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Combating Impunity: Contractor Liability For Torture During Times Of War Under The Wartime Suspension Of Limitations Act

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COMBATING IMPUNITY: CONTRACTOR LIABILITY FOR TORTURE DURING TIMES OF WAR UNDER THE WARTIME SUSPENSION OF LIMITATIONS ACT

CLAIRE JABBOUR*

This Comment focuses its analysis on the Wartime Suspension of Limitations Act and how it applies to military contractors who commit crimes during times of war. This Comment argues that the Wartime Suspension of Limitations Act, as modified in 2008, applies to the offense of torture if committed during the Iraq and/or Afghanistan conflicts. Applying the 2008 modification of the Wartime Suspension of Limitations Act does not violate the rule against ex post facto applications of law because the statute of limitations on torture would not have expired by 2008; therefore, there is no retroactive application.

This Comment looks at the current lay of the land surrounding military contractor liability. Ultimately, this Comment concludes that military contractors enjoy near-impunity, both criminally and civilly, under the current law. In the few circuits where military contractors have been held civilly liable, there continues to be uncertainty about the future stability of the decision.

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INTRODUCTION

The definition of war has changed since World War II—the last
officially declared war—ended in the 1940s. During World War II,
Congress enacted the Wartime Suspension of Limitations Act (“the
WSLA” or “the Act”) to give the government time to bring charges against
contractors who defrauded the government.¹ In 2008, Congress redefined
war under the WSLA to include a modern interpretation; war is not limited
to official declarations, but it also includes congressional or presidential
authorizations of military force.² Numerous wars have occurred between
the end of WWII and 2008, all without formal declarations of war by
Congress.³

Despite the changing nature of war, in 2015, the Supreme Court heard its
first case regarding the WSLA since the 1950s. In the 1950s, Bridges v.

American taxpayers from criminal contractor fraud by giving investigators and auditors
the time they need to thoroughly review contracts related to the ongoing conflicts in
Iraq and Afghanistan.”).
2. See 18 U.S.C. § 3287 (2008) (“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)).”).
force in Iraq and Afghanistan); Official Declarations of War by Congress, UNITED
STATES SENATE, https://www.senate.gov/pagelayout/history/h_multi_sections_and
 teasers/WarDeclarationsbyCongress.htm (last visited Jan. 24, 2015).


United States and United States v. Grainger both held that fraud was an essential element for the WSLA to apply.⁴

Additionally, military contractors have not consistently been held criminally liable for crimes committed while performing a government contract abroad during the conflicts in Iraq and Afghanistan.⁵ However, military contractors feel that they are being held accountable because civil cases have been filed, and courts are unwilling to dismiss most of these cases outright.⁶ Currently, military contractors, who are facing criticism, have created a practice of changing the name of their company to acquire new government contracts and circumventing liability.⁷

This Comment will raise a number of arguments: 1) that a plain meaning reading of the WSLA expands the Act’s reach beyond defrauding the government to include other crimes that are also in the government’s interest; 2) that military contractor liability currently is uncertain for crimes like torture; and 3) that courts should apply the Carter⁸ decision and the plain language reading of the WSLA to Al Shimari⁹ to establish a precedent.

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⁵ See The Editorial Board, Will Anyone Pay for Abu Ghraib?, N.Y. TIMES (Feb. 5, 2015), http://www.nytimes.com/2015/02/05/opinion/will-anyone-pay-for-abu-ghraib.html?_r=1 (stating that only low level officers have been held accountable for torture in Abu Ghraib, but contractors that gave orders for torture have not been held criminally or civilly liable); see also FAR 9.103 (2015) (dictating the policy behind awarding government contracts to outside contractors); FAR 9.104-1 (2015) (noting the factors to consider to determine if a potential contractor is responsible for the purpose of the meeting the reliability requirement); FAR 9.406-2 (2015) (highlighting that a contractor may be ineligible to receive a government contract if the contractor has committed an offense that questions professional responsibility and integrity).
⁶ See Stephen Vladeck, Military Contractor Liability Returns to the Supreme Court, LAWFARE BLOG (June 11, 2014, 7:00 AM), http://www.lawfareblog.com/2014/06/military-contractor-liability-returns-to-the-supreme-court/ (arguing that military contractors are attempting to ask the Supreme Court for a precedent rule that provides them with immunity and bars civil liability claims).
⁸ Kellogg Brown & Root Servs., Inc. v. United States ex rel. Carter, No. 12-1497, 1 (U.S. May 26, 2015) (holding that the WSLA can be applied criminally and not civilly).
for consistent application of military contractor liability. Finally, this Comment will briefly highlight military contractor liability under other statutes.

I. WARTIME CRIMINALS: THE UNITED STATES GOVERNMENT ATTEMPTS TO OVERCOME IMPUNITY

Since WSLA's enactment, it has been modified and extended several times. The lower courts have analyzed the WSLA a limited number of times, and the Supreme Court has analyzed the WSLA a handful of times.

