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## The War on Tax Fraud and the War in Afghanistan: Is there a Link?

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### Introduction

Over the past ten years, the Government has fought a steadily escalating war against tax fraud. The first phase of this battle was directed primarily at so-called “abusive” tax shelters and has led to the investigation and prosecution of accounting firms, law firms, and financial institutions involved in the marketing or implementing of those shelters.<sup>1</sup> Numerous professionals at those organizations have been charged criminally<sup>2</sup> and many have pled guilty or been convicted after trial.<sup>3</sup>

The second phase of the Government’s attack is targeted at taxpayers directly, and, in particular, at high-net worth individuals who have secreted assets in foreign bank accounts. The Government has fought doggedly to force foreign banks to disclose the identities of US account holders. The Government

1. HVB Deferred Prosecution Agreement at 1, *United States v. Bayerische Hypo-und Vereinsbank AG*, No. 06-Cr. 162 (AKH) (S.D.N.Y. Aug. 7, 2007); KPMG Deferred Prosecution Agreement at 1, *United States v. KPMG*, No. 1:05-cr-00903-LAP (S.D.N.Y. Aug. 26, 2005); Press Release, United States Attorney, Southern District of New York, Manhattan United States Attorney Announces Decision Not to Prosecute Sidley Austin LLP (May 23, 2007) (available at [http://lawprofessors.typepad.com/whitecollarcrime\\_blog/files/sidley\\_austin\\_sdney\\_press\\_release.pdf](http://lawprofessors.typepad.com/whitecollarcrime_blog/files/sidley_austin_sdney_press_release.pdf)).
2. See e.g., Press Release, United States Attorney, Southern District of New York, Four Current or Former Ernst & Young Partners Found Guilty on Criminal Tax Shelter Charges (May 7, 2009) (available at <http://www.justice.gov/usao/nys/pressreleases/May09/Coplan,%20et%20al.%20Verdict%20PR.pdf>) [hereinafter E&Y Press Release]; Press Release, United States Attorney, Southern District of New York, Promoter of Fraudulent Tax Shelter and Louisiana Attorney Indicted on Tax Charges (Nov. 14, 2008) (available at <http://www.justice.gov/usao/nys/pressreleases/November08/ohleetalindictmentprdoj.pdf>); Press Release, United States Attorney, Southern District of New York, 19 Individuals Charged in Superseding Indictment Filed in Criminal Tax Case Related to KPMG Tax Shelters (Oct. 17, 2005) (available at <http://www.justice.gov/usao/nys/pressreleases/October05/kpmgsupersedingindictmentpr.pdf>).
3. See E & Y Press Release, *supra* note 2; Press Release, United States Attorney, Southern District of New York, Three Defendants in Tax Shelter Fraud Trial Convicted of Multiple Counts of Tax Evasion (Dec. 17, 2008) (available at <http://www.justice.gov/usao/nys/pressreleases/December08/larsonetalverdictpr.pdf>); Department of Justice, Tax Division, Enforcement Results April 2005 to April 2006, Apr. 11, 2006, [http://www.justice.gov/tax/FilingSeason06\\_Appx.pdf](http://www.justice.gov/tax/FilingSeason06_Appx.pdf) (discussing plea agreements of Domenick DeGiorgio, HVB, and David Rivkin, KPMG).

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achieved a significant victory in February 2009 when it entered into a Deferred Prosecution Agreement with UBS that required UBS to turn over documents identifying approximately 4,450 US taxpayers who failed to report income earned in undeclared Swiss bank accounts.<sup>4</sup> Subsequently, the Government settled a summons enforcement action against UBS pursuant to which UBS agreed to disclose 10,000 accounts belonging to US citizens by January 10, 2010 in exchange for immediate withdrawal of the summons.<sup>5</sup>

