

# SOLDIERS WITH FORTUNES? RETHINKING THE TAX TREATMENT OF FALLEN COMBATANTS

Jeffrey A. Cooper\*

## *Abstract*

*Section 2201 of the Internal Revenue Code provides a partial estate tax exemption for members of the armed forces who die in, or as a result of, combat operations. In this Article, I explore the origins of this exemption and assess the extent to which it serves three important policy goals: (1) reducing financial and administrative burdens on military families, (2) incentivizing military service, and (3) avoiding the moral hazard of the government being able to “profit” (through increased tax revenues) as a result of combat deaths.*

*Through this analysis, I conclude that this arguably well-intentioned provision does little to serve these three policy ends. I urge Congress to abandon the provision and replace it with expanded, simplified, income tax relief for the families of those lost in combat. This income tax relief will better serve the enumerated policy goals than does the current combat exemption, offering more meaningful relief to more typical military families.*

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\* Carmen Tortora Professor of Law and Associate Dean for Research and Faculty Development, Quinnipiac University School of Law. My thanks to Michael Rapiejko (class of 2018) for his able research assistance and to my faculty colleagues for helpful comments on preliminary versions of this article. Thanks also to the student participants in the Fall 2017 Legal Research Symposium for their thoughtful feedback on this article.

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## I. INTRODUCTION

From the Revolutionary War to the battle against international terrorism, American history has been shaped by military conflict.<sup>1</sup> That national history also reflects an ongoing effort to thank those who have served in our nation's armed forces and to honor those who have fallen in combat.<sup>2</sup>

Like much in our national consciousness, such as our desires to incentivize energy efficiency,<sup>3</sup> higher education,<sup>4</sup> and home ownership,<sup>5</sup> our quest to honor our fallen heroes has shaped modern tax policy. The tax code contains a litany of tax relief provisions targeted toward members of the nation's military, including statutes providing relief from income and estate taxes for those who die in combat operations.<sup>6</sup>

In this article, I explore the origins, justification and operation of the estate tax relief offered to those who fall in combat (hereinafter the "combat exemption" or "the estate tax exemption"), currently codified in Section 2201 of the Internal Revenue Code (hereinafter "the Code").<sup>7</sup> I contend that while well-intentioned, the combat exemption is a poorly-targeted provision that does little to address the plight of those left behind by our fallen heroes. I urge Congress to abandon the provision and instead to offer greater, simplified, income tax relief to the families of those lost in combat.

## II. A BRIEF OVERVIEW OF ESTATE TAXATION AND THE COMBAT EXEMPTION

In this section, I provide a brief overview of the federal estate tax and the combat exemption, including relevant legislative history.

### A. Modern Federal Estate Tax: Overview

The federal estate tax has a long history as a wartime revenue measure, with its

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<sup>1</sup> See generally TERENCE T. FINN, *AMERICA AT WAR: CONCISE HISTORIES OF U.S. MILITARY CONFLICTS FROM LEXINGTON TO AFGHANISTAN* (2014).

<sup>2</sup> See generally Jason R. Harris, *The Protection of Sunken Warships as Gravesites at Sea*, 7 *OCEAN & COASTAL L.J.* 75, 114–16 (2001) (discussing public holidays and military traditions that honor soldiers' sacrifices).

<sup>3</sup> Richard A. Westin, *Energy and Environmental Tax Changes in the Flood of Recent Federal Revenue Laws and What They Imply*, 15 *PENN ST. ENVTL. L. REV.* 171, 176–82 (2007) (discussing a variety of tax provisions designed to incentivize energy conservation by consumers).

<sup>4</sup> See generally Sean M. Stegmaier, *Tax Incentives for Higher Education in the Internal Revenue Code: Education Tax Expenditure Reform and the Inclusion of Refundable Tax Credits*, 37 *SW. U. L. REV.* 135 (2008).

<sup>5</sup> Anthony B. Kuklin, *Impetus to an Industry – the Effect of Taxation of Real Estate and Real Estate Derived Income on Real Property Development in the United States*, 17 *REAL PROP. PROB. & TR. J.* 458 (1982) ("The United States is certainly a leader, if not preeminent, among the nations of the world in the use of taxation as a policy tool to foster real estate development and ownership."). For a defense of using the tax code in this manner, see Joseph W. Trefzger, *Why Homeownership Deserves Special Tax Treatment*, 26 *REAL EST. L.J.* 340 (1998). For a contrary viewpoint, see Rebecca N. Morrow, *Billions of Tax Dollars Spent Inflating the Housing Bubble: How and Why the Mortgage Interest Deduction Failed*, 17 *FORDHAM J. CORP. & FIN. L.* 751 (2012) (contending that the major tax code provision designed to incentivize home ownership, the deductibility of home mortgage interest, is misguided and ineffective). See also Sagit Leviner, *Affordable Housing and the Role of the Low Income Housing Tax Credit Program: A Contemporary Assessment*, 57 *TAX LAW.* 869 (2004) (discussing tax incentives for the construction of low income housing).

<sup>6</sup> The first of these, codified in I.R.C. § 692, provides income tax relief to a soldier who dies in a combat zone. The second, codified in I.R.C. § 2201, provides estate tax relief.

<sup>7</sup> I.R.C. § 2201.

antecedents being used to finance the buildup of the U.S. Navy in the late 18th century,<sup>8</sup> the Civil War,<sup>9</sup> and the Spanish-American War.<sup>10</sup> In 1916, Congress again turned to this source of revenue amid the growing crisis that would eventually become World War I.<sup>11</sup> Unlike its short-lived 18th and 19th century ancestors, the estate tax enacted in 1916 has remained in place for over a century.

On its face, the federal estate tax seems to cast a wide net, applying to “every decedent who is a citizen or resident of the United States”<sup>12</sup> as well as “all property, real or personal, tangible or intangible, wherever situated.”<sup>13</sup> However, despite this broad verbiage, relatively few estates actually pay any tax.<sup>14</sup> Two main features of the Code account for this result. First, each taxpayer is given a generous exemption from the estate tax, \$5,490,000 per taxpayer for deaths in 2017 with additional inflation adjustments thereafter.<sup>15</sup> Taxpayers with wealth below this level are effectively exempt from the tax.<sup>16</sup> Second, the Code exempts from tax transfers to, or to certain types of trusts for the benefit of, a decedent’s surviving spouse.<sup>17</sup> Taken together, these two provisions effectively exempt well over 99% of estates from the estate tax.<sup>18</sup>

#### B. Modern Federal Estate Tax: The Combat Exemption of Section 2201

In addition to the exemptions and credits available to all taxpayers, the Code contains a special exemption for soldiers<sup>19</sup> who die in combat. The relevant Code section,

<sup>8</sup> An Act Laying Duties on Stamped Vellum, Parchment, and Paper, ch. 11, 1 Stat. 527 (1797). For a brief discussion of this act and other early federal estate taxes, see Jeffrey A. Cooper, *Interstate Competition and State Death Taxes: A Modern Crisis in Historical Perspective*, 33 PEPP. L. REV. 835, 844 (2006). For a more detailed analysis, see STAFF OF J. COMM. ON TAX’N, 107TH CONG., DESCRIPTION AND ANALYSIS OF PRESENT LAW AND PROPOSALS RELATING TO FEDERAL ESTATE AND GIFT TAXATION, 10–18 (Comm. Print 2001) (analyzing the legislative history of federal death taxes enacted between 1797 and 2001).

<sup>9</sup> An Act to Provide Internal Revenue to Support the Government and to Pay Interest on the Public Debt, and for Other Purposes, § 110, 13 Stat. 223, 277 (1864); An Act to Provide Ways and Means for the Support of the Government, and for Other Purposes, § 1, 13 Stat. 218, 218 (1864).

<sup>10</sup> An Act to Provide Ways and Means to Meet War Expenditures, and for Other Purposes, § 29, 30 Stat. 448, 464–65 (1898).

<sup>11</sup> Revenue Act of 1916, Pub. L. No. 64–271, 39 Stat. 756 (1916).

<sup>12</sup> I.R.C. § 2001.

<sup>13</sup> I.R.C. § 2031.

<sup>14</sup> In recent years, the tax has impacted just 0.1% to 0.2% of decedents, a “historically low number.” See Paul L. Caron, *The One-Hundredth Anniversary of the Federal Estate Tax: It’s Time to Renew Our Vows*, 57 B.C. L. REV. 823, 826 (2016). See also Philip Bump, *Here’s How Many People Have to Pay the Estate Tax that Trump Wants to Dump*, WASH. POST (Apr. 26, 2017), <https://www.washingtonpost.com/news/politics/wp/2017/04/26/heres-how-many-people-have-to-pay-the-estate-tax-that-trump-wants-to-dump> [https://perma.cc/MSS5-AFCA] (citing statistics and including both illustrative graphics and an interactive tax simulator).

<sup>15</sup> I.R.C. § 2010(c)(3).

<sup>16</sup> Per I.R.C. § 2010(a), the “unified credit” is a single credit applicable to inter vivos transfers subject to the federal gift tax and testamentary transfers subject to the estate tax. Taxpayers with wealth below the level of the credit thus can transmit all of their wealth tax free during life or at death. Per I.R.C. §§ 2010(c)(2)(B) and (c)(4), a taxpayer has additional unified credit if the taxpayer was predeceased by a spouse who did not fully utilize his or her own unified credit. For a discussion of this “deceased spousal unused exclusion” (DSUE), see John A. Miller & Jeffrey A. Maine, *Wealth Transfer Tax Planning for 2013 and Beyond*, 2013 B.Y.U. L. REV. 879, 913 (2013).

<sup>17</sup> I.R.C. § 2056.

<sup>18</sup> See Caron, *supra* note 14.

<sup>19</sup> In this article, I use the term “soldier” to refer generically to all members of all U.S. military branches. I have made this choice solely in the interests of readability of an article written for a predominantly civilian audience. It is not my intent to exclude or offend members of the military who

recently expanded to include astronauts and victims of domestic terrorism, provides a partial estate tax exemption, as follows:

(a) In general. Unless the executor elects not to have this section apply, in applying sections 2001 and 2101 to the estate of a qualified decedent, the rate schedule set forth in subsection (c) shall be deemed to be the rate schedule set forth in section 2001 (c).

(b) Qualified decedent. For purposes of this section, the term “qualified decedent” means—

(1) any citizen or resident of the United States dying while in active service of the Armed Forces of the United States, if such decedent—

(A) was killed in action while serving in a combat zone, as determined under section 112 (c), or

(B) died as a result of wounds, disease, or injury suffered while serving in a combat zone (as determined under section 112 (c)), and while in the line of duty, by reason of a hazard to which such decedent was subjected as an incident of such service,

(2) any specified terrorist victim (as defined in section 692 (d)(4)), and

(3) any astronaut whose death occurs in the line of duty.<sup>20</sup>

In its practical effect, the combat exemption does two things. First, it increases the effective amount of the unified credit from approximately \$5.5 million to over \$10 million.<sup>21</sup> Second, it halves the applicable tax rate paid thereafter to 20% from the current 40%.<sup>22</sup>

## C. Legislative History of Section 2201

### 1. *World War I*

When the modern Federal Estate tax was first enacted in 1916, it contained no special provisions relating to members of the armed forces.<sup>23</sup> That changed the following year when Congress enacted a Supplemental War Tax to finance the nation’s entry into World War I.<sup>24</sup>

During legislative consideration of the proposed supplemental tax bill, some members of Congress saw a significant policy concern—the likelihood that fallen members of the armed forces would represent a disproportionate percentage of those dying during a time of war and thus would bear a disproportionate burden of the wartime

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associate that term solely with the U.S. Army rather than members of their branch of the armed forces. *See* PAUL BRIANS, COMMON ERRORS IN ENGLISH USAGE 297 (3d ed. 2013) (“Marines, Air Force personnel, and Navy soldiers all object to being called ‘soldiers’ but there is no other traditional generic term.”).

