

NOTES

THE WARTIME SUSPENSION OF LIMITATIONS ACT, THE WARTIME ENFORCEMENT OF FRAUD ACT, AND THE WAR ON TERROR

*Erin M. Brown**

INTRODUCTION

In 1945, while the world was sifting through the rubble of World War II, Harold Lurie and Samuel Dworetz were attempting to fraudulently profit from the remnants of the American war machine. In order to redistribute what was estimated at the time to be \$75 billion in surplus stock,¹ veterans were granted a priority right to buy property, machinery, and other surplus items.² In fact, by the distribution's end, former soldiers purchased over \$500 million worth of the remaining tools and materials—twenty-two percent of the entire war surplus.³

Lurie and Dworetz, hoping to exploit this priority access to the goods, attempted to fraudulently obtain veterans' preferences for themselves and for their business, Rel Sales Company, Inc.⁴ They "advised and caused" honorably discharged veterans to apply for

* Candidate for Juris Doctor, Notre Dame Law School, 2010; M.A., International Relations, University of Chicago, 2006; B.S.F.S., International Politics, Georgetown University, 2005. A special thank you to all of my generous friends, the dedicated staff of the *Notre Dame Law Review*, and my endlessly supportive parents for taking the time to read and improve this Note.

1 See John B. Olverson, *Legal Aspects of Surplus War Property Disposal*, 31 VA. L. REV. 550, 550 (1945) (citing S. REP. NO. 78-539, pt. 2, at 3 (1944)). Olverson notes, for example, that after World War II, the government was in possession of 500,000 to 600,000 machine tools, the equivalent of twenty-five years of prewar production. *Id.* at 551.

2 See STUART D. BRANDES, *WARHOGS: A HISTORY OF WAR PROFITS IN AMERICA* 271 (1997).

3 *Id.*

4 *United States v. Lurie*, 222 F.2d 11, 13 (7th Cir. 1955).

materials on the company's behalf, including counseling the veterans to falsify statements on their applications.⁵ The two were eventually indicted in 1952, but Lurie and Dworetz filed motions to dismiss on the grounds that the charges were barred by the three-year statute of limitations on fraud.⁶

Despite the apparent staleness of the indictments, the government was able to prevail on the prosecution by utilizing the Wartime Suspension of Limitations Act⁷ (WSLA). The Act, seemingly drafted for this very situation, suspended the commencement of the statute of limitations on fraud until three years after the termination of hostilities.⁸ Accepting the government's application of WSLA, the U.S. Court of Appeals for the Seventh Circuit affirmed Lurie and Dworetz's convictions.⁹

After a flurry of like prosecutions in the aftermath of World War II, WSLA was not successfully invoked again for over fifty years.¹⁰ But in May 2006, the government successfully relied on the now "obscure"¹¹ WSLA to prosecute construction contractors who were charged with multiple counts of fraud while the United States was involved in the conflicts in Afghanistan and Iraq.¹² District Judge Richard Stearns accepted the government's application of the Act, allowing prosecutors to extend the statute of limitations and pursue charges of fraud related to Boston's Central Artery/Tunnel Project, known in Massachusetts as the "Big Dig."¹³

Awakening this essentially dormant Act not only has significant implications for both corporate and individual actors, but it also presents new challenges for judicial interpretation and reestablishes an important tool for federal prosecutors. The application of this twentieth century statute to a twenty-first century conflict, however,

5 *Id.*

6 *Id.* (citing 18 U.S.C. § 3282 (1952)).

7 Act of June 25, 1948, ch. 645, 62 Stat. 828 (codified as amended at 18 U.S.C.A. § 3287 (West 2000 & Supp. 2009)).

8 *Id.*

9 *Lurie*, 222 F.2d at 15, 16 (citing 18 U.S.C. § 3287 (1950)).

10 *Judge Rules Wartime Law Applies to Big Dig*, UNITED PRESS INT'L, Sept. 3, 2008, http://www.upi.com/Top_News/2008/09/03/Judge_rules_wartime_law_applies_to_Big_Dig/UPI-86221220463247 (citing Assistant U.S. Attorney Brian Kelly, who labeled this the first successful modern application). For more on the Central Artery/Tunnel Project, see generally Massachusetts Turnpike Authority, MTA—Project Background, <http://www.masspike.com/bigdig/background/index.html> (last visited Oct. 27, 2009).

11 *Judge Rules Wartime Law Applies to Big Dig*, *supra* note 10.

12 *United States v. Proserpi*, 573 F. Supp. 2d 436, 438–39 (D. Mass. 2008).

13 *See id.* at 455–56.

also raises a host of concerns, including the constitutional tension that arises when the judiciary must decide when the nation is at war, particularly in a threat environment where armed conflict is drastically different than the 1940s-conception of war. Judge Stearns's application of this statute to non-war-related fraud also reopens an old jurisprudential inconsistency: exactly how broadly did Congress envision the types of "fraud" that should be affected by WSLA? Further, it requires a consideration of the purpose of the statute itself, and whether this purpose can still provide interpretational guidance or a rationale for the Act.

As it turns out, Senators Leahy and Grassley had already considered some of the problems inherent in WSLA and its application to the conflicts in Iraq and Afghanistan.¹⁴ Nearly five months before Judge Stearns issued his Big Dig decision, the Senators introduced the Wartime Enforcement of Fraud Act¹⁵ (WEFA) in an attempt to modernize WSLA. Added as an amendment to the national defense bill, the legislation made its way through both Houses, passing the Senate in September 2008, and was signed into law on October 14, 2008.¹⁶ The Senators' amendment makes significant improvements to the original WSLA, but unfortunately does not adequately address some of its key shortcomings. Most notably, it does not apply to the breadth of modern conflicts that are susceptible to wartime fraud, and its legislative history complicates the already ambiguous jurisprudence as to the scope of frauds that should be covered by the Act.¹⁷

Part I of this Note briefly introduces WSLA, looking at the purposes behind the original Act and its application. This Part also analyzes four distinct problems with the sixty-year-old statute. First, it addresses the practical question of why the Act was established in the first place—either to counteract the increased opportunity for fraud during wartime, or in response to the belief that the investigative branches of government are less capable of initiating prosecutions during times of war. Second, it assesses the theoretical problems with

14 See S. REP. NO. 110-431, at 4 (2008) (explaining the inapplicability of WSLA to the most recent military operations in Iraq and Afghanistan).

15 S. 2892, 110th Cong. (2008); see also S. REP. NO. 110-431 (2008) (explaining the background and purposes behind the amendment).

16 The bill was eventually passed as an amendment to the National Defense Authorization Act. See Duncan Hunter National Defense Authorization Act for Fiscal Year 2009, Pub. L. No. 110-417, § 855, 122 Stat. 4356, 4545–46 (2008) (codified as amended at 18 U.S.C.A. § 3287 (West Supp. 2009)); see also Press Release, Office of Senator Leahy, Leahy-Authored Provisions to Address Wartime Fraud Set to Become Law (Sept. 27, 2008) [hereinafter Leahy Press Release], available at <http://leahy.senate.gov/press/200809/092708c.html> (describing the amendment).

17 See *infra* Parts II & III.

the Act, particularly the challenge of applying vague terms such as “at war” to our current threat environment. Part I next considers constitutional concerns, including the separation of powers and justiciability problems inherent in the original Act. Last, this Part asks about the appropriate scope of the Act, namely whether the statute is limited to war-related fraud, or all fraud against the government during times of war.

Part II explains WEFA and assesses how this amendment impacts these four challenges. Part III considers ways to improve the understanding of WSLA and its new amendment, both through an analysis of the courts’ jurisprudence and legislative history, as well as by offering suggestions for further legislative clarification.

Overall, while this Note provides a fairly favorable assessment of WEFA, it views the amendment as addressing only some of WSLA’s failings. In light of WEFA’s shortcomings, legislators should look to expand the kinds of conflicts that are covered by WSLA, and should specifically define the types of fraud that merit a suspension of limitations.

