

# **In the Field or in the Courtroom: Redefining the APA's Military Authority Exception in the Age of Modern Warfare\***

James D. Cromley\*\*

## ABSTRACT

*In the recent case of Zaidan v. Trump, an American citizen sought to challenge the alleged decision of the United States to place him on a "Kill List," evidenced by his narrow avoidance of death in five separate airstrikes while covering the war in Syria. To challenge such a decision of the United States, a plaintiff must first overcome the government's sovereign immunity. To overcome this immunity, one must point to a waiver. The Administrative Procedure Act ("APA") "waives the government's sovereign immunity from suit for individuals 'suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute.'" The APA's waiver, however, is not absolute. In section 701(b)(1), the APA enumerates exceptions to the waiver under its definition of "agency." One of those exceptions is the military authority exception, which states that "military authority exercised in the field in time of war or in occupied territory" is exempted from waiver. Plaintiffs like the one in Zaidan v. Trump now face a unique challenge as the United States continues to carry out strikes justified by the expansive Global War on Terror. As the modern battlefield grows, so too does the exception to the waiver of sovereign immunity granted to military decision-making in the APA. Given this proportional expansion, "in the field" should be interpreted narrowly in order to prevent the APA's military authority exception from swallowing all waiver of sovereign immunity in cases of targeting and extrajudicial killing of American citizens.*

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\* Winner of the 2019 Rear Admiral John S. Jenkins Writing Award for Excellence given by the National Institute for Military Justice.

\*\* J.D. Candidate, May 2020, Sandra Day O'Connor College of Law at Arizona State University; B.B.A. Marketing, May 2010, University of Miami. Prior to law school, the author served as an Infantry Officer in United States Marine Corps from August 2010 until separating as a Captain in September 2017 to begin law school. The author would like to thank Professor Amy Langenfeld for her wit, wisdom, and patience in providing advisory assistance and extends his sincere gratitude to the *Journal* editors who assisted in the production of this Comment.

## I. INTRODUCTION

Journalism can be a dangerous business. In 2017 alone, forty-eight journalists were killed worldwide.<sup>1</sup> When the news of Washington Post reporter Jamal Khashoggi's death at the hands of Saudi officials broke, American congressional leaders were quick to condemn the Saudi government.<sup>2</sup> Watching these events with morbid detachment, most American citizens feel confident that the United States government would never use extrajudicial killing<sup>3</sup> against one of its own. However, Bilal Abdul Kareem, an American citizen, claimed the United States government tried to kill him on five separate occasions.<sup>4</sup>

Kareem is an investigative journalist who, between June 2016 and September 2016, narrowly avoided death in five different airstrikes while covering the anti-Assad rebels in the Syrian war.<sup>5</sup> Kareem has worked for multiple media outlets including Al Jazeera, CNN, and the BBC, and his work necessarily involves interaction with local militants.<sup>6</sup> Though he says he has never assisted in any terrorist plot and has no association with the Taliban or al Qaeda,<sup>7</sup> Kareem believes that his occupational connections led U.S. officials to place him on a list of targets for extrajudicial killing ("Kill List") created and maintained at the highest levels of government.<sup>8</sup> He sought,

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1. Jason Rezaian, *2017 Was the Most Dangerous Year Ever for Journalists. 2018 Might Be Even Worse.*, WASH. POST (Feb. 1, 2018), <https://www.washingtonpost.com/news/worldviews/wp/2018/02/01/2017-was-the-most-dangerous-year-ever-for-journalists-2018-might-be-even-worse> [https://perma.cc/L2PL-SJ2X].

2. Mark Niquette, *Congressional Leaders Reject Saudi Arabia's Story of Jamal Khashoggi's Death*, TIME (Oct. 21, 2018), <http://time.com/5430599/congressional-leaders-reject-saudi-story-jamal-khashoggi/> [https://perma.cc/CJN6-WHBJ].

3. Extrajudicial killing means "deliberated killing not authorized by a previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples." *Flanagan v. Islamic Republic of Iran*, 190 F. Supp. 3d 138, 161 (D.D.C. 2016) (citing the Torture Victim Protection Act of 1991, Pub. L. No. 102-256, 106 Stat. 73 (1992) (codified at 28 U.S.C. § 1350 (1994))).

4. *Zaidan v. Trump*, 317 F. Supp. 3d 8, 14–15 (D.D.C. 2018).

5. *Id.* at 14. For a detailed description of each of these airstrikes, see Complaint at 12–13, *Zaidan v. Trump*, 317 F. Supp. 3d 8 (D.D.C. 2018) (No. 1:17-cv-00581).

6. *Zaidan*, 317 F. Supp. 3d at 14.

7. *Id.*

8. See Complaint, *supra* note 5, at 14. The United States neither confirmed nor denied Kareem's existence on such a list, nor did it confirm or deny the existence of the list itself. See *Zaidan*, 317 F. Supp. 3d at 19. As such, it did not contest Kareem's lack of ties to terrorist organizations but instead argued that "Syria is a volatile place where forces from multiple countries and groups engage in hostilities and attacks, making implausible Mr. Kareem's allegations that the attacks he suffered were at the hands of the United States and not other combatants." *Id.* at 20.

*inter alia*, an injunction prohibiting his inclusion on the Kill List<sup>9</sup> until he was given an opportunity to challenge his inclusion on the list in accordance with the standards of due process.<sup>10</sup>

If placed in Kareem’s situation, most would think that his requested relief seems reasonable. After all, Kareem was not challenging his inclusion on the Kill List; he was simply challenging his *inability to challenge* his inclusion on the Kill List. And therein lies the important distinction underlining the unique hurdle that must first be overcome.

An American citizen bringing suit to challenge his targeting by the United States for killing would first have to overcome the government’s sovereign immunity.<sup>11</sup> To overcome this immunity, a plaintiff must point to a waiver. The Administrative Procedure Act (“APA”) “waives the government’s sovereign immunity from suit for individuals ‘suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute.’”<sup>12</sup> The APA’s waiver, however, is not absolute. In section 701(b)(1), the APA enumerates exceptions to the waiver under its definition of “agency.”<sup>13</sup> Most notably, and at issue here, is the military authority exception, which states that “military authority exercised *in the field* in time of war or in occupied territory” is exempted from waiver.<sup>14</sup>

In *Zaidan v. Trump*, the government argued that the decision to place Kareem on the Kill List—as a national security decision made during the so-called “Global War on Terror”—fell squarely within the military authority exception, but Judge Rosemary Collyer quickly dismissed this argument.<sup>15</sup> Briefly noting that the decision to place Mr. Kareem on the Kill List took place not “in the field” but instead in Washington D.C., Judge Collyer denied the motion to dismiss and allowed the case to proceed.<sup>16</sup> Unlike judges in

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9. While beyond the scope of this Comment, Kareem’s requested relief presents an interesting ancillary question: Can a court grant an injunction regarding something that may not exist?

10. Complaint, *supra* note 5, at 21–22.

11. See *Fed. Deposit Ins. Corp. v. Meyer*, 510 U.S. 471, 475 (1994) (“Absent a waiver, sovereign immunity shields the Federal Government and its agencies from suit.”); see also *Lane v. Pena*, 518 U.S. 187, 192 (1996) (stating that “a waiver of the Government’s sovereign immunity will be strictly construed, in terms of its scope, in favor of the sovereign”); *United States v. Williams*, 514 U.S. 527, 531 (1995) (noting the court must “constru[e] ambiguities in favor of immunity” when determining whether a statutory waiver of immunity applies).

12. *Zaidan*, 317 F. Supp. 3d at 21 (citing 5 U.S.C. § 702 (2012)).

13. 5 U.S.C. § 701(b)(1) (2018).

14. *Id.* § 701(b)(1)(G) (emphasis added).

15. *Zaidan*, 317 F. Supp. 3d at 22.

