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WARTIME ENFORCEMENT OF FRAUD ACT OF 2008

JULY 25, 2008.—Ordered to be printed

Mr. LEAHY, from the Committee on the Judiciary, submitted the following

R E P O R T

together with

ADDITIONAL VIEWS

[To accompany S. 2892]

The Committee on the Judiciary, to which was referred the bill (S. 2892), to promote the prosecution and enforcement of frauds against the United States by suspending the statute of limitations during times when Congress has authorized the use of military force, having considered the same, reports favorably thereon, without amendment, and recommends that the bill do pass.

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I. BACKGROUND AND PURPOSE OF THE WARTIME ENFORCEMENT OF FRAUD ACT OF 2008

On April 18, 2008, Chairman Patrick Leahy introduced the Wartime Enforcement of Fraud Act of 2008 (WEFA), which was cosponsored by Senator Grassley. Senators Obama, Byrd, and Cardin have since joined as cosponsors. This legislation will protect Amer-

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ican 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.

The legislation makes current law extending the statute of limitations during wartime applicable to the conflicts in Iraq and Afghanistan. It amends the Wartime Suspension of Limitations Act (18 U.S.C. 3287) to apply not only when the United States is engaged in a declared war, but also when Congress has authorized the used of military force pursuant to the War Powers Resolution (50 U.S.C. 1544(b)). The legislation also extends the statute of limitations to five years after the end of a conflict, making the law consistent with the current statute of limitations for criminal fraud offenses. See 18 U.S.C. § 3282(a).

A. BACKGROUND

War contracting fraud and efforts to combat it have a long history in this Nation. During World War II, President Franklin Delano Roosevelt spoke out against "war millionaires" who made excessive profits exploiting the calamity of war, and President Harry S. Truman, when he served in the Senate, crossed this country holding now-famous public hearings to expose gross fraud, waste and abuse by military contractors. In 1942, President Roosevelt signed into law the Wartime Suspension of Limitations Act, which extended the time prosecutors had to bring charges relating to criminal fraud offenses against the United States.[1] Recognizing the extreme difficulty in tracking down contracting fraud in the midst of a war, Congress unanimously approved the 1942 law, which temporarily suspended the statute of limitations. In 1948, President Truman signed a new law making this change permanent. The Wartime Suspension of Limitations Act proved to be vital in pursuing war profiteers, as prosecutors used the law to pursue contracting fraud after the war was over.[2]

In recent years, war contracting fraud has again plagued this Nation during the engagement of U.S. forces in Iraq and Afghanistan. Congress has appropriated more than $500 billion to date for the wars in Iraq and Afghanistan, including more than $50 billion for relief and reconstruction activities. The investigations and audits conducted so far have uncovered how billions in taxpayers' money has been lost to contract fraud, waste, and abuse. The Department of Justice, however, has only initiated a few cases involving less than $30 million lost to fraud, while hundreds of investigations into contracts worth billions remain pending, and new investigations based on allegations of fraud are started every month. Unless the statute of limitations is extended, these investigations may well be shut down before they can be completed and wartime fraud will go unpunished.

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[1] A similar provision was passed after World War I, extending the statute of limitations for conspiracy to defraud the Government from three years to six years. Congress recognized that war contracts required "the most minute investigation" and wanted to provide prosecutors with the time necessary to discover fraud. H.R. Rep. No. 67–365, at 1 (1921). Congress restored the three-year statute of limitations after the war once the Department of Justice announced that it did not plan any further prosecution of contracting fraud related to World War I.

[2] For example, this extension of the statute of limitations allowed prosecutors to secure a 79-count indictment against a subcontract employee who for three years falsified payroll records to bill the government for the hours worked by nonexistent employees. See *United States* v. *Agnew*, 6 F.R.D. 566 (E.D.Pa. 1947).

Private contractors have been used to a greater extent during these war-time activities than at any time in our history. The exigencies of war overseas, however, make oversight of these contractors more difficult, and expenditures are often made with fewer audit and other controls than during normal Government procurement. Often, the Government does not learn about serious fraud until years after the fact. As a result, the provision of goods and services during these military actions, as well as during relief and reconstruction activities, are more vulnerable to acts of fraud and abuse.

