A History of the Military Authority Exception in the Administrative Procedure Act

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# A History of the Military Authority Exception in the Administrative Procedure Act

**Kathryn E. Kovacs***

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INTRODUCTION

The War on Terror ignited a firestorm of commentary on issues related to civil liberties and international law. It also sparked a debate about the environmental impacts of military action and whether existing statutory provisions are too restrictive or not restrictive enough. Few commentators, however, have mentioned the provision in the Administrative Procedure Act (APA) that exempts “military authority exercised in the field in time of war,” and none have examined it closely. Yet there can be no doubt about the importance of the APA. In 1945, the American Bar Association’s Special Committee on Administrative Law, which drafted the bill that eventually became the APA, predicted that it might “become the most important event in improving the administration of justice since the Judiciary Act of 1789.” Current commentators think the APA “is arguably the most important piece of legislation governing federal regulatory agency policy making[.]” and that “of all the administrative laws, none have been more significant than the federal Administrative Procedure Act of 1946 and the similar state-level administrative procedure acts . . . .”

The APA may provide an avenue to judicial review for individuals detained by the military. Although habeas corpus is available to those held


in "territory over which the United States exercises plenary and exclusive
jurisdiction," it may not be available to those held elsewhere. And the
Alien Tort Act does not waive the government’s sovereign immunity.
Hence, some persons challenging their detention by the military have relied
on the APA’s waiver of sovereign immunity to gain access to the courts.
Even if the APA is not the detainee’s road to the courthouse door, it may be
relevant to the procedures used by military tribunals or in the judicial
review of their decisions.

In environmental law, the APA is particularly significant because it
provides the jurisdictional grounding for suits against the federal
government under many, if not most, environmental and natural resources
statutes. While some of the pollution statutes provide the waiver of
sovereign immunity and cause of action required to sue a federal agency,
the environmental statutes that are of the greatest current relevance to the
example, the Supreme Court vacated in part an injunction that barred the
Navy from using sonar during training exercises off the coast of California
and clarified the standards for granting preliminary injunctive relief. The
injunction at issue in Winter was premised primarily on the National
Environmental Policy Act (NEPA), which requires federal agencies to
examine the potential environmental impacts of their proposals before
implementing them. NEPA, “the statute that launched the "environmental decade" of the 1970s, has been hailed as one of the nation’s
most important environmental laws.” Yet it is actionable only through

(per curiam); Sanchez-Espinoza v. Reagan, 770 F.2d 202, 207 (D.C. Cir. 1985).
(2004).
could certainly be argued that the [Administrative Review Board] had violated the
principles of the APA,” but that argument “would be met with the claim that the APA is
inapplicable due to” the “military authority” exception); Bismullah v. Gates, 514 F.3d 1291,
1294–95 (D.C. Cir. 2008) (Ginsburg, C.J., concurring in denial of rehe’g en banc)
(concluding that Combatant Status Review Tribunals fall outside the scope of the APA); id.
at 1303 n.3 (Randolph, J., dissenting from denial of rehe’g en banc) (concluding that
Combatant Status Review Tribunals “are military ‘functions’ the APA specifically
exempts”).
12. See id. at 372–74.
Environmental Performance, 102 COLUM. L. REV. 903, 904 (2002).
the APA. The same is true of the Migratory Bird Treaty Act, under which the D.C. District Court enjoined Navy exercises on an island in the Pacific Ocean, and certain claims under the Marine Mammal Protection Act and the Endangered Species Act, which underlie many challenges to the Navy's use of sonar in training.

The academic literature lacks any in-depth analysis of the military authority exception. Given the critical importance of the APA to military detainees and environmental plaintiffs, that silence is deafening. Part II of this article provides a much needed and long overdue historiographic analysis of the APA's military authority exception. While a court interpreting this provision might limit itself to examining the statute's text and official legislative history, the surrounding historical context of this enactment allows a fuller understanding of Congress's probable intent. As Professor Eskridge observed, "statutory interpretation is all about words, but words are about much more than dictionaries and ordinary usage; they also involve policies chosen by the legislature and enduring principles suggested by the common law, the law of nations, and the Constitution."

20. See, e.g., Cetacean Cmty v. Bush, 386 F.3d 1169, 1171 (9th Cir. 2004).
21. The term agency as it appears in the waiver of sovereign immunity in 5 U.S.C. § 702 must be read in favor of the government. Thus, any ambiguity in the definition of that term, including the "military authority" exception, should be read to exempt the military from judicial review. See Lane v. Pena, 518 U.S. 187, 192 (1996). Recently, however, the Supreme Court said that the "sovereign immunity canon" does not "displace[] the other traditional tools of statutory construction." Richlin Sec. Serv. Co. v. Chertoff, 128 S. Ct. 2007, 2019 (2008); see also Gregory C. Sisk, The Continuing Drift of Federal Sovereign Immunity Jurisprudence, 50 WM. & MARY L. REV. 517, 575 (2008) ("So understood, the rubric of strict construction is not a substitute for careful attention to the statutory language and structure actually enacted by Congress or a basis for ignoring the manifest purpose of the statutory waiver."). And the military authority exception cannot be given such an "unduly generous interpretation" that it "defeat[s] the central purpose of the statute." Dolan v. U.S. Postal Serv., 546 U.S. 481, 492 (2006) (quoting Kosak v. United States, 465 U.S. 848, 853 n.9 (1984)); see also United States v. Nordic Vill., Inc., 503 U.S. 30, 34 (1992) ("We have on occasion narrowly construed exceptions to waivers of sovereign immunity where that was consistent with Congress' clear intent . . . .").
22. William N. Eskridge, Jr., All About Words: Early Understandings of the "Judicial Power" in
This article does not delve into the debate about whether extratextual sources should be examined to determine congressional intent, but instead presents the full historical context and leaves it to others to take what they will from the material presented.

Although the first bill to constrain administrative agencies was introduced in 1929, it was not until Roosevelt took office in 1933 and plowed ahead with the New Deal that the drive for administrative reform took root. In late 1940, a coalition of Republicans and conservative Democrats passed the Walter–Logan bill, a bill that was similar in many respects to the present-day APA, but which broadly exempted "any matter concerning or relating to the military or naval establishments, including . . . any other agency or authority hereafter created to expedite military and naval defense."24 As Hitler occupied Paris and bombed London, President Roosevelt won reelection to a third term and vetoed the Walter–Logan bill, in part because he thought the military exemption was not broad enough.25 Administrative reform went into hibernation for several years during the war and reemerged after D-Day to blossom into the APA of 1946, which enjoyed wide support from Congress and the President. While the rulemaking and adjudication provisions of the APA contained broad exemptions for military functions, the judicial review provisions exempted only "military . . . authority exercised in the field in time of war or in occupied territory."26 This article concludes that the history of that shift reveals much about Congress's changing relationship with the military, but that further analysis is required to unearth the contemporary understanding of the particular phrases Congress chose to employ in the military authority exception.

Part III explores the provisions of the Articles of War from which the military authority exception was apparently drawn. At the time it enacted the APA, Congress would have understood the phrase "in the field" to be a term of art encompassing not just the locus of combat overseas, but any


23. Compare id. at 997 ("[T]he original materials surrounding Article III's judicial power assume an eclectic approach to statutory interpretation, open to understanding the letter of a statute in pursuance of the spirit of the law and in light of fundamental values.") with John F. Manning, Textualism and the Equity of the Statute, 101 COLUM. L. REV. 1, 127 (2001) ("[Q]uestions about the appropriate method of statutory interpretation must be debated, as they have been for the past century, on the assumption that, in matters of federal statutory interpretation, the federal judge must act as the faithful agent of Congress.").

24. H.R. 6324, 76th Cong. § 7(b) (1940).

25. 1940 PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT 620–21 (1941).

place "where military operations are being conducted,"27 including military training camps in the United States and military transport ships docked in the U.S. The phrase "time of war" is also a term of art that has long been understood not to require a congressional declaration of war. Although the courts have interpreted those phrases narrowly in the context of court martial jurisdiction over civilians, this Article asserts that such a narrow interpretation is not appropriate for the military authority exception, and that Congress's understanding of those phrases in 1946 would have been somewhat broader than that of a modern reader.

This historical analysis of the military authority exception begins to bring the plain language's ambiguity into focus and reveals that some courts' and commentators' assumptions about the military authority exception have been flawed. Those flaws are explored in Part IV. Most commonly, modern readers interpret the phrase "in the field" too narrowly and fail to recognize that, in the 1940s, that phrase would have been understood to reach well beyond the locus of combat to the high seas and domestic facilities and to activities with only a faint connection to combat operations. Those erroneous assumptions could lead courts to review a broader scope of military action than Congress might have intended. On the other hand, the history of the military authority exception calls into question the courts' continued willingness to employ common law deference doctrines to avoid reviewing military action. Congress, implementing the lessons learned in World War II, mandated judicial review of a broad range of military actions. This Article will begin to define how broad that range actually is.

I. LEGISLATIVE HISTORIOGRAPHY

The term *agency* is central to the APA. Virtually all of the Act's provisions apply to agencies: §553 requires "the agency" to allow public participation in rulemaking;28 §554 requires "the agency" to give interested parties notice of adjudicatory hearings and an opportunity to participate;29 and §702 provides a cause of action and waiver of sovereign immunity for claims challenging "agency action."30 The term *agency* is defined identically in two separate provisions of the current APA, §§551 and 701, as, "each authority of the Government of the United States, whether or not it is within or subject to review by another agency."31 Among the exceptions from that definition are Congress, the courts, the territories or possessions

29. § 554(b), (c).
30. § 702; Puerto Rico v. United States, 490 F.3d 50, 72 (1st Cir. 2007).
of the United States, courts-martial and military commissions, and, the subject of inquiry here, "military authority exercised in the field in time of war or in occupied territory."

The APA passed the House and Senate in 1946 on voice votes with little debate. But that seemingly peaceful end was preceded by seventeen years of competing legislative proposals, fierce debate, a presidential veto, and finally, successful compromise. The debate was only in part "a search for administrative truth and efficiency." Underlying that substantive dispute "was a pitched political battle for the life of the New Deal." World War II interrupted the political battle temporarily and helped to shift the debate sufficiently to yield compromise. This historical context puts flesh on the bones of the military authority exception.

The American Bar Association (ABA) was central to the development and passage of the APA, the law that still imposes the primary statutory constraints on federal administrative agencies. That the Bar was so resistant to the rise of the administrative state may seem odd to us, given the significant number of lawyers currently employed in administrative practice. Professor Zeppos explains, however, that, in the "age of formalism" at the end of the nineteenth century, law was considered "a

32. §§ 551(1)(A), (B), (C), (F), 701(b)(1)(A), (B), (C), (F).
33. §§ 551(1)(G), 701(b)(1)(G). The exceptions at § 551(1)(E) through (H) do not apply to the public information requirements in § 552. § 551(1).
35. Id. Walter Gellhorn portrayed the debate leading to the APA’s passage, on its fortieth anniversary, as a battle between the reactionary, ideological, and rhetorically inflammatory American Bar Association (ABA) and the systematically analytical Attorney General’s Committee on Administrative Procedure. See generally Walter Gellhorn, The Administrative Procedure Act: The Beginnings, 72 VA. L. Rev. 219 (1986). Gellhorn was research director and “intellectual leader” of the Attorney General's Committee. Shepherd, supra note 34, at 1595; see also Martin Shapiro, APA: Past, Present, Future, 72 VA. L. Rev. 447, 449 (1986) (“Gellhorn’s view is a conflation of New Deal ideology with good, common law lawyering. In fact, Professor Gellhorn was one of a cohort of New Deal lawyers who... created a body of administrative law that rationalized and legitimated the administrative state that the New Deal created and that the New Deal ideology defended.”).
36. See Nicholas S. Zeppos, The Legal Profession and the Development of Administrative Law, 72 CHI.-KENT L. Rev. 1119, 1151 (1997) (“The puzzling question is why, given the obvious business opportunities presented by the rise of administrative law, the bar (or elite segments of the bar) was so slow (or reluctant) to fill this important new niche in legal services.”).
scientific, objective reasoning process,” separate “from the world of politics.”\textsuperscript{37} The Bar enjoyed a “privileged role . . . inextricably bound up with the power, independence, and prestige of the courts.”\textsuperscript{38} Then, in the first thirty years of the twentieth century, the number of federal administrative agencies doubled.\textsuperscript{39} Administrative adjudication “substitute[d] informal meetings presided over by a political actor for the formalized, structured, and ritualistic hearing before an independent judge.”\textsuperscript{40} That shift away from the formalist legal model breached the “boundary between law and politics,” raising “basic issues of due process and bias” and threatening the elite status and livelihoods of elite lawyers.\textsuperscript{41}

The ABA’s early efforts at administrative reform thus focused on subjecting administrative decisionmaking to judicial review.\textsuperscript{42}

Those early efforts were not successful. As Professor Schiller explains,

\begin{itemize}
  \item 37. Id. at 1121–22 (citations omitted).
  \item 38. Id. at 1130.
  \item 39. Shepherd, supra note 34, at 1561 (citation omitted). “By 1940 there were over fifty federal administrative agencies compared to the eleven that existed at the beginning of the Civil War.” Reuel E. Schiller, Reining in the Administrative State: World War II and the Decline of Expert Administration, in TOTAL WAR AND THE LAW: THE AMERICAN HOME FRONT IN WORLD WAR II 185, 186 (Daniel R. Ernst & Victor Jew eds., 2002); see also Daniel R. Ernst, The Ideal and the Actual in the State: Willard Hurst at the Board of Economic Warfare, in TOTAL WAR AND THE LAW: THE AMERICAN HOME FRONT IN WORLD WAR II, supra, at 149 (“[seventy] percent of the practice of major law firms in 1934 was before agencies that did not exist a generation earlier.”).
  \item 40. Zeppos, supra note 36, at 1125. See also Reuel E. Schiller, The Era of Difference: Courts, Expertise, and the Emergence of New Deal Administrative Law, 106 Mich. L. Rev. 399 (2007) (investigating the shifting relationship between the courts and administrative agencies during the New Deal era).
  \item 41. Zeppos, supra note 36, at 1127–29; see also Shepherd, supra note 34, at 1571 (“The increasing importance of administrative tribunals appeared to elite lawyers to threaten the lawyers’ livelihoods by diminishing the importance of lawyers and traditional lawyering.”). Professor Zeppos points out that, unlike the ABA, the Federal Bar Association and the National Lawyer’s Guild opposed the ABA’s proposals. Zeppos, supra note 36, at 1131 n.64. He thus posits that the ABA’s efforts at administrative reform may have been based in part on self-interested protection of large, industrial clients. Id. at 1133–37; see also Shepherd, supra note 34, at 1571 (“The lawyers feared that New Deal agencies threatened their clients.”).
  \item 42. Zeppos, supra note 36, at 1129.
\end{itemize}
progressive reformers early in the twentieth century expressed “a faith that properly trained experts could find objectively correct solutions to the myriad of social problems extant in a rapidly industrializing, increasingly fractious society.” That faith carried over to New Deal-era reformers, who believed that expert administration would solve the massive problems the Great Depression had caused. In the early 1930s, “liberals and progressives believed that administrative government was a scientific solution to an economic and social crisis of unparalleled proportions.” The three branches of government were seen as “insufficiently flexible” to solve such enormous and complex problems. Strict judicial review of expert administrative action had no place in that belief system. Invasive judicial review would “hobble governmental efficiency” and “defeat the purpose of creating expert agencies in the first place.” “Progressives had long viewed the American judiciary as a reactionary institution ...” The Supreme Court’s invalidation of early New Deal programs “heightened this suspicion” and made it “an article of faith among dedicated New Dealers” that the judiciary should have a limited role in reviewing agency action. It was not until those notions and the political balance of power began to shift in the late 1930s and early 1940s that administrative reform, and in particular the drive for judicial review of administrative action, picked up steam.