A. When a Bill Becomes a Law: The Passing of the WSLA

In 1942, Congress passed an act suspending the statute of limitations for crimes involving defrauding the government to last until July 1945. In 1944, Congress amended the Act to extend the minimum amount of time before a statute of limitations can begin to run during times of war to a time following the termination of war. This gave the government more time to...
adjudicate crimes committed during war on the basis that the government had been preoccupied by war when the crimes were committed.\textsuperscript{17} Congress amended the Act again to include offenses related to the Surplus Property Act of 1944 ("Surplus Property Act").\textsuperscript{18}

In 1948, Congress amended the WSLA for the first time. The WSLA replaced the option of crimes committed in connection with the Surplus Property Act\textsuperscript{19} with a broader interpretation that considered crimes "committed in connection with the acquisition, care, handling, custody, control or disposition of any real or personal property of the United States . . . ."\textsuperscript{20} This broadening allowed other property crimes committed against the United States to be prosecuted criminally rather than limiting liability only to violations of the Surplus Property Act.\textsuperscript{21}

From 1948 to 2008, Congress did not touch the WSLA, and it did not use the Act because Congress had not declared war since World War II.\textsuperscript{22} However, Congress modified the WSLA in 2008: during the conflicts in Afghanistan and Iraq.\textsuperscript{23} Both the United States Supreme Court and the lower courts have attempted to analyze the WSLA in its various forms with varying results.

\begin{itemize}
\item \textsuperscript{17} Smith, 342 U.S. at 228-29; Prosperi, 573 F. Supp. 2d at 448-49.
\item \textsuperscript{18} Surplus Property Act of 1944, Pub. L. No. 78-457, ch. 479, sec. 28, 58 Stat. 649, 781 (1944) (amending the WSLA to reflect laws enacted in response to congressional concerns of crimes committed during acts of war such as contractors keeping property bought by the government for use during war but left over after the end of war).
\item \textsuperscript{20} 62 Stat. at 828.
\item \textsuperscript{21} Id.; see 58 Stat. at 781 (applying a prong of the WSLA only to violations of the Surplus Property Act of 1944).
\item \textsuperscript{22} See 18 U.S.C. § 3287 (2008) (amending the WSLA for the first time since 1948); 62 Stat. at 828 (amending the WSLA for the last time before 2008); United States v. Smith, 342 U.S. 225, 225-26 (1952) (applying the WSLA to a crime committed after the end of World War II); United States v. Shelton, 816 F. Supp. 1132, 1135 (W.D. Tex. 1993) (addressing congressional intent behind the WSLA for the first time since the 1950s by noting that Congress intended the WSLA to only apply to pervasive wars); see also United States Senate, Official Declarations of War by Congress, supra note 3.
\item \textsuperscript{23} See 18 U.S.C. § 3287 (modifying the WSLA to apply to congressionally authorized wars).
\end{itemize}
B. The Courts Intervene: The State of Affairs During the 1940s and 1950s

The Supreme Court has heard few WSLA cases. The first case, in 1952, was *United States v. Smith*, where the appellee committed forgery and check fraud two years after the end of World War II. The Court held that the WSLA only applied to crimes committed during times of war and not crimes that occurred before or after the declared war. The Court determined that the purpose of the WSLA is to allow the government sufficient times to prosecute when busy with war. Therefore, because the actions of the defendant had occurred after the war, the WSLA did not apply.

In 1953, the Court heard two WSLA cases on the same day: *Bridges v. United States* and *United States v. Grainger*. In *Bridges*, the petitioners lied under oath at a naturalization hearing about whether the applicant was a communist. The events in *Bridges* took place after the second amendment to the WSLA in 1944. The Court held that the WSLA only applied to crimes of pecuniary fraud and noted that lying under oath, while considered to be defrauding the government, was not pecuniary. The Court reasoned that the WSLA should be interpreted conservatively because it carves out an exception to bringing cases swiftly and efficiently.

In *Grainger*, the defendants were indicted for providing false claims that items had been purchased to the Community Credit Corporation in an attempt to obtain funds. The Court held the WSLA applies where the crime committed was 1) pecuniary; and 2) was committed before the official termination of war. Accordingly, fraud and conspiracy to commit fraud were enough to trigger the WSLA on this occasion. Additionally,
the statute of limitations would not begin running until three years after the war ended because the President officially declared that the war ended after the crimes occurred; therefore, the defendants could have been indicted for fraud.\textsuperscript{34}

Since 1956, the Supreme Court has not heard a case analyzing the WSLA. Interpretation has been left up to the judges of the lower courts, who have taken up the challenge.

\textbf{C. Sibling Rivalry 101: The Lower Courts Split on the Wartime Suspension of Limitations Act}

The lower courts have taken opposing sides when analyzing the WSLA. In \textit{United States v. Shelton}, the District Court for the Western District of Texas held that the Persian Gulf War did not constitute a war because Congress did not officially declare war.\textsuperscript{35} The court focused on the fact that Congress intended the WSLA to apply to all-encompassing conflicts that completely preoccupy the government, such as World War II.\textsuperscript{36} The court further noted that the WSLA was not used by the government during the Vietnam War, which was overbearing enough to trigger the WSLA, and it found the Persian Gulf War to be similar to the Vietnam War.\textsuperscript{37}

Conversely, in \textit{United States v. Prosperi}, the United States District Court for the District of Massachusetts held that the conflicts in Iraq and Afghanistan each constituted wars under the WSLA.\textsuperscript{38} The court argued that, under the plain meaning of the WSLA, the term “at war” is broader than declared wars because Congress did not specify “at war” only applied to congressionally declared wars.\textsuperscript{39} The court created a factors test to determine if a conflict constitutes time of war:

\begin{enumerate}
\item the extent of the authorization given by Congress to the President to act;
\item whether the conflict is deemed a “war” under accepted definitions of the term and the rules of international law;
\item the size and scope of the conflict (including the cost of the related procurement effort); and
\item the diversion of resources that might have been expanded on investigation frauds against the government.
\end{enumerate}

\textsuperscript{34} \textit{Id.} at 245–47.

\textsuperscript{35} \textit{United States v. Shelton}, 816 F. Supp. 1132, 1135 (W.D. Tex. 1993). \textit{Contra} Koohi v. United States, 976 F.2d 1328, 1328 (9th Cir. 1992) (holding the phrase “time of war” in the Federal Tort Claims Act (FTCA) did not require a war to be officially declared by Congress and that the Persian Gulf War constituted a war for the purpose of the FTCA).

