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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

(SAN DIEGO)

UNITED STATES OF AMERICA,

v.

DAVID NEWLAND (1),
aka "Newly,"
ENRICO DEGUZMAN (2),
aka "Rick,"
DONALD HORNBECK (3),
aka "Bubbles,"
JAMES DOLAN (4),
aka "JD,"
BRUCE LOVELESS (5),
DAVID LAUSMAN (6),
aka "Too Tall,"
STEPHEN SHEDD (7),
MARIO HERRERA (8),
aka "Choke," aka "Choke OIC,"
ROBERT GORSUCH (9),

Defendants.

Case No. 17 CR 0623 JLS

BRIEF OF AMICUS CURIAE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF DEFENDANT DAVID NEWLAND

Date: March 21, 2019

Time: 9:30 am

Place: US District Court
Courtroom 4D
221 West Broadway
San Diego, CA 92101

The Honorable Janis L. Sammartino

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STATEMENT OF INTEREST OF AMICUS CURIAE

The National Association of Criminal Defense Lawyers (NACDL) is a nonprofit voluntary professional bar association that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of crime or misconduct. NACDL was founded in 1958. It has a nationwide membership of thousands of direct members, as well as approximately 90 state, local, and international affiliate organizations with up to 40,000 members. NACDL's members include private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges. NACDL is the only nationwide professional bar association for public defenders and private criminal defense lawyers. NACDL is dedicated to advancing the proper, efficient, and just administration of justice. NACDL files numerous amicus briefs each year in the U.S. Supreme Court and other federal and state courts, seeking to provide amicus assistance in cases that present issues of broad importance to criminal defendants, criminal defense lawyers, and the criminal justice system as a whole. NACDL has a particular interest in fair application of criminal statutes of limitations and the Congressionally intended repose they provide. In particular, NACDL is concerned with how statutes of limitations will be affected by application of the Wartime Suspension of Limitations Act.

INTRODUCTION

Defendant David Newland was a Captain in the U.S. Navy. More than five years after he retired from the Navy, he was charged in a three-count indictment in March 2017 with conspiracy, 18 U.S.C. § 371, bribery, 18 U.S.C. § 201, and honest services fraud, 18 U.S.C. § 1343, 1346, 1349. The alleged conduct related to certain U.S. Navy officers assigned to the Navy's Seventh Fleet based in the Western Pacific Ocean and their involvement with Glenn Defense Marine Asia, a ship husbanding company that provided services to the Navy. Mr. Newland left his position with the Seventh Fleet in approximately July of 2007 and retired from the Navy in or about

March 2010. All of the conduct in the indictment attributable to him occurred before 2010. Thus, on their face, the charges are barred by the five-year statute of limitations, 18 U.S.C. § 3282, unless some exception applies.

The Wartime Suspension of Limitations Act, 18 U.S.C. § 3287, should not apply here. That Act, like all exceptions to a statute of limitations, should be construed narrowly. The text, legislative history, and relevant precedent all show that the Act was intended to apply only to war-related, pecuniary frauds, not the crimes charged against Mr. Newland here. Fairness concerns also weigh against overbroad application of the Act, because the Act may render the important affirmative defense of withdrawal from a conspiracy a nullity and the Act also allows practically indefinite suspension of statutes of limitations due to the open-ended nature of modern uses of military force. Thus, the Wartime Suspension of Limitations Act should not apply to suspend the statute of limitations for the charges against Mr. Newland.

ARGUMENT

I. THE HISTORY AND PURPOSE OF THE WARTIME SUSPENSION OF LIMITATIONS ACT.

The Wartime Suspension of Limitations Act ("WSLA," the "2008 Act," or the "Act"), extends the statute of limitations "until 5 years after the termination of hostilities" for offenses

> (1) involving fraud or attempted fraud against the United States or any agency thereof in any manner, whether by conspiracy or not, 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 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 or Government agency . . . .