A. Pre-APA Bills

I. 1929–1936

Senator George Norris introduced “the first legislation for constraining administrative agencies” in 1929, four years before Franklin Delano Roosevelt took office. Norris’s bill would have established a Court of Administrative Justice to adjudicate claims against the United States.
Norris was a liberal Republican who later supported the New Deal and became an independent. Professor Shepherd posits that Norris “apparently introduced the bill in 1929 in order to control the excesses of Republican-controlled agencies.”\textsuperscript{53} Congress took no action on Norris’s bill, but those who sought administrative reform would remain focused on the administrative court concept for several more years.

In May 1933, the ABA’s Executive Committee established a Special Committee on Administrative Law, which spurred the debate over administrative procedure and played a pivotal role in passing the APA.\textsuperscript{54} The ABA Committee’s first report implies that the Committee was formed at that particular time in reaction to the first New Deal, which President Roosevelt had kicked off vigorously and immediately after his inauguration only two months earlier.\textsuperscript{55} Also in May 1933, Senator Mills Logan, a Kentucky Democrat and former chief justice of that state’s highest court, introduced a bill that was almost identical to Senator Norris’ administrative court bill of 1929.\textsuperscript{56} Like Senator Norris, Logan likely intended his bill as a “sincere, nonpolitical attempt to foster agency fairness and efficiency.”\textsuperscript{57} Congress took no action on the bill.

In 1935 and 1936, the ABA Committee proposed a draft bill nearly identical to those previously introduced by Senators Norris and Logan.\textsuperscript{58} Though the ABA withheld its full approval of that bill, the ABA Committee’s chairman, with the approval of only the Executive Committee, proposed a similar bill to Senator Logan, who introduced it in 1936; the bill died in committee.\textsuperscript{59} The administrative court proposals likely enjoyed little conservative support and hence saw no congressional

\textsuperscript{53} Shepherd, supra note 34, at 1567.
\textsuperscript{54} Id. at 1569–70.
\textsuperscript{55} 58 REPORT OF THE FIFTY-SIXTH ANNUAL MEETING OF THE AMERICAN BAR ASSOCIATION 407 (1933); see also John Dickinson, Administrative Procedure Act: Scope and Grounds of Broadened Judicial Review, 33 A.B.A. J. 434, 434 (1947) (“[t]he Committee came into existence simultaneously with a mass of early so-called ‘New Deal legislation’, . . . statutes which called into play a vast extension of administrative powers.”). The Twentieth Amendment moved inauguration day from March 4th to January 20th. U.S. CONST. amend. XX, § 1 (ratified January 23, 1933).
\textsuperscript{56} S. 1835, 73d Cong. (1933).
\textsuperscript{57} Shepherd, supra note 34, at 1569.
\textsuperscript{58} Id. at 1575; 60 REPORT OF THE FIFTY-EIGHTH ANNUAL MEETING OF THE AMERICAN BAR ASSOCIATION 136–43 (1935); 61 REPORT OF THE FIFTY-NINTH ANNUAL MEETING OF THE AMERICAN BAR ASSOCIATION 756 (1936) (“[T]he proposal as worked out by the committee is neither revolutionary nor particularly novel in character or purpose but, on the contrary, has been constructed upon a foundation already laid by bills introduced in earlier Congresses and upon study which was made in connection with them.”).
action before 1937 because “the Supreme Court's rejection of New Deal programs made political attacks unnecessary.”

So long as Republicans dominated the federal judiciary, legislative efforts to reign in New Deal agencies were not a high priority for congressional conservatives. Not surprisingly, given Congress’s growing isolationism and its focus on domestic issues at the time, none of these early proposals mentioned the military.

2. The Walter–Logan Bill

Starting in 1937, when the Supreme Court began to approve New Deal programs, President Roosevelt had been weakened by the failure of his Court-packing plan, and recession set in, the drive for administrative reform strengthened. Republicans joined conservative Democrats in support of administrative reform proposals. In the mid-term elections of 1938, Republicans picked up eighty-one seats in the House and eight seats in the Senate, which left Congress firmly in Democratic hands, but nonetheless enhanced the coalition to reign in administrative agencies.

By that time, the liberal faith in expert agencies to solve the nation’s problems began to be overshadowed by a fear of those agencies’ totalitarian tendencies. In the mid-1930s, “the true dimensions of European totalitarianism forced themselves into the American consciousness” with Stalin’s Show Trials, Hitler’s Kristallnacht, and Mussolini’s invasion of Ethiopia, among others. By the late 1930s, many Americans began to fear that “Roosevelt’s ambitions” and “economic desperation” could lead

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64. Shepherd, supra note 34, at 1580–82.
65. Id. at 1586.
66. Schiller, supra note 40, at 424 n.141.
67. Schiller, supra note 39, at 188; see also Schiller, supra note 43, at 77.
to totalitarianism at home. Although conservatives had long attacked the absolutist tendencies of administrative agencies, by the end of the 1930s, those fears had spread even to New Deal supporters. Professor Schiller posits that Americans' exposure to the abuses in Europe, coupled with their fear of “administrative absolutism” and Roosevelt's dictatorial tendencies at home, made them “less and less inclined to trust legislators or administrative experts to look after their civil liberties.” Instead, “Americans came to expect the judiciary . . . to protect individuals and minorities from the deadly tide of totalitarianism that seemed to be infecting” Europe. That shift put wind in the sails of administrative reform in Congress. Despite the military involvement in the atrocities in Europe, however, Congress gave the U.S. military a wide berth in the years leading up to the war.

The 1937 ABA Committee proposal was much stricter than its previous administrative court proposals; it provided for formal administrative hearings, required regulations to be preceded by notice and public hearings, and provided for judicial review. For the first time at the ABA’s annual meeting in September 1937, just weeks after Japan began the Second Sino-Japanese War by attacking China in what some consider the first battle of World War II, the Committee proposed to exempt from its bill “the conduct of military and naval operations in time of war or civil insurrection.” The bill also would have exempted foreign affairs, the Federal Reserve Board, the Comptroller of the Currency, the Federal Deposit Insurance Corporation, and internal revenue, patent, and customs matters, among others. The Committee chair explained that some of those agencies and matters were exempted because the agencies themselves or members of the bar objected or because judicial review was already

68. Schiller, supra note 39, at 188–89.
69. Id. at 189.
70. Schiller, supra note 43, at 85–86, 88; Schiller, supra note 39, at 189.
71. Schiller, supra note 43, at 75, 85–86.
72. Id. at 75–76.
75. 62 REPORT OF THE SIXTIETH ANNUAL MEETING OF THE AMERICAN BAR ASSOCIATION 794, 850 (1937).
76. Id.
available, but he did not explain the military exemption. The ABA Board of Governors approved the proposed bill in 1938. The Committee, chaired for that one year by “a particularly cranky” Roscoe Pound, former Dean of Harvard Law School, began to employ more inflammatory rhetoric in support of its proposals, likening Roosevelt’s administration to the Soviet Union’s Marxist dictatorship.

Senator Logan and Democratic Representative Emanuel Celler of Brooklyn, New York, introduced the ABA’s proposed bill in 1939, the year Hitler invaded Poland, and Great Britain and France declared war on Germany. Pennsylvania Democratic Congressman Francis Walter reintroduced the ABA bill a few months later. The bill came to be known as the Walter–Logan bill.

The bill’s proponents in Congress, both Republicans and Democrats, picked up on the ABA’s rhetoric. The floor debates were “riddled with comparisons of the administrative state to fascist and communist governments and accusations that administrative agencies were [being] used to advance [Roosevelt’s] totalitarian ambitions.” Ohio Republican Congressman White endorsed the bill as a “vitally important” means of counteracting Roosevelt’s ceaseless “greed for power.”

Michigan
Republican Congressman Michener, quoting Congressman Walter, said that the rise of administrative government paralleled "the developments in Europe, where control of governments by men who usurped the laws has culminated in the dictatorships which now hold much of that continent in their grasp." He further asserted that allowing agencies to issue regulations that have the force of law without also providing for judicial review "rapidly approach[es] the totalitarian state." South Dakota Republican Congressman Mundt topped it off when he said that "[n]o one interested in genuine self-government and the liberal concepts of the American system whereby the individual citizen is safeguarded from discrimination and dictatorial acts by powerful interests, political or economic, can fail to support the Walter–Logan bill." Opponents of the bill answered in equally hyperbolic terms, if not as frequently, accusing the bill's proponents of creating a "judicial fascism" and of being supported by "the utilities fascism, the most deadly enemy to economic democracy this country has ever seen." The congressional pugilists in this "bruising political brawl" found perhaps their only repose in their common desire to avoid hampering military readiness, but they could not agree on the extent to which the bill would do so, despite the ultimate

87. Id. Texas Democratic Congressman Sumners doubted that "either Hitler or Mussolini would consent to have their acts reviewed by a court proceeding under the provisions of law and the rules of evidence." Id. at 13,811 (1940). Wisconsin Republican Congressman Hawks said that the Securities and Exchange Commission's authority to investigate statutory and regulatory violations "call[s] to the mind stories of the tyrannies of the Gestapo of Germany, or the Russian OGPU, the Soviet Union's internal security force between 1922-1934." Id. at 4603 (1940). And Utah Democratic Senator King branded the bill's opponents socialists. Id. at 13,662 (1940). The Senate Judiciary Committee's Report identified the bill's purpose as reversing the nation's drift into parliamentarism which, if it should succeed in any substantial degree in this country, could but result in totalitarianism with complete destruction of the division of governmental power between the Federal and State Governments and with the entire subordination of both the legislative and judicial branches of the Federal Government to the executive branch wherein are included the administrative agencies and tribunals of that Government.
S. Rep. No. 76-442, at 5 (1939); see also id. at 9; H.R. Rep. No. 76-1149, at 6, 7 (1939) (espousing the bill as necessary to prevent autocracy).
88. 86 Cong. Rec. 13,813 (1940).
89. Shepherd, supra note 34, at 1592; see also id. at 1593 ("[B]oth sides in the administrative reform debate expressed real fears of dictatorship and communism"); id. at 1611.
90. 86 Cong. Rec. 4530 (1940) (statement of Rep. Rankin (D–Miss.)).
91. Id. at 4595.
92. Shepherd, supra note 34, at 1596.
inclusion in the Walter–Logan bill of a broad military exemption.

Logan’s bill, as originally submitted, required publication of regulations in the Federal Register, provided for administrative appeals boards in executive agencies and judicial review in the courts of appeals, and enunciated a standard of review that is not dissimilar from that of the current APA. Like the ABA’s proposal, the bill originally exempted “any matter concerning or relating to the conduct of foreign affairs; the conduct of military or naval operations in time of war or civil insurrection,” and a laundry list of agencies and specific types of administrative decisions.\(^9\)

Rep. Celler later explained that “[t]hose bureaus that yelled most loudly got their answer in exemptions, and those bureaus that did not yell too loudly did not.”\(^9\)

The War Department complained that the bill would be “gravely subversive of military discipline in all components of the Army, destructive of efficiency in the performance of the functions of the War Department, both military and non-military, obstructive to progress in preparedness for national defense, and generally disastrous from the viewpoint of the public interest.”\(^9\)

In particular, the Department objected that the bill would allow military personnel to challenge orders “on any occasion except in time of war or insurrection.”\(^9\)

The Department therefore suggested that “all matters concerning or relating to the operations of the War Department and the Army” be exempted.\(^9\)

Logan submitted an amended version of the bill in May 1939, which defined agency for the first time, removed the exemption for foreign affairs, and amended the military exemption to delete the reference to “time of war or civil insurrection,” leaving a broad exemption for “the conduct of military or naval operations.”\(^9\)

The Senate Judiciary Committee approved the amended bill unanimously;\(^9\) its report did not mention the military

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93. S. 915, 76th Cong. § 6(b) (1939).

94. 86 CONG. REC. 4547 (1940). McNollgast points out that the list of exempted agencies “included nearly all agencies created before 1933 under Republican administrations and thus more likely to be serving interests favored by Republicans.” McNollgast, supra note 5, at 197.


96. Id. at 103.

97. Id.

98. S. 915, 76th Cong. §§ 1(3), 7(b) (1939).

99. See Shepherd, supra note 34, at 1601 (explaining why “[e]ven the committee’s eleven Northern Democrats approved the bill”).
exemption. Like Logan’s Senate bill, Walter’s House bill exempted “the conduct of military or naval operations.” The House Judiciary Committee reported Walter’s bill favorably on July 13, 1939. The majority report did not mention the military. The minority report, however—authored by Congressman Celler, who had introduced the ABA’s bill, but changed his mind about its wisdom and ultimately voted against it—criticized the bill for failing to include a broader exemption for “other activities” of the Departments of War and the Navy “which highly affect public interest and the national defense, such as river and harbor improvements, and purchase of munitions and supplies.”

The House debated the bill from April 15–18, 1940, just days after Hitler invaded Denmark. On the third day of debate, some congressmen suggested that the military exemption was too narrow. On the final day of debate, Congressman Walter proposed to amend the exemption for military “operations” to include “strictly military and naval activities of the War and Navy Departments.” He explained that the War Department had requested the amendment “because the word ‘establishments’ has a well-known technical meaning.” In Congressman Walter’s view,

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100. S. REP. NO. 76-442 (1939).
101. Shepherd, supra note 34, at 1603.
102. Id.
103. H.R. 6324, 76th Cong. § 7(b) (3d Sess. 1939).
105. H.R. 4236, 76th Cong. (1939) [introducing the ABA bill]; 86 CONG. REC. 4744 (1940) (voting against the ABA bill); see also Shepherd, supra note 34, at 1604 (“Celler’s transformation is consistent with the Roosevelt administration’s having convinced him that the Walter–Logan bill would hinder New Deal programs; Celler otherwise firmly supported the New Deal.”).
106. H.R. REP. NO. 76-1149, pt. 2, at 5 (1940) (Minority Rep.); see also id. at 6 (“[I]t would be manifestly inappropriate to require the War Department to conduct hearings on Army regulations.”).
107. See 86 CONG. REC. 4653 (1940) (statement of Rep. McGranery) (suggesting that the military exemption would allow military officers to contest promotion decisions in the courts of appeals and substitute the court’s judgment for that of the Army or Navy). One of the bill’s supporters, Republican Congressman Gwynne, defended the bill’s exemptions, including the military exemption. Id. at 4649 (statement of Rep. Gwynne) (“We know that under the Constitution Congress declares war, but the actual conduct of the armies and the navies is an executive function and Congress and the courts have very little, if anything, to do with it.”).
108. Id. at 4725 (statement of Rep. Walter).
109. Id.; see also id. at 4726 (statement of Rep. May) (accepting this amendment, but also suggesting express inclusion of the War and Navy Departments); id. at 4727 (statement of
however, the exemption, even as amended, would not cover the military's "civil operations." Other members of the House argued strenuously that all operations of the War and Navy Departments, including work on rivers and harbors, should be excluded from the bill, and Rep. Celler expressed his view that the term *establishments* would do so. Others agreed with Celler's interpretation. Rep. Hobbs then stated that Walter "certainly did not intend to give the impression that the word 'establishments' was not all-inclusive of the present activities of the War and Navy Departments, nor even of those that are not primarily and wholly military or naval functions." The amendment then passed. Rep. Keller's proposal to title the bill "[t]he lawyers' emergency relief bill to end unemployment in the legal profession, and for no other purpose" was defeated, and the bill passed by a vote of 282 to 96.

