Corporations, Securities & Antitrust

Kellogg Brown & Root—What Happens to a Case Deferred?[1]

*By Christopher Bowen**

This article details the Fourth Circuit's and the Supreme Court's recent decisions in *United States ex rel. Carter v. Kellogg Brown & Root Services, Inc.*[2] The Supreme Court correctly held that the Wartime Statues of Limitations Act ("WSLA")[3] should only be applied in criminal cases, but then incorrectly held that the "first-to-file" jurisdictional bar is lifted whenever a prior lawsuit based on the same allegations is dismissed. In emphasizing the word "pending" over the rest of the text of the statute and the subsection, the Supreme Court has not only defeated a major purpose of the statute, it has given contractors facing False Claims Act lawsuits the perverse incentive to delay seeking a resolution.

The article further argues that the Supreme Court erred in failing to take the opportunity to reverse the Fourth Circuit on the definition of when the United States is "at war," because that Circuit adopted such an expansive definition that it essentially rendered superfluous later WSLA amendments and the False Claims Act's own statute of limitations. Because of this failure to address the Fourth Circuit's "at war" holding, not only do contractors face uncertainty regarding when the statute of limitations actually expires, but courts will be forced to decide when the United States is "at war," a task courts are ill-suited to perform.

I. Introduction[4]

The False Claims Act, 31 U.S.C. § 3729 *et seq*., permits the United States to recover amounts that contractors obtained through false "claims." The lawsuit may be brought either directly by the United States, represented by the Department of Justice, or by a "relator," an individual who files a complaint under seal containing allegations of the false claim that have not been previously publicly disclosed.[5] Once a False Claims Act complaint has been filed, a subsequent relator may not maintain a False Claims Act lawsuit "based on the facts underlying the pending action."[6] After a relator files the lawsuit, the Attorney General has 60 days (routinely extended by motions one or more years)[7] to investigate the claim and decide whether or not to intervene. If the United States declines to intervene, the complaint is unsealed and the relator pursues the lawsuit on his or her own on behalf of the United States.[8]

To prove a violation of the False Claims Act, the plaintiff must demonstrate that the defendant:

(1) Made a false statement or engaged in a fraudulent course of conduct;

(2) With the requisite scienter (knowledge, willful blindness, or reckless disregard of the truth);[9]

(3) That was material to the Government's decision to pay; and

(4) That resulted in a claim to the Government.[10]

A "claim" is "any request or demand . . . for money or property . . . that is presented to an officer, employee, or agent of the United States."[11] The classic examples of "false claims" are invoices that request payment for a certain quantity or quality of goods or services, when in fact goods or services of lesser quantity or quality were delivered.[12] Liability also attaches to the creation of false records or statements that are material to a false or fraudulent claim, along with other acts not relevant here.[13]

The False Claims Act's statute of limitations is:

i. Six years from the date of the claim; or

ii. Three years from the date on which the relevant facts were known or should have been known "by the official of the United States charged with responsibility to act in the circumstances, but in no even more than 10 years after the date on which the violation occurs"; but

iii. In no event more than ten years after the date on which the violation is committed.[14]

The Government and relators have argued that the civil False Claims Act's statute of limitations may be suspended, however, by the Wartime Statute of Limitations Act ("WSLA").[15] Passed during World War II and currently found in the criminal code, the WSLA suspends the statute of limitations for claims of fraud against the United States for five years after the termination of hostilities. It currently reads:

> *When the United States is at war or Congress has enacted a specific authorization for the use of the Armed Forces*, as described in section 5(b) of the War Powers Resolution (50 U.S.C. 1544(b)), *the running of any statute of limitations applicable to any offense* (1) involving fraud or attempted fraud against the United States . . . *shall be suspended until 5 years after the termination of hostilities* as proclaimed by a Presidential proclamation, with notice to Congress, or by a concurrent resolution of Congress. For purposes of applying such definitions in this section, the term "war" includes a specific authorization for the use of the Armed Forces, as described in section 5(b) of the War Powers Resolution (50 U.S.C. 1544(b)).[16]

Prior to 2008, the statute had only suspended the statute of limitations for three years and had only been applied to situations where the United States was "at war" but not where "Congress has enacted a specific authorization for the use of the Armed Forces":

> When the United States is at war the running of any statute of limitations applicable to any offense (1) involving fraud or attempted fraud against the United States . . . shall be suspended until three years after the termina-

* *Christopher Bowen is a senior attorney with a Fortune 20 corporation and specializes in federal contracting issues.*

tion of hostilities as proclaimed by the President or by a concurrent resolution of Congress.[17]

The WSLA was passed because of concerns about the difficulty with detecting fraud during wartime when the Government's attention may be diverted.[18] Despite being placed within Title 18 of the United States Code, some courts have held that the WSLA applies to both criminal and civil actions.[19] The WSLA defines neither when the United States is "at war" nor when the suspension is lifted in the absence of a Presidential proclamation or concurrent resolution of Congress.

