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## Taxing Combat

Samuel Kan

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# Taxing Combat

Samuel Kan, CFP®\*

## ABSTRACT

When you are being shot at or dodging landmines you are in a combat zone. Diplomatic niceties aside, these brave warriors are in danger because of the policies of their Government and we must take care of them. Quite frankly, we must act to insure that we do not have a repeat of what happened in Somalia. In Somalia, the families of the soldiers who lost their lives could not receive the benefits that should have gone to them under the Tax Code because the President never declared it a combat zone.<sup>1</sup>

We don't know exactly where we're at in the world militarily and what we're doing . . . . If you don't think it's a generational struggle, you don't understand the war . . . . It is spreading throughout the world . . . . [W]e're going to follow the terrorists wherever they go. We're going to use whatever means we need to with partners to destroy them. And whatever time it takes, it takes. And most people are not ready for that, but I am.<sup>2</sup>

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1. 142 CONG. REC. H1670 (daily ed. Mar. 5, 1996) (quoting Rep. Bunning) <https://bit.ly/2lYDwVh> [<https://perma.cc/DV8Y-YHJZ>]. See generally Paul Kantwill, Director of Legal Policy, Office of the Undersec'y for Pers. and Readiness, Dep't of Def., Speech at the Pentagon, Washington D.C. (June 16, 2015) (stating "whether we are serving as team leaders or senior leaders in government, our job is and always should be the same. Our job is about taking care of people.").

2. *Full Graham Interview: Americans in Niger Were Fighting Terrorists*, NBC NEWS (Oct. 22, 2017), <https://nbcnews.to/2xYxuZp> [<https://perma.cc/WW7M->

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3UPS] (providing Sen. Lindsey Graham’s comments on Soldiers who were killed in Niger). *See also* Callimachi Rukmini, Hele Cooper, Eric Schmitt, Alan Blinder & Thomas Gibbons-Neff, *An Endless War: Why 4 U.S. Soldiers Died in a Remote African Desert*, N.Y. TIMES (Feb. 20, 2018), <https://nyti.ms/2oe71TN> [<https://perma.cc/FJ2C-S345>] (explaining how little Congress knew about the military operations in Africa). *See also* Full Mattis: American’s ‘Don’t Need Military Generals’ Getting Involved in Politics, NBC NEWS (Oct. 13, 2019), <https://bit.ly/2NL9SgP> [<https://perma.cc/XJ7W-AQSY>] (providing retired Secretary of Defense Mattis’s comments that “We may want a war over; we may even declare it over. You can pull your troops out [of Iraq] as President Obama learned the hard way . . . but the ‘enemy gets the vote,’ we say in the military. And in this case, if we don’t keep the pressure on, then ISIS will resurge. It’s absolutely a given that they will come back.”).

## INTRODUCTION

Conflict after conflict, the United States has sent servicemembers into harm's way long before political leaders establish the deployment locations as combat zones.<sup>3</sup> Combat zones are defined as areas where the "Armed Forces of the United States are or have engaged in combat,"<sup>4</sup> as designated by the President of the United States by Executive Order.<sup>5</sup> Recent combat zone designations include Afghanistan,<sup>6</sup> the Arabian Peninsula,<sup>7</sup> and the Federal Republic of Yugoslavia.<sup>8</sup>

For military families—some of whom struggle to meet financial needs—designation of the areas in which their loved ones serve as combat zones has important financial consequences.<sup>9</sup> For purposes of equity, servicemembers who are deployed in combat zones should receive greater compensation and tax benefits due to the

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3. See generally INTERNAL REVENUE SERV., ARMED FORCES' TAX GUIDE 13, DEP'T OF TREASURY, PUB. 3, at 12-15 (Feb. 26, 2019) [hereinafter ARMED FORCES' TAX GUIDE], <https://bit.ly/2o7qy8c> [<https://perma.cc/6J9W-HQQ4>] (providing an overview and timeline of current combat zones, qualified hazardous duty areas (QHDAs), and areas where the Department of Defense has certified that military service is in direct support of military operations in combat zones or QHDAs).

4. I.R.C. § 112 (2012).

5. See Revenue Act of 1950, Pub. L. No. 81-814, § 202, 64 Stat. 906, 927 (1950) (originally defining the term combat zone, conditioning the receipt of additional allowances based on the physical presence of servicemembers in combat zones, and establishing that "service is performed in a combat zone only if performed on or after the date designated by the President by Executive Order as the date of the commencing of combatant activities in such zone, and on or before the date designated by the President by Executive Order as the date of the termination of combatant activities in such zone . . .").

6. Exec. Order No. 13239, 3 C.F.R. 13239 (2002) (establishing the Afghanistan Combat Zone).

7. Exec. Order No. 12744, 56 Fed. Reg. 2,663 (Jan. 21, 1991) (establishing the Arabian Peninsula Combat Zone including countries such as Iraq, Kuwait, Saudi Arabia, Oman, Bahrain, Qatar, and the United Arab Emirates, as well as, areas such as the Persian Gulf, the Red Sea, the Gulf of Oman, the Gulf of Aden, and portions of the Arabian Sea).

8. Exec. Order No. 13119, 64 Fed. Reg. 18,797 (Mar. 24, 1999) (establishing the Federal Republic of Yugoslavia Combat Zone including countries such as Serbia, Montenegro, and Albania, as well as, areas such as the Adriatic Sea and portions of the Ionian Sea).

9. See *infra* app. 1, at pp. 424–29. The table was formed using Military Pay Chart data provided by the Defense Finance and Accounting Service available at <https://bit.ly/2ueEbpp> (last visited Sept. 2, 2019) and from the MyArmyBenefits website <https://bit.ly/2TFOy00> [<https://perma.cc/7J3E-NQFV>] (last visited Sept. 3, 2019). For those using the deployment calculator at the MyArmyBenefits website, it will be necessary to download the latest Flash Player from Adobe. It is important to note that many computers block Flash Player and thus installers may need to physically allow the program to install and to run. The income tax computations were run by Samuel Kan and David Dulaney using Bloomberg BNA's Tax Calculator, <https://bit.ly/3aqapyx> (last visited Sept. 2, 2019).

significant risks they face protecting their nation. However, the designation of a geographic area as a combat zone often opens the door to a variety of complicated political and administrative conflicts. As a result, servicemembers who face the inherent dangers of serving in areas of conflict<sup>10</sup> often find the financial well-being of their families taking a back seat to beltway political disputes.

Since Congress has moved away from decisively exercising its war powers under the Constitution,<sup>11</sup> the remaining gap in authority has been filled in a manner that has created serious inequities. While some servicemembers fail to get the benefits and recognition they truly deserve,<sup>12</sup> other members unfairly benefit from historic combat zone designations that no longer accurately depict the dangers members serving in such locations face.<sup>13</sup>

This article argues that the tax relief afforded to servicemembers under the current system of combat zone designation is inequitable and must be reformed. The President, Congress, and the Department of Defense should take proactive steps to remedy the inequity, including the timely designation of combat zones, Qualified Hazardous Duty Areas (QHDA),<sup>14</sup> and direct support

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10. See U.S. DEP'T. OF DEF., U.S. CASUALTY STATUS, <https://bit.ly/2mgSQY6> [<https://perma.cc/82ZV-C69U>] (last updated Sept. 30, 2019, 10:00 AM) (showing the thousands of U.S. servicemembers killed in action and the tens of thousands of U.S. servicemembers wounded in action in countries such as Iraq and Afghanistan during Operation Iraqi Freedom, Operation New Dawn, Operation Enduring Freedom, Operation Inherent Resolve, and Operation Freedom Sentinel).

11. See U.S. CONST. art. I, § 8 (establishing Congress's war powers). See generally ERWIN CHERMERINSKY, *CONSTITUTIONAL LAW PRINCIPLES AND POLICIES* 207–09, 275–78 (Aspen Publishers 1997) (providing background on the war powers).

12. See, e.g., 142 CONG. REC. H1671 (daily ed. Mar. 5, 1996) (statement of Rep. Bunning) (emphasizing the tragedy of servicemembers killed during Operation Restore Hope in Somalia).

13. See, e.g., Exec. Order No. 12744, 56 Fed. Reg. 2,663 (Jan. 21, 1991) (establishing Bahrain as part of the Arabian Peninsula Combat Zone and thus entitling members there to combat zone tax exclusion benefits); Exec. Order No. 13119, 64 Fed. Reg. 18,797 (Mar. 24, 1999) (establishing Yugoslavia as a combat zone and thus entitling members there to combat zone tax exclusion benefits). See also *Housing Service Center: PCS'ing to NSA Bahrian*, NAVY MWR BAHRAIN, <https://bit.ly/2lW7oS2> [<https://perma.cc/CEJ8-K9V8>] (last visited Sept 2, 2019) (providing information about safe off base family housing in Bahrain, a country which is still designated as a combat zone); *Balkan Winter Wonderlands Ready for 2019 Season*, BALKAN INSIGHT, (Jan. 11, 2019), <https://bit.ly/2mEXRiE> [<https://perma.cc/PS6G-4XUR>] (providing information about safe skiing opportunities in the Balkans).

14. See INTERNAL REVENUE SERV., DEP'T OF TREASURY, PUB. 3, ARMED FORCES' TAX GUIDE 1, 12 (2019) (explaining that QHDAs are areas designated by Congress where servicemembers who are eligible to receive hostile fire pay (HFP) or imminent danger pay (IDP) may earn combat pay, which is excluded from gross income for tax purposes). See, e.g., Act of Dec. 22, 2017, Pub. L. No. 115-97, § 11026, 131 Stat. 2054, 2076–77 (2017) (creating a QHDA for The Sinai Peninsula

areas.<sup>15</sup> Additionally, Congress and the Treasury Department should modify the Internal Revenue Code and the Treasury Regulations to decouple tax relief from the rigid structure of combat area designations.

Part II of this article provides a historical and legal background of the combat zone tax exclusion and details the significant benefits that arise from serving in designated combat zones, QHDAs, and direct support areas.<sup>16</sup> Part II also addresses problems encountered by servicemembers who serve outside these designated areas and who need to submit timely tax returns without the benefit of interest- and penalty-free extensions.<sup>17</sup>

Part III outlines the struggle between the executive and legislative branches over exercising war powers in light of the judicial branch's treatment of these issues as non-judiciable political questions of international foreign policy. Part III offers solutions that

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of Egypt); Act of Mar. 20, 1996, Pub. L. No. 104-117, § 1, 110 Stat. 827, 827-28 (1996) (creating a QHDA for Bosnia, Herzegovina, Croatia, and Macedonia); Act of Apr. 19, 2019, § 1, Pub. L. No. 106-21, 113 Stat. 34, 34-35 (1999) (creating a QHDA for The Federal Republic of Yugoslavia, Albania, the Adriatic Sea, and the Ionian Sea north of the 39th parallel).

15. See Treas. Reg. § 1.112-1-1(e) (2018) (explaining that servicemembers serving outside combat zones (CZ) are deemed to serve in combat zones while the member's service is in direct support of military operations in the combat zone and the member qualifies for hostile fire or imminent danger pay); Rev. Rul. 70-621, 1970-2 C.B. 17, 17 (providing that duties performed in any other area or with any unit, if certified by the Department of Defense as being in direct support of military operations in the combat zone, will qualify as duties so performed). See also U.S. DEP'T OF DEF., INSTR. 1340.25, COMBAT ZONE TAX EXCLUSION (CZTE), ¶ 4(b)(3) (2010). The instruction establishes DoD policy stating:

A member of the Armed Forces is entitled to the CZTE if for any period during a calendar month the member performs active service in . . . [an] area outside the CZ or QHDA when the Principal Deputy Under Secretary of Defense for Personnel and Readiness . . . certifies that such military service is in direct support of military operations in a CZ or QHDA, as applicable, and the member is entitled to HFP/IDP . . . . The HFP/IDP entitlement must be directly related to military operations in the CZ or QHDA.

*Id.*

16. See, e.g., I.R.C. § 692(a) (2012) (providing tax forgiveness to the surviving family of servicemembers killed in combat).

17. See, e.g., I.R.C. § 7508(a) (2012) (disregarding the time spent in a combat zone or while participating in a contingency operation, or time spent hospitalized as a result of injury received while serving in such an area or operation, plus the period of continuous qualified hospitalization attributable to such injury, and the next 180 days thereafter for purposes of assessing tax liability including interest and penalties). See also, e.g., Combat-Injured Veterans Tax Fairness Act., Pub. L. No. 114-292, § 3, 130 Stat. 1500,1500-01 (2016) (allowing veterans who received disability severance payments (DSP) to submit amendments to tax returns way past the typical three year statute of limitations; permitting veterans to seek refunds from tax years as early as 1991 to be filed as late as 2019).

the executive and legislative branches could implement to address the current tension between the branches of government. These proposed changes include amending the Internal Revenue Code to tie combat zone tax exclusion benefits to a servicemember's eligibility to receive hostile fire pay—for actual exposure to hostile fire—or imminent danger pay. To be eligible for imminent danger pay, servicemembers must be in a foreign area where they are “subject to the imminent danger of physical injury due to threat conditions.”<sup>18</sup> This change would improve overall equity; only servicemembers in foreign areas of armed conflict would receive combat zone tax relief.<sup>19</sup>

Part IV further addresses these issues by offering solutions that the Department of Defense should take in the interim, such as timely designating areas in direct support of military operations in combat zones. Part IV also suggests solutions that the Treasury Department should adopt, such as modifying<sup>20</sup> Treasury Regulation

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18. See 37 U.S.C. § 351(a) (2012) (establishing new authority for hazardous duty pay to include hostile fire pay, hazardous duty pay, and imminent danger pay). See also *id.* § 310(a)(2) (2012). HFP/IDP is payable at the monthly rate of \$225.00. Service members will receive \$7.50 for each day they are on duty in an IDP area up to the maximum monthly rate of \$225. Members who are exposed to a hostile fire or hostile mine explosion event are eligible to receive non-prorated Hostile Fire Pay (HFP) in the full monthly amount of \$225. Members cannot receive both IDP and HFP in the same month.” DEP’T. OF DEF., MILITARY COMPENSATION, HOSTILE FIRE/IMMINENT DANGER PAY (HFP/IDP), <https://bit.ly/2mynFwR> [<https://perma.cc/Z6HP-L3QX>] [hereinafter HF/IDP PAY] (last visited Sept. 4, 2019).

19. See 37 U.S.C. § 310(a)(2) (2012) (establishing the requirements for hostile fire and imminent danger pay). See also 37 U.S.C. § 351 (2012) (providing new authority for hostile fire and imminent danger pay under subchapter II, Chapter 5 of Title 37, United States Code); HOSTILE FIRE/IMMINENT DANGER PAY, *supra* note 18 (explaining that a member may receive \$225 for hostile fire pay or imminent danger pay).

20. See generally Ellen P. Aprill, *The Impact of Agency Procedures and Judicial Review on Tax Reform*, 65 NAT’L TAX J. 917, 918 (2012), (discussing the many challenges and the time consuming process involved with promulgating Treasury Regulations that will withstand judicial scrutiny). Specifically, Professor Aprill highlights the potential challenges ahead for the IRS and Treasury, which will likely face numerous “hurdles” that could constrain their ability “to issue guidance that courts will uphold”:

One [hurdle] is heightened interest in the course of tax litigation regarding compliance by the IRS and Treasury with the Administrative Procedure Act (APA), particularly its requirements for public notice-and-comment in connection with proposed regulations. A second relates to a set of provisions enacted in 1988 and 1996 limiting temporary and retroactive regulations. Moreover, the Tax Anti-Injunction Act (AIA) and the Declaratory Judgement Act (DJA) have the effect of postponing challenges to tax guidance until enforcement of administrative guidance has taken place.

*Id.* at 918.

section 1.112-1<sup>21</sup> to provide benefits to servicemembers who serve in harm's way in direct support areas, but who do not qualify for benefits because they support military operations in other direct support areas rather than in combat zones. The government should take these steps to halt the current, unacceptable status quo, which fails to protect servicemembers and their families.

## I. COMBAT ZONE DESIGNATION AND THE "DOUBLE BURDEN" OF FINANCING WAR

Congress has established a military compensation system with the goal of properly recognizing and compensating servicemembers, so that they can effectively defend the country.<sup>22</sup> Legislative history shows that Congress originally intended that "those who fought the nation's wars should not bear the 'double burden' of financing the conflict."<sup>23</sup> This rationale has evolved over time to include linking tax benefits to "combat and risk," and to justify the benefits as incentives "in the absence of higher levels of military compensation."<sup>24</sup> With this evolution of the military compensation system, however, Congress has effectively tied both servicemembers' compensation and tax benefits to a set of rigid requirements.

The establishment of these requirements has had the unintended consequence of depriving many servicemembers actually deployed in harm's way from receiving the benefits they and their family members deserve. Ironically, these same rigid requirements have resulted in allowing servicemembers who are no longer in harm's way—such as servicemembers who live safely with their families in the foreign civilian communities in Bahrain—to continue to receive combat zone tax exclusion-related benefits.<sup>25</sup> This

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21. Treas. Reg. § 1.112-1 (2018).

22. See Brandon R. Gould & Stanley A. Horowitz, *History of the Combat Tax Zone Exclusion*, in DEFENSE TECH. INFO. CENT., REPORT OF THE ELEVENTH QUADRENNIAL REVIEW OF MILITARY COMPENSATION: SUPPORTING RESEARCH PAPERS at 267, 267 (2012) [hereinafter *History of the CZTE*], <https://bit.ly/2nHY9W6>.

23. *Id.* at 267. By paying taxes on their military salaries earned in a combat zone, servicemembers, especially those who were drafted into the military not by their own choice, would risk their lives serving their country in foreign areas of armed conflict, and also help fund the conflict. In contrast, most taxpayers such as those who were not drafted into the military, would only help fund the conflict by paying their taxes.

24. *Id.* at 271.

25. See Exec. Order No. 12744, 56 Fed. Reg. 2,663 (1991) (establishing Bahrain as part of the Arabian Peninsula Combat Zone). See also *Housing Service Center: PCS'ing to NSA Bahrain*, NAVY MWR BAHRAIN, <https://bit.ly/21W7oS2>



result is unfair to many servicemembers who are deployed to foreign areas of armed conflict and who are in harm's way. Simultaneously, extending combat zone tax exclusion benefits to servicemembers who are not in harm's way is a wasteful allocation of U.S. Treasury funds.