\textsuperscript{36} \textit{Shelton}, 816 F. Supp. at 1135.

\textsuperscript{37} \textit{See id.}


\textsuperscript{39} \textit{Id.} at 444, 446.

\textsuperscript{40} \textit{Id.} at 449.
The court noted that the reasoning behind the WSLA's enactment was that the government is too preoccupied during times of war to be able to prosecute fraud cases.\footnote{41}

The United States District Court for the Southern District of California reviewed the \textit{Prosperi} decision and came to the opposite conclusion. In \textit{United States v. Western Titanium, Inc.}, the court, much like the \textit{Shelton} court, held the term "at war" was limited to congressionally declared wars.\footnote{42} According to the court, the initial \textit{Prosperi} decision created too much uncertainty regarding what constitutes war.\footnote{43} The court drew support from the fact that statutes of limitations are typically narrowly construed in consideration of fairness; therefore, "times of war" should be narrowly construed.\footnote{44}

Following the enactment of the 2008 amendment, Congress required the courts to consider whether the legislative addition of authorized uses of force applied to the conflicts in Afghanistan and Iraq. In \textit{United States v. BNP Paribas}, the court held that the WSLA does apply to the conflicts and determined that the United States was indeed at war in 2005.\footnote{45} The court reasoned that \textit{United States v. Pfluger} stated that the wars in Afghanistan and Iraq did not, in fact, end in 2005; therefore, the statute of limitations could not have begun to toll.\footnote{46} The 2008 amendment, therefore, did apply to the conflicts in Afghanistan and Iraq because the statute of limitations on the False Claims Act claim had not run between the criminal offense in 2005 and the 2008 amendment.\footnote{47}

\begin{footnotes}
\item[41] \textit{Id.}
\item[43] See \textit{id.} at *17 (stating that the uncertainty which results from the \textit{Prosperi} approach is completely at odds with the objectives of finality, notice, and prompt investigation sought to be served by a criminal statute of limitations).
\item[44] \textit{Id.} at *9–10.
\item[46] Compare \textit{BNP Paribas}, 884 F. Supp. 2d at 607 (arguing that neither the toppling of the Afghan government in 2001 nor President Bush's declaration that the fighting in Iraq ended in 2003 satisfied the requirements of the WSLA), with United States v. Pfluger, 685 F.3d 481 (5th Cir. 2012) (holding that the plain meaning of the Act requires specific provisions to be met when terminating hostilities).
\end{footnotes}
CONTRACTOR LIABILITY FOR TORTURE DURING WAR

D. The Return of the Supreme Court in United States v. Carter

In the years following the 2008 amendment, the Supreme Court heard a case relating to military contractors in Iraq. In 2005, a military contractor, Kellogg Brown, & Root Services ("KBR"), had a contract to provide services for United States troops in Iraq. As part of its contract, KBR purified water for the troops, which Carter (the relator—a person related to a case party) tested. KBR told Carter to submit fraudulent and inaccurate timesheets so that KBR could overbill the government. Carter later brought a claim against KBR under the False Claims Act, alleging that KBR defrauded the government.

The Fourth Circuit held that the WSLA does not require a congressional declaration of war, and the war in Iraq constituted war under the WSLA. The court noted that Congress decides when a war begins, and because Congress did not include the term "declared" in the text of the statute, there was no formal declaration requirement. The Fourth Circuit held that neither the President nor Congress had declared an end to hostilities when the crimes in Carter occurred; therefore, either version of the statute is applicable. Further, the Fourth Circuit reasoned that a person related to the plaintiff or defendant ("a relator") could bring a claim under the WSLA because it allows fraud against the United States to be prosecuted. Following further appeals, the Supreme Court ultimately held that the WSLA only applies to criminal offenses. However, the Court did not rule on defining "at war" nor did the Court rule whether the 2008 amendment extended to the entire Iraq and Afghanistan conflicts.

When brought before the Supreme Court, the New England Legal Foundation submitted an amicus brief that reasoned that the WSLA

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50. Id. at 174–75.
51. Id. at 175.
52. Id.
53. Id. at 178.
54. Id. at 176 (quoting Lee v. Madigan, 358 U.S. 228, 231 (1959)).
55. Id. at 177.
56. Id. at 179.
57. Id. at 180.
59. Id. at 3.
continued to apply to fraud offenses, both pre- and post-2008 amendment; therefore, there should be no argument on whether the types of offenses covered have changed.\textsuperscript{60} However, the Supreme Court ultimately held that the WSLA only applies to criminal cases, thereby excluding the need to decide on the application of the WSLA to crimes committed during the Afghanistan and Iraq conflicts before the 2008 amendment.\textsuperscript{61} The implications of limiting the WSLA to criminal cases could include liability for military contractors or monetary savings for military contractors if cases like these are automatically dismissed. The Court did not rule on defining "at war," nor did the Court rule whether the 2008 amendment extended to the entire Iraq and Afghanistan conflicts.\textsuperscript{62}

II. ARE MILITARY CONTRACTORS LIABLE? DEFINING WARTIME CRIMES BEYOND FRAUD IN IRAQ AND AFGHANISTAN

Military contractor liability for crimes committed during times of war is still uncertain, thereby providing impunity for contractors.\textsuperscript{63} To combat the issue of impunity, the WSLA should be interpreted using the ordinary canons of statutory construction.\textsuperscript{64}

A. To Fraudulence and Beyond: Based on the Plain Meaning Cannon of Construction, What Does the WSLA Really Cover?

Congress originally limited the WSLA to crimes of fraud; however, Congress extended the WSLA’s reach to encompass property, fraud, or crimes committed in the performance of contracts.\textsuperscript{65} The “or” separating the three subsections connotes that only one of the claims is required for the WSLA to apply, leaving no requirement for fraud as an essential element.\textsuperscript{66}


\textsuperscript{61} Kellogg Brown & Root Servs., Inc., No. 12-1497, slip op. at 10–11 (U.S. May 26, 2015).


