

NOTE

LIMITLESS LIMITATIONS: HOW WAR OVERWHELMS CRIMINAL STATUTES OF LIMITATIONS

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INTRODUCTION

The federal statute of limitations permits the United States to prosecute acts of fraud against the government for only five years after the fraud occurs.¹ As a result, when you went to Cancun during your senior year of college and, in a fit of youthful indiscretion, burned through \$5,000 of your federal student loans, criminal liability hung over your head for a relatively short period of time.² During times of war, however, acts of fraud against the United States—from misuse of student loans to welfare fraud, embezzlement, or bribery³—are not subject to this strict limitation. War tolls the statute of limitations, and at the war's end, the Government enjoys an extra five years on the statute-of-limitations clock.⁴ In this way, if a war erupted shortly after your youthful indiscretion, the statute of limitations for misusing your student loan ran longer than if, say, you had bombed federal property.⁵

¹ See 18 U.S.C. § 1001 (2006) (describing fraud against the government); 18 U.S.C. § 3282(a) (2006) (providing a five-year limitation unless otherwise excepted by statute). A few enumerated acts of fraud, however, are subject to longer limitations periods. See generally CHARLES DOYLE, CONG. RESEARCH SERV., RL31253, STATUTES OF LIMITATION IN FEDERAL CRIMINAL CASES: AN OVERVIEW 19–24 (2007) (listing the limitations periods for enumerated federal crimes).

² See 20 U.S.C. § 1097(a) (2006) (“Any person who knowingly and willfully . . . misapplies . . . any funds, assets, or property provided or insured under this [Student Assistance] subchapter . . . shall be fined not more than \$20,000 or imprisoned for not more than 5 years, or both . . .”).

³ Based on an FBI study of white-collar crime in the three years between 1997 and 1999, the government identified roughly 7,000 instances of criminal activity that could be subject to this tolling mechanism. CYNTHIA BARNETT, U.S. DEP’T OF JUSTICE, FED. BUREAU OF INVESTIGATION, THE MEASUREMENT OF WHITE-COLLAR CRIME USING UNIFORM CRIME REPORTING (UCR) DATA 5 tbl.6 (2000), available at <http://www2.fbi.gov/ucr/whitecollarforweb.pdf> (reporting the number of offenses against government victims that involved fraud, bribery, counterfeiting, and embezzlement).

⁴ See 18 U.S.C. § 3287 (Supp. IV 2010). Charles C. Callahan once quipped that “there is a conflict of judicial opinion on almost every question connected with the statute of limitations; and that they ‘always have vexed the philosophical mind.’” Charles Callahan, *Statutes of Limitation—Background*, 16 OHIO ST. L.J. 130, 132 (1955) (footnote omitted) (quoting *Chase Sec. Corp. v. Donaldson*, 325 U.S. 304, 313 (1945)). Because of the confusing nature of statutes of limitations, it may help to clarify a few points relating to limitations jargon. “Tolling,” in common legal usage and in this Note, means to pause the limitations clock. See BLACK’S LAW DICTIONARY 1625 (9th ed. 2009) (defining the verb “toll” as “[t]o [o]f a time period, esp. a statutory one) to stop the running of; to abate . . .”). Thus, a five-year limitation that is tolled for two years will not expire for a total of seven years. The terminology surrounding the expiration of a limitations period may also raise confusion. In this Note, variations of the terms “expire” and “close” will be used to refer to the end of a limitations period. Some writers use “to run” to mean “to expire”; others use it when they mean “to continue.” See discussion *infra* Part II.B.2. Except as required by quotation, this Note will use “to run” to refer only to the continued ticking of the limitations clock.

⁵ The limitation on your crime would run for the normal five years, plus the duration of the war, plus an extra five years after the war. See 18 U.S.C. § 3287. For bombing federal property, you face a ten-year limitations period. See 18 U.S.C. § 3295 (2006).

This tolling mechanism for fraud against the government traces its roots to the aftermath of World War I, when the Department of Justice pleaded with Congress for extra time to prosecute certain crimes. A generation later, as the United States carried out another massive war effort, Congress passed the Wartime Suspension of Limitations Act (WSLA) to toll the statute of limitations until 1945. In 1948, Congress enacted legislation that made permanent the principle behind the WSLA: war tolls the limitations clock for fraud against the government and, after a time of war, the government enjoys an additional cushion before the statute of limitations begins to run again.⁶

Congress enacted the WSLA in the midst of wartime haste and left many unanswered questions. In the decade following World War II, federal courts grappled with the interpretation of the statute; in 1953 alone, the U.S. Supreme Court decided three cases that turned upon its meaning.⁷ After the wartime cases completed their course, however, prosecutors largely ignored the statute.

Undeclared wars in Kuwait, Iraq, and Afghanistan in the 1990s and 2000s inspired new interest in the statute and prompted new questions as prosecutors sought to resurrect it. Were these conflicts “wars” for the purposes of the WSLA? In the wake of judicial uncertainty, Congress passed the Wartime Enforcement of Fraud Act (the Amendment) in 2008, incorporating authorized military actions—short of declared war—into the WSLA’s list of applicable triggers.⁸ What Congress neglected to clarify was when and how the WSLA could be deactivated—that is, once a sufficient war triggers the provision, when will that war end?⁹

Prosecutors used the WSLA for nearly a decade after WWII ended; if the past is any guide, when the conflict in Afghanistan ends, courts can expect prosecutors to bring cases under the WSLA for many years, potentially decades after the crimes were committed. The problem, though, is not that a limitations period might last for many years. The problem is that the WSLA and its Amendment leave unresolved interpretive questions, the answers to which bear material consequences. For example, if you frittered away your federal student loans in 1997, a broad interpretation of the WSLA would stretch the

⁶ See discussion *infra* Part II.B.

⁷ See *United States v. Grainger*, 346 U.S. 235 (1953); *Bridges v. United States*, 346 U.S. 209 (1953); *United States v. Klinger*, 345 U.S. 979 (1953) (per curiam).

⁸ S. 2892, 110th Cong. § 2 (2008).

⁹ 18 U.S.C. § 3287 suspends the limitations period until “5 years after the termination of hostilities as proclaimed by a Presidential proclamation, with notice to Congress, or by a concurrent resolution of Congress.” This standard has defied easy application to President Obama’s statements regarding the conflicts in Afghanistan and Iraq. See discussion *infra* Parts III.C.1 and IV.C.

normal five-year limitation on your crime into a limitation more than twenty years long that would last until at least 2019. In contrast, a narrow interpretation would have buried that crime in 2002. Courts are currently at odds over the best reading of the statute. This instability in the law undermines the certainty that the statute of limitations exists to provide.

This Note seeks to isolate the questions that the WSLA and the 2008 Amendment leave open and to propose answers to those questions. By way of background, Part I examines the statute of limitations in the criminal context. In particular, it will survey the history of criminal limitations in the United States and the purposes for which limitations exist. Part II explores the structure and operation of 18 U.S.C. § 3287, which codifies the WSLA. This part focuses on the legislative changes and judicial interpretations that have shaped the current provision. Part III refines and explores two critical questions about § 3287: when is it triggered and what circumstances will end the triggering war? Part IV suggests a method for answering these questions.

I

THE STATUTE OF LIMITATIONS: ITS PURPOSES AND ORIGINS

A. Purposes of Criminal Statutes of Limitations

Judges, practitioners, and theorists ascribe varying purposes to statutes of limitations. Perhaps most prevalent among these justifications is that limitations promote certainty and stability by preventing stale claims.¹⁰ In a seminal exposition of limitations law, the Supreme Court in *Toussie v. United States* reasoned that criminal law limits exposure to prosecution in order to “protect individuals from having to defend themselves against charges when the basic facts may have become obscured by the passage of time and to minimize the danger of official punishment because of acts in the far-distant past.”¹¹ The passage of time erodes the mass of available evidence, making defense more difficult and prosecution less reliable.

Statutes of limitations serve many additional purposes that often overlap.¹² Indeed, the Supreme Court added in *Toussie* that the stat-

¹⁰ See Callahan, *supra* note 4, at 133 (arguing that preventing stale claims is a rationale cited “so frequently in opinions that [it] must be taken to state at least a verbal consensus as to the policy of the statutes”); see also *Developments in the Law: Statutes of Limitations*, 63 HARV. L. REV. 1177, 1185 (1950) [hereinafter *Developments*] (stating that fairness to the accused is the primary reason for the statute of limitations); Note, *The Statute of Limitations in Criminal Law: A Penetrable Barrier to Prosecution*, 102 U. PA. L. REV. 630, 632 (1954) [hereinafter *Penetrable Barrier*] (claiming the most important reason for a limitation period is protecting the accused from defending against “long-completed misconduct” because witnesses, evidence, and memories are lost or forgotten over time).

¹¹ 397 U.S. 112, 114–15 (1970).

¹² See Callahan, *supra* note 4; *Developments*, *supra* note 10, at 1185–86.

ute of limitations may “have the salutary effect of encouraging law enforcement officials promptly to investigate suspected criminal activity.”¹³ Other apparent purposes include repose for courts, society, and defendants.¹⁴ Limitations serve as “practical and pragmatic devices to spare the courts” from caseloads bogged down by tenuous and unimportant claims.¹⁵ For society, efficient markets rely on the security and stability of transactions, and a limitations period ensures that one’s bargaining counterpart will not be hauled before the court for long-ago crimes that business judgment could not have reasonably discovered.¹⁶ As a corollary, society derives less utility from prosecuting crimes buried in the past.¹⁷ For defendants, limitations provide repose as a form of grace for people whose unrepeated crimes rest deep in the past; they protect those who have rehabilitated themselves and pose little threat to society.¹⁸ All of these objectives bespeak some time limit on culpability.