<sup>20</sup> I.R.C. § 2201.

<sup>21</sup> Rev. Proc. 2016-14, 2016-9 I.R.B. 365. For an example of the calculations required to compute these figures, *see* Rev. Rul. 2002-86, 2002-2 C.B. 993.

<sup>22</sup> I.R.C. § 2201(c).

<sup>23</sup> An Act to Increase the Revenue, and for Other Purposes, Pub. L. No. 64-271, § 1, 39 Stat. 756, 756-57 (1916).

<sup>24</sup> An Act to Provide Revenue to Defray War Expenses, and for Other Purposes, Pub. L. No. 65-50, 40 Stat. 300 (1917) [hereinafter 1917 Tax Act].

estate tax. Those Congressmen actively opposed such a tax that would “put a special penalty upon the estates of men who may sacrifice their lives for their country.”<sup>25</sup>

Initially, those pleas did not inspire the broader House of Representatives, which rejected an amendment that would have exempted estates of soldiers from the proposed wartime estate tax.<sup>26</sup> But a defeat on the House floor did not end the matter. Rather, when deliberations reached the Senate, that chamber voted to strike out the supplemental estate tax in its entirety.<sup>27</sup> This set the stage for a compromise brokered in a conference committee: the supplemental estate tax was returned to the bill but with the caveat that it would not apply to any members of the armed forces who died during the war.<sup>28</sup> Those dying on the battlefields of World War I would pay estate tax at the 1916 rates rather than the higher 1917 ones. The combat exemption was born.

In the Revenue Act of 1918, Congress enacted another supplemental war estate tax, further increasing the applicable rates.<sup>29</sup> When doing so, Congress again considered the plight of soldiers and retroactively augmented the combat exemption to provide a full, rather than partial, estate tax exemption, for soldiers who died during the war.<sup>30</sup>

By their terms, these 1917 and 1918 variants of the combat exemption were to be in effect only during World War I. The end of the war thus brought the end of the exemption.

## 2. *Subsequent Legislation*

In the decades that followed the end of World War I, the United States remained at peace and Congress had no reason to revisit the combat exemption. This is not to say that those decades were uneventful ones for the federal estate tax. To the contrary, Congress in this era paid considerable attention to the tax, making numerous revisions to the tax rate and applicable exemption,<sup>31</sup> as well as engaging in extensive debates regarding the interplay between federal and state death taxes.<sup>32</sup> These debates ultimately led to a major structural change—Congress bifurcated the estate tax into two different taxes, a Basic Estate Tax (calculated at the rates in effect during 1926 and shared with the

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<sup>25</sup> 55 CONG. REC. H2,726 (daily ed. May 22, 1917) (statement of Rep. Platt).

<sup>26</sup> On May 22, 1917, the House rejected Representative Good’s amendment to add a soldiers’ exemption to the proposed wartime estate tax. *See id.* at H2,727.

<sup>27</sup> 55 CONG. REC. S6,133 (daily ed. Aug. 17, 1917).

<sup>28</sup> 1917 Tax Act, § 901 (“the tax imposed by this title shall not apply to the transfer of the net estate of any decedent dying while serving in the military or naval forces of the United States, during the continuance of the war in which the United States is now engaged ...”). This provision was added in Conference Committee as a result of a compromise between members of the House who favored increased estate taxation and Senate conferees who wanted to delete the estate tax in its entirety. *See* 55 CONG. REC. S7,620 (daily ed. Oct. 2, 1917) (statement of Sen. Simmons) (discussing the compromise). *See also* Amendment 274 in the Conferee’s Report, *available at* 55 CONG. REC. 7,571 (1917).

<sup>29</sup> Revenue Act of 1918, Pub. L. No. 65–254, § 401, 40 Stat. 1057, 1096 (1919).

<sup>30</sup> *Id.* at 1097 (“The taxes imposed by this title or by Title II of the Revenue Act of 1916 (as amended ...) or by Title IX of the Revenue Act of 1917, shall not apply to the transfer of the net estate of any decedent who has died or may die while serving in the military or naval forces of the United States in the present war or from injuries received or disease contracted while in such service.”). It is worth noting that the Revenue Act of 1918 was not enacted until February 1919, months after the war had ended. The expanded combat exemption provided by 401 was thus retroactive in effect. For a more detailed discussion of Congress’ pattern of retroactively modifying the combat exemption, *see infra* part II, section (B)(1)(b).

<sup>31</sup> *See* Jeffrey A. Cooper, *Ghosts of 1932: The Lost History of Estate and Gift Taxation*, 9 FLA. TAX REV. 875, 883 (2010) (discussing subsequent legislative developments).

<sup>32</sup> For a detailed history of these debates, *see* Cooper, *supra* note 8, at 848–60.

states via a mechanism known as the state death tax credit) and an Additional Estate Tax (the revenue from which was reserved entirely to the federal government).<sup>33</sup> Initially this bifurcation was designed as a mechanism to alter the balance between federal and state estate tax revenues and had nothing to do with the soldier's exemption.<sup>34</sup> It soon became crucial to that issue.

During World War II, Congress again offered relief to soldiers dying in combat.<sup>35</sup> The resulting variant of the combat exemption was modeled after that in place during 1917, offering soldiers a partial relief from taxation. Mechanically, Congress achieved this end by providing that only the Basic Estate Tax, and not the Additional Estate Tax, would apply to combatants dying in World War II.<sup>36</sup> Much like its World War I counterpart, this World War II combat exemption was added without any significant debate.<sup>37</sup>

In the decades that followed, the combat exemption became a permanent fixture of the Code. An analogous provision applied to those killed in action in a combat zone between June 25, 1950, and December 31, 1953.<sup>38</sup> This relief was later extended and expanded to apply to those killed in action in a combat zone during any induction period between 1954 and June 30, 1973.<sup>39</sup> The induction period requirement was dropped during 1975, extending partial estate tax relief to all soldiers killed in action in a combat zone on

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<sup>33</sup> Congress enacted the first version of a state death tax credit in 1924. Revenue Act of 1924, Pub. L. No. 68-176, § 300, 43 Stat. 253, 304. ("The tax imposed by this section shall be credited with the amount of any estate, inheritance, legacy, or succession taxes actually paid to any State or Territory or the District of Columbia, in respect of any property included in the gross estate. The credit allowed by this subdivision shall not exceed 25 per centum of the tax imposed by this section.") In 1926, Congress increased the maximum credit from 25% to 80%. Revenue Act of 1926, Pub. L. No. 69-21, §301(b), 44 Stat. 9, 70 ("The tax imposed by this section shall be credited with the amount of any estate, inheritance, legacy, or succession taxes actually paid to any State or Territory or the District of Columbia, in respect of any property included in the gross estate. The credit allowed by this subdivision shall not exceed 80 per centum of the tax imposed by this section ..."). In 1932, Congress amended the estate tax regime by keeping the 1926 rates in place but supplementing them with an "Additional Estate Tax" which was not subject to the state death tax credit. *See* Revenue Act of 1932, Pub. L. 72-154, §§ 401, 402, 47 Stat. 169, 245 (adding the "additional estate tax" and providing that "The credit provided in section 301(c) of the Revenue Act of 1926, as amended (80 per centum credit), shall not be allowed in respect of such additional tax.")

<sup>34</sup> Under the state death tax credit in effect beginning from 1926, an estate could claim a dollar-for-dollar federal credit for state estate taxes paid up to 80% of the Basic Estate Tax. Originally, Congress enacted this regime to facilitate state estate tax collections and most states took advantage of this mechanism by enacting state estate taxes exactly equal to the available credit. *See* Cooper, *supra* note 8, at 852-70 (discussing Congress's motivation in enacting the state death tax credit and state legislative responses). The Additional Estate Tax enacted in 1932 was not included in this revenue-sharing regime, thus allowing Congress to increase estate tax rates without sharing the resulting revenue with the states. *See* Cooper, *supra* note 31, at 905-09 (discussing Congress's motivation in restructuring the estate tax and illustrating the resulting effect on tax rates).

<sup>35</sup> Congress offered this relief retroactively to those dying during World War II. *See* Pub. L. No. 81-378, § 10, 63 Stat. 891, 896 (1949) (providing that additional estate tax shall not apply to estates of decedents killed in action between December 7, 1941 (the attack on Pearl Harbor) and December 31, 1946 (the date President Truman proclaimed to be the end of the war). *See* Proclamation No. 2714, 3 C.F.R. 1943-1948 Comp. (Dec. 31, 1946).

<sup>36</sup> Pub. L. No. 81-378, § 10, 63 Stat. 891, 896 (1949).

<sup>37</sup> 95 CONG. REC. 12,997 (1949) (amendment was approved by voice vote without any debate).

<sup>38</sup> Pub. L. No. 82-183, §606, 65 Stat. 452, 567 (1951) (extending partial estate tax exemption to those killed in action while serving in a combat zone after June 24, 1950 and before January 1, 1954).

<sup>39</sup> I.R.C. § 2201 (1954).

or after July 1, 1973.<sup>40</sup>

The exemption, by then codified in I.R.C. § 2201, was later expanded<sup>41</sup> to extend partial estate tax relief to all citizens (whether military personnel or civilians) dying as a result of the terrorist attacks of April 19, 1995,<sup>42</sup> and September 11, 2001,<sup>43</sup> or by anthrax poisoning.<sup>44</sup> A final expansion provided relief to the estate of any astronaut whose death occurs in the line of duty after 2002.<sup>45</sup>

As Congress expanded the scope of the combat exemption it also added, and expanded, numerous other provisions offering tax relief to those serving in combat zones. Foremost among these is the income tax analogue to the combat exemption, codified at I.R.C. § 692(a), which provides for a soldier dying in a combat zone to receive a refund of all income taxes paid while in that combat zone (hereinafter the “income tax exemption”).<sup>46</sup> In addition the Code now offers a series of other tax benefits for combatants.<sup>47</sup> As examples, I.R.C. § 112 excludes compensation received in a combat zone,<sup>48</sup> I.R.C. § 104(a)(4) excludes combat-related disability payments,<sup>49</sup> I.R.C. § 4253(d)

<sup>40</sup> Pub. L. No. 93–597, § 6(b), 88 Stat. 1950, 1953 (1975). That Act contained a typographical error that was corrected by Title XIX, Pub. L. No. 94–455, § 1902(a)(7)(A), 90 Stat. 1805, 1805 (1976) (correcting erroneous cross-reference that had been to Section “2210” rather than the intended Section “2201”).

<sup>41</sup> Victims of Terrorism Tax Relief Act of 2001 § 103; Pub. L. No. 107–134, 115 Stat. 2427, 2430 (2002). This major expansion of the combat exemption included adoption of a separate estate tax rate table applicable only to those entitled to relief under section 2201. This restructuring was necessitated by the Economic Growth and Tax Relief Reconciliation Act of 2001 (EGTRRA), Pub. L. No. 107–16, 115 Stat. 38, which combined the prior Basic Estate Tax and Additional Estate Tax into a single rate structure, thereby inadvertently eliminating the basis for computing the soldier’s exemption. As a result of all of these legislative machinations, I.R.C. § 2201, which began in 1917 as a single sentence, now contains some 500 words.

<sup>42</sup> On this date, 168 people were killed when a truck filled with explosives was detonated in front of the Alfred P. Murrah Federal Building in Oklahoma City, Oklahoma. See CNN Library, *Oklahoma City Bombing Facts*, CNN, <http://www.cnn.com/2013/09/18/us/oklahoma-city-bombing-fast-facts/index.html> [<https://perma.cc/8DZQ-7VKY>] (last updated Mar. 29, 2017, 4:10 PM) (providing a summary of the day’s events and the subsequent prosecution of the perpetrators).