#### A. *Brief History*

To understand the evolution of this issue, a look at history is enlightening. Faced with numerous problems—from addressing the poor morale of the infantry to working with limited budgets—Congress has used the tools at its disposal to shape military compensation while trying to maintain the structure and military personnel necessary to defend the nation.<sup>26</sup> For example, in addition to using direct incentives such as basic and special pay, Congress has also used indirect methods, such as tax policy, to increase the effective compensation servicemembers received.<sup>27</sup> Simultaneously, Congress wanted to ensure that servicemembers had a “fair tax system”<sup>28</sup> to ease “the difficulties inherent in fulfilling routine tax obligations”<sup>29</sup> while serving in combat areas.

To allow for smooth administration of these tax policies, Treasury Regulations define the types of military service that qualify for combat zone tax treatment. For example, a pilot stationed outside the combat zone who “is shot while participating in aerial combat over the combat zone, but is not hospitalized until returning to his home base”<sup>30</sup> would qualify as serving in the combat zone. As a result of this qualification, the income earned during the pilot's service in the combat zone, as well as during the period of hospitalization, would be excluded from gross income<sup>31</sup> for tax purposes, subject to certain limitations.<sup>32</sup> Similarly, servicemembers stationed

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[<https://perma.cc/CEJ8-K9V8>] (last visited Sept. 2, 2019) (providing information about safe off base family housing in Bahrain).

26. *History of the CZTE*, *supra* note 22, at 267-70.

27. See Generally Brandon R. Gould & Stanley A. Horowitz, *History of Combat Pay*, in DEFENSE TECH. INFO. CENT., REPORT OF THE ELEVENTH QUADRENNIAL REVIEW OF MILITARY COMPENSATION, 207, 207-266 (providing a history of the combat zone tax exclusion).

28. *History of the CZTE*, *supra* note 22, at 267-68.

29. *Id.* at 271.

30. Treas. Reg. § 1.112-1-1(c)(3) (2018). It is important to note that the pilot would be eligible for combat zone tax exclusion (CZTE) treatment even if the pilot was not shot at, and the pilot's mission to be present in the combat zone for even one day would entitle the pilot to CZTE treatment for the entire month.

31. I.R.C. § 61 (2012) (defining gross income, “[e]xcept as otherwise provided in this subtitle,” to include “all income from whatever source derived.”).

32. See I.R.C. § 112 (2012) (establishing that the income earned by a commissioned warrant officer would be excluded from gross income during the time the

outside a combat zone who qualify for imminent danger pay and who directly support military operations in a combat zone would qualify for combat zone tax treatment.<sup>33</sup>

By contrast, servicemembers who are stationed in countries near combat zones and who maintain combat aircraft operating in the combat zone, but who do not qualify for hostile fire or imminent danger pay, do not qualify for combat zone tax treatment.<sup>34</sup> Servicemembers present in a combat zone solely for their own personal convenience also do not qualify for combat zone tax treatment. Thus, these servicemembers would receive pay subject to income taxes.<sup>35</sup>

Tying tax relief to combat zones has had an unfortunate and unintended outcome. Often times, politics are such that designating an area as a combat zone “might imply either a deterioration of diplomatic relations or [an] escalation of internal hazards” in a country.<sup>36</sup> Along with other factors, these political ramifications have caused the executive and legislative branches to slowly and cautiously evaluate the particulars of each situation before taking actions such as designating a combat zone or enacting legislation to establish a QHDA. For example, although military forces were deployed to Vietnam as early as 1950, President Johnson did not declare Vietnam a combat zone until 1965, at which time he extended the designation retroactively only to January 1, 1964.<sup>37</sup>

In contrast, the President never declared Somalia a combat zone;<sup>38</sup> servicemembers who deployed there in support of Opera-

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warrant officer served in a combat zone and during the period of hospitalization as a result of injury incurred while serving in a combat zone; however, the income earned by a commissioned officer under the same circumstances would not be fully excluded; instead only an amount equal to the maximum enlisted amount would be excluded from gross income). The applicable maximum enlisted amount was \$225 a month for hostile fire or imminent danger pay + \$8,165.10 a month in 2017, \$8,361 a month in 2018, and \$8,578.50 a month in 2019. *See also* DEF. FIN. AND ACCT. SERV., U.S. DEP’T OF DEF., MILITARY PAY CHARTS, <https://bit.ly/2mncM0o> [<https://perma.cc/J36C-6JJW>] [hereinafter MILITARY PAY CHARTS] (last updated Apr. 24, 2019) (providing military pay charts from 1949 to 2019); app. 1, *infra*, at pp. 424–29 (showing the tax implications for warrant officers compared to commissioned officers and enlisted personnel).

33. *See* Treas. Reg. § 1.112-1-1(e)(2) ex. 7 (2018).

34. *See* Treas. Reg. § 1.112-1-1(f)(iii) (2018).

35. *See* Treas. Reg. § 1.112-1-1(e)(2) ex. 3 (2018).

36. *History of the CZTE*, *supra* note 22, at 285.

37. *See* Exec. Order No. 11216, 30 Fed. Reg. 5817 (1965). *See also* Patrick J. Kusiak, *Income Tax Exclusion for Military Personnel During War*, 39 FED. B. NEWS & J 146, 148 (1992).

38. 142 CONG. REC. H1670 (daily ed. Mar. 5, 1996) (statement of Rep. Bunning). *See also* U.S. DEP’T OF DEF., 7000.14-R, DoD FINANCIAL MANAGEMENT REGULATION, vol. 7A, ch. 44, fig. 44-1 (Apr. 2019) [*hereinafter* 2019 FMR], <http://>

tion Restore Hope in 1993 were resultantly denied essential military equipment and did not qualify for tax relief.<sup>39</sup> Their desperate struggle, which resulted in the death of 13 and the wounding of 75 servicemembers<sup>40</sup> and was later memorialized in the Hollywood movie *Black Hawk Down*,<sup>41</sup> will never be forgotten. It is a somber irony that the servicemembers dragged through the streets of Mogadishu were not—as a legal matter—serving in combat when their tragic deaths were captured on television.<sup>42</sup> Somalia, although never declared a combat zone, was eventually designated as an area in direct support of the Afghanistan combat zone as of 2004.<sup>43</sup> As a result, servicemembers stationed there—who continue to become casualties<sup>44</sup>—may at least be able to qualify for tax relief.

### B. *The Financial Consequences of Combat Zone Designation*

The magnitude of maintaining the status quo, where servicemembers must suffer and take a backseat to political considera-

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bit.ly/2PorLU7 [https://perma.cc/4QD2-CPL5] (listing the areas that have been designated in direct support of a combat zone). See also ARMED FORCES' TAX GUIDE, *supra* note 3, at 13 (2019) (providing a yearly update of the current combat zones, QHDAs, and areas in direct support of combat zones or QHDAs).

39. John H. Cushman Jr., *The Somalia Mission: Forces; How Powerful U.S. Units Will Work*, N.Y. TIMES (Oct. 8, 1993), <https://nyti.ms/2mukt1m> [https://perma.cc/V332-J2XM] (highlighting that “Defense Secretary Les Aspin has been strongly criticized . . . for having denied requests . . . from the senior United States commander in the field [Maj. Gen. Thomas M. Montgomery] for armored reinforcements [including tanks and Bradley armored vehicles], a request that had been supported by Gen. Colin L. Powell, then Chairman of the Joint Chiefs of Staff.”). It may be interesting to contrast this scenario, where servicemembers received no tax relief, with the crew of the *Pueblo*, who received POW status 22 years after the fact through specific legislation, and the Iran hostage situation, where hostages or their estates ultimately received up to \$4.4 million each through specific legislation approximately 40 years after the fact. Carol Morello & Frances Stead Sellers, *Americans Held in Iran During 444-day Hostage Crisis Finally Get Compensation*, WASH. POST (Dec. 24, 2015), <https://wapo.st/1OcUUdF> [https://perma.cc/SNE3-P5NS]; Greg Johnson, *Crew of Pueblo, Bitter at Delay, Get POW Status*, L.A. TIMES (May 6, 1990), <https://lat.ms/2kRLL4V> [https://perma.cc/G3B3-XANT].

40. Cushman, *supra* note 39.

41. BLACK HAWK DOWN (Sony Pictures 2001).

42. International25, *US Marines [Servicemembers] in Somalia 1993 The Infamous Somalia Incident*, YOUTUBE (Sept. 26, 2013), <https://bit.ly/1Acj01b> [https://perma.cc/G9MK-6NF6].

43. See 2019 FMR, *supra* note 38, fig. 44-1; ARMED FORCES' TAX GUIDE, *supra* note 3, at 13.

44. See, e.g., Thomas Gibbons-Neff and Helene Cooper, *1 U.S. Soldier is Killed and 4 are Wounded in Somalia Firefight*, N.Y. TIMES (Jun. 8, 2018), <https://nyti.ms/2sSbXMK> [https://perma.cc/G5AM-SHDS] (highlighting recent U.S. casualties in Africa including a U.S. soldier killed in Somalia in June 2018, a Navy Seal killed in Somalia in May 2017, four American soldiers killed in Niger in October 2017, and numerous other servicemembers who were wounded in action).

tions, can never be accurately measured. To understand the situation more completely, this article addresses the numerous benefits at stake.

### 1. *Understanding the Benefits at Stake*

The significance of the benefits available to members serving in designated combat zones cannot be understated. These benefits include combat zone tax exclusion benefits, extension possibilities for filing tax returns and paying applicable taxes without penalties or interest, the option to take advantage of many non-tax related benefits, and even benefits that extend beyond a servicemember's period of active-duty.

First, servicemembers who perform duties in combat zones are eligible for combat zone tax exclusion benefits. Enlisted servicemembers and warrant officers earn all of their pay and allowances, including bonuses that are earned in combat zones,<sup>45</sup> free of income taxes.<sup>46</sup>

Appendix 1 to this article provides data showing the financial impact of tax exclusion benefits on servicemembers. For example, a single private (E-2) with over two years of service who earns approximately \$1884 in monthly basic pay would be able to exclude all of his military income—so long as he was deployed to a combat zone for the entire 2019 calendar year—saving approximately \$1057 in federal income taxes.<sup>47</sup> Similarly, a single sergeant major (E-9) with twenty years of service who earns approximately \$74,724 a year in basic pay would be able to exclude all of his military income if he was deployed to a combat zone for the entire 2019 calendar year, saving him approximately \$9614 in federal income taxes.<sup>48</sup> He

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45. See Rev. Rul. 71-343, 1971-2 C.B. 92, 93 (clarifying that the combat zone income tax exclusion covers payments such as reenlistment bonuses by stating, if the “voluntary extension or reenlistment occurs in a month during any part of which the member serves in a combat zone, any amount to which he becomes entitled as a reenlistment bonus is, to the extent provided by section 112, excludable from gross income when received”).

46. See generally I.R.C. § 112 (2012). However, military pay earned in combat zones is still subject to Social Security and Medicare taxes. INTERNAL REVENUE SERV., TAX EXCLUSION FOR COMBAT SERVICE, <https://bit.ly/2JPVBA6> [<https://perma.cc/U8CD-JLGK>] (last updated Oct. 29, 2018).

47. See app. 1, *infra*, at pp. 424–29.

48. See app. 1, *infra*, at pp. 424–29. It is important to note that if a servicemember receives Basic Allowance for Housing (BAH) and Basic Allowance for Subsistence (BAS), those pays are not subject to income tax. In addition, if the servicemember is deployed to a combat zone and receives hostile fire pay, the hostile fire pay is not included in gross income as long as the total pay received is less than or equal to the maximum exclusion, which was \$105,642 for the 2019 calendar year. Furthermore, if a servicemember was in a combat zone for a single

might also experience additional tax savings if he was subject to state or local income taxes.<sup>49</sup>

Commissioned officers who serve in combat zones are also able to exclude their pay and allowances, but only up to the maximum amount that could be received by a senior enlisted member.<sup>50</sup> For example, a single lieutenant colonel (O-5) with eighteen years of service would be able to exclude approximately \$105,642 of military income if she was deployed to a combat zone for the entire 2019 calendar year. This exclusion would save her approximately \$17,161 in federal income taxes and would allow her to receive a federal tax refund of approximately \$384.<sup>51</sup> Furthermore, deployed servicemembers who are married to civilians receive similar benefits. Their military income would be excluded from their joint income tax returns, reducing their federal, state, and local income taxes that would otherwise be due.

That said, it is important to note that the tax benefits of deploying to combat zones are significantly greater for single servicemembers than for married servicemembers with dependent children who file “married filing joint” income tax returns. This disparity is due to numerous factors including the child tax credit, the additional child tax credit, the earned income tax credit, and the standard deduction.<sup>52</sup> For example, a sergeant first class (E-7) with 12 years of service, married to a full-time homemaker who cares for

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day, the entire month’s income would be subject to the CZTE exclusion. Thus, a member could enter the combat zone on the last day of January 2019 and exit the combat zone the first day of December 2019, and the entire year’s income would be eligible for the CZTE.

49. See generally Bloomberg Law: Tax, Individual Income Tax Chart Builder, <https://bit.ly/37i82Mi> (last visited Sept. 4, 2019) (providing BNA Tax subscribers the ability to create charts showing the tax impacts of military compensation by state and providing hyperlinks to applicable federal and state authorities).

50. See I.R.C. § 112(a) (2012). See also U.S. Army, My Army Benefits, Combat Zone Tax Exclusion (CZTE), <https://bit.ly/2lAWxwR> [<https://perma.cc/M6TZ-EUDN>] (last updated Jul. 11, 2019) (explaining that the applicable monthly exclusion amount for 2019 is \$8,578.50 plus \$225 for hostile fire pay or imminent danger pay for a total monthly amount of \$8,803.50 or a total of \$105,642 for the year).

51. See app. 1, *infra*, at pp. 424–29. It is important to note that since the O-5 earns more than the CZTE limitation due to her basic pay plus her hostile fire pay, she receives \$5,040 [ $12 \times (\$8,998.5 \text{ basic pay} + \$225 \text{ hostile fire pay}) - \$105,642 \text{ CZTE limitation}$ ] of taxable income if she is deployed to a combat zone for the entire 2019 calendar year. See *id.*

52. See app. 1, *infra*, at pp. 424–29 (showing that, while all single servicemembers received tax benefits for deploying to a combat zone regardless of the tax year deployed, married servicemembers had to be quite senior before they experienced any tax benefit for deploying to a combat zone; as a result, imparting CZTE benefits to servicemembers deployed to combat zones may cost the government less than most people would expect).

their two dependent minor children, would receive no significant tax relief even though she may have deployed to a combat zone for the entire year.<sup>53</sup>

Tax exclusion of otherwise taxable military pay also has powerful corollary tax benefits because the exclusion reduces the servicemember's adjusted gross income (AGI).<sup>54</sup> With a significantly reduced AGI, servicemembers may be able to qualify for valuable tax credits such as the earned income tax credit<sup>55</sup> and the retirement savings contribution credit.<sup>56</sup> The earned income tax credit is designed to encourage taxpayers to work even if they earn low wages. The qualified retirement savings contributions credit encourages taxpayers to invest for their retirement. Had servicemembers not served in a combat zone, their AGI may not be low enough to qualify for either credit.

Additionally, if servicemembers own residential rental property and their AGI drops below \$100,000, they may be able to qualify to deduct up to \$25,000 in passive activity losses<sup>57</sup> if they actively participate in the rental activity.<sup>58</sup> The ability to deduct passive activity losses is significant for servicemembers because they must move every couple of years when they receive military orders. As a

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53. *Id.* (showing that she would receive a federal tax refund of \$1133 regardless of whether or not she deployed to a combat zone in 2019; showing similar results for the 2018 tax year; in 2017, she would have received a meager \$92 tax benefit).

54. See INTERNAL REVENUE SERV., DEP'T OF TREASURY, FORM 1040; U.S. INDIVIDUAL INCOME TAX RETURN (2019) (showing how AGI is calculated on an IRS Form 1040).

55. See I.R.C. § 32(a) (2012) (defining the earned income tax credit and establishing its limitations). See INTERNAL REVENUE SERV., DEP'T OF TREASURY, PUB. 4012, VOLUNTEER RESOURCE GUIDE I-2, 1, A1-A3 (2018) (providing useful charts to identify the earned income tax credit's qualification requirements). It is important to note that senior servicemembers may benefit significantly by deploying to a combat zone, because their gross income levels might drop to a point where they might qualify for the earned income tax credit. See also Dept. of Defense, Report of The Eleventh Quadrennial Review of Military Compensation, 1, 70 <https://bit.ly/2lcf02x> [<https://perma.cc/V8X6-2LTQ>] (last visited Sept. 15, 2019).

56. See I.R.C. § 25B(a) (allowing taxpayers an income tax credit not to exceed \$2,000 per taxpayer based on a percentage of the taxpayer's qualified retirement savings contributions).

57. See *id.* § 469(c) (defining passive activities). See generally INTERNAL REVENUE SERV., *Passive Activity Losses – Real Estate Tax Tips*, <https://bit.ly/2S0fmHW> [<https://perma.cc/X2B6-RP8Y>] (last updated Mar. 27, 2019) (explaining that passive activities are generally rental activities or any business where taxpayers do not materially participate; explaining that nonpassive activities are businesses where taxpayers work on a regular, continuous, and substantial basis).

58. See I.R.C. § 469(i) (2012) (establishing the ability to deduct passive losses, which are phased out as the taxpayer's AGI approaches \$150,000, at which time the ability to deduct such losses is eliminated).

result, servicemembers often buy homes and subsequently rent them out when they are unable to sell their homes upon relocation to distant areas. Due to depreciation that must generally be taken,<sup>59</sup> these rental properties often produce passive activity losses, especially in the first few rental years. The ability to offset their income with passive activity losses enables servicemembers to maintain break-even or positive cash flows for their rental properties and, thus, gives servicemembers the ability to hold their properties until they can be sold.

Also, with a reduced AGI, servicemembers have a greater ability to qualify to contribute<sup>60</sup> to a Roth<sup>61</sup> individual retirement account (IRA) or a deductible traditional<sup>62</sup> IRA.<sup>63</sup> For example, a single major (0-4) with ten years of service who earns \$84,632 a year in basic pay in 2018, or \$86,832 a year in basic pay in 2019, would be prohibited from making a deductible IRA contribution in 2018 and 2019 because the major's income would be above the applicable phase-out thresholds.<sup>64</sup> However, if the major deployed to a com-

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59. See generally INTERNAL REVENUE SERV., DEP'T OF TREASURY, PUB. 523, SELLING YOUR HOME 15, 15 (2018) (providing taxpayers with a worksheet to identify depreciation that the taxpayers "took or could have taken" for the purposes of recapturing that depreciation upon the ultimate disposition of the property such as a sale).

