AN OVERVIEW OF TOLLS OF STATUTES OF LIMITATIONS ON ACCOUNT OF WAR: ARE THEY CURRENT AND RELEVANT IN THE POST-SEPTEMBER 11TH ERA?

*By Hon. Mark C. Dillon**

Introduction: The Attacks of September 11, 2001 and Their Aftermath 316
I. State Jurisdictions with War Toll Statutes 321
A. The Majority View 324
B. The Minority View 328
II. State Jurisdictions with No War Toll Statute 333
III. Federal Law Pertaining to War Tolls 337
A. The Wartime Suspension of Limitations Act 337
B. Equitable Tolling 338
C. The Servicemembers' Civil Relief Act 342
IV. Determining a Party's Entitlement to a War Toll and Its Length, From Commencement of Hostilities to Cessation 344
A. Judiciability 345
B. The Commencement of Hostilities 350
C. The Cessation of Hostilities 351
V. The Procedural Difference Between the "Suspension" of New York Statutes of Limitations by Executive Order and a "Toll" Under the State's War Toll Statute 354
VI. Would the Events of September 11, 2001 Have Qualified As "War" to Trigger a Toll of the New York Statutes of Limitations Under CPLR Section 209? 356

* Mark C. Dillon (B.A. Colgate University, M.A. New York University, J.D. Fordham Law School) is a Justice of the Appellate Division of the New York State Supreme Court, Second Judicial Department, and an Adjunct Professor of New York Practice at Fordham Law School. He was voted Fordham Law School's Adjunct Professor of the Year in 2009. The author acknowledges the research assistance of Fordham Law School student Mik Shin-Li and Pace Law School student Lisa Van Batavia, and the editing assistance of Fordham Law School '09 graduate Jeanette Ynfante, Esq.

VII. Whether the Governors of States Other Than New York Are Authorized to Suspend Statutes of Limitations During Declared Disaster Emergencies 362
VIII. Recent Legislative Developments in New York Arising Out of the Events of September 11, 2001 366
IX. A Suggestion for Any Future Disaster Emergency Executive Orders in New York 369
Conclusion 370

Introduction: The Attacks of September 11, 2001 and Their Aftermath

The World Trade Center in New York City was attacked on September 11, 2001.[1] American Airlines Flight 11 took off from Logan International Airport in Boston, Massachusetts, at 7:59 a.m. headed for Los Angeles.[2] The flight was hijacked,[3] and at 8:46 a.m., the Boeing 767 crashed into the North Tower of the World Trade Center.[4] The same morning, United Airlines Flight 175 took off from Logan International Airport in Boston, Massachusetts, at 8:14 a.m., also headed for Los Angeles, California.[5] It, too, was hijacked in flight.[6] At 9:03 a.m., United Airlines Flight 175 was flown into the South Tower of the World Trade Center.[7] There were similar hijackings of American Airlines Flight 77, which left Dulles International Airport at 8:20 a.m. bound for Los Angeles[8] and which was flown into the Pentagon Building at 9:37 a.m.,[9] and United Airlines Flight 93, which left Newark Liberty International Airport at 8:42 a.m. bound for San Francisco, California,[10] and which crashed in a field at Shanksville, Pennsylvania, at 10:03 a.m.[11]

1. *See* Nat'l Comm'n on Terrorist Attacks Upon the United States, The 9/11 Commission Report: Final Report of the National Commission on Terrorist Attacks Upon the United States 7–8 (2004) (hereinafter The 9/11 Commission Report).
2. *Id.* at 1–2, 4.
3. *Id.* at 4–5.
4. *Id.* at 4, 7.
5. *Id.* at 7.
6. *Id.*
7. *Id.* at 8.
8. *Id.*
9. *Id.* at 10.
10. *Id.*
11. *Id.* at 30.

The intensity of the collapse of the North and South Trade Towers measured 2.1 and 2.3, respectively, on the Richter Scale.[12] A cloud of smoke and ash caused by the collapse of the World Trade Towers hovered over Manhattan for many days.[13] A total of 2,752 persons were killed in the two plane crashes and the resulting collapse.[14] The death toll included William Harry Thompson, Thomas Jurgens, and Mitchel Wallace, three court officers of the New York State Unified Court System who left their posts at either the New York City Criminal Court Building at 100 Centre Street, or the court officers' training center at William Street, to assist at the Trade Towers before their collapse.[15]

The collapse of the World Trade Towers significantly impacted the operation of the courts in New York City.[16] In the days following the attacks, 14,000 attorneys were unable to access their offices which, according to statistics maintained by the New York State Office of Court Administration (OCA), was equal to 10.3% of all attorneys within the state and 19% of all attorneys practicing specifically within New York City.[17] The OCA itself was temporarily displaced from its headquarters at 25 Beaver Street, near where the World Trade Center had stood.[18] The site of the New York State Court of Claims located at Five World Trade Center was destroyed.[19] Courts in Manhattan were closed until Monday, September 17, 2001.[20] The practice of law by attorneys was negatively affected not just by the closure of the

---

12. Won-Young Kim, et al., *Seismic Waves Generated by Aircraft and Building Collapses at World Trade Center, New York City*, 82 EOS, TRANSACTIONS, AMERICAN GEOPHYSICAL UNION, 565 (2001).

13. *See* New York, September 11, 2001: 4 Days Later, http://www.l00k.org/september_11th_project/ (last visited Mar. 10, 2010).

14. *See* Posting of David W. Dunlap to City Room, http://www.cityroom.blogs.nytimes.com/2009/01/16/sept-11-death-toll-rises-by-one-to-2752/ (Jan. 16, 2009, 17:46 EST).

15. *See Today's News Update*, N.Y.L.J., Sept. 18, 2001, at 1; Daniel Wise, *Disaster Displaces 14,000 Lawyers: But Courts, Mindful of Victims, Rally to Return to Business of Justice*, N.Y.L.J., Sept. 14, 2001, at 1; Supreme Court Officers Ass'n, http://www.nysscoa.org/memory.html (last visited Mar. 10, 2010).

16. *See* Daniel Wise, *Court System Feels Disaster's Impact: Courthouses and Other Key Facilities Are Focus of Struggle to Restore Order to Administering Law*, N.Y.L.J., Sept. 13, 2001, at 1; Wise, *supra* note 15.

17. Wise, *supra* note 15.

18. *Id.* According to the article, the Chief Administrative Judge of the State of New York, Jonathan Lippman, who is now Chief Judge of the State of New York, oversaw the efforts to reopen courts in New York City from a satellite office in White Plains, New York.

19. *See id.*

20. *Statement of Chief Judge Judith S. Kaye*, N.Y.L.J., Sept. 18, 2001, at 2.

courts, but in certain instances by the death of attorneys,[21] the destruction of law offices,[22] the destruction of case evidence, the loss of documents and litigation files, and the unavailability of clients.[23]

On September 11, 2001, New York State Governor George Pataki signed Executive Order No. 113,[24] which declared a disaster emergency in the state.[25] The following day, September 12, 2001, Governor Pataki issued Executive Order No. 113.7,[26] which, *inter alia,* suspended New York Civil Practice Laws and Rules (CPLR) section 201,[27] which otherwise bars as untimely actions commenced be-

---

21. *See Today's News Update*, *supra* note 15. Notably, New York state law provides that the death of an attorney automatically stays litigation in which the attorney appeared, which remains in effect for thirty days after notice is served upon the party to appoint another attorney. N.Y. C.P.L.R. 321(c) (McKinney 2001). *See generally* Fusco v. Shailya Taxi Corp., 700 N.Y.S.2d 7 (App. Div. 1999). However, that rule has no application to a circumstance where an attorney dies or becomes incapacitated prior to the initiation of a suit, even on the eve of a statute of limitations deadline.

22. Law offices that were destroyed included those of many well-known and leading firms such as, Thacher Proffit & Wood LLP, Harris Beach PLLC, Serko & Simon LLP, *see World Trade Center Recovery Update*, N.Y.L.J., Oct. 9, 2001, at 4, and Sidley Austin Brown & Wood LLP, *see World Trade Center Recovery Update*, N.Y. L.J., Sept. 27, 2001, at 7. A number of other firms, including Holland & Knight LLP, Schinidler Cohen & Hochman LLP, and Cleary Gottlieb Steen & Hamilton LLP, were forced to relocate. *See World Trade Center Recovery Update*, N.Y.L.J., Oct. 9, 2001, at 4.

23. *See Smaller Firms Struggling After Sept. 11*, N.Y.L.J., Oct. 30, 2001, at 1.

24. N.Y. Comp. Codes R. & Regs. tit. 9, § 5.113 (2009).

25. *Id.*

26. *See* N.Y. Comp. Codes R. & Regs. tit. 9 § 5.113.7 (2009). The text of the executive order reads, in relevant part:

> I hereby temporarily suspend, from the date the disaster emergency was declared, pursuant to Executive Order Number 113, issued on September 11, 2001, until further notice, the following laws:
>
> > Section 201 of the Civil Practice Laws and Rules, so far as it bars actions whose limitation period concludes during the period commencing from the date that the disaster emergency was declared . . . until further notice, and so far as it limits a courts [sic] authority to extend such time, whether or not the time to commence such an action is specified in Article 2 of the Civil Practice Laws and Rules.

In addition to the general limitations grace period, Executive Order 113.7 extended deadlines for the commencement of criminal actions, trial readiness deadlines, and deadlines for appeals. *Id.*

27. CPLR section 201 specifically provides that "[a]n action . . . must be commenced within the time specified in the [statute of limitations] article unless a different time is prescribed by law or a shorter time is prescribed by written agreement. No court shall extend the time limited by law for the commencement of an action." N.Y. C.P.L.R. 201 (McKinney 2003); *see also* Randolph v. CIBC World Markets, 219 F. Supp. 2d 399, 401 n.1 (S.D.N.Y. 2002). *See generally* Stuart v. American Cyanamid Co., 158 F.3d. 622, 627 (2nd Cir. 1998); Dunkum v. Maceck Bldg. Corporation, 176 N.E. 392, 396 (N.Y. 1931); Matter of Magat v. County of Rockland, 697 N.Y.S.2d 114, 114–15 (App. Div. 1999); Cerio v. Charles Plumbing & Heating, Inc., 450

yond the applicable statute of limitations, and kept the suspension in place for the duration of the declared disaster emergency until further notice.[28] Further notice was later provided by Executive Order No. 113.28,[29] which established a cut-off for the suspension of the statutes of limitations at 11:59 p.m. on October 12, 2001.[30] However, under the same executive order, lawyers and litigants "directly affected" by the September 11th attacks were granted a further grace period for the statutes of limitations until 11:59 p.m. on November 8, 2001.[31]

The disaster-related executive orders of Governor Pataki generated certain litigation, not as to the Governor's authority to issue the orders,[32] but as to their applicability and meanings in particular circumstances.[33] These litigations are discussed later in this Article.

N.Y.S.2d 90, 91 (App. Div. 1982); Connell v. Hayden, 443 N.Y.S.2d 383, 392 (App. Div. 1981).

28. *See* Scheja v. Sosa, 771 N.Y.S.2d 554, 554 (App. Div. 2004).

29. *See* N.Y. Comp. Codes R. & Regs. tit. 9 § 5.113.28 (2009).

30. *Id.*; *see also* Scheja v. Sosa, 771 N.Y.S.2d at 555; CB Richard Ellis, Buffalo, NY, LLC v. JLC Holdings, LLC, 761 N.Y.S.2d 899, 900 (App. Div. 2003); Deltoro v. Arya, 760 N.Y.S.2d 201, 202 (App. Div. 2003).

31. *See* N.Y. Comp. Codes R. & Regs. tit. 9 § 5.113.28 (2009). Executive Order 113.28 reads, in pertinent part:

> I hereby temporarily suspend, from October 12, 2001, at 11:59 p.m., until November 8, 2001, at 11:59 p.m., the following laws:
>
> > To the extent that any person or an attorney for any reason has been directly affected by the disaster emergency, section 201 of the Civil Practice Laws and Rules, so far as it bars an action, by or on behalf of such person, whose limitation period concludes during the period this provision is in effect, whether or not the time to commence an action is specified in Article 2 of the Civil Practice Laws and Rules.

In addition to the general limitations grace period, Executive Order 113.28 extended deadlines for the commencement of criminal actions, criminal trial readiness deadlines, family court deadlines, and deadlines for criminal and civil appeals and cross-appeals. The full grace period after the attacks of September 11, 2001 totaled a maximum of fifty-eight days. A comparison of Executive Order 113.7 with 113.28 reveals that the latter is more expansive than the former, suggesting that the Executive Order became more complete with each revision.

32. Authority for the orders resides in New York's Executive Law 29-a(1), which allows the Governor of the state to "temporarily suspend specific provisions of any statute, local law, ordinance, or orders, rules or regulation . . . of any agency during a state disaster emergency, if compliance with such provisions would prevent, hinder, or delay action necessary to cope with the disaster." N.Y. Exec. Law § 29-a(1) (McKinney 2002).

33. *See* Randolph v. CIBC World Markets, 219 F. Supp. 2d 399, 401–02 (S.D.N.Y. 2002); McGarty v. City of New York, 843 N.Y.S.2d 287, 288 (App. Div. 2007); *In re* Anderson v. Cent. N.Y. Developmental Disabilities Serv. Office, 769 N.Y.S.2d 623, 625 (App. Div. 2003); CB Richard Ellis, Buffalo, NY, LLC v. JLC Holdings, LLC, 761 N.Y.S.2d at 899–900; Deltoro v. Arya, 670 N.Y.S.2d at 202.

The attacks of September 11, 2001, marked the commencement of what commonly became known as a "War on Terror."[34] Yet, in New York, the extensions that were permitted to the state's statutes of limitations were implemented via ad hoc executive orders, and not via the statutory war toll that already existed in section 209 of New York's CPLR.[35] New York's war toll, written and amended in times of conventional warfare and fear of nuclear confrontation, would likely prove to be inadequate or inapplicable in the context of significant acts of terrorism.

This Article examines war tolls in the fifty states, the District of Columbia, and in federal law, and whether legislated war-related tolls to statutes of limitations have any application to major acts of terrorism such as those which occurred at the World Trade Center on September 11, 2001. This Article also examines whether, in the absence of an applicable war toll, the various states and the District of Columbia provide any mechanism for extending their statutes of limitations by means of executive decrees. As will be shown, the states' statutory war tolls are inapplicable to significant acts of terrorism such as the 9/11 attacks, as the tolls are limited to conflicts between the United States and another "country," as differentiated from private organizations such as al Qaeda. Moreover, a significant number of states and the District of Columbia do not unambiguously vest their governing executives with the authority to suspend statutes of limitations during declared disaster emergencies. These issues should raise concerns for future plaintiffs who may potentially be unable to commence timely actions as a result of terrorist-related events beyond their control, such as the closure of courts, the death of attorneys, the destruction of law offices, or the loss of necessary documents.

---

34. President George W. Bush gave a nationally televised address to a joint session of the U.S. Congress on September 20, 2001. At that time, he used the word "war" to describe efforts that would be undertaken against terrorists, and used the phrase "war on terror" once during that speech. *See* Address Before a Joint Session of the Congress on the United States Response to the Terrorist Attacks of September 11, 37 WEEKLY COMP. PRES. DOC. 1347 (Sept. 20, 2001). The phrase quickly attained common usage in the daily lexicon of the Bush Administration and the American public. More recently, the Obama Administration dropped the phrase "war on terror," out of concern that it sends a counterproductive message overseas. *See* Jay Solomon, *U.S. Drops 'War on Terror' Phrase, Clinton Says*, WALL ST. J., Mar. 31, 2009, at A16.

35. N.Y. EXEC. LAW. § 24(1)(g) (2002); N.Y. COMP. CODES R. & REGS. tit. 9, § 5.113.28 (2009).

I.
State Jurisdictions with War Toll Statutes

There is a phrase in Latin, *lex non cogit ad impossibilia,* which means that the law does not compel the doing of impossibilities.[36] This concept is what underlies tolls to statutes of limitations, by which the running of the limitations periods may be temporarily stopped.

Among the fifty states and the District of Columbia, twenty-three statutorily recognize a generalized toll of their statutes of limitations on account of war. Those states consist of Alabama,[37] Alaska,[38] California,[39] Idaho,[40] Kentucky,[41] Maine,[42] Massachusetts,[43] Michigan,[44] Minnesota,[45] Missouri,[46] Montana,[47] Nevada,[48] New York,[49] North Carolina,[50] North Dakota,[51] Oregon,[52] Pennsylvania,[53] South Carolina,[54] Utah,[55] Vermont,[56] Washington,[57] West Virginia,[58] and Wisconsin.[59] On balance, therefore, less than one half of all states and the District of Columbia have enacted general war tolling provisions to their statutes of limitations.[60] Only one state, South Dakota, has en-

36. *See* Black's Law Dictionary 1844 app. (9th ed. 2009).
37. *See* Ala. Code § 6-2-13 (LexisNexis 1998); *accord* Cent. of Ga. Ry. Co. v. Ramsey, 151 So. 2d 725, 731 (Ala. 1962).
38. *See* Alaska Stat. § 09.10.160 (2008).
39. *See* Cal. Civ. Proc. Code § 354 (West 2006).
40. *See* Idaho Code Ann. § 5-232 (2004).
41. *See* Ky. Rev. Stat. Ann. § 413.300 (LexisNexis 2005).
42. *See* Me. Rev. Stat. Ann. tit. 14, § 857 (2003).
43. *See* Mass. Ann. Laws ch. 260, § 8 (LexisNexis 2004).
44. *See* Mich. Comp. Laws Serv. § 600.5854 (LexisNexis 2000).
45. *See* Minn. Stat. § 541.15(a)(3) (West 2000).
46. *See* Mo. Rev. Stat. § 516.210 (2000).
47. *See* Mont. Code Ann. § 27-2-403 (2009).
48. *See* Nev. Rev. Stat. § 11.330 (2007).
49. *See* N.Y. C.P.L.R. 209 (McKinney 2003).
50. *See* N.C. Gen. Stat. § 1-34 (2000).
51. *See* N.D. Cent. Code § 28-01-27 (2006).
52. *See* Or. Rev. Stat. § 12.200 (2009).
53. *See* 42 Pa. Cons. Stat. Ann. § 5534 (West 2004).
54. *See* S.C. Code Ann. § 15-3-80 (2005).
55. *See* Utah Code Ann. § 78B-2-107 (2008); *see also* Platz v. Int'l Smelting Co., 213 P. 187, 188 (Utah 1922).
56. *See* Vt. Stat. Ann. tit. 12, § 554 (2002).
57. *See* Wash. Rev. Code § 4.16.210 (West 2005).
58. *See* W. Va. Code § 55-2-17 (LexisNexis 2000).
59. *See* Wis. Stat. § 893.20 (West 1997).
60. The absence of war tolls in the District of Columbia and the state of Hawaii is of particular interest. In the post-Revolutionary history of the United States, the District of Columbia is the only jurisdiction that was both occupied and burned by a foreign enemy during war. This occurred on August 24, 1814, during the War of 1812 between the United States and Great Britain, while James Madison was President of the United States. The British burned the White House and various other

acted a statute expressly counting the time of war against the statute of limitations rather than recognizing a toll.[61]

The geographic distribution of states that recognize a war-based toll to their statutes of limitations is unrevealing. The states are not clustered in any regionally or historically distributive pattern. On the contrary, every region of the country has some number of states with statutory war tolls: three such states in New England, consisting of Maine,[62] Massachusetts,[63] and Vermont;[64] three in the mid-Atlantic region consisting of New York,[65] Pennsylvania,[66] and West Virginia;[67] four southern states including Alabama,[68] Kentucky,[69] North Carolina,[70] and South Carolina;[71] five states in the Midwest including Michigan,[72] Minnesota,[73] Missouri,[74] North Dakota,[75] and Wisconsin;[76] Idaho,[77] Montana,[78] Oregon,[79] and Washington[80] in the Northwest; Nevada[81] and Utah[82] in the Southwest; and Alaska,[83] California[84] in the West.

Just as there is no regional pattern to the war toll statutes, there also seems to be no chronological pattern to their initial enactments. It might be expected that the velocity of war toll enactments by the states would increase in the years immediately following major wars,

---

buildings of the federal government. *See* WALTER R. BORNEMAN, 1812: THE WAR THAT FORGED A NATION 226–31 (2004); ROBERT A. RUTLAND, JAMES MADISON, THE FOUNDING FATHER 230–31 (1987). Hawaii is the only U.S. territory that has been militarily attacked, which occurred, of course, at Pearl Harbor on December 7, 1941. *See* WILLIAM L. SHIRER, THE RISE AND FALL OF THE THIRD REICH 892 (1960).

61. *See* S.D. CODIFIED LAWS § 15-2-21 (2004).
62. *See* ME. REV. STAT. ANN. tit. 14, § 857 (2003).
63. *See* MASS. ANN. LAWS ch. 260, § 8 (LexisNexis 2004).
64. *See* VT. STAT. ANN. tit. 12, § 554 (2002).
65. *See* N.Y. C.P.L.R. 209 (McKinney 2003).
66. *See* 42 PA. CONS. STAT. ANN. § 5534 (West 2004).
67. *See* W. VA. CODE § 55-2-17 (LexisNexis 2000).
68. *See* ALA. CODE § 6-2-13 (LexisNexis 1998).
69. *See* KY. REV. STAT. ANN. § 413.300 (LexisNexis 2005).
70. *See* N.C. GEN. STAT. § 1-34 (2000).
71. *See* S.C. CODE ANN. § 15-3-80 (2005).
72. *See* MICH. COMP. LAWS SERV. § 600.5854 (LexisNexis 2000).
73. *See* MINN. STAT. § 541.15(a)(3) (West 2000).
74. *See* MO. REV. STAT. § 516.210 (2000).
75. *See* N.D. CENT. CODE § 28-01-27 (2006).
76. *See* WIS. STAT. § 893.20 (West 1997).
77. *See* IDAHO CODE ANN. § 5-232 (2004).
78. *See* MONT. CODE ANN. § 27-2-403 (2009).
79. *See* OR. REV. STAT. § 12.200 (2009).
80. *See* WASH. REV. CODE § 4.16.210 (West 2005).
81. *See* NEV. REV. STAT. § 11-330 (2007).
82. *See* UTAH CODE ANN. § 78B-2-107 (2008).
83. *See* ALASKA STAT. § 09-10.160 (2008).
84. *See* CAL. CIV. PROC. CODE § 354 (West 2006).

such as the late 1860s, the early 1920s, and the late 1940s. A survey of the war toll statutes suggests otherwise, at least as to their derivative enactments, which follow no apparent major conflict pattern. Although all war toll statutes existing today appear to have been revised or recodified on one or more occasions, their derivative statutes were initially enacted or published at least as far back as, for instance, in Pennsylvania in 1815,[85] Massachusetts in 1836,[86] Vermont in 1840,[87] Michigan in 1846,[88] New York in 1848,[89] Wisconsin in 1849,[90] Alabama in 1852,[91] Washington in 1854,[92] Montana in 1866,[93] South Carolina in 1912,[94] California in 1872,[95] North Dakota in 1877,[96] Idaho in 1881,[97] Nevada in 1912,[98] the Alaska territory in 1913,[99] Utah in 1917,[100] West Virginia in 1863,[101] Kentucky in 1922,[102] and Maine in 1954.[103] None of the war tolls on the books today exist in the identical form as their original enactments.