<sup>43</sup> On this date, 2,977 people were killed when terrorists simultaneously hijacked four airliners. The hijackers crashed two of the aircraft into the towers of the World Trade Center in New York City and one into the Pentagon in Washington, D.C. Passengers are believed to have prevented the hijackers of the fourth airliner from reaching its intended target and it crashed into a field in Shanksville, Pennsylvania. See CNN Library, *September 11th Terror Attacks Fast Facts*, CNN, <http://www.cnn.com/2013/07/27/us/september-11-anniversary-fast-facts/index.html> [<https://perma.cc/82MM-EMRB>] (last updated Aug. 24, 2017, 6:04 PM) (providing detailed information on the day’s events and aftermath).

<sup>44</sup> Between September and November 2001, an unknown perpetrator mailed numerous letters containing anthrax spores. Five people died from anthrax as a result. See *Timeline: How the Anthrax Terror Unfolded*, NPR (Feb. 15, 2011, 11:00 AM), <http://www.npr.org/2011/02/15/93170200/timeline-how-the-anthrax-terror-unfolded> [<https://perma.cc/26G6-58XA>] (providing a detailed timeline of the anthrax poisoning and subsequent law enforcement investigation).

<sup>45</sup> Military Family Tax Relief Act of 2003, Pub. L. No. 108–121, 117 Stat. 1335. As reflected in the text of the legislation itself, this expansion of the combat exemption was inspired by the February 1, 2003 explosion of the Space Shuttle Columbia, which killed all seven astronauts onboard. See *id.* at § 110 (Entitled “Tax Relief and Assistance for Families of Space Shuttle Columbia Heroes”). For a history and analysis of the Columbia flight, see NASA Mission Archives, *STS-107*, NASA, [https://www.nasa.gov/mission\\_pages/shuttle/shuttlemissions/archives/sts-107.html](https://www.nasa.gov/mission_pages/shuttle/shuttlemissions/archives/sts-107.html) [<https://perma.cc/49ZS-TXKU>].

<sup>46</sup> I.R.C. § 692(a). Like the estate tax combat exemption, this income tax exemption traces its roots to 1917.

<sup>47</sup> For a comprehensive, albeit slightly dated, overview of many of these provisions, see Theodore Paul Manno, *Federal Income Taxation of Soldiers, Sailors, Airmen and Marines*, 50 S.D. L. REV. 293 (2005).

<sup>48</sup> I.R.C. § 112.

provides exemption from excise taxes on phone calls originating in a combat zone,<sup>50</sup> and I.R.C. § 7508(a) offers those deployed to combat zones an automatic 180-day extension of time to file and pay their income taxes.<sup>51</sup>

### III. EVALUATING THE POLICY SUCCESS OF THE COMBAT EXEMPTION

Having considered the history and current operation of the combat exemption, I now turn to the major normative question: does that exemption serve any important policy goals? This analysis is somewhat complicated by the fact that the legislative history of Section 2201 and its predecessors is extremely thin, revealing little about Congress' original policy justification for the provision beyond the overarching desire to reduce the burdens on soldiers killed in combat and their loved ones left behind. There was almost no recorded legislative debate concerning the first enactment of the combat exemption during World War I.<sup>52</sup> When the provision returned in World War II, the legislative history is similarly thin, with the House Ways and Means Committee reporting only that the provision would be "similar to the relief Congress granted to persons killed in action during World War I."<sup>53</sup> Modern legislative history is similarly devoid of any detailed analysis of the ongoing rationale for retaining the combat exemption.<sup>54</sup>

Given the dearth of legislative history, determining the rationale for the exemption requires piecing together remarks made by various individual legislators throughout the past century. Combining these snippets of legislative history with some general principles of tax policy yields three potential justifications for the combat exemption. In the balance of this section, I present these potential policy justifications and evaluate whether, after a century has passed, the exemption still serves these policy goals.

#### A. Reduce Burdens on Soldiers' Families

A first potential justification for the combat exemption is that it would reduce the burdens on those left behind by deceased members of the armed forces. Congressman Good, one of the initial proponents of the exemption, argued this point in 1917. He contended that estate tax "ought to stop at the open grave of our heroic dead who give their lives for the defense of the flag, and not reach into the pockets of the widow and children for the savings of such a man ... The soldier has given enough when he has

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<sup>49</sup> I.R.C. § 104(a)(4).

<sup>50</sup> I.R.C. § 4253(d).

<sup>51</sup> I.R.C. § 7508(a).

<sup>52</sup> See *supra* notes 26 and 28 and accompanying text (discussing how the 1917 predecessor of I.R.C. § 2201 was added in a legislative committee without any substantive floor debate).

<sup>53</sup> 94 CONG. REC. 9,204 (1948) (statement of Rep. Knutson). Like its predecessor in effect during World War I, the estate tax combat exemption applicable during World War II was added via amendment without any material debate. See 95 CONG. REC. 12,997 (1949).

<sup>54</sup> Research reveals far greater legislative history relating to the subsequent expansion of the combat exemption to civilians killed in terrorist attacks in 1995 and 2001 and to astronauts dying in the line of duty. For purposes of this article, that legislative history is largely unhelpful. My inquiry is limited to the question of the combat exemption as applied to soldiers rather than these other groups. As a general rule, modern soldiers differ from civilian terrorism victims and astronauts on key demographic and socioeconomic metrics and also, typically voluntarily, expose themselves to different kinds of peril. Accordingly, the policy implications of the estate tax exemption offered to soldiers that is the focus of this paper materially differ from those applicable to the other individuals covered by these later expansions of Section 2201.

given his life for the defense of the flag.”<sup>55</sup> In a line generating applause from his fellow members of Congress, Congressman Platt agreed with Good’s rationale for a military exemption, contending that tax code should not “penalize the families of those who lose their lives for their country.”<sup>56</sup>

The potential “penalty” of estate taxation takes two forms. First is the financial burden of paying the tax itself, the “reach into the pockets” that Congressman Good found so distasteful. But, taxes impose a second type of “penalty” as well—the compliance burden of calculating the tax due and preparing the appropriate returns. As detailed below, the modern combat exemption does little to redress either burden faced by families of our fallen soldiers.

### I. *Reduce Financial Burdens*

Unfortunately, as a practical matter, the modern Section 2201 typically fails to achieve its stated purpose of providing economic relief to loved ones left behind by those who die in combat. Taking into account the other available estate tax exemptions and the demographics of the modern armed forces, Section 2201 can be expected to achieve the goal of minimizing financial burdens only in an exceedingly small number of cases.

One reason for this result is that under the complex modern estate tax the military exemption is far from the only way to reduce, or completely eliminate, estate taxation. As a starting proposition, as noted above, each individual has a \$5.49 million exemption from the federal estate tax as well as an unlimited marital deduction which exempts from estate taxation any property left to, or to certain types of trusts for the benefit of, a surviving spouse.<sup>57</sup> The combined effect of the exemption and the marital deduction is to eliminate all estate taxes for well over 99% of decedents.<sup>58</sup> Accordingly, if soldiers represented a random socio-economic cross section of the population, we would expect a mere fraction of 1% to benefit from the combat exemption.

In reality, due to the demographics of the modern military, the percentage of soldiers’ estates benefitting from the exemption is likely even smaller. Members of the U.S. armed forces are not a random socio-economic cross-section of the population but rather are skewed toward lower socio-economic strata. Indeed, as Professors Aprill and Schmalbeck have noted, “soldiers are often among the least affluent groups in our society,”<sup>59</sup> a conclusion supported by both anecdotal evidence<sup>60</sup> and detailed empirical studies.<sup>61</sup> As one Senator observed in a modern debate regarding the expansion of Section

<sup>55</sup> 55 CONG. REC. 2,726 (1917) (statement of Rep. Good), in support of his amendment to add a soldiers’ exemption. The amendment was rejected. *See* 55 CONG. REC. 2,727 (1917).

<sup>56</sup> 55 CONG. REC. 2,726 (1917) (statement of Rep. Platt).

<sup>57</sup> *See supra* notes 15–17 and accompanying text.

<sup>58</sup> *See supra* note 18 and accompanying text.

<sup>59</sup> Ellen P. Aprill & Richard Schmalbeck, *Post-Disaster Tax Legislation: A Series of Unfortunate Events*, 56 DUKE L.J. 51, 72 (2006).

<sup>60</sup> *See, e.g., Small Towns Absorb the Toll of War*, NPR (Feb. 20, 2017, 6:00 AM) <http://www.npr.org/templates/story/story.php?storyId=7492231> [<https://perma.cc/XS7P-R5LA>] (observing that “nearly three quarters of those killed in Iraq came from towns where per capita income is below the national average” and discussing the war’s impact on these towns).

<sup>61</sup> A recent analysis by Douglas L. Kriner & Francis X. Shen illustrates that soldiers disproportionately come from lower-class and middle-class backgrounds, a demographic trend which has increased since World War II. Douglas L. Kriner & Francis X. Shen, *Invisible Inequality: The Two Americas of Military Sacrifice*, 46 U. MEMPHIS L. REV. 545, 547 (2016) (“Through a series of empirical investigations—including analysis of over 500,000 American combat casualties from World War II through

2201, an Army specialist earning the average base pay of \$24,000 per year “won’t be worrying, nor (sic) his family be worrying about the estate tax.”<sup>62</sup>

Further demographic headwind for the combat exemption comes from the fact that more than half of the members of the modern military are married.<sup>63</sup> Accordingly, the unlimited marital deduction already provides those soldiers with a sufficient means to exempt their estates from taxation, making Section 2201 superfluous as a means of blunting the impact of the estate tax.

In sum, the combat exemption offers meaningful financial relief only to unmarried, multi-millionaire, members of the military. Demographic evidence suggest those soldiers are few and far between.<sup>64</sup> Thus, to the extent the combat exemption was designed to reduce the financial burden on fallen soldiers’ estates, it will fail in this mission more than 99% of the time.<sup>65</sup>

The inefficiency of using Section 2201 to offer financial relief is further shown by comparison with two other programs the military currently uses to offer much more direct financial relief to the families of fallen soldiers. The most direct of these is the oddly-named “death gratuity” whereby the families of soldiers who die in a combat zone receive a cash payment of \$100,000.<sup>66</sup> In addition, the government provides for \$400,000 in life insurance coverage for all soldiers in combat, making for a total of \$500,000 in direct, cash payments to the estate of each fallen soldier.<sup>67</sup> While some might contend that the combat exemption appropriately provides an additional benefit for the families of the most affluent soldiers, whose financial loss perhaps is not adequately compensated by \$500,000 in payments, I contend that the exemption has become an extraneous, poorly-targeted subsidy to a demographically narrow population.

## 2. *Reduce Administrative Burdens*

What of the related justification for the combat exemption: namely that it will reduce administrative burdens on soldiers’ estates? While this is a desirable result, and a

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Afghanistan, combined with seven unique surveys of American public opinion—we reveal that, even more than previous wars, Iraq and Afghanistan have been working class wars”).

<sup>62</sup> 152 CONG. REC. S5,543 (daily ed. June 7, 2006) (statement of Sen. Reed).

<sup>63</sup> 149 CONG. REC. 7,718 (2003) (statement of Sen. Baucus).

<sup>64</sup> The demographics of soldiers in World War I were very different than those of the modern military. Part of this result is attributable to the design of the draft in effect during that war, which gave a higher priority to unmarried soldiers and those with additional sources of family income. *See* Selective Service Act, Pub. L. No. 65–12, 40 Stat. 76 (1917). *See also* Selective Service Regulations Prescribed by the President, § 73 (1917) (providing that the first class of draftees would be unmarried or otherwise without dependents).