I. UNDERSTANDING AND ASSESSING THE ORIGINAL WSLA

The relevant text of the original WSLA states:

When the United States is at war the running of any statute of limitations applicable to any offense (1) involving fraud or attempted fraud against the United States . . . shall be suspended until three years after the termination of hostilities as proclaimed by the President or by a concurrent resolution of Congress.¹⁸

The Act was originally signed into law in 1942 by President Franklin D. Roosevelt,¹⁹ who vigorously spoke out against “war millionaires” and

18 18 U.S.C. § 3287 (2006) (codified as amended at 18 U.S.C.A. § 3287 (West 2000 & Supp. 2009)). A simple illustration helps explain how WSLA works in practice. When President Roosevelt proclaimed the end of hostilities in World War II on December 31, 1946, this caused the statute of limitations to begin to run three years later, on December 31, 1949. *See, e.g.*, *United States v. Grainger*, 346 U.S. 235, 246 (1953). In the case of fraud committed during World War II, therefore, the three year statute of limitations “began to run for the first time on January 1, 1950 and expired December 31, 1952.” *Id.*

19 The predecessor to WSLA was drafted in 1921 as a temporary measure during World War I to extend the statute of limitations of fraud. *See* Act of Nov. 17, 1921, ch. 124, 42 Stat. 220, 220 (repealed 1927); *United States v. Prosperi*, 573 F. Supp. 2d 436, 448 (D. Mass. 2008) (describing the purposes of the 1921 law); *see also* *Bridges v. United States*, 346 U.S. 209, 218 n.17 (1953) (noting the reason for the repeal of the 1921 Act was the fact that the Department of Justice “did not propose to attempt any further prosecution of offenses of that character, that is to say, offenses giving rise to

profiteers who exploited the calamity of war.²⁰ Throughout his presidency, whenever Roosevelt requested further funding for military spending, “it was usually accompanied by legislation for the ‘prevention of profiteering.’”²¹ In 1948, WSLA was permanently enshrined in Title 18 of the United States Code by President Harry S. Truman,²² who as a senator had held public hearings to expose fraud and waste by contractors during the war.²³

Prosecutors attempted to apply WSLA to a wide range of fraudulent acts in the immediate post–World War II years with mixed success.²⁴ These inconsistent outcomes can be attributed in some part to interpretational challenges not unlike the ones facing the judiciary today due to the vagueness of the statute’s text and its ambiguous legislative history.²⁵

the statute’” (quoting H.R. REP. NO. 70-16, at 1 (1927))). For an overview of wartime profiteering during World War I, see BRANDES, *supra* note 2, at 127–77.

20 See 2 LAWRENCE M. SALINGER, *ENCYCLOPEDIA OF WHITE-COLLAR AND CORPORATE CRIME* 870 (2005).

21 *Id.* (quoting President Franklin D. Roosevelt).

22 Act of June 25, 1948, ch. 645, 62 Stat. 828 (current version at 18 U.S.C.A. § 3287 (West 2000 & Supp. 2009)).

23 See generally ANDREW J. DUNAR, *THE TRUMAN SCANDALS AND THE POLITICS OF MORALITY I* (1984) (reporting that the so-called “Truman committee” monitored defense expenditures and saved taxpayers \$15 billion).

24 One of the more celebrated cases in which WSLA was raised was the attempted prosecution of Harry Bridges, a notorious Communist who saw the inside of the Supreme Court on more than one occasion. See generally WILLIAM M. WIECEK, *The Birth of the Modern Constitution* 297–300 (2006) (discussing Bridges’s immigration concerns and his fraud charges that reached the Supreme Court). In *Bridges v. United States*, 346 U.S. 209 (1953), the Supreme Court narrowly decided that the statute of limitations was not tolled by WSLA, and the opportunity for the government to indict Bridges for fraudulently denying his affiliation with the Communist Party during his naturalization proceedings had expired. *Id.* at 210–11; see also WIECEK, *supra* at 299 (discussing *Bridges*). A more successful application was the seventy-nine-count indictment lodged against a subcontractor who falsified payroll records to fraudulently bill the government for hours worked by nonexistent employees. See *United States v. Agnew*, 6 F.R.D. 566, 566–67 (E.D. Pa. 1947).

25 See Willard P. Norberg, *The Wartime Suspension of Limitations Act*, 3 *STAN. L. REV.* 440, 440–43 (1951). Norberg points out that careful draftsmen expressly provide statutory definitions for their terms, and “[i]n so far as haste, carelessness, or expediency cause the lawmakers to forget or ignore the problem, the difficulties of interpretation by the courts are enhanced. . . . [as] illustrated by the current difficulty experienced by the federal courts in applying the Wartime Suspension of Limitations Act.” *Id.* at 440 (citing 18 U.S.C. § 3287 (Supp. III 1950)).

A. *Practical Criticisms: Purposes Behind the Act*

While it is generally agreed that WLSA was not intended to secure the prosecution of *all* frauds committed against the government during times of war,²⁶ the “legislative history offers no express affirmative indication of the purpose that Congress had in mind.”²⁷

The simplest explanation is that there is a much greater opportunity for defrauding the government when the nation is at war.²⁸ The legislative history of the Act details this concern, noting that “opportunities will no doubt be presented for unscrupulous persons to defraud the Government or some agency. These frauds may be difficult to discover . . . and many of them may not come to light for some time to come.”²⁹ This “demand-side” argument implies that the purpose behind WLSA is a direct response to the greater possibilities for fraud during wartime.³⁰

An alternative, not entirely contradictory interpretation, suggests that the purpose of the Act is to allow a hampered investigatory arm of the government more time to prosecute fraud.³¹ According to Judge Learned Hand, “the purpose of the [Act] was not to let crimes pass unpunished which had been committed in the hurly-burly of war.”³² In other words, the purpose of WLSA was less related to the opportunity for fraud itself, and more tied to the fact that “investigative agencies of the government are handicapped during such periods by loss of personnel to the armed forces.”³³ This understanding of the Act

26 *See id.* at 442.

27 *Id.* at 451.

28 *See Bridges*, 346 U.S. at 218 (“Congress was concerned with the exceptional opportunities to defraud the United States that were inherent in its gigantic and hastily organized [war] procurement program.”).

29 *Id.* at 219 n.18 (citing S. REP. NO. 77-1544, at 2 (1942)); *see also* S. REP. NO. 110-431, at 2 (2008) (calling the original WLSA “vital in pursuing *war profiteers*, as prosecutors used the law to pursue *contracting fraud* after the war was over” (emphasis added)).

30 *See United States v. Sack*, 125 F. Supp. 633, 636 (S.D.N.Y. 1954) (noting that the “volume of transactions in which the Government was engaged as a result of the war made the three year period too short for effective law enforcement”).

31 *See, e.g., United States v. Bates*, No. 89 CR 908, 2004 WL 2980649, at *1 (N.D. Ill. Dec. 20, 2004) (stating that the purpose of WLSA was “excusing the government, not the government’s opponent, from promptly prosecuting offenses during times of war”).

32 *United States v. Gottfried*, 165 F.2d 360, 368 (2d Cir. 1948).

33 Norberg, *supra* note 25, at 452 (suggesting that this line of reasoning implies that the government should suspend limitations, therefore, on all crimes, and not simply limit it to war-related fraud); *see also Sack*, 125 F. Supp. at 636 (stating the need for the Act was “the fact that many law enforcement officials were preoccupied with offenses in the more vital areas of espionage and sabotage, prevent[ing] them from

presents a “supply-side” argument about the need for the statute—while the need for prosecutions during wartime is high for reasons discussed above, this need cannot be met with an adequate supply of prosecutorial tools.³⁴

This reveals two possible rationales for the Act: executive and congressional belief that businesses and individuals should not improperly profit from the machinery of war, and Judge Hand’s suggestion that investigative capabilities are much less effective during wartime. This bifurcated view of the purpose of WLSA is particularly relevant when assessing the intended scope of both it and WEFA.³⁵

B. *Theoretical: Defining War in the Twenty-First Century*

Under the original WSLA, there was no express definition of what Congress meant by the phrase “at war.”³⁶ Surely, the 70th Congress viewed the phrase “at war” through the lens of the only wars and conflicts that it knew: World War I and World War II.³⁷ The reality, however, is that since the statute was enacted, the United States has simply not declared war, “despite prolonged engagements in Korea, Vietnam, Kosovo, Afghanistan, and Iraq (twice) and shorter deployments in Panama, Grenada, Haiti, and Somalia, among others.”³⁸ The drafters’ understandably myopic view of war hardly represents the twenty-first century realities of armed conflict, which ranges from peacekeeping missions, to democratic occupations, to threats of possible full-scale conflicts, and to the amorphous war on terror.

