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CATEGORIZING CONFLICT IN THE WARTIME ENFORCEMENT OF FRAUDS ACT: WHEN ARE WE REALLY AT WAR?

INTRODUCTION

In 2008, news headlines were inundated with a discourse born out of one of the worst economic eras America has endured since the Great Depression. Headlines thrived on catch phrases depicting the financial turmoil running rampant from "Wall Street to Main Street," and they made "Fannie and Freddie" household names. A new rhetoric had emerged to describe what had come to be labeled as the foreclosure crisis. The economy was a pressing concern, and Congress reacted, passing a $700 billion bailout plan to aid the country's financial sector. Critics questioned the oversight mechanisms for the distribution of the bailout funds and with good cause. Due to ineffective oversight before the bailout, the government had lost billions of dollars as a result of contract fraud arising out of government spending on the wars in Iraq and Afghanistan.

Exacerbating the risk that bailout funds would be used fraudulently was the fact that the ongoing "war on terror" was consuming government resources that otherwise would have been used to investigate and prosecute the misuse of government funds. Days after the bailout passed, the New York Times reported that the Federal Bureau of Investigation (FBI) was "struggling to find enough agents and resources to investigate criminal wrongdoing tied to the country's economic crisis." Following the September 11th attacks, the FBI transferred nearly one-third of its agents to terrorism and intelligence

1. See, e.g., Peter S. Goodman, Slump Moves from Wall St. to Main St., N.Y. TIMES, Mar. 21, 2008, at A7; Donald Mengay, Letter to the Editor, Jitters from Wall Street to Main Street, N.Y. TIMES, Sept. 17, 2008, at A26.
2. See, e.g., Peter Coy, Time to Let Fannie and Freddie Wither?, BUS. WK., July 11, 2008.
7. Id.
programs, leaving the bureau “seriously exposed” when it came to investigating acts of fraud committed against the government.\(^8\)

History seemed to be repeating itself, bringing with it, out of obscurity, the Wartime Suspension of Limitations Act (the Act or the Suspension Act),\(^9\) which was originally enacted during World War II (WWII) when the FBI and Justice Department were facing deficiencies in investigative and prosecutorial resources that were similar to the deficiencies faced in 2008.\(^10\) The Suspension Act tolls the statute of limitations for acts of fraud\(^11\) committed against the government “when the United States is at war,”\(^12\) providing the government with more time than it would normally have to prosecute fraudulent actors. Although the Act was regularly used for cases arising out of WWII, it has remained dormant until recently.\(^13\) Its recent use has raised a number of significant questions: What does it mean to be at war?;\(^14\) Does a state of war exist only by formal declaration?;\(^15\) Must there be active combat?;\(^16\) Does the existence of a state of war depend on

8. Id.
10. See Bridges v. United States, 346 U.S. 209, 218 (1953) (noting that Congress proposed the Act because it “was concerned with the exceptional opportunities to defraud the United States” that grew out of the nation’s war contracts); H.R. REP. NO. 77-2051, at 2 (1942).
11. The Act also tolls the limitations period for offenses involving “real or personal property of the United States” and offenses “committed in connection with the negotiation . . . [or] performance . . . [of] any contract . . . which is connected with or related to the prosecution of the war.” 18 U.S.C. § 3287(2)-(3).
13. “18 U.S.C. § 3287 appears to have only been used in cases that involved conduct during or shortly after WWII. There are no civilian cases that involve the use or application of [the Act] since that era.” United States v. Shelton, 816 F. Supp. 1132, 1134–35 (W.D. Tex. 1993).
15. See Clyde Eagleton, The Form and Function of the Declaration of War, 32 AM. J. INT’L L. 19, 21 (1938) (“It is not intended thereby to say that war can exist only after a declaration . . ..”). But see J. Gregory Sidak, To Declare War, 41 DUKE L.J. 27, 34 (1992) (noting that some scholars advocate that Congress should use a formal declaration to declare war).

[H]ow is one to sort out the relationships among formally declared war, war in general, and informally declared armed conflict? Is war the genus, which contains at least two species, (formally declared) war and (formally undeclared) armed conflict? Or is armed conflict the genus, which contains at least two species, (formally declared) war and (formally undeclared) war? Or is conflict the genus, which contains at least two species, unarmed conflict and armed conflict, which in turn subdivides into (formally declared) war and (formally undeclared) armed conflict?

HALLET, supra, at 94–95.
whether a certain amount of resources have been devoted to the conflict? Answering these questions is complicated by the fact that war is a dynamic phenomenon. The manner in which countries wage war evolves as technology and international relations evolve.\textsuperscript{17}

When applying wartime statutes like the Suspension Act, courts must resolve these questions by engaging in what this Comment will refer to as the "wartime determination." The wartime determination requires courts to discern when a war begins and when it ends. It is unique for each wartime statute because what constitutes war for the purposes of one statute may not constitute war for the purposes of another.\textsuperscript{18} This Comment will explore what it means for the United States to be at war for the purposes of the Suspension Act. Only two courts have engaged in this wartime determination,\textsuperscript{19} and their decisions are not in accord. One court decided that Congress must formally declare war for the United States to be at war as contemplated by the Suspension Act.\textsuperscript{20} The other determined that a formal declaration of war was not necessary for the Act to apply.\textsuperscript{21} In 2008, Congress enacted the Wartime Enforcement of Frauds Act (WEFA)\textsuperscript{22} to clarify the Suspension Act's wartime determination and to ensure that the conflicts in Iraq and Afghanistan would invoke the Act's tolling provision.\textsuperscript{23}

This Comment examines the Suspension Act's wartime determination and how it has been affected by WEFA, arguing that the Suspension Act, as evidenced by its legislative purpose, was intended to apply to conflicts beyond formally declared wars. This Comment also asserts that the changes that WEFA imposed upon the Act, though done with laudable purpose, were unnecessary and may have a detrimental impact upon the Act's future application. Part II of this Comment discusses the legislative and judicial background of the Act.\textsuperscript{24} Part III

\textsuperscript{17} "How one defines a time of war has crucial importance as [we] encounter[ ] new variations on the classic model of a formally declared war," "including the amorphous War on Terror." John M. Hagan, Note, From the XYZ Affair to the War on Terror: The Justiciability of Time of War, 61 Wash. & Lee L. Rev. 1327, 1332 (2004).

\textsuperscript{18} See Lee v. Madigan, 358 U.S. 228, 231 (1958) ("Congress in drafting laws may decide that the Nation may be 'at war' for one purpose, and 'at peace' for another.").

\textsuperscript{19} "The 'at war' clause of the Suspension Act has not been the subject of extensive judicial review—in fact only one district court has been called upon recently to decide its meaning." United States v. Prosperi, 573 F. Supp. 2d 436, 444 (D. Mass. 2008).


\textsuperscript{21} See Prosperi, 573 F. Supp. 2d at 436.


\textsuperscript{24} See infra notes 28–103 and accompanying text.
examines WEFA and its legislative history, focusing on how WEFA's proponents intended to amend the Suspension Act. Part IV argues that WEFA made an unnecessary change to the Suspension Act, which potentially inhibits the Act's purpose. Finally, Part V discusses the potential impact that WEFA may have on judicial construction and application of the Suspension Act.

II. BACKGROUND

This Part examines the development of the wartime determination in the Suspension Act, focusing on the Act's legislative purpose as a means of guiding how and when the Act should apply. Section A explores the Act's legislative history in order to glean the legislative purpose behind the tolling provision. Section B focuses on cases that have interpreted the Act and its legislative purpose.

A. The Legislative History of the Suspension Act

The Suspension Act has undergone numerous revisions since its original enactment during WWII. When enacting the Suspension Act, Congress drew from the reasoning behind a law enacted during World War I (WWI). Therefore, in order to fully understand the reasoning behind the Suspension Act, it is helpful to analyze the reasoning behind its WWI counterpart.

1. WWI and the Precursor to the Act

The WWI law that the Suspension Act emulated extended the statute of limitations period for acts of fraud committed against the government from three years to six years. Nearly three years after WWI ended, the government realized that it would need more than the three years provided by the traditional statute of limitations in order to successfully combat the growing issue of contract fraud that had developed out of WWI's procurement program. The extension was granted at the behest of the Attorney General who wrote to Congress that "there [were] many cases growing out of the war upon

25. See infra notes 104-141 and accompanying text.
26. See infra notes 142-278 and accompanying text.
27. See infra notes 279-285 and accompanying text.
28. See infra notes 30-56 and accompanying text.
29. See infra notes 57-103 and accompanying text.
which that statute of limitations [would] soon run, placing the government to a disadvantage unless [Congress granted] some relief.\textsuperscript{33}

Congress noted that in addition to being a more prevalent crime as a result of the war, contract fraud is one of the more difficult crimes that the Justice Department prosecutes due to the difficulty inherent in discovering and investigating it.\textsuperscript{34} Allegations of fraud require "the most minute investigation in order to ascertain the exact facts" and a "considerable period" of time to ascertain whether those facts justify a prosecution.\textsuperscript{35}

Although it was enacted into law, the extension was only temporarily in effect. Three years after its enactment, Congress re-implemented the three-year limitations period\textsuperscript{36} because the circumstances necessitating the extension no longer existed.\textsuperscript{37}

2. \textit{The Act During WWII: Enacted, Amended, Amended and Enacted Again}

Although the extension was repealed, the reasoning behind it remained persuasive and was employed by both House and Senate Judiciary Committees during WWII.\textsuperscript{38} Aware of the constraints that the Justice Department faced following WWI,\textsuperscript{39} Congress enacted the first version of the Suspension Act (the Temporary Suspension Act),\textsuperscript{40} suspending the "running of any existing statute of limitations applicable to offenses involving" fraud against the United States until June 30, 1945.\textsuperscript{41}

