No. 18-8956

IN THE

Supreme Court of the United States

JORDAN M. JUCUTAN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR THE ST. MARY'S UNIVERSITY SCHOOL OF LAW, WARRIOR DEFENSE PROJECT, AS *AMICI CURIAE* SUPPORTING PETITIONER

JEFFREY ADDICOTT
WARRIOR DEFENSE PROJECT
ST. MARY'S UNIVERSITY
SCHOOL OF LAW
One Camino Santa Maria
San Antonio, Texas 78228
(210) 431-2219
jaddicott@stmarytx.edu

Counsel for Amici Curiae

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INTEREST OF *AMICI CURIAE*[1]

The Founder and Director of the St. Mary's University School of Law, Warrior Defense Project (WDP), is Professor of Law, Jeffrey F. Addicott, a retired Lieutenant Colonel Army Judge Advocate (JAG), who served in senior legal positions throughout the world, and now specializes in national security law. WDP's mission includes the study of legal issues that impact military readiness as well as providing pro bono representation to military personnel wrongfully accused of misconduct in the performance of their duties. The national security interests at stake in this case are of great importance and the WDP has an interest in the effect this case will have on military readiness for the nation and for the military clients it represents.

SUMMARY OF ARGUMENT

In this case, the decision from the Ninth Circuit invalidates a policy of repose with respect to criminal limitations which this Court has long endorsed as "fundamental to our society and our criminal law." The Ninth Circuit replaces the policy of repose with one of indefinite criminal liability. The decision from the Ninth Circuit has also created a split between the Circuit courts on whether the Wartime Suspension of Limitations Act (WSLA) should apply to a charged offense not involving fraud against the United States government. In fact, the Ninth Circuit is in direct

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[1] Pursuant to Rule 37.6, *amici* certifies that no counsel for a party authored this brief in whole or in part, and that no person or entity, other than the *amici*, its members, or counsel, has made a monetary contribution to this brief's preparation or submission. This brief is filed with timely consent of the parties. Letters indicating such consent are filed with *amici*.

opposition with a recent decision of the Tenth Circuit regarding the same subject.

Jordan M. Jucutan (Mr. Jucutan) appeals the district court's denial of his motion to dismiss for prosecution of acts beyond the set statute of limitations and lack of standing to prosecute due to lack of any alleged criminal acts committed against the United States of America.[2] The district court concluded the criminal indictment against Mr. Jucutan was not barred by the generally applicable five-years statute of limitations period,[3] finding that 18 U.S.C. § 3282(a) was tolled by the WSLA,[4] and the Ninth Circuit affirmed the district court's denial, by a 2-1 vote.[5] Both rulings erred in concluding that the WSLA applied to the wire fraud and aggravated identity theft charged against Mr. Jucutan.

Because Mr. Jucutan was employed by Document and Packaging Brokers, Inc. (DOCUPAK) as a contractor and performed his contract requirements outside of the scope of any wartime activity, he is not subject to the tolling provisions of the WSLA. Further, the military provided no guidance on how DOCUPAK established and administered the subject contract, making that relationship beyond the intent of Wartime Enforcement of Fraud Act (WEFA).[6]

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[2] *See* United States v. Jucutan, No. 1:15-CR-00017 (N. Mar. I. 2016) (denying the defendant's motion to dismiss) (on file with author).

[3] *Id.*; 18 U.S.C. § 3282(a) (2017).

[4] 18 U.S.C. § 3287 (2017).

[5] United States v. Jucutan, 2018 WL 6445749 (9th Cir. 2018).

[6] S. REP. NO. 110-431 (2008).

ARGUMENT

I. BACKGROUND

Although the Global War on Terror (GWOT)[7] serves as a reminder of the importance of the Army National Guard[8] and Army Reserve as essential components to the nation's military readiness, both the Guard and Reserve have periodically struggled to achieve proper force levels—even in "peace time"[9] environments. In the context of this discussion, in July 2005, the Army National Guard counted roughly 330,000 soldiers—20,000 short of Congress' authorization.[10] Due to the shortages, various steps were taken to bolster recruitment including the development of a recruiting assistance program—the Army National Guard Recruiting Assistance Program (G-RAP).[11] The government

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[7] The term "Global War on Terror" is used both as a metaphor to describe a general conflict against all international terrorist groups and, more precisely, to describe the ongoing international armed conflict between the United States of America and the "Taliban, al-Qaeda, or associated forces." *See* Military Commissions Act of 2006 (MCA), 10 U.S.C. § 948a(1)(i) (2006).