Although one could look at other contemporary or prior statutes that use the phrase “at war” for interpretational guidance,³⁹ this would

devoting their attention to offenses related to the commercial aspect of the war program” (citing H.R. REP. NO. 77-2051, at 2 (1942)).

34 See, e.g., S. REP. NO. 110-431, at 2 (explaining that, despite the “hundreds of investigations into contracts worth billions remain pending, . . . [u]nless the statute of limitations is extended, these investigations may well be shut down before they can be completed and wartime fraud will go unpunished”).

35 See *infra* Parts I.D & II.D.

36 See *Bates*, 2004 WL 2980649, at *1 (rejecting defendant’s attempt to apply WSLA “for the time during which the government was fighting the ‘war on drugs’”).

37 *But see* *United States v. Prospero*, 573 F. Supp. 2d 436, 446 (D. Mass. 2008) (suggesting Congress’ choice of the term “at war” rather than “declared” war indicates an intent to include less substantial conflicts).

38 *Id.* at 447. Three of those conflicts (Vietnam, Iraq II, and Afghanistan) were congressionally sanctioned through authorizations for the use of military force; the Korean conflict was sanctioned by the United Nations. *Id.*

39 See, e.g., *Smith v. City of Jackson*, 544 U.S. 228, 233 (2005) (“[W]hen Congress uses the same language in two statutes having similar purposes . . . it is appropriate to

not reveal a clear or consistent definition of the phrase.⁴⁰ In fact, courts have interpreted the term “at war” in other statutes to include both formal and informal conflicts.⁴¹ Courts have also held that “Congress in drafting laws may decide that the Nation may be ‘at war’ for one purpose, and ‘at peace’ for another.”⁴² Unfortunately, in drafting WSLA, Congress did not decide at all.⁴³

While there are myriad similar statutes and canons of construction which could theoretically aid in the interpretation of such a vague statute,⁴⁴ the ambiguous and amorphous threat environment that exists today only makes interpreting “at war” even more complicated.

For example, in 1993 prosecutors attempted to apply WSLA to a case in the Western District of Texas, but the judge held that the armed conflict in the first Gulf War was not “at war” within the meaning of the statute.⁴⁵ The court reasoned that the Act only applies when Congress formally declares war because the congressional intent of the original Act “appears to have been more directly concerned with such massive and pervasive conflicts as World War II.”⁴⁶ The court supported this reasoning with the fact that there were “no reported decisions of civilian courts in which the Suspension Act was

presume that Congress intended that text to have the same meaning in both statutes.”).

40 *See, e.g.*, 18 U.S.C. § 2388(a) (2006) (establishing punishments for individuals who interfere with the success of the military “when the United States is at war”).

41 *See, e.g.*, *Rotko v. Abrams*, 338 F. Supp. 46, 48 (D. Conn. 1971), *aff'd*, 455 F.2d 992 (2d Cir. 1972) (interpreting “time of war” to include “an undeclared war as well as a war which has been formally declared by Congress”); *Morrison v. United States*, 316 F. Supp. 78, 79 (M.D. Ga. 1970) (“[A] war is no less a war because it is undeclared.”).

42 *Lee v. Madigan*, 358 U.S. 228, 231 (1959).

43 *See United States v. Prospero*, 573 F. Supp. 2d 436, 442 (D. Mass. 2008) (noting that aside from a formal declaration of war, Congress gave no indication of when WSLA would be triggered).

44 To further complicate interpretation, courts also look to customary international law to determine how the term “at war” should be applied. International law also does not seem to require a formal declaration of war for two states or parties to be “at war.” *See, e.g.*, *Prosecutor v. Tadic*, Case No. IT-94-1, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 70 (Oct. 2, 1995) (“[A]rmed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State.”).

45 *United States v. Shelton*, 816 F. Supp. 1132, 1135 (W.D. Tex. 1993).

46 *Id.* (“For the Persian Gulf conflict to have amounted to war under 18 U.S.C. § 3287, Congress should have formally recognized that conflict as a war.”).

applied during any of the ‘wars’ involving the United States that have occurred since World War II.”⁴⁷

Contrary to this opinion, simply because prosecutors *did not* turn to WSLA during the Vietnam or Korean wars does not imply that prosecutors *could not* apply it during those wars. As Judge Stearns explained in the Big Dig decision, “[t]he government should not be penalized for invoking a criminal statute sparingly (or judiciously).”⁴⁸ Furthermore, the requirement of a massive conflict to trigger the Act ignores the fact that the Vietnam and Korean wars were immensely catastrophic, both financially and in human lives lost.⁴⁹ The court’s dismissal of these conflicts applies an unnecessarily strict interpretation that discounts certain conflicts simply because they were not official declarations of war or of sufficient subjective magnitude.

The court’s holding also contradicts longstanding judicial precedent, unrelated to WSLA, that does not require an official declaration to establish that the United States is at war.⁵⁰ The fact that “war may exist without a declaration on either side”⁵¹ was conceded two hundred years ago at a time when “at war” was much more clear cut than it is today. A formal declaration of war is even more unnecessary and unlikely in this era of asymmetrical threats and internationalism. Moreover, had Congress intended to include only official declarations of war in the original Act, it could have explicitly done so.⁵²

Each of these interpretative difficulties, particularly as the threat environment becomes less defined by conventional warfare, exacerbates the weaknesses of WSLA—weaknesses that were only partially addressed by WEFA.⁵³

C. *Constitutional: Separation of Powers and the Political Question*

Because the Act does not specifically stipulate what it means to be “at war,” the Big Dig case highlights some of the constitutional tensions present under the original WSLA.⁵⁴ Most notably, it puts the decision about when the nation is “at war” in the hands of the judi-

47 *Id.*

48 *Prosperi*, 573 F. Supp. 2d at 445.

49 *See infra* note 139 and accompanying text.

50 *See, e.g., Bas v. Tingy*, 4 U.S. (4 Dall.) 37, 42 (1800) (declaring that fighting with the enemy evidences that the nation is at war).

51 *The Prize Cases*, 67 U.S. (2 Black) 635, 668 (1863).

52 *Cf.* 28 U.S.C. § 2416(d) (2006) (applying an act when “the United States is in a state of war declared pursuant to article I, section 8, of the Constitution of the United States”).

53 *See infra* Part III.B.

54 *See United States v. Prosperi*, 573 F. Supp. 2d 436, 442–55 (D. Mass. 2008).

ary, although war powers are specifically assigned to the executive and legislative branches.⁵⁵ In the Big Dig case, “Judge Stearns actually had to decide whether the U.S. [was] at war in order to decide whether the statute of limitations had run.”⁵⁶

The case, *United States v. Prosper*,⁵⁷ involved the indictment of concrete suppliers charged with submitting fraudulent reports to the government.⁵⁸ The defendants argued that the alleged charges took place in early 2001 (the indictments were handed out in May 2006), and the five-year statute of limitations barred the prosecution.⁵⁹ By tapping WSLA, however, the government was successful in suspending the running of the statute of limitations until three years after the end of hostilities as proclaimed by the President or Congress.⁶⁰ “There-

55 See U.S. CONST. art. I, § 8; U.S. CONST. art. II, § 2; see also 103 Op. Ind. Att’y Gen. 407, 409 (1945) (“It has been held that the exclusive right to begin and terminate War is in Congress.”); *id.* (“The existence of war and restoration of peace are determined by action of the legislative, supplemented by the executive, department of government.” (quoting *Kneeland-Bigelow Co. v. Mich. Cent. R.R. Co.*, 174 N.W. 605, 608 (Mich. 1919))).

56 Ashby Jones, *U.S. Not Currently at War, Boston Federal Judge Rules*, WALL ST. J. BLOGS, Sept. 2, 2008, <http://blogs.wsj.com/law/2008/09/02/us-not-currently-at-war-boston-federal-judge-rules/trackback>. Although traditionally war is terminated by a peace treaty, Judge Stearns recognized that, like the disappearance of formal declarations of war, such treaties are also less frequent: “The end of more recent conflicts have been signaled by Presidential pronouncement or by the diplomatic or de jure recognition of a former belligerent or a newly constituted government.” *Prosper*, 573 F. Supp. 2d at 454. Using this rationale, the district court judge decided that the United States was at war with Afghanistan from September 18, 2001 (when Congress authorized the use of military force against “those nations, organizations or persons” responsible for the September 11 attacks) through December 22, 2001, when the United States extended full diplomatic privileges to Afghan President Karzai’s government. *Id.* at 450–55. Interestingly, the judge stated specifically that “the statute of limitations with respect to the Afghan conflict, expired on December 22, 2004.” *Id.* at 455. This implies that the fraud should relate directly to the specific conflict, which is hardly the case with the “Big Dig” contract.

