



Statutes of Limitation in Federal Criminal Cases: A Sketch

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Summary

A statute of limitations dictates the time period within which a legal proceeding must begin. The purpose of a statute of limitations in a criminal case is to ensure the prompt prosecution of criminal charges and thereby spare the accused of the burden of having to defend against stale charges after memories may have faded or evidence is lost.

There is no statute of limitations for federal crimes punishable by death, nor for certain federal crimes of terrorism, nor, since passage of the Adam Walsh Child Protection and Safety Act (2006) (P.L. 109-248), for certain federal sex offenses. Prosecution for most other federal crimes must begin within five years of the commitment of the offense. There are exceptions. Some types of crimes are subject to a longer period of limitation; some circumstances suspend or extend the otherwise applicable period of limitation.

Arson, art theft, certain crimes against financial institutions, and various immigration offenses all carry statutes of limitation longer than the five year standard. Regardless of the applicable statute of limitations, the period may be extended or the running of the period suspended or tolled under a number of circumstances, such as when the accused is a fugitive or when the case involves charges of child abuse, bankruptcy, wartime fraud against the government, or DNA evidence.

Ordinarily, the statute of limitations begins to run as soon as the crime has been completed. Although the federal crime of conspiracy is complete when one of the plotters commits an affirmative act in its name, the period for conspiracies begins with the last affirmative act committed in furtherance of the scheme. Other so-called continuing offenses include various possession crimes and some that impose continuing obligations to register or report.

Limitation-related constitutional challenges arise most often under the Constitution's ex post facto and due process clauses. The federal courts have long held that a statute of limitations may be enlarged retroactively as long as the previously applicable period of limitation has not expired. The Supreme Court recently confirmed that view; the ex post facto proscription precludes legislative revival of an expired period of limitation. Due process condemns pre-indictment delays even when permitted by the statute of limitations if the prosecution wrongfully caused the delay and the accused's defense suffered actual, substantial harm as a consequence.

This is an abbreviated version of CRS Report RL31253, *Statutes of Limitation in Federal Criminal Cases: An Overview*, without the footnotes, citations to authority and appendices found in the longer report.

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Introduction

The Constitution's speedy trial clause protects the criminally accused against unreasonable delays between his indictment and trial. Before indictment, the statutes of limitation, and in extreme circumstances, the due process clauses protect the accused from unreasonable delays. This is an overview of federal law relating to the statutes of limitation in criminal cases.

The phrase "statute of limitations" refers to the time period within which formal criminal charges must be brought after a crime has been committed. "The purpose of a statute of limitations is to limit exposure to criminal prosecution to a certain fixed period of time following the occurrence of those acts the legislature has decided to punish by criminal sanctions. Such a limitation is designed to protect individuals from having to defend themselves against charges when the basic facts may have become obscured by the passage of time and to minimize the danger of official punishment because of acts in the far-distant past. Such a time limit may also have the salutary effect of encouraging law enforcement officials promptly to investigate suspected criminal activity." Therefore, in most instances, prosecutions are barred if the defendant points out that there was no indictment or other formal charge within the time period dictated by the statute of limitations.

Statutes of limitation are creatures of statute. The common law recognized no period of limitation. An indictment could be brought at any time. Limitations are recognized today only to the extent that a statute or due process dictates their recognition. Congress and most state legislatures have enacted statutes of limitation, but declare that prosecution for some crimes may be brought at any time. Federal statutes of limitation are as old as federal crimes. When the Founders assembled in the First Congress, they passed not only the first federal criminal laws but made prosecution under those laws subject to specific statutes of limitation. Similar provisions continue to this day. Federal capital offenses may be prosecuted at any time, but unless some more specific arrangement has been made a general five year statute of limitations covers all other federal crimes. Some of the exceptions to the general rule, like those of the USA PATRIOT Act, identify longer periods for particular crimes. Others suspend or extend the applicable period under certain circumstances such as the flight of the accused, or during time of war.