Although the origination of the various war toll statutes cannot be tied generally to military conflicts, many of the statutes' *revisions* are proximate to wars involving the United States. During the Civil War era, Vermont amended its war toll in 1862,[104] while Alabama did so in 1867.[105] Near or after the conclusion of World War I, war toll statutes were amended in Vermont in 1917,[106] Idaho in 1919,[107] Missouri in

85. *See* 12 PA. STAT. § 74 (1815).
86. *See* MASS. REV. STAT. tit. 5, ch. 120, § 8 (1836).
87. *See* VT. GEN. STAT. ch. 58, § 13 (1840).
88. *See* MICH. REV. STAT. tit. 26, ch. 140, § 8 (1846).
89. *See* N.Y. CODE PROC. § 103 (Field Code 1848).
90. *See* WIS. REV. STAT. ch. 127, § 31 (1849).
91. *See* ALA. CODE tit. 1, ch. 21, § 2500 (1852).
92. *See* WASH. CODE p. 365, § 13 (1854).
93. *See* MONT. STAT. p. 469, § 16 (Bannack 1866).
94. *See* S.C. CODE PROC. part 2, tit. 1, ch. 4, § 150 (1912).
95. *See* CAL. CIV. PROC. CODE § 354 (West 1872).
96. *See* N.D. CODE CIV. PROC. § 66 (1877).
97. *See* IDAHO CODE. CIV. PROC. § 172 (1881).
98. *See* NEV. REV. LAWS § 4979 (1912).
99. *See* ALASKA COMP. LAWS § 850 (1913).
100. *See* UTAH COMP. LAWS § 6483 (1917).
101. *See* W. VA. CODE ch. 149, § 17 (1863). This section can technically be traced back to the Code of Virginia in 1849, which became the first code of West Virginia.
102. *See* KY. STAT. § 2534 (Carroll 1922). *But see* Louisville & N.R. Co. v. Buckner, 71 Ky. (8 Bush) 277 (1971) (recognizing a suspension of statutes of limitations during the Civil War, under principles of international law).
103. *See* ME. REV. STAT. ANN. tit. 14, § 857 (1954).
104. *See* VT. GEN. STAT. ch. 63, § 14 (1862).
105. *See* REV. CODE ALA. part 3, tit. 1, ch. 21, § 2924 (1867).
106. *See* VT. GEN. LAWS tit. 12, § 1859 (1917).
107. *See* IDAHO COMP. LAWS § 4072 (1919).

1919,[108] Montana in 1921,[109] and Minnesota in 1923.[110] Many war toll revisions were implemented during and shortly after World War II, as in California in 1943,[111] Utah in 1943,[112] North Dakota in 1943,[113] New York in 1943, 1948, and 1949,[114] Montana in 1947,[115] Vermont in 1947,[116] and Michigan in 1948.[117] Even the Cold War may have influenced revisions to war tolls, such as New York in 1950 and 1962,[118] Utah in 1951 and 1953,[119] Maine in 1954,[120] and Michigan in 1961.[121]

The substance of the various states' war toll statutes falls primarily into two broad categories, classified here as a "majority" view and a "minority" view.

A. The Majority View

Eighteen states have war toll statutes that bear remarkable substantive similarities to one another, and which represent the "majority" view. These states consist of Alabama, Alaska, Idaho, Kentucky, Maine, Massachusetts, Minnesota, Missouri, Montana, Nevada, North Carolina, North Dakota, Oregon, Utah, Vermont, Washington, West Virginia, and Wisconsin.[122] The current war toll statutes of Alaska,

---

108. *See* REV. STAT. MO. § 1327 (1919).
109. *See* REV. CODE MONT. part 3, ch. 5, § 9053 (1921).
110. *See* MINN. GEN. STAT. ch. 77, § 9202 (1923).
111. *See* 1943 Cal. Stat. 1043.
112. *See* UTAH CODE § 104-12-39 (Supp. 1943).
113. *See* N.D. REV. CODE § 28-0127 (1943).
114. *See* 1943 N.Y. Laws 1092; 1948 N.Y. Laws 1518; 1949 N.Y. Laws 1943. Indeed, the Appellate Division of the state's Supreme Court discussed at length the 1948 and 1949 amendments to the state's war toll as responsive to circumstances that had arisen during World War II. *See* Von Hofmannsthal v. Wolfe, 93 N.Y.S.2d 550 (App. Div. 1949).
115. *See* REV. CODE MONT. § 93-2707 (1947).
116. *See* VT. STAT. § 1699 (1947).
117. *See* MICH. COMP. LAWS § 600.5854 (1948).
118. *See* 1950 N.Y. Laws 2082; 1962 N.Y. Laws 1297.
119. *See* 1951 Utah Laws 150–51; 1953 Utah Laws § 78-12-39.
120. *See* ME. REV. STAT. ch. 112, § 101 (1954).
121. *See* 1963 Mich. Pub. Acts, 593.
122. ALA. CODE § 6-2-13 (LexisNexis 1998); ALASKA STAT. § 09.10.160 (2008); IDAHO CODE ANN. § 5-232 (2004); KY. REV. STAT. ANN. § 413.300 (LexisNexis 2005); ME. REV. STAT. ANN. tit. 14, § 857 (2003); MASS. ANN. LAWS ch. 260, § 8 (LexisNexis 2004); MINN. STAT. § 541.15(a)(3) (West 2000); MO. REV. STAT. § 516.210 (2000); MONT. CODE ANN., § 27-2-403 (2009); NEV. REV. STAT. § 11.330 (2007); N.C. GEN. STAT. § 1-34 (2000); N.D. CENT. CODE § 28-01-27 (2006); OR. REV. STAT. § 12.200 (2009); UTAH CODE ANN. § 78B-2-107 (2008); VT. STAT. ANN. tit. 12, § 554 (2002); WASH. REV. CODE § 4.16.210 (West 2005); W. VA. CODE § 55-2-17 (LexisNexis 2000); WIS. STAT. § 893.20 (West 1997). While the text of West Virginia's statute does not bear these substantial similarities to the others, it is in-

Montana, North Carolina, and Oregon are almost word-for-word identical to one another.[123] The tolling language of other states within the "majority" category, while perhaps not absolutely identical, is often so close in wording as to suggest that some states borrowed language from others, such as geographically-proximate Maine and Vermont[124] and the more far-flung Kentucky and Nevada.[125]

Under the majority view, a toll suspends the states' statutes of limitations in favor of persons who are "subjects" or "citizens" of a country that is at war with the United States.[126] Naturally, the statutes read in favor of "persons"[127] and, in the case of Kentucky, "plaintiff[s]"[128] commencing actions, as only parties initiating claims need be concerned about their timeliness in the first instance.[129] In this regard, the statutes are necessarily plaintiff-oriented. Because a pur-

---

cluded in the set of majority war tolls because its language tolls in favor of foreign plaintiffs. Some war toll statutes, such as those of Alaska and Nevada, have titles restricting their applicability to foreign plaintiffs. A survey of case law from other states demonstrates that their war tolls have only been applied in favor of alien plaintiffs. *E.g.,* Maryland Casualty Co. v. Vidigoj, 270 S.W. 472 (Ky. Ct. App. 1925); Hammond v. Johnston, 6 S.W. 83, 91–92 (Mo. 1887); State *ex rel.* Biering v. Dist. Court, Fourteenth Judicial Dist., Meagher County, 140 P.2d 583 (Mont. 1943); Platz v. International Smelting Co., 213 P. 187, 190–91 (Utah 1922) ("[T]he running of the statute of limitations is tolled in favor of an alien enemy during a period of war."). No cases are found where the same or similar statutes have been interpreted as favoring resident plaintiffs.

123. *Compare* ALASKA STAT. § 09.10.160 (2008), *with* MONT. CODE ANN. § 27-2-403 (2009), *with* N.C. GEN. STAT. § 1-34 (2000), *with* OR. REV. STAT. § 12.200 (2009).

124. *Compare* ME. REV. STAT. ANN. tit. 14, § 857 (2003), *with* VT. STAT. ANN. tit. 12, § 554 (2002).

125. *Compare* KY. REV. STAT. ANN. § 413.300 (LexisNexis 2005), *with* NEV. REV. STAT. § 11.330 (2007).

126. *See* ALA. CODE § 6-2-13 (LexisNexis 1998); ALASKA STAT. § 09.10.160 (2008); IDAHO CODE ANN. § 5-232 (2004); KY. REV. STAT. ANN. § 413.300 (LexisNexis 2005); ME. REV. STAT. ANN. tit. 14, § 857 (2003); MASS. ANN. LAWS ch. 260, § 8 (LexisNexis 2004); MINN. STAT. § 541.15(a)(3) (West 2000); MO. REV. STAT. § 516.210 (2000); MONT. CODE ANN., § 27-2-403 (2009); NEV. REV. STAT. § 11.330 (2007); N.C. GEN. STAT. § 1-34 (2000); N.D. CENT. CODE § 28-01-27 (2006); OR. REV. STAT. § 12.200 (2009); UTAH CODE ANN. § 78B-2-107 (2008); VT. STAT. ANN. tit. 12, § 554 (2002); WASH. REV. CODE § 4.16.210 (West 2005); WIS. STAT. § 893.20 (West 1997).

127. *See* ALASKA STAT. § 09.10.160 (2008); IDAHO CODE ANN. § 5-232 (2004); ME. REV. STAT. ANN. tit. 14, § 857 (2003); MASS. ANN. LAWS ch. 260, § 8 (LexisNexis 2004); MO. REV. STAT. § 516.210 (2000); MONT. CODE ANN., § 27-2-403 (2009); NEV. REV. STAT. § 11.330 (2007); N.C. GEN. STAT. § 1-34 (2000); N.D. CENT. CODE § 28-01-27 (2006); OR. REV. STAT. § 12.200 (2009); UTAH CODE ANN. § 78B-2-107 (2008); VT. STAT. ANN. tit. 12, § 554 (2002); WASH. REV. CODE § 4.16.210 (West 2005); WIS. STAT. § 893.20 (West 1997).

128. *See* KY. REV. STAT. ANN. § 413.300 (LexisNexis 2005).

129. Of course, defendants wishing to interpose counterclaims must independently do so within the governing statute of limitations, so there may be certain instances

pose of a war toll is to suspend the statute of limitations when hostilities prevent plaintiffs from accessing American courts, it is not surprising that the only category of plaintiffs expressly eligible for the saving provisions of the war tolls are the subjects and citizens of foreign countries at war with the United States.[130] Significantly, the majority of war toll statutes do not, by their state-by-state language, extend the toll to home state residents who wish to commence actions against foreign nationals while their countries are at war with the United States. The statutes have also been construed as inapplicable to citizens of countries at war with the United States while those citizens reside in the United States.[131] In other words, the benefit of the majority war toll solely favors foreign nationals present in their foreign territories who, because of war, are unable to commence actions in one of the American states.

The applicability of states' war tolls under the majority view has been, in almost all cases, liberally construed in favor of the foreign

---

where defendants, rather than just plaintiffs, need be concerned about the timeliness of their claims.

130. *See, e.g.*, *In re* Spinosa's Estate, 255 P.2d 843, 846 (Cal. Ct. App. 1953) (finding Italian heir's claim for escheated property timely, given toll occasioned by World War II); *In re* Caravas' Estate, 250 P.2d 593, 595 (Cal. 1952) (finding Greek citizen's claim for escheated property timely, given the toll during World War II); Md. Cas. Co. v. Vidigoj, 270 S.W. 472 (Ky. Ct. App. 1925) (finding appointed Italian alien property custodian during World War I entitled to toll of statute of limitations); Afric v. Alaska United Gold Min. Co., 6 Alaska 540 (D. Alaska 1922) (finding administrator of estate of a subject of Austria-Hungary during World War I); German Sav. & Loan Soc. v. Hutchinson, 8 P. 627, 637 (Cal. 1885).

131. *See supra* note 130; *see also* Petition of Bernheimer, 130 F.2d 396, 399 (3d Cir. 1942) (finding no war toll applicable for German national residing in United States during World War II); Summar v. Besser Mfg. Co., 17 N.W.2d 209, 211 (Mich. 1945) (holding Greek national residing in United States during World War II not afforded the benefit of war toll), *abrogated on other grounds by* Sexton v. Ryder Truck Rental, Inc., 320 N.W.2d 843 (Mich. 1982); State *ex rel.* Gaspar v. District Court of Fourteenth Judicial Dist. In and For Meagher County, 124 P.2d 1010 (Mont. 1942) (holding Romanian citizen residing in United States during war time not barred from commencing action in American courts); Krachanake v. Acme Mfg. Co., 95 S.E. 851, 852–53 (N.C. 1918) (finding Austrian native, residing in the United States, not barred from using courts in the United States and therefore not entitled to a war toll). There appears to be a split in authority as to whether Japanese interned during World War II could avail themselves of the statutory war toll. *Compare* Gregoire v. G.P. Putnam's Sons, 93 F. Supp. 929, 930 (S.D.N.Y. 1950) (holding resident alien's ability to access courts despite internment barred use of war toll, though cause of action untimely in any event), *with* Taketa v. State Bd. of Equalization, 231 P.2d 873, 875 (Cal. Ct. App. 1951) (deeming resident Japanese alien interned during World War II under a disability to commence action to restore liquor license, though cause of action untimely despite toll); Arndt-Ober v. Metropolitan Opera Co., 169 N.Y.S. 944, 947 (App. Div. 1918).

nationals residing abroad.[132] The statutes uniformly speak to both "subjects" and "citizens" of countries at war with the United States. Residents of foreign nations that are not at war with the United States, but whose national territories have been invaded and occupied by a country at war with the United States, have been included within the scope of the war tolls.[133] The extension of war toll benefits to resident aliens of countries not at war with the United States, but occupied by an enemy at war with the United States, is not a great leap of statutory construction. During times of enemy occupation, such persons are "subjects" of the foreign power at war with the United States, consistent with the language of the states' war toll statutes.[134] Moreover, as explained by the Supreme Court of California in *In Re Caravas' Estate*, residents of enemy occupied countries are forbidden by the federal Trading With the Enemy Act[135] from maintaining proceedings

132. The only notable potential exception appears to be *Gregoire v. G.P. Putnam's Sons,* 93 F. Supp. at 930, wherein an enemy alien was nevertheless capable of commencing an action despite internment, and on that basis, was denied a war toll.

133. *See In re* Caravas' Estate, 250 P.2d at 595 (finding Greek citizen's claim for escheated property timely, given Germany's occupation of Greece during World War II); Peters v. McKay, 246 P.2d 585, 586 (Or. 1952) (holding Dutch citizen's claim for distributive share of decedent's property would have applied, given Germany's occupation of Holland during World War II, though the statute of limitations had expired despite the war toll); May v. Rosen, 205 P.2d 1118 (Cal. Ct. App. 1949) (finding Danish resident's action to quiet title would have been timely, given Germany's occupation of Denmark during World War II, though the statute of limitations had expired in any event).

134. *See* ALA. CODE § 6-2-13 (LexisNexis 1998); ALASKA STAT. § 09.10.160 (2008); IDAHO CODE ANN. § 5-232 (2004); KY. REV. STAT. ANN. § 413.300 (LexisNexis 2005); ME. REV. STAT. ANN. tit. 14, § 857 (2003); MASS. ANN. LAWS ch. 260, § 8 (LexisNexis 2004); MINN. STAT. § 541.15(a)(3) (West 2000); MO. REV. STAT. § 516.210 (2000); MONT. CODE ANN., § 27-2-403 (2009); NEV. REV. STAT. § 11.330 (2007); N.C. GEN. STAT. § 1-34 (2000); N.D. CENT. CODE § 28-01-27 (2006); OR. REV. STAT. § 12.200 (2009); UTAH CODE ANN. § 78B-2-107 (2008); VT. STAT. ANN. tit. 12, § 554 (2002); WASH. REV. CODE § 4.16.210 (West 2005); WIS. STAT. § 893.20 (West 1997). Though the statutes of Michigan, New York, Pennsylvania, and South Carolina are not in the majority view, they also refer to subjects and citizens. *See* MICH. COMP. LAWS SERV. § 600.5854 (LexisNexis 2000); N.Y. C.P.L.R. 209(b) (McKinney 2003); 42 PA. CONS. STAT. ANN. § 5534(b) (West 2004); S.C. CODE ANN. § 15-3-80 (2005). California is the only state that has not adopted the terms "subject" and "citizen" in its war toll statute. *See* CAL. CIV. PROC. CODE § 354 (West 2006).

135. *See* 50 U.S.C.A. app., §§ 1–4 (2006). *See generally* The Rita Maersk, 52 F. Supp. 56, 59 (D. Mass. 1943), *aff'd sub nom.*, United States v. Grain Imps. (ÉIRE) Ltd., 144 F.2d 921 (1st Cir. 1944); Compagnie Francaise De L'Afrique Occidentale, French West African Co. v. Otho, 57 F. Supp. 829, 830 (S.D.N.Y. 1944); H. P. Drewry S. A. R. L. v. Onassis, 42 N.Y.S.2d 74, 78 (App. Div. 1943), *aff'd mem.*, 53 N.E.2d 243 (N.Y. 1944); Sakin v. London, N.Y., Shanghai Trading Corp., 100 N.Y.S.2d 178, 179 (App. Div. 1950).

during war time in a state court.[136] Since a purpose of a war toll is to suspend the statute of limitations during periods of hostilities between nations that prevent plaintiffs from accessing American courts, it is logical that the beneficiaries of the toll include not only citizens of the countries with which the United States is at war, but the residents of enemy-occupied countries as well.

Differences amongst the war toll statutes of the majority view are few. The Alabama war toll, by its language, is uniquely and expressly limited to actions involving contracts.[137] The Nevada war toll uniquely specifies that no "citizen or person of any state engaged in rebellion against the United States Government" should be considered an alien within the statute.[138] Any other substantive differences in the language of these war tolls evade discernment.

B. The Minority View

A minority of states with statutory war tolls confer the benefits of the toll to both foreign nationals as well as residents of the American states. The war toll statutes of California, Michigan, New York, Pennsylvania, and South Carolina, which comprise the minority view, provide a more complicated and expansive view of the subject than other state counterparts. The substantive language of the Pennsylvania statute is borrowed from New York,[139] so that the state and the commonwealth may be treated as one in the same.

The minority view statutorily applies the war toll to three categories of persons. First, as with the majority view, the toll benefits subjects and citizens of foreign countries at war with the United States.[140]

---

136. *See In re* Caravas' Estate, 250 P.2d at 593; Meier v. Schmnidt, 35 N.W.2d 500 (Neb. 1949).

137. *See* ALA. CODE § 6-2-13 (LexisNexis 1998).

138. *See* NEV. REV. STAT. § 11.330 (2007).

139. *See* 42 PA. CONS. STAT. ANN. § 5534, Official Source Note (West 2004).

140. *See* MICH. COMP. LAWS SERV. § 600.5854 (LexisNexis 2000); 1941–42 Mich. Op. Atty. Gen. 516 (Op. 22768, Feb. 20, 1942); N.Y. C.P.L.R. 209(b) (McKinney 2003); Rothbarth v. Herzfeld, 119 N.E. 1075 (N.Y. 1918); Sakin v. London, N.Y., Shanghai Trading Corp., 99 N.Y.S.2d at 179; Gallewski v. H. Hentz & Co., 90 N.Y.S.2d 855, 856 (Sup. Ct. 1949), *aff'd*, 93 N.Y.S.2d 546 (App. Div. 1949), *app. granted*, 94 N.Y.S.2d 822 (App. Div. 1949), *aff'd*., 93 N.E.2d 620 (N.Y. 1950); Farenholtz v. Meinshausen, 168 N.Y.S. 869, 870 (App. Div. 1918); 42 PA. CONS. STAT. ANN. § 5534(b) (West 2004); Garvin v. Diamond Coal & Coke Co., 123 A. 468, 468–69 (Pa. 1924); *accord* CAL. CIV. PROC. CODE § 354 (West 2006). While California's statute does not use the terms "subject" or "citizen," the statute is applicable to a "person" under a disability to commence an action by reason of a state of war. *See In re* Spinosa's Estate, 255 P.2d 843, 847–48 (Cal. Dist. Ct. App. 1953) (holding Italian heir's claim to escheated property timely, given toll of statute of limitations during World War II); *In re* Caravas' Estate, 250 P.2d at 596–98 (holding Greek

New York and Pennsylvania take the same concept a step further, by directing their statutory language not just to countries at war with the United States, but also countries at war with *allies* of the United States.[141] What qualifies as a third party "ally" nation of the United States is not expressly stated in the statutes.[142] No case law interpreting the term has been generated in either New York or Pennsylvania relative to the war toll. The language regarding "allies" of the United States was included in the New York statute for the first time in an amendment effective on April 6, 1948,[143] shortly after World War II and the formulation of the alliance of nations that fought it. The 1948 amendment preceded the somewhat different alliances that were forged during the Cold War, such as the United States' memberships in the Organization of American States (OAS) later in 1948,[144] the North American Treaty Organization (NATO) in 1949,[145] the Australia, New Zealand, United States treaty (ANZUS) in 1951,[146] the Southeast Asia Treaty Organization (SEATO) in 1954,[147] and the

---

citizen's claim to escheated property timely, given toll of statute of limitations during World War II); May v. Rosen, 205 P.2d 1118, 1121 (Cal. Dist. Ct. App. 1949) (noting Danish resident's action to quiet title would have been timely, given Germany's occupation of Denmark during World War II, though the statute of limitations had expired in any event); *In re* Knauft's Estate, 211 P. 29, 30 (Cal. Dist. Ct. App. 1922) (holding German citizens' time to contest probate tolled during World War I).

141. *See* N.Y. C.P.L.R. 209 (McKinney 2003); 42 PA. CONS. STAT. ANN. § 5534 (West 2004). No other war tolls in the country expressly extend to conflicts involving allies of the United States.

