

## Tolling Statutes of Limitations During COVID-19 Pandemic

On March 13, 2020, President Donald J. Trump signed the Proclamation on Declaring a National Emergency Concerning the Novel Coronavirus Disease (COVID-19) Outbreak, pursuant to sections 201 and 301 of the National Emergencies Act, 50 U.S.C. § 1601 *et seq.* As the coronavirus outbreak continues to spread throughout the United States, the federal judiciary and several states are rapidly rolling out orders restricting access to courts. The limited access to the courts will likely present novel legal challenges in the coming months and years in criminal and regulatory cases. Entities and individuals being investigated for potential criminal or regulatory liability may be faced with arguments by the Government that statutes of limitations that are about to expire should be extended in light of the coronavirus pandemic. With prosecutors and regulators working remotely and a skeleton court staff, this issue will likely be litigated in the coming months. This client alert reviews the legal constraints on tolling and extending statutes of limitations that are an inevitable result of this pandemic.

### I. Background

Federal law contains a general period of limitation for non-capital criminal offenses of five years.<sup>1</sup> For certain crimes, there is an extended statute of limitations, including a 10 year statute of limitations for bank fraud<sup>2</sup> and a six year statute of limitations for securities fraud.<sup>3</sup> The general federal criminal statute of limitations can be extended or tolled under circumstances specifically delineated by statute, including: offenses against children;<sup>4</sup> concealment of a bankrupt's assets;<sup>5</sup> certain terrorism offenses;<sup>6</sup> during wartime;<sup>7</sup> fugitives from justice;<sup>8</sup> and to permit the U.S. to obtain foreign evidence.<sup>9</sup> The Securities and Exchange Commission likewise has a general five year limitations period for commencing enforcement actions.<sup>10</sup>

Statutes of limitations “reflect[] a legislative judgment that, after a certain time, no quantum of evidence is sufficient to convict”<sup>11</sup> and are “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.”<sup>12</sup> “When a defendant presses a limitations defense, the Government *then* bears the burden of establishing compliance with the statute of limitations by presenting evidence that the crime was committed within the statute of limitations period or by establishing an exception to the limitations period.”<sup>13</sup>

### II. Analysis

In light of the rapid development of the COVID-19 pandemic and the scope of restrictions being implemented on a daily basis, three questions arise: (1) whether the Government, in a criminal action or SEC civil enforcement action, can argue that, in light of the national emergency, statutes of limitations should be tolled; (2) considering Congress can enact a statute tolling the limitations period, whether such a statute could be used to revive offenses on which the limitations period expired; and (3) whether the President can issue an Executive Order tolling statutes of limitations on federal crimes as at least one governor has done for state crimes.<sup>14</sup>

#### **A. There Are Few Viable Options Currently Available To The Government To Support An Argument For Tolling Of The Statute Of Limitations**

What legal mechanisms are currently in place that the Government can exercise to argue that statutes of limitations should be tolled during the COVID-19 national emergency? Among statutes tolling the limitations period, only one, the Wartime Suspension Limitations Act, is potentially applicable under the

circumstances. Without an applicable statute, the Government may argue that equitable tolling is appropriate. Equitable tolling appears to be the stronger option for the Government.

**1) A Global Health Crisis Is Not A War Sufficient To Trigger The Wartime Suspension Of Limitations Act.**

The Wartime Suspension of Limitations Act, 18 U.S.C. § 3287 (the “Suspension Act”), provides for a suspension of the statute of limitations for certain specified offenses “[w]hen the United States is at war or Congress has enacted a specific authorization for the use of the Armed Forces.”<sup>15</sup> The statute only applies to criminal cases, thus it would be unavailable with respect to SEC enforcement actions.<sup>16</sup> The Suspension Act, however, does *not* toll the statute of limitations for all federal crimes.<sup>17</sup> “Offenses involving fraud covered by the Suspension Act are ‘limited strictly to offenses in which defrauding or attempting to defraud the United States is an essential ingredient of the offenses charged.’”<sup>18</sup> Once the Act is triggered, the relevant limitations period is suspended “until 5 years after the termination of hostilities as proclaimed by a Presidential proclamation, with notice to Congress, or by a concurrent resolution of Congress.”<sup>19</sup>