[8] *Our History*, ARMY NATIONAL GUARD, https://www.nationalguard.com/legacy (last visited May 13, 2019).

[9] *See generally* John Warner, Curtis Simon and Deborah Payne, *The Military Recruiting Productivity Slowdown: The Roles of Resources, Opportunity Cost and the Tastes of Youth*, 14 DEFENCE AND PEACE ECON. 5 (2003).

[10] Rowan Scarborough, *Numbers Show National Guard Bonus Scandal Not Living Up to the Hype*, WASH. TIMES (Feb. 11, 2016), https://www.washingtontimes.com/news/2016/feb/11/national-guard-fraud-claims-taint-recruiting-assis/.

[11] *Id.*

awarded DOCUPAK, a private civilian corporation, a contract to administer G-RAP.[12]

> [G-RAP and later AR-RAP] was designed to be a recruitment tool to supplement the recruiting activities of full-time recruiters during a time of increased demand for soldiers in a depressed recruiting market . . . [by leveraging] soldiers to identify, mentor, and sponsor potential candidates for enlistment.[13]

Any soldier, who was qualified by completing an online DOCUPAK course of instruction, could be designated as a recruiting assistant (RA).[14] Accordingly, RA's were compensated—through DOCUPAK—based on fulfilling certain obligations which centered on discussing the benefits of joining the Army National Guard (and later the Army Reserve) with potential soldiers (PS). The RA would enter basic information about each PS whom they contacted in the DOCUPAK

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[12] *See* United States v. Osborne, 886 F.3d 604, 606 (6th Cir. 2018). Although the official website for G-RAP (www.guardrecruitingassistant.com) cannot be found, the Defend Our Protectors website has compiled AR-RAP and G-RAP marketing and other informational materials which have been cited throughout. Memorandum from the Subcomm. on Fin. and Contracting Oversight Majority Staff, to Members of the Subcomm. and Contracting Oversight (Feb. 13, 2014), https://www.hsgac.senate.gov/imo/media/doc/Army%20Recruiting%20Memo%20for%20Members%20and%20Staff%20Final.pdf.

[13] NATIONAL GUARD ASSOCIATION OF THE UNITED STATES, THE G-RAP PROGRAM: THE INVESTIGATIONS AND AN INJECTION OF REALITY, http://www.defendourprotectors.com/wp-content/uploads/2015/02/G-RAP-Program-The-Investigations-and-an-Injection-of-Reality.pdf (last visited May 14, 2019).

[14] Testimony of Philip Crane at 123, Colorado v. Wilson, (C.D. Col. 2015) (No. 14CR327).

online network, including personal identifiable information (PII). When the subject PS enlisted, the RA would be compensated through DOCUPAK: $1,000 for every PS who signed an enlistment contract and then an additional $1,000 when the new enlistee completed basic training.[15] Other bonuses were offered to RAs for officers who joined.

When asked to describe the workings of DOCUPAK, Philip Crane, the company's former president testified that DOCUPAK was a "[m]arketing and advertising company. In this particular instance, our focus was on providing services to the United States government Department of Defense for recruiting and retention purposes."[16] Crane also testified that DOCUPAK was merely a "force multiplier."

> [DOCUPAK] encouraged members in good standing of the Army National Guard to go out and to share their story with other individuals who might have a propensity to also serve in the military . . . the RAs would share their stories within their sphere of influence, whether it be a community center, high school, church, or any other place of worship.[17]

In short, the military contracted with DOCUPAK to administer recruiting programs for the "Army, the big Army, and the National Guard,"[18] with essentially zero oversight. Two years after G-RAP, in June 2007, the Army Reserve launched the Army Reserve Recruiting

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[15] NATIONAL GUARD ASSOCIATION OF THE UNITED STATES, *supra* note 13.

[16] Testimony of Philip Crane *supra* note 14 at 5.

[17] *Id.* at 6 and 9.

[18] *Id.* at 5.

Assistance Program (AR-RAP), which was also administered by DOCUPAK with similar rules.[19]

Before the two recruiting programs were shut down in 2012, approximately 150,000 recruits Army-wide joined either the National Guard or the Army Reserve resulting in payments of over $300 million.[20] By April 2007, the Army National Guard achieved the Congressional authorized strength number of 350,000 troops.[21] Nevertheless, the program continued even though no need was demonstrated for it to continue. Incidentally, the same year, the Army's Criminal Investigation Command (CID) investigated several cases of alleged abuse—instances where some RAs were suspected of sharing payment money with Army Recruiters—leading to the erroneous belief of a systemic nationwide scandal.[22]

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[19] Lt. Col. William Nutter, *Recruiting Assistants, New Programs, Help Boost Army Reserve Numbers*, U.S. ARMY (Aug. 1, 2007), https://www.army.mil/article/4237/recruiting_assistants_new_programs_help_boost_army_reserve_numbers.

