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Criminal Law - Wartime Suspension of Limitations Act Extends Filing Time for Fraud Claims against Big Dig Contractors - United States v. Prosperi, 573 F. Supp. 2D436 (D. Mass. 2008)

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CRIMINAL LAW –WARTIME SUSPENSION OF LIMITATIONS ACT EXTENDS FILING TIME FOR FRAUD CLAIMS AGAINST BIG DIG CONTRACTORS – *UNITED STATES V. PROSPERI*, 573 F. SUPP. 2D 436 (D. MASS. 2008)

The United States government historically suspends federal statutes of limitations during wartime.[1] The Wartime Suspension Act ("Suspension Act") extends the statute of limitations involving crimes of fraud against the federal government for five years after the end of a war.[2] In *United States v. Prosperi*,[3] the Federal District Court of Massachusetts considered whether the country was "at war" and, if so, whether the Suspension Act allowed fraud claims to be brought against Central Artery Tunnel project ("Big Dig") contractors that were otherwise time-barred.[4] The court concluded that the United States was at war in both Afghanistan and Iraq when the lawsuit originated, and thus, the fraud claims were not time-barred because the Suspension Act applied.[5]

The Big Dig, a fifteen-year $14.6 billion infrastructure project, included replacing almost eight miles of highway and moving large portions of an elevated highway underground in Boston, Massachusetts.[6]

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[1] *See infra* note 17 (highlighting history of suspension of statutes of limitations during wartime).

[2] *See* 18 U.S.C.A. § 3287 (West 2008) (detailing extension of statute of limitations during wartime). The statute reads in part,

> When the United States is at war or Congress has enacted a specific authorization for the use of the Armed Forces, as described in section 5(b) of the War Powers Resolution (50 U.S.C. § 1544(b)), the running of any statute of limitations applicable to any offense (1) involving fraud or attempted fraud against the United States or any agency thereof in any manner, whether by conspiracy or not, . . . shall be suspended until 5 years after the termination of hostilities as proclaimed by a Presidential proclamation, with notice to Congress, or by a concurrent resolution of Congress. For purposes of applying such definitions in this section, the term "war" includes a specific authorization for the use of the Armed Forces, as described in section 5(b) of the War Powers Resolution (50 U.S.C. § 1544(b)).

Id.

[3] 573 F. Supp. 2d 436 (D. Mass. 2008).

[4] *See id.* at 438-39 (explaining alleged crime).

[5] *See id.* at 455 (holding statute of limitations tolled from September 18, 2001 to May 1, 2006).

[6] *See* THOMAS P. HUGHES, RESCUING PROMETHEUS: FOUR MONUMENTAL PROJECTS THAT CHANGED THE MODERN WORLD 12 (Pantheon Books 1998) (chronicling history of Big Dig).

The defendants, former managers of Aggregate Industries, a Big Dig contractor, were charged with making and mailing false claims to the federal government.[7] The government alleged that beginning in 1999, the defendants supplied concrete that did not meet government construction contract specifications.[8] The government indicted the defendants on May 3, 2006.[9] The defendants moved to dismiss the majority of the counts as time-barred on June 29, 2007.[10]

Historically, the branches of the federal government struggle over which branch has the ability to decide that the country is at war.[11] The Constitution gives Congress the power to "declare war" and the President the power to command the military.[12] The Constitution, however, is silent

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The project first received federal funding in 1987 after Congress overrode President Reagan's veto of the transportation bill. *Id.*

[7] *See Prosperi*, 573 F. Supp. 2d at 438-39 (detailing charges). The defendants were charged under 18 U.S.C. § 1020 and 18 U.S.C. § 1341 for making false claims and mail fraud. *Id.* at 439 n.1. Under 18 U.S.C. § 1020, it is illegal for a government contractor to make a "false statement, false representation, false report, or false claim with respect to the character, quality, quantity, or cost of any work performed . . . or materials furnished or to be furnished, in connection with the construction of any highway or related project approved by the Secretary of Transportation." 18 U.S.C. § 1020 (2006). The mail fraud statute punishes individuals who intend to defraud the government and use the United States Postal Service to do so. *See* 18 U.S.C. § 1341 (2007).

