91</sup> ranging from “super-deference” in cases implicating foreign affairs and national security to “anti-deference” in criminal cases and cases in which the agency’s interpretation raised serious constitutional concerns.<sup>92</sup> Agencies won an average of 68.8% of all of the cases included in the study.<sup>93</sup> In cases implicating foreign affairs and national security, however, agencies won 78.5% of the time.<sup>94</sup> Eskridge and Baer concluded that “super-strong deference to the government in the areas of foreign

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(finding “variations among agency support rates” an above-average success rate for the Department of Defense); 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.”). *But see* Reginald S. Sheehan, *Administrative Agencies and the Court: A Reexamination of the Impact of Agency Type on Decisional Outcomes*, 43 W. POL. Q. 875, 881 (1990) (“There were no significant differences in levels of support for economic agencies as compared to social agencies.”).

<sup>89</sup> Eskridge & Baer, *supra* note 8, at 1094.

<sup>90</sup> 467 U.S. 837 (1984). First, if “Congress has directly spoken to the precise question at issue,” the agency must effectuate Congress’s express intent. *Id.* at 842–43. 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.

<sup>91</sup> Eskridge & Baer, *supra* note 8, at 1090.

<sup>92</sup> *Id.* at 1098–1100.

<sup>93</sup> *Id.* at 1127, 1129 tbl.7.

<sup>94</sup> *Id.* at 1102; *see also id.* at 1095 (“[B]ecause our dataset consists of the entire population of cases of interest to us, and not a sample of cases from the population . . . there is no need to conduct significance tests on the basic summary figures we lay out.”). 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 eighty-five percent of the cases. Cass R. Sunstein, *Judging National Security Post-9/11: An Empirical Investigation*, 2008 SUP. CT. REV. 269, 277. 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.



affairs and national security remains a prominent part of the Court's deference practice."<sup>95</sup>

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.<sup>96</sup> Agency win rates in intellectual property and pensions cases were also above 80%.<sup>97</sup> 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.<sup>98</sup>

Eskridge and Baer found that “regardless of subject area, ad hoc judicial reasoning reigns,” and the Court's deference practice was “wildly inconsistent.”<sup>99</sup> In 16.7% of the foreign affairs and national security cases,<sup>100</sup> the Court invoked the highly deferential standard of *United States v. Curtiss-Wright Export Corp.*,<sup>101</sup> and the agencies won across the board.<sup>102</sup> In half of the foreign affairs and national security cases, the Court employed “consultative deference,”<sup>103</sup> 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.”<sup>104</sup> And in the remaining one-third of foreign affairs and national security cases, the

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<sup>95</sup> Eskridge & Baer, *supra* note 8, 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 3, at 519.

<sup>96</sup> Eskridge & Baer, *supra* note 8, at 1145 tbl.16. For a discussion of whether super-deference to agency scientific determinations is justified, see Emily Hammond Mezell, *Super Deference, the Science Obsession, and Judicial Review as Translation of Agency Science*, 109 MICH. L. REV. 733 (2011).

<sup>97</sup> Eskridge & Baer, *supra* note 8, at 1145 tbl.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 (arguing that theories that rely on the descriptive claim that national security cases are distinctive are flawed); *see also* Peck, *supra* note 57, at 60 (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.

<sup>98</sup> Eskridge & Baer, *supra* note 8, at 1145 tbl.16.

<sup>99</sup> *Id.* at 1098, 1137.

<sup>100</sup> *Id.* at 1140 tbl.14.

<sup>101</sup> 299 U.S. 304, 320 (1936) (“[C]ongressional legislation . . . within the international field must often accord to the President a degree of discretion and freedom from statutory restriction which would not be admissible were domestic affairs alone involved.”).

<sup>102</sup> Eskridge & Baer, *supra* note 8, at 1099.

<sup>103</sup> *Id.* at 1140 tbl.14.

<sup>104</sup> *Id.* at 1098.

Court invoked no deference regime at all.<sup>105</sup> The variety of deference regimes employed in other subject areas was similar.<sup>106</sup>

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. Whether the courts regularly give the military super-deference in APA cases or do so only sporadically, however, is of little consequence to my analysis. Any instance of giving the military more deference than other agencies under the APA is potentially problematic, for the reasons spelled out below. Giving agencies like the Department of Energy and the State Department super-deference, or the Department of the Interior no deference at all, may or may not be problematic as well, but I leave those discussions for another day.<sup>107</sup>

### III

#### THE PROBLEM OF GIVING THE MILITARY SUPER-DEFERENCE UNDER THE APA

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 raises separation-of-powers concerns.<sup>108</sup>

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 Congress reached after years of hard-fought compromise with overwhelming support, and that has had a broad

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<sup>105</sup> *Id.* at 1140 tbl.14.

<sup>106</sup> *See id.* at 1139–41 tbl.14.

<sup>107</sup> *See* Robert Knowles, *American Hegemony and the Foreign Affairs Constitution*, 41 ARIZ. ST. L.J. 87 (2009) (arguing that foreign affairs deference is outmoded).

<sup>108</sup> I need not and do not intend to take sides here in the larger debate about the validity of federal common law. For purposes of this Article, it suffices to demonstrate, as I do below, that the common-law practice of giving the military super-deference in APA cases is unjustified.

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. This unpredictability causes doctrinal confusion, which does not do agencies, plaintiffs, or regulated industries any favors. It also raises concerns related to the hypocrisy of courts: they purport to keep agencies within the bounds of their delegated authority through rules of administrative common law, even though creating that common law may exceed the courts' authority. Likewise, courts emphasize the rule of law while defying rule-of-law values by singling out one agency for special treatment and leaving little restraint on the agency's discretion. Finally, this unpredictability is inconsistent with the Supreme Court's slow but steady trend toward closer adherence to the text of the APA.

#### A. *Common-Law Overlay*

Judicial lawmaking raises many concerns, including separation-of-powers concerns.<sup>109</sup> The federal courts exercise authority conferred by Congress; without statutory authority, they are not authorized to craft a common-law rule of decision.<sup>110</sup> 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."<sup>111</sup> Federal common law was recognized to be "theoretically

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<sup>109</sup> ERWIN CHERMERINSKY, FEDERAL JURISDICTION § 6.1, at 367–68 (5th ed. 2007); Thomas W. Merrill, *The Common Law Powers of Federal Courts*, 52 U. CHI. L. REV. 1, 19 (1985).

<sup>110</sup> CHERMERINSKY, *supra* note 109, § 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.*

<sup>111</sup> Merrill, *supra* note 109, at 5; *see also* CHERMERINSKY, *supra* note 109, § 6.1, at 363 ("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."); 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'"); Merrill, *supra* note 109, 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."). *But see* Bradford R. Clark, *Separation of Powers as a Safeguard of*

and constitutionally troubling”<sup>112</sup> even before the Supreme Court’s declaration in *Erie Railroad Co. v. Tompkins* that “[t]here is no federal general common law.”<sup>113</sup> 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.”<sup>114</sup> 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. The drafters of the Constitution designed this separation of functions to avoid judicial tyranny<sup>115</sup> and “safeguard[] liberty by dispersing governmental power.”<sup>116</sup> 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.”<sup>117</sup>

To be sure, federal common law survives “in limited circumstances.”<sup>118</sup> Professor Chemerinsky postulates that “[f]ederal common law always has existed and always will exist”<sup>119</sup> for at least three purposes: to fill in statutory gaps, “to fulfill congressional intent,” and “to protect the interests of the federal government.”<sup>120</sup> Federal common law of the statutory-gap-filling variety may be “easily justified” given the impossibility of drafting a truly complete

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*Federalism*, 79 TEX. L. REV. 1321, 1403 n.504 (2001) (declining to follow Merrill’s definition because it does not draw the “theoretical distinction between judicial interpretation and judicial lawmaking”).

<sup>112</sup> Duffy, *supra* note 6, at 116.

<sup>113</sup> 304 U.S. 64, 78 (1938). See also CHEMERINSKY, *supra* note 109, § 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.*

<sup>114</sup> 437 U.S. 153, 194 (1978).

<sup>115</sup> Merrill, *supra* note 109, at 19; see also THE FEDERALIST NO. 78, at 466 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (“[T]he 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) (vesting the power of impeachment in the legislature guards against judicial usurpation of legislative authority).

<sup>116</sup> Manning, *supra* note 17, at 645; cf. Richard Stith, *Securing the Rule of Law Through Interpretive Pluralism: An Argument from Comparative Law*, 35 HASTINGS CONST. L.Q. 401, 402 (2008) (arguing that, given the politicization of legal interpretation, consolidating the power of legal interpretation in a single high court yields judicial tyranny).

<sup>117</sup> Merrill, *supra* note 109, at 23.

<sup>118</sup> CHEMERINSKY, *supra* note 109, § 6.1, at 365.

<sup>119</sup> *Id.* at 367.

<sup>120</sup> *Id.* at 366.

statute,<sup>121</sup> but it is hard to distinguish between statutory interpretation and common law.<sup>122</sup> Professor Merrill referred to the practice of filling in the blanks of “broad, vague, or open-textured provisions” as “delegated lawmaking.”<sup>123</sup> He posited that federal common law is permissible where the statute reveals Congress’s intent to delegate lawmaking power to the courts and circumscribes that delegation “with reasonable specificity.”<sup>124</sup> 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.<sup>125</sup>

Those theories are consistent with current jurisprudence. In the eighteenth and nineteenth centuries, federal judicial common law was assumed to exist.<sup>126</sup> In the twentieth century, the duty to elaborate on statutes shifted to federal agencies.<sup>127</sup> Since *Erie* pronounced the death of the federal 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.”<sup>128</sup> The “new federal common law”<sup>129</sup> is acknowledged to be a “judicial creation,”<sup>130</sup> but it must have a textual basis in the Constitution or a statute,<sup>131</sup> it may

<sup>121</sup> *Id.* § 6.3.1, at 387.