[20] Rowan Scarborough, *Numbers Show National Guard Bonus Scandal Not Living Up to the Hype*, WASH. TIMES (Feb. 11, 2016), https://www.washingtontimes.com/news/2016/feb/11/national-guard-fraud-claims-taint-recruiting-assis/; Memorandum from the Subcomm. on Fin. and Contracting Oversight Majority Staff, to Members of the Subcomm. and Contracting Oversight (Feb. 13, 2014), https://www.hsgac.senate.gowimo/media/doc/Army%20Recruiting%20Memo%20for%20Members%20and%20Staff%20Final.pdf.

[21] NATIONAL GUARD ASSOCIATION OF THE UNITED STATES, *supra* note 13.

[22] Rowan Scarborough, *supra* note 10; Memorandum from the Subcomm. on Fin. and Contracting Oversight Majority Staff, to Members of the Subcomm. and Contracting Oversight (Feb. 13, 2014), https://www.hsgac.senate.gov/imo/media/doc/Army%20Re

The Army Audit Agency did not commence a program-wide audit until 2011.[23] By the beginning of March 2012, the investigation gained intense publicity due to the media's "sensational headlines based on half-truths, innuendo, and anonymous government leaks."[24] For example, the *Washington Post* reported on March 13, 2012, $92 million in bonuses was allegedly paid to Army recruiters who were not eligible for the payments, and more than a quarter of the $339 million in bonuses given over the past six years may have been fraudulent.[25] Consequently, the Army

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cruiting%20Memo%20for%20Members%20and%20Staff%20Final.pdf.

[23] Rowan Scarborough, *supra* note 10; Memorandum from the Subcomm. on Fin. and Contracting Oversight Majority Staff, to Members of the Subcomm. and Contracting Oversight (Feb. 13, 2014), https://www.hsgac.senate.gov/imo/media/doc/Army%20Recruiting%20Memo%20for%20Members%20and%20Staff%20Final.pdf.

[24] Memorandum from the Subcomm. on Fin. and Contracting Oversight Majority Staff, to Members of the Subcomm. and Contracting Oversight (Feb. 13, 2014), https://www.hsgac.senate.gov/imo/media/doc/Army%20Recruiting%20Memo%20for%20Members%20and%20Staff%20Final.pdf; *see* Robert O'Harrow Jr., *Fraud Investigation Targets Recruiting Program for Army National Guard, Reserves*, WASH. POST (Mar. 13, 2012), https://www.washingtonpost.com/investigations/fraud-investigation-targets-recruiting-program-for-army-national-guard-reserves/2012/03/12/gIQAp1QXAS_story.html?utm_term=.a0a0dd4ca5e0; *see also Army Cancels Recruitment Program After Allegations of Bonus Payout Fraud*, FOX NEWS (Mar. 14, 2012), https://www.foxnews.com/politics/army-cancels-recruitment-program-after-allegations-of-bonus-payout-fraud (last updated Dec. 23, 2015).

[25] *See* Robert O'Harrow Jr., *Fraud Investigation Targets Recruiting Program for Army National Guard, Reserves*, WASH. POST (Mar. 13, 2012), https://www.washingtonpost.com/investigations/fraud-investigation-targets-recruiting-program-for-army-na

terminated G-RAP and AR-RAP in January 2012.[26] However, CID investigations continued for years after the termination of the recruiting programs, often described as CID "witch hunts" for targeting innocent RAs who had under the parameters of the contract simply followed the actual G-RAP and AR-RAP rules.[27]

Ironically, while the 2011 Army audit detailed profound deficiencies at DOCUPAK the majority of the ensuing CID investigations targeted low level RAs who, in many cases, did nothing more than follow the highly dubious and often contradictory mandates set out by DOCUPAK. According to one watchdog group:

> Rather than accept responsibility for ineffective command and for mismanagement of a contract worth a half a billion dollars, military brass redirected this uncomfortable inquiry to the rank-in-file soldiers . . . .[28]

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tional-guard-reserves/2012/03/12/gIQAp1QXAS_story.html?utm_term=.a0a0dd4ca5e0.

[26] Memorandum from the Subcomm. on Fin. and Contracting Oversight Majority Staff, to Members of the Subcomm. and Contracting Oversight (Feb. 13, 2014), https://www.hsgac.senate.gov/imo/media/doc/Army%20Recruiting%20Memo%20for%20Members%20and%20Staff%20Final.pdf.

