

Problems With Federal Courts Tolling Statutes Of Limitations

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Among so many other things to address, the COVID-19 pandemic has caused law enforcement agencies and courts to reschedule everything from grand jury presentations to arraignments to motions, trials and sentencing. The immediate question these delays raise is the impact of constitutional, statutory and rule-based deadlines.

Two of the most important of these are statutes of limitations and Speedy Trial Act requirements. The article below addresses certain federal courts' purported efforts to toll the statutes of limitations and the likely invalidity of those judicial orders. Its companion article, published in Law360 on May 6, discussed federal courts' tolling of the time limits under the Speedy Trial Act and analyzed whether those orders, issued in the absence of a case-by-case analysis of their need and other factors, were valid and, if so, for how long.

Can Federal Courts Toll the Statute of Limitations?

In response to the COVID-19 pandemic, some federal courts have issued orders purporting to toll the civil and criminal statutes of limitations in their respective jurisdictions.[1] For example, the U.S. District Court for the Eastern District of Texas, the U.S. District Court for the Western District of Texas, the U.S. District Court for the Northern District of Texas, the U.S. District Court for the Southern District of Texas, and the U.S. District Court for the Middle District of Louisiana have all issued such tolling orders.

The Texas federal courts have issued orders suspending and tolling the statutes of limitations up through May.[2] Similarly, the Middle District of Louisiana succinctly ordered that "[p]rescriptive, peremptive and statute of limitation deadlines are hereby suspended until April 30, 2020." [3] As none of those courts cited any legal authority in support of their blanket tolling orders, however, it is unclear from where their alleged authority arises.

In the past, the ability of a court to make findings that would allow extensions of Speedy Trial Act rules has often occurred.[4] Blanket tolling of federal statutes of limitations, however, have rarely, if ever, occurred.[5] As discussed in this article, authority for this type of blanket, across-the-board tolling does not exist under the present

circumstances. Accordingly, based on our analysis, the blanket tolling orders issued by the federal district courts in Texas and the Middle District of Louisiana may not be legally valid.[6]

Federal courts may toll criminal statutes of limitations under only very limited circumstances. They do not appear to have the authority to issue blanket tolling of all criminal statutes of limitations. Federal courts also may equitably toll some civil statutes of limitations in individual cases, but just as in criminal actions, they seemingly lack the authority to issue orders for the blanket tolling of all civil statutes of limitations.

Tolling Orders in Criminal Actions

Although some federal criminal statutes provide for longer limitations periods, the default statute of limitations for most criminal offenses is the five-year statute of limitations of U.S. Code Title 18, Section 3282.

In *Toussie v. United States*,[7] the U.S. Supreme Court explained that the statute of limitations is needed to balance the rights of a defendant against criminal charges where the underlying facts may have eroded over time with the interest of the government in swiftly investigating the alleged criminal activity.[8] The statute of limitations is necessary to provide repose and finality to the defendant[9] and commences when each element of the criminal offense has been satisfied.[10]

Given the need for repose, it is unsurprising that criminal statutes of limitations may be tolled or extended for only certain, limited categories of federal criminal cases.[11] The circumstances for prior tolling orders have depended on the statutes involved and case-specific fact finding (e.g., a person is a fugitive or documents properly sought exist outside of the United States).

To date, no authority seems to exist for federal courts to order the blanket tolling of all criminal statutes of limitations during a pandemic or other national emergency. In fact, in March, when Congress was soliciting input for the terms of its monumental COVID-19 financial relief package, the U.S. Department of Justice proposed the addition of a provision that would have granted the chief justice of the United States the power to suspend the statutes of limitations in criminal cases during a national emergency and for one year thereafter.[12]

Lawmakers vehemently objected to the proposal, with one senator tweeting, “OVER MY DEAD BODY.”[13] No such provision was ultimately incorporated into the relief package. The department’s request to create this authority and Congress’ unequivocal rejection of such a proposal serve as strong evidence that no such authority to toll all criminal statutes of limitations currently exists or would be passed by Congress.[14]

The lack of such authority makes sense beyond the important function of creating certain repose. The uneven application of such an extension — outside of the specific facts of a case — would make such extensions subject to abuse.

Prosecutors have ample tools to prevent the loss of a charge without such a shotgun approach. These include filing criminal complaints based on sworn declarations of investigators, seeking agreed-upon tolling agreements from those under investigation who would prefer not to be charged in anything other than a full investigation handled normally, or even presenting evidence to a grand jury sitting in a fashion to address the pandemic (e.g., through video presentations or even larger rooms with social distancing and the use of face coverings or videoconferencing).

