

Pandemic May Prompt Legislative Action On Court Deadlines

By **Reed Brodsky and Michael Nadler** (April 30, 2020, 5:43 PM EDT)

COVID-19 has disrupted the judiciary on a massive scale reminiscent of war. Federal and state courts are doing their best to manage the crisis with the limited tools at their disposal.

What may surprise many is that the federal government and multiple state governments do not have the power to toll or pause the statutes of limitations of criminal and civil statutes, or in many cases to toll other statutory deadlines, in a sweeping fashion.

Indeed, barring special circumstances on a case-by-case basis, statutes of limitations for most criminal and civil statutes are running unabated during this public health crisis while prosecutors and law enforcement are limited in their abilities to interview witnesses, serve subpoenas and review evidence; while grand juries cannot be empaneled to hear evidence and return potential charges; while potential civil litigants are hampered from collecting documents and speaking with or deposing witnesses; while litigants in the midst of civil litigation cannot serve subpoenas without process servers; while hearings have been cancelled; and while many trials have been suspended indefinitely.



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The Federal Government Cannot Toll Statutes of Limitations in the COVID-19 Crisis

The federal government does not have the power to toll or suspend statutes of limitations for federal criminal and civil statutes across the board. Indeed, its powers to pause the clock on statutory, and even certain procedural, filing deadlines is highly limited.

Although the president has dozens of enumerated powers upon the declaration of an emergency under the National Emergencies Act,[1] and additional powers may be granted to the executive branch by a congressional declaration of emergency,[2] none of those powers explicitly provide the country's chief executive with the authority to close courts or toll statutes of limitations.

There is a federal statute allowing for a limited suspension of statutes of limitations "[w]hen the United States is at war or Congress has enacted a specific authorization for the use of the Armed Forces," but it does not apply to COVID-19, and in any event, it is only applicable to a narrow band of criminal cases alleging fraud against the United States, United States property, or wartime contracts.[3]

Courts applying the canon of *expressio unius est exclusio alterius* ("the express mention of one thing excludes the others") might conclude these specific grants of authority imply that the executive branch lacks any broader power to toll statutes of limitations or similar procedural deadlines during peacetime or with respect to other types of claims.[4]

COVID-19 May Reinvigorate Federal Efforts to Permit Tolling of Statutory Deadlines

The COVID-19 crisis may allow for the suspension of the Speedy Trial Act, which governs the timing of federal criminal prosecutions. Defendants must normally be indicted within 30 days of being arrested or summoned, with their trial to begin within 70 days of the latter of indictment or their first court appearance.[5]

Judges may nevertheless exclude time or continue deadlines if "the ends of justice ... outweigh the best interest of the public and the defendant in a speedy trial,"[6] provisions that have been and probably will be invoked in connection with the ongoing COVID-19 pandemic. Courts have suspended Speedy Trial Act deadlines and continued trials in other instances in which courthouses have closed during states of emergency,[7] or when individuals have been unable to appear due to illness.[8]

In addition, a separate statute allows federal judges to request suspension of the 70-day Speedy Trial deadline for up to one year in times of emergency,[9] albeit without permitting similar suspensions for the bringing of charges following arrest or arraignment.[10] Federal courts have already sought to utilize these provisions in connection with COVID-19.

The U.S. Court of Appeals for the Ninth Circuit relied on them in declaring an emergency in the U.S. District Court for the Southern District of California on April 2,[11] for instance, and the U.S. District Court for the Eastern District of California requested a similar suspension six days later.[12]

Following the disaster of Hurricane Katrina and related federal court closures, Congress previously considered the Federal Judiciary Emergency Powers Tolling Act of 2006, legislation that would have provided broader powers to toll federal statutory deadlines. After unanimous passage in the House of Representatives, however, that bill never came to a vote in the Senate.[13]

Nor is it clear whether federal judges themselves have authority to proactively set aside statutory deadlines across the board. Ever since the United States Civil War forced the closure of courts, federal judges have occasionally chosen to accept late filings under the judicial common law doctrine of equitable tolling.[14] Nevertheless, that doctrine has generally been invoked retroactively and on a case-by-case basis.[15]

Accordingly, COVID-19 may reinvigorate legislative efforts to clearly empower the federal government to toll statutes of limitations and other deadlines in times of emergency.