The Suspension Act can be triggered in two ways: (1) when “the United States is at war”; or (2) 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)).”<sup>20</sup> Because Congress has not authorized the use of military forces to combat the coronavirus, the Suspension Act cannot be triggered by the second mechanism. If Congress does authorize the use of the military in response to the coronavirus, it will likely be to provide humanitarian support rather than to use force. Whether the Government could successfully argue that such an authorization would qualify under the Suspension Act may hinge on the authorizing language used by Congress. But no case has ever held that humanitarian use of military forces triggers the Suspension Act.

The other triggering mechanism, “when the United States is at war”, is a bit more elusive. Courts have seldom addressed this issue. In *United States v. Prosperi*, the District Court of Massachusetts listed four factors for determining what constitutes “war” for purposes of the Suspension Act: “(1) the extent of congressional authorization by Congress to the President to act; (2) whether the conflict was deemed ‘war’ under accepted definitions of the term and the rules of international law; (3) the size and scope of the conflict (including the cost of the related procurement effort); and (4) the diversion of resources that might have been expended on investigating frauds against the government.”<sup>21</sup> This approach has been adopted by a few other courts.<sup>22</sup> At least one court has disagreed with the four factor approach outlined in *Prosperi*, because of the “extensive post-hoc factual determinations” it requires that “render its application too ambiguous and uncertain in the context of a criminal statute of limitation.”<sup>23</sup> The court in *Western Titanium* found that “given the ambiguity inherent in finding it otherwise, a narrow construction of the term ‘at war’ in the [Suspension Act] requires a finding that it encompasses only those wars which have been formally declared by Congress.”<sup>24</sup>

The COVID-19 pandemic is likely insufficient to trigger the Suspension Act. Under the narrow approach propounded by *Western Titanium*, the COVID-19 national emergency does not rise to the level of “those wars which have been formally declared by Congress,” and thus would be insufficient to trigger the Suspension Act. *Id.* Even under the more generous standard laid out in *Prosperi*, a court would have to assess the *Prosperi* factors as applied to a global health crisis, each of which would likely weigh against triggering the Suspension Act. First, Congress has not authorized the use of military force. Second, the global health crisis is unlikely to be considered a “war” under accepted definitions of the term or rules of international law because “[d]efinitions rather emphasize the element of armed conflict, whether among States or between States and insurrectionary forces.” *Prosperi*, 573 F. Supp. 2d at 451. The emergency the United States is facing right now is a global health crisis, not an armed conflict between the United States and other insurrectionary forces. Though the third and fourth factors, standing alone, would seem to weigh in favor of triggering the act because this is a large scale health crisis which is impacting everyday life and requiring the diversion of resources away

from investigating frauds against the government, the “conflict” nevertheless cannot be categorized as a “war” contemplated by the Suspension Act. This is particularly true in light of the Supreme Court’s repeated instruction that, “the [Suspension Act] should be ‘narrowly construed’ and ‘interpreted in favor of repose.’”<sup>25</sup> Accordingly, the Suspension Act will likely be of no avail to the Government to toll statutes of limitations.

## **2) A National Emergency, Without More, Is Not Sufficient For Application Of Equitable Tolling.**

Equitable tolling is a common law remedy used to toll the statute of limitations under extraordinary circumstances and is usually applied only to civil actions. The doctrine “permits courts to extend a statute of limitations on a case-by-case basis to prevent inequity ... even when the limitations period would otherwise have expired,” “under compelling circumstances.”<sup>26</sup> The Supreme Court has stated that, “[g]enerally, a litigant seeking equitable tolling bears the burden of establishing two elements: (1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstances stood in his way.”<sup>27</sup> Extraordinary circumstances requires a showing of an “external obstacl[e]’ to timely filing, *i.e.*, that ‘the circumstances that caused ... delay must have been beyond [the litigant’s] control.’”<sup>28</sup> “Because the doctrine effectively extends an otherwise discrete limitations period set by Congress, whether equitable tolling is available is fundamentally a question of statutory intent.”<sup>29</sup> Courts acknowledge an “understanding that Congress ‘legislate[s] against a background of common-law adjudicatory principles’”; thus, they “presume that equitable tolling applies if the period in question is a statute of limitations and if tolling is consistent with the statute.”<sup>30</sup>