In the summer of 1940, war became a more pressing concern as Hitler marched into Paris and began the London Blitz. Roosevelt won reelection to a third term in November. Shortly after election day, the Senate Committee took the military amendment a step further and deleted "the conduct of" such that the military exemption provided: "Nothing contained in this Act shall apply to or affect any matter concerning or relating to the military or naval establishments." On November 26, 1940, the Senate accepted the Committee's amendment without discussion. The Senate also accepted without discussion Senator Hatch's amendment adding to the military exemption "any other agency or authority hereafter created to expedite military and naval defense." The bill passed the same day by a vote of 27 to 25, much closer than the House's lopsided vote in the spring.

Rep. Hobbs (arguing that *establishments* covers "the complete functioning of all parts of the Military and Naval Establishments of Uncle Sam").

10. *Id.* at 4725 (statement of Rep. Walter).
11. *Id.* at 4726–27 (statements of Reps. Celler, May, and Bulwinkle).
12. *Id.* at 4727 (statement of Reps. Hobbs and May).
14. *Id.* at 4728.
15. *Id.* at 4742, 4743–44 (1940). "All but two Republicans, 83% of Southern Democrats, and 41% of Northern Democrats" voted for the bill. Shepherd, *supra* note 34, at 1619.
16. *Id.* at 1622.
17. H.R. 6324, 76th Cong. § 7(b) (3d Sess. 1940).
18. 86 CONG. REC. 13,746–47 (1940).
19. *Id.* at 13,747.
20. *Id.* at 13,747–48. Every voting Republican senator and ten conservative Democrats, both Northern and Southern, voted in favor of the bill. Shepherd, *supra* note 34, at 1622.
Back in the House on December 2, 1940, Representative Cochran said that Senator Hatch's amendment was "a legislative afterthought...designed to prevent the Walter-Logan bill from hampering the national-defense program" that "falls far short of accomplishing this purpose" because it would not cover civilian agencies "performing functions which are indispensable to the workings of our defense program."\textsuperscript{121} Congressman Sumners, on the other hand, believed that the military exemption included not just the military, but "covers everything that may be done by any agency concerning or relating to the Military and Naval Establishments."\textsuperscript{122} The House concurred in the Senate amendments by a vote of 176 to 51.\textsuperscript{123}

President Roosevelt vetoed the Walter-Logan bill on December 18, 1940.\textsuperscript{124} On one hand, he did not think the bill went far enough in enabling administrative agencies to resolve disputes so as to avoid litigation. He saw the bill as "one of the repeated efforts by a combination of lawyers who desire to have all processes of Government conducted through lawsuits and of interests which desire to escape regulation."\textsuperscript{125} On the other hand, he felt that the bill imposed too much of a burden on national defense. He noted that affected agencies, "including many whose activities have an important collateral effect on the defense program, have pointed out serious delays and uncertainties which would be caused by the present bill."\textsuperscript{126} Roosevelt acknowledged that the bill exempted "agencies engaged in National Defense functions," but found the bill flawed in that it would subject other agencies, like the Maritime Commission and the Departments of Commerce and Treasury, to delay when engaging in defense-related functions.\textsuperscript{127} "Quite apart from the general philosophy of this Bill," he concluded, "its unintentional inclusion of defense functions would require my disapproval at this time."\textsuperscript{128} Later that day, the House failed to override the President's veto.\textsuperscript{129}

\begin{itemize}
  \item \textsuperscript{121} 86 CONG. REc. 13,810 (1940) (statement of Rep. Cochran).
  \item \textsuperscript{122}  Id. at 13,811 (1940) (statement of Rep. Sumners).
  \item \textsuperscript{123}  Id. at 13,815–16. Apparently, many of the 203 House members who did not vote, including Rep. Celler, were absent. Id.
  \item \textsuperscript{124}  Id. at 13,942–43; Shepherd, supra note 34, at 1625.
  \item \textsuperscript{125}  Franklin Delano Roosevelt, The President Vetoes the Bill Regulating Administrative Agencies, Note to the House of Representatives, Dec. 18, 1940, in THE PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT 619 (1941).
  \item \textsuperscript{126}  Id. at 620.
  \item \textsuperscript{127}  Id. at 620–21.
  \item \textsuperscript{128}  Id. at 621.
  \item \textsuperscript{129}  86 CONG. REc. 13,953 (1940). While 113 of 115 Republicans voted to override, "many conservative Democrats now defected from their coalition with Republicans." Shepherd, supra note 34, at 1630.
\end{itemize}
3. The War Years

As he mentioned in his veto of the Walter–Logan bill, President Roosevelt had asked the Attorney General to form a committee to study administrative reform in 1939, about a month after Logan introduced the ABA bill in the Senate. The President’s suggestion in his veto message that legislation should await the committee’s report “may have swayed some members of Congress” who voted for the bill to vote against an override. The Attorney General’s Committee on Administrative Procedure submitted its report on January 22, 1941, about a month after the override vote failed. Despite President Roosevelt’s concern that the Walter–Logan bill, even with its broad exemption for “any matter concerning or relating to the Military or Naval Establishments,” would have hampered military readiness, the Attorney General’s Committee did not recommend special treatment for the military. Instead, the Committee said that its recommendations “relating to delegation; . . . administrative information; . . . informal methods of adjudication; and . . . rule-making procedures are applicable to the War Department.” Indeed, the only substantial discussion of the military in the Committee’s report concerned the War Department’s civil jurisdiction over navigable waterways and toll bridges.

The report included two draft bills, one favored by the eight-member liberal majority and the other favored by the four-member conservative minority. Senator Hatch introduced both bills in the Senate on January 29, 1941. While the majority bill “imposed little restraint on agencies,” the minority bill “would have controlled agencies substantially, but not as strictly as the Walter–Logan bill.” Interestingly, it was the minority bill that provided broader exemptions for the military. Both bills would have

131. Shepherd, supra note 34, at 1594.
132. Id. at 1631 (citation omitted).
133. COMM. ON ADMINISTRATIVE PROCEDURE, Administrative Procedure in Government Agencies, S. Doc. No. 77-8 (1941).
134. H.R. 6324, 76th Cong. § 7(b) (3d Sess. 1940); S. Doc. No. 77-8, at 155.
135. Id. at 155–57.
136. Shepherd, supra note 34, at 1632.
137. S. 675, 77th Cong. (1941); S. 674, 77th Cong. (1941). See also S. 918 and H.R. 3464, 77th Cong. (1941), which “combined the most restrictive sections of the Walter–Logan bill and the minority bill.” Shepherd, supra note 34, at 1636. Hatch introduced S. 918 on February 13, 1941, and Congressman Walter introduced H.R. 3464 on February 18, 1941. S. 918, 77th Cong. (1941); H.R. 3464, 77th Cong. (1941). Section 900(b) of these bills exempted “the conduct of the Military or Naval Establishments” from all of their provisions. S. 918 § 900(b); H.R. 3464 § 900(b).
138. Shepherd, supra note 34, at 1633–34.
created an Office of Federal Administrative Procedure to review practices and procedures of executive agencies, required promulgation and publication of regulations, and mandated procedures for administrative hearings. Both defined “agency” to include executive branch agencies, but neither exempted the military from that definition. Instead, both bills exempted from their adjudication provisions “the conduct of the Military or Naval Establishments, or the selection or procurement of men or materials for the armed forces of the United States.” The bills’ commonalities end there. The majority bill included no military exemption from its rulemaking provisions; the minority bill, on the other hand, authorized the President to temporarily suspend any of the act’s provisions under certain circumstances. In addition, Title II of the minority bill, which required notice and comment rulemaking “whenever practicable,” provided:

Whenever expressly found by an agency to be contrary to the public interest, the provisions of this title, in whole or in part, shall not apply to (a) the conduct of military, naval, or national-defense functions, or the selection or procurement of men or materials for the armed forces of the United States . . . .

In the spring of 1941, as Germany prepared to invade the Soviet Union, the Senate Judiciary Committee held hearings. Captain Karl R. Bendetson from the Office of the Judge Advocate General appeared for the War Department. He opined that that the military “could not properly function” if it had to comply with the proposed procedural requirements and that the bills’ military exemptions were “not sufficiently broad to provide a complete exemption.” The Secretary of War’s written statement even questioned Congress’s constitutional authority to impose on the President’s “command function” statutory requirements “which would gravely impair” military efficiency. The word conduct, Bendetson said, was “restrictive,” and the term military establishment could be read to not cover the War Department. Bendetson objected in particular to the provisions requiring publication of rules, which “might conceivably cover

139. S. 675, 77th Cong. § 301(d) (1941); S. 674, 77th Cong. § 301(c) (1941).
140. S. 674, 77th Cong. § 111 (1941).
141. Id. § 208.
142. Id. § 201.
144. Id. at 36.
145. Id. at 48.
146. Id. at 46.
any type of regulation whether adopted in the field or not.”

The War Department wanted Congress not just to clarify the exemption of military functions, but also to provide a “full exemption” for the War Department’s civil functions, specifically its “civil jurisdiction over navigable waters” which Bendetson said “is so closely allied to the national defense that it partakes of the same character.” Bendetson proposed amending the bills to provide a “complete exclusion” of “every function” of both the War and Navy Departments by specifying that they “shall have no application to” the War and Navy Departments, including the Army, the Marine Corps, and the Coast Guard “when serving under the jurisdiction of the Navy Department.”

Other witnesses rejected Bendetson’s suggestion. The Chairman of the ABA Committee responded that the military “should not be completely free of judicial review” and in fact “has not been since 1853 when the Court of Claims was established.” The ABA committee’s proposed bill at that time exempted from its judicial review provisions “any case involving military or naval operations in time of war.” Assistant Secretary of State and Chairman of the Attorney General’s Committee Dean Acheson opined that the majority bill’s exceptions for “the military service, the armed forces, or the selection and discharge of employees” were “very clear.” Carl McFarland, a member of the Attorney General’s Committee and proponent of the stricter minority bill, objected to the “exemption of any agencies, as such, since they almost all exercise certain functions which, as a matter of principle, should be governed by the mild requirements of these proposals.” In particular, McFarland disagreed with the War Department’s request that it be “bodily exempted . . . even beyond the present exemption of its military functions.”

The United States declared war on Japan on December 8, 1941, and work on administrative reform took a back seat. Several changes during

147. Id. at 37.
148. Id. at 38.
149. Id. at 45.
150. Id.
151. Id. at 961.
152. Id. at 995; see also 66 ANNUAL REPORT OF THE AMERICAN BAR ASSOCIATION 451 (“This committee believes that there can be no compromise on the necessity and desirability of there being in the courts ultimate and final judicial authority to fully review any and all administrative decisions of whatever character which the Congress does not specifically exempt from such review for reasons of state or military policy.”).
154. Id. at 1349.
155. Id.
the war years “paved the path to the APA.” Both sides of the administrative reform debate became more flexible during the war years, and “[v]ituperation . . . [went] out of style.” Congressional Democrats grew politically weaker during the war. In the 1942 midterm election, Republicans gained nine seats in the Senate, leaving Democrats with a twenty-one-seat majority, but they picked up forty-seven seats in the House, leaving Democrats with only a nine-seat majority. President Roosevelt remained enormously popular, but retreated from the New Deal “to ensure industrialists’ cooperation” in the war effort. That retreat may have deflated the drive for strict administrative controls among the anti-New Deal conservatives who had supported the Walter–Logan bill. In addition, the President’s judicial appointments had shifted the federal bench to the left. The new liberal judiciary was less likely to strike down New Deal programs, making broad judicial review of administrative decisions less attractive to conservatives and less feared by liberals. The ABA backed off of its previously “combative approach” and gave “an olive branch to Roosevelt” by appointing Carl McFarland chair of its Special Committee on Administrative Law. Francis Biddle, who had served with McFarland on the Attorney General’s Committee on Administrative Law.

156. Shepherd, supra note 34, at 1641.
157. See Gellhorn, supra note 35, at 229–30 (“Seemingly, all concerned heard the message that agitated advocacy was no longer appropriate.”).
158. Shepherd, supra note 34, at 1643.
159. Roosevelt’s approval rating hit 84% immediately following Pearl Harbor and remained high until his death. See Roper Center, Job Performance Ratings for President Roosevelt, http://webapps.ropercenter.uconn.edu/CFIDE/roper/presidential/webroot/presidential_rating_detail.cfm?allRate=True&PresidentName=Roosevelt (last visited August 1, 2010).
160. Shepherd, supra note 34, at 1643.
161. See Schiller, supra note 40, at 404 (“By the end of the 1930s there had been a dramatic change in the relationship between courts and the administrative state. Courts were placed in a position frankly subservient to the administrators whose task it was to rationalize and reform the failing economy through the application of scientific expertise.”).
162. Shepherd, supra note 34, at 1643–44; McNollgast, supra note 5, at 183, 191. Roosevelt made 204 judicial appointments. See Judgship Appointments by President, http://www.uscourts.gov/JudgesAndJudgeships/Viewer.aspx?doc=/uscourts/JudgesJudgeships/docs/apptsbypres.pdf (last visited June 21, 2010). Although that number is far less than modern presidents like Reagan, Clinton, and Bush II, it represents a significant proportion of the then-smaller federal judiciary. When Roosevelt took office in 1933, there were 211 Article III judges. See Authorized Judgeships, http://www.uscourts.gov/JudgesAndJudgeships/Viewer.aspx?doc=/uscourts/JudgesJudgeships/docs/allauth.pdf, at 5 (last visited August 1, 2010). When he died in 1945, the judicial ranks had swelled to 262 judges. Id. at 6. Thus, Roosevelt replaced a large proportion of the federal judiciary in his years in office. In 2009, there were 864 Article III judgeships. Id. at 8.
163. Shepherd, supra note 34, at 1645–46.
Procedure, became Attorney General in 1941. Professor Shepherd explains that McFarland and Biddle “continued a cooperative relationship that they had established on the Attorney General’s Committee.”

In addition, the size of the federal bureaucracy increased dramatically, as twenty-six new agencies were created to guide the nation through the war. Federal agencies gained broad new powers and sometimes “blundered,” revealing to the public “the abuses and irritations that agencies could cause.” For example, the Office of Price Administration, which had the authority among other things to fix prices and control rents, rationed over 90% of consumer goods by the end of the war. Inflation and chronic shortages were blamed on federal agencies. The war demonstrated that “agencies could be inefficient, incompetent, bullying, and perhaps even captured by the interests they were supposed to regulate.” The ABA Committee’s 1943 report explained, “[w]ar has complicated and aggravated the problems of administrative law, particularly federal administrative law. The impact of administrative regulation has vastly increased in both degree and in scope.” The Committee believed that the war, “fought for freedom and the dignity of the individual,” had made citizens “more keenly aware” that their “freedom and rights lie under the pall of a war emergency reflected in operations of the federal administrative establishment.”

