

Criminal Statutes of Limitations and Speedy Trial Act Considerations During the COVID-19 Pandemic

April 3, 2020

White Collar Defense and Investigations

COVID-19 (hereinafter, “the coronavirus”) is causing significant interruptions to the legal system across the United States, with implications for actual and potential subjects in government investigations and defendants in enforcement actions. This client advisory analyzes the pandemic’s potential effects on the default statute of limitations for federal crimes and deadlines under the Speedy Trial Act.

Overview

Federal courts have not addressed whether states of emergency or disruptive events such as natural disasters and epidemics can toll the statute of limitations for federal crimes. To that end, the Department of Justice has reportedly sent Congress proposed legislation that would toll the statute of limitations for federal prosecutions during, and for one year following, national emergencies. In response to the coronavirus outbreak, at least two district courts have issued orders explicitly tolling all statutes of limitations.

Delays resulting from a pandemic would likely be excluded from the deadlines established by the Speedy Trial Act. Courts have attempted to adapt to the coronavirus pandemic by holding telephonic proceedings to the extent possible. But trials raise unique public safety concerns that will be challenging for courts to address. To that end, many courts across the country have issued “ends-of-justice” orders of general applicability, which have continued all criminal trials and excluded delays resulting from the disruption caused by COVID-19.

Statute of Limitations

A statute of limitations “limit[s] exposure to criminal prosecution to a certain fixed period of time following the occurrence of” alleged criminal acts.¹ Most federal crimes are subject to a five-year statute of limitations set out in the federal catch-all statute.² A number of exceptions identify longer time periods, or no limitations, for certain crimes.³ We expect the pandemic will thrust

¹ *Toussie v. United States*, 397 U.S. 112, 114 (1970).

² 18 U.S.C. § 3282(a) (“[N]o person shall be prosecuted, tried, or punished for any offense, not capital, unless the indictment is found or information is instituted within five years next after such offense shall have been committed.”).

³ See, e.g., *id.* § 3286 (terrorism offenses); *id.* § 3298 (trafficking-related offenses); *id.* § 3301 (securities fraud offenses).

statute of limitations issues to the forefront of investigations and enforcement actions.⁴ While courts may theoretically be able to toll statutes of limitations equitably,⁵ none has yet done so in favor of the government in a criminal context, and prosecutors likely will be wary of relying on the interim orders that courts have issued in the aftermath of the outbreak. Looking ahead, Congress' action or inaction in the coming weeks will likely determine the outcome of the tolling question.

Proposed Legislation

Amid the outbreak, the Department of Justice has reportedly sent Congress proposed legislation regarding the statute of limitations.⁶ According to *Politico*, the Department “asked Congress to pause the statute of limitations for criminal investigations . . . during national emergencies, ‘and for one year following the end of the national emergency.’”⁷ A Department spokeswoman later clarified that it had proposed several options for tolling the statute of limitations, including upon an order by the chief judge of the relevant federal district court or by the Chief Justice of the United States, and that it would expire upon termination of the national emergency or by a finding from the Chief Justice that it no longer affected the functions of the federal courts, whichever came sooner.⁸ To date, the Department has not issued any public guidance on how it will approach enforcement pending any change to the federal statute of limitations.

District Court Orders

In the last month, courts around the country have issued orders in response to the outbreak.⁹ Most courts either did not address the statute of limitations or explicitly stated that the orders did not affect them.¹⁰ Two courts in Texas, however, purported to toll all applicable statutes of limitations. The Northern District of Texas issued an order stating that “[a]ll deadlines are . . . tolled for all purposes, including the statute of limitations,” through May 1, 2020,¹¹ and the Eastern District of Texas issued a similarly worded order.¹² Both orders, which did not cite any supporting legal authority or invoke

⁴ New York State, pursuant to an executive order, also tolled all state statutes of limitations from March 20, 2020 until April 19, 2020. [N.Y. Exec. Order No. 202.8](#) (Mar. 20, 2020).