Many States Lack Broad Tolling Authority

Like the federal government, many states similarly lack broad authority to toll statutes of limitations and other statutory deadlines.

As of 2010, only New York and Texas had statutes addressing statute of limitations suspensions during times of disaster.[16] Some states, such as Kansas, have recently sought to plug this legislative gap by authorizing emergency tolling of statutes of limitations in response to the spread of COVID-19.[17]

In the absence of statutory powers to suspend deadlines, otherwise broad emergency powers granted to state officials may not suffice.

Although Wisconsin's governor is authorized to "[i]ssue such orders as he or she deems necessary for the security of persons and property,"[18] for instance, the Wisconsin Supreme Court recently enjoined a gubernatorial order delaying the state's presidential primary election in light of the COVID-19 pandemic, holding that while "the Governor is granted the power to '[s]uspend the provisions of any administrative rule' if certain conditions are met," he nevertheless lacked "the authority to suspend or rewrite statutes in the name of public safety." [19]

That same rationale could arguably be applied outside the electoral context if the governor were to toll statutes of limitations.

States without statutory schemes for emergency tolling could face judicial crises if they attempt to suspend operations during the current pandemic, as occurred in Louisiana following Hurricane Katrina. In the face of widespread damage, the governor of Louisiana closed courthouses and tolled deadlines without express authority to do so, leading to lengthy delays in trials, litigation and other proceedings.

Among other difficulties, New Orleans' criminal justice system collapsed, with many arrestees serving more time while awaiting arraignment or trial than their estimated sentences would have required. Detainees later overwhelmed the courts with claims that their due process and speedy trials rights had been violated.[20]

The New York Governor's Broad Emergency Powers

The statutory scheme in New York stands in stark contrast to the federal system and those in the overwhelming majority of other states. New York's governor has long been empowered to "temporarily suspend any statute" by executive order "during a state disaster emergency," which includes not only wars but also "epidemic[s]" and "disease outbreak[s]." [21] This power is subject to several limitations.

Of particular note, such suspensions (1) are subject to the state and federal constitutions; (2) must be "reasonably necessary to aid the disaster effort;" (3) cannot exceed "the minimum deviation from the requirements of the statute ... consistent with the goals of the disaster action deemed necessary;" (4) may not exceed 30 days, though "upon reconsideration" by the governor they may be extended in additional 30-day increments; and (5) are terminable by the legislature at any time.[22]

Despite these restrictions on the governor's authority, it bears noting that the New York attorney general issued a memo prior to the statute's enactment explaining that it "would have to be carefully construed and implemented" because of the risks overbroad interpretation would pose to "the constitutional rights and liberties of citizens." [23]

On March 20, New York Gov. Andrew Cuomo relied on the state disaster emergency authority in issuing Executive Order 202.8, tolling "any specific time limit[s] for the commencement, filing, or service" of a variety of legal matters until April 19,[24] which was subsequently extended through May 7.[25]

Concurrently, a March 22 administrative order by New York's chief administrative judge referenced the Executive Order 202.8 in limiting filings in the state's courts to specified categories deemed essential.[26] The two orders work together to ensure that the New York state judiciary will be able to resolve urgent matters while mitigating the consequences of delaying other litigation.

Cuomo's order is likely to have implications beyond the state's courts. Litigants and judges will have to carefully consider whether the tolling provisions in New York apply in individual matters as conflict of laws analysis may vary from case to case.