[27] *See generally* Darron Smith, *The Conspiracy Behind the G-RAP War on American Soldiers*, HUFFINGTON POST (Mar. 25, 2016, 10:10 AM), https://www.huffpost.com/entry/the-conspiracy-behind-the-g-rap-war_b_9535058 (last updated Mar. 26, 2017).

[28] Darron T. Smith & Liz Ullman, *The Silent Campaign by the US Government to Brand American Soldiers as Criminals*, HUFFINGTON POST (Jun. 05, 2015), https://www.huffpost.com/entry/the-silent-campaign-by-th_b_7521228; *see also* Rowan Scarborough, *Army Brass Avoid Rap in Recruitment Fraud Probe: Lower Ranks Take Brunt of Blame*, WASH. TIMES, Mar. 14, 2016, at A6.

Code named "Task Force Raptor," over 200 CID investigators set out to determine whether over 100,000 RAs committed crimes.[29]

Curiously, in every Report of Investigation (ROI) the particular CID agent would not list the specific G-RAP or AR-RAP rule which an alleged RA wrongdoer violated. Instead, criminal charges were set out as violations of various Title 18 U.S.C. offenses such as wire fraud or aggravated identity theft.

At the end of the day, the red thread throughout all the ROIs reflected the perception that it was preposterous for an RA to claim a substantial monetary reward for simply engaging a PS in a onetime conversation about the benefits of joining the Army National Guard or the Army Reserve. However, as the former president of DOCUPAK testified, a single conversation of unspecified length about the Army National Guard (or Army Reserve) with a PS was all the RA was required to accomplish before submitting the name for lawful payment.[30]

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[29] Dave Philipps, *Army Fraud Crackdown Uses Broad Net to Catch Small Fish, Some Unfairly*, N.Y. TIMES (May 28, 2017), https://www.nytimes.com/2017/05/28/us/national-guard-army-fraud-crackdown.html.

[30] Testimony of Philip Crane *supra* note 14 at 111–12.

II. THE NINTH CIRCUIT'S DECISION WILL HINDER THE UNITED STATES' CAPABILITIES TO CONDUCT MILITARY OPERATIONS

A. The Use of Contractors Working Alongside Soldiers is Necessary to Effectively Carry Out Military Operations.

The level of civilian contractor activities in concert with Department of Defense (DOD) missions—which encompass a range of technical, logistical, maintenance, and security support services—has caused a "substantial shift in the types of contracts for troop support services."[31] Without the extensive use of contractors, the American military could not conduct combat operations, contingency operations, or even peacetime operations.[32]

Given the scope and the pace of the modern military, military planners no longer consider contractors as a luxury or a "nice to have" addition to the force structure. Because contractors now provide a wide range of technical, logistical, maintenance, and security support services to DOD missions, American military superiority requires contractor support to maintain military readiness and operational capabilities.[33] As such, contractors are critical to national security in

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[31] *See* VALERIE B. GRASSO, CONG. RESEARCH SERV. RL33834, DEFENSE CONTRACTING IN IRAQ: ISSUES AND OPTIONS FOR CONGRESS ii (2007) (discussing the various types of Logistics Civil Augmentation Program (LOGCAP) contracts that have been awarded).

[32] *See* 10 U.S.C. § 101(a)(13) (2017) (defining "contingency operation").

[33] JEFFREY F. ADDICOTT, TERRORISM LAW: MATERIALS, CASES, COMMENTS 286 (7th ed. 2014).

and out of armed conflict scenarios. In turn, as evidenced by the functions of DOCUPAK, contractors could actually be military personnel, albeit complying with requirements that attempted to separate their status as soldiers and as contractors performing work for DOCUPAK.

B. The Ninth Circuit's Decision Would Potentially Expose Contractors to Prolonged Liability, Disincentivizing A Willingness to Assist the Military.

If the Ninth Circuit's decision stands, it would disincentivize contractors from supporting America's military mission. This is so because the GWOT is unlikely to end soon. Without an end to the GWOT the WEFA has the unintended consequence of creating a potentially unlimited statute of limitations for contractors. This means contractors could remain subject to potential liability for criminal offenses for years, possibly a lifetime. In *Boumediene v. Bush*, this Court said the GWOT may not end for "a generation or more."[34] The potential for prolonged liability will prevent otherwise willing contractors from assisting the military to complete its mission, hindering U.S. military capabilities and national security.

[34] Boumediene v. Bush, 553 U.S. 723, 785 (2008).