<sup>122</sup> *Id.* § 6.1, at 367; *see also id.* § 6.3.2, at 388.

<sup>123</sup> Merrill, *supra* note 109, at 34, 35.

<sup>124</sup> *Id.* at 41; *see also* Peter L. Strauss, *On Resegregating the Worlds of Statute and Common Law*, 1994 SUP. CT. REV. 429, 436–37 (arguing that common law extends legislative influence when it replicates statutory purposes).

<sup>125</sup> Strauss, *supra* note 124, at 441.

<sup>126</sup> William N. Eskridge, Jr., *Vetogates, Chevron, Preemption*, 83 NOTRE DAME L. REV. 1441, 1454 (2008).

<sup>127</sup> GUIDO CALABRESI, *A COMMON LAW FOR THE AGE OF STATUTES* 45 (1982); Eskridge, *supra* note 126, at 1455.

<sup>128</sup> *Tex. Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 640 (1981) (citations and internal quotation marks omitted).

<sup>129</sup> *See* Henry J. Friendly, *In Praise of Erie—and of the New Federal Common Law*, 39 N.Y.U. L. REV. 383 (1964).

<sup>130</sup> *Atherton v. FDIC*, 519 U.S. 213, 218 (1997) (internal quotation marks 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 . . .’”).

<sup>131</sup> *See* CHEMERINSKY, *supra* note 109, § 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.”); Curtis A. Bradley et al., *Sosa, Customary International Law, and the Continuing Relevance of Erie*, 120 HARV. L. REV. 869, 879 (2007) (“While there is much scholarly

only fill in the gaps left in those texts,<sup>132</sup> and it must be consistent with the policy expressed in those texts.<sup>133</sup>

The judicial practice of giving the military heightened deference under the APA is not a matter of statutory interpretation or gap filling. Professor Duffy correctly pointed out 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.”<sup>134</sup> While § 706 of the APA leaves ample room for the judiciary to engage in gap filling,<sup>135</sup> however, it leaves no room to interpret its terms relative to which agency is the defendant.<sup>136</sup> 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.”<sup>137</sup> In particular, the enactment of the APA should have changed the scope of review,<sup>138</sup> at least insofar as the statute subjected all agencies to the same standards. Just as the Supreme Court held in *FCC v. Fox*

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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.”); Andrew W. Davis, Note, *Federalizing Foreign Relations: The Case for Expansive Federal Jurisdiction in Private International Litigation*, 89 MINN. L. REV. 1464, 1466 (2005); Duffy, *supra* note 6, at 117.

<sup>132</sup> Bradley et al., *supra* note 131, at 880 (“[T]he 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 regimes.”).

<sup>133</sup> *Id.*

<sup>134</sup> Duffy, *supra* note 6, at 153.

<sup>135</sup> 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 6, at 385, 391–92.

<sup>136</sup> Professors Levy and Glicksman recently observed that “the APA’s standards of review are stated in terms that are broad enough to encompass a variety of different formulations.” Richard E. Levy & Robert L. Glicksman, *Agency-Specific Precedents*, 89 TEX. L. REV. 499, 572 (2011). They cautioned, however, that agency-specific variations must “be justified by agency-specific statutes, programs, or practices.” *Id.* “Unfounded deviations from generally applicable APA provisions . . . are improper. They upset the congressional balance of autonomy and accountability and undermine the legislative goal of universality without justification.” *Id.*

<sup>137</sup> Duffy, *supra* note 6, 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 . . .”).

<sup>138</sup> *Id.* at 130.

*Television Stations, Inc.* that courts may not subject agency action to a stricter standard of review than that set forth in the APA, so too they should not subject it to a lesser standard of review or excuse it from review altogether based on a doctrine that has no “basis in the text of the statute.”<sup>139</sup>

Like all federal common law, administrative common law<sup>140</sup> implicates separation-of-powers concerns.<sup>141</sup> By ignoring the plain language of the APA and instead fashioning a judge-made rule, the practice of applying a super-deference standard in military cases under the APA undermines separation of powers.<sup>142</sup> 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.<sup>143</sup> By giving the military super-deference, the courts excuse the military from meaningful judicial

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<sup>139</sup> 129 S. Ct. 1800, 1811 (2009).

<sup>140</sup> 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.” 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)).

<sup>141</sup> 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. 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 17, at 631–54.

<sup>142</sup> Cf. J. Lyn Entrikin Goering, *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.”).

<sup>143</sup> 5 U.S.C. § 702 (2006) (“A person suffering legal wrong because of agency action . . . is entitled to judicial review thereof.”); *id.* § 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.”); *id.* § 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 6, at 130.

review in precisely the cases Congress determined should be reviewable.<sup>144</sup>

### 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 the practice of giving the military heightened deference under the APA as statutory interpretation, it would be deeply troubling. The history described in Part I 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 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 at which it was aimed appear.<sup>145</sup>

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."<sup>146</sup> Professor Clark agrees that where "compromise produces relatively clear and precise provisions . . . courts pursuing interpretive fidelity should strive to uphold the

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<sup>144</sup> 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. See Kovacs, *supra* note 9, at 707–08.

<sup>145</sup> *Wong Yang Sung v. McGrath*, 339 U.S. 33, 40–41 (1950), *quoted in* *Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc.*, 435 U.S. 519, 523 (1978).

<sup>146</sup> RICHARD A. POSNER, *THE FEDERAL COURTS: CRISIS AND REFORM* 289 (1985); Richard A. Posner, *Statutory Interpretation—in the Classroom and in the Courtroom*, 50 U. CHI. L. REV. 800, 820 (1983).



specific compromises incorporated into enacted legal texts.”<sup>147</sup> Expanding the “military authority” exception beyond its bounds by giving super-deference to the military “defeat[s] the purpose (and benefits) of a multi-member, multihouse legislature checked by the executive”<sup>148</sup> and disenfranchises “all who use the political process to register the democratic will.”<sup>149</sup>

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 norm over time” as “super-statutes.”<sup>150</sup> 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;<sup>151</sup> it emerged from a “lengthy period of public discussion and official deliberation”;<sup>152</sup> the principles it established, including the idea that agency action should be subject to judicial review, have become “foundational or axiomatic to our thinking”;<sup>153</sup> it has “passe[d] the test of time”;<sup>154</sup> and whether or not the entire statute “alter[ed] substantially the then-

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<sup>147</sup> See Bradford R. Clark, *Constitutional Compromise and the Supremacy Clause*, 83 NOTRE DAME L. REV. 1421, 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”).

<sup>148</sup> See Clark, *supra* note 147, at 1424.

<sup>149</sup> *Thomasson*, 80 F.3d at 923.

<sup>150</sup> William N. Eskridge, Jr. & John Ferejohn, *Super-Statutes*, 50 DUKE L.J. 1215, 1216 (2001); see also William N. Eskridge, Jr., *America’s Statutory “Constitution,”* 41 U.C. DAVIS L. REV. 1, 36 (2007).

<sup>151</sup> See Eskridge & Ferejohn, *supra* note 150, at 1227.

<sup>152</sup> *Id.* at 1231.

<sup>153</sup> *Id.*

<sup>154</sup> *Id.* at 1273.

existing regulatory baselines with a new principle or policy,”<sup>155</sup> certainly the concept of applying a uniform standard of review to all federal agencies was something new.<sup>156</sup>

Eskridge and Ferejohn posited that “super-statutes” should be treated “as more normatively powerful than ordinary statutes.”<sup>157</sup> 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 texts.”<sup>158</sup> Courts must also be mindful, they cautioned, “of cross-cutting costs and countervailing policies.”<sup>159</sup> If the APA is treated as a “super-statute,” then, the “military authority” exception should be interpreted “broadly and evolutively.”<sup>160</sup> 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.<sup>161</sup> 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.<sup>162</sup> Interpreting the “military authority” exception broadly implements an important legislative compromise and, as

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<sup>155</sup> *Id.* at 1230.

<sup>156</sup> 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* note 6, 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., 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.”); William R. Andersen, *Chevron in the States: An Assessment and a Proposal*, 58 ADMIN. L. REV. 1017, 1033 (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 (2004) (“The Administrative Procedure Act (APA) has achieved virtually constitutional status.”); 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.”).

<sup>157</sup> Eskridge & Ferejohn, *supra* note 150, at 1217.

<sup>158</sup> *Id.* at 1247; see also *id.* at 1234, 1247.

<sup>159</sup> *Id.* at 1248.

<sup>160</sup> *Id.* at 1249.

<sup>161</sup> See Kovacs, *supra* note 9, at 717–20.

<sup>162</sup> *Id.* at 712–17.

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 "great[est] public purposes": uniformity and judicial review.<sup>163</sup> 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 extraordinary statute embodies.<sup>164</sup> 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, administrative bias, and overreaching.<sup>165</sup> Congress intended "to retrench the administrative state and to reassert legislative and judicial control over administrative action."<sup>166</sup> The Act was also designed to increase uniformity in agency practices and procedures.<sup>167</sup> The Supreme Court held in *Dickinson v. Zurko* that "grandfathered common-law variations" based only on ambiguous authority would undermine Congress's desire "to bring uniformity to a field full of variation and diversity."<sup>168</sup>

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<sup>163</sup> Eskridge, *supra* note 150, at 36.