At the same time that the Government fought for disclosure of the identities of US citizens with undeclared foreign bank accounts, it offered a small carrot to those accountholders. On March 26, 2009, the IRS announced a Voluntary Disclosure Program, which promised reduced penalties to taxpayers who voluntarily disclosed previously undeclared foreign bank accounts and assets by September 23, 2009.<sup>6</sup> On September 21, 2009, the IRS announced a one-time extension to the program and gave taxpayers until October 15, 2009 to step forward.<sup>7</sup> The Government accompanied its announcement of the Voluntary Disclosure Program with a big stick — the threat of vigorous prosecution of accountholders who were discovered after having not come forward voluntarily.<sup>8</sup> Although the Voluntary Disclosure Program itself offered no promise of immunity from prosecution, IRS announcements made clear that the agency's enforcement efforts would be targeted at those who continued to hide.<sup>9</sup> The unlucky ones who are eventually caught will face prosecution for offenses such as tax evasion (26 U.S.C. § 7201), filing a false return (26 U.S.C. § 7206(1)), and failure to file an income tax return (26 U.S.C. § 7203). These offenses carry prison sentences of up to ten years, as well as stiff fines.<sup>10</sup>

The Voluntary Disclosure Program was highly successful. As of November 2009, approximately 14,000 US taxpayers had taken advantage of the program, including a significant number of post-deadline filings permitted under the IRS's regular voluntary disclosure procedures.<sup>11</sup> Nonetheless, many taxpayers continued to opt for secrecy. Some no doubt are hoping to run out the clock, and are gambling that the statute of limitations on any crime that they have committed will expire before the IRS discovers their identity and obtains an indictment.<sup>12</sup>

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4. Petition to Enforce John Doe Summons at 1, *United States v. UBS AG*, 09-CR-60033 (S.D. Fla. Feb. 19, 2009).

5. Erin Marie Daly, "Swiss Regulator Ordered to Produce UBS Client Info," *Law360.com*, Sept. 9, 2009, <http://www.law360.com/articles/121167>.

6. IRS.gov., *Voluntary Disclosure: Questions and Answers*, Sept. 21, 2009, <http://www.irs.gov/newsroom/article/0,,id=210027,00.html>; Kim Dixon, *US offshore tax amnesty yields big response: IRS*, November 17, 2009, <http://www.uspoliticsinfo.com/article/U.S.%20offshore%20tax%20amnesty%20yields%20big%20response:%20IRS/?k=j83s12y12h94s27k02>.

7. *Id.*

8. IRS.gov., *Excerpts from IRS Commissioner Doug Shulman's Press Remarks on UBS*, Aug. 19, 2009, <http://www.irs.gov/newsroom/article/0,,id=212203,00.html> (noting that the UBS agreement sends the "unmistakable message to people hiding income and assets offshore [that] the IRS will vigorously pursue tax cheats around the world").

9. *Id.* ("International tax evasion will continue to be a top priority. . . . People hiding assets and income offshore will find themselves increasingly at risk due to our efforts in this area."); see Patti S. Spencer, "Are Swiss Bank Accounts Really Secret," *Landcaster Newspapers, Inc.* (July 7, 2008) at B5.

10. *Voluntary Disclosure: Questions and Answers*, *supra* note 6.

11. Edward Froelich and Joseph Fletcher, "New Year's Resolution: Disclosing Your Foreign Bank Account?," *Mondaq Ltd.*, 2010 WLNR 613973 (Jan. 12, 2010).

12. Others are fighting against disclosure in Swiss Courts, and recently the Swiss Federal Administrative Tribunal ruled that Swiss law did not permit the transmittal of banking data for a client accused of failing to file a W-9 on the grounds that failure to file did not constitute fraud. See Carrick Mollenkamp & Laura Saunders, "Swiss Ruling Muddles UBS Pact with U.S.," *Money & Investing*, January 23-24, 2010, at B1-B2; E. Howard-Potter and M. Levine, "Swiss Court Prevents Disclosure of Some UBS Data to the U.S.; Same Court Earlier Found FINMA Exceeded Authority by Releasing Names of UBS

Under the best of circumstances, waiting out the statute of limitations is a risky and uncertain game. For example, new affirmative acts of evasion, however small, can delay the starting point of the limitations period.<sup>13</sup> Similarly, each tax return that falsely states that a taxpayer has no foreign bank account can be the basis for new criminal charges.<sup>14</sup> In addition, the statute may be tolled in certain situations, including for any period when the taxpayer is outside of the United States, regardless of the reason,<sup>15</sup> or for certain periods when the Government has made an official request to a foreign government for foreign evidence.<sup>16</sup>