Judge Stearns went on to decide that the United States was at war with Iraq from October 11, 2002 (beginning with the authorization of military force in Iraq) until May 1, 2003, when Bush declared that “[m]ajor combat operations in Iraq have ended. In the Battle of Iraq, the United States and our allies have prevailed.” *Id.* While his decisions about the termination of the conflicts seem logical, the judge could just have easily decided that the country was still at war in both countries, particularly given that American presence in Iraq and Afghanistan had hardly diminished since May 2003.

57 573 F. Supp. 2d 436, 454 (D. Mass. 2008).

58 *Id.* at 439.

59 See Jones, *supra* note 56.

60 See 18 U.S.C. § 3287 (2006) (current version at 18 U.S.C.A. § 3287 (West 2000 & Supp. 2009)).

fore, strange as it seems, Judge Stearns had to decide whether the U.S. [was] at war to rule on a motion involving contractors in a highway project.”⁶¹

This is an uncomfortable holding. Courts generally avoid ruling on cases that touch on a “political question,” which *Baker v. Carr*⁶² broadly defined as

a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court’s undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.⁶³

Without standards explicitly laid out in the statute, or at least clear and consistent legislative guidance, courts are required to pass judgment on the very political question of whether the nation *is at war* with a foreign state. Foreign affairs are fundamentally political questions that courts often avoid,⁶⁴ yet the original WSLA essentially required the judiciary to step actively into this off-limits arena.

61 Jones, *supra* note 56.

62 369 U.S. 186, 210 (1962).

63 *Id.* at 217; *see also* *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 170 (1803) (noting early in the Court’s history the existence of “[q]uestions, in their nature political, or which are, by the constitution and laws, submitted to the executive,” and which, therefore, “can never be made in this court”). Each of these different “political questions” laid out in *Carr* are implicit in deciding when the country is at war. A “textually demonstrable constitutional commitment of the issue to a coordinate political department” is laid out in the first and second articles of the Constitution; the vagueness of the statute, discussed *supra* Part I.B, highlights the lack of “judicially discoverable and manageable standards for resolving it”; declaring war is a political question “of a kind clearly for nonjudicial discretion”; separation of powers mandates that the courts avoid such determinations out of “respect due [to] coordinate branches of government”; and foreign affairs, in particular, require the “unusual need for unquestioning adherence to a political decision already made,” particularly because of the huge “potentiality of embarrassment from multifarious pronouncements by various departments on one question” in the international arena. *Id.*

64 *See, e.g., Oetjen v. Cent. Leather Co.*, 246 U.S. 297, 302 (1918) (“The conduct of the foreign relations of our Government is committed by the Constitution to the Executive and Legislative—‘the political’—Departments of the Government, and the propriety of what may be done in the exercise of this political power is not subject to judicial inquiry or decision.”). *But see Carr*, 369 U.S. at 211 (“Yet it is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance.”).

Additionally, on separation of powers grounds, courts cannot and should not interfere with the political branches of government.⁶⁵ At question here is which branch is intended to have final determination of when the country is “at war.” Both constitutionally and statutorily, this duty falls to the legislative and executive branches.⁶⁶ *Carr*, the starting point for political question jurisprudence, specifically states that there are “isolable reasons for the presence of political questions, underlying this Court’s refusal to review the political departments’ determination of when or whether a war has ended.”⁶⁷

This formalist interpretation highlights the constitutional tensions in a statute that demands that the courts define the vague notion of “at war.” A functionalist, however, might make the counterargument that the statute does not require courts to determine when the nation is at war, but rather whether the United States is “at war” within the meaning of the statute (e.g., the end of hostilities as proclaimed by Congress or the President). Even with this more pragmatic view of the law, however, the original WSLA does not provide sufficient statutory guidance for the courts, a problem that has been somewhat ameliorated by WEFA.⁶⁸

D. *Scope: How Broadly to Define Fraud*

Lastly, the statute is ambiguous as to whether the suspension applies only to fraud specifically related to the war effort, or to any fraud carried out against the government when the United States is at war.

Professor Willard Norberg noted this difficulty as early as 1951, just three years after the statute was permanently enshrined in the United States Code.⁶⁹ Norberg called the problem with WSLA “one of reference,” because the phrase “involving fraud” is a “vague referent” causing courts to reach “divergent and at times confusing conclusions as to which offenses against the United States ‘involve fraud.’”⁷⁰

Judicial history generally suggests that WSLA does not apply to all fraud, but rather is limited to war-related frauds and frauds of a pecuniary nature or concerning property.⁷¹ Outlier cases, however, have

65 See *Carr*, 369 U.S. at 210 (“The nonjusticiability of a political question is primarily a function of the separation of powers.”).

66 See *supra* note 55 and accompanying text.

67 *Carr*, 369 U.S. at 213.

68 See *infra* Part II.C.

69 Norberg, *supra* note 25, at 440–41.

70 *Id.*

71 See *United States v. Grainger*, 346 U.S. 235, 241 (1953); see also *Dennis v. United States*, 384 U.S. 855, 863 (1966) (noting that the statute is “to be construed

more narrowly interpreted the Act to apply only to the prosecution of fraud specifically related to the war programs.⁷² Because the statute is vague, the courts were forced to craft their own rules as to which types of fraud fell under the purview of the Act. Courts have applied WSLA to cases involving the submission of false financial statements on war contracts⁷³ and conspiracy to defraud the government in the purchase of surplus war property.⁷⁴ WSLA has not been successfully applied to prosecutions for false statements made to obtain passports,⁷⁵ false statements under oath during naturalization proceedings,⁷⁶ the passing of worthless checks,⁷⁷ and other instances of fraud completely unrelated to the war effort.⁷⁸

Assessing these holdings, a theory emerges that the fraud does in fact have to be related to the war effort; however, the war effort has been defined liberally. In other words, if the prosecution can tie the fraud in any way to the war effort, then the court will usually allow the application of the Act. If the fraud is directly related to a war contract, then it obviously falls under the Act. In *United States v. Sack*,⁷⁹ for

narrowly and to be applied ‘only where the fraud is of a pecuniary nature or at least of a nature concerning property’” (quoting *Bridges v. United States*, 346 U.S. 209, 215 (1953)); *Bridges*, 346 U.S. at 216 (stating that the legislative history requires a conservative interpretation of WSLA).

72 See *United States v. Sack*, 125 F. Supp. 633, 636 (S.D.N.Y. 1954) (“The purpose of the Suspension Act was to give the Government’s law enforcement officials additional time to discover and punish offenses related to the commercial aspects of the war program.”).

73 *Id.* at 637.

74 See *United States v. Lurie*, 222 F.2d 11, 15 (7th Cir. 1955).

75 See *United States v. Shoso Nii*, 96 F. Supp. 971, 972–73 (D. Haw. 1951).

76 See *Bridges*, 346 U.S. at 227; *United States v. Obermeier*, 186 F.2d 243, 256–57 (2d Cir. 1950).

77 See *McGuinness v. United States*, 77 A.2d 22, 25 (D.C. 1950) (“[L]egislative history of the legislation confirms our view that the Suspension Act was not intended to embrace violations of the bad check law even if the checks were received by the Government.”).

78 See, e.g., *United States v. Beard*, 118 F. Supp. 297, 303 (D. Md. 1954) (refusing to apply the Act to income tax evasion). The courts have also held that, in order to qualify for WSLA, the fraud must be an essential element of the crime. See *Bridges*, 346 U.S. at 222 (“The purpose of the Wartime Suspension of Limitations Act is not that of generally suspending the three-year statute, e.g., in cases of perjury, larceny and like crimes. It seeks to suspend the running of it only where fraud against the Government is an essential ingredient of the crime.”); *United States v. Grainger*, 346 U.S. 235, 242 (1953) (“[O]ffenses are limited to those which include fraud as an essential ingredient.”). This “essential ingredient” analysis is another way to distinguish between types of frauds that could be considered within the scope of WSLA, but it is not addressed in this Note.