60. See I.R.C. § 219(f)(7) (2012) (providing that income of servicemembers in combat zones can be considered gross income for purposes of making retirement account contributions). See generally INTERNAL REVENUE SERV., MISCELLANEOUS PROVISIONS – COMBAT ZONE SERVICE, available at <https://bit.ly/2lcygwR> [<https://perma.cc/6PDK-TJ6K>] (last updated June 28, 2019) (providing details about contributing pay earned in a combat zone to an IRA).

61. See I.R.C. § 408A. It is important to note that Roth IRA contributions are made with after-tax dollars and result in qualified distributions that are income tax free both to the contributions as well as their growth.

62. See *id.* § 408(d). Traditional IRA contributions are generally made with pre-tax dollars and result in qualified distributions where both the original pre-tax contributions and their growth are taxable. The taxability of these traditional IRA qualified distributions matters, because the distributions could elevate the taxpayer's tax bracket resulting in significant income taxes. For example, this elevation could occur if taxpayers make contributions early in their careers when they are in low income tax brackets and then they distribute those IRA assets later in their careers when they are in higher tax brackets. By making the taxable distributions at that time, taxpayers would likely end up being in higher tax brackets than they would have been had they not made the taxable distributions.

63. See Major Joseph E. Cole, *Essential Estate Planning: Tools and Methodologies for the Military Practitioner*, 1999 ARMY LAW. 1, 8 (1999) (explaining the difference between traditional and Roth IRAs); see also G. VICTOR HALLMAN & JERRY S. ROSENBLUM, *PERSONAL FINANCIAL PLANNING* 1, 362–70 (7th ed. 2003) (contrasting traditional IRAs with Roth IRAs).

64. See I.R.C. § 408 (2012). For 2018, the single traditional IRA phase-out threshold was \$63,000–\$73,000. See IRS, *2018 IRA Contribution and Deduction Limits – Effect of Modified AGI on Deductible Contributions if you are Covered by a Retirement Plan at Work*, <https://bit.ly/2nc9ObI> [<https://perma.cc/6PHB-GHNL>]

bat zone for over two months, his income would drop to a level where he could make a deductible traditional IRA contribution.<sup>65</sup> The ability to contribute to these tax advantaged retirement accounts can encourage servicemembers to make contributions earlier in their careers, allowing servicemembers to benefit from the power of compound interest<sup>66</sup> and dollar cost averaging.<sup>67</sup> It is important to note that although tax-exempt combat pay was once not considered earned income for purposes of making IRA contributions, which prevented servicemembers from making any contributions for lack of earned income, the Heroes Earned Retirement Opportunities Act<sup>68</sup> allowed combat pay to be considered gross income for IRA contribution purposes.<sup>69</sup> As a result, servicemembers who have no income other than their combat pay can still fully contribute to their IRA.

By being in a combat zone, servicemembers may be able to take advantage of other tax-related benefits, such as the ability to make significant contributions to their traditional or Roth Thrift

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(last updated, June 18, 2019). For 2019, the single traditional IRA phase-out threshold was \$64,000–\$74,000. *Id.*

65. See MILITARY PAY CHARTS, *supra* note 32 (showing that the monthly basic pay in 2018 for a major with ten years of service was \$7,053, for an annual amount of \$84,632, which was above the deductible IRA threshold for a single taxpayer in 2018; showing that the monthly basic pay in 2019 for a major with ten years of service was \$7,236, for an annual amount of \$86,832, which was above the deductible IRA threshold for a single taxpayer in 2019).

66. See generally U.S. Sec. & Exch. Comm'n, *Tips for Teaching Students About Saving and Investing*, <https://bit.ly/1IkSKRp> [<https://perma.cc/WVZ9-ZS7F>] (last modified Sept. 14, 2005) (explaining the concepts of investing such as the power of compounding, as well as the importance of paying oneself first by automatically removing money from paychecks in order to regularly fund investments). U.S. Sec. & Exchange Comm'n, *Compound Interest Calculator*, <https://bit.ly/2fYKPFi> [<https://perma.cc/XJT4-NRU3>] (last visited Oct. 6, 2019) (providing a free compound interest calculator for investors to use in order to understand the power of compounding and the time value of money).

67. See U.S. Sec. & Exch. Comm'n, *Financial Navigating in the Current Economy: Things to Consider Before You Make Investing Decisions* (Dec. 1, 2008), <https://bit.ly/2mRUkNG> [<https://perma.cc/BDF2-LXQS>] (explaining the concept of dollar cost averaging, which is the practice of “making regular investments with the same amount of money each time . . . [which results in buying] more of an investment when its price is low and less of the investment when its price is high” which over time can produce a significantly greater rate of return).

68. Heroes Earned Retirement Opportunities Act, Pub. L. No. 109-227, 120 Stat. 385 § 2 (2006) (amending I.R.C. § 219 to include income earned by servicemembers in a combat zone for purposes of making IRA contributions). See generally Note, *Update for 2006 Federal Income Tax Returns*, 2006 ARMY LAW. 51 (2006) (explaining the implications of the Heroes Earned Retirement Opportunities (HERO) Act, which allowed tax-free combat zone pay to be considered for earned income purposes of determining qualification for IRA contributions).

69. See Heroes Earned Retirement Opportunities Act, 120 Stat. 385 § 2 (codified as amended at I.R.C. § 219(f) (2012)).



Savings Plan (TSP) retirement accounts,<sup>70</sup> while avoiding the alternative minimum tax which may apply to higher income taxpayers.<sup>71</sup> While servicemembers not serving in combat zones were permitted to contribute \$18,500 to their TSP accounts in 2018, those serving in combat zones could contribute up to \$55,000.<sup>72</sup> Similarly, while non-combat zone servicemembers could contribute \$19,000 to their TSP accounts in 2019, those serving in combat zones could contribute up to \$56,000.<sup>73</sup> Furthermore, because servicemembers' combat pay is excluded from gross income, servicemembers are less likely to deal with the alternative minimum tax, even if their civilian spouses earned significant income, which could result in significant tax savings for the married couple.

Second, if servicemembers are deployed to a combat zone or are participating in a contingency operation, the members could take advantage of extension policies that provide the opportunity to file tax returns beyond the traditional deadlines.<sup>74</sup> These extension

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70. See I.R.C. § 415(c). TSP accounts are similar to civilian 401(k) tax advantaged retirement accounts and allow servicemembers the ability to make substantial contributions in order to plan for their retirement. It is important to note that servicemembers contributing to their Roth TSP accounts while deployed to combat zones would benefit from tax free contributions, growth, and withdrawals.

71. See generally I.R.C. § 55 (imposing a minimum amount of federal income taxes due).

72. See 5 U.S.C. §§ 8431–8840 (2012) (establishing the Thrift Savings Plan rules). See also THRIFT SAVINGS PLAN, <https://bit.ly/2mpfjmr> [<https://perma.cc/Z34K-R7ZR>] (last visited Sept. 3, 2019) (providing a wealth of information regarding the Thrift Savings Plan, including applicable forms and publications as well as historical rates of returns for each type of TSP fund). It is important to note that although the elective deferral limit under I.R.C. § 402(g) is \$18,500 in 2018 and \$19,000 in 2019, members can contribute up to \$55,000 in 2018 and \$56,000 in 2019 to their TSP under I.R.C. § 415(c) if they are in a combat zone. However, the maximum Roth contribution is only \$18,500 in 2018 and \$19,000 in 2019. Any excess contributions would be deposited into a traditional TSP account. See Treas. Reg. § 1.402(g)-1 (2016). Members over the age of 50 can also make catch-up contributions to both their IRA and TSP accounts. See I.R.C. § 414(v) (2012). The TSP catch-up contribution for employees over the age of 50 is \$6,000 for 2018 and 2019. See also Thrift Savings Plan, *Contribution Limits*, <https://bit.ly/1kaxaez> [<https://perma.cc/G5HD-KAQP>] (last visited Sept. 15, 2019); Thrift Savings Plan, *2019 TSP Contribution Limits*, <https://bit.ly/2nsF3Dr> [<https://perma.cc/YUV3-NTW6>] (last visited Sept. 15, 2019) (showing the TSP contribution limits for 2018 and 2019).

73. See Thrift Savings Plan, *Contribution Limits*, <https://bit.ly/1kaxaez> [<https://perma.cc/G5HD-KAQP>] (last visited Sept. 3, 2019). See also Thrift Savings Plan, *Calculator*, <https://bit.ly/21PMkMW> [<https://perma.cc/Q9ES-EK9A>] (last visited Sept. 3, 2019) (providing a calculator to determine how much a member could contribute to TSP).

74. See I.R.C. § 7508(a) (2012) (disregarding the time spent in a combat zone or while participating in a contingency operation, or time spent hospitalized as a result of injury received while serving in such an area or operation, plus the period of continuous qualified hospitalization attributable to such injury, and the next 180

policies are extremely important because they prevent interest and penalties that may otherwise accrue.<sup>75</sup> This benefit can even extend significantly past the member's departure from the combat zone. For example, if a servicemember is hospitalized due to injuries incurred in a combat zone, the member can qualify for a filing extension of 180 days with the opportunity for additional extensions for the time spent in both the combat zone and hospital during the tax filing season.<sup>76</sup>

Third, by being in a designated combat zone, a servicemember can take advantage of many non-tax related benefits that the member would not otherwise be eligible for had he stayed in the United States. For example, a servicemember stationed in a combat zone has the option of contributing up to \$10,000 to the Savings Deposit Program, which provides up to a ten percent guaranteed interest rate of return.<sup>77</sup> Thus, a colonel (O-6) could contribute \$10,000 at the beginning of his deployment and earn over \$1000 in interest after serving just a year in a combat zone.

Furthermore, members deployed to designated combat zones may be able to qualify for a family separation allowance of up to \$250 a month,<sup>78</sup> hardship duty pay not to exceed \$1500 a month,<sup>79</sup> hostile fire or imminent danger pay of \$225 a month,<sup>80</sup> and reim-

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days thereafter for purposes of assessing tax liability including interest and penalties).

75. *See id.* It is also important to note that interest can still accrue for income tax refund purposes. *See also generally, Interest for Individuals*, INTERNAL REVENUE SERV., U.S. DEP'T OF TREASURY, <https://bit.ly/2lJtVBq> [<https://perma.cc/P6SD-LGS3>] (last updated July 29, 2019) (explaining when the IRS charges and pays interest).

76. *See* I.R.C. § 7508(a) (2012).

77. *See* 10 U.S.C. § 1035 (2012).

78. *See* 37 U.S.C. § 427 (2012) (establishing the requirements for the family separation allowance (FSA) entitlement). *See generally* U.S. Dep't of Def., Def. Fin. and Acct. Serv., *Family Separation Allowance*, <https://bit.ly/2mjqqoW> [<https://perma.cc/S5RF-PY5W>] (last updated Mar. 31, 2011) (explaining that military members can receive FSA "at a rate of \$250 a month (pro-rated to \$8.33 per day for periods less than a month)" if they cannot live with their dependent family members).

79. *See* 37 U.S.C. § 305 (2012) (establishing the historic requirements for hardship duty pay (HDP)). *See Hardship Duty Pay*, U.S. DEP'T OF DEF. <https://bit.ly/2lR8Nte> [<https://perma.cc/L92B-CV6G>] (last visited Sept. 3, 2019) (explaining that members can receive varying amounts of HDP based on factors such as their location, mission, or tempo). *See also* U.S. DEP'T OF DEF., 7000.14-R, DoD FINANCIAL MANAGEMENT REGULATION, vol. 7A, ch. 17, ¶ 170101 (Dec. 2018).

80. *See* 37 U.S.C. § 310 (2012) (establishing the requirements for hostile fire and imminent danger pay (IDP), which allow members to qualify for such pay if they are subject to hostile fire or explosion of hostile mines, or are on duty in a foreign area in which the member is "subject to the threat of physical harm or imminent danger on the basis of civil insurrection, civil war, terrorism, or wartime

bursement for life insurance premiums of up to \$29 a month.<sup>81</sup> In addition to these financial benefits, other significant benefits attach. For example, if a member serves in a combat zone, the member can earn specific military combat badges and awards. These badges and awards can improve a military member's performance file and can improve the member's chances for promotion, which correspond to increases in pay and benefits.

Fourth, some benefits even extend beyond the servicemember's period of active duty. For example, if a servicemember injured in a combat zone separates from the military as a result of those injuries and receives Disability Severance Pay, that pay would not be subject to income taxes.<sup>82</sup> If the injury occurred in a combat zone after 2008 and the member later qualifies for benefits from the Department of Veterans Affairs, no amount of the Disability Severance Pay would be subject to recoupment.<sup>83</sup> Furthermore, by being in a combat zone, the member might be able to qualify for Combat Related Special Compensation, which provides tax-free compensation for servicemembers who suffer from combat-related disabilities.<sup>84</sup>

Similarly, if a member dies in a combat zone, her surviving spouse filing the couple's income tax returns would qualify for income tax forgiveness for the military income earned during the

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conditions." *Id.* § 310(a)(2)(D)). See also *id.* § 351 (2012) (providing new authority for hostile fire and imminent danger pay under subchapter II, Chapter 5 of Title 37, United States Code). See also U.S. Dep't of Def., *Military Compensation Hostile Fire/Imminent Danger Pay* (HFP/IDP), <https://bit.ly/2mynFwR> [<https://perma.cc/5924-8P4T>] (last visited Sept. 3, 2019) (explaining that a member may receive \$225 for hostile fire pay or imminent danger pay).

81. See 37 U.S.C. § 437 (2012) (requiring reimbursement of Servicemembers Group Life Insurance (SGLI) premiums for servicemembers who are deployed in support of a contingency operation in an area that has been designated a combat zone or is in direct support of an area that has been designated a combat zone; ensuring that such deployed servicemembers do not die without SGLI coverage). See also U.S. Dep't of Veterans Aff., *Life Insurance*, <https://bit.ly/2lR2aHc> [<https://perma.cc/9H5X-EB6H>] (last updated July 2, 2019) (providing detailed information regarding SGLI and the coverage it can provide, including the premium rates and the amounts of life insurance coverage available).

82. See I.R.C. § 104(b)(2)(c) (2012) (providing that gross income does not include amounts received as a pension, annuity, or similar allowance for combat-related injuries resulting from active service in the armed forces).

83. See 10 U.S.C. § 1212(d)(2) (2012) (requiring that the amount of Disability Severance Pay (DSP) received shall be recouped, meaning that it "shall be deducted from any compensation for the same disability to which the former member of the armed forces or his dependents become entitled under any law administered by the Department of Veterans Affairs" unless an exception applies, such as where members incurred the disability in the line of duty, in a combat zone, or during performance of their duties in combat-related operations).

84. See *id.* § 1413a.

open years beginning with the year when the servicemember first entered a combat zone.<sup>85</sup> Consider the tax benefits received by a married major who first entered a combat zone in 2017, then later returned to serve in the United States until she deployed to a different combat zone where she was killed three years later. When filing their joint income tax return, her surviving spouse, a homemaker caring for their two dependent children, would qualify for income tax forgiveness of approximately \$11,127 for the 2017, 2018, and 2019 calendar years—as if the servicemember served in a combat zone the entire time.<sup>86</sup>

## 2. *Little Relief for Those Who Fall Outside the Rigid Combat Zone Requirements*

While members who serve in combat zones can take advantage of all of the benefits outlined above, servicemembers who serve outside of rigidly-defined combat areas are denied access to these benefits and, consequently, receive little relief. In the most egregious situations, servicemembers who fall outside the rigid combat zone requirements may actually be engaged in de facto combat operations yet receive no tax-related benefits. While these at-risk servicemembers are excluded from receiving vital tax-related benefits, fellow servicemembers who are not actively in harm's way—such as those in Bahrain who live safely with their families in foreign civilian cities—continue to receive combat zone tax-related benefits.

Overseas servicemembers who are not in a designated combat zone are deprived of substantive tax relief and are entitled only to certain procedural relief, such as an automatic two-month extension to file their taxes<sup>87</sup> and up to a six month extension if they file a Form 4868.<sup>88</sup> Fortunately, in 2018, the IRS agreed to streamline the process “in order to facilitate the filing of mass extension requests” by military personnel.<sup>89</sup>

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85. See I.R.C. § 692(a)(1)–(2) (2012). See also *id.* § 7508.

86. See app. 1, *infra*, at pp. 424–29 (showing an estimated tax benefit of \$11,127 (\$3103 in 2019 + \$2894 in 2018 + \$5130 in 2017)).

87. See Treas. Reg. § 1.6081-5(a)(6) (2018). See also *id.* § 1.6081-4(a).

88. See INTERNAL REVENUE SERV., DEP'T OF TREASURY, FORM 4868 APPLICATION FOR AUTOMATIC EXTENSION OF TIME TO FILE U.S. INDIVIDUAL INCOME TAX RETURN (2017).

89. MAJ Matthew Wright, Information Paper: Streamlined Processing for Overseas Income Tax Filing Extensions 1, 1 (Nov. 5, 2018) (on file with author) (allowing military units deployed to foreign areas that have not been designated as combat zones to request a mass filing extension for members who affirmatively opt-in; the request for an extension until December 15th would need to include a unit roster of those members who decide to opt-in, as well as a certification from the local JAG Office).

Unfortunately, these extensions allow only for additional time to file. The non-combat extensions do not function as an extension to pay taxes, interest,<sup>90</sup> or penalties that might otherwise be due.<sup>91</sup> Thus, if members serving outside designated combat zones do not timely pay taxes, they may be subject to interest and penalties imposed from the date their taxes were due.<sup>92</sup> If the standard procedural time extension is insufficient, servicemembers can ask the IRS for an additional extension to file their tax returns.<sup>93</sup> However, even if these requests are granted, the servicemember would receive only an additional two months to file. These extension periods often do not allow enough time for servicemembers to gather their records and submit their returns, especially if they are in remote locations without access to mail.<sup>94</sup>

Just as servicemembers outside combat zones are ineligible for sufficient extensions to file and pay their taxes, these same servicemembers are denied the ability to exclude any portion of their taxable military pay from federal income taxes. In addition, servicemembers who received Disability Severance Pay for disabilities incurred outside combat zones, or injuries not considered combat-related, are subject to recoupment of benefits if the members also

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90. See I.R.C. § 6621(a)(2) (2012) (explaining the rate of interest due). See *id.* § 6601(b)(1) (explaining that the interest rate is subject to change). See Treas. Reg. § 301.6601-1(a) (2018).

