Expanding the Prosecutor’s Purview: Interpreting the Wartime Suspension of Limitations Act

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Introduction

The question of when a war exists has been extensively considered in international law,² but the subject is greatly important in the regulation of government contracting because of the little-known Wartime Suspension of Limitations Act (WSLA).³ The Act declares that when the nation is “at war,” the statute of limitations on fraud committed against the United States government will not take effect. When the nation is at war, the general five-year statute of limitations on federal crimes can be extended without end for fraud in government contracting.⁴

The Fifth Circuit’s 2012 ruling in United States v. Pfluger ⁵ has garnered significant attention within the business community because it ruled that the wars in Iraq and Afghanistan have not ended, thus extending the statute of limitations on fraud against the government.⁶ Despite the implications of the ruling for companies engaged

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² See generally MARY DUDZIAK, WAR TIME: AN IDEA, ITS HISTORY, ITS CONSEQUENCES (2012).
³ Wartime Suspension of Limitations Act, 18 U.S.C. § 3287 (2012). (“When the United States is at war or Congress has enacted a specific authorization for the use of the Armed Forces, as described in section 5(b) of the War Powers Resolution ( . . . the running of any statute of limitations applicable to any offense (1) involving fraud or attempted fraud against the United States or any agency thereof in any manner, whether by conspiracy or not, or (2) committed in connection with the acquisition, care, handling, custody, control or disposition of any real property or personal property of the United States, or (3) . . ., shall be suspended until three years after the termination of hostilities as proclaimed by the President or by a concurrent resolution of Congress.”)
⁵ 685 F.3d 481 (5th Cir. 2012).
⁶ Lance Duroni, Justices Won’t Review Ex-Army Officer’s Bribery Indictment, LAW360 (Feb. 19, 2013, 8:38 PM),
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in government contract work, no scholarship has discussed what the court called a “minimally developed area of law.”7 This Comment seeks to fill that gap by tracing how courts have interpreted the “at war” section of the Act. In the three cases where federal courts have considered this question, they have all come out differently on how to interpret this provision of the Act.

The interpretation will have broad ramifications for the regulation of government contracting because the Act applies to all government contracting, done both in and outside of the war zone. Under United States v. Prosperi, courts have interpreted the Act to give the government power to prosecute fraud committed against the government, even where that fraud has no relation to the war.8 In that case, the court upheld the government’s use of the Act to prevent the statute of limitations from taking effect on fraud committed by a contractor who was working on Boston’s “Big Dig” project. Though the fraud had nothing to do with the war, the court reasoned that because the fraud took place during wartime, the government could stop the clock on the statute of limitations.9

Government contracting was a $516.3 billion industry in FY 2012, and the industry is significantly impacted by the statute of limitations on contracting work.10 By extending the statute of limitations, companies can be deterred from fraud that may be too complex to discover quickly. Similarly, increases in the statute of limitations will raise the regulatory exposure of a company in a government contract and will prevent them from closing the books on earlier contract work. Though the law does not involve action from an administrative agency, it is regulation in Barak Orbach’s conceptualization of a regulation as government action that can “directly influence (or ‘adjust’) conduct of individuals and firms” and which “enables, facilitates or

7 United States v. Pfluger, 685 F.3d 481, 482 (5th Cir. 2012).
8 United States v. Prosperi, 573 F. Supp. 2d 436, 442 (D. Mass. 2008) (“[I]t makes no difference that the fraud in this case involved a construction project unrelated to the Iraqi or Afghani conflicts.”).
9 Id.
adjusts activities, with no restrictions." The law and its interpretation will directly adjust the activity of firms by determining the length of their exposure to costly prosecutions from the government for their contracting work.

This Comment proceeds in two sections. First, the Comment reviews how courts have interpreted the Wartime Suspension of Limitations Act. The Comment argues that Pfluger marked a departure from the functionalist test in Prosperi that, in an era without formal surrender treaties, will extend the “at war” section of the Act without any end point. Second, the Comment argues for a return to the functionalist test in which the courts are held responsible for determining on a factual basis when the nation is at war. This is a more difficult task for the courts but is necessary to properly construe the statute.

Section I: Defining “At War”

There have only been three cases that have sought to interpret the “at war” section of the Wartime Suspension of Limitations Act.

A. United States v. Shelton

In the first case, United States v. Shelton, the court ruled that the Gulf War never met the definition of “at war” because a formal Declaration of War was requiring to trigger the statute. The case involved a local official in Texas who was indicted in June 1992, more than five years after he was alleged to have engaged in fraud against the United States government in conjunction with his position as Deputy Director of the Texas Department of Community Affairs. The government responded that because of the 1991 Gulf War, the statute of limitations was halted. The court ruled that “the recent conflict with Iraq did not constitute a ‘war’ as that term is used in the Suspension Act” because the statute was designed for “massive and pervasive conflicts [such] as World War II,” which the Gulf War was not.