The House and Senate committee reports echoed the reasoning that supported the enactment of the WWI extension, noting that while the normal three-year limitations period was sufficient during "normal times," the realities of wartime necessitated the suspension.\textsuperscript{42} Like

\begin{footnotesize}
\begin{enumerate}
\item See H.R. REP. No. 67-365, at 1 (1921).
\item \textit{Id.}
\item Act of Dec. 27, 1927, Pub. L. No. 70-3, ch. 6, 45 Stat. 51 (1927).
\item "[T]he Department of Justice announced . . . that it did not propose to attempt any further prosecution of . . . offenses giving rise" to the extension. H.R. REP. No. 70-16, at 1 (1927).
\item See H.R. REP. No. 77-2051, at 1-2 (1942); S. REP. No. 77-1544, at 2 (1942) (citing H.R. REP. No. 67-365 (1921)).
\item See H.R. REP. No. 77-2051, at 1 (1942).
\item \textit{Id.} It is interesting to note that the bill, as passed by the House, suspended the statute of limitations for “the period of the present war and for 6 months thereafter.” \textit{88 Cong. Rec. 4759} (1942). This wording is more in line with the statute as it reads today. However, the Senate amended the bill, omitting the above portion and replacing it with a specific date—June 30, 1945. See S. REP. No. 77-1544, at 1 (1942).
\item H.R. REP. No. 77-2051, at 2 (1942); S. REP. No. 77-1544, at 2 (1942).
\end{enumerate}
\end{footnotesize}
the proponents of its WWI counterpart, proponents of the Temporary Suspension Act argued that the suspension was necessary because the government was spending "huge sums of money" on contracts that were necessary to run a "gigantic war program."43 These expenditures created greater opportunity for the government to fall victim to fraudulent activity.44

Congress again recognized fraud as a difficult crime to investigate because it is difficult to discover.45 Proponents of the Temporary Suspension Act noted that war strains governmental law enforcement agencies' resources, making the inherently difficult investigation into fraud even more difficult.46 During wartime, the Justice Department must enforce laws that are not in effect during peace time, including laws that are applicable only in wartime and new laws that are created as a result of the specific war itself.47 Under these additional laws, the Justice Department's case load increased.48 During WWII, new units had to be created within the Justice Department to keep up with the demands of the war. Notably, a War Frauds Unit was created to ensure "the vigorous and prompt prosecution of cases involving frauds under government contracts."49 In light of these increasing demands on the Justice Department, proponents urged for the passage of the suspension in order to "ensure that the limitations statute [would] not operate under the stress of present-day events" to the advantage of fraudulent actors.50

In 1944, the Temporary Suspension Act was amended.51 The amendment changed the sunset provision in the Act.52 Rather than end on June 25, 1945, the amendment provided that the suspension would continue until "three years after the termination of hostilities in

43. H.R. REP. No. 77-2051, at 2; S. REP. No. 77-1544, at 2; see also Bridges v. United States, 346 U.S. 209, 218 (1953) (noting congressional concern over the potential to defraud the government that was "inherent in [the government's] gigantic and hastily organized procurement program").
44. See H.R. REP. No. 77-2051, at 2.
45. See id.
46. See id.
48. Consider, for example, Justice Department investigations and prosecutions of espionage. "In the 5-year period preceding 1938, the [FBI] investigated an average of 35 espionage matters each year." 1941 ATT'Y GEN. ANN. REP. 178. In 1942, "more than 100,000 matters... involving selective service, espionage, sabotage, sedition, treason, foreign agents, [and] trading with the enemy" commanded the Department's attention. 1942 ATT'Y GEN. ANN. REP. 6.
49. 1942 ATT'Y GEN. ANN. REP. 10-11.
52. See id.
the present war as proclaimed by the President or by a concurrent resolution of the two Houses of Congress.\textsuperscript{53}

In 1948, Congress once again amended the Temporary Suspension Act and reenacted it as the Suspension Act, making it permanent.\textsuperscript{54} As enacted in 1948, the Suspension Act reads in pertinent part,

When the United States is at war the running of any statutes of limitations applicable to any offense involving fraud or attempted fraud against the United States or any agency thereof in any manner whether by conspiracy or not, \ldots shall be suspended until three years after the termination of hostilities as proclaimed by the President or by a concurrent resolution of Congress.\textsuperscript{55}

This was the form that the Suspension Act maintained until the passage of WEFA in 2008.

B. Judicial Interpretation of the Act

The judicial history regarding the Act's wartime determination has not been as extensive as the Act's legislative history. As noted above, only two courts have engaged in the wartime determination. As discussed below, however, several military cases required interpretation of the Act's military counterpart, which mandates as a preliminary matter that the courts make the wartime determination for the Act.

1. The Absence of a Wartime Determination in WWII Cases

The cases arising out of WWII, in which the government relied upon the tolling provision of the Suspension Act, did not establish precedent for the Act's wartime determination.\textsuperscript{56} These cases did not resolve the issue of whether and when a war had begun because this determination was simply unnecessary. The 1942 version of the Act expressly stated that the suspension would be in "effect from and after the date of [the Act's] passage."\textsuperscript{57} Thus, for cases arising out of

\textsuperscript{53} Id. (emphasis added).
\textsuperscript{56} Most cases involved determining which crimes constituted the substantive offenses enumerated in the Act to which the tolling provision applied. See, e.g., Bridges v. United States, 346 U.S. 209, 221 (1953) (determining that the Act did not apply to offenses that did not involve defrauding the nation in any "pecuniary manner or in a manner concerning property"). The cases of this era were also concerned with whether the limitations period was tolled for crimes that occurred in the three-year period after the termination of hostilities. See, e.g., United States v. Smith, 342 U.S. 225, 228 (1951) (holding that the Suspension Act is inapplicable to crimes committed after the date on which hostilities had terminated).
WWII, the tolling provision became effective upon its enactment, August 24, 1942.\textsuperscript{58}

Determining when the tolling period ended, and consequently the date from which the three-year “grace” period was to be measured, similarly presented no material issue in these cases. The 1942 version of the Act provided an exact date upon which the Suspension Act would no longer be in force.\textsuperscript{59} The 1944 and 1948 versions determined that the date upon which the Act would cease to toll the statute of limitations would be the date of “termination of hostilities . . . as proclaimed by the President or by a concurrent resolution of the two Houses of Congress.”\textsuperscript{60} On December 31, 1946, President Harry Truman announced the cessation of hostilities of WWII through a formal presidential proclamation.\textsuperscript{61} Because this formal proclamation clearly satisfied the requirement of the Act,\textsuperscript{62} courts accepted it as the date on which the three-year grace period commenced.\textsuperscript{63}

2. Looking to the Military Courts for Some Wartime Guidance

The Act was not litigated in civilian courts during the period following WWII until the Persian Gulf Conflict.\textsuperscript{64} The Act received more interpretation during this period from military courts that interpreted the Act’s military counterpart.\textsuperscript{65} Article 43(f)(1) of the Uniform Code of Military Justice (Article 43)\textsuperscript{66} was taken directly from the Suspen-
sion Act, and as a result, the Military Court of Appeals stated that Article 43 was to be construed in the same manner that the United States Supreme Court interpreted (or would interpret) the Suspension Act.\textsuperscript{67} The military courts were the first to determine whether “police actions” or “military conflicts” constitute war for the purposes of the Act.\textsuperscript{68}

The courts generally took a totality of the circumstances approach, looking to whether the conditions created by the conflict led to the conclusion that the nation was “in a state of war within the meaning of the term as used by Congress” for the purposes of Article 43.\textsuperscript{69} In \textit{United States v. Swain}, the court held that the Korean conflict, though officially deemed a “police action,” was a war for purposes of Article 43.\textsuperscript{70} In making this determination, the court looked to several factors, including,

the casualties involved; the sacrifices required; the drafting of recruits to maintain the large number of persons in the military service; the national emergency legislation enacted . . .; the executive orders promulgated; and the tremendous sums being expended for the express purpose of keeping the [armed forces] in . . . operation[ ].\textsuperscript{71}

The Military Court of Appeals also interpreted Article 43 to determine what constitutes a proclamation of the “termination of hostilities.”\textsuperscript{72} In \textit{United States v. Taylor}, the court noted that Article 43 was enacted to provide the government additional time within which to discover and prosecute “frauds” by deferring the running of the statute of limitations for three years following a “\textit{formal proclamation of termination of hostilities}.”\textsuperscript{73} Thus, the court read the Act to require that the presidential proclamation of the termination of hostilities be a formal proclamation.

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\textsuperscript{67} See \textit{id.} at 40.
\textsuperscript{68} See \textit{id.} at 39.
\textsuperscript{69} \textit{Id.}
\textsuperscript{70} \textit{See id.}
\textsuperscript{71} \textit{Id.} at 39. This determination was not without opposition. \textit{See United States v. Ayers}, 4 C.M.A. 220, 231 (1954) (Quinn, C.J., dissenting) (discussing a U.S. Supreme Court case arising out of the Korean War—in which the statute of limitations had run and the government had failed to argue that the Act applied—as indicative of the fact the Act was not intended to apply to the Korean War).
\textsuperscript{72} \textit{United States v. Taylor}, 4 C.M.A. 232 (1954).
\textsuperscript{73} \textit{Id.} at 236 (emphasis added).
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3. The Comeback Kid: The Act Reappears in the Civilian Courts

The first civilian case dealing with the Act's wartime determination, United States v. Shelton, was decided by a Texas district court in 1993. In Shelton, the defendant was indicted for conspiring to commit bribery and for misapplying federal funds. The government issued the indictment more than five years after the alleged conduct took place, despite a five-year statute of limitations. The government argued that the claim was preserved pursuant to the Suspension Act, which suspended the statute of limitations for the duration of, and three years following, the termination of the Persian Gulf conflict. The court disagreed and stated that "[f]or the Persian Gulf conflict to have amounted to a war under [the Suspension Act], Congress should have formally recognized that conflict as a war."