[8] *See* Raja Mishra and Shelley Murphy, *Big Dig Probe Expanding*, BOSTON GLOBE, May 5, 2006, *available at* http://www.boston.com/news/local//articles/2006/05/05/big_dig_probe_ expan ding/. The defendants were charged with taking old concrete, mixing it with water, and then falsifying documents to make the concrete appear new and up to contract specifications. *Id.* The specifications require the concrete to be used within 90 minutes of being mixed or it will begin to harden. *Id.* If water is added or the concrete is used after that time it may not solidify properly. *Id.* The defendants were accused of using inadequate concrete in approximately 5000 of the 500,000 loads it delivered and used in the Big Dig project. *See Prosperi*, 573 F. Supp. 2d at 439.

[9] *Prosperi*, 573 F. Supp. 2d at 439 (explaining procedural history).

[10] *Id.* (explaining procedural history).

[11] *See* J. Brian Atwood, *The War Powers Resolution in the Age of Terrorism*, 52 ST. LOUIS U. L. J. 57, 74 (2007) (commenting on constitutional separation of powers). The Framers drafted the Constitution to create a check and balance system when waging war. *Id.* at 69. They did not "wish to leave the security of our nation and the world to the exclusive judgment of a single person whose accountability is limited in the short term." *Id.* at 74. In 1973, "congressional frustration over an unpopular war" prompted the ratification of The War Powers Resolution Act. *Id.* at 58. The Act attempted to reign in the President's war power by requiring the President to "consult with Congress before introducing United States Armed Forces into hostilities . . . ." 50 U.S.C. § 1542 (1973).

[12] U.S. CONST. art. I (setting forth legislative powers). The War Power is a shared power between the Legislative and Executive Branches. *See* Robert Gray Bracknell, *Real Facts, "Magic Language," the Gulf of Tonkin Resolution, and Constitutional Authority to Commit Forces to War*, 13 NEW ENG. J. INT'L & COMP. L. 167, 213-14 (2007). Specifically, Congress has the power "to *announce* the commencement or to *announce* the recognition of the existence of a state war" through a formal declaration or legislation. *Id.* at 224. It is not necessary for Congress to use the phrase "at war" if the country has taken "war-like" actions. *Id.* The President is the "Commander in Chief of the Army and Navy of the United States," and has the power to sign treaties with the consent of two thirds of the Senate. U.S. CONST. art. II, § 2

as to the war power of the Judiciary.[13] In light of this silence, the Judiciary has been reluctant to rule that a war legally exists.[14] Instead, the Supreme Court, through analyzing the actions of both the President and Congress, can articulate the start and end dates of wars.[15] Traditionally, the Court looks towards presidential proclamations, formal peace agreements, and specific legislation to determine when a war has ended.[16]

Despite the ambiguity as to which branch of the federal government decides if the country is "at war," the government has long recognized the need to extend statutes of limitations during times of war.[17]

(providing scope of Presidential powers). In addition, the Commander in Chief has a "textually undefined 'executive' power," Bracknell, *supra* at 212, limited by The War Powers Resolution Act of 1973. *See* Atwood, *supra* note 11, at 58.

[13] *See* 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, 1333-34 (2004) (commenting on absence of war language regarding the judiciary). The only time "war" is mentioned within Article III is to define the crime of treason as "levying war" against the United States. U.S. CONST. art. III, § 3.