Hearings in both the Judiciary and Appropriations Committees have highlighted the difficulty of conducting investigations and audits into contracting fraud as the war is ongoing.[3] Inspectors General from the Defense Department, the State Department, and other agencies, as well as the Special Inspector General for Iraq Reconstruction (SIGIR), have consistently indicated that ongoing hostilities in Iraq and Afghanistan have significantly hampered their ability to review contracts and pursue investigations. For example, an audit by the Department of Defense Inspector General in May 2008 found that more than 90 percent of the $8.2 billion spent on contractors in Iraq lacked adequate documentation, and the DoD IG is still in the process of auditing billions spent on these contracts. Similarly, a separate SIGIR audit of a $1.2 billion State Department contract for security services in Iraq had to be stopped because Government and contractor officials could not find the invoices and documents showing how the money was spent. The State Department estimates it will take three to five years to find and organize the documentation for this contract, just for the audit to be completed. At this point, billions of dollars are unaccounted for, and it will take years to fully investigate and audit these expenditures for fraud.

In response to this problem, the Deputy Secretary of Defense Gordon England and the Acting Defense Department Inspector General Gordon Hedell testified before the Senate Appropriations Committee on July 23, 2008 that the bill would help them complete their oversight of Iraq war contracts, and they both supported the bill.[4]

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[3] See Senate Judiciary Committee Hearing, "Combating War Profiteering: Are We Doing Enough to Investigate and Prosecute Contracting Fraud and Abuse in Iraq" (March 20, 2007); Senate Appropriations Committee Hearing, "The Effectiveness of U.S. Efforts to Combat Corruption, Waste, Fraud and Abuse in Iraq (March 11, 2008); Senate Appropriations Committee, "Oversight Hearing on Fraud, Waste, and Abuse in Defense Department Contracts Supporting Activities in Iraq and Afghanistan" (July 23, 2008).

[4] In their views, Senators Sessions and Coburn express concern that "the Department of Defense should weigh in before the Senate considers the bill" and the legislation needs to be studied further. In their testimony before the Appropriations Committee, the Deputy Secretary of Defense and the Defense Department Inspector General both weighed in supporting the bill. In addition, Senators Sessions and Coburn claim that in passing the Wartime Suspension of Limitations Act in 1942 and 1948, Congress "intentionally limited" the law to declared wars, not authorizations for the use of military force. Since the War Powers Resolution, which allows for congressional authorizations for the use of military force, was not passed until 1973, nearly three decades after the Wartime Suspension of Limitations Act, this contention is dubious at best. Even if there were anything to this claim, that does not preclude this Congress from doing the right thing and extending the wartime suspension of statutes of limitations to war zones created by authorizations for the use of military force. The point of the Wartime Suspension of Limitations Act and this bill is the same, to ensure that the fog of war does not allow those who defraud the United States from getting away with it because their actions could not be investigated during hostilities.

B. NEED FOR LEGISLATION

While the World War II provision suspending the statute of limitations is still the law today, it applies only "when the United States is at war." 18 U.S.C. § 3287. As a result, the ongoing military operations in Iraq and Afghanistan are likely exempt from this law because they were undertaken when Congress authorized the use of military force, rather than by a formal declaration of war.

The Wartime Enforcement of Fraud Act of 2008 (WEFA) would correct this problem and extend the statute of limitations when Congress has authorized the use of the Armed Forces pursuant to the War Powers Resolution, as well as during declared wars. The legislation would make three changes to current law.

First, it would extend the statute of limitations when Congress enacts a specific authorization for the use of the Armed Forces consistent with the War Powers Resolution. In doing so, this language would apply current law to the ongoing conflicts in Iraq and Afghanistan, and to similar actions in the future. This amendment is not intended to apply to peacekeeping missions under the auspices of the United Nations, or military actions not specifically authorized by Congress pursuant to the War Powers Resolution. This will give investigators and auditors additional time to thoroughly review all war contracts and bring those who have defrauded the American taxpayers to justice.

Second, the legislation would extend the statute of limitations for five years after the end of the conflict, updating the provision to be consistent with the general statute of limitations for criminal offenses. See 18 U.S.C. § 3282(a). The statute of limitations for criminal fraud offenses was only three years when the law was passed during World War II, but is five years today.[5]

Third, it makes clear that a presidential proclamation ending hostilities, and thus ending the tolling of the statute of limitations period, must be a formal proclamation with notice to Congress. This will provide a clear point in time at which the statute of limitations will begin to run, providing certainty to courts, prosecutors, and litigants interpreting this provision.