The Shelton court stated that the legislative purpose of the Act was to assist governmental law enforcement during conflicts as "massive and pervasive" as WWI. It concluded that because the government did not rely upon the Suspension Act during any of the conflicts after WWII, those conflicts—the Korean and Vietnam wars—must not have been "massive" enough to invoke the tolling provision. Based upon this reasoning, the court held that an even "less intrusive conflict," such as the Persian Gulf War, was insufficient to invoke the Act. According to Shelton, in order for a conflict to constitute a war for purposes of the Suspension Act, Congress must formally declare it a war. Any conflict that did not obtain this designation did not qualify for the tolling of the limitations period.

In United States v. Prosperi, the wartime determination for the Suspension Act arose in the context of the Iraq and Afghanistan conflicts. Under the Shelton approach, neither the Iraq nor the Afghan conflict would constitute war for purposes of the Suspension Act because neither was initiated by formal congressional declaration.

75. See id. at 1134.
76. See id. During WWII, the limitations period for fraud was three years. 18 U.S.C. § 3282 (1948). That period was permanently extended to five years in 1954. 18 U.S.C. § 3282 (2006).
77. See Shelton, 186 F. Supp. at 1134.
78. Id. at 1135. The court dismissed the wartime determinations of military courts in construing Article 43 as unpersuasive because the standard that an armed conflict must meet to constitute a war for the military purposes is different—that is, lower—than the standard that an armed conflict must meet in order to constitute a war for civilian purposes. See id.
79. Id.
80. Id.
82. See id. at 439–40.
83. Both conflicts were authorized pursuant to the War Powers Resolution. See id. at 450.
The Prosperi court rejected the Shelton court's approach, reasoning that the Shelton court read a condition precedent into the wartime determination that the Suspension Act did not require. The Prosperi court noted the absence of any provision in the text of the Act or its legislative history that indicated that the Act required a formal congressional declaration of war before its provisions could be invoked. According to the Prosperi court, the text and legislative history of the Suspension Act indicated that it was "intended to capture any authorized military engagement that might compromise or impede the government's ability to investigate allegations of fraud." Rather than taking an approach entirely dependent on nomenclature, the Prosperi court followed the military court's interpretation and took a multi-factor approach.

The Prosperi court announced a four-factor test for determining if the country is at war for purpose of the Suspension Act. The factors include the following:

1. the extent of the authorization by Congress to the President to act;
2. whether the conflict is 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.

After applying the four factors, the court determined that both the Iraq and Afghan conflicts constituted wars for the purposes of the Suspension Act.

In addition to addressing whether the United States was "at war" for the purposes of the Suspension Act, the Prosperi court also interpreted the "termination of hostilities" clause. Although civil courts had previously always looked to a formal presidential proclamation when determining whether hostilities had ended, the court in Prosperi relied on the plain language of the Act to determine whether the

84. See id. at 445.
85. Id. at 449.
86. Id.
88. Prosperi, 573 F. Supp. 2d at 449. This approach, though with different factors, has been used by courts historically in various wartime determinations. See Hagan, supra note 17, at 1360.
89. Prosperi, 573 F. Supp. 2d at 449.
90. See id. at 455.
91. See id. at 454-55.
92. See supra notes 59-63 and accompanying text.
termination of hostilities had in any way been proclaimed by the president or recognized in a congressional resolution.\(^\text{93}\)

The Prosperi court determined that the termination of hostilities in Iraq was proclaimed on May 1, 2003,\(^\text{94}\) when President George W. Bush—while aboard the USS Abraham Lincoln—stated that “[m]ajor combat operations in Iraq have ended. In the battle of Iraq, the United States and our allies have prevailed.”\(^\text{95}\) This speech was not a formal presidential proclamation like that given by President Truman after WWII. Nonetheless, the court believed that it satisfied the Act’s criteria. It reasoned that formal actions recognizing the termination of hostilities were the “modern exceptions,” and that the end of more recent conflicts had been signaled by presidential pronouncement.\(^\text{96}\)

Similarly, the court determined that the United States’ formal recognition of an extension of diplomatic relations to the new government of Afghanistan on December 22, 2001 was a congressional act that signified the termination of hostilities for the Afghanistan conflict.\(^\text{97}\)

This examination of the Act’s legislative and judicial history reveals two important aspects of the Act. First, regardless of the Act’s changing form, the purpose behind it has remained constant: providing the government with additional time during periods of war in order to investigate allegations of fraud, when, as a consequence of war, the potential for fraud increases while government resources are stretched.\(^\text{98}\) Second, two divergent views regarding the Act’s wartime determination have emerged. The phrase “at war,” as used in the statute, has been interpreted to signify a formally declared war,\(^\text{99}\) but it has also (and more often) been interpreted to signify any conflict whose circumstances amount to a war for the purpose of the Act.\(^\text{100}\)

Similarly, the way in which courts have interpreted the sunset provision of the Act has also resulted in divergent views. One court determined that the termination of hostilities must be declared through a formal presidential proclamation.\(^\text{101}\) The Prosperi court, alternatively, determined that a presidential speech was an adequate indication of

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\(^\text{93}\) See Prosperi, 573 F. Supp. 2d at 455. When the court decided Prosperi, neither a formal presidential proclamation nor any concurrent resolution of Congress had been made declaring that hostilities in either conflict had ended. See id.

\(^\text{94}\) Id. at 455.

\(^\text{95}\) Id.

\(^\text{96}\) Id. at 454.

\(^\text{97}\) See id. at 455.

\(^\text{98}\) H.R. REP. No. 77-2051, at 2 (1942).


\(^\text{101}\) See Taylor, 4 C.M.A. at 236.
when hostilities had ceased.\textsuperscript{102} It is on the backdrop of these divergent but thinly developed interpretations of the Act that the 110th Congress proposed WEFA in an effort to provide some clarity.

III. The Congressional Claim: We Need WEFA

America's involvement in the conflicts in both Iraq and Afghanistan, coupled with the extensive use of private contractors\textsuperscript{103} in various aspects of the war effort, gave rise to the potential for and realization of an unprecedented amount of contract procurement fraud committed against the U.S. government.\textsuperscript{104} By 2008, contract fraud had generated a loss in the billions, but only a few cases—involving less than $30 million—had been initiated by the government.\textsuperscript{105} This prompted Congress to reexamine the Suspension Act.

WEFA\textsuperscript{106} was proposed in order to make two\textsuperscript{107} significant changes to the Act's wartime determination.\textsuperscript{108} First, WEFA was proposed to clarify and expand the term "war" as it was used in the Act.\textsuperscript{109} Second, WEFA made clear that that the action signaling the termination of hostilities for the purposes of the Suspension Act must be a formal presidential proclamation with notice to Congress or a concurrent resolution of Congress.\textsuperscript{110}

The concerns that gave rise to WEFA echoed those of the original Suspension Act. WEFA's Committee Report noted the increased possibility for fraud arising out of the many contractual relationships that the government entered into in order to wage war in Iraq and Afghanistan.\textsuperscript{111} It also noted the excessive strains imposed by the

\textsuperscript{102} See \textit{Prosperi}, 573 F. Supp. 2d at 455.
\textsuperscript{103} The committee report accompanying the Wartime Enforcement of Frauds Act (WEFA) noted that "[p]rivacy contractors have been used to a greater extent during these war-time activities than at any time in our history." S. \textit{Rep.} No. 110-431, at 3.
\textsuperscript{104} See \textit{id}, at 2.
\textsuperscript{105} \textit{Id}.
\textsuperscript{106} S. 2892, 110th Cong. (2008).
\textsuperscript{107} Three changes were made to the text of the Act, but for the purposes of this Comment only two changes will be discussed. It is worth noting, however, that in addition to the changes that affect the wartime determination, WEFA also extended the number of years for which the tolling period would remain in effect after the termination of hostilities from three years to five years. S. 2982, 110th Cong. (2008). This measure brought the Act in accord with the "standard statute of limitations for all criminal fraud provisions," which, as previously noted, had been extended from three years to five years. S. \textit{Rep.} No. 110-431, at 5 (2008).
\textsuperscript{109} See \textit{id.} at 4.
\textsuperscript{110} See \textit{id}.
\textsuperscript{111} See \textit{id.} at 3.
wars upon governmental investigative bodies,\textsuperscript{112} pointing to the requests from those bodies seeking assistance in their efforts to prosecute fraudulent activity.\textsuperscript{113}

WEFA’s purpose was clear from the outset: to clarify, redefine, and modernize the Suspension Act’s wartime determination.\textsuperscript{114} WEFA affected both the determination of whether and when wars have begun\textsuperscript{115} and the determination of whether and when hostilities have terminated.\textsuperscript{116}

A. The Effort to Expand What It Means to Be “At War”

To better understand how WEFA changed the Act’s wartime determination, it is necessary to explain the premise upon which WEFA was propagated and ultimately passed. WEFA’s proponents sought to amend the Suspension Act because they believed that the Act, as codified in 1948, only applied to formally declared wars.\textsuperscript{117} Consequently, these proponents believed that prior to WEFA, the Act would not have tolled the limitations period for fraudulent acts committed during the Iraq and Afghan conflicts simply because these conflicts were not formally declared wars.\textsuperscript{118} WEFA was proposed to close this semantic “loophole.”\textsuperscript{119} WEFA’s proponents and opponents agreed upon this narrow reading of the phrase “at war.”\textsuperscript{120} The difference among the legislators seemed to rest upon whether the application of the Act should be expanded to include hostilities that were not formally declared wars.\textsuperscript{121}

Based on this premise, WEFA proposed a second category of conflict that would invoke the tolling provision of the Act.\textsuperscript{122} WEFA pro-

\textsuperscript{112} See id. Both the Defense Department and State Department “indicated that ongoing hostilities in Iraq and Afghanistan have significantly hampered their ability to review contracts and pursue investigation.” Id.