Tolling Orders in Civil Actions

U.S. Code Title 28, Section 2462 provides a general, five-year statute of limitations that governs government actions “for the enforcement of any civil fine, penalty, or forfeiture,” starting from “the date when the claim first accrued.” In *Gabelli v. U.S. Securities and Exchange Commission*, the U.S. Supreme Court declined to extend the fraud discovery rule to civil penalty enforcement actions and held that the five-year clock starts from when the alleged fraud first occurs, and not when it is discovered.[15]

As with criminal cases, federal courts lack legal authority to order the blanket tolling of all statutes of limitations in civil cases. Indeed, previous attempts to grant federal courts the authority to suspend civil statutes of limitations during a national emergency have been unsuccessful, and no such statutory authority has been enacted since.[16]

In 2005, a bill was introduced in the House of Representatives that would have permitted tolling the statutes of limitations in certain federal civil cases in the event of a “natural disaster or other emergency situation requiring the closure of courts or rendering it impracticable for the United States Government or a class of litigants to comply with” federal or state deadlines (we’ll call it the 2006 draft act).[17]

On such an occasion, the chief judges of the district courts could have authorized the tolling of federal civil statutes of limitations.[18] Although the 2006 draft act was passed in the House of Representatives, it died in the Senate.[19]

In 2008, the provisions were subsequently introduced again in another bill in the House of Representatives,[20] which passed the House of Representatives, but again died in the Senate, just like its predecessor.[21] Both bills, which contained identical language, expressly stated that their proposals to toll the statutes of limitations did not extend to criminal actions.

Congress’ rejection of the 2006 and 2008 draft acts again serves as strong evidence that federal courts currently do not possess the judicial authority to order blanket suspensions of federal civil statutes of limitations, not even during national emergencies.

It should be noted, however, that some civil statutes have been construed to permit equitable tolling on a case-by-case basis. Federal courts ruling on civil claims may thus be faced with requests to apply the equitable estoppel doctrine once they return to normal operations after the COVID-19 pandemic has passed.

Conclusion

These blanket orders will no doubt be challenged when a defendant whose alleged acts would have expired before charges were brought is now charged under this newly stated authority. (It is questionable whether a challenge, e.g., a declaratory judgment, to the orders that have been entered could occur outside a specific case given the requirement of standing.)

When such a challenge is made, research as to any existing authority and failed attempts to create new authority would strongly suggest that blanket orders such as those entered in Texas and the Middle District of Louisiana are not valid and will be successfully challenged in upcoming cases.

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[1] Given the rapidity in which courts throughout the country are issuing orders in response to the COVID-19 pandemic, the analysis of court orders in this article is accurate as of May 7, unless otherwise noted.

[2] See U.S. District Court for the Western District of Texas, Supplemental Order Regarding Court Operations Under the Exigent Circumstances Created by the COVID-19 Pandemic, dated April 15, 2020, at ¶ 3 (“Effective immediately all grand jury proceedings between now and through May 31, 2020 are continued. All deadlines are suspended and tolled for all purposes, including the statute of limitations, from now through May 31, 2020.”); U.S. District Court for the Eastern District of Texas, General Order 20-03, dated March 16, 2020, at ¶ 3 (“All other grand jury proceedings ... through May 1, 2020 are continued. All related deadlines are suspended and tolled for all purposes, including the statute of limitations, from this date through May 1, 2020,” updated in General Order 20-09); U.S. District Court for the Northern District of Texas, Special Order No. 13-11, dated April 22, 2020 (extending Special Order No. 13-5 and tolling all statutes of limitations until May 31, 2020); U.S. District Court for the Northern District of Texas, Special Order No. 13-5, dated March 13, 2020, at ¶ 3 (“[A]ll grand jury proceedings between now and through May 1, 2020, are continued. All deadlines are suspended and tolled for all purposes, including the statute of limitations, from today through May 1, 2020.”); U.S. District Court for the Southern District of Texas (Brownsville Division), Special Order B-2020-04, dated April 14, 2020, at ¶ 4 (“Any currently scheduled sessions of the Grand Jury ... through June

1 are continued. Related deadlines are suspended and tolled for all purposes, including the statute of limitations, from this date through June 1, 2020.”); U.S. District Court for the Southern District of Texas (Corpus Christi and Victoria Divisions), Special Order C-2020-4/V-2020-04, dated April 20, 2020, at ¶ 3 (same, through May 31, 2020); U.S. District Court for the Southern District of Texas (Houston and Galveston Divisions), Special Order H-2020-13, dated April 22, 2020, at ¶ 3 (same, through July 6, 2020); U.S. District Court for the Southern District of Texas (Laredo Division), Special Order L-2020-7, dated April 13, 2020, at ¶ 3 (same, through May 31, 2020). But see U.S. District Court for the Southern District of Texas (McAllen Division), Special Order M-2020-2, dated April 3, 2020, at ¶ 3 (“Related deadlines are suspended and tolled for all purposes to the extent permissible by law from this date through May 31, 2020.”) (emphasis added).