Though the doctrine is routinely applied in civil cases, courts disagree on whether it should be applied to criminal actions. For example, the Third Circuit has explicitly refused to foreclose the possibility of applying the equitable tolling doctrine to criminal cases, whereas, the District Court for the District of Columbia has found applying equitable tolling unsupported by precedent.<sup>31</sup>

As there are few cases that have considered the application of equitable tolling to criminal statutes, the analysis should revert to the presumption that equitable tolling applies where “the period in question is a statute of limitations and if tolling is consistent with the statute.”<sup>32</sup> In making this determination, courts look at the “text of the relevant statute,” to assess whether Congress has precluded application of the doctrine.<sup>33</sup> “Congress can provide that signal by making a statute of limitations jurisdictional.”<sup>34</sup> The general federal criminal statute of limitations provides, in relevant part, that a five year statute of limitations will apply “[e]xcept as otherwise expressly provided by law...”<sup>35</sup> Despite this language which appears to indicate that only an express statute could toll the five year limitations period, the Supreme Court has acknowledged that federal criminal statutes of limitations are not jurisdictional in nature.<sup>36</sup> Accordingly, it is possible that faced with the question the Supreme Court would not find § 3282(a)’s language to preclude the equitable tolling doctrine.<sup>37</sup> But the general presumption that equitable tolling applies to statutes of limitations originated in the context of “suits between *private* parties.”<sup>38</sup> The Supreme Court has extended that rule to “suits brought against the United States,”<sup>39</sup> and although it has not considered whether to extend it to criminal actions, it would likely decline to do so in light of the presumption’s origins in private actions and applicability of the Due Process Clause, which supplements statutes of limitations “in protecting against oppressive delay.”<sup>40</sup>

With respect to SEC enforcement actions, on the other hand, several courts have already held that 28 U.S.C. § 2462 is subject to equitable tolling.<sup>41</sup> We are not aware of any case in which the SEC has sought to apply equitable tolling to extend the statute of limitations because of the COVID-19 pandemic.

Assuming the applicability of the equitable tolling doctrine to both federal criminal and regulatory statutes of limitations, prosecutors and regulators would nevertheless bear the burden to establish that exceptional circumstances prevented them from meeting the statutory deadline.<sup>42</sup> A declaration of a national emergency, without more, likely does not rise to the level of “exceptional circumstances” warranting equitable tolling, particularly because the Supreme Court has cautioned that equitable tolling is only to be applied

“sparingly.”<sup>43</sup> Exceptional circumstances include those situations that make it impossible for a litigant to initiate suit, such as “war”, “actions of courts”, and “actions of government agencies.”<sup>44</sup> Though federal courts have already issued several administrative orders limiting access to the courts in light of the COVID-19 health crisis, federal courts nevertheless remain open and prosecutors and regulators are not yet precluded from investigating and initiating new actions.<sup>45</sup> It is important to keep in mind that the COVID-19 pandemic is rapidly developing and the extent to which the courthouses will remain open is subject to change.

**B. A Statute Tolling The Limitations Period For Federal Crimes During The Coronavirus Pandemic Could Not Be Applied To Revive Time-Barred Offenses.**

The Suspension Act and doctrine of equitable tolling are the only mechanisms currently in place that the Government may be able to harness in support of tolling the statutes of limitations in light of the COVID-19 pandemic. Both mechanisms present serious hurdles to the Government. It is telling that there are reports that the Department of Justice is petitioning Congress to enact new legislation that would, among other things, suspend the statute of limitations in light of the COVID-19 outbreak.<sup>46</sup> Specifically, the Department of Justice is seeking Congressional intervention to “pause the statute of limitations for criminal investigations and civil proceedings during national emergencies, and for one year following the end of the national emergency.”<sup>47</sup>

