

**IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES**

UNITED STATES

Appellee

v.

Staff Sergeant (E-6)

ZACHARY J. ASKINS

United States Army

Appellant

**THE CENTER FOR ETHICS AND
THE RULE OF LAW NATIONAL
INSTITUTE OF MILITARY
JUSTICE *AMICUS CURIAE* BRIEF**

Crim. App. Dkt. No. 20230303

USCA Dkt. No. 26-0002/AR

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**TO THE HONORABLE JUDGES OF THE UNITED STATES
COURT OF APPEALS FOR THE ARMED FORCES**

INTEREST OF *AMICI*

The Center for Ethics and the Rule of Law (CERL) is a nonpartisan national security organization affiliated with the University of Pennsylvania. CERL is dedicated to preserving and promoting the rule of law in 21st-century national security, military operations, and democratic governance. Founded in 2012, its distinguished Executive Board includes retired military officers, lawyers, academics, and legal practitioners, as well as former public servants. It files briefs, advises policymakers, educates students, and provides a resource for the media and members of the public through its publications and conferences convening academics and policymakers. As part of the University of Pennsylvania, CERL is a registered 501(c)(3) entity.

The National Institute of Military Justice (NIMJ) is a private, non-profit organization founded in 1991, dedicated to ensuring the fair administration of justice within the armed forces and to improving public understanding of military justice. NIMJ's leadership includes former judge advocates, private practitioners, and legal scholars.

GRANTED ISSUE

Whether the Army Court erred when it held that the United States was in a “time of war” from 2014–2017 and the statute of limitations was tolled.

RELEVANCE OF THE BRIEF

Amici argue that the Army Court’s test to determine if the United States was “at war” during the relevant period was erroneous. The Army Court improperly treated the *Bancroft* factors as a test for whether the United States was in a “time of war,” despite the fact that this Court never established the *Bancroft* factors as a test of this question. *See United States v. Bancroft*, 3 U.S.C.M.A. 3 (1952) (hereinafter “Bancroft factors”). This Court should assess whether the United States was “at war” according to the definition of “time of war” found in the Manual for Courts-Martial as interpreted through the lens of international law.

STANDARD OF REVIEW

Interpreting the Rules for Courts-Martial is a legal question that must be reviewed *de novo*. *United States v. Hunter*, 65 M.J. 399, 401 (C.A.A.F. 2008) (citation omitted).

ARGUMENT

Article 43 of the Uniform Code of Military Justice (UCMJ) provides for a five-year statute of limitations for most offenses. *See* 10 U.S.C. § 843(b). Here, the officer exercising court-martial jurisdiction over Appellant received the charges five years *and three months* after the latest date the offenses could have been committed (according to Appellant’s admissions). *United States v. Askins*, ARMY 20230303, 2025 CCA LEXIS 420, at *4 (A. Ct. Crim. App. Aug. 28, 2025) (emphasis added.). Thus, under UCMJ art. 43(b)(1) 10 U.S.C. § 843(b)(1), any action against Appellant for these offenses would be time-barred. However, Article 43(f) provides that:

When the United States is at war, the running of any statute of limitations applicable to any offense under this chapter . . . (2) committed in connection with the acquisition, care, handling, custody, control, or disposition of any real or personal property of the United States . . . is suspended until three years after the termination of hostilities as proclaimed by the President or by a joint resolution of Congress.

10 U.S.C. § 843(f). Applying this exception, the Army Court found that the United States was in a “time of war” from 2014 to 2017, and therefore that the tolling provision in Article 43(f) applied.¹

¹ *Amici* note that while the Army Court refers throughout its decision to the meaning of “time of war,” the text of Article 43(f) uses the phrase “at war.” *See* 10 U.S.C. § 843(f). At no point does the Army Court note whether this discrepancy has any significance to its analysis.

Askins, 2025 CCA LEXIS 420 at *8.

Amici view the Army Court’s analysis as erroneous in view of the inappropriate weight the court gave to the *Bancroft* factors as the method of interpreting 10 U.S.C. § 843(f). *Amici* note that other possible improvements upon this analysis, such as a test drawn from the definition of “time of war” currently in the presidentially-directed Manual for Courts-Martial (the “Manual”) may come closer to resolving the ambiguity but do not fully answer the question of congressional intent in 10 U.S.C. § 843(f) with regard to the meaning of the phrase “time of war.” Given the combined ambiguity of the UCMJ and the Manual on this issue, *amici* urge the court to apply usage from international law, specifically the *Tadić* test, to interpret whether the United States is “at war.” Given that the concept of war has both an international and a domestic meaning, and that these meanings are regularly used in various military contexts involving the UCMJ to resolve the status of U.S. military activities, it is appropriate for this court to harmonize international and domestic law on the question of the meaning of the phrase “time of war” where possible.