Nevertheless, the way that society applies statutes of limitations largely contradicts the rationales that support them. If “freshness,” repose, or prosecutorial motivation drove statutes of limitations, then these statutes would not assign longer limitations periods for more serious crimes. But, of course, they do. In a case of aggravated murder, for which no limitation applies,¹⁹ none of the proffered rationales would counsel a longer limitations period; in particular, the desire for fresh evidence would seem to be even stronger for serious crimes. If the most serious crimes face no limitations period, some “counterpurpose” must overcome the standard rationales for statutes of limitations.²⁰ Likely, society’s desire to vindicate justice—a desire for retribution without regard to time—arises in the treatment of serious crimes, especially capital crimes.²¹ In sum, multiple purposes and

¹³ 397 U.S. at 115; see *Penetrable Barrier*, *supra* note 10, at 633.

¹⁴ See Callahan, *supra* note 4, at 135–36.

¹⁵ Chase Sec. Corp. v. Donaldson, 325 U.S. 304, 314 (1945); see *Developments*, *supra* note 10. Judge Learned Hand disagreed in *United States v. Curtiss Aeroplane Co.*, 147 F.2d 639, 642 (2d Cir. 1945): “Courts are maintained to settle disputes, however the parties may embroil themselves; it would be a strange doctrine which forbid people to deal with their affairs as they wish, lest the judges should be unduly vexed.”

¹⁶ See Callahan, *supra* note 4, at 136; see also *Norgart v. Upjohn Co.*, 981 P.2d 79, 87 (Cal. 1999) (stating that statutes of limitation, in accordance with public policy, provide security and stability).

¹⁷ See *Developments*, *supra* note 10, at 1186, 1235.

¹⁸ See *id.* at 1185 (“The primary consideration underlying such legislation is undoubtedly one of fairness to the defendant.”); *Penetrable Barrier*, *supra* note 10, at 630, 634.

¹⁹ See DOYLE, *supra* note 1, at 19–20 (listing nearly 100 federal capital offenses for which no limitation applies).

²⁰ See Callahan, *supra* note 4, at 138.

²¹ See *id.*; *Penetrable Barrier*, *supra* note 10, at 636 (“[O]ne is left with the conclusion that the chief motivation for such an approach is the desire for retribution; the more serious the crime, the more likely is it that this desire will outweigh the aims of limitation statutes.”).

“counterpurposes” collide in a complex body of law that generally prescribes a hard time limit on criminal indictments, except in cases of grave crimes.

B. History of Criminal Statutes of Limitations

Statutes of limitations arose in Roman law to bar litigation in civil actions after a certain point in time.²² The concept of limiting a wrongdoer’s period of liability entered common law systems in thirteenth-century England.²³ These early statutes fixed a point in time—for example, the coronation of a king—as the date before which the alleged wrong could not have occurred. As years went by, these fixed points faded too far into the past, so the law adopted set periods of time in which plaintiffs had to commence a given type of action.²⁴

Although England did not translate its civil limitations into the criminal context,²⁵ continental European countries established limited periods during which the government could prosecute crimes.²⁶ This practice also prevailed in North America, where colonial governments established statutes of limitations as early as 1652.²⁷ Criminal statutes of limitations likewise were among the first laws passed by early state legislatures.²⁸

At the federal level, when the First Congress of the United States convened in Manhattan, it enacted a set of limitations for federal criminal actions.²⁹ Congress’s first draft of federal limitations emerged as a dozen lines tacked onto the end of a general criminal

²² See RUDOLPH SOHM, *THE INSTITUTES: A TEXTBOOK OF THE HISTORY AND SYSTEM OF ROMAN PRIVATE LAW* § 64, at 318–22 (James Crawford Ledlie trans., 3d ed. 1907).

²³ *Developments, supra* note 10, at 1177.

²⁴ *Id.* at 1177–78. Notably, the Limitation Act of 1623, which provides the basic framework for modern limitations statutes, sought to clear inconsequential claims from the dockets of the King’s courts by establishing different limitations periods depending on the nature of the action at bar. See *An Act for Limitation of Actions, and for Avoiding of Suits in Law*, 1623, 21 Jac. 1, c. 16, §§ 3–7 (Eng.); *Developments, supra* note 10, at 1177–78.

²⁵ See *Developments, supra* note 10, at 1179; *Penetrable Barrier, supra* note 10, at 630 (noting that English doctrine generally holds *nullum tempus occurrit regi*: that no lapse of time prohibits the sovereign from prosecuting a crime).

²⁶ See, e.g., *Penetrable Barrier, supra* note 10, at 631 n.6 (citing CODE D’INSTRUCTION CRIMINELLE arts. 637–38 (Fr.) (prescribing three- and ten-year limitations)). Roman law, with its twenty-year limitations period, provided a foundation for statutes of limitations in civil law countries in Europe. These countries now follow a graduated system similar to that used in the United States. *Id.* at 631.

²⁷ See, e.g., *THE COLONIAL LAWS OF MASSACHUSETTS* 163 (William H. Whitmore ed. 1889) (establishing in 1652 a one-year period in which to bring indictments or complaints after the commission of a misdemeanor).

²⁸ See Callahan, *supra* note 4, at 130–31 (“Occasional intimations that [limitations] are contrary to the spirit of the law and not to be favored are refuted by the persistence of these statutes through more than three hundred years of Anglo-American law . . .” (footnote omitted)).

²⁹ *An Act for the Punishment of Certain Crimes Against the United States*, ch. 9, § 32, 1 Stat. 112, 119 (1790).

statute passed in 1790. The statute required an indictment within three years of any alleged treason or capital offense other than “wilful murder or forgery.”³⁰ For all other offenses, an indictment had to issue within two years.³¹ The only statutory tolling mechanism applied against “any person or persons fleeing from justice.”³² This represented the sole means by which a prosecutor might pause the statute of limitations.

In 1876, Congress expanded the general statute of limitations for criminal offenses from two years to three³³ and, in 1954, adopted the current five-year limitations period, which applies to all federal crimes for which Congress has not established a specific limitations period.³⁴ Federal law applies specific limitations periods of one, six, seven, eight, ten, or twenty years to more than a hundred different crimes.³⁵ Additionally, a number of particularly grave crimes enumerated in a list are not subject to a limitations period.³⁶

As limitations periods grew, so too did the number of mechanisms for tolling them. In addition to the 1790 tolling provision for fugitive criminals, Congress has added six more mechanisms by which a prosecutor may pause the statute of limitations.³⁷ I turn now to examine one of these tolling laws.

³⁰ *Id.*

³¹ *Id.*

³² *Id.*

³³ An Act to Amend Section 1044 of the Revised Statutes Relating to Limitations in Criminal Cases, ch. 56, § 1, 19 Stat. 32, 32–33 (1876).

³⁴ An Act to Prohibit Payment of Annuities to Officers and Employees of the United States Convicted of Certain Offenses, and for Other Purposes, ch. 1214, § 10(a), 68 Stat. 1142, 1145 (1954) (amending 18 U.S.C. § 3282 (1952)). David E. Seidelson argues in *The Federal Non-Capital Statute of Limitations and Public Law 769—Stare Decisis by Accretion*, 30 GEO. WASH. L. REV. 42, 45–47 (1961), that most members of Congress intended to apply this extension of the general statute of limitations only to corrupt public officials, particularly purported spies like Alger Hiss, but the proposal ultimately had much broader impact. When the U.S. District Court for the District of New Jersey faced the statute as a matter of first impression, it held that legislative intent was not pertinent and that a literal reading of the statute demands that all criminal actions receive a five-year limitation unless Congress specifies otherwise. *See id.* at 49–51. When the jury acquitted the defendant, the case did not go up on appeal. As a result, other cases cited that ruling, and again, no appeal challenged the courts’ broad interpretation of the statute. The author concludes that district court judges built a broad enough base of interpretation that other courts just followed suit and ignored potential legislative intent: stare decisis by accretion. *See id.* at 52–54.

³⁵ *See* DOYLE, *supra* note 1, at 22–24.

³⁶ *See id.* at 19–22.

³⁷ *See* 18 U.S.C. § 3283 (2006) (child abuse); 18 U.S.C. § 3284 (2006) (concealment of assets in bankruptcy); 18 U.S.C. § 3287 (Supp. IV 2010) (wartime fraud against the government); 18 U.S.C. §§ 3288–3289 (2006) (dismissal of original charges); 18 U.S.C. § 3292 (2006) (foreign evidence); 18 U.S.C. §§ 3282(b), 3297 (2006) (DNA evidence).

II

18 U.S.C. § 3287

A. Development of the Provision

The WSLA, codified in 18 U.S.C. § 3287, pauses the statute of limitations for acts of fraud against the government during times of war. Like the statute of limitations itself, wartime tolling mechanisms have a long history in U.S. law.

In the early nineteenth century, a federal judge in North Carolina noted that, as a matter of international law, the civil courts of the United States are closed to citizens of a foreign country when the United States is at war with that country.³⁸ Because citizens of an enemy power could not bring suit in a U.S. court, equity demanded some tolling provision to protect individual rights. Before statutory mechanisms developed to toll the statute of limitations, common law principles of equity sidestepped the statute's strict deadline.