Congress undoubtedly has the power to enact legislation altering the federal criminal statutes of limitations:<sup>48</sup> “Just as Congress [is] empowered to define the crime, including the statute of limitations, [Congress is also] empowered to provide for tolling of the statute of limitations.”<sup>49</sup> Such action would not be unprecedented; the Suspension Act was enacted similarly to resolve an issue that arose during national conflict.<sup>50</sup>

If Congress heeds DOJ’s requests and enacts a statute tolling the limitations period for federal crimes, the real query is whether Congress is empowered to make it retroactive, and whether its retroactivity would permit the Government to revive prosecutions for any offenses whose statutes of limitations expire before the passage of the statute. “[T]here is a ‘presumption against retroactive legislation,’” which will be applied “unless Congress has clearly manifested its intent to the contrary.”<sup>51</sup>

Despite Congress’s ability to enact legislation that is explicitly retroactive, “[t]he Constitution’s ... *Ex Post Facto* Clause[] prohibit[s] the Federal Government ... from enacting laws with certain retroactive effects.”<sup>52</sup> Such impermissibly retroactive effects include, among others, any law “that aggravates a crime, or makes it greater than it was, when committed” or “alters the legal rules of evidence, and receives less, or different, testimony, than the law required at the time of the commission of the offence, in order to convict the offender.”<sup>53</sup>

In *Stogner v. California*, the Supreme Court addressed this exact issue when it considered the constitutionality of a statute that extended a limitations period and “revived any cause of action barred by [prior statutes of limitations],” so long as certain conditions were met.<sup>54</sup> The Court reasoned that this type of tolling statute “threatens the kinds of harm that ... the *Ex Post Facto* Clause seeks to avoid.”<sup>55</sup> Such statutes are considered to be “manifestly unjust and oppressive,”<sup>56</sup> and would operate to inflict punishment on an individual or entity “for past criminal conduct that (when the law was enacted) did not trigger any such liability.”<sup>57</sup> Any such statute would likewise “eliminate a currently existing conclusive presumption forbidding prosecution, and thereby ... permit conviction on a quantum of evidence where that quantum, at the time the new law is enacted, would have been legally insufficient.”<sup>58</sup> Courts have re-affirmed this position time and again upholding only those statutes that do not resurrect time-barred prosecutions.<sup>59</sup> Consequently, though Congress could enact a statute that applies retroactively to extend the statute of limitations, it could not be applied by the Government to revive time-barred prosecutions. Indeed, as the Supreme Court has acknowledged, “[n]umerous legislators, courts, and commentators have long believed it well settled that the *Ex Post Facto* Clause forbids resurrection of a time-barred prosecution.”<sup>60</sup>

**C. The President Is Without Authority To Suspend Or Toll Criminal Statutes Of Limitations**

To the extent the President would attempt to suspend or toll the criminal statutes of limitations, he would likely do so by way of an Executive Order. Insofar as he does, such an act would likely exceed his Constitutional authority. While the President has broad executive powers and can generally issue Executive Orders within the bounds of those powers, the President's authority to issue Executive Orders must be closely tied to the authority vested to him in Article II of the Constitution.<sup>61</sup>

*Youngstown*, the seminal case on Presidential powers, "divide[d] exercises of Presidential power into three categories.<sup>62</sup> As Congress has the vested power to enact legislation, and it has already prescribed a statute of limitations for federal crimes, an Executive Order that creates law tolling such limitations period would fall into this third *Youngstown* category: "when the President takes measures incompatible with the expressed or implied will of Congress... he can only rely upon his own constitutional powers minus any constitutional powers of Congress over the matter."<sup>63</sup> "To succeed in this third category, the President's asserted power must be both 'exclusive' and 'conclusive' on the issue,"<sup>64</sup> and he "may rely solely on powers the Constitution grants to him alone."<sup>65</sup> It is in this category, that the President's "power is at its lowest ebb."<sup>66</sup> "It is a fundamental constitutional principle that '[t]he power to make the necessary law is in Congress; the power to execute in the President."<sup>67</sup> Consequently, such Presidential action would be subject to heightened scrutiny and likely be held to be in excess of the President's constitutional authority.