In addition, because federal courts apply state statutes of limitation in some circumstances, federal courts applying New York law may have to consider whether to recognize such tolling.[27] If an action in New York state court accrued in another state, meanwhile, New York will generally "borrow" that state's statute of limitations,[28] but actions accruing within New York that apply other states' laws are typically subject to New York's statute of limitations.[29]

How Executive Order 202.8 might apply in these varied circumstances remains uncertain and will undoubtedly be subject to litigation.

The current pandemic is not the first time New York has invoked the state disaster emergency authority to toll statutes of limitations and other deadlines. New York governors have previously invoked these same powers to modify court deadlines after 9/11 and Hurricane Sandy.[30]

Disputes concerning those earlier orders largely focused on the scope and effect of the orders rather than on challenging their legitimacy,[31] although one state court expressly rejected an argument that the post-9/11 executive order violated constitutional separation of powers principles.[32]

Guided by minimal precedent concerning constitutional or statutory limitations on the governor's emergency powers, New York courts have already begun to grapple with a wide variety of issues relating to the scope and applicability of Cuomo's recent actions.

One branch of the state's intermediate appellate court has denied a writ of habeas corpus on the grounds that "Executive Order 202.8 temporarily suspends the operation of" certain deadlines related to state criminal prosecutions,[33] and several lower courts have held that such suspensions do not violate the constitutional right to due process or prohibition against unlawful detention.[34] Nevertheless, other decisions have suggested that the constitutional implications of Executive Order 202.8 remain an open question.[35]

Until these matters and others like them have fully wound their way through the judiciary, the breadth of the governor's power in this area will remain broadly undefined. In the meantime, further litigation is sure to follow.

Closing Statement

As the country continues to address the ongoing COVID-19 pandemic, the dichotomy between the federal government and most states' inability to toll statutory deadlines, on the one hand, and New York, on the other, will become more pronounced. It will likely lead to a full scale reconsideration of the Federal Judiciary Emergency Powers Tolling Act of 2006, or something similar, to enable the federal government to suspend statutory deadlines on a sweeping scale in the face of a national crisis.

Moreover, it will likely lead to potential legislation in many states using New York's disaster emergency statutory authority as a model. Undoubtedly, it will lead to litigation over whether the government or the parties complied with statutes of limitations or other deadlines, and whether the COVID-19 crisis equitably tolled such statutes and deadlines.

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[1] See 50 U.S.C. § 1631.

[2] See, e.g., 16 U.S.C. § 831(s); 10 U.S.C. § 3063(b); 14 U.S.C. § 722; 14 U.S.C. § 371(b); 10 U.S.C. § 8033(a)(1); 10 U.S.C. § 3033(a)(1); 10 U.S.C. § 5033(a)(1); 10 U.S.C. § 5043(a)(1); 10 U.S.C. § 6911(b); 10 U.S.C. § 12301(a); 50 U.S.C. §§ 3806(b), (c); 10 U.S.C. § 12103(c); 42 U.S.C. § 2138; see generally A Guide to Emergency Powers and Their Use, Brennan Center, <https://www.brennancenter.org/our-work/research-reports/guide-emergency-powers-and-their-use> (last visited Apr. 9, 2020).

[3] 18 U.S.C. § 3287; see also *Kellogg, Brown & Root Services, Inc. v. U.S. ex rel. Carter*, 575 U.S. 650 (2015).

[4] See, e.g., *Brennan-Centrella v. Ritz-Craft Corp. of Pa.*, 942 F.3d 106, 111 (2d Cir. 2019).

[5] 18 U.S.C. § 3161(b), (c).

[6] 18 U.S.C. § 3161(h)(7)(A).

[7] See, e.g., *Furlow v. United States*, 644 F.3d 764, 768 (9th Cir. 1981).

[8] See *United States v. Bell*, 925 F.3d 362, 375 (7th Cir. 2019); *United States v. Allen*, 2012 WL 3763912, at *4 (D. V.I. Aug. 30, 2012).