18 U.S.C. § 3287. Because suspension of the statute of limitations conflicts with the policy of repose that is "fundamental to our society and our criminal law," *Bridges v. United States*, 346 U.S. 209, 215-16 (1953), and clearly intended by Congress, the exception provided by the WSLA should be narrowly construed.

The WSLA was first enacted in 1921 as an exception to the general statute of limitations for noncapital federal crimes. *See id.* at 217 (explaining the history of the WSLA).[1] It applied to "offenses involving the defrauding or attempts to defraud the United States or any agency thereof." 67 Cong. Ch. 124, 42 Stat. 220 (1921). It was "directed at the war frauds of World War I" and was enacted after the conclusion of the war. *Bridges*, 346 U.S. at 217. This World War I version was largely similar to the 2008 Act, although it suspended the limitations period only for six years following its enactment. It was therefore in effect from 1921 to 1927 and it only applied to crimes that had already occurred. *Id.* It also did not apply to any crimes for which the statute of limitations had already fully run when it was enacted. 67 Cong. Ch. 124, 42 Stat. 220. Thus, the Act was limited in scope and duration from its inception.

The Act was revived in 1942 during World War II, providing that

> the running of any existing statute of limitations applicable to offenses involving the defrauding or attempts to defraud the United States or any agency thereof, whether by conspiracy or not, and in any manner, and now indictable under any existing statutes, shall be suspended until June 30, 1945, or until such earlier time as the Congress by concurrent resolution, or the President, may designate.

United States v. Grainger, 346 U.S. 235, 245 (1953) (quoting 56 Stat. 747-48 (1942)) (describing the 1942 WSLA). The 1942 Act was amended twice, once

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[1] The 1921 version of the Act did not use the title "Wartime Suspension of Limitations Act." Rather, it was "An Act To amend section 1044 of the Revised Statutes of the United States relating to limitations in criminal cases." 67 Cong. Ch. 124, 42 Stat. 220.

during the war and once during 1948.

The 1948 amendment was the first to use the title "Wartime Suspension of Limitations Act" and provided more description regarding the covered offenses. 80 Cong. Ch. 645, 62 Stat. 828 (1948). It provided a suspension until "three years after the termination of hostilities" for

> any offense (1) involving fraud or attempted fraud against the United States . . . (2) committed in connection with the acquisition, care, handling, custody, control of disposition of" real or personal federal property, 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 connected with or related to the prosecution of the war.

Id. These three categories of offenses are the same as in the 2008 Act. Again, because the 1948 amendment occurred after the conclusion of the war, there was a clear temporal limitation on application of the Act.

The Act was then dormant again until 2008, when a new version was passed and signed into law. The 2008 Act differed from the previous versions in three notable ways. First, the suspension of limitations period was changed to five years. 18 U.S.C. § 3287. Second, in an effort to clarify a previous ambiguity, the Act now explicitly applies not only to declared wars but to "specific authorization[s] for the use of the Armed Forces." *Id.* Third, rather than ending on a date set by the statute, the sunset provision was changed to require a presidential proclamation of the termination of hostilities, with notice to Congress, or a concurrent resolution of Congress. *Id.*

II. EXCEPTIONS TO STATUTES OF LIMITATIONS SHOULD BE NARROWLY CONSTRUED.

It is a fundamental principle that any exception to a statute of limitations should be narrowly construed. Statutes of limitations serve as a crucial safeguard in our criminal justice system, limiting defendants' exposure to criminal liability and protecting them from having to defend themselves against charges when the

underlying facts have become obscured by the passage of time. *See*, *e.g.*, *Toussie v. United States*, 397 U.S. 112, 114-15 (1970); *see also Order of R.R. Telegraphers v. Ry. Express Agency*, 321 U.S. 342, 348-49 (1944) (statutes of limitations "promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared."). A statute of limitations "reflects a legislative judgment that, after a certain time, no quantum of evidence is sufficient to convict." *Stogner v. California*, 539 U.S. 607, 615 (2003). They also have the "salutary effect of encouraging law enforcement officials promptly to investigate suspected criminal activity." *Toussie*, 397 U.S. at 115.