The fact that the President declared a national emergency pursuant to the National Emergencies Act does not alter the outcome. Pursuant to the National Emergencies Act, the President shall not exercise "powers or authorities made available by statute for use in the event of an emergency ... unless and until the President specifies the provisions of law under which he proposes that he, or other officers will act."<sup>68</sup> Once properly invoked, the President's emergency powers are immense, but nevertheless constrained by statute. As such, the President may exercise certain "special statutory authorities" that are specifically delineated by statute and are triggered by the lawful declaration of a national emergency.<sup>69</sup> The Brennan Center for Justice collected several such statutes, including three that are triggered in the area of criminal law once a national emergency is declared: 18 U.S.C. § 793 (gathering, transmitting or losing defense information), 18 U.S.C. § 2153 (destruction of war material, war premises, or war utilities), and 18 U.S.C. § 2154 (production of defective war material, war premises, or war utilities).<sup>70</sup> None of these bear on timing for the prosecution of a criminal action and none of the remaining statutes concern limitations of time. Accordingly, it is unlikely the President could utilize the powers vested to him in the time of a national emergency to suspend or toll statutes of limitations.

Moreover, were the President to issue an Executive Order tolling the statute of limitation for federal criminal offenses, his conduct would override the legislature's judgment. Little has been written about other branches of government, such as the Executive Branch, altering Congressionally promulgated statute of limitations, but in those instances where the courts were asked to impose certain doctrines conflicting with statute of limitations or suspend statutes of limitations, courts have declined to do so.<sup>71</sup>

### **III. Significance**

As of now, statutes of limitations have not been extended and the Government is constrained in extending limitations absent Congressional action. As limitations periods expire, these prosecutions and regulatory actions are likely lost to the Government permanently.

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If you have any questions about the issues addressed in this memorandum, or if you would like a copy of any of the materials mentioned in it, please do not hesitate to reach out to:

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<sup>1</sup> See 18 U.S.C. § 3282(a).

<sup>2</sup> 18 U.S.C. § 3293

<sup>3</sup> 18 U.S.C. § 3301.

<sup>4</sup> 18 U.S.C. § 3283

<sup>5</sup> 18 U.S.C. § 3284

<sup>6</sup> 18 U.S.C. § 3286

<sup>7</sup> 18 U.S.C. § 3287

<sup>8</sup> 18 U.S.C. § 3290

<sup>9</sup> 18 U.S.C. § 3292

<sup>10</sup> 28 U.S.C. § 2462 (the SEC can bring a “suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise ... within five years from the date when the claim first accrued”).

<sup>11</sup> *United States v. DeLia*, 906 F.3d 1212, 1217 (10th Cir. 2018) (quoting *Stogner v. California*, 539 U.S. 607 (2003))

<sup>12</sup> *Id.* (quoting *Toussie v. United States*, 397 U.S. 112 (1970)).

<sup>13</sup> *Musacchio v. United States*, 136 S.Ct. 709, 718 (2016).

<sup>14</sup> On March 20, 2020, Governor Andrew Cuomo issued an executive order suspending, *inter alia*, the statutes of limitations on the “commencement, filing, or service of any legal action,” to include criminal actions. See N.Y. Exec. Or. 202.8 (Mar. 20, 2020).

<sup>15</sup> 18 U.S.C. § 3287 (applying suspension to offenses (1) involving fraud or attempted fraud against the United States or any agency thereof in any manner, whether by conspiracy or not, or (2) committed in connection with the acquisition, care, handling, custody, control or disposition of any real or personal property of the United States, or (3) committed in connection with the negotiations, procurement, award, performance, payment for, interim financing, cancelation, or other termination or settlement, of any contract, subcontract, or purchase order which is connected

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with or related to the prosecution of the war or directly connection with or related to the authorized use of the Armed Forces, or with any disposition of termination inventory by any war contractor or Government agency”).

<sup>16</sup> *Kellog Brown & Root Servs., Inc. v. United States*, 135 S.Ct. 1970, 1976 (2015).