\textsuperscript{113} See id.

\textsuperscript{114} See Press Release, U.S. Senator Patrick Leahy, Judiciary Committee Reports Leahy Bill to Address Wartime Fraud 3 (June 26, 2008) (on file with author). Senator Leahy noted that the bill would make the Act “applicable to the ongoing conflicts in Iraq and Afghanistan.” 154 CONG. REC. S3175 (daily ed. Apr. 18, 2008) (statement of Sen. Leahy)


\textsuperscript{116} See id.

\textsuperscript{117} See Press Release, supra note 114, at 2.

\textsuperscript{118} See S. REP. No. 110-431, at 4.

\textsuperscript{119} Press Release, supra note 114, at 1. The committee report notes that the conflicts in Iraq and Afghanistan are “likely exempt from [the Act] because they were undertaken by congressional authorization of the use of military force, rather than by a formal declaration of war.” S. REP. No. 110-431, at 4.

\textsuperscript{120} See S. REP. No. 110-431, at 4, 7–8.

\textsuperscript{121} See id. at 7.

\textsuperscript{122} See id.
posed that in addition to suspending the running of the limitations period “[w]hen the United States is at war,” as formally declared by Congress, the period should be tolled when “Congress has enacted a specific authorization for the use of the Armed Forces, as described in section 5(b) of the War Powers Resolution.”\(^1\)\(^2\)\(^3\) WEFA added the WPR category in both the substantive section of the Act and its definitions section.\(^4\) The addition of this language in both clauses ensured that the Act would apply to the current conflicts in Iraq and Afghanistan.\(^5\) Thus, according to WEFA’s legislative history and express language, the Act as amended is applicable in two types of military action: formally declared wars and conflicts authorized pursuant to the WPR.

The committee report clarified that the amended version of the Act was not applicable to “peacekeeping missions under the auspices of the United Nations or military actions not specifically authorized by Congress pursuant to the War Powers Resolution.”\(^6\) According to the report, suspending a limitations statute is permissible only under “extraordinary circumstances.”\(^7\) Only “significant military actions requiring Congressional action . . . trigger [the] suspension.”\(^8\)

Senators Jeff Sessions and Tom Coburn conveyed their apprehensions regarding WEFA in the committee report.\(^9\) They expressed a concern that Congress was altering the Act in a manner that the enacting Congress never intended.\(^10\) The Senators’ argument rested on the claim that the Suspension Act was only intended to apply to formally declared wars, and that by adding a second category of conflict, “conflicts that [fell] short of declared war” would invoke the Act’s provisions.\(^11\) They noted that “[a] declared war is of a different nature than an undeclared military conflict which can be a much smaller affair that does not similarly affect the government’s ability to build and prosecute war fraud cases.”\(^12\)

Proponents of the bill countered by noting that determining the 80th Congress’s intention regarding whether the Act could apply to

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\(^2\) S. REP. No. 110-431, at 9.
\(^3\) See id. at 5–6.
\(^4\) See id. at 4.
\(^5\) Id. at 5.
\(^6\) Id.
\(^7\) Id.
\(^8\) Id.
\(^9\) See id. at 7–8.
\(^10\) See id. at 7.
\(^11\) Id.
\(^12\) Id.
authorized military actions would be a dubious exercise because Congress in 1948 could not have contemplated the WPR, which was passed in 1973.\textsuperscript{134} Additionally, WEFA’s proponents argued that notwithstanding any possible limiting intention of the enacting Congress, present-day Congress was not precluded “from doing the right thing and extending the wartime suspension of statutes of limitation to war zones created by authorizations for the use of military force.”\textsuperscript{135}

\section*{B. The Presidential Proclamation: Formality Required}

WEFA also changed the sunset provision of the Suspension Act. As codified in 1948, the Act tolled the applicable limitations period until three years after the “termination of hostilities, as proclaimed by the President or a concurrent resolution of Congress.”\textsuperscript{136} This language did not specify the form or manner in which the President should “proclaim” the termination of hostilities.\textsuperscript{137} At the end of WWII, courts referred to President Truman’s formal proclamation as signifying the termination of hostilities. However, the text of the Act did not expressly require a formal proclamation; it merely required that the President proclaim that hostilities had ceased.\textsuperscript{138} WEFA clarified this, requiring that the President issue a formal proclamation—with notice to Congress—declaring the termination of hostilities.\textsuperscript{139} When introducing WEFA, Senator Patrick Leahy noted that this requirement would ensure that a “[s]ecret proclamation by the President or a self-serving ‘mission accomplished’ speech” would not operate to end the tolling of the statute of limitations period.\textsuperscript{140}

\section*{IV. “War Is an Existing Fact, and Not a Legislative Decree . . . ”\textsuperscript{141}}

WEFA ensured that the tolling provision of the Suspension Act would apply to the conflicts in Iraq and Afghanistan.\textsuperscript{142} However, the question that this Comment posits is whether the changes that WEFA imposed were necessary to achieve this result. This Part contends that WEFA’s amendments to the Suspension Act were not necessary and

\begin{footnotesize}
\begin{enumerate}
\item[134.] See id. at 3 n.4.
\item[135.] Id.
\item[137.] As discussed above, the WWII era cases did not present the issue of whether a formal proclamation was required. See supra notes 59–63 and accompanying text.
\item[138.] See 18 U.S.C. § 3287.
\end{enumerate}
\end{footnotesize}
do not further the purpose that the Act was originally created to serve. Section A argues that the Suspension Act, prior to WEFA, was not as limited in application as WEFA’s proponents and opponents presumed; the Act prior to WEFA was indeed applicable to hostilities other than formally declared wars. Based on the premise extrapolated in Section A, Section B asserts that WEFA, although purporting to expand the applicability of the Suspension Act, has actually severely restricted it. Section C discusses the problems raised by WEFA’s approach to the wartime determination, namely, that WEFA compromises the purposes of the Suspension Act for administrative efficiency by substituting and essentially eliminating any real judicial wartime determination for a per se categorical approach that is based on political wartime acts and discourse. Finally, Section D asserts that courts would better serve the purposes of the Act by making the wartime determination based on the circumstances of the conflict, rather than the categorical approach suggested by WEFA’s legislative history.

A. War Is No Less a War Because It Is Undeclared.

One of the driving forces behind WEFA was the concern that the Suspension Act, as codified in 1948, applied only to formally declared wars, thereby excluding the “imperfect wars” in Iraq and Afghanistan from the Act’s tolling provisions. Certainly, this presumption was not without justification. The Suspension Act was enacted during a formally declared war, so one could presume it was intended for formally declared wars. Additionally, when WEFA was introduced in the Senate, Shelton had been the only civilian court to interpret the “at war” provision of the Act and had done so quite narrowly. Nonetheless, strong counterarguments support a much broader reading of the Act. This Section employs several of those arguments to demonstrate that the Suspension Act, as codified in 1948, was applicable to wars that were not formally declared.

143. See infra notes 147–202 and accompanying text.
144. See infra note 202 and accompanying text.
145. See infra notes 203–256 and accompanying text.
146. See infra notes 257–276 and accompanying text.
1. The Act Never Required That War Be Formally Declared

As with any exercise in statutory interpretation, it is helpful to first look at the text of the Act itself.152 Even though the Suspension Act developed out of a formally declared war, its text does not contain any language expressly requiring a formal declaration of war as a prerequisite to be satisfied before the tolling provision comes into effect.153 The 1942 and 1944 versions of the Suspension Act did not establish any condition to be satisfied in order for the tolling provision to come into effect.154 Only when Congress sought to make the Act permanent did it establish a precondition for the tolling provision.155 However, the Act only required that "the United States [be] at war."156 Noticeably absent from this language is the specification that the war be formally declared. This exclusion is especially noteworthy when considered in conjunction with the fact that Congress has expressly included this specification in other wartime statutes.157

Indeed, while an oft-used phrase, "at war" is not the only prerequisite employed by wartime statutes. Congress has specified that some statutes only come into effect upon a formal declaration of war,158 in time of a national emergency as declared by Congress,159 or as declared by the President.160 Congress has even amended wartime statutes that initially used the phrase "at war" to more specifically require that the war be formally declared.161 Thus, there is a distinction—recognized by Congress—between the phrases "at war" and "at war as declared by Congress" as representative of two distinct phenomena. This distinction indicates that the former does not automatically

152. "[W]here . . . [a] statute's language is plain, the sole function of the courts is to enforce it according to its terms." United States v. Ron Pair Enters., Inc., 489 U.S. 235, 241 (1989).
153. 18 U.S.C. § 3287 (2006) stated—and still states—"[w]hen the United States is at war." The statute contains no express requirement that the war be formally declared.
156. Id.
implicate the latter.162 As two scholars have written in a report to Congress,

In addition to the statutes that are explicitly triggered by a declaration of war, a number come into the effect if a state of war, or period of war, or simply “war” exists. Because a declaration of war automatically creates a state of war, these authorities also are triggered by the enactment of a declaration of war. But they can come into effect even if no declaration of war is adopted.163

The phrase “at war,” as used in wartime statutes, is a term of art, distinct from other wartime statute prerequisites. What exactly this phrase connotes—that is, what constitutes a war—is beyond the scope of this Comment,164 but for now it is sufficient to say that the phrase itself encompasses its own set of circumstances of which a formal declaration of war need not be one.