16. *Id.* Judge Collyer eventually dismissed all remaining defendants on September 24, 2019. *Kareem v. Haspel*, No. 17-581 (RMC), 2019 WL 4645155, at \*7 (D.D.C. Sept. 24, 2019). The basis for the case’s ultimate dismissal—the state secrets privilege—provides a conclusion as

previous cases, in which the government had found success by invoking the APA's military authority exception,<sup>17</sup> Judge Collyer interpreted "in the field" literally and narrowly to prevent a premature end to this case.<sup>18</sup> This Comment will argue that, given the expansion of the modern battlefield, "in the field" should be interpreted narrowly in order to prevent the APA's military authority exception from swallowing all waiver of sovereign immunity in cases of targeting and extrajudicial killing of American citizens.

As the modern battlefield grows, so too does the waiver exception that is granted to military decision-making during a time of war. This Comment will first discuss the background of the APA by briefly detailing the wars leading up to its enactment,<sup>19</sup> the legislative history of the APA and the military authority exception specifically,<sup>20</sup> and the contemporaneous understanding of "in the field."<sup>21</sup> Next, Section II.B will discuss cases under which the APA's military authority exception either precluded<sup>22</sup> or failed to preclude<sup>23</sup> judicial review. From there, this Comment will explore the rise of proxy conflict,<sup>24</sup> terrorism,<sup>25</sup> and cyberwarfare<sup>26</sup> in order to give context to the exponentially expansive evolution of modern warfare. It will then analyze the problems with an overly broad interpretation of "in the field" within the military authority exception before proposing a simple solution.<sup>27</sup> Finally, this Comment will conclude that a narrow interpretation of "in the field" is necessary to prevent an unchecked expansion of the exception itself as modern conflict continues to spill over into new realms.<sup>28</sup>

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unsatisfying as it is chilling. Even though Kareem's claims properly allege "that the United States targeted an American citizen for lethal action in a foreign country without due process of law," the case may not even be heard because of the "'reasonable danger' that disclosing [whether Kareem was even on the Kill List] would endanger national security." *Id.* at \*3 (quoting *United States v. Reynolds*, 345 U.S. 1, 10 (1953)).

17. See, e.g., *Anderson v. Carter*, 802 F.3d 4, 8–9 (D.C. Cir. 2015); *Vance v. Rumsfeld*, 701 F.3d 193, 197–98 (7th Cir. 2012); *Nattah v. Bush*, 770 F. Supp. 2d 193, 202–04 (D.D.C. 2011).

18. *Zaidan*, 317 F. Supp. 3d at 22.

19. See *infra* Section II.A.1.

20. See *infra* Section II.A.2.

21. See *infra* Section II.A.3.

22. See *infra* Section II.B.1.

23. See *infra* Section II.B.2.

24. See *infra* Section II.C.1.

25. See *infra* Section II.C.2.

26. See *infra* Section II.C.3.

27. See *infra* Part III.

28. See *infra* Part IV.

## II. BACKGROUND

In order to fully understand the expansion of the APA's military authority exception, Section II.A will place the enactment of the APA in the proper historical context. The APA was enacted in 1946,<sup>29</sup> at the fulcrum of an important shift in the way the United States engaged in global armed conflict. Section II.B will discuss cases argued under the military authority exception. Finally, because Congress tied the military authority exception directly to military action in the field, Section II.C will round out the background by tracking the evolution of warfare since the enactment of the APA.

### A. *The Military Authority Exception in Historical Context*

Proper study of legislative history necessarily requires examination of both internal and external influences on Congress leading up to and during the enactment of legislation. This Section begins by examining the role of Congress in, and the nature of, military conflicts before the passage of the APA. It then addresses, more broadly, the domestic and foreign influences on Congress leading up to and during enactment.<sup>30</sup> Finally, this Section concludes by exploring how Congress and the judiciary likely understood the phrase "in the field" contemporaneously with the APA.

#### 1. Declarations of War Before the Administrative Procedure Act

The Constitution of the United States clearly vests the power to declare war in Congress.<sup>31</sup> Before the passage of the APA in 1946, Congress exercised this power to great effect in both the First and Second World Wars, when it declared that the President was "authorized and *directed* to employ the entire naval and military forces of the United States and the resources of the Government to carry on war against [its enemies]."<sup>32</sup> By its wording in each of these declarations of war, Congress emphasized that *it* was the entity ultimately responsible; Congress not only declared the war, it also directed

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29. Kathryn E. Kovacs, *A History of the Military Authority Exception in the Administrative Procedure Act*, 62 ADMIN. L. REV. 673, 704 (2010) [hereinafter Kovacs, *A History of the Exception*].

30. The Walter-Logan Bill, the predecessor to the modern APA, was introduced in 1939, *id.* at 685, while the United States was nearing the end of the Great Depression and global events were already setting the stage for the Second World War.

31. U.S. CONST. art. I, § 8, cl. 11.

32. S.J. Res. 119, 77th Cong. (1941) (emphasis added); S.J. Res. 116, 77th Cong. (1941).

the actions of the President in carrying it out.<sup>33</sup> Before the passage of the APA, Congress had declared war on eleven occasions.<sup>34</sup> Since the passage of the APA, Congress has still yet to declare another war.<sup>35</sup>

The APA was passed only months after George Kennan sent his “Long Telegram” from Moscow to the Secretary of State.<sup>36</sup> Kennan’s telegram is regarded by historians as the foundation for the American change in strategy regarding the Soviet Union and the beginning of the Cold War.<sup>37</sup> The “Long Telegram” assessed the expanding Soviet power as “[i]mpervious to logic of reason” but “highly sensitive to logic of force.”<sup>38</sup> Kennan theorized that if the United States “has sufficient force and makes clear [its] readiness to use it,” it could properly handle situations that would have previously led to open war, and “there need be no prestige engaging showdowns.”<sup>39</sup>

Because the strategy of the Cold War was based predominantly on avoidance of heated battle—and, therefore, congressional declaration of war—so began a “period of enhanced presidential power and congressional acquiescence.”<sup>40</sup> This acquiescence led to less “personal[] involve[ment] in the decision” to wage war for which “constituents could have held [Congress] accountable at the next election.”<sup>41</sup> Such congressional acquiescence has persisted ever since,<sup>42</sup> ultimately culminating in the broad 2001 Authorization

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33. See Alfred W. Blumrosen & Steven M. Blumrosen, *Restoring the Congressional Duty to Declare War*, 63 RUTGERS L. REV. 407, 412 (2011).

34. *Official Declarations of War by Congress*, UNITED STATES SENATE, [https://www.senate.gov/pagelayout/history/h\\_multi\\_sections\\_and\\_teasers/WarDeclarationsbyCongress.htm](https://www.senate.gov/pagelayout/history/h_multi_sections_and_teasers/WarDeclarationsbyCongress.htm) [<https://perma.cc/GS4Q-WPV6>] (last visited Sept. 16, 2019). After the first declaration of war against Great Britain in 1812, the remaining declarations are: the Declaration of War with Mexico in 1846, the Declaration of War with Spain in 1898, the Declaration of War with Germany in 1917, the Declaration of War with Austria-Hungary in 1917, the Declaration of War with Japan in 1941, the Declaration of War with Germany in 1941, the Declaration of War with Italy in 1941, the Declaration of War with Bulgaria in 1942, the Declaration of War with Hungary in 1942, and the Declaration of War with Rumania in 1942. *Id.*

35. Blumrosen & Blumrosen, *supra* note 33, at 460 (“This was the last time that a President properly proceeded under a congressional declaration of war.”).

36. Telegram from George Kennan, Am. Chargé d’Affaires in Moscow, to Sec’y of State (Feb. 22, 1946) (on file with the Harry S. Truman Presidential Library & Museum). Kennan sent the telegram from Moscow on February 22, 1946; President Truman signed the APA on June 11, 1946. Kovacs, *A History of the Exception*, *supra* note 29, at 704.