Recently, however, the specter of a much broader, and possibly indefinite, extension of the statute of limitations has emerged. In one of the high profile tax shelter prosecutions in the Southern District of New York, *United States v. Ohle*, 08 Crim. 1109 (LBS), the Government took the position that the statute of limitations on tax fraud charges has been tolled by the Wartime Suspension of Limitations Act, 18 U.S.C. § 1327 (the “Suspension Act”). In particular, the Government asserted that, because the United States has been “at war” in Afghanistan and Iraq, the statute of limitations has been tolled, and will continue to be tolled, until the President or Congress formally declares an end to hostilities.

### **The History of the Wartime Suspension of Limitations Act**

The Wartime Suspension of Limitations Act (“Act” or “Suspension Act”), 18 U.S.C. 3287, can be traced back to the aftermath of World War I when the Department of Justice petitioned Congress for “additional time to investigate and prosecute a backlog of war-related procurement-fraud cases.”<sup>17</sup> In response, Congress passed legislation that temporarily tolled the limitations period on crimes involving fraud against the government for six years from 1921 through 1927.<sup>18</sup> In 1942, during World War II, Congress enacted a similar measure that suspended the limitations period on crimes involving fraud against the government until June 30, 1945, “or until such earlier time as the Congress by concurrent resolution, or the President, may designate.”<sup>19</sup> Congress amended the Act twice in 1944 by inserting specific references to fraud committed in connection with war contracts and the acquisition, handling, control, custody or disposition of government property during times of war.<sup>20</sup>

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Clients,” *Dewey & LeBoeuf, Focus on Tax Controversy & Litigation*, available at [http://www.deweyleboeuf.com/~media/Files/newsletters/TaxControversy/20100127\\_TaxControversy.ashx](http://www.deweyleboeuf.com/~media/Files/newsletters/TaxControversy/20100127_TaxControversy.ashx).

13. See e.g., *United States v. Butler*, 297 F.3d 505, 511 (6th Cir. 2002) (holding that the limitations period on charges under 26 U.S.C. 7201 begins to run with the last act of evasion in furtherance of the crime); *United States v. Feldman*, 731 F. Supp. 1189, 1194 (S.D.N.Y. 1990) (concluding that the limitations period had not lapsed on a tax evasion offense committed twelve years prior where the government offered proof that the defendant had committed “one or more affirmative acts of evasion” within the past six years).
14. 26 U.S.C. § 7206; See *United States v. Root*, 585 F.3d 145, 152 (3rd Cir. 2009) (recognizing that each false tax return is specific to the taxable year in which it was filed and constitutes a separate offense); *United States v. Ross*, 52 F.3d 329 (7th Cir. 1995) (“[I]n a criminal tax evasion case each year stands alone, and the failure to pay taxes in each of the years involved constitutes a separate offense.”); 35A Am. Jur. 2d *Federal Tax Enforcement* § 1208 (2009).
15. 26 U.S.C. § 6531; see *United States v. Yip*, 248 F. Supp. 2d 970, 973-74 (D. Haw. 2003); *United States v. Matis*, 476 F. Supp. 1287, 1294 (S.D.N.Y. 1979).
16. 18 U.S.C. § 3292.
17. Joshua S. Levy and David J. D’Addio, “Perpetual Tolling for Fraud Against the United States?,” 16 No. 6 *BUSCRIMB* 1 (February 2009).
18. See *United States v. Proserpi*, 573 F. Supp. 2d 436, 448 (D. Mass. 2008); *Bridges v. United States*, 346 U.S. 209, 216 (1953); *id.* at 1.
19. *Proserpi*, 573 F. Supp. 2d at 449; see *Bridges*, 346 U.S. at 219 n.15.
20. *Proserpi*, 573 F. Supp. 2d at 448.