142. *See* N.Y. C.P.L.R. 209 (McKinney 2003); 42 PA. CONS. STAT. ANN. § 5534 (West 2004).

143. *Compare* 1948 N.Y. Laws 1518, *with* 1943 N.Y. Laws 1092.

144. The OAS Charter was adopted on April 30, 1948. Its original membership consisted primarily of the members of the predecessor Rio Treaty, i.e., the United States and twenty other nations primarily located in South and Central America. *See* History—United States Permanent Mission to the Organization of American States, http://www.usoas.usmission.gov/history.html (last visited Mar. 16, 2010); Our History, http://www.oas.org/en/about/our_history.asp (last visited Mar. 16, 2010). Inter-American Treaty of Reciprocal Assistance (Rio Treaty), http://www.oas.org/juridico/english/sigs/b-29.html (last visited Mar. 16, 2010).

145. The NATO treaty was signed on April 4, 1949. Its original members consisted of the United States, France, Great Britain, Italy, Portugal, Belgium, Luxembourg, Holland, Iceland, Denmark, Norway, and Canada. *See* N. Am. Treaty Org., Topic: Member Countries, http://www.nato.int/cps/en/natolive/topics_52044.htm (last visited Mar. 16, 2010).

146. The ANZUS treaty was signed on September 1, 1951. Its membership at the time consisted of only the United States, Australia, and New Zealand. *See* U.S. Dept. of State, Background Note: Australia, Foreign Relations, http://www.state.gov/r/pa/ei/bgn/2698.htm (last visited Mar. 16, 2010).

147. The SEATO treaty was signed on September 8, 1954. Its original members included the United States, France, Great Britain, Australia, Thailand, the Philippines, New Zealand, and Pakistan. The treaty was dissolved on June 30, 1977. *See* U.S.

Central Treaty Organization (CENTO) in 1955.[148] Indeed, the Bill Jacket to the 1948 amendment demonstrates that the term "ally" was understood by the New York State Legislature in a World War II context, for claims that were then extant, rather than in a Cold War context.[149] Nevertheless, in the years that followed, the language extending the war toll to conflicts involving allies of the United States seemingly fit the various security alliances created in the late 1940s and the early- to mid-1950s.

The second category of plaintiffs within the scope of the "minority" view of the war toll statutes is comprised of persons, other than the subjects or citizens of a country at war with the United States or its allies, who are "resident[s] of, or . . . sojourner[s] in, a foreign country" at war with the United States or its allies or in a "territory occupied by the government of such foreign country."[150] The majority of war toll statutes do not expressly extend protection to persons in enemy-occupied territories, though, as has been shown, courts have liberally interpreted such statutes to include persons in non-belligerent countries occupied by a country at war with the United States.[151] In contrast, the war toll statutes of New York, Pennsylvania, California, and Michigan expressly extend to residents of those respective states.[152] Specifically, New York and Pennsylvania apply their statutes to persons unable to commence an action or proceeding within the state or commonwealth because "any party" is an alien subject or

---

Dept. of State, Southeast Asia Treaty Organization (SEATO) 1954, http://www.state.gov/r/pa/ho/time/lw/88315.htm (last visited Mar. 16, 2010).

148. The CENTO treaty was signed on February 24, 1955. Its original members consisted of Great Britain, Iran, Iraq, Pakistan, and Turkey, and they were joined by the United States in 1958. The treaty was dissolved in 1979. *See* U.S. Dept. of State, The Baghdad Pact (1955) and the Central Treaty Organization, http://www.state.gov/r/pa/ho/time/lw/98683.htm (last visited Mar. 16, 2010).

149. *See* Memorandum by the Executive Secretary and Director of Research of the Law Revision Commission relating to Assembly Int. No. 1723, Senate Rec. No. 308, Senate Pr. No. 2855, Bill Jacket, 1948 N.Y. Laws 1518, at 5. "Allies" in the context of World War II of course refers to those countries that sided with the United States against the Axis Powers. "Allies" during the Cold War refers instead to those countries that were members of the various United States-led security alliances.

150. *See* N.Y. C.P.L.R. 209(c) (McKinney 2003); 42 PA. CONS. STAT. ANN. § 5534(c) (West 2004).

151. *See, e.g.*, Gallewski v. H. Hentz & Co., 90 N.Y.S.2d 855, 856 (Sup. Ct. 1949), *aff'd*, 93 N.Y.S.2d 546 (App. Div. 1949), *app. granted*, 94 N.Y.S.2d 822 (App. Div. 1949), *aff'd*., 93 N.E.2d 620 (N.Y. 1950); Peters v. McKay, 246 P.2d 585, 590 (Or. 1952); May v. Rosen, 205 P.2d 1118 (Cal. Dist. Ct. App. 1949).

152. South Carolina's war toll provision is nearly identical to those of the majority view in all but its title. While South Carolina's language does not expressly extend to plaintiffs in this category, analysis of the majority view's language would still apply. *See* S.C. CODE ANN. § 15-3-80 (2005); *supra* note 133–136 and accompanying text.

citizen of a foreign country at war with the United States or its allies,[153] and to persons "entitled to commence an action or proceeding" while residing or sojourning in an enemy-occupied foreign country.[154] The persons identified in the statutes, by not being limited to the subjects and citizens of foreign countries, may therefore include New York and Pennsylvania residents who, because of war, are unable to initiate suits against foreign nationals, or who are temporarily residing or traveling in a foreign country at war with the United States or its allies, or who are located within the territory of an enemy-occupied country.[155] Indeed, the statutes have been interpreted by courts as applying equally and specifically to residents and non-residents of the state alike.[156] Similarly, the California statute is expressly applicable to persons under a disability to commence an action on account of war, without being restricted by its language to the subjects and citizens of foreign countries.[157] Likewise, the Michigan statute applies to any persons unable to prosecute an action in the courts of the state as a result of being detained in a country at war with the United States or detained by a neutral power, or because of "any other reason arising out of war,"[158] suggesting circumstances where the war toll could be applicable to residents of the state. Finally, South Carolina's war toll

153. *See* N.Y. C.P.L.R. 209(b) (McKinney 2003); 42 PA. CONS. STAT. ANN. 5534(b) (West 2004).

154. *See* N.Y. C.P.L.R. 209(c) (McKinney 2003); 42 PA. CONS. STAT. ANN. 5534(c) (West 2004).

155. *See* Bernstein v. N.V. Nederlandsche-Amerikaansche Stoomvaart-Maatschappij, 173 F.2d 71, 74 (2d Cir. 1949) (applying New York law), *amended on other grounds*, 210 F.2d 375 (2d Cir. 1954); Lord Day & Lord, Barrett Smith v. Socialist Republic of Vietnam, 134 F. Supp. 2d 549, 563 (S.D.N.Y. 2001); Rabinovitch v. Auerbach, 100 N.Y.S.2d 923, 929–30 (Sup. Ct. 1950) (citing Report of Law Revision Commission, Legislative Documents 1949, No. 65 L., pps. 26-30). The 1949 amendment to New York's war toll statute, which was intended to extend the statute to residents of the state, legislatively abrogated an earlier contrary holding of the Court of Appeals in *Nathan v. Equitable Trust Co.*, 165 N.E. 282 (N.Y. 1929).

156. *See* Bernstein v. N.V. Nederlandsche-Amerikaansche Stoomvaart-Maatschappij, 173 F.2d at 74 (applying New York law); Rabinovitch v. Auerbach, 100 N.Y.S.2d at 929–30.

157. *See* CAL. CIV. PROC. CODE § 354 (West 2006). California had also separately tolled the statute of limitations to December 31, 2010 for actions brought by owners, heirs, or beneficiaries of owners of Holocaust-era artwork in the possession of museums and galleries, *see* CAL. CIV. PROC. CODE § 354.3 (West 2006), for Armenian genocide victims, and their heirs or beneficiaries residing in the state, for claims arising out of certain insurance policies procured in Europe and Asia between 1875 and 1923, *see* CAL. CIV. PROC. CODE § 354.4 (West 2006), and for Mexican braceros, and their heirs or beneficiaries, who have a claim arising out of the failure to pay or return savings fund amounts during the 1940s, *see* CAL. CIV. PROC. CODE § 354.7 (West 2006).

158. *See* MICH. COMP. LAWS SERV. § 600.5854 (LexisNexis 2000).

statute is expressly applicable to suits "by and against" alien subjects and citizens.[159]

The third war toll category of the minority view states, unique to the statutes of New York and Pennsylvania, speaks to the issue of *where* the cause of action accrues. If a cause of action in favor of a resident or non-resident of the state accrues in a foreign country with whom the United States or its allies are at war, or in enemy-occupied territory, then the time between the commencement of the war and the termination of hostilities is excluded from the statute of limitations.[160] A reason for extending the war toll in such instances, based upon where the cause of action accrues, may be that war can be expected to interfere with a plaintiff's ability to *inter alia* serve process upon a defendant, obtain party and non-party discovery from foreign sources, and investigate and locate witnesses.

A review of the war toll provisions of all states that have them reveals that the statutes of New York and Pennsylvania are the most expansive. Only these two statutes expressly extend to all four of the following:

(1) both residents and non-residents of the states; and

(2) any party residing or traveling in foreign countries at war with the United States or its allies; and

(3) any party residing or traveling in territories occupied by war time enemies of the United States or its allies; and

(4) causes of action accrued in the foreign country at war with the United States or its allies, or accrued in an enemy-occupied territory.[161]

---

159. S.C. Code Ann. § 15-3-80 (2005). Though South Carolina's war toll uses language matching that of the majority view, the *title* of the statute sets it apart from majority view war tolls by making it expressly applicable in suits against aliens.

160. *See* N.Y. C.P.L.R. 209(a) (McKinney 2003); 42 Pa. Cons. Stat. Ann. § 5534(a) (West 2004); *see also* Bernstein v. N.V. Nederlandsche-Amerikaansche Stoomvaart-Maatschappij, 173 F.2d at 74 (applying New York law); Von Hofmannsthal v. Wolfe, 93 N.Y.S.2d 550, 552 (App. Div. 1949); Apton v. Barclay's Bank, Ltd., 83 N.Y.S.2d 488, 489–90 (App. Div. 1948).

161. *Compare* N.Y. C.P.L.R. 209 (McKinney 2003), *and* 42 Pa. Cons. Stat. Ann. § 5534 (West 2004), *with* Ala. Code § 6-2-13 (LexisNexis 1998), Alaska Stat. § 09.10.160 (2008), Cal. Civ. Proc. Code § 354 (West 2006), Idaho Code Ann. § 5-232 (2004), Ky. Rev. Stat. Ann. § 413.300 (LexisNexis 2005), Me. Rev. Stat. Ann. tit. 14, § 857 (2003), Mass. Ann. Laws ch. 260, § 8 (LexisNexis 2004), Mich. Comp. Laws Serv. § 600.5854 (LexisNexis 2000), Minn. Stat. § 541.15(a)(3) (West 2000), Mo. Rev. Stat. § 516.210 (2000), Mont. Code Ann. § 27-2-403 (2009), Nev. Rev. Stat. § 11.330 (2007), N.C. Gen. Stat. § 1-34 (2000), N.D. Cent. Code § 28-01-27 (2006), Or. Rev. Stat. § 12.200 (2009), S.C. Code Ann. § 15-3-80 (2005), Utah Code Ann. § 78B-2-107 (2008), Vt. Stat. Ann. tit. 12, § 554 (2002), Wash. Rev. Code § 4.16.210 (West 2005), *and* Wis. Stat. § 893.20 (West 1997).

Since the language of Pennsylvania's statute is borrowed from New York's,[162] and as the two states' case law on the war toll has been generated overwhelmingly on the New York side of their common border, the New York statute may be classified as the nation's leading war toll statute, at least in terms of its expansiveness and potential applicability.

The foregoing analysis of state war tolls therefore demonstrates a morbid coincidence, that the attacks on the World Trade Center on September 11, 2001, occurred within the one state, New York, that had the most expansive and decisionally-defined war toll statute. In Part VI, this coincidence will allow us to examine whether the 9/11 attacks could trigger even the broadest existing state war toll.

II.
State Jurisdictions with No War Toll Statute

A complete discussion of tolls to statutes of limitations on account of war also requires analysis of the states that have no war toll in their procedural statutes, but which may or may not have encountered the issue in their decisional authorities.

Seventeen states and the District of Columbia appear to have no specific reported cases dealing with a war-related tolling of the statute of limitations. These states are Arizona, Delaware, Florida, Georgia, Hawaii, Illinois, Louisiana, Maryland, Mississippi, Nebraska, New Hampshire, New Jersey, New Mexico, Oklahoma, Rhode Island, Virginia, and Wyoming. The absence of case law might not be particularly surprising for states that are thinly populated or that are not centers of international commerce. Such states present a smaller statistical likelihood that litigations would arise between state residents and foreign nationals, as in Delaware, Idaho, New Hampshire, New Mexico, Rhode Island, South Dakota, and Wyoming.[163] More surprising is the absence of case law dealing with war-related timeliness is-

162. *See* 42 Pa. Cons. Stat. Ann. § 5534, Official Source Note (West 2004).

163. The populations of these states are, in descending rank order, Oklahoma (28th), New Mexico (36th), Nebraska (38th), New Hampshire (41st), Rhode Island (43rd), Delaware (45th), and Wyoming (50th). *See* U.S. Census Bureau, The 2010 Statistical Abstract, Population, http://www.census.gov/compendia/statab/cats/population/html (last visited Mar. 16, 2010). Using 2008 as a guide, the fifteen states and District of Columbia with the smallest value of annual exports include, in descending rank order, Nebraska (36th), Oklahoma (37th), Delaware (39th), New Hampshire (40th), New Mexico (44th), Rhode Island (46th), the District of Columbia (49th), and Wyoming (50th). *See* U.S. Census Bureau, Foreign Trade Statistics, The 2010 Statistical Abstract, Foreign Commerce & Aid: Exports and Imports, http://www.census.gov/compendia/statab/foreign_commerce_aid/exports_and_imports.html (last visited Mar. 16, 2010).

sues from states with higher populations and greater international commerce, such as Florida, Georgia, Illinois, New Jersey, and Virginia.[164]

Seven states have reported older cases discussing the recognition of non-statutory war tolls in some form or fashion, all of which date back more than 100 years. These states are Arkansas,[165] Connecticut,[166] Iowa,[167] Kansas,[168] South Carolina,[169] Tennessee,[170] and Texas.[171] To the extent these dusty cases address circumstances where war prevented the initiation of litigation, they uniformly recognized the existence of a war toll even in the absence of enabling statutory authority.[172]

More "recent" cases from the states that are without war toll statutes, decided within the past one hundred years, similarly recognize a toll of the statute of limitations on account of intervening war, despite the absence of legislated war toll authority. The Supreme Court of Colorado specifically held under the circumstances of one case that

---

164. U.S. Government census data ranks the populations of Florida, Illinois, Georgia, New Jersey, and Virginia as fourth, fifth, ninth, eleventh, and twelfth largest, respectively. *See* U.S. Census Bureau, The 2010 Statistical Abstract, Population, http://www.census.gov/compendia/statab/cats/population.html (last visited Mar. 16, 2010). As for international commerce, these states ranked for exports in 2008, as among all states and the District of Columbia, as Florida (5th), Illinois (6th), New Jersey (10th), Georgia (13th), and Virginia (23rd). *See* U.S. Census Bureau, The 2010 Statistical Abstract, Foreign Commerce & Aid: Exports and Imports, http://www.census.gov/compendia/statab/cats/foreign_commerce_aid/exports_and_imports.html (last visited Mar. 16, 2010).

165. *See* Mayo v. Cartwright, 30 Ark. 407, 415 (1875) (holding Civil War did not suspend adverse possession statute), *overruled in part, on other grounds*, Whittington v. Flint, 43 Ark. 504, 521 (1884).

166. *See* Barton v. City of New Haven, 52 A. 403, 405 (Conn. 1902) (including war in list of disabilities which can suspend period of statute).

167. *See* Bradley v. Cole, 25 N.W. 849, 860 (Iowa 1885) (recognizing generally that war suspends statute of limitations between citizens of adverse belligerent powers).

168. *See* Foreman v. Carter, 9 Kan. 674, 679–80 (1872) (noting conflict of authorities as to whether war suspends statute of limitations).

169. *See* Nicks v. Martindale, 16 S.C.L. (Harp.) 135, 137 (Constitutional Court 1824) (noting that war suspends statute of limitations as to alien enemies).

170. *See* Neely v. Luster, 54 Tenn. 354 (1872) (noting that war suspends statute of limitation between opposing belligerents, and holding that closure of courts during war causes similar suspension); Townsend v. Townsend, 7 Tenn. (Peck) 1, 16 (Ct. Err. & App. 1821).

171. A case from Texas, *Jackson v. Houston*, 19 S.W. 799 (Tex. 1892), recognized a Civil War toll. However, in that case, the toll was recognized pursuant to Texas Rev. Stat. art. 5544, which was in effect at the time but was later repealed. Texas is therefore in the unusual position where its caselaw recognizes the validity of war tolling, but which is subject to the subsequent removal of its statutory predicate.

172. *See* Barton v. City of New Haven, 52 A. 403, 405 (Conn. 1902); Bradley v. Cole, 25 N.W. at 860; Neely v. Luster, 54 Tenn. at 354–55; Townsend v. Townsend, 7 Tenn. (Peck) at 16.

World War I suspended the statute of limitations as to an enemy alien, based upon principles of international law rather than state statutes.[173] The same outcome was reached by the Supreme Court of Ohio,[174] and consistent conclusions have been reached by appellate courts in Indiana,[175] Nebraska,[176] and the District of Columbia.[177]

Almost all states, with or without war toll statutes, have tolling provisions for parties whose "absence" from the state prevents the initiation of litigation. These statutes provide, generally-speaking, that the states' limitations periods are tolled when defendants are continuously without the state at the time the causes of action accrue or thereafter and service of process cannot be accomplished.[178] An absence

173. *See* Colo. Fuel & Iron Co. v. Indus. Comm'n., 216 P. 706, 706 (Colo. 1923).

174. *See* Indus. Comm'n of Ohio v. Rotar, 179 N.E. 135, 136–37 (Ohio 1931) ("It is elementary that, when a state of war exists, an alien enemy cannot prosecute any claim in the courts of a country at war with his country. Irrespective of statute, this is the universally accepted rule."). However, no disability would be recognized in Ohio for an enemy alien residing in the United States and not under an actual war disability preventing the commencement of an action. *See* Leiberg v. Vitangeli, 47 N.E.2d 235, 237 (Ohio Ct. App. 1942).

175. *See* Inland Steel Co. v. Jelenovic, 150 N.E. 391, 392–93 (Ind. App. 1926). However, it was also held in Indiana that the statutes of limitations are not suspended for plaintiffs that do not plead they resided in enemy territory. *See* Sadowski v. Hubbard Steel Foundry Co., 193 N.E. 676, 679 (Ind. App. 1935).

176. *Cf.* Meier v. Schmidt, 35 N.W.2d 500 (Neb. 1949) (finding that a German national would be entitled to a war toll in a probate proceeding, based on the inability to earlier proceed during World War II under the Trading With the Enemy Act).

177. *Cf.* McGuinness v. United States, 77 A. 22 (D.C. 1950) (holding the federal Wartime Suspension of Limitations Act was not intended to include violation of District of Columbia's law against passing bad checks). A particularly interesting case from another jurisdiction, Mississippi, is *Hill v. Boyland*, 40 Miss. 618 (High Ct. Err. & App. 1866). In *Hill*, the court noted that an Act of December 29, 1862, which suspended the statute of limitations for war, was null and void as it was enacted by a Confederate legislature, before the state reverted to its *status ante bellum*.

178. *See* ALA. CODE § 6-2-10 (LexisNexis 1998); ALASKA STAT. § 09.10.130 (2008); ARIZ. REV. STAT. ANN. § 12-501 (2003); ARK. CODE. ANN. § 16-56-120 (2005); COLO. REV. STAT. § 13-80-103.8(2) (2008); CONN. GEN. STAT. ANN. § 52-590 (2005); DEL. CODE ANN. tit. 10, § 8117 (1999); FLA. STAT. ANN. § 95.051(1)(a) (2002); GA. CODE ANN. § 9-3-94 (2007); HAW. REV. STAT. § 657-18 (1993); IDAHO CODE ANN. § 5-229 (2004); 735 ILL. COMP. STAT. ANN. 5/13-208(a) (West 2003); IND. CODE ANN. § 34-11-4-1 (LexisNexis 2008); IOWA CODE ANN. § 614.6 (West 1999); KAN. CIV. PROC. CODE ANN. § 60-517 (West 1967); LA. CODE CRIM. PROC. ANN. art. 579 (2003); ME. REV. STAT. ANN. tit. 14, § 866 (2003); MD. CODE ANN., CTS. & JUD. PROC. § 5-205(b) (LexisNexis 2006); MASS. GEN. LAWS ANN. ch. 260, § 9 (West 2004); MICH. COMP. LAWS ANN. § 600.5853 (West 2000); MINN. STAT. ANN. § 541.13 (West 2000); MISS. CODE ANN. § 15-1-63 (West 1999); MO. ANN. STAT. § 537.100 (West 2008); NEB. REV. STAT. § 25-214 (2008); NEV. REV. STAT. § 11.300 (2007); N.H. REV. STAT. ANN. § 508:9 (LexisNexis 2009); N.J. STAT. ANN. § 2A:14-22 (West 2000); N.M. STAT. ANN. § 37-1-9 (LexisNexis 2004); N.Y. C.P.L.R. 207 (McKinney 2003); N.C. GEN. STAT. ANN. § 1-21 (West 2000); OHIO REV. CODE ANN. § 2305.15 (West 2004); OR. REV. STAT. § 12-150 (2009); 42 PA.

statute is not a substitute for a war toll, as the reason for an absence toll (i.e., the inability to jurisdictionally serve process upon an out-of-state defendant) is not the same underlying reason for the war toll (i.e., the impossibility to access a court in-state on account of war). There would be no need for a plaintiff barred from courts by war, in any state that has an applicable war toll statute, to resort to an absence toll. Conversely, no reported case has been located in any state that has a general absence toll, but no specific war toll, where any party has sought to substitute an absence for war as the justification for tolling the statute of limitations. Of course, the most significant difference between an absence toll and a war toll, which prevents the first from acting as a clean substitute for the second, is that the absence toll favors the in-state plaintiffs seeking to commence actions and serve process upon out-of-state defendants,[179] whereas the war toll works in the majority of states in the opposite direction, in favor of enemy aliens seeking to initiate suit against defendants within the state.