37. JOHN LUKACS, *GEORGE KENNAN: A STUDY OF CHARACTER* 73 (2007).

38. See Telegram from George Kennan to Sec’y of State, *supra* note 36, at 15.

39. *Id.* at 15–16.

40. Blumrosen & Blumrosen, *supra* note 33, at 461.

41. *Id.* at 479.

42. See *id.* at 461; see also *supra* text accompanying note 35.

for Use of Military Force (“AUMF”)<sup>43</sup> in the wake of the September 11, 2001 terrorist attacks.

Before the APA, Congress enjoyed a prominent role in the application of American military force abroad. Such a role necessarily brought with it increased accountability for the decisions made, which inevitably drove the need for a deeper understanding to be applied to each declaration of war. In debating the APA and the bills that led up to it, Congress must have expected to remain in this influential position regarding the projection of military force. However, after the enactment of the APA, the fact that Congress never again declared war underscores the period of congressional acquiescence that had begun.<sup>44</sup>

## 2. Legislative History of the Administrative Procedure Act and the Military Authority Exception

The bill that would ultimately become the APA was proposed in 1944, just two weeks after the Allied landings in Normandy on D-Day,<sup>45</sup> but its evolution stretches back much further.<sup>46</sup> The zeitgeist of the 1930s in the United States—a growing trust in administrative action—was predominantly a response to the crippling economic problems of that decade and its predecessor.<sup>47</sup> The 1930s were marked by a belief “that expert administration would solve the massive problems the Great Depression had caused” and “that the judiciary should have a limited role in reviewing agency action.”<sup>48</sup>

Precursor bills to the APA<sup>49</sup> found little congressional Republican support so long as the predominantly conservative Supreme Court continued to invalidate New Deal programs.<sup>50</sup> The drive for administrative reform, and therefore increased judicial oversight, did not begin to gain traction until 1937

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43. Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001) (codified at 50 U.S.C. § 1541 (2018)).

44. See Blumrosen & Blumrosen, *supra* note 33; see also *supra* text accompanying notes 35, 40.

45. Kovacs, *A History of the Exception*, *supra* note 29, at 696.

46. See *id.* at 681 (“Senator George Norris introduced ‘the first legislation for constraining administrative agencies’ in 1929, four years before Franklin Delano Roosevelt took office.” (quoting George B. Shepherd, *Fierce Compromise: The Administrative Procedure Act Emerges from New Deal Politics*, 90 NW. U. L. REV. 1557, 1566 (1996))).

47. Kovacs, *A History of the Exception*, *supra* note 29, at 681.

48. *Id.*

49. Senator George Norris proposed such a bill in 1929, upon which Congress took no action; Senator Mills Logan proposed such a bill in 1933, upon which Congress took no action; and the American Bar Association’s (“ABA”) chairman proposed such a bill in 1936, which died in committee. *Id.* at 681–82.

50. *Id.* at 683.

following President Roosevelt's failed "court-packing" plan and the Supreme Court's approval of certain New Deal programs.<sup>51</sup> Aside from these domestic developments, Americans began to warily watch the rise of totalitarianism abroad.<sup>52</sup> Such domestic and international events set the stage for heated congressional debate on the issue of judicial oversight of administrative action.<sup>53</sup>

While the APA's predecessor—the Walter–Logan bill—evoked strong debate in Congress, both sides of the aisle found common ground on one thing: the bill must not unduly burden the military.<sup>54</sup> Although there was disagreement on the extent to which the military should be given deference under the bill, it must be understood that the evolution of the military authority exception in the APA grew in the shadow of Hitler's rise in Germany and ultimately his march across Europe.<sup>55</sup> After congressional debate and protest by the War Department,<sup>56</sup> the initial military authority exception grew to be extremely broad.<sup>57</sup> When presented to the President, the bill exempted from its coverage "any matter concerning or relating to the Military or Naval Establishments."<sup>58</sup> Less than one year after the President

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51. *Id.*

52. *Id.* Across Europe, these events included "Stalin's Show Trials, Hitler's Kristallnacht, and Mussolini's invasion of Ethiopia, among others." *Id.*

53. *See id.* at 685–86 for a more detailed account of these debates. Even the progressive opponents of the bill readily invoked comparisons to the fascist specter haunting Europe by cautioning against the creation of a "judicial fascisti." *Id.* at 686.

54. *Id.*

55. *See id.* at 683–84. With memories of World War I still fresh in the minds of Americans, most felt that a bill limiting military capability could not serve the country well.

56. Before the bill was submitted to President Roosevelt,

[t]he War Department complained that the bill would be "gravely subversive of military discipline in all components of the Army, destructive of efficiency in the performance of the functions of the War Department, both military and non-military, obstructive to progress in preparedness for national defense, and generally disastrous from the viewpoint of the public interest."

*Id.* at 687 (quoting Letter from Harry H. Woodring, Sec'y of War, to Rep. Hatton W. Sumners, Chairman, Judiciary Comm. (May 6, 1939), reprinted in *Hearings on H.R. 4236, H.R. 6198, and H.R. 6324: Bills to Provide for the More Expeditious Settlement of Disputes with the United States, and for Other Purposes Before the Subcomm. No. 4 of the H. Comm. on the Judiciary, 76th Cong. 102 (1939)*). The War Department then went on to suggest "that 'all matters concerning or relating to the operations of the War Department and the Army' be exempted" from the bill. Kovacs, *A History of the Exception*, *supra* note 29, at 687.

57. Kovacs, *A History of the Exception*, *supra* note 29, at 691.

58. *Id.*



vetoed the bill,<sup>59</sup> the United States declared war on Japan and Germany.<sup>60</sup> World War II not only put the administrative oversight debate on hold, it also further shaped understanding of the necessary size of the APA's military authority exception.<sup>61</sup>

Before the war, the Walter–Logan bill underscored the feeling of Congress that military decision-making deserved broad deference, but this feeling changed during the war.<sup>62</sup> Scholars posit that “the militaristic regimentation of civilian life or exposure to the abuses of Europe’s fascist armies” during the war increased the Nation’s—and thereby the congressional—appetite for administrative oversight.<sup>63</sup> Tellingly, when the APA was introduced by Senator McCarran and Representative Sumners in 1944 (and revised and reintroduced in 1945) it contained no military authority exception for the judicial review provision.<sup>64</sup>

After complete opposition by the Assistant Secretary of the Navy, H. Struve Hensel,<sup>65</sup> and a suggestion by the Secretary of War, Henry L. Stimson, that a blanket exception for the War Department be added to the bill,<sup>66</sup> the Senate Judiciary Committee worked with representatives of the Attorney General and the American Bar Association to revise the bill.<sup>67</sup> In the second draft presented by the Committee, § 2(a) “excluded from the operation of [the] Act . . . military or naval authority exercised in the field in time of war or in occupied territory.”<sup>68</sup> Although the congressional record contained little to explain this shift, it did state that it chose to use functional exemptions

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59. Even with the broad exemption of “Military or Naval Establishments,” President Roosevelt made clear in his veto message that “he felt that the bill imposed too much of a burden on national defense.” *Id.* at 690.

60. See sources cited *supra* note 32.

61. See Kovacs, *A History of the Exception*, *supra* note 29, at 693, 695–96.

62. *Id.* at 696.

63. *Id.*

64. *Id.* at 696–97.

65. *Id.* at 699. Assistant Secretary Hensel, unlike Secretary Stimson, “did not suggest any amendments to fix those problems, but instead ‘urgently’ recommended against the bill’s enactment.” *Id.*

66. Secretary Stimson sought an amendment in order to specifically prevent the bill from applying to:

the War Department, the Army of the United States, the Navy Department, or the United States Navy (including the United States Marine Corps and the United States Coast Guard when operating under the control of the Navy), or to the selection or procurement of personnel or materiel for the armed forces of the United States.