79 125 F. Supp. 633 (S.D.N.Y. 1954).

example, the government successfully relied on WSLA to pursue individuals who had falsified financial information in their applications for war contracts.⁸⁰ In another vein, courts have also held that fraud of a pecuniary nature or involving property brings the conduct under the Act, because financial harm to the government during times of military conflict would indirectly harm the war effort.⁸¹

This interpretation of fraud, insofar as it is tangentially related to the war effort, is supported by *Prosperi's* holding.⁸² The Big Dig decision, the most recent interpretation of WSLA, applied the Act to a construction contract entirely unrelated to the war effort—the fraud involved the building and reconstruction of about eight miles of highway in Boston.⁸³ The defendants were “accused of recycling stale and adulterated concrete, and submitting false batch reports to conceal their fraud”⁸⁴—activities that have no actual relationship to the war effort.

The defendants rejected the government’s charges on two grounds: first, because the United States was not “at war” within the meaning of Act;⁸⁵ and second, and relevant to this Part, because the charges were not related to military procurement. The court in *Prosperi* relied on *United States v. Grainger*⁸⁶ to reject the defendants’ claims, concluding that, despite a handful of lower court holdings to the contrary, WSLA tolls the limitations period on non-war-related fraud as long as the fraud creates a pecuniary harm to the government.⁸⁷ The Act, therefore, allowed for the prosecution of the Big Dig contract fraud because the harm suffered by the government was financial, and therefore tangentially affected the war effort.⁸⁸

Understanding the scope of the Act is particularly relevant due to the nature of WSLA. Because it is a statute of limitations law, courts have a countervailing requirement to interpret the definition of fraud narrowly so as to limit its application, and ensure that corporations

80 *Id.* at 636.

81 *See* *United States v. Prosperi*, 573 F. Supp. 2d 436, 439 (D. Mass. 2008); *Sack*, 125 F. Supp. at 636.

82 *See* 573 F. Supp. 2d at 439–41.

83 *See id.* at 439.

84 *Id.*

85 For a discussion of the phrase “at war,” see *supra* Part I.B and *infra* Part II.B.

86 346 U.S. 235, 241 (1953) (allowing for the application of the Act in charges to defraud the Commodity Credit Corporation, of which the United States owns shares). The *Grainger* court found this relevant to the war effort by noting the “pecuniary nature” of the particular fraud. *See id.* at 240–41.

87 *Prosperi*, 573 F. Supp. 2d at 441–42.

88 *Id.*

and individuals can benefit from repose.⁸⁹ “[A]s the section has to do with statutory crimes it is to be liberally interpreted in favor of repose, and ought not to be extended by construction to embrace so-called frauds not so denominated by the statutes creating offenses.”⁹⁰ In other words, courts should look to narrowly define exceptions to the statute of limitations because such suspensions weaken the judicial preference toward repose. This principle is meant to afford corporations and individuals general assurances that stale claims will not be brought against them years after the alleged conduct.⁹¹

In defining the scope of fraud it is therefore important, as mentioned above, to understand the correct legislative intent of the Act. Was it to ensure that frauds could be prosecuted years after the fact due to the wartime obligations of the investigative branch? Or was it to prevent fraud that specifically exploits war contracts? If the courts allow the Act to apply to both war- and non-war-related frauds, it weakens the normal judicial preference toward repose. As shown below, WEFA does not help clarify the underlying purpose of the Act or the scope of the word “fraud,” leaving the courts with the continued responsibility of interpreting the statute while also upholding the important preference toward repose.

II. UNDERSTANDING WEFA AND THE NEW WSLA

A. *Practical: Expanding the Potential to Prosecute Fraud*

In drafting WEFA, Senators Leahy and Grassley achieved the pragmatic goal⁹² of improving the prosecution of fraud by extending the statute of limitations from three years to five years after the end of hostilities.⁹³

89 *Toussie v. United States*, 397 U.S. 112, 114–15 (1970).

90 *United States v. Scharton*, 285 U.S. 518, 522 (1932) (citing *United States v. Hirsch*, 100 U.S. 33 (1879)).

91 *See also* *United States v. Marion*, 404 U.S. 307, 321–23 (1971) (noting that in addition to concerns about repose, statutes of limitation “‘may also have the salutary effect of encouraging law enforcement officials promptly to investigate suspected criminal activity’” (quoting *Toussie*, 397 U.S. at 115)); S. REP. NO. 110-431, at 7 (2008) (statement of Sens. Sessions & Coburn) (expressing concern about the implications of tampering with the statute of limitations in WEFA).

92 WEFA also addresses the problems with vague terminology in twenty-first century armed conflict. *See supra* Parts I.B & II.B. For the ways this amendment addresses the justiciability and separation of powers concerns, see *supra* Part I.C and *infra* Part II.C.

93 Duncan Hunter National Defense Authorization Act for Fiscal Year 2009, Pub. L. No. 110-417, § 855, 122 Stat. 4356, 4545–46 (2008) (codified as amended at 18 U.S.C.A. § 3287 (West Supp. 2009)); *see also* Leahy Press Release, *supra* note 16.

“In times of war, we often do not learn about serious fraud until years after the fact,” Senator Leahy explained in a press release.⁹⁴ According to the Senator, the Bush administration “chose[] essentially to ignore one of its primary obligations during wartime—to protect American taxpayers from losses due to fraud, waste, and abuse of military contracts.”⁹⁵ Therefore, this amendment was pursued largely as an effort to provide accountability to constituent groups, particularly those frustrated with the perceived fraud and corruption in the current military campaigns.⁹⁶ The obvious concern was that, if the statute was “left unchanged, under the current statute of limitations, each passing day of the conflicts in Iraq and Afghanistan could amount to immunizing fraudulent conduct by war contractors that has gone undiscovered during the Bush Administration or during the conflicts.”⁹⁷

The amendment also helped bring WSLA up to date with modern statute of limitations rules. At the time WSLA was originally enacted, the statute of limitations on criminal fraud was three years,⁹⁸ yet the statute of limitations on fraud is currently set at five years.⁹⁹

94 Press Release, Office of Senator Leahy, Leahy, Grassley Introduce Wartime Fraud Legislation (Apr. 18, 2008) [hereinafter Leahy & Grassley Press Release], available at <http://leahy.senate.gov/press/200804/041808a.html>.

95 *Id.* This view supports the demand-side view of the impetus for WEFA: that there is a higher demand for fraud prosecutions simply due to the fact that the nation is at war. Salam Adhoob, former chief investigator of the Iraqi Commission of Public Integrity, estimated in his testimony to Congress that \$9 billion has been lost to corruption and fraud in the latest campaign in Iraq. See Leahy Press Release, *supra* note 16. Leahy also cites “no-bid” and “cost-plus” contracts that have no oversight, as well as cash contracts flown to Iraq and handed out in paper bags without any records. *Id.*; see also *Combating War Profiteering: Are We Doing Enough to Investigate and Prosecute Contracting Fraud and Abuse in Iraq?: Hearing Before the S. Comm. on the Judiciary*, 110th Cong. 2–3, 17–18 (2007) [hereinafter *Combating War Profiteering*] (statements of Sen. Patrick J. Leahy and Special Inspector Gen. for Iraq Reconstruction Stuart W. Bowen) (discussing no-bid and cash contracts and their relation to war profiteering). For more information about corporate profiteering from the latest war effort, including faulty bullet-proof vests, see, for example, William Baue, *War Millionaires: Defense Contractor CEO Pay Up 200 Percent Since 9/11*, SOCIAL FUNDS, Sept. 1, 2005, <http://www.socialfunds.com/news/article.cgi/1794.html>.

96 See, e.g., *Congress Votes to Crack Down on Fraud by Private Contractors in Iraq*, FOX NEWS.COM, Oct. 9, 2007, <http://origin2.foxnews.com/story/0,2933,300631,00.html> (last visited Oct. 25, 2009) (“Some of these contractors have declared the U.S. occupation of Iraq open season on the American taxpayer.” (quoting Representative Neil Abercrombie)).

97 Leahy Press Release, *supra* note 16.

98 18 U.S.C. § 3282 (1948), amended by Hiss Law Amendment, Pub. L. 87-299, § 1, 68 Stat. 1142 (1954).

99 18 U.S.C. § 3282 (2006).