Prosecution at Any Time

Aside from capital offenses, crimes which Congress associated with terrorism may be prosecuted at any time if they result in a death or serious injury or create a foreseeable risk of death or serious injury. Although the crimes were selected because they are often implicated in acts of terrorism, a terrorist defendant is not a prerequisite to an unlimited period for prosecution. A third category of crimes that may be prosecuted at any time consists of various designated federal child abduction and sex offenses.

Limits by Crime

Although the majority of federal crimes are governed by the general five year statute of limitations, Congress has chosen longer periods for specific types of crimes – 20 years for the theft of art work; 10 years for arson, for certain crimes against financial institutions, and for immigration offenses; and eight years for the nonviolent violations of the terrorism-associated

statutes which may be prosecuted at any time if committed under violent circumstances. Investigative difficulties or the seriousness of the crime seem to have provided the rationale for enlargement of the time limit for prosecuting these offenses beyond the five year standard.

Suspension and Extension

The five year rule may yield to circumstances other than the type of crime to be prosecuted. For example, an 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.

Child Protection: The child protection section, 18 U.S.C. 3283, permits an indictment or information charging kidnaping, or sexual abuse, or physical abuse, of a child under the age of 18 to be filed within the longer of 10 years or the life of the victim. Section 3299 (enacted in 2006), which eliminates the statute of limitations in cases of child abduction and sex offenses against children, supersedes §3283 wherever the two overlap.

DNA: There are two DNA provisions. One, 18 U.S.C. 3297, suspends any applicable statute of limitations for the time required to identify an individual when DNA evidence implicates his involvement in a felony offense. The other, 18 U.S.C. 3282(b), suspends the statute of limitations for federal sexual abuse violations by means of an indictment using a DNA profile alone to identify the person charged. Neither provision comes into play when the offense involves sexual abuse of a child or child abduction. As noted earlier, prosecution for such crimes may be brought at any time under 18 U.S.C. 3299.

Section 3282(b) is the narrower of the two DNA provisions. It only applies to offenses proscribed in 18 U.S.C. ch. 109A. Chapter 109A outlaws abusive sexual contact, sexual abuse, and aggravated sexual abuse when any of these offenses is committed in a federal prison, or within the special maritime or territorial jurisdiction of the United States. Section 3282(b) also suspends the provisions of the Speedy Trial Act that would otherwise come to life with the filing of an indictment in such cases. Section 3282(b), however, reaches only those cases in which the statute of limitations has not already expired. Section 3297 applies to any federal felony. Rather than suspend the statute of limitations, it marks the beginning of the period of limitation, not from the commission of the crime, but from the time when DNA testing implicates an individual.

Concealing Bankruptcy Assets: The statute of limitations on offenses which involve concealing bankruptcy assets does not begin to run until a final decision discharging or refusing to discharge the debtor: “The concealment of assets of a debtor in a case under Title 11 shall be deemed to be a continuing offense until the debtor shall have been finally discharged or a discharge denied, and the period of limitations shall not begin to run until such final discharge or denial of discharge,” 18 U.S.C. 3284. When a discharge determination is impossible because of the dismissal of bankruptcy proceedings or want of a timely discharge petition or for any other reason, the statute of limitations runs from the date of the event when discharge becomes impossible.

Wartime Statute of Limitations: Section 3287 establishes a suspension of the statute of limitations covering wartime frauds committed against the United States that allows for prosecution at any time up to five years after the end of the war. At one time, it could be said with some conviction that §3287 “appears to have only been used in cases that involved conduct during or shortly after World War II” and none since. That is no longer the case.

In 2008, Congress amended the section to make it clear that the provision covers misconduct during both declared wars and periods of armed conflict for which Congress has explicitly authorized use of the Armed Forces. The same amendment extended the period of suspension from three to five years. The provision applies to crimes related to conduct of the conflict as well as those that are not. The offense, however, must “involve the defrauding of the United States in [some] pecuniary manner or in a manner concerning property.” The provision’s five year clock begins to run with the end of the war or conflict, but there is some difference of opinion over whether a formal termination must come first.