*Id.* at 697 n.190.

67. See *id.* at 699, 702.

68. *Id.* at 702. Of note, this was the first use of the language “in the field.”

rather than by-name exemptions (of, say the War Department or the Department of the Navy) in order to afford the necessary freedom of action for those functions whether they were exercised by military or civilian agencies, or jointly.<sup>69</sup> Eight months later, the APA passed both the House and the Senate by voice vote and was signed by President Truman<sup>70</sup> on June 11, 1946.<sup>71</sup> In the end, “only a narrow slice of military action was exempt from judicial review under the Act.”<sup>72</sup> When amended in 1976,<sup>73</sup> the APA added its waiver of sovereign immunity but kept the original wording of the military authority exception.<sup>74</sup> The practical effect of this exception was to place military decisions made in the field in time of war outside the reach of the waiver.<sup>75</sup>

The oscillating size of the exception granted to military decision-making is telling of Congress’s intent throughout the development of the APA and its predecessors. Although the exception began extremely broad<sup>76</sup> and then disappeared,<sup>77</sup> it ultimately settled at a size reflective of the compromise necessary to effect passage of the bill.<sup>78</sup> In the end, “[i]t was neither possible nor desirable under the circumstances to make the statute any clearer” because such “specificity may have doomed the bill’s chances of passage or its prospects for survival in the courts.”<sup>79</sup>

### 3. “In the Field” as Understood Contemporaneously with the APA

Because the record is silent on congressional interpretation of “in the field,” it is necessary to look elsewhere to glean the contemporaneous understanding. “On June 30, 1775, the Second Continental Congress established sixty-nine Articles of War to govern the conduct of the

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69. *See id.*

70. President Roosevelt died on April 12, 1945, just over one year before the APA was signed. After assuming office, President Truman devoted neither personal attention nor political effort towards the APA, and “when Congress passed the bill in the spring of 1946, Truman was engaged with the national railroad strike.” *Id.* at 698.

71. *Id.* at 703–04.

72. *Id.* at 704.

73. For a full history of the 1976 amendment, see Kathryn E. Kovacs, *Scalia’s Bargain*, 77 OHIO ST. L.J. 1155, 1158–69, 1181 (2016).

74. *See Kovacs, A History of the Exception*, *supra* note 29, at 708–09.

75. *See id.* at 709.

76. *See supra* text accompanying note 59.

77. *See supra* text accompanying note 65.

78. *See Kovacs, A History of the Exception*, *supra* note 29, at 705.

79. *Id.* at 705–06.

Continental Army.”<sup>80</sup> The Articles of War remained in effect until they were replaced by the Uniform Code of Military Justice (“UCMJ”), which was signed into law by President Truman on May 31, 1951 and still currently governs the military.<sup>81</sup> While enacting the UCMJ, Congress noted “that ‘[t]he phrase “in the field” has been construed to refer to any place, whether on land or water, apart from permanent cantonments and fortifications, where military operations are being conducted.’”<sup>82</sup>

While the 1951 enactment of the UCMJ provides a glimpse into the contemporary congressional meaning of “in the field,” the judiciary has interpreted the phrase notably in a few different ways. In 1919, the case of *Hines v. Mikell*<sup>83</sup> required the Fourth Circuit to review a lower court’s decision that had interpreted “in the field” to mean:

in the actual field of operations against the enemy; not necessarily the immediate field of battle, but the field of operations,<sup>84</sup> so to say; the field of war; the territory so closely connected with the absolute struggle with the enemy that it is a part of the field of contest.<sup>85</sup>

The Court of Appeals reversed with a much broader view, holding that “in the field” should not be limited by “the locality in which the army may be found, but rather by the activity in which it may be engaged at any particular time.”<sup>86</sup> The opinion relied heavily on “in the field” as a term of art in military parlance<sup>87</sup> to ultimately determine that those training aboard Camp Jackson

80. *Articles of War*, LIBRARY OF CONGRESS, [https://www.loc.gov/rr/frd/Military\\_Law/AW-1912-1920.html](https://www.loc.gov/rr/frd/Military_Law/AW-1912-1920.html) [<https://perma.cc/N27G-ESCJ>] (last visited Sept. 17, 2019). Later, on April 10, 1806, Congress enacted 101 Articles of War to apply to both the Army and the Navy. *Id.*

81. *Id.*

82. Kovacs, *A History of the Exception*, *supra* note 29, at 712–13 (citing H.R. REP. NO. 81-491, at 11 (1949); S. REP. NO. 81-486, at 7 (1949)).

83. 259 F. 28 (4th Cir. 1919).

84. The qualification “but the field of operations” should be understood in the context of the pervasive tactic of trench warfare employed at the time. The court likely took the contested area between combatants’ trench lines—no man’s land—to be the “immediate field of battle” but also understood the trenches themselves were scarcely less dangerous and were therefore also “closely connected with the absolute struggle.” *Ex parte Mikell*, 253 F. 817, 821 (E.D.S.C. 1918) *rev’d Hines*, 259 F. 28.

85. *Id.*

86. *Hines*, 259 F. at 34.

87. From my own experience in the infantry, I can attest to the interchangeable nature of “in the field.” Aboard the Marine Corps Air-Ground Combat Center in Twentynine Palms, California, we considered any training event taking place just off of the “mainside” of the base to be “in the field.” However, I should note that “in the field” was never actually used to refer to any areas of operation on either my deployment to Afghanistan or my deployment to Yemen where we were undoubtedly on territory which the court in *Ex parte Mikell* would have held to be “closely connected with the absolute struggle with the enemy.” For this reason, I caution against an interpretation of “in the field” relying too heavily on common military usage.

in the United States were just as much “in the field” as those currently serving overseas in France.<sup>88</sup>

The 1957 case of *Reid v. Covert*<sup>89</sup> presented the Supreme Court with its opportunity to construe “in the field” when, in unrelated crimes, civilian wives killed their servicemember husbands with whom they were stationed in Japan and England at the time. The military sought court-martial jurisdiction over the wives as dependents urging “that the concept ‘in the field’ should be broadened to reach dependents accompanying the military forces overseas under the conditions of world tension which exist at the present time.”<sup>90</sup> The plurality opinion of the Court rejected this notion because “neither Japan nor Great Britain could properly be said to be an area where active hostilities were under way at the time.”<sup>91</sup> Although this case discussed the issue of court-martial jurisdiction and not the definition of agency under the APA’s military authority exception, *Reid v. Covert* demonstrated the necessary linkage between a proximity to “actual hostilities” and a time of war required for a finding of “in the field.”<sup>92</sup>

#### B. Cases Challenged Under the APA’s Military Authority Exception

In the period since *Reid v. Covert*, the judiciary has been presented with a renewed opportunity not only to interpret “in the field” but also to situate the phrase in the context of the APA’s military authority exception. This Section will provide an overview of the somewhat inconsistent approaches applied in recent caselaw by discussing cases in which the military authority exception barred judicial review as well as cases in which plaintiffs avoided the exception’s preclusive effect. Due to the elemental structure of the military authority exception, more cases analyze the exception as a whole than specifically construe “in the field.”<sup>93</sup> Accordingly, the following cases interpreting the exception are illustrative but not exhaustive.

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88. *Hines*, 259 F. at 33 (“[T]hose who entered the cantonment took the first step which was to lead them to the firing line, and they were then as much ‘in the field’ in pursuance of such training as those who were encamped on the fields of Flanders awaiting orders to enter the engagement.”). One might imagine how a veteran of the Battle of Flanders would have reacted to Judge Smith’s interpretation.

89. 354 U.S. 1 (1957).

90. *Id.* at 34.

91. *Id.* at 33–34.