In the wake of World War I, applying a similar rationale, Congress tolled the limitations clock for crimes of fraud against the United States. During the war, a surging tide of opportunities to defraud the United States arose from the "gigantic and hastily organized procurement program," and three years after the war ended, the surge threatened to outrun the statute of limitations.³⁹ The Department of Justice reported that it needed additional time to conduct "the most minute investigation," which would take considerably longer than the three-year limitation provided by the general criminal statute.⁴⁰ Congress passed H.R. 8298 in November 1921, providing prosecutors an additional three years to build their cases.⁴¹ Six years later, the Department of Justice indicated that its time of need had passed, causing Congress to repeal the statute.⁴²

In 1942, the United States found itself in the midst of yet another massive, hastily assembled war effort, and Congress desired to resurrect the repealed tolling mechanism.⁴³ It did so with the Wartime Suspension of Limitations Act. Initially, the WSLA applied only until

³⁸ *In re Lewis*, 15 F. Cas. 456, 456–57 (C.C.N.C. 1805) ("The act of 1715, whilst it was unrepealed, was suspended from its usual operation by the acts disqualifying British adherents to sue in our courts. It did not begin to operate as to such persons till the end of the war The demurrer to the plea, stating these facts, and relying upon the act of 1715, must be allowed.")

³⁹ *Bridges v. United States*, 346 U.S. 209, 218 (1953).

⁴⁰ *Id.* at 218 n.17.

⁴¹ An Act to Amend Section 1044 of the Revised Statutes of the United States Relating to Limitations in Criminal Cases, ch. 124, § 1, 42 Stat. 220, 220 (1921).

⁴² *See* An Act Amending Section 1044 of the Revised Statutes of the United States as Amended by the Act Approved November 17, 1921, ch. 6, 45 Stat. 51, 51 (1927); *see also Bridges*, 346 U.S. at 218 n.17 (describing the Department of Justice's request for an extended limitation and the subsequent termination of that extension).

⁴³ *See* S. REP. NO. 77-1544, at 2 (1942).

June 30, 1945.⁴⁴ Realizing that the war would not end by the WSLA's cutoff, Congress extended the statute in July 1944 so that it would operate until the end of the war.⁴⁵ This amendment also introduced a new feature: it would continue to toll the statute of limitations until three years after the conclusion of the war.⁴⁶ As the WSLA neared its sunset, Congress opted to enact a permanent code provision implementing this tolling principle for all future wars.⁴⁷

In 2008, Senate Judiciary Committee Chairman Patrick Leahy revamped the WSLA, after decades of disuse, with the Wartime Enforcement of Fraud Act.⁴⁸ With the Amendment, Senator Leahy wished to ensure that the WSLA could apply in a contemporary national security context.⁴⁹ To achieve this goal, he structured three specific elements into the Amendment. First, the Amendment explicitly applied the WSLA to the conflicts in Iraq and Afghanistan—or any conflict for

⁴⁴ See An Act to Suspend Temporarily the Running of Statutes of Limitations Applicable to Certain Offenses, ch. 555, § 1, 56 Stat. 747, 747–48 (1942).

⁴⁵ See Surplus Property Act of 1944, ch. 479, § 28, 58 Stat. 765, 781 (1944) (codified at 50A U.S.C. §§ 1611–1646 (1946)).

⁴⁶ See *id.*

⁴⁷ See An Act to Revise, Codify, and Enact Into Positive Law, Title 18 of the United States Code, Entitled “Crimes and Criminal Procedure,” ch. 645, § 3287, 62 Stat. 683, 828 (1948) (codified as amended at 18 U.S.C. § 3287 (2006)) (“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 or any agency thereof in any manner, whether by conspiracy or not . . . shall be suspended until three years after the termination of hostilities as proclaimed by the President or by a concurrent resolution of Congress. Definitions of terms in Section 103 of Title 41 shall apply to similar terms used in this section.”).

⁴⁸ See S. 2892, 110th Cong. (2008). After the Amendment, the WSLA reads:

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 . . . shall be suspended until 5 years after the termination of hostilities as proclaimed by a Presidential proclamation, with notice to Congress, or by a concurrent resolution of Congress.

Definitions of terms in section 103 of Title 41 shall apply to similar terms used in this section. For purposes of applying such definitions in this section, the term ‘war’ includes a specific authorization for the use of the Armed Forces, as described in section 5(b) of the War Powers Resolution.

18 U.S.C. § 3287 (Supp. IV 2010) (footnote omitted) (citations omitted).

⁴⁹ See 154 CONG. REC. S3174–75 (daily ed. Apr. 18, 2008) (“Today we introduce the Wartime Enforcement of Fraud Act of 2008, which updates President Roosevelt’s law for our times. This will allow us better to protect American taxpayers from contracting fraud today, just as we did during World War II.”). In so doing, Senator Leahy implied an answer to an ongoing question. His legislation suggests that the WSLA did not apply to the conflicts in Iraq and Afghanistan prior to 2008. This implication notwithstanding, the intent of Congress when it standardized the WSLA in 1948 cannot be divined on the basis of post hoc legislation passed by Congress in 2008. The question of the WSLA’s application to the undeclared wars prior to 2008 therefore remains unresolved. See discussion *infra* Part III.B.

which Congress authorized the use of force.⁵⁰ Second, the bill extended from three to five years the period after war during which the statute of limitations remains paused.⁵¹ Finally, the legislation required that, to end hostilities, the President may not simply proclaim an end. Rather, the Amendment specifically requires that the termination of hostilities “be proclaimed by a Presidential proclamation,”—an awkwardly redundant turn of phrase—and accompanied by notice to Congress.⁵²

Why, after lying dormant throughout the Korean and Vietnam Wars, did the WSLA spring up again in 2008? Given the narrower scope of the current military conflicts⁵³ and the prodigious capacity of federal prosecutors, why did Senator Leahy feel compelled to expand a sovereign exemption developed to cope with the exigencies of global war?⁵⁴

The 2008 Amendment’s seemingly redundant third element suggests an underlying motive for its enactment. Senator Leahy argued that the original language of the WSLA permitted a president to informally proclaim that hostilities had ended. By requiring that the war’s end be “proclaimed by a Presidential proclamation, with notice to Congress,”⁵⁵ Senator Leahy argued that a president would be compelled to go beyond a “[s]ecret proclamation . . . or a self-serving ‘mission accomplished’ speech.”⁵⁶ By inserting the proclamation requirements, Senator Leahy emphasized that, all presidential publicity stunts to the contrary, the United States was still very much at war in 2008. In this way, Senator Leahy indicated that he wanted to give the Bush Administration a black eye, regardless of the substantive impact the Amendment might carry.

⁵⁰ See S. 2892 § 2(2).

⁵¹ See *id.* § 2(3).

⁵² See *id.* § 2(4).

⁵³ An important question for policymakers is whether a wartime tolling mechanism can apply at all in a context that some commentators have described as “perpetual war” or “eternal war.” See GORE VIDAL, *PERPETUAL WAR FOR PERPETUAL PEACE: HOW WE GOT TO BE SO HATED* 20 (2002); Robert Fisk, *Locked in an Orwellian Eternal War*, INDEP. (London), Feb. 18, 2001, at 1. Whether prudent or not, though, Congress has clearly decided that this tolling provision currently applies to the military conflicts in Afghanistan and Iraq.

⁵⁴ Cf. *Developments*, *supra* note 10, at 1252–53 (“In modern times there seems to be little justification for the sovereign exemption. . . . [T]he argument that the rigors of statutes of limitations should not be applied to overworked government officials is difficult to square with the universal limitations on the government’s taxing and penal functions, areas in which the burden of public law enforcement is particularly heavy.” (footnote omitted)).

⁵⁵ Wartime Enforcement of Fraud Act of 2008, S. 2892, 110th Cong. § 2(4) (2008).

⁵⁶ 154 CONG. REC. S3175 (daily ed. Apr. 18, 2008). Magnifying Senator Leahy’s point, the Court in *United States v. Proserpi*, 573 F. Supp. 2d 436, 455 (D. Mass. 2008), held that President Bush’s “Mission Accomplished” moment aboard the *U.S.S. Abraham Lincoln* constituted the termination of hostilities in Iraq so far as the WSLA was concerned.

Similar subtext came through in Senator Leahy's other speeches about the Amendment. He chastened the Administration for its "failure to take aggressive action to enforce and punish wartime fraud" and for implementing "'no-bid' and 'cost-plus' contracts . . . awarded with little, if any, oversight or accountability."⁵⁷ On the day the bill passed Congress, Senator Leahy let loose:

The failed legacy of the Bush [A]dministration is clearer today than ever before, as our Nation faces unprecedented crises . . . [including being] mired in Iraq, fighting a war that President Bush should never ha[ve] started, that continues to cost too many lives and billions of dollars each month, with no end in sight. As part of this legacy, the Bush [A]dministration has further failed to meet one of its most important obligations during wartime—to protect American taxpayers from losses due to fraud and corruption in war contracting.⁵⁸

Whereas legislators originally enacted the WSLA to accommodate the "necessities" of all-out war,⁵⁹ whatever policy objectives the 2008 Amendment nominally addressed, the bill seems to have been drafted, in large part, as a political exclamation point. As such, the bill missed the mark. It failed to answer critical operational questions, which will soon require judicial attention.

