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PERSPECTIVE

Ruling says law tolls SOL for decades in criminal cases involving fraud on federal programs

By Alex Porter

On May 12, the 9th U.S. Circuit Court of Appeals issued a ruling that extends the statute of limitations in certain criminal cases potentially for decades. See *United States v. Nishiie*, 2021 DJDAR 4576 (9th Cir. May 12, 2021). In *Nishiie*, the 9th Circuit held that the Wartime Suspension of Limitations Act applies to cases involving fraud against the United States and cases involving property of the United States, even if the cases do not have a nexus to ongoing war efforts. In so doing, the 9th Circuit held that Congress's authorizations for use of military force issued in connection with the September 11th terrorist attacks and the 2003 Iraq War continue to suspend the statute of limitations for such offenses under the WSLA.

The roots of the WSLA trace back to after World War I, when Congress passed legislation to suspend the statute of limitations for criminal charges in war-related fraud cases. After a series of amendments before World War II, in 1948, Congress codified the WSLA in Title 18 of the United States Code. See 18 U.S.C. Section 3287. The WSLA states that “[w]hen the United States is at war or Congress has enacted a specific authorization for the use of the Armed Forces,” the statute of limitations for criminal offenses specified in the statute is tolled until five years after the termination of hostilities is pronounced “by a Presidential proclamation, with notice to Congress, or by a concurrent resolution of Congress.” The WSLA applies to offenses set forth in three subsections of the statute: (1) fraud

offenses against the United States or an agency thereof; (2) offenses committed in connection with property of the United States; and (3) offenses committed in connection with government contracts. The statute applies only to criminal cases; it does not toll the statute of limitations for civil enforcement actions. See *Kellogg Brown & Root Servs., Inc. v. United States*, ex rel. Carter, 575 U.S. 650, 661 (2015) (holding that the WSLA does not apply to civil False Claims Act cases).

Since its enactment, the WSLA has been invoked most often in cases involving procurement fraud, where wrongdoers have attempted to defraud the government in connection with government contracts in the military defense industry. Indeed, when there is a connection to ongoing war efforts, for example in Afghanistan or Iraq, such cases fall within the heartland of the WSLA's application.

In *Nishiie*, however, the defendant was charged with committing fraud in connection with the relocation of United States military bases in South Korea. Given that his conduct was not related to active war efforts connected to the congressional authorizations for use of military force, *Nishiie* argued that the WSLA did not extend to his conduct. *Nishiie* relied on a provision of the WSLA referred to as the “war nexus clause,” which refers to conduct that is that “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.” *Nishiie* argued that since his alleged activities in South Korea were not “connected with or related to” the authorizations of use of military force, the WSLA did not apply. The government disagreed and

noted that the “war nexus clause” is contained in subsection (3) of the WSLA, which applies only to offenses involving government contracts, and argued that the “war nexus” clause did not apply to subsections (1) and (2) of the WSLA, which applies to fraud and offenses against property of the United States. Thus, the government argued that the WSLA tolled the statute of limitations for *Nishiie*'s offenses in South Korea.

The district court agreed with *Nishiie*'s interpretation of the statute and found that the WSLA did not apply. The district court dismissed the counts in the indictment that fell outside the ordinary five-year statute of limitations. The government appealed the district court's dismissal and the 9th Circuit reversed the district court. A majority of the 9th Circuit panel analyzed the text of the WSLA and found that the “war nexus clause” modifies only subsection (3) of the WSLA, and does not apply to subsections (1) and (2) of the statute. In order to reach this conclusion, the court applied canons of statutory interpretation, including the “last antecedent canon” and the “series-qualifier canon,” and also reviewed the history of the WSLA. The concurring judge (Schroeder, J.), reached the same interpretation of the statute, but relied solely on the legislative history of the statute and the codification of a similar provision in the Uniform Code of Military Justice, and did not rely on the canons of interpretation cited by the majority of the panel.

Based on its interpretation of the WSLA, the 9th Circuit held that for offenses involving fraud against the United States or offenses involving property of the United States, there is no require-

ment of a nexus to Congress' authorization of use of military force in order for the WSLA to apply. The 9th Circuit noted that as a result of its opinion, the statute of limitations is extended significantly for offenses under the WSLA. The court said: “We are acutely aware — and somewhat concerned — that this interpretation, while legally correct, may effectively toll the statute of limitations for offenses under the WSLA for 20, 30, even 40 plus years. In large part that results from the expansion of war powers far beyond what they were when the WSLA was codified in 1948.”

The 9th Circuit said the policy concern of “subjecting defendants to decades-long liability is subordinated to the WSLA's unambiguous language,” and noted that Congress is able to pass legislation to change the law if it decides public policy warrants

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such a change. Indeed, the court noted that in 2008, at a time when the authorizations for use of military force were already in effect, Congress amended the WSLA, but chose not to reduce the length of the tolling period.

The 9th Circuit's decision in *Nishiie* aligns the 9th Circuit with three other circuits, which have all found that the WSLA suspends the statute of limitations based on the authorizations for use of military force after the September 11th attacks and the 2003 Iraq War. See *United States v. Melendez-Gonzalez*, 892 F.3d 9, 15 (1st Cir. 2018); *United States v. Frediani*, 790 F.3d 1196, 1201 (11th Cir. 2015); *United States v. Pfluger*, 685 F.3d 481, 485 (5th Cir. 2012). Notably, these other circuits did not consider the applicability of the "war nexus clause." As a result, the 9th Circuit is the first to

explicitly hold that a nexus to ongoing war efforts is not required for fraud offenses and offenses against United States property.

Based on the court's ruling in *Nishiie*, the statute of limitations for two categories of criminal cases continue to be extended until such time as the president or Congress takes action to terminate the authorizations of use of military force that were passed almost 20 years ago. Those categories are:

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

(2) offenses "committed in connection with the acquisition, care, handling, custody, control or disposition of any real or personal property of the United States."

Given the breadth of these cat-

egories, the WSLA could operate to extend the statute of limitations for a large number of criminal offenses, especially since the 9th Circuit ruled there is no requirement of a nexus to war-related activities. There are many white-collar offenses that involve fraud against the United States or any agency thereof, including not just defense procurement fraud cases, but also health care fraud offenses, and fraud related to government programs that were enacted in response to the COVID-19 pandemic (e.g., the Paycheck Protection Program). Courts have applied certain other limitations to restrict the offenses that fall within the ambit of the WSLA. See, e.g., *United States v. DeLia*, 906 F.3d 1212, 1220 (10th Cir. 2018) (holding that WSLA did not apply to criminal health care fraud statute, 18 U.S.C. Section

1347, because the offense "contains no element requiring proof that [defendant] defrauded the federal government"). However, in order to reach a broad range of cases that involve fraud against federal government programs, prosecutors could make greater use of the criminal provision of the False Claims Act, 18 U.S.C. Section 287, which likely falls within the scope of the WSLA.

It remains to be seen whether federal prosecutors in the 9th Circuit will rely on the WSLA to charge cases involving fraud on the federal government that otherwise would fall outside the statute of limitations. However, the 9th Circuit's ruling in *Nishiie* provides prosecutors with new flexibility to charge such cases, including cases that do not have any connection to ongoing war efforts. ■