Professor Schiller posits that the war bureaucracy “weakened Americans’ faith in expertise.” At the same time, the belief that administrative power could pave the road to totalitarianism gained prominence “across the political spectrum and had even entered mainstream culture.” Those factors, coupled with growing economic prosperity, led to a shift in liberal reformers’ belief that government regulation would solve society’s

164. Id. at 1647.
165. Id.
166. Schiller, supra note 39, at 190.
167. Shepherd, supra note 34, at 1641–42.
168. Schiller, supra note 39, at 193.
169. Shepherd, supra note 34, at 1641.
170. Schiller, supra note 39, at 195; see also id. at 201 (“Too often American wartime agencies had the appearance of incompetent bullies, captured by special interests, acting with autocratic disregard of due process.”).
171. 68 ANNUAL REPORT OF THE AMERICAN BAR ASSOCIATION 249 (1943).
172. Id. at 250.
173. Schiller, supra note 43, at 93; see also id. at 95 (“[A]dministrative expertise, once a powerful rationale for exempting agencies from judicial oversight, became nothing more than an excuse for frightening excesses of governmental power.”); Schiller, supra note 39, at 188.
Consequently, after World War II, "[t]he claim that imposing the rule of law on agency behavior could protect Americans from an administrative state run amok . . . was increasingly heard across the political spectrum."\textsuperscript{176} The Walter–Logan bill demonstrated that, at least in Congress, the military was generally exempt from these concerns before the war. But that changed during the war. By the time Congress passed the APA in 1946, it was still hesitant to impose procedural constraints on the military, but its willingness to leave the military free of judicial oversight had waned, perhaps due to the militaristic regimentation of civilian life or exposure to the abuses of Europe’s fascist armies.\textsuperscript{177}

B. The APA of 1946

1. Introduction and Passage

Two weeks after D-Day in 1944, Senator McCarran and Representative Sumners introduced the bill that would eventually become the APA.\textsuperscript{178} The ABA Committee designed the bill as a compromise between the Attorney General’s Committee’s majority bill, which the ABA Committee believed was “designed to confirm administrative practices,” and the minority bill, which the ABA Committee believed was “too long and prolix.”\textsuperscript{179} The bill included public information, notice and comment rulemaking, and adjudication provisions; it specified parties’ rights in formal rulemakings and adjudications and provided for judicial review.\textsuperscript{180} “The introduction of these bills brought forth a volume of further suggestions from every quarter.”\textsuperscript{181} McCarran and Sumners revised and reintroduced the bill in January

\textsuperscript{175} Id. at 75–76, 84, 95.
\textsuperscript{176} Schiller, supra note 49, at 1405; see also id. at 1409 (“[B]y the end of World War II, a consensus had developed that the judiciary should take a more active role in policing agencies than it had during the New Deal.”); Schiller, supra note 43, at 102 (“It was events that occurred in the 1940s—particularly the rise of fascism in Europe and the disillusionment with the administration in the United States—that resulted in the judiciary taking on an institutional role as the protector of civil liberties.”); Schiller, supra note 39, at 190.
\textsuperscript{177} See Schiller, supra note 39, at 189.
\textsuperscript{178} S. 2030, 78th Cong. (1944); H.R. 5081, 78th Cong. (1944).
\textsuperscript{179} 68 ANNUAL REPORT OF THE AMERICAN BAR ASSOCIATION 256 (1943); Shepherd, supra note 34, at 1649–50.
\textsuperscript{180} See Shepherd, supra note 34, at 1650–52.
\textsuperscript{181} S. REP. NO. 79-752 (1945), reprinted in ADMINISTRATIVE PROCEDURE ACT: LEGISLATIVE HISTORY, 1944–46, at 190 (1946) [hereinafter LEGISLATIVE HISTORY].
Like their original bill, § 3 and § 4 of the revised bill exempted “any military, naval, and diplomatic function of the United States” from its public information and rulemaking provisions. The bill also included a blanket exemption for temporary wartime functions: “functions which by law expire on the termination of present hostilities, within any fixed period thereafter, or before July 1, 1947.”  

Henry L. Stimson, the Secretary of War, wrote to Pat McCarran, chair of the Senate Judiciary Committee, on February 15, 1945, in response to the Committee’s request for comments on the revised bill. Stimson noted that the “military function” exceptions had “no precise statutory meaning.” He also expressed concern that courts-martial might be subject to the adjudication and judicial review provisions and that various other provisions in the bill “would be ruinous if made applicable to the War Department and the Army.” Accordingly, Stimson suggested adding to the bill a blanket exemption for the War Department, the Army, the Navy, and “the selection or procurement of personnel or materiel for the armed forces of the United States.”

183. The rulemaking provisions of § 4 included the clause: “Except to the extent that there is directly involved any military, naval, or diplomatic function of the United States . . . .” The public information provisions of § 3 included the same clause with the following addition at the end: “requiring secrecy in the public interest.” H.R. 1203, 79th Cong. §§ 3, 4 (1945); S. 7, 79th Cong. §§ 3, 4 (1945). Congressman Gwynne introduced an earlier, slightly stricter version of the same bill several months before McCarran and Sumners introduced their bill. See Shepherd, supra note 34, at 1653. Gwynne’s bill included the same military exemption in its public information and rulemaking provisions. See H.R. 4314, 78th Cong. §§ 2, 6 (1944). Congressman Smith also introduced a stricter version of the bill in 1944, which, “[r]eflecting popular anger at the agencies that had arisen during the war . . . eliminated the McCarran–Sumners bill’s exemption of wartime agencies.” Shepherd, supra note 34, at 1653–54. Yet even Smith’s bill included the same military exemption in its public information and rulemaking provisions. See H.R. 5237, 78th Cong., §§ 2, 3 (1944).
184. H.R. 1203, 79th Cong. § 2(a) (1945); S. 7, 79th Cong. § 2(a) (1945).
185. Also introduced in 1945 were H.R. 184, 339, 1117, 1206, and 2602, 79th Cong. (1945), all of which contained some sort of military exemption.
187. Id. at 2.
188. See id. at 2–3.
189. Id. at 4.
190. Stimson recommended adding the following language:

The provisions of this statute shall not apply to the War Department, the Army of the United States, the Navy Department, or the United States Navy (including the
President Roosevelt died on April 12, 1945, three months into his fourth term, and Harry Truman became President. Professor Shepherd explains that "Truman supported administrative reform with marginally greater fervor than had Roosevelt." "Truman had an in-depth understanding of the United States' war effort, in part from his experience as chair of the Senate Special Committee to Investigate the National Defense Program, which examined the nation's war preparations, but he was politically weaker than Roosevelt. Indeed, when Congress passed the bill in the spring of 1946, Truman was engaged with the national railroad strike. "Truman could devote neither attention nor political resources to the APA." Meanwhile, public support for administrative reform continued to grow after the war ended in Europe on May 8, 1945 and in Japan on August 14, 1945, as federal agencies' reconversion to a peacetime economy faltered.

Roosevelt's death may also have given New Deal Democrats in Congress "the incentive to consolidate the gains of the New Deal thus far" as they "realized that their prospects for retaining the presidency were growing increasingly dim." McNollgast explains that the prospect of a Republican executive led congressional Democrats to "favor procedural restraints on agency action" because such restraints "would blunt any republican president's ability to dismantle or shift the regulatory policies of the New Deal." For their part, congressional Republicans may have continued to support the bill because it "would slow the adoption of further New Deal regulations" and could be altered if Republicans won the presidency and majorities in Congress in the next election.

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

Id. at 4.

191. Shepherd, supra note 34, at 1658.
192. See S. Res. 71, 77th Cong. (1941); 87 CONG. REC. 1615 (1941).
193. Shepherd, supra note 34, at 1658. Although Truman's approval rating was high when he became President, it dipped rapidly during his first year in office. By the time he signed the APA in June, 1946, his approval rating was 45% and dropping. See Roper Center, Job Performance Ratings for President Truman, http://webapps.ropercenter.uconn.edu/CFIDE/roper/presidential/webroot/presidential_rating_detail.cfm?allRate=True&PresidentName=Truman (last visited Aug. 1, 2010). Republicans took control of both houses of Congress in the 1946 mid-term election.
194. Shepherd, supra note 34, at 1659.
195. See id. at 1658.
196. McNollgast, supra note 5, at 182-83; see also id. at 190-91.
197. Id. at 192; see also id. at 203.
198. Id. at 194-95. Alan Schwartz criticizes McNollgast for failing to explain why Republicans did not stall until the 1948 election and posits that "the contribution of the
Less than a month after Roosevelt died, on May 5, 1945, H. Struve Hensel, formerly a partner at Milbank, Tweed in New York, then the Navy’s first General Counsel and, at the time, Assistant Secretary of the Navy, wrote to Senator McCarran as Acting Secretary that the bill “is so drafted as to cause difficulties to this Department which are wholly disproportionate to the intended benefits to the public.”

“To the extent that it is possible to construe the bill with any reasonable degree of certainty,” he continued, “it appears to be, in many instances, affirmatively prejudicial to the operations of the Navy Department.”

In Hensel’s view, the “fundamental difficulty” with the bill was the lack of certainty as to which of the Navy’s functions would be covered. In particular, Hensel was unsure whether the exceptions for naval functions would cover all of the Navy’s activities or “only those directly related to Navy ships.”

Hensel also expressed concern that the adjudication provisions would impact courts-martial and the judicial review provisions would subject the Navy’s actions to de novo review in court. Unlike the War Department, the Navy did not suggest any amendments to fix those problems, but instead “urgently” recommended against the bill’s enactment.

Following private negotiations with representatives of the Attorney General, the ABA, and others, the Senate Judiciary Committee issued a proposed revision of the bill in May 1945. The Senate Committee proposed retaining the military exemptions in the public information and rulemaking provisions in §§3 and 4; adding an exemption to the adjudication provision in §5 for “the conduct of military, naval, or foreign affairs functions”; moving the exemption for temporary wartime functions from §2 to a new §13; and adding to that exemption the Selective Service Act and other specific statutes.

The Senate Committee received further comments and, in June 1945, issued a second committee print with columns showing the provisions of the original bill, the Committee’s
proposed revisions, explanations of the provisions, and a summary of comments received.\textsuperscript{207}

The Secretary of War wrote to Senator McCarran again on June 13, 1945, supporting the addition of a “military function” exception to the adjudication provisions, but again expressing concern about the imprecision of those terms.\textsuperscript{208} Stimson’s “special concern,” however, was the lack of a military exception in § 10’s judicial review provisions.\textsuperscript{209} He suggested that “at least” § 10 should include a “military function” exception similar to those in the other sections,\textsuperscript{210} but reiterated the proposal in his February letter that the War Department, the Army, and the Navy be exempted from the bill entirely.\textsuperscript{211} The Senate Committee declined that proposal.

Among the other comments the Committee received and responded to in the June 1945 Committee Print was a recommendation that it add to § 13 “courts[-]martial, military or naval authority exercised in the field in time of war or in occupied territory.”\textsuperscript{212} The Committee commented that “[t]his may properly be done to remove any question of the application of the measure to purely military functions.”\textsuperscript{213} Although the legislative history does not indicate who made that suggestion, a handwritten note on a copy of the Committee Print in the bill on file at the National Archives in Washington, D.C., indicates that this amendment may have come from the War Department.\textsuperscript{214} Since much of the bill’s development took place behind closed doors, it would not be surprising if the War Department suggested that language as a compromise. Another commenter “strongly urged” that “there should be no exemption of war functions except those relating to courts-martial and the authority of the Army and Navy”—in other words, that the exemption in § 13 be limited to “courts[-]martial,
military or naval authority exercised in the field in time of war or in
colonized territory” and not include temporary wartime agencies.215 The
Committee explained that “war agencies functions” were exempted in § 13
because “it would take at least a year” for an agency to revise its
practices.216 Presumably, the temporary wartime agencies would have been
close to expiring at that point.217 With regard to the exception in §§ 3 and 4
for “any military, naval, and diplomatic function of the United States” and
the newly proposed exemption to the adjudication provision in § 5, the
Committee commented that these exemptions were “self-explanatory” 218
and could be further clarified in committee reports.219 Unfortunately, the
committee reports did not clarify those terms.

The House Judiciary Committee held hearings in June 1945,220 but
those hearings were “a side show” to the “main act,” which entailed private
negotiations with the Attorney General.221 The only discussion of the
military at the hearings concerned the exemption for temporary wartime
agencies, which ABA Committee chairman Carl McFarland assured the
Committee would “not be unduly injured in any way.”222 After future
Supreme Court Justice Tom Clark became Attorney General on July 1,
1945, negotiations reopened between the Senate Judiciary Committee and
the interested agencies, parties, and organizations whose views were
received informally rather than at public hearings.223 By August 1945, the

215. LEGISLATIVE HISTORY, supra note 181, at 43–44. With regard to the bill’s
adjudication provisions, one commenter suggested that “military functions—particularly
courts-martial proceedings—require specific exemption.” Id. at 36. The Committee
responded that “[t]his is dealt with in the comment to Section 13.” Id.
216. Id. at 43.
217. See id. at 313 (statements of Sen. McCarran, Chairman, S. Comm. on the Judiciary)
(“The pending bill does, however, in Section 2(a), exempt war agencies, because they are
presumably self-liquidating, and it was deemed unwise to attempt to cover them at this late
date.”).
218. Id. at 15, 17, 22.
219. See id. at 22.
1203, H.R. 1206, and H.R. 2602 Before the H. Comm. on the Judiciary, 79th Cong. (1945),
reprinted in LEGISLATIVE HISTORY, supra note 181, at 45.
221. Shepherd, supra note 34, at 1659–60.
222. LEGISLATIVE HISTORY, supra note 181, at 83 (statement of Rep. Ernest W.
McFarland, Member, H. Comm. on the Judiciary).
223. See Shepherd, supra note 34, at 1661 (citing S. Rep. No. 79-752 (1945), reprinted in
LEGISLATIVE HISTORY, supra note 181, at 191); see also id. at 1663 (“The bill had sprung not
from public debate in Congress, as other bills had, but from months of private, off-the-
record negotiations.”); 70 ANNUAL REPORT OF THE AMERICAN BAR ASSOCIATION 271
(1945) (“The Senate Judiciary Committee has a subcommittee at work on the bill and is
proceeding by executive sessions, consultations, and written submittals of views.”).
Navy had backed off of its opposition to the bill somewhat. Hensel chose instead to interpret the "naval authority" exceptions to encompass "all operations under the jurisdiction of the Navy Department" and the judicial review provisions in § 10 to "create no new methods of review." 224

The Senate Judiciary Committee issued another draft of the bill on October 5, 1945, 225 § 2(a) of which "excluded from the operation of this Act . . . (2) courts[-]martial and military commissions, (3) military or naval authority exercised in the field in time of war or in occupied territory," temporary wartime agencies, and several specific statutes. 226 The draft also retained an independent exemption in the rulemaking provisions of § 4 for "any military, naval, or foreign affairs function of the United States"; included an exemption from the adjudication provisions in § 5 for "the conduct of military, naval, or foreign affairs functions"; deleted the military exemption from § 3's public information requirements; and deleted the Committee's proposed § 13. 227