⁵ See, e.g., *United States v. Atiyeh*, 402 F.3d 354, 367 (3d Cir. 2005) (“[W]e have never foreclosed the possibility that equitable tolling applies to criminal statutes of limitations.”); *United States v. Midgley*, 142 F.3d 174, 175–78 (3d Cir. 1998) (“Although the doctrine of equitable tolling is most typically applied to limitation periods on civil actions, there is no reason to distinguish between the rights protected by criminal and civil statutes of limitations.” (citations and internal quotation marks omitted)).

⁶ DOJ Seeks New Emergency Powers amid Coronavirus Pandemic, [POLITICO](#) (Mar. 21, 2020).

⁷ *Id.* While the status of the proposed legislation is unclear, lawmakers in both parties have announced their opposition. See DOJ Asks Congress for Broad New Powers Amid COVID-19. Schumer Says, “Hell No,” [VOX](#) (Mar. 22, 2020).

⁸ Kerri Kupec (@KerriKupecDOJ), [Twitter](#) (Mar. 23, 2020, 12:01 a.m.). Some of proposed options for tolling the statute of limitations may raise constitutional concerns. For example, the “judicial Power” granted by Article III may not empower the Chief Justice to make factual determinations outside of a pending “case or controversy,” and it is debatable whether Congress may delegate its legislative authority to the courts in this manner.

⁹ *The Federal Courts Begin to Adapt to COVID-19*, [LAWFARE](#) (updated Mar. 18, 2020).

¹⁰ E.g., [Standing Order No. 20-9](#), *In re: Court Operations in Exigent Circumstances Created by the COVID-19 Pandemic* (D.D.C. Mar. 16, 2020); [Order of the Chief Judge No. 18](#), *In the Matter of Suspension of Jury Trials and Other Proceedings During the COVID-19 Public Emergency* (S.D. Cal. Mar. 17, 2020).

¹¹ [Special Order No 13-5](#), *Court Operations under the Exigent Circumstances Created by the COVID-19 Pandemic* (N.D. Tex. Mar. 13, 2020).

¹² [General Order 20-03](#), *Court Operations under Exigent Circumstances Created by the COVID-19 Pandemic* (E.D. Tex. Mar. 16, 2020).

the courts' equitable tolling powers, arguably exceed the courts' authority to issue rules governing proceedings in their courts.¹³

Statutory Tolling

Generally, the federal tolling statutes would likely not apply in the event of national emergencies or other disruptive events. These provisions are narrowly tailored and apply only to certain categories of cases, such as child abuse (18 U.S.C. § 3283), concealment of assets in bankruptcy (18 U.S.C. § 3284), wartime fraud against the government (18 U.S.C. § 3287), and obtaining foreign evidence (18 U.S.C. § 3292). For investigations with international dimensions, the pandemic could lead to tolling under the foreign evidence provision, which allows tolling for up to three years while the government makes an official request to obtain evidence located in a foreign country.¹⁴ As governments take steps to limit the operations of nonessential business to mitigate the spread of the coronavirus, the Department of Justice may face delays in gathering evidence overseas, making the provision particularly salient for global investigations involving foreign witnesses and evidence.

The Speedy Trial Act

In addition to statutes of limitations, prosecutors must also consider the Speedy Trial Act,¹⁵ which governs the timing of a federal criminal prosecution. Under the Act, the government must indict a defendant within 30 days of arrest or service of summons; a trial must begin within 70 days of the indictment or the defendant's first appearance in court, whichever is later.¹⁶ The Act contains some provisions automatically excluding time from these deadlines under certain circumstances.¹⁷ More broadly, it permits a judge to exclude time under the Speedy Trial Act by granting a continuance, so long as "the ends of justice served by taking such action outweigh the best interest of the public and the defendant in a speedy trial."¹⁸

While the scale of disruption caused by the coronavirus is novel, precedents suggest that its resulting delays could be excluded under the Speedy Trial Act. Courts have routinely continued trials when states of emergency have closed courthouse facilities, or when disease has rendered individuals unavailable to appear at trial. On a broader scale, the virus has disrupted government operations, either because of diverted resources, sick or quarantined personnel, or a backlog of