Now, more than five years after the start of the Iraq war and nearly seven years after the beginning of the Afghanistan war, the statute of limitations has started to bar criminal actions in investigations of contracting fraud early in these conflicts. This bill will allow additional time for investigators and auditors to thoroughly investigate and review all war contracts and potentially save the U.S. taxpayers untold millions of dollars. If the current law is left unchanged, each passing day of the conflicts in Iraq and Afghanistan would result in a grant of immunity for fraudulent conduct by war contractors that has gone undiscovered or unprosecuted during the conflicts.

[5] Pub. L. No. 870–299, 68 Stat. 1145 (1961) amended 18 U.S.C. 3287 to change the statute of limitations to five years for noncapital offenses.

II. History of the Bill and Committee Consideration

A. Introduction of the Bill

Chairman Patrick Leahy introduced the bill, S. 2892, on April 18, 2008, with Senator Grassley.

B. Committee Consideration

The Committee voted at a June 26, 2008 executive business meeting to report S. 2892 favorably to the Senate without amendment by voice vote.

III. Section-by-Section Summary of the Bill

Section 1. Short title

This section provides that the legislation may be cited as the "Wartime Enforcement of Fraud Act of 2008."

Section 2. Suspends the statute of limitations when Congress has authorized the use of military force

This provision amends Section 3287 of title 18, which suspends the statute of limitations "when the United States is at war," to include circumstances where Congress has authorized the use of military force consistent with the War Powers Resolution. Technically, Section 3287 only applies to declared wars, not circumstances where Congress has authorized the use of military force, as in the recent wars in Iraq and Afghanistan. The amendment to Section 3287 specifically tracks the text of the Congressional authorizations for the use of the Armed Forces in Iraq and Afghanistan and refers only to those authorizations described in the War Powers Resolution (50 U.S.C. 1544(b)). As a result, only significant military actions requiring Congressional action would trigger this suspension of the statute of limitations. This amendment is not intended to apply to peacekeeping missions under the auspices of the United Nations or military actions not specifically authorized by Congress pursuant to the War Powers resolution. This language is intended to apply the suspension of statute of limitations to the wars in Iraq and Afghanistan.

The bill extends the statute of limitations for five years from the termination of hostilities, as opposed to the three years under current law. When the original Wartime Suspension of Limitations Act was passed in 1942, the criminal statute of limitations was only three years, and today it is five years. This change is consistent with the standard statute of limitations for all criminal fraud provisions and is necessary to update the law for modern times. See 18 U.S.C. 3282(a).

The bill also makes clear that the act that ends the tolling of the statute of limitations period must be an official act of the President with notice to Congress, or a concurrent resolution of Congress. This change is necessary so that the date ending the authorization of military force is clear, so courts, prosecutors, and litigants can be sure when the statute of limitations starts to run. This change will avoid any confusion or unnecessary litigation in enforcing fraud cases in the future.

Lastly, the bill clarifies that for purposes of applying the definitions in Section 103 of Title 41 in Section 3287 of Title 18, the term

"war" shall include Congressional authorizations for the use of military force pursuant to the War Powers resolution. This is just a conforming amendment so the definitions in the law can properly be applied.

IV. Congressional Budget Office Cost Estimate

The cost estimate provided by the Congressional Budget Office pursuant to section 402 of the Congressional Budget Act of 1974 was not available for inclusion in this report. The estimate will be printed in either a supplemental report or the Congressional Record when it is available.

V. Regulatory Impact Evaluation

In compliance with rule XXVI of the Standing Rules of the Senate, the Committee finds that no significant regulatory impact will result from the enactment of S. 2892.

VI. Conclusion

The Wartime Enforcement of Fraud Act, S. 2892, would close a loophole in current law and give the government new power to prosecute contracting fraud in Iraq and Afghanistan. If passed, the government could recover taxpayers' money lost in no-bid and cost-plus contracts awarded to companies that have delivered defective products, overbilled the government, or committed criminal fraud. The legislation would update a law first passed by the Congress during World War II that suspends the statute of limitations for contracting fraud offenses during times of war. It will allow the government to punish war profiteers and potentially save the U.S. taxpayers untold millions.

VII. Additional Views

ADDITIONAL VIEWS OF SENATORS SESSIONS AND COBURN ON S. 2892, "THE WARTIME ENFORCEMENT OF FRAUD ACT OF 2008"

The Wartime Enforcement of Fraud Act amends the Wartime Suspension of Limitations Act, which currently extends the statute of limitations for contracting fraud offenses committed during a time of war. The bill would add any "Congressional enactment of a specific authorization for the use of the Armed Forces" as a trigger for suspension of the statute of limitations for contracting fraud offenses. Additionally, the bill provides that the statute of limitations is suspended until 5 years after the termination of hostilities as proclaimed by a Presidential proclamation with notice to Congress.