The Senate Judiciary Committee's report yields little insight into the intended meaning of the military authority exemption in § 2(a); the Committee's few military-related comments concern the exemption for temporary wartime agencies. The Committee explained that § 2(a) "[e]xpressly exempted from the term 'agency' . . . defined war authorities including civilian authorities functioning under temporary or named statutes operative during 'present hostilities'" and that "[t]he exclusion of war functions and agencies, whether exercised by civil or military personnel, affords all necessary freedom of action for the exercise of such functions in the period of reconversion." 228 The Committee further explained, however, that it exempted "functional classifications," rather than "administrative agencies by name. Thus, certain war and defense functions [were] exempted, but not the War or Navy Departments in the performance of their other functions." 229 The Committee also said that it used the term "authority" in the definition of "agency" to include "whatever persons are vested with powers to act (rather than the mere form of agency organization such as department, commission, board, or bureau)
because the real authorities may be some subordinate or semi-dependent person or persons within such form of organization." 230

The Committee formally submitted that draft to the Attorney General for his review. 231 Not surprisingly, the Attorney General supported the bill, 232 as did the ABA. 233 The Senate Judiciary Committee passed the bill unanimously on October 29, 1945. 234 On March 12, 1946, the Senate passed the bill on a voice vote with much back-patting, but little debate. 235 Like the Judiciary Committee’s report, the Committee’s chairman, Senator McCarran, emphasized that the bill “followed the undeviating policy of dealing with types of functions as such and in no case dealing with administrative agencies by name.” 236 Thus, “certain war and defense functions [were] exempted under the bill, but there [was] no exemption of the War or Navy Departments in the performance of their other functions.” 237

The House Judiciary Committee reported the bill unanimously, with a few minor amendments, 238 which the Senate Judiciary Committee and the Attorney General approved. 239 The House Report of May 3, 1946, reiterated the Senate Report’s explanation of the meaning of authority in the definition of agency: “Whoever has the authority is an agency.” 240 The term authority was thus intended to encompass “those who have the real power to act.” 241 The Report stated that the exemption for “war functions,” apparently referring to the “rapidly liquidating” temporary wartime agencies, was “self-explanatory,” 242 but did not mention § 2(a)’s exemption of “military authority exercised in the field in time of war or in occupied territory.” On May 24, 1946, the House passed the bill on a voice vote,

230. LEGISLATIVE HISTORY, supra note 181, at 196.
231. See id. at 223; 92 CONG. REC. 2148 (1946); Shepherd, supra note 34, at 1661.
233. 92 CONG. REC. 2148; 70 ANNUAL REPORT OF THE AMERICAN BAR ASSOCIATION, supra note 222, at 127.
234. See S. REP. NO. 79-752 (1945), reprinted in LEGISLATIVE HISTORY, supra note 181, at 187; Shepherd, supra note 34, at 1662.
235. Shepherd, supra note 34, at 1668; LEGISLATIVE HISTORY, supra note 181, at 344.
236. LEGISLATIVE HISTORY, supra note 181, at 302.
237. Id.
238. LEGISLATIVE HISTORY, supra note 181, at 233-91, 347; Shepherd, supra note 34, at 1669 (citation omitted).
239. 92 CONG. REC. 5647 (1946), reprinted in LEGISLATIVE HISTORY, supra note 181, at 349; Shepherd, supra note 34, at 1670.
240. LEGISLATIVE HISTORY, supra note 181, at 253.
241. Id.
242. Id.
again with little debate. On May 27, 1946, the Senate concurred on a voice vote. President Truman signed the bill on June 11, 1946.

2. The Aftermath

In the end, the definition of agency in § 2(a) narrowly “excluded from the operation of this Act . . . military or naval authority exercised in the field in time of war or in occupied territory,” and temporary wartime functions. The military authority exemption did not apply to § 3 of the Act, which concerned public information and independently exempted “any function of the United States requiring secrecy in the public interest.” The rulemaking provisions in § 4 also retained a separate exemption for “any military . . . or foreign affairs function of the United States,” and the adjudication provisions in § 5 exempted “the conduct of military, naval, or foreign affairs functions.” The broad exclusions of functions “requiring secrecy in the public interest” from § 3 and of “military functions” from §§ 4 and 5 underscore the narrowness of the exemption in § 2(a) for “military or naval authority exercised in the field in time of war.” Indeed, since §§ 6, 7, 8, 9, and 11 largely supplemented the rulemaking and adjudication provisions in §§ 4 and 5, the narrow military authority exemption in § 2(a) primarily related to the judicial review provisions in § 10. Thus, the military was largely exempted from the APA’s rulemaking and adjudication requirements, but only a narrow slice of military action was exempt from judicial review under the Act.

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243. Shepherd, supra note 34, at 1670–74. The only comment that is notable here is Rep. Walter’s statement that “[p]urely military and naval functions should obviously be exempt.” Legislative History, supra note 181, at 355. Yet, again, he appeared to direct that comment to “defined war authorities functioning under temporary or named statutes,” not the broader “military authority” exemption. Id.
244. Legislative History, supra note 181, at 423.
246. Id. § 3.
247. Id. § 4.
248. Id. § 5.
250. If Congress believed at the time that the exception for “agency action [that] is by law committed to agency discretion,” § 10(2), 60 Stat. at 243, would insulate the military from judicial review, the legislative history does not reflect it. Congress believed this exception would codify the status quo. The Senate Report explained that the “agency discretion” exception “would apply even if not stated at the outset” where, for example, the terms of a statute are so broad that “there is no law to apply.” Legislative History, supra note 181, at 212. On the other hand, “where statutory standards, definitions, or other grants of power deny or require action in given situations or confine an agency within limits as required by the Constitution, then the determination of the facts does not lie in agency
Although the ABA President and the Senate Judiciary Committee Chairman denied it publicly, all parties involved in the APA’s passage understood that the Act was a compromise, and none were fully satisfied.  

Several years after its enactment, the Supreme Court said that the APA “represents a long period of study and strife; it settles long-continued and hard-fought contentions, and enacts a formula upon which opposing social and political forces have come to rest. It contains many compromises and generalities and, no doubt, some ambiguities.” Indeed, the bill’s ambiguity was essential to its passage. As Professor Vermeule observes, the Congress that passed the APA employed ambiguity to reconcile conflicting desires. On one hand, “a major purpose of the APA was to retrench the administrative state and to reassert legislative and judicial control over administrative action.” On the other hand, “the drafters of the APA had just lived through a global hot war and were on the verge of a global cold one,” and “[e]xecutive power was, perhaps, near a kind of local maximum.” Thus, “[t]he framers of the APA quite deliberately left escape hatches from the administrative code of legal liberalism, recognizing that unforeseen and emergency circumstances would inevitably arise, and that no code of administrative law and procedure could hope to specify, in advance, what to do about those circumstances.” It was neither possible
discretion” but is subject to judicial review. Id.; see also id. at 275 (H.R. REP. NO. 79-1980 (1946) reprinted in LEGISLATIVE HISTORY, supra note 181, at 275). The Attorney General agreed that this exception “declares the existing law concerning judicial review.” LEGISLATIVE HISTORY, supra note 181, at 229; see also U.S. DEP’T OF JUSTICE, ATTORNEY GENERAL’S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 94–95 (1947), available at http://www.law.fsu.edu/library/admin/1947ix.html [hereinafter ATTORNEY GENERAL’S MANUAL] (restating the same assertion and discussing the scope of § 10). Hence, the “agency discretion” exception would not insulate military action from judicial review where that action was governed by sufficiently specific statutory or constitutional standards. Moreover, if the agency discretion exception encompassed “military authority exercised in the field in time of war,” there would have been no need to include the latter exception.

251. See McNollgast, supra note 5, at 206 (“A grand coalition emerged in support of the APA... not because everyone agreed that this was the best form of procedures [but] because that bill altered the status quo in the direction preferred by everyone...”); Shepherd, supra note 34, at 1667, 1674.


253. Schiller, supra note 39, at 199; Shepherd, supra note 34, at 1665.


255. Id.

256. Id.

257. Id.; see also id. at 1139 (“The reasons that the APA’s enactors created the black and grey holes were quite pragmatic, including the inability to formulate comprehensive and precise rules that would apply to the sprawling diversity of the administrative state and its problems, and a lively appreciation of the inevitability of emergencies and unforeseen
nor desirable under the circumstances to make the statute any clearer. Further specificity may have doomed the bill’s chances of passage or its prospects for survival in the courts.

Rather than attempting to resolve their disagreements, the parties to this compromise set their sights on convincing the courts to adopt their interpretation of the Act. To that end, the parties ensured that the legislative history included their various interpretations. In addition to the House and Senate Reports and scant debate on the floor of the two chambers, the Senate Report included a letter from Attorney General Clark in which he expressed his “belief that the provisions of the bill can and should be construed reasonably and in a sense which will fairly balance the requirements and interests of private persons and governmental agencies.” The Attorney General’s letter included an appendix analyzing the bill’s provisions. For example, the Attorney General interpreted the term naval as including “defense functions of the Coast Guard and the Bureau of Marine Inspection and Navigation.” The Attorney General did not comment on the military authority exemption in § 2(a) at that time. Representative Hobbs also introduced a memorandum from the Justice Department interpreting the bill, which did not mention the military.

Following its signing, the Attorney General issued a monograph interpreting the APA that “was intended primarily as a guide to the agencies in adjusting their procedures to the requirements of the Act.” The Attorney General’s Manual on the Administrative Procedure Act did not discuss the “military authority” exemption in § 2(a). The only relevant comment on § 4’s exemption from the rulemaking provisions for “any military, naval, or foreign affairs function” was that the exemption was “not limited to activities of the War and Navy Departments but covers all military and naval functions exercised by any agency,” including the Coast Guard and the Federal Power Commission. Similarly, the Attorney General interpreted § 5’s exemption from the adjudication provisions of “military, naval, or foreign affairs functions” as including not
just the War and Navy Departments, but also "any other agency . . . to the extent that the conduct of military or naval affairs is involved."265

Professor Shepherd explains that Congress "would have preferred a stronger bill" and thus "interpreted the bill's ambiguous provisions as imposing strict new controls on agencies."266 The Attorney General, in contrast, interpreted the bill "as merely restating existing case law,"267 and "suppressed to a minimum the bill's limits on agencies."268 Attorney General Clark's efforts to shape the courts' interpretation of the APA paid off. The Supreme Court has "often found persuasive"269 and "given some deference,"270 if not "great weight,"271 to the Attorney General's Manual, rather than to the contrasting congressional statements in the legislative history. Commentators have criticized the Court's adoption of the administration's thesis as the definitive interpretation of the Act.272 Congress's and the Executive's interpretations of the military authority exemption, however, do not conflict. Both appear to agree that, in contrast to the Walter-Logan bill, the APA's exemptions were intended to cover functions, not particular agencies, and that the term authority was intended to cover whichever entity has the power to act. In fact, the military

265. Id. at 45.

266. Shepherd, supra note 34, at 1663; see also Dickinson, supra note 55, at 516; Pat McCarran, Improving "Administrative Justice": Hearings and Evidence; Scope of Judicial Review, 32 A.B.A.J. 827, 827-28 (1946); Shepherd, supra note 34, at 1673.

267. Shepherd, supra note 34, at 1663. The ATTORNEY GENERAL'S MANUAL, a "highly political document designed to minimize the impact of the new statute on executive agencies, shrewdly characterized the APA provisions governing judicial review as merely a 'restatement' and thereby invited courts and the bar to treat the Act as something less than a statute, as subservient to judge-made doctrine." John F. Duffy, Administrative Common Law in Judicial Review, 77 Tex. L. Rev. 113, 119 (1998).

268. Shepherd, supra note 34, at 1666; see also Comment, The Federal Administrative Procedure Act: Codification or Reform?, 56 Yale L.J. 670, 673 (1947) ("It is not surprising that those sponsoring the legislation should favor a construction that would establish new standards of law; and conversely those whom the Act is designed to control would favor making it as weak as possible.").


272. See, e.g., Duffy, supra note 267, at 132 ("In fact, most of the passages from the legislative history cited by Clark to bolster his restatement thesis were letters sent to Congress by Clark himself."); Roland M. Frye, Jr., Restricted Communications at the United States Nuclear Regulatory Commission, 59 Admin. L. Rev. 315, 340 n.100 (2007); Shepherd, supra note 34, at 1682-83.
exemptions generated almost no debate and hence little contemporaneous discussion. Thus, the question of which branch's view of the APA should garner more judicial respect need not be answered here.

C. 1966 and 1976 Amendments

In 1966, the APA was recodified and included in Title 5 of the U.S. Code.273 The definition of agency, with the military authority exemption, previously appeared only in § 2 of the Act, now codified at 5 U.S.C. § 551. With the 1966 recodification, provisions concerning the Administrative Conference of the United States bisected the original provisions of the APA. Hence, Congress repeated the definition of agency at the beginning of the provisions governing judicial review, previously § 10 of the Act, now codified at 5 U.S.C. § 701(b). In both sections, Congress retained the "time of war" exemption, but omitted "or naval" as included in "military."274 The House and Senate Reports state that no substantive change was intended.275

The factors that led Congress, after years of deliberation, to add a waiver of sovereign immunity to 5 U.S.C. § 702 in 1976276 have been addressed elsewhere.277 Congress did not change the military authority exception at that time, but stated that § 702's new waiver of sovereign immunity would be limited by the exceptions to the definition of agency, including the military authority exception. The House and Senate Reports stated:

274. See S. REP. No. 89-1380, at 28, 33 (1966); H.R. REP. No. 89-901, at 11, 16 (1965) (listing what was omitted). Congress also "omitted as executed" the exemption in § 2(a) for wartime functions when it recodified the APA in 1966. See S. REP. No. 89-1380, at 28, 33 (1966); H.R. REP. No. 89-901, at 11, 16 (1965).
Since the amendment is to be added to 5 U.S.C. Section 702, it will be applicable only to functions falling within the definition of ‘agency’ in 5 U.S.C. Section 701. Section 701(b)(1) defines ‘agency’ very broadly . . . except for a list of exempt agencies or functions: . . . courts-martial and certain other military, wartime and emergency functions.\(^{278}\)

The fact that the waiver of sovereign immunity was “subject to the other limitations of the Administrative Procedure Act” was “an important factor” in the Justice Department’s support for the bill,\(^{279}\) and presumably in its passage.\(^{280}\) More important than the military authority exception, however, may have been the preclusion of judicial review of agency actions that are “committed to agency discretion by law.”\(^{281}\) The Administrative Conference of the United States thought it “fanciful to suppose that abolition of sovereign immunity will allow the courts to decide issues about foreign affairs, military policy, and other subjects inappropriate for judicial action.”\(^{282}\) Of course, if the “agency discretion” exception covered quintessentially military actions, the military authority exception would not have been necessary.\(^{283}\)

**D. Summation**

The Walter–Logan Bill’s broad exemption for “any matter concerning or relating to the military or naval establishments”\(^{284}\) was too narrow, in President Roosevelt’s eyes, for a nation on the brink of war. Yet, shortly after the war ended, Congress willingly subjected military actions to judicial

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\(^{282}\) *Sovereign Immunity Hearing*, supra note 278, at 135.

\(^{283}\) *See supra* note 250.