91. See Treas. Reg. § 1.6081-4(b) (2018).

92. See *id.* § 1.6072-1(a). Federal income tax returns are generally due on April 15th, but the due-date may be delayed if it falls on a weekend or holiday, such as Emancipation Day or Patriot's Day. See *Topic 301 When, How, and Where to File*, INTERNAL REVENUE SERV., DEP'T OF TREASURY, <https://bit.ly/2nrtnkn> [<https://perma.cc/QC6K-KUBB>] (last updated Aug. 23, 2019).

93. See INTERNAL REVENUE SERV., DEP'T OF TREASURY, PUB. 54 TAX GUIDE FOR U.S. CITIZENS AND RESIDENT ALIENS ABROAD 1, 4 (2015) (explaining the need to send the IRS a letter explaining that they are military personnel stationed outside the country and that they need an extension of time to file; if a calendar taxpayer has already received the automatic six-month extension, they need to send a letter to the Department of the Treasury, Internal Revenue Service Center, Austin TX 73301-0045 by October 15th).

94. See MAJ Wright, *supra* note 89, at 1 (explaining the tax complications involved with deploying to foreign areas that have not been designated as combat zones). In these types of situations, before deploying to remote foreign areas, just as servicemembers often put their mortgage, car, utility, and credit card bills on automatic payment, deploying servicemembers may also make estimated tax payments to avoid penalties and interest that might otherwise apply if they later fail to submit their tax returns on time; See *generally* INTERNAL REVENUE SERV., DEP'T OF TREASURY, EFTPS: THE ELECTRONIC FEDERAL TAX PAYMENT SYSTEM, <https://www.eftps.gov/eftps/> [<https://perma.cc/C3JJ-A5QE>] (last updated July 10, 2019) (informing taxpayers of electronic methods to make estimated tax payments).

received disability benefits from the Department of Veteran's Affairs.<sup>95</sup>

## II. THE SEPARATION OF POWERS

The U.S. government currently operates in a political environment where no branch of government feels comfortable taking ownership of the thorny issues surrounding the lack of meaningful tax-relief available to servicemembers deployed to areas outside of combat zones, many of whom are very much in harm's way. For example, the judicial branch has resisted involvement in foreign policy matters, including determinations of when the executive branch can deploy military forces to foreign areas of armed conflict. Viewing combat issues as non-justiciable political questions, the judicial branch has placed the burden of resolving these combat-related issues on the executive and legislative branches.<sup>96</sup> Fortunately, the issues surrounding combat zone designation and associated servicemember benefits could be resolved in at least four ways: (1) by timely Presidential action through Executive Orders establishing combat zones; (2) by Congressional action via declarations of war; (3) by amendments to the Internal Revenue Code; and (4) by establishment of QHDAs.

Unfortunately, rather than addressing the current issues surrounding servicemember tax relief, the government continues to deploy more servicemembers to foreign areas of armed conflict without first designating the areas as combat zones. Some have ar-

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95. See 10 U.S.C. § 1212(d)(1) (2012).

96. See generally CHEMERINSKY, *supra* note 11, at 207–09, 275–78 (providing background on the war powers and how the courts have stayed out of the fray on the grounds that political questions are at issue). Professor Chemerinsky states:

In discussing congressional authority in the area of the war powers, there are two distinct questions. First, what constitutes a declaration of war . . . ? Second, when may the president use American troops in hostilities without congressional approval . . . ? Neither of these questions ever has been clearly answered by the Supreme Court. In fact, given the Court's view that such foreign policy disputes constitute a political question, answers are unlikely to come from the judiciary.

*Id.* at 208. But see, e.g., *The Brig Amy Warwick*, 67 U.S. 635, 665 (1862) (holding in the *Prize Cases* that the President had a right to institute a blockade of ports in possession of the states in rebellion, and that as the Commander-in-chief, the President, when faced with armed hostile resistance, had the authority to characterize the resistance as belligerents and to determine what degree of force the crisis demanded). In his concurring opinion in *Campbell v. Clinton*, Judge Silberman summarized “the *Prize Cases* to stand for the proposition that the President had independent authority to repel aggressive acts by third parties even without specific congressional authorization, and [that] courts may not review the level of force selected.” *Campbell v. Clinton*, 203 F.3d 19, 27 (D.C. Cir. 2000) (Silberman, J., concurring).

gued that Congress has failed to act consistently and decisively over time to defend its constitutional authority and, consequently, that this “congressional inertia, indifference, or [ac]quiescence”<sup>97</sup> has created “a zone of twilight” where the President and Congress have concurrent authority to engage in combat. Emphasizing this dynamic, Justice Jackson in *Youngstown Sheet & Tube Co. v. Sawyer* famously stated:

When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum for it includes all that he possesses in his own right plus all that Congress can delegate. . . . [However, when] the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter. . . . Presidential claim to a power at once so conclusive and preclusive must be scrutinized with caution, for what is at stake is the equilibrium established by our constitutional system.<sup>98</sup>

As a result of these challenges, and perhaps Congress’s reluctance to take on the President, the President has consistently and unilaterally deployed military members into harm’s way while rarely issuing Executive Orders designating the areas as official combat zones.

#### A. *The Power to Tax*

Congressional reluctance to take on the President should be contrasted with how Congress has administered its Constitutional power to “lay and collect [t]axes” under Article I, Section 8, of the United States Constitution.<sup>99</sup> Congress has consistently and decisively acted to defend its authority by taking steps such as clearly establishing that all income is taxable<sup>100</sup> unless specifically excluded in the Internal Revenue Code.<sup>101</sup> In general, section 112 of the Internal Revenue Code excludes from gross income military compensation earned by members serving in a combat zone.<sup>102</sup> Similarly, section 134 of the Internal Revenue Code excludes qualified mili-

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97. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring).

98. *Id.* at 635.

99. U.S. CONST., art. I, § 8, cl. 1.

100. See generally JAMES EDWARD MAULE, BUREAU OF NATIONAL AFFAIRS, INC., U.S. INCOME PORTFOLIOS 501-4TH, GROSS INCOME: OVERVIEW AND CONCEPTUAL ASPECTS (2016) (discussing the nature and significance of gross income).

101. See I.R.C. § 61(a) (2012) (defining the numerous components of gross income).

102. See generally *id.* § 112 (excluding certain combat pay from gross income).

tary benefits, such as housing allowances, from a servicemember's gross income.<sup>103</sup>

Not surprisingly, the courts have interpreted the power to tax very broadly.<sup>104</sup> In 2012, the Supreme Court held that a shared responsibility payment on individuals who failed to maintain minimum essential coverage required by the Affordable Care Act was a tax and thus a proper exercise of power under the United States Constitution.<sup>105</sup> Despite this broad and regularly-exercised power, Congress has not acted decisively to amend the Internal Revenue Code to better protect servicemembers who are deployed in harm's way.

## B. *The War Powers*

### 1. *Congress*

The Constitution grants Congress the ability to declare war. Although Congress has acted decisively to defend its power to tax, Congress has not acted decisively to defend its war powers. Some have even argued that “Congress really doesn’t want to act”<sup>106</sup> on controversial actions such as sending servicemembers into harm's way, or at least does not want to act until it can see whether the war is “going to be a disaster”<sup>107</sup>—”to do nothing and then take credit for what goes well and criticize the president for what goes poorly.”<sup>108</sup> Few can deny that politics embody every part of this issue.

The drafters of the Constitution may not have fully anticipated the extent of the political forces that would eventually arise when they wrote Article I, Section 8, of the United States Constitution empowering Congress with the ability to “declare war[,] . . . raise

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103. *See id.* § 134.

104. *See* BORIS I. BITTKER ET AL., FEDERAL INCOME TAXATION OF INDIVIDUALS 1, 1–2 (3d ed. 2002) (providing background on Congress's power to tax).

105. Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 570 (2012) (upholding the Patient Protection and Affordable Care Act of 2010).

106. John Hudak, *Presidential Executive Order and Executive Power*, U.S. DEPT. OF STATE (Feb. 12, 2015, 2:00 PM), <https://bit.ly/2m1UFgk> [<https://perma.cc/ZQX3-XF53>] (discussing presidential executive orders and executive power in the form of a question-and-answer with Mr. Hudack and a moderator, with telephonic participation by journalists and other callers). *See generally* Emma Newburger, *Trump Defends Syria Withdrawal Amid Reports of Atrocities and ISIS Supporters Escaping*, CNBC (Oct. 13, 2019, 11:53 AM) <https://cnb.cx/38nvkAk> [<https://perma.cc/26UY-C8T5>] (last visited Oct. 15, 2019) (quoting President Trump's tweet that, “Those that mistakenly got us into the Middle East Wars are still pushing to fight” and “They have no idea what a bad decision they have made. Why are they not asking for a Declaration of War?”)

107. Hudak, *supra* note 106.

108. *Id.*



and support Armies . . . [and] provide and maintain a Navy.”<sup>109</sup> Despite this clear grant of power, Congress has not decisively declared war since 1942, even though U.S. military forces have been repeatedly placed in harm’s way in numerous overseas armed conflicts.<sup>110</sup>

Rather than acting consistently and decisively in defense of its constitutional authority, Congress has had difficulties speaking and acting with one voice. On one hand, Congress has passed legislation attempting to limit the executive powers of the President as the commander-in-chief. In 1973, Congress enacted The War Powers Resolution, which attempted to limit the introduction of

United States Armed Forces into hostilities, or into situations where imminent involvement in hostilities is clearly indicated by the circumstances . . . [and] only pursuant to (1) a declaration of war, (2) specific statutory authorization, or (3) a national emergency<sup>111</sup> created by attack upon the United States, its territories or possessions, or its armed forces.<sup>112</sup>

In addition, Congress attempted to require the President, absent a 30- to 60-day extension, to remove forces from hostilities after 60 days, or an earlier date upon a joint resolution of Congress.<sup>113</sup>

Although, the constitutionality of the War Powers Resolution continues to be heavily debated,<sup>114</sup> Congress has taken more recent

109. U.S. CONST., art. I, § 8, cls. 11, 12, 13.

110. See UNITED STATES SENATE, OFFICIAL DECLARATIONS OF WAR BY CONGRESS, <https://bit.ly/2NMxphf> [<https://perma.cc/8DE7-JPHE>] (listing the eleven times in U.S. history where Congress declared war including the most recent declarations of war against Bulgaria, Hungary, and Rumania in 1942 during World War II). See also Captain Robert E. Murdough, “*I Won’t Participate in an Illegal War*”: *Military Objectors, the Nuremberg Defense, and the Obligation to Refuse Illegal Orders*, THE ARMY LAWYER, July 2010, at 4, 5.

111. See Declaration of National Emergency by Reason of Certain Terrorist Attacks, 66 Fed. Reg. 48199 (Sept. 14, 2001) (declaring a national emergency in 2001 due to the terrorist attacks on the World Trade Center and the Pentagon). To prevent the termination of this national emergency, subsequent Presidents have published the continuation of the national emergency in the Federal Register and notified Congress. See, e.g., Continuation of the National Emergency With Respect to Certain Terrorist Attacks, 81 Fed. Reg. 60579 (Aug. 30, 2016). See also 50 U.S.C. § 1622(d) (2012) (establishing the automatic termination of national emergencies unless the President publishes a continuation of the national emergency in the Federal Register and notifies Congress).

112. 50 U.S.C. § 1541(c) (2012).

113. See *id.* § 1544.

114. See *Campbell v. Clinton*, 203 F.3d 19, 24 (D.C. Cir. 2000) (dismissing the case for lack of standing). In concurrence, Judge Silberman stated [N]o one is able to bring this challenge because the two claims are not justiciable. . . . [T]he War Powers Clause claim implicates the political question doctrine. . . . [And] the statutory threshold standard is not pre-

steps to limit the power of the executive branch. In 1987, Congress attempted to limit the executive branch by preventing its agencies—including the Department of Defense—from providing funds to support the Nicaraguan democratic resistance in the absence of specific authorization by Congress.<sup>115</sup>

More recently, some members of Congress concerned about foreign relations with countries such as Iran and Syria have become very vocal against allegedly unilateral Presidential military action. These Congressional members argue that if the President wants to take military action, he has to first get permission from Congress.<sup>116</sup> Congressional criticism has included calling the strikes in Syria in 2018 “illegal” and highlighting the fact that “congressional opposition to American military engagements that still rely on authorizations approved after the 2001 terrorist attacks could grow without [first] getting Capitol Hill onboard . . . .”<sup>117</sup>

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cise enough and too obviously calls for a political judgment to be one suitable for judicial determinations.

*Id.* at 24–25 (Silberman, J., concurring). *See also, e.g.*, The President’s Constitutional Authority to Conduct Military Operations Against Terrorists and Nations Supporting Them, 25 Op. O.L.C. 188, 210 (2001) (providing a memorandum opinion for the Deputy Counsel, Office of Legal Counsel, to the President, informing the President of his broad powers to take military action under the Constitution); Major Geoffrey Corn, *Clinton, Kosovo, and the Final Destruction of the War Powers Resolution*, 42 WM. & MARY L. REV. 1149, 1190 (Apr. 2001) (arguing that the War Powers Resolution is an unconstitutional restriction on Presidential power, as well as, “an unconstitutional attempt to restrict future Congresses from supporting executive initiatives with something less than express authorization”). In addition, Professor Chemerinsky notes that, because

[T]he judiciary is likely to deem challenges to the War Powers Resolution to be a nonjusticiable political question, a Supreme Court decision on its constitutionality is unlikely . . . [and thus] its significance will depend on the willingness of Congress to enforce it, such as by cutting off funds for military efforts that it has not authorized.

CHEMERINSKY, *supra* note 11, at 209.

115. *See* Restriction on Support for Military or Paramilitary Operations in Nicaragua, Pub. L. No. 101-178, 101 Stat. 1011 (1987).

116. Tara Golshan, *House Democrats Vote to Repeal 9/11-Era Law Used to Authorize Perpetual War*, VOX, (Jun. 19, 2019, 6:30 PM), <https://bit.ly/3atwH2s> [<https://perma.cc/896Y-FBZ6>]. *See also, e.g.*, Deirdre Shesgreen, *How Real is Iran Threat? Democrats Fear Trump Administration Using Intel to Justify Conflict*, USA TODAY, (May 21, 2019, 5:46 PM), <https://bit.ly/2kpUriy> [<https://perma.cc/QW26-3LWN>].

117. Helene Cooper, *Mattis Wanted Congressional Approval Before Striking Syria. He was Overruled.*, N.Y. TIMES (Apr. 17, 2018), <https://nyti.ms/2J4HG3z> [<https://perma.cc/L5J7-FQXP>] (quoting Democrat of California, Representative Barbara Lee’s criticism of President Trump’s decision to launch airstrikes against Syria in a rapid and dramatic fashion without first getting congressional approval). *See also* Helene Cooper, *U.S., Britain, and France Strike Syria Over Suspected Chemical Weapons Attack*, N.Y. TIMES (July 31, 2018), <https://nyti.ms/2HkZOt4> [<https://perma.cc/R9QS-WWEH>] (quoting Democrat of Virginia, Senator Tim

In fact, in 2019, the House of Representatives voted to repeal the 2001 Authorization for Use of Military Force (AUMF). Specifically, section 1099W of the National Defense Authorization Act (NDAA) for fiscal year 2020 states:

The 2001 AUMF is one of the only modern authorizations for the use of force in the history of the United States that included no limitation in time, geography, operations, or a named enemy. . . . [It] has been cited 41 times as the legal basis for the use of force in 19 countries. . . . [and] has served as a blank check for any President to wage war at any time and at any place . . . . new authorizations for the use of military force . . . should include a sunset clause and timeframe within which Congress should revisit the authority provided . . . [and there should be a] clear and specific expression of mission objectives, targets, and geographic scope . . . [as well as] reporting requirements to increase transparency and ensure proper Congressional oversight.<sup>118</sup>

Congressman Barbara Lee introduced this action to repeal the AUMF on multiple occasions. Lee believes that Congress must “fulfill its oversight role of the president’s war-making powers.”<sup>119</sup> She stated that Congress “failed its responsibility to understand the [2001 AUMF’s] dimensions”<sup>120</sup> when Congress originally passed the authorization.

On the other hand, Congress has not prevented the President from unilaterally deploying forces to areas of armed conflict. Not only has Congress granted authorizations for the use of military

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Kaine who said, “President Trump’s decision to launch airstrikes [in retaliation for suspected chemical weapon attacks] against the Syrian government without Congress’s approval is illegal and – absent a broader strategy – it’s reckless.”). See also Jeremy Herb, *How Trump’s Syria Airstrike is Different from – and similar to – Obama’s*, CNN, (Apr. 7, 2017, 11:56 AM), <https://cnn.it/2HzNvGK> [<https://perma.cc/7X7D-DN5F>] (explaining that President Obama encountered congressional opposition to striking Syria when Syria crossed his “red line” of using chemical weapons, but that a year later, President Obama launched airstrikes in Syria against ISIS).

118. National Defense Authorization Act for Fiscal Year 2020, H.R. 2500, 116th Cong. § 1099W (2019).

119. Christopher Woody, *Congress May Repeal the Post-9/11 Act the US Military Used to Justify the Fight Against ISIS*, BUS. INSIDER, (Jun. 29, 2017, 1:16PM), <https://bit.ly/2ksf0Li> [<https://perma.cc/SRY6-FSLN>].

120. *Id.* (explaining that the 2001 AUMF had “empowered the President to target non-state actors, even to the individual level, as well as states, and . . . [more significantly] did not specify which states and non-state actors were included under the authorization” thus arguably giving the President broad latitude to engage in warfare with new entities such as “ISIS, which did not [even] exist at the time of the September 11 attacks”).

force in 2001<sup>121</sup> and again in 2002,<sup>122</sup> Congress has also continued to provide funding for conflict after conflict, even where authorizations for the use of military force have not been granted.<sup>123</sup> Unfortunately, by providing funding and not preventing the President from unilaterally deploying forces to foreign areas of armed conflict, Congress has failed to properly protect servicemembers who might remain ineligible for combat zone tax relief.