Finally, the False Claims Act permits only the United States to intervene in a relator's case or to file a related cased "based on the facts underlying the pending action."[20]

II. Mr. Carter's Long and Winding Road & How It Always Led to His Case Being Dismissed[21]

In *United States ex rel. Carter v. Kellogg Brown & Root Services*, the relator, former Kellogg Brown & Root Services ("KBR") employee Benjamin Carter, alleged that KBR had sought payment between January and April 2005 for water purification services that had not actually been performed, and that KBR had ordered its employees to bill 12 hours a day, every day, to the project, even though the employees were not working on the project.[22] Despite at one point being only a month away from trial, Mr. Carter had various iterations of his complaint dismissed four times by the district court, with only the first dismissal being on the grounds of deficiencies within the complaint itself. The Fourth Circuit set forth the procedural posture in its 2013 opinion:

- February 2006 – The relator files his first complaint in the Central District of California, well within the six-year statute of limitations.
- February 2006 to Winter 2008 – The Government investigates the claims for two years, and then opts not to intervene.
- January 2009 – After the case is unsealed and transferred to the Eastern District of Virginia, the district court dismisses the complaint without prejudice for failure to plead fraud with particularity. That same month the relator files an amended complaint.
- January 2009 to March 2010 – After the district court denies-in-part a renewed motion to dismiss, the case proceeds through the close of discovery.
- March 2010 – A month before scheduled trial, the Department of Justice informs the court that the relator's case is similar to another pending False Claims Act case (*Thorpe*) in the Central District of California also based upon allegations of improper time-charging. KBR moves to dismiss the complaint based on the existence of a related action.
- May 2010 – Eastern District of Virginia dismisses the amended complaint, and relator timely appeals in July.
- July 2010 – Central District of California dismisses *Thorpe*.
- August 2010 – Relator re-files his amended complaint and seeks to dismiss his pending appeal.
- February 2011 – Fourth Circuit grants relator's motion to dismiss the appeal.
- May 2011 – Eastern District of Virginia dismisses relator's 2010 complaint, because relator had filed it while his appeal of the dismissal of his 2009 complaint was still pending, creating a first-to-file problem under 31 U.S.C. § 3730(b)(5).
- June 2011 – Relator re-files his amended complaint. KBR moves to dismiss on grounds of the statute of limitations and two other pending actions filed in 2007 regarding time-charging, one in Texas and one in Maryland.
- October 2011 – Maryland False Claims Act case is dismissed.
- November 2011 – Eastern District of Virginia dismisses relator's 2011 complaint, because it was related to the other cases and because it occurred more than 6 years after the events in question. Relator timely appeals.
- March 2012 – Texas False Claims Act case is dismissed.[23]

A review of the above timeline demonstrates that all but the final complaint was filed within the six-year statute of limitations and that many of the delays could be attributed to the on-again-off-again nature of other litigation related to KBR's time-charging practices.[24] Mr. Carter, therefore, presented the Fourth Circuit with a sympathetic case for finding that the statute of limitations did not bar his complaint.

III. The Fourth Circuit Did Not Leave Mr. Carter Waiting at the Courthouse Steps

The Fourth Circuit reversed the District Court on the statute of limitations issue, as well as the first-to-file issue. To resolve the statute of limitations issue, the Fourth Circuit needed to decide three questions:

> (1) Was the United States "at war" for purposes of the WSLA between January and April 2005?
>
> (2) Did the WSLA apply to civil fraud claims or only to criminal claims?
>
> (3) Did the WSLA apply only to actions brought by the United States or also to actions maintained by relators on behalf of the United States?

Writing the opinion for a split panel, Judge Floyd began the analysis by noting that "[c]ourts are in disagreement as to which version of the WSLA applies to offenses that occurred before the amendments of 2008," but decided that it was unnecessary to reach that issue because, between January and April 2005, the United States was "at war."[25] The Court held that to be "at war" for WSLA purposes did not require a formal declaration of war, because:

- Congress opted not to write "declared war" despite having done so in other statutes;
- Requiring a declaration of war would be "unduly formalistic" given the nature of conflicts in the second half of the twentieth century;

- The Supreme Court has held that the laws of war apply even during an undeclared war; and
- The WSLA's purpose "to combat fraud at times when the United States may not be able to act as quickly because it is engaged in 'war' [] would be thwarted" if a formal declaration were required.[26]

Using these principles, the Fourth Circuit held that the Authorization for the Use of Military Force ("AUMF") that Congress passed in October 2002 was sufficient to put the United States "at war" in Iraq.[27] In contrast with its views on the informality with which the country could find itself "at war," the court then noted that the Iraq war was not over, because the formal cessation requirements ("termination . . . as proclaimed by the President . . .") had not been met.[28] The United States, therefore, was "at war" in Iraq between January and April 2005 (the dates relevant to Mr. Carter's allegations) because Congress had passed an Authorization for the Use of Military Force, but the president had never issued a formal proclamation regarding termination.