<sup>65</sup> Since my focus here is on the effects of Section 2201, I intentionally do not consider the normative question of whether it is good tax policy to target these soldiers for financial relief. I consider this question in Part **Error! Reference source not found.** *infra* of this Article.

<sup>66</sup> I.R.C. § 1475 et seq. The Congress of 1917 similarly provided for direct compensation to families of fallen soldiers. Act of Oct. 6, 1917, ch. 105, §§ 300–14, 40 Stat. 398, 405–08 (providing in relevant part for monthly compensation to specified family members of those killed in military service.).

<sup>67</sup> The coverage, known as Servicemembers’ Group Life Insurance (SGLI) is available to several categories of individuals engaged in military service. Those eligible are automatically insured for the maximum \$400,000 death benefit unless they opt out. For a description of the program, *see* VETERANS BENEFITS ADMIN. MANAGING AGENCY, *Service Members’ Group Life Insurance*, <https://www.benefits.gov/benefits/benefit-details/585> [<https://perma.cc/7LW5-CNVE>].

bedrock principle of good tax policy,<sup>68</sup> the combat exemption simply doesn't achieve it.

As an initial matter, the partial reduction afforded by modern Section 2201 doesn't eliminate any paperwork. An estate relying on the relief provision of the Code section must still complete a federal estate tax return in its entirety.<sup>69</sup> In fact, an enhanced administrative burden is placed upon an estate claiming relief under Section 2201 insofar as claiming the combat exemption requires including additional calculations on the deceased soldier's return, about which the applicable instructions provide no clear guidance.<sup>70</sup> From a strictly administrative standpoint, Section 2201 serves to increase, rather than reduce, administrative and paperwork burdens.<sup>71</sup>

Putting this issue in a larger context, the Code imposes a massive administrative burden on the estate of a fallen soldier. As discussed in greater detail below, the income tax exemption is particularly cumbersome to navigate.<sup>72</sup> Refund of income taxes due can be collected only by filing amended returns for all years in which the decedent served in a combat zone.<sup>73</sup> In the case of married soldiers, these returns must distinguish the decedent soldier's income from that of his or her surviving spouse.<sup>74</sup> Rather than eliminating even a single tax return, the overarching scheme of tax relief designed by Congress has added additional, complicated, administrative burdens for the families of fallen soldiers.

## B. Incentivize Service in Armed Forces

A second potential justification for the combat exemption is that it might incentivize service in the armed forces. Professors Aprill and Schmalbeck have attributed this motive to Congress, arguing that "longstanding special tax provisions for members of the armed forces, including the special ... estate tax provisions for those killed in combat, are part of a package designed ex ante to attract and reward soldiers for a decision to serve voluntarily in the armed forces."<sup>75</sup> While seemingly a logical rationale, available evidence suggests that neither members of Congress nor the leaders of the modern military view the exemption as a significant tool for incentivizing military service.

### 1. Congress

Three factors suggest that Congress has never considered the combat exemption as a means of incentivizing volunteering for military service. First, the legislative history itself suggests that Congress envisioned the combat exemption as applying to conscripted soldiers rather than volunteers. Second, Congress often implemented or expanded estate tax relief through retroactive legislation, thus all but eliminating the legislation's incentive effects. Third, Congress has declined to expand the combat exemption to

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<sup>68</sup> MICHAEL J. GRAETZ, *THE U.S. INCOME TAX: WHAT IT IS, HOW IT GOT THAT WAY, AND WHERE WE GO FROM HERE* 10 (1999) (indicating that "most everyone agrees" that a good tax or tax system is one that is "easy to comply with and administer").

<sup>69</sup> CCH TAX LAW EDITORS, *U.S. MASTER ESTATE AND GIFT TAX GUIDE* ¶ 1565 (2017).

<sup>70</sup> *Id.*

<sup>71</sup> In contrast, the complete exemption provided by the Revenue Act of 1918 did reduce the compliance burden. Rather than filing a complete estate tax return, the soldier's representative filed a shorter form detailing the soldier's military history and his cause and manner of death. If that form was accepted as filed, a complete estate tax return was not required.

<sup>72</sup> See *infra* part III, section **Error! Reference source not found.**

<sup>73</sup> See *infra* note 134 and accompanying text.

<sup>74</sup> See *infra* notes 135 and 136 and accompanying text.

<sup>75</sup> Aprill & Schmalbeck, *supra* note 59, at 71–72.

civilian military contractors and private military, groups which tend to be wealthier than military combatants and thus more likely to be incentivized by the prospect of estate tax relief. A discussion of these factors follows.

a. Focus on Draftees

The earliest formulations of the combat exemption were enacted in times when there was a wartime draft.<sup>76</sup> The limited legislative debate regarding the initial 1917 exemption reflects a Congress far more concerned with mitigating the plight of those forced into military service than inducing volunteers to enlist. While one proponent of the combat exemption did argue that the exemption would “encourage the millionaire to go [to war] and take a chance on getting killed,”<sup>77</sup> most were far more motivated by the plight of the conscripted soldier than the volunteer.<sup>78</sup> This same concern for those forced into military service, rather than volunteers, was reflected in the language of the combat exemption in effect from 1954 through June 30, 1973, which applied only in times of a military draft.<sup>79</sup>

Both the content of Congressional debates and the language of the statute itself thus undercut the notion that Congress intended the combat exemption to incentivize military and combat service.

b. Retroactivity

Further undercutting the notion of the combat exemption as an incentive for wartime service is the fact that Congress often enacted the exemption retroactively. For example, the major expansion of the exemption in 1918 was enacted after World War I had ended.<sup>80</sup> Similarly, relief for those dying between 1941 and 1947 in World War II was included as part of the Revenue Act of 1948, enacted in 1949, long after the cessation of combat.<sup>81</sup> A Congress seeking to use the combat exemption to incentivize wartime military service presumably would have enacted the exemption as wars began, not after they had ended.<sup>82</sup>

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<sup>76</sup> For a brief history of the military draft in the U.S., see Andrew M. Pauwels, *Mandatory National Service: Creating Generations of Civic Minded Citizens*, 88 NOTRE DAME L. REV. 2597, 2601–02 (2013) (surveying the subject from the Civil War to the modern era).

<sup>77</sup> 55 CONG. REC. 2,726 (1917) (statement of Rep. Little).

<sup>78</sup> I explore this in more detail in the following section of this Article. See *infra* part II, section C.

<sup>79</sup> See *supra* notes 39 and 40 and accompanying text.

<sup>80</sup> See generally *supra* note 30 and accompanying text. In 1924, Congress provided another retroactive benefit to the soldiers of World War I in the form of an additional “bonus” for their wartime service. World War Adjusted Compensation Act, Pub. L. No. 68–120, §§ 401–501, 43 Stat. 121, 125 (1924). For a discussion of that bonus legislation, see generally James D. Ridgway, *Recovering an Institutional Memory: The Origins of the Modern Veterans’ Benefits System from 1914 to 1958*, 5 VETERANS L. REV. 1, 11 (2013) (discussing the origins and mechanics of the bonus). See also Anne L. Alstott & Ben Novick, *War, Taxes, and Income Redistribution in the Twenties: The 1924 Veterans’ Bonus and the Defeat of the Mellon Plan*, 59 TAX L. REV. 373 (2006) (providing a detailed history of the legislation and considering its implications for tax policy).

<sup>81</sup> See *supra* notes 35 and 36 and accompanying text.

<sup>82</sup> Congress has taken a similar retroactive approach to the expansion of Section 2201 to victims of domestic terrorism, expanding the statute to cover victims of specified terrorist incidents after they had taken place. See *supra* notes 42 to 44 and accompanying text. For a discussion of this phenomenon, see generally Aprill & Schmalbeck, *supra* note 59. Similarly, the expansion of the section to include astronauts was motivated by the Space Shuttle Challenger disaster. Military Family Tax Relief Act of, Pub. L. No. 108–121, § 110, 117 Stat. 1342, 1342 (“Tax relief and Assistance for Families of Space Shuttle Columbia”). In this last

c. Exclusion of Contractors and Support Personnel

Finally, the incentive effects of the combat exemption are further muted by the fact that it is narrowly tailored to exclude government employees and civilians operating in combat zones, individuals who typically earn more than their military equivalents<sup>83</sup> and thus presumably would be far more likely to be incentivized by the prospect for estate tax relief.

An obvious example on point is that of Richard DuPont, a wealthy civilian who died during World War II.<sup>84</sup> At the time of his death, DuPont was serving as Special Assistant to General H. H. Arnold, Commanding General of the United States Army Air Forces.<sup>85</sup> DuPont died during a test flight of an experimental transport glider being developed for the Army.<sup>86</sup> When his estate sought to avail itself of the combat exemption, the Tax Court denied the exemption, holding that its application was “strictly limited” to those who were “formally members of the armed forces” at the time of death.<sup>87</sup>

The relevance of the DuPont case to this article lies in the history of DuPont’s affiliation with General Arnold. The army desperately needed DuPont, a skilled glider pilot, to train other pilots.<sup>88</sup> Given the urgency with which his skills were needed, DuPont volunteered to serve in a civilian, as opposed to a military role.<sup>89</sup> This decision was made solely in the name of efficiency—he could begin service earlier and have more direct reporting lines in this capacity.<sup>90</sup> His motivation to aid his country’s military efforts and the nature of his service, including time spent in active combat zones,<sup>91</sup> was indistinguishable from many who formally enlisted in the war. Indeed, as General Arnold himself stated, “[DuPont being in civilian clothes was truly a military expedient. Factually, he was as much a member of our military establishment as though he held a commission. He gave his life in military service as actually as any officer in uniform, in actual military combat.”<sup>92</sup> Yet the Tax Court was unmoved: “While to [General Arnold’s] military mind, decedent may have been considered factually as much a member of the military establishment as any military personnel, it does not necessarily follow that decedent may be legally so considered...”<sup>93</sup> The court thus denied the exemption.

As a matter of law, the Tax Court may have correctly applied the statute as written.<sup>94</sup> But as a matter of policy, one must ask why Congress failed to respond. If the

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case, unlike in the case of terrorism victims, Congress did include future astronauts within the protection of Section 2201.

<sup>83</sup> Christopher D. Belen, *Reining in Rambo: Prosecuting Crimes Committed by American Military Contractors in Iraq*, 27 PENN ST. INT’L L. REV. 169, 204 n.276 (2008) (citing authority for the proposition that “private contractors often complete similar or identical operations as active duty service members but for exponentially more pay.”). *Accord* Robert Bejesky, *Mercenaries, Myrmidons, and Missionaries*, 37 U. ARK. LITTLE ROCK L. REV. 45, 61 (2014) (citing data from the Iraq war).

<sup>84</sup> *Estate of Du Pont v. Comm’r*, 18 T.C. 1134 (1952), *aff’d sub nom. Du Pont’s Estate v. Comm’r*, 233 F.2d 210 (3d Cir. 1956).

<sup>85</sup> *Id.* at 1138.

<sup>86</sup> *Id.*

<sup>87</sup> *Id.* at 1142.

<sup>88</sup> *Id.* at 1137.

<sup>89</sup> *Id.* at 1136.

<sup>90</sup> *Id.* at 1137.

<sup>91</sup> *Id.* at 1138.

<sup>92</sup> *Id.* at 1137.

<sup>93</sup> *Id.* at 1142.