<sup>164</sup> Moreover, if the APA is a "super-statute," the "military authority" exception should be interpreted broadly to implement the legislative compromise it embodies. *See infra* text accompanying notes 235–37 (advocating a broad reading of the "military authority" exception on other grounds).

<sup>165</sup> *See Kovacs, supra* note 9, at 683–86, 695–96; *see also Miles & Sunstein, supra* note 88, at 810 ("The enactment of the APA was based on concerns about agency bias and relative enthusiasm for judicial review.").

<sup>166</sup> Vermeule, *supra* note 16, at 1138; *see also Universal Camera Corp. v. NLRB*, 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).

<sup>167</sup> *Wong Yang Sung v. McGrath*, 339 U.S. 33, 41 (1950); *see also Dickinson v. Zurko*, 527 U.S. 150, 154, 155 (1999); *Universal Camera*, 340 U.S. at 489.

<sup>168</sup> 527 U.S. at 155.

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.<sup>169</sup> The agencies, in turn, adjust their actions to the “intensity of judicial review” and the “likelihood of judicial invalidation.”<sup>170</sup> The Supreme Court in *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council* 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.<sup>171</sup> Conversely, excusing the military from meaningful judicial review may lead the defense agencies to give only nominal attention to administrative requirements.<sup>172</sup> Agencies are motivated to expand their own authority.<sup>173</sup> They “tend toward tunnel vision, where they pursue their statutory mission with varying degrees of diligence, but often without sufficient regard to a larger normative framework.”<sup>174</sup> 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.

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<sup>169</sup> Miles & Sunstein, *supra* note 88, 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, *supra* note 94, at 271 (“[L]itigants are responsive to the likelihood of victory . . .”).

<sup>170</sup> Miles & Sunstein, *supra* note 88, at 804 (intensity of review impacts “both the rate of challenges to agency decisions and the content of agency decisions”); *see also id.* at 781 (“[L]itigants are likely to adjust their decisions in accordance with the intensity of review . . .”); Sunstein, *supra* note 94, 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.”).

<sup>171</sup> *Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council*, 435 U.S. 519, 546–47 (1978); *see also* Scalia, *supra* note 6, at 371 (“[I]t 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.”).

<sup>172</sup> *See* MAZUR, *supra* note 3, at 90 (“Institutions that do not have to explain their conduct . . . tend to become lazier in their decision making, because it is the anticipation of having to justify decisions and offer good reasons for a particular choice that sharpens the mind.”).

<sup>173</sup> Eskridge, *supra* note 126, at 1457, 1478; *see also* Timothy K. Armstrong, *Chevron Deference and Agency Self-Interest*, 13 CORNELL J.L. & PUB. POL’Y 203, 208–11 (2004) (summarizing ways in which an agency’s interpretation of a statute may serve the agency’s self-interest).

<sup>174</sup> Eskridge & Baer, *supra* note 8, at 1174.

### 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.<sup>175</sup> Courts reviewing administrative action thus require the agency to be authorized by some legislative grant.<sup>176</sup> “Judicial oversight of administrative agencies is itself justified in terms of forcing governmental agencies to heed limitations on their authority.”<sup>177</sup> “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.”<sup>178</sup>

That judicial oversight 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.<sup>179</sup> “[F]or [federal] courts policing the bounds of legitimate authority against other government officials, it is only fair that they similarly police the legitimate bounds of their own authority.”<sup>180</sup> Additionally, if an agency cannot meet the standards Congress has established, “the showdown ought to be between the agency and Congress, where the

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<sup>175</sup> *Ex parte Quirin*, 317 U.S. 1, 25 (1942) (“Congress and the President, like the courts, possess no power not derived from the Constitution.”); *Marbury v. Madison*, 5 U.S. (1 Cranch) 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.”); 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.”).

<sup>176</sup> See STEPHEN G. BREYER ET AL., *ADMINISTRATIVE LAW AND REGULATORY POLICY: PROBLEMS, TEXT, AND CASES* 20 (5th ed. 2002) (ensuring that administrative action is authorized by statute supports the “traditional rule of law values” of equal treatment and predictability); Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667, 1670 (1975) (“[T]he traditional model [of administrative law] affords judicial review in order to cabin administrative discretion within statutory bounds . . .”); David S. Tatel, *The Administrative Process and the Rule of Environmental Law*, 34 HARV. ENVTL. L. REV. 1, 2–3 (2010) (“[T]he 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.”).

<sup>177</sup> Duffy, *supra* note 6, at 120.

<sup>178</sup> 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).

<sup>179</sup> Duffy, *supra* note 6, at 145.

<sup>180</sup> *Id.*

problem originates.”<sup>181</sup> The courts should not adjust their standard of review to accommodate agencies that fall short.<sup>182</sup> 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,<sup>183</sup> 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,<sup>184</sup> “the main formulations of the Rule of Law do agree upon an assumption that law consists of rules.”<sup>185</sup> Commentators also generally agree that, under the rule of law, “[t]he same rules should apply to everyone,”<sup>186</sup> and the law should restrain government discretion.<sup>187</sup> 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 limited government under the rule of law.”<sup>188</sup> The courts’ practice of giving the military

<sup>181</sup> Wald, *supra* note 178, at 662.

<sup>182</sup> *Id.* at 662–63.

<sup>183</sup> See *infra* text accompanying notes 349–56.

<sup>184</sup> See Steven G. Calabresi, *The Historical Origins of the Rule of Law in the American Constitutional Order*, 28 HARV. J.L. & PUB. POL’Y 273, 273 (2004) (examining “the historical foundations of the rule of law in the American constitutional order”); Richard H. Fallon, Jr., “The Rule of Law” as a Concept in Constitutional Discourse, 97 COLUM. L. REV. 1, 7 (1997); James Lanshe, *Morality and the Rule of Law in American Jurisprudence*, 11 RUTGERS J.L. & RELIGION 1, 1 (2009) (“[M]oral values can, and must, play a role in jurisprudence and an American understanding of the rule of law.”); Margaret Jane Radin, *Reconsidering the Rule of Law*, 69 B.U. L. REV. 781 (1989) (suggesting that the rule of law concept should be reinterpreted).

<sup>185</sup> Fallon, *supra* note 184, at 8; Radin, *supra* note 184, at 782; see also Katie R. Eyer, *Administrative Adjudication and the Rule of Law*, 60 ADMIN. L. REV. 647, 655 (2008) (“[A]ny system hoping to achieve the ideal of rule of law must have fixed general rules by which individual and government conduct can be judged.”).

<sup>186</sup> Eyer, *supra* note 185, at 655; see also Masur, *supra* note 3, at 493 (arguing that the rule of law requires all agencies to receive the same standard of review); Radin, *supra* note 184, at 789–90 (identifying “consistency” as an element shared by different conceptions of the “rule of law”).

<sup>187</sup> Eyer, *supra* note 185, at 655; Masur, *supra* note 3, 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.”).

<sup>188</sup> 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

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.<sup>189</sup>

One might argue that stability is also a rule-of-law value<sup>190</sup> 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.<sup>191</sup> 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.<sup>192</sup> 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.<sup>193</sup> Professor Strauss applauded the courts for having "kept the APA more or less in step with developing understandings,"<sup>194</sup> but he cautioned that courts should avoid "judicial adventurism."<sup>195</sup>

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*Chevron's* failure to mention section 706 of the APA, "In a democracy ever striving to achieve a rule of law, the Court's laconic stance seems arrogant and dysfunctional.").

<sup>189</sup> See *United States v. Lindh*, 212 F. Supp. 2d 541, 555 (E.D. Va. 2002) ("[I]t 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 3, at 452 ("[A]dherence 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.").

<sup>190</sup> Eyer, *supra* note 185, 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."); Fallon, *supra* note 184, at 8 ("The law should be reasonably stable, in order to facilitate planning and coordinated action over time.").

<sup>191</sup> Strauss, *supra* note 124, at 436–37; see also Radin, *supra* note 184, at 818–19 (advocating a "pragmatic normative" conception of the rule of law).

<sup>192</sup> Strauss, *supra* note 124, at 437; see also Metzger, *supra* note 6, at 508 (noting "the evolving nature of ordinary administrative law").

<sup>193</sup> Strauss, *supra* note 124, at 437, 505–06; see also Levin, *supra* note 6, 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 already have arranged their expectations").

<sup>194</sup> Strauss, *supra* note 124, at 491.

<sup>195</sup> *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.<sup>196</sup> Implementing the plain language of the APA, on the other hand, would lend some predictability to this constantly morphing area of the law.<sup>197</sup>

#### *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.<sup>198</sup> In *Vermont Yankee*, 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

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<sup>196</sup> Duffy, *supra* note 6, 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 (“[E]ven time-honored judicial doctrines supported by decades of precedent cannot be considered stable law if they lack a foothold in statutory or constitutional text.”); Robert G. Natelson, *Running with the Land in Montana*, 51 MONT. L. REV. 17, 87 (1990) (“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.”); 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) (“[T]he expansive fair warning rule is unmoored common law, legally unstable, and suitable for such modification as experience demonstrates is appropriate.”).

<sup>197</sup> *See* Levy & Glicksman, *supra* note 136, at 574 (“For private parties, legal uncertainty increases information costs, requires additional planning, and creates risk. For agencies, legal uncertainty may increase information and planning costs, undermine compliance and enforcement, and distort agency policy. For courts, legal uncertainty leads to litigation and makes settlement more difficult because parties may entertain substantially different assessments of the likely outcome of litigation.”).