[3] U.S. District Court for the Middle District of Louisiana, Administrative Order No. 2020-05, dated April 8, 2020, at ¶ 10; see U.S. District Court for the Middle District of Louisiana, Administrative Order No. 2020-07, dated May 1, 2020 (amending other provisions in Administrative Order No. 2020-05, but neither superseding nor modifying the provision related to the suspension of the statute of limitations).

[4] See, e.g., *United States v. Mann*, 701 F.3d 274, 284-85 (8th Cir. 2012) (agreeing with district court’s finding that the 30-day period to return an indictment is “automatically extended in the absence of a grand jury, regardless of whether the Government makes a motion to that effect,” as authorized by 18 U.S.C. § 3161(b)); *United States v. Thompson*, 524 F.3d 1126, 1131 (10th Cir. 2008) (finding that, because there was no grand jury in session when the time to file the indictment under § 3161(b) would have otherwise expired, the period for filing the indictment extended an additional 30 days”); *In re Approval of the Judicial Emergency Declared in the Dist. of Ariz.*, 639 F.3d 970, 970-71 (9th Cir. 2011) (approving the District of Arizona’s declaration of a judicial emergency under 18 U.S.C. § 3174(e) and granting suspension of the Speedy Trial Act’s 70-day limit for bringing defendants to trial); *United States v. Bilsky*, 664 F.2d 613, 619-20 (6th Cir. 1981) (noting the Sixth Circuit Judicial Council’s suspension of the Speedy Trial Act’s time limits for one year in the Western District of Tennessee); *United States v. Rodriguez-Restrepo*, 680 F.2d 920, 921 n.1 (2d Cir. 1982) (noting an extension of the time limits under the Speedy Trial Act based on the Second Circuit Judicial Council’s declaration of a judicial emergency in the Eastern District of New York); see also Greg Ostfeld, Comment, *Speedy Justice and Timeless Delays: The Validity of Open-Ended “Ends of Justice” Continuances Under the Speedy Trial Act*, 64 U. Chi. L. Rev. 1037, 1040-41 & n.15 (Summer 1997) (citing cases finding ends-of-justice continuances under § 3161(h)(7)(A)).

[5] Federal statutes of limitations for specific offenses involving fraud, the real or personal property of the United States, and government contracts were tolled during the Civil War and both World Wars under the Wartime Suspension of Limitations Act. See 18 U.S.C. § 3287. Some states also tolled the statutes of limitations after the September 11, 2001, terrorist attacks and certain natural disasters. See, e.g., New York State Governor George E. Pataki, Executive Order No. 113.7, Temporary Suspension and Modification of Statutory Provisions Establishing Time Limitations on Actions and Time in which to Take an Appeal, dated September 12, 2001; New York State Governor George E. Pataki, Executive Order No. 113.28, Reinstatement of Statutory Provisions Establishing Time Limitations on Actions and Time in Which to Take an Appeal and Continued Limited Suspension and Modification of Such Limitations, dated October 2, 2001; Supreme Court of Texas, Emergency Order on Statutes of Limitations in Civil Cases, dated August 29, 2017, at ¶ 4 (suspending civil statute of limitations after Hurricane Harvey).

[6] By contrast, some state courts, for example those in Georgia and Tennessee, have issued blanket tolling orders, but those orders rely upon state statutory authority to do so and, therefore, rest upon more solid ground than the federal orders addressed here. See Supreme Court of Tennessee, *In re: COVID-19 Pandemic*, Order No. ADM2020-00428, dated April 24, 2020, at ¶ 7 (tolling statutes of limitations set to expire between March 13, 2020 and May 31, 2020, but not tolling other statutes of limitations not set to expire during that period); Tenn. Code Ann. § 28-1-116 (2017) (mandating that when a “duly authorized member of the appellate judiciary enters an order declaring a disaster” pursuant to the state rules, “all applicable statutes of limitations and statutes of repose shall be extended in the counties subject to the order by the same number of days by which other applicable filing deadlines are extended.”); Supreme Court of Georgia, Amended Order Declaring Statewide Judicial Emergency, dated March 14, 2020, at 2 (tolling statute of limitations and citing O.C.G.A. § 38-3-62); Supreme Court of Georgia, Press Release: Chief Justice Will Extend Statewide Judicial Emergency, dated May 4, 2020 (extending March 14, 2020 order declaring judicial emergency until June 12, 2020); O.C.G.A. §38-3-62 (authorizing tolling of the statutes of limitations in civil or criminal cases in an order declaring a judicial emergency).