Furthermore, Congress has taken decisive steps to establish QHDAs<sup>124</sup> on only three occasions, leaving many servicemembers deployed in harm's way at risk of not receiving appropriate tax benefits. For example, Congress took action in 1995 and 1999 to ensure that servicemembers receiving hostile fire or imminent danger pay while they served in countries such as Bosnia and The Federal Republic of Yugoslavia also received combat zone tax exclusion benefits, just like servicemembers serving in designated combat zones.<sup>125</sup> More recently, in the Tax Cuts and Jobs Act of 2017, Congress designated the Sinai Peninsula of Egypt as a QHDA from June 9, 2015 to January 1, 2026.<sup>126</sup> Because Congress has taken only these limited actions, servicemembers in other areas that have not yet been

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121. Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 § 2 (2001). In the 2001 AUMF, Congress authorized the President:

[T]o use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organization or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.

*Id.* § 2. The AUMF declared that it was “intended to constitute specific statutory authorization with the meaning of section 5(b) of the War Powers Resolution.” *Id.*

122. Authorization for Use of Military Force Against Iraq Resolution of 2002, Pub. L. No. 107-243, 116 Stat. 1498 (2002). *See also* Murdough, *supra* note 110, at 6 (2010) (listing numerous previous authorizations for use of military force).

123. *See* Hudak, *supra* note 106 (alleging that President Obama did not get permission from Congress to use military forces against the Islamic State of Iraq and the Levant (ISIL) but rather used President Bush's previous authorization).

124. *See generally* Major Richard W. Rousseau, *Update: Tax Benefits for Military Personnel in a Combat Zone or Qualified Hazardous Duty Area*, ARMY LAWYER, Dec. 1999, at 15 (describing QHDAs and the taxation of military pay).

125. Act of Mar. 20, 1996, Pub. L. No. 104-117, § 1, 110 Stat. 827, 827–28 (1996) (creating a QHDA for Bosnia, Herzegovina, Croatia, and Macedonia effective November 21, 1995); Act of Apr. 19, 1999, Pub. L. No. 106-21, § 1, 113 Stat. 34, 34–35 (1999) (creating a QHDA for The Federal Republic of Yugoslavia, Albania, the Adriatic Sea, and the Ionian Sea north of the 39th parallel effective March 24, 1999).

126. Act of Dec. 22, 2017, Pub. L. No. 115-97, § 11026, 131 Stat. 2054, 2076–77 (2017) (creating a QHDA for The Sinai Peninsula of Egypt).

designated have often found themselves in harm's way without the benefits that they deserve.<sup>127</sup>

## 2. *The President*

While Congress has occasionally tried to limit the President's power as the commander-in-chief to deploy military members into harm's way, the executive branch has consistently taken the position that such limitations are unconstitutional. The Department of Justice has consistently opined that the President has unilateral authority to deploy armed forces into hostilities.<sup>128</sup> Providing an opinion on the deployment of United States Armed Forces into Haiti, the Department of Justice stated:

[T]he structure of the War Powers Resolution ("WPR") recognizes and presupposes the existence of unilateral presidential authority to deploy armed forces "into hostilities or into situations where imminent involvement in hostilities is clearly indicated by the circumstances." 50 U.S.C. § 1543(a)(1). The WPR requires that, in the absence of a declaration of war, the President must report to Congress within forty-eight hours of introducing armed forces into such circumstances and must terminate the use of United States armed forces within sixty days (or ninety days, if military necessity requires additional time to effect a withdrawal) unless Congress permits otherwise. *Id.* § 1544(b). This structure makes sense only if the President may introduce troops into hostilities or potential hostilities without prior authorization by the Congress: the WPR regulates such action by the President and seeks to set limits to it.<sup>129</sup>

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127. *See, e.g.*, 142 CONG. REC. H1670 (daily ed. Mar. 5, 1996), (statement of Rep. Bunning) (emphasizing the tragedy of servicemembers killed during Operation Restore Hope in Somalia). *See also* Gibbons-Neff & Cooper, *supra* note 44 (showing that casualties continue to be suffered in Somalia although under different operations).

128. *See, e.g.*, Proposed Deployment of United States Armed Forces into Bosnia, 19 Op. O.L.C. 327, 327 (1995) (opining that the President had unilateral authority to deploy United States Armed Forces into Bosnia, where they served as part of an international peace-keeping force). *See also* U.S. Dep't. of State, U.S. Relations with Bosnia and Herzegovina, (2018), <https://bit.ly/30WmGVs> [<https://perma.cc/X5DX-29S4>] (explaining the use of military forces to implement the 1995 Dayton Peace Agreement which ended the war in Bosnia and Herzegovina).

129. *See, e.g.*, Deployment of United States Armed Forces into Haiti, 18 Op. O.L.C. 173, 173 (1994) (opining that the President had unilateral authority to deploy U.S. Armed Forces into Haiti, where servicemembers helped restore democracy). *See also* U.S. Dep't. of State, Office of the Historian, Intervention in Haiti, 1994-1995, <https://bit.ly/2op2Ch1> [<https://perma.cc/JAN7-ZEA2>] (last visited Sept. 3, 2019) (explaining the events surrounding the U.S. intervention in Haiti including the military coup led by Lieutenant General Raoul Cedras who initially overthrew the government of Jean-Bertrand Aristide).

By taking steps such as these, the executive branch has continued to defend its ability to unilaterally deploy forces and to challenge Congress's ability to take certain actions to remove forces. Furthermore, some argue that the War Powers Resolution's requirement to remove members from foreign areas of armed conflict if Congress issues a joint resolution is an impermissible legislative veto, since a joint resolution may not become law and thus would have no controlling authority.<sup>130</sup>

### III. REDEFINING COMBAT: CONGRESSIONAL AND ADMINISTRATIVE REFORM

Because the U.S. Constitution reserves the power to declare war for Congress, an outside observer might expect that the most simple and direct solution would be for Congress to declare war in a timely and accurate manner. However, in the complicated world of partisan politics and in light of numerous destabilizing forces across the globe, consensus is difficult to achieve and time is often of the essence. Calling Congress into session on short notice to make a bipartisan decision to send the sons and daughters of our nation into harm's way may simply be a bridge too far, thus preventing servicemembers from obtaining appropriate tax relief.

#### A. *Congressional Reform*

This reality arguably calls for a less confrontational and more politically palatable solution. Perhaps when Congress passes the next National Defense Authorization Act amending the Servicemembers Civil Relief Act, Congress should also amend section 112 of the Internal Revenue Code to cover all servicemembers deployed to foreign areas of armed conflict. Specifically, Congress should tie combat zone tax exclusion benefits to eligibility for hostile fire or imminent danger pay; generally, only members deployed in harm's way would qualify for such pay. For example, Congress should amend section 112(a)<sup>131</sup> of the Internal Revenue Code to provide:

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130. See, e.g., *INS v. Chadha*, 462 U.S. 919, 956–59 (1983) (holding that the House of Representatives could not act alone and that to “accomplish what has been attempted by one House of Congress in this case requires action in conformity with the express procedures of the Constitution’s prescription for legislative action: passage by a majority of both Houses and presentment to the President . . . [and as a result] the Congressional veto provision in § 244(c)(2) is . . . unconstitutional.”)

131. I.R.C. § 112(a) (2012). The section states:

Gross income does not include compensation received for active service as a member below the grade of commissioned officer in the Armed

Gross income does not include compensation received for active service as a member below the grade of commissioned officer in the Armed Forces of the United States for any month during any part of which such member *was eligible to receive hostile fire or imminent danger pay* AND (1) served in a combat zone, *qualified hazardous duty area, area designated in direct support of a combat zone, or contingency operation outside the United States* or (2) was hospitalized as a result of wounds, disease, or injury incurred while serving in a location specified by paragraph 1.

Similar changes could be made to section 112(b) of the Internal Revenue Code to provide tax relief for commissioned officers.<sup>132</sup>

In addition, section 112(c) of the Internal Revenue Code<sup>133</sup> should be amended to add definitions of QHDAs and areas designated in direct support of combat zones. Such definitions would codify protections and eliminate the need to rely on the Departments of the Treasury and Defense to implement vague Treasury Regulations and Revenue Rulings, which fail to adequately define

Forces of the United States for any month during any part of which such member-(1) served in a combat zone, or (2) was hospitalized as a result of wounds, disease, or injury incurred while serving in a combat zone. . . .

*Id.* See also 10 U.S.C. § 101(a)(13)(A)–(B) (2012) (defining contingency operation as any military operation that “(A) is designated by the Secretary of Defense as an operation in which members of the armed forces are or may become involved in military actions, operations, or hostilities against an enemy of the United States or against an opposing military force; or (B) results in the call or order to, or retention on, active duty of members of the uniformed services under section 688, 12301(a), 12302, 12304, 12304a, 12305, or 12406 of this title, chapter 13 of this title, section 712 of title 14, or any other provision of law during a war or during a national emergency declared by the President or Congress.”)

132. I.R.C. § 112(b) (2012). The section states:

Gross income does not include so much of the compensation as does not exceed the maximum enlisted amount received for active service as a commissioned officer in the Armed Forces of the United States for any month during any part of which such officer-(1) served in a combat zone, or (2) was hospitalized as a result of wounds, disease, or injury incurred while serving in a combat zone . . .

*Id.*

133. I.R.C. § 112(c) (2012). The section states:

Definitions[:] For purposes of this section-(1) The term “commissioned officer” does not include a commissioned warrant officer . . . (5) The term “maximum enlisted amount” means, for any month, the sum of-(A) the highest rate of basic pay payable for such month to any enlisted member of the Armed Forces of the United States at the highest pay grade applicable to enlisted members, and (b) in the case of an officer entitled to special pay under section 310, or paragraph (1) or (3) of section 351(a), of title 37, United States Code, for such month, the amount of such special pay payable to such officer for such month.

*Id.* Unfortunately, the definition section does not include definitions for QHDAs or areas designated in direct support of combat zones.

these terms.<sup>134</sup> By making these amendments, Congress can help ensure that servicemembers in harm's way are appropriately recognized, while simultaneously ensuring that those who are no longer in harm's way do not receive excess tax benefits—such members would be ineligible for hostile fire pay and imminent danger pay.

Considering these amendments, some may argue that the budgetary cost of such changes may be prohibitive. To evaluate the cost, it would be necessary to estimate the cost per servicemember. It would also require an estimation of the number of servicemembers who were eligible to receive hostile fire or imminent danger pay because they deployed to foreign areas of armed conflict which had not already been designated as combat zones, QHDAs, or areas in direct support of combat zones.<sup>135</sup>

It is important to remember that servicemembers not eligible to receive hostile fire or imminent danger pay would not be included in the cost estimates, such as servicemembers stationed in Japan, Germany, South Korea, Italy, the United Kingdom, Spain, Australia, and Belgium. Similarly, servicemembers deployed to combat zones who are eligible to receive hostile fire or imminent danger pay, such as those in Afghanistan and Iraq, would also not be included in the cost estimates since they already receive tax relief. Instead, the proposed amendment would cover servicemembers like those deployed to Niger, which is not a combat zone, QHDA, or area in direct support of a combat zone.<sup>136</sup> Under the proposed amendment, once servicemembers deployed to Niger became eligible to receive hostile fire or imminent danger pay, they would then qualify for CZTE benefits even though they previously did not qualify for such tax relief.<sup>137</sup>

Although estimating the number of servicemembers affected by these changes would be very difficult because the estimate depends on threat conditions around the world, which constantly

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134. See, e.g., Treas. Reg. § 1.112-1 (2018); Rev. Rul. 70-621, 1970-2 C.B. 17; 2019 FMR, *supra* note 38, ¶ 440203B.5.b (stating that military service “is considered to be in direct support if it has the effect of maintaining, upholding, or providing assistance for those involved in military operations” in the combat zone or QHDA).

135. See Tara Coop, *DoD Approves Danger Pay for Niger, Mali, Cameroon*, MILITARY TIMES, (Mar. 8, 2018), <https://bit.ly/37fTFrQ> [<https://perma.cc/N7KT-AT6T>] (showing that servicemembers deployed to Niger did not receive hostile fire or imminent danger pay until March 2018 when pay was allowed to be retroactive back to June 7, 2017).

136. See generally 2019 FMR, *supra* note 38 (listing the combat zones, QHDAs, and areas in direct support of combat zones as of April 2019).

137. See Coop, *supra* note 135.



change,<sup>138</sup> it is possible to estimate the approximate cost per servicemember. To address the cost per servicemember, it may be helpful to reference the Bluebook for The Tax Cuts and Jobs Act of 2017. The Bluebook shows the estimated budget cost for making the Sinai a QHDA and providing tax relief to servicemembers deployed there, offering a point of reference for the per-servicemember cost of the proposed amendment.<sup>139</sup> The cost to provide such tax relief to those deployed to the Sinai was approximately \$1 million per year.<sup>140</sup> Since public reports show that approximately 700 troops were stationed in the Sinai at the time of the legislation, the cost computes to approximately \$1429 per deployed servicemember.<sup>141</sup> Another way to estimate the cost per servicemember would include using commercial income tax software to calculate how much a servicemember would save in federal income taxes based on a servicemember's rank and marital status, as well as the number of their dependents. For example, a single private (E-2) deployed for all of 2019 would save approxi-

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138. See Kristen Bialik, *U.S. Active-Duty Military Presence Overseas is at its Smallest in Decades*, PEW RESEARCH CENTER, (Aug. 22, 2017), <https://pewrsr.ch/2ncSPKa> [<https://perma.cc/EEF6-NCET>] (showing the thousands of U.S. troops deployed around the world which is helpful to put into context the relatively small number of servicemembers who would be affected by the article's proposal since they would have to be eligible to receive hostile fire or imminent danger pay and not be deployed to a combat zone, QHDA, or area in direct support of a combat zone). See also DoD Personnel, Workforce Reports & Publications, DEF. MANPOWER DATA CTR., U.S. DEP'T OF DEF., <https://bit.ly/2raLZ7p> [<https://perma.cc/ZG7D-EH8L>] (last visited Sept. 10, 2019) (showing the changing deployed personnel strength over time, as well as, the limitations of publicly available data as DMDC's table no longer includes the number of personnel on temporary duty or those deployed in support of contingency operations). See also Tara Coop, *Pentagon Strips Iraq, Afghanistan, Syria Troop Number From Web*, MILITARY TIMES, (Apr. 9, 2018), <https://bit.ly/37dh9he> [<https://perma.cc/KVA3-W3HZ>] (showing the limitation of publicly available data with regards to the number of servicemembers deployed). See also HEIDI M. PETERS & SOFIA PLAGAKIS, R44116, DEPARTMENT OF DEFENSE CONTRACTOR AND TROOP LEVELS IN AFGHANISTAN AND IRAQ: 2007-2018, Cong. Research Serv. 1, 5-16 (2019) (showing changing personnel strength over time).

139. See JOINT COMM. ON TAX'N, GENERAL EXPLANATION OF PUBLIC LAW 115-97 435, 435 (providing cost estimates of making the Sinai a QHDA).

140. *Id.*

141. Leo Shane III, *Troops Serving on Sinai Peninsula to see Financial Windfall Under New Tax Overhaul*, MILITARY TIMES, <https://bit.ly/311cNpC> [<https://perma.cc/BFF2-WLXU>]. But see DoD Personnel, Workforce Reports & Publications, DEF. MANPOWER DATA CTR., U.S. DEP'T OF DEF., *supra* note 138 (Go to "Military and Civilian Personnel by Service/Agency by State/Country (follow "September 2017" hyperlink) (reporting a total of 454 personnel in Egypt including 14 civilians as of Sept. 30, 2017, which was reported before DMDC stopped including personnel on temporary duty or those deployed in support of contingency operations).

mately \$1057, while a married master sergeant (E-8) with two dependent children who deployed for all of 2019 would save approximately \$217.<sup>142</sup>

Furthermore, it is important to note that although the proposed amendment provides tax relief to servicemembers deployed to foreign areas of armed conflict, it also takes away benefits to servicemembers not deployed to foreign areas of armed conflict, but who still receive such tax relief as if they were in harm's way. Public reports show that approximately 7000 servicemembers—approximately ten times the numbers of servicemembers deployed to the Sinai—have been deployed to Bahrain.<sup>143</sup> By taking away tax relief provided to servicemembers deployed to relatively safe areas such as Bahrain, the budgetary savings could be significant.

### *B. Administrative Reform and Action*

Fortunately, even if Congress and the President choose not to act decisively to address this issue, other solutions exist. Recognizing that the political process has become exceedingly partisan and that basic tasks—such as passing a budget in a timely fashion to prevent a government shutdown—have appeared extremely difficult in recent times, government agencies should take appropriate actions within their span of control to address this current dilemma. Specifically, the Department of the Treasury should modify the Treasury Regulations to provide more flexibility to help ensure that deserving servicemembers qualify to receive combat zone tax exclusion benefits. In addition, the Department of Defense should designate areas in direct support of combat zones in a timely manner, and award members in harm's way with hostile fire or imminent danger pay to ensure that servicemembers receive appropriate tax benefits.

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142. See generally app. 1, *infra*, at pp. 424–29 (showing that the number of servicemembers as well as their marital status would affect the costs of such an amendment; for example, while all single servicemembers received tax benefits for deploying to a combat zone regardless of the tax year deployed, married servicemembers had to be quite senior before they experienced any tax benefit for deploying to a combat zone; as a result, imparting CZTE benefits to servicemembers deployed to combat zones may cost the government less than most people would expect). To simplify matters, the drafters of Appendix 1 assumed two types of servicemembers, single income tax filers and those married filing jointly. The drafters also assumed that married filers had two dependent minor children and thus could take advantage of appropriate credits such as the child tax credit.

143. KENNETH KATZMAN, 95-1013, *BAHRAIN: UNREST, SECURITY, AND U.S. POLICY*, CONG. RESEARCH SERV. 1, 16 (2019).

## 1. *The Department of Defense*

Although the Department of Defense cannot designate combat zones and must follow the rules established by Congress and the Department of the Treasury, the Department of Defense has the ability to designate areas in direct support of combat zones.<sup>144</sup> Using this tool in a timely and effective manner can help address a significant portion of the current dilemma.