In 1948, Congress enacted a new version of the Suspension Act, with significant changes.<sup>21</sup> For instance, the 1948 version removed the sunset provision that contemplated the Act's automatic expiration, and instead provided for tolling during any period "when the United States is at war."<sup>22</sup> In addition, the 1948 Act provided that the limitations period on all applicable crimes would be tolled until three years *after* the President or Congress announced the termination of hostilities.<sup>23</sup> The pertinent portion of the 1948 Act provided that: "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 termination of hostilities as proclaimed by the President or by a concurrent resolution of Congress."<sup>24</sup> Congress did not amend the statute further until October 2008.

The October 2008 amendments are significant in three ways.<sup>25</sup> First, they broaden the scope of the Act, explicitly extending its provisions to any military conflict Congress authorizes under section 5(b) of the War Powers Resolution, including presumably the ongoing hostilities in Iraq and Afghanistan. Second, they provide that tolling will continue until five years after hostilities end. Third, they require a Presidential Proclamation with notice to Congress, or a concurrent Congressional resolution, to mark the end of hostilities and start the clock for the five-year tolling period.<sup>26</sup> Taken together, these changes add years of exposure to criminal prosecutions that would otherwise be time-barred.<sup>27</sup>

### **Judicial Construction of the Wartime Suspension Act**

Litigation under the Suspension Act has traditionally focused on three issues: first, what is a war; second, when does it end; and, third, what is the necessary relationship between the crime alleged and the war. Surprisingly, the answers to these seemingly straightforward questions have proven somewhat elusive.

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21. *United States v. Dailey*, 342 U.S. 225, 227 n.1 (1952).

22. See *Prosperi*, 573 F. Supp. 2d at 449. By adding this phrase, Congress intended to make the section permanent, rather than temporary legislation, and to "obviate the necessity of reenacting such legislation in the future." *Id.*

23. *Id.* at 449; see *Bridges*, 346 U.S. at 219 n. 15.

24. 18 U.S.C. 3287 (1948); see *Bridges*, 346 U.S. at 218.

25. S. Rep. 110-431 at 3-4.

26. *Id.* at 4; see Levy and D'Addio, *supra* note 17.

27. See Levy and D'Addio, *supra* note 17. The current version of the Act provides:

*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 an authorized use of the Armed Forces, or with any disposition of termination inventory by any war contractor or Government agency, 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 such definitions in the 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)).*

18 U.S.C. 3287.

## What is a war?

This basic question of what constitutes a “war” under the Act was raised for the first time in *United States v. Shelton*, 816 F. Supp. 1132 (W.D. Tex. 1993). In that case, the defendant moved to dismiss charges of conspiracy, bribery and misappropriation of federal funds and federal property as untimely. The Government argued that, under the Suspension Act, the limitations periods on these crimes were tolled during the first Gulf War. The court disagreed, reasoning that the Gulf War “did not constitute a ‘war’ as that term is used in the Suspension Act” because Congress had not exercised its Article I, Section 8 power under the Constitution to declare war in the Persian Gulf.<sup>28</sup>

Fifteen years later, the court in *United States v. Proserpi*, 573 F. Supp. 2d 436 (D. Mass. 2008), reached a different conclusion.<sup>29</sup> The court reasoned that if Congress had intended the “at war” limitation to be so narrow, it would have referred explicitly to a “declared” war, as it did in other statutes. The court also noted that there was no “compelling logic connecting a formal declaration of war with the state of being at war,”<sup>30</sup> and pointed out that the United States had engaged in many “massive and pervasive” wars, including the Korean War and Vietnam war, without such a formal declaration.<sup>31</sup> As a result, *Proserpi* held that the phrase “at war”—as written prior to the 2008 amendments—was broad enough to encompass undeclared wars, such as the ongoing hostilities in Iraq and Afghanistan.<sup>32</sup>

The 2008 Amendments have now put this debate to rest, at least prospectively, because they expressly provide that the Act applies either if the United States is “at war” or if Congress has authorized the use of force pursuant to the War Powers Resolution.<sup>33</sup> As a result, it is now plain that the statute of limitations may be tolled by an undeclared war.