Other state courts, such as those in Texas, may possess the discretionary authority to toll the statutes of limitations, which would invite uneven application and unpredictable results. See Supreme Court of Texas and Court of Criminal Appeals of Texas, First Emergency Order Regarding the COVID-19 State of Disaster, dated March 13, 2020, at ¶ 3 (“All courts in Texas may extend the statute of limitations in any civil case for a stated period ending no later than 30 days after the Governor’s state of disaster has been lifted.”); *id.*, Eighth Emergency Order Regarding the COVID-19 State of Disaster, dated April 1, 2020, at ¶¶ 2-3 (“Any deadline for the filing or service of any civil case is tolled from March 13, 2020, until June 1, 2020”); *id.*, Twelfth Emergency Order Regarding the COVID-19 State of Disaster, dated April 27, 2020, at ¶ 3 (“Subject only to constitutional limitations, all courts in Texas may in any case, civil or criminal ... without a participant’s consent ... [m]odify or suspend any and all deadlines and procedures, whether prescribed by statute ..., for a stated period ending no later than 30 days after the Governor’s state of disaster has been lifted.”). The validity of these state orders is beyond the scope of this article, but practitioners should be mindful of their existence.

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

[8] *Id.* at 114-15.

[9] See, e.g., *United States v. Marion* , 404 U.S. 307, 322 (1971).

[10] *Toussie*, 397 U.S. at 115.

[11] See Charles Doyle, Statute of Limitation in Federal Criminal Cases: A Sketch, Congressional Research Service (Nov. 14, 2017), at 2, available at <https://fas.org/sgp/crs/misc/RS21121.pdf> (“[A]n otherwise applicable limitation period may be suspended or extended in cases involving child abuse, the concealment of the assets of an estate in bankruptcy, wartime fraud against the government, dismissal of original charges, fugitives, foreign evidence, or DNA evidence.”).

[12] See Betsy Woodruff Swan, DOJ Seeks New Emergency Powers Amid Coronavirus Pandemic, *Politico* (Mar. 21, 2020), available at <https://www.politico.com/news/2020/03/21/doj-coronavirus-emergency-powers-140023>; Matt Zapotosky, Justice Department’s Coronavirus Considerations Rankle Civil Liberties Advocates, *Washington Post* (Mar. 23, 2020), available at https://www.washingtonpost.com/national-security/justice-department-coronavirus-laws/2020/03/23/6b860018-6d01-11ea-b148-e4ce3fbd85b5_story.html.

[13] Mike Lee (@SenMikeLee), Twitter (Mar. 21, 2020, 4:30 p.m.), available at <https://twitter.com/SenMikeLee/status/1241507516980375555>.

[14] See, e.g., *Fourth Estate Pub. Benefit Corp. v. Wall-Street.com, LLC* , 139 S. Ct. 881, 891 (2019) (Congress’s rejection of proposals to eliminate copyright registration regime reflects the importance of registration); *FDA v. Brown & Williamson Tobacco Corp.* , 529 U.S. 120, 147 (2000) (Congress’s rejection of proposals to extend FDA’s jurisdiction over tobacco evidences Congress’ rejection of such jurisdiction); *Santa Clara Pueblo v. Martinez* , 436 U.S. 49, 68-70 (1978) (finding Congress’ rejection of proposals to expand judicial review evidenced Congress’ desire for limited judicial review).

[15] *Gabelli v. SEC* , 568 U.S. 442, 447-48, 454 (2003).

[16] As noted above, see *supra* note 14, courts should reject the authority to act where Congress has rejected proposals that would have explicitly conferred such authority.

[17] See Federal Judiciary Emergency Tolling Act of 2006, H.R. 3729, 109th Cong. (2006), available at <https://www.congress.gov/109/bills/hr3729/BILLS-109hr3729rfs.pdf>.

[18] *Id.*

[19] See H.R. 3729 (109th): Federal Judiciary Emergency Tolling Act of 2006, Govtrack, available at <https://www.govtrack.us/congress/bills/109/hr3729>.

[20] See Responsive Government Act of 2008, H.R. 6344, 110th Cong. (2008), available at <https://www.congress.gov/110/bills/hr6344/BILLS-110hr6344rfs.pdf>.

[21] See H.R. 6344 (100th): Responsive Government Act of 2008, Govtrack, available at <https://www.govtrack.us/congress/bills/110/hr6344>.

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