III. THE NINTH CIRCUIT'S DECISION WILL MAKE IT MORE DIFFICULT FOR THE GOVERNMENT TO PROVE CRIMINAL CASES

A. It Has Been the Repeated Position of the Supreme Court that the Wartime Suspension of Limitations Act Should Be Narrowly Construed and Interpreted in Favor of Repose.

The repeated position of this Court is that the WSLA "should be 'narrowly construed' and 'interpreted in favor of repose.'"[35] The government has had more than ten years to indict Mr. Jucutan. A "statute of limitations reflects a legislative judgment that, after a certain time, no quantum of evidence is sufficient to convict."[36] According to the Tenth Circuit, quoting this Court, the time limit barring a criminal charge is:

> designed to protect individuals from having to defend themselves against charges when the basic facts may have become obscured by the passage of time and to minimize the danger of official punishment because of acts in the far-distant past. Such a time limit may also have the salutary effect of encouraging law enforcement officials promptly to investigate suspected criminal activity. [37]

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[35] Kellogg Brown v. United States *ex rel.* Carter, 135 S. Ct. 1970, 1978 (2015) (quoting Bridges v. United States, 346 U.S. 209, 216 (1953)).

[36] United States v. DeLia, 906 F.3d 1212, 1217 (10th Cir. 2018) (quoting Stogner v. California, 539 U.S. 607, 615 (2003)).

[37] *Id.* at 1217 (quoting Toussie v. United States, 397 U.S. 112, 114–15 (1970)).

B. The Charged Offenses Against Mr. Jucutan Were Allegedly Committed More Than Ten Years Prior.

Mr. Jucutan is charged with offenses which were allegedly committed between August 25, 2007 and June 6, 2009,[38] well past the five-year statute of limitations for most federal crimes, and should be barred.[39] Although the government asserts the five-year statute of limitations period, as provided in 18 U.S.C. § 3282(a), has been suspended by the WSLA, the WSLA does not apply to the crimes charged—wire fraud[40] and aggravated identity theft.[41]

The WSLA was enacted "to ensure that the fog of war does not allow those who defraud the United States from getting away with it because their actions could not be investigated during hostilities."[42] Nevertheless, the WSLA "creates an exception to a longstanding Congressional 'policy of repose' that is fundamental to our society and our criminal law."[43] Accordingly, any ambiguity in 18 U.S.C. § 3287 should

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[38] United States v. Jucutan, No. 1:15-CR-00017 (N. Mar. I. 2016) (on file with author).

[39] *See* 18 U.S.C. § 3282(a) ("Except as otherwise expressly provided by law, no person shall be prosecuted, tried, or punished for any offense, not capital, unless the indictment is found or the information is instituted within five years next after such offense shall have been committed.").

[40] 18 U.S.C. § 1343 (2017).

[41] 18 U.S.C. § 1028A (2017).

[42] S. REP. NO. 110-431, at 3 n.4 (2008); United States v. Sack, 125 F. Supp. 633 (S.D.N.Y. 1954).

[43] United States v. DeLia, 906 F.3d 1212, 1217 (10th Cir. 2018) (quoting Bridges v. United States, 346 U.S. 209, 215–16 (1953)).

be strictly construed and "interpreted in favor of repose."[44]

C. The Ninth Circuit's Decision Violates the Supreme Court's Longstanding Principle of Repose.

The Ninth Circuit's decision violates the Supreme Court's longstanding principle of repose. Providing a long—potentially indefinite—statute of limitations for a criminal offense is contrary to the Court's precedent. In *Toussie v. United States*, the Court held:

> The purpose of a statute of limitations is to limit exposure to criminal prosecution to a certain fixed period of time following the occurrence of those acts the legislature has decided to punish by criminal sanctions. Such a limitation is designed to protect individuals from having to defend themselves against charges when the basic facts may have become obscured by the passage of time and to minimize the danger of official punishment because of acts in the far-distant past.[45]

The charged offenses against Mr. Jucutan are precisely of the same kind *Toussie* finds problematic. Indeed, if the statute of limitations is to be tolled, the alleged offenses must be directly related to the authorized use of military force in a wartime setting.

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[44] *Id.* at 1217 (quoting Kellogg Brown v. United States *ex. rel.* Carter, 135 S. Ct. 1970, 1978 (2015) (quoting *Bridges*, 346 U.S. at 216)).

[45] Toussie v. United States, 397 U.S. 112, 114 (1970).

IV. THE WARTIME SUSPENSION OF LIMITATIONS ACT DOES NOT APPLY TO FRAUD THAT IS NOT DIRECTLY CONNECTED TO THE CONGRESSIONALLY AUTHORIZED USE OF THE ARMED FORCES

A. The Wartime Suspension of Limitations Act Was Amended to Prevent Fraud in Relation to the Ongoing Conflicts in Iraq and Afghanistan.