Indictment or Information: The statute of limitation runs until an indictment or information is returned. There is, however, some question about the impact of sealing the indictment upon its return. The Federal Rules of Criminal Procedure allow the magistrate to whom the indictment is returned to seal it until the defendant is apprehended or released on bail. Some of the courts seem troubled when they believe that the seal has been applied for purposes of tactical advantage rather than to prevent the escape of the accused.

If the indictment or information is subsequently dismissed, federal law gives the government an additional six months (30 days if the indictment or information is dismissed on appeal and there is a grand jury with jurisdiction in place). Beyond the extension here, when a timely indictment is dismissed pursuant to a plea agreement under which the defendant pleads to other charges, the statute of limitations ordinarily begins again for the dismissed charges unless the defendant has waived as part of the plea agreement. The statute of limitations remains tolled if the original indictment is replaced by a superseding indictment, as long as the superseding indictment does not substantially alter the original charge.

Foreign Evidence: Section 3292 was enacted to compensate for the delays the Justice Department experienced when it sought to secure bank records and other evidence located overseas. Construction of Section 3292 has been something less than uniform, thus far. The courts are divided over whether the target of the grand jury or the subject of the foreign evidence sought may contest the government’s application when it is filed or whether the application may be filed *ex parte* with an opportunity for the accused to contest suspension following indictment. By the same token, it is less certain whether the phrase indicating that the application must be filed with “the district court before which a grand jury is impaneled to investigate the offense,” means that the application must relate to a specific grand jury investigation or may be filed in anticipation of such an investigation. On the related issue of when an application may be filed, one court has ruled that the government may seek the suspension either to allow it to obtain foreign evidence or to compensate it for time expended to acquire the evidence prior to the application. Another has held that the extension cannot be had when the evidence sought by the government is in its possession at the time of the application. Still others cannot agree on whether the request may revive an expired statute of limitations.

The statute demands that the government bear the burden of establishing to the court its right to a suspension by a preponderance of the evidence. The Second Circuit has pointed out, however, that the statute sets out two slightly different preponderance standards, a simple preponderance

standard for the fact a request has been made, and slightly less demanding one (preponderance that it reasonably appears) for the fact that the evidence sought exists overseas. The government must do more than present unsworn, conclusionary statements to meet its burden, but “something of evidentiary value” on point will ordinarily do. As for the nature of the overseas evidence, it is no bar to suspension that the evidence might be obtained in this country or that without it the grand jury has enough evidence to indict. On the other hand, the court may not suspend if the government has already received the foreign evidence at the time when it submits its application for suspension. The suspension begins when the government submits its official request to a foreign source. It ends when the foreign entity takes “final action” on the request. When that occurs may be a matter of some dispute. Some courts suggest that final action occurs with a dispositive response, i.e., when the United States is satisfied its request has been answered; yet at least one believes that final action occurs when the foreign government believes it has provided a final response.

Fugitives: A provision exempting fugitives accompanied passage of the first federal statute of limitations. The language has changed little since, but its meaning remains a topic of debate. Most circuits have held that the government must establish that the accused acted with an intent to avoid prosecution. Yet two have held that mere absence from the jurisdiction is sufficient. Even in the more demanding circuits, however, flight is thought to include the accused’s concealing himself within the jurisdiction, or remaining outside the jurisdiction when he becomes aware of the possibility of prosecution, or fleeing before an investigation begins or to avoid prosecution on another matter, or to avoid civil or administrative justice rather than criminal justice.

Conspiracies and Continuing Offenses: Statutes of limitation “normally begin to run when the crime is complete” which occurs when the last element of the crime has been satisfied. The rule for conspiracy is a bit different. The general conspiracy statute consists of two elements: (1) an agreement to commit a federal crime or to defraud the United States and (2) an overt act committed in furtherance of the agreement. Conspirators left uninterrupted will frequently continue on through several overt acts to the ultimate commission of the underlying substantive offenses which are the objectives of their plots. Thus, the statute of limitations for such conspiracies runs not from the first overt act committed in furtherance of the conspiracy but from the last. The statute of limitations under conspiracy statutes that have no overt act requirement runs from the accomplishment of the objectives of the conspiracy or from its abandonment.