The Fourth Circuit then held that the language "any offense" did not limit the WSLA to criminal cases, but included civil offenses as well. In reaching this conclusion, the court focused on Congress' deletion of the words "now indictable" from the original wording in 1944 as well as the prior holdings from three district and circuit courts.[29] The court also rejected KBR's argument that the WSLA only applied when the United States, acting through the Department of Justice, was pursuing the case, as opposed to a private relator acting on behalf of the United States. The Fourth Circuit acknowledged that in 2008 it had decided *United States ex rel. Sanders*,[30] in which a panel had held that the statute of limitations extension within Section 3731(b)(2) (three years from time the cognizant Government agent or employee knew or should have known) only applied when the United States was represented by the Department of Justice.[31] The opinion, however, distinguished the extension within Section 3731(b)(2) with the WLSA, by holding that "whether the suit is brought by the United States or a relator is irrelevant to this case because the suspension of limitations in the WSLA depends upon whether the country is at war and not who brings the case."[32]

The Fourth Circuit then turned to the question of whether, assuming Mr. Carter's 2011 complaint was timely, it was nonetheless barred by the intervening filing of other False Claims Act lawsuits "based on the facts underlying the pending action,"[33] i.e., alleging similar time-charging misdeeds during the same time period. Applying the "material elements test," the Fourth Circuit determined that Mr. Carter's 2011 complaint regarding time-charging was "based on the facts underlying" the complaints filed in Texas and Maryland in 2007.[34] The district court had therefore correctly dismissed the 2011 complaint, because the other two lawsuits were pending in June 2011 when Mr. Carter filed his amended complaint.

The Fourth Circuit, however, held that the district court had erred in dismissing the 2011 complaint *with prejudice*.[35] The Fourth Circuit held that the prohibition on filing a False Claims Act lawsuit "based on the facts underlying" another pending action only existed so long as the other lawsuits were pending.[36] Because the other lawsuits had been dismissed, the court held that Mr. Carter should now be free to re-file his complaint.[37]

In a partial dissent, Judge Agee argued both that the WSLA did not apply in civil cases and that it could not be invoked when the lawsuit was not being prosecuted by the United States.[38] Regarding the applicability of the WSLA to civil cases, Judge Agee noted that all of the cases cited in the majority opinion had dealt with the civil applicability of the WSLA only in dicta, and that in none had the applicability of the WSLA been dispositive.[39]

In a concurring opinion, Judge Wynn joined with the entirety of the majority opinion, but wrote separately to address Judge Agee's dissent. Notably, Judge Wynn explicitly acknowledged the obvious implications of Judge Floyd's opinion—that the majority opinion could result in a statute of limitations that could continue indefinitely if Congress or the President never officially declared a war to be over:

> Moreover even if the informal nature of modern military conflicts renders the limitations period established by the Wartime Suspension of Limitations Act somewhat less definite, it is within Congress's purview to determine that certain conduct is sufficiently egregious—such as defrauding the government during a time of war—that an extended or indefinite limitations period is warranted.[40]

Per Judge Wynn, therefore, a contractor could continue to face litigation regarding claims not only submitted in 2003 during the Second Gulf War, but also for claims submitted during the First Gulf War, which, as the Fifth Circuit noted in *United States v. Pfluger*, had never officially ended.[41]

IV. The Supreme Court Leaves Mr. Carter With A Token of A Claim

KBR and the other defendants appealed the Fourth Circuit's decision to the Supreme Court, and oral argument was held on January 13, 2015. KBR's primary arguments were that:

- The WSLA did not apply to civil offenses,[42] and
- The first-to-file jurisdictional bar applied even if the previously filed lawsuits were dismissed.[43]

The Supreme Court reversed the Fourth Circuit, holding that the WSLA did not apply to civil actions, but only applied to criminal actions.[44] The unanimous opinion by Justice Alito held that the word "offense" in the phrase "any offense (1) involving fraud" only applied to crimes, principally because:

- The word "offense" is "most commonly used to refer to crimes," not civil infractions;[45]
- The WSLA is located in Title 18 of the United States Code;[46]
- The history of the WSLA does not indicate that Congress intended the removal of the words "now indictable" to expand the WSLA to cover civil offenses.[47]

The justices did, however, leave Mr. Carter with a small portion of the lawsuit that was within the statute of limitations, despite the fact that other relators had filed complaints with similar allegations prior to Mr. Carter's present complaint.[48] The Supreme Court held that the so called first-to-file bar only barred relators from bringing False Claims Act lawsuits if the

prior lawsuits were still pending, but was not a bar if the lawsuits had been dismissed, because:

- Congress chose to use the word "pending," which means "remaining undecided; awaiting decision";[49]
- "Pending" could not be a shorthand for "first-filed" because if Congress had wanted to use the word "first-filed" or "prior," it would have done so;[50]
- Using "pending" to mean "first-filed" would mean that the relators would be barred from recovery if a prior relator had brought a lawsuit and then subsequently dismissed it.[51]

The opinion characterized its holding as "an earlier suit bars a later suit while the earlier suit remains undecided but ceases to bar that suit once it is dismissed."[52] The Court rejected the Fourth Circuit's "first-to-file" characterization of the "pending action" bar because, "[u]nder this interpretation, *Marbury v. Madison*, 1 Cranch 137 (1803), is still 'pending.' So is the trial of Socrates."[53] Further, the Court asked, "[w]hy would Congress want the abandonment of an earlier suit to bar a later potentially successful suit that might result in a large recovery for the Government?" The Court conceded that contractors may be reluctant to settle with relators without the bar, but concluded that "[t]he False Claims Act's qui tam provisions present many interpretive challenges, and it is beyond our ability in this case to make them operate together smoothly like a finely tuned machine."[54]

Mr. Carter, therefore, is free to pursue his claims that accrued after June 2011, despite those claims being substantially related to claims already dismissed in Texas, Maryland, and California.