<sup>198</sup> Duffy, *supra* note 6, at 139 (citing *Cannon v. Univ. of Chi.*, 441 U.S. 677 (1979) and *Touche Ross & Co. v. Redington*, 442 U.S. 560 (1979)); *see also* Levin, *supra* note 6, 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 a continually evolving judge-made common law not based upon constitutional prescriptions or rooted in the language of the APA itself.” Scalia, *supra* note 6, at 363.



hard-fought contentions, and enacts a formula upon which opposing social and political forces have come to rest.”<sup>199</sup> The rulemaking provisions, the Court held, “established the maximum procedural requirements which Congress was willing to have the courts impose upon agencies.”<sup>200</sup> The circumstances in which a court may impose procedural requirements beyond those enumerated in the statute “are extremely rare.”<sup>201</sup> 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”<sup>202</sup> and that the Supreme Court “definitively rejected” the courts’ “common-law power” to supplement the APA.<sup>203</sup> Scalia opined that *Vermont Yankee* set “a new tone . . . of judicial restraint and of great deference to the text . . . of the APA.”<sup>204</sup>

*Darby v. Cisneros*,<sup>205</sup> in turn “ended the judge-made [exhaustion] doctrine’s domination over the APA.”<sup>206</sup> Again, the Court refused to engraft procedural requirements that were not mandated by the plain language of the APA.<sup>207</sup> 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 Programs v. Greenwich Collieries*, declaring that “the Department cannot allocate the burden of persuasion in a manner that conflicts with the APA.”<sup>208</sup> In *Dickinson v. Zurko*, the Court held that the standards of review in § 706 of the APA guide Federal Circuit review of Patent and Trademark Office findings of fact, despite years of contrary practice.<sup>209</sup> Most recently, in *FCC v.*

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<sup>199</sup> 435 U.S. 519, 523 (1978) (quoting *Wong Yang Sung v. McGrath*, 339 U.S. 33, 36, 40 (1950)).

<sup>200</sup> *Id.* at 524.

<sup>201</sup> *Id.*; see also Meazell, *supra* note 96, at 758–59 (discussing separation-of-powers concerns underlying *Vermont Yankee*); Miles & Sunstein, *supra* note 88, 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.”).

<sup>202</sup> Scalia, *supra* note 6, at 359.

<sup>203</sup> *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 the areas covered by the APA.”).

<sup>204</sup> *Id.* at 396. Of course, not all commentators agree with Scalia’s assessment of *Vermont Yankee*. See, e.g., Duffy, *supra* note 6, at 182.

<sup>205</sup> 509 U.S. 137 (1993).

<sup>206</sup> Duffy, *supra* note 6, at 153.

<sup>207</sup> *Darby*, 509 U.S. at 146–47.

<sup>208</sup> 512 U.S. 267, 281 (1994).

<sup>209</sup> 527 U.S. 150, 165 (1999).

*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.”<sup>210</sup>

There are, of course, notable exceptions to this trend. In *Chevron U.S.A., Inc. v. Natural Resources Defense Council*,<sup>211</sup> for example, the Court made no effort to reconcile with the text of the APA its holding that agency interpretations of statutes are entitled to deference.<sup>212</sup> 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*.<sup>213</sup> 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 to the question whether affording the military super-deference is justified.

#### IV

#### POTENTIAL JUSTIFICATIONS FOR SUPER-DEFERENCE TO THE MILITARY

Is there is an adequate justification that overrides the concerns discussed above for departing from the plain text of § 706 in APA cases against the military?<sup>214</sup> The APA itself already protects the

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<sup>210</sup> 129 S. Ct. 1800, 1810 (2009).

<sup>211</sup> 467 U.S. 837 (1984).

<sup>212</sup> Duffy, *supra* note 6, at 191, 192; Goering, *supra* note 142, at 36; Manning, *supra* note 17, at 621; Thomas W. Merrill & 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 supersedes the instruction in the APA that courts are to ‘decide all relevant questions of law.’”). *Chevron* has been criticized on other grounds as well. *E.g.*, Clark, *supra* note 112, at 1434 (arguing that *Chevron* is in tension with “the traditional presumption against preemption”); Eskridge, *supra* note 126, at 1443 (suggesting that *Chevron* should be read narrowly in preemption cases); Manning, *supra* note 17, at 621 (observing that *Chevron* is in tension with *Marbury v. Madison*).

<sup>213</sup> *Cf.* Metzger, *supra* note 6, at 494 n.48 (“The Court’s refusal [in *Motor Vehicle Manufacturers Ass’n of the United States v. State Farm Automobile Insurance Co.*, 463 U.S. 29 (1983)] 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.”).

<sup>214</sup> 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

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 to which the military is entitled under the Constitution. 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.<sup>215</sup>

### 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.<sup>216</sup> 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.<sup>217</sup> As former Solicitor General Ted Olson said,

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and should be grounded in a practical reasoning process). I argue that there is no sufficient justification for bypassing the plain language of the APA in cases against the military.

<sup>215</sup> 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 Export Corp.*, 299 U.S. 304, 320 (1936) (“[C]ongressional legislation . . . within the international field must often accord to 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 & Baer, *supra* note 8, at 1184–85. They point out that other deference regimes are already sufficiently protective of the executive branch’s discretion. *Id.* at 1185. 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 3, at 521.

<sup>216</sup> 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.*, Hamdan v. Rumsfeld, 548 U.S. 557, 591–92 (2006); *id.* at 679–81 (Thomas, J., dissenting); David J. Barron & Martin S. Lederman, *The Commander in Chief at the Lowest Ebb—Framing the Problem, Doctrine, and Original Understanding*, 121 HARV. L. REV. 689 (2008); Heidi Kitrosser, *It Came From Beneath the Twilight Zone: Wiretapping and Article II Imperialism*, 88 TEX. L. REV. 1401 (2010); Ingrid Wuerth, *The Captures Clause*, 76 U. CHI. L. REV. 1683 (2009).

<sup>217</sup> *See Dep’t 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

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 <sup>218</sup>every wartime decision is subject to real-time judicial review.

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 *Franklin v. Massachusetts*, the Supreme Court held that the President is neither expressly included nor expressly excluded from the APA.<sup>219</sup> “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.”<sup>220</sup> 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.<sup>221</sup> But the *Franklin* rule is permissible because it is gap filling that does not contradict any explicit provision of the

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circumscribed); John F. O’Connor, *The Origins and Application of the Military Deference Doctrine*, 35 GA. L. REV. 161, 166 (2000) (“[B]ecause 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.”); Peck, *supra* note 57, 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 16, 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 untrammelled by even the threat of legal regulation and judicial review, no matter how deferential that review might be on the merits.”). *But see* *Hamdi v. Rumsfeld*, 542 U.S. 507, 535 (2004) (rejecting “the Government’s assertion that 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 WIS. L. REV. 1165, 1215–16 (arguing that judicial review of facts supporting detention of enemy combatants does not violate separation of powers).

<sup>218</sup> Theodore B. Olson, *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).

<sup>219</sup> 505 U.S. 788, 800 (1992).

<sup>220</sup> *Id.* at 800–01; *see also* *Dalton v. Specter*, 511 U.S. 462, 470 (1994). *See generally* Jonathan R. Siegel, *Suing the President: Nonstatutory Review Revisited*, 97 COLUM. L. REV. 1612, 1617–21 (1997) (analyzing *Franklin v. Massachusetts*).

<sup>221</sup> *See supra* note 220 and accompanying text; *see also* Vermeule, *supra* note 16, 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”).

APA and because the Court acknowledged that it was reaching beyond the plain text of the statute.<sup>222</sup>

The *Franklin* rule provides a complete answer to concerns about judicial review under the APA interfering with the President's authority as Commander in Chief. As then-Professor Elena Kagan explained,<sup>223</sup> *Franklin* concerned an action that Congress had committed to the President's sole discretion: calculation and transmittal to Congress of the census.<sup>224</sup> 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 into the shoes of an agency head, and the review provisions usually applicable to that agency's action should govern."<sup>225</sup>

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."<sup>226</sup> On that theory, judicial review of any executive branch officer has the potential to interfere with the President's power as Commander in Chief.<sup>227</sup> Thus, further analysis is required to convince proponents of a strong unitary executive

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<sup>222</sup> See *supra* text accompanying notes 130–34.

<sup>223</sup> Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2351 (2001).

<sup>224</sup> *Franklin*, 505 U.S. at 800.

<sup>225</sup> Kagan, *supra* note 223, at 2351; see also *id.* at 2369 ("[W]hen 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."); Kevin M. Stack, *The President's Statutory Powers to Administer the Laws*, 106 COLUM. L. REV. 263, 290 & n.121 (2006); Daniel P. Rathbun, Note, *Irrelevant Oversight: "Presidential Administration" from the Standpoint of Arbitrary and Capricious Review*, 107 MICH. L. REV. 643, 645–46 (2009) ("[A]rbitrary and capricious review can be easily and appropriately applied to agency decisions, even in cases of presidential involvement . . .").

<sup>226</sup> Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 YALE L.J. 541, 595 (1994); see also Stack, *supra* note 225, at 302–03 ("[D]efenders 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).