92. Kovacs, *A History of the Exception*, *supra* note 29, at 716.

93. See, e.g., *Anderson v. Carter*, 802 F.3d 4, 8 (D.C. Cir. 2015) (looking only to whether the decision took place during a time of war); *Doe v. Sullivan*, 938 F.2d 1370, 1380 (D.C. Cir. 1991) (noting that the issue was “not one between soldiers and their superiors, but one over the scope of the authority Congress has entrusted to the FDA”).

### 1. Judicial Review Precluded by the Military Authority Exception

Two cases, *Vance v. Rumsfeld*<sup>94</sup> and *Nattah v. Bush*,<sup>95</sup> are particularly demonstrative of judicial willingness to construe the military authority exception “in favor of the sovereign.”<sup>96</sup>

#### a. *Vance v. Rumsfeld*

In *Vance*, two young American citizens brought suit against the government after they were allegedly detained and tortured by U.S. military personnel during the Iraq War in 2006.<sup>97</sup> The plaintiffs, Vance and Ertel, went to Iraq in a self-proclaimed effort to “help rebuild the country and achieve democracy” following the U.S. invasion.<sup>98</sup> They joined a private Iraqi security company, Shield Group Security (“Shield”), which they eventually came to suspect was involved in corruption and other illegal activities.<sup>99</sup> Because of his suspicions, Vance contacted the FBI, and both he and Ertel became informants regarding the illicit activities of Shield.<sup>100</sup>

By April 2006, Shield became suspicious of Vance and Ertel and began to question their loyalty.<sup>101</sup> Shield then confiscated their Green Zone credentials.<sup>102</sup> Having been effectively trapped within the Red Zone of Baghdad, Vance and Ertel reached out to their U.S. government contacts for assistance.<sup>103</sup> When U.S. forces arrived, they instead confiscated Vance and Ertel’s personal property, detained them, and allegedly interrogated and tortured them for weeks before finally releasing them—all without charging them with any crimes.<sup>104</sup>

Along with a *Bivens*<sup>105</sup> claim for violation of their constitutional rights, the plaintiffs in *Vance* brought a claim under the APA to recover their personal property.<sup>106</sup> In analyzing whether the seizure took place “in the field,” the court relied on caselaw which had previously emphasized physical proximity

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94. 653 F.3d 591 (7th Cir. 2011), *vacated*, 701 F.3d 193 (7th Cir. 2012) (en banc).

95. 770 F. Supp. 2d 193 (D.D.C. 2011).

96. *Lane v. Pena*, 518 U.S. 187, 192 (1996).

97. *Vance*, 653 F.3d at 594.

98. *Id.* at 595.

99. *Id.*

100. *Id.*

101. *Id.* at 596.

102. *Id.*

103. *Id.*

104. *Id.* at 596–98.

105. *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971).

106. *Vance*, 653 F.3d at 594.

to military hostilities.<sup>107</sup> The *Vance* court then concluded that “the exception clearly applie[d] as the claims ha[d] been pled” because, “[w]hen their property was seized, Vance and Ertel were *in Baghdad during an armed conflict*.”<sup>108</sup> Thus—even after suffering detainment, torture, and litigation—Vance and Ertel did not recover their belongings.

b. *Nattah v. Bush*

While the *Vance* court focused on the proximity to actual hostilities<sup>109</sup> in determining whether the decision occurred “in the field,” the court in *Nattah* almost completely sidelined any analysis of “in the field.”<sup>110</sup> The *Nattah* court preferred instead to focus primarily on whether the decision occurred “in time of war *or* in occupied territory.”<sup>111</sup>

The plaintiff, Nattah, a dual citizen of the United States and Libya, was offered a job as a translator in Kuwait in early 2003.<sup>112</sup> After allegedly reaching an agreement to work only in Kuwait, Nattah was taken to Iraq by military personnel after working for about two months in Kuwait.<sup>113</sup> While in Iraq, Nattah claimed that he was forced to travel with the military, translate various documents, teach soldiers Arabic, and communicate with local intelligence.<sup>114</sup> On one occasion, Nattah was seen by a base physician and sent to Germany for further medical care after a mortar shell allegedly exploded near the vehicle he was traveling in.<sup>115</sup>

As a result of what appears to be significant dissatisfaction with the alleged unilaterally-determined work assignments, Nattah brought against the government, *inter alia*, “claims for violations of (1) the Geneva Convention, (2) prohibitions against slavery, (3) the constitutional right to travel, and (4) international law.”<sup>116</sup> On remand, the government sought to dismiss those claims on the grounds that the Court of Appeals failed to consider the APA’s military authority exception, which the government argued exempted the acts at issue from any waiver of sovereign immunity.<sup>117</sup>

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107. See *id.* at 626 (first citing *Rasul v. Bush*, 215 F. Supp. 2d 55, 64 n.11 (D.D.C. 2002); then citing *Doe v. Sullivan*, 938 F.2d 1370, 1380 (D.C. Cir. 1991)).

108. *Id.* at 626–27 (emphasis added).

109. This relationship between a proximity to hostilities and a time of war required for a finding of “in the field” closely parallels the Supreme Court’s analysis in *Reid v. Covert* discussed *supra* Section II.B.

110. *Nattah v. Bush*, 770 F. Supp. 2d 193, 202–04 (D.D.C. 2011).

111. *Id.* at 203 (emphasis in original).

112. *Id.* at 196.

113. *Id.* at 197.

114. *Id.*

115. *Id.*

116. *Id.* at 202.

117. *Id.*

Before conducting its analysis, the *Nattah* court reiterated the D.C. Circuit's understanding that the military authority exception "applies to 'military commands made in combat zones or in preparation for, or in the aftermath of, battle.'"<sup>118</sup> The court then noted that the purpose of the exception is "to avoid the debilitating effect the specter of judicial scrutiny might have in combat situations."<sup>119</sup> Based on this promising setup, the court's broad summary of the military authority exception in its conclusion is surprising.

The court correctly held that decisions regarding the tactical employment of Nattah's skills were made by "commanders in the field in preparation for, and during the course of, combat in Iraq" and thus his claims were barred by the APA;<sup>120</sup> however, in dismissing Nattah's subsequent argument that many of these acts took place prior to the war in Iraq, the court summarized the military authority exception with alarmingly wide latitude. Ignoring the requirement that the decision be made "in the field," the *Nattah* court summarily stated that "as long as the military acts in question occurred at a time of war, *the precise location where those acts occurred is immaterial.*"<sup>121</sup> The conclusion is unambiguous, but its effect is not.

## 2. Judicial Review Not Precluded by the Military Authority Exception

In contrast to the *Nattah* court's bold statement of proximity immateriality, some courts have much more narrowly construed "in the field" within the meaning of the exception. Notably, the courts in *Jaffee v. United States*<sup>122</sup> and *Doe v. Rumsfeld*<sup>123</sup> both denied the government's attempts to invoke sovereign immunity under a broad reading of the exception.

### a. *Jaffee v. United States*

*Jaffee* "present[ed] a perplexing problem spawned by modern nuclear warfare."<sup>124</sup> The plaintiff, Jaffee, served in the United States Army.<sup>125</sup> He alleged that during a 1953 nuclear test at Camp Desert Rock, Nevada, his superiors ordered him and other soldiers to stand in the open near the test site

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118. *Id.* (quoting *Doe v. Sullivan*, 938 F.2d 1370, 1380 (D.C. Cir. 1991)).

119. *Id.* at 203.

120. *Id.*

121. *Id.* (emphasis added).

122. 592 F.2d 712 (3d Cir. 1979).

123. 297 F. Supp. 2d 119 (D.D.C. 2003).

124. 592 F.2d at 714.