\textsuperscript{63} See The Editorial Board, \textit{supra} note 5 (stating military contractors are not held liable for torture under current laws).

\textsuperscript{64} \textit{Cf.} INS \textit{v.} Cardoza-Fonseca, 480 U.S. 421 (1987) (Scalia, J., concurring) (stating that legislative intent and other canons of interpretation are unnecessary when the statute is clear).


\textsuperscript{66} See \textit{id.} (listing crimes committed in connection with performance of the
There have been a few cases that have analyzed the WSLA, and of those few, none discussed the third subsection: offenses that deal with the contract. In fact, all of the cases that discuss the WSLA applied the Act only to cases of fraud. When analyzing a statute, if the plain meaning of a statute is unambiguous, then the court needs not continue analyzing the statute. The terms of the statute are assumed to include any and all of Congress’ legislative intent of what is to be included and what is to be excluded in the statute. If the statute is clear, then a court does not need to turn to legislative history to analyze the law. When the Prosperi court examined the WSLA, the court only found the terms “at war” to be ambiguous. The WSLA can toll other offenses that meet the third subsection, provided that the offenses are criminal in nature.

In examining the WSLA, the term “or” is a connector between three separate elements. A reasonable person reads the term “or” to represent an option between two or more clauses, words, or statements. Therefore, the

67. See Bridges v. United States, 346 U.S. 209, 215 (1953) (holding that the WSLA only applies to offenses that defraud the government). See generally United States v. Grainger, 346 U.S. 235 (1953) (holding that fraud must be essential element of the crime in order to qualify for tolling of statute of limitations under the WSLA).


69. See Richards v. United States, 369 U.S. 1, 9 (1962) (determining that the terms of the Federal Tort Claims Act are the precise terminology that Congress intended).


71. See Prosperi, 573 F. Supp. 2d at 444–45 (mentioning that Congress may have multiple definitions of term “at war,” making it the only portion of the statute that is vague).


73. See Or, DICTIONARY.COM, http://dictionary.reference.com/browse/or?s=t (last visited Jan. 24, 2015) (defining the term “or” as a term “used to connect words, phrases, or clauses representing alternatives”); cf. WILLIAM N. ESKRIDGE, JR., PHILLIP P. FRICKEY, & ELIZABETH GARRETT, CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY 832 (3d ed. 2001) (including discussions on how legislation is made and process of how a statute is created).
WSLA applies to three different offenses: fraud, property, or contract.\textsuperscript{74} The final subsection should be broken down and read as providing a broad range of options for offenses.\textsuperscript{75} Breaking down the third element, the first part provides for a range of options for offenses: "committed in connection with the negotiation, procurement, award, performance, payment for, interim financing, cancelation, or other termination or settlement . . . ."\textsuperscript{76} A reasonable person would read the list as giving the option to select one of these applications. The second prong provides a list of three options: "any contract, subcontract, or purchase order,"\textsuperscript{77} again connected by the term "or," to mean that the offense must be derived either from an issue falling under the first range of options or from an issue falling under the second range of options relates the first prong.\textsuperscript{78} This analysis is similar to the first portion because the terms and connectors are the same—commas between each option followed by an "or"—allowing a reasonable person to assume that it is proper to select one option from the list.\textsuperscript{79} The second list, however, has a limit: the option selected must be "connected with or related to the prosecution of the war or directly connected with or related to the authorized use of the Armed Forces, or with any disposition of termination inventory by any war contractor . . . ."\textsuperscript{80} Provided that the offense fits into all three parameters of the third subsection, the WSLA applies as based on the plain meaning interpretation.

The extension of the WSLA applies as a tolling statute to the entirety of

\textsuperscript{74} See 18 U.S.C. § 3287 (2008) (listing options as "(1) involving fraud or attempted fraud against the United States or any agency thereof in any manner . . . or (2) committed in connection with the acquisition, care, handling, custody, control or disposition of any real or personal property of the United States, or (3) committed in connection with the negotiation, procurement, award, performance, payment for, interim financing, cancelation, or other termination or settlement, of any contract, subcontract, or purchase order which is ... related to the prosecution of the war . . . .").

\textsuperscript{75} See id. (stating that one prong notes that the crime must have been "(3) committed in connection with the negotiation, procurement, award, performance, payment for, interim financing, cancelation, or other termination or settlement, of any contract, subcontract, or purchase order which is connected with or related to the prosecution of the war or directly connected with or related to the authorized use of the Armed Forces, or with any disposition of termination inventory by any war contractor . . . .")

\textsuperscript{76} Id.

\textsuperscript{77} 18 U.S.C. § 3287.

\textsuperscript{78} See id. (numbering three options of applicability separated by "or"s); cf. Or, DICTIONARY.COM, supra note 73 (highlighting the definition of the term or as a connector); cf. ESKRIDGE, supra note 73 (discussing ways by which statutes are created and how legislative intent factors into wording).

\textsuperscript{79} Cf. Or, DICTIONARY.COM, supra note 73 (defining the term "or"); ESKRIDGE, supra note 77 (noting various theories about legislative intent).