[9] 18 U.S.C. § 3174(a).

[10] 18 U.S.C. § 3174(b).

[11] Judicial Council of the 9th Cir., Order In re Approval of the Judicial Emergency Declared in the Southern District of California (Apr. 2, 2020).

[12] Letter from Hon. K. Mueller to Chief Judge S. Thomas, Judicial Counsel of the 9th Cir. (April 8, 2020).

[13] See H.R. 3729, 109th Cong. (2006).

[14] *Hanger v. Abbott*, 73 U.S. 532, 541-42 (1867).

[15] See, e.g., *Braxton v. Zavaras*, 614 F.3d 1156, 1160 (10th Cir. 2010).

[16] Mark C. Dillon, An Overview of Tolls of Statutes of Limitations on Account of War: Are They Current and Relevant in the Post-September 11th Era? 13 N.Y.U. J. Legis. & Pub Pol'y 315, 362 (2010).

[17] 2020 House Substitute for S.B. 102 (Kan. 2020).

[18] Wis. Code. § 323.12(4)(b).

[19] Amended Order, Wis. Legislature v. Evers, No. 2020AP608-OA, at 3 (April 6, 2020) (quoting Wis. Stat. §323.12(4)(d)).

[20] See, e.g., Matthew Paul Crouch, In the Aftermath: Responsibility and Professionalism in the Wake of Disaster, 65 S.C. L. Rev. 465, 492-95 (2013).

[21] N.Y. Exec. Law § 29-a.

[22] Id.

[23] S.B. 7265B, 1978 (N.Y. 1978), reprinted in NYLS' Governor's Bill Jacket, 1978 C. 640 (1978).

[24] N.Y. Exec. Ord. 202.8 (2020).

[25] N.Y. Exec. Ord. 202.14 (2020).

[26] N.Y. Admin. Ord. 78/20 (2020).

[27] See Guaranty Trust Co. of N.Y. v. York, 326 U.S. 99, 109–10 (1945); Klaxon Co. v. Stentor Electric Mfg. Co., 313 U.S. 487, 495-96 (1941).

[28] See N.Y. C.P.L.R. 202; see, e.g., 2138747 Ontario, Inc. v. Samsung C&T Corp., 144 A.D.3d 122, 124-27 (1st Dep't 2016).

[29] See Tanges v. Heidelberg N. Am., Inc., 93 N.Y.2d 48, 54-55 (1999); Ontario, 114 A.D.3d at 124-27.

[30] N.Y. Exec. Ord. 52 (2012); N.Y. Exec. Ord. 113.7 (2001).

[31] See, e.g., People v. Aquino, 734 N.Y.S.2d 371 (Crim. Ct. 2001); People v. Sheehan, 962 N.Y.S.2d 886 (Crim. Ct. 2013).

[32] People v. Haneiph, 191 Misc.2d 738, 742-44 (N.Y.C. Crim. Ct. 2002).

[33] People v. Franchi, --- N.Y.S.3d ---, 2020 WL 1942130 (App. Div. Apr. 23, 2020).

[34] See People ex rel. Hamilton v. Brann, 2020 N.Y. Slip Op 50392(U) (Sup. Ct. Apr. 2, 2020); People v. Hood, 2020 N.Y. Slip Op. 50384(U) (Poughkeepsie City Ct. Apr. 4, 2020).

[35] See People v. Stanley, --- N.Y.S.3d ---, 2020 WL 1917666, at *4 (Albany City Ct. Apr. 20, 2020) ("[T]he court might be inclined to suspect that the Executive Order is unconstitutional"); People v. Brann, --- N.Y.S.3d ---, 2020 WL 1878094, at *7 (Sup. Ct. Apr. 13, 2020) (detainees awaiting indictment "may ... file

a petition for a writ of habeas corpus if it appears that the constitutional or statutory standards inhibiting excessive bail or the arbitrary refusal of bail are violated." (internal quotation marks omitted)).