In 1942, President Franklin Roosevelt signed into law the WSLA, tolling the statute of limitations and providing prosecutors more time to bring charges "relating to criminal fraud offenses in the United States."[46] In 1948, President Harry S. Truman signed a new law making the WSLA permanent.[47] The WSLA, however, only applied to a formal Congressional declaration of war under Article I. In the GWOT, there was no such formal declaration of war by Congress. The WEFA amended[48] the WSLA so its tolling clause would apply to a Congressional authorization of military force pursuant to the War Powers Resolution.[49] A report from the Committee on the Judiciary, providing the purpose of the WEFA, specified that the original WSLA was signed in

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[46] S. REP. NO. 110-431, at 2 (2008).

[47] *Id.* at 2.

[48] *See id.* at 6 (2008) ("The [WSLA] . . . would close a loophole in current law and give the government new power to prosecute contracting fraud in Iraq and Afghanistan.").

[49] 50 U.S.C. § 1544(b) (2017) (outlining the steps Congress must take to authorize the lawful use of military force by the Executive in a prolonged military engagement lasting more than sixty days).

"[recognition of] the extreme difficulty in tracking down contracting fraud in the midst of war . . . ."[50] At no point does the report stipulate a deviation from the original purpose of the WSLA.[51] In summary, the WSLA, as amended, applies to fraud against the United States in "[relation] to the ongoing conflicts in Iraq and Afghanistan."[52]

B. The Wartime Enforcement of Fraud Act Did Not Expand the Wartime Suspension of Limitations Act's Scope Beyond the Type of Charged Offense It Would Toll During Wartime.

Although the WEFA extended the statute of limitations to the overseas conflicts in Iraq and Afghanistan, the WEFA did not broaden WSLA's scope beyond the type of charged offense it would toll during wartime. Specifically, the report from the Committee on the Judiciary states that the WSLA "is not intended to apply to . . . military actions not specifically authorized by Congress pursuant to the War Powers Resolution."[53] Thus, the WSLA only applies to fraud against the United States which is connected to the specific authorized use of military force which, in turn, is directly tied to those activities in the overseas war zones outside of the continental United States.

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[50] S. REP. NO. 110-431, at 2 (2008).

[51] *Id*.

[52] *Id.* at 2.

[53] *Id.* at 4.

C. Congress Specifically Authorized the Use of Military Force in Iraq and Afghanistan.

Congress specifically authorized the use of military force by enacting, respectively, the Authorization for Use of Military Force (AUMF)[54] and the Authorization for Use of Military Force Against Iraq Resolution (AUMFAI).[55] The AUMF limits the authorized use of military force to "those nations, organizations, or persons [the President] determines planned, authorized, committed, or aided the terrorist attacks which occurred on September 11, 2001.[56] The AUMFAI, authorized the President to:

> [U]se the Armed Forces of the United States as he determines to be necessary and appropriate in order to:
>
> (1) defend the national security of the United States against the continuing threat posed by Iraq; and
>
> (2) enforce all relevant United Nations Security Council resolutions regarding Iraq.[57]

Both Congressional authorizations of military force limit the use of force to specific locations for specific purposes—all overseas. Conversely, the WSLA was "not intended to apply to . . . military actions not specifically authorized by Congress pursuant to the

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[54] Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001).

[55] Authorization for Use of Military Force Against Iraq Resolution of 2002, Pub. L. No. 107-243, 116 Stat. 1501 (2002).

[56] Authorization for Use of Military Force.

[57] Authorization for Use of Military Force Against Iraq Resolution of 2002.

War Powers Resolution."[58] Thus, alleged criminal actions by a soldier—engaged as a contractor or not—committed solely within the confines of the United States without a connection to the GWOT is beyond the reach of the WSLA.

D. Offenses Involving Fraud Under the Wartime Suspension of Limitations Act Are Limited Strictly to Offenses in Which Defrauding or Attempting to Defraud the United States is an Essential Ingredient of the Offense Charged.

Offenses involving fraud under the WSLA are "limited strictly to offenses in which defrauding or attempting to defraud the United States is an essential ingredient of the offense charged."[59] *Bridges v. United States* held that the WSLA did not apply to offenses outside defrauding the United States "in any pecuniary manner or in any manner concerning property."[60] In contrast, this Court has also held that the WSLA applied "to false claims for wool purchases from a federal agency, . . . because defrauding the federal government was 'an essential ingredient of the offenses charged.'"[61] In this context, to determine whether WSLA should apply to the criminal offenses alleged against Mr. Jucutan, a soldier and also a

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[58] S. REP. NO. 110-431, at 4 (2008).