\textsuperscript{80} 18 U.S.C. § 3287.
Title 18. According to the United States District Court for the District of Columbia, fraud is no longer an essential element required to trigger the WSLA under a violation of the False Claims Act. The court reasoned that the requirement of fraud as an essential element did not stem from the WSLA but from fraud offenses under the False Claims Act, which has since been amended to no longer require fraud as an essential element. Applying the court’s opinion, and based on a plain-text reading of the statute, the suggestion that fraud is no longer an essential element allows for a more broad application of the WSLA to other types of criminal offenses that fit the criteria outlined in other subsections of the Act.

B. What is Torture? How Does the International Definition of Torture Apply Domestically? What Is the Current Lay of the Land Regarding Military Contractor Liability for Torture?

Under a plain reading of the WSLA, the statute applies more broadly than just to cases of pecuniary fraud. The current legal setting is not ripe for prosecution of torture under other statutes and has currently led to military contractor impunity rather than liability.

The WSLA should apply to the offense of torture because torture is codified in Title 18 of the United States Code. Here, Congress defines torture as “an act committed by a person acting under the color of law specifically intended to inflict severe physical or mental pain or...
suffering . . . upon another person within his custody or physical control.\textsuperscript{86} Congress codified this definition following the ratification of the Convention Against Torture and Other Cruel, Inhuman, and Degrading Treatment or Punishment.\textsuperscript{87} Under a complimentary statute of limitations, the government has eight years to prosecute those who commit crimes of torture either domestically or abroad.\textsuperscript{88} Therefore, the statute of limitations for torture committed in 2001, and onward, could not have expired by the enactment of the 2008 WSLA amendment.

The lower courts' inconsistency, and the recent release of the Senate torture report,\textsuperscript{89} creates a strong government interest for an increase in time to end military contractor impunity. The issues began with Congress' changing of the official definition of the term “at war,” which now includes acts of congressional approval of forces executed in the middle of a conflict that began with the congressional approval of forces.\textsuperscript{90} Courts have interpreted the meaning of “at war”; however, courts have not acknowledged that, even though the term may not be certain in domestic law, perpetrators of international crimes are still required to abide by \textit{jus in bello} (laws of war).\textsuperscript{91}

Those soldiers who committed torture at Abu Ghraib were held criminally accountable by the United States courts and military tribunals

\textsuperscript{87} See id. (noting in history that this Act has been modified several times since codification in 1994 following the United States' ratification of the Convention Against Torture).
\textsuperscript{88} 18 U.S.C. § 3286 (2014) (noting that eight-year statute of limitations was codified in 1994); see 18 U.S.C. § 2340A (2014) (noting that “[t]here is jurisdiction over the activity prohibited in subsection (a) if (1) the alleged offender is a national of the United States; or (2) the alleged offender is present in the United States, irrespective of the nationality of the victim or alleged offender . . . ”).
\textsuperscript{89} S. SELECT COMM. ON INTELLIGENCE, COMM. STUDY OF THE CIA'S DETENTION AND INTERROGATION PROGRAM: FINDINGS AND CONCLUSIONS (Comm. Print 2014) (listing various cases of torture during both the conflicts in Iraq, Afghanistan, and the spillover effects into other countries).
\textsuperscript{91} See generally Hamdan v. Rumsfeld, 548 U.S. 557, 567 (2004) (holding that the military tribunal that was created to try Hamdan violated the Geneva Conventions which apply during times of war). Compare Nathaniel Berman, Privileging Combat? Contemporary Conflict and the Legal Construction of War, 43 COLUM. J. TRANSNAT'L L. 1, 3 (2004) (defining \textit{jus in bello} as the laws of how war is conducted, including protection of non-combatants), with Robert D. Sloane, The Cost of Conflation: Preserving the Dualism of \textit{jus ad bellum} and \textit{jus in bello} in the Contemporary Law of War, 34 YALE J. INT'L L. 47, 49 (2009) (defining \textit{jus ad bellum} as the laws that dictate the entrance into conflict).
for their participation in the violation of the laws of war.\textsuperscript{92} Since military contractors are agents of the United States, they are also required to follow the laws of war.\textsuperscript{93} However, because of the current state of the law, there have been issues prosecuting military contractors for crimes committed during times of war.\textsuperscript{94} Following the \textit{Kiobel v. Royal Dutch Petroleum Co}\textsuperscript{95} decision (holding that the Alien Tort Statute does not apply to crimes committed abroad unless they sufficiently "touch and concern" the United States),\textsuperscript{96} the lower courts have been divided on military contractor liability under the Alien Tort Statute.\textsuperscript{97} The current circuit split in applying \textit{Kiobel} has left military contractors with an air of uncertainty regarding the potential prosecution of their actions. The \textit{Al Shimari v. CACI Premier Technologies, Inc.} precedent allowed the Fourth Circuit to apply the Alien Tort Statute to hold military contractors liable for activities that touch and concern the United States.\textsuperscript{98}

While \textit{Al Shimari} theoretically allows military contractors to be held


\textsuperscript{93} See Geneva Convention Relative to the Treatment of Prisoners of War art. 3, Aug. 12, 1949, 6 U.S.T. 3316. ("In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions . . . . "); Hamdi v. Rumsfeld, 542 U.S. 507, 518 (2004) (listing several sources that dictate that capture is not a form of punishment but is utilized to remove soldiers from the field); \textit{International Humanitarian Law and Private Military/Security Companies}, ICRC (Oct. 12, 2013), https://www.icrc.org/eng/resources/documents/faq/pmsc-faq-150908.htm (noting that military contractors are obligated to follow the laws of war if they take part in military activities).