<sup>94</sup> Under the same facts, a District Court judge found that DuPont was a member of the military at the time of his death, a result which triggered an exclusion on his personal life insurance policy. Wilmington

goal of the combat exemption really was to incentivize military service, then DuPont seemed like the perfect person to come within its protection. Yet the statute facially fails to cover him or others like him.

Notably, Congress did later expand the *income tax* exemption to offer a more limited form of relief to civilian employees of the government working in combat zones,<sup>95</sup> a provision which would offer income tax relief to modern day DuPonts.<sup>96</sup> Despite revising the applicable estate tax statutes numerous times since DuPont's death, however, Congress has not seen fit to similarly expand the *estate tax* combat exemption.<sup>97</sup> The failure of Congress to include individuals such as DuPont within the protection of Section 2201 is a tacit approval of the Tax Court's restrictive reading of the applicable statutes<sup>98</sup> and further undercuts the ability of the combat exemption to incentivize wealthy Americans to serve their nation in combat zones.<sup>99</sup>

In an era when increasing numbers of those exposing themselves to the dangers of combat are in civilian contractor roles,<sup>100</sup> a Congress seeking to encourage wealthy Americans to assume those roles would have included them within the scope of Section 2201. Absent such extension, the combat exemption is narrowly targeted to a portion of the population that is extremely unlikely to ever benefit from it, dramatically weakening its incentive effects.

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Trust Co v. Mut. Life Ins. Co. of N.Y., 76 F. Supp. 560, 564 (D. Del. 1948), *aff'd sub nom.* Wilmington Trust Co. v. Mut. Life Ins. Co., 177 F.2d 404 (3d Cir. 1949) (“[DuPont] was under orders from a Commanding General during war time and I think it unreal to say that he had a degree of volition anywhere comparable to a civilian employee in peacetime ... His status, it would appear, at the time of his death was clearly military and again it is unreal to argue that he was not performing a military function at the time of death.”).

<sup>95</sup> Section 692(c) of the Code provides a refund of taxes paid “In the case of any individual who dies while a military or civilian employee of the United States, if such death occurs as a result of wounds or injury which was incurred while the individual was a military or civilian employee of the United States and which was incurred in a terroristic or military action.” I.R.C. § 692(c). The refund period includes both the year of death and “the last taxable year ending before the taxable year in which the wounds or injury were incurred.” This relief is more limited temporally than the relief offered to soldiers.

<sup>96</sup> While the general point is valid, this may be a bit of a factual oversimplification as DuPont was killed in a training mission rather than during a combat flight. In addition, the World War II version of the combat exemption, unlike modern law, applied to all those dying in military service, whether or not in an active combat zone. Pub. L. No. 81–378, § 10, 63 Stat. 891, 896 (1949).

<sup>97</sup> As noted, Congress has revisited the combat exemption several times since the DuPont case and has expanded its scope to cover astronauts and victims of terrorism.

<sup>98</sup> *Lorillard v. Pons*, 434 U.S. 575, 580–81 (1978) (“Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change.”) (citing *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 414 n.8 (1975)); *NLRB v. Gullett Gin Co.*, 340 U.S. 361, 366 (1951); *Nat'l Lead Co. v. United States*, 252 U.S. 140, 147 (1920).

<sup>99</sup> The courts have been similarly strict in applying Section 2201 to the estates of “specified terrorist victims” under Section 2201(b)(2). See *Estate of Kalahasthi v. United States*, 630 F. Supp. 2d 1120 (C.D. Cal. 2008) (holding that grieving widow who committed suicide shortly after the death of her husband in the 9/11 terrorist attacks was not herself a “specified terrorist victim.”). For a discussion of the case, see Howard M. Zaritsky, *District Court Limits Estate Tax Relief for Terrorist Victims*, 35 EST. PLAN. 48, 48 (2008) (summarizing the case and defending the result).

<sup>100</sup> Jeffrey F. Addicott, *Contractors on the “Battlefield:” Providing Adequate Protection, Anti-Terrorism Training, and Personnel Recovery for Civilian Contractors Accompanying the Military in Combat and Contingency Operations*, 28 HOUS. J. INT'L L. 323, 325 (2006) (“Although many Americans still visualize the U.S. military as a monolithic force of uniformed personnel only, the reality is far different ... [H]undreds of activities once performed by the military are now privatized and outsourced to thousands of civilian contractors.”). For a discussion of the various types of civilian roles in the modern military, see Lisa L. Turner & Lynn G. Norton, *Civilians at the Tip of the Spear*, 51 AIR FORCE L. REV. 1, 4–16 (2001) (discussing multiple categories of civilians who may be deployed to combat zones alongside military personnel).

## 2. *Army Recruiting*

As is the case with Congress, the military establishment has done nothing to suggest that the combat exemption will incentivize voluntary military service and does not actively exploit the combat exemption in recruiting efforts.

Consider, for example, the content of the military recruiting websites, all of which are silent on the issue of estate tax relief for combat deaths. Specifically, internet searches on the Army's website for the terms "estate tax" and "death gratuity" generate no results, while search terms such as "uniform allowance," "tax-free," and "education benefits" do link the searcher to information about various fringe benefits that are exempt from income taxation.<sup>101</sup> This same pattern is reflected in the Army's Pocket Recruiter Guide, billed "as a ready reference for recruiters and other members of U.S. Army Recruiting Command," but which contains no reference to "estate," "estate tax," or "death."<sup>102</sup>

Similarly, on the Navy's recruiting website, a search for "tax" or "benefits" sends the searcher to a comprehensive listing of compensation and other benefits while searches for "estate," "estate tax," and "death" all yield no results.<sup>103</sup> The recruiting websites for the Coast Guard,<sup>104</sup> Air Force,<sup>105</sup> and Marines<sup>106</sup> are all similarly silent about the estate tax consequences of combat deaths.<sup>107</sup>

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<sup>101</sup> Searches on [www.goarmy.com](http://www.goarmy.com) performed on July 1, 2017. In addition, the Army has another area in the recruiting website where a virtual "Sargent Star" will answer recruiting questions. When asked about "death in combat" the virtual recruiter links to information about death benefits and life insurance but makes no reference to the combat exemptions ("SGT STAR: The Army's risk management system ensures the best possible outcome to all Army missions. Unfortunately, some Soldiers do die during combat. The possibility of death exists in every profession. In the event that a Soldier dies, the Army provides compensation for the family." The website then provides links to information on VA Death Benefits and Life Insurance.).

<sup>102</sup> *2015-16 Pocket Recruiter Guide*, U. S. ARMY RECRUITING COMMAND, <http://www.usarec.army.mil/hq/apa/download/PRG15-16.pdf>.

<sup>103</sup> Searches on [www.navy.com](http://www.navy.com) performed on July 1, 2017.

<sup>104</sup> An internet search for "estate tax" generates no result on the Coast Guard's official recruiting website ([www.gocoastguard.com](http://www.gocoastguard.com)) while "income tax" generates 3 results. The area of the website addressing frequently asked questions includes life insurance and income tax exclusions in response to the question "what are some benefits of joining?" *What Are Some Benefits of Joining?*, GO COAST GUARD, <http://www.gocoastguard.com/faq/what-are-some-benefits-of-joining>. No mention is made of either the estate tax or the combat exemption.

<sup>105</sup> Internet searches for "income tax" and "estate tax" generate no results on the Air Force's official website ([www.airforce.com](http://www.airforce.com)). The area of the website addressing pay and benefits includes a mention of life insurance and tax-free housing allowance but no reference to either the estate tax or the combat exemption. *Pay and Benefits*, U.S. AIR FORCE, <https://www.airforce.com/careers/pay-and-benefits>.

<sup>106</sup> Internet searches for "income tax" and "estate tax" generate no results on the Marines' official website ([www.marines.com](http://www.marines.com)). The area of the website addressing pay and benefits includes a generic reference to "insurance" but does not reference to the income tax, estate tax or combat exemption. *Benefits*, U.S. MARINE CORPS, <http://www.marines.com/being-a-marine/benefits/salary>.

<sup>107</sup> One piece of legislative history reinforces this conclusion that military leadership does not view estate tax relief as a major recruitment tool. During the limited debate concerning the World War II combat exemption, one Congressman reported that military leaders had pressed Congress for *income tax* benefits they could use as recruitment tools but characterized the *estate tax* exemption as a matter of basic fairness rather than as having any incentive effect. *Cf.* 91 CONG. REC. H9,204 (daily ed. June 19, 1948) (statement of Rep. Knutson) ("the armed forces have particularly requested us to make this [income tax] extension effective in order to assist them in attracting high-caliber personnel.") *with* 91 CONG. REC. H9,204 (daily ed.

Media coverage of military recruiting reflects a similar silence about the combat exemption. A recent discussion of the Army's intensified recruiting effort in 2017 summarized the Army's general approach as "beefier bonuses, more advertising and shorter enlistment periods for some."<sup>108</sup> The reporter's interview with Maj. Gen. Jeffrey Snow, the commanding general of US Army Recruiting Command, did not include any discussion of estate tax relief.<sup>109</sup>

### C. Avoiding the Government "Profiting" from Deaths in Combat

A third potential rationale for the combat exemption is that the death of a soldier in battle is simply an inappropriate time to assess a tax. Professor Fennel has aptly described this policy concern as the "incongruity of the government profiting from certain categories of untimely deaths."<sup>110</sup> Borrowing a term from the insurance literature, Professor Jones has called it a "moral hazard."<sup>111</sup>

As discussed above, the legislative history from the World War I era confirms that many legislators were concerned with this issue.<sup>112</sup> Yet, it is crucial to remember that the relief offered by Section 2201 is only partial relief. The government still does "profit" from the death of multi-millionaire soldiers, just not as much as it would without the exemption in place.

There is no doubt that on one level it is unseemly for the government to collect tax, and thus to benefit financially from, the death of a fallen soldier. Given the relative youth of members of the armed forces and the nature of combat, those deaths can be expected to be both tragic and untimely. As a matter of politics and public policy, it may well remain appropriate for the government to offer a tax reduction in such circumstances. Having said that, for two reasons, this rationale for the combat exemption is weaker currently than it was when the combat exemption was created a century ago. First, today's military is an all-volunteer force, the military draft having ended forty years ago. Second, the estate tax which was in its infancy in 1917 has gone on to become a permanent feature of the tax code. These two factors undercut the argument that it would be inappropriate for Congress to fully tax the estate of a soldier who falls in combat. In the balance of this section, I explore those two significant changes.

#### I. No Draft

It is indisputable that the Congressmen who advocated for the initial combat exemption in 1917 saw it as incongruous to draft a man into military service and then impose a heightened wartime estate tax if he died during that service. One Congressman reasoned as follows: "Under the new conscript law the soldier serves whether he will or not. You compel him to stand up on the firing line. Is it fair to take tax from the property

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June 19, 1948) (statement of Rep. Knutson) ("a person who gave his or her life while serving in the armed forces during World War II should not be made to bear the additional penalty of an estate tax.").

<sup>108</sup> Tom Vanden Brook, *Army to Spend \$300 million on Bonuses and Ads to get 6,000 More Recruits*, USA TODAY, Feb. 13, 2017, at A1.

<sup>109</sup> *Id.*

<sup>110</sup> Lee Anne Fennel, *Death, Taxes, and Cognition*, 81 N.C. L. REV. 567, 652 (2003).

<sup>111</sup> Carolyn C. Jones, *The Moral Hazard of the Estate Tax*, 48 CLEV. ST. L. REV. 729, 734 (2000) (analyzing the potential for the government to profit from soldiers' deaths as a "moral hazard.").