I. The Army Court Gave Inappropriate Weight to the “*Bancroft* Factors.”

In its decision below, the Army Court stated that “[c]ourts conduct a multi-factored analysis to determine ‘whether the country is engaged in a de facto war’ absent a formal declaration of war” by Congress. *Askins*, 2025 CCA LEXIS 420, at *7 (quoting *United States v. Rivaschivas*, 74 M.J. 758, 761 (A. Ct. Crim. App. 2015)). According to the Army Court, the factors in that analysis include:

(1) the nature of the conflict; (2) the manner in which it is carried on; (3) the movement to and presence of large numbers of personnel on the battlefield; (4) the casualties involved; (5) the sacrifices required; (6) the drafting of recruits to maintain a large number of personnel in the military service; (7) national emergency legislation enacted and being enacted; (8) executive orders promulgated; and (9) the expenditure of large sums to maintain armed forces in the theater of operations.

Id. (citing *Rivaschivas*, 74 M.J. at 761). The Army Court noted the United States’ involvement in “multiple armed conflicts,” including in Afghanistan, Iraq, and Syria; the President’s acknowledgment of these conflicts “through military appropriations, force deployments, executive orders, and casualty reporting”; and the President’s declarations of the end of hostilities in Afghanistan and the end of the war there in April and August 2021, respectively. *Id.* at *7–8. Accordingly, the court concluded “the United States was in a ‘time of

war’ within the meaning of Article 43(f) during the period in question.”

Id. at *8.²

This Court has never adopted Bancroft’s nine-factor test for the determination of whether the United States is in a “time of war.” Instead, the nine factors in *Rivaschivas* come from the lower-court case *United States v. Castillo*. *Rivaschivas*, 74 M.J. at 761 (quoting *Castillo*, 34 M.J. 1160, 1162–64 (N.M.C.M.R. 1992)). The court in *Castillo* derived these factors from the analysis in *United States v. Bancroft*. *Castillo*, 34 M.J. at 1163 (citing *Bancroft*, 3 U.S.C.M.A. 3, 5–6 (1953)).

Bancroft asked whether a special court-martial had jurisdiction over the case of the accused who had been tried “for sleeping on post” while serving in Korea. 3 U.S.C.M.A. at 4. If the offense occurred during the “time of war,” the offense was a capital one and the special court-martial lacked jurisdiction to hear the case. *See id.* The Court found that despite the absence of a declaration of war, the United States was engaged in a war in Korea for UCMJ purposes. *Id.* at 5–6. Explaining its reasoning, the Court included the following language:

We believe a finding that this is a time of war, within the meaning of the language of the Code, is compelled by the

² The Army Court’s conclusion also rested on what it asserted was in “recogni[tion] of the plain language of Article 43(f), UCMJ.” *Askins*, 2025 CCA LEXIS 420, at *8.

very nature of the present conflict; the manner in which it is carried on; the movement to, and the presence of large numbers of American men and women on, the battlefields of Korea; the casualties involved; the sacrifices required; the drafting of recruits to maintain the large number of persons in the military service; the national emergency legislation enacted and being enacted; the executive orders promulgated; and the tremendous sums being expended for the express purpose of keeping our Army, Navy and Air Force in the Korean theatre of operations.

Id. at 5.

This language, which interpreted a different section of the UCMJ, does not establish a “multi-factor[] analysis”; rather, it constitutes a description of the particular facts influencing the Court’s view that the United States was then at war in Korea. Indeed, the *Bancroft* Court named several other reasons why it was convinced the United States was then “in a highly developed state of war,” including “[a] reading of the daily newspaper accounts of the conflict in Korea”; “an appreciation of the size of the forces involved”; “a recognition of the efforts, both military and civilian, being expended to maintain the military operations in that area”; and the “knowledge of other well-publicized wartime activities.” *Id.* at 5–6. Additionally, the Court articulated its view that “battle conditions” require “peacetime sentences with regard to military offenses be discarded and more severe wartime sentences be invoked,” and that “[i]t would indeed be an insult

to the efforts of those servicemen who are daily risking their lives in defense of democratic principles to hold that peacetime conditions prevail.” *Id.* at 6.