[14] *See* Hagan, *supra* note 13, at 1338 (discussing Judiciary's war power). The Supreme Court has refused to decide whether a state of war exists because it is a political question. *See* Ludecke v. Watkins, 335 U.S. 160, 170 (1948) ("[the existence of wars] are matters of political judgment for which judges have neither technical competence nor official responsibility."); *see also* Stephen I. Vladeck, *Ludecke's Lengthening Shadow: The Disturbing Prospect of War Without End*, 2 J. NAT'L SECURITY L. & POL'Y 53, 62-63 (2006) (discussing whether existence of war is a political question). The Court has also refused to decide whether an officially declared war is in fact legally terminated. *See Ludecke*, 335 U.S. at 169 ("[T]hat a war though merely formally kept alive had in fact ended, is a question too fraught with gravity even to be adequately formulated when not compelled."). Instead, through a line of cases dating back to the Civil War, "the judicial branch retains the power to determine the condition of war in a material sense." Hagan, *supra* note 13, at 1339; *see also* Vladeck, *supra* (citing The Amy Warwick, 67 U.S. 635, 670 (1862)) (highlighting courts can decide "disputes turning on when a state of war existed.").

[15] *See Ludecke*, 335 U.S. at 168 ("'The state of war' may be terminated by treaty or legislation or Presidential proclamation."); United States v. Anderson, 76 U.S. 56, 70 (1869) (requiring proclamation by President or act of Congress "that armed resistance had ceased."). *See also* John Alan Cohan, *Legal War: When Does it Exist, and When Does it End?*, 27 HASTINGS INT'L & COMP. L. REV. 221, 301 (2004) ("[T]he end of a war is something determined by the political branches of the government . . . ."). Despite the fact that the Court looks toward the actions of Congress and the President to signal the legal end to war, the Constitution is silent as to who has the power to declare that war has ended. *See* Hagan, *supra* note 13, at 1368.

[16] *See Ludecke*, 335 U.S. at 170 (finding country still at war because political branch had not ended war); Hamilton v. Kentucky Distilleries & Warehouse Co., 251 U.S. 146, 163 (1919) (holding war act applicable because of Congressional and Presidential acts). In 1919, the Court ruled that the country was still at war because the President controlled the railroad, the wheat and grain supplies, and there were still armed forces in occupied territory. *Hamilton*, 251 U.S. at 163. *See also* Cohan, *supra* note 15, at 312 ("[W]ar does not end with the cessation of hostilities in and of itself . . . a formal proclamation or peace treaty is necessary to establish that a war has in fact come to an end in the legal sense.").

[17] *See* Lindsey Powell, *Unraveling Criminal Statutes of Limitations*, 45 AM. CRIM. L. REV. 115, 122-23 (2008) (explaining history of suspending federal statutes of limitations during wartime). The first suspension of federal statutes of limitations occurred in 1869 after the Civil War. *Id.* at 122. This extended the statutes of limitations for offenses committed in states that had seceded until two years after the state regained representation in Congress. *Id.* If statutes of

The Suspension Act, first enacted in 1921, extends the statute of limitations for crimes involving fraud or attempted fraud against the government during times of war.[18] The statute applies when fraud is an essential element of the crime charged and the offense involves a pecuniary matter.[19] Congress amended the Suspension Act multiple times; first in 1948, when the words "at war" were added to make the statute permanent.[20] The statute was amended again in July 2008 to expand the definition of "at war" to include the congressional authorization of military force and to encourage the prosecution of crimes involving fraud against the government, despite the statute not being successfully used since 1956.[21]

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limitations were not suspended, the government was faced with the problem that violators would not be prosecuted. *Id.* However, the "policy behind any statute of limitations . . . is as valid during war as in peacetime." Willard P. Norberg, *The Wartime Suspension Limitations Act*, 3 STAN. L. REV. 440, 452 (1951). Statutes of limitations, in general, serve the general purpose of limiting the prejudice to a defendant litigating a stale claim, which may affect his ability to gather evidence or witnesses. *Id.*

[18] *See* 18 U.S.C.A. § 3287 (West 2008) (noting legislative intent); Bridges v. United States, 346 U.S. 209, 217 (1953) (detailing legislative history). Fearing that there were "exceptional opportunities to defraud the United States that were inherent in its gigantic and hastily organized procurement program," Congress enacted the Suspension Act to safeguard against crimes of fraud "by increasing the time allowed for their discovery and prosecution." *Bridges*, 346 U.S. at 218.