### a. Properly Using the Limited Tools Available: Designating Areas in Direct Support of Combat Zones

In the absence of congressional or presidential action, the Department of Defense has limited, but important, tools it can use to help address the problem. First, section 112(a) of the Internal Revenue Code provides that gross income does not include compensation earned while serving in a combat zone.<sup>145</sup> Second, Treasury Regulation section 1.112-1-1(e) provides that members who perform military service in areas outside combat zones are deemed to serve in that combat zone when the member's service directly supports combat zone operations and qualifies the member for hostile fire or imminent danger pay.<sup>146</sup> Third, Revenue Rulings clarify the Treasury Regulation by providing examples where servicemembers qualify as providing direct support to combat zones, such as when they transport supplies and encounter hostile fire on the way to a combat zone.<sup>147</sup>

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144. U.S. DEP'T OF DEF., INSTR. 1340.25, COMBAT ZONE TAX EXCLUSION (CZTE) para. 4(b)(3) (2010) (establishing that the Principal Deputy Under Secretary of Defense for Personnel and Readiness can certify that applicable military service is in direct support of military operations in a CZ or QHDA). *See generally* I.R.C. § 112(a) (2012) (establishing that the President designates combat zones). *See generally* Treas. Reg. § 1.112-1-1(e) (2018) (establishing that servicemembers outside combat zones are deemed to serve in combat zones when their service "is in direct support of military operations in that zone and qualifies the member for" hostile fire or imminent danger pay). It is important to note that, while the Department of Defense cannot designate combat zones, the Department can help shape the discussion by requesting the designation or termination of a combat zone and helping draft the applicable Executive Order. When drafting such an order, the Department may want to include a sunset clause so that there is an automatic termination of the combat zone unless there is an express action to extend the designated period.

145. I.R.C. § 112(a)(1)–(2) (2012). *See also id.* § 112(c)(2) (defining a combat zone as any area which the President designates as an area where Armed Forces of the United States are or have engaged in combat).

146. Treas. Reg. § 1.112-1-1(e)(1) (2018). *See also* 37 U.S.C. § 310 (2012); *id.* § 351 (2019).

147. *Accord* Rev. Rul. 70-621, 1970-2 C.B. 17, 18 (providing examples illustrating direct support of military operations, such as a vessel transporting neces-

The Department of Defense has implemented its authority to designate areas in direct support of combat zones in Department of Defense Instruction (DoDI) 1340.25, Combat Zone Tax Exclusion. The DoDI provides that the Principal Deputy for the Undersecretary of Defense for Personnel and Readiness can designate an area in direct support of a combat zone.<sup>148</sup> If an area is so designated, military members serving in the area can qualify for combat zone tax exclusion benefits if they are eligible to receive hostile fire or imminent danger pay.

The Department of Defense should act on its authority, as clarified under the Treasury Regulations, to timely designate direct support areas by ensuring that requests from subordinate commands asking for such designations are processed in a timely fashion. Unfortunately, staffing these actions is extremely time consuming; the Army, Navy, Marine Corps, Air Force and other stakeholders often need time to evaluate the facts, provide input to shape the outcome, and achieve the necessary consensus on what action to take. This process could result in designations being made months or even years too late.

The reality of such time-consuming processes may raise the need to allow for retroactive designations,<sup>149</sup> which some may argue

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sary supplies and encountering “hostile fire enroute [sic] prior to its entrance into the combat zone”).

148. U.S. DEP’T OF DEF., INSTR. 1340.25, COMBAT ZONE TAX EXCLUSION (CZTE) para. 4(b)(3) (2010). The instruction establishes DoD policy stating:

A member of the Armed Forces is entitled to the CZTE if for any period during a calendar month the member performs active service in . . . [an] area outside the CZ or QHDA when the Principal Deputy Under Secretary of Defense for Personnel and Readiness . . . certifies that such military service is in direct support of military operations in a CZ or QHDA, as applicable, and the member is entitled to HFP/IDP . . . The HFP/IDP entitlement must be directly related to military operations in the CZ or QHDA.

*Id.*

149. See generally I.R.C. § 7805(b)(1)–(2) (2012) (providing a contrast to situations where retroactive tax regulations may be allowed). Specifically, the Internal Revenue Code provides:

(1) In general[.] Except as otherwise provided in this subsection, no temporary, proposed, or final regulation relating to the internal revenue laws shall apply to any taxable period ending before the earliest of the following dates:

(A) The date on which such regulation is filed with the Federal Register.

(B) In the case of any final regulation, the date on which any proposed or temporary regulation to which such final regulation relates was filed with the Federal Register.

(C) The date on which any notice substantially describing the expected contents of any temporary, proposed, or final regulation is issued to the public.

are improper. For example, numerous Comptroller General opinions provide that personnel actions may not be made retroactively so as to increase the rights of an employee to compensation. This limitation applies absent an administrative or clerical error that prevented a personnel action from being effected as originally intended, resulted in nondiscretionary administrative regulations or policies not being carried out, or deprived the employee of a right granted by statute or regulation.<sup>150</sup> Fortunately, the taxability of income does not involve awarding discretionary pay and allowances; by the time late combat zone designations are made, pay and allowances have already been provided. Cases involving retroactive designations simply result in an over-withholding of taxes, which can be resolved by methods such as having the member file an amended tax return if taxes have already been paid. Of course, a tax refund may be barred if the amendment is not filed within the typical three-year statute of limitations.<sup>151</sup>

In addition to late designations, late terminations and effective administration of designations are even more problematic. Although it takes many months to circulate an action with the relevant stakeholders and to achieve the necessary consensus to have an area designated as a direct support area, it takes even longer to terminate areas once they have been designated. Such actions can be viewed as removing benefits from members who have begun to see the benefits as quasi entitlements. For example, Uzbekistan, Tajikistan and Kyrgyzstan were designated as direct support areas in 2001, but members erroneously continued to receive benefits years after imminent danger pay was taken away.<sup>152</sup> To simplify administration and to avoid the appearance of taking away quasi entitlements, self-terminating provisions should be included in direct support area designations. For example, when the Department

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(2) Exception for promptly issued regulations[.] Paragraph (1) shall not apply to regulations filed or issued within 18 months of the date of the enactment of the statutory provision to which the regulation relates.

*Id.*

150. See *Retroactive Promotions With Backpay for Internal Revenue Service Employees*, B-183061, 55 Comp. Gen. 42 (1975); *Implementation of Grievance Decision Awarding a Retroactive Promotion*, B-192295, 58 Comp. Gen. 51 (1978).

151. See I.R.C. § 6511 (2012). *But see* *Combat-Injured Veterans Tax Fairness Act of 2016*, Pub. L. No. 114-292, § 3, 130 Stat. 1500, 1500-01 (2016) (extending the statute of limitations for certain cases ranging back to tax returns from 1991).

152. See U.S. DEP'T OF DEF., 7000.14-R, DoD FINANCIAL MANAGEMENT REGULATION, vol. 7A, ch. 44, fig. 44-1 (July 2016), <http://bit.ly/2PnpXuW> [<https://perma.cc/4UWQ-4XY9>] (citing USD (P&R) Memo, Dec. 31, 2013, which terminated imminent danger pay for servicemembers in Kyrgyzstan, Tajikistan, and Uzbekistan and should have effectively terminated their CZTE benefits as a result).

of Defense designated Lebanon as an area in direct support of a combat zone, a provision was included to terminate the designation in five years, unless terminated earlier.<sup>153</sup>

To simplify administration, the designations should also specify that the terms of the designation apply to all members “unless otherwise specified.”<sup>154</sup> For example, based on a local commander’s determination in extremely unique circumstances, a member’s military orders could state that the member did not qualify for combat zone tax exclusion benefits because the member’s role was not to provide direct support but rather to attend school in the area as part of a student exchange program. Thus, a default rule applying to all members unless otherwise specified would make it easier for military pay centers to take appropriate action and make accurate tax withholding decisions.

Furthermore, designations should include specific geographic regions rather than specifically named operations because operation names and missions change over time. The Philippines and Turkey were, for example, designated as direct support areas of Operation Enduring Freedom (OEF). OEF was renamed Operation Freedom Sentinel (OFS) in 2015, which necessitated clarification that the name change did not affect “eligibility to benefits being administered under the OEF/OIF name.”<sup>155</sup> An even better way to address this issue would be for Congress to take overt action as it did by amending legislation regarding reimbursement of Servicemember Group Life Insurance premiums. The amendment did away with old practices by eliminating specifically-named operations such as OEF and Operation Iraqi Freedom (OIF) and replaced those specific terms with more generic language.<sup>156</sup>

By establishing general criteria, the Department effectively minimizes the need to publish new policy when names of operations

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153. *See, e.g., id.* (citing USD (P&R) Memo, Oct. 21, 2015, which designated Lebanon as an area in direct support of operations in the Arabian Peninsula Combat Zone and included a five-year self-terminating provision).

154. *See, e.g., id.*

155. U.S. DEP’T OF VETERANS AFF., M21-1, PART III, SUBPART II, CHAPTER 6, SECTION B – SERVICE REQUIREMENTS AND VERIFICATION OF ELIGIBILITY, PARA. III.II.6.B.4.H. NAME CHANGE FOR CONTINGENCY OPERATIONS OF OER/OIF, <https://bit.ly/2tvg9Xe> [<https://perma.cc/AU07-BYQ8>].

156. *See generally* Pub. L. 114-328, §644(a)(2) (2016) (amending 37 U.S.C. § 437 to strike named Operation Enduring Freedom and Operation Iraqi Freedom and replacing those terms with generic language including the term “designated duty assignment . . . [meaning] a permanent or temporary duty assignment outside the United States or its possessions in support of a contingency operation in an area that (A) has been designated a combat zone; or (B) is in direct support of an area that has been designated a combat zone.”).

change over time and ensures a level of equitable parity for all members. A recent example of the Department's use of this successful strategy was its modification of the Savings Deposit Program (SDP) policy.<sup>157</sup> Participation in the SDP program was originally tied to a member's service in specifically named operations,<sup>158</sup> even though 10 U.S.C. § 1035 provides for broader implementation authority.<sup>159</sup> Specifically, § 1035 provides that "a member who is on a permanent duty assignment outside the United States or its possessions" or is "on a temporary duty assignment outside of the United States or its possessions in support of a contingency operation" may contribute to SDP.<sup>160</sup> Despite this broad statutory authority, the Financial Management Regulation (FMR) previously allowed only those who were involved in OEF and OIF to participate in this powerful savings program.<sup>161</sup> When OIF was renamed Operation New Dawn and OEF was renamed Operation Freedom Sentinel, servicemembers risked being left out of the likely intent of the SDP program: to provide an incentive for servicemembers who were in harm's way to remove cash from circulating in the combat zone and to earn a good rate of return when they might otherwise not have access to viable banking options.<sup>162</sup> To

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157. 2019 FMR, *supra* note 38, ¶ 51021. The guidance provides that: Effective May 1, 2016, any member serving in an assignment outside the United States, its possessions, or the Commonwealth of Puerto Rico for at least 30 consecutive days or 1 day for each 3 consecutive months is eligible to participate in SDP if serving: (1) In a combat zone; or (2) While qualified to receive hostile fire or imminent danger pay while in a: (a) Qualified Hazardous Duty Area (QHDA); or Designated direct support area of a CZ. (B) Members already contributing to the SDP on May 1, 2016, will be allowed to continue to contribute to the SDP until they depart from the member's SDP-eligible assignment.

*Id.*

158. See U.S. DEP'T OF DEF., 7000.14-R, DoD FINANCIAL MANAGEMENT REGULATION, vol. 7A, ch. 51, ¶ 510203 (Apr. 2015) [hereinafter 2015 FMR], <http://bit.ly/2NeqU62> [<https://perma.cc/4CWM-GTLY>] (establishing the historic eligibility for SDP based on specifically named operations).

159. See 10 U.S.C. § 1035(a)-(f) (2012).

160. See *id.* § (a)-(f).

161. See 2015 FMR, *supra* note 158, ¶ 5102.

162. See generally U.S. DEP'T OF VETERANS AFF., M21-1, PART III, SUBPART II, CHAPTER 6, SECTION B – SERVICE REQUIREMENTS AND VERIFICATION OF ELIGIBILITY, ¶ III.II.6.B.4.H. NAME CHANGE FOR CONTINGENCY OPERATIONS OF OEF/OIF, <https://bit.ly/2tv9Xe> [<https://perma.cc/AUU7-BYQ8>]; USF-I for STAND-TO!, *Operation New Dawn*, U.S. ARMY, (Aug. 31, 2010), <https://bit.ly/2nFuNYr> [<https://perma.cc/38PB-4PUX>].

address this problem, the Department created general criteria<sup>163</sup> that ultimately was incorporated into the FMR in 2019.<sup>164</sup>

b. The Problems with Increasing Flexibility: Working with the Existing Regulations

Complicating matters, neither the statutes nor the Treasury Regulations define “direct support of a combat zone.” Rather the Treasury Regulation simply states:

[A] member of the Armed Forces who performs military service in an area outside the area designated by Executive Order as a combat zone is deemed to serve in that combat zone while the member’s service *is in direct support* of military operations *in that zone* and qualifies the member for the special pay for duty subject to hostile fire or imminent danger authorized under section 310 of title 37 of the United States Code.<sup>165</sup>

Although the Treasury Regulation provides numerous examples, each example uses the phrase “direct support” without clearly defining the term.<sup>166</sup>

To clarify this gray area, the Department of Defense has interpreted the Treasury Regulations in the FMR, stating “Military service is considered to be in direct support if it has the effect of maintaining, upholding, or providing assistance for those involved in military operations” in a combat zone or QHDA.<sup>167</sup> In addition,

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163. See generally *Savings Deposit Program*, U.S. DEPT. OF DEF., MILITARY COMPENSATION, <https://bit.ly/2nB0gLn> [<https://perma.cc/98W7-HMCL>] (last visited Sept. 3, 2019) (providing the qualifications for SDP and the withdrawal procedures).

164. See 2019 FMR, *supra* note 38, ¶ 510201.

165. Treas. Reg. § 1.112-1(e)(1) (2018) (citing the old law 37 U.S.C. § 310). The law has since been updated and is now 37 U.S.C. § 351. Since the Treasury Regulation has not been updated to reflect this change, the Treasury Regulation would need to be modified due to the transitional authority of pays from subchapter I to subchapter II, Chapter 5, Title 37 United States Code. See 37 U.S.C. § 351 (2012).

166. See, e.g., Treas. Reg. § 1.112-1(e)(2) ex. 7 (2018) (using the term direct support, but failing to define the term in any meaningful way). For example, example 7 states:

B performs military service in Nearby Country [outside the combat zone] from June 1 through June 8 in direct support of the military operations in the combat zone. Nearby Country is designated as an area in which members of the Armed Forces qualify for hostile fire/imminent danger pay due to imminent danger, even though members in Nearby Country are not subject to hostile fire. B is deemed to serve in the combat zone from June 1 through June 8. Accordingly, B is entitled to the exclusion under section 112 for June.

*Id.*

167. See 2019 FMR, *supra* note 38, ¶ 440203B.5.b.



the Department of Defense's interpretation appears to focus on the Treasury Regulations phrase "in that zone"—which is also used in Internal Revenue Code section 112— by stating that the "hostile fire or imminent danger pay entitlement must be related to activities or circumstances in the CZ [combat zone] or QHDA."<sup>168</sup> Fortunately, the FMR provides numerous examples of what constitutes "direct support." For example, the FMR states:

If an aircraft in a nearby country outside the CZ or QHDA is used to transport supplies and personnel into the CZ or QHDA, then the members of the ground crews who load the aircraft and the maintenance personnel who maintain the aircraft all qualify for CZ or QHDA tax exclusion.<sup>169</sup>

Another example goes one step further by stating that members serving "in support of operations at an installation where some members serve in direct support of military operations in a CZ or QHDA are considered to be serving in direct support of military operations in that CZ or QHDA."<sup>170</sup>

Although this paradigm seems to provide sufficient coverage for servicemembers in foreign areas of armed conflict, a problem arises when the servicemember's mission changes. Servicemembers in a direct support area may shift their efforts from supporting military operations in a combat zone to supporting military operations in another direct support area in response to hostile forces moving their operations. Those members may still receive imminent danger pay due to the risks they face. In this event, one could argue that the members serving there should still qualify for combat zone tax exclusion benefits, even though a strict reading of the authorities may indicate otherwise.

To address this dilemma, the Department should request that the Treasury Department update the Treasury Regulations. Specifically, to give the Department of Defense additional flexibility to provide tax benefits to servicemembers in foreign areas of armed conflict, Treasury Regulation section 1.112(e)(1)<sup>171</sup> should be modified to state:

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168. 2019 FMR, *supra* note 38, ¶ 440203B.5.

169. 2019 FMR, *supra* note 38, ¶ 440203B.5.b. ex. 2.

170. 2019 FMR, *supra* note 38, ¶ 440203B.5.b. ex. 3.

171. *See* Treas. Reg. § 1.112-1(e)(1) (2018). The Regulation states: For purposes of section 112, a member of the Armed Forces who performs military service in an area outside the area designated by Executive Order as a combat zone is deemed to serve in that combat zone while the member's service is in direct support of military operations in that zone and qualifies the member for the special pay for duty subject to hostile fire or imminent danger authorized under section 310 of title 37 of the

For purposes of section 112, a member of the Armed Forces who performs military service in an area outside the area designated by Executive Order as a combat zone is deemed to serve in that combat zone while the member's service qualifies the member for hostile fire or imminent danger pay, and the member's service is in direct support of military operations in the combat zone or other area certified by the Department of Defense as being in direct support of military operations in the combat zone.

This change would grant eligibility to members serving in foreign areas of armed conflict that are currently not covered, while preventing the unnecessary awarding of benefits; the amendment still requires servicemembers to qualify for hostile fire or imminent danger pay. In the alternative, understanding that making such a change to the Treasury Regulations may be difficult, the Department could consider pursuing a Revenue Ruling, private letter ruling, or general information paper to serve as a good faith basis to modify the FMR.<sup>172</sup>

## 2. *The Department of the Treasury*

To help servicemembers deployed to foreign areas of armed conflict receive appropriate tax relief, another option might be for the Department of the Treasury to update the Treasury Regulations. However, recent case law and currently-litigated controversies bring to light the possibility that the Treasury Department's powers may be much more limited; the Treasury may need to comply with relevant authority, such as the Administrative Procedures Act, to ensure that its actions withstand judicial scrutiny.<sup>173</sup>

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United States Code, as amended (37 U.S.C. 310) (hostile fire/imminent danger pay).