Laws that extend or suspend statutes of limitations, such as the WSLA, are exceptions to the "longstanding congressional policy of repose that is fundamental to our society and our criminal law." *Bridges*, 346 U.S. at 216. It is therefore axiomatic that statutes of limitations be narrowly construed, and that any ambiguity should be interpreted in favor of repose. *Id.; United States v. W. Titanium, Inc.*, No. 08-CR-4229-JLS, 2010 WL 2650224, at *3 (S.D. Cal. July 1, 2010) (Sammartino, J.) (quoting *Bridges*, 346 U.S. at 215-16) (holding that statutes of limitations should be interpreted in favor of a finding of repose). This rule favoring repose when there is an ambiguity regarding an exception to a statute of limitations is also supported by the more general rule of lenity, which requires that any ambiguity in a criminal statute be construed in the defendant's favor. *See United States v. Santos*, 553 U.S. 507, 514 (2008) (discussing the rule of lenity).

The text, legislative history, and relevant precedent regarding the WSLA suggest two ways to narrowly construe it: First, it should only apply to war frauds, that is, frauds against the United States relating to the specific armed conflict authorized by Congress; and second, it should only apply to pecuniary frauds, that is, fraud that causes a tangible, measurable, pecuniary loss to the federal fisc. These are separate and independent reasons to construe the Act narrowly. Both apply in

this case and both are reasons the Act should not apply to suspend the running of the statute of limitations for the charges against Mr. Newland.

A. The WSLA Should Only Apply to War Frauds.

This court should hold that the WSLA only suspends a statute of limitations when the fraud at issue directly relates to the declared war or authorized military action that triggers the Act. This independent conclusion is particularly warranted because of the general rule that any suspension or exception to a statute of limitations should be narrowly construed.

The 2008 WSLA provides that it suspends the limitations period for "any offense" involving fraud against the United States, the property of the United States, or federal government contracting "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." 18 U.S.C. § 3287 (emphasis added). This requirement that the offense be related to the prosecution or the authorized use of the armed forces should be read to apply to all three categories of offenses covered by the Act. Additionally, the use of the phrase "*the* authorized use of the Armed Forces" makes clear that Congress intended for the WSLA to apply only to the specific congressionally declared war or congressionally authorized use of military force at issue. 18 U.S.C. § 3287 (emphasis added). Had Congress intended the Act to apply outside of the context of a specific war or authorized use of military force, it could have done so. But it did not.

The Ninth Circuit has agreed that a fraud must be specifically war-related in order for the statute of limitations to be suspended under the WSLA, albeit in an unpublished case. *United States v. Jucutan*, __ F. App'x __, 2018 WL 6445749 (9th Cir. Dec. 10, 2018). In *Jucutan*, the defendant participated in a program whereby he received bonuses to find recruits for the Army Reserve. Appellant's Opening Brief at *1, *Jucutan*, No. 16-10452, 2018 WL 679152 (9th Cir. Jan. 25, 2018). He sought payment for individuals who had not actually agreed to join the Army

Reserve and was ultimately charged with wire fraud and identity theft. *Id.*; *see also Jucutan*, __ F. App'x __, 2018 WL 6445749, at *1. A divided Ninth Circuit held that the WSLA applied to the otherwise time-barred charges, but only because the "government sufficiently demonstrated" that the recruiting program was "directly connected with or related to" the existing 2001 and 2002 AUMFs. *Id*. (quoting 18 U.S.C. § 3287).[2] The court of appeals made clear that the WSLA would not apply with a sufficient showing that, in the terms of the statute, the alleged fraud was "directly connected with or related to" the military conflicts at issue in the AUMFs.[3]