[59] United States v. DeLia, 906 F.3d 1212, 1217 (10th Cir. 2018) (quoting Bridges v. United States, 346 U.S. 209, 221 (1953)).

[60] *Id*.

[61] *Id.* at 1219 (quoting United States v. Grainger, 346 U.S. 235, 237, 241–45 (1953)).

contractor with DOCUPAK, the Court must evaluate the elements of the charged offense.[62]

V. THE NEXUS BETWEEN THE MILITARY AND THE CIVILIAN CONTRACTOR AS A GUIDEPOST TO DETERMINE WHETHER THE WARTIME SUSPENSION OF LIMITATIONS ACT SHOULD APPLY TO A CHARGED OFFENSE

A. By Extrapolation to the Political Question Doctrine, the Court Should Not Apply the Wartime Suspension of Limitations Act to Military Personnel who Are Engaged in Fulfilling Contractor Requirements Unless There is a Clear and Direct Nexus Between a Military Wartime Requirement and the Obligations of the Contractor.

Civilian parent contracting companies function under individualized contracts either directly with the DOD or with other federal agencies. Because overseas military operations give rise to their fair share of untoward activities caused by negligent or intentional acts, including wrongful deaths and accidents, it is not surprising that during the GWOT parent contracting companies have faced a number of civil lawsuits emanating from the acts of their civilian employees, other contractors, military personnel, and host nation foreigners.

An often raised "defense" employed by contracting companies in the litigation process is the political question doctrine, which, if adopted by the court,

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[62] *Id.* at 1219.

serves as a complete jurisdictional bar to the suit.[63] Even if the plaintiff's lawsuit is appropriate and meritorious as to every other procedural and substantive matter, the political question doctrine renders the case non-justiciable.

The question of how to identify a non-justiciable political question is set out in *Baker v. Carr*.[64] The so-called *Baker* inquiry lists six separate factors, any one of which renders the case non-justiciable.[65] The six *Baker* factors are:

> (1) a textually demonstrable constitutional commitment of the issue to a coordinate political department; or (2) a lack of judicially discoverable and manageable standards for resolving it; or (3) the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or (4) the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or (5) an unusual need for unquestioning adherence to a political decision already made; or (6) the potentiality of embarrassment from multifarious pronouncements by various departments on one question.[66]

The *Baker* factors are broadly defined and apparently listed in descending order of importance, with the first and second factors providing the most

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[63] *See* Japan Whaling Ass'n v. Am. Cetacean Soc'y, 478 U.S. 221, 230 (1986).

[64] Baker v. Carr, 369 U.S. 186 (1962).

[65] *Id.* at 217.

[66] *Id.*

weight.[67] Each case mandates "a discriminating analysis of the particular question posed, in terms of the history of its management."[68] The critical element is the amount of command and control that the military has over the particular contract and contractor. The greater the level of command and control the greater the probability that the requisite *Baker* factors will be invoked to bar the civil action suit.

For instance, the 2006 case of *Smith v. Halliburton Co.* involved a suit against a civilian contractor who operated a dining facility on Forward Operating Base (FOB) Marez in Mosul, Iraq.[69] In December 2004, a suicide bomber entered the dining facility, detonated explosives packed with shrapnel, and murdered twenty-two-people.[70] The court applied the *Baker* factors and determined that the contractor was operating pursuant to the military's orders, instructions, regulations, and protection, and therefore the contractor was under military control making the case non-justiciable.[71]

On the other hand, in *McMahon v. Presidential Airways, Inc.,* the Eleventh Circuit upheld a lower court's denial of a motion to dismiss based on the political question doctrine.[72] Although the civilian contractor company Presidential Airways (Presidential)

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[67] Veith v. Jubelirer, 541 U.S. 267, 277–78 (2004).

[68] McMahon v. Presidential Airways, Inc., 502 F.3d 1331, 1364 (11th Cir. 2007), *aff'g* 460 F. Supp. 2d 1315 (M.D. Fla. 2006).

[69] No. H-06-0462, 2006 WL 2521326, at *1 (S.D. Tex. Aug. 30, 2006).

[70] *Id.* at 1.

[71] *Id.* at 6–7.