\(^{284}\) H.R. 6324, 76th Cong. § 7(b) (1940).
review unless those actions were the result of "military authority exercised in the field in time of war" or fell within one of the APA's other exceptions. The history of that shift lends insight into how World War II affected Congress's and the President's view of the need to control the Fourth Branch, specifically through judicial review of military action. That history, however, exposes little about Congress's intended meaning in the military authority exception that the plain language does not already reveal. Congress had at its disposal language that would have insulated a wide swath of military actions from judicial review, language it employed in other provisions of the Act, but it denied the military's pleas and opted to employ much more specific language when it came to judicial review. The history does show that military authority was not intended to be synonymous with the Departments of War and the Navy but to cover "defense functions," regardless of which agency or individual was responsible. To unearth the meaning of the exception's other key terms—in the field and time of war—more digging is required.

II. THE ARTICLES OF WAR

When Congress enacted the APA in 1946, the key phrases in the field and time of war had well established meanings. If Congress was aware that those terms had long been used in the Articles of War that governed the Army, however, the legislative history gives no indication of it. As mentioned above, the legislative history does not reveal the source of the military authority exception, but the War Department may have proposed it as a compromise when the Senate Judiciary Committee declined to exempt the military from the bill entirely. The lineage of the phrases in the field and time of war in the Articles of War reinforce that possibility. Thus, the contemporaneous understanding of these phrases in the Articles of War may assist in deciphering the military authority exemption in the APA.

The Second Continental Congress first enacted the Articles of War in 1775. Though they were revised many times, they did not change

285. LEGISLATIVE HISTORY, supra note 181, at 191, 196.
286. WILLIAM B. AYCOCK & SEYMOUR W. WURFEL, MILITARY LAW UNDER THE UNIFORM CODE OF MILITARY JUSTICE 9–10 (1955); OFFICE OF THE JUDGE ADVOCATE GEN. OF THE ARMY, MILITARY LAWS OF THE UNITED STATES 163 (8th ed. 1940); WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS 17 (2d ed. William S. Hein & Co. 2000) (1920). Colonel Winthrop, the "Blackstone of Military Law," Reid v. Covert, 354 U.S. 1, 19 n.38 (1957), published the first edition of his treatise in 1886 and addressed Article 63 of the 1874 Articles of War: "All retainers to the camp, and all persons serving with the armies of the United States in the field, though not enlisted soldiers, are to be subject to orders, according to the rules and discipline of war." WINTHROP, supra at 991. At the time, the phrase "in the field" was "deemed clearly to indicate that the application of the Article [was]
significantly between 1806 and their replacement in 1950 by the Uniform Code of Military Justice. The version of the Articles that governed the Army during World War II was enacted in 1920 along with other "changes in details which the lapse of time and the experience of the [First World War] had shown to be necessary." Article 2(d) provided for court-martial jurisdiction over:

All retainers to the camp and all persons accompanying or serving with the armies of the United States without the territorial jurisdiction of the United States, and in time of war all such retainers and persons accompanying or serving with the armies of the United States in the field, both within and without the territorial jurisdiction of the United States, though not otherwise subject to these articles.

The Uniform Code of Military Justice (UCMJ), enacted in 1950, replaced the Articles of War with a code that still governs all of the Armed Forces. Article 2 of the UCMJ, which was "taken from" Article 2(d) of the Articles of War, continued to subject to court-martial jurisdiction "all persons serving with, employed by, or accompanying the armed forces without the continental limits of the United States" and "[i]n time of war, all persons serving with or accompanying an armed force in the field." Civilians were thus subject to military jurisdiction at the time Congress enacted the APA if they served with or accompanied the Army "without the territorial limits of the United States" such that they were "beyond the territorial jurisdiction of state and federal civil courts." In a "time of war," however, civilians were subject to military jurisdiction either abroad

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289. Pub. L. No. 66-242, 41 Stat. at 787 (emphasis added); AYCOCK & WURFEL, supra note 286, at 54. These phrases also appear together in Article 48(b), which authorized the dismissal of an officer below a certain grade, and Article 48(d), which authorized the death sentence for murder, rape, mutiny, desertion, and spying "in time of war... upon confirmation by the commanding general of the Army in the field." 41 Stat. at 796–97. The phrase time of war appears unaccompanied by "in the field" in numerous other provisions as well. The Articles of War were amended substantially in 1948. Selective Service Act of 1948, Pub. L. No. 80-759, § 201, 62 Stat. 604, 627. Article 2(d) was not amended, § 202, 62 Stat. at 628, and the legislative history does not discuss the phrases in the field or time of war.
293. AYCOCK & WURFEL, supra note 286, at 57.
or within the United States if they served with or accompanied the Army “in the field.”

A. “In the Field”

Before World War I, the phrase in the field was interpreted somewhat narrowly as referring to “the theatre of military operations.” The Supreme Court later said, referring primarily to pre-World War I authorities, that “[e]xperts on military law, the Judge Advocate General and the Attorney General have repeatedly taken the position that ‘in the field’ means in an area of actual fighting.” Consequently, an event could occur “in the field” only during a “time of war.” And even during a time of war, “in the field” did not apply “to any portions of the territory of the United States in which military operations were not being carried on against the public enemy.” During the World Wars, however, the phrase came to be interpreted more broadly as “not by any means limited to overseas service, but includ[ing] service within the territorial limits of the United States.” Accordingly, when Congress enacted the UCMJ, the committee reports observed that “[t]he phrase ‘in the field’ has been

294. Id. During World War II, “[t]he trial by military tribunals of civilian employees of the military establishment in overseas areas... added substantially to the number confined by military authority.” Id. at 314. On January 1, 1950, there were more than 2,500 persons “serving civilian type felony sentences imposed by military tribunals.” Id. Although federal courts lack appellate jurisdiction over courts-martial, they may entertain “collateral attack[s] upon [their] determinations.” Shaw v. United States, 209 F.2d 811, 812–13 (D.C. Cir. 1954). Habeas corpus, for example, gives federal courts authority to examine whether the military tribunal had jurisdiction, but “[b]eyond this, [federal courts] need not look into the record.” Ex parte Reed, 100 U.S. 13, 23 (1879), aff’d, Hiatt v. Brown, 339 U.S. 103, 111 (1950).

295. GEORGE B. DAVIS, A TREATISE ON THE MILITARY LAW OF THE UNITED STATES 52 (3d ed. rev. 1915); see also id. at 52 n.2, 478; MERRIAM WEBSTER’S NEW INTERNATIONAL DICTIONARY 941 (2d ed. 1939) (defining field as “a place where a battle is fought”); WINTHROP, supra note 286, at 101.

296. Reid v. Covert, 354 U.S. 1, 34 n.61 (1957); see also 14 Op. Att’y Gen. 23 (1872) (“These words imply military operations with a view to an enemy.”).

297. See DAVIS, supra note 295, at 52 (“[T]he statute is restricted in its operation to persons accompanying armies in the field in time of war, and in the actual theatre of military operations”); EDGAR S. DUDLEY, MILITARY LAW AND THE PROCEDURE OF COURTS-MARTIAL 413–14 (2d ed. rev. 1908); WINTHROP, supra note 286, at 101 (“[T]he application of the article is confined both to the period and pendency of war and to acts committed on the theatre of the war.... [T]his article is operative only in and for a time of war....”).

298. DAVIS, supra note 295, at 52.

299. JULIAN J. APPLETON, MILITARY LAW FOR THE COMPANY COMMANDER 14 n.* (1944); see also Ex parte Jochen, 257 F. 200, 208–09 (S.D. Tex. 1919) (declaring that a civilian serving with troops patrolling the Texas-Mexico border was “in the field”).
construed to refer to any place, whether on land or water, apart from permanent cantonments or fortifications, where military operations are being conducted.”

For example, the Fourth Circuit in *Hines v. Mikell* held that Camp Jackson near Columbia, South Carolina, which “was established for the training of the military forces of the United States for service in the theater of operations overseas,” was “in the field” under Article 2(d). A civilian auditor was arrested and held in a military prison until the district court granted his petition for a writ of habeas corpus, holding that the phrase *in the field* was limited to “a place of contact with the enemy.” The court of appeals reversed. Looking to military statutes and regulations which indicated that domestic cantonments could be “in the field,” the court of appeals held that “there is a required distinction between the term ‘in the field’ and the places of contact with the enemy.” Whether a particular location was *in the field* was “not to be determined by the locality in which the army may be found, but rather by the activity in which it may be engaged at any particular time.” The court considered *in the field* to be a term of art that encompassed troops “engaged in training and preparing for service on the firing line overseas.” Hence, “[i]n time of war, with some exceptions, practically the entire army is ‘in the field,’ but not necessarily ‘in the theater of operations.’” Service members at Camp Jackson “took the first step which was to lead them to the firing line, and they were then as much ‘in the field’ in pursuance of such training as those who were encamped on the fields of Flanders awaiting orders to enter the engagement.” The court emphasized that a contrary decision “would handicap the military authorities, and greatly hinder and delay military

301. 259 F. 28, 29, 35 (4th Cir. 1919) (Camp Jackson was established “for the purpose of training preparatory for service in the actual theater of war”). Article 2(d) of the 1916 Articles of War at issue in *Hines* was identical to Article 2(d) in the 1920 recodification. See *id.* at 30.
302. *Id.* at 29, 32.
303. *Id.* at 29–34. For example, in 1918 Congress provided that commissioned officers were entitled to retain quarters for dependents while they were “on duty in the field, or on active duty without the territorial jurisdiction of the United States.” *Id.* at 33 (quoting Pub. L. 65-129, 40 Stat. 530 (1918)).
304. *Id.* at 32.
305. *Id.* at 34.
306. *Id.* at 33.
307. *Id.; see also id.* at 31 (“[T]n case of war, when the army leaves the post and moves in the direction of the enemy, or to some intermediate point where they may temporarily stop for training, would it not be more reasonable to say that they were then ‘in the field’?”).
308. *Id.* at 33.
operations.”

Civilians serving on ships transporting troops or military supplies were also “in the field” under Article 2(d). For example, _In re Berue_ held that a civilian merchant seaman serving on a ship bound for Casablanca carrying military supplies was “in the field.” The court noted that the ship “was in waters infested by submarines and other naval craft of the Axis Nations” and hence was in “actual combat zones.” Similarly, in _Ex parte Gerlach_, the court held that a civilian employee of the United States Shipping Board who was returning from Europe on an army transport ship that faced “peril from submarines” was “in the field.” The court said that “[t]he words ‘in the field’ do not refer to land only, but to any place, whether on land or water, apart from permanent cantonments or fortifications, where military operations are being conducted.” Indeed, civilians on ships could be “in the field” even when docked in the United States.

Court-martial jurisdiction over civilians “in the field” was “sparingly exercised” and “reserved for cases where the individual is . . . engaged in

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309. _Id._ at 35. _Hines v. Mikell_ is consistent with other cases holding civilians subject to military jurisdiction during World War I:

Port of Brooklyn storage office chauffeur and laborers; . . . cook employed by quartermaster at New Mexico camp; scout in Texas; quartermaster civilian employee laborers on docks at ports of embarkation and at Camp Upton, New York; . . . clerks employed by the Quartermaster overseas and at Camp Meade, Maryland; . . . merchant seamen on Army transports at sea or in English, French, or American ports,

_Aycock, supra_ note 286, at 55 (citations omitted), and World War II:

decoding experts employed by the Signal Corps at installations in the United States; electricians employed by the Corps of Engineers in . . . Alaska; . . . employees of post exchanges at camps in the United States; . . . firefighters at an air base within the United States; . . . policemen and guards at installations in the United States important to the prosecution of the war.

_Id._ at 56–57 (citations omitted).

310. _Id._ at 58.


312. _Id._ at 255.

313. 247 F. 616, 617 (S.D.N.Y. 1917); see also _McCune v. Kilpatrick_, 53 F. Supp. 80, 84–85 (E.D. Va. 1943) (civilian cook on merchant ship transporting troops to battle zones was “in the field”).

314. _Ex Parte Gerlach_, 247 F. at 617, (quoted in _In re Berue_, 54 F. Supp. at 255); _Ex parte Falls_, 251 F. 415, 416 (D.N.J. 1918).

315. _Ex parte Falls_, 251 F. at 416 (civilian cook on ship transporting supplies for the Army was “in the field” when he attempted to desert just before the ship sailed from Brooklyn, New York).
work essential to the war effort.\textsuperscript{316} But a civilian did not have to be working directly on a military operation to fall within Article 2(a)'s jurisdiction. \textit{Perlstein v. United States} concerned the habeas corpus petition of a civilian mechanic employed at a military base in Eritrea by a private contractor engaged in a salvage operation to raise enemy ships and docks that had been scuttled.\textsuperscript{317} The Third Circuit held that court-martial jurisdiction was properly exercised under Article 2(d), even though the petitioner was not directly involved in the salvage operation. The court concluded that, although the petitioner "did not physically assist in the raising of the ships and docks, his association with that program was as close as if he had and his contribution to its successful completion was of considerable importance."\textsuperscript{318} Specifically, given the "very hot and humid" weather, his work on air conditioning and refrigeration "was an integral part of the whole endeavor and as such was within the intendment of Article 2(d)."\textsuperscript{319}

In the 1957 case of \textit{Reid v. Covert},\textsuperscript{320} the Supreme Court held that civilians accompanying the military overseas were not subject to court martial jurisdiction and, in the course of the opinion, also returned to a narrower interpretation of the phrase \textit{in the field}. \textit{Reid v. Covert} involved the habeas corpus petitions of two civilian women who were tried in military tribunals for the murder of their service-member husbands on military bases in Japan and England. The military asserted jurisdiction under UCMJ Article 2(11), which covers persons serving with or accompanying the military outside the United States.\textsuperscript{321} The Supreme Court initially held that the military trials were constitutional, but reheard the case the following term and concluded to the contrary that the defendants were entitled to the protections of the Bill of Rights.\textsuperscript{322} Although the government had not asserted jurisdiction

\begin{itemize}
\item \textsuperscript{316} AYCOCK \& WURFEL, supra note 286, at 57–58.
\item \textsuperscript{317} 151 F.2d 167 (3d Cir. 1945), cert. granted sub nom. Perlstein v. Hiatt, 327 U.S. 777, dismissed as moot, 328 U.S. 822 (1946).
\item \textsuperscript{318} 151 F.2d at 168.
\item \textsuperscript{319} Id. On the other hand, "personnel at industrial establishments in the United States; employees of an independent contractor engaged in construction work on the Inter-American highway supervised by a few Army Engineer officers but where no troops were present; [and] War Department clerical employees in Washington or in a field office in the United States not located at a military camp" were not subject to court martial jurisdiction. AYCOCK \& WURFEL, supra note 286, at 58.
\item \textsuperscript{320} 354 U.S. 1 (1957).
\item \textsuperscript{321} Id. at 3, 4.
\item \textsuperscript{322} Id. at 21 ("Every extension of military jurisdiction is an encroachment on the jurisdiction of the civil courts, and, more important, acts as a deprivation of the right to jury trial and of other treasured constitutional protections.").
\end{itemize}
under Article 2(10), Justice Black, writing for a four-member plurality, distinguished cases upholding military jurisdiction over "civilians performing services for the armed forces 'in the field' during time of war," including *Hines, Perlstein*, and *In re Berue*, as having "rest[ed] on the Government's 'war powers.'" In the face of an actively hostile enemy, military commanders necessarily have broad power over persons on the battlefront. From a time prior to the adoption of the Constitution the extraordinary circumstances present in an area of actual fighting have been considered sufficient to permit punishment of some civilians in that area by military courts under military rules.