<sup>112</sup> In the end, these predictions failed to foresee a major intervening force: the influenza pandemic of 1918. Eighty percent of soldiers dying during the war died of influenza, a disease which killed ten civilians for every soldier who died during the war. *Id.* at 734–35.

of the man whom you compel to serve?”<sup>113</sup> Another Congressman put it even more bluntly: “It is not right to kill a man and make him pay for it.”<sup>114</sup>

However, similar logic does not apply today, insofar as our military is an entirely volunteer one, not a conscripted one.<sup>115</sup> While the fact that modern soldiers volunteer for military service certainly does not make combat deaths less tragic or lessen the impact on the affected soldiers’ survivors, it does on one level reduce the government’s culpability in those deaths.<sup>116</sup> While the fact that a soldier has volunteered, rather than being conscripted, may not eliminate the policy concerns about the government profiting from that soldier’s death, it largely eliminates the argument that the government has caused the very death it is now seeking to tax.<sup>117</sup>

## 2. Normalized Estate Tax Rates

The second way in which the landscape surrounding the combat exemption has materially changed is that the estate tax has become a permanent feature of our taxing system.<sup>118</sup>

<sup>113</sup> 55 CONG. REC. H2,726 (daily ed. May 22, 1917) (statement of Rep. Mondell).

<sup>114</sup> 55 CONG. REC. H2,726 (daily ed. May 22, 1917) (statement of Rep. Little). *See also* 55 CONG. REC. H2,726 (daily ed. May 22, 1917) (statement of Rep. Platt) (“We are going to conscript men in the Army, rich and poor.”).

<sup>115</sup> While technically correct, this may be an overstatement due to the government’s unilateral ability to extend the tour of duty of a service member. *See* 10 U.S.C. § 12305(a) (“the President may suspend any provision of law relating to promotion, retirement, or separation applicable to any member of the armed forces who the President determines is essential to the national security of the United States.”). It can be argued that volunteer soldiers that are ordered to remain in combat duty through stop-loss orders are effectively being conscripted into military service. For a discussion of stop-loss orders, *see* Hannah Dyer, *Keeping Faith: The United States Military Enlistment Contract and the Implementation of Stop-Loss Measures*, 34 PEPP. L. REV. 791, 795 (2007). For a criticism of the policy, *see* Cheryle M. Cryer, *Stop Loss and the Back-Door Draft: An Illumination of Government Contract Violations and Potential Allegations of Modern-Day Slavery*, 49 HOW. L.J. 843 (2006). For a defense of the practice, *see* Matthew Ivey, *The Broken Promises of an All-Volunteer Military*, 86 TEMP. L. REV. 525 (2014). For a judicial decision upholding the practice, *see* *Santiago v. Rumsfeld*, 425 F.3d 549 (9th Cir. 2005) (stop-loss order did not violate either enlistment contract or due process).

<sup>116</sup> Professor Jones similarly seems to associate a military draft with the immorality of taxing soldiers’ estates. Jones, *supra* note 111, at 735. (“The government, in drafting men, required a sacrifice of time and, in some cases, of life itself ... [T]he government could be seen as a moral hazard, profiting from death it had compelled.”).

<sup>117</sup> Going further, the elimination of the draft has eliminated a bright line related to the combat exemption and replaced it with a slippery slope. Section 2201 now exempts astronauts dying on missions from estate tax because proponents of that change successfully analogized astronauts to modern soldiers, both groups volunteering to expose themselves to great danger in the name of our national interest. But what about those who secure our domestic borders or devote their lives to service in law enforcement, or protecting us from fire? The distinction between soldiers in combat and law enforcement involved, for example, in the “war on drugs” or the “war on terror” seems increasingly arbitrary. Consider specifically the example of police officer Sean A. Collier, who was killed in the aftermath of the 2013 Boston Marathon bombing but does not come within the protection of Section 2201. *See supra* notes 42 to 44 and accompanying text. For a discussion of Officer Collier’s death, *see* Wendy Ruderman, Serge F. Kovaleski & Michael Cooper, *Officer’s Killing Spurred Pursuit in Boston Attack*, N.Y. TIMES, April 25, 2013, at A1 (discussing Officer Collier’s death and connecting it to the bombing).

<sup>118</sup> Admittedly there may be no such thing as a “permanent” feature of our ever-changing tax system as evidenced by the one-year repeal of the estate tax in 2010. *See* Beth Shapiro Kaufman, *2010: The Anatomy of a Train Wreck*, 37 EST. PLAN. 42 (2010) (discussing the estate tax applicable to 2010 deaths). Revision of the Code is even more likely in the coming year given the results of the 2016 election which left Republicans in control of both Congress and the White House. Howard M. Wagner and David A. Lifson, *The*

The Congress of 1917 was operating under the assumption that the heightened wartime estate tax would be repealed after the war. Proponents of the tax had promised their fellow legislators that “as soon as the war ends, this tax will likewise end.”<sup>119</sup> For this reason, the wartime estate tax could be assailed as arbitrary in its application—those who died during the war would pay tax at a higher rate than those who died at other times. As one Congressman argued, “I do not see ... why a tax should be higher which occurs once in a lifetime, on a death that occurs during war, than at any other time.”<sup>120</sup> Others agreed that such a tax would be capricious and “unjust.”<sup>121</sup>

The Senate in particular seemed swayed by these arguments. The Finance Committee proposed deletion of the wartime estate tax from the revenue bill, contending that it would unjustly punish those who died during wartime while leaving unaffected those “who had the good fortune to outlive the period of the war.”<sup>122</sup> The broader Senate agreed, voting to strike the tax.<sup>123</sup>

When the compromise committee restored the tax, they also added the combat exemption. By so doing, they addressed the most obvious source of potential injustice resulting from a wartime estate tax: the soldier whose life was cut short by the war, thus exposing him to the double penalty of a shortened life and heightened estate taxation. At the same time, however, Congress understood that soldiers, like all other humans, must ultimately die and rightly should pay tax by virtue of those deaths. This logic explains why the initial combat exemption provided for soldiers to pay estate tax at the standard (pre-war) tax rates, the ones Congress expected to remain in effect after the war’s end.<sup>124</sup> Put another way, soldiers were exempted from the estate tax consequences of wartime death. They were not exempted from the tax consequences of death itself.<sup>125</sup>

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*Taxes They are a Changin’*, 98 PRAC. TAX STRATEGIES 38, 38 (2017) (“With the Republican Party in control of Congress and the presidency, tax reform certainly will be a focus in 2017 and potentially beyond ...”). My point is solely that the modern 1916 estate tax has proven to be much more long-lived than its antecedents. Since the last two U.S. World War I veterans died in 2009 and 2011, the estate tax ended up being in force at death of every American who served in World War I. See Paul Courson, *Last Living U.S. World War I Veteran Dies*, CNN (Feb. 28, 2011, 9:33 PM), <http://www.cnn.com/2011/US/02/27/wwi.veteran.death/> [<https://perma.cc/L93R-LG8H>] (reporting the 2011 death of the last U.S. World War I veteran, Frank Buckles); WIKIPEDIA, *ROBLEY REX*, [https://en.wikipedia.org/wiki/Robley\\_Rex](https://en.wikipedia.org/wiki/Robley_Rex) [<https://perma.cc/GYS9-ZQB4>] (reporting the 2009 death of the second-to-last U.S. World War I veteran, Robley Rex) (as of Oct. 16, 2017, 11:17 EST).

<sup>119</sup> 55 CONG. REC. H2,726 (daily ed. May 22, 1917) (statement of Rep. Miller). Senator Penrose, one of the Senate Conferees, agreed: “this bill is only for the duration of the war.” 55 CONG. REC. S7,628 (daily ed. Oct. 2, 1917) (statement of Sen. Penrose).

<sup>120</sup> 55 CONG. REC. H2,726 (daily ed. May 22, 1917).

<sup>121</sup> 55 CONG. REC. H2,228 (daily ed. May 12, 1917) (report of the Committee on Financing War to the U.S. Chamber of Commerce) (“Inheritances are, in our opinion, not proper subjects for war taxes, as such a tax would place an unjust burden upon the estates of those dying during the progress of the war.”).

<sup>122</sup> Senator Lodge explained the conference committee’s rationale: “[T]he provisions of this bill are temporary in their nature. This is headed a war estate tax. The assumption is, and the provision of the bill is, that it will expire on the conclusion of the war. As we have a permanent inheritance tax, the result of that would be that the estates of those persons, comparatively few in number, who died during the war period would ... have to bear an additional tax, whereas the estates of those persons who had the good fortune to outlive the period of the war would escape it entirely. It therefore seemed to the committee that it was unjust.” 55 CONG. REC. S6,130 (daily ed. Aug. 17, 1917) (statement of Sen. Lodge).

<sup>123</sup> 55 CONG. REC. S6,133 (daily ed. Aug. 17, 1917) (amendment passes on floor).

<sup>124</sup> See *supra* note 122.

<sup>125</sup> With the exception of the 1918 Revenue Act, which retroactively offered full estate tax exemption for those dying during World War I, the estate tax exemption for soldiers has always been a partial exemption. The modern codification, based upon the traditional 1926 estate tax rates, carries forward this

Placed in that historical context, the *ex ante* logic of the combat exemption was unassailable. It was a skillfully crafted, well-targeted, provision to avoid one particular injustice—a soldier paying tax at the “wrong” rate by virtue of a premature death. But in the current era, with the benefit of a century of hindsight, that justification for the provision no longer applies. Today, there is no heightened, temporary, wartime estate tax rate in effect. Rates may always change by act of Congress, but in theory may go up just as easily as they may go down. Accordingly, it cannot be said in 2017, as it could in 1917, that a soldier’s premature death would expose her estate to higher estate tax rates than if that soldier had lived to her full life expectancy.<sup>126</sup> An untimely death might just as likely expose a soldier to a lower, rather than a higher, estate tax than if she had lived out a full life expectancy. It all depends on what future Congresses might do.

#### IV. A BETTER IDEA?

As demonstrated by the above analysis, the combat exemption was a well-intentioned effort to avoid a potential tax injustice. But a century after its inception, it no longer serves important policy goals. It adds massive verbiage and complexity to the tax code, yet serves only a poorly-targeted slice of those who serve in the nation’s armed forces. For these reasons, it should be repealed.

If Congress repeals the exemption, the obvious question is whether it should enact something in its place. Two potential answers come to mind. The first would be to expand any of the myriad of programs designed to provide services to living veterans. In modern warfare, soldiers are increasingly likely to suffer disabling wounds rather than death.<sup>127</sup> Yet, veterans programs are woefully underfunded.<sup>128</sup> Healthcare is often

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historical ideal that there is a baseline, permanent, element of the estate tax that all taxpayers should expect to confront regardless of the timing or nature of their deaths. But soldiers should be rightly exempted from estate taxes viewed as temporary—taxes which they could expect to see repealed prior to their deaths had they been given the opportunity to live full life expectancies. During the latter half of the 20th Century, there was another reason to structure the estate tax in this manner; since the basic estate tax was the computational basis for the state death tax credit, Congress seemingly didn’t wish to interfere with that mechanism. *See* 94 CONG. REC. H9,204, (daily ed. June 19, 1948) (statement of Rep. Martin) (“The exemption . . . is restricted to the additional estate tax and does not apply to the basic estate tax. This provision is made to avoid interference with the inheritance- and estate-tax laws of the individual States.”). If this concern about the combat exemption interfering with state estate taxes were ever valid, and it is not clear to me that it is, the issue is now moot since the state death tax credit has since been replaced with a deduction for state death taxes. *See generally* Jeffrey A. Cooper, *Time for Permanent Estate Tax Reform*, 81 UNIV. OF MO. KAN. CITY L. REV. 277, 283–86 (2012) (discussing this legislative change).