125. *Id.*

without any protection.<sup>126</sup> Jaffee claimed that the government was not only aware of the radiation risk but was, in fact, using him and his fellow soldiers as unknowing and unwilling test subjects.<sup>127</sup> Unfortunately, Jaffee was later diagnosed with inoperable cancer, which he believed was a direct result of the government's order.<sup>128</sup>

In his suit, Jaffee sought, as relief, a government-issued warning to the rest of the soldiers present so that they could seek medical care accordingly.<sup>129</sup> In denying the government's motion to dismiss on the grounds of the military authority exception, the court implied that even if the nuclear test had occurred before the armistice ending the Korean War,<sup>130</sup> nuclear test operations in Nevada were unlikely to meet the "in the field" requirement anyway.<sup>131</sup> While not directly contradictory to the holding in *Hines v. Mikell* that soldiers training aboard a stateside base were "in the field,"<sup>132</sup> the holding in *Jaffee* seems to treat actions taken in the continental United States differently than it would those in Korea.

b. *Doe v. Rumsfeld*

The case of *Doe v. Rumsfeld* required the court to interpret the APA's military authority exception to determine its preclusive effect upon numerous, dispersed actions taken within the United States.<sup>133</sup> In *Doe v. Rumsfeld*, members of the Armed Forces along with civilian contractors of the Department of Defense ("DoD") brought suit against the Secretary of Defense for inoculating them as part of the Anthrax Vaccine Immunization Program ("AVIP") without their informed consent and therefore in violation of federal law, an Executive Order, and the DoD's own regulations.<sup>134</sup>

Naturally, the defendants invoked the military authority exception to argue that judicial review of the decision to order the AVIP should be precluded, but the court disagreed.<sup>135</sup> After briefly analyzing the timing of the AVIP, the court looked to the locations of the events and the decision itself to determine

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126. *Id.*

127. *Id.*

128. *Id.*

129. *Id.* at 719.

130. The opinion does not state whether the explosion took place before July 27, 1953, when the armistice was signed. It is likely that Jaffee's complaint failed to provide this level of specificity; however, the point is moot because the claim concerns the government's inaction following the blast, not the government's actions during it. *Id.* at 720.

131. *See id.* at 720.

132. *See supra* note 88 and accompanying text.

133. *See* 297 F. Supp. 2d 119, 123, 129 (D.D.C. 2003).

134. *Id.* at 122–23.

135. *Id.* at 129.



whether they were properly “in the field.”<sup>136</sup> The court based its denial, in part, upon the fact that none of the plaintiffs were in the field or in occupied territory and that “the order for the program . . . was given by the Secretary of Defense, not by commanders in the field.”<sup>137</sup> The court’s focus on the actual location of the decision-maker set the stage for the decision in *Zaidan v. Trump*.<sup>138</sup>

The caselaw interpreting “in the field” within the military authority exception is, at best, relatively sparse and, at worst, inconsistent. The courts seem willing to look to different parts of the exception—“in the field,” “in time of war,” and “in occupied territory”—in order to expand and contract the government’s waiver of sovereign immunity as deemed to be situationally appropriate. While the courts attempt to ascribe the precise meaning to words provided by a conflicted legislature, the ever-expanding battlefield promises to further muddy the waters.

### C. *The Evolution of Modern Warfare*

*War is both timeless and ever changing. While the basic nature of war is constant, the means and methods we use evolve continuously.*

– General Alfred M. Gray (USMC Ret.)<sup>139</sup>

The twentieth and twenty-first centuries have seen technological advances spur along the evolution of war in ways unfathomable before the enactment of the APA. It is unlikely that the legislature or judiciary of the mid-twentieth century would even recognize the national security challenges facing our military today. This Section will address these evolutionary leaps in the ways war is waged by first exploring the rise of proxy conflict in a post-nuclear age. Next, it will examine the impact of terrorism and asymmetrical warfare. Lastly, this Section will conclude with a discussion of the proliferation of cyberwarfare.

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136. *Id.*

137. *Id.*

138. *See supra* notes 4–18 and accompanying text.

139. A. M. GRAY, *Preface to DEP’T OF THE NAVY, WARFIGHTING (MCDP 1)* (1997).

### 1. The Rise of Proxy Conflict

On August 6, 1945, the United States dropped an atomic bomb on the Japanese city of Hiroshima, and the world entered a new age of warfare.<sup>140</sup>

Although proxy war<sup>141</sup> existed in some capacity before the advent of nuclear weapons, its prevalence has grown in the post-nuclear age as superpowers seek to impose their will on each other while attempting to avoid potentially world-ending consequences.<sup>142</sup> Proxy wars will continue to be an attractive option for state actors well into the future.<sup>143</sup> This attractiveness stems from the fact that they can “circumvent the potential international political uproar provoked by direct intervention, especially where the legitimacy of such action is under question.”<sup>144</sup> For this same reason, proxy wars are notoriously difficult to both control and contain.<sup>145</sup>

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140. “The fact that we can release atomic energy ushers in a new era in man's understanding of nature's forces.” Harry S. Truman, President of the U.S., Statement Announcing the Use of the A-Bomb at Hiroshima (Aug. 6, 1945) (transcript available at the Harry S. Truman Presidential Library & Museum). President Truman seized on the horrific effect of the weapon to remind the Japanese that should they refuse to surrender unconditionally, “they may expect a rain of ruin from the air, the like of which has never been seen on this earth.” *Id.* Just nine days later, the Emperor of Japan issued a radio broadcast announcing the Japanese surrender. Harry S. Truman, President of the U.S., Statement Announcing the Surrender of Japan (Sept. 1, 1945) (transcript available at the Harry S. Truman Presidential Library & Museum).

141. Proxy wars are defined as “conflicts in which a third party intervenes indirectly in order to influence the strategic outcome in favour of its preferred faction.” Andrew Mumford, *Proxy Warfare and the Future of Conflict*, 158 *RUSIJ* 40, 40 (2013).

142. *Id.* at 40–41. Recent examples of American involvement in proxy wars include: American funding of the *mujahideen* following the Soviet invasion of Afghanistan in 1979, American support of anti-Assad factions against the Russian-backed pro-Assad forces in the Syrian civil war, and American support for the Saudi Arabian war effort against the Iranian-backed Houthi rebels in Yemen. *Id.*

143. *See id.* at 45 (“The alluring combination of ‘plausible deniability’ and lower risk has ensured that proxy wars are attractive to states seeking to defend or expand their interests or ideology.”).

144. *Id.*; *cf.* Vitaly Shevchenko, “Little Green Men” or “Russian Invaders”?, *BBC NEWS* (Mar. 11, 2014), <https://www.bbc.com/news/world-europe-26532154> [<https://perma.cc/WVN2-XAC7>] (discussing the ambiguous origin of the armed men present during the 2014 annexation of Crimea who spoke in Russian accents and used weaponry identical to that of the Russian military but wore no identifying insignia).

145. After providing financial and materiel support to the *mujahideen* against the Soviet Union in the late 1970s, the United States found itself opposing the progeny of its proxy, the Taliban, just thirty years later in a conflict that still rages on. *See, e.g., Timeline: Taliban in Afghanistan*, *AL JAZEERA* (July 4, 2009), <https://www.aljazeera.com/news/asia/2009/03/2009389217640837.html> [<https://perma.cc/SE2K-TADJ>].

Even within the already nebulous realm of proxy war, evolution is afoot.<sup>146</sup> The use of Cold War-style, one-on-one proxy conflict is giving way to more complex inter- and intra-state proxy conflict in which “coalitions” of sort back the same proxy in different ways—and often, for different reasons—creating situations where conflict is all the more likely to ignore borders and defy classification.<sup>147</sup> Much like the nuclear chain reaction they so often intend to avoid, once begun, proxy wars become unpredictable, destructive, and uncontrollable while “increas[ing] the likelihood of higher casualties as a result of the influx of externally sourced weapons, money or personnel.”<sup>148</sup>

## 2. Terrorism and the Prevalence of Asymmetrical Warfare

The terrorist attacks of September 11, 2001 not only defined a generation, they also presented the West with a reminder of—and the United States with its most prominent defeat in—asymmetrical warfare.<sup>149</sup> While the United States had been party to asymmetrical warfare before,<sup>150</sup> this attack brought the brutality of it home. It also presented the United States with the imposing challenge of defining terrorism and categorizing the new enemy it now faces.<sup>151</sup> The attacks of September 11, 2001 were but the first of a staggering

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146. See Mumford, *supra* note 141, at 45 (“The predominantly unilateral way in which the two Cold War superpowers provided their chosen proxies with arms, training and money has evolved in the early twenty-first century into coalition proxy warfare.”).