Since no "active hostilities were under way" in England or Japan at the time the defendants committed their crimes, the Court held that the military tribunals lacked jurisdiction. The Court thus linked the phrase "in the field" once again to the existence of a "time of war" and the proximity of combat.

The Supreme Court has continued not only to treat *Reid v. Covert* as viable precedent, but also to follow its holding that military tribunals for non-service members must have some nexus to actual combat. In *Hamdan v. Rumsfeld*, the Court opined that military commissions must be supported by "military necessity." The Court held that the petitioner, who was being detained at Guantánamo Bay, could not be tried by a military commission because, among other things, his commission was appointed by "a retired major general stationed away from any active hostilities" and

323. Id. at 34 n.61.
324. Id. at 33. Justices Frankfurter and Harlan concurred in the result on the narrower ground that Article 2(11) did not permit court martial jurisdiction over civilians for capital offenses in times of peace. Id. at 64, 65 (Frankfurter, J., concurring).
325. Id. at 33 (plurality opinion).
326. Id. at 34.
327. See id. at 35 (rejecting "the Government's argument that present threats to peace permit military trial of civilians accompanying the armed forces overseas in an area where no actual hostilities are under way"); see also McElroy v. United States *ex rel. Guagliardo*, 361 U.S. 281, 284–86 (1960); Ian W. Baldwin, *Comrades in Arms: Using the Uniform Code of Military Justice and the Military Extraterritorial Jurisdiction Act to Prosecute Civilian-Contractor Misconduct*, 94 *IOWA L. REV.* 287, 309–10 (2008) ("Reid again proves instructive by defining 'in the field.' A contractor is 'in the field' when that person is working 'in an area of actual fighting' at or near the 'battlefront' where 'actual hostilities are under way.'") (citations omitted). The Supreme Court extended *Reid v. Covert* in later cases. *Kinsella v. United States ex rel. Singleton*, 361 U.S. 234, 273–77 (1960) (extending *Reid v. Covert* to noncapital trial of civilian dependent); *Grisham v. Hagan*, 361 U.S. 278 (1960) (extending *Reid v. Covert* to capital trial of civilian employee); *McElroy*, 361 U.S. at 281 (extending *Reid v. Covert* to noncapital offenses).
none of the alleged unlawful acts “necessarily occurred during time of, or in a theater of, war.” 330 Nonetheless, at the time Congress passed the APA, the phrase “in the field” was understood to reach more broadly to “any place . . . where military operations are being conducted. 331

B. “Time of War”

The interpretation of the phrase time of war has changed over time as well. Early military authorities state that a declaration of war was “not absolutely necessary to the legal existence of a status of foreign war.” 332 Likewise, courts have long held that Congress need not issue a declaration of war for combat to qualify as “time of war.” 333 “Although the United States has committed its armed forces into combat more than a hundred times, Congress has declared war only five times: the War of 1812, the Mexican–American War of 1848, the Spanish–American War of 1898, World War I, and World War II.” 334 Nonetheless, “[s]ince the earliest

330. Id.; see also Chad DeVeaux, Rationalizing The Constitution: The Military Commissions Act and the Dubious Legacy of Ex Parte Quirin, 42 AKRON L. REV. 13, 30–31 (2009) (“Once removed from the exigency of the war zone, the legitimacy of military tribunals rapidly dissipates.”).


332. WINTHROP, supra note 286, at 668. Under the Articles of War, a war could commence when the United States’ territory or defenses were attacked and the President declared the existence of an insurrection. Id. “War” also included not just combat with foreign nations, but also civil war and “a state of active hostilities with an Indian tribe.” Id. at 86, 101.

333. See The Prize Cases, 67 U.S. 635, 666–70 (1862) (holding that the Civil War constituted a de facto state of war); Bas v. Tingy, 4 U.S. 37, 41–42 (1800) (opinion of Washington, J.); id. at 43–44 (opinion of Chase, J.); id. at 45–46 (opinion of Paterson, J.) (all concluding that conflict with France constituted war); Campbell v. Clinton, 203 F.3d 19, 37–39 (D.C. Cir. 2000) (Tatel, J., concurring) (discussing cases); Koohi v. United States, 976 F.2d 1328, 1334 (9th Cir. 1992), cert. denied, 508 U.S. 960 (1993) (holding government not liable under the Federal Tort Claims Act for accidental downing of civilian aircraft during “tanker war” between Iran and Iraq); Mitchell v. Laird, 488 F.2d 611 (D.C. Cir. 1973) (holding that the President may wage “some types of war” without Congressional approval); Minns v. United States, 974 F. Supp. 500, 506 (D. Md. 1997) (holding that the Persian Gulf War constituted a “time of war” under the Federal Tort Claims Act).

334. Campbell, 203 F.3d at 29–30 n.6 (Randolph, J., concurring). Moreover, since 1945 when “the United Nations Charter prohibited the use of force in international law, congressional declarations of war have disappeared from U.S. practice.” Catherine H. Gibson, Frankfurter’s Gloss Theory, Separation of Powers, and Foreign Investment, 36 N. KY. L. REV. 103, 125 (2009); see also Paul W. Kahn, War Powers and the Millennium, 34 LOY. L.A. L. REV. 11, 16–17 (2000) (“Since the advent of the United Nations (UN) Charter, war has been abolished as a category of international law. A declaration of war serves no purpose under international law; it can have no bearing on the underlying legal situation.”).
years of the nation, courts have not hesitated to determine when military action constitutes 'war.' The Ninth Circuit, for example, interpreting the phrase *time of war* in an exception to the waiver of sovereign immunity in the Federal Tort Claims Act, held that "when, as a result of a deliberate decision by the executive branch, United States armed forces engage in an organized series of hostile encounters on a significant scale with the military forces of another nation... a 'time of war' exists... ." The court observed that the military actions in Korea, Vietnam, Panama, Grenada, Kuwait, and Iraq were not preceded by declarations of war, "[y]et no one can doubt that a state of war existed."

The UCMJ includes the phrase "time of war" in numerous provisions, but provides no definition of the phrase, and the legislative history contains no discussion of whether a war requires a congressional declaration or not. After the adoption of the UCMJ, the military courts continued to determine on a case-by-case basis whether a particular military engagement constituted a "time of war." In 1954, for example, the Court of Military Appeals held that a service member who deserted in the continental United States during the Korean Conflict could be charged with absence without leave in time of war. Applying a "practical approach," the court emphasized that the phrase *time of war* appears in several Articles of the UCMJ and its meaning "must be determined with an eye to the goal toward which that Article appears to have been directed." The court observed that, during the Korean Conflict, "[c]ertainly..., from [the] state-side, most of the attributes of a declared war were undeniably present."

In 1969, the Court of Military Appeals shifted gears. In *United States v. Averette*, the court held that a civilian employee of a military contractor in Vietnam was not subject to court-martial jurisdiction under Article 2(10) of the UCMJ. The court observed that, although "the fighting in Vietnam qualifies as a war as that word is generally used and understood," the phrase *in time of war* in Article 2(10) means "a war formally declared by

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335. *Campbell*, 203 F.3d at 37 (Tatel, J., concurring).
337. Id. at 1334.
338. See *United States v. Castillo*, 34 M.J. 1160, 1162 (N-M.C.M.R. 1992) ("The Code, however, does not define the term and its legislative history is not particularly enlightening.").
340. Id. at 222.
341. Id. at 227.
342. Id. at 224.
The court found that “recent guidance” from the Supreme Court, i.e., Reid v. Covert and its progeny, required “a strict and literal construction of the phrase ‘in time of war’” in Article 2(10) so as to avoid “the possibility of civilian prosecutions by military courts whenever military action on a varying scale of intensity occurs.” Military courts continued to apply the “practical” approach in other contexts, and following the terrorist attacks of September 11, 2001, the Averette decision began to receive harsh criticism.

In 2006, Congress amended Article 2(10) to overrule Averette. Where the UCMJ previously provided for court martial jurisdiction over “persons serving with or accompanying an armed force in the field” only “[i]n time of war,” it now provides for such jurisdiction “[i]n time of declared war or a contingency operation.” Apart from the Averette detour, however, and certainly at the time Congress enacted the APA, no declaration of war was required for combat to qualify as a time of war.

The courts’ narrow interpretations of the phrases “in the field” and

344. Id. at 365.
345. Id. at 364–65; accord Robb v. United States, 456 F.2d 768, 769, 771 (Ct. Cl. 1972) (holding that a civilian engineer employed by the Navy in Vietnam was not subject to court martial jurisdiction under Article 2(10) because the Vietnam conflict was not a formally declared war).
346. See United States v. Castillo, 34 M.J. 1160, 1163, 1166 (C.M.R. 1992) (holding, in case of marine charged with disobeying an order, that the Persian Gulf conflict was a “time of war” based on the “realities of the situation as distinguished from the legal niceties”) (citation omitted).
347. E.g., Joseph Romero, Of War and Punishment: “Time of War” in Military Jurisprudence and a Call for Congress to Define its Meaning, 51 NAVAL L. REV. 1, 32 (2005) (commenting that Averette “may have to be described as the most divergent, inconsistent, and questionable decision to arise from the Court of Military Appeals with regard to UCMJ wartime provisions”); Lawrence J. Schwarz, The Case for Court-Martial Jurisdiction over Civilians under Article 2(a)(10) of the Uniform Code of Military Justice, 2002 ARMY LAW. 31, 34–35 (2002) (identifying four weaknesses of the Averette decision’s definition of “in time of war”).
349. See Pub. L. No. 109-364, § 552, 120 Stat. 2083, 2217 (2006) (codified at 10 U.S.C. § 802(a)(10) (2006)). The term “contingency operation” is defined to include military operations designated by the Secretary of Defense or those resulting in “the call or order to, or retention on, active duty of members of the uniformed services . . . during a war or during a national emergency declared by the President or Congress.” 10 U.S.C. § 101(a)(13)(B) (2006).
“time of war” in Article 2(10) of the UCMJ do not compel a similarly narrow interpretation of those phrases in § 701 of the APA. The provision allowing court martial jurisdiction over civilians is appropriately construed narrowly to protect citizens’ constitutional rights.\textsuperscript{350} By the same token, the term agency in the APA’s waiver of sovereign immunity should be interpreted narrowly to insulate agency action from judicial review.\textsuperscript{351} Any ambiguity in the meaning of that term that remains after employing “traditional tools of statutory construction” should be resolved in favor of the government’s immunity from suit.\textsuperscript{352} Likewise, any ambiguity in the definition of agency should be resolved in favor of the government’s immunity. Hence, if the phrases in the field and time of war in § 701 of the APA are ambiguous, they should be interpreted broadly to insulate military actions from judicial review. The upshot is that, while the plain language of the military authority exception is certainly narrower than the military function exceptions, the contemporaneous understanding of the terms in the field and time of war in the 1940s was somewhat broader than the plain language might indicate to a modern reader.

III. WHERE THE COURTS AND COMMENTATORS HAVE GONE WRONG

Although courts mentioned the military authority exception over the years, it was not until 1979 that a court actually discussed it.\textsuperscript{353} Perhaps the lack of a clear waiver of sovereign immunity in the APA before 1976 provided the government with sufficient means for keeping APA claims against the military out of court. From 1976 until the start of the present conflicts in Iraq and Afghanistan, the United States may not have experienced a time of war of sufficient length to warrant invoking the military authority exception. Whatever other factors may have contributed to the dearth of case law discussing the exception in years past, the issue has arisen more often in recent years. Commentators have followed suit and begun to mention the exception, though without any in-depth inquiry. The above historiographic analysis demonstrates that courts and commentators have been reading the exception too narrowly.

The 1979 case that first analyzed the exception did not stray from

\textsuperscript{350} See Robb, 456 F.2d at 771 (“[T]he succession of Supreme Court decisions dealing with military jurisdiction over civilians leads to the conclusion that Article 2(10) is to be narrowly construed.”).

\textsuperscript{351} See supra note 21.


\textsuperscript{353} See Jaffee v. United States, 592 F.2d 712, 719–20 (3d Cir. 1979).
historical accuracy. In *Jaffe v. United States*, the plaintiff claimed that he developed cancer as a result of exposure to radiation during a nuclear test in Nevada in 1953 while he was serving in the Army.\footnote{Id. at 714.} The district court dismissed the plaintiff’s class action claim, which sought to enjoin the government to warn all soldiers that had been present at the test of the medical risks of their exposure, for lack of a waiver of sovereign immunity.\footnote{Id.} The court of appeals reversed on that point, holding that the Army is an *agency* and the military authority exception did not apply.\footnote{Id.} The court held that, even if the explosion took place before the Korean War ended and the exception “could be interpreted to cover operations in Nevada,” the claim concerned “the Army’s failure to act in the years since the explosion,” which “was neither in the field nor in time of war.”\footnote{Id. at 719-20.} The court was correct to assume that the Korean Conflict would qualify as a *time of war* and that the Nevada nuclear testing site could be considered *in the field*. As explained above, Congress in the 1940s would not have thought a declaration of war necessary for a *time of war* to exist,\footnote{Id. at 720.} and weapons testing falls comfortably within the scope of the phrase *in the field* as interpreted in contemporary case law.\footnote{See supra text accompanying notes 332–349.}

The D.C. Circuit’s 1991 decision in *Doe v. Sullivan* began the courts’ and commentators’ departure from historical accuracy. In *Doe*, a service member challenged a Food and Drug Administration regulation permitting the military to use “unapproved . . . drugs on military personnel[ in certain combat-related situations, [in this case, during Operation Desert Storm,] without . . . informed consent.”\footnote{Doe v. Sullivan, 938 F.2d 1370, 1371 (D.C. Cir. 1991).} The D.C. Circuit held the military authority exception was not applicable essentially because the plaintiff was not challenging any military authority. The court said that the claim did not concern “military commands made in combat zones or in preparation for, or in the aftermath of, battle,” “judicial interference with the relationship between soldiers and their military superiors,” or “military strategy or discipline,” but rather “the scope of the authority Congress has entrusted to the FDA.”\footnote{Id. at 1380.} The court’s holding that the military authority exception would not reach the FDA’s regulation is consistent with the APA’s history, not because the FDA is not a military agency but because it probably was not exercising a “defense function” when it issued the
challenged regulation. But the D.C. Circuit's dicta did not contemplate the full reach of the military authority exception; the exception could reach beyond combat zones, preparation for battle, the relationship between service members and their superiors, military strategy, and military discipline. The *Doe* dicta is hard to square with some of the case law contemporaneous with the APA's enactment that interpreted the phrase *in the field* in the UCMJ, like *Ex parte Gerlach*, which held that an Army transport ship bound for the United States was in the field simply because it might be attacked by a submarine, and *Perlstein v. United States*, which was decided a few weeks before the Senate added the military authority exception to the bill and held that a civilian air conditioning mechanic was in the field even though he was not directly involved in any military operation.