<sup>126</sup> An *ex post* analysis shows that the Congress of 1917 incorrectly predicted the course of the Federal estate tax. Rates over the ensuing century increased over time, such that a soldier dying in 1917 most likely would have paid estate tax at a *higher* rate had he lived to his full life expectancy. *See* Darien B. Jacobson, Brian G. Raub & Barry W. Johnson, *The Estate Tax: Ninety Years and Counting*, 27 STAT. INCOME BULL. 118, 122 fig.D (2007), <http://www.irs.gov/pub/irs-soi/ninetyestate.pdf> [<https://perma.cc/FU7L-HT4C>] (chart of estate tax rates from 1917 through 2007).

<sup>127</sup> Rajiv Chandrasekaran, *A Legacy of Pride and Pain*, WASH. POST (Mar. 29, 2014), <http://www.washingtonpost.com/sf/national/2014/03/29/a-legacy-of-pride-and-pain/> [<https://perma.cc/RC9V-VFFS>] (“Although more than 6,800 U.S. service members were killed in Iraq and Afghanistan, advancements in body armor, transportation and battlefield medicine gave troops a better chance of coming home than any other generation of war fighters.”). Kriner & Shen, *supra* note 61, at 569–70 (2016) (“[W]hen compared with Vietnam and Korea, the ratio of wounded to killed soldiers in Iraq/Afghanistan is more than two and a half times larger. When compared to World War II, the ratio in Iraq/Afghanistan is more than four times as large.”).

<sup>128</sup> Michael Waterstone, *Returning Veterans and Disability Law*, 85 NOTRE DAME L. REV. 1081, 1084 (2010) (“Veterans programs and commitments are chronically underfunded . . .”).

substandard.<sup>129</sup> Returning soldiers, particularly enlisted men and women, face significant economic challenges.<sup>130</sup> Depression, marital discord, and suicide are massive issues to confront.<sup>131</sup> While a wealthy soldier's combat death is tragic, it is arguably no less tragic than the plight faced by thousands of returning combat veterans struggling with the physical and psychological wounds of battle. Although the potential details of any such solution go far beyond the scope of this article, providing estate tax benefits for deceased soldiers seems less important than providing quality health care and education benefits for living veterans.

A second potential alternative lies within the tax code itself. As noted above, the Code already contains an income tax exemption for soldiers dying in combat.<sup>132</sup> However, as explored below, the provision as drafted is poorly-targeted and creates unnecessary administrative complexity. In the balance of this Article, I propose an alternative version of the income tax exemption and assess the extent to which this alternative addresses the policy failures that plague the combat exemption. I conclude that my proposed income tax relief would more effectively address key goals than does the current estate tax exemption.

## A. Structuring a Better Income Tax Exemption

### 1. *The Current Regime*

In addition to the estate tax combat exemption discussed above, Congress has provided income tax relief to those dying in combat. Specifically, when a soldier dies in combat, her estate is entitled to a full refund of all taxes on the soldier's income from the time the soldier entered a combat zone until the date of death. The governing provision is I.R.C. § 692(a), which provides in relevant part as follows:

§ 692. Income taxes of members of Armed Forces, astronauts, and victims of certain terrorist attacks on death

(a) General rule. —In the case of any individual who dies while in active service as a member of the Armed Forces of the United States, if such death occurred while serving in a combat zone (as determined under section 112) or as a result of wounds, disease, or injury incurred while so serving—

(1) any tax imposed by this subtitle shall not apply with respect to the taxable year in which falls the date of his death, or with respect to any prior taxable year ending

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<sup>129</sup> Nema Milaninia, *The Crisis at Home Following the Crisis Abroad: Health Care Deficiencies for US Veterans of the Iraq and Afghanistan Wars*, 11 DEPAUL J. HEALTH CARE L. 327, 328 (2008) (contending that the VA health system is incapable of delivering the health care services needed by returning combat veterans, specifically mental care assistance).

<sup>130</sup> Chandrasekaran, *supra* note 127 (“Enlisted vets also report more severe economic challenges. Forty-three percent of them have taken an extra job or worked additional hours because they need the money, compared with just 16 percent of officers. A quarter of enlisted members have had trouble paying their rent or mortgage; only 11 percent of officers say the same.”).

<sup>131</sup> See generally RAND CTR. FOR MILITARY HEALTH POLICY RESEARCH, INVISIBLE WOUNDS OF WAR: PSYCHOLOGICAL AND COGNITIVE INJURIES, THEIR CONSEQUENCES, AND SERVICES TO ASSIST RECOVERY (Terri Tanielian & Lisa H. Jaycox eds., 2008), <https://www.rand.org/pubs/monographs/MG720.html> [<https://perma.cc/Q4N6-HD47>].

<sup>132</sup> See *supra* note 46 and accompanying text.

on or after the first day he so served in a combat zone.<sup>133</sup>

In its application, this income tax exemption provision is complex, requiring a soldier's estate to file amended income tax returns for each year in which the soldier served in a combat zone.<sup>134</sup> The complexity is compounded in the case of a married soldiers who filed joint income tax returns while on combat duty. Since the income tax exemption forgives taxes attributed to the soldier's income but not the spouse's, income must be divided between those two sources when preparing this series of complex amended returns.<sup>135</sup> The resulting administrative burden can be substantial.<sup>136</sup>

## 2. *A Proposal for Reform*

As shown above, the estate tax combat exemption fails to achieve important policy goals and the income tax exemption introduces significant complexity, particularly in the case of a married soldier. I contend that rather than relying on these two very imperfect tax exemptions, Congress should implement a single better one. To do so, Congress should abandon the estate tax combat exemption in its entirety and modify the income tax exemption of Section 692(a) to apply to both a soldier and that soldier's surviving spouse, entitling both of them to a refund of all taxes imposed on them during the soldier's combat service.<sup>137</sup> As explored more fully below, this expanded income tax exemption would better serve important policy goals than does the current regime.

<sup>133</sup> I.R.C. § 692 (2012).

<sup>134</sup> U.S. DEP'T OF THE TREASURY INTERNAL REVENUE SERVICE, Armed Forces' Tax Guide, I.R.S. Pub. No. 3, Cat. No. 46072M, 25 (Dec. 22, 2016).

<sup>135</sup> Treas. Reg. § 1.692-1 (1978) ("If such an individual and his spouse have for any such year filed a joint return, the tax abated, credited, or refunded pursuant to the provisions of section 692 for such year shall be an amount equal to that portion of the joint tax liability which is the same percentage of such joint tax liability as a tax computed upon the separate income of such individual is of the sum of the taxes computed upon the separate income of such individual and his spouse.").

<sup>136</sup> I.R.S. Pub. No. 3, *supra* note 134, at 25 outlines the multi-step process required to compute the tax forgiveness for each year of service in a combat zone:

Computation when the decedent filed joint returns.

Only the decedent's part of the joint income tax liability is eligible for the refund or tax forgiveness. To determine the decedent's part, the person filing the claim must:

1. Figure the income tax for which the decedent would have been liable if a separate return had been filed,
2. Figure the income tax for which the spouse would have been liable if a separate return had been filed, and
3. Multiply the joint tax liability by a fraction. The top number of the fraction is the amount in (1) above. The bottom number of the fraction is the total of (1) and (2).

<sup>137</sup> It is worth noting that I leave (at least) two questions for a future date. First, for purposes of analysis, I make the simplistic assumption that a "married soldier" is married to the same spouse for his or her entire combat service and at the time of death. By so doing, I avoid the complex administrative questions of how to treat soldiers and their spouses who marry during the years of the soldier's combat service and/or get divorced prior to that soldier's death. Second, as I have throughout this paper, I consider the income tax exemption solely as it applies to soldiers dying in combat and do not offer any proposal for how the tax code should treat other groups offered tax relief under Section 692, including civilian military employees, victims of terrorism, and astronauts.

## B. Assessing the Proposal

### 1. *Reducing Burdens on Surviving Family Members*

#### a. Financial Burdens

As discussed above, one of the major justifications for the combat exemption was that it would offer financial relief to the family members left behind by soldiers killed in combat.<sup>138</sup> But the current estate tax relief is a blunt tool in this effort.<sup>139</sup> In contrast, the proposed income tax relief would be a more precise policy tool that offers more targeted financial relief to those left behind by a soldier lost to combat. There are three major reasons why income tax relief would be superior to estate tax reduction.

First, the proposed income tax exemption would offer greater financial benefits to married soldiers than does the combat exemption. As noted above, in the case of a married soldier, the unlimited marital deduction already provides a sufficient means to avoid all estate taxes, rendering the combat exemption largely superfluous in the case of a married soldier.<sup>140</sup> The existing provision thus oddly targets the unmarried soldier for relief. In contrast, the proposed expansion of the income tax exemption, which would offer a full refund of taxes paid on both spouses' income, offers greater relief to the married soldier than to his or her unmarried counterparts. Given the goal of minimizing the financial burden on soldiers' surviving loved ones, it would seem preferable to target those leaving behind a surviving spouse.

Second, expanded income tax relief would more effectively target the soldier whose death means the loss of income, either directly (for example, the death of a high-paid career officer) or indirectly (due to the possible disruption of the surviving spouse's own career in the aftermath of the soldier's combat service and eventual death).<sup>141</sup>

Third, given that the top marginal rate on earned income is double that imposed upon dividends and capital gains,<sup>142</sup> income tax forgiveness will afford more relief to families whose income is attributed to the wages of the soldier or her spouse (and thus more likely to be disrupted by the soldier's death) rather than mere portfolio investors.

In sum, the proposed income tax relief would more directly advance the goal of

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<sup>138</sup> See *supra* Part II, Section A.

<sup>139</sup> In addition to the factors discussed below, it is also important to realize that the fact that a soldier leaves behind a sizable estate tells us nothing about the source of that wealth. The soldier may have earned it, in which case, the soldier's death will end the stream of income. Alternatively, the soldier may have inherited it, in which case the soldier's death eliminates a consumer of that wealth rather than its source. Estate tax relief does not distinguish between these two very different scenarios.

<sup>140</sup> See *supra* note 17 and accompanying text.

<sup>141</sup> For a discussion of some of the hardships faced by a soldier's surviving spouse, see Adam Ashton, *Washington-based Army Widows Group Takes Care of Their Own*, ARMY TIMES (Mar. 16, 2015), <https://www.armytimes.com/story/military/2015/03/16/washington-based-army-widows-group-takes-care-of-their-own/24842391/> [<https://perma.cc/UUA9-K543>]. For a discussion of the role of a soldier's spouse in his or her career, see generally Matthew A. Ward, *The Military Must Lead in Advocating for Marriage Equality*, 37 N.Y.U. REV. L. & SOC. CHANGE 457, 476–87 (2013).

<sup>142</sup> Under current law, the top nominal marginal tax rate for earned income is 39.6% whereas long-term capital gains and qualified dividends are taxed at a maximum nominal rate of 20%. See TAX POLICY CENTER, *Briefing Book: Key Elements of the U.S. Tax System*, <http://www.taxpolicycenter.org/briefing-book/how-are-capital-gains-taxed> [<http://perma.cc/3GTF-ELS3>] (last visited Oct. 18, 2017). The actual rates of tax may vary slightly from these numbers if a taxpayer reported itemized deductions and/or is subject to the 3.8% tax on net investment income. *Id.*

offering appropriate financial benefits to the family members of soldiers lost in combat.

b. Administrative Burdens

A second shortcoming of the estate tax combat exemption is that it fails to adequately reduce the administrative burdens on soldiers' surviving family members. The proposed expansion of the income tax exemption for deceased soldiers would far better serve this policy goal.