\textsuperscript{94} See Sonia Tabriz, Note, \textit{The Battlefield Preemption Doctrine: Preempting Tort Claims Against Contractors on the Battlefield to Preserve Federal Interests in Wartime Matters}, 42 PUB. CONT. L.J. 629, 630-31 (2013) (arguing that all courts should adopt Combattant Battlefield Exception as announced in \textit{Saleh v. Titan Corp.}, removing crimes committed by military contractors from the hands of the court to hands of lawmakers). \textit{But see} Anupam Chander, \textit{Reflections on Kiobel: Unshackling Foreign Corporations Kiobel's Unexpected Legacy}, 107 A.J.I.L. 829, 830 (2013) (noting that Alien Tort Claims Act can likely be applied to American corporations because they are likely to meet the "touch and concern" requirement of \textit{Kiobel}).

\textsuperscript{95} 133 S. Ct. 1659 (2013).

\textsuperscript{96} \textit{Id.} at 1669.

\textsuperscript{97} \textit{Compare} \textit{Al Shimari v. CACI Premier Tech., Inc.}, 758 F.3d 516 (4th Cir. 2014) (holding under \textit{Kiobel}, military contractors can be held liable for crimes committed abroad), \textit{with} \textit{Saleh v. Titan Corp.}, 580 F.3d 1 (D.C. Cir. 2009) (holding under \textit{Kiobel} that military contractors cannot be held liable for crimes committed abroad).

\textsuperscript{98} See \textit{Al Shimari}, 758 F.3d at 530–31 (specifying that in \textit{Al Shimari}, a U.S. military contractor, CACI, was given a contract by the U.S. Department of the Interior).
liable for crimes, which helps combat impunity,\textsuperscript{99} other cases heard under statutes other than the Alien Tort Statute have faced troubling results. For example, Saleh \textit{v. Titan Corp.} provides military contractors immunity if these men or women were not the leading commanders on the war field.\textsuperscript{100} However, Saleh leaves room for impunity for those contractors who were commanded by a leading military officer.\textsuperscript{101} The constant back and forth among different courts has caused great confusion between which civil claims can be brought against military contractors and which claims are ineligible.\textsuperscript{102}

\textbf{C. Al Shimari \textit{a la Carte}: Is Torture Too Much to Bargain for Under the WSLA?} \\

Based on a plain reading of the WSLA, the Act can be applied to military contractors who commit crimes outside of pecuniary fraud, too. The facts presented by \textit{Al Shimari} show that military contractors committed an offence—torture, a crime according to Title 18.\textsuperscript{103} When one individual subjects another to genital beatings or to being tasered in the head, then the actions serve no other purpose than to cause severe physical pain or harm to an individual.\textsuperscript{104} Here, the individuals subject to these conditions were the prisoners at Abu Ghraib; therefore, they were under the custody of the CACI interrogators.\textsuperscript{105} Thus, CACI interrogators’ actions constituted an offense under the WSLA because CACI’s actions fulfill both elements of torture.

Second, to meet the first portion of the WSLA’s third subsection, it is

\begin{itemize}
  \item \textsuperscript{99} \textit{Contra} \textit{Al Shimari v. CACI Premier Tech., Inc.,} No. 1:08-CV-00827-GBL-JFA, 2015 U.S. Dist. LEXIS 107511, at *2-3 (E.D. Va. 2015) (holding that when the facts require the court to question military decisions, the court does not have jurisdiction to decide the claim).
  
  \item \textsuperscript{100} \textit{See} Saleh, 580 F.3d at 9.
  
  \item \textsuperscript{101} \textit{See id.} (holding that those in leadership positions are responsible for crimes committed).
  
  \item \textsuperscript{102} \textit{See id.} (following the decision, \textit{In re KBR, Inc.}, which was vacated and remanded by Metzgar \textit{v. KBR Inc.}, 744 F.3d 326, 351–52 (2014)).
  
  \item \textsuperscript{103} \textit{See} 18 U.S.C. \textsection 2340 (2014) (noting that the WSLA is located in Title 18); \textit{Al Shimari v. CACI Premier Tech., Inc.}, 758 F.3d 516, 521–22 (4th Cir. 2014) (stating that CACI employees, including interrogators, committed or ordered acts of torture in Abu Ghraib).
  
  \item \textsuperscript{104} \textit{See} 18 U.S.C. \textsection 2340 (defining torture to include “an act . . . intended to inflict severe physical or mental pain or suffering . . . ”); \textit{Al Shimari}, 758 F.3d at 521–22 (listing various methods of torture used against Iraqis detained in Abu Ghraib, such as prisoners being shot with guns, forced to perform sexual acts, raped, or forced to watch rape, among other unapproved torture methods).
  
  \item \textsuperscript{105} \textit{See} 18 U.S.C. \textsection 2340 (requiring custody as a necessary element of torture); \textit{Al Shimari}, 758 F.3d at 521–22 (noting that custody includes not having freedom to leave).
\end{itemize}
necessary to look at the second “or” list. The second “or” list provides for a choice between “any contract, subcontract, or purchase order . . .”\footnote{106} Al Shimari notes, in its facts, that CACI was under contract to provide interrogation services to the military, which it was in the process of performing during Abu Ghraib.\footnote{107} Thus, CACI committed torture during the performance of its contract with the Department of Interior.\footnote{108} CACI’s crimes, therefore, fit the application of the third prong of the WSLA.\footnote{109}

The final portion of the third subsection is less obviously applicable than the first two portions of subsection A because, based on the facts, there seemed to be no obvious connection between the third subsection and the facts.\footnote{110} However, Al Shimari noted that the government hired CACI because there was a “shortage of trained military interrogators[,]”\footnote{111} and the government required the interrogators to yield information for the war effort.\footnote{112} CACI received the contract because the war required interrogator services, relating the contract to the performance of the war.\footnote{113} Therefore, the WSLA can be applied to a military contractor’s torture that holds military contractors criminally liable.

