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Time for Final Action on 18 U.S.C. § 3292

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INTRODUCTION

I. A STATUTE IN ACTION

Imagine that you receive a knock on the door of your New York City apartment early on the morning of April 15, 2000.[1] When you answer, you are surprised to find that the people at the door are FBI agents, informing you that you are under arrest pursuant to an

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1. This sequence of events is based on a case in which the authors participated. Names have been omitted, and locations and details of events have been altered in order to protect client confidentiality.

indictment for a fraud that was allegedly committed between 1989 and 1992. Although alarmed by the sudden charges relating to events so long in the past, you call your attorney from the Metropolitan Correctional Center and are somewhat reassured when he informs you that the statute of limitations has long since expired and it should be only hours before you are released. But as attorneys do, he says he will check on it anyhow just to make sure.

Nearly 24 hours later, you are brought to arraignment. Only then does your attorney tell you that his inquiries have revealed that the statute of limitations was extended by a district court pursuant to 18 U.S.C. § 3292, at the request of the prosecutor and without notice to you. When, at arraignment, your counsel asks the reason for this tolling, the assistant United States attorney informs him that the Government needed to obtain a bank record from a foreign country—a record that is incidental to the case against you, and one that you could easily have produced yourself if asked. Assuming that the Government had need of such evidence, its request to a foreign jurisdiction could justify tolling of the statute of limitations under 18 U.S.C. § 3292 for up to three years.[2] Because the prosecution applied for tolling *ex parte*, however, you had no opportunity to challenge their entitlement to it at the time. Instead, you must prepare to defend yourself against charges concerning events that have slipped from your memory, let alone the memories of key witnesses. This may not seem to comport with the American system of justice—but, thanks to a little-known 1984 statute, it can and has occurred and will no doubt happen again.

Prosecutions of Federal crimes, with very few exceptions, must be commenced within five years after their commission.[3] This statute of limitations, which protects defendants' rights to adequately defend themselves and obtain a timely resolution of criminal charges, has traditionally been strictly construed by the courts.[4] Due to the fact, however, that many major and even routine prosecutions are now transnational in nature, prosecutors have frequently encountered difficulties in obtaining the evidence necessary to prove their case within the limitation period prescribed by law.[5] Accordingly, in the early 1980s, Congress considered methods of alleviating the difficulties posed to prosecutors by the need to gather evidence from abroad.[6] While declin-

2. *See* 18 U.S.C. § 3292(c)(1)(1994).

3. *See* 18 U.S.C. § 3282. Specific exceptions for particular crimes or circumstances are enumerated in 18 U.S.C. §§ 3281 and 3283–91.

4. *See United States v. Marion*, 404 U.S. 307, 322–23 (1971) (explaining the reason for strict adherence to statutes of limitations).

5. *See* notes 51–71 *infra* and accompanying text.

6. *See* notes 73–80 *infra* and accompanying text.

ing to lengthen the generally applicable statute of limitations for all cases, Congress ultimately enacted an unprecedented procedure for tolling the statute in certain cases where it was necessary to obtain foreign evidence.[7] Despite the fact that this statute has been used and interpreted for more than 15 years, there have been relatively few reported cases and no prior scholarly discussions of its underpinnings, scope and practical application.

II. SECTION 3292: A PROBLEMATIC SOLUTION

Modern crime, like any other major industry, is increasingly international in scope.[8] Free trade agreements, international banking and currency transfer, the ease of air travel, and the growth of international media such as the Internet have combined to offer criminals as well as legitimate businessmen the means to conduct their activities across borders on an unprecedented scale.[9] Thus, in order to keep up with their adversaries, prosecutors and law enforcement authorities have also had to conduct investigations on an international scale. Even relatively unsophisticated fraud or narcotics cases now often involve evidence or witnesses from abroad.[10]

In pursuing such multinational investigations, law enforcement authorities encounter constraints that criminals do not. Unlike criminal organizations, police and prosecutors must act within prescribed methods and periods of time, and must frequently abide by cumbersome and time-consuming procedures in order to obtain evidence from outside their jurisdiction. This is especially true of investigations which take place across national borders, since diplomatic as well as law enforcement officials must frequently be consulted in order to obtain the necessary documents or testimony.[11] In some cases, especially where

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7. *See* 18 U.S.C. § 3292.

