Statutes of Limitation in Federal Criminal Cases: A Sketch

Charles Doyle
Senior Specialist in American Public Law

April 9, 2007

Congressional Research Service
7-5700
www.crs.gov
RS21121

CRS Report for Congress
Prepared for Members and Committees of Congress

Summary

A statute of limitations dictates the time period within which a legal proceeding must begin. The purpose of a statute of limitations is to ensure the prompt prosecution of criminal charges and thereby spare the accused 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 (P.L. 109-248, H.R. 4472, 2006), 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.

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 without offending the ex post facto clauses as long as the previously applicable period of limitation has not expired. The United States Supreme Court recently rejected a contrary interpretation by the California state courts. Due process condemns pre-indictment delays 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 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.

Contents

Background ... 1
Prosecution at Any Time ... 1
Limits by Crime ... 1
Suspension and Extension ... 2
Conspiracies and Continuing Offenses ... 4
Constitutional Considerations ... 4

Contacts

Author Contact Information ... 6

Background

This is an overview of federal law relating to the statutes of limitation in criminal cases, including those changes produced by the USA PATRIOT Act, P.L. 107-56, 115 Stat. 809 (2001) and the Adam Walsh Child Protection and Safety Act, P.L. 109-248, 120 Stat. 587 (H.R. 4472, 2006).

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," *Toussie v. United States*, 397 U.S. 112, 114-15 (1970). Therefore, in most instances, prosecutions are barred if there has been 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 demands. 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 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.

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. The recent enactment in the Adam Walsh Act of 18 U.S.C. 3299 eliminates the statute of limitations in cases of child abduction and sex offenses against children, obviously limits the sweep of Section 3283.

Prior to the enactment of Section 3299 and the passage of the 2006 Violence Against Women Act, the application of the DNA sections turned on the presence or absence of a crime under Chapter 109A of Title 18. In the case of a crime under Chapter 109A, Section 3282(b) stated that the statute of limitations could be tolled by the filing of an indictment identifying the accused by his DNA profile, if the accused were otherwise unknown. In the case of felonies other than those of Chapter 109A, the governing section, Section 3297, seemed open to either of two interpretations. It might mean that the otherwise applicable statute of limitations is tolled until DNA testing can be completed. On the other hand, it may mean that the applicable statute of limitations is tolled in the presence of suspect-implicating DNA evidence until the individual implicated is sufficiently identified for indictment other than merely by his DNA profile. Section 3297's enactment in conjunction with legislation designed to eliminate DNA testing backlogs seems to support the first reading; the hearing testimony of Justice Department officials who proposed the language, the second. Dicta in the only case, reported or unreported, to have considered Section 3297 supports the Justice Department's view. Whichever is the case, the Violence Against Women Act struck the exception for Chapter 109A cases from Section 3297 so that it now clearly applies to cases arising under that Chapter as well.

Enactment of Section 3299, which eliminates the statute of limitations for prosecutions under Chapter 109A, makes it unnecessary to consider the impact of Section 3282(b) which tolls the statute of limitations in Chapter 109A cases when one applies. Section 3299 overshadows Section 3297 to a lesser extent. Section 3297's DNA tolling of the applicable statute of limitations comes into play in rape and other sex offenses, although it may be implicated in other cases involving DNA evidence. Section 3299 reduced its impact substantially when it eliminated the statute of limitations in most federal sex cases. Questions of Section 3297's coverage may still arise in cases brought under other federal statutes.

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.

Statutes of limitation for defrauding the United States during wartime do not begin to run until three years after the war is over. The provision is fairly limited. It does not appear to have been used except in cases occurring during a declared war, i.e., World War II, and even there did not encompass cases that obstructed governmental activity unless they involved federal property or monetary.

The dismissal of an indictment presents special statute of limitations problems because the clock ordinarily stops for statute of limitation purposes when an indictment or information is returned. 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). The statute of limitations remains tolled if the original indictment is replaced by a superseding indictment, but only if the superseding indictment does not substantively alter the original charge, 18 U.S.C. 3288, 3289.

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. It provides that:

> (a)(1) Upon application of the United States, filed before return of an indictment, indicating that evidence of an offense is in a foreign country, the district court before which a grand jury is impaneled to investigate the offense shall suspend the running of the statute of limitations for the offense if the court finds by a preponderance of the evidence that an official request has been made for such evidence and that it reasonably appears, or reasonably appeared at the time the request was made, that such evidence is, or was, in such foreign country.
>
> (2) The court shall rule upon such application not later than thirty days after the filing of the application.
>
> (b) Except as provided in subsection (c) of this section, a period of suspension under this section shall begin on the date on which the official request is made and end on the date on which the foreign court or authority takes final action on the request.
>
> (c) The total of all periods of suspension under this section with respect to an offense— (1) shall not exceed three years; and (2) shall not extend a period within which a criminal case must be initiated for more than six months if all foreign authorities take final action before such period would expire without regard to this section.
>
> (d) As used in this section, the term "official request" means a letter rogatory, a request under a treaty or convention, or any other request for evidence made by a court of the United States or an authority of the United States having criminal law enforcement responsibility, to a court or other authority of a foreign country.

Construction of Section 3292 has thus far been something less than uniform. 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. In either event, the government clearly bears the burden of establishing to the court its right to a suspension by a preponderance of the evidence. Yet 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, the only court to consider the question 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. Finally, the question of when "final action" occurs and the statute of limitations again begins to run has proven perplexing. One court suggests that final action occurs with a dispositive response, i.e., when the United States is satisfied its request has been answered; another that final action occurs when the foreign government believes it has provided a final response.

A provision exempting fugitives accompanied passage of the first federal statute of limitations. The language has changed little since ("no statute of limitations shall extend to any person fleeing from justice," 18 U.S.C. 3290), 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 occurs. 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 unimpaired 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 which have no overt act requirement runs from the accomplishment of the objectives of the conspiracy or from its abandonment.

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.

Constitutional Considerations

Constitutional challenges to the application of various statutes of limitation perhaps most often claim shelter in the ex post facto or due process clauses. The Constitution prohibits both Congress and the states from enacting ex post facto laws, U.S. Const. Art. I, §§9, 10. 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. 2d. Every law that aggravates a crime, or makes it greater than it was, when committed. 3d. 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," *Calder v. Bull*, 3 Dall. (3 U.S.) 386, 390 (1798).

The lower federal appellate courts had long felt that a statute that extends a period of limitation before its expiration does 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. The California Supreme Court's *Frazer* decision, for example, concluded that the ex post facto clauses in fact pose no impediment to the revival of statutes of limitation. The Justice Department cited the *Frazer* case in its summary of the proposed legislation that Congress ultimately enacted as the USA PATRIOT Act, suggesting that the retroactivity section was intended both to extend the statute of limitations to cases where the period of limitation had not run and to revive the prospect of prosecution where the period had expired. The act's retroactivity clause uses the same language found in the Justice Department's original proposal, arguably reflecting the same intent. The United States Supreme Court, however, recently concluded that ex post facto condemns any criminal law that retroactively "inflict[s] punishment, where the party was not, by law, liable to any punishment" at the time of enactment, *Stogner v. California.*

Retroactivity aside, preindictment delay may implicate due process issues even if the requirements of the applicable statute of limitations are met. Although statutes of limitation 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 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.

Author Contact Information

Charles Doyle
Senior Specialist in American Public Law
cdoyle@crs.loc.gov, 7-6968