Cons. Stat. Ann. § 5532(a) (West 2004); S.C. Code Ann. § 15-3-30 (2005); S.D. Codified Laws § 15-2-20 (2004); Tenn. Code Ann. § 28-1-111 (2000); Tex. Civ. Prac. & Rem. Code Ann. § 16.063 (Vernon 2008); Utah Code Ann. § 78B-2-104 (West 2008); Vt. Stat. Ann. tit. 12, § 552 (2002); Va. Code Ann. § 8.01-229(D) (2007); Wash. Rev. Code § 4.16.180 (West 2005); W. Va. Code Ann. § 55-2-17 (LexisNexis 2000); Wis. Stat. Ann. § 893.19(1) (West 1997); Wyo. Stat. Ann. § 1-3-116 (2009). For discussion of the applicability state absence tolls, see also, for example, Olseth v. Larson, 236 Fed. Appx. 443, (10th Cir. 2007); Gibson v. Nadel, 164 F.2d 970 (5th Cir. 1947); Venables v. Bell, 941 F. Supp. 26 (D. Conn. 1996); Kuk v. Nalley, 166 P.3d 47 (Alaska 2007); Jones v. Johnson, 244 S.W.3d 338 (Tenn. Ct. App. 2007); Mercer v. Andersen, 715 N.W.2d 114 (Minn. Ct. App. 2006); Andrews v. Stark, 592 S.E.2d 438 (Ga. Ct. App. 2003); Hansen v. Larsen, 797 A.2d 118 (Md. Ct. Spec. App. 2002); Herzberg v. Moseley Aviation, Inc., 964 P.2d 1137 (Or. Ct. App. 1998); Shin v. McLaughlin, 967 P.2d 1059 (Haw. 1998); Butterfield v. MacKenzie, 966 P.2d 658 (Idaho Ct. App. 1998); Meyer v. Paschal, 498 S.E.2d 635 (S.C. 1998); Johnson v. Stuenzi, 696 A.2d 237 (Pa. Super. Ct. 1997); Abbott v. Kiser, 654 So.2d 640 (Fla. Dist. Ct. App. 1995); Dalition v. Langemeier, 524 N.W.2d 336 (Neb. 1994); Cortes v. Cotton, 626 A.2d 1306 (Conn. App. Ct. 1993); Brossman v. Fed. Deposit Ins. Corp., 510 A.2d 471 (Del. 1986); Schumacher v. Tidswell, 360 N.W.2d 915 (Mich. Ct. App. 1984); Brown v. ProWest Transp. Ltd., 886 P.2d 223 (Wash. Ct. App. 1994); Burke v. Foss, 334 N.W.2d 861 (S.D. 1983); Bray v. Bayles, 618 P.2d 807 (Kan. 1980); Edmonsond v. Lakeside Hosp. Ass'n, 562 S.W.2d 361 (Mo. 1978); Walsh v. Ogorzalek, 361 N.E.2d 1247 (Mass. 1977); Tarter v. Insco, 550 P.2d 905 (Wyo. 1976); Selby v. Karman, 521 P.2d 609 (Ariz. 1974); Kennedy v. Lynch, 513 P.2d 1261 (N.M. 1973); Alex v. Grande, 285 N.Y.S.2d 909 (App. Div. 1967); Kisner v. Fiori, 157 S.E.2d 238 (W. Va. 1967); Merchs. & Planters Nat'l Bank of Sherman v. Appleyard, 77 S.E.2d 783 (N.C. 1953); U.S. Fid. & Guar. Co. v. Ransom, 5 So. 2d 238 (Miss. 1941); Freund v. Freund, 151 A. 375 (N.J. 1930); Finley v. Thorne, 226 N.W. 103 (Iowa 1929); Jayne v. Kane, 124 S.E. 247 (Va. 1924); Trask v. Karrick, 108 A. 846 (Vt. 1920); *In re* Gilbert's Estate, 167 N.W. 447 (Wis. 1918); Watson v. Lecklider, 45 N.E. 72 (Ind. 1896); Wooley v. Yarnell, 32 N.E. 891 (Ill. 1892); Quarles v. Bickford, 13 A. 642 (N.H. 1888).

179. *See supra* note 178.

In sum, the absence of statutory war toll authority in the majority of states has not historically prevented courts, in several of those states, from nevertheless recognizing tolls in appropriate instances, whether based upon the common law tolls on account of war or upon the defendant's absence from the state.

III.
Federal Law Pertaining to War Tolls

There is also a universe of statutes and case law on the federal level, independent of the fifty states and the District of Columbia, which must be addressed as part of any complete analysis of war toll issues.

A. The Wartime Suspension of Limitations Act

The United States Code (U.S.C.) contains no omnibus provision tolling the federal statutes of limitations on account of war. It does, however, contain the Wartime Suspension of Limitations Act (the Suspension Act),[180] which, despite its broad title, has narrow application. The Suspension Act tolls the statute of limitations in favor of the federal government in matters of fraud, real estate transactions, and commercial contracts related to the prosecution of war.[181] The statute has both criminal and civil application.[182] The type of conduct that is subject to the toll is further restricted by time, in that the offensive conduct must occur while the United States is "at war" or while Congress has enacted a specific authorization for the use of armed forces described in the War Powers Resolution.[183] When applicable, the statute suspends the statute of limitations until five years "after the termi-

180. *See* 18 U.S.C. § 3287 (2006).

181. *Id.*; *see also* Bridges v. United States, 346 U.S. 209 (1953); United States v. Gottfried, 165 F.2d 360 (2d Cir. 1948); United States v. Witherspoon, 211 F.2d 858 (6th Cir. 1954); United States v. Temple, 147 F. Supp. 118 (N.D. Ill. 1956); United States v. Taylor, 132 F. Supp. 886 (E.D.N.Y. 1955); United States v. Sack, 125 F. Supp. 633 (S.D.N.Y. 1954); United States v. Strange Bros. Hide Co., 123 F. Supp. 177 (N.D. Iowa 1954); United States v. Murphy-Cook & Co., 123 F. Supp. 806 (E.D. Pa. 1954); United States v. Epstein, 119 F. Supp. 946 (E.D. Pa. 1953); United States v. Showalter, 103 F. Supp. 806 (N.D. Cal. 1952). *See generally* Cailin M. Campbell, Case Comment, *Criminal Law—Wartime Suspension of Limitations Act Extends Filing Time For Fraud Claims Against Big Dig Contractors*—United States v. Prosperi, 573 F. Supp. 2d 436 (D. Mass. 2008), 14 Suffolk J. Trial & App. Advoc. 140 (2009).

182. *See* United States v. Kolsky, 137 F. Supp. 359, 361 (E.D. Pa. 1955).

183. *See* 18 U.S.C. § 3287 (2006); *see also* War Powers Resolution, 50 U.S.C. § 1544(b) (2006).

nation of hostilities as proclaimed by a Presidential proclamation, with notice to Congress, or by a concurrent resolution of Congress."[184]

B. Equitable Tolling

In matters involving private, non-governmental parties, where there exists no legislated disability toll to statutes of limitations, federal courts have recognized "equitable tolling" under the concept of fair play based on the special circumstances of particular cases.[185] The doctrine of equitable tolling was particularly recognized and discussed by the Supreme Court in *Hanger v. Abbott*,[186] in favor of plaintiffs who were otherwise prevented from commencing actions during the Civil War because courts had been closed in certain rebellious states.[187]

Case law dealing with whether claims against the United States may be tolled for war has undergone an evolution during the past fifty years. The original, definitive case on the subject from the Supreme Court was *Soriano v. United States*,[188] decided in 1957. *Soriano* involved a claim by a resident of the Philippines seeking compensation for foodstuffs, supplies, equipment, and merchandise requisitioned by a unit operating on behalf of the United States, in resistance to the Japanese occupation of the Philippines during World War II.[189] The action was commenced more than six years after the last requisition.[190] Issues addressed by the Court included, *inter alia*, whether

184. *See* 18 U.S.C. § 3287. The statute operates more as a "suspension" of statutes of limitations rather than a "toll." The difference between these terms is discussed in Part V *infra*.

185. *See* E. Rebecca Ballard, Note, *It's About Time: Enforcing Human Rights Through Equitable Tolling*, 32 N.C. J. INT'L L. & COM. REG. 311, 324–25 (2006); Suzette M. Malveaux, *Statutes of Limitations: A Policy Analysis in the Context of Reparations Litigation*, 74 GEO. WASH. L. REV. 68, 104–11 (2005). *But see* Houston v. U.S. Postal Serv., 823 F.2d 896, 902 (5th Cir. 1987) (denying equitable tolling in litigation against the sovereign). *See generally* Hallstrom v. Tillamook County, 493 U.S. 20, 27 (1989) ("The running of such statutes is traditionally subject to equitable tolling."); Cabello v. Fernandez-Larios, 402 F.3d 1148, 1155 (11th Cir. 2005) (finding equitable tolling appropriate in extraordinary circumstances, as when defendant deliberately conceals misconduct); Hilao v. Estate of Marcos, 103 F.3d 767, 773 (9th Cir. 1996) (recognizing equitable tolling where defendant is absent from jurisdiction or immune from suits, and also where plaintiff is imprisoned or incapacitated).

186. 73 U.S. (6 Wall.) 532, 537 (1867); *see also* Malcolm L. Morris, *Troubled Taxpayers' Tolling Troubles*, 47 SYR. L. REV. 121, 125–26 (1996); Note, *Does War Toll the Statute of Limitations?*, 57 COLUM. L. REV. 1140, 1142–43 (1957).

187. *Supra* note 186.

188. 352 U.S. 270 (1957).

189. *See id.* at 270–71.

190. *See id.* at 272. Actions in the U.S. Court of Claims are barred unless commenced within six years from the accrual of the claim. 28 U.S.C. § 2501 (2006).

the action was rendered timely by tolling the statute of limitations on account of the war.[191] The Court held that limitations periods expressed in various federal statutes "meant just that period and no more."[192] Indeed, reasoned the Supreme Court, Congress had tolled other specific statutes of limitations for claims against the U.S. Government, but did not do so here.[193] The Court found that *Hanger v. Abbott* was inapplicable as that case involved private parties rather than a claim against the sovereign.[194] The Supreme Court concluded that since it must strictly construe waivers of the Government's sovereign immunity, no tolling of the statute of limitations on account of war was authorized in the absence of explicit legislative authority.[195] The holding of *Soriano* meant that if the exigencies of war prevented any claimant from commencing an action against the U.S. Government within the standard limitations period, the claimant had no recourse through tolling.

The *Soriano* opinion was criticized by academia.[196] Later, it was believed to have been overruled in the 1990 case of *Irwin v. Department of Veterans Administration*.[197] In *Irwin*, an employment discrimination case, the Supreme Court appeared to adopt a new general rule that the failure to commence an action against the Government within the statute of limitations could in fact be excused under the doctrine of equitable tolling.[198] The majority in *Irwin* held "that the same rebuttable presumption of equitable tolling applicable to suits

191. *See id.* at 275–77.

192. *See id.* at 276.

193. *Id*. at 276 n.7. Ad hoc tolls that had been enacted include a provision of the Soldiers and Sailors Civil Relief Act, 54 Stat. 1181 (1942) (codified as amended at 50 U.S.C. app. § 525 (2006)), and a provision of the Trading With the Enemy Act regarding vested property, 60 Stat. 925–26 (codified as amended at 50 U.S.C. app. § 34(a) (2006)).

194. Soriano v. United States, 352 U.S. at 275.

195. *See id.* at 276 (citing United States v. Sherwood, 312 U.S. 584, 590–91 (1941)); *see also* Lehman v. Nakshian, 453 U.S. 156, 161 (1981); Kreiger v. United States, 539 F.2d 317, 321 (3d Cir. 1976). *But see* David D. Doran, *Equitable Tolling of Statutory Benefit Time Limitations: A Congressional Intent Analysis*, 64 WASH. L. REV. 681, 687 (1989) (noting that some recent courts had allowed the tolling of statutes of limitations that were found not to be jurisdictional in nature).

196. *See* Note, *supra* note 186, at 1150 (advocating legislation to make tolling the statute of limitations a default).

197. *See* 498 U.S. 89, 98 (1990) (White, J., concurring). As to *Soriano* being overruled, see also Stevens v. Sec'y of the Dep't of Health and Human Servs., 31 Fed. Cl. 12, 23 (1994); Glick v. United States, 25 Cl. Ct. 435, 439–40 (1992).

198. *See* Irwin v. Dep't of Veteran Affairs, 498 U.S. at 95–96; *see also* Berman v. United States, 264 F.3d 16, 19–20 (1st Cir. 2001); Allied/Royal Parking L.P. v. United States, 166 F.3d 1000, 1003 (9th Cir. 1999); Stevens v. Sec'y of the Dep't of Health and Human Servs., 31 Fed. Cl. at 23; Massard v. Sec'y of the Dep't of Health and Human Servs., 25 Fed. Cl. 421, 424 (1992).

against private defendants should also apply to suits against the United States."[199] The Supreme Court repeated the rebuttable presumption language for equitable tolling twelve years later in *Raygor v. Regents of University of Minnesota*.[200] Justice Rehnquist, writing for the majority in *Irwin*, cautioned that equitable tolling, even in matters involving private litigants, is recognized only sparingly, such as when there is a defective filing during the statutory period[201] or when a party is fraudulently induced by an adversary to allow a commencement deadline to pass.[202] A garden-variety law office failure, at issue in *Irwin*, was found by the court to be insufficient to permit an equitable tolling.[203]

The Supreme Court did not thereafter have an occasion to address whether war meets the necessary rigorous standard for permitting an equitable toll of the statute of limitations for claims against the U.S. Government.[204] However, on the broader topic of equitable estoppel, the Supreme Court revisited *Soriano* and *Irwin* in the 2008 case of *John R. Sand & Gravel Co. v. United States*.[205] *Sand* involved a due process claim arising out of the federal Environmental Protection Agency's alleged interference with certain leasehold rights.[206] In an effort to reconcile *Soriano* with *Irwin*, the Supreme Court noted that its recognition of equitable tolling for claims against the sovereign in *Irwin* "refer[red] only to the statute's claims-accrual rule and adds little or nothing to [the] contention that *Irwin* overruled our earlier cases—a contention that we [reject]."[207] More specifically, *Sand* identified two types of statutes of limitations; namely, the majority of statutes that seek to protect defendants from stale or unduly delayed case-

199. *See* Irwin v. Dep't of Veterans Affairs, 498 U.S. at 95–96.

200. 534 U.S. 533, 543 (2002); *see also* Long v. Frank, 22 F.3d 54, 58 (2d Cir. 1994); Veltri v. Bldg. Serv. 32B-J Pension Fund, 393 F.3d 318, 322–23 (2d Cir. 2004).

201. *See* Irwin v. Dep't of Veterans Affairs, 498 U.S. at 95–96 (citing Am. Pipe & Const. Co. v. Utah, 414 U.S. 538 (1974), Burnett v. N.Y. Cent. R.R. Co., 380 U.S. 424 (1965), and Herb v. Pitcairn, 325 U.S. 77 (1945)).

202. *See id.* (citing Glus v. Brooklyn E. Dist. Terminal, 359 U.S. 231 (1959) and Holmberg v. Armbrecht, 327 U.S. 392 (1946)).

203. *Id.* at 96.

204. The holding of *Irwin* in regards to equitable tolling appeared to be solidified by language set forth by the Supreme Court in *Franconia Associates v. United States*, 536 U.S. 129, 145 (2002); *see also* Scarborough v. Principi, 541 U.S. 401, 420–21 (2004). But *Irwin* was also later limited in a particular tax refund context, in *United States v. Brockamp*, 519 U.S. 347 (1997).

205. 552 U.S. 130 (2008).

206. *See id.* at 752–53.

207. *See id.* at 138.

specific claims on the one hand,[208] and the minority of statutes that achieve broader system-related goals[209] on the other.[210] Stale case-specific claims are subject to equitable tolling, while the stricter "jurisdictional" authority claims are not.[211] The statute of limitations at issue in *Irwin*, applicable to an employment discrimination claim brought under 42 U.S.C. § 2000e-16(c), would be the type of case-specific protection for a defendant where the statute of limitations could be equitably tolled.[212] The statute of limitations for the due process claim in *Sand* brought under 28 U.S.C. § 2501, which was jurisdictionally allowable only by the Government's waiver of sovereign immunity, was held to be a more strict, jurisdictional statute of limitations that is not eligible for equitable tolling.[213] *Sand* involved the same statute of limitations as *Soriano*.[214] Thus, the holding of *Soriano* was resuscitated, and *Soriano* and *Irwin* were distinguished from one another.

The development of federal case law from the *Soriano* decision in 1957 to the *Sand* decision in 2008 suggests that war may or may not equitably toll a plaintiff's statute of limitations in suits against the Government, depending on the nature of the claim asserted. If the statute of limitations applicable to the claim speaks broadly to the court's subject matter jurisdiction over this type of claim, then no toll can be recognized.[215] If the claim is case-specific, without implicating the court's jurisdictional authority to hear the case, such as a claim to

---

208. The Court had previously explained this protective purpose of statutes of limitations in *United States v. Kubrick*, 444 U.S. 111, 117 (1979).

209. For types of broader system related goals described in *Sand*, see, for example, United States v. Brockamp, 519 U.S. 347, 352–53 (1997) (facilitating the administration of claims); United States v. Dalm, 494 U.S. 596, 609–10 (1990) (limiting the scope of a governmental waiver of sovereign immunity); Bowles v. Russell, 505 U.S. 205, 210–13 (2007) (promoting judicial efficiency).

210. John R. Sand & Gravel Co. v. United States, 552 U.S. at 133–34. For cases determining which of the *Sand* categories a statute of limitations falls into, see Aloe Vera of Am., Inc. v. United States, 574 F.3d 1176 (9th Cir. 2009), *amended by* 2009 U.S. App. LEXIS 20136 (2009); Marley v. United States, 567 F.3d 1030, 1035 (9th Cir. 2009).

211. *Supra* note 210.

212. *See John R. Sand & Gravel Co.*, 552 U.S. 130.

213. *See id.*; Marley v. United States, 567 F.3d at 1034–35.

214. *See* Soriano v. United States, 352 U.S. 270, 271 (1957); John R. Sand & Gravel Co. v. United States, 552 U.S. at 132.

215. *See, e.g.*, *John R. Sand & Gravel Co.*, 552 U.S. 130; *Soriano*, 352 U.S. 270; Aloe Vera of Am., Inc. v. United States, 574 F.3d 1176 (9th Cir. 2009), *amended by* 2009 U.S. App. LEXIS 20136 (2009); Marley v. United States, 567 F.3d 1030 (9th Cir. 2009); Fauvergue v. United States, 86 Fed. Cl. 82, 91 (2009); Brown v. United States, 84 Fed. Cl. 400 (2008); Levy v. United States, 83 Fed. Cl. 67, 76 (2008).

a personal right invoked under the federal Privacy Act,[216] the Taxpayer Bill of Rights,[217] the Anti-Terrorism and Effective Death Penalty Act,[218] then a general equitable toll of the statute of limitations can be recognized. Accordingly, it now appears that under current federal decisional law, the exigencies of war, which are beyond the control of lawyers and litigants, may only some of the time equitably toll the statutes of limitations for claims against the Government, even when access to courts is legitimately foreclosed by hostilities.

C. The Servicemembers' Civil Relief Act

Active members of the United States military services can also benefit from a statutory toll. Men and women in the active services are automatically entitled to a toll of state and federal statutes of limitations by virtue of their service, pursuant to the Servicemembers Civil Relief Act.[219] The Act has been in place since 1918,[220] but has undergone amendments related to the tolling of relevant statutes of limitations in 1940, 1942, 1991, and 2003.[221] The current version of the Act provides that the time of a service member's military service will not be included in any period limited by law for the bringing of an action in any state or federal court, or by or against the service member's heirs, executors, administrators, or assigns.[222] The toll applies to actions and proceedings that accrue in favor of or against service mem-

---

216. *See* 5 U.S.C. § 552a(g)(5) (2006); Rouse v. United States Department of State, 567 F.3d 408, 415–16 (9th Cir. 2009) (applying a presumption of equitable tolling based on similarity of the claim to a traditional tort action).

217. *See* 26 U.S.C. § 7433 (2006); *cf.* Whittington v. United States, 607 F. Supp. 2d 43, 45 n.6 (D.D.C. 2009) (refusing to find the statute's requirement that plaintiff exhaust all administrative remedies to be jurisdictional in nature).

218. *See* 28 U.S.C. § 2244(d) (2006); Diaz v. Kelly, 515 F.3d 149, 153 (2d Cir. 2008); Dunlap v. United States, 250 F.3d 1001, 1004 n.1 (6th Cir. 2001); Smith v. McGinnis, 208 F.3d 13, 17 (2d Cir. 2000).

219. *See* 50 U.S.C. app. § 526 (2006).

220. *See* Soldiers' and Sailors Civil Relief Act of 1918, Pub. L. No. 65-103, 40 Stat. 440 (codified as amended at 50 U.S.C. app. 501–96 (2006); Conroy v. Aniskoff, 507 U.S. 511, 520–21 (1993); Boone v. Lightner, 319 U.S. 561, 565 (1943).

221. *See* Soldiers' and Sailors' Civil Relief Act of 1940, Pub. L. No. 76-861, § 205, 54 Stat. 1178, 1181; Soldiers' and Sailors' Civil Relief Act Amendments of 1942, Pub. L. No. 77-732, § 5, 56 Stat. 770, 770–71; Soldiers' and Sailors' Civil Relief Act Amendments of 1991, Pub. L. No. 102-12, § 9(6), 105 Stat. 34, 39; Servicemembers' Civil Relief Act of 2003, Pub. L. No. 108-189, 117 Stat. 2835.

222. *See* 50 U.S.C. app. § 526(a) (2006) ("The start of an action, proceeding, attachment, or execution made pursuant to the provisions of this Act . . . may be ordered for the period of military service and 90 days thereafter, or for any part of that period."). The only exception noted in the statute regards statutes of limitations prescribed by the internal revenue laws of the United States. *See id.* § 526(b)–(c) (2006).

bers either prior to or during the period of military service.[223] The toll ceases upon the service member's departure from the military.[224]

In the event a member of the armed services is named as a defendant in an action, the Act also vests trial courts with discretion to stay the action for the duration of the service member's military service and for up to ninety days thereafter.[225] Discretion will be exercised for or against a stay based upon whether the defendant's military service materially affects the conduct of the defense.[226]

The statutory toll provided by the Servicemembers Civil Relief Act is not a war toll per se. It is available to all active servicemen and servicewomen[227] with an accrued cause of action, whether the United States is engaged in war or not, and whether or not the service member's ability to commence an action is handicapped by the military service.[228] These differences make tolling provisions relating to active members of the United States military unique to all others.