[19] *See Bridges*, 346 U.S. at 222 (holding false statement at hearing did not toll Suspension Act because pecuniary interest not involved); *see also* Norberg, *supra* note 17, at 440 (explaining use of statute post World War II). During the McCarthy Era, the government unsuccessfully attempted to use the Suspension Act to prosecute suspected communists. *See id.*

[20] *See Bridges*, 346 U.S. at 217 (detailing legislative history). The legislative history of the text explains that prior to 1948, the text of the statute would refer to a specific war and the legislation would expire after that war ended. *Id.* at 218-29. For example, the Suspension Act was first enacted in 1921 during World War I, lapsed, and was reenacted again in 1942 to extend the statutes of limitation for the same types of fraudulent crimes against the federal government during World War II. *See id.*

[21] *See* United States v. Temple, 147 F. Supp. 118, 121 (N.D. Ill. 1956) (allowing fraud claim under Suspension Act). The statute was frequently used during the 1950s to prosecute crimes involving fraud that occurred during World War II. *See* United States v. Grainger, 346 U.S. 235, 243 (1953) (holding Suspension Act applied to fraudulent purchases of wool); United States v. Taylor, 132 F. Supp. 886, 889 (E.D.N.Y. 1955) (denying motion to dismiss claims of fraud against National Guard officer due to Suspension Act). Despite the lengthy conflicts in Korea and Vietnam, the statute was not used again until almost forty years later. *See* United States v. Shelton, 816 F. Supp. 1132, 1134-35 (W.D. Tex. 1993). In *Shelton*, the court found that the Persian Gulf Conflict was not a "war" for the purposes of the Suspension Act. *Id.* at 1135. Specifically, the court reasoned that the "Congressional intent underlying the Suspension Act appears to have been more directly concerned with such massive and pervasive conflicts as World War II." *Id.* The court supported this argument by reasoning that "[T]he Vietnam War was arguably a much more intrusive and lengthy conflict than the recent conflict in the Persian Gulf area, but the Suspension Act does not appear to have ever been used . . ." during that war. *Id.; see also* S. Rep. No. 110-431 (July 25, 2008) (amending statute). Congress amended the statute with the express purpose to promote prosecution during times when Congress authorized the use of military force. *Id.* The amendment also changes the tolling period from three years to five years after the end of hostilities. *Id.*

The definition of "at war" within legislation has been the subject of much debate.[22] "[T]here is next to no positive law regulating the war-ending process which is both substantive and explicit;" thus, the specific actions necessary to end a war are unclear.[23] Traditionally, war ends through a formal agreement or complete military victory by annihilation of the adversary.[24] With the advent of wars against terrorism, like those in Afghanistan and Iraq, the analysis becomes complicated because there is not an easily identifiable enemy, such as a country.[25] As a result, it is difficult to ascertain the start and end dates of untraditional wars like those in Afghanistan and Iraq.[26]

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[22] *See* Cohan, *supra* note 15, at 223 ("American courts seem never to have agreed on a standard for determining the existence of a state of war."); Vladeck, *supra* note 14, at 62 ("Questions about when and how wars end have come before U.S. courts in nearly every major American conflict.").

[23] Brian Orend, *Terminating Wars and Establishing Global Governance*, 12 CAN. J. L. & JURIS. 253, 254 (1999). This is a problem on a global and national scale as both the United States Constitution and international law contain little guidance for terminating wars. *See id.* at 255; Cohan, *supra* note 15, at 301 ("Although the Constitution provides that Congress has the power to declare war, there is no provision regarding which branch has the power to terminate war."). *See also* Vladeck, *supra* note 14, at 55 (explaining cessation of war). "[I]t is irrelevant whether fighting actually has ceased. All that matters is whether the political branches have formally acknowledged as much." *Id.*; Hagan, *supra* note 13, at 1371 (arguing courts may not have "sufficient standards" to determine end of war).