The Supreme Court limited the application of the WSLA to criminal offenses. However, the Court did not define the term “at war,” which has changed over time. Therefore, it is likely the WSLA could apply torture

\footnote{107. Al Shimari, 758 F.3d at 521–22.}
\footnote{108. See id. (limiting the third prong to crimes committed during multiple stages of a government contract including performance of contract); Al Shimari, 758 F.3d at 521–22 (finding CACI was performing under a government contract, providing interrogators, while working in Abu Ghraib).}
\footnote{109. See 18 U.S.C. 3287 (identifying that the third prong states that offenses must be “committed in connection with the negotiation, procurement, award, performance, payment for, interim financing, cancelation, or other termination or settlement, of any contract, subcontract, or purchase order which is connected with or related to the prosecution of the war”); id. at 521–22 (articulating that CACI was given contract by the U.S. government).}
\footnote{110. See 18 U.S.C. 3287 (limiting offenses to those that are “connected with or related to the prosecution of the war or directly connected with or related to the authorized use of the Armed Forces, or with any disposition of termination inventory by any war contractor . . .”); Al Shimari, 758 F.3d at 521–22 (highlighting the facts include the purpose of employing CACI, which was to provide interrogation services to the American military).}
\footnote{111. Al Shimari, 758 F.3d at 521.}
\footnote{112. See id. (highlighting that individuals held at Abu Ghraib were thought to have information about insurgent groups and therefore required the use of skilled interrogators).}
\footnote{113. See generally 18 U.S.C. § 3287 (covering crimes committed during authorized uses of military force); Al Shimari, 758 F.3d at 521 (noting CACI investigators were instructed by military to torture).}
committed during the Iraq and Afghanistan conflicts because torture is a
criminal offense, and the statute of limitations had not run when Congress
amended WSLA.

III. THE FUTURE OF MILITARY CONTRACTORS: IMMUNITY AND A BLANK
CHECK OR JUSTICE?

The future of military contractor liability is still uncertain pending a
Supreme Court decision further interpreting the WSLA or clarifying the
applicability of the Alien Tort Claims Act.

A. The Courts Should Seek to Apply Justice, Not Spread Impunity

The government is not currently holding military contractors liable for
crimes they committed during the Iraq and Afghanistan conflicts. However, to move forward, “transitional justice measures—such as
criminal prosecutions of perpetrators of atrocities—can be crucial tools to
prevent the recurrence of cycles of violence.” Prosecution is a clear
deterrent to potential perpetrators noting that they may violate the law, but
they will not get away without punishment.

Holding military contractors liable for the crimes committed by their
employees is not likely to cause a negative backlash. If the government
holds contractors liable for their actions abroad, they will change their
behavior so that they continue to receive government contracts in the
future. However, contractors may also seek to limit their liability by
negotiating indemnification clauses into their contracts with the
government. Ultimately, though, even if military contractors are held

military contractors exempt from liability for practical and policy reasons); Saleh v.
Titan Corp., 580 F.3d 1, 9-10 (D.C. Cir. 2009) (holding that Alien Tort Statute does not
apply to military contractors).

115. David Tolbert, EU Must Protect Bosnia’s War Crimes Court, INTERNATIONAL
CENTER FOR TRANSITIONAL JUSTICE (Feb. 8, 2012), http://www.ictj.org/news/eu-must-
protect-bosnia’s-war-crimes-court.

116. See generally id. (arguing that prosecuting war crimes is a clear deterrent).

U. CHI. L. REV. 1449, 1453 (2009) (concluding that military contractors should be held
liable under respondeat superior doctrine).

on a government contract has not “within a three-year period preceding this offer, been
convicted of or had a civil judgment rendered against them for: commission of fraud or
a criminal offense in connection with obtaining, attempting to obtain, or performing a
public . . . contract or subcontract . . . ”).

119. See VIVIAN S. CHU & KATE M. MANUEL, CONG. RESEARCH SERV., R41755,
TORT SUITS AGAINST FEDERAL CONTRACTORS: AN OVERVIEW OF THE LEGAL ISSUES,
REP. 22 (2001) (arguing that contractors could potentially make government
liable, they will not shy away from government contracts because of their profitability.\textsuperscript{120}

The Supreme Court has not ruled on whether the WSLA applies to offenses whose statutes of limitations had not expired in 2008, when the Act was amended. However, the court in\textit{United States v. BNP Paribas} held that if the statute of limitations had not yet expired when the crime and war otherwise meet all the provisions of a modified tolling statute, then that tolling statute should apply.\textsuperscript{121} While at first blush it seems that allowing the 2008 WSLA to apply to offenses committed prior to its enactment would violate the ban on \textit{ex post facto} laws, it actually does not because those laws focus on not holding someone liable for an action that was not defined to be criminal at the time it was committed.\textsuperscript{122} In addition to the holding in \textit{United States v. BNP Paribas}, \textit{United States v. Prosperi} made it very clear that, because Congress had not limited war to declared wars by using the term “declared” in the statute, a broader reading of the term at war was appropriate.\textsuperscript{123} The courts should apply the 2008 amendment to \textit{Carter} by following the \textit{Prosperi} court’s test and thus deem the Iraq conflict a war under the WSLA.\textsuperscript{124}