B. Resolving Initial Confusion About the Operation of § 3287

In the late 1940s and throughout the 1950s, courts addressed several questions that the WSLA's bare statutory language left unresolved. Among the most pressing disputes, disagreement sprang up over the scope of "fraud against the government" and the meaning of "running."

1. *Defining "Involving Fraud Against the United States"*

The WSLA's exclusive application to crimes of fraud against the government remains somewhat puzzling. When Congress expanded the statute of limitations for fraud after World War I, it acted in response to a specific request from the Department of Justice.⁶⁰ By contrast, Congress passed the WSLA in the midst of the war because the "law-enforcement branch of the Government [was] also busily engaged in its many duties, including the enforcement of the espionage,

⁵⁷ *Id.* at S3174.

⁵⁸ 154 CONG. REC. S9964 (daily ed. Sept. 27, 2008). The Senate passed the 2008 Amendment on September 27, 2008, as part of a larger omnibus bill: the Consolidated Security, Disaster Assistance, and Continuing Appropriations Act, 2009, H.R. 2638, 110th Cong. (2008). President Bush signed the Amendment into law on September 30, 2008.

⁵⁹ See *Bridges v. United States*, 346 U.S. 209, 219 n.18 (1953); Willard P. Norberg, *The Wartime Suspension of Limitations Act*, 3 STAN. L. REV. 440, 452 (1951).

⁶⁰ See *Bridges*, 346 U.S. at 218–19.

sabotage, and other laws”⁶¹ and because the massive military mobilization had thinned the government’s investigative personnel.⁶² These rationales would not seem to advocate a narrow extension of the statute of limitations; rather, they appear to urge a general suspension of limitations on all crimes.⁶³ Some lower courts agreed and gave the statute a broad gloss,⁶⁴ but in confining the WSLA to crimes of fraud against the government, Congress clearly intended to impose some limit. What were the contours of that limit?

In a foundational article on the WSLA, attorney Willard Norberg wrestled with defining what offenses “involve fraud.”⁶⁵ He dismissed any attempt to take a plain-meaning approach to the multifaceted concept of fraud and instead proposed four possible definitions from which courts could choose: (1) offenses involving pecuniary loss to the United States, such as tax fraud; (2) offenses with statutory definitions that include the word “fraud” but that cause no pecuniary loss, such as fraudulent petitions for naturalization; (3) offenses that include some form of the word “fraud” with the connotation of “false” or “fictitious,” such as false statements; and (4) offenses defined without any reference to the word “fraud” and from which no pecuniary loss results, such as perjury.⁶⁶ Norberg reasoned that the justifications for the WSLA supported a general suspension of the statute of limitations but that, unfortunately, Congress had not reached that far in its enactment. In the absence of clear legislative intent, Norberg called upon the courts to use his four alternatives to define “some other logical and workable test that can be understood and applied.”⁶⁷

Two years after Norberg’s article, the Supreme Court answered his call in *Bridges v. United States*. Writing for a four-to-three majority, Justice Harold Burton determined that the WSLA applied only to fraud “of a pecuniary nature or at least of a nature concerning property.”⁶⁸ He went on to emphasize that Congress limited the suspension statute to “offenses in which defrauding or attempting to defraud the United States is an *essential ingredient of the offense charged*.”⁶⁹ Tak-

61 *Id.* at 219 n.18.

62 *See* Norberg, *supra* note 59.

63 *See id.*

64 *See* *United States v. Gottfried*, 165 F.2d 360, 368 (2d Cir. 1948) (determining that Congress’s purpose for enacting the WSLA “was not to let crimes pass unpunished which had been committed in the hurly-burly of war”); *United States v. Choy Kum*, 91 F. Supp. 769, 771 (N.D. Cal. 1950) (concluding that Congress intended a broad application of fraud against the government, including “criminal acts of a domestic nature which were injurious to it as a sovereign”).

65 *See* Norberg, *supra* note 59 *passim*.

66 *Id.* at 442–43.

67 *Id.* at 452.

68 *Bridges v. United States*, 346 U.S. 209, 215 (1953).

69 *Id.* at 221.

ing these standards together, false statements do not trigger the WSLA,⁷⁰ nor does the mere existence of the word “fraud” in a crime’s description.⁷¹ In short, crimes that involve fraud relating to money or property—such as welfare fraud, bribery, counterfeiting, or embezzlement—will trigger the WSLA.

2. *The Meaning of “Running”*

If the statute of limitations is a thicket of legal questions,⁷² the terminology associated with it only adds to the tangle. Ambiguity surrounding the term “run” provides a prime example. To “run” connotes a termination but also a process of continuation—the process has “run its course” versus the “river runs through it.” The 1948 language of the WSLA stated that “the running of any statute of limitations . . . shall be suspended until three years after the termination of hostilities.”⁷³ In the years following the WSLA’s enactment, courts and lawmakers struggled with whether they should interpret “running” to mean “concluding” or “continuing.”

Facing this question in *United States v. Klinger*, Judge Learned Hand noted that “the word, ‘running,’ is a colloquial term, not a ‘word of art,’ . . . and it does not appear to us that in this setting it so inexorably excludes the meaning, ‘bar,’ that it will not bear that construction, if only so will the purpose of the Act as a whole be realized, and consequences avoided that Congress certainly would not have tolerated.”⁷⁴ Put another way, Judge Hand interpreted the statute to mean that the “closing” or “ending” of the statute of limitations would not occur until three years after the war. To provide a three-year tolling period *plus* the three-year limitations period for fraud would, as Judge Hand explained, “more than double[] the existing period of limitation . . . , a situation . . . that Congress would [not] have countenanced.”⁷⁵

⁷⁰ See *id.* at 222.

⁷¹ See *id.* at 223.

⁷² See Callahan, *supra* note 4.

⁷³ An Act to Revise, Codify, and Enact Into Positive Law, Title 18 of the United States Code, Entitled “Crimes and Criminal Procedure,” ch. 645, § 3287, 62 Stat. 683, 828 (1948) (codified as amended at 18 U.S.C. § 3287 (2006)).

⁷⁴ 199 F.2d 645, 646 (1952), *aff’d per curiam*, 345 U.S. 979 (1953). Judge Hand’s analysis directly contradicted the accepted interpretation of the term “running” and what he admitted to be the literal meaning of the statutory language. *Id.* Judge Hand did not favor literal readings, however, as demonstrated in his famous explanation of statutory interpretation: “There is no surer way to misread any document than to read it literally As nearly as we can, we must put ourselves in the place of those who uttered the words, and try to divine how they would have dealt with the unforeseen situation; and, although their words are by far the most decisive evidence of what they would have done, they are by no means final.” *Guiseppi v. Walling*, 144 F.2d 608, 624 (2d Cir. 1944) (Hand, J., concurring).

⁷⁵ *Klinger*, 199 F.2d at 646.

Quite to the contrary, writing for a five-justice majority in *United States v. Grainger*, Justice Burton overruled Judge Hand's reading of the statute the following year. "There is no doubt as to the meaning of the word 'running,'" he explained.⁷⁶ The statute of limitations clock resumes ticking "only three [(now five)] years *after* the date of the termination of hostilities as proclaimed by the President or Congress."⁷⁷ A strong dissent countered that the Court should adopt Judge Hand's interpretation of the statute in *Klinger*.⁷⁸ Nevertheless, the "termination of hostilities + 5 years" interpretation is the law today.⁷⁹

III

TRIGGERING AND DEACTIVATING § 3287

Having determined how the WSLA operates and to which crimes it applies, we now turn to a more basic question: when will it switch on and switch off? To use the provision, a prosecutor must show that "the United States is at war or Congress has enacted a specific authorization for the use of the Armed Forces."⁸⁰ Although courts have resolved how the WSLA affects crimes committed shortly before or after a time of war, what precisely constitutes war remains unclear.

A. Treatment of Fraud Within Close Temporal Proximity to a Time of War

The statute's bare language fails to specify the treatment of fraud committed shortly before or after a time of war. For crimes committed before the war but for which the limitations window is still open

⁷⁶ *United States v. Grainger*, 346 U.S. 235, 245 (1953).

⁷⁷ *Id.* at 246.

⁷⁸ *Id.* at 248.

⁷⁹ In light of the tenuous majority in *Grainger*—as well as changes to the statute and to the composition of the Court that would interpret it—some uncertainty may surround the "termination of hostilities + 5 years" interpretation. Moreover, a starkly different context framed the statute in 1953, when the Court decided *Grainger*. The Korean War weighed on government resources while prosecutors were still addressing crimes from World War II; the Vinson Court may have wished to read extra lenience into the statute to aid prosecutors overwhelmed by back-to-back wars with back-to-back procurement problems. A contemporary Court, facing an already long tolling period, may be less inclined to interpret the statute in a manner that gives prosecutors a five-year cushion after the war in addition to the time remaining on the underlying limitations clock. In addition, Senator Leahy implied a reading of the statute that stands closer to Judge Hand's interpretation. Shortly after introducing the 2008 Amendment, he explained that "this bill would just toll the running of the statute during the conflict itself and not a day longer." 154 CONG. REC. S3175 (daily ed. Apr. 18, 2008). Regardless of these factors, given the identical statutory phrasing at issue in *Grainger* and at issue today, the Court would not likely change its gloss on the WSLA. *See, e.g.*, *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 854–55 (1992) (discussing the importance of precedent in reexamining prior holdings).