<sup>227</sup> See David Luban, *On the Commander in Chief Power*, 81 S. CAL. L. REV. 477, 540 (2008) (executive branch officers, "not the president personally, exercise the commander in chief's day-to-day operational functions"); Rachel Ward Saltzman, *Executive Power and the Office of Legal Counsel*, 28 YALE L. & POL'Y REV. 439, 443–46 (2010) (describing Office of Legal Counsel memos following 9/11 which advocated broad executive power); cf. Kagan, *supra* note 223, at 2373, 2380 (advocating a variable deference regime turning on the role of the President in an agency's decision making).

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.<sup>228</sup> The Supreme Court has defined the President's power to include the "command of the forces and the conduct of campaigns"<sup>229</sup> and "the power to wage war."<sup>230</sup> 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<sup>231</sup> and a "time of war" can exist without a congressional declaration of war,<sup>232</sup> *Winter v. Natural Resources Defense Council, Inc.* fell within the scope of the "military authority" exception, and the case should have been dismissed.<sup>233</sup>

In *A History of the Military Authority Exception in the Administrative Procedure Act*, I advocated a generous reading of the "military authority" exception due to its status as an exception to a waiver of federal sovereign immunity.<sup>234</sup> 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

<sup>228</sup> See Masur, *supra* note 3, at 448 (asserting that the Supreme Court has read the Commander in Chief Clause "broadly to encompass nearly any necessary war-related actions"); cf. Barron & Lederman, *supra* note 216, at 696 ("[T]he 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.'").

<sup>229</sup> *Ex parte Milligan*, 71 U.S. 2, 139 (1866); see also *Hamdan v. Rumsfeld*, 548 U.S. 557, 591–92 (2006).

<sup>230</sup> *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.").

<sup>231</sup> See Kovacs, *supra* note 9, at 712–13.

<sup>232</sup> See *id.* at 719.

<sup>233</sup> 129 S. Ct. 365 (2008). Given that the Supreme Court decided to allow the case to proceed, it should have reviewed the Navy's action as it would any other agency's action and not given super-deference to the Navy.

<sup>234</sup> Kovacs, *supra* note 9, at 720.

judicial review.<sup>235</sup> 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.<sup>236</sup>

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.<sup>237</sup> 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,<sup>238</sup> but for many actions that are

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<sup>235</sup> See Metzger, *supra* note 6, 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 109, 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 (advocating abandonment of the 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”).

<sup>236</sup> See Merrill, *supra* note 109, 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”).

<sup>237</sup> Barron & Lederman, *supra* note 216, at 771 n.260 (“[T]he Commander in Chief Clause itself does not distinguish between war and peace . . . .”); Robert H. Jackson, *Training of British Flying Students in the United States*, 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 CALIF. L. REV. 235, 247 n.46 (2007) (“[T]he President is Commander in Chief in peace as well as war . . . .”); Saikrishna Prakash, *Regulating the Commander in Chief: Some Theories*, 81 IND. L.J. 1319, 1322 n.13 (2006) (observing that “the President is CINC whether we are at war or not”); 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.”).

<sup>238</sup> See David J. Barron & Martin S. Lederman, *The Commander in Chief at the Lowest Ebb—A Constitutional History*, 121 HARV. L. REV. 941, 984 (2008) (antebellum constitutional treatises indicated that Congress could control the military during peacetime); Saikrishna Prakash, *The Constitution as Suicide Pact*, 79 NOTRE DAME L.

potentially subject to an APA claim, Congress has concurrent<sup>239</sup> and superseding power.<sup>240</sup> The Constitution assigns Congress the power to “declare War . . . and make Rules concerning Captures on Land and Water,”<sup>241</sup> “raise and support Armies,”<sup>242</sup> “provide and maintain a Navy,”<sup>243</sup> and “make Rules for the Government and Regulation of the land and naval Forces.”<sup>244</sup> 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.’”<sup>245</sup> Congress also has “broad and sweeping” spending powers<sup>246</sup> 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.”<sup>247</sup> 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,

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REV. 1299, 1319 (2004) (“[T]he commander in chief probably can do more (as a matter of constitutional law) in times of war than he can in peacetime.”).

<sup>239</sup> See Barron & Lederman, *supra* note 216, 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 227, at 542 (“[T]he argument for overlapping or concurrent powers appears a lot more appealing.”).

<sup>240</sup> See Barron & Lederman, *supra* note 216, at 771 n.260 (“[N]ot many would argue that Congress cannot regulate the way in which, for instance, affairs at the Pentagon are arranged in peacetime.”); Kutz, *supra* note 237, 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”).

<sup>241</sup> U.S. CONST. art. I, § 8, cl. 11.

<sup>242</sup> *Id.* at cl. 12.

<sup>243</sup> *Id.* at cl. 13.

<sup>244</sup> *Id.* at cl. 14. Congress also has the authority to call forth, organize, arm, and discipline the militia. *Id.* at cl. 15, 16.

<sup>245</sup> *Weiss v. United States*, 510 U.S. 163, 177 (1994) (quoting *Chappell v. Wallace*, 462 U.S. 296, 301 (1983)); see also Barron & Lederman, *supra* note 216, at 733; Luban, *supra* note 227, at 523 (observing that “to keep the president’s war powers in check . . . the Constitution hives off important powers of war and peace from the executive and gives them to Congress”).

<sup>246</sup> *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47, 58 (2006) (quoting *United States v. O’Brien*, 391 U.S. 367, 377 (1968)).

<sup>247</sup> Barron & Lederman, *supra* note 216, at 734.



including the powers that the Constitution vests in the President.”<sup>248</sup> 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.<sup>249</sup>

Most APA cases against the military in peacetime do not implicate military readiness;<sup>250</sup> instead, they concern run-of-the-mill administrative activities concerning personnel and facilities—areas in which Congress may override the President.<sup>251</sup> The military records cases discussed in Part II.A., for example,<sup>252</sup> are within Congress’s purview. Congress may establish standards of review for agency action taken pursuant to power it has delegated<sup>253</sup> and may put the military on par with other agencies in cases within Congress’s preclusive range without raising constitutional concerns. 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.<sup>254</sup>

There potentially remains a sliver of actions, 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.”<sup>255</sup> In the very least, this narrow category includes the President’s authority to act “as civilian superintendent of

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<sup>248</sup> *Id.* at 735 (quoting *McCulloch v. Maryland*, 17 U.S. 316, 420–21 (1819)).

<sup>249</sup> *Hamdan v. Rumsfeld*, 548 U.S. 557, 599 n.31, 602, 628 (2006); Barron & Lederman, *supra* note 216, at 719 n.85.

<sup>250</sup> See Peck, *supra* note 57, at 3 (“Cases involving purely military activities, such as preparation for and conduct of combat operations, are relatively rare.”); *cf.* Chesney, *supra* note 3, at 1420 (“[N]ot all ‘national security’ cases are alike . . . Some interests may truly be paramount, others quite ordinary.”).

<sup>251</sup> Eskridge & Baer, *supra* note 8, at 1164 (Article I “accords Congress primacy in the regulation of . . . the governance of the armed forces.”).

<sup>252</sup> See *supra* text accompanying notes 84–88.

<sup>253</sup> Gary Lawson, *Controlling Precedent: Congressional Regulation of Judicial Decision-Making*, 18 CONST. COMMENT. 191, 215–16 (2001); Stack, *supra* note 225, at 300–01.

<sup>254</sup> *Cf.* Peck, *supra* note 57, 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.”).

<sup>255</sup> Barron & Lederman, *supra* note 216, at 694 n.6.

the military.”<sup>256</sup> Thus, Congress may not “delegate the ultimate command of the army and navy . . . to anyone other than the President.”<sup>257</sup> 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”<sup>258</sup> or the political question doctrine.<sup>259</sup> 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

The APA does not define the arbitrary or capricious standard, and the terms leave room for judicial interpretation.<sup>260</sup> Such federal common law is permissible so long as it does not contradict the statute and the court acknowledges that it is filling in a statutory gap.<sup>261</sup> 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.<sup>262</sup> Rationality review may sweep various considerations into the courts’ analysis.<sup>263</sup> I turn now

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<sup>256</sup> *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”).

<sup>257</sup> *Id.* at 769; *see also* Barron & Lederman, *supra* note 238, at 1102 (“[I]t 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 227, 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.”).

<sup>258</sup> 5 U.S.C. § 701(a)(2) (2006).

<sup>259</sup> *See Baker v. Carr*, 369 U.S. 186, 217 (1962).

<sup>260</sup> *See supra* text accompanying notes 135–36.

<sup>261</sup> *See supra* text accompanying note 126.

<sup>262</sup> *See supra* note 20 and accompanying text.

<sup>263</sup> 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.

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 *Motor Vehicle Manufacturer's Ass'n v. 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."<sup>264</sup> The Court looks to the agency's "relative expertness" when reviewing the agency's interpretation of a statute it administers,<sup>265</sup> and the Court is particularly deferential in cases concerning complex, technical areas that "require significant expertise."<sup>266</sup> 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."<sup>267</sup> The dissenting Justices agreed that agency expertise is central to the arbitrary or capricious inquiry in cases concerning an agency's change of policy.<sup>268</sup> Eskridge and 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.<sup>269</sup> An agency's access to relevant expertise and information, as well as its "capacity . . . reliably to *integrate* these inputs," implicates the

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Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983).

<sup>264</sup> *Id.*, quoted in Nat. Ass'n of Home Builders v. Defenders of Wildlife, 1275 S. Ct. 2518, 2522 (2007).

<sup>265</sup> United States v. Mead Corp., 533 U.S. 218, 228 (2001).