Additionally, the legislative history of the 2008 WSLA, and of its substantively similar predecessor acts, indicates that it was intended to apply only to specific war frauds. To begin, all three versions of the Act have only ever been enacted during or shortly after a significant military conflict. In *Bridges*, the Supreme Court noted that the original 1921 Act was "directed at the war frauds of World War I." 346 U.S. at 217. The Court continued, "Congress aimed the proviso at the pecuniary frauds growing out of war contracts." *Id.* at 218. Specifically, "Congress was concerned with the exceptional opportunities to defraud the United States that were inherent in its gigantic and hastily organized procurement program." *Id.* Thus, the WSLA "sought to help safeguard the treasury from such frauds by increasing the time allowed for their discovery and prosecution." *Id.* The Court reviewed the relevant legislative history and concluded that Congress intended for

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[2] Because the defendant had apparently not made these statute of limitations arguments before the district court, the case was decided using the clear error standard. *See* 2018 WL 6445749, at *1.

[3] The dissenting opinion disagreed with the majority's conclusion that the Government's provided sufficient evidence that the alleged fraud was directly related to the authorization for use of military force. *Id.* at *2 (Berzon, J., dissenting).

the Act to cover war frauds. *See id.* at 218 n.17. Specifically, it noted a Congressional report stating that "The Department of Justice has been engaged in the investigation and is now engaged in the investigation of various alleged offenses, consisting largely of frauds against the Government which are claimed to have occurred during the war with Germany and since its conclusion." *Id.* (quoting H.R. Rep. No. 365, 67th Cong., 1st Sess. 1 (1921)) (internal quotation marks omitted); *see also id.* ("In 1921 the Attorney General represented that he was desirous of having further time to investigate alleged war frauds . . .) (quoting H.R. Rep. No. 16, 70th Cong., 1st Sess. 1 (1927)) (internal quotation marks omitted) (considering a bill to terminate the 1921 Act).

In *Bridges*, the Supreme Court considered whether the World War II WSLA suspended the statute of limitations for the crime of making false statements in naturalization applications under the Immigration and Nationality Act. 346 U.S. at 213. The Court found that Congress's purpose was to "readopt the World War I policy." *Id.* at 218-19. The Court then ruled that the World War II Act was likewise focused on giving the government time to prosecute *war* frauds. It noted the many war-related reasons that the Government might need additional time to investigate and prosecute *war*-related frauds, such as wartime need to focus on "the enforcement of the espionage, sabotage, and other laws." *Id.* at 219 n.18 (quoting S. Rep. No. 1544, 77th Cong., 2d Sess. 1, 2 (1942)).

The current version of the WSLA is also intended to apply only to war-related frauds, as indicated by both the historical purposes of the Act and by its legislative history. Senator Patrick Leahy introduced the WSLA in the Senate in April 2008. In a statement introducing the bill, he said the bill was meant "to protect American taxpayers from losses due to fraud, waste, and abuse of military contracts," which was "all too common in times of war, and . . . particularly pervasive in Iraq." 154 Cong. Rec. S3174 (daily ed. Apr. 18, 2008). He also was concerned with "how difficult it can be for investigators to uncover and prosecute fraud amidst the chaotic

environment of war." *Id.*

The purpose of the 2008 Act was not to change the previous Acts' focus on war-related frauds. Rather, Senator Leahy recognized that previous versions explicitly required a declaration of war and were therefore inapplicable to the ongoing "military operations in Iraq and Afghanistan," because of the lack of "Congressional declarations of war" regarding those conflicts. *Id.* The new Act was meant to remedy the old Acts' limitation to declared wars, not to change its focus on war-related frauds.