\begin{itemize}
  \item \textsuperscript{120} See Samuel Weigley, \textit{10 Companies Profiting the Most From War}, \textsc{USA TODAY} (Mar. 10, 2013, 6:10 PM), \url{http://www.usatoday.com/story/money/business/2013/03/10/10-companies-profiting-most-from-war/1970997/} (describing the massive profitability of war. For example, L-3 Communications made $956 million in 2010–11.); see also Angelo Young, \textit{And the Winner for the Most Iraq War Contract is KBR, With $39.5 Billion in a Decade}, \textsc{Int’l Bus. Times} (Mar. 19, 2013, 10:13 AM), \url{http://www.ibtimes.com/winner-most-iraq-war-contracts-kbr-395-billion-decade-1135905} (noting that KBR received many of its contracts without competition to total $39.5 billion with the next highest recipient of government contract funds at $13.5 billion).
  \item \textsuperscript{121} See \textit{United States v. BNP Paribas}, 884 F. Supp. 2d 589, 603, 608 (S.D. Tex. 2012) (holding that if a statute of limitations has not expired when a law is modified, the modified law applies).
  \item \textsuperscript{122} See \textit{id.} (reasoning that the statute of limitations had not expired so the application of the law is not necessarily \textit{ex post facto}); \textit{United States v. Prosperi}, 573 F. Supp. 2d 436, 443-44, 446 (D. Mass. 2008) (noting a list of factors to consider when determining whether a conflict constitutes as war for the purpose of the WSLA).
  \item \textsuperscript{123} See \textit{id.} at 605–06 (mentioning that the terms Congress uses in a statute are the terms Congress intended, including omission of words).
  \item \textsuperscript{124} See \textit{id.} at 607 (identifying that the \textit{Prosperi} court created a factors-balancing test: (1) the extent of the authorization given 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 expanded on investigation frauds against the government”).
\end{itemize}
B. "I'll take 'Certainty' for 100," Chief Justice Roberts

The Supreme Court should take additional WSLA cases because, to achieve certainty that military contractors will be prosecuted for crimes they commit while performing contracts, it is necessary to clarify lower court circuit splits and inconsistencies on this issue. To do this, the Supreme Court can take the next lower court case that discusses military contractor liability for serious crimes committed during the Afghanistan or Iraq conflicts. Alternatively, Congress can pass a law that removes any possible ambiguity that military contractors are indeed held liable for the crimes they commit abroad, during times of war, where these actions are not necessary for the successful performance of their contract.

Lastly, the Court should apply the plain meaning interpretation of the WSLA to extend the reach of the Act. The third prong of the WSLA has not been considered or applied in any lower court case. However, based on the analysis in Part II of this Comment, it is useful for expanding upon offenses eligible to utilize the WSLA’s tolling mechanism. Applying the third prong in this test could give the courts or Congress sufficient time to work out all the noted issues with military contractor liability because it will extend the commencement of the tolling of the statute of limitations. Ultimately, the collective goal of the courts and Congress should be to hold military contractors liable in both civil and criminal respects for the crimes they commit while performing contracts abroad during wartime. Military contractors will then be sure to know that if they commit certain crimes, they will be held liable.

125. Compare Al Shimari v. CACI Premier Tech., Inc., 758 F.3d 516, 520 (4th Cir. 2014) (holding that Kiobel does not automatically preclude all liability cases against military contractors), with In re KBR, Inc., 925 F. Supp. 2d at 772–73 (advocating for the inability of suits to be brought against military contractors who commit crimes during performance of their contracts), and Saleh, 580 F.3d at 9 (noting that military contractors should be automatically exempt from liability).


127. See discussion supra Part II.B (listing Supreme Court cases that have evaluated the WSLA); Part II.C (identifying lower court cases that have evaluated the WSLA); see also 18 U.S.C. § 3287 (2012) (identifying options for types of offenses that the WSLA covers).
CONCLUSION

Today, the United States is on the brink of potentially setting an unfortunate example for the world. Currently, the United States continues to be haunted by the torture committed by military contractors: torture that was sanctioned and deliberately hidden by the CIA. The Supreme Court's decisions in 2015 could shape future military contractor liability in a negative or positive manner. A plain meaning interpretation allows the courts to expand the WSLA to address the rampant impunity and uncertainty of prosecution of military contractors who commit crimes during times of war.128 The current precedent allows military contractors to be relatively free from prosecution.129 When potential war criminals are uncertain about whether or not the government will prosecute them, there is less deterrence to keep the potential war criminals from committing crimes.130 Because torture is included in the same title as the WSLA, the Act should include all crimes enumerated in the same Title 18.131

This current state of affairs can be reformed if the Supreme Court adopts a plain meaning interpretation of the WSLA. The plain meaning interpretation will adapt the Act to crimes such as military contractors' acts of torture committed during times of war. Ultimately, military contractors are hired to do a job and do it successfully; committing crimes such as fraud or torture means military contractors are not performing their contracts successfully. For the United States to be able to move forward with preventing future infractions, the Court must seal the impunity gap for military contractors.

128. See discussion supra Part III.A (arguing that the WSLA as a whole is unambiguous and, therefore, a plain meaning reading is permissible).
129. See discussion supra Part IV (noting that various statutes do not consistently hold military contractors accountable, which leads to impunity).
130. See discussion supra Part IV.B (pointing to uncertainty for the lack of deterrence).
131. See discussion supra Part III.B (mentioning that some offenses in Title 18 are civil while others are criminal and, therefore, that the WSLA should apply to both).
Erratum


In our Volume 4 Issue 3, we mistakenly omitted Professor Max Stul Oppenheimer’s middle name in his article, The Innovator’s Dilemma, on the title page and in later footnotes. We would like to extend our apologies to the author, and we would like to note that, at this time, we have corrected the omission on the online databases and on our website.