V. The Supreme Court's "Pending Action" Analysis Errs By Ignoring the Government's Role in Cases Brought by Relators

The Supreme Court's analysis of the "pending action" bar focused on why Congress would risk forgoing the potential rewards of False Claims Act lawsuits just because the first relator-filed lawsuit was dismissed because of, for example, failure to prosecute.[55] "Under petitioners' interpretation," the Court said "a first-filed suit would bar all subsequent related suits even if that earlier suit was dismissed for a reason having nothing to do with the merits."[56]

This concern, however, ignores the Government's involvement in False Claims Act lawsuits, even where the lawsuits are being pursued by a relator instead of the Department of Justice. If a relator's lawsuit is dismissed because the relator chooses not to prosecute it, this means that the Department of Justice:

- Has already had an opportunity to review the allegations,[57] but
- Has decided that the allegations are not worth much and therefore decided not to intervene[58] and
- Has not subsequently sought to intervene despite the lack of progress in the case.[59]

If a relator's complaint is at the stage of being dismissed for failure to prosecute, therefore, it is because both the relator *and* the Department of Justice have decided that the case is not worth pursuing.

Nor is there a danger that contractors could buy off relators with a quick settlement to foreclose larger claims. An "action may be dismissed only if the court and the Attorney General give written consent to the dismissal and their reasons for consenting."[60] Additionally, if a relator's initial complaint contained defects, such as a failure to plead fraud with particularity, the Department of Justice could stop dismissal by filing an amended complaint.[61] Interpreting "pending action" to mean actions that were filed but then subsequently dismissed, therefore, would not result in a loss of opportunity for the United States to pursue what it thought to be a meritorious claim.

Not only does the Supreme Court's reasoning rely on nonexistent concerns, but its decision also is not required by the text. The "pending action" or "first-to-file" bar states "[w]hen a person brings an action under this subsection, no person other than the Government may intervene or bring a related action based on the facts underlying the pending action."[62] The Supreme Court focused on the word "pending" in holding that a case is no longer pending if it has been dismissed, and that such dismissal lifts the jurisdictional bar.[63] This analysis, however, ignores the rest of the text, the section's placement within the statute, and the absurd result that the interpretation engenders.

Both the text and the statutory placement demonstrate that the section is meant to provide only the first relator and the Department of Justice the opportunity to litigate the claims. The trigger barring "a person other than the Government" from intervening or bringing a related action is "when [another] person brings an action . . ."[64] Congress created a trigger for the bar on other relators, but did not create an event that would eliminate the bar.[65] The opinion has therefore stretched the word "pending" into an entirely new clause requiring the release of the prohibition, contrary to normal rules of statutory interpretation.[66] The word "pending," therefore, is simply the adjective Congress chose to describe the existing lawsuit, and nothing within the statute indicates that Congress intended to create a situation where multiple relators could bring lawsuits based upon facts of which the Government was already aware.[67]

Furthermore, the "pending action" restriction is within Subsection (b) of 31 U.S.C. § 3730, which pertains to the Government's right to take control of the claim, including the requirements that the complaint be filed under seal and served on the Government, and the deadlines for the Government to make a decision.[68] The subsequent sections delineate what control the Government may exercise over the lawsuit, both when it has chosen to intervene and when it declines to intervene, along with what share of the recovery the relator may claim.[69] The "pending action" restriction, therefore, must be seen in light of the Act's overall context of permitting a relator to maintain a lawsuit, but ensuring that the Department of Justice monitors and retains final over any dismissal or lawsuit.[70] Reading the word "pending" as permitting multiple relators to bring seriatim lawsuits, frustrates the overall purpose of Section 3730, because:

- The purpose of the seal is nullified, because the defendant presumably is aware of the allegations;[71]
- The Department of Justice has already decided once

not to intervene and not to oppose dismissal, and yet is being required to do another round of investigation;[72]

- Any settlement that results in a dismissal of the lawsuit will have already allocated proceeds between the portion received by a relator and the portion that goes to the Government.[73]

The Court's interpretation of "pending" makes the rest of Subsections 3730(b) through (d) pointless, is not required by the text, and creates the possibility that a contractor could end up paying multiple relators, even though the relators are alleging the same harm.

Finally, the Court's interpretation violates the Supreme Court's rule that "absurd results" should be avoided.[74] The absurd result that the opinion acknowledged is that, after this decision, defendants facing relator's lawsuits may be reluctant to settle the case in exchange for a dismissal, knowing that another relator can then just file another complaint.[75] The Court's response to this problem was a judicial shrug: "The False Claims Act's qui tam provisions present many interpretive challenges, and it is beyond our ability in this case to make them operate together smoothly like a finely tuned machine."[76] Additionally, although the United States and the relator argued that res judicata could prevent follow-on lawsuits, KBR noted in its reply brief that satisfying the identity-of-parties requirement could be a challenge when the Government opts not to intervene.[77] The Supreme Court, therefore, has created an incentive for contractors facing False Claims Act lawsuits to delay any settlement offer, perhaps in hopes that the relator and the relator's counsel will continue to litigate the claim until any other potential relators are barred by the statute of limitations. The Government, therefore, will face delays in receiving any settlement proceeds.