WEFA rids WSLA of this inconsistency by updating the statute of limitations to its criminal counterpart, allowing more time for the investigative branches to uncover and charge actors with fraud.¹⁰⁰

B. *Theoretical: Stricter Guidance for Defining War*

Under the original WSLA, determining when the United States was technically at war was vague and abstract; the new amendment helps to clarify this ambiguity, although its definition of “at war” still leaves substantial gaps in the statute’s application.¹⁰¹ As Senator Leahy detailed in a press release, the original WSLA applied only when the United States was “at war,” yet the military operations in Iraq and Afghanistan were undertaken without congressional declarations of war.¹⁰² Throughout the last half century, in fact, the United States has never been “at war” in the conventional sense of the term. Since World War II, Authorizations for the Use of Military Force (AUMF), such as the AUMF preceding the second Iraq invasion, have been used more frequently in place of conventional declarations of war.¹⁰³

WEFA suspends the statute of limitations not only for formal declarations of war, but also for congressional AUMFs consistent with the War Powers Resolution.¹⁰⁴ It does not, however, apply to international peacekeeping missions under the United Nations or under any military actions not specifically authorized by Congress.¹⁰⁵ “As a result, only significant military actions requiring congressional action trigger this suspension of the statute of limitations.”¹⁰⁶

Is it a stretch, however, to imagine scenarios in the future in which the United Nations Security Council will authorize the multilat-

100 See Duncan Hunter National Defense Authorization Act for Fiscal Year 2009, Pub. L. No. 110-417, § 855, 122 Stat. 4356, 4545–46 (2008) (codified as amended at 18 U.S.C.A. § 3287 (West Supp. 2009)); see also Leahy Press Release, *supra* note 16; Leahy Press Release, Office of Senator Patrick Leahy, Judiciary Committee Reports Leahy Bill To Address Wartime Fraud (June 26, 2008) [hereinafter Leahy & Judiciary Comm. Press Release], available at <http://leahy.senate.gov/press/200806/062608c.html>.

101 See *infra* Part III.B.

102 Leahy & Judiciary Comm. Press Release, *supra* note 100.

103 See 18 U.S.C.A. § 3287 (“For purposes of applying such definitions in this section, the term ‘war’ includes a specific authorization for the use of the Armed Forces”); see also Authorization for the Use of Military Force Against Iraq Resolution of 2002, Pub. L. No. 107-243, 116 Stat. 1498, 1501–02 (2002) (codified at 15 U.S.C. § 1541 note (2006)).

104 See 18 U.S.C.A. § 3287; Leahy Press Release, *supra* note 16. For more on the War Powers Resolution, see 50 U.S.C.A. §§ 1541–1548 (West 2006 & Supp. 2009).

105 See Leahy & Grassley Press Release, *supra* note 94.

106 Leahy & Judiciary Comm. Press Release, *supra* note 100.

eral use of military force, to which the United States will surely be a significant participant? These military activities will not be covered under WEFA, yet could clearly be significant military actions susceptible to fraud. Furthermore, it is likely that the United States government, acting outside of an official AUMF, will continue to carry out large-scale military or peacekeeping operations. In an era less centered on large-scale state conflict and more focused on threats arising from terrorists and other violent nonstate actors, this narrow view of “at war” is incomplete and insufficient, and fails to bring WSLA completely up to date.

C. Constitutional: Removing Vagueness, Improving Separation of Powers

WEFA, while establishing a definition of “at war” that ignores significant modern forms of conflict, does provide more rigid guidance for the courts in deciding when the nation is at war. Such guidance will help uphold traditional separation of powers requirements.

First, the amendment requires that the war must be officially declared by Congress (either through an official declaration or an AUMF).¹⁰⁷ Second, it mandates that the war, as defined, must be ended by Congress or by a Presidential proclamation, with notice to Congress.¹⁰⁸ Both of these developments are important, as they ensure that WSLA will no longer require a judge to determine when the United States is at war (the Big Dig problem). In fact, a main impetus for the amendment, as stated by the drafters of WEFA, was “so courts, prosecutors, and litigants can be sure when the statute of limitations starts to run.”¹⁰⁹

Of course, these clarifications hinge on the fact that only significant, congressionally authorized declarations of war are sufficient to trigger the statute. While WEFA may provide more judicial guidance, if the bigger goal is allowing for the prosecution of frauds against the government while the nation is at war, then Congress should have detailed not only more rigid guidance, but also a broader, more modern, and more comprehensive definition of what constitutes “at war.”¹¹⁰

107 18 U.S.C.A. § 3287.

108 *Id.*

109 See Leahy & Judiciary Comm. Press Release, *supra* note 100.

110 See *infra* Part III.B for a discussion of the need for a broader definition of war.

D. Scope: Ignoring an Age-Old Critique

Like under WSLA, the scope of fraud covered by WEFA is unclear on its face. Therefore, understanding WEFA requires a clear conception of congressional intent.

A supply-side interpretation of the amendment implies that WEFA applies to all fraud carried out against the government during times of war because of strains on investigatory bodies. Courts have generally refused to accept this broad, plain language interpretation of the Act¹¹¹ despite concerns that the government will not be able to adequately provide prosecutorial services during wartime.¹¹² A second view is that the statute should apply to frauds that at least indirectly affect the war effort, either in contract or as an economic burden. This arbitrary rule reflects current jurisprudence as laid out in WSLA's earliest applications, but does not necessarily represent the legislative intent of the original drafters or the modern sponsors of WEFA.¹¹³ Lastly, a demand-side framework would apply WEFA to fraud directly related to the war effort, as the language surrounding the drafting of the amendment seems to suggest.¹¹⁴

In the main, Senators Leahy and Grassley appear to be concerned with specifically war-related fraud, such as faulty vests and contaminated water.¹¹⁵ Under this demand-side framework, WEFA would no longer apply to cases such as the Big Dig. The kinds of fraud cited by the Senators—the cash contracts and corruption in Iraq—do not seem to extend the amendment to non-war-related contracts.¹¹⁶

The new amendment was essentially presented as a way to address the numerous accounts of fraud in the Iraq and Afghanistan campaigns, as evidenced by the abundant testimony and emphasis on defective products, unsafe bullet proof vests, and faulty ammunition

111 See Norberg, *supra* note 25, at 441 (“Few courts have been enticed by the chimerical ‘plain meaning’ approach to the reference problem raised by the [WSLA].”).

112 For more on the supply-side argument, see *supra* Part I.A.

113 See *supra* Part I.D.

114 This argument reflects the demand-side hypothesis that there is simply more demand for prosecutions because there is more fraud due to the fact that the United States is at war. See *supra* Part I.A.

115 See Leahy Press Release, *supra* note 16; Leahy & Grassley Press Release, *supra* note 94; Leahy & Judiciary Comm. Press Release, *supra* note 100.

116 See Leahy Press Release, *supra* note 16; see also, e.g., Jenny Mandel, *Iraq Contractor Admits to Bribery and Fraud*, GOV'T EXECUTIVE, Apr. 25, 2006, <http://www.govexec.com/dailyfed/0406/042506m1.htm> (describing the case of a businessman who admitted to bribing U.S. Department of Defense officials with more than \$2 million in cash and goods to steer over \$8.6 million in contracts to his business).

delivered to U.S. troops abroad.¹¹⁷ This language suggests that WEFA was crafted to apply to demand-side frauds committed in Iraq and Afghanistan, or at the very least, frauds *related to* the campaigns there.¹¹⁸

On the other hand, there is also language in the legislative history that suggests a concern about the ability of investigative agencies during wartime. This concern implies an intent to place all frauds committed against the government during wartime under WEFA. According to Senator Grassley, the purpose of the amendment was to expand the suspension period to “allow prosecutions of criminal fraud after the war is ended so that investigations don’t have to occur while conducting military operations.”¹¹⁹ This statement suggests a broad, supply-side interpretation of fraud that would include prosecutions of frauds completely unrelated to the war itself which might otherwise be inhibited during times of war.

Because WEFA does not clearly state the scope of fraud to which it applies, it is still up to the courts to decide which language in the legislative history they will defer to, if at all. Because the current legislative history is inconclusive, courts will likely rely on past WSLA jurisprudence, which straddled the two extreme interpretations of fraud to include war-related fraud as well as frauds of a pecuniary nature or involving property.¹²⁰

III. MOVING FORWARD: JUDICIAL AND LEGISLATIVE GUIDANCE

Despite the improvements made by WEFA to WSLA, two important issues still need to be clarified by a definitive rule by the courts or, preferably, through further legislative action. First, particularly in light of WEFA’s vague legislative history, the appropriate scope of “fraud” should be made plain. Second, the definition of “at war,” while improved, should account for an even more extensive vision of modern military conflict, particularly in an era so focused on amorphous threats such as terrorism, rogue states, and violent nonstate actors.