¹³ Congress has granted district courts rulemaking power to "prescribe rules for the conduct of their business," but for no other purpose. 28 U.S.C. § 2071(a), (f). Congress has clearly stated that these rules "shall not abridge, enlarge or modify any substantive right." *Id.* § 2072(b). The district court orders tolling statutes of limitations arguably exceed the district court's rulemaking authority by abridging and modifying a defendant's rights. *Cf. Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 407 (2010) (Under § 2072, a court may issue rules to "govern only the manner and the means by which the litigants' rights are enforced"; they cannot "alter the rules of decision by which the court will adjudicate those rights" (cleaned up)); *Bonham v. Weinraub*, 413 F. App'x 615, 616 (4th Cir. 2011) ("state statutes of limitations are considered substantive law" (citing *Guaranty Trust Co. v. York*, 326 U.S. 99, 110 (1945))).

¹⁴ 18 U.S.C. § 3292(a)(1), (c).

¹⁵ *Id.* § 3161 *et seq.*

¹⁶ *Id.* § 3161(b)–(c).

¹⁷ *See generally id.* § 3161(h)(1)–(6).

¹⁸ *Id.* § 3161(h)(7)(A).

continued matters. The Act does not explicitly exclude time associated with such delays, but parties are likely to request, and courts are likely to grant, exclusions on these grounds.

Unavailability of the Courthouse

Courts have excluded time under the Speedy Trial Act when exigent events interrupt the operations of the courthouse.¹⁹ While these precedents tend to relate to natural disasters like volcanic eruptions and hurricanes, courts have also recognized that an infectious disease is “an extraordinary event” sufficient to justify delaying trial proceedings.²⁰ In the case of the coronavirus, the risk of transmission threatens the safety of parties, judges, and staff, which may disrupt courthouse proceedings.²¹ And several courts have noted the risk of convening grand juries.²² To that end, many federal courts have already begun closing their doors and granting blanket ends-of-justice continuances under the Act.²³

Unavailability of the Defendant or Witnesses

The Act excludes any period of delay resulting from “unavailability of the defendant or an essential witness,” including when their “presence for trial cannot be obtained by due diligence.”²⁴ It also specifically excludes time when the defendant is “physically unable to stand trial.”²⁵ Under some circumstances, the quarantine of a defendant or witness may mean that her testimony “cannot be obtained by due diligence” within the meaning of the Act.²⁶ Outside of the statutory provisions for “availability,” a disease quarantine may also justify an ends-of-justice continuance.²⁷ Where a defendant or key witness has contracted the coronavirus, then, a court could determine that she is “unavailable” for trial or grant an ends-of-justice continuance in the interest of preventing transmission.²⁸

¹⁹ See, e.g., *Furlow v. United States*, 644 F.2d 764, 768 (9th Cir. 1981). There, a district court issued a 13-day continuance following the eruption of Mt. St. Helens, which had a “paralyzing impact on . . . the location of the court.” *Id.* at 767.

²⁰ See *United States v. Phinizy*, 2019 WL 2570038, at *4 (D.D.C. June 21, 2019). A court’s closure during a natural disaster can render it “inaccessible” under Federal Rule of Criminal Procedure 45(a)(3), which may also automatically exclude the corresponding delays under the Speedy Trial Act. See *United States v. Sanchez-Senda*, 2018 WL 1737615, at *1 (D.P.R. Apr. 9, 2018) (excluding time from the Act’s deadlines because courthouse was inaccessible during Hurricane Maria).

²¹ See *United States v. Clark*, 2007 WL 2446128, at *2 (W.D. La. June 15, 2007) (defendant suffered a rare infection rendering him contagious to anyone he touched).

²² See [Standing Order No. 20-9](#), *In re: Court Operations in Exigent Circumstances Created by the COVID-19 Pandemic*, at 3 (D.D.C. Mar. 16, 2020).

²³ See *The Federal Courts Begin to Adapt to COVID-19*, [LAWFARE](#) (updated Mar. 18, 2020), *supra* n.9.