The Senate Judiciary Committee's Report on the bill also highlights the Act's sole focus on war frauds. The Report stated, "This legislation will protect 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." S. Rep. 110-431, at 1-2 (2008) (emphasis added). The Committee noted that "war contracting fraud has again plagued this Nation during the engagement of U.S. forces in Iraq and Afghanistan" and estimated huge potential losses to the "more than $500 billion [appropriated] to date for the wars in Iraq and Afghanistan . . ." *Id.* at 2. The Committee repeatedly stated its desire to "target[] fraudulent conduct by war contractors" during the "hostilities in Iraq and Afghanistan." *Id.* at 2-3. The Report does not mention any potential application of the statute to conduct not directly related to the war efforts. *See id.* at 2-3.

Even in the civil context, the Supreme Court and lower courts have recognized the WSLA's focus on war-related frauds. In 2015, the Court reaffirmed this understanding of the 1921 Act's purpose. In *Kellogg Brown & Root Servs., Inc. v. United States ex rel. Carter*, which considered the WSLA's application in civil False Claims Act cases, the Supreme Court said that Congress enacted the 1921 Act because it was "concerned about war-related frauds." 135 S. Ct. 1970, 1975 (2015). In *United States ex rel. Shemesh v. CA, Inc.*, the District Court for the District of Columbia refused to apply the WSLA to "a *qui tam* civil action unrelated to the war

effort" because it "would expand the WSLA far beyond its current applications." 89 F. Supp. 3d 36, 55 (D.D.C. 2015). The court distinguished the matter before it from another case where the alleged fraud "was directly related to the war effort in Iraq." *Id.*

These reasons illustrate why the 2008 Act is limited to frauds relating to the specific war or congressionally authorized use of military force. The alleged conduct of Mr. Newland took place in the Western Pacific Ocean and cities in Southeast Asia, as alleged in the indictment, nowhere near Iraq or Afghanistan. Nor is there any allegation that any conduct undertaken by Mr. Newland was "directly connected with or related to" war efforts in Iraq or Afghanistan. Because this alleged conduct is plainly not related to a congressionally authorized use of military force, it is not war-related conduct and does not fall within the WSLA's suspension of the statute of limitations.

B. The WSLA Should Only Apply to Pecuniary Frauds.

The WSLA does not apply in this case for a second independent reason: The legislative history and relevant precedent demonstrate that it should be narrowly construed to only apply to pecuniary frauds. Because Newland is not charged with any pecuniary fraud, and indeed the indictment does not indicate a measurable loss amount attributed to his alleged conduct, the WSLA should not suspend the limitations period for any charges against him.

Just as the Supreme Court in *Bridges* noted that the WSLA applied to war frauds, the Court also recognized that the Act was "aimed … at pecuniary frauds growing out of war contracts," not honest services fraud, the only type of fraud charged against Mr. Newland. *See Bridges*, 346 U.S. at 218. In *Bridges*, the Court determined, based largely on the legislative history, that the WSLA covered only "the defrauding of the United States in any pecuniary manner or in a manner concerning property," and so did not encompass nonpecuniary immigration fraud. *Id.* at 221. In contrast, in a case decided the same year as *Bridges*, the Supreme

Court held that the WSLA *did* apply to a False Claims Act case because the defendants' false claims for payment were the type of pecuniary fraud that was within the WSLA's reach. *See United States v. Grainger*, 346 U.S. 235, 243 (1953). There is nothing new in the 2008 WSLA regarding the types of fraud to which the Act applies. Thus, the Supreme Court's holding that the World War II WSLA applies only to pecuniary frauds should govern the interpretation of the 2008 Act as well.