As discussed above, under current law, a soldier's estate wishing to claim income tax relief under Section 692 must file amended returns for every year from the year that soldier first entered a combat zone until the year of his or her death.<sup>143</sup> In the case of a married taxpayer, these returns must retroactively separate the decedent's income from the spouse's.<sup>144</sup> Disentangling a married couple's income in this manner requires extensive, complicated, computations and imposes a massive compliance burden.<sup>145</sup>

The proposed expansion of Section 692 would all but eliminate this cumbersome regime. In order to obtain relief under the provision as modified, the soldier's survivors would simply need to show how much income tax liability was reported on the soldier's and/or spouse's applicable income tax returns for the years deployed in combat service. That amount could then be refunded. There would be no complex calculations, and no lengthy amended returns. Particularly in the case of married soldiers, this approach would dramatically reduce administrative burdens.

2. *Incentivize Service*

To the extent the estate tax combat exemption incentivizes anyone to volunteer for combat service, a possibility I discount above,<sup>146</sup> it narrowly targets its incentivizing effects to unmarried soldiers with considerable net worth. Rather than target this group, the proposed income tax exemption would offer additional incentives to all married soldiers.

Like the current version codified in Section 692(a), expanded income tax relief would offer greater benefits to those serving in combat zones for longer durations, and for those earning higher salaries for such service. Since the benefits offered would increase the more a soldier earned and the longer he or she remained in a combat zone, the proposal maintains current incentives for all soldiers to extend their tours of duty and seek promotions.<sup>147</sup> But the proposed expanded income tax exemption would offer a

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<sup>143</sup> See *supra* Part III, Section (A)(**Error! Reference source not found.**).

<sup>144</sup> *Id.*

<sup>145</sup> *Id.* For an example of the arcane computations required to amend a joint return, see Theodore Paul Manno, *supra* note 47, at 307–08 (2005). The IRS Publication setting out the process of making these computations seems to acknowledge that they create a compliance burden many surviving spouses will be unable to meet. See I.R.S. Pub. No. 3, *supra* note 134 (“If you are unable to complete this process, you should attach a statement of all income and deductions, indicating the part that belongs to each spouse. The IRS will determine the amount eligible for forgiveness.”). While this offer may seem to reduce the potential administrative burdens on the surviving spouse, it does nothing to eliminate the most cumbersome step in the filing process, namely locating and/or recreating the records necessary to divide sources of income between the spouses.

<sup>146</sup> See *supra* Part II, Section B.

<sup>147</sup> In this regard, income tax exemptions offer superior incentives to the current estate tax combat exemption. An estate tax exemption does not offer incentives for extended tours of duty (the benefits offered are the same regardless of deployment length) and only indirectly incentivizes a soldier to seek promotions or

heightened incentive for military service for married soldiers, a group the military has been striving to attract and maintain.<sup>148</sup> In addition, due to documented correlations between educational attainment and income level,<sup>149</sup> the proposal would incentivize military service by those who already possess good educations and/or valuable marketable skills, providing a cohort of recruits the modern military often lacks.<sup>150</sup> Accordingly, the proposed exemption more directly targets a cohort of families that the military wishes to attract and retain and for whom military service, and a subsequent

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pay raises (to the extent some of the increased compensation is saved rather than consumed and thus ultimately would be subjected to estate tax).

<sup>148</sup> See generally David Crary, *Latest Military Maneuvers Target Tarnished Family Ties*, L.A. TIMES (May 28, 2000), <http://articles.latimes.com/2000/may/28/local/me-35065> [<https://perma.cc/KEH5-VPL8>] (discussing the Army's effort to become more "family friendly" to compete with civilian employers). In addition to incentivizing married individuals to enter and stay in military service, the proposal could have an unintended effect of encouraging some existing soldiers to marry in order to obtain this potential tax benefit. See BENJAMIN R. KARNEY & JOHN S. CROWN, *FAMILIES UNDER STRESS: AN ASSESSMENT OF DATA, THEORY, AND RESEARCH ON MARRIAGE AND DIVORCE IN THE MILITARY* xxxiii (2007), [https://www.rand.org/content/dam/rand/pubs/monographs/2007/RAND\\_MG599.pdf](https://www.rand.org/content/dam/rand/pubs/monographs/2007/RAND_MG599.pdf) [<https://perma.cc/7S6D-RRFA>] ("[T]o the extent that valuable benefits are reserved for married couples only, the existence of those benefits may induce couples to marry who might otherwise have postponed marriage or never married at all."). Undercover reporting by the TODAY television show reinforces this concern. Jeff Rossen & Jovanna Billington, *Hidden cameras reveal how US soldiers 'shop' for wives to get more pay, benefits*, TODAY (Oct. 2, 2014, 7:42 AM), <http://www.today.com/news/us-soldiers-shop-wives-get-more-pay-benefits-2D80186882> [<http://perma.cc/7RPD-VC2K>] (reporting how some soldiers enter into sham marriages just to obtain additional military benefits).

<sup>149</sup> Given the relatively modest salaries earned by most soldiers in combat zones, particularly in comparison to civilian salaries, my conjecture that income tax relief would attract higher-skilled and higher-educated soldiers requires some justification. I offer three arguments in support. First, there is an established correlation between one spouse's educational level and the other's earnings. See Chong Huang, Hongbin Li, Pak Wai Liu & Junsen Zhang, *Why Does Spousal Education Matter for Earnings? Assortative Mating and Cross-Productivity Source*, 27 J. LABOR ECON. 633, 634 (2009) ("Economists have long noticed the positive relationship between spousal education and a person's own earnings ..."). Accordingly, military recruits married to higher earners are more likely to be well educated than those married to lower earners. A tax provision which offers greater benefits to soldiers with higher-earning spouses, as would my proposed income tax relief, thus indirectly attracts more highly-educated soldiers. Second, some soldiers, particularly members of the National Guard and Reserves called away from private-sector employment to serve in combat zones may continue to receive salaries from their private employers during the time of their combat service. See Alex Fryer, *While on Military Duty, Some Jobs Pay, Some Don't*, SEATTLE TIMES (Aug. 15, 2005), <http://www.seattletimes.com/seattle-news/while-on-military-duty-some-jobs-pay-some-dont> [<http://perma.cc/Z7S6-QPVC>]. Third, the income tax exemption extends retroactively to the beginning of the year a soldier entered a combat zone. Accordingly, the exemption may extend to a small portion of the soldier's civilian income if that soldier dies early in his or her deployment. Congress could enhance this effect and further bolster efforts to lure civilians away from lucrative employment and into military service by extending tax relief backwards one or more years, to income earned prior to the soldier's entering the combat zone. The Code already includes a similar provision providing one additional year of income tax relief to the other categories of taxpayers covered by Section 692: military and civilian employees, victims of domestic terrorism, and astronauts. I.R.C. §§ 692 (c)(1)(B), (d)(1)(B), (d)(5).

<sup>150</sup> Put another way, the current mix of salary, benefits, and training offered by military service is often more attractive to those with fewer employment opportunities and limited family incomes. As Congressman Charles Rangle has observed, "the people that we ask to fight our wars are people who join the military because of economic conditions, because they have fewer options." David M. Halbfinger & Steven A. Holmes, *A Nation at War: The Troops; Military Mirrors a Working-Class America*, N.Y. TIMES (Mar. 30, 2003), <http://www.nytimes.com/2003/03/30/us/a-nation-at-war-the-troops-military-mirrors-a-working-class-america.html> [<https://perma.cc/G5DK-UEHK>]. While Rangle has supported a military draft as a way of restoring social-economic balance to the military, the proposed income tax reform would serve this same end by providing an incentive targeted to those who do have economic options other than military service, as evidenced by their higher family incomes.

combat death, would represent a meaningful economic burden.<sup>151</sup>

### 3. *Avoiding the Government Profiting from Death*

The final policy concern underlying the current combat exemption is the distasteful thought of the government collecting money from a dead soldier's estate. On this final policy point, my proposed income tax relief will be inferior to the current regime in the extremely limited number of cases in which a soldier dies in combat who is both (a) wealthy enough to be subject to estate taxation and (b) unmarried and thus ineligible for the estate tax marital deduction. In this case, the government will assess a "full" estate tax and thus arguably will "profit" from that death more than under the current regime.

I offer two responses to this concern.

First, this hypothetical is the rare exception rather than the rule. As discussed in detail above, for the most part, our armed services are populated by those from poor or middle-class families.<sup>152</sup> Accordingly, the vast majority of soldiers would be financially better off under the proposed regime which trades a meaningless estate tax exemption for more meaningful income tax relief.

The second reply to the policy concerns about the government profiting from death is an indirect one, but one which justifies the estate tax as a general matter; that death is an appropriate time for the wealthy to be subject to taxation to enable the government to serve the living.<sup>153</sup> The original proponents of the combat exemption did not dispute this overarching theme that death was universal and death taxation appropriate. Their concern was not the estate tax itself but rather the morality of imposing a heightened estate tax on drafted soldiers; the fear, as framed by Congressman Little, that the government would "kill a man and make him pay for it."<sup>154</sup>

But a century later the analysis is very different. Given the estate tax's longevity, one cannot say that a soldier's death in 2017 would expose him to a heightened wartime estate tax, as the Congress of 1917 feared over a century ago. Similarly, the government's "culpability" in that soldier's death is very different in this era of an all-volunteer military than it was in past times of military conscription, weakening the "government as moral hazard" objection.<sup>155</sup> In enacting the combat exemption, Congress merely provided a partial exemption designed to insulate combat casualties from heightened wartime estate taxes and not from a normalized estate tax that would have applied had their lives not

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<sup>151</sup> Like the current exemption, my proposed revision offers greater benefits to those from higher socio-economic classes, by merely shifting the focus to those with higher incomes rather than higher net worth. Given that the death gratuity and life insurance are flat amounts, equal for all soldiers, *see supra* notes 66, 67 and accompanying text, an income tax benefit offering greater protection to married, high-earning soldiers would seem to achieve the proper balance of incentives.

<sup>152</sup> *See supra* notes 59–61 and accompanying text.

<sup>153</sup> *See generally* Mark L. Ascher, *Curtailing Inherited Wealth*, 89 MICH. L. REV. 69, 151 n.14 (1990) (collecting authority in defense of estate taxation).

<sup>154</sup> *See supra* note 114.

<sup>155</sup> One other issue implicated by the discussion of the government's "culpability" is whether a fallen soldier should be able to sue the government in tort, a question the Supreme Court answered in the negative. *See, e.g.*, *Feres v. United States*, 340 U.S. 135 (1950) (holding that the government cannot be held liable under the Federal Tort Claims Act for injuries or death incident to military service). For a discussion of this case, *see* Paul Figley, *In Defense of Feres: An Unfairly Maligned Opinion*, 60 AM. U. L. REV. 393 (2010) (discussing the case, surveying the literature criticizing the result, and offering the author's defense of the court's holding).

been cut short by war.<sup>156</sup> In the modern world, that standard would be met by imposing the then-current estate tax, whatever it may be, on the handful of combat fatalities wealthy enough to pay it.

## V. CONCLUSION

For over a century, Congress has wrestled with the proper tax treatment for those soldiers who make the ultimate national sacrifice by dying in combat. The current regime offers tax reduction to those dying in combat in the form of an estate tax combat exemption, which provides partial estate tax relief to the wealthiest soldiers, coupled with an income tax exemption applicable to all soldiers but not their spouses.

As illustrated above, this current combination of partial estate tax relief and partial income tax relief fails to achieve crucial policy goals attributed to the combat exemption. Accordingly, I contend that Congress should consider abandoning the estate tax combat exemption in its entirety and replacing it with a more robust income tax exemption applicable to both a fallen soldier and the spouse he or she leaves behind. By making this change, Congress could offer more meaningful financial and administrative relief to more typical military families.

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<sup>156</sup> The only exception to this general rule was the Revenue Act of 1918. *See supra* note 29.