⁸⁰ 18 U.S.C. § 3287 (Supp. IV 2010).

when the war begins, will the WSLA apply? That is, if Blackstone committed a crime on January 1, 2020, and a war began on July 1, 2022, would the statute of limitations on this crime pause pursuant to § 3287, or does the WSLA affect only crimes committed during the war? In *Grainger*, the Supreme Court chose the former course, explaining, “For those offenses which occurred before [the war commenced], Congress’ intention was to give the Department three years after the cessation of hostilities plus whatever portion of the regular three-year limitations’ period had not yet run”⁸¹ Consequently, any criminal fraud against the government with time remaining on its limitations clock falls under the WSLA’s tolling provision.⁸²

On the other end of the war, a similar question arises. After its 2008 Amendment, the WSLA provides a full five years after the war before the limitations clock begins to tick again,⁸³ but will the WSLA toll the statute of limitations for an act of fraud committed during the post-war buffer period? For example, if a war ended on December 31, 2010, would a crime of fraud committed on June 1, 2012, fall within the WSLA’s scope? Prosecutors in the post–World War II era argued that certain types of fraud covered by the statute—in particular, fraud relating to surplus military property—would occur after hostilities ceased. Accordingly, the WSLA should cover them.⁸⁴ The Court disagreed in *United States v. Smith*, holding that the WSLA “is inapplicable to crimes committed after the date of termination of hostilities.”⁸⁵ Justice William Douglas reasoned that Congress intended to alleviate the fear that “law-enforcement officers would be so preoccupied with prosecution of the war effort that the crimes of fraud perpetrated against the United States would be forgotten until it was too late.”⁸⁶ Only the “frenzied activities” of war justify extending the limitations period; “when the pressure [is] off, the time [begins] to run again.”⁸⁷

B. Activating the WSLA

Although courts have provided an answer as to how they will apply the WSLA to crimes committed shortly before or after a war, this knowledge is not much without knowing what constitutes “war.” Identifying a war may be a simple task in the case of an Article I declara-

⁸¹ *Grainger*, 346 U.S. at 247 (quoting *United States v. Smith*, 342 U.S. 225, 231 (1952) (Clark, J., concurring)).

⁸² From our example, Blackstone would have two-and-a-half years remaining on his statute of limitations clock after the WSLA ceased to operate.

⁸³ See Consolidated Security, Disaster Assistance, and Continuing Appropriations Act, 2009, Pub. L. No. 110-329, § 8117(3), 122 Stat. 3574, 3647 (2008) (amending 18 U.S.C. § 3287 “by striking ‘three years’ and inserting ‘5 years’”).

⁸⁴ See Brief for Petitioner at 27–28, *Smith*, 342 U.S. 225 (Nos. 20, 162).

⁸⁵ See 342 U.S. at 228.

⁸⁶ *Id.* at 229.

⁸⁷ *Id.*

tion, but it is less clear how the WSLA, in its original form, interacts with congressional authorizations for the use of force, like those involved in the Persian Gulf War or the more recent wars in Afghanistan and Iraq. Although the 2008 Amendment has partly resolved this question, the Amendment does not address thousands of crimes committed before 2008 to which the original WSLA language still applies. For these crimes, courts must interpret both versions of the WSLA to determine whether the statute of limitations has been tolled.⁸⁸

1. *Prior to the 2008 Amendment*

From the end of the World War II era to the enactment of the 2008 Amendment, only two cases implicated the WSLA. These cases stand in direct conflict.

In *United States v. Shelton*, prosecutors charged the defendant with three counts of fraudulent activity occurring as late as May 7, 1987.⁸⁹ The grand jury indictment issued on June 16, 1992—more than a month after the five-year limitations window closed. Although the prosecutor asserted that the congressionally authorized conflict in the Persian Gulf in 1991 tolled the statute of limitations, the court was skeptical.

The U.S. District Court for the Western District of Texas doubted whether the impact of the conflict in the Persian Gulf equaled World War II's "extremely broad and intrusive effect into the entire country," for which Congress enacted the WSLA.⁹⁰ Moreover, the prosecution's argument suffered inasmuch as the government had not utilized the WSLA during other post-World War II conflicts that were far more intrusive into prosecutorial operations than the conflict in the Persian Gulf. Ultimately, the Court concluded that, for the WSLA to take effect, "Congress should have formally recognized [the] conflict as a war. The Judicial Branch of the United States has no constitutional power to declare a war."⁹¹

More than a decade later, another prosecutor attempted to utilize the WSLA in reference to the Authorizations for the Use of Military Force in Afghanistan (AUMFA) and Iraq (AUMFI).⁹² In *United*

⁸⁸ Another difficult interpretive question could arise if Congress declared that a state of war *had existed*, as it did on December 8, 1941. In such a case, would the WSLA apply retroactively to the moment when the state of war first existed—i.e., the December 7 attack—or would it only apply prospectively from the moment of congressional action? The Supreme Court did not have to address this issue in the World War II era because it held that the tolling mechanism applied beginning with the enactment of the WSLA in 1942. *See id.* at 226, 231. Neither have the modern cases addressed this potentiality.

⁸⁹ 816 F. Supp. 1132, 1134 (W.D. Tex. 1993).

⁹⁰ *Id.* at 1134–35.

⁹¹ *Id.* at 1135.

⁹² Congress enacted the AUMFA on September 18, 2001. Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001) (codified at 50 U.S.C. § 1541

States v. Prosperi, the prosecutor charged the defendants with both fraud on a government contract and mail fraud.⁹³ The indictment issued on May 3, 2006—more than five years after the most recent offense—placing the alleged crimes outside the five-year statute of limitations unless the WSLA paused the limitations clock.⁹⁴ The U.S. District Court for the District of Massachusetts criticized the *Shelton* court’s rigid reading of § 3287, questioning why a small declared war such as the Mexican-American War would toll limitations but a large undeclared war like the Korean conflict would not.⁹⁵ The Court reasoned that if “Congress intended the phrase ‘at war’ to serve as a limitation, it would have written the modifier ‘declared’ into the Act as it has in other statutes.”⁹⁶

As an alternative, the *Prosperi* court derived from ancient common law the concept of an “imperfect war,” which, although undeclared, nevertheless consists of “indicia of war” sufficient to classify a conflict as a war.⁹⁷ *Prosperi* suggests four criteria: “(1) the extent of the [congressional] authorization . . . ; (2) whether the conflict [would be] deemed a ‘war’ under accepted definitions of the term and the rules of international law; (3) the size and scope of the conflict (including the cost of the related procurement effort); and (4) the diversion of resources that might have been expended on investigating frauds against the government.”⁹⁸ In applying these criteria to the situation at hand, the Court pointed to the congressional authorizations of force to satisfy the first point. To meet the second criterion, the Court asserted that the conflicts in Iraq and Afghanistan would be characterized as wars by most common definitions of “war.” Finally, the Court argued that the number of servicemembers stationed overseas, the vast sums of money expended, and the dramatic overhaul of civilian law enforcement efforts after September 11, 2001, all worked in unison to satisfy the third and fourth requirements of the test.⁹⁹ Rejecting the *Shelton* court’s conclusions, the *Prosperi* court concluded that a state of war had existed such that the WSLA applied and the indictment would stand.¹⁰⁰

(2006)). The AUMFI followed on October 16, 2002. Authorization for Use of Military Force Against Iraq Resolution of 2002, Pub. L. No. 107-243, 116 Stat. 1498 (2002) (codified at 50 U.S.C. § 1541 (2006)).

⁹³ 573 F. Supp. 2d 436, 438–39 (D. Mass. 2008).

⁹⁴ *Id.* at 439.

⁹⁵ *See id.* at 445–46.

⁹⁶ *Id.* at 446.

⁹⁷ *See id.* (citing *Bas v. Tingy*, 4 U.S. (4 Dall.) 37, 40–41 (1800)).

⁹⁸ *Id.* at 449.

⁹⁹ *See id.* at 450–54.

¹⁰⁰ *Id.* at 455–56.

2. *After the 2008 Amendment*

The 2008 Amendment arose, at least in part, to resolve the main question that *Shelton* and *Prosperi* left open: What is war? Like the *Prosperi* court, members of Congress sought to apply the WSLA to the conflicts in Afghanistan and Iraq.¹⁰¹ As a result, after 2008, two different types of war trigger the WSLA.

The first is the traditional declaration of war by Congress, as conceived in Article I, Section 8 of the U.S. Constitution.¹⁰² The second involves a specific authorization for the use of armed force as described in 50 U.S.C. § 1544(b) (2006), better known as the War Powers Resolution. The War Powers Resolution provides three ways by which the President may introduce the U.S. military into hostile action: a formal declaration of war, a national emergency arising from an attack on the United States, or specific statutory authorization passed by both Houses of Congress.¹⁰³ By reference to the War Powers Resolution, the WSLA implicates this third method only.¹⁰⁴ As a result, the congressional authorizations for the use of force in Afghanistan and in Iraq fall squarely within the amended WSLA.

3. *Retroactivity Problems*

The 2008 Amendment clarified what will trigger the WSLA, but its retroactive reach is limited by the Constitution, meaning that it cannot provide answers to events that took place before its enactment. In *Stogner v. California*, the Supreme Court held that the U.S. Constitution's Ex Post Facto Clause does not permit limitations amendments to operate retroactively once the limitations period in question has closed.¹⁰⁵ Consequently, the pre-2008 reading of the WSLA still af-

¹⁰¹ See 154 CONG. REC. S9964–65 (daily ed. Sept. 27, 2008) (statement of Sen. Leahy) (“This bill simply amends current law to make clear that extending the statute of limitations during wartime applies to the wars in Iraq and Afghanistan.”); 154 CONG. REC. S8830 (daily ed. Sept. 10, 2008) (statement of Sen. Levin) (“[T]he United States is now engaged in combat operations in Iraq and Afghanistan without a formal declaration of war. The amendment takes the appropriate step of modifying the statute of limitations to cases in which the use of force has been authorized without a formal declaration of war.”); 154 CONG. REC. S3174–75 (daily ed. Apr. 18, 2008) (statement of Sen. Leahy) (expressing similar sentiments).