Individuals who commit fraud against the government during hostilities should be vigorously prosecuted. We have a history of supporting legislation, such as the Military Extraterritorial Jurisdiction Act, that ensures crimes and frauds perpetrated in Iraq or other places overseas are rightly brought to justice here in the United States. We support efforts to provide the Department of Justice all the tools they need to prosecute contractors who commit fraud against the United States. However, we fear this approach would have the unintended consequence of creating a potentially unlimited statute of limitations period for defense contractors. This goes against the great traditions of our American legal system where statutes of limitation typically begin to run as soon as a crime has been committed and are usually limited to a specific number of years. In fact, prosecution for most federal crimes must begin within five years of the commission of an offense. Limited exceptions include murder and other offenses punishable by death, and some federal terrorism and sex offenses.

By including a Congressional authorization for the use of Armed Forces as an event that triggers suspension of the Statute of Limitations, the bill will directly impact conflicts that fall short of declared war. The Wartime Suspension of Limitations Act was enacted after World War II and we can only assume that the language is intentionally limited to declared wars. A declared war is of a different nature than an undeclared military conflict which can be a much smaller affair that does not similarly affect the government's ability to build and prosecute war fraud cases. If, as is potentially the case in the current conflicts with Iraq and Afghanistan, a President is hesitant to officially announce the end of hostilities, the statute of limitations will never start running. This means contractors could remain subject to potential liability for criminal offenses (or investigations) for years, possibly a lifetime.

Even if an official act declaring an end to hostilities is made, it may not happen for a very long time. The Supreme Court recently said in Boumediene v. Bush, "the duration of hostilities . . . may last a generation or more." [1]

Furthermore, providing a very long—potentially indefinite—statute of limitations for a criminal offense violates longstanding principles often articulated by the Supreme Court. In Toussie v. United States, the Court held:

> The purpose of a statute of limitations is to limit exposure to criminal prosecution to a certain fixed period of time following the occurrence of those acts the legislature has decided to punish by criminal sanctions. Such a limitation is designed to protect individuals from having to defend themselves against charges when the basic facts may have become obscured by the passage of time and to minimize the danger of official punishment because of acts in the far-distant past. Such a time limit may also have the salutary effect of encouraging law enforcement officials promptly to investigate suspected criminal activity. [2]

The Court has also held:

> Passage of time, whether before or after arrest, may impair memories, cause evidence to be lost, deprive the defendant of witnesses, and otherwise interfere with his ability to defend himself. . . . Possible prejudice is inherent in any delay, however short; it may also weaken the Government's case. . . . Such a [statute of] limitation is designed to protect individuals from having to defend themselves against charges when the basic facts may have become obscured by the passage of time and to minimize the danger of official punishment because of acts in the far-distant past. Such a time limit may also have the salutary effect of encouraging law enforcement officials promptly to investigate suspected criminal activity.[3]

We believe this bill creates two disturbing disincentives at a time where contractors are vital to national security and American efforts during armed conflicts: (1) it could make it more difficult to recruit contractors needed during conflict, and (2) it could make it more difficult for the government to prove these cases if too much time goes by. We believe the statute of limitations issue should be studied closely and that the Department of Defense should weigh in before the Senate considers the bill.

JEFF SESSIONS.
TOM COBURN.

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[1] 128 S. Ct. 2229, at 2270 (2008) (the Court was expressing concern for detainees, saying that the possibility of persons wrongfully detained for such a long conflict "is a risk too significant to ignore").

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

[3] U.S. v. Marion, 404 U.S. 307, 321–323 (1971) (emphasis added).

VIII. CHANGES TO EXISTING LAW MADE BY THE BILL, AS REPORTED

In compliance with paragraph 12 of rule XXVI of the Standing Rules of the Senate, changes in existing law made by S. 2892, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italic, and existing law in which no change is proposed is shown in roman):

UNITED STATES CODE

TITLE 18—CRIMES AND CRIMINAL PROCEDURE

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PART II—CRIMINAL PROCEDURE

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CHAPTER 213—LIMITATIONS

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§ 3287. Wartime suspension of limitations

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 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, shall be suspended until [three] *five* years after the termination of hostilities as proclaimed by [the President] *Presidential proclamation, with notice to Congress*, or by a concurrent resolution of Congress.

Definitions of terms in section 103 of title 41 shall apply to similar terms used in this section. *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)).*

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