*Id.*

172. See Rev. Proc. 2018-1 I.R.B. 23–39 (explaining how to get a private letter ruling from the IRS).

173. See, e.g., *Cohen v. United States*, 650 F.3d 717, 736 (D.C. Cir. 2011) (holding that “the district court should consider the merits of . . . [the plaintiff’s] APA claim [against the IRS] on remand.”); *Chamber of Com. of the U.S. v. IRS*, 2017 WL 4682050 (U.S. Dist. Ct. W.D. TX, Austin Div. Oct. 6, 2017) (holding that the government “violated the APA by failing to provide notice and an opportunity for comment”; the government appealed the decision to the 5th circuit, but the government moved to dismiss their own appeal in 2018). *But see* Bruce N. Davis, *Foreign Income Portfolios: Provisions Applicable to U.S. and Foreign Persons Portfolio 913-3rd U.S.-to-Foreign Transfers Under Section 367(a)*, THE BUREAU OF NATIONAL AFFAIRS, INC. (2019) at 287 (arguing that the decision in the Chamber of Commerce case may not have had any significant practical impact, because the final regulations generally adopted the temporary rules with minor modifications and the preamble to the serial acquisition rule stated that although the Chamber of Commerce case “invalidated the temporary regulations on procedural grounds

a. The Treasury's Authority to Change the Treasury Regulations

“Historically, the IRS has argued that its regulations are interpretative, not legislative, and thus not subject to the” Administrative Procedure Act (APA).<sup>174</sup> Taking this view, the IRS might be able to modify Treasury Regulation section 1.112-1<sup>175</sup> by adding the specific language previously suggested: “or other area certified by the Department of Defense as being in direct support of military operations in the combat zone.” If this phrase was added, it would help prevent members from falling outside the current rigid qualification requirements.

b. Challenges in Light of Recent Litigation

Despite the Treasury's historic position that its regulations are interpretive and thus are not subject to the APA, some might argue that modifying the Treasury Regulations to address combat areas may, in this instance, be legislative. This argument is particularly salient in light of recent cases such as *Cohen v. United States*, which held that the Treasury needs to comply with the APA.<sup>176</sup>

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. . . the serial acquisition rule was substantively valid under section 7874(c)(6) and (g).”).

174. Alison Bennett, *Lawsuit on IRS Inversion Rules May be 'Fascinating' Battle*, BLOOMBERG (Aug. 11, 2016). See, e.g., *Altera Corp. v. Comm'r*, 145 T.C. 91, 92 (2015). See also, e.g., 5 U.S.C. §§ 551–559 (2012) (codifying the Administrative Procedure Act (APA) including the Freedom of Information Act, 5 U.S.C. § 552, and the Privacy Act, 5 U.S.C. § 552a).

175. Treas. Reg. § 1.112-1 (2018).

176. See, e.g., *Cohen*, 650 F.3d at 736. The court stated that:

[a]fter conceding the excise tax was collected illegally, the Service set up a virtual obstacle course for taxpayers to get their money back. . . . [and that the case was about this] obstacle course, and the decisions made by the IRS while setting it up. As a result, we have federal question jurisdiction, and neither the AIA [Anti-Injunction Act] nor the DJA [Declaratory Judgment Act] provide a limitation on our exercise of it. Because Appellants have no other adequate remedy at law, the district court should consider the merits of their APA claim on remand.” In addition, the court specifically addressed the dissent's argument as follows: “The practical consequence of the dissent's ripeness argument is a judicially created exemption for the IRS from suit under the APA. . . . But Congress has not made that call.

*Id.* Professor Aprill effectively summarizes the case and its aftermath as follows:

In *Cohen*, the D.C. Circuit . . . held that the court could hear taxpayers' challenge on grounds of failure to engage in notice-and-comment rulemaking as required by the APA to a notice setting forth procedures to claim a refund for certain telephone excise taxes. . . . The Court could identify no judicial exception for the IRS from the APA. The DC Circuit thus permitted a challenge to a notice to go forward on the grounds of failure to follow APA notice-and-comment requirements. Upon remand, the District Court determined that the notice was binding, that failure to provide notice-and-comment violated the APA and that the failure did

These relatively recent cases create future uncertainty. For example, in *Altera Corp. v. Commissioner*,<sup>177</sup> despite the IRS's arguments that its rules were interpretive, the U.S. Tax Court held that Treasury Regulation section 1.482-7(d)(2) was legislative due to the delegation of legislative power under section 7805(a) of the Internal Revenue Code.<sup>178</sup> Therefore, the court held that the requirements of 5 U.S.C. § 553<sup>179</sup> applied, and found the Treasury rule invalid because the process failed to satisfy the reasoned decision making standard under *Motor Vehicle Manufacturers Association v. State Farm Mutual Automobile Insurance Company*.<sup>180</sup>

The Ninth Circuit reversed this decision in July, 2018, and then, less than one month later, withdrew its opinion “to allow time for the reconstituted panel to confer on this appeal.”<sup>181</sup> However, the court ultimately reversed the tax court's decision in June, 2019 stating:

[W]e disagree with the Tax Court that the 2003 regulations are arbitrary and capricious under the standard of review imposed by the APA. While the rulemaking process was less than ideal, the APA does not require perfection. . . . Treasury's understanding of its power to use methodologies other than a pure transactional comparability analysis was reasonable, and we defer to its interpretation under *Chevron*.<sup>182</sup>

In its decision, the Ninth Circuit made clear that while the standard in *State Farm* is used to evaluate “whether a rule is procedurally defective as a result of flaws in the agency's decision making process,” *Chevron*<sup>183</sup> is used to evaluate “whether the conclusion reached as a result of that process—an agency's interpretation of a statutory provision it administers—is reasonable.”<sup>184</sup> Specifically,

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not constitute harmless error. The District Court vacated the notice prospectively.

Ellen P. Aprill, *The Impact of Agency Procedures and Judicial Review on Tax Reform*, 65 NAT'L TAX J. 917, 923 (2012).

177. *Altera Corp. v. Comm'r*, 145 T.C. 91, 92 (2015).

178. I.R.C. § 7805(a) (2012) (providing the Secretary of the Treasury authority “to prescribe all needful rules and regulations for the enforcement” of the Internal Revenue Code).

179. 5 U.S.C. § 553 (2012) (establishing the requirements for rule-making, including providing notice in the Federal Register and providing interested persons an opportunity to participate in the rule-making process).

180. *Motor Vehicle Mfrs. Assn. v. State Farm Mut. Automobile Ins. Co.*, 463 U.S. 29, 57 (1983).

181. *Altera Corp. v. Comm'r*, 898 F.3d 1266, 1266 (9th Cir. 2018).

182. *Altera Corp. v. Comm'r*, 926 F.3d 1061, 1087 (9th Cir. 2019).

183. *See Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984).

184. *Altera*, 926 F.3d at 1075.

*Chevron* held that a court must determine “whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.”<sup>185</sup> In *Altera*, the court found the statute to be “ambiguous,” and thus, the Treasury was entitled to *Chevron* deference since its interpretation of the statute was reasonable given Congress’s intent “to establish tax parity.”<sup>186</sup>

Other cases continue to challenge the IRS on similar grounds. In *Chamber of Commerce v. Internal Revenue Service*, which was initially appealed to the Fifth Circuit and then dismissed upon government motion in 2018,<sup>187</sup> petitioners successfully challenged temporary<sup>188</sup> Treasury Regulations combatting corporate inversions. The petitioners argued that the Anti-Injunction Act<sup>189</sup> did not bar

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185. *Chevron*, 467 U.S. at 842–43 (1984). See also *Mayo Found. for Med. Educ. & Research v. U.S.* 562 U.S. 44, 60 (2011) (applying the “principles underlying our decision in *Chevron* . . . with full force in the tax context” and affirming the lower court’s holding that the issue is one “which Congress has not directly spoken, and . . . the Treasury Department’s rule is a reasonable construction of what Congress has said . . .”). See also *Dominion Res., Inc. v. U.S.*, 681 F.3d 1313, 1319 (2012) (applying *Chevron* and holding that the Treasury’s actions were “not sufficient to satisfy the *State Farm* requirement that the regulation must articulate a satisfactory or cogent explanation.”).

186. *Altera*, 926 F.3d at 1076 (2019). But see *id.* at 1088 (O’Malley, J. dissenting). The dissent argued that “the majority stretches highly deferential review, . . . beyond its breaking point.” *Id.* Accordingly, she

would instead find, as the Tax Court did, that Treasury’s explanation of its rule (to the extent any was provided) failed to satisfy the *State Farm* standard, that Treasury did not provide adequate notice of its intent to change its longstanding practice of employing the arm’s length standard and using a comparability analysis to get there, and that its new rule is invalid as arbitrary and capricious.

*Id.*

187. *Chamber of Comm. of the U.S. v. IRS*, No. 17-51063, 2018 WL 3946143 (5th Cir. 2018) (dismissing the government’s appeal of the district court’s decision which held that the government violated the APA). See generally, *Chamber of Com. of the U.S. v. IRS*, 2017 WL 4682050 (U.S. Dist. Ct. W.D. TX, Austin Div. Oct. 6, 2017) (holding that the government “violated the APA by failing to provide notice and an opportunity for comment.”).

188. See generally I.R.C. § 7805(e)(2) (2012) (providing that any “temporary regulation shall expire within 3 years after the date of issuance of such regulation”).

189. See I.R.C. § 7421 (2012) (barring suits for the purpose of restraining the assessment or collection of taxes). In short, “the Act generally bars pre-enforcement challenges to certain tax statutes and regulations. The Act requires plaintiffs to instead raise such challenges in refund suits after the tax has been paid, or in deficiency proceedings. The Act thus creates a narrow exception to the general administrative law principle that pre-enforcement review of agency regulations is available in federal court.” *Fla. Bankers Ass’n v. Dep’t of Treasury*, 799 F.3d 1065, 1066 (D.C. Cir. 2015). In *Florida Bankers*, banks did not like the 2012 rule that required U.S. banks to report the interest they paid to non-resident aliens, because

the suit, that the IRS rules are legislative and not interpretive, that the IRS is subject to the APA, and that the IRS needs to comply with the notice and comment requirements, as well as with the reasoned decision making process.<sup>190</sup>

Due to these recent legal challenges, the IRS should consider strict compliance with the APA when changing its Treasury Regulations to address the tax benefits associated with armed conflict in foreign areas. This path remains advisable even though it could be argued that Congress has spoken to the precise question of which servicemembers should receive tax relief. In 2001, Congress expressed its intent in section 1089 of Public Law 106-398, which states:

It is the sense of Congress that members of the Armed Forces who receive special pay under section 310 of title 37, United States Code, for duty subject to hostile fire or imminent danger should receive the same treatment under Federal income tax laws as members serving in combat zones.<sup>191</sup>

Furthermore, Congress took similar actions in 2000, when Congress expressed its intent in section 677 of Public Law 106-65, which states:

It is the sense of Congress that a member of the Armed Forces who is receiving special pay under section 310 of title 37, United States Code, while assigned to duty in support of a contingency

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the banks feared it would cause capital flight as non-resident aliens would no longer view the United States “as a safe place to keep their money.” *Id.* at 1073. Although the IRS

does not tax the interest earned by non-resident aliens, [the IRS gives] . . . this information to other countries in exchange for information about the interest U.S. citizens earn in foreign banks . . . The idea behind the 2012 rule is that, if U.S. citizens know foreign banks report the interest they earn abroad, they are more likely to self-report that income to the IRS.

*Id.*

190. *See* Chamber of Comm. of the U.S. v. IRS, No. 1:16-CV-944-LY, 2017 WL 4682050, at 4 (W.D. Tex. Oct. 6, 2017). *But see Fla. Bankers*, 799 F.3d at 1067 (holding that the Anti-Injunction Act, I.R.C. § 7421 (2012), and the tax exception to the Declaratory Judgment Act, 28 U.S.C. § 2201(a) (2012), barred pre-enforcement challenges to the IRS’s interest-income reporting regulations that banks argued were imposed in violation of the Administrative Procedure Act and the Regulatory Flexibility Act; the court clarified that

our ruling does not prevent a bank from obtaining judicial review of the challenged regulation. A bank may decline to submit a required report, pay the penalty, and then sue for a refund. At that time, a court may consider the legality of the regulation. The issue is when—not *if*—the banks may challenge the regulation.

*Id.*

191. National Defense Authorization for Fiscal Year 2001, Pub. L. No. 106-398, § 1089 114 Stat. 1654, 654A-294 (2001).

operation should be treated under the Internal Revenue Code of 1986 in the same manner as a member of the Armed Forces serving in a combat zone (as defined in section 112 of the Internal Revenue Code of 1986).<sup>192</sup>

In addition, one might go even further, arguing that there is a rule making exception for “military or foreign affairs function[s] of the United States.”<sup>193</sup>

However, those challenging these arguments may assert that step two of the *Chevron* analysis “incorporates the reasoned decision making standard” of the *State Farm* decision.<sup>194</sup> As a result, the IRS needs to act in such a manner to prevent others from being able to argue that the IRS’s actions are “arbitrary or capricious in substance.”<sup>195</sup> By strictly complying with the APA in changing its Treasury Regulations, the IRS can help ensure that the rules it promulgates can be relied upon without the specter of pending litigation.

## CONCLUSION

In conclusion, the President, Congress, the Department of Defense, and the Department of the Treasury must take appropriate actions within their authorities to ensure that servicemembers and their families are not forced to take a back seat to the political process. Understanding the political dynamics and the time required to take effective action, each branch or agency of government must act and must not simply depend on others to solve this dilemma.

First, the President should timely designate combat zones by issuing Executive Orders when requested by the Department of Defense. Where appropriate, the President should make retroactive designations, such as in circumstances where it has taken a long time to make decisions and where servicemembers have been placed in harm’s way in foreign areas of armed conflict while issues are debated. In addition, where conditions no longer warrant combat zone benefits, existing combat zones should be terminated, saving the government tax revenue.

Second, Congress should take legislative action such as designating QHDAs or declaring war when and where appropriate.

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192. National Defense Authorization Act for Fiscal Year 2000, Pub. L. No. 106-65, § 677, 113 Stat. 512, 676 (2000).

193. 5 U.S.C. § 553(a) (2012) (“This [rule making] section applies, according to the provisions thereof, except to the extent that there is involved – (1) a military or foreign affairs function of the United States. . .”).

194. *Altera Corp. v. Comm’r*, 145 T.C. 91, 120 (2015).

195. *Id.*

Realizing that these legislative actions are often contentious and difficult to achieve, Congress should amend the Internal Revenue Code to tie combat zone tax exclusion benefits to servicemembers' eligibility to receive hostile fire or imminent danger pay.

Third, the Department of Defense should timely designate areas in direct support of military operations in combat zones and QHDAs. In addition, where conditions no longer warrant combat zone tax exclusion benefits, existing direct support areas should be terminated and the information should be incorporated into the FMR in a timely fashion.

Fourth, the Treasury Department should amend its Treasury Regulations to give more flexibility to the Department of Defense to provide for servicemembers in harm's way. Furthermore, the Treasury Department should comply with relevant authority including the Administrative Procedures Act to ensure that its actions withstand judicial scrutiny.

In short, a second Somalia must be prevented. When casualties occur in foreign areas of armed conflict, the affected servicemembers and their families must not be left without appropriate tax benefits because the government failed to take action to protect those who answered the call to serve their nation.



Single Taxpayer Filing a Federal Income Tax Return Under the Single Filing Status (2017)*									
Rank	YOS	2017 Monthly Basic Pay	Annual Taxable Income if Not Deployed to a CZ in 2017	Annual CZTE Limitation in 2017	Taxable Income if Deployed to a CZ in 2017	Tax if Not Deployed to a CZ in 2017	Tax if Deployed to a CZ in 2017	Savings	Comments
<b>E-2</b>	2	\$ 1,793	\$ 21,521	\$ 100,681	\$ -	\$ 1,202	\$ -	\$ 1,202	BAH and BAS are not subject to income taxes since they are non-taxable; per diem is generally not taxable*; Hostile Fire Pay in a combat zone would generally not be taxable, unless the amounts exceed the applicable CZTE limitation; a negative number indicates a federal income tax refund
<b>E-3</b>	3	\$ 2,126	\$ 25,510	\$ 100,681	\$ -	\$ 1,800	\$ -	\$ 1,800	
<b>E-4</b>	4	\$ 2,432	\$ 29,185	\$ 100,681	\$ -	\$ 2,352	\$ -	\$ 2,352	
<b>E-5</b>	6	\$ 2,857	\$ 34,279	\$ 100,681	\$ -	\$ 3,116	\$ -	\$ 3,116	
<b>E-6</b>	8	\$ 3,373	\$ 40,471	\$ 100,681	\$ -	\$ 4,044	\$ -	\$ 4,044	
<b>E-7</b>	12	\$ 4,089	\$ 49,064	\$ 100,681	\$ -	\$ 5,405	\$ -	\$ 5,405	
<b>E-8</b>	18	\$ 4,980	\$ 59,764	\$ 100,681	\$ -	\$ 8,080	\$ -	\$ 8,080	
<b>E-9</b>	20	\$ 5,927	\$ 71,118	\$ 100,681	\$ -	\$ 10,918	\$ -	\$ 10,918	
<b>W-1</b>	1	\$ 2,966	\$ 35,597	\$ 100,681	\$ -	\$ 3,313	\$ -	\$ 3,313	
<b>W-2</b>	3	\$ 3,797	\$ 45,569	\$ 100,681	\$ -	\$ 4,809	\$ -	\$ 4,809	
<b>W-3</b>	6	\$ 4,366	\$ 52,391	\$ 100,681	\$ -	\$ 6,237	\$ -	\$ 6,237	
<b>W-4</b>	10	\$ 5,409	\$ 64,912	\$ 100,681	\$ -	\$ 9,367	\$ -	\$ 9,367	
<b>O-1</b>	1	\$ 3,035	\$ 36,418	\$ 100,681	\$ -	\$ 3,436	\$ -	\$ 3,436	
<b>O-2</b>	2	\$ 3,982	\$ 47,786	\$ 100,681	\$ -	\$ 5,142	\$ -	\$ 5,142	
<b>O-3</b>	4	\$ 5,398	\$ 64,778	\$ 100,681	\$ -	\$ 9,333	\$ -	\$ 9,333	
<b>O-4</b>	10	\$ 6,887	\$ 82,649	\$ 100,681	\$ -	\$ 13,801	\$ -	\$ 13,801	
<b>O-5</b>	18	\$ 8,565	\$ 102,780	\$ 100,681	\$ 4,799	\$ 18,848	\$ (365)	\$ 19,213	