The Supreme Court has underscored the WSLA's focus on fraud. The *Bridges* Court also held that fraud must be "an essential ingredient of the offense" for the WSLA to apply. *Id.* at 222. Fraud is not an element of two of the three offenses, conspiracy and bribery, with which Mr. Newland is charged. *See* 18 U.S.C. § 371 (conspiracy); 18 U.S.C. § 201(b) (bribery). Additionally, Mr. Newland is charged with honest services fraud, not with pecuniary fraud against the United States. The indictment merely states that the goal of the alleged conspiracy was to obtain improper benefits from Glenn Defense Marine Asia, not to wrongfully obtain pecuniary benefit from the federal government. *See* Indictment at 12, *United States v. Newland et al.*, No. 3:170cr000623-JLS (S.D. Cal. March 10, 2017), ECF No. 1 (in exchange for participation in alleged conspiracy, Francis "would offer and give a stream of benefits to or on behalf of the defendants"). This is a key distinction. Because these charges do not include the "essential ingredient" of pecuniary fraud against the United States, the WSLA should not apply.

III. FAIRNESS FURTHER REQUIRES NARROW CONSTRUCTION OF THE WSLA.

A. Strict Construction of the 2008 Act Is Needed Because Modern AUMFs Would Otherwise Allow an Unintended Indefinite Suspension of Statutes of Limitations.

The WSLA should also be construed narrowly because the open-ended nature of modern Congressional authorizations of the use of military force could lead to a

practically indefinite running of the statute of limitations. This unfair result would be harmful to defendants and society as a whole and would have a deleterious effect on the "policy of repose" that is fundamental to our society and our criminal law. *Bridges*, 346 U.S. at 215-16.

Modern Congressional authorizations of the use of military force (AUMF) are generally open-ended and potentially long-running. *See*, *e.g.*, *Boumediene v. Bush*, 553 U.S. 723, 785 (2008) (noting that "the duration of hostilities" in the global war on terror "may last a generation or more"). There are two recent AUMFs: the September 2001 authorization for the use of military force against "those responsible for the [September 11, 2001] attacks against the United States," Pub. L. No. 107-40, 115 Stat. 224 (2001), and the October 2002 authorization for the use of military force in Iraq, Pub. L. No. 107–243, 116 Stat. 1498 (2002). *See United States v. DeLia*, 906 F.3d 1212, 1218 (10th Cir. 2018). The first, authorizing military operations primarily in Afghanistan, is still in effect and has been in effect for more than 17 years. The WSLA has a stringent formal requirement for when an AUMF is deemed terminated, requiring a "Presidential proclamation, with notice to Congress, or by a concurrent resolution of Congress." 18 U.S.C. § 3287.

Because the 2001 AUMF is still active, the statute of limitations for pecuniary war frauds committed that year has not yet begun to run and, under the WSLA, will not begin running until the official termination of hostilities. *See* 18 U.S.C. § 3287. This suspension of limitations is already more than three times longer than the five-year limitations period set forth by Congress for noncapital federal crimes. *See* 18 U.S.C. § 3282. This is grossly unfair to defendants, particularly those not charged with war frauds or pecuniary frauds against the United States, and makes a mockery of statutes of limitations and the fundamental repose they provide.

This potentially indefinite suspension of statutes of limitations was a key concern for the Senators debating the 2008 WSLA. In the Senate Judiciary Committee's Report, Senators Jeff Sessions and Tom Coburn warned that the

president may be "hesitant to officially announce the end of hostilities" in the ongoing conflicts in Iraq and Afghanistan. S. Rep. 110-431, at 7. Thus, they worried, "the statute of limitations will never start running" and potential defendants "could remain subject to potential liability for criminal offenses (or investigations) for years, possibly a lifetime." *Id.* at 7-8. They further noted that this "very long—potentially indefinite—statute of limitations" would violate the "longstanding principles" of repose and fairness that are fundamental in our justice system and were articulated by the Supreme Court in *Toussie*. *Id.* at 8. Finally, the Senators worried that a nebulous and potentially indefinite limitations period could have negative policy impacts, including "making it more difficult to recruit contractors needed" during wartime and wasting government resources due to the heightened difficulty of proving cases after the passage of considerable time. *Id.* The latter reason, of course, is one of the primary reasons for the existence of statutes of limitations in the first place.