<sup>266</sup> Thomas Jefferson Univ. v. Shalala, 512 U.S. 504, 512 (1994) (quoting Pauley v. BethEnergy Mines, Inc., 501 U.S. 680, 697 (1991)); see also Marsh v. Or. Natural Res. Council, 490 U.S. 360, 376–77 (1989); Kleppe v. Sierra Club, 427 U.S. 390, 412 (1976).

<sup>267</sup> FCC v. Fox Television Stations, Inc., 129 S. Ct. 1800, 1823 (2009) (Kennedy, J., concurring in part and concurring in the judgment).

<sup>268</sup> *Id.* at 1826 (Stevens, J., dissenting) ("[S]hould 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."); *id.* at 1830 (Breyer, J., dissenting) ("An agency's policy decisions must reflect the reasoned exercise of expert judgment.").

<sup>269</sup> Eskridge & Baer, *supra* note 8, at 1144.

accuracy of the agency's decisions<sup>270</sup> 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.<sup>271</sup> 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.<sup>272</sup> 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."<sup>273</sup> 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."<sup>274</sup> Eskridge and Baer do not endorse the practice of giving the military super-deference,<sup>275</sup> 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."<sup>276</sup>

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 "[c]ourts lack information about the potentially serious consequences of their judgments, and the elected branches are in the best position to balance the competing considerations."<sup>277</sup> The Fourth Circuit, in upholding "Don't Ask, Don't Tell," deferred to the military in part because courts lack "access to intelligence and testimony on military readiness."<sup>278</sup> And Professor Vermeule proposes that "[j]udges defer

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<sup>270</sup> See Chesney, *supra* note 3, at 1394.

<sup>271</sup> Peck, *supra* note 57, at 75.

<sup>272</sup> *Id.*

<sup>273</sup> Luban, *supra* note 227, at 478.

<sup>274</sup> Thomasson v. Perry, 80 F.3d 915, 925 (4th Cir. 1996).

<sup>275</sup> See Eskridge & Baer, *supra* note 8, at 1185.

<sup>276</sup> *Id.* at 1144; *see also id.* at 1173 ("[A]gencies are usually better informed than courts along several dimensions . . .").

<sup>277</sup> Sunstein, *supra* note 94, at 270.

<sup>278</sup> Thomasson, 80 F.3d at 925.

because they think the executive has better information than they do.”<sup>279</sup>

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 § 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.<sup>280</sup> 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.”<sup>281</sup> He also acknowledges, though, that the “military authority” exception insulates many such actions from judicial review.<sup>282</sup> In the remainder of cases, the executive branch may have no greater institutional competence than any other branch of government.<sup>283</sup> 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.<sup>284</sup>

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].”<sup>285</sup> 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.”<sup>286</sup> Just as super-

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<sup>279</sup> Vermeule, *supra* note 16, at 1135.

<sup>280</sup> See *supra* text accompanying notes 229–37.

<sup>281</sup> McDaniel, *supra* note 22, at 127.

<sup>282</sup> *Id.* at 126.

<sup>283</sup> Chesney, *supra* note 3, at 1409–11 (arguing that whether agency expertise justifies greater deference to agency factfinding depends on the circumstances of the case); Luban, *supra* note 227, at 542–43; Masur, *supra* note 3, at 509 (“many so-called ‘wartime’ cases may turn on issues . . . about which military administrators hold no particular expertise”).

<sup>284</sup> Meazell, *supra* note 96, at 751 (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”).

<sup>285</sup> *Hamdi v. Rumsfeld*, 542 U.S. 507, 534 (2004).

<sup>286</sup> Chesney, *supra* note 3, at 1406, 1407; see also Masur, *supra* note 3, at 509 (“To the extent that [war and national security] are impenetrable to judges, it is often because

deferential review may incentivize agency obfuscation, so too may meaningful judicial review incentivize the military to be forthcoming with the information underlying its decision.<sup>287</sup>

Moreover, Congress had the opportunity to consider whether military expertise should play a role in judicial review under the APA.<sup>288</sup> Certainly, the Congress of 1946 was well aware of the need to respect military judgments.<sup>289</sup> 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<sup>290</sup> is misplaced, as such balancing is already accounted for in the APA.<sup>291</sup>

Esckridge 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

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military authorities have simply refused to share relevant and necessary information.”). 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 3, at 1411.

<sup>287</sup> See Meazell, *supra* note 96, at 751–52 (discussing incentives created by hard-look review of agency scientific determinations).

<sup>288</sup> See Kovacs, *supra* note 9, at 696–703 (discussing APA’s legislative history regarding judicial review of military action); *cf.* S. DOC. NO. 77-8, at 61 (1941) (“[E]xpertness 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.”).

<sup>289</sup> See Kovacs, *supra* note 9, at 691–96 (discussing changes in Congress’s view of the military during World War II); Vermeule, *supra* note 16, 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.”).

<sup>290</sup> Peck, *supra* note 57, at 76; *see also* 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.”); McDaniel, *supra* note 22, at 124 (“[T]he military imperatives of discipline and combat readiness demand a judicial deference unlike that due other governmental agencies.”); *cf.* United States v. Johnson, 481 U.S. 681, 690–91 (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)).

<sup>291</sup> *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.”).

it comes to public administration.”<sup>292</sup> Perhaps the courts are of the view that the military can 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.”<sup>293</sup> Courts may also fear that their judgments may not engender the same respect as decisions of the elected branches.<sup>294</sup> 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.”<sup>295</sup> 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.”<sup>296</sup> Similarly, 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.<sup>297</sup> Judicial disruption has potentially disastrous consequences in that context as well, as it does in many others. As Professor Masur said, “Military cases do not always hold the threat of substantially greater national peril, nor offer more pressing exigencies, nor present more intractable fact or policy questions than do typical administrative law adjudications.”<sup>298</sup>

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<sup>292</sup> Eskridge & Baer, *supra* note 8, at 1172.

<sup>293</sup> Vermeule, *supra* note 16, at 1135.

<sup>294</sup> See *Thomasson*, 80 F.3d at 926 (“[T]he imprimatur of the President, the Congress, or both imparts a degree of legitimacy to military decisions that courts cannot hope to confer.”).

<sup>295</sup> Masur, *supra* note 3, at 503.

<sup>296</sup> *Id.* at 503–04.

<sup>297</sup> *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.”).

<sup>298</sup> Masur, *supra* note 3, at 519.

### 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 those factors which give it power to persuade, if lacking power to control," as well as the "formality" of the decision.<sup>299</sup>

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.<sup>300</sup> The military records cases, for example, arise from informal adjudications.<sup>301</sup> The Navy decision at issue in *Winter v. Natural Resources Defense Council*<sup>302</sup>—to continue training despite the environmental impacts of the Navy's activities—was no more formal than other agency decisions under NEPA that earned little or no deference.<sup>303</sup> Eskridge and Baer found that, in cases concerning agency interpretations of statutes, the Supreme Court tends to prefer rulemakings to adjudications,<sup>304</sup> and that agency interpretations presented in informal rules, guidance, manuals, and amicus briefs all resulted in higher-than-average win rates.<sup>305</sup> 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.

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<sup>299</sup> *United States v. Mead Corp.*, 533 U.S. 218, 228 (2001) (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)).

<sup>300</sup> Peck, *supra* note 57, at 68.

<sup>301</sup> See *Ass'n of Civilian Technicians, Inc. v. United States*, 603 F.3d 989, 992 (D.C. Cir. 2010) ("[T]he Board's rules of procedure call for informal proceedings, see 32 C.F.R. § 581.3 . . ."); *Green v. White*, 319 F.3d 560, 566 (3d Cir. 2003).

<sup>302</sup> 129 S. Ct. 365 (2008).

<sup>303</sup> *E.g.*, *Native Ecosystems Council v. Tidwell*, 599 F.3d 926, 937 (9th Cir. 2010); *S. Fork Band Council of W. Shoshone of Nev. v. U.S. Dep't of the Interior*, 588 F.3d 718, 725–28 (9th Cir. 2009); *New Mexico ex rel. Richardson v. Bureau of Land Mgmt.*, 565 F.3d 683, 706–15 (10th Cir. 2009).

<sup>304</sup> Eskridge & Baer, *supra* note 8, at 1147 (finding "markedly higher win rates for agency interpretations embodied in rulemaking as opposed to adjudications").

<sup>305</sup> *Id.* at 1148.



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."<sup>306</sup> Courts may be less inclined to defer to agencies they perceive as biased.<sup>307</sup> 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, however,<sup>308</sup> 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."<sup>309</sup> Eskridge and Baer refer to this as "consultative deference."<sup>310</sup> 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,"<sup>311</sup> the agency won 80.6% of the time,<sup>312</sup> well above the average of 68.8%.<sup>313</sup> 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, because this factor has nothing to do with the quality of the agency's decision,

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<sup>306</sup> *Id.*; see also *id.* at 1149 ("[T]he Court has a [strong] preference for supporting interpretations that are stable . . ."); Eskridge, *supra* note 126, 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 & Baer, *supra* note 8, at 1129.

<sup>307</sup> Eskridge & Baer, *supra* note 8, at 1173.

<sup>308</sup> See *infra* text accompanying notes 357–81.

<sup>309</sup> Eskridge & Baer, *supra* note 8, at 1143–44; see also *id.* at 1114 (positing that the Court relies "on agency inputs in its reasoning and decisionmaking" because agencies provide "useful information" like legislative or regulatory history, relevant data and facts, or "experience-based analysis").

<sup>310</sup> *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").

<sup>311</sup> *Id.* at 1113.

<sup>312</sup> *Id.* at 1142 tbl.15.