Federal law pertaining to war toll issues has developed independent of states' laws, perhaps reflecting the direct role that the United States government and its military play in the prosecution of wars, as distinguished from states, which address war toll issues without concerns of federal sovereign immunity.

---

223. *See* Conroy v. Aniskoff, 507 U.S. at 514 (describing the statute's toll language as "unambiguous, unequivocal, and unlimited"); *see also, e.g.*, Mason v. Texaco, Inc., 862 F.2d 242, 245 (10th Cir. 1988); Ricard v. Birch, 529 F.2d 214, 217 (4th Cir. 1975); Bickford v. United States, 656 F.2d 636, 639 (Ct. Cl. 1981); Wanner v. Glen Ellen Corp., 373 F. Supp. 983, 986 (D. Vt. 1974); Thompson v. Reedman, 201 F. Supp. 837, 838 (E.D. Pa. 1961); Detroit Harbor Terminals v. Kuschinski, 181 F.2d 541, 542–43 (6th Cir. 1950); De Griffin v. Ark. Dep't of Health and Human Servs., 2009 Ark. App. 177 (Ct. App. 2009); Min v. Avila, 991 S.W.2d 495, 505–06 (Tex. App. 1999); Levesque v. Levesque, 631 A.2d 925, 926–27 (N.H. 1993); McCance v. Lindau, 492 A.2d 1352, 1356–57 (Md. Ct. Spec. App. 1985); King v. First Nat'l Bank of Fairbanks, 647 P.2d 596, 602 (Alaska 1982); Syzemore v. Sacramento County, 127 Cal. Rptr. 741, 744–45 (Ct. App. 1976); Newman v. Newman, 216 S.E.2d 79, 80 (Ga. 1975); Eubanks v. Zimmerman, 498 S.W.2d 655, 656 (Ark. 1973); Worlow v. Miss. River Fuel Corp., 444 S.W.2d 461, 463–64 (Mo. 1969); Van Heest v. Veech, 156 A.2d 301, 305 (N.J. Passaic County Ct. 1959).

224. *See* Diamond v. United States, 344 F.2d 703, 706 (Ct. Cl. 1965).

225. 50 U.S.C app. § 525(a) (2006); *see* Kindy v. Koenke, 216 F.2d 907, 910–11 (8th Cir. 1954) (noting the stay provision intended to apply particularly to actions commenced by persons other than servicemen).

226. *See* Conroy v. Aniskoff, 507 U.S. at 515.

227. *See* 50 U.S.C. app. § 511(2) (2006).

228. *See* Bickford v. United States, 656 F.2d at 640; Taylor v. N.C. Dep't of Transp., 357 S.E.2d 439, 441 (N.C. Ct. App. 1987); Bowsman v. Peterson, 45 F. Supp. 741, 743 (D. Neb. 1942).

IV.
Determining a Party's Entitlement to a War Toll and Its Length, From Commencement of Hostilities to Cessation

In New York, the site of the World Trade Center attacks, the war toll of CPLR section 209 applies to causes of action that accrue prior to or during "war," and continuing until the "termination of hostilities."[229] The language of the statute raises several questions. Since only Congress is authorized to declare war under Article I, Section 8 of the U.S. Constitution,[230] does war need to be formally declared by Congress to trigger the statutory toll? If not, how would courts treat undeclared wars such as the Korean War,[231] the Vietnam War,[232] the first Gulf War,[233] and the war in Afghanistan?[234] Does the term "hostilities" connote something other than "war"? Must the hostilities be terminated by means of a peace treaty to qualify under the statute? If a conflict ends without a peace treaty, as the Korean War did, would claims from that time still be tolled today? How can conflicts be objectively quantified as of sufficient magnitude to trigger a war toll? Is the decision to describe a conflict as a "war" a judiciable question for the courts, or a non-judiciable political question for the other branches of government?

---

229. *See* N.Y. C.P.L.R. 209(a)–(b) (McKinney 2003).

230. U.S. Const. art. I, § 8, cl. 11 ("The Congress shall have the [p]ower [t]o . . . declare [w]ar, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water.").

231. The Korean War presents contradictions in terms. The conflict was described by President Truman not as a war, but as a "police action" necessary to repel invaders, *see* Joseph C. Goulden, Korea: The Untold Story of the War 86 (1982), and no war was ever declared. Nevertheless, the Korean War has been judicially recognized as a war based on the geographic scope of the conflict, the number of troops deployed, the number of casualties incurred, the extent of emergency legislation enacted, and its total cost. *See* John Alan Cohan, *Legal War: When Does It Exist, and When Does It End?*, 27 Hastings Int'l. & Comp. L. Rev. 221, 276 (2004). Furthermore, military courts-martial during the time applied provisions for punishment and the suspension of statutes of limitations normally only available during times of war. *See* United States v. Anderten, 4 C.M.A. 354, 357 (1954); United States v. Ayers, 4 C.M.A. 220, 221 (1954); United States v. Aldridge, 4 C.M.A. 107, 109 (1954); United States v. Bancroft, 3 C.M.A. 3, 8 (1953); United States v. Gann, 3 C.M.A. 12, 13 (1953).

232. Though undeclared, the Vietnam War has been judicially recognized as a war from the date of the Gulf of Tonkin Resolution, August 4, 1964, as the conflict involved committing hundreds of thousands of military forces to the theater, heavy casualties, and the draft and recruitment of persons into the armed forces. *See* United States v. Taylor, 40 C.M.R. 761, 766–67 (A.B.R. 1969); *see also* Rotko v. Abrams, 338 F. Supp. 46, 47–48 (D. Conn. 1971), *aff'd,* 455 F.2d 992 (2nd Cir. 1972); Vogelaar v. United States, 665 F. Supp. 1295, 1302 (E.D. Mich. 1987); Morrison v. United States, 316 F. Supp. 78, 79 (M.D. Ga. 1970).

233. *See* Minns v. United States, 974 F. Supp. 500, 506 (D. Md. 1997).

234. *See* United States v. Prosperi, 573 F. Supp. 2d 436 (D. Mass. 2008).

A. Judiciability

The separation of powers between the three branches of government has necessitated consideration of whether war-related issues are judiciable. *The Amy Warwick,*[235] an early case on the judiciability of war, involved the question of whether President Lincoln could blockade the ports of rebellious states during the Civil War and seize ships that attempted to run the blockades. The Supreme Court determined that despite the absence of any declaration of war, the President's actions in response to insurrection was "a question to be decided *by* [*President Lincoln*]" rather than the courts, and could establish "that a state of war existed."[236] Similar reasoning was adopted by the Supreme Court later that century in *The Three Friends*,[237] in which the Court considered whether a group of individuals supporting an insurrection in Cuba constituted a belligerency under the Neutrality Act.[238] The Supreme Court noted in that case a difference between war in the legal sense, which is a conflict that reaches a certain magnitude of national interest, and war in a material sense, such as a local revolt.[239] The Court held that, at least with respect to war in the legal sense, war may only be recognized by the political department of government and is therefore not judiciable.[240]

Years later, the Supreme Court rendered a seminal case on judiciability, *Baker v. Carr*.[241] *Baker,* though not directly involving an issue of war,[242] determined in its broader discussion of judiciability that the conduct of foreign relations is committed to the political department of government[243] and that the "recognition of belligerency abroad is an executive responsibility."[244] The same reasoning was ap-

---

235. 67 U.S. (2 Black) 635 (1862). This opinion of the Supreme Court is also known as the *Prize Cases*.
236. *See id.* at 670.
237. 166 U.S. 1 (1897).
238. *See* Rev. Stat. §§ 5281–91 (1878) (current version at 18 U.S.C. § 960 (2006)).
239. *See The Three Friends*, 166 U.S. at 63.
240. *Id.* An excellent discussion of the difference between war in the legal sense, and war in the material sense, may be found in John M. Hagan, Note, *From the XYZ Affair to the War on Terror: The Justiciability of Time of War*, 61 WASH. & LEE L. REV. 1327, 1336–39 (2004).
241. 369 U.S. 186 (1962).
242. The ultimate issue in *Baker* was the judiciability of review of the apportionment of districts for the Tennessee General Assembly. *Id.* at 187–88.
243. *Id.* at 211 n.31 (citing Oetjen v. Cent. Leather Co., 246 U.S. 297, 302 (1918)).
244. *Id.* at 212. In *Baker*, the Supreme Court identified six circumstances which alternatively raise non-judiciable political questions: [(1)] "a textually demonstrable constitutional commitment of the issue to a coordinate political department, [(2)] lack of judicially discoverable and manageable standards for resolving it, [(3)] the impossibility of deciding without an initial policy determination of a kind clearly for nonjudi-

plied more recently in a military context in *El-Shifa Pharmaceutical Industries Co. v. United States*,[245] in which the Court of Appeals for the Federal Circuit, addressing the complaint of the owner of a Sudanese pharmaceutical plant that had been destroyed by a missile strike ordered by President Clinton, deferred to the exclusive authority of the President as Commander in Chief to designate a facility as an extraterritorial enemy target.[246]

Despite the general non-judiciability of war and military decision making,[247] there are instances where the nature of a case in contro-

---

cial discretion, [(4)] the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of the government, [(5)] an unusual need for unquestioning adherence to a political decision already made, and [(6)] the potentiality of embarrassment from multifarious pronouncements by various departments on one question." *Id.* at 217. The *Baker* standard for determining judiciability has become engrained in our jurisprudence, as evidenced by the high number of federal appellate cases that have cited it, and without referencing here any district court cases that have cited it. *See, e.g.*, Vieth v. Jubelirer, 541 U.S. 267 (2004); Branch v. Smith, 538 U.S. 254 (2003); Nixon v. United States, 506 U.S. 224 (1993); U.S. Dep't of Commerce v. Montana, 503 U.S. 442 (1992); United States v. Munoz-Flores, 495 U.S. 385 (1990); Rogers v. Lodge, 458 U.S. 613 (1982) (Stevens, J., dissenting); Goldwater v. Carter, 444 U.S. 996 (1979) (Powell, J., concurring); Powell v. McCormack, 395 U.S. 486 (1969); Scholle v. Hare, 369 U.S. 429 (1962); Schroder v. Bush, 263 F.3d 1169 (10th Cir. 2001); Zivotofsky v. Sec'y of State, 571 F.3d 1227 (D.C. Cir. 2006); Made in the USA Found. v. United States, 242 F.3d 1300 (11th Cir. 2001); Khouzam v. Attorney Gen. of U.S., 549 F.3d 235 (3d Cir. 2008); Carmichael v. Kellogg, Brown & Root Servs., Inc., 572 F.3d 1271 (11th Cir. 2009); Lane v. Halliburton, 529 F.3d 548 (5th Cir. 2008); Harbury v. Hayden, 522 F.3d 413 (D.C. Cir. 2008); Khulumani v. Barclay Nat. Bank Ltd., 504 F.3d 254 (2d Cir. 2007); Corrie v. Caterpillar, Inc., 503 F.3d 974 (9th Cir. 2007); McMahon v. Presidential Airways, Inc., 502 F.3d 1331 (11th Cir. 2007); Sarei v. Rio Tinto, PLC, 487 F.3d 1193 (9th Cir. 2007); Gross v. German Found. Indus. Initiative, 456 F.3d 363 (3d Cir. 2006); Bancoult v. McNamara, 445 F.3d 427 (D.C. Cir. 2006); Whiteman v. Dorotheum GmbH & Co. KG, 431 F.3d 57 (2d Cir. 2005); Samish Indian Nation v. United States, 419 F.3d 1355 (Fed. Cir. 2005); Wang v. Masaitis, 416 F.3d 992 (9th Cir. 2005); Schneider v. Kissinger, 412 F.3d 190 (D.C. Cir. 2005); Alperin v. Vatican Bank, 410 F.3d 532 (9th Cir. 2005); Ungar v. Palestine Liberation Org., 402 F.3d 274 (1st Cir. 2005); 767 Third Ave. Assocs. v. Consulate Gen. of Socialist Fed. Republic of Yugo., 218 F.3d 152 (2d Cir. 2000); Larsen v. Senate of Pa., 152 F.3d 240 (3d Cir. 1998); L.A. County Bar Ass'n. v. Eu, 979 F.2d 697 (9th Cir. 1992); Lamont v. Woods, 948 F.2d 825 (2d Cir. 1991); Tel-Oren v. Libyan Arab Republic, 726 F.2d 774 (D.C. Cir. 1984); Wymbs v. Republican State Executive Comm. of Fla., 719 F.2d 1072 (11th Cir. 1983); Vander Jagt v. O'Neill, 699 F.2d 1166 (D.C. Cir. 1982); Ripon Soc'y, Inc. v. Nat'l Republican Party, 525 F.2d 567 (D.C. Cir. 1975); Nat'l Treasury Employees Union v. Nixon, 492 F.2d 587 (D.C. Cir. 1974); Olegario v. United States, 629 F.2d 204 (2d Cir. 1980); Shakman v. Democratic Org. of Cook County, 435 F.2d 267 (7th Cir. 1970).

245. 378 F.3d 1346 (Fed. Cir. 2004).

246. *See id.* at 1363–64; *see also Ex parte* Quirin, 317 U.S. 1 (1942) (discussing generally the President's power to wage war).

247. *See, e.g.*, Gilligan v. Morgan, 413 U.S. 1, 11–12 (1973) (refusing to review regulatory control over the training of the Ohio National Guard); Orloff v. Wil-

versy requires a judicial determination of whether war exists, and in some instances, the time of its commencement and cessation. Examples include whether a party to a contract is excused from performance on account of impossibility caused by war,[248] whether members of the armed services away without leave may receive the enhanced punishment that is authorized during war time,[249] whether an existing treaty conflicts with state law[250] or federal statute,[251] whether a claim

---

loughby, 345 U.S. 83, 90–92 (1953) (the commissioning of officers in the Army is a non-judiciable matter within the discretion of the military); Johnson v. Eisentrager, 339 U.S. 763, 789 (1950) (holding claims by enemy aliens challenging U.S. military presence in China not judiciable); Aktepe v. United States, 105 F.3d 1400, 1403 (11th Cir. 1997) (holding complaint of crew of Turkish destroyer struck by American missiles during naval exercises non-judiciable); Holtzman v. Schlesinger, 484 F.2d 1307, 1310 (2d Cir. 1973) (holding the legality of the bombing of Cambodia not judiciable); Linder v. Portocarrero, 963 F.2d 332, 336 (11th Cir. 1992) (holding "contra" activities in Nicaragua, for the most part, not judiciable); Greenham Women Against Cruise Missiles v. Reagan, 755 F.2d 34, 37 (2d Cir. 1985) (holding deployment of American cruise missiles at American air force base in Great Britain not judiciable); Bentzlin v. Hughes Aircraft Co., 833 F. Supp. 1486, 1497 (C.D. Cal. 1993) (holding claims by relatives of marines killed by allegedly defective missiles not judiciable).

248. Kiyoichi Bush v. Protravel Int'l., Inc., 746 N.Y.S.2d 790, 796–97 (Civ. Ct. 2002) (noting that in the wake of 9/11 "the City of New York was on a wartime footing" for purposes of impossibility); Sokoloff v. Nat'l City Bank of N.Y., 164 N.E. 745, 748–49 (N.Y. 1922); Crown Embroidery Works v. Gordon, 180 N.Y.S. 158, 159–60 (App. Div. 1920); Erdreich v. Zimmermann, 179 N.Y.S.2d 829, 833–34 (App. Div. 1920); *cf.* 7200 Scottsdale Rd. Gen. Partners v. Kuhn Farm Mach., Inc., 909 P.2d 408, 412–13 (Ariz. Ct. App. 1995). Similarly, in cases where contract terms refer to war, courts have been required to determine when wars began. *See* Syquia v. United States, 124 F. Supp. 638, 644 (Ct. Cl. 1954) (lease agreement in effect for the duration of the war). *Compare* N.Y. Life Ins. Co. v. Bennion, 158 F.2d 260, 264–65 (10th Cir. 1946), *with* West v. Palmetto State Life Ins. Co., 25 S.E.2d 475, 477 (S.C. 1943) (insurance policy excluding death coverage resulting from war).

249. *See* 10 U.S.C. §§ 801–946 (2003) (Uniform Code of Military Justice); United States v. Taylor, 40 C.M.R. 761, 766–67 (A.B.R. 1969); United States v. Anderson, 17 C.M.A. 588, 589–90 (1968); United States v. Anderten, 4 C.M.A. 354, 357 (1954); United States v. Aldridge, 4 C.M.A. 107, 109 (1954); United States v. Bancroft, 3 C.M.A. 3, 5–6 (1953); United States v. Gann, 3 C.M.A. 12, 13 (1953); *see also* Cohan, *supra* note 231 at 229–30 (2004); *cf.* United States v. Sobell, 314 F.2d 314, 329–30 (2d Cir. 1963) (reviewing sentencing enhancement for espionage in time of war).

250. *E.g.*, Sanchez-Llamas v. Oregon, 548 U.S. 331, 375 (2006); Zschernig v. Miller, 389 U.S. 429, 440–41 (1968); Ioannou v. New York, 371 U.S. 30, 32 (1962); Kolovrat v. Oregon, 366 U.S. 187, 196–97 (1961); Wickes v. Olympic Airways, 745 F.2d 363, 368 (6th Cir. 1984); *In re* Air Disaster Near Honolulu, Haw. on Feb. 24, 1989, 792 F. Supp. 1541, 1548–49 (N.D. Cal. 1990); Dahiya v. Talmidge Intern. Ltd., 931 So.2d 1163, 1167–68 (La. Ct. App. 2006); Leandres v. Mazda Motor Corp., 25 Conn. L. Rptr. 700 (Super. Ct. 1999); State v. St. Clair, 560 N.W.2d 732, 735 (Minn. Ct. App. 1997); Sopcak v. Northern Mountain Helicopter Servs., 924 P.2d 1006, 1009 (Alaska 1996).

251. *E.g.*, Breard v. Greene, 523 U.S. 371, 376 (1988); Whitney v. Robertson, 124 U.S. 190, 193–94 (1888); Sohappy v. Hodel, 911 F.2d 1312, 1321 (9th Cir. 1990);

against the federal government under the Federal Tort Claim Act is barred by the Act's combat exception during times of war,[252] and whether, as discussed here, a party is entitled to a war toll of a statute of limitations.

In *Baker*, the Supreme Court recognized that while the recognition of belligerency was an executive function, courts were authorized to interpret specific issues dealing with war when proclamations from the Executive do not provide an answer.[253] That language in *Baker* allows what might be viewed as a rule of necessity, that no matter how much the judiciary wishes to defer to the political branches of government on issues related to war, there are some instances when judicial pronouncements tangential to war are simply unavoidable.

The tolling of statutes of limitations on account of war is a classic example of where courts must be involved. The recognition of a toll is a distinctly judicial function.[254] Courts must necessarily engage in a two-step approach, determining in the first instance whether there is a war, and in the second instance, the measurable number of calendar days to credit between the commencement and cessation of the conflict.

For instance, courts must determine whether a country is "at war," and determine the time that hostilities are terminated, in order to properly apply or not apply the Suspension Act.[255] In a matter involving the Act, a District Court in *United States v. Prosperi*[256] determined that the United States had been "at war" during combat operations in Iraq and Afghanistan, despite the lack of any formal dec-

---

MacNamara v. Korean Air Lines, 863 F.2d 1135, 1146 (3d Cir. 1988); United States v. A.L. Burbank & Co., Ltd., 525 F.2d 9, 14 (2d Cir. 1975); *cf.* Medellin v. Texas, 128 S. Ct. 1346, 1356–57 (2008); United States v. Emuegbunam, 268 F.3d 377, 389 (6th Cir. 2001).

252. *See* 28 U.S.C. §§ 1346(b), 2680(j) (2006); *e.g.*, Johnson v. United States, 170 F.2d 767, 769–70 (9th Cir. 1948); Matthews v. United States, 453 F. Supp. 2d 433, 444 (S.D.N.Y. 2006); *In re* Agent Orange Prod. Liab. Litig., 580 F. Supp. 1242, 1255 (E.D.N.Y. 1984); Skeels v. United States, 72 F. Supp. 372, 374 (W.D. La. 1947)

253. *See* Baker v. Carr, 369 U.S. 186, 212–13 (1962).

254. The inherent role of courts in determining tolls in litigations is self-evident, and therefore, there are few if any cases that expressly report that point. One case that comes close is Cross v. McDonough, No. 4:06cv460-RH/WCS, 2008 WL 817088, (N.D. Fla. Mar. 25, 2008), which dealt with whether the "mailbox rule" used in connection with the filing of federal habeas applications arising from state convictions tolls the deadline for the timely filing of such applications under the Antiterrorism and Effective Death Penalty Act of 1996. In resolving the issue, the court in Cross noted that "[t]he purpose of tolling is to acknowledge the role of state courts as they determine the merits of challenges to state convictions." *Id.* at *13.

255. *See* 18 U.S.C. § 3287 (2006).

256. 573 F. Supp. 2d 436 (D. Mass. 2008).

laration of war by Congress.[257] The holding in *Prosperi* was supported by the fact that the Act expressly applies not only to wars formally declared by Congress, but also to conflicts where the use of armed forces is specifically authorized by congressional action under the War Powers Resolution.[258] For the 2003 war in Iraq, Congress had passed its Authorization for Use of Military Force Against Iraq on October 16, 2002,[259] rendering the Suspension Act applicable to relevant claims.

Other courts, in adjudicating the war exception to the Federal Tort Claims Act (FTCA),[260] recognized conflicts as "war" despite the absence of formal congressional declarations, including the 1991 Persian Gulf War[261] and the Vietnam War.[262] In still other cases, *outside* the scopes of the Suspension Act and the FTCA, courts have recognized undeclared conflicts as "war," as with the war in Afghanistan,[263] the Vietnam War,[264] and the Korean War.[265] Lest we forget, the Civil War was also never declared as such by Congress, yet cases are legion treating the conflict as a war.[266] Recent language from the U.S. Su-

257. *See id.* at 450. *But see* United States v. Shelton, 816 F. Supp. 1132 (W.D. Tex. 1993).

258. *See* 18 U.S.C. § 3287 (2006); 50 U.S.C. § 1544(b) (2006).

259. *See* Pub. L. No. 107-243, 116 Stat. 1498 (2002).

260. *See* 28 U.S.C. §§ 1346(b), 2680(j) (2006). The FTCA is a statutory waiver by the federal government of its sovereign immunity to tort claims, but the waiver does not apply to claims arising out of combat activities during time of war. *See id.*

261. *See* Koohi v. United States, 976 F.2d 1328, 1334 (9th Cir. 1992); Minns v. United States, 974 F. Supp. 500, 506 (D. Md. 1997); Dellums v. Bush, 752 F. Supp. 1141, 1146 (D.D.C. 1990).