[24] *See* W. Michael Reisman, *Stopping Wars and Making Peace: Reflections on the Ideology and Practice of Conflict Termination in Contemporary World Politics*, 6 TUL. J. INT'L & COMP. L. 5, 36-39 (1998) (outlining methods of ending war). Military victory involves everything from "political obliteration to complete subjection of the adversary." *Id.* at 36. *See also* Wolff Heintschel von Heinegg, *Factors in War to Peace Transitions*, 27 HARV. J.L. & PUB. POL'Y 843, 849-52 (2004) (detailing ways to end war). A war is not terminated until there is the end of "active hostilities" or a formal peace agreement, both of which must be accompanied by the end of occupation by the hostile army. *Id.* at 845, 852. The end of "active hostilities" also must include the release of political prisoners. *Id.* at 854.

[25] *See* Vladeck, *supra* note 14, at 94. The Supreme Court "seems to recognize that now, and for the indefinite future, we are indeed, at war." *Id.* (discussing courts decision in Hamdi v. Rumsfeld, 542 U.S. 507 (2004)). For example, the President, in asking for authorization to invade Afghanistan proclaimed, "Our war on terror begins with Al Qaida, but it does not end there. It will not end until every terrorist group of global reach has been found, stopped, and defeated." Address Before a Joint Session of the Congress on the United States Response to the Terrorist Attacks of September 11, 2 PUB. PAPERS 1140, 1141 (Sept. 20, 2001).

[26] *See* Hagan, *supra* note 13, at 1333 ("[T]he War on Terror does not lend itself to easy labeling of enemies, battles, and start and end dates."). On September 18, 2001, Congress authorized the President "to take action to deter and prevent actions of international terrorism against the United States." Authorization for the Use of Military Force Pub. L. No. 107-40, 115 Stat. 224 (2001). With this authorization, the United States began "Operation Enduring Freedom" to root out Al Qaida terror training camps in Afghanistan. *See* Michael Petrusic, Comment, *Enemy Combatants in the War on Terror and the Implications for the U.S. Armed Forces*, 85 N.C. L. REV. 636, 640 (2007). As of June 1, 2008, 48,250 troops were stationed in Afghanistan. *See* JOANNE O'BRYANT & MICHAEL WATERHOUSE, U.S. FORCES IN AFGHANISTAN, CRS REPORT FOR CONGRESS, (May 8, 2008), www.fas.org/sgp/crs/natsec/RS226

In *United States v. Prosperi*, the Federal District Court of Massachusetts held that the United States was at war with both Afghanistan and Iraq, and therefore, the Suspension Act extended the statute of limitations for crimes involving fraud committed against the government during the war period.[27] Despite possible political implications, the court reasoned that it was appropriate to determine whether the country was, in fact, at war.[28] The court debated the actual meaning of the words "at war" within the statute.[29] Acknowledging that the statute was used rarely between World War II and today, the court rejected the idea that the statute had been impliedly revoked.[30] Instead, the court identified four factors that a court should consider in determining whether the United States is at war.[31] Specifically, the court considered whether: 1) Congress gave authorization to the President; 2) the conflict is deemed a war under international law; 3) the size and scope of the conflict is large; and 4) the conflict causes a diversion of national resources.[32]

Applying the first factor, the *Prosperi* court found that Congress and the Supreme Court had sufficiently recognized the President's authority to combat terrorism in both Afghanistan and Iraq.[33] Because a

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33.pdf. On October 16, 2002, Congress authorized the use of military force in Iraq. Authorization for the Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (October 16, 2002). The attack on Iraq began with 40 cruise missile strikes against Iraq on March 19, 2003. *See* GlobalSecurity.org, Operation Iraqi Freedom, www.globalsecurity.org/ military/ops/iraqi _fre edom.htm (last visited Jan. 18, 2009). Although the end of major combat operations in Iraq was declared on May 1, 2003, there have been 298 operations since that time. *See id.*

[27] *See* United States v. Propseri, 573 F. Supp. 2d 436, 439 (D. Mass. 2008) (setting forth holding). The court explained, "it is clear from both the text and the legislative history that the at war provision of the Suspension Act was intended to capture any authorized military engagement that might compromise or impede the government's ability to investigate allegations of fraud." *Id.* at 449.