2. A History Lesson: Being “At War” Never Required a Formal Declaration

A formal declaration is not expressly required by the Act, and it should not be implied from the circumstances surrounding the creation of the Act. Although the early to mid-twentieth century certainly marked a time when the congressional act of formally declaring war was a relatively prevalent practice,165 its prevalence does not necessitate the conclusion that Congress presumed formal declarations were and would be the established norm, such that the general phrase “at war,” without more, would nonetheless signify formally declared war.166

162. “Had 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.” United States v. Prosperi, 573 F. Supp. 2d 436, 446 (D. Mass. 2008).


164. This question is further complicated by the fact that the Supreme Court has stated that “Congress in drafting laws may decide that the nation may be ‘at war’ for one purpose, and ‘at peace’ for another.” Lee v. Madigan, 358 U.S. 228, 231 (1959).

165. In the early twentieth century, Congress issued eight formal declarations of war. ELSEA & GRIMMET, supra note 163, at 3.

166. Indeed, formal declarations of war seemed to be the exception rather than the norm. From 1700 to 1870 there were 107 cases of undeclared war, and not more than 10 declared wars. Eagleton, supra note 15, at 20. Throughout history, the U.S. Congress has only issued 11 formal declarations of war. ELSEA & GRIMMET, supra note 163, at 1. The United States Congress formally declared war against Great Britain in 1812; Mexico in 1846; Spain in 1848; Germany and Austria-Hungary in 1917; Japan, Germany, and Italy in 1941; and Bulgaria, Hungary, and Rumania in 1942. See id. app. 1.
Even during this era, two distinct categories of hostilities were recognized: the formally declared war and what this Comment will refer to as the “circumstantial war.” For the purposes of this argument, a circumstantial war exists where the circumstances of a conflict create a de facto war.\textsuperscript{167} A circumstantial war and a formally declared war are not opposites. A formal declaration of war may or may not be one of the circumstances that make up a circumstantial war. Thus, circumstantial war—the state of being “at war”—is a broad concept that can (though it need not) include a formal declaration of war.\textsuperscript{168}

a. Judicial Recognition of the Circumstantial War

In Bas v. Tingy, nearly a century and a half before WWII, the Supreme Court recognized the disconnect—the United States could be at war without Congress issuing a formal declaration of war.\textsuperscript{169} There, the Court found that the United States was at war with France “in fact and in law”\textsuperscript{170} despite both governments’ assertions to the contrary.\textsuperscript{171} Not only did Bas demonstrate the Court’s position that war could exist without formal state recognition, it demonstrated that war could exist despite state denials. The Court determined that the “legislative will” of whether the country was or was not at war could manifest itself in circumstances beyond a formal declaration.\textsuperscript{172} The reality that “an American vessel fighting with a French vessel, to subdue and make her prize, [was] fighting with an enemy” served as “sufficient evidence of the legislative mind” that the two nations were at war.\textsuperscript{173}

\textit{Bas} demonstrates judicial recognition of the fact that a state of war can exist without there being a formal declaration; that is, being “at war” does not require a formal declaration of war. Formally declared war and circumstantial war are not synonymous: hostilities can exist

\begin{thebibliography}{9}
\bibitem{167} Because the Supreme Court in \textit{Lee v. Madigan} noted that the legislative purpose behind wartime statutes affects whether a conflict is a war for the purposes of the particular statute, the specific set of circumstances that amount to a circumstantial war will differ for each statute depending on its particular purpose. \textit{See} 358 U.S. 228, 231 (1959).

\bibitem{168} The difference between a circumstantial war and a formally declared war, and the fact that each can exist independently of the other, can be explained using Grotius’ differentiation between war as a contest and war as a condition. Grotius was a sixteenth century scholar who authored \textit{On the Law of War and Peace}. As explained by one author, “[T]he contest of war is not the only means for establishing the condition of war. . . . [W]hen one employs [a declaration of war], the condition of war (especially, its legal conditions) can thereby be established without ever triggering the contest of war.” \textit{Hallet}, supra note 16, at 91.

\bibitem{169} Bas \textit{v. Tingy}, 4 U.S. (4 Dall.) 37 (1800).

\bibitem{170} \textit{Id.} at 42.


\bibitem{172} \textit{See Bas}, 4 U.S. at 42.

\bibitem{173} \textit{Id.}
\end{thebibliography}
where the nation is at war as the circumstances dictate (circumstantial war) and where the nation is at war pursuant to the dictates of political discourse (formally declared war). 174

b. Scholarly Recognition of the Circumstantial War

Scholars too have recognized that being "at war" is a state that is not dependent upon and is certainly not synonymous with a formally declared war. 175 This concept has been recognized since before the United States was founded. 176 Importantly, both declared and circumstantial wars were recognized as distinct categories during the WWII era when the Suspension Act was created and codified. Professor Clyde Eagleton, writing on the eve of WWII, noted that "war [could] exist without a formal declaration." 177 Additionally, Eagleton noted that the international community acknowledged that the "legal status of war may exist in the case of hostilities without a declaration." 178

c. Executive and Legislative Recognition of Circumstantial War

Perhaps the strongest evidence of Congress's recognition that war can exist without a formal declaration is the discourse surrounding the passage of the declarations that "commenced" WWII. In requesting a formal declaration of war against Japan, President Franklin Roosevelt told Congress that a "state of war has existed between the United States and the Japanese Empire" since the attack on Pearl Harbor. 179 Thus, according to Roosevelt, the United States was at war with Japan before any formal declaration had been issued. As made obvious by the purpose of his speech, this state of war did not exist because of any formal designation, but rather, it arose from the surrounding circumstances. 180

174. See The Brig Army Warwick (The Prize Cases), 67 U.S. (2 Black) 635 (1863) ("A state of actual war may exist without any formal declaration of it by either party.").


176. "After the end of the seventeenth century, with the growth of the new scientific spirit, it was no longer considered respectable to permit the word war to represent simultaneously and ambiguously both a condition and a contest." Halley, supra note 16, at 62 (internal quotation marks omitted); see also The Federalist No. 24 (Alexander Hamilton) (recognizing that "the ceremony of a formal denunciation of war has of late fallen into disuse").


178. Id. at 35 (emphasis added).

179. 87 Cong. Rec. 9504–5 (1941) (statement of President Franklin Roosevelt).

180. "Since the unprovoked and dastardly attack by Japan . . . a state of war has existed . . . ." Id. at 9505.
Congress conveyed the same notion in its declarations. The declaration of war against Japan, for example, begins: "Declaring that a state of war exists . . . ." 181 This declaration recognized a war that was ongoing, rather than a war that the declaration itself initiated. Thus, Congress’s own language evidences that war can exist without any formal declaration. 182 The other declarations issued during WWII contain similar language. 183

From these facts two significant conclusions can be drawn. First, the government and the legal community have recognized and continue to recognize that the country can be at war without a formal declaration of war. Second, a circumstantial war (whether or not formally declared) is a phenomenon that has legal consequences. Because there is a category of war that does not require any formal declaration but that can affect legal change, it follows that a communicative symbol is needed with which to label this phenomenon. The phrase “at war” satisfies this aspect of our wartime discourse. 184

Congress has used the phrase “at war as declared by congress” to signify that a statute is applicable only during declared war. 185 Therefore, to argue that the phrase “at war” also signifies declared war—but not circumstantial war—is to give declared war two communicative symbols but leave circumstantial war with none. To insist that the phrase “at war” implies only formally declared war is to deny circumstantial war its seemingly natural designation. Thus, the phrase “at war” should not be narrowly interpreted as signifying only declared war.

182. Congress has recognized the prior existence of a state of war in four out of the five wars that have involved formal declarations. Cohan, supra note 171, at 243.
184. At the most basic level, the phrase “at war” is an appropriate means of signifying circumstantial war because to be engaged in a circumstantial war is to be at war. The phrase “at war” also signifies circumstantial war better than others. Consider for example the phrases “undeclared war,” “war without formal declaration,” or even “war as determined by the circumstances.” The first two are not accurate because a circumstantial war can include a formal declaration. Thus, as much as circumstantial war should not be made synonymous with a formal declaration of war, it should not be synonymous with “undeclared war” either. The third option says in six words what could be said in two.
185. See supra note 158 and accompanying text.
3. The Act's Legislative Purpose Supports a Broad Reading of "At War"

A broad interpretation of the applicability of the Suspension Act prior to WEFA is further supported by its legislative history and purpose.\(^1\) The Act was created to "ensure that the fog of war [did] not allow those who [might] defraud the United States from getting away with it because their actions could not be investigated during hostilities."\(^2\) The committee reports that accompanied the original version of the Act were not concerned with nomenclature.\(^3\) Instead, they focused on the size and demands of the war, as well as the effect of the war procurement program on the Justice Department's resources and how the procurement effort increased the government's exposure to fraud.\(^4\) The political categorization of hostilities is not necessarily indicative of a conflict's size or the strain it places on the government's ability to perform essential functions.\(^5\) These difficulties can exist in conflicts other than formally declared wars.\(^6\) The legislative purpose of the Act, as evidenced by its legislative history, indicates that the Act was applicable to conflicts whose circumstances, not designation, mirrored those for which the Act was implemented.