262. *See* Rotko v. Abrams, 338 F. Supp. 46, 47–48 (D. Conn. 1971), *aff'd mem.*, 455 F.2d 992 (2d Cir. 1972); Vogelaar v. United States, 665 F. Supp. 1295, 1302 (E.D. Mich. 1987); Morrison v. United States, 316 F. Supp. 78, 79 (M.D. Ga. 1970).

263. *See* Hamdi v. Rumsfeld, 542 U.S. 507, 517 (2004) (finding detention of citizen as enemy combatant a fundamental incident of waging war pursuant to the congressional Authorization for Use of Military Force of September 18, 2001, which granted the President power to use "necessary and appropriate force" against "nations, organizations or persons" responsible for the 9/11 attacks); *see also* Authorization for Use of Military Force in Response, Pub. L. No. 107-40, 115 Stat. 224 (2001) (authorizing the use of force after 9/11).

264. *See* United States v. Taylor, 40 C.M.R. 761, 766 (A.B.R. 1969); United States v. Anderson, 17 C.M.A. 588, 590 (1968); *cf.* Van Tu v. Koster, 364 F.3d 1196, 1199–1200 (10th Cir. 2004) (finding claims arising out of My Lai massacre as statutorily barred while still recognizing that claims arose in context of war in Vietnam).

265. *See* United States v. Anderten, 4 C.M.A. 357 (1953); United States v. Aldridge, 4 C.M.A. 107, 109 (1953); United States v. Bancroft, 3 C.M.A. 3, 6 (1952); United States v. Gann, 3 C.M.A. 12, 13 (1952); *see also* Cohan *supra* note 231, at 229–30 (2004).

266. *E.g.*, Matthews v. McStea, 91 U.S. 7 (1875); Hanger v. Abbott, 73 U.S. (6 Wall.) 532 (1867); The Gray Jacket, 72 U.S. (5 Wall.) 342 (1866); *Ex parte* Milligan, 71 U.S. (4 Wall.) 2 (1866); The Josephine, 70 U.S. (3 Wall.) 83 (1865); The Circas-

preme Court in *Boumediene v. Bush*[267] suggests that it is poised to recognize the War on Terror as a "war" in a classic legal sense, if it has not already done so. In *Boumediene*, the Supreme Court stated that the detention of individuals at Guantanamo Bay, "if measured from September 11, 2001, to the present, is already *among the longest wars* in American history,"[268] and held that the detainees are entitled to the writ of habeas corpus.[269] In *Hamdan v. Rumsfeld,*[270] the Supreme Court similarly conferred upon al Qaeda detainees the rights contained in Article 3 of the Geneva Convention, which triggers in the event of wars that are not necessarily between nations.[271]

Conflicts of more modest proportions have not qualified as "war." The deployment of troops for evacuation, rescue, humanitarian and peacekeeping missions do not constitute war as their underlying rationales are not to compromise another nation's sovereignty.[272]

B. The Commencement of Hostilities

To the extent that state and federal statutes, including war toll statutes, have provisions that speak to when the United States is "at war,"[273] a formal declaration of war by an adversary nation, or by the

---

sian, 69 U.S. (2 Wall.) 135 (1864); The Amy Warwick, 67 U.S. (2 Black) 635, 670 (1862); The Ambrose Light, 25 F. 408 (S.D.N.Y. 1885); Cross v. Sabin, 13 F. 308, 313 (E.D. Tenn. 1882); Chicora Co. v. Crews, 6 S.C. 243 (1875); DeJarnette v. DeGiverville, 56 Mo. 440 (1874); Tarleton v. S. Bank of Ala., 49 Ala. 229 (1873); Cohen v. N.Y. Mut. Life Ins. Co., 50 N.Y. 610 (1872); Bank of New Orleans v. Matthews, 49 N.Y. 12 (1872); Foreman v. Carter, 9 Kan. 674 (1972); Stewart v. Kerrison, 3 S.C. 266 (1872); Hubbard v. Harnden Exp. Co., 10 R.I. 244 (1872); Ingersoll v. Campbell, 46 Ala. 282 (1872); Neely v. Luster, 54 Tenn. 354 (1872); Perkins v. Rogers, 35 Ind. 124 (1871); Smith v. Brazelton, 48 Tenn. (7 Heisk.) 44 (1870); Wright v. Graham, 4 W. Va. 430 (1870); Billgerry v. Branch & Sons, 60 Va. (19 Gratt.) 393 (1869); Union Nat'l Bank v. Marr's Adm'r, 69 Ky. (6 Bush) 614 (1870); Zacharie v. Godfrey, 50 Ill. 186 (1869); Miller v. Gould, 38 Ga. 465 (1868); Cassell v. Backrack, 42 Miss. 56 (1868); Hall v. Keese, 31 Tex. 504 (1868); Swinnerton v. Columbian Ins. Co., 37 N.Y. 174 (1867); Hedges v. Price, 2 W. Va. 192 (1867); Martin v. Hortin, 64 Ky. (1 Bush) 629 (1867); Mitchell v. DeSchamps, 12 S.E. 664 (1866).

267. 128 S. Ct. 2229 (2008).

268. *See id.* at 2262 (emphasis added).

269. *See id.* at 2275.

270. 548 U.S. 557 (2006).

271. *See id.* at 629.

272. *See* Cohan, *supra* note 231, at 245–46.

273. *See* 18 U.S.C. § 3287 (2006); 28 U.S.C. § 1346(b), 2680(j) (2006); ALA. CODE § 6-2-13 (LexisNexis 1998); ALASKA STAT. § 09.10.160 (2008); CAL. CIV. PROC. CODE § 354 (West 2006) ("existence of a state of war"); IDAHO CODE ANN. § 5-232 (2004); KY. REV. STAT. ANN. § 413.300 (LexisNexis 2005); ME. REV. STAT. ANN. tit. 14, § 857 (2003); MASS. ANN. LAWS ch. 260, § 8 (LexisNexis 2004); MICH. COMP. LAWS SERV. § 600.5854 (LexisNexis 2000); MINN. STAT. § 541.15(a)(3) (West 2000);

United States Congress, can set a legal date of its commencement.[274] The War of 1812 against Great Britain, World War I against Germany, and World War II against the Axis powers, began for the United States with declarations of war on June 17, 1812,[275] April 6, 1917,[276] and December 8, 1941,[277] respectively. Courts might be expected to readily defer to the date of war declarations, however, as doing so would be consistent with the limitations upon judiciability and the desire to commit such matters to the political branches of government.

The wars involving the United States during the last half century have been undeclared, including Korea, Vietnam, the Gulf War, Kosovo, Afghanistan, and Iraq. For these conflicts, courts have looked to political acts or statements, as well as the general scale of hostilities, as suitable substitutes for formal declarations of war, rather than engaging in an in-depth fact-based or evidentiary analysis of the conflict.[278] The dates of the Vietnam War, for instance, have been measured from the Gulf of Tonkin Resolution.[279] Political acts and statements indicative of the commencement of a war in the legal sense can include congressional authorizations of war power, appropriations to the military, executive orders, or the proclamation of a blockade.[280]

C. The Cessation of Hostilities

Determining when a conflict has terminated can be more problematic. While Article I, Section 8 of the U.S. Constitution vests Congress with the power to declare war, it is silent as to how to pronounce that war is at an end. The Supreme Court had occasion to consider the "end of war" in deciding the effect of the cessation of hostilities upon

---

Mo. Rev. Stat. § 516.210 (2000); Mont. Code Ann. § 27-2-403 (2009); Nev. Rev. Stat. § 11.330 (2007); N.Y. C.P.L.R. 209 (McKinney 2003); N.C. Gen. Stat. § 1-34 (2000); N.D. Cent. Code § 28-01-27 (2006); Or. Rev. Stat. § 12.200 (2009); 42 Pa. Cons. Stat. Ann. § 5534 (West 2004); S.C. Code Ann. § 15-3-80 (2005); Utah Code Ann. § 78B-2-107 (2008); Vt. Stat. Ann. tit. 12, § 554 (2002); Wash. Rev. Code § 4.16.210 (West 2005); Wis. Stat. § 893.20 (West 1997).

274. *See* The Protector, 79 U.S. (12 Wall.) 700 (1871) (judicial examination of proclamations by the President in determining dates of war).

275. Borneman, *supra* note 60, at 51.

276. *See, e.g.*, Military Employment Preference, 73 Pa. D. & C.2d 741, 751 (Pa. Dept. Just. 1976) (Opinion of the Attorney General).

277. Shirer, *supra* note 60, at 894.

278. *See* Cohan, *supra* note 231, at 257–58.

279. *See* United States v. Taylor, 40 C.M.R. 761, 766 (A.B.R. 1969); United States v. Anderson, 17 C.M.A. 588, 589–90 (1968); *see also* Military Employment Preference, 73 Pa. D. & C.2d at 751 (Opinion of the Attorney General) (dating the war to the Gulf of Tonkin incident, two days prior to the resolution).

280. *See* Cohan, *supra* note 231, at 257.

specific circumstances under existing statutes.[281] In such cases, the Supreme Court recognized a traditional view that war terminates upon the ratification of a treaty, or by legislation, or by other political act.[282] However, in New York and Pennsylvania, the war toll statutes do not speak to the formal end of the war or the execution or ratification of a peace treaty, but instead extend the toll until the seemingly less rigid "termination of hostilities."[283] Many other states' tolls speak only to the time of the "continuance" of war[284] or the "duration" of war.[285] The combat exception to the FTCA exempts the federal government from tort liability "during time of war,"[286] while the Suspension Act suspends the statute of limitations for its designated offenses for five years measured from "the termination of hostilities."[287]

The existence of a peace treaty that addresses the tolling of claims between citizens of each nation may set a date to which a toll is measured, and would become binding through the Supremacy Clause of the U.S. Constitution.[288] Addressing such issues in formal peace treaties was once commonplace, but was not the case at the conclusion of some conflicts, such as the Civil War.[289] Moreover, peace treaties are not always concluded, as with the Korean War where an "armi-

---

281. *See* Lee v. Madigan, 358 U.S. 228, 230 (1959); United States *ex rel.* Knauff v. Shaughnessy, 338 U.S. 537 (1950); Ludecke v. Watkins, 335 U.S. 160 (1948); Wood v. Cloyd W. Miller Co., 333 U.S. 138 (1948), Fleming v. Mohawk Wrecking & Lumber Co., 331 U.S. 111 (1947).

282. *See supra* note 281.

283. *See* N.Y. C.P.L.R. 209(a)–(b) (McKinney 2003); 42 PA. CONS. STAT. ANN. § 5534(a)–(b) (West 2004); *see also* United States v. Sobell, 314 F.2d 314, 329 (2nd Cir. 1963) (noting that "a 'time of war' could end through simple cessation of hostilities even though no formal peace treaty had been concluded").

284. ALA. CODE § 6-2-13 (LexisNexis 1998); ALASKA STAT. § 09.10.160 (2008); CAL. CIV. PRO. CODE § 354 (West 2006); IDAHO CODE ANN. § 5-232 (2004); KY. REV. STAT. ANN. § 413.300 (LexisNexis 2005); ME. REV. STAT. ANN. tit. 14, § 857 (2003); MASS. ANN. LAWS ch. 260, § 8 (LexisNexis 2004); MICH. COMP. LAWS SERV. § 600.5854 (LexisNexis 2000); MO. REV. STAT. § 516.210 (2000); MONT. CODE ANN., § 27-2-403 (2009); NEV. REV. STAT. § 11.330 (2007); N.C. GEN. STAT. § 1-34 (2000); N.D. CENT. CODE § 28-01-27 (2006); OR. REV. STAT. § 12.200 (2009); S.C. CODE ANN. § 15-3-80 (2005); VT. STAT. ANN. tit. 12, § 554 (2002); WASH. REV. CODE § 4.16.210 (West 2005); WIS. STAT. § 893.20 (West 1997).

285. UTAH CODE ANN. § 78B-2-107 (2008).

286. *See* 28 U.S.C. § 2680(j) (2006).

287. *See* 18 U.S.C. § 3287 (2006).

288. *See* Borelli v. Rochester Transit Corp., 136 N.Y.S.2d 315, 318 (App. Div.1954) (discussing suspension of statutes of limitations contained in Treaty of Peace between the United States and Italy effective September 15, 1947); Note, *supra* note 186, at 1142; *see also*, U.S. CONST., art. VI.

289. *See* Note, *supra* note 186, at 1142; *see also* United States v. Anderson, 76 U.S. 56, 63 (1869) (recognizing date of conclusion of war contained in Presidential proclamation for purposes of tolling, despite multiple other competing pronouncements); United States v. Prosperi, 573 F. Supp. 2d 436, 454 (D. Mass. 2008) ("[F]ormal sur-

stice," which merely suspended hostilities short of a peace treaty, was reached on July 27, 1953 and announced by President Eisenhower.[290] There is never a guarantee that a peace treaty will be reached, nor that even a peace treaty will contain a provision addressing the tolling of claims.

By history, the New York war toll statute was amended in 1949 to make clear that a peace treaty was not necessary to establish the end date of the tolling period, stating instead that the termination of hostilities suffices.[291] The 1949 amendment made sense, as the cessation of hostilities coupled with the failure of governments to ratify a peace treaty could conceivably toll statutes of limitations indefinitely.[292] Caselaw from other states confirms that courts are not necessarily shackled by the dates of peace treaties in determining the conclusion of the war toll period.[293] Rather, courts may look at when hostilities actually ended, and in making those determinations, will ordinarily defer whenever possible to pronouncements from the political branches of government. For instance, in determining the end of New York's war toll in connection with the Vietnam War, three federal courts sitting in New York held that hostilities had terminated under the controlling limitations period more than six years prior to the commencement of the litigations,[294] and disregarded, in one of those cases, the later written agreement that normalized relations between the Governments of the United States and Vietnam.[295] More recently,

---

renders like those of Germany and Japan at the end of World War II, like formal declarations of war, are the modern exceptions.").

290. *See* United States v. Prosperi, 573 F. Supp. 2d, at 454–55; *see also* GOULDEN, *supra* note 231, at 644–45.

291. Lord Day & Lord, Barrett Smith v. Socialist Republic of Vietnam, 134 F. Supp. 2d 549, 564–65 (S.D.N.Y. 2001) (citing 1949 REPORT: RECOMMENDATIONS AND STUDIES OF THE LAW REVISION COMMISSION 795–96 (1949)); *see also* Recommendation of New York County Lawyers' Association Committee on State Legislation, Feb. 24, 1949, Bill Jacket, 1949 N.Y. Laws 1943, at 12.

292. *See* Lord Day & Lord, Barrett Smith v. Socialist Republic of Vietnam, 134 F. Supp. 2d at 565; *see also* Tran v. Citibank, N.A., 586 F. Supp. 203, 206 n.1 (S.D.N.Y. 1983); Bao v. Bank of Am., N.T., No. 84 Civ. 6013 (JFK), 1986 WL 1807, at *3–*4 (S.D.N.Y. Feb. 3, 1986) (citing Tran v. Citibank, N.A., 586 F. Supp. at 206 n.1).

293. *See, e.g.*, United States v. Hicks, 256 F. 707, 711 (W.D. Ky. 1919) (finding that "a completely ratified treaty of peace is the best evidence of the termination of a war, but . . . such a treaty is not essential to the actual ending of a war, as had many times been demonstrated").

294. *See* Lord Day & Lord, Barrett Smith v. Socialist Republic of Vietnam, 134 F. Supp. 2d at 564–65; Tran v. Citibank, N.A., 586 F. Supp. at 206 n.1; Bao v. Bank of America, N.T., 1986 WL 1807, at *3–*4.

295. *See* Lord Day & Lord, Barrett Smith v. Socialist Republic of Vietnam, 134 F. Supp. 2d at 567–68 (citing Agreement Between the Government of the United States of America and the Government of the Socialist Republic of Vietnam Concerning the Settlement of Certain Property Claims, U.S.-Vietnam, Jan. 28, 1995, 34 I.L.M. 685).

regarding the war in Iraq, President George W. Bush announced on May 1, 2003, that the "[m]ajor combat operations in Iraq [had] ended," causing one court to calculate a war toll to that date[296] even though an active military engagement continued there for many years thereafter.

V.
The Procedural Difference Between the "Suspension" of New York Statutes of Limitations by Executive Order and a "Toll" Under the State's War Toll Statute

Returning to the events of September 11, 2001, in New York, more focus can now be given to Governor Pataki's Executive Orders 113.7 and 113.28, which suspended the state's statute of limitations, and to the effect of New York's war toll statute, CPLR section 209. By the executive orders of Governor Pataki, the state's statutes of limitations after September 11, 2001, were "suspended,"[297] rather than "tolled" as would be the case under section 209. The legal distinction between the two terms is of significance.

A "toll" of a statute of limitations for any reason, such as by infancy, insanity, death, or war, stops the clock of the statute of limitations from ticking. The time that the limitations period is tolled for war is added to the calendar computation once the toll is lifted.[298] As a consequence, if a statute of limitations is tolled for 365 days, the action or proceeding can be commenced one year after the limitations period would have expired had there been no toll. By contrast, a "suspension" of the statute of limitations simply extends the expiration date of the limitations period to a later defined date on the calendar.[299] If a statute of limitations is suspended for 365 days, the time for commencing an action expires at the end of the suspension, without restarting the statute of limitations clock at the end of that period.

---

296. United States v. Prosperi, 573 F. Supp. 2d 456, 455 (D. Mass. 2008).

297. *See* 9 N.Y. Comp. Codes R. & Regs. tit. 9, §§ 5.113.7, 5.113.28 (2009).

298. *See* Bernstein v. N.V. Nederlandsche-Amerikaansche Stoomvaart-Maatschappij, 173 F.2d 71, 74 (2d Cir. 1949) (applying New York law); Von Hofmannsthal v. Wolfe, 93 N.Y.S.2d 550, 555 (App. Div. 1949); Gallewski v. H. Hentz & Co., 90 N.Y.S.2d 855, 856 (Sup. Ct. 1949), *aff'd*, 93 N.Y.S.2d 546 (App. Div. 1949), *app. granted*, 94 N.Y.S.2d 822 (App. Div. 1950), *aff'd*, 93 N.E. 620 (N.Y. 1950); Gruss v. Nettel, 104 N.Y.S.2d 329, 331–32 (Sup. Ct. 1951); Rabinovitch v. Auerbach, 100 N.Y.S.2d 923, 929–30 (Sup. Ct. 1950); Welder v. Koppel, 100 N.Y.S.2d 300, 302 (Sup. Ct. 1950).

299. *See* Randolph v. CIBC World Markets, 219 F. Supp. 2d 399, 402 (S.D.N.Y. 2002); Scheja v. Sosa, 771 N.Y.S.2d 554, 555 (App. Div. 2004).

The distinction between a "toll" and a "suspension" was dispositively important in two reported New York litigations that followed the attacks of September 11, 2001, *Randolph v. CIBC World Markets*[300] and *Scheja v. Sosa*.[301] The statute of limitations in *Randolph* was originally to expire on October 31, 2001,[302] but the action was not commenced until December 19, 2001.[303] The statute of limitations was to expire in *Scheja* on February 23, 2002,[304] but the action was not commenced until March 19, 2002.[305] In both cases, the plaintiffs' attorneys were "directly affected" by the disaster emergency,[306] and argued that their clients were therefore entitled to an additional fifty-eight days to their statutes of limitations pursuant to Executive Order 113.28, rendering the actions timely.

Courts disagreed with the plaintiffs in both instances. As explained by both the federal district court in *Randolph* and the state's appellate division in *Scheja*, Executive Order 113.28 merely extended to November 8, 2001, the statute of limitations for any cases whose limitations period expired on dates between September 11, 2001, and November 8, 2001.[307] Accordingly, there was a grace period in *Randolph* to the statute of limitations from October 31, 2001, to November 8, 2001, rendering the commencement of the action on December 19, 2001, untimely.[308] The grace period under Executive Order 113.28 was of no benefit at all in *Scheja*, as the disaster emergency no longer existed at the time the action was to have been commenced, and thus, the emergency could not have interfered with the plaintiff's ability to meet the limitations deadline.[309] In other words, the plaintiffs' attorneys in *Randolph* and *Scheja* cardinally erred in treating Executive Order 113.28 as a fifty-eight day "toll" rather than as a mere "suspension" to November 8, 2001, of any statutes of limitations that were otherwise expiring during the time of the declared disaster emergency. In stark contrast, actions where the statute of limitations was to expire during the suspension of the executive orders, and which

300. 219 F. Supp. 2d at 399.
301. 771 N.Y.S.2d at 555–56.
302. *See* Randolph v. CIBC World Markets, 219 F. Supp. 2d at 401.
303. *Id.*
304. *See* Scheja v. Sosa, 771 N.Y.S.2d at 555.
305. *Id.*
306. *See* Randolph v. CIBC World Markets, 219 F. Supp. 2d at 401; Scheja v. Sosa, 771 N.Y.S.2d at 556.
307. *See* Randolph v. CIBC World Markets, 219 F. Supp. 2d at 402; Scheja v. Sosa, 771 N.Y.S.2d at 555–56.
308. *See* Randolph v. CIBC World Markets, 219 F. Supp. 2d at 402.
309. *See* Scheja v. Sosa, 771 N.Y.S.2d at 556.

were then commenced before the grace period expired, were held to be timely.[310]

Courts were called upon to resolve other issues regarding the interpretation of Governor Pataki's executive orders relating to the events of September 11, 2001. It was held that the executive orders only applied to deadlines that courts had no discretion to extend, such as statutes of limitations, and were inapplicable to deadlines over which New York courts could exercise discretion, such as the time requirement for the filing of a municipal notice of claim as a condition precedent to suit,[311] the time for extending the time to serve an answer,[312] and the time for issuing without penalty late workers' compensation payments.[313]

VI.
Would the Events of September 11, 2001 Have Qualified As "War" to Trigger a Toll of the New York Statutes of Limitations Under CPLR Section 209?

Would the attacks on the World Trade Center have qualified as acts of "war" within the context of New York's war toll statute, CPLR section 209? The short answer is "no," but for reasons that are not necessarily related to the extent that lives and property were lost on September 11, 2001.

As noted, Governor Pataki issued Executive Order 113 and its subsequent extensions and revisions, which suspended the state's statutes of limitations for prospective plaintiffs directly affected by the events of September 11, 2001, to an outlying date of November 8, 2001.[314] Any plaintiffs that had been initially unable to commence timely actions because of the attacks on the World Trade Center, but who were later able to commence actions between September 11, 2001, and November 8, 2001, pursuant to the Governor's executive orders, never needed to resort to the savings provisions of section 209.[315] There are no reported decisions from any New York court

310. *E.g.*, Deltoro v. Arya, 760 N.Y.S.2d 201 (App. Div. 2003).