8. *See* John Dugard & Christine van der Wyngaert, *Reconciling Extradition and Human Rights*, 92 AM. J. INT'L L. 187 (1998) (noting the increase in international crime).

9. *See id.* (noting that "as movement around the world becomes easier . . . crime takes on a larger international dimension.")(quoting *Soering v. United Kingdom*, 161 Eur. Ct. H.R. (Ser. A.) para. 89 (1989).

10. *See, e.g.*, *BONY Case Takes Abrupt Turn as Officer Pleads Guilty*, MONEY LAUNDERING ALERT, Vol. II, No. 5, at 1 (Mar. 2000) (stating that numerous customers of Russian banks were routinely able to transfer money clandestinely to the United States with the aid of officials at the Bank of New York); *see also* R. Robin McDonald, *Sham Tucker Business Plays Key Role in Global Drug Sting*, ATLANTA CONSTITUTION, Dec. 23, 1999, at 1B (stating that 47 people in nine United States cities and two foreign countries were arrested in scheme to launder Colombian cocaine money through small-time black-market peso brokers).

11. *See* notes 37–40 *infra* and accompanying text.

diplomatic and law enforcement interests diverge, this has led to the statute of limitations expiring while the prosecutor's request for evidence was still in diplomatic limbo.[12]

Accordingly, the Justice Department urged Congress during its consideration of the Comprehensive Crime Control Act of 1984 to take measures to alleviate the time pressures frequently faced by prosecutors in international investigations.[13] In response to the Justice Department's importuning, Congress enacted a statute giving prosecutors partial relief from these time pressures. This statute, 18 U.S.C. § 3292, allows prosecutors to apply to Federal district courts to toll the applicable statute of limitations if they have made an official request for evidence from abroad.[14] Tolling under 18 U.S.C. § 3292 lasts until the shorter of the expiration of three years or until the foreign country takes "final action" on the prosecutor's request—a term the statute leaves undefined.[15]

The tolling provided by Section 3292 is unlike any other extension of the statute of limitations provided by Federal law. [16] The other periods of tolling recognized by statute—including periods during which a defendant is a fugitive from justice or conceals bankruptcy assets—are based upon the behavior of the defendant and are thus within his control.[17] Tolling under 18 U.S.C. § 3292, however, is undertaken by the prosecution, and is not only beyond the defendant's ability to influence but is also frequently beyond his knowledge.

Moreover, the vague language of Section 3292 opens the door for the possibility of its misuse. Cases interpreting 18 U.S.C. § 3292 to date offer conflicting interpretations of its scope and reveal considerable potential for abuse in the statute's practical application. For instance, prosecutors have generally applied *ex parte* for tolling under 18 U.S.C. § 3292 in order to obtain a secret extension of the statute of limitations without the knowledge or consent of the targets of the investigation.[18] In addition, it appears that prosecutors in certain cases have deliberately failed to pursue requests for foreign evidence in a timely manner in order to obtain the benefit of the full three years' tolling or have applied

12. H.R. Rep. No. 98-907, 98th Cong., 2d Sess. (1984), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3578–79 (hereinafter "House Report").

13. *Id.*

14. *See* 18 U.S.C. § 3292(a)(1).

15. *See* notes 105–25 *infra* and accompanying text.

16. *See* notes 169–__ *infra* and accompanying text.

17. *See* 18 U.S.C. §§ 3284 (providing for tolling where bankruptcy assets are concealed), 3290 (providing for tolling where the defendant is a fugitive from justice). Federal statutory law also provides that prosecution of a sex offense against a minor may be commenced at any time prior to the minor's 25th birthday. *See* 18 U.S.C. § 3283.