The Senators' concerns are rooted in the judicial precedent. Courts are generally loath to adopt rules that would lead to significant or indefinite extensions of a statute of limitations. *See, e.g.*, *Grunewald v. United States*, 353 U.S. 391, 401-02 (1957) (rejecting prosecution argument regarding overt acts of a conspiracy when that rule "would for all practical purposes wipe out the statute of limitations in conspiracy cases"); *People v. Zamora*, 18 Cal. 3d 538, 559, 557 P.2d 75, 89 (1976) (rejecting similar rule because it would "result in a great widening in the scope of conspiracy prosecutions" and would "extend the life of a conspiracy indefinitely"). These fairness concerns even ring true in the less grave context of civil cases, where a defendant's liberty is not at stake. *See, e.g.*, *Camboni v. MGM Grand Hotel*, LLC, No. CV11-1784-PHX-DGC, 2012 WL 2915080, at *4 (D. Ariz. July 16, 2012) (rejecting a proposed rule because it would lead to a "potentially indefinite extension of the statute of limitations for RICO claims[,] . . . an approach that clearly was longer than Congress could have contemplated") (internal quotation marks omitted).

The uncertain and potentially indefinite duration of modern AUMFs underscores why the WSLA should be narrowly construed to apply only to the pecuniary, war-related fraud cases for which it was intended.

B. Application of the WSLA Would Render the Defense of Withdrawal from a Conspiracy a Nullity.

The ability to raise and potentially prevail on affirmative defenses is of crucial importance to defendants in criminal cases. The WSLA could render the affirmative defense of withdrawal from a conspiracy a nullity. This is both fundamentally unfair and beyond what Congress intended. Thus, this court should rule that the Act does not indefinitely extend the statute of limitations in conspiracy cases where there is a withdrawal defense.

"Withdrawal marks a conspirator's disavowal or abandonment of the conspiratorial agreement." *Hyde v. United States*, 225 U.S. 347, 369 (1912). A withdrawn defendant is no longer part of the conspiracy and is not liable for any subsequent acts by the conspiracy after his or her withdrawal. *United States v. Lothian*, 976 F.2d 1257, 1262 (9th Cir. 1992). Importantly, the withdrawal defense does not negate a charge of conspiracy on its own. Rather, it must be "coupled with the defense of statute of limitations." *See United States v. Nava-Salazar*, 30 F.3d 788, 799 (7th Cir. 1994); *see also Smith v. United States*, 568 U.S. 106, 111 (2013) (noting that a withdrawing defendant may remain guilty of conspiracy, although withdrawal starts the running of the statute of limitations). Thus, the running of a statute of limitations is an important component of a withdrawing defendant's withdrawal defense.

Mr. Newland can argue that he withdrew from the conspiracy because he left his position with the Seventh Fleet in July 2007 and formally retired from the Navy in March 2010. Both of these occurred more than five years prior to the March 2017 indictment. Yet application of the WSLA would unfairly prevent him from asserting his defense that he withdrew from the conspiracy. The Afghanistan military conflict

is still ongoing and, if the WSLA applies, the statute of limitations has not yet begun to run. This is grossly unfair to Mr. Newland, who, due to circumstances beyond his control—the length of an ongoing military conflict—would be deprived of the opportunity to assert an affirmative defense. Other defendants charged with conspiracy may be similarly affected if the WSLA applies in such circumstances. Moreover, although the WSLA does apply to conspiracies, there is no indication that Congress intended for the WSLA to nullify an important affirmative defense in criminal cases that has been recognized for over a century. The application of the WSLA to conspiracy cases should be limited because the WSLA would deprive defendants, including Mr. Newland, of a crucially important affirmative defense of withdrawal for reasons entirely unrelated to anything they did.

CONCLUSION

The Court should hold that the Wartime Suspension of Limitations Act does not suspend the statute of limitations for the charges against Defendant David Newland.

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Respectfully submitted,

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