147. See *id.*

148. *Id.*

149. The RAND Corporation explains that asymmetrical warfare is:

a relatively new area because the nature of modern warfare has changed dramatically from that of the “classical” wars of the past. In classical warfare, the enemy is visible, and soldiers are easily identifiable by uniform and openly carry weapons . . . . By contrast, in asymmetric warfare, the enemy is usually invisible, hiding among the civilian population, often in densely populated areas. Lethal attacks are often launched from civilian facilities. There may be no means to distinguish combatants from the civilian population.

AMICHAY AYALON & BRIAN MICHAEL JENKINS, WAR BY WHAT MEANS, ACCORDING TO WHOSE RULES? THE CHALLENGE FOR DEMOCRACIES FACING ASYMMETRIC CONFLICTS: PROCEEDINGS OF A RAND-ISRAEL DEMOCRACY WORKSHOP, DECEMBER 3–4, 2014 39 (RAND Corp. 2015).

150. To name just a few: the Barbary Wars of the early 1800s, the Banana Wars of the early 1900s, the Philippine-American War of the early 1900s, the U.S. intervention in Haiti from 1915 to 1934, the U.S. intervention in the Somali Civil War in the 1990s, etc. See, e.g., Max Boot, *More Small Wars: Counterinsurgency Is Here to Stay*, FOREIGN AFF., Nov.–Dec. 2014, at 5, 5.

151. For an in-depth explanation of what makes al Qaeda both so successful and so difficult to categorize, see Rosa Ehrenreich Brooks, *War Everywhere: Rights, National Security Law, and the Law of Armed Conflict in the Age of Terror*, 153 U. PA. L. REV. 675, 710–11, 714 (2004).

number of high-profile terrorist attacks showcasing the extreme violence and unpredictability of asymmetrical warfare.<sup>152</sup>

The categorical challenge presented by asymmetrical warfare is nothing new; the law has been struggling to define the boundaries of conflict and to place sprawling ideological clashes into neat categories for more than a century.<sup>153</sup> But social changes coupled with the development of new technologies have increased the breakdown of both categories and boundaries at an alarming new rate.<sup>154</sup> Two sorts of conflicts on the rise in recent decades typify this issue: “conflicts in which insurgent groups train and attack from across international borders . . . and conflicts in which one or more ‘outside’ states provide material support (weapons, financing, training, safe harbor, etc.) to insurgents fighting within another state, despite official denials of any involvement.”<sup>155</sup>

As weapon technologies continue to become cheaper and more accessible, allowing non-state actors to strike population centers across borders, “[t]he distinction between zones of war and zones of peace . . . is another once clear-cut distinction that no longer seems tenable.”<sup>156</sup> Furthermore, the temporal distinction between war and peace (traditionally shown by formal surrender, ceasefire, or a cessation of hostilities) cannot be applied to the war on terrorism.<sup>157</sup> To grimly summarize, “we today face the literal prospect of war without end.”<sup>158</sup>

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152. Adding to the unpredictability is the fact that many recent attacks have been carried out by “lone wolf” actors who have been recruited—and even trained—through the use of social media. *See, e.g.*, Ben Jacobs, *America Since 9/11: Timeline of Attacks Linked to the ‘War on Terror,’* THE GUARDIAN (Dec. 11, 2017, 10:23 AM), <https://www.theguardian.com/us-news/2017/nov/01/america-since-911-terrorist-attacks-linked-to-the-war-on-terror> [<https://perma.cc/P5B8-8EW5>].

153. Brooks, *supra* note 151, at 705–07.

154. *Id.* at 707.

155. *Id.* at 714. The second type of conflict described are proxy conflicts, which are discussed in more detail *supra* Section II.C.1.

156. *Id.* at 721. Brooks seizes on this point to pose a poignant corollary question to the issue raised by this Comment:

[T]his breakdown of spatial boundaries also has potentially breathtaking domestic consequences. If the mere presence of a suspected al Qaeda operative is sufficient to render any place a zone of armed conflict, in which the law of armed conflict trumps other legal regimes, what legal principles would prevent the U.S. government from preemptively killing—on U.S. territory—any U.S. citizen suspected of aiding al Qaeda?

*Id.* at 725.

157. *Id.* at 726 (“[T]he enemy in the war on terrorism is shadowy and shifting, and since it seems overwhelmingly likely that the U.S. will face terrorist threats for decades to come, . . . there is no obvious point at which the U.S. will be able to declare victory and end the conflict.”).

158. *Id.*

### 3. The Nebulous Realm of Cyber Warfare

Cyber warfare is not a new concept,<sup>159</sup> but it presents unique challenges where it intersects with the traditional notions of kinetic warfare. The difficulty of conducting and responding to cyber warfare parallels the difficulty in giving “cyber warfare” a workable definition.<sup>160</sup> This inability to define precisely what constitutes cyber attacks and then categorize them (for example, in terms of actor, intent, consequence, etc.) presents problematic implications for the development of policy and doctrine for response.<sup>161</sup>

For the same reasons that asymmetrical and proxy warfare continue to proliferate, so too does cyber warfare.<sup>162</sup> In addition to the aforementioned benefits, the return on investment can be quite high—while cyber warfare takes place in an intangible realm, the effects can be very real and lead to serious consequences.<sup>163</sup> Finally, cyber warfare often has unpredictable—and, therefore, unintentional—second- and third-order effects not found in the traditional application of force due to the interconnectivity of the Internet.<sup>164</sup>

Cyber warfare should not be viewed as a realm distinct from the modern battlefield. Instead, cyber warfare acts upon “the nature of conflict, expanding it both spatially and temporally” because “[t]he growing importance of the Internet to a state’s economic, diplomatic, and military

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159. DOD networks were subjected to attack as early as 1998 in the incident known as Solar Sunrise. Todd C. Huntley, *Controlling the Use of Force in Cyber Space: The Application of the Law of Armed Conflict During a Time of Fundamental Change in the Nature of Warfare*, 60 NAVAL L. REV. 1, 7–8 (2010). For a listing of further incidents, see *infra* text accompanying note 163.

160. *See id.* at 3–4 (“The terms ‘cyber warfare’ and ‘cyber attack’ are commonly used to refer to all unauthorized cyber activity, regardless of the nature of the activity, who is conducting the activity, or the consequences which result from the activity.”).

161. *Id.* at 4.

162. Cyber attacks do not require large expenditures or even overly sophisticated equipment. To illustrate, “the U.S. government originally believed Iraq to be behind” the Solar Sunrise attack, when “in reality it was the work of teenagers from Israel and California.” *Id.* at 8. Additionally, cyber attacks present attackers with plausible deniability, due to the difficulty in identifying the source of attacks. The Moonlight Maze intrusions, for example, “were well coordinated and appeared to originate from Russia, although the involvement of the Russian government could never be proven.” *Id.*

163. To list a few: the Conficker virus “prevented French naval aircraft from downloading flight plans and grounded the planes until a work around could be developed,” an intrusion into the F-35 Joint Strike Fighter program allowed the attacker to download “several terabytes of information on the aircraft’s design and electronics systems” as well as “view the location of Air Force aircraft” after hacking the Air Force air traffic control systems, and an intrusion into the U.S. power grid allowed the hacker to “map out the U.S. electrical system and to implant software that could be activated in the future to shut down these systems or destroy parts of the electrical system infrastructure.” *Id.* at 9–12.