117 See Leahy Press Release, *supra* note 16; Leahy & Judicial Comm. Press Release, *supra* note 100.

118 See *Combating War Profiteering*, *supra* note 95, at 2 (statement of Sen. Leahy) (reporting “widespread fraud, waste, and abuse in Iraq on a scale that may be unprecedented in our history”).

119 See Leahy & Grassley Press Release, *supra* note 94.

120 See *supra* Part I.D. Note also that this ignores the possibility that courts could take a plain language view (i.e., a supply-side view) and allow for the prosecution of all frauds that happen to be carried out during times of war.

A. Redefining “Fraud”

Unfortunately, WEFA does not completely solve Professor Norberg’s complaint that WSLA is ambiguous as to the scope of fraud covered by the Act.¹²¹ WEFA provided an opportunity for Congress to lay out a clearer vision of fraud; now, as Norberg suggested fifty years ago, “[i]n the absence of . . . ameliorative action by Congress, the appellate courts should attempt to create some order out of the present confusion.”¹²² The better solution, however, would be for Congress to take further action to define fraud and clarify the extent to which non-war-related fraud is affected by the statute.¹²³ Barring that, it is helpful here to assess the effect of WEFA, if any, on past WSLA jurisdiction about the scope of fraud.

As discussed above, past judicial holdings reveal that WSLA appears to cover two kinds of fraud: fraud directly related to war contracts and fraud of a pecuniary nature.¹²⁴ Legislative history surrounding WEFA, however, provides confusing and contradictory guidance. The majority of the language surrounding WEFA focuses on fraud directly related to war contracts in Iraq and Afghanistan, and the general demand-side concerns about the potential for fraud during the actual conflicts.¹²⁵ Other legislative rhetoric, however, seems to impute to the amendment a narrow, supply-side vision of fraud by implying that the goal of the amendment is to allow a preoccupied and overwhelmed Department of Justice more time to prosecute all frauds that take place during wartime.¹²⁶

The supply-side argument based on a handicapped investigative branch, which has been generally short-shifted by the courts and in WEFA’s legislative history,¹²⁷ is actually supported by past use of the

121 Norberg, *supra* note 25, at 452 (“Whether the legislature was thinking only of criminal acts arising out of the confusion of war production and rearmament is impossible to determine from the legislative history.”).

122 *Id.*

123 *See id.* (“If Congress has a more limited purpose, it should express it in words less susceptible to ambiguity, misinterpretation, and judicial expansion than those found in the present Suspension of Limitations Act.”).

124 *See supra* Part I.D.

125 *See supra* Part II.D.

126 *See supra* note 111–12 and accompanying text.

127 A few lower courts have ruled otherwise, holding that WSLA “is to be liberally construed in favor of the public.” *United States v. Choy Kum*, 91 F. Supp. 769, 771 (N.D. Cal. 1950). The issue in *Choy Kum* was whether the term “defraud” encompassed nonmonetary injuries to the United States, in this case violations of passport laws. *Id.* at 770. There, the court decided that WSLA should be interpreted by looking at the plain meaning of the words of the Act, and the general objective sought to be attained by the Act. *Id.* at 771; *see also* *United States v. Gilliland*, 312 U.S. 86, 93

Act. Case analysis reveals that prosecutors did not use the statute to go after only war-related and contracting frauds, but also crimes which they could not prosecute during the war, possibly because of institutional or investigative hamstrings. WSLA, for example, “played a significant role in several of the postwar trials of alleged Communists.”¹²⁸ This use of the Act supports the interpretation that the statute should allow for the prosecution of all frauds, not merely war-related frauds.

Furthermore, the original language of WSLA reinforces the idea that the statute was enacted to deal with the supply-side, investigatory constraints on the prosecutorial wing of the government during times of war. The original statute did not serve to suspend the statute of limitations for three years, but rather “‘until June 30, 1945, or until such earlier time as the Congress by concurrent resolution, or the President, may designate.’”¹²⁹ This timeline implies that the Act is not about the war itself, but about allowing the Department of Justice the appropriate amount of time to prosecute crimes missed during the “hurly-burly” of war.¹³⁰ In other words, the intention was that once this time had passed, if it was less than three years, then Congress or the President had the power to restore repose and allow parties to move on. Even under the permanently codified WSLA, which included a three-year extension on the statute of limitations, courts viewed this provision as simply reflecting “Congress’ intention . . . to give the Department of Justice six years from the [cessation of hostilities] to investigate and prosecute.”¹³¹

Prior to WEFA, the courts generally rejected the broad, supply-side interpretation.¹³² As Norberg noted, “[p]erhaps Congress should have been motivated [by fear of general fraud], but the unsuccessful attempt of Representative Rankin of Montana to secure the passage of just such a general suspension act leads one to believe that Congress had a more limited purpose in mind.”¹³³ For the most part, prior jurisprudence has not recognized a plain language interpretation of

(1941) (noting that WSLA should not be narrowly construed to require a showing that alleged charge involved monetary injuries to the government); *Choy Kum*, 91 F. Supp. at 711 (“To the end that while fighting for its life the sovereign would not have to divert a portion of its energies to attend timely to criminal acts of a domestic nature which were injurious to it as a sovereign, the Congress wisely provided for a suspension of the operation of the general Statute of Limitations.”).

128 See Norberg, *supra* note 25, at 440.

129 *United States v. Grainger*, 346 U.S. 235, 245 (1953) (quoting Act of Aug. 24, 1942, ch. 444, Pub. L. No. 77-706, 56 Stat. 747 (1942)).

130 See *United States v. Gottfried*, 165 F.2d 360, 368 (2d Cir. 1948).

131 *United States v. Smith*, 342 U.S. 225, 231 (1952).

132 See Norberg, *supra* note 25, at 442.

133 *Id.* at 451–52.

the statute, and its proponents were able to creatively explain the prosecutions of Communists as tangentially war related using the pecuniary fraud argument.¹³⁴

WEFA's legislative history further complicates this already confusing jurisprudence.¹³⁵ Because the language surrounding the amendment is inconclusive—it suggests both a limited and expansive view of the scope of fraud—it is probably insufficient guidance to overrule over sixty years of WSLA jurisprudence. The courts will likely continue to uphold their judicially crafted limits on fraud—pecuniary and war related. If Congress would like the statute to apply more broadly, or more narrowly, it should legislate so explicitly.

B. *Redefining War*

WEFA's definition of war, while beneficial on separation of powers and other justiciability grounds, does not sufficiently address the kinds of conflict that should be covered by a modern suspension of limitations act. Like understanding the scope of fraud, appropriately defining the scope of "at war" should be considered in light of the purpose of the Act. Here, however, both the supply- and demand-side incentives for the Act support the extension of "at war" to include conflicts outside of conventional warfare.

First, if the Act is concerned about the supply-side issue—that the Justice Department is spread too thinly during times of war—then it should clearly extend to the efforts to fight terrorism and nonstate actors. In fact, the so-called "war on terror" precipitated the largest restructuring of the Department of Justice and the FBI in fifty years, including the creation of a new National Security Division¹³⁶ and the diversion of huge numbers of personnel and funds from other investigatory bodies to focus on the investigations and prosecutions of crimes related to terrorism.¹³⁷ If the concern is about the inability for the Department of Justice to prosecute fraud because it is hampered

134 For a discussion of pecuniary fraud, see *supra* Part I.D.

135 See Norberg, *supra* note 25, at 442 ("No court has as yet supplied a workable rule by which the line of demarcation can be recognized.").

136 See generally U.S. DEP'T OF JUSTICE, NATIONAL SECURITY DIVISION PROGRESS REPORT 2 (2008) (describing the developments in the U.S. security program since September 11, 2001). Also, it is noteworthy that there is a statute extending the statute of limitations for certain terrorism offenses. See 18 U.S.C. § 3286 (2006).

137 See generally U.S. Dep't of Justice, Fact Sheet: Justice Department Counter-Terrorism Efforts Since 9/11 (Sept. 11, 2008), <http://www.usdoj.gov/opa/pr/2008/September/08-nsd-807.html> ("Since the attacks of September 11, 2001, the highest priority of the Justice Department has been to protect America against acts of terrorism.").

during wartime, then the war on terror presents a prime example of investigatory hamstrings that might merit a suspension of the statute of limitations.