[28] *See id.* at 442-43 (supporting justiciability of war). The court explained that although some political questions are excluded from judicial review, the determination that the country is at war is an allowable exercise. *Id.* at 442. The Suspension Act itself has been reviewed by many courts. *Id.* at 441-42.

[29] *See id.* at 443 (questioning definition of "at war" within statute). The court recognized that the Suspension Act is unusual because it requires not only that the nation be "at war," but also that the government suffers a pecuniary harm. *Id.* at 441. Although the statutory language may appear clear on its face, the court anticipated difficulty in interpreting these words because "the Nation may be 'at war' for one purpose, and 'at peace' for another." *Id.* at 444 (internal citations omitted).

[30] *See id.* at 445 (noting statute's scant usage since World War II). The court highlighted that the statute "has not been the subject of extensive judicial review . . . ." *Id.* at 444. The court explained that whether or not the Suspension Act applies is a prudential decision reflecting political ideology or mere governmental expediency. *Id.* at 445.

[31] *See id.* at 449 (outlining war test). The court created this test by looking at legislative history, case law, custom, and common sense. *Id.*

[32] *See Propseri*, 573 F. Supp. 2d at 449 (outlining factors).

[33] *See id.* at 450 (analyzing first factor). The Court explained that on September 18, 2001,

formal declaration of war was not necessary, the court also found that the conflicts in Afghanistan and Iraq could be deemed wars under international law.[34] Considering the third factor, the court concluded that the size and scope suggested that both military actions were, in fact, "wars."[35] Finally, applying the last factor, the court recognized that the terrorist attacks on September 11, 2001, prompted a massive reorganization of the federal government that diverted resources to preventing international terrorism.[36] With all four factors satisfied, the court ultimately concluded that the conflicts in Afghanistan and Iraq were "wars" for the purpose of the statute, and that the Afghanistan War ended on December 22, 2001, and the Iraq War ended on May 1, 2003.[37]

The Federal District Court of Massachusetts correctly found that the meaning of "at war" within the Suspension Act was a judicial, rather

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Congress passed the Authorization of the Use of Military Force to allow the President to use military force against those individuals responsible for the September 11, 2001 terrorist attacks. *Id.* A month after the attack, on October 11, 2001, Congress authorized the use of military force against Iraq. *Id.* In addition, the judicial branch has "consistently invoked the legal presumption that the United States is at war" by, for example, calling those individuals detained in the conflicts enemy combatants. *Id.*

[34] *See id.* at 451 (explaining second factor). The court detailed the definition of "war" from the seventeenth century. *Id.* Conceding that seventeenth century and eighteenth century international law required a formal declaration of war, the court concluded that "it is almost impossible to find a more contemporary definition of 'lawful' war that depends on a formal declaration for its existence." *Id.*

[35] *See id.* at 452 (analyzing third factor). The court noted that both conflicts cost more than any other war, with the exception of World War II, and both conflicts have lasted longer than World War I and World War II added together. *Id.* The Afghanistan and Iraq wars have cost $859 billion in the past seven fiscal years. *Id.* "The Congressional Budget Office (CBO) has projected a total combined cost through FY2017 of between $1.2 trillion and $1.7 trillion." *Id.* The court also considered the fact that over one million soldiers have been deployed in both wars and 4,589 have died to that point. *Id.*

[36] *See id.* at 453 (examining fourth factor). The court discussed the profound change the terrorist attacks of September 11, 2001, had on the federal government. *Id.* Specifically, in response to these attacks Congress passed the Patriot Act, amended the Foreign Intelligence Surveillance Act, and created the Department of Homeland Security. *Id.* In addition, the prevention of terrorism, rather than the investigation of ordinary crimes, became the top priority of the Justice Department. *Id.* As a result, there have been sharp decreases in prosecutions of both white collar and organized crime. *Id.* at 454.