## When does a war end?

The question of when the war ends is significant since the normal running of the limitations period will not resume until that point is reached. The Act provides that the statute of limitations “shall be suspended until three years after the termination of hostilities as proclaimed by the President or by a concurrent resolution of Congress.” But when do hostilities “terminate”? As the Court noted in *Proserpi*:

*Traditionally, the end of a war is marked by the signing of a formal peace treaty. However, formal surrenders like those of Germany and Japan at the end of World War II, like formal declarations of war, are the modern exceptions. The end of more recent conflicts have [sic]*

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28. *Id.* at 1135.

29. 573 U.S. at 442, 445-46 (D. Mass. 2008) (“[T]he Suspension Act gives no explicit indication of the type of military action that Congress intended to trigger a tolling of a limitations period under the Act. As a result, this case requires the court to make the determination of what it means for the United States to be ‘at war’ within the meaning of the Act.”).

30. *Id.* at 446.

31. *Id.* at 445-46, 447.

32. *See id.* at 449. (“Accordingly, it is clear from both the text and the legislative history that the at war provision of the Suspension Act was intended to capture any authorized military engagement that might compromise or impede the government’s ability to investigate allegations of fraud.”).

33. Interestingly, the legislative history and, indeed the very fact that Congress believed such an amendment to be necessary, suggests that Congress itself believed that the earlier version of the Act did require a formal declaration. *See* S. Rep. 110-431 at 2.

been signaled by Presidential pronouncement or by the diplomatic or de jure recognition of a former belligerent or a newly constituted government.<sup>34</sup>

573 F. Supp. 2d at 454.

But this explanation raises more questions than it answers. Most importantly, what is a “Presidential Pronouncement”? In *Prosperi*, the court found that President Bush’s May 1, 2003 announcement on the USS *Abraham Lincoln* that “[m]ajor combat operations in Iraq have ended” marked the end of that “war.” However, fighting in Iraq continued long after President Bush’s speech and American combat troops remain in that country to this day. Similarly, the Court in *Prosperi* found that the war in Afghanistan ended on December 22, 2001,<sup>35</sup> a conclusion that would surely be puzzling to the thousands of American soldiers who continue to fight there.

In short, the answer to the question of when hostilities terminate will often be a murky one. Moreover, in an era of non-traditional conflicts, such as the current wars in Iraq and Afghanistan, that ending point may lie far in the future, if it ever comes at all. Thus, as a result of these conflicts, the statute of limitations may be tolled indefinitely.

#### **What is the necessary relationship between the crime alleged and the war?**

Although the legislative history accompanying each version of the Act evidences Congress’s concern with war-related fraud, the plain language of the Act has been and continues to be ambiguous on this point. Nonetheless, not one court has refused to apply the Act based on the lack of a connection between the charged offense and the war in question.

In *United States v. Grainger*, the Supreme Court held that the Act tolled the limitations period on False Claims Act offenses committed during World War II. The defendant in *Grainger* was charged with submitting falsified documents to the Commodity Credit Corporation in order to obtain payments for purchases that the defendant had either never made, or had made at lower prices than the amounts requested.<sup>36</sup> The court found it sufficient that the offenses charged involved fraud of a pecuniary nature against the United States, and did not discuss the relationship between the allegations and the war effort.<sup>37</sup>

Relying on the court’s decision in *Grainger*, the court in *Prosperi* similarly concluded that the Act applied to charges of conspiracy, mail fraud, and the making of false statements in connection with a federally-financed highway project.<sup>38</sup> This highway project had no discernable connection to the conflicts in Iraq, Afghanistan, or anywhere else.<sup>39</sup> *Prosperi* held that “it ma[de] no difference that the

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34. 573 F. Supp. 2d at 454.

35. *Id.* at 455.

36. *Grainger*, 346 U.S. at 239.

37. *Id.* at 241.

38. *Prosperi*, 573 F. Supp. 2d at 439.