¹⁰² Congress has declared war only five times in U.S. history: the War of 1812, the Mexican-American War, the Spanish-American War, World War I, and World War II. See RICHARD F. GRIMMETT, CONG. RESEARCH SERV., R41677, INSTANCES OF USE OF UNITED STATES ARMED FORCES ABROAD, 1798-2010, at 2–31 (2011) (listing all notable military engagements from 1798 to 2010).

¹⁰³ 50 U.S.C. § 1541(c) (2006).

¹⁰⁴ To view this reference in the statute, see 18 U.S.C. § 3287 (Supp. IV 2010), which concludes by stating that “the term ‘war’ includes a specific authorization for the use of the Armed Forces, as described in section 5(b) of the War Powers Resolution (50 U.S.C. 1544(b)).”

¹⁰⁵ See 539 U.S. 607, 609–10 (2003).

fects the limitations period for any crime committed more than five years before the enactment date of the 2008 Amendment. For example, the statute of limitations for a crime committed in November of 2001 would have expired in November 2006 based on *Shelton*, and the Ex Post Facto Clause would prohibit the 2008 Amendment from resurrecting that stale crime. On the other hand, the statute of limitations for the same crime under *Prosperi* would have been tolled by the AUMFA and the AUMFI. As a result, the limitations clock would not have expired before the 2008 Amendment went into effect, meaning that the Amendment would apply and the statute of limitations would remain tolled today for that 2001 crime. In this way, any WSLA-eligible crime committed between September 1996 and September 2003—likely more than 15,000 crimes¹⁰⁶—will require a court to decide between *Prosperi* and *Shelton* or to announce a different standard for determining how the WSLA applied to the wars in Afghanistan and Iraq before 2008.

Two 2010 cases demonstrate how the pre-2008 WSLA remains relevant. In the July 2010 decision in *United States v. Western Titanium*, the U.S. District Court for the Southern District of California confronted a December 2008 indictment that contained four charges of fraud committed against the government in 2002.¹⁰⁷ After carefully considering the *Prosperi* decision, the Court rejected it, stating, “[w]hatever Congress intended by the phrase ‘at war’ in the WSLA, it cannot have meant a definition not capable of determination until a court conducts a subjective analysis years after the commission of an offense.”¹⁰⁸ The Court further explained that determining a limitations question using a loose post hoc test would be “completely at odds with the objectives of finality, notice, and prompt investigation sought to be served by a criminal statute of limitations.”¹⁰⁹ Consequently, the Court determined that the statute of limitations for those alleged crimes closed in 2007, a year before the 2008 Amendment expanded the WSLA’s scope. Accordingly, the Court dismissed the case.

¹⁰⁶ See BARNETT, *supra* note 3, at 5 (identifying roughly 7,000 crimes likely eligible for WSLA treatment in a three-year period).

¹⁰⁷ No. 08-CR-4229-JLS, 2010 U.S. Dist. LEXIS 65786, at *2–4 (S.D. Cal. July 1, 2010). The indictment in this case issued after the 2008 Amendment. More recently, the Court in *United States v. Anghaie*, No. 1:09-CR-37-SPM/AK, 2011 U.S. Dist. LEXIS 23863, at *5–7 (N.D. Fla. Feb. 21, 2011), followed the reasoning of *Western Titanium*. See also *United States ex rel. Carter v. Halliburton Co.*, No. 1:11cv602 (JCC/JFA), 2011 U.S. Dist. LEXIS 145236, at *27–29 (E.D. Va. Dec. 12, 2011) (acknowledging the ongoing dispute as to whether the pre-Amendment WSLA applied to the AUMFA and AUMFI but declining to decide the issue).

¹⁰⁸ *W. Titanium*, 2010 U.S. Dist. LEXIS 65786, at *9.

¹⁰⁹ *Id.* at *10.

In August 2010, the U.S. District Court for the Southern District of Mississippi held in the alternative, determining that *Prosperi* applies. The defendant in *United States v. Pearson* faced two charges of fraud against the government for acts committed no later than 2002.¹¹⁰ Rather than building its own analysis, the Court borrowed the four-part test established in *Prosperi* and adopted that court's conclusion.¹¹¹ *Western Titanium* and *Pearson* illustrate the split over the definition of "at war" that persists even after the 2008 Amendment and that will persist until appellate courts begin to nail down just how the pre-2008 WSLA applies to the AUMFA and AUMFI.

C. Deactivating the WSLA: ". . . until five years after the termination of hostilities . . ."

Even if we manage to determine what constitutes "at war" under the WSLA, the question of when that war ends for purposes of the statute remains unclear. And as with the activation of the WSLA, so too the date of the charged crime may affect the WSLA's deactivation.

1. *Pre-2008 Language*

Under the WSLA's pre-2008 language, the statute of limitations stayed frozen until three years after the termination of hostilities as proclaimed by the President or resolved by both chambers of Congress. The old language left some ambiguity regarding what steps constitute a sufficient termination of hostilities and what form a presidential proclamation must take. Consider, for example, the end of World War II. When did the war end? Was it the German unconditional surrender on May 8, 1945 that ended the war? The unconditional surrender by the Japanese on September 2, 1945? President Truman's proclamation in December 1946 of a "termination of hostilities" accompanied by a statement that "a state of war still exists"? The 1947 joint resolution of Congress that terminated most of the Articles of War? Congress's 1951 resolution terminating the war with Germany? Or President Truman's 1952 proclamation terminating the war with Japan? In total, six events, spanning seven years, might qualify as the end of the war.¹¹²

Before 2008, the WSLA stated that the limitations clock would start ticking again three years after the "termination of hostilities." Although World War II's fighting ceased in September 1945 and affirmations in 1947, 1951, and 1952 might be deemed in a general sense to have ended hostilities, the Supreme Court determined that the President's 1946 proclamation terminated hostilities for the purpose

¹¹⁰ No. 2:09cr43-KS-MTP, 2010 U.S. Dist. LEXIS 79242, at *2 (S.D. Miss. Aug 4, 2010).

¹¹¹ See *id.* at *4.

¹¹² See *Lee v. Madigan*, 358 U.S. 228, 230 (1959).

of the WSLA, even though that proclamation recognized an ongoing state of war.¹¹³

A half-century later, when the *Prosperi* court tried to determine when the hostilities in Iraq and Afghanistan had terminated, it could not point to any statement as clear as President Truman's "termination of hostilities." Instead, the Court asserted that modern warfare did not conclude with peace treaties or formal proclamations but with "diplomatic . . . recognition" and informal "pronouncement[s]."¹¹⁴ Thus, the Court determined that, for the AUMFA, the WSLA terminated when the Karzai Government took control of Afghanistan in December 2001, and for the AUMFI, the WSLA terminated when President Bush proclaimed "Mission Accomplished" from the deck of the *U.S.S. Abraham Lincoln* on May 1, 2003.¹¹⁵ Consequently, under the *Prosperi* analysis, although the conflicts in Iraq and Afghanistan tolled the limitations period, the limitations clock started ticking again on May 2, 2006.

On the facts, this conclusion is absurd. More problematic, it runs against precedent. The Supreme Court noted in 2004 that the hostilities in Afghanistan had not ended. Central to its holding in *Hamdi v. Rumsfeld*, the Court observed, "[a]ctive combat operations against Taliban fighters apparently are ongoing in Afghanistan."¹¹⁶ As a result, even if courts follow *Prosperi's* four-point test for determining whether a war has started, they cannot well follow its method for determining whether hostilities have ended.

2. *Post-2008 Language*

The 2008 Amendment goes halfway toward answering end-date questions. Obviously, Congress passed the Amendment in part because it determined that the conflicts in Afghanistan and Iraq were "ongoing."¹¹⁷ For any crimes subject to the Amendment, then, the tolling period has not ended. The bill's sponsor also emphasized that the bill would require either a congressional resolution or a formal proclamation by the President, with notice to Congress, in order to terminate hostilities.¹¹⁸ Nevertheless, even this new requirement may not provide a satisfying end-date for the purpose of deactivating the WSLA. The statute requires the courts to look to Congress or the President for a resolution or proclamation; the courts may not con-

¹¹³ See *United States v. Smith*, 342 U.S. 225, 227 (1952).

¹¹⁴ *United States v. Prosperi*, 573 F. Supp. 2d 436, 454 (D. Mass. 2008).

¹¹⁵ See *id.* at 455.

¹¹⁶ 542 U.S. 507, 521 (2004).

¹¹⁷ 154 CONG. REC. S3174-75 (daily ed. Apr. 18, 2008) (statement of Sen. Leahy).