Post-*Bancroft*, this Court decided multiple other cases regarding the applicability of provisions of the UCMJ containing the phrase “time of war” to offenses that took place during the United States’ military involvement in Korea and Vietnam. While many of these cases referenced and reproduced sections of *Bancroft*, none established that the nine “*Bancroft* factors” constituted a multi-factor test to be applied to future cases. *See, e.g., United States v. Ayers*, 4 U.S.C.M.A. 220, 221, 227–28 (1954) (finding that December 23, 1950 qualified as a “time of war” under of Article 43(a) “for the purpose of a prosecution for an absence without leave originating within the continental limits of the United States”); *United States v. Taylor*, 4 U.S.C.M.A. 232, 237–38 (1954) (determining that the United States was at war in Korea “within the meaning of Article 43(f)”); *United States v. Anderson*, 17 U.S.C.M.A. 588, 589 (1968) (stating “[t]he current military involvement of the United States in Vietnam undoubtedly constitutes a ‘time of war’ in that area, within the meaning of Article 43's suspension of the running of the statute of limitations”); *United States v. Averette*,

19 U.S.C.M.A. 363, 365 (1970) (holding “for a civilian to be triable by court-martial in ‘time of war,’ Article 2(10) means a war formally declared by Congress”). Only in lower court opinions like *Castillo* and *Rivaschivas*, decided decades after *Bancroft*, did these factors take on the special status that the Army Court afforded them here.

Because the Army Court erroneously relied on the *Bancroft* factors, the question remains of what test to apply.

II. The Plain Language of Article 43(f) Does Not Resolve the Question of When the United States is “At War.”

Analysis of Article 43(f) begins but does not end with “the text of the statute.” See *United States v. Jacobsen*, 77 M.J. 81, 84 (C.A.A.F. 2017). The plain meaning of the Code does not define when we are at war; the Court must resort to alternative sources of meaning in its interpretive task.

One possible source of guidance is Article 43(f)’s civilian analogue, the Wartime Suspension of Limitations Act (WSLA), codified at 18 U.S.C. § 3287. See *Taylor*, 4 U.S.C.M.A. at 235 (“Article 43(f) was taken directly from 18 USC § 3287, for the purpose of escaping the possibility that the latter suspension of limitations might be deemed inapplicable to trials by court-martial.”). However, the case law and statutory history of this provision confuse rather than clarify

the question of when the United States is “at war.” Prior to its amendment in 2008, only two cases interpreted the meaning of “at war” within the WSLA, and they came to starkly different conclusions. *Compare United States v. Shelton*, 816 F. Supp. 1132, 1135 (W.D. Tex. 1993) (holding that the WSLA did not apply to suspend the statute of limitations for an offense committed during the Gulf War because Congress had not declared war), *with United States v. Prosperi*, 573 F. Supp. 2d 436, 444–55 (D. Mass. 2008) (finding on the basis of a four-factor test that the United States was “at war” in Afghanistan between September 18, 2001, and December 22, 2001, and in Iraq between October 10, 2002, and May 1, 2003).

Shortly after the District Court for the District of Massachusetts decided *Prosperi*, Congress amended the WSLA to apply when “Congress has enacted a specific authorization for the use of the Armed Forces, as described in section 5(b) of the War Powers Resolution (50 U.S.C. § 1544 (b)).” *See Consolidated Security, Disaster Assistance, and Continuing Appropriations Act, 2009*, Pub. L. No. 110-329, 122 Stat. 3574, 3647 (2008). The Senate sponsors of the legislation believed that the amendment was necessary for the statute to operate with respect to conduct committed during the Afghanistan and Iraq wars. *See Press*

Release, Office of U.S. Sen. Chuck Grassley, Leahy, Grassley Introduce Wartime Fraud Legislation (Apr. 14, 2008), <https://www.grassley.senate.gov/news/news-releases/leahy-grassley-introduce-wartime-fraud-legislation> (stating the WSLA “does not apply to the conflicts in Iraq and Afghanistan, which are not declared wars.”); 154 Cong. Rec. S9965 (2008) (statement of Sen. Leahy) (“Unfortunately, [the WSLA] does not appear to apply to the ongoing conflicts in Iraq and Afghanistan.”).