The *Doe* dicta has led some courts and commentators astray. The court in *Vance v. Rumsfeld*, for example, relied on *Doe* when it denied pending discovery the government's motion to dismiss claims for the return of personal property filed by civilian employees of a private security firm in Iraq who had been detained by the U.S. military. The court was correct in its belief that the "military authority" exception was not intended to "exempt the military as a whole." That is one of the few points the

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362. See LEGISLATIVE HISTORY, supra note 181, at 191, 196.
363. 247 F. 616, 617 (S.D.N.Y. 1917).
364. 151 F.2d 167, 168 (3d Cir. 1945).
365. No. 06 C 6964, 2009 WL 2252258, at *3 (N.D. Ill. July 29, 2009). The court in *Vance* also relied on *Rosner v. United States*, 231 F. Supp. 2d 1202 (S.D. Fla. 2002), in which the court denied pending discovery the government's motion to dismiss claims filed by Hungarian Jews whose personal property was seized during World War II first by the pro-Nazi Hungarian government and later by the U.S. Army. *Id.* at 1203–04. Among other things, the plaintiffs brought claims alleging violations of international law and seeking non-monetary relief under the APA, and the government invoked the military authority exception. *Id.* at 1209, 1211. The court rejected the plaintiffs' argument that the military authority exception did not apply because the order for the Army to seize the property came from American soil, reasoning that the military authority exception "covers 'military authority exercised in the field,' without regard to where the underlying order to take military action arises" and that "virtually all military action will be traceable, at some level, back to United States soil." *Id.* at 1211–12 & n.13. Instead, the court held that the exception did not apply because the plaintiffs asserted in their complaint that the Army had taken their property "after hostilities had ceased and peace was formally declared" and had engaged in "conduct that, although exercised by military personnel, is decidedly non-military in its nature." *Id.* at 1212 n.14. On reconsideration however, the court ordered discovery on the underlying facts and noted that the plaintiffs bore the burden of proving that "the Government's actions were non-military in nature." *Rosner v. United States*, No. 01-1859-CIV, 2002 WL 31954453, at *2–3 (S.D. Fla. Nov. 26, 2002).
official legislative history makes quite clearly. The court departed from historical accuracy, however, in suggesting that the military authority exception only applies to "an exercise of authority from the field of battle" or to orders from "a commander in the field." The court did not mention the cases that would have informed the understanding of the military authority exception in 1946, like Hines v. Mikell, which held that "there is a required distinction between the term 'in the field' and the places of contact with the enemy."369

The Doe dicta also impacted Professor Masur’s article on judicial deference to executive branch factual determinations in wartime, in which he examines whether the substantive law governing judicial review in national security matters compels greater deference and concludes that it does not, in part because the military is an agency under the APA. Although he admits that the military authority exception’s “outer limits remain somewhat murky,” he contends that “[t]he judiciary has generally construed this exception narrowly and literally, constraining its application to genuine military operations in theaters of battle, as exemplified by the D.C. Circuit’s language in Doe.”371 As explained above, however, the dicta in Doe are not consistent with the full range of judicial decisions that would have informed contemporary understanding of the military authority exception in 1946. And aside from Doe, Professor Masur cites only three cases that did not discuss the military authority exception, but merely noted the exception’s obvious inapplicability.372 Thus, while Professor Masur is correct insofar as he suggests that military action that is reviewable under the APA would be examined under the arbitrary and capricious standard, a broader range of military actions might not be actionable under the APA than he contemplates.

Judge Randolph of the D.C. Circuit came closer to historic accuracy in his concurrence in Al Odah v. United States. Judge Randolph wrote the court’s opinion holding that it lacked jurisdiction to hear habeas corpus petitions filed by aliens held outside the United States at Guantánamo.

369. 259 F. 2d, 32 (4th Cir. 1919), cert denied, 250 U.S. 645 (1919).
371. Id. at 513 (citing Doe v. Sullivan, 938 F.2d 1370, 1380 (D.C. Cir. 1991)).
372. Id. at n.293 (citing Dickson v. Sec’y of Def., 68 F.3d 1396, 1401 (D.C. Cir. 1995); Guerrero v. Stone, 970 F.2d 626, 628 (9th Cir. 1992); Neal v. Sec’y of the Navy, 639 F.2d 1029, 1036 (3d Cir. 1981)).
He also filed a concurring opinion in which he said that the military authority exception would bar the plaintiffs' APA claims because they were taken into custody and remain in custody "in the field in time of war." Judge Randolph explained that historically the phrase "in the field" "was not restricted to the field of battle," but "applied as well to organized camps stationed in remote places where civil courts did not exist." He also believed that the lack of a congressional declaration of war did not prevent "the war against the al Qaeda terrorist network" from qualifying as a time of war within the meaning of the APA. Those observations were certainly consistent with the meaning of those terms when the APA was enacted. Whether Judge Randolph's belief that the military authority exception was "meant to forbid" judicial review of "military decisions after those captured have been moved to a 'safe' location," however, is less clear. Unfortunately, when the Supreme Court reversed, holding that habeas corpus jurisdiction extends to aliens held in "territory over which the United States exercises plenary and exclusive jurisdiction, but not 'ultimate sovereignty,'" the Court did not address the "military authority" exception.

Professors Jinks and Sloss find Judge Randolph's concurring opinion in *Al Odah* "unpersuasive." In their article examining whether the President has the authority under domestic law to violate the Geneva Conventions in order to protect national security, they analyze, among other things, whether sovereign immunity would bar Guantánamo detainees' claims that the executive branch breached the Geneva Conventions. In the course of that analysis, they assume that the military prison at Guantánamo Bay, Cuba cannot be in the field, even if that phrase is interpreted broadly,

374. *Id.* at 1144.

375. *Id.* at 1149–50. The district court had also concluded that it lacked jurisdiction, but held in the alternative that § 702 of the APA would not waive the government's sovereign immunity because "the actions of the government in this case would be exempt" under the military authority exception. *Rasul v. Bush*, 215 F. Supp. 2d 55, 64 n.11 (D.D.C. 2002). Because the plaintiffs "were captured in areas where the United States was (and is) engaged in military hostilities pursuant to the Joint Resolution of Congress," the court found that "[t]his situation plainly falls within" the exception. *Id.*

376. *Al Odah*, 321 F.3d at 1150 (quoting Kinsella v. United States *ex rel.* Singleton, 361 U.S. 234, 274 (Whittaker, J., concurring in part and dissenting in part)).

377. *Id.*

378. *Id.*


380. Jinks & Sloss, *supra* note 1, at 188.

381. *Id.* at 181.
because it is "thousands of miles away from the battlefield." That assumption, however, is not consonant with the understanding of that phrase when Congress enacted the APA. The contemporary case law extended the field beyond the locus of combat to "any place... where military operations are being conducted," including domestic training facilities. The history thus indicates that the military authority exception could well have been intended to encompass military prisons, regardless of where they are located. Accordingly, the criticism that "Judge Randolph's interpretation of the statute is flawed because it deprives the phrase 'in the field' of any meaning whatsoever" is not well taken.

Recognizing the historical significance of Congress's decision to use the phrases in the field and time of war in the APA and the contemporary meaning of those phrases in 1946 could narrow the circumstances in which the APA would pave an avenue to judicial relief for military detainees. Similarly, although no court has analyzed the military authority exception in the context of an environmental claim, acknowledging that the exception's meaning in 1946 was somewhat broader than a modern reader would presume from the plain language might lead courts to decline to hear claims under environmental statutes that are actionable only through the APA. On the other hand, a court might limit its analysis to the plain language and official legislative history of the APA, thus paving a broader path to the courthouse door for detainees and environmental claimants.

CONCLUSION

The military authority exception is plainly narrower than the Walter-Logan bill's exemption for "any matter concerning or relating to the military establishments" and the exemptions for military functions in §§ 4 and 5 of the APA. But Congress's understanding of the phrases in the field and time of war may have been somewhat broader than a modern reader would suppose. Contemporary case law held that in the field was not limited to the locus of combat and time of war did not require a congressional declaration of war. Moreover, Congress was under pressure from the military to reduce the bill's impact on military functions. As it did in many other provisions of the APA, Congress used ambiguous language in the

382. Id. at 188 & n.473. Similarly, Professor Chesney assumes, without analysis, that decisions to transfer custody of Guantanamo detainees to nations that might subject them to torture are not made "in the field." Chesney, supra note 1, at 684 n.126.
385. Jinks & Sloss, supra note 1, at 188.
"military authority" exception in order to compromise with competing interests and ease the bill's passage. Lacking any understanding of that historical context, courts and commentators have made assumptions about the exception's scope based only on their modern interpretation of the plain language and have failed to take into account the contemporary understanding of the exception when Congress enacted the APA in 1946.

The historiographic analysis of the military authority exception presented in this article reveals questions that remain to be answered. Why has the exception not arisen in litigation more often? To what extent has the meaning of the exception changed since 1946 in response to shifts in fundamental doctrines of administrative law? And most importantly, is the history of the military authority exception, beyond the plain language and official legislative history, even relevant to a court's analysis of its jurisdiction under the APA?

Litigation concerning persons held at military facilities or the environmental impacts of military actions may give the courts further opportunities to answer some of these questions. The Supreme Court, however, does not appear to be in any rush to discuss this provision. The Court declined the opportunity in Bismullah v. Gates in which the government's rehearing petition in the D.C. Circuit generated five separate opinions, including a face-off between Judge Randolph and Judge Ginsburg about the relevance of the military authority exception to the procedures applied in petitions for review under the Detainee Treatment Act of 2005.

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386. See Shepherd, supra note 34, at 1665; Schiller, supra note 39, at 199; Vermeule, supra note 254, at 1138–39.

387. 501 F.3d 178 (D.C. Cir. 2007), reh'g denied, 503 F.3d 137, 138–39 (D.C. Cir. 2007), reh'g en banc denied, 514 F.3d 1291, 1293 (D.C. Cir. 2008) (per curiam), vacated and remanded, 128 S. Ct. 2960 (2008). The Detainee Treatment Act of 2005 gives the D.C. Circuit exclusive jurisdiction to review determinations by Combatant Status Review Tribunals that aliens are properly being detained as "enemy combatants." Id. at 182. Among other things, the D.C. Circuit held that the record on review includes not just information submitted to the Tribunal, but all "reasonably available information in the possession of the U.S. Government bearing on the issue of whether the detainee meets the criteria to be designated as an enemy combatant . . . ." Id. at 139. Judge Randolph dissented from the denial of rehearing en banc. Although he acknowledged that the case was not "controlled . . . by the APA," he opined that "the detention of enemy combatants, and the review processes related to them, are military 'functions' the APA specifically exempts." 514 F.3d at 1303 n.3 (Randolph, J.). He attached as an addendum his concurrence in Al Odah to further explain that point. Id. Judge Ginsburg responded in his opinion concurring in the denial of rehearing en banc that no court has ever held that a Combatant Status Review Tribunal is a "military authority exercised in the field in time of war" and "no party to this case has suggested as much." Id. at 1294 n.3 (Ginsburg, C.J., concurring in the denial of rehearing en banc). In Judge Ginsburg's view, the Tribunal is "not a court[-]martial, not a military
The Supreme Court also has shown some willingness to defer to quintessentially military decisions, regardless of whether they fall within the scope of the military authority exception, and thus might not see a need to address the exception any time soon. In Winter, for example, the Supreme Court did not mention the military authority exception when it reviewed an order enjoining the use of sonar in Navy training, even though the courts' jurisdiction rested in part on the APA. Instead, the Court reiterated that it would give "great deference to the professional judgment of military authorities concerning the relative importance of a particular military interest" and to the "essentially professional military judgments" concerning "the composition, training, equipping, and control of a military force." The Court held that the "lower courts failed properly to defer to senior Navy officers' specific, predictive judgments about how the preliminary injunction would reduce the effectiveness of the Navy's . . . training exercises.

The history of the military authority exception calls into question the courts' continued willingness to employ common law deference doctrines to avoid reviewing military actions. Congress chose to use narrow language in the military authority exception, obviously intending for military actions commission, and not an agency," but "something sui generis and outside the contemplation of the APA." Id. at 1294–95. The Supreme Court granted certiorari, vacated the court of appeals' judgment, and remanded for further consideration in light of Boumediene. Gates v. Bismullah, 128 S.Ct. 2960 (2008). On remand, the court of appeals dismissed the petitions for lack of jurisdiction, holding that the jurisdictional provision of the Detainee Treatment Act was not severable from the provision eliminating habeas corpus jurisdiction, which the Supreme Court held unconstitutional in Boumediene. Bismullah v. Gates, 551 F.3d 1068, 1070 (D.C. Cir. 2009).

389. 129 S. Ct. at 377 (quoting Goldman v. Weinberger, 475 U.S. 503, 507 (1986)).
390. Id. (quoting Gilligan v. Morgan, 413 U.S. 1, 10 (1973)).
391. Id. at 378. Perhaps the Supreme Court was willing to defer so broadly in Winter because the APA expressly preserves the courts' equitable discretion to fashion a remedy appropriate to the case, 5 U.S.C. § 702 (2006), because of the "longstanding consensus" that in some "domains affecting national security . . . executive action must proceed untrammelled by even the threat of legal regulation and judicial review, no matter how deferential that review might be on the merits," Vermeule, supra note 254, at 1133, or simply because the case concerned harm to marine mammals, not human beings. See Jonathan Cannon, Environmentalism and the Supreme Court: A Cultural Analysis, 33 ECOLOGY L. Q. 363 (2006); Richard J. Lazarus, Thirty Years of Environmental Protection Law in the Supreme Court, 17 PACE ENVTL. L. REV. 1 (1999); Richard J. Lazarus, Restoring What's Environmental About Environmental Law in the Supreme Court, 47 UCLA L. REV. 703 (2000); Richard J. Lazarus, Environmental Law and the Supreme Court: Three Years Later, 19 PACE ENVTL. L. REV. 653 (2002). The Court probably declined to address the military authority exception because no party raised it.
falling outside the scope of the exception to be subject to judicial review (unless some other provision precludes review). The history of the APA's enactment demonstrates that Congress believed judicial review of administrative action, including military action, was one of the keys to protecting individual liberties and avoiding totalitarianism. "With the enactment of the APA in 1946, the judicial method in most administrative law cases should have shifted to the task of interpreting the new statute, rather than continuing to formulate and apply judicially-created doctrines."\(^{392}\) Professor Masur demonstrates that military agencies are entitled to no greater deference than other expert administrative agencies and that the rule of law demands that courts exercise their authority to review military actions.\(^{393}\) Indeed, the plain language of the APA itself mandates judicial review in appropriate cases.\(^{394}\) The Supreme Court recently held that agency action may not be subjected to a stricter standard of review than that set forth in the APA.\(^{395}\) By the same token, it should not be subjected to a lesser standard of review, or excused from review altogether, based on a doctrine that has no "basis in the text of the statute."\(^{396}\)

Whatever the reason for the Supreme Court's continued willingness to defer broadly to the military, Winter and Bismullah indicate that those who desire a definitive interpretation of the military authority exception from the Court may have to be patient.\(^{397}\) In the interim, the historical context provided in this Article may lend some aid to those who are trying to bring Congress's intentional ambiguity into focus.

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392. Duffy, supra note 267, at 121.
393. Masur, supra note 370, at 493, 520.
394. 5 U.S.C. §§ 702 ("A person suffering legal wrong because of agency action . . . is entitled to judicial review thereof."); 704 ("Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review."); 706 ("To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action."); Duffy, supra note 267, at 130.
396. Id. at 1811.
397. Professor Babcock was somewhat prescient when she said that "[c]ourts have generally been protective of the military when confronted with a conflict between NEPA mandates and military needs." Babcock, supra note 2, at 115–16. If she is also correct that "the circumstances of 9/11 and the continual state of war may change that posture," id. at 116, perhaps the Supreme Court will address the "military authority" exception in the not-too-distant future.