164. *Id.* at 29.

interests has created a new arena in which states pursue these interests and compete with potential adversaries.”<sup>165</sup> The use of cyber warfare is likely to increase as a supplement to traditional conflict because its benefits “present an opportunity for weaker states to gain an asymmetrical advantage over traditional military powers by engaging in cyber warfare.”<sup>166</sup>

### III. ANALYSIS

Taking into account the legislative history of an act passed at the fulcrum of a national security policy shift, the judicial inconsistency of its interpretation, and the unchecked expansion of the modern battlefield, “in the field” as used in the APA’s military authority exception should be construed narrowly. The exception protects military decision-makers and their troops from the devastating effects of hesitation on the battlefield. Therefore, as the Supreme Court found in *Reid*, there must necessarily be a linkage between proximity to “actual hostilities” and a time of war in order to be considered “in the field.”<sup>167</sup>

#### A. Legislative Intent Supports a Narrow Interpretation

The APA was enacted at a time when Congress held a prominent role in the application of military force. The fact that Congress explicitly “directed” the actions of the President in its declarations of war highlights the influential position it held in the decision-making process. While it was debating the final language of the APA’s military authority exception, Congress would have assumed that—in the absence of evidence to the contrary—this power would continue. However, Congress could not have foreseen the policy shift and continued period of acquiescence ushered in by the Cold War.

Had this policy shift occurred before the enactment of the APA, it is likely that Congress would have been more explicit in shaping the military authority exception narrowly to provide for increased oversight of decision-making in conflicts which Congress would no longer choose to declare as wars. Scholars even note that the exception “encompasses a somewhat broader range of military action than a modern reader might suppose from the plain language.”<sup>168</sup> The APA now exempts this broader range of action due not to

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165. *Id.* at 31.

166. *Id.*

167. *Reid v. Covert*, 354 U.S. 1, 33–35 (1957).

168. Kathryn E. Kovacs, *Leveling the Deference Playing Field*, 90 OR. L. REV. 583, 588 (2011) (“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.”).

the express intent of Congress, but instead to definitional creep within the compromised provision.<sup>169</sup>

During the development of the exception, Congress agreed only on the fact that the APA should not unduly burden the military. As the prospect of global war grew abroad, Congress intended that military decision-makers not be hindered by hesitation spawned from the fear of answering to an Article III judge for their split-second commands on the battlefield. Congress presented an extremely broad exception before the outset of World War II, but after witnessing the abuses of Europe's fascist armies, Congress settled on the current, narrow exception limited to decisions made "in the field." Historical justification is not enough, however; *ex ante* analysis must be conducted.

### B. Judicial Review Requires a Narrow Interpretation

If construed broadly, "in the field" within the military authority exception will produce a chilling effect on suits against the government challenging targeted killings "justified" by the Global War on Terror. While some courts have interpreted "in the field" narrowly,<sup>170</sup> others have given it a frighteningly broad application.<sup>171</sup> Citizens rely on—and due process demands—predictability of judicial interpretation. When applied inconsistently, the phrase threatens to swallow all waiver of sovereign immunity granted by the APA. Without such means to challenge their selection for termination, citizens are left to tread carefully within the invisible boundaries drawn by agencies that lie beyond the reach of Article III justice. Taking life is the ultimate taking of liberty; one mistake here is one mistake too many.<sup>172</sup>

### C. The Expanding Battlefield Necessitates a Narrow Interpretation

Since 1946, the battlefield has expanded—and will only continue to expand—well past where Congress could have envisioned when it enacted the APA. Methods of war that were unfathomable at the APA's creation now

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169. See Kovacs, *A History of the Exception*, *supra* note 29, at 705–06 ("[S]pecificity may have doomed the bill's chances of passage or its prospects for survival in the courts.").

170. See, e.g., *Reid*, 354 U.S. at 33–34; *Zaidan v. Trump*, 317 F. Supp. 3d 8, 22 (D.D.C. 2018); *Ex parte Mikell*, 253 F. 817, 821 (E.D.S.C. 1918).

171. See, e.g., *Hines v. Mikell*, 259 F. 28, 33 (4th Cir. 1919); *Nattah v. Bush*, 770 F. Supp. 2d 193, 203 (D.D.C. 2011) ("[A]s long as the military acts in question occurred at a time of war, the precise location where those acts occurred is immaterial.") (emphasis added).

172. "[T]he law holds that it is better that ten guilty persons escape than that one innocent suffer." *Coffin v. United States*, 156 U.S. 432, 456 (1895) (citing 4 WILLIAM BLACKSTONE, COMMENTARIES \*352).

further complicate the understanding of the meaning ascribed to the military authority exception. Proxy conflict blurs the boundaries of the modern battlefield, terrorism completely ignores those boundaries, and cyber warfare challenges the notion of a traditional “battlefield” altogether. None of these forms of war show any signs of slowing, and their progeny will present parallel classification challenges.

Viewed in context of a broad AUMF,<sup>173</sup> this sprawling evolution of warfare threatens to preclude nearly all judicial review by expanding “in the field” to encompass not only foreign theaters of war where military commanders make on-the-spot decisions but also suburban streets where supposed terrorists stroll during their downtime and darkened D.C. conference rooms where the President and three-letter agencies decide the fate of those on a list that may or may not exist. This leaves all citizens at risk of targeting without an opportunity to know whether they have been designated, let alone challenge that decision.

#### D. A Two-Step Solution

To find that a decision was made “in the field,” courts should look to whether there is a linkage between (1) a proximity to actual hostilities and (2) a time of war. This is the rule properly inferred from the Supreme Court decision in *Reid v. Covert*,<sup>174</sup> and its logic may aptly be applied here—even if the issue in *Reid* was not the military authority exception. As courts have already determined that which constitutes a “time of war,”<sup>175</sup> this Comment will address only the first element of proximity to actual hostilities.

In determining whether a decision was made in proximity to actual hostilities, courts may look to either the plain meaning of the words or even use an agency yardstick, such as whether the area falls within a combat tax exclusion zone<sup>176</sup> for U.S. military members. In any event, the courts should focus on whether those who made or executed the decision faced imminent danger. The intent of Congress was to avoid paralyzing the decision-making

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173. The 2001 AUMF authorizes “all necessary and appropriate force” to be used “in order to prevent any future acts of international terrorism against the United States.” Authorization for Use of Military Force, Pub. L. No. 107-40, § 2(a), 115 Stat. 224 (2001) (codified at 50 U.S.C. § 1541 (2018)).

174. 354 U.S. at 33–34.

175. *Anderson v. Carter*, 802 F.3d 4, 9 (D.C. Cir. 2015) (explaining that, although the conflict in Afghanistan is not a declared war, “the true definition of war is ‘an external contention by force, between some of the members of the two nations, authorised by the legitimate powers,’ even if it is not a ‘perfect’ declared war”) (quoting *Bas v. Tingy*, 4 U.S. 37, 40 (1800)).

176. See INTERNAL REVENUE SERV., DEP’T OF THE TREASURY, PUBL’N 3 CAT. NO. 46072M, ARMED FORCES’ TAX GUIDE 12–14 (2019) for a classification of qualifying combat zones.



ability of commanders by imposing undue oversight. Implementation of this elemental focus on proximity to actual hostilities would bring caselaw reasoning into uniformity while preventing any inconsistent rulings or dangerous dicta from being later misused.

#### IV. CONCLUSION

As the modern battlefield grows, so too does the exception to the waiver of sovereign immunity granted to military decision-making under the APA. Under this parallel expansion, the American people ostensibly trade one specter for another: random acts of terrorism for extrajudicial killing by their own government. However, the trade is never complete. Both specters now loom above. The military authority exception's "in the field" language should be construed narrowly in order to prevent the exception from swallowing all waiver of sovereign immunity, especially in cases of targeting and extrajudicial killing of American citizens.