<sup>17</sup> *United States v. DeLia*, 906 F.3d 1212, 1217 (10th Cir. 2018) (“Congress enacted the Suspension Act to guard against the increased potential of fraud against the federal government during wartime by giving the government more time to discovery and prosecute such offenses.”).

<sup>18</sup> *Id.* at 1218 (quoting *Bridges v. United States*, 346 U.S. 209 (1953)).

<sup>19</sup> 18 U.S.C. § 3287.

<sup>20</sup> *Id.*

<sup>21</sup> *United States v. Prospero*, 573 F. Supp. 2d 436, 449 (D. Mass. 2008).

<sup>22</sup> *United States v. Pearson*, 2010 WL 3120038, at \*1 (S.D. Miss. Aug. 4, 2010) (holding that U.S. was “at war” for purposes of Suspension Act during military actions in Iraq and Afghanistan); *United States v. Barrera*, 2009 WL 10680035, at \*7 (W.D. Tex. Nov. 9, 2009).

<sup>23</sup> *United States v. Western Titanium, Inc.*, 2010 WL 2650224, at \*3 (S.D. Cal. July 1, 2010).

<sup>24</sup> *Id.*

<sup>25</sup> *Kellog Brown & Root Servs., Inc. v. U.S.*, 135 S.Ct. 1970, 1978 (2015) (quoting *Bridges*, 346 U.S. 209 (1953)).

<sup>26</sup> *United States v. All Funds Distrib. To*, 345 F.3d 49, 54 (2d Cir. 2003); *United States v. Midgley*, 142 F.3d 174, 179 (3d Cir. 1998) (“Absent a showing of intentional inducement or trickery by the defendant, a statute of limitations should be tolled only in the ‘rare situation where equitable tolling is demanded by sound legal principles as well as the interests of justice.’”).

<sup>27</sup> *Pace v. DiGuglielmo*, 544 U.S. 408, 418 (2005).

<sup>28</sup> *Menominee Indian Tribe of Wisc. v. United States*, 136 S.Ct. 750, 756 (2016).

<sup>29</sup> *Lozano v. Montoya Alvarez*, 572 U.S. 1, 10 (2014).

<sup>30</sup> *Id.* at 10-11 (quoting *Astoria Fed. Sav. & Loan Ass’n v. Solimino*, 501 U.S. 104 (1991); citing *Young v. United States*, 535 U.S. 43 (2002)).

<sup>31</sup> *Midgley*, *supra* note 26, at 179 (“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.” (internal citations and quotations omitted)); *United States v. Atiyeh*, 402 F.3d 354, 367 (3d Cir. 2005) (“we have never foreclosed the possibility that equitable tolling applies to criminal statutes of limitations”); *but see In re Grand Jury*, 2011 WL 5834016, at \*1 (D.C.C. Nov. 7, 2011) (noting that “this Court can find little authority that allows for an equitable exception to §3282(a)” and rejecting reliance on *Holland v. Florida*, 130 S.Ct. 2549 (2010) because “[t]hat case involved equitable tolling for habeas petitions under the Antiterrorism and Effective Death Penalty Act of 2006 and does not bear on the time within which the government may bring prosecution.”).

<sup>32</sup> *Lozano*, *supra* note 29, at 11.

<sup>33</sup> *Id.* (quoting *Young v. United States*, 535 U.S. 43 (2002)).

<sup>34</sup> *See United States v. Kwai Fun Wong*, 575 U.S. 402, 420 (2015); *see also John R. Sand & Gravel Co. v. United States*, 552 U.S. 130, 133-34 (2008) (finding certain statutes that are “jurisdictional” not subject to the equitable tolling doctrine).

<sup>35</sup> 18 U.S.C. § 3282(a).

<sup>36</sup> *See Musacchio v. United States*, 136 S.Ct. 709, 717 (2016) (“the statutory text, context, and history establish that §3282(a) imposes a nonjurisdictional defense that becomes part of a case only if a defendant raises it in the district court”).