The Supreme Court's interpretation of the "pending action" bar will delay settlements and ignores that the False Claims Act already provides the Government with ample opportunity to protect its own interest. The result creates a conflict with the operation of the surrounding text. To clear up the confusion, Congress should amend the False Claims Act by replacing the word "pending" with the word "first."

VI. The Supreme Court Missed an Opportunity to Clarify When the United States is "At War"

Two major topics were left unaddressed by the Supreme Court's opinion:

> (1) Whether the Fourth Circuit correctly held that conflicts without a formal declaration of war met the definition of "at war" under the WSLA; and
>
> (2) Whether the Fourth Circuit correctly held that only a formal presidential proclamation or Congressional resolution could terminate the period during which the United States was "at war" under the WSLA.

Whether the Fourth Circuit had correctly applied the definition of "at war" was not among the issues on which the Supreme Court granted certiorari,[78] but both sides nevertheless addressed it. In its primary brief, KBR argued that the Fourth Circuit's interpretation of the phrase "at war" would impermissibly involve courts in matters of foreign policy decisions best left to the political branches.[79] If some engagements on foreign soil could make the United States "at war" even in the absence of a formal declaration, then courts would become involved in:

> the difficult and politically charged task of deciding when an undeclared conflict begins and ends. . . . Disregarding the ordinary meaning of "at war" will inevitably require extensive post-hoc factual determinations' on a range of issues, e.g., (1) the extent of Congress's authorization for the President to act; (2) whether the conflict is a "war" under other definitions and international law; (3) the conflict's scope; and (4) the diversion of resources away from investigating frauds.[80]

Neither Carter nor the United States directly addressed KBR's argument about the expansiveness of the Fourth Circuit's "at war" definition. Instead, both argued that the Supreme Court did not need to reach the definition of "at war" because the post-2008 WSLA, rather than the pre-2008 WSLA, applied. As a result, because the current WSLA permitted tolling of the statute of limitations not only when the United States was "at war" but also when "Congress has enacted a specific authorization for the use of the Armed Forces, as described in section 5(b) of the War Powers Resolution (50 U.S.C. 1544(b)), the 2002 AUMF was sufficient to trigger the WSLA.[81]

KBR replied by arguing that regardless of whether the current or prior version of the WSLA applied, the Supreme Court needed to address the Fourth Circuit's interpretation of "at war."[82] KBR pointed out that, if left unaddressed, the "at war" definition would render meaningless the 2008 addition of Congressional authorizations under the War Powers Act, because any conflicts authorized under the War Powers Act would be subsumed within the Fourth Circuit's definition of "at war."[83]

In addition, the Supreme Court did not address whether any event other than a presidential proclamation could demonstrate the cessation of hostilities to stop the tolling of the statute of limitations. This issue was examined by the Fifth Circuit in *United States v. Pfluger*, in which that court held that neither the toppling of Saddam Hussein's government in the spring of 2003 (in the case of Iraq) nor the recognition of a substitute government (in the case of Afghanistan) counted as a cessation of hostilities.[84] The Fifth Circuit held that it was bound by the Supreme Court's decision in *United States v. Grainger*,[85] which had held that World War II had not ceased for WSLA purposes until December 31, 1946, the date of President Truman's declaration regarding the cessation of hostilities, rather than, for example, September 3, 1945, the date of Japan's surrender.[86] The Fifth Circuit was not swayed by the argument that such a literal ruling would lead to absurd results, such as defendants still being liable for frauds committed during the first Gulf War, because it said that such a case was not before it.[87]

The Supreme Court opted not to address the issue of when the United States is "at war" or whether a formal presidential declaration is required for the United States to no longer be "at war." Although the WSLA now only applies to criminal offenses, the prior interpretations of the term "at war" by the Fourth and Fifth Circuits create confusion over when, if ever, the Government is time-barred from pursuing a criminal action for fraud. If a military operation that was conducted pursuant

to an authorization for the use of military force (as with the conflict in Iraq) meets the definition of "at war,"[88] then the 2008 amendment adding "or Congress has enacted a specific authorization for the use of the Armed Forces" was superfluous.[89] Additionally, given the frequent use of U.S. military forces abroad, the Fourth Circuit's interpretation makes it possible that False Claims Act actions may never be subject to a statute of limitations bar, as there has been no six year gap between the military actions abroad involving U.S. military forces since the end of World War II.[90] In the absence of correction by the Supreme Court or by Congress, therefore, contractors face the possibility of being subject to criminal fraud actions for decades beyond their contract's completion. Such a result would eviscerate the ten year limitation contained within the False Claims Act itself.[91]

This result is compounded by the formal requirement for ending a conflict only at "the termination of hostilities as proclaimed by a Presidential proclamation, with notice to Congress, or by a concurrent resolution of Congress."[92] After World War II, the Supreme Court held this requirement to mean that the statute of limitations was tolled until December 31, 1946 (the date of President Truman's formal declaration), even though the last enemy country had unconditionally surrendered on September 3, 1945, more than 16 months earlier.[93] The Fifth Circuit explicitly rejected formal recognitions of new governments after the deposing of the enemy governments, and has left open the possibility that the First Gulf War has never been ended for WSLA purposes.[94] At least one district court, however, has used May 1, 2003 as an end date for the Iraq War, when President George W. Bush proclaimed that "major combat operations have ended . . . . And now our coalition is engaged in securing and reconstructing that country."[95] The Fourth Circuit's "at war" definition, along with the Fifth Circuit's formalistic requirements for showing a termination of war, put contractors in the position of anticipating that litigation regarding their services could come decades after they have performed them.