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13 Id. at 1134.
14 Id.
15 Id. at 1132.
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The Shelton court took a strongly formalist approach to the definition of “at war.” No Declaration of War had been issued since World War Two, and under the court’s interpretation, the U.S. would not have been “at war” during the Korean and Vietnam Wars. While various military courts had adopted more expansive definitions of war, the court held that “armed conflict to amount to a ‘war’ for military purposes admittedly should be a lower standard than to constitute a war for civilian purposes.”16 According to the court, the only trigger for the “at war” section would be action from Congress that “formally recognized that conflict as a war. The Judicial Branch of the United States has no constitutional power to declare a war.”17 Shelton avoids complications about when the Gulf War may have ended by arguing that it never began for the purposes of the statute. In seeking to divorce the definition of “at war” from any functional interpretation of U.S. military action, the court was distancing its interpretation of the conflict from Dellums v. Bush, in which Judge Harold Greene ruled that “here the forces involved are of such magnitude and significance as to present no serious claim that a war would not ensue if they became engaged in combat,” which they ultimately did.18

B. United States v. Prosperi

In United States v. Prosperi, the government used the “at war” provision to charge a contractor in Boston’s “Big Dig” with fraud that would have otherwise been time-barred.19 Even though the fraud had nothing to do with the conflicts in Afghanistan and Iraq, the court held that “it makes no difference that the fraud in this case involved a construction project unrelated to the Iraqi or Afghan conflicts.”20

In determining the scope of the “at war” provision, Prosperi rejected the formalist approach in Shelton and adopted a functionalist approach. While noting that courts should generally abstain from wading into questions “fraught with gravity,”21 the court ruled that

16 Id. at 1135.
17 Id.
20 Id. at 442.
21 Id. at 442 (quoting Ludecke v. Watkins, 335 U.S. 160, 169 (1948)).
there are “cases, however, that leave no choice to a court but to interpret statutory or contractual language that depends on the determination of the existence of a declared or undeclared state of war.” The court criticized the Shelton decision for missing the major conflicts that should meet the “at war” trigger: “[t]he Shelton formulation thus does not capture the Korean War or the Vietnam War, two of the largest, bloodiest, and most expensive military campaigns in our nation’s history (nor does it capture the conflicts in Iraq and in Afghanistan).” Prosperi rejected the requirement for a Declaration of War because “there is no compelling logic connecting a formal declaration of war with the state of being at war.”

In moving away from a formalist definition, the Prosperi decision opened up questions concerning what level of violence would constitute war. The court ceded that “not every shot fired or every armed skirmish is of sufficient magnitude to stop the running of the statute of limitations.” In establishing that the conflicts in Iraq and Afghanistan constituted the United States being “at War,” the decision engaged in a thorough examination of the resources used and American lives lost.

Prosperi returned to a more formalist definition to define the “termination of hostilities.” Instead of applying its earlier empirical examination of the existence of hostilities, the court argued that 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.”

The court ruled that the U.S. recognition of the Afghan government on December 22, 2001 constituted the end of hostilities in Afghanistan and that President George W. Bush’s “Mission Accomplished” speech aboard the USS Abraham Lincoln constituted the end of hostilities in Iraq. While Prosperi had criticized the formalism of Shelton in determining whether a war exists, it returned to this formalism in making its assessment of when war ends.

22 Id. at 442.
23 Id. at 445.
24 Id. at 446.
26 Id. at 452 & n.28.
27 Id. at 454.
28 Id.
29 Id. at 455.
C. United States v. Pfluger

In *United States v. Pfluger*, the government used the “at war” provision of the statute to extend the statute of limitations in a case involving fraud by a U.S. soldier in Iraq. David Pfluger was a lieutenant colonel in Iraq accused of taking kickbacks in connection with contracts he arranged for fuel for his Forward Operating Base.\(^{30}\) Pfluger challenged his conviction because the statute of limitations had run, and the government responded that because the nation was “at war” the statute of limitations was suspended.\(^{31}\) The court rejected the narrow definition of war from *Prosperi* and ruled that the Act “mandates formal requirements for the termination clause to be met.”\(^{32}\)

In the decision, the court tried to narrow potential applications of the case to future litigation. Noting that the precedent could lead to “absurd” applications, the court said that it was only claiming that the standard worked in this case: the court “need only determine that it is not an absurd result that the hostilities in the armed conflict authorized by either the AUMF or the AUMF-I were ongoing in May 2004,” when the conduct was carried out.\(^{33}\) To justify that position, the court relied on the standards of active combat developed in *Hamdi v. Rumsfeld*.\(^{34}\) However, the court went beyond this to state that because the President hadn’t engaged in the “formal requirements for terminating the WSLA’s suspension of limitations” up through “this date,” WSLA would still be in effect when the decision was made in June 2012.\(^{35}\)

With the Supreme Court denying certiorari in the appeal of *Pfluger*, the expansive standard from that case is the most recent law on the subject.