[37] *See Prosperi*, 573 F. Supp. 2d at 455 (expounding nation was "at war" and wars have ended). It was important for the court to set an end date for each war because "[t]he tolling provisions of the Suspension Act apply 'until three years after the termination of hostilities . . . .'" *Id.* at 454. The court rejected the government's argument that both wars were ongoing, choosing instead to announce a clear ending date for both. *Id.* The court chose December 22, 2001, the day the United States recognized the new Afghani government, as the end date for the Afghanistan War. *Id.* It chose May 1, 2003, the day President Bush declared "Mission Accomplished" aboard the USS Abraham Lincoln, as the termination of hostilities in the Iraq War. *Id.*

than a political, question.[38] The court, in line with Supreme Court precedent, looked toward congressional and presidential actions to determine the start dates of each war.[39] Additionally, the court appropriately rejected the reasoning that the Suspension Act had been impliedly repealed due to disuse.[40] The court went beyond Supreme Court precedent, however, in formulating the four-factor test to determine whether the country was at war.[41] While the court was correct in considering congressional recognition of the Afghanistan and Iraq Wars, it should not have analyzed the wars under international law or considered the size or cost of either war.[42] Instead, the court should have only analyzed the actions of Congress and the President and decided whether either political branch had acknowledged a start or end date to either war.[43]

The court incorrectly defined December 22, 2001 as the end date of the Afghanistan War.[44] Although cited, the court ignored *Hamdi v. Rumsfeld*,[45] in which the Supreme Court found that the United States was still "at war" in Afghanistan in 2004.[46] Specifically, the Supreme Court

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[38] *See* sources cited *supra* note 14 and accompanying text (explaining limits to Judiciary's ability to rule on war).

[39] *See* cases cited *supra* note 15 and accompanying text (laying out Supreme Court precedent). Specifically, the court cited the two times Congress authorized the use of military force with regards to Afghanistan and Iraq. *Prosperi*, 573 F. Supp. 2d at 450; *see also* sources cited *supra* note 26 and accompanying text (summarizing Afghanistan and Iraq Wars).

[40] *See Prosperi*, 573 F. Supp. 2d at 445. The court's reasoning is supported by the fact that the Suspension Act was amended in 2008 expressly to promote prosecutions. *See* S.Rep. No. 110-431 (July 25, 2008) (outlining legislative intent).

[41] *See* sources cited *supra* note 14 and accompanying text (explaining judicial limitations with regard to existence of war). The Supreme Court refuses to "recognize war in a legal sense." Hagan, *supra* note 13, at 1338. Additionally, it is questionable "whether courts possess sufficient standards to decide the issue of time of war . . . ." *Id.* at 1371. Instead, Supreme Court precedent suggests that federal courts can decide wartime cases when the nation is obviously at war and the facts have relatively limited foreign implication. *See id.* at 1377.

[42] *See* cases cited *supra* note 15 and accompanying text (detailing Supreme Court precedent). *See also* Ludecke v. Watkins, 335 U.S. 160, 169 (1948) (discussing war termination). To declare a war had started, the Supreme Court looked neither to international definitions of the state of war, nor to the size and scope of the conflict; instead, the Court looked solely to the actions of the political branch for each major United States conflict since the Civil War. *See* sources cited *supra* notes 14-15 and accompanying text (detailing Supreme Court precedent).

[43] *See* sources cited *supra* note 14 and accompanying text (outlining judicial limits in regard to war); *see also* cases cited *supra* note 15 and accompanying text (detailing Supreme Court precedent in regard to existence of war).

[44] *See* United States v. Prosperi, 573 F. Supp. 2d 436, 455 (D. Mass. 2008) (tolling limitations period for Afghanistan war from September 18, 2001, until December 22, 2004). The court specifically found that the Afghanistan War ended December 22, 2001, when the United States recognized full diplomatic recognition of an interim Afghan government. *Id.*

[45] 542 U.S. 507 (2004).