Finally, as KBR and the other defendants pointed out in their brief, if the Supreme Court leaves the Fourth Circuit's "at war" definition untouched, courts will be placed in the position of deciding when the United States is and is not "at war."[96] The Supreme Court has previously noted, "[w]e are all of opinion, that the authority to decide whether the exigency has arisen, belongs exclusively to the president, and that his decision is conclusive upon all other persons."[97] The Court has also held that "analysis reveals isolable reasons for the presence of political questions, underlying this Court's refusal to review the political departments' determination of when or whether a war has ended. Dominant is the need for finality in the political determination, for emergency's nature demands '[a] prompt and unhesitating obedience.'"[98] Drawing the courts into the defining when an informal conflict amounts to a war, therefore, is contrary to established precedent and common sense.

VII. Conclusion

The Supreme Court has correctly limited the scope of the WSLA to criminal lawsuits, but it has now put contractors on notice that they may be subject to False Claims Act lawsuits brought by serial relators. This creates perverse incentives for contractors to delay settlements with relators, thus delaying payments to the federal government and needlessly burdening the judicial system with extended cases. Congress should correct the Supreme Court's mistake by simply deleting the word "pending" and replacing it with "first-filed," "earlier," or "prior."[99] Additionally, Congress or the Supreme Court should correct the circuit courts' erroneous statements that the United States can be "at war" despite the lack of a formal declaration as well as establish standards for determining when the United States ceases to be at war. Failing to do so not only renders the 2008 amendments superfluous, it creates a potentially never-ending criminal statute of limitations for government contractors, and puts courts in a position to decide issues historically left to the political branches.

Endnotes

1 Adapted from Langston Hughes, *Harlem*, courtesy of the Poetry Foundation website, *available at* http://www.poetryfoundation.org/poem/175884 (last accessed Feb 24, 2015) ("What happens to a dream deferred? Does it dry up / like a raisin in the sun? / . . . / Maybe it just sags / like a heavy load. / Or does it explode?").

2 — U.S. —, 135 S. Ct. 1970 (2015); 710 F.3d 171 (4th Cir. 2013).

3 18 U.S.C. § 3287 (2011).

4 The author assumes that any reader of this publication will be familiar with the history and general contours of the False Claims Act. Therefore, this Introduction does not seek to provide an exhaustive overview of the statute or its processes and provides a substantially simplified summary.

5 31 U.S.C. § 3730(b), (e). The court will still have jurisdiction to adjudicate the complaint even if the allegations were previously publicly disclosed, so long as the relator was the "original source" of the information. 31 U.S.C. § 3730(e)(4). A discussion of the "public disclosure" jurisdictional bar and the "original source" exception to the "public disclosure" jurisdictional bar is beyond the scope of this article.

6 31 U.S.C. § 3730(b)(5).

7 Oral Argument Transcript, *Kellogg Brown & Root et al. v. United States ex rel. Carter*, U.S. Supreme Court No. 12-1497 (argued Jan. 13, 2015) *available at* http://www.supremecourt.gov/oral_arguments/argument_transcripts/12-1497_bpm1.pdf (citing Chamber of Commerce Letter finding an average of 13 months between filing of sealed complaint and Government decision on intervention).

8 31 U.S.C. § 3730(b).

9 The False Claims Act explicitly does NOT require a "specific intent to defraud". 31 U.S.C. § 3729(b)(1)(B).

10 *United States ex rel. Badr v. Triple Canopy, Inc.*, 775 F.3d 628, 634 (4th Cir. 2014) (citing *United States ex rel. Harrison v. Westinghouse Savannah River Co.*, 352 F.3d 908, 913 (4th Cir. 2003)).

11 31 U.S.C. § 3729(b)(2)(i). The term "claim" also includes statements made by suppliers or subcontractors to Federal contractors or grantees. 31 U.S.C. § 3729(b)(2)(ii)(I)-(II).

12 31 U.S.C. § 3729(a)(1)(A); *see* John T. Boese, *Civil False Claims and Qui Tam Actions*, § 1.06[A], p.1-46 (4th Ed. 2006) (updated through 2014) ("The mischarge case is the most common False Claims Act case, as well as well as the most straightforward.").

13 31 U.S.C. § 3729(a)(1)(B) (creation of false record or statement material to a claim); § 3729(a)(1)(C)-(G) (including conspiracy to violate the False Claims

Act, failing to return all money due to the United States, creating a false record to conceal or avoid repaying money to the United States; returning a receipt showing receipt of property used without knowing whether the receipt was true; or taking United States property as a pledge for loan from an officer or employee of the United States not authorized to sell or pledge the property).