18. *See* notes 179–80 *infra* and accompanying text.

for tolling even when the foreign evidence has already been obtained.[19] Moreover, the ambiguity of the term "final action" has permitted the Government to argue that the tolling can be extended via successive requests for supplementary evidence even where the foreign country has responded in full to the original request.[20]

This potential for prosecutorial abuse, combined with the lack of prior scholarship, renders it vitally important that the undefined areas in 18 U.S.C. § 3292 be explored. This Article will analyze the history, purpose, terms and interpretation of the statute and suggest a resolution of open issues. Part I of this Article will discuss traditional methods of international evidence-gathering and explain the necessity for a legitimate method of tolling the statute of limitations in certain cases. Part II will discuss Congress' attempt to achieve this goal through the enactment of 18 U.S.C. § 3292 and the issues which have arisen from the statute's application. Finally, Part III will suggest an interpretation of 18 U.S.C. § 3292 which achieves its legitimate purpose while curtailing the potential for prosecutorial abuse and misconduct.

A. *Obstacles to International Evidence Gathering*

The impetus for the enactment of Section 3292 was a factor that has become an increasing obstacle to American law enforcement authorities: international borders. While technology has increasingly allowed criminals to bypass national borders in conducting their activities, law enforcement authorities have continued to be bound by cumbersome rules of jurisdiction and time-consuming evidence gathering procedures.[21] Attempts to reduce the time necessary to complete foreign investigations through treaties and memoranda of understanding have met with some success—but, as shown below, that success has been limited.[22] Thus, the stage was set for the enactment of 18 U.S.C. § 3292 as a fallback tactic—a means of allowing prosecutors more time to complete investigations where efforts at streamlining their task had failed.

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19. *See, e.g., United States v. Miller*, 830 F.2d 1073 (9th Cir. 1987) (upholding extension of limitation period where prosecutor did not apply for Section 3292 tolling until after evidence from abroad had been received).

20. *See id.*; *see also United States v. Meador*, 138 F.3d 986 (5th Cir. 1998) (describing Government's argument that prosecutors could gain additional tolling by filing successive requests for foreign evidence, even without making additional applications to district court).

21. *See* notes 51–71 *infra* and accompanying text.

22. *See id.*

1. The Internationalization Of Crime

Three factors have been cited most often in explaining the growing globalization of crime in the late twentieth century: narcotics, banking secrecy and technology.[23] The rise of the large-scale narcotics trade practically necessitated the growth of international criminal organizations, as the countries where a high demand for narcotics existed were frequently not the same as the nations where the drugs of choice were grown or processed.[24] Thus, the drug trade led to the growth of international organizations linking manufacturers or growers with street distributors in drug-consumer countries, often with the aid of transshippers in third countries. To take just one example, heroin—which is commonly produced from raw opium in South Asian countries such as Pakistan and Thailand—is frequently shipped to the United States via middlemen in West Africa.[25] Similarly, Colombian cocaine is frequently shipped through Mexico to street distributors in the United States.[26]

Another factor that has led to the internationalization of crime is foreign bank secrecy legislation. It has long been traditional for criminals to maintain foreign bank accounts in order to protect their ill-gotten gains from civil judgments in American courts.[27] In the second half of the twentieth century, however, concealment of the proceeds of crime became even more important with the enactment of criminal forfeiture statutes such as the Racketeer-Influenced Corrupt Organizations Act (RICO).[28] The RICO statute and similar laws which provide for the forfeiture of the proceeds of crime—sometimes prior to trial[29]—gave added incentive to criminal organizations to conceal the criminal origin of

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23. *See generally* ETHAN NADELMANN, COPS ACROSS BORDERS (1997); *see also United States v. Nippon Paper Indus.*, 109 F.3d 1, 6 (1st Cir. 1997) (noting that the growth of the global economy was responsible for the increasing amount of extraterritorial crime).

24. *See* James Ostrowski, *The Moral and Practical Case for Drug Legalization*, 18 HOFSTRA L. REV. 607, 668 (1990) (noting that drug producing countries were primarily poorer Third World nations and that the majority of drug profits were derived from the United States and Europe).

25. *See Nigeria Launches National Anti-Drug Campaign*, XINHUA NEWS AGENCY, Nov. 5, 1998 (stating that West Africa is a primary transshipment point for Asian heroin destined for sale in the United States and Europe).