Concealment of the criminal plot after its completion is considered a natural component of all conspiracies. Consequently, overt acts of concealment after the objectives of the conspiracy have been accomplished may not be used to delay the running of the statute of limitations. Overt acts of concealment which are among the original objectives of the conspiracy as charged in the indictment, however, may serve as the point at which the statute of limitations begins to run. Distinguishing between the two is sometimes difficult.

There are other crimes, which, like conspiracy, continue on long after all the elements necessary for their prosecution are first present. The applicable statute of limitations for these continuing crimes is delayed if either “the explicit language of the substantive criminal statute compels such a conclusion, or the nature of the crime involved is such that Congress must assuredly have intended that it be treated as a continuing one,” *Toussie v. United States*, 397 U.S. 112,115 (1970).

Constitutional Considerations

Constitutional challenges to the application of various statutes of limitation perhaps most often claim support from the ex post facto or due process clauses. The Constitution prohibits both Congress and the states from enacting ex post facto laws. More precisely it prohibits:

1st. Every law that makes an action done before the passing of the law, and which was innocent when done, criminal; and punishes such action. 2^d. Every law that aggravates a crime, or makes it greater than it was, when committed. 3^d. Every law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed. 4th. Every law that alters the legal rules of evidence, and receives less, or different, testimony, than the law required at the time of the commission of the offense, in order to convict the offender.

The lower federal appellate courts had long felt that a statute that extends a period of limitation before its expiration did not offend the ex post facto clauses, but that the clauses ban laws that attempt to revive and extend an expired statute of limitations. Until the United States Supreme Court confirmed that view in *Stogner v. California*, 539 U.S. 607 (2003), however, there were well regarded contrary opinions. There, U.S. Supreme Court characterized a California legislative revival of an expired period of limitation as not only “manifestly unjust and oppressive,” but among those laws that run afoul of *Calder*’s second standard (“Every law that aggravates a crime, or makes it greater than it was, when committed”), *id.* at 611-12. As properly understood and alternatively characterized in *Calder*, this second category embraces statutes that like the California statute “inflicted punishments, where the party was not by law, liable to any punishment,” at the time, *id.* at 612, quoting, *Calder*, 3 Dall. (3 U.S.) at 389.

Retroactivity aside, the due process clauses may be implicated if a crime is not subject to any statute of limitations or if the period of limitation has not run. Although statutes of limitation alone generally govern the extent of permissible pre-indictment delay, extraordinary circumstances may trigger due process implications. The Supreme Court in *Marion* observed that even “the Government concedes that the Due Process Clause of the Fifth Amendment would require dismissal of [an] indictment if it were shown at trial that the pre-indictment delay ... caused substantial prejudice to [a defendant’s] rights to a fair trial and that the delay was an intentional device to gain tactical advantage over the accused,” *United States v. Marion*, 404 U.S. 307, 324 (1971). The Court declined to dismiss the indictment there, however, because the defendants failed to show they had suffered any actual prejudice from the delay or to show “that the Government intentionally delayed to gain some tactical advantage over [them] or to harass them,” *id.* at 325. The Court later made clear that due process contemplates more than a claimant’s showing of adverse impact caused by pre-indictment delay: “Thus *Marion* makes clear that proof of prejudice is generally a necessary but not sufficient element of a due process claim, and that the due process inquiry must consider the reasons for the delay as well as the prejudice to the accused,” *United States v. Lovasco*, 431 U.S. 783, 790 (1977).

Perhaps because so few defendants have been able to show sufficient prejudice to necessitate further close inquiry, the lower federal appellate courts seem at odds over exactly what else due process demands before it will require dismissal. Most have held that the defendant bears the burden of establishing both prejudice and government deficiency; others that once the defendant establishes prejudice the burden shifts to the government to negate the second prong; and still others that once the defendant shows prejudice the court must balance the harm against the justifications for delay.

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