14 31 U.S.C. § 3731(b)(1)-(2). Procedurally, attorneys with the United States investigating these allegations will seek a tolling agreement from the contractor, using the implied or explicit threat to file the False Claims Act lawsuit immediately if the contractor does not agree to the tolling. *See, e.g.*, Kellogg Brown & Root, 710 F.3d at 175 (delay of 2 years between initial filing of lawsuit and subsequent decision not to intervene); Oral Argument Transcript, *supra* note 7, at 5.

15 18 U.S.C. § 3287.

16 18 U.S.C.A. § 3287 (West 2011) (emphasis added).

17 18 U.S.C.A. § 3287 (West 2006).

18 *United States v. Temple*, 147 F. Supp. 118, 120 (N.D. Ill. 1956) ("The Wartime Suspension of Limitations Act was concerned in turn with the ease with which fraud could be concealed, and sought to grant the government in time of war a correspondingly longer time to discover it.").

19 *Id*. ("Surely Congress may be assumed to have been as anxious, or even more anxious, to preserve to the government its civil remedy as its criminal retribution.").

20 31 U.S.C. § 3730(b)(5).

21 Adapted from Sir Paul McCartney, *Long and Winding Road*, courtesy of the lyrics found at Google Play, *available at* play.google.com (last accessed Feb 25, 2015).

22 710 F.3d at 174-75.

23 *Id.* at 175-76.

24 In yet another and perhaps final indignity, on November 12, 2015 (after this article was substantially complete), the Eastern District of Virginia *again* dismissed Mr. Carter's remaining claims, holding that, because the Texas case was pending at the time of the filing of the current complaint, Mr. Carter's complaint was still barred by the first-to-file prohibition, and Mr. Carter therefore needed to file yet another complaint. *United States ex rel. Carter v. Kellogg Brown & Root*, E.D. Va. No. 1:11-cv-602, 2015 U.S. Dist. Lexis 153541 (E.D. Va. Nov. 12, 2015). The amount remaining in dispute is $673.56. *Id*. at *35.

25 *Id*. at 178.

26 *Id*. at 178-79.

27 *Id*. at 179.

28 *Id.*

29 *Id*. at 180.

30 546 F.3d 288 (4th Cir. 2008).

31 *Kellogg Brown & Root Services*, 710 F.3d at 180 (citing *United States ex rel. Sanders v. North American Bus Industries, Inc.*, 546 F.3d 288 (4th Cir. 2008)).

32 *Id.* at 180.

33 31 U.S.C. § 3730(b)(5) ("When a person brings an action under this subsection, no person other than the Government may intervene or bring a related action based on the facts underlying the pending action.").

34 *Kellogg Brown & Root Services*, 710 F.3d at 182.

35 *Id.*

36 *Id*. at 183.

37 *Id.*

38 *Id*. at 189-92 (Agee, J., dissenting).

39 *Id*. at 189-90.

40 *Id*. at 187 (Wynn, J., concurring).

41 *Pfluger*, 685 F.3d at 485 (citing Barbara Salazar Torreon, Congressional Research Serv., U.S. Periods of War and Dates of Current Conflicts (2011), *available at* http://www. fas.org/sgp/crs/natsec/RS21405.pdf).

42 Oral Argument Transcript, *supra* note 7, at 3-12.

43 *Id.* at 12-28.

44 *Kellogg Brown & Root, Inc.*, 135 S. Ct. 1970.

45 *Id.* at 1976-77.

46 *Id*. at 1977.

47 *Id*. at 1978.

48 *Id.*

49 *Id.*

50 *Id.*

51 *Id*. at 1979.

52 *Id*. at 1978.

53 *Id*. at 1979.

54 *Id.*

55 *Id.*

56 *Id.*

57 31 U.S.C. § 3730(b)(2)-(4) (Government has the right to review allegations and conduct investigation for 60 days, often extended to more than a year, before deciding whether to intervene).

58 31 U.S.C. § 3730(b)(4)(B) (Government has the right to decline to intervene).

59 31 U.S.C. § 3730(c)(3) (even if the Government opts not to intervene, the Government has the right to be served with all pleadings and may intervene at a later time "upon a showing of good cause").

60 31 U.S.C. § 3730(b)(1).

61 *See* 31 U.S.C. § 3730(c)(1). In practice, if the United States intervenes, it will always file its own complaint, often adding new grounds for recovery not previously contained in the relator's complaint.

62 31 U.S.C. § 3730(b)(5).

63 *Kellogg Brown & Root*, 135 S. Ct. at 1979.

64 31 U.S.C. § 3730(b)(5).

65 *Id.*

66 *See, e.g.*, *Marchetti v. United States*, 390 U.S. 39, 60 n. 18 (declining to adopt statutory interpretation that would require the court "to insert words that are not now in the statute"); *United States v. Reese*, 92 U.S. 214, 219 (1875)

("The proposed effect is not to be attained by striking out or disregarding words that are in the section, but by inserting those that are not now there."); *see also Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291, 296 (2006) ("We have 'stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there.'").

67 *Id.*

68 31 U.S.C. §§ 3730(b)(1)-(4).

69 31 U.S.C. § 3730(c)-(d).