²⁴ 18 U.S.C. § 3161(h)(3).

²⁵ *Id.* § 3161(h)(4).

²⁶ *United States v. Bell*, 925 F.3d 362, 375 (7th Cir. 2019) (finding that a district court had properly deemed a key witness not “available” under the Speedy Trial Act during his time in disease quarantine).

²⁷ In *United States v. Allen*, a court continued the defendant’s trial after he became exposed to chicken pox—both because of his own unavailability but also due to “the obvious benefit to the public of containing a harmful contagion.” 2012 WL 3763910, at *4 (D.V.I. Aug. 30, 2012).

²⁸ Federal prisons have begun to report cases among inmates. *New Coronavirus Cases in U.S. Jails Heighten Concerns about an Unprepared System*, [CNN](#) (updated Mar. 20, 2020). In response, some have begun blocking attorney visitation, potentially creating more excludable delays. See 18 U.S.C. § 3161(h)(7)(B)(iv).

Unavailability of Government Personnel

When a judge is asked to grant an ends-of-justice continuance, the Act requires her to consider whether failure to do so would deny the government reasonable time to prepare for trial.²⁹ Courts have rarely, if ever, excluded delays associated with government trial preparation in this context.³⁰ Nonetheless, the coronavirus is likely to place significant burdens on government counsel, who will face delays from quarantines or shelter-in-place orders, not to mention the logjam of matters that will develop as courts grant further continuances. Public restrictions on nonessential travel may also limit federal agents' ability to conduct their work in advance of indictment or trial. There is relatively little precedent for this, but the government might plausibly request ends-of-justice continuances for "the reasonable time necessary for effective preparation."³¹ Many courts, whose dockets will be similarly burdened, may be inclined to grant them.³²

Conclusion

If you have a matter that may be affected by the disruption caused by COVID-19, or if you have a question about how the current disruption to courts and DOJ may affect the statute of limitations or the Speedy Trial Act, please contact the following members of our White Collar Defense and Investigations and Appellate and Supreme Court practices:

<u>Lanny Breuer</u>	+1 202 662 5674	<u>lbreuer@cov.com</u>
<u>Beth Brinkmann</u>	+1 202 662 5312	<u>bbrinkmann@cov.com</u>
<u>Steven Fagell</u>	+1 202 662 5293	<u>sfagell@cov.com</u>
<u>James Garland</u>	+1 202 662 5337	<u>jgarland@cov.com</u>
<u>Eric Holder</u>	+1 202 662 6000	
<u>Nancy Kestenbaum</u>	+1 212 841 1125	<u>nkestenbaum@cov.com</u>
<u>Mark Mosier</u>	+1 202 662 5435	<u>mmosier@cov.com</u>
<u>Mythili Raman</u>	+1 202 662 5929	<u>mraman@cov.com</u>
<u>Doug Sprague</u>	+1 415 591 7097	<u>dsprague@cov.com</u>
<u>Peter Koski</u>	+1 202 662 5096	<u>pkoski@cov.com</u>
<u>Joshua Roselman</u>	+1 202 662 5572	<u>jroselman@cov.com</u>
<u>Phoebe Yu</u>	+1 202 662 5939	<u>pyu@cov.com</u>

This information is not intended as legal advice. Readers should seek specific legal advice before acting with regard to the subjects mentioned herein.

Covington & Burling LLP, an international law firm, provides corporate, litigation and regulatory expertise to enable clients to achieve their goals. This communication is intended to bring relevant developments to our clients and other interested colleagues. Please send an email to unsubscribe@cov.com if you do not wish to receive future emails or electronic alerts.

²⁹ 18 U.S.C. § 3161(h)(7)(B)(iv).

³⁰ Typically, these type of continuances are only warranted under the Act for unusually complex, multi-defendant prosecutions. See *id.* § 3161(h)(7)(B)(ii).

³¹ *Id.* § 3161(h)(7)(B)(iv).

³² *But see id.* § 3161(h)(7)(C) (preventing judges from considering "general congestion of the court's calendar" when granting an ends-of-justice continuance).