311. *See* McGarty v. City of New York, 843 N.Y.S.2d 287 (App. Div. 2007).

312. *See* CB Richard Ellis, Buffalo, N.Y., LLC v. JLC Holdings, LLC, 761 N.Y.S.2d 899 (App. Div. 2003) (discretionary authority pursuant to N.Y. C.P.L.R. 3012(d) (McKinney 2001)).

313. *See In re* Anderson v. Cent. N.Y. Developmental Disabilities Serv. Office, 769 N.Y.S.2d 623 (App. Div. 2003).

314. *See* 9 N.Y. Comp. Codes R. & Regs. tit. 9, § 5.113 (2009).

315. *See id.* § 5.113.28. An example of a case falling into this category is *Deltoro v. Arya*, 760 N.Y.S.2d at 201. *Accord* Randolph v. CIBC World Markets, 219 F. Supp. 399, 401–02 (S.D.N.Y. 2002); Scheja v. Sosa, 771 N.Y.S.2d 554 (App. Div. 2004); *In*

where any plaintiff commenced an action after the November 8, 2001 extension, and beyond the applicable statute of limitations, while arguing that the action was timely by virtue of the New York war toll set forth in section 209.

As also noted, the term "war" has not been defined by state and federal cases as events that must necessarily commence with a declaration of war by the United States Congress and end with the execution of a peace treaty between the once-belligerent nations. While war may, in some instances, be measured by such declarations and treaties, the term has been expansively applied to extended, conventional military conflicts, where the nature of hostilities between countries disables a party from commencing an action within standard statutory time limits. The term "War on Terror," when used, presents special problems, as it does not lend itself to the easy identification of enemies, battles, nor the dates of its commencement and cessation.[316]

Nevertheless, the events of September 11, 2001, represent considerable loss of life, destruction of property, and significant disruption to lawyers, litigants, and the judiciary before which they appear. The attacks on the World Trade Center cost 2,752 lives.[317] A study by the General Accounting Office estimated the economic cost of the attacks to be between $46 and $54 billion.[318] Its impact on the American economy was significant.[319] The destruction of the World Trade Center had the same effect as a significant and successful military operation, as if the attacks had been undertaken through the use of bombs, tanks, or missiles rather than with airplanes loaded with jet fuel.[320]

Certainly, some of the statutory elements that must exist for a war toll were present as a result of the events of September 11, 2001. Certain plaintiffs were under a disability to commence actions and proceedings, because of the temporary closure of courts, the death of their attorneys, the destruction of law offices, or the loss of litigation

---

re Anderson v. Cent. N.Y. Developmental Disabilities Serv. Office, 769 N.Y.S.2d at 623; CB Richard Ellis, Buffalo, N.Y., LLC v. JLC Holdings, LLC, 761 N.Y.S.2d at 899; McGarty v. City of New York, 843 N.Y.S.2d 287 (App. Div. 2007).

316. *See* Hagan, *supra* note 240, at 1333.

317. *See* Dunlap, *supra* note 14.

318. *See* Letter from Nancy R. Kingsbury, Managing Dir., Applied Research & Methods, General Accounting Office, Review of Studies of the Economic Impact of the September 11, 2001, Terrorist Attacks on the World Trade Center (May 29, 2002), http://www.gao.gov/new.items/d02700r.pdf (last visited Apr. 3, 2010).

319. *Id.*

320. *See* THE 9/11 COMMISSION REPORT, *supra* note 1, at 4.

files and records.[321] Some of those plaintiffs included New York State residents, in whose favor the state's war toll is applicable.[322] Also, some resident plaintiffs were facing the expiration of their controlling statutes of limitations, absent an extension by executive order or by a war toll.[323]

Whether New York's war toll would have triggered in favor of residents disabled from the timely commencement of actions or proceedings in the aftermath of September 11, 2001, depends on two crucial elements of the statute; namely, whether the attacks on the World Trade Center constitute acts of "war," and whether the war involves a foreign "country."[324]

Here, it appears that the events of September 11, 2001, would not qualify as "war" within the meaning of New York's war toll statute. Whether the events qualify as "war" is not, in this context, a question of fact measured by the extent to which lives and properties were lost. Rather, the definition of war should be interpreted, in this context, as a question of the legal and statutory interpretation of CPLR section 209.

In interpreting the meaning of New York statutes generally, including the state's war toll provision specifically, the plain language chosen by the state legislature is to be examined to determine its statutory intent.[325] If the language of a statute is ambiguous, courts are to then examine the legislative history underlying the statute for evidence

---

321. *See* N.Y. C.P.L.R. 209(c) (McKinney 2003); 42 PA. CONS. STAT. ANN. § 5534(c) (2004); CAL. CODE CIV. PROC. § 354 (West 2006); MICH. COMP. LAWS. SERV. § 600.5854 (LexisNexis 2000); Randolph v. CIBC World Markets, 219 F. Supp. 399, 401–02 (S.D.N.Y. 2002); Scheja v. Sosa, 771 N.Y.S.2d 554 (App. Div. 2004); *In re* Anderson v. Cent. N.Y. Developmental Disabilities Serv. Office, 769 N.Y.S.2d 623 (App. Div. 2003); CB Richard Ellis, Buffalo, N.Y., LLC v. JLC Holdings, LLC, 761 N.Y.S.2d 899 (App. Div. 2003); Deltoro v. Arya, 760 N.Y.S.2d 201 (App. Div. 2003); McGarty v. City of New York, 14 Misc.3d 1412A (N.Y. Sup. Ct. 2007); Wise, *supra* note 16; Wise, *supra* note 15; *Today's News Update*, *supra* note 15; *World Trade Center Recovery Update*, N.Y.L.J., Oct. 9, 2001, at 4; *Smaller Firms Struggling After Sept. 11*, *supra* note 23.

322. *See* N.Y. C.P.L.R. 209(a)–(c) (McKinney 2003); Bernstein v. N.V. Nederlandsche-Amerikaansche Stoomvaart-Maatschappij, 173 F.2d 71, 74 (2d Cir. 1949); Rabinovitch v. Auerbach, 100 N.Y.S.2d 923, 929–30 (Sup. Ct. 1950).

323. *See, e.g.*, Deltoro v. Arya, 760 N.Y.S.2d at 201.

324. *See* N.Y. C.P.L.R. 209(a)–(c) (McKinney 2003).

325. *See* N.Y. STAT. LAW §§ 92, 94 (McKinney 1971). *See generally* Jones v. Bill, 890 N.E.2d 884 (N.Y. 2008); Comptroller of N.Y. v. Mayor of N.Y., 852 N.E.2d 1144, 1148 (N.Y. 2006); Theroux v. Reilly, 803 N.E.2d 364, 366 (N.Y. 2003); Bluebird Partners v. First Fid. Bank, 767 N.E.2d 672, 674 (N.Y. 2002); Riley v. County of Broome, 742 N.E.2d 98, 102 (N.Y. 2000); *In re* Yong Myun Rho v. Ambach, 546 N.E.2d 188, 190 (N.Y. 1989); *In re* Sutka v. Connors, 538 N.E.2d 1012, 1015 (N.Y. 1989); Brooklyn Navy Yard Cogeneration Partners, L.P. v. Tax Appeals Tribunal, 848 N.Y.S.2d 747, 748 (App. Div. 2007); Janssen v. Inc. Vill. of Rockville Ctr., 869 N.Y.S.2d 572, 581–82 (App. Div. 2008).

of the legislature's intent.[326] In applying a limitations toll, CPLR subsections 209(a), (b), and (c) all require that the United States be "at war," but without specific statutory definition of the term. Definitions for various terms used throughout New York's CPLR, as set forth in CPLR section 105, similarly do not include a definition for the term "war."[327]

Absent specific legislative definition, words may be given their plain dictionary meaning.[328] Black's Law Dictionary defines "war" as a "hostile conflict by means of armed forces, carried on between nations, states, or rulers, or sometimes between parties within the same nation or state."[329] The Webster's Third New International Dictionary defines the term as an armed conflict between states or nations, and more generally, between opposing mental, physical, or social forces.[330] Dictionary definitions provide no controlling guidance here, because while on the one hand they restrict the meaning of "war" to conflicts between nations, which was not the case on September 11, 2001, they also include on the other hand mere circumstances of hostility, conflict, or antagonism,[331] which arguably include the events of September 11, 2001.

Notwithstanding recent language from the Supreme Court in *Boumediene* and *Hamdan* suggesting that the War on Terror may be viewed as a war in the classic sense, the plain language of section 209 does not extend to acts of private organized terrorism. The three prongs of the New York war toll statute, subsections 209(a), (b), and (c), are each restricted to war involving a foreign "country."[332] Subsection 209(a), which provides a war toll based on the place of a cause of action's accrual, requires that the accrual be in a foreign "country," or an occupied territory of a foreign "country," with which the United

326. *See* N.Y. STAT. LAW §§ 76, 94 (McKinney 1971); Action Elec. Contractors, Inc. v. Goldin, 474 N.E.2d 601, 604 (N.Y. 1984); *see also* Uniformed Firefighters Ass'n, Local 94 v. Beekman, 420 N.E.2d 938 (N.Y. 1981); Tutunjian v. Conroy, 865 N.Y.S.2d 768, 770 (App. Div. 2008).

327. *See* N.Y. C.P.L.R. 105 (McKinney 2003).

328. *See* N.Y. STAT. LAW § 234 (McKinney 1971); Rosner v. Metro. Prop. and Liab. Ins. Co., 754 N.E.2d 760, 762–63 (N.Y. 2001); *In re* Village of Chestnut Ridge v. Howard, 708 N.E.2d 988, 990 (N.Y. 1999).

329. BLACK'S LAW DICTIONARY 1720 (9th ed. 2009). The same dictionary provides a separate definition for the term "private war," defined as "[a] war between private persons." *Id.*

330. It defines the term as "a state of usu[ally] open and declared armed hostile conflict between political units (as states or nations) . . . [or] a state of hostility, conflict, opposition or antagonism between mental, physical, social or other forces." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2575 (1993).

331. *See* N.Y. STAT. LAW § 235 (McKinney 1971).

332. N.Y. C.P.L.R. 209 (McKinney 2003).

States is at war.[333] Subsection 209(b) confers a war toll upon aliens of a foreign "country" at war with the United States.[334] Likewise, CPLR subsection 209(c), which tolls the statutes of limitations for other persons temporarily residing or traveling in a country at war with the United States, or in an enemy-occupied territory, requires by its language that the belligerent party be a "country."[335] The attacks on the World Trade Center on September 11, 2001, were not carried out by any "country," but were instead the acts of a non-sovereign organization, al Qaeda.[336] The United States Congress never voted on any declaration of war against any country that had been directly or indirectly supportive of terrorist training and activities,[337] nor even against any individuals or organizations responsible for the attacks of September 11, 2001.

More notably, the most recent amendment to New York's CPLR section 209 was in 1962, at a time when the New York Legislature, and the state's predecessor legislatures, could only have understood the term "war" as involving a belligerent country, in the conventional or Cold War sense. The legislative history of a statute is relevant to its meaning.[338] Nothing in the examined bill jackets or legislative reports for the years in which section 209 was amended suggests that New York legislators had ever considered organized terrorism, independent of countries, relative to those amendments.[339] When words are sus-

333. *Id.* § 209(a).
334. *See id.* § 209(b).
335. *Id.* § 209(c).
336. *See* THE 9/11 COMMISSION REPORT, *supra* note 1, at 145–73.
337. *See* N.J. Peace Action v. Obama, No. 08-2315, 2009 WL 1416041 (D. N.J. May 19, 2009); Doe v. Bush, 240 F. Supp. 2d 95, 96–97 (D. Mass. 2003), *sub. det*., 257 F. Supp. 2d 436 (D. Mass. 2003), *aff'd*, 323 F.3d 133 (1st Cir. 2003).
338. *See* N.Y. STAT. LAW § 124 (McKinney 1971); Riley v. County of Broome, 742 N.E.2d 98, 102 (N.Y. 2000).
339. *See* 1958 Report of the Temporary Commission on the Courts to the Governor and The Legislature of the State of New York, and Second and Fifth Preliminary Reports of the Advisory Committee on Practice and Procedure, and related documents, Bill Jacket, 1962 N.Y. Laws 1297; Memorandum by the Executive Secretary and Director of Research of the Law Review Commission relating to Senate Int. No. 1587, Printed No. 1699, and related documents, Bill Jacket, 1950 N.Y. Laws 2082; Recommendation of the Law Revision Commission to the Legislature Relating to Definition of the Period of Tolling of the Statute of Limitations Upon Causes of Action Arising in Enemy Countries or Enemy Occupied Territory, Recommendation of the New York County Lawyers' Association Committee on State Legislation, and related documents, Bill Jacket, 1949 N.Y. Laws 1943; Memorandum by the Executive and Director of Research of the Law Revision Commission relating to Senate Int. No. 226, Pr. No. 226, Report No. 38 of the New York County Lawyers' Association Committee on State Legislation, and related documents, Bill Jacket, 1949 N.Y. Laws 1943; Memorandum by the Executive and Director of Research of the Law Revision Commission relating to Assembly Int. No. 1723, Senate Rec. No. 308, Pr. No. 2855, Re-

ceptible of two or more meanings, the meaning is to be determined from the context of the statute, the purpose and spirit of it, and the intention of the lawmakers.[340] In the years that amendments were enacted to section 209, war was necessarily understood in terms of opposing uniformed soldiers in battlefields acting on behalf of their respective countries, operating marked tanks, ships, and planes, and where enemies were identifiable to each other. If *arguendo* section 209 is ambiguous as to whether its language could extend to acts of terrorism, the legislative intent behind the language suggests that it does not include such acts, no matter how significant their scale. Thus, regardless of how we interpret the word "war" in connection with terrorism, the events of September 11, 2001, do not meet the additional requirement in New York, and in all of the other states, that the war involve a belligerent "country."[341]

Viewed in this light, Governor Pataki's initial issuance on September 12, 2001, of Executive Order 113.7, with its later revisions that suspended New York State's statutes of limitations to November 8, 2001, for lawyers and litigants directly affected by the attacks on the World Trade Center, should be construed not only as a lawful exercise of authority under Executive Law 29-a(1), but also, as a prudent exercise of such authority. Governor Pataki may not have known on September 12, 2001, when the initial executive order was issued, whether any "country" was behind the attacks of al Qaeda and "at war" with the United States. Absent the Governor's issuance of the executive orders suspending the state's statutes of limitations, a defined set of resident plaintiffs with potentially serious and meritorious causes of

---

port No. 293 of the New York County Lawyers' Association Committee on State Legislation, and related documents, Bill Jacket, 1948 N.Y. Laws 1518; Recommendation of the Law Revision Commission to the Legislature Relating to Application of Foreign Periods of Limitation and Tolling of the Statute of Limitations by Absence of Defendant, Bill Jacket, 1943 N.Y. Laws 1092.

340. *See* N.Y. STAT. LAW § 235 (McKinney 1971); *In re* Grand Jury Subpoena Duces Tecum Served on Museum of Modern Art, 719 N.E.2d 897, 906 (N.Y. 1999); City of White Plains v. Sassower, 467 N.Y.S.2d 418, 419 (App. Div. 1983); McKendry v. Thornberry, 872 N.Y.S.2d 658, 662 (Sup. Ct. 2009).

341. *See* N.Y. C.P.L.R. 209 (McKinney 2003); *see also* ALA. CODE § 6-2-13 (LexisNexis 1998); ALASKA STAT. § 09.10.160 (2008); IDAHO CODE ANN. § 5-232 (2004); KY. REV. STAT. ANN. § 413.300 (LexisNexis 2005); ME. REV. STAT. ANN. tit. 14, § 857 (2003); MASS. ANN. LAWS ch. 260, § 8 (LexisNexis 2004); MICH. COMP. LAWS SERV. § 600.5854 (LexisNexis 2000); MINN. STAT. § 541.15(a)(3) (West 2000); MO. REV. STAT. § 516.210 (2000); MONT. CODE ANN. § 27-2-403 (2009); NEV. REV. STAT. § 11.330 (2007); N.C. GEN. STAT. § 1-34 (2000); N.D. CENT. CODE § 28-01-27 (2006); OR. REV. STAT. § 12.200 (2009); 42 PA. CONS. STAT. ANN. § 5534 (West 2004); S.C. CODE ANN. § 15-3-80 (2005); UTAH CODE ANN. § 78B-2-107 (2008); VT. STAT. ANN. tit. 12, § 554 (2002); WASH. REV. CODE § 4.16.210 (West 2005); WIS. STAT. § 893.20 (West 1997).

action would have been barred from seeking damages for reasons that may have looked like war, and sounded like war, and had the effects of war, but which were not "war" with any "country" in the purely statutory sense of the war toll statute.

VII.
Whether the Governors of States Other Than New York Are Authorized to Suspend Statutes of Limitations During Declared Disaster Emergencies

The laws of New York fortuitously permitted the Governor of the state to suspend the statutes of limitations in the wake of the 9/11 attacks. Since statutory war tolls are not applicable to significant acts of terrorism absent war between the United States and another "country," a secondary question arises as to whether the laws of the other states authorize their governors to issue executive orders temporarily suspending their states' statutes of limitations, similar to the authority exercised by Governor Pataki.

Surprisingly, a survey of the laws of the fifty states reveals that with the exception of New York and Texas, our country's governors do not appear to have the authority to suspend their states' statutes of limitations during declared disaster emergencies. At the time of the 9/11 attacks, New York appears to have been the only state that unambiguously vested its governor with the authority to suspend statutes of limitations in response to the declared disaster emergency.

There are twenty-one states where the defined emergency powers of governors clearly do not include the authority to suspend any laws. These states are Alabama,[342] Kentucky,[343] Maine,[344] Maryland,[345] Massachusetts,[346] Minnesota,[347] Missouri,[348] Nevada,[349] New Hampshire,[350] New Jersey,[351] New Mexico,[352] North Carolina,[353] Ohio,[354]

342. *See* Ala. Code § 31-9-8 (LexisNexis 1998).
343. *See* Ky. Rev. Stat. Ann. § 39A.100 (LexisNexis 2009).
344. *See* Me. Rev. Stat. Ann. tit. 37-B, § 741 (2009).
345. *See* Md. Code Ann. art. 41 § 2-101 (2002) (repealed 2003).
346. *See* 1950 Mass. Acts ch. 639.
347. *See* Minn. Stat. Ann. § 12.21 (West 2010).
348. *See* Mo. Ann. Stat. § 44.022 (West 2001).
349. *See* Nev. Rev. Stat. § 414.060 (2007).
350. *See* N.H. Rev. Stat. Ann. 4:45 (2008).
351. *See* N.J. Stat. Ann. app. §§ A:9-45 (2006).
352. *See* N.M. Stat. Ann. § 12-10-4 (LexisNexis 2004).
353. *See* N.C. Gen. Stat. Ann. § 147-33.2 (2009).
354. *See* Ohio Rev. Code Ann. § 5502.271 (West 2008).

Oklahoma,[355] Oregon,[356] Utah,[357] Vermont,[358] Virginia,[359] Washington,[360] Wisconsin,[361] and Wyoming.[362]

Another twenty-seven states vest their governors during declared disaster emergencies with the authority to suspend statutes that regulate procedures for the conduct of state business, where strict compliance with statutes would hinder or delay the mitigation of the emergency itself. These states include Alaska,[363] Arizona,[364] Arkansas,[365] California,[366] Colorado,[367] Connecticut,[368] Delaware,[369] Florida,[370] Georgia,[371] Hawaii,[372] Idaho,[373] Illinois,[374] Indiana,[375] Iowa,[376] Kansas,[377] Louisiana,[378] Michigan,[379] Mississippi,[380] Montana,[381] Nebraska,[382] North Dakota,[383] Pennsylvania,[384] Rhode Island,[385] South Carolina,[386] South Dakota,[387] Tennessee,[388] and West Virginia.[389] Many of these "state of emergency" statutes are either identical to one

355. *See* OKL. STAT. ANN. tit. 63, § 683.8–.9 (West 2004).
356. *See* OR. REV. STAT. § 401.065(2) (2009); *see also* OR. REV. STAT. § 401.085 (2009).
357. *See* UTAH CODE ANN. § 63K-4-401(2) (2008).
358. *See* VT. STAT. ANN. tit. 20 § 9 (2000).
359. *See* VA. CODE ANN. § 44-146.17 (2002).
360. *See* WASH. REV. CODE ANN. § 43.06.220 (2006).
361. *See* WIS. STAT. ANN. § 166.03(1)(b) (West 2006).
362. *See* WYO. STAT. ANN. § 19-13-104(c) (2009).
363. ALASKA STAT. § 26.20.040 (2008).
364. ARIZ. REV. STAT. § 26-303 (LexisNexis 2007).
365. ARK. CODE ANN. § 12-75-114(e)(1) (2003).
366. CAL. GOV'T. CODE § 8571 (West 2005).
367. COLO. REV. STAT. ANN. § 24-32-2104(7)(a) (West 2008).
368. CONN. GEN. STAT. ANN. 28-9(a) (West 2009).
369. DEL. CODE ANN. tit. 20, § 3116(a)(2) (2005).
370. FLA. STAT. ANN. § 252.36(5)(a) (West 2006).
371. GA. CODE ANN. 38-3-51(d)(1) (West 2009).
372. HAW. REV. STAT. § 128-8 (2009).
373. IDAHO CODE ANN. § 46-1008(5)(a) (2003).
374. 20 ILL. COMP. STAT. 3305/7(a)(1) (West 1993).
375. IND. CODE § 10-14-3-12(d)(1) (LexisNexis 2009).
376. IOWA CODE ANN. § 29C.6(6) (West 2009).
377. KAN. STAT. ANN. § 48-925(c)(1) (2005).
378. LA. REV. STAT. ANN. § 29:724(D)(1) (2007) (*amended by* 2009 La. Sess. Law Serv. 768 (West)).
379. MICH. COMP. LAWS ANN. § 30.405(1)(a) (2004).
380. MISS. CODE ANN. § 33-15-11(c)(1) (West 1972).
381. MONT. CODE ANN. § 10-3-104 (2009).
382. NEB. REV. STAT. § 81-829.40(6)(a) (2008).
383. N.D. CENT. CODE § 37-17.1-05(6)(a) (2004).
384. 35 PA. CONST. STAT. § 7301(f)(1) (2003).
385. R.I. GEN. LAWS § 30-15-9(e)(1) (1994).
386. S.C. CODE ANN. § 25-1-440(a)(3) (1991).
387. S.D. CODIFIED LAWS § 33-15-8(4) (2004).
388. TENN. CODE ANN. § 58-2-107(e)(1) (West 2002).
389. W.VA. CODE 15-5-6(g) (LexisNexis 2004).

another or, at least, very similar. However, it is arguable whether any of these states actually authorize the suspension of statutes of limitations, as gubernatorial authority to suspend statutes in disaster emergencies is legislatively limited in most such instances to the laws that regulate or prescribe the conduct of state business or agencies.[390]

Louisiana is a state that has recent experience coping with widespread disaster emergencies, stemming from the events surrounding Hurricane Katrina. The hurricane's 160-mile winds struck the Gulf Coast, including the City of New Orleans, on August 28, 2005.[391] Certain litigants who faced court deadlines, including plaintiffs who faced the imminent expiration of statutes of limitations, were unable to meet those deadlines because of the hurricane-related disruption of law offices[392] and the closure of courts.[393] In the immediate aftermath of the hurricane, Louisiana Governor Kathleen Blanco promulgated Executive Order KBB 2005-32 effective August 29, 2005, which provided that "[a]ll deadlines in legal proceedings, including liberative prescriptive and peremptive periods in all courts . . . are hereby suspended until at least September 25, 2005."[394] The suspension of deadlines was later extended for designated parishes to October 25 and November 25, 2005, by Executive Orders KBB 2005-48 and KBB 2005-67.[395] The initial executive order, and those that followed, were issued pursuant to the authority purportedly conferred upon the Gover-

390. The statutes of Connecticut and Hawaii grant their governors slightly greater suspension authority. The governor of Connecticut may suspend any statute he determines is in conflict with efficient "execution of civil preparedness functions." CONN. GEN. STAT. ANN. 28-9(a) (West 2009). The governor of Hawaii may suspend "any law that impedes or tends to impede" the execution of emergency functions. HAW. REV. STAT. § 128-8 (2009). Neither governor is limited to suspension of regulatory statutes, but both are still limited to suspending statutes that in some way interfere with emergency management. As a result, it is still only arguable whether either governor's authority extends to the suspension of statutes of limitation.