Married Taxpayer (with 2 Minor Dependents) Filing a Federal Income Tax Return Under the Married Filing Joint Filing Status (2017)*									
Rank	YOS	2017 Monthly Basic Pay	Annual Taxable Income if Not Deployed to a CZ in 2017	Annual CZTE Limitation in 2017	Taxable Income if Deployed to a CZ in 2017	Tax if Not Deployed to a CZ in 2017	Tax if Deployed to a CZ in 2017	Savings	Comments
E-2	2	\$ 1,793	\$ 21,521	\$ 100,681	\$ -	\$ (2,000)	\$ (2,000)	\$ -	BAH and BAS are not subject to income taxes since they are non-taxable; per diem is generally not taxable*; Hostile Fire Pay in a combat zone would generally not be taxable, unless the amounts exceed the applicable CZTE limitation; a negative number indicates a federal income tax refund
E-3	3	\$ 2,126	\$ 25,510	\$ 100,681	\$ -	\$ (2,000)	\$ (2,000)	\$ -	
E-4	4	\$ 2,432	\$ 29,185	\$ 100,681	\$ -	\$ (1,971)	\$ (1,971)	\$ -	
E-5	6	\$ 2,857	\$ 34,279	\$ 100,681	\$ -	\$ (1,462)	\$ (1,462)	\$ -	
E-6	8	\$ 3,373	\$ 40,471	\$ 100,681	\$ -	\$ (843)	\$ (843)	\$ -	
E-7	12	\$ 4,089	\$ 49,064	\$ 100,681	\$ -	\$ 92	\$ -	\$ 92	
E-8	18	\$ 4,980	\$ 59,764	\$ 100,681	\$ -	\$ 1,697	\$ -	\$ 1,697	
E-9	20	\$ 5,927	\$ 71,118	\$ 100,681	\$ -	\$ 3,400	\$ -	\$ 3,400	
W-1	1	\$ 2,966	\$ 35,597	\$ 100,681	\$ -	\$ (1,330)	\$ (1,330)	\$ -	
W-2	3	\$ 3,797	\$ 45,569	\$ 100,681	\$ -	\$ (333)	\$ (333)	\$ -	
W-3	6	\$ 4,366	\$ 52,391	\$ 100,681	\$ -	\$ 591	\$ -	\$ 591	
W-4	10	\$ 5,409	\$ 64,912	\$ 100,681	\$ -	\$ 2,469	\$ -	\$ 2,469	
O-1	1	\$ 3,035	\$ 36,418	\$ 100,681	\$ -	\$ (1,248)	\$ (1,248)	\$ -	
O-2	2	\$ 3,982	\$ 47,786	\$ 100,681	\$ -	\$ (100)	\$ (100)	\$ -	
O-3	4	\$ 5,398	\$ 64,778	\$ 100,681	\$ -	\$ 2,449	\$ -	\$ 2,449	
O-4	10	\$ 6,887	\$ 82,649	\$ 100,681	\$ -	\$ 5,130	\$ -	\$ 5,130	
O-5	18	\$ 8,565	\$ 102,780	\$ 100,681	\$ 4,799	\$ 8,150	\$ (635)	\$ 8,785	

\* Although per diem is generally not taxable, per diem could be taxable in situations such as if the assignment is for a period exceeding one year. See Rev. Rul. 99-7. See I.R.S. Pub. 3, Table 2, Items Excluded from Gross Income. See I.R.C. § 162 (establishing that ordinary and necessary traveling expenses for a trade or business are allowable as a deduction). See F.M.R., Vol. 9, Chapter 8 (2019) ¶ 080206 (stating that a “civilian employee who performs a TDY assignment at one location for more than a year is considered by the Internal Revenue Service (IRS) to be permanent and any reimbursement (e.g., per diem) is considered taxable income”). See Thomas Emswiler, *Taxation of Payments for Temporary Duty*, ARMY LAWYER (Oct. 1996) (discussing the tax aspects involved with performing temporary duty).

Single Taxpayer Filing a Federal Income Tax Return Under the Single Filing Status (2018)*									
Rank	YOS	2018 Monthly Basic Pay	Annual Taxable Income if Not Deployed to a CZ in 2018	Annual CZTE Limitation in 2018	Taxable Income if Deployed to a CZ in 2018	Tax if Not Deployed to a CZ in 2018	Tax if Deployed to a CZ in 2018	Savings	Comments
<b>E-2</b>	2	\$ 1,836	\$ 22,036	\$ 103,032	\$ -	\$ 1,013	\$ -	\$ 1,013	BAH and BAS are not subject to income taxes since they are non-taxable; per diem is generally not taxable*; Hostile Fire Pay in a combat zone would generally not be taxable, unless the amounts exceed the applicable CZTE limitation; a negative number indicates a federal income tax refund
<b>E-3</b>	3	\$ 2,177	\$ 26,122	\$ 103,032	\$ -	\$ 1,505	\$ -	\$ 1,505	
<b>E-4</b>	4	\$ 2,491	\$ 29,887	\$ 103,032	\$ -	\$ 1,955	\$ -	\$ 1,955	
<b>E-5</b>	6	\$ 2,925	\$ 35,104	\$ 103,032	\$ -	\$ 2,585	\$ -	\$ 2,585	
<b>E-6</b>	8	\$ 3,454	\$ 41,443	\$ 103,032	\$ -	\$ 3,341	\$ -	\$ 3,341	
<b>E-7</b>	12	\$ 4,187	\$ 50,242	\$ 103,032	\$ -	\$ 4,397	\$ -	\$ 4,397	
<b>E-8</b>	18	\$ 5,100	\$ 61,196	\$ 103,032	\$ -	\$ 6,758	\$ -	\$ 6,758	
<b>E-9</b>	20	\$ 6,069	\$ 72,824	\$ 103,032	\$ -	\$ 9,321	\$ -	\$ 9,321	
<b>W-1</b>	1	\$ 3,038	\$ 36,450	\$ 103,032	\$ -	\$ 2,747	\$ -	\$ 2,747	
<b>W-2</b>	3	\$ 3,889	\$ 46,663	\$ 103,032	\$ -	\$ 3,971	\$ -	\$ 3,971	
<b>W-3</b>	6	\$ 4,471	\$ 53,647	\$ 103,032	\$ -	\$ 5,097	\$ -	\$ 5,097	
<b>W-4</b>	10	\$ 5,539	\$ 66,470	\$ 103,032	\$ -	\$ 7,924	\$ -	\$ 7,924	
<b>O-1</b>	1	\$ 3,108	\$ 37,292	\$ 103,032	\$ -	\$ 2,843	\$ -	\$ 2,843	
<b>O-2</b>	2	\$ 4,078	\$ 48,935	\$ 103,032	\$ -	\$ 4,241	\$ -	\$ 4,241	
<b>O-3</b>	4	\$ 5,528	\$ 66,334	\$ 103,032	\$ -	\$ 7,891	\$ -	\$ 7,891	
<b>O-4</b>	10	\$ 7,053	\$ 84,632	\$ 103,032	\$ -	\$ 11,917	\$ -	\$ 11,917	
<b>O-5</b>	18	\$ 8,771	\$ 105,246	\$ 103,032	\$ 4,914	\$ 16,664	\$ (374)	\$ 17,038	

Married Taxpayer (with 2 Minor Dependents) Filing a Federal Income Tax Return Under the Married Filing Joint Filing Status (2018)*									
Rank	YOS	2018 Monthly Basic Pay	Annual Taxable Income if Not Deployed to a CZ in 2018	Annual CZTE Limitation in 2018	Taxable Income if Deployed to a CZ in 2018	Tax if Not Deployed to a CZ in 2018	Tax if Deployed to a CZ in 2018	Savings	Comments
E-2	2	\$ 1,836	\$ 22,036	\$ 103,032	\$ -	\$ (2,800)	\$ (2,800)	\$ -	BAH and BAS are not subject to income taxes since they are non-taxable; per diem is generally not taxable*; Hostile Fire Pay in a combat zone would generally not be taxable, unless the amounts exceed the applicable CZTE limitation; a negative number indicates a federal income tax refund
E-3	3	\$ 2,177	\$ 26,122	\$ 103,032	\$ -	\$ (2,800)	\$ (2,800)	\$ -	
E-4	4	\$ 2,491	\$ 29,887	\$ 103,032	\$ -	\$ (2,800)	\$ (2,800)	\$ -	
E-5	6	\$ 2,925	\$ 35,104	\$ 103,032	\$ -	\$ (2,800)	\$ (2,800)	\$ -	
E-6	8	\$ 3,454	\$ 41,443	\$ 103,032	\$ -	\$ (2,257)	\$ (2,257)	\$ -	
E-7	12	\$ 4,187	\$ 50,242	\$ 103,032	\$ -	\$ (1,234)	\$ (1,234)	\$ -	
E-8	18	\$ 5,100	\$ 61,196	\$ 103,032	\$ -	\$ 80	\$ -	\$ 80	
E-9	20	\$ 6,069	\$ 72,824	\$ 103,032	\$ -	\$ 1,478	\$ -	\$ 1,478	
W-1	1	\$ 3,038	\$ 36,450	\$ 103,032	\$ -	\$ (2,752)	\$ (2,752)	\$ -	
W-2	3	\$ 3,889	\$ 46,663	\$ 103,032	\$ -	\$ (1,660)	\$ (1,660)	\$ -	
W-3	6	\$ 4,471	\$ 53,647	\$ 103,032	\$ -	\$ (826)	\$ (826)	\$ -	
W-4	10	\$ 5,539	\$ 66,470	\$ 103,032	\$ -	\$ 716	\$ -	\$ 716	
O-1	1	\$ 3,108	\$ 37,292	\$ 103,032	\$ -	\$ (2,672)	\$ (2,672)	\$ -	
O-2	2	\$ 4,078	\$ 48,935	\$ 103,032	\$ -	\$ (1,390)	\$ (1,390)	\$ -	
O-3	4	\$ 5,528	\$ 66,334	\$ 103,032	\$ -	\$ 698	\$ -	\$ 698	
O-4	10	\$ 7,053	\$ 84,632	\$ 103,032	\$ -	\$ 2,894	\$ -	\$ 2,894	
O-5	18	\$ 8,771	\$ 105,246	\$ 103,032	\$ 4,914	\$ 5,749	\$ (739)	\$ 6,488	

\* Although per diem is generally not taxable, per diem could be taxable in situations such as if the assignment is for a period exceeding one year. See Rev. Rul. 99-7. See I.R.S. Pub. 3, Table 2, Items Excluded from Gross Income. See I.R.C. § 162 (establishing that ordinary and necessary traveling expenses for a trade or business are allowable as a deduction). See F.M.R., Vol. 9, Chapter 8 (2019) ¶ 080206 (stating that a “civilian employee who performs a TDY assignment at one location for more than a year is considered by the Internal Revenue Service (IRS) to be permanent and any reimbursement (e.g., per diem) is considered taxable income”). See Thomas Emswiler, *Taxation of Payments for Temporary Duty*, ARMY LAWYER (Oct. 1996) (discussing the tax aspects involved with performing temporary duty).

Single Taxpayer Filing a Federal Income Tax Return Under the Single Filing Status (2019)*									
Rank	YOS	2019 Monthly Basic Pay	Annual Taxable Income if Not Deployed to a CZ in 2019	Annual CZTE Limitation in 2019	Taxable Income if Deployed to a CZ in 2019	Tax if Not Deployed to a CZ in 2019	Tax if Deployed to a CZ in 2019	Savings	Comments
E-2	2	\$ 1,884	\$ 22,608	\$ 105,642	\$ -	\$ 1,057	\$ -	\$ 1,057	BAH and BAS are not subject to income taxes since they are non-taxable; per diem is generally not taxable*; Hostile Fire Pay in a combat zone would generally not be taxable, unless the amounts exceed the applicable CZTE limitation; a negative number indicates a federal income tax refund
E-3	3	\$ 2,234	\$ 26,802	\$ 105,642	\$ -	\$ 1,561	\$ -	\$ 1,561	
E-4	4	\$ 2,555	\$ 30,665	\$ 105,642	\$ -	\$ 2,023	\$ -	\$ 2,023	
E-5	6	\$ 3,002	\$ 36,018	\$ 105,642	\$ -	\$ 2,665	\$ -	\$ 2,665	
E-6	8	\$ 3,543	\$ 42,520	\$ 105,642	\$ -	\$ 3,445	\$ -	\$ 3,445	
E-7	12	\$ 4,296	\$ 51,548	\$ 105,642	\$ -	\$ 4,525	\$ -	\$ 4,525	
E-8	18	\$ 5,232	\$ 62,788	\$ 105,642	\$ -	\$ 6,985	\$ -	\$ 6,985	
E-9	20	\$ 6,227	\$ 74,724	\$ 105,642	\$ -	\$ 9,614	\$ -	\$ 9,614	
W-1	1	\$ 3,116	\$ 37,397	\$ 105,642	\$ -	\$ 2,827	\$ -	\$ 2,827	
W-2	3	\$ 3,988	\$ 47,852	\$ 105,642	\$ -	\$ 4,087	\$ -	\$ 4,087	
W-3	6	\$ 4,587	\$ 55,040	\$ 105,642	\$ -	\$ 5,280	\$ -	\$ 5,280	
W-4	10	\$ 5,683	\$ 68,198	\$ 105,642	\$ -	\$ 8,173	\$ -	\$ 8,173	
O-1	1	\$ 3,188	\$ 38,261	\$ 105,642	\$ -	\$ 2,935	\$ -	\$ 2,935	
O-2	2	\$ 4,184	\$ 50,206	\$ 105,642	\$ -	\$ 4,369	\$ -	\$ 4,369	
O-3	4	\$ 5,672	\$ 68,058	\$ 105,642	\$ -	\$ 8,151	\$ -	\$ 8,151	
O-4	10	\$ 7,236	\$ 86,832	\$ 105,642	\$ -	\$ 12,276	\$ -	\$ 12,276	
O-5	18	\$ 8,999	\$ 107,982	\$ 105,642	\$ 5,040	\$ 17,161	\$ (384)	\$ 17,545	

Married Taxpayer (with 2 Minor Dependents) Filing a Federal Income Tax Return Under the Married Filing Joint Filing Status (2019)*									
Rank	YOS	2019 Monthly Basic Pay	Annual Taxable Income if Not Deployed to a CZ in 2019	Annual CZTE Limitation in 2019	Taxable Income if Deployed to a CZ in 2019	Tax if Not Deployed to a CZ in 2019	Tax if Deployed to a CZ in 2019	Savings	Comments
E-2	2	\$ 1,884	\$ 22,608	\$ 105,642	\$ -	\$ (2,800)	\$ (2,800)	\$ -	BAH and BAS are not subject to income taxes since they are non-taxable; per diem is generally not taxable*; Hostile Fire Pay in a combat zone would generally not be taxable, unless the amounts exceed the applicable CZTE limitation; a negative number indicates a federal income tax refund
E-3	3	\$ 2,234	\$ 26,802	\$ 105,642	\$ -	\$ (2,800)	\$ (2,800)	\$ -	
E-4	4	\$ 2,555	\$ 30,665	\$ 105,642	\$ -	\$ (2,800)	\$ (2,800)	\$ -	
E-5	6	\$ 3,002	\$ 36,018	\$ 105,642	\$ -	\$ (2,800)	\$ (2,800)	\$ -	
E-6	8	\$ 3,543	\$ 42,520	\$ 105,642	\$ -	\$ (2,187)	\$ (2,187)	\$ -	
E-7	12	\$ 4,296	\$ 51,548	\$ 105,642	\$ -	\$ (1,133)	\$ (1,133)	\$ -	
E-8	18	\$ 5,232	\$ 62,788	\$ 105,642	\$ -	\$ 217	\$ -	\$ 217	
E-9	20	\$ 6,227	\$ 74,724	\$ 105,642	\$ -	\$ 1,651	\$ -	\$ 1,651	
W-1	1	\$ 3,116	\$ 37,397	\$ 105,642	\$ -	\$ (2,702)	\$ (2,702)	\$ -	
W-2	3	\$ 3,988	\$ 47,852	\$ 105,642	\$ -	\$ (1,571)	\$ (1,571)	\$ -	
W-3	6	\$ 4,587	\$ 55,040	\$ 105,642	\$ -	\$ (713)	\$ (713)	\$ -	
W-4	10	\$ 5,683	\$ 68,198	\$ 105,642	\$ -	\$ 985	\$ -	\$ 985	
O-1	1	\$ 3,188	\$ 38,261	\$ 105,642	\$ -	\$ (2,612)	\$ (2,612)	\$ -	
O-2	2	\$ 4,184	\$ 50,206	\$ 105,642	\$ -	\$ (1,289)	\$ (1,289)	\$ -	
O-3	4	\$ 5,672	\$ 68,058	\$ 105,642	\$ -	\$ 853	\$ -	\$ 853	
O-4	10	\$ 7,236	\$ 86,832	\$ 105,642	\$ -	\$ 3,103	\$ -	\$ 3,103	
O-5	18	\$ 8,999	\$ 107,982	\$ 105,642	\$ 5,040	\$ 6,104	\$ (765)	\$ 6,869	

\* Although per diem is generally not taxable, per diem could be taxable in situations such as if the assignment is for a period exceeding one year. See Rev. Rul. 99-7. See I.R.S. Pub. 3, Table 2, Items Excluded from Gross Income. See I.R.C. § 162 (establishing that ordinary and necessary traveling expenses for a trade or business are allowable as a deduction). See F.M.R., Vol. 9, Chapter 8 (2019) ¶ 080206 (stating that a “civilian employee who performs a TDY assignment at one location for more than a year is considered by the Internal Revenue Service (IRS) to be permanent and any reimbursement (e.g., per diem) is considered taxable income”). See Thomas Emswiler, *Taxation of Payments for Temporary Duty*, ARMY LAWYER (Oct. 1996) (discussing the tax aspects involved with performing temporary duty).

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