¹¹⁸ See *id.* at S3175.

sider the reality of the military situation.¹¹⁹ Thus, the political branches control the WSLA's off-switch. In this way, shifting political considerations—rather than prosecutorial necessity—will likely affect its operation. This political skew is the practical consequence of Senator Leahy's focus on exploiting President Bush's vulnerabilities rather than on producing clear, constructive policy.¹²⁰

IV

A CONSISTENT INTERPRETATION OF § 3287

In view of these unresolved issues of application, courts need to answer three questions. First, for acts of fraud committed between September 18, 1996, and September 27, 2003,¹²¹ does *Prosperi's* or *Shelton's* trigger analysis apply, or does some other standard apply instead? Second, if *Prosperi* applies, does its end-date standard apply, or do *Hamdi* and military realities foreclose that reading for cases that fall in the gap prior to the 2008 Amendment? Finally, if a crime falls under the 2008 Amendment—either because its limitation had not closed by September 27, 2008, or it was committed after that date—what kind of presidential proclamation will end the war?¹²² The following three figures illustrate how a court's method of answering these questions can materially impact the length of time that a would-be defendant remains subject to criminal liability.

¹¹⁹ See Sarah E. Barnes, Comment, *Categorizing Conflict in the Wartime Enforcement of Frauds Act: When Are We Really at War?*, 59 DEPAUL L. REV. 979, 1009 (2010) (“[T]here is no way to guarantee that even formal proclamations would be free of political motivation or would better reflect when hostilities end. . . . [After President Truman terminated hostilities], questions arose as to whether the date of the proclamation was appropriate for the purposes of the Suspension Act. In *United States v. Smith*, the concurrence took issue with the fact that the proclamation was made on December 31, 1946, even though ‘all war procurement stopped [and] contracts were canceled’ ‘immediately after V-J day’ . . . sixteen months earlier.” (footnote omitted)).

¹²⁰ See *supra* notes 48–54 and accompanying text.

¹²¹ The 1996 date is five years before the AUMFA, which is the earliest date that could trigger the WSLA. The 2003 date is five years before Congress passed the Amendment to the WSLA, after which any relevant crime will automatically fall solely under the Amendment's provisions.

¹²² The ambiguity seems limited only to a situation in which the President announces the end of hostilities because, presumably, courts will have no difficulty determining the end of hostilities if Congress revokes the AUMFA or declares by joint resolution an end to hostilities.

FIGURE 1: A 1997 CRIME, USING *SHELTON* TO DETERMINE WHETHER THE WSLA APPLIES.

1997	2001	2002
Defendant commits an act of fraud.	AUMFA takes effect but does not trigger WSLA.	Statute of limitations expires for this crime.

FIGURE 2: A 1997 CRIME, USING *PROSPERI* TO DETERMINE BOTH WHETHER THE WSLA APPLIES AND WHEN HOSTILITIES END.

1997	2001	2003	2006	2007
Defendant commits an act of fraud.	The AUMFA takes effect and triggers WSLA; hostilities ceased later that year.	The AUMFI takes effect and retriggers WSLA; hostilities cease later that year, which starts the three-year buffer period.	The three-year buffer period ends; the statute of limitations clock begins to tick again.	The statute of limitations expires for this crime.

FIGURE 3. A 1997 CRIME, USING *PROSPERI* TO DETERMINE WHETHER THE WSLA APPLIES AND *HAMDI* TO DETERMINE WHEN HOSTILITIES END.

1997	2001	2003	2010–2011	2014	2019	2020
Defendant commits an act of fraud.	The AUMFA takes effect and triggers WSLA.	The AUMFI takes effect and retriggers WSLA.	Hostilities in Iraq terminate and combat troops depart.	Hostilities in Afghanistan terminate and combat troops depart; the five-year buffer begins.	The five-year buffer period ends; the statute of limitations clock begins to tick again.	The statute of limitations expires.

A. *Prospери* versus *Shelton*

To determine whether *Prospери* or *Shelton* applies, criminal courts should look to canons of construction. The Supreme Court has held that courts should construe statutes of limitations liberally in favor of defendants: “[W]hen choice has to be made between two readings of what conduct Congress has made a crime, it is appropriate, before we choose the harsher alternative, to require that Congress should have spoken in language that is clear and definite. We should not derive criminal outlawry from some ambiguous implication.”¹²³ If one plausible interpretation favors a defendant and another goes against the defendant’s interest, courts should take the former approach. As a corollary, therefore, courts should construe tolling mechanisms nar-

¹²³ United States v. Universal C.I.T. Credit Corp., 344 U.S. 218, 221–22 (1952).

rowly.¹²⁴ Using this standard to decide between *Prosperi* and *Shelton*, the *Shelton* holding should win out.

The purposes behind statutes of limitations shed additional light on which reading should prevail. As discussed above in Part I.A, stability and certainty are central rationales for limitations, and, as demonstrated in Figure 3 above, a broad reading of the WSLA could place potential defendants in a state of perpetual limbo for decades. Moreover, assuming that statutes of limitations exist to ensure the use of fresh evidence, the *Prosperi* court's reading of the WSLA could compromise this aim by bringing a citizen into court to defend a 1996 crime in 2019 or later, depending on the end of the war in Afghanistan.¹²⁵ Likewise, if statutes of limitations should serve to focus prosecutors, then an interpretation of the WSLA that would give prosecutors two decades to prosecute fraud has no justification. And, although the law has developed such that the need for justice in the face of grave crimes will often override the purpose for which limitations exist, pecuniary fraud against the government hardly falls into the same category as capital offenses or heinous acts of terrorism or kidnapping.¹²⁶ In sum, applying *Prosperi* would ignore the rationales that, over centuries of legal development, gave rise to statutes of limitations.

Taking too broad an interpretation of the WSLA also poses constitutional problems. Based on the scenario in Figure 3, the *Prosperi* analysis could result in a criminal defendant facing charges for a relatively minor crime more than twenty years after its commission. This long delay could violate the Fifth Amendment right to due process.¹²⁷ Although statutes of limitations serve typically as “the primary guarantee against bringing overly stale criminal charges,”¹²⁸ they do not “fully define the [defendants’] rights with respect to the events occurring prior to indictment.”¹²⁹ The Due Process Clause also serves to protect defendants against oppressive delay that would cause them ac-

¹²⁴ See *United States v. Marion*, 404 U.S. 307, 322 n.14 (1971); *Bridges v. United States*, 346 U.S. 209, 215–16 (1953).

¹²⁵ One might argue that, although theoretically possible, prosecutors would not likely wish to bring charges in relation to such an ancient crime. To the contrary, the frequent use of the WSLA throughout the 1950s—right up until the WSLA's tolling mechanism ceased to apply—suggests that prosecutors are not shy about using the tools at their disposal to secure a conviction, regardless of the crime's age.

¹²⁶ See DOYLE, *supra* note 1, at 19–22 (listing these three categories and certain sexual offenses as the only crimes for which federal law provides no limitation on prosecution).

¹²⁷ See *United States v. Lovasco*, 431 U.S. 783, 789 (1977); *Marion*, 404 U.S. at 322, 324. The Court held in *Marion* and affirmed in *Lovasco*, however, that the Speedy Trial Clause does not apply to pre-indictment delays. *Lovasco*, 431 U.S. at 788–89; *Marion*, 404 U.S. at 320.

¹²⁸ *Marion*, 404 U.S. at 322 (quoting *United States v. Ewell*, 383 U.S. 116, 122 (1966)).

¹²⁹ *Id.* at 324.

tual prejudice, and an effectively limitless limitation under the WSLA could run afoul of that provision.¹³⁰

Finally, several practical factors weigh against the *Prosperi* decision. First, the principle of desuetude holds that a long-disused legal provision will lose legal effect.¹³¹ The WSLA sat on prosecutors' shelves through the Korean War, the Vietnam War, and several smaller authorizations of force before the government dusted it off during the Persian Gulf War in *Shelton*.¹³² As a matter of fairness, that the government failed to utilize the WSLA during non-declared wars should serve to define the scope of the statute's use. Moreover, the Eightieth Congress, which passed the WSLA in 1948, gave no indication that it intended the law to apply to the kind of military activity the United States has conducted in the 1990s and 2000s.¹³³ The Persian Gulf War and the military activity in Afghanistan and Iraq did not represent the same kind of total war for which the statute was originally enacted,¹³⁴ nor did they represent the kind of "frenzied activities" to which the Supreme Court limited the WSLA's reach.¹³⁵ The wars did not affect the U.S. civilian population in the same way that World War II did by requiring meaningful contribution from every citizen.¹³⁶ For crimes that implicate the pre-2008 statute, it would be inequitable to permit the government to apply the WSLA to the AUMFA and AUMFI, which are qualitatively indistinguishable from the wars in Korea, Vietnam and Kuwait—wars in which the WSLA was not applied. Moreover, by applying the WSLA to a conflict that bears no practical resemblance to the war for which it was originally enacted, courts would stretch the tolling mechanism beyond its limits.

The *Shelton* decision comports with the purposes of the WSLA and with the path of statutes-of-limitations jurisprudence. Courts should follow that decision rather than *Prosperi* when determining the WSLA's applicability to crimes committed before September 2003.

¹³⁰ See *Lovasco*, 431 U.S. at 789.

¹³¹ BLACK'S LAW DICTIONARY 513 (9th ed. 2009) ("The doctrine holding that if a statute or treaty is left unenforced long enough, the courts will no longer regard it as having any legal effect even though it has not been repealed.").

¹³² 816 F. Supp. 1132, 1134 (W.D. Tex. 1993).

¹³³ In *United States v. Prosperi*, 573 F. Supp. 2d 436, 444–45 (D. Mass. 2008), the Court confronted whether or not to follow this line of argument and concluded that, notwithstanding the doctrine's implied use in *Shelton*, 816 F. Supp. at 1135, it should not apply to the WSLA.