[46] *See id.* at 521 ("Active combat operations against Taliban fighters apparently are ongoing in Afghanistan.").

explained that the United States could only hold enemy combatants as long as the conflict was ongoing.[47] The Supreme Court's holding in *Hamdi* necessitates a finding that the country is still at war in Afghanistan because there were still Afghan enemy combatants detained.[48] Additionally, the court should have considered the fact that American soldiers still occupy Afghanistan and still engage in active military operations.[49]

The court also erred in defining May 1, 2003, the day President Bush declared major combat operations over, as the end date of the Iraq War.[50] Although the court was correct in looking toward presidential actions, the court failed to apply Supreme Court precedent looking at both the words and actions of the political branches to determine the end of war.[51] Since May 1, 2003, the United States has engaged in 298 military operations in Iraq.[52] The court should have noted the absence of specific peace agreements or formal legislation indicating that the war was over.[53] Without a formal peace agreement or the withdrawal of troops from Iraq, it was incorrect for the *Prosperi* court to break with precedent and declare that the war had ended.[54]

In *United States v. Prosperi*, the Federal District Court of

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[47] *Id.* at 518. The Court explained that detention of enemy combatants "for the duration of the particular conflict in which they were captured, is so fundamental and accepted an incident to war as to be an exercise of the 'necessary and appropriate force' Congress has authorized the President to use." *Id.*

[48] *See id.* at 521 ("If the record establishes that United States troops are still involved in active combat in Afghanistan, those detentions are part of the exercise of the 'necessary and appropriate force,' and therefore are authorized . . . .").

[49] *See* Heintschel von Heinegg, *supra* note 24, at 854 (explaining cessation of hostilities and release of prisoners necessary for war to end); *see also* O'Bryant, *supra* note 26 (noting American troop levels in Afghanistan).

[50] *See* United States v. Prosperi, 573 F. Supp. 2d 436, 455 (D. Mass. 2008) (defining end of the Iraq War).

[51] *See* sources cited *supra* notes 15-16 and accompanying text (discussing actions of political branches determine when a war has ended); *see also* Hamilton v. Ky. Distilleries & Warehouse Co., 251 U.S. 146, 159-60 (1919) (examining actions of President and Congress to determine state of war). In *Hamilton*, the Supreme Court considered whether World War I had ended for the purposes of a statute. *Id.* at 153. To make this determination, the Court looked at both the words and actions of the President and Congress. *Id.* Although the President had made declarations that the war was over, the fact that Congress passed wartime legislation, and that the President still controlled the railroad, wheat and grain supply, and kept an army in occupied territory, led the Court to find that the country was still "at war." *Id.* at 160, 163. Similarly, Congress amended the Suspension Act in 2008, five years after major combat operations had been declared over. S. Rep. No. 110-431 (July 25, 2008). This Amendment extended the tolling period from three to five years and explicitly included conflicts for which Congress had authorized military force, like Afghanistan and Iraq. *See id.*

[52] *See* Operation Iraqi Freedom, *supra* note 26 (listing combat operations after 2003 in Iraq).

[53] *See supra* note 24 and accompanying text (discussing traditional ends to wars).

[54] *See supra* note 24 and accompanying text (discussing how wars traditionally end).

Massachusetts considered whether the United States was "at war" for the purpose of prosecution under the Suspension Act. The court held that the nation had been at war with Afghanistan and Iraq, and therefore the tolling provision of the Suspension Act allowed fraud charges to be brought against Big Dig contractors. Ignoring Supreme Court precedent, the court incorrectly applied a four-part test to determine whether the Afghanistan and Iraq wars were ongoing. Additionally, the court arbitrarily found that both the Afghanistan and Iraq wars had ended, without appropriately considering the actions of the political branches as required by the Supreme Court. The court's actions not only ignores Supreme Court precedent, but also threatens the separation of powers.

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