391. *See* Joseph B. Treaster & Abby Goodnough, *Powerful Storm Threatens Havoc Along Gulf Coast*, N.Y. TIMES, Aug. 29, 2005, at A1.

392. *See* Parker v. B & K Constr. Co., 962 So.2d 484, 486–87 (La. Ct. App. 2007).

393. *See* Robert Ambrogi, *Katrina and the Profession — Where to Find Answers About Courts, Lawyers*, BULLSEYE, Sept. 2005, http://www.ims-expertservices.com/newsletters/sept/katrinaandtheprofession-091905.htm; Federal Courts Closed by Hurricane Katrina, http://www.uscourts.gov/newsroom/hurricane2.html (last visited Mar. 24, 2010).

394. *See* Posting of Alan J. Bertreau to Louisiana Law Blog, http://www.louisianalawblog.com/hurricane-katrina-governors-executive-order-kbb-200532-suspension-of-legal-deadlines-prescription-peremption.html (Sept. 7, 2005).

395. *See* Asseleh v. Sherwood Forest Country Club Inc., 991 So.2d 67, 72–73 (La. App. Ct. 2008); Executive Order KBB 2005-67, Emergency Suspension of Prescription, Peremption and other Legal Deadlines, http://www.katrinalegalaid.org/link.cfm?4164 (last visited Apr. 05, 2010). Governor Blanco's hurricane-related suspension of legal deadlines was adopted by Resolution of the Supreme Court of Louisiana dated

nor by the Louisiana Homeland Security and Emergency Assistance and Disaster Act.[396] That Act, however, similar to the disaster emergency statutes of twenty-six other states, merely authorized the suspension of "regulatory statutes" regarding "procedures for the conduct of state business" if strict compliance with any statute, order, rule, or regulation would "prevent, hinder, or delay necessary action in coping with the emergency."[397] Arguably, statutes of limitations are not "regulatory" in nature, the initiation of private litigation is not necessarily "state business," and post-emergency litigation does not necessarily "cop[e] with the emergency" itself.

Nevertheless, in the wake of Hurricane Katrina, governing authorities recognized, at least initially, Governor Blanco's emergency authority to suspend legal deadlines pursuant to executive orders. Notably, the Louisiana state legislature found it necessary to thereafter approve, ratify, and confirm the Governor's executive orders, subject to three chronologically-sequential hurricane-related statutes that further extended legal deadlines for parties unable to meet them because of the catastrophic events of the hurricane.[398] The last of the three laws set June 1, 2006, as the outside date for extending legal deadlines.[399] While it remains arguable whether the disaster emergency authority of Louisiana and twenty-six other states clearly and unambiguously extends to the suspension of statutes of limitations, the Louisiana experience suggests that states similarly situated would view their Governors' emergency powers expansively, though perhaps subject to later legislative ratification. This is of no solace to the remaining states whose emergency powers do not authorize their governors to suspend any laws in response to declared disaster emergencies.[400]

October 3, 2005. *See* Supreme Court of Louisiana Resolution, http://www.katrinalegalaid.org/link.cfm?4157 (last visited Apr. 05, 2010).

396. *See* LA. REV. STAT. ANN. § 29:721 (2007) (*amended by* 2009 La. Sess. Law Serv. 768 (West)).

397. *See id.*

398. *See* LA. REV. STAT. ANN. §§ 9:5822–9:5824 (2007); Asseleh v. Sherwood Forest Country Club Inc., 991 So.2d at 72–73; Dendy v. City Nat. Bank, 977 So.2d 8, 13 (La. Ct. App. 2007); Robinson v. State Farm Mut. Auto. Ins. Co., 973 So.2d 796, 798 (La. Ct. App. 2007); Huth v. Pickering, 966 So.2d 652 (La. Ct. App. 2007); Parker v. B&K Const. Co., Inc., 962 So.2d at 486; McCrory v. Can Do, Inc., 938 So.2d 802 (La. Ct. App. 2006); State *ex rel.* La. Dep't of Educ.—Food Service v. Bright Beginnings Child Care, Inc., 957 So.2d 362, 366 (La. Ct. App. 2007).

399. *See* LA. REV. STAT. ANN. § 9:5824(B)(1) (2007); Lambert v. Roussel, 991 So.2d 8, 12–13 (La. Ct. App. 2008)

400. *See* ALA. CODE § 31-9-8 (LexisNexis 1998); KY. REV. STAT. ANN. § 39A.100 (LexisNexis 2009); ME. REV. STAT. ANN. tit. 37-B, § 741(2009); MD. ANN. CODE art. 41 § 2-101; 1950 Mass. Acts ch. 639; MINN. STAT. ANN. § 12.21 (West 2010); MO. ANN. STAT. § 44.022 (West 2001); OHIO REV. CODE ANN. § 5502.271 (West 2008);

In a very recent development, the state of Texas enacted expanded gubernatorial authority for dealing with declared disaster emergencies, effective as of June 19, 2009.[401] There is no ambiguity as to the meaning of the amended Texas statute. Texas law permits the state's governor to "waive or suspend a deadline imposed by a statute . . . if the waiver or suspension is reasonably necessary to cope with a disaster."[402] The amended language of the Texas statute is discretionary and similar to New York's Executive Law 29-a(1), pursuant to which Governor Pataki issued his executive orders after the 9/11 attacks.[403]

The foregoing survey of states' disaster emergency laws demonstrates that, just as no war toll will operate to suspend statutes of limitations in the event of significant acts of terrorism, the governors of a significant number of states appear to lack any clear authority to suspend statutes of limitations in the event of far-reaching declared disaster emergencies. This is true whether states of emergency arise from severe floods, earthquakes, civil upheaval, war, or, as relevant here, significant acts of terrorism that could cause the death of attorneys, the destruction of law offices, or the closure of courts.

By extension, in the event of future significant acts of terrorism, a significant number of states do not appear to currently protect potential plaintiffs that may find themselves unable to commence actions in the courts on or shortly after the event and before the expiration of their controlling statutes of limitations.

VIII.
Recent Legislative Developments in New York Arising Out of the Events of September 11, 2001

There were two legislative developments in New York during 2009 that directly arose from the events of September 11, 2001. One deals with plans for coping with future disaster emergencies. The second deals with an amendment to the state's statute of limitations for

---

Nev. Rev. Stat. § 414.060 (2007); N.H. Rev. Stat. Ann. 4:45 (2008); N.J. Stat. Ann. app. §§ A:9-45 (2006); N.M. Stat. Ann. § 12-10-4 (LexisNexis 2004); N.C. Gen. Stat. Ann. § 147-33.2 (2009); Okla. Stat. Ann. tit. 63, § 683.8–.9 (West 2004); Vt. Stat. Ann. tit. 20 § 9 (2000); Va. Code Ann. § 44-146.17 (2002); Wash. Rev. Code Ann. § 43.06.220 (2006); Wis. Stat. Ann. § 166.03(1)(b) (West 2006); Wyo. Stat. Ann. § 19-13-104(c) (2009).

401. *See* 2009 Tex. Gen. Laws, ch. 990, § 1.

402. *See* Tex. Gov't Code Ann. § 418.016(b) (Vernon Supp. 2009); *see also id.* § 418.015.

403. *Compare* Tex. Gov't Code Ann. § 418.016(a), *with* N.Y. Exec. Law § 29-a(1) (McKinney 2002).

rescue workers who became sick as a result of their exposure to toxic substances at the site of the World Trade Center. Both developments demonstrate that the events of September 11, 2001, influence the current thinking and emergency planning of the state's government.

In regards to emergency planning, New York State Governor David Paterson signed into law on July 28, 2009 the repeal of Judiciary Law sections 8 through 12 and the replacement of those provisions with a new section 8 of the statute.[404] Previously, in the event of a war, pestilence, or other public calamity, courts within the state were allowed to relocate, but not to any court outside of their designated judicial districts.[405] The prior law contributed to the six-day closure of certain courts in Manhattan after the attacks of September 11, 2001, as they could not lawfully be moved to a safer functional location outside of their county or city jurisdictions. The amended provisions of the Judiciary Law permit the Governor, upon consultation with the state's Chief Judge, to temporarily relocate trial courts to locations outside of their judicial districts if necessary to maintain their continued operation.[406] While the statute also applies to circumstances of disease and natural disaster, the events of September 11, 2001, were the true impetus to these amendments of New York's Judiciary Law.[407]

The aftermath of the 9/11 attacks on the World Trade Center is also being seen in the workers who claim they were sickened by exposure to toxic substances during rescue, recovery, or clean-up operations at the site. On September 16, 2009, Governor Paterson signed into law an amendment to General Municipal Law section 50-i.[408] Under CPLR section 214-c, plaintiffs with claims attributed to the latent exposure to toxic substances accrue not on the date of the exposure to the substances, but on the date the injury was discovered or should have been discovered through the exercise of reasonable dili-

---

404. *See* 2009 N.Y. Consol. Laws Adv. Legis. Serv. 1077 (LexisNexis); N.Y. JUD. CT. ACTS LAW § 8 (McKinney Supp. 2010).

405. *See* N.Y. JUD. CT. ACTS LAW § 10 (McKinney 2002) (repealed 2009).

406. *See* N.Y. JUD. CT. ACTS LAW § 8 (McKinney Supp. 2010). The new law permits the Governor to designate the "most proximate" location for the safe operation of the courts, "without limitation based on the judicial department, judicial district, county, city, town, village, or other geographical district for which such court was established." N.Y. JUD. CT. ACTS LAW § 8(2)(a) (McKinney Supp. 2010); *see also Law Establishes Protocols for Relocating Courts*, N.Y.L.J., Aug. 4, 2009, at 1.

407. *See Law Establishes Protocols For Relocating Courts*, *supra* note 406.

408. *See* N.Y. GEN. MUN. LAW § 50-i(4) (McKinney 2007); *see also* Joel Stashenko, *Law Opens One-Year Window for Time-Barred 9/11 Claims*, N.Y.L.J., Sept. 25, 2009, at 1.

gence.[409] A three year statute of limitations runs generally from such date,[410] unless the cause of the injury is determined within five years from when the injury was discovered or should have been discovered, in which cases the statute of limitations is one year from discovery of the injury's cause.[411] The statute of limitations for claims against municipal defendants is one year and ninety days.[412] Plaintiffs in New York who seek to recover damages from public corporations have the added burden of filing notices of claim with the target municipality, prior to the commencement of their litigations, setting forth in each instance the identity of the claimant and the claimant's attorney, the nature, time, place and manner of the claim, and the items of injuries or damages claimed.[413] Notices of claim must be filed within ninety days after a claim arises,[414] but courts have the discretion to extend the filing deadline so long as the extension does not exceed the time limit of the applicable statute of limitations.[415]

The 2009 amendment to GML section 50-i recognizes that there are workers who had been engaged in rescue, recovery, and clean-up operations at the World Trade Center site who apparently developed injuries as a result of their exposure to toxic substances at the site, and who were barred from commencing actions against any municipal corporation because their time limits for doing so had passed.[416] An amendment to the state's General Municipal Law, denominated as GML section 50-i(4), revives otherwise time-barred causes of action by expressly permitting the filing of such claims against municipal defendants within one year of the legislation's effective date of September 16, 2009, without the necessity of filing any notices of

409. *See* N.Y. C.P.L.R. 214-c(2) (McKinney 2003). *See generally* Germantown Cent. Sch. Dist. v. Clark, Clark, Millis & Gilson, AIA, 791 N.E.2d 398 (N.Y. 2003); Martin v. 159 W. 80 St. Corp., 770 N.Y.S.2d 720 (App. Div. 2004); Miller Realty Associates v. Amendola, 859 N.Y.S.2d 258 (App. Div. 2008).

410. *See* N.Y. C.P.L.R. 214-c(2) (McKinney 2003).

411. *See* N.Y. C.P.L.R. 214-c(4) (McKinney 2003). If the cause of the injury is determined within five years from the latent exposure to the toxic substance, but after the statute of limitations would have normally expired, plaintiffs must plead and prove that the technical, scientific or medical knowledge and information needed to ascertain the cause had not yet been developed during the time frame within which an action would have been authorized. *Id; see, e.g.*, Annunziato v. City of N.Y., 647 N.Y.S.2d 850, 854–55 (App. Div. 1996).

412. *See* N.Y. Gen. Mun. Law § 50-i(1) (McKinney 2007); Pietrowski v. City of N.Y., 560 N.Y.S.2d 662, 664 (App. Div. 1990).

413. *See* N.Y. Gen. Mun. Law § 50-e(2), 50-i (McKinney 2007).

414. *See* N.Y. Gen. Mun. Law § 50-e(1)(a) (McKinney 2007).

415. *See* N.Y. Gen. Mun. Law § 50-e(5) (McKinney 2007); *e.g.*, Lucero v. N.Y. City Health & Hosps. Corp., 828 N.Y.S.2d 507 (App. Div. 2006); *In re* Kressner v. Town of Malta, 564 N.Y.S.2d 643 (App. Div. 1991).

416. *See* Stashenko, *supra* note 408.

claim.[417] The law provides dual relief to potential time-barred plaintiffs that had been engaged in rescue, recovery and clean-up activities at the World Trade Center site, in that it provides a one-year extension to the toxic tort statute of limitations embodied in CPLR section 214-c, and also waives any plaintiffs' failures to have filed a notice of claim within the general or extended time limits of the state's General Municipal Law.

The amendments in New York to its Judiciary Law and General Municipal Law suggest that state governments, dealing with past emergencies like 9/11, should be equally willing to address potential future emergencies.

IX.
A Suggestion for Any Future Disaster Emergency Executive Orders in New York

For New York, one suggestion for future executive orders that may be warranted in the event of another significant disaster emergency is to address the state's "borrowing statute" set forth in CPLR section 202. That statute provides that when an out-of-state plaintiff commences an action in New York, and the cause of action arose outside of New York, the action is governed by either the New York statute of limitations or the limitations period of the forum in which the claim arose, whichever is *shorter*.[418] The purpose of the borrowing statute is to prevent forum shopping by plaintiffs.[419] When invoked, the application of a foreign state's statute of limitations also

417. *See* N.Y. Gen. Mun. Law § 50-i(4) (McKinney 2007). The amendment is known as "Jimmy Nolan's Law," in honor of Jimmy Nolan, a carpenter, who slept at the World Trade Center site for three weeks while engaged in volunteer rescue and recovery efforts. *See* Stashenko, *supra* note 408. Nolan suffers from skin and respiratory problems that he attributes to toxic exposure. *Id.* The law applies also to persons who worked at the Fresh Kills landfill on Staten Island, the city morgue, the temporary morgue on the west side of Manhattan, and the barges that operated between the west side and Fresh Kills. *See id.*

418. *See* N.Y. C.P.L.R. 202 (McKinney 2003); Stuart v. American Cyanamid Co., 158 F.3d 622, 627 (2d Cir. 1998); Davis v. E.I. DuPont DeNemours Co., 400 F. Supp. 1347, 1349 (W.D.N.C. 1974); Wamboldt v. Mannion, 281 F. Supp. 774, 775 (S.D.N.Y. 1968); Antone v. Gen. Motors Corp., 473 N.E.2d 742, 745 (N.Y. 1984); Proforma Partners, LP v. Skadden Arps Slate Meagher & Flom, LLP, 720 N.Y.S.2d 139, 139–40 (App. Div. 2001); Smith Barney, Harris Upham & Co. v. Luckie, 665 N.Y.S.2d 74, 75 (App. Div. 1997); *see also* Mark C. Dillon, *Five Tips for the Civil Practitioner in Handling Choice of Law Issues,* 22 Westchester B.J. 15, 22 (Winter 1994).

419. *See* Cafferty v. Scotti Bros. Records, Inc., 969 F. Supp. 193, 203 (S.D.N.Y. 1997); Ins. Co. of N. Am. v. ABB Power Generation, Inc., 690 N.E.2d 1249, 1252 (N.Y. 1997); Antone v. General Motors Corp., 473 N.E.2d at 745; Eaton v. Keyser, 862 N.Y.S.2d 640, 641–42 (App. Div. 2008).

requires application of its tolling provisions.[420] As previously noted, the tolling provisions of all states are less extensive for war than those recognized by New York, except for Pennsylvania's war toll statute which is identical to New York's.

The language of Executive Orders 113.7 and 113.28 extended the statutes of limitations in New York only as to the general limitations provisions of CPLR section 201.[421] The executive orders did not address the borrowing statute of section 202.[422] Indeed, any out-of-state plaintiff subject to the borrowing statute, facing an expiring statute of limitations in the wake of the September 11, 2001 attacks, would have received the benefit of neither the foreign state's war toll in the absence of war with another "country," nor the saving provisions of Governor Pataki's executive orders. No reported cases raised the borrowing statute as an issue in the aftermath of September 11, 2001, suggesting, fortunately for out-of-state plaintiffs, that the issue might not have arisen. Theoretically, however, out-of-state plaintiffs subject to the borrowing statute in any future declared natural or man-made disaster emergency, could find themselves ineligible for limitations extensions under similar executive orders and foreclosed from commencing timely actions in New York courts. It is therefore suggested that the template executive orders created after September 11, 2001, be modified to suspend in any declared disaster emergency not only the general limitations period within the scope of section 201, but also the borrowing statute under section 202.

Conclusion

Should the State of New York, and other states, consider enacting war tolls in favor of potential residents or non-residents disabled from the timely commencement of future actions and proceedings on account of significant acts of terrorism? Such a war toll does not appear to exist in any war toll statutes today, not even in New York and Pennsylvania, which currently have the most expansive war toll language, since all such statutes limit the concept of "war" to conflicts between "countries." There may be no compelling need to do so

420. *See In re* Agent Orange Prod. Liab. Litig., 597 F. Supp. 740, 801 (E.D.N.Y. 1984), *aff'd*., 818 F.2d 145 (2d Cir. 1987); Hunt v. Enzo Biochem, Inc., 471 F. Supp. 2d 390, 405 (S.D.N.Y. 2006); *In re* Smith Barney, Harris Upham & Co., Inc. v. Luckie, 647 N.E.2d 1308, 1316 (N.Y. 1995); Antone v. General Motors Corp., 473 N.E.2d at 747; Childs v. Brandon, 459 N.E.2d 149, 150 (N.Y. 1983); Martin v. Dierck Equip. Co., 374 N.E.2d 97, 101–02 (1978); *see also* Dillon, *supra* note 418, at 22.

421. *See* N.Y. Comp. Codes R. & Regs. tit. 9, § 5.113.7, 5.113.28 (2009).

422. *Id.*

where, as in New York and Texas, other provisions of law[423] permit the issuance of executive orders extending statutes of limitations in declared disaster emergencies. Certainly, legislatures are free to consider, debate, and perhaps enact expanded war toll provisions to reflect any changed realities arising from the events of September 11, 2001.

Any broadening of war tolls will not be undertaken in statehouses absent a consensus amongst legislators and members of the public that our understanding of what is "war" may now extend beyond the conventional and nuclear models of past decades. Such a consensus is probably elusive given the current polarization of political thought in the United States. Consensus aside, the challenge to any expansion of statutory war toll language would be in providing an objective threshold definition of terrorist activity sufficient to trigger a toll in favor of potential litigants, knowable on or shortly after the event, whether that definition be triggered by a quantifiable loss of life or destruction of property, or by the measurable disruption of the judicial branch of government. That objective benchmark is probably elusive, too.

Consequently, to best protect the litigation rights of plaintiffs that could be foreclosed by future declared disaster emergencies, there should be continued reliance upon the reasonableness and thoroughness of ad hoc executive orders, rather than upon war toll statutes, to the extent warranted by any future significant terrorist-related attacks upon the persons and property of the United States. Focus should therefore be placed upon whether disaster emergency authority of governors in any given state includes the authority to temporarily suspend statutes of limitations. Such authority is arguably lacking in every state except New York and Texas. Any state governors without the authority to issue executive orders akin to those of Governor Pataki in the aftermath of September 11, 2001, particularly with regard to the suspension of statutes of limitations, should consider requesting such authority from their state legislatures, so that it is available to them in the event of any future declared disaster emergency. Legislators in those forty-eight states should consider conferring such power in language that is clear and unambiguous. State bar associations may be well advised to consider lobbying their statewide representatives as well since, in the end, gubernatorial authority protects a defined set of potential plaintiffs with meritorious causes of action, who, through no fault of their own, may otherwise be foreclosed from commencing

423. *See* N.Y. EXEC. LAW § 29-a (McKinney 2002); TEX. GOV'T CODE ANN. § 418.016(b) (Vernon Supp. 2009).

timely actions as a result of significant terrorist-related disaster emergencies.