39. *See id.* at 441.

fraud [alleged] involved a construction project unrelated to the Iraqi or Afghani conflicts.” The court noted that the “absence of a connection between the fraud and wartime procurement has played no part” in the cases in which the government has successfully invoked the Suspension Act.<sup>40</sup>

## **United States v. Ohle**

What, you may ask, does all of this have to do with tax cases? The answer, at least according to the United States Attorney’s Office for the Southern District of New York, is plenty.

In *United States v. Ohle*, 08 Cr. 1109 (LBS) (S.D.N.Y.), the government charged a former Bank One executive with, among other things, conspiracy to commit wire fraud for his role in marketing and implementing an allegedly fraudulent tax shelter. When Ohle moved to dismiss this charge on statute of limitations grounds, the Government offered several responses, including the argument that the statute of limitations was tolled under the Suspension Act because a conspiracy to defraud the Government of tax revenues is a “fraud against the United States” under the Act.<sup>41</sup> In particular, the Government argued that the plain language of the statute does not require that the fraud be linked in any way to the war. In light of this allegedly “plain language,” the Government asserted that the legislative history indicating Congress’s intent “to ensure that the fog of war does not allow those who defraud the United States from getting away with it [sic] because their actions could not be investigated during hostilities,”<sup>42</sup> was irrelevant.

Because the Government prevailed on an alternative statute of limitations ground, the *Ohle* Court did not need to reach the Suspension Act issue.<sup>43</sup> Nonetheless, we can expect the Government to make similar arguments in the future and, accordingly, it is worthwhile to consider the implications of the Government’s position.

As a legal matter, the Government’s argument has force, but the argument begs the policy question of whether, as a matter of discretion, the Justice Department ought to be relying on the provision to extend the statute of limitations on all frauds against the government for an extended and indefinite period. Clearly, that was not Congress’s intent and there are sound policy reasons for providing definite, or at least reasonably definite, limits to the period of time within which prosecutions may be brought.

## **Conclusion**

Until *Ohle*, the possibility of indefinite tolling on tax evasion offenses had not been a significant issue; indeed, our research has revealed no reported cases in which prosecutors had previously attempted to rely on the Suspension Act to extend a statute of limitations in a tax fraud case. However, that

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40. *Id.* at 442 (citing *United States v. Lurie*, 222 F.2d 11, 15 (7th Cir. 1955); *United States v. Salvatore*, 140 F. Supp. 470, 473 (E.D. Pa 1956); *United States v. Strange Bros. Hide Co.*, 123 F. Supp. 177, 184 (N.D. Iowa 1954)).

41. See Government’s Memorandum of Law in Opposition to Defendants’ Pretrial Motions, at 18-21, *United States v. Ohle*, No. 08 Crim. 1109 (S.D.N.Y. Oct. 26, 2009).

42. S. Rep. 110-431 at 2 n.4.

43. *United States v. Ohle*, No. S2 08 Cr. 1109 (LBS), 2010 WL 102867, at \* 9-10 (S.D.N.Y. Jan. 12, 2010). Specifically, the court held that the wire fraud charges are governed by the ten-year limitations period prescribed by 18 U.S.C. § 3293(2) because the offense affected a financial institution.

This article is intended only as a general discussion of these issues. It is not considered to be legal advice. We would be pleased to provide additional details or advice about specific situations. For additional information on this important topic, please feel free to call upon your Dewey & LeBoeuf relationship partner.

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self-restraint is apparently a thing of the past, at least in the Southern District of New York, and, as a result, all taxpayers are now faced with the possibility that there may effectively be no statute of limitations at all for tax fraud offenses.

Certainly Congress can remedy this situation, but in the absence of a legislative fix, there is a compelling argument for the Justice Department to implement a policy limiting the circumstances in which prosecutors can rely on the Suspension Act to file what would otherwise be time-barred fraud charges. Such a policy, which would prohibit the filing of such charges unless the underlying frauds were war-related or expressly approved by a senior Department official, would go far towards ensuring that implementation of the Act comports with Congressional intent. Certainly, tax fraud is a significant problem in this country; however, there is no good reason why the vast majority of tax fraud cases cannot be investigated, and an indictment returned, within the normal six-year limitations period.