4. Courts HaveApplied the Act to Undeclared Wars

One final argument in favor of a broad reading of the phrase "at war," as codified in the Suspension Act in 1948, is the broad application given to the provision by courts. As discussed above, military courts have interpreted the "at war" provision of the Act's military counterpart more often than civilian courts have interpreted the Suspension Act itself.\(^7\) They interpreted the "at war" provision broadly,

\(^{186}\) Additionally, WEFA's legislative history indicates that the Suspension Act may not be as narrow as WEFA's proponents presumed. WEFA's committee report states that without WEFA the Iraq and Afghan conflicts are "likely exempt" from the tolling provisions of the Act. S. REP. No. 110-431, at 4 (2008). The uncertainty conveyed through the phrase "likely exempt" undermines the argument, which was presented at WEFA's introduction, that the Iraq and Afghan conflicts are absolutely beyond the scope of the Suspension Act. See 154 CONG. REC. S3174 (daily ed. Apr. 18, 2008) (statement of Sen. Leahy).


\(^{188}\) See H.R. REP. No. 77-2051 (1942); S. REP. No. 77-1544 (1942).

\(^{189}\) See H.R. REP. No. 77-2051 (1942); S. REP. No. 77-1544 (1942).

\(^{190}\) See infra notes 251-257 and accompanying text.

\(^{191}\) The enormity of the Korean War "presented as frequent [an] opportunity for fraud as would have existed had the conflict been designated a 'war' instead of a 'police action.'" United States v. Prosperi, 573 F. Supp. 2d 436, 443 (D. Mass. 2008) (quoting United States v. Taylor, 4 C.M.A. 232 (1954)).

\(^{192}\) See supra notes 64–65 and accompanying text.
focusing on the “nature of the . . . conflict,” as opposed to the designation of the action.\textsuperscript{193}

Additionally, the most recent decision interpreting the provision—\textit{Prosperi}—rejected the notion that the Act, prior to WEFA, applied only to formally declared wars.\textsuperscript{194} The court ruled that limiting the Act to situations where there is a formal declaration of war “incorporate[d] a condition precedent that is not found in [the Act’s] text or legislative history.”\textsuperscript{195}

Moreover, although the \textit{Shelton} court read the Act narrowly, its logic is unpersuasive. The \textit{Shelton} court noted that the Suspension Act was created in response to problems that arose out of the “massive and pervasive” conflict of WWII.\textsuperscript{196} The court indicated that the Act had not been used during any of the conflicts since WWII, and it assumed that the Act was not used because those conflicts were not large enough in scale to warrant its application.\textsuperscript{197} Based on this assumption, the court stated that because the Persian Gulf conflict was not as large as the previous wars—for which the Act, it assumed, could not have been invoked—it too was insufficient to invoke the Act.\textsuperscript{198} This argument assumes too much by relying on evidence that is not necessarily indicative of the Act’s applicability. It assumes that the Act was not employed during the war after WWII because it could not have been (due to the “inadequate”\textsuperscript{199} magnitude of the hostilities).\textsuperscript{200} However, several other reasons can explain why the Act was not invoked: perhaps the Justice Department did not need to invoke its provisions, perhaps the attorneys who prosecuted wartime fraud did not consider the option, or perhaps they consciously chose not to employ the tolling provision.\textsuperscript{201}

Given the Act’s historical context, the government’s recognition that war can exist without a formal declaration, and the way the Act
has been interpreted by the courts, the phrase "at war," as used in the Suspension Act, should be read to apply to conflicts beyond formally declared wars.

B. The Limitation of the Newest Version of the Suspension of Limitations Act

If, as argued above, the Suspension Act prior to WEFA was not limited to formally declared wars but was applicable to conflicts whose circumstances constitute war for the purpose of the Act, there was no need to expand the Act's "at war" clause. But that is exactly what WEFA purported to do—add a second category of conflict to which the Act would apply. However, if courts find the 110th Congress's interpretation of the phrase "at war" persuasive and thus follow it, the Act will apply in only two situations: situations of formally declared war and situations where Congress has authorized the use of military force pursuant to the WPR. Therefore, the expansion that WEFA purported to provide potentially serves as a limitation.

C. Abandoning Legislative Purpose for Judicial Efficiency

If the legislative purpose behind WEFA and its accompanying assumptions about the Suspension Act prevail, then the Act as amended is applicable in only two instances. However, these two instances are not defined by a set of circumstances regarding the hostilities. Rather, they are categories. The use of a categorical approach to determine when the Act is in effect essentially eliminates any judicial wartime determination.

The committee report accompanying WEFA applauds the categorical approach for "provid[ing] a clear point in time at which the statute of limitations will begin to run, providing certainty to courts, prosecutors and litigants." In light of courts' longstanding position of "repose" regarding statutes of limitations, it is logical and certainly efficient to provide a specific date (the date on which war is formally declared or the authorization for the use of force enacted) to determine when the Act would come into effect.

203. See id.
204. This is assuming, as was argued above, that the Act was originally intended to apply to any conflicts whose circumstances amount to a war for the purposes of the Act.
This Section, however, will argue against the use of the categorical approach and in favor of a circumstantially based judicial determination. As the Prosperi court stated, the purpose of the Act was to "capture any authorized military engagement that might compromise or impede the government's ability to investigate allegations of fraud." Thus, in looking to best serve the purpose of the Act, courts should look to the circumstances of the conflict, rather than its formal designation.

This Section does not deny that a categorical approach provides some benefits: certainty and efficiency. This Section seeks only to raise the question of whether this certainty and efficiency outweigh the risks inherent in a mechanical approach that is dependent upon political discourse and action. It highlights several of the risks of using the categorical approach that the 110th Congress assumes courts will use in interpreting the Act, demonstrating the need for courts to make this determination in an organic, non-mechanical way.

1. Pacificus and Helvidius: The Ongoing Political Struggle for War Power

One risk in using a categorical approach lies in the innate qualities of the categories themselves: both are creatures of politics. Each category is a political power that can be wielded, withheld, and used in compromise. It is the political context out of which both of these categories were created that makes these potential abuses even more real; both the power to declare war and the power to authorize the Executive's use of military force were a result of the political struggle for war power that has been waged between the two political branches since the creation of the Constitution.

207. See infra notes 210-276 and accompanying text.
209. It provides courts and litigants certainty in knowing if and when the Act's tolling provision has been invoked. The ability for litigants and courts to point to a specific date of a formal declaration of war, or a WPR authorization, does promote judicial efficiency.
210. In the late eighteenth century, Alexander Hamilton, under the pen name Pacificus, and James Madison, under the pen name Helvidius, debated which branch of government—the Executive or the Legislative—should have the power to engage the country in war. See Hallet, supra note 16, at 30. Helvidius argued on behalf of the Legislative Branch, stating that "[t]hose who are to conduct a war cannot . . . be proper or safe judges of whether a war ought to be commenced, continued or concluded." Id. Pacificus argued that the congressional power to declare war was merely an exception to "the general 'Executive Power' vested in the President [that should] be construed strictly . . . extended no further than is essential to [its] execution." Id. at 30-31.
211. The U.S. Constitution is "an invitation to struggle for the privilege of directing American foreign policy." ROGER DAVIDSON & WALTER OLESZEK, CONGRESS AND ITS MEMBERS 452
The allocation of the power to declare war exemplifies this struggle. Some constitutional framers initially proposed that Congress should have the power to "make war." However, this language did not find its way into Article I. Rather than the authority to make war, Congress was provided the authority to "declare war." Proponents of this language wanted to ensure that the Executive maintained the ability to wage war, believing that "the direction of war most peculiarly demands those qualities which distinguish the exercise of power by a single hand." Opponents of this language took the alternative position that "[i]f the President alone is allowed to send anywhere abroad, at any time, hundreds of thousands of American troops without a declaration of war . . . then, indeed there is little left of American constitutional government." History has shown that the Executive does not necessarily share this sentiment. Out of the more than 150 times American forces have engaged in combat overseas, only five wars—the War of 1812, the Spanish-American war, the Mexican-American war, WWI, and WWII—have involved formal declarations.

The political tug of war that has resulted has involved both branches grappling for more power, often in response to the power exercised by the other. Arthur Schlesinger, in his landmark work *The Imperial Presidency*, described the "postwar congressional impulse to strike back at the war-magnified Presidency" and the "grand revival of the presidential prerogative . . . as a direct reaction to . . . [Congress's efforts] to seize the guiding reins of foreign policy."