[72] *McMahon*, 502 F.3d 1331 at 1361.

was under military contract to provide transportation support to the DOD in Afghanistan, it could not satisfy any of the *Baker* factors in a negligence lawsuit filed by survivors of a Presidential plane crash, killing all aboard. The Eleventh Circuit dismissed the first *Baker* factor, finding that while the military was involved in choosing the starting and ending points of various Presidential flights, the military's role in directing the activities was "relatively discrete."[73] Because the court felt the facts demonstrated minimal military involvement and the type of claim was squarely in the realm of a negligence claim, the remaining *Baker* factors were disposed of in quick step.

In the case of DOCUPAK, this civilian contracting company operated outside of any theater of combat and was provided no guidance from the military as to how to organize or run the G-RAP and AR-RAP initiatives—DOCUPAK would certainly fail to satisfy any of the *Baker* factors.[74] DOCUPAK and the individual RA "military" contractor who worked for DOCUPAK were far removed from any real connection to the GWOT and thus far removed from the letter and spirit of the WLSA. While it is undeniable that the RA working for DOCUPAK provided some service to the military in the sphere of reaching certain enlistment

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[73] *Id.*, at 1361.

[74] *See* United States v. Osborne, 886 F.3d 604, 606 (6th Cir. 2018) (stating DOCUPAK is a private corporation); *see also* Memorandum from the Subcomm. on Fin. and Contracting Oversight Majority Staff, to Members of the Subcomm. and Contracting Oversight (Feb.13, 2014), https://www.hsgac.senate.gov/imo/media/doc/Army%20Recruiting%20Memo%20for%20Members%20and%20Staff%20Final.pdf (providing further details on DOCUPAK).

goals, those services were not connected to combat-related actions on the battlefield or in direct support of wartime actions.

B. Defrauding the U.S. Government is Not an Essential Ingredient of the Charged Offenses—Wire Fraud and Aggravated Identity Theft.

As stated, the Ninth Circuit held that the WSLA applied to the criminal offenses alleged against Mr. Jucutan. Although the Ninth Circuit applied the WSLA to criminal offenses "committed in connection with the . . . performance . . . of any contract . . . which is . . . directly connected with or related to [Congressionally] authorized use of the Armed Forces,"[75] the government failed to show that AR-RAP itself is "directly connected with or related to the authorized use of the Armed Forces."[76] The government haphazardly relies on a work statement for AR-RAP to show that the program was directly connected with or related to the AUMF:

> [A]s the Army Reserve (AR) transitions from a stand-by reserve to an operational reserve there still remains challenges for the Global War on Terror (GWOT) and for manning the AR. The current strength of the Selected Reserve (SELRES) is just under 195K; missing end-strength goal by 10K.[77]

This language, however, fails to expand the narrow authorization of the AUMF and AUMFAI. Again, only

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[75] 18 U.S.C. § 3287 (2017)

[76] *See* 18 U.S.C. § 3287 (2017).

[77] United States v. Jucutan, 2018 WL 6445749, 3 (9th Cir. 2018) (Berzon, J., dissenting).

Congressionally authorized use of military force activates the WSLA's suspension of the applicable statute of limitations.[78] The government has made no effort to show that the need to recruit more troops for the Army Reserve was "directly connected with or related to the authorized use" of military force under the AUMF or AUMFAI. Furthermore, the charged offenses against Mr. Jucutan—wire fraud[79] and aggravated identity theft[80]—contain no element which requires Mr. Jucutan to have defrauded the United States government.[81] As demonstrated above, this Court has applied the WSLA to toll the limitations period only when the alleged fraud was an "essential ingredient of the offense charged."[82] Defrauding the U.S. government is not an essential ingredient of the charged offenses—wire fraud and aggravated identity theft—because neither of the offenses require Mr. Jucutan to have defrauded the U.S. government.[83] Therefore, the district court plainly erred in holding the WSLA applies to the charged offenses against Mr. Jucutan.

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[78] *See* 18 U.S.C. § 3287.

[79] 18 U.S.C. § 1343.

[80] 18 U.S.C. § 1028A.

[81] *See* 18 U.S.C. § 1343; 18 U.S.C. § 1028A.

[82] United States v. DeLia, 906 F.3d 1212, 1217 (10th Cir. 2018) (quoting Bridges v. United States, 346 U.S. 209, 221 (1953)).

[83] *See* 18 U.S.C. § 1028A.

CONCLUSION

The judgement of the Ninth Circuit of Appeals should be set aside.

Respectfully submitted,

JEFFREY ADDICOTT
WARRIOR DEFENSE PROJECT
ST. MARY'S UNIVERSITY
SCHOOL OF LAW
One Camino Santa Maria
San Antonio, Texas 78228
(210) 431-2219
jaddicott@stmarytx.edu

Counsel for Amici Curiae

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