JURIST

Feds' Excuse for Laggardly Lawsuits: There's a War On!

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"War is the health of the state," wrote Randolph Bourne a century ago—from the special war taxes that can linger for a century, to the mohair subsidy program from the Korean War days, to New York City's wartime emergency rent controls, to the many incursions on civil liberties that don't get rolled back afterward. War, it now turns out, can even give a boost the lawyers who represent the federal government in civil litigation, magically transmuting losing cases into winners.

Every major legal system embraces the concept of the statutes of limitations. In the US, statutes of limitations contribute to both our litigation system's fairness and its practicality. The great majority of civil claims must be filed within a time-frame ranging from one to five years, the exact length depending on the kind of claim and under which law it arises.

In 1942, not long after the Japanese attacked Pearl Harbor, Congress passed the Wartime Suspension of Limitations Act (WSLA), providing that the statute of limitations would be suspended (or "tolled") on claims of defrauding the federal government until hostilities had ended. When the Japanese surrendered three years later, Congress left WSLA on the books, where nearly everyone forgot about it.

Last year, however, in a case that gave business lawyers chills [PDF], the US Department of Justice (DOJ) managed to rouse WSLA, long presumed dead, from its proverbial grave. The government had filed a lawsuit claiming that French bank BNP Paribas had improperly enrolled ineligible Mexican clients in a US trade promotion program six years earlier. Under the ordinary federal fraud statute, the claim was too stale to go forward, since the bank's alleged misconduct had occurred a bit too far in the past to satisfy the statute of limitations. Deadline, schmeadline, DOJ argued: the country is at war! There is one war in Afghanistan and another in Iraq, and both require that the ordinary statute of limitations be suspended, the argument goes. A Texas federal court agreed. Never mind that BNP's misconduct (which it denies; the litigation is still pending) had nothing whatever to do with national defense or war or Afghanistan or Iraq. Never mind either that WSLA is part of the federal criminal code and refers in its text to an offense, ordinarily language that refers to criminal prosecution as distinct from civil suits; this statute nonetheless carries over to fraud as a purely civil claim, which demands a lower standard of proof.

That ruling was no fluke: last month in a different case, the US Court of Appeals for the Fourth Circuit ruled [PDF] the same way. It held that mere Congressional authorization of the use of

military force—not necessarily an actual declaration of war—suffices to trigger the statute (Congress itself had encouraged this reading, it should be noted, in a 2008 law). The court further ruled that the provision was available not just to DOJ, but also to private plaintiffs who use the False Claims Act [PDF] to accuse federal contractors of overcharging the government or misrepresenting work done. By law, the private complainant, if successful, pockets a share of the proceeds, and such "qui tam" provisions had already spawned a mini-industry of private bounty-hunting litigation against hospitals, universities and many other categories of federal contractor, including defense contractors.

Reliance on WLSA is surging. Last December, the federal government filed a slew of mortgage-meltdown claims against Wells Fargo that would otherwise have been time-barred, citing the Afghan war as reason to ignore the statute of limitations. Twelve times the government invoked WSLA from 2009 to 2012, as many times as it has relied on the statute in the preceding 47 years.

Nervous business lawyers are wondering who is next and when, if at all, they can safely advise clients that a potential dispute is too old to worry about. If truth is the first casualty of war, perhaps the fairness of dispute resolution is the next.

Walter Olson is senior fellow at the Cato Institute's Center for Constitutional Studies and the author of The Litigation Explosion and other books.