¹³⁴ See *Penetrable Barrier*, *supra* note 10, at 648.

¹³⁵ See *United States v. Smith*, 342 U.S. 225, 229 (1952).

¹³⁶ See Rick Hampson, *Effects of Iraq War Vary Dramatically in USA*, USA TODAY, Mar. 16, 2006, http://www.usatoday.com/news/world/iraq/2006-03-16-iraq-war-anniversary-effects_x.htm.

B. *Hamdi* Versus *Prosperi*

Nevertheless, if courts do determine that the AUMFA and AUMFI triggered WSLA before the 2008 Amendment, *Prosperi*'s standard for the conflicts' end-dates should not apply. In *Hamdi*, the Supreme Court's finding that the conflicts were ongoing was central to the holding of the case,¹³⁷ directly undermining the reasoning in *Prosperi*. *Prosperi* should yield to binding case law and to military realities.

Other factors weigh against the *Prosperi* end-date analysis. First, the AUMFA authorized the use of force not against Afghanistan but against "nations, organizations, or persons" that contributed to the attacks on the United States on September 11, 2001.¹³⁸ This broad language—clearly intended by Congress to entail more than the Afghan state—did not lose effect when the Karzai Government took charge, and it contains no sunset provision so long as the President requires ongoing authority to use force in order to prevent subsequent terrorist attacks.

Second, after the end-dates that *Prosperi* suggests, the conflicts in Iraq and Afghanistan did not wind down; they escalated. Through fiscal year (FY) 2002, the United States spent \$20.8 billion on military operations in Afghanistan. Then from FY 2003 to FY 2010, the United States spent nearly \$300 billion pursuant to the AUMFA. Likewise, through FY 2003, the United States spent \$53 billion for the fight in Iraq. Then from FY 2004 to FY 2010, that number jumped to nearly \$700 billion.¹³⁹ And, although more than 200 troops lost their lives in Iraq and Afghanistan between September 2001 and the end of April 2003,¹⁴⁰ far more servicemembers lost their lives in each year after 2003—indeed, in each year from 2004 to 2007, nearly 1,000 soldiers, seamen, airmen, and marines gave their best and final effort for their country.¹⁴¹ Hostilities did not cease in 2001 or 2003; they continued at great cost. The *Prosperi* analysis ignores this reality.

C. When Will Hostilities End?

Crimes committed after September 2003 do not suffer from the interpretive wrangling between *Prosperi*, *Shelton*, and *Hamdi* because these crimes fall under the 2008 Amendment. But, under the Amendment, when will hostilities end? President Barack Obama declared an

¹³⁷ See *Hamdi v. Rumsfeld*, 542 U.S. 507, 521 (2004).

¹³⁸ Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001) (codified at 50 U.S.C. § 1541 (2006)).

¹³⁹ See AMY BELASCO, CONG. RESEARCH SERV., RL33110, THE COST OF IRAQ, AFGHANISTAN, AND OTHER GLOBAL WAR ON TERROR OPERATIONS SINCE 9/11, at 3 (2010).

¹⁴⁰ See *Faces of the Fallen*, WASH. POST, <http://projects.washingtonpost.com/fallen/dates/> (last visited Aug. 5, 2012).

¹⁴¹ See *id.*

end to combat operations in Iraq on August 31, 2010.¹⁴² More than a year later, on December 18, 2011, the last combat troops departed Iraq.¹⁴³ It is unclear which, if either, of these equates to President Harry S. Truman's declaration of the end of hostilities in 1946.¹⁴⁴ Because the war in Afghanistan continues, however, the end-date of the Iraq war is less salient to the WSLA.

So what about Afghanistan? The White House has indicated that the combat mission will continue until 2014.¹⁴⁵ The WSLA provides two methods for ending hostilities: presidential proclamation and congressional resolution.¹⁴⁶ Unless Congress intervenes to revoke the AUMFA,¹⁴⁷ nothing short of a presidential proclamation would constitute a termination of hostilities.¹⁴⁸ By this standard, the presumptive end date lies in 2013 or beyond.¹⁴⁹

¹⁴² See President Barack Obama, Remarks by the President in Address to the Nation on the End of Combat Operations in Iraq (Aug. 31, 2010), *available at* <http://www.whitehouse.gov/the-press-office/2010/08/31/remarks-president-address-nation-end-combat-operations-iraq>.

¹⁴³ See Joseph Logan, *Last U.S. Troops Leave Iraq, Ending War*, REUTERS, Dec. 18, 2011, <http://www.reuters.com/article/2011/12/18/us-iraq-withdrawal-idUSTRE7BH0320111218>.

¹⁴⁴ See discussion *supra* Part III.C.1. In his 2011 State of the Union Address, President Obama demonstrated how tricky nailing down the end-date of a war can be, stating, "The Iraq war is *coming* to an end." Remarks by the President in State of Union Address (Jan. 25, 2011) (emphasis added), *available at* <http://www.whitehouse.gov/the-press-office/2011/01/25/remarks-president-state-union-address>. The President had previously declared the end of America's combat mission on August 31, 2010, but had hostilities then terminated? Either way, the President implied that the war was not over.

¹⁴⁵ See Peter Baker & Rod Nordland, *U.S. Plan Offers Path to Ending Afghan Combat*, N.Y. TIMES, Nov. 15, 2010, at A1.

¹⁴⁶ See 18 U.S.C. § 3287 (Supp. IV 2010).

¹⁴⁷ Notably, less than a month before the last combat troops left Iraq, the U.S. Senate declined to support a resolution that would have rescinded the Authorization for the Use of Military Force in Iraq. See 157 CONG. REC. S7957 (daily ed. Nov. 29, 2011) (vote on the Paul Amendment).

¹⁴⁸ This proclamation would likely need to be accompanied by the complete withdrawal of combat troops. By inference, the War Powers Resolution, 50 U.S.C. § 1541 (2006), and the WSLA's post-2008 language support this conclusion. The WSLA may be deactivated in two ways: joint congressional action or a formal presidential proclamation with notice to Congress. 18 U.S.C. § 3287. Under the War Powers Resolution, a joint congressional action would require the prompt removal of U.S. troops from combat operations. 50 U.S.C. § 1544(c) (2006). The WSLA's structure implies that a presidential proclamation represents an equivalent action. If that equivalent action should have an equivalent effect, then it would remove troops from combat.

¹⁴⁹ See Robert Burns, *Afghanistan War: U.S. Troops to End Combat Role Next Year*, HUFFINGTON POST, Feb. 1, 2012, http://www.huffingtonpost.com/2012/02/01/afghanistan-war-panetta_n_1247910.html ("Defense Secretary Leon Panetta [said] . . . that U.S. and other international forces in Afghanistan expect to end their combat role in 2013 and continue a training and advisory role with Afghan forces through 2014."). This protracted war—and the concomitantly protracted tolling period—provides more reason for courts to reject the *Prosperi* limitations analysis in order to remove as many pre-2008 crimes as possible from the WSLA's scope. Also worth consideration, Vidal's discussion of perpetual war hints that new congressional authorizations for the use of force might not be far off in

CONCLUSION

Statutes of limitations exist to provide stability to society and to the justice system; as a measure of grace, they afford security to would-be defendants who have long stayed within the law after their crimes. Limitations also induce prosecutors to promptly investigate and indict as soon as feasible, thus helping enforce the Fifth Amendment's mandate for due process. Of course, limitations also require that some wrongdoers go free, and in recognition of this, legislatures have structured statutes that attempt to balance society's need for justice against its desire for fairness, efficiency, and grace. The Wartime Suspension of Limitations Act represents one of Congress's attempts to fine-tune the balance between these competing interests by ensuring that the haste of wartime does not overcome justice.

Congress's fine-tuning, if not carefully applied, threatens to upturn this balance by effectively eliminating the limitations period for crimes of fraud against the government. Given its broadest reading, the WSLA could toll the statute of limitations for crimes committed in the mid-1990s until 2020, which would represent a near five-fold increase over the typical five-year limitations period for acts of fraud. Under federal law, no limitations period extends this long unless Congress specifically deems that the gravity of the underlying crime compels no limitations period at all.

In the United States, crimes without limitations are a rare exception rather than the rule. From the First Congress, American law has included a strict statute of limitations. Slowly, Congress has eased the pressure that limitations place on federal prosecutors. By extending the general limitations period from two years to five and by adding new statutory tolling mechanisms, Congress has carefully readjusted the scales that balance justice, fairness, and efficiency. Despite these extensions, Congress has never turned its back on the fundamental role that limitations play.

The WSLA and its 2008 Amendment represent adjustments to the balance, but courts should not permit a broad reading of these readjustments to upend the scales. When the conflicts in Iraq and Afghanistan conclude and government prosecutors begin to invoke the broadest possible reading of the statute—just as they did after World War II—courts should heed the American tradition of limited periods of criminal liability. The multiple purposes of the statute of limitations should guide courts as they seek an interpretation that

Iran, Mexico, or some other security hot spot around the world. See VIDAL, *supra* note 53, at 20–21. If Congress authorized force prior to 2019, the WSLA would activate again, picking up any limitations periods that had tolled under the AUMFA and AUMFI. This, too, would suggest that courts should exclude as many pre-2008 crimes as possible from the WSLA's scope.

strikes the balance that Congress envisioned. This interpretation should defer to the longstanding principle that criminal limitations are to be construed in favor of defendants and that tolling should be applied as narrowly as possible.