Given the ambiguity of the phrase “at war,” the Court should resort to additional interpretive sources of statutory meaning.

A. The Definition of “Time of War” Provided by the Manual for Courts-Martial is Instructive But Not Dispositive

This Court should adopt an interpretation of “at war” or “time of war” within the meaning of Article 43 that aligns with the Manual for Courts-Martial’s definition of “time of war”— a definition added in 1984. *See Manual for Courts-Martial, United States*, R.C.M. 103(19) (1984 ed.) [hereinafter MCM]. The Manual defines “[w]ar, time of” as: “[f]or purposes of R.C.M. 1004(c)(6) and of implementing the applicable paragraphs of Parts IV and V of this Manual only, ‘time of war’ means a period of war declared by Congress, or the factual determination by the President that the existence of hostilities warrants

a finding that a ‘time of war’ exists for purposes of R.C.M. 1004(c)(6) and Parts IV and V of this Manual.” *MCM*, R.C.M. 103(29) (2024 ed.).³

Amici acknowledge this case does not involve R.C.M. 1004(c)(6) or the definition of a term in Parts IV and V of the Manual. The Manual’s definition nevertheless offers a useful test for determining when the United States is considered “at war” for statute of limitations purposes, as it is at least one regulatory interpretation of the UCMJ with regard to the definition of war. This definition suggests that the United States is at war when Congress has declared war, or when the President has made a determination on the basis of active hostilities that the country is at war. This definition, however, does not strictly apply to the current case. Nor will it cover every case. What would be the answer under the Manual, for example, with regard to military operations of limited duration and scope that the President

³The text of the definition has remained largely unchanged since 1984. *Compare MCM*, R.C.M. 103(19) (1984 ed.) (“For purpose of R.C.M. 1004(c)(6) and of implementing the applicable paragraphs of Parts IV and V of this Manual only, ‘time of war’ means a period of war declared by Congress or the factual determination by the President that the existence of hostilities warrants a finding that a ‘time of war’ exists for purposes of R.C.M. 1004(c)(6) and Parts IV and V of this Manual.”), *with MCM*, R.C.M. 103(29) (2024 ed.).

insists does not rise to the level of war, when Congress has made no indication of approval?

The Manual's definition would align tolling with the United States being "at war" or during a "time of war," with increases in the severity of punishment due to "time of war." *See* 10 U.S.C. §§ 885, 889, 890, 895 (containing offenses punishable by death only during time of war). Under the current system, the statute of limitations may be tolled pursuant to Article 43 when a court, applying the *Bancroft* factors or another test, finds that the United States was "at war" or in a "time of war" when the offense was committed. Under the Manual's definition, by contrast, the court would not be able to impose increased punishment for offenses committed during "time of war" without a Congressional declaration or Presidential determination. An inconsistent result may be avoided by aligning "at war" and "time of war" within the meaning of Article 43 with the meaning of "time of war" within Parts IV and V of the Manual.

Third, adopting this definition helps ensure consistency from the executive branch to prevent tolling abuse. Absent a declared war, a president would be required to make particular factual determinations justifying the invocation of such wartime provisions. This requirement

of presidential reason-giving helps puts the onus on the federal government to avoid arbitrary assertions of war that are specific to the courts-martial process to justify otherwise time-barred prosecutions. *Cf. Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (explaining that under the Administrative Procedure Act’s “arbitrary and capricious” standard, an “agency must examine the relevant data and articulate a satisfactory explanation for its action including a ‘rational connection between the facts found and the choice made.’” (citation omitted)).

This regulation is not binding and, by its own terms, contains ambiguities. In light of this, the Court ought to resort to further sources to aid in interpreting 10 U.S. Code § 843(f).

B. Applying International Law Can Help Disambiguate the Meaning of “At War” Under Article 43(f).

This Court should look to the internationally recognized and well-developed body of customary and treaty law jurisprudence that bears directly on this question. *See Murray v. The Schooner Charming Betsy*, 6 U.S. 64, 118 (1804) (“It has also been observed that an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains”); *Hamdi v. Rumsfeld*, 542 U.S. 507, 516–24 (2004) (O’Connor, J., plurality opinion) (using

international law to interpret the scope of the AUMF in authorizing the detention of a citizen qualifying as an “enemy combatant”); *see also Prosperi*, 573 F. Supp. 2d at 451 (drawing on international law, including the *Tadić* test, to interpret the meaning of “at war” within the WSLA). Moreover, the UCMJ itself specifically incorporates international law, *see* 10 U.S.C. § 818(a) (“General courts-martial also have jurisdiction to try any person who by the law of war is subject to trial by a military tribunal and may adjudge any punishment permitted by the law of war.”), suggesting that it is an appropriate source from which to draw.