<sup>313</sup> *Id.* at 1127, 1129 tbl.7.

but only its representation in court, it is not a permissible common-law interpretation of the arbitrary or capricious standard.<sup>314</sup>

#### 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.<sup>315</sup> Other studies have confirmed that ideology plays a significant role in judicial review of agency decisions.<sup>316</sup> Professors Miles and Sunstein demonstrated that Democratic appointees vote to validate certain agency decisions significantly more often than Republican appointees<sup>317</sup> and are "far more likely to uphold liberal decisions than conservative ones."<sup>318</sup> Republican appointees "show the opposite pattern."<sup>319</sup> 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."<sup>320</sup> Indeed, this phenomenon may be more pronounced in cases implicating national security than other areas of the law.<sup>321</sup> Significantly, the standard of review does not appear to

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<sup>314</sup> 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.").

<sup>315</sup> Eskridge & Baer, *supra* note 8, at 1156.

<sup>316</sup> Canon & Giles, *supra* note 88, at 190 (the Supreme Court's "willingness to support an agency . . . stems largely from the justices' attitudes towards the agency's substantive policies"); Crowley, *supra* note 88, at 276 (finding "rather striking support for the hypothesis that agency support is a function of the policy direction of that agency"); Thomas J. Miles & Cass R. Sunstein, *Do Judges Make Regulatory Policy? An Empirical Investigation of Chevron*, 73 U. CHI. L. REV. 823, 825–26 (2006) ("[T]he data reveal a strong relationship between the judges' ideological predisposition and the probability that they will validate agency determinations."); Richard L. Revesz, *Environmental Regulation, Ideology, and the D.C. Circuit*, 83 VA. L. REV. 1717, 1719 (1997) ("[I]deology significantly influences judicial decisionmaking on the D.C. Circuit."); Sheehan, *supra* note 88, at 884 ("[T]he policy position of the agency is an important factor.").

<sup>317</sup> Miles & Sunstein, *supra* note 88, at 767.

<sup>318</sup> *Id.* at 784; *see also* Sunstein, *supra* note 94, at 272.

<sup>319</sup> Miles & Sunstein, *supra* note 88, at 784.

<sup>320</sup> Eskridge & Baer, *supra* note 8, at 1155.

<sup>321</sup> *See* Sunstein, *supra* note 94, 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").

dampen the effect of ideology.<sup>322</sup> Miles and Sunstein observed that, whether courts reviewed actions of the Environmental Protection Agency or National Labor Relations Board under *Chevron* or under the arbitrary or capricious standard, ideology had a similar effect.<sup>323</sup> They concluded that “judicial policy judgments play an unquestionable role under arbitrariness review.”<sup>324</sup>

Typically, the makeup of the appellate panel significantly impacts voting behavior.<sup>325</sup> Democratic appointees tend to vote more liberally as the number of Democratic appointees on the panel increases, and Republican appointees do the same.<sup>326</sup> Conversely, judges tend to moderate their voting when they are in the minority on a three-judge panel.<sup>327</sup> In some areas, however, such as abortion and capital punishment, panel composition does not impact voting behavior.<sup>328</sup> Professor Sunstein found a similar absence of panel impacts in national security cases, presumably because judges’ “convictions are deeply held.”<sup>329</sup> Eskridge and Baer similarly suggested that the “*intensity of (judicial) preferences*” might explain differential win rates.<sup>330</sup>

The empirical evidence suggests, then, that the courts’ practice of giving super-deference to the military may simply reflect judicial ideological preferences.<sup>331</sup> Professor Steven Lichtman concluded that

<sup>322</sup> Miles & Sunstein, *supra* note 88, at 768 (“[I]deology influences judges’ decisionmaking to the same extent regardless of the judicial task or the standard of review.”).

<sup>323</sup> *Id.* (“[T]he 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.”).

<sup>324</sup> *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.”).

<sup>325</sup> *Id.* at 784.

<sup>326</sup> *Id.* at 785; *see also* Revesz, *supra* note 316 at 1764 (“[T]he ideology of one’s colleagues is a better predictor of one’s vote than one’s own ideology.”); Sunstein, *supra* note 94, at 273.

<sup>327</sup> Sunstein, *supra* note 94, at 273.

<sup>328</sup> *Id.* at 274–75.

<sup>329</sup> *Id.* at 279–80, 290.

<sup>330</sup> Eskridge & Baer, *supra* note 8, at 1146. Eskridge and Baer found that, where the Justices have strongly held views about the subject matter, they are more likely to overturn the agency. *Id.* at 1146–47; *see also* Eskridge, *supra* note 126, at 1480–81.

<sup>331</sup> The decision in *Winter*, for example, may have reflected the extent to which the Justices value marine life. *See* Jonathan Cannon, *Environmentalism and the Supreme Court: A Cultural Analysis*, 33 *ECOLOGY L.Q.* 363 (2006); Richard J. Lazarus, *Thirty Years of Environmental Protection Law in the Supreme Court*, 17 *PACE ENVTL. L. REV.* 1 (1999); Richard J. Lazarus, *Restoring What's Environmental About Environmental Law in*

“the military’s success rate is an instance in which there is an ‘ideology’ backstopping the success of this particular repeat player.”<sup>332</sup> Obviously, that is not a permissible common-law exegesis of the arbitrary or capricious standard.<sup>333</sup>

Commentators agree that, normatively, it would be desirable to reduce the impact of ideology in administrative judicial review,<sup>334</sup> but how that should be accomplished is the subject of academic debate.<sup>335</sup> Some commentators advocate formalist rules.<sup>336</sup> 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.”<sup>337</sup> Other commentators advocate turning to legislative history.<sup>338</sup> Eskridge and Baer agree that legislative history “offers a greater chance of supplanting the judge’s own preconceptions,”<sup>339</sup> but they show that Justices who rely on legislative history also vote ideologically.<sup>340</sup> Professor Sunstein advocates the use of non-delegation canons.<sup>341</sup> Eskridge and Baer counter that canonical approaches are no more effective at overcoming judicial ideology than textualist approaches: Justices

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*the Supreme Court*, 47 UCLA L. REV. 703 (2000); Richard J. Lazarus, *Environmental Law and the Supreme Court: Three Years Later*, 19 PACE ENVTL. L. REV. 653 (2002).

<sup>332</sup> Lichtman, *supra* note 94, at 945. Lichtman also points out that 35 out of 110 Supreme Court Justices included in his analysis served in the military. *Id.* at 949.

<sup>333</sup> Similarly, a super-deference rule premised *sub silentio* on the desire “to shield the judiciary from . . . institutional harms in the form of lost prestige, legitimacy, or political capital,” Chesney, *supra* note 3, at 1397, would not be within the scope of the arbitrary or capricious standard. *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 will play some role.”).

<sup>334</sup> *E.g.*, Miles & Sunstein, *supra* note 88, at 802; *id.* at 814 (arguing that judicial review of agency action should not provide “a method of substituting judicial policy preferences for agency policy preferences”); *see also* Miles & Sunstein, *supra* note 316, at 827 (“[T]he 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 . . .”).

<sup>335</sup> *See* Eskridge & Baer, *supra* note 8, 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, *supra* note 3, at 1402.

<sup>336</sup> *See* Eskridge & Baer, *supra* note 8, at 1193–95.

<sup>337</sup> *Id.* at 1195.

<sup>338</sup> *Id.*

<sup>339</sup> *Id.*

<sup>340</sup> *Id.* at 1194.

<sup>341</sup> Cass R. Sunstein, *Beyond Marbury: The Executive’s Power to Say What the Law Is*, 115 YALE L.J. 2580, 2607–10 (2006).

employ such canons to reach ideologically driven results as well.<sup>342</sup> 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.”<sup>343</sup> 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

Because 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.<sup>344</sup> 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.”<sup>345</sup> The Supreme Court has already acknowledged that the APA supplants judicial common law, at least in part.<sup>346</sup> 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. As legislation that mood must be respected. . . .”<sup>347</sup>

The recognition that Congress can and does add military exemptions to substantive statutes should alleviate any lingering concerns about the potential for judicial review of administrative military action to interrupt military priorities. In 2002, the District Court for the District of Columbia enjoined Navy training on the island of Farallon de Medinilla<sup>348</sup> based on the Navy’s violation of

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<sup>342</sup> Eskridge & Baer, *supra* note 8, at 1195.

<sup>343</sup> *Id.* at 1196.

<sup>344</sup> *See, e.g.*, Merrill, *supra* note 109.

<sup>345</sup> Duffy, *supra* note 6, at 213.

<sup>346</sup> *See, e.g.*, FCC v. Fox Television Stations, Inc., 129 S. Ct. 1800, 1810 (2009).

<sup>347</sup> Universal Camera Corp. v. NLRB, 340 U.S. 474, 487 (1951).

<sup>348</sup> Ctr. for Biological Diversity v. Pirie, 191 F. Supp. 2d 161, 164 (D.D.C. 2002) (granting plaintiff’s motion for summary judgment); Ctr. for Biological Diversity v. Pirie, 201 F. Supp. 2d 113, 122 (D.D.C. 2002) (enjoining military training).

the Migratory Bird Treaty Act (MBTA),<sup>349</sup> which is enforceable only through the APA.<sup>350</sup> 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.<sup>351</sup> Again, in 2003, Congress responded to a district court injunction<sup>352</sup> by exempting “military readiness activities” from certain provisions of the Marine Mammal Protection Act,<sup>353</sup> the relevant provisions of which are actionable only through the APA.<sup>354</sup> These statutes spurred debate,<sup>355</sup> 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. Commentators have long extolled the benefits of judicial candor.<sup>356</sup> 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.”<sup>357</sup> Professor Shapiro

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<sup>349</sup> The Migratory Bird Treaty Act, 16 U.S.C. §§ 703–712 (2006), provides in part: “Unless and except as permitted by regulations . . . it shall be unlawful . . . to pursue, hunt, take, capture, kill . . . any migratory bird” covered by bilateral international agreements with Canada, Mexico, Japan, and the former Soviet Union, entered into for the protection of migratory birds. 16 U.S.C. § 703(a).