On the other hand, if one considers the demand-side argument—that there is more opportunity for fraud during times of war—then, as with conventional warfare, the war on terror, conflicts against nonstate actors, peacekeeping missions, and other non-congressional military initiatives all leave the nation exceedingly vulnerable to fraud. While the limitations that WEFA placed on “at war” are better than under the original WSLA,¹³⁸ it does not adequately set forth all of the kinds of modern conflicts that currently leave the government vulnerable to huge amounts of fraud. The Korean War, in which over 33,000 American soldiers died and over \$335 billion dollars were spent, would not have constituted “at war” under the new amendment.¹³⁹ Similarly, President George H.W. Bush sent thousands of soldiers into the Middle East in the months preceding the first Gulf War, without a congressional authorization for the use of force; any fraud surrounding this initial deployment would not have satisfied WEFA’s requirements.¹⁴⁰ In the international context, Congress recently pledged \$1.69 billion for international peacekeeping, hardly an insignificant fund, and undeniably vulnerable to fraud.¹⁴¹ Again, this is not covered under WEFA.

It is important to expand the Act’s definition of “at war,” especially in this era, and it will be easier to do so if Congress also limits the scope of fraud that qualifies under the Act.¹⁴² Because we are faced with more amorphous conflicts, the kinds of fraud that are ame-

138 See *supra* Part II.B.

139 See CARL KAYSEN ET AL., AM. ACAD. OF ARTS & SCIS., WAR WITH IRAQ 54–55 (2002), available at http://amacad.org/publications/monographs/War_with_Iraq.pdf. The cost was adjusted to 2002 dollars. The war was authorized under S.C. Res. 83, U.N. Doc. S/RES/83 (June 27, 1950).

140 See Nora Boustany, *U.S. Sends Troops, Jets to Saudi Arabia As Iraqi Forces Pose Imminent Threat*, WASH. POST, Aug. 8, 1990, at A1. President Bush relied on his inherent Commander in Chief powers to send in troops without congressional approval, but later went and asked for congressional authorization, which he received from both Houses. See also Authorization for Use of Military Force Against Iraq Resolution, Pub. L. No. 102-1, § 2, 105 Stat. 3 (1991) (codified at 50 U.S.C. § 1541 note (2006)); S.C. Res. 678, U.N. Doc. S/RES/678 (Nov. 29, 1990).

141 See Merle D. Kellerhals, Jr., *U.N. Peacekeeping Vital to International Security*, U.S. DEP’T OF STATE, Apr. 3, 2008, <http://www.america.gov/st/peacesec-english/2008/April/20080403123540dmslahrellek0.4752313.html> (“The Bush ‘administration considers United Nations peacekeeping to be in the direct national security interest of the United States. It deserves and it receives both our political and financial support.” (quoting Assistant Sec’y of State for Int’l Org. Affairs Kristen Silverberg)).

142 See *supra* Part III.A.

nable to exemptions should be clearly delineated—either using a war-related model, the pecuniary-harm precedent, or another rubric chosen by Congress. Limiting fraud, while important for the reasons mentioned above, is even more important when “at war” is expanded to include conflicts without definite beginnings and ends.¹⁴³

Extending this statute to amorphous conflicts like the war on terror does open the possibility for fraud with no statute of limitations, which flies in the face of the judicial preference toward repose. Congress should certainly take this into consideration if it attempts to re-envision the definition of “at war” under the statute.

One possible solution might be to expand the scope of “at war,” but determine the statute of limitations from the date of the alleged conduct, not the end of hostilities (which is vague and sometimes nonexistent). For example, for fraud against the government directly related to military contracts in the war on terror, the statute of limitations could be extended to ten years from the date of the fraudulent activity (similar to the five-year WEFA suspension and the five-year current statute of limitations). Therefore, if Lurie and Dworetz¹⁴⁴ were fraudulently attempting to purchase surplus materials of a peacekeeping mission, instead of an officially declared conflict like World War II, the government would have double the length of time to uncover their deeds and secure their prosecution.

A framework that defines the statute of limitations from the date of the conduct, rather than the date of the termination of hostilities, could allow for a more comprehensive understanding of “at war,” while also ensuring that the statute of limitations on fraud has a reasonable lifespan. In a supply-side framework, where the incentive for

143 WEFA declares that the termination of war is complete upon “a Presidential proclamation, with notice to Congress, or by a concurrent resolution of Congress”; however, this definition hardly seems complete when military conflicts, particularly those that are vulnerable to fraud, are not going to be the large-scale sorts that require full congressional or presidential conclusions. *See* Duncan Hunter National Defense Authorization Act for Fiscal Year 2009, Pub. L. No. 110-417, § 855, 122 Stat. 4356, 4545–46 (2008) (codified as amended at 18 U.S.C.A. § 3287 (West Supp. 2009)). Narrowly defining war in this era would strengthen the judicial preference for repose, which is at risk if “war” is characterized in a more endless, amorphous manner. *See* *Boumediene v. Bush*, 128 S. Ct. 2229, 2270 (2008) (noting that the “duration of hostilities . . . may last a generation or more”); S. REP. NO. 110-431, at 7 (2008) (statement of Sens. Sessions & Coburn) (expressing concern that there will be situations, such as the conflicts in Iraq and Afghanistan, in which if “a President is hesitant to officially announce the end of hostilities, the statute of limitations will never start running,” which means that “contractors could remain subject to potential liability for criminal offenses (or investigations) for years, possibly a lifetime”).

144 *See supra* notes 1–9 and accompanying text.

the Act is the investigatory impediments caused by the war itself, then perhaps this model is not as applicable. But if Congress is concerned about a demand-side framework, as Senators Leahy and Grassley imply by consistently remarking on the opportunities for fraud *in and related to* the current military campaigns,¹⁴⁵ then the legislature should be just as concerned about the possibility for fraud in peacekeeping operations, U.N. sanctioned missions, and counterterrorism efforts. Such military campaigns would not fall under WEFA, but could be reasonably covered by an amended regime that commences an extended statute of limitations on war-related frauds from the date of the fraudulent conduct.

CONCLUSION

The senators' efforts in drafting and passing WEFA are flawed, but not without merit. The new amendment expands the suspension of the statute of limitations to five years, bringing it up to its criminal counterpart; it includes AUMFs so as to cover conflicts such as the current campaigns in Iraq and Afghanistan; and it concretely defines "at war" so as to eliminate some of the constitutional concerns noted above.

In so defining war, however, the amendment fails to encompass the complete breadth of conflicts that are vulnerable to wartime fraud. As it is currently crafted, United Nations initiatives, peacekeeping missions, and counterterrorism campaigns are outside of the purview of the Act. Yet these military initiatives obviously carry significant opportunity for fraud against the government.¹⁴⁶ In future modifications of WSLA, Congress should include these twenty-first century military initiatives, perhaps by significantly expanding the window for prosecuting frauds related to these "timeless" conflicts from the date of the fraudulent conduct. This would preclude the need to define the indefinable—namely, when these kinds of wars end—while at the same time extending the timeline for prosecution, and ensuring the important benefit of repose.

In addition to WEFA's narrow definition of war, language found in WEFA's legislative history provides contradictory guidance as to the

145 See Leahy Press Release, *supra* note 16; Leahy & Grassley Press Release, *supra* note 94; Leahy Judiciary Comm. Press Release, *supra* note 100.

146 It is also worthwhile to consider the extent to which contracting and subcontracting are involved in modern day conflicts and warfare, which only exacerbates the potential for fraud related directly to war and military contracts. See S. REP. NO. 110-431, at 3 (2008) ("Private contractors have been used to a greater extent during these war-time activities than at any time in our history.").

purpose of the amendment itself. This ambiguity complicates the already confusing jurisprudence as to the kinds of fraud that should be covered by WSLA's suspension of the statute of limitations. Congress should continue to improve on the work of Senators Leahy and Grassley by expressly defining the types of fraud that merit a suspension of the statute of limitations so this important question is no longer left to the courts. A concrete, limited definition of fraud, combined with an expansive vision of "at war," would provide guidance for courts, repose for corporate and individual actors, and an improved prosecutorial tool for the Department of Justice.