International law recognizes the existence of an armed conflict “whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State.” *Prosecutor v. Tadić*, Case No. IT-94-1-AR72, Decisions on the Defence [*sic*] Motion for Interlocutory Appeal on Jurisdiction, ¶ 70 (Int’l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995). This is known as the *Tadić* test. Sasha Radin, *Global Armed Conflict? The Threshold of Extraterritorial Non-international Armed Conflict*, 89 Int’l L. Stud. 696, 710 (2013).

The *Tadić* test considers “the intensity of the conflict” and “the organization of parties to the conflict.” *Prosecutor v. Dordević*, Case No. IT-05-87/1-T, Public Judgment with Confidential Annex, ¶ 1522 (Int’l Crim. Trib. for the Former Yugoslavia Feb. 23, 2011). “These criteria are used solely as a way to distinguish an armed conflict ‘from banditry, unorganized and short-lived insurrections, or terrorist activities.’” *Id.* (quoting *Prosecutor v. Tadić*, Case No. IT-94-1-T, Opinion and Judgment, ¶ 562 (Int’l Crim. Trib. for the Former Yugoslavia May 7, 1997)). In determining whether the parties are sufficiently organized, courts have considered factors such as: “the existence of a command structure”; “an ability to carry out operations in an organized manner”; “the level of logistics”; “a level of discipline and ability sufficient to implement the basic obligations of Common Article 3 [of the Geneva Conventions]”; and “an ability to speak with one voice.” Radin, *supra* page 14, at 711. With respect to whether the necessary level of intensity has been reached, courts have looked at: “the seriousness, increase, and spread of clashes over territory and time”; “the distribution and type of weapons”; “government forces (number, presence in crisis area and the way force is used)”; “the number of casualties”; “the number of civilians fleeing the combat

zone”; “the extent of destruction”; “blocking, besieging and heavy shelling of towns”; “the existence and change of front lines”; “occupation of territory”; “road closures”; and “UN Security Council attention.” *Id.* at 712 (summarizing applicable case law).

The *Tadić* test sets out a generally accepted approach to determining the existence of armed conflict that has stood the test of time in a variety of international fora. The analysis “is widely relied on as authoritative for the meaning of armed conflict in both international and non-international armed conflicts.” *The Hague Conference: Final Report on the Meaning of Armed Conflict in International Law*, Int’l L. Ass’n 14 (2010).

Numerous international cases have relied on the *Tadić* decision, meaning that military courts applying the test would have a substantial body of law on which to draw. *See, e.g., Dordević*, Public Judgment with Confidential Annex, ¶¶ 1522–26, 1531–80; *Prosecutor v. Boškoski*, Case No. IT-04-82-T, Judgment, ¶¶ 175–92 (Int’l Crim. Trib for the Former Yugoslavia July 10, 2008); *Prosecutor v. Limaj*, Case No. IT-03-66-T, Judgment, ¶¶ 84, 90, 93–173 (Int’l Crim. Trib for the Former Yugoslavia Nov. 30, 2005).

In the absence of a clear statement from Congress defining the meaning of the phrase “at war,” reliance on the international consensus of what constitutes an armed conflict is a methodological approach consistent with United States case law.

CONCLUSION

For the above reasons, this Court should find that the Army Court failed to apply the appropriate test for determining whether the United States was “at war” within the meaning of Article 43(f) and remand this case to the Army Court to apply the appropriate test.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this amicus brief complies with the maximum length authorized by Rule 26(d) as it has fewer than 6500 words, not including front matter, the certificate of compliance, and the certificate of filing and service. This brief complies with the typeface and typestyle requirements of Rule 37. It was prepared using the 14-point Times New Roman font.

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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was transmitted by electronic means on March 11, 2026, to the Clerk of the Court; counsel for the Government—Government Appellate Division—usarmy.pentagon.hqda-otjag.mbx.usalsa-gad@army.mil; Defense Appellate Division—usarmy.pentagon.hqda-otjag.mbx.usalsadadservice@army.mil.

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