<sup>37</sup> *See Kwai Fun Wong*, *supra* note 34 at 420 (holding that “the FTCA’s time bars are nonjurisdictional and subject to equitable tolling”, despite language in statute that tort claims “shall be forever barred” unless they meet the two year limitations period).

<sup>38</sup> *Id.* at 407.

<sup>39</sup> *Id.* at 408.

<sup>40</sup> *United States v. Lovasco*, 431 U.S. 783, 789 (1977) (“But we did acknowledge that the “statute of limitations does not fully define (defendants’) rights with respect to the events occurring prior to indictment,” ... and that the Due Process Clause has a limited role to play in protecting against oppressive delay.”).

<sup>41</sup> *See Fed. Election Comm’n v. Williams*, 104 F.3d 237, 240 (9th Cir. 1996); *see also S.E.C. v. Huff*, 758 F. Supp. 2d 1288, 1339 (S.D. Fla. 2010) (collecting cases).

<sup>42</sup> *See Pace*, *supra* note 27, at 418.

<sup>43</sup> *Nat’l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 113 (2002).

<sup>44</sup> *Softel, Inc. v. Dragon Medical And Scientific Commc’n Ltd.*, 1995 WL 75490, at \*7 (S.D.N.Y. Feb. 23, 1995) (collecting cases); *see also Hanger v. Abbot*, 73 U.S. 532, 542 (1867) (equitable tolling applicable where courts were

closed during Civil War, preventing litigants from initiating actions); *Osbourne v. United States*, 164 F.2d 767, 769 (2d Cir. 1947) (applying equitable tolling where plaintiff was unable to assert rights while he was held prisoner in Japan during Second World War); *Murray v. Cain*, 2019 WL 1417442, at \*3-4 (M.D. La. Mar. 5, 2019) (equitable tolling warranted where a state of emergency was “declared upon the Louisiana State Penitentiary Angola” due to flooding which caused petitioner to be evacuated from the prison and delay his filing); *but see Guevara v. Sessions*, 697 F. App’x 340, 341 (5th Cir. 2017) (argument that statute of limitations for filing a motion to reopen should be tolled “during a federally-recognized state of emergency”, without more, was insufficient, where plaintiff did not act diligently by waiting nine years after he was ordered removed to reopen removal proceedings).

<sup>45</sup> See e.g., *In re Coronavirus/COVID-19 Pandemic*, 20-MISC-00155 (Mar. 16, 2020) (limiting persons who can enter the United States District Court for the Southern District of New York); *In re Coronavirus/COVID-19 Pandemic*, 20-MISC-00154 (Mar. 13, 2020) (noting that the courthouses for the Southern District of New York would remain open, but suspending criminal and civil jury trials and otherwise permitting judges to continue to “hold hearings, conferences, and bench trials”).

<sup>46</sup> Betsy Woodruff Swan, *DOJ Seeks New Emergency Powers Amid Coronavirus Pandemic*, POLITICO (March 21, 2020) available at <https://www.politico.com/news/2020/03/21/doj-coronavirus-emergency-powers-140023>; Leah Nysten, et al., *DOJ Wants More Time on Merger Reviews, Price-fixing Cases Because of Pandemic*, POLITICO (March 21, 2020) available at <https://www.politico.com/news/2020/03/21/doj-merger-reviews-coronavirus-140669>.

<sup>47</sup> Swan, *supra* note 43.

<sup>48</sup> *United States v. Comstock*, 560 U.S. 126, 133 (2010) (“[T]he Necessary and Proper Clause grants Congress broad authority to enact federal legislation.”); *id.* at 136 (“Congress routinely exercises its authority to enact criminal laws in furtherance of, for example, its enumerated powers to regulate interstate and foreign commerce, to enforce civil rights, to spend funds for the general welfare, to establish federal courts, to establish post offices, to regulate bankruptcy, to regulate naturalization, and so forth.”).

<sup>49</sup> *United States v. Arrington*, 2013 WL 5963140, at \*7 (D. Neb. Nov. 7, 2013).

<sup>50</sup> *Bridges*, *supra* note 18, at 217 (“The Act was a wartime measure reviving for World War II substantially the same exception to the general statute of limitations, which, from 1921 to 1927, had been directed at the war frauds of World War I.”).