*Section II: Towards a Functionalist Interpretation of the WSLA*

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\(^{30}\) United States v. Pfluger, 685 F.3d 481, 481 (5th Cir. 2012).

\(^{31}\) Id.

\(^{32}\) Id. at 485.

\(^{33}\) Id.

\(^{34}\) Id. (citing Hamdi v. Rumsfeld, 542 U.S. 507, 521 (2004)).

\(^{35}\) Id.
Interpretations of the WSLA have been marred first by under-inclusive formalism and now by over-inclusive formalism. In Shelton, the court’s formalism led them to rule that only a Declaration of War could trigger the start of “at war” provision. In Pfluger, the court ruled that only a formal surrender could trigger the end of the “at war” provision. As the law stands in Pfluger, the court has already admitted that it is open to “absurd” interpretations because the AUMF will never expire. In an era where the United States is engaged in what a “forever war” that is difficult to end, the WSLA could mean an indefinite cessation of the statute of limitations for fraud against the government.36

Instead of the formalism of Shelton and Pfluger, other jurisdictions should return to the functionalist test developed in Prosperi. While the functionalist test requires a more in-depth engagement with the facts of the conflict, the alternative is to avoid the question and create a definition that is either far too narrow or far too broad. However, courts should seek to depart from the definition of the “termination of hostilities” offered in Prosperi. There the court argued that the recognition of the government in Afghanistan and a speech by the President regarding the war in Iraq could suffice to establish the termination of hostilities. While there is a need to establish firm dates for the termination of hostilities, such a formal test represents a departure from the functionalism that Prosperi offered in determining whether there are hostilities.

The underlying intent of the Senate was to prevent fraud against the government as they hastily assembled large-scale military procurement programs. The Senate Report accompanying the 1942 enactment of the law stated that in “normal times the present 3-year statute of limitations may afford the Department of Justice sufficient time to investigate, discover, and gather evidence to prosecute frauds against the Government. The United States, however, is engaged in a gigantic war program. Huge sums of money are being expended for materials and equipment in order to carry on the war successfully.”37 With that in mind, “it is recognized that in the varied dealings opportunities will no doubt be presented for unscrupulous persons to de-

36 Harold Koh, How To End the Forever War, YALE GLOBAL ONLINE, (May 14, 2013), http://yaleglobal.yale.edu/content/how-end-forever-war.
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fraud the Government or some agency.”\textsuperscript{38} The Senate was seeking to curtail fraud against the government in the abnormal circumstance in which the country was engaged in large-scale military operations. Increasingly, the “normal times” are wartime, not peacetime, which has allowed for an expansion of the law beyond the limited intent of the Act’s drafters.\textsuperscript{39}

The ruling in \textit{Pfluger} has stretched the law to a limitless standard wherein the statute of limitations on these crimes will never run out. While courts should not return to the standard in \textit{Shelton} of never recognizing a war, courts should use the functionalism from \textit{Prosperi}, which is consistent with the Senate’s objectives, in determining whether a conflict was a war. In determining the termination of hostilities, the court will need to engage in a fact-specific analysis to determine whether or not the “at war” clause was in effect on the date in question. Though this represents a far greater task for courts than any have taken, this is the only way to determine properly when the hostilities have ceased.

Rather, the courts should seek to narrowly tailor their decisions on the dates of termination for the WSLA. When the question cannot be avoided, the court should focus on an individual date in question and then see whether or not the nation was at war. From there, the court can apply the fact-based functionalist test from \textit{Prosperi}. This approach may be more intensive for the courts, but it is remarkably better than the alternative of the baseless date for the end of hostilities in \textit{Prosperi} and the indefinite definition offered in \textit{Pfluger}.

As a regulatory matter, the Executive could play a greater role in helping to ensure transparency and predictability in this process. The Department of Defense should issue guidance that informs companies and courts when it considers the United States to be “at war” for the purposes of the WSLA. This would remove the onus from the courts to interpret activity in far-flung battlefields and would afford firms a clearer understanding of the statute of limitations on their government contracting work. The confusion in this area, and the divergent holdings in different jurisdictions make this a ripe area for greater regulatory oversight from the Executive.

\textsuperscript{38} \textit{Id.} at 2. 
\textsuperscript{39} Dudziak, \textit{supra} note 1, at 8.