70 31 U.S.C. § 3730(b)(1) ("The action may be dismissed only if the court and the Attorney General give written consent . . ."); § 3730(c)(2)(A) ("The Government may dismiss the action notwithstanding the objections of the person initiating the action . . . ."); § 3730(c)(2)(B) ("The Government may settle the action with the defendant notwithstanding the objections of the person initiating the action . . ."); § 3730(c)(2)(C) ("Upon a showing by the Government that unrestricted participation during the course of the litigation by the person initiating the action would interfere with or unduly delay the Government's prosecution of the case, or would be repetitious, irrelevant, or for purposes of harassment, the court may, in its discretion, impose limitations on the person's participation . . ."); § 3730(c)(3) (requiring the relator to provide the Government with copies of all pleadings and deposition transcripts as well as permitting the court to allow the Government to intervene even after declining to intervene initially).

71 31 U.S.C. § 3730(b)(2)

72 31 U.S.C. § 3730(b)(4)

73 31 U.S.C. § 3730(d)(1).

74 *Armstrong Paint & Varnish Works v. Nu-Enamel Corp.*, 305 U.S. 315, 332–333 (1938) ("To construe statutes so as to avoid results glaringly absurd, has long been a judicial function. Where, as here, the language is susceptible of a construction which preserves the usefulness of the section, the judicial duty rests upon this Court to give expression to the intendment of the law.").

75 *Kellogg Brown & Root Services*, — U.S. —, 135 S. Ct. at 1979. Note that this scenario assumes that subsequent relators are not barred by any of the jurisdictional bars within 31 U.S.C. § 3730(e). This subsection deprives the court of jurisdiction to entertain relators' lawsuits where, relevant here, the allegations are already the subject of a civil lawsuit or an administrative civil money penalty hearing (31 U.S.C. § 3730(e)(3)) or the allegations were already publicly disclosed in a criminal, civil, or administrative hearing where the Government is a party, in a Government report, audit, or investigation, or in the news media, unless the relator is an "original source of the information". 31 U.S.C. § 3730(e)(4).

76 *Id.*

77 Reply Brief of Petitioners, *Kellogg Brown & Root Services Inc. et al. v. United States ex rel. Carter*, U.S. Supreme Court No. 12-1497 at pp. 20-21 (Nov. 13, 2014) (available at 2014 WL 5906565).

78 Brief of the Petitioners, *Kellogg Brown & Root Services Inc. et al. v. United States ex rel. Carter*, U.S. Supreme Court No. 12-1497 at I (Aug. 29, 2014) (available at 2014 WL 7717720).

79 *Id.* at 38-41.

80 *Id*. at 40-41 (quoting *United States v. Prosperi*, 573 F. Supp. 2d 436, 449 (D. Mass. 2008)).

81 18 U.S.C. § 3287. *See* Brief of the Respondents, *Kellogg Brown & Root Services Inc. et al. v. United States ex rel. Carter*, U.S. Supreme Court No. 12-1497 at pp. 43-44 (Oct. 14, 2014) available at 2014 WL 5299413; Brief of Amicus Curaie United States, *Kellogg Brown & Root Services Inc. et al. v. United States ex rel. Carter*, U.S. Supreme Court No. 12-1497 at pp. 15-16 (Oct. 21, 2014) (available at 2014 WL 5395798).

82 Reply Brief of Petitioners, *Kellogg Brown & Root Services Inc. et al. v. United States ex rel. Carter*, U.S. Supreme Court No. 12-1497 at pp. 13-14 (Nov. 13, 2014) (available at 2014 WL 5906565).

83 *Id*. at 14.

84 685 F.3d at 485.

85 346 U.S. 235 (1953).

86 *Pfluger*, 685 F.3d at 485 (citing *Grainger*, 346 U.S. at 246).

87 *Id.* at 485.

88 *See Kellogg Brown & Root Services*, 710 F.3d at 179-80.

89 *Compare* 18 U.S.C. § 3287 (2011) *with* 18 U.S.C. § 3287 (West 2006).

90 *See* http://www.pbs.org/wgbh/americanexperience/features/timeline/warletters/ (listing military involvement of U.S. forces.

91 *See* 31 U.S.C. § 3731(b)(10) ("A civil action under section 3730 may not be brought . . . more than 10 years after the date on which the violation is committed . . .").

92 31 U.S.C. § 3287 (2011).

93 *Grainger*, 346 U.S. at 246.

94 *Pfluger*, 685 F.3d at 485.

95 *United States v. Prosperi*, 573 F. Supp. 2d 436, 455 (D. Mass. 2008) (quoting speech of President George W. Bush on May 1, 2003 aboard U.S.S. Abraham Lincoln).

96 Reply Brief of Petitioners, *Kellogg Brown & Root Services Inc. et al. v. United States ex rel. Carter*, U.S. Supreme Court No. 12-1497 at pp. 13-14 (Nov. 13, 2014) (available at 2014 WL 5906565).

97 *Martin v. Mott*, 25 U.S. 19, 30 (1827).

98 *Baker v. Carr*, 369 U.S. 186, 213 (1962) (quoting *Martin v. Mott*, 12 Wheat. 19, 30 (1827)).

99 *Kellogg Brown & Root*, 135 S. Ct. at 1979 (suggesting such terms as substitutes for "pending").