<sup>51</sup> *Hughes Aircraft Co. v. United States*, 520 U.S. 939, 946 (1997).

<sup>52</sup> *Stogner v. California*, 539 U.S. 607, 610 (2003) (citing Const., Art. I, §9, cl. 3 (Federal Government)).

<sup>53</sup> *Id.* at 612.

<sup>54</sup> *Id.* at 609.

<sup>55</sup> *Id.* at 611.

<sup>56</sup> *Id.*

<sup>57</sup> *Id.* at 613.

<sup>58</sup> *Id.* at 616.

<sup>59</sup> See *United States v. Gibson*, 490 F.3d 604, 609 (finding 18 U.S.C. § 3296 permissible under *ex post facto* clause “so long as the statute is passed before the given prosecution is barred”); *United States v. Leo Sure Chief*, 438 F.3d 920, 924 (9th Cir. 2006) (finding statute that was enacted before statute of limitations expired “did not purport to resurrect an expired criminal charge”); *United States v. McGuire*, 636 F. App’x 445, 447 (10th Cir. 2016) (restitution statute enacted while period for enforcing defendant’s restitution order had not expired does not violate the *ex post facto* clause); *United States v. Merkel*, 357 F. Supp. 3d 1060, 1064 (noting that the “2008 amended version of the WSLA appli[es] to pre-amendment conduct as long as the original limitations period had not yet expired”); *United States v. Jeffries*, 405 F.3d 682, 684 (8th Cir. 2005) (18 U.S.C. § 3509(k) (later recodified at § 3283), extending the statute of limitations for child sex abuse cases did not violate *ex post facto* clause because the limitations period for defendant’s offense had not yet expired when the statute was enacted).

<sup>60</sup> *Stogner*, *supra* note 50, at 617.

<sup>61</sup> *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 587 (1952) (“It is clear that if the President had authority to issue the order he did, it must be found in some provisions of the Constitution.”).

<sup>62</sup> *Zivotofsky v. Kerry*, 135 S.Ct. 2076, 2083-84 (2015) (noting three categories of Presidential power articulated in *Youngstown*: (1) “when ‘the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate;” (2) “in absence of either a congressional grant or denial of authority there is a zone of twilight in which he and Congress may have concurrent authority, and where congressional inertia, indifference or quiescence may invite the exercise of executive power”; and (3) when the President takes measures incompatible with the expressed or implied will of

Congress... he can only rely upon his own constitutional powers minus any constitutional powers of Congress over the matter.”).

<sup>63</sup> *Id.* at 2083-84.

<sup>64</sup> *Id.*

<sup>65</sup> *Id.* at 2084.

<sup>66</sup> *Youngstown*, *supra* note 59, at 638.

<sup>67</sup> *Medellin v. Texas*, 552 U.S. 491, 526 (2008) (holding that the President did not have the power to make a non-self-executing treaty domestic law); *see also Youngstown*, 343 U.S. at 587 (“In the framework of our Constitution, the President’s power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker.”).

<sup>68</sup> 50 U.S.C. § 1631.

<sup>69</sup> *See A Guide to Emergency Powers and Their Use*, BRENNAN CTR. FOR JUSTICE (2019) [https://www.brennancenter.org/sites/default/files/2019-10/2019\\_10\\_15\\_EmergencyPowersFULL.pdf](https://www.brennancenter.org/sites/default/files/2019-10/2019_10_15_EmergencyPowersFULL.pdf).

<sup>70</sup> *Id.*

<sup>71</sup> *See SCA Hygiene Prods. Aktiebolag v. First Quality Baby Prods., LLC*, 137 S.Ct. 954, 960 (2017) (the judiciary could not “apply laches within a limitations period specified by Congress” because it would “give judges a ‘legislation overriding’ role that is beyond the Judiciary’s power”); *see also Canton v. United States*, 265 F.Supp. 1018, 1022 (D. Minn. 1967) (the courts “have no authority to suspend a statute of limitations enacted by Congress”).