The WPR was also created out of this political tug of war. Tensions came to a head after the Executive flexed its war power muscles dur-
ing the Korean and Vietnam wars, and in 1973, Congress, acting on its "postwar congressional impulse to strike back," enacted the WPR.\textsuperscript{222} Passed over the veto of President Nixon,\textsuperscript{223} the WPR was the congressional effort to reverse the "devastating precedent [Congress] ha[d] set in remaining silent while the President took over the powers specifically reserved for Congress in the Constitution."\textsuperscript{224}

The WPR never received a warm welcome from the Executive Branch. Opponents viewed it as Congress's effort to "correct nearly two hundred years [of what it perceived as] error, strip the Presidency of many of its most essential powers, and restore what [members of Congress] fondly imagine was the constitutional model of 1789."\textsuperscript{225} Since its passage, presidents have considered the measure unconstitutional,\textsuperscript{226} have sought to operate outside of its provisions,\textsuperscript{227} and have stated that a congressional authorization is unnecessary even when they do operate under it.\textsuperscript{228} One of President George W. Bush's statements is demonstrative of the executive reaction toward the WPR. When signing the Authorization for the Use of Military Force Against Iraq Resolution 2002, President Bush noted that he only sought a "resolution of support" from Congress and that signing the authorization did not "change . . . the long-standing positions of the executive branch on . . . the President's constitutional authority to use [military] force."\textsuperscript{229}

Considering the struggle for war power in the past, the risk in using the categorical approach is that the congressional choice to employ (or withhold) either of these designations may be more reflective of political relations rather than the conflict itself. The language of the WPR makes it acutely susceptible to this possibility. The WPR imposes a sixty-day limit on the President if he does not obtain congressional authorization.\textsuperscript{230} The sixty-day limit is only triggered when forces are introduced into hostile or imminently hostile situations.\textsuperscript{231}

\begin{itemize}
\item \textsuperscript{223} Richard F. Grimmet, \textit{The War Powers Resolution After Thirty Years, in The War Powers Resolution After 30 Years} 1, 2 (Gerald M. Perkins ed., 2005).
\item \textsuperscript{224} SCHLESINGER, supra note 217, at 135 (quoting Rep. Frederic R. Coudert, Jr.).
\item \textsuperscript{225} HALLETT, supra note 16, at 39.
\item \textsuperscript{226} See Grimmet, supra note 223, at 10.
\item \textsuperscript{227} See id. at 47 (discussing President Bill Clinton's failure to withdraw troops from Kosovo after sixty days even though no authorization had been given).
\item \textsuperscript{228} The President has "welcomed support from the Congress in the form of legislation authorizing him to use U.S. military forces . . . but has not taken the view that he is required to obtain such authorization." ELSEA & GRIMMET, supra note 163, at 6 (emphasis added).
\item \textsuperscript{229} Grimmet, supra note 223, at 57.
\item \textsuperscript{230} Pub. L. No. 93-148, § 5(a).
\item \textsuperscript{231} See Huckabee, supra note 219, at 215.
\end{itemize}
The determination of whether troops are being introduced into hostile situations is based on a report that the WPR mandates the President to submit.\textsuperscript{232} The President may not wish to start the running of the sixty-day period, and in order to avoid it, he may choose not to submit the necessary "hostilities" report to Congress,\textsuperscript{233} he may delay in submitting it,\textsuperscript{234} or he may be intentionally obscure as to whether the report is in fact a hostilities report.\textsuperscript{235} In these scenarios, the President does not require and Congress need not provide authorization for the use of force. In some cases, the President has continued the mobilization of troops in hostilities beyond the sixty days without congressional approval.\textsuperscript{236} In these instances, when the President exercises the war powers that he feels are rightly his, but that are beyond the confines of the WPR, the Suspension Act would not apply, although the circumstances might dictate that it should.

2. \textit{Each Category Brings With It a Whole Host of Political Consequences.}

Another risk in using these categories is the fact that each invokes legal and political consequences that Congress may be hesitant to bring into play. Thus, the decision to label a conflict with certain wartime discourse may be based more on congressional willingness to invoke a particular category's secondary consequences and less upon the nature of the conflict. Speaker Thomas Foley explained why Congress did not formally declare war during the Persian Gulf Conflict:

\begin{quote}
[T]he reason [that Congress] did not declare a formal war was not because there is any difference . . . in the action that was taken and in a formal declaration of war with respect to military operations, but because there is some question about whether we wish to excite or enact some of the domestic consequences of a formal declaration of war—seizure of property, censorship, and so forth which the President neither sought nor desired.\textsuperscript{237}
\end{quote}

\begin{footnotesize}\textsuperscript{232} See Hallet, supra note 16, at 5. \\
\textsuperscript{233} "Congress is powerless to act unless and until the [President] acts first . . . . Should the [President] . . . refuse to report . . . Congress is left high and dry, sputtering and protesting but unable to do much else." \textit{id.} at 5–6. \\
\textsuperscript{234} See Grimmet, supra note 223, at 28–30 (describing how over the course of six months President George H.W. Bush deployed hundreds of thousands of troops to Kuwait but sent two reports to Congress that stated that hostilities were not imminent). \\
\textsuperscript{235} "[W]hen Reagan reported . . . that he had deployed 1,200 marines to Lebanon . . . he left it up to Congress to decide whether his letter constituted a hostilities report." Hallett, supra note 16, at 6. \\
\textsuperscript{237} Grimmet, supra note 223, at 32.\end{footnotesize}
In addition to domestic political consequences, formal declarations of war and authorizations for the use of force under the WPR also have international political consequences. The international ramifications of upholding alliances certainly affect congressional action. Consider, for example, the United States' declarations of war against Bulgaria, Hungary, and Romania during WWII. These nations declared war on the United States in late 1941.\textsuperscript{238} However, the United States government generally ignored those declarations.\textsuperscript{239} It was "[o]nly later, as a gesture of friendship to the Soviet Union" that President Roosevelt asked Congress to recognize the wars with these countries.\textsuperscript{240} Thus, the declarations were not necessarily reflective of the nature of the conflict. They were an effort by the government to appease its allies.

Additionally, there are "numerous . . . diplomatic reasons why states wish to avoid the disruption and embarrassment of admitting a state of war exists."\textsuperscript{241} Some of these include the belief that the international community has outlawed war as a means of resolving interstate dispute and the desire not to interrupt treaty agreements or trade.\textsuperscript{242} Thus, the international implications of formally declaring war in particular may be more indicative of why Congress chooses to employ certain wartime discourse than the conflict itself.

4. Do the Dates Match Up?

One of the purposes for employing the categorical approach is to provide both courts and litigators certainty in knowing the dates upon which the tolling provisions of the Act take effect.\textsuperscript{243} While this approach may provide clear dates, it does not necessarily provide accurate dates.

Consider potential problems for determining the cessation of hostilities in accordance with WEFA. The Suspension Act as amended by WEFA requires courts to look to a formal proclamation of the President or a concurrent resolution of Congress to determine when hostilities have ceased.\textsuperscript{244} Thus, rather than look to see whether hostilities have actually ended, courts must look to whether one of the political

\begin{itemize}
  \item \textsuperscript{238} See Cohan, \textit{supra} note 171, at 242.
  \item \textsuperscript{239} See id.
  \item \textsuperscript{240} Id.
  \item \textsuperscript{241} Id. at 227.
  \item \textsuperscript{242} Id.
  \item \textsuperscript{243} See S. \textsc{Rep.}, No. 110-431, at 5 (2008).
\end{itemize}
branches has communicated—in a very specific manner—that hostilities have ceased.

Even though WEFA requires that the presidential proclamation be a formal proclamation in order to ensure that courts not look to “self-serving” presidential speeches, there is no way to guarantee that even formal proclamations would be free of political motivation or would better reflect when hostilities end. Consider the cases following WWII where President Truman issued a formal proclamation regarding the cessation of hostilities. Even then, 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,” which was September 2, 1945—sixteen months earlier.

The requirement that courts look to the political branches to see whether either has manifested the belief that hostilities have ended requires courts to forgo interpreting the facts of the situation and instead interpret the actions and words of Congress or the President. The risk here lies not only in the fact that these formal discursive categories and modes of communication (formal declarations of war, authorizations for the use of military force, formal presidential proclamations, and congressional resolutions) can be politically influenced, but also in the fact that they can produce inaccurate dates. Thus, while we can say that the dates upon which the Act relies may be clear, they are not necessarily accurate.

5. “Sometime They’ll Give a War and Nobody Will Come.”

Taking a categorical approach rather than basing the wartime determination on the “indicia of war” is problematic because each category does not necessarily reflect the magnitude of the hostilities that it

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246. Proclamation No. 2714, 12 Fed. Reg. 1 (Jan. 1, 1947). It is interesting to note the proclamation itself claimed that “a state of war still exist[ed].” Id. Nonetheless, President Truman felt it was “possible to declare and . . . in the public interest to declare, that hostilities [had] terminated.” Id.
248. Id. at 230 (Clark, J., concurring).
249. These dates may not be so clear. Consider what might happen if both the President and Congress have proclaimed hostilities to be over but at different times, or if neither a formal proclamation is issued nor a resolution passed, even though hostilities have in fact ended.
labels. The purpose of the Suspension Act was to provide the government more time to investigate the fraud that grew out of the "gigantic war program" that developed when the number of government contracts increased while government resources were stretched. Neither a formal declaration nor an authorization for the use of military force pursuant to the WPR is a label that depends upon or is even related to any of these factors.

Consider the Korean War, which was officially deemed a "police action." During the war, there was neither a formal declaration nor any authorization by Congress to use force. Thus, under WEFA's proponents' proposed interpretation of the Act, the Korean War would be excluded from the Act's tolling provision. This exclusion acutely demonstrates the arbitrariness of the categorical approach, particularly in light of the fact that after adjusting for inflation, the Korean War cost $160 billion more than WWI, which, as a formally declared war, would toll the statute of limitations pursuant to the Act.

Considering the risks outlined above, the categorical approach to making the wartime determination has the potential to frustrate the effective application of the Act. While WEFA may provide certainty, it has potentially compromised accuracy. While it may provide efficiency, it has potentially compromised the purposes of the Act.

252. As Karl Llewellyn has noted, categories . . . once formulated and once they have entered into thought processes, tend to take on an appearance of solidity, reality and inherent value which has no foundation in experience. More than this: although originally formulated on the model of at least some observed data, they tend, once they have entered into the organization of thinking, both to suggest the presence of corresponding data when these data are not in fact present, and to twist any fresh observation of data into conformity with the terms of the categories.