<sup>350</sup> *Hill v. Norton*, 275 F.3d 98, 103 (D.C. Cir. 2001).

<sup>351</sup> Bob Stump National Defense Authorization Act for Fiscal Year 2003, Pub. L. No. 107-314, 116 Stat. 2509, § 315(a) (2002), provided that the MBTA’s prohibition against taking migratory birds “shall not apply to the incidental taking of a migratory bird by a member of the Armed Forces during a military readiness activity authorized by the Secretary of Defense or the Secretary of the military department concerned.”

<sup>352</sup> *Natural Res. Def. Council, Inc. v. Evans*, 279 F. Supp. 2d 1129 (N.D. Cal. 2003).

<sup>353</sup> National Defense Authorization Act for Fiscal Year 2004, Pub. L. No. 108-136, 117 Stat. 1392, § 319(c) (2003).

<sup>354</sup> See *Didrickson v. U.S. Dept. of the Interior*, 982 F.2d 1332, 1338 (9th Cir. 1992).

<sup>355</sup> Compare Hope Babcock, *National Security and Environmental Laws: A Clear and Present Danger?*, 25 VA. ENVTL. L.J. 105 (2007), with E.G. Willard et al., *Environmental Law and National Security: Can Existing Exemptions In Environmental Laws Preserve DOD Training and Operational Prerogatives Without New Legislation?*, 54 A.F. L. REV. 65 (2004).

<sup>356</sup> See, e.g., Eskridge & Frickey, *supra* note 214, at 365–71, 383 (urging courts to be more candid regarding methods of statutory interpretation); Micah Schwartzman, *Judicial Sincerity*, 94 VA. L. REV. 987, 988 n.2 (2008) (Indeed, “[s]ystematic criticism of judicial candor is a fairly recent phenomenon.”).

<sup>357</sup> David L. Shapiro, *In Defense of Judicial Candor*, 100 HARV. L. REV. 731, 737 (1987); see also *id.* at 750 (“[C]andor is to the judicial process what notice is to fair procedure.”).

posited that the nature of the judicial process mandates that judges provide reasons for their decisions “that can be debated, attacked, and defended.”<sup>358</sup> 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.<sup>359</sup>

Professor Merrill advocates judicial transparency as a means to “promote rigor and clarity in judicial thinking about the appropriate role of federal common law.”<sup>360</sup> He believes that candor yields “predictability and stability,”<sup>361</sup> which are goals of the APA and values of the rule of law.<sup>362</sup> Predictability in the law “appeals to basic notions of fairness” by giving notice to potential litigants of what the law requires.<sup>363</sup> By the same token, giving agencies notice of what to expect from judicial review may prevent arbitrary agency action.<sup>364</sup> It cannot be gainsaid that the military requires predictability to fulfill its mission of protecting the nation.<sup>365</sup> 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.

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<sup>358</sup> *Id.* 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).

<sup>359</sup> *See supra* text accompanying notes 180–81; *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 404–05 (arguing that candor may threaten judicial integrity).

<sup>360</sup> Merrill, *supra* note 109, at 72; *see also* Idleman, *supra* note 358, at 1350 (“[C]andor [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.”).

<sup>361</sup> Merrill, *supra* note 109, at 72; *see also* Stack, *supra* note 175, at 568.

<sup>362</sup> *See* FCC v. Fox Television Stations, Inc., 129 S. Ct. 1800, 1826 (2009) (Stevens, J., dissenting) (“[T]he [APA] . . . and the rule of law . . . favor stability over administrative whim.”).

<sup>363</sup> Zeppos, *supra* note 359, at 401. *But see id.* at 402–03 (arguing that judicial candor does not yield greater predictability).

<sup>364</sup> *Cf.* Manning, *supra* note 17, at 674 (“[T]ransparent [agency] rules have a salutary effect on the control of arbitrariness.”); Stack, *supra* note 175, at 568 (“[U]ncertainty does nothing to limit adventurous assertions of statutory power by presidents.”).

<sup>365</sup> Peck, *supra* note 57, at 80 (“[T]he increased degree of predictability would itself have a salutary effect on the entire subject area [reviewability of challenges to military administrative activities].”).

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.<sup>366</sup> She posits that a “lack of transparency is a serious impediment to both judicial and administrative accountability.”<sup>367</sup> 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.<sup>368</sup>

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.<sup>369</sup> 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.<sup>370</sup> Finally, to the extent that judicial ideology provides the motivation for deferring excessively to the military in APA cases, judicial candor may counteract that tendency to some extent.<sup>371</sup>

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<sup>366</sup> Metzger, *supra* note 6, at 486; *see also id.* at 506, 534–37.

<sup>367</sup> *Id.* at 535.

<sup>368</sup> *Cf. Masur, supra* note 3, at 506 (“[T]here exists no internal mechanism to prevent executive branch actors from simply alleging generalized threats to national security at the outset of any wartime adjudication.”).

<sup>369</sup> *See Huq, supra* note 97, at 271 (“Spillover effects that result from the convergence of national security with general public law, such as in *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.”).

<sup>370</sup> *See Kagan, supra* note 223, at 2331–33; Stack, *supra* note 175, at 568 (“[W]ithout 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.”).

<sup>371</sup> *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 359, at 406–12 (arguing that calls for judicial candor may be unrealistic because judges may not be aware of the real reasons for their



Judicial candor may not always be “desirable,”<sup>372</sup> however, much less required.<sup>373</sup> It “may reveal unpalatable value choices, raise obstacles to securing the agreement of multimember bodies, or have worrying implications for future decisions.”<sup>374</sup> It may be ineffective if the court’s audience is unable or unwilling to respond to the court’s transparency,<sup>375</sup> and it may even threaten the judiciary’s institutional legitimacy.<sup>376</sup> 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.<sup>377</sup>

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 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.”<sup>378</sup> He contends that black holes—like the “military authority” exception—and grey holes—like the tendency to give the

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).

<sup>372</sup> Vermeule, *supra* note 16, at 1132.

<sup>373</sup> See Idleman, *supra* note 358, at 1310 (arguing that federal appellate judges “may regularly forgo candor under the principles of logic and prudence and still retain their political legitimacy and institutional integrity”).

<sup>374</sup> Metzger, *supra* note 6, at 535; see also Idleman, *supra* note 358, 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 357, at 739–50 (refuting arguments that judicial candor is not always preferable).

<sup>375</sup> Idleman, *supra* note 358, at 1383–84.

<sup>376</sup> *Id.* at 1388–94.

<sup>377</sup> 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 16, 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, which 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.

<sup>378</sup> *Id.* at 1097.

military super-deference—are inevitable.<sup>379</sup> Here, however, I seek merely to substitute one judicially created grey hole—super-deference to the military—for another congressionally established grey 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.<sup>380</sup> 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.

### CONCLUSION

Congress subjected the military to the same standard of review under the APA as other federal agencies: the deferential arbitrary or capricious standard. The courts, however, 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 consistently rules to restrain government discretion. It also undermines two of the APA’s primary purposes: to increase uniformity in administrative law and to augment judicial review of agency action. Additionally, 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 is not amenable to suit under the APA, and even if the Commander in Chief power extends to executive branch officers, the 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

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<sup>379</sup> *Id.*

<sup>380</sup> *Id.* at 1134.

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.<sup>381</sup> 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.<sup>382</sup> But some areas of the

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<sup>381</sup> See H.R. COMM. ON THE JUDICIARY, ADMINISTRATIVE PROCEDURE ACT, H.R. Rep. No. 79-1980 (1946), reprinted in LEGISLATIVE HISTORY, *supra* note 40, at 250 ("The bill is an outline of minimum essential rights and procedures."); Vermeule, *supra* note 16, at 1108 ("[T]he administrative state is too varied and complex to be regulated by crisp legal standards formulated in advance . . ."). But see S. COMM. ON THE JUDICIARY, ADMINISTRATIVE PROCEDURE ACT, S. Rep. No. 79-752 (1945), reprinted in LEGISLATIVE HISTORY, *supra* note 40, at 191 (Senate Judiciary Committee aimed "to make sure that the bill [was] complete enough to cover the whole field.").

<sup>382</sup> See 5 U.S.C. § 702 (2006) ("Nothing herein . . . affects . . . the power or duty of the court to . . . deny relief on any other appropriate legal or equitable ground . . ."); Levin, *supra* note 6; see also Duffy, *supra* note 6, at 128 (the Judiciary Act of 1875 "should be viewed as an authorization for 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 97, at 229. Perhaps the Supreme Court was willing to defer so broadly in *Winter v. Natural Resources Defense Council* because the APA expressly preserves the courts' equitable discretion to fashion a remedy appropriate to the case.

law are completely codified. Where Congress provides clear direction for agencies and courts to follow, agencies and courts should follow. The courts should cease reliance on common-law doctrines that do not comport with Congress's stated intent absent a sufficient reason to do so, and they certainly should not rely on those doctrines 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.