256. Prosperi, 573 F. Supp. 2d at 452 n.28.
D. Courts Should Not Be Required to Close Their Eyes to the Circumstances of a Conflict

A wartime determination that requires courts to look at the circumstances and consequences of a conflict would better serve the Act's purpose. The Act was intended to provide the government sufficient time to investigate fraud that occurs during war when the amount of government spending increases and when there are heavier than normal burdens on investigative resources.\(^{257}\) Finding whether these conditions exist requires a thoughtful determination. This determination should not be made to rely upon Congress's use of or failure to use a formal declaration of war or a WPR authorization. These categories have no necessary relation to the existence of the above mentioned circumstances. Their use in this instance can be wholly arbitrary.

Requiring courts to take their cue from formal, political acts of the Executive and Legislature in determining when hostilities have begun or ended assumes that the political branches' actions will accurately reflect the state of hostilities. However, as indicated by the courts in *Prosperi* and *Smith*, this expectation is often frustrated. It is here that *Prosperi* should be defended, particularly in regard to its decision that the war in Iraq ended on May 1, 2003 when President Bush gave his "Mission Accomplished" speech,\(^{258}\) despite the fact that billions of dollars were still being spent on the Iraq war when the decision came down in 2008.\(^{259}\) While the court's determination may seem to have abandoned common sense, there is no denying it complied fully with the provisions of the Act. *Prosperi* looked to the President and Congress to determine whether either had conveyed any indication that hostilities had ended.\(^{260}\) President Bush's speech stating that the "tyrant has fallen, and Iraq is free" certainly indicated hostilities had ended and "the [government] transition . . . to democracy" had taken over.\(^{261}\) *Prosperi*'s determination seems odd at best, but it should not


\(^{258}\) *Prosperi*, 573 F. Supp. 2d at 455.


\(^{260}\) See *Prosperi*, 573 F. Supp. 2d at 454–55.

be viewed as a reflection of the court’s analytical abilities. This outcome is the result of prohibiting courts from looking to the circumstances of a conflict.

To obtain an accurate reflection of the state of hostilities, the body responsible for the wartime determination should be able to look to the conflict rather than another branch’s interpretation of or reaction to the conflict. Accordingly, courts should have the authority to decide not only whether circumstances dictate that the United States is “at war,” but also to determine whether hostilities have ended.

The wartime determination is an assessment that is not foreign to courts. The determination is not a standardless one. In the context of the Suspension Act, the Prosperi court laid out four factors for courts to consider in making the wartime determination. These factors take into consideration the purpose of the Act, the fact that war is a dynamic phenomenon, and the fact that it is the prerogative of the political branches to determine whether the nation is at war.

The first factor (requiring courts to look to “the extent of the authorization given by Congress to the President to act”) and the third factor (requiring courts to look to how much Congress has invested in a conflict) take into consideration the actions of the political branches, such that courts are not making the wartime determination wholly apart from the Executive and Legislative bodies. These factors should assuage fears that a circumstantially based wartime determination would enable the Judicial Branch to usurp any war powers or even enter the war powers struggle. “Whether . . . war, in its legal sense exists, is to be determined alone by the political power of the government.” However, as demonstrated in Bas v. Tingy, courts should not be limited in what they may look to in discerning the legislative will. The political branches may engage in acts of war without calling the resulting conflict a war. Accordingly, courts should be permitted to look to different acts of the political

263. Prosperi, 573 F. Supp. 2d at 449.
264. See id. Factors three and four take into consideration the conflict’s procurement effort and diversion of government resources. See id.
265. See id. Factor two looks to how war is defined “under accepted definitions of the term.” Id. The Prosperi court examined how the term “war” is used in contemporary context. Id. at 451.
266. Id. at 449. Factors one and three look to the actions of the political branches. Id.
267. Id.
268. Id.
269. Sutton v. Tiller, 46 Tenn. (6 Cold.) 593, 595 (1869).
270. See Bas v. Tingy, 4 U.S. (4 Dall.) 37, 42 (1800).
bodies to determine whether there is war. In doing so, courts will defer to the political branches’ implied and express indications that the country is at war.

The second Prosperi factor (determining whether the “conflict is deemed a ‘war’ under accepted definitions of the term and the rules of international law”) takes into consideration the amorphous nature of war. By looking to modern and accepted definitions of war, Prosperi’s circumstantially based approach would accommodate the changes that occur in international and domestic discourse. A categorical approach, on the other hand, does not necessarily account for changes, but instead is likely to need changing itself as new ways of categorizing conflict develop and others fall into disuse. WEFA demonstrates this. If one takes a categorical approach—as did WEFA’s proponents—in order for the Act to remain viable, new categories of war will have to be added to the Act as wartime discourse changes. A circumstantial approach does not require that the Act be further amended in order to keep up with how the nation classifies war.

The third factor (looking to the “the cost of the reacted procurement effort”) and the fourth factor (looking to the “diversion of resources” caused by the conflict) take into account the purpose of the Act. By determining whether the circumstances that the Act was created to remedy do in fact exist, courts can accurately apply the Act in accordance with its purpose. Moreover, these factors ensure that minor conflicts, which WEFA’s proponents wanted to prevent from invoking the tolling provision of the Act, will not come within the Act’s purview.

The Prosperi court did not indicate that these factors were exclusive. These factors may develop into standards that provide the predictability and certainty to courts and litigators that WEFA’s proponents desired, while comporting with the purposes of the Act.

V. How Will Courts Make the Wartime Determination After WEFA?

The question that remains to be answered is how the Act as amended by WEFA will be applied by courts. WEFA’s proponents

272. See id. at 451.
273. Id. at 449.
274. Id.
276. The Prosperi court stated that courts should “include” these factors. Prosperi, 573 F. Supp. 2d at 449.
took the view that the Act’s wartime determination would involve a per se categorical approach. However, this may not necessarily have to be the case. It will depend on competing principles of statutory interpretation.

Courts could engage in a strict textualist reading of the Act. A strict textualist reading would emphasize that the Act prior to WEFA, and still today, does not specifically require war to be formally declared. Although WEFA was intended to clarify the wartime determination, Congress left the phrase “at war” untouched. And although Congress assumed the phrase “at war” referred only to formally declared wars, it did not amend the Act to expressly convey this notion, even though it could have done so, and even though similar amendments have been passed previously by Congress. Courts may look at this omission as intentional; even though Congress felt that the Act only applied to formally declared wars, it did not want to limit courts’ abilities to make the wartime determination by expressly stating it.

Moreover, the premise upon which WEFA was enacted, as argued above, was incorrect. The fact that Congress adopted an amendment on the basis of a misconception as to the meaning of the law does not turn that misconception into law. Employing this reasoning, courts could determine that WEFA only creates one per se category—conflicts that have been authorized pursuant to the WPR—while still allowing any other conflicts, whose circumstances amount to a war for the purposes of the Act, to toll the limitations period.

However, courts may opt to take the categorical approach if they apply the principle of expressio unius est exclusio alterius to their reading of the text. Using this principle, courts could determine that because Congress had to add a second category of conflict that would invoke the tolling provision of the Act, that second category was not originally intended to be covered by the Act. Thus, implying that because the phrase “at war” did not encompass authorized uses of military force, it does not encompass other types of conflicts that are not designated wars by formal declaration. Courts may find that Congress added this one category of conflict to the exclusion of all that are not expressly included in the Act.

WEFA’s legislative history also seems to permit courts to take either the categorical approach or circumstantial approach when making the Act’s wartime determination. For the most part, WEFA’s

277. See id.
278. See supra note 161 and accompanying text.
279. See United States v. Price, 361 U.S. 304, 313 (1960) ("[T]he views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one.").
legislative history conveys that the phrase "at war" refers only to declared wars. The committee report accompanying WEFA states with certainty that WEFA was necessary to ensure that the Act would apply both "when the United States is engaged in a declared war" and when Congress has authorized the use of force. Furthermore, the statements surrounding WEFA in the Congressional Record advocate the notion that the Act prior to WEFA only applied to formally declared wars. However, this notion was not entirely without doubt. The committee report also states that the conflicts in Iraq and Afghanistan were "likely" exempt from the Act as enacted in 1948, indicating that perhaps the phrase "at war" did not refer solely to declared wars. This uncertainty invites courts to determine which approach they will take when making the wartime determination for the Act in the future.

Courts may still follow the categorical tack and apply the Act only in limited circumstances. However, courts would not be unjustified in interpreting the phrase "at war" by using the Prosperi factors, thereby applying the tolling provision based on a conflict's circumstances rather than its official designation.

VI. Conclusion

Wartime fraud that is committed against the government is a growing problem. The United States is using private contractors in war more and more. Beyond that, the current financial crisis has moved the government to buy shares in banks and other financial institutions, leaving the government susceptible to even more fraudulent conduct during the ongoing war on terror. The financial and political climates have forced this once overlooked law into the forefront of the government's possible litigation strategies. However, as discussed above, this most recent attempt to revive the Act may not have been absolutely necessary and may in fact prevent the Act from applying when it is needed most. The categories potentially created by WEFA do not necessarily reflect the purpose behind the Suspension Act and

283. Id. at 3.
prevent courts from engaging in any substantial wartime
determination.

In order to ensure that the Act applies in accordance with its pur-
pose, courts should not limit themselves to taking a categorical ap-
proach. They should follow Prosperi and look to the circumstances of
the conflict: the size of the war procurement program, how stretched
the government's resources are, and whether the conflict amounts to
war in accordance with contemporary standards. It is only through
this approach that the Act will serve its true legislative purpose of
ensuring that "the crisis of war [is] not ... used as a means of avoiding
just penalties for wrongdoing."286

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President Franklin Roosevelt).
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