26. *See* Mary Beth Sheridan, *Mexico Hails Its Progress Battling Drug Traffickers*, L.A. TIMES, Jan. 27, 2000, at A6 (stating that Mexico is "the principal transshipment point for U.S.-bound cocaine from Colombia").

27. *See* Douglas Kim, Note, *Asset Forfeiture: Giving Up Your Constitutional Rights*, 19 CAMPBELL L. REV. 527, 549 n.133 (1997) (describing Swiss bank accounts as the "traditional safe haven for illegal funds").

28. *See* Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. §§ 1961–68 (1994 & Supp. IV 1998).

29. *See, e.g.*, 18 U.S.C. §§ 851, 982, 467, 1963, 2253 (1994 & Supp. IV 1998) (providing for pretrial forfeiture of proceeds or instrumentalities of crime in certain situations).

their assets—that is, to launder them[30]—and place those assets beyond the reach of the American judicial system.[31] At the same time, the strong bank secrecy laws that existed in certain nations such as Liechtenstein, Switzerland, Israel, and certain Caribbean islands provided attractive locations for criminal syndicates to conduct their money-laundering activities and conceal the proceeds of their crimes.[32]

Technology, the third factor, has worked in tandem with financial privacy and narcotics as an impetus to the globalization of crime. The drug trade and criminal forfeiture laws necessitated that crimes be conducted internationally; technology provided the means. With the growth of the internet, transmission of information and money across national borders has become much easier and less expensive than when such transmission required physical travel.[33] Moreover, the ease of obtaining anonymity on the Internet has resulted in criminals being able to avoid detection in two ways: by concealing their identity and by routing their communications through a foreign computer not subject to the subpoena power of American courts.[34] Accordingly, it is not uncommon at the present time for even small criminal organizations with limited resources to conduct their illegal enterprises in more than one country.[35]

2. The Mechanisms Of International Investigation: Letters Rogatory and MLATs

"The procedures that must be undertaken in other countries in order to obtain [evidence] generally take a considerable period of time to complete."[36] When evidence is required from foreign jurisdictions, it has traditionally been obtained via two methods: letters rogatory or, more recently, by mutual legal assistance treaties (MLATs).[37] Letters rogatory, which until the 1970s were the exclusive legally sanctioned

30. *See* 18 U.S.C. § 1956 (1994) (defining money laundering as concealment of the criminal origin of assets).

31. *See Federal Travel Comm'n v. Affordable Media*, 179 F.3d 1228, 1240 (9th Cir. 1999) (describing the activities of "asset protection" agencies that specialize in creating trusts in foreign jurisdictions in order to shield assets from American civil or criminal judgments).

32. *See* Kim, *supra* note 27, at 549–50.

33. *See generally* Jonathan Gaskin, *Policing the Global Marketplace: Wielding a Knife in a Gunfight*, 38 COLUM. J. TRANSNAT'L L. 191 (1999) (describing the obstacles to law enforcement in an environment where information can be transferred instantaneously).

34. *See* Jonathan I. Edelstein, *Anonymity and Int'l Law Enforcement in Cyberspace*, 7 FORDHAM INTELL. PROP. L.J. 231 (1996).

35. *See* notes 8–10 *supra* and accompanying text.

36. House Report, *supra* note 12, at 3578.

37. *See Worldwide Review of Status of U.S. Extradition Treaties and Mutual Assistance Treaties: Hearings Before the House Comm. on Foreign Affairs*, 100th Cong. 36–37 (1987) (discussing the use of letters rogatory and their limitations as compared with MLATs).

method for obtaining evidence from abroad,[38] are requests made by the United States Justice Department which are passed through diplomatic channels to corresponding authorities in the receiving state.[39] Once received by the foreign jurisdiction, the request is then handled according to the foreign country's judicial procedures with little if any oversight by the requesting state.[40] In addition, unless provided by local legislation or separate treaty, requests for evidence pursuant to letters rogatory are subject to foreign bank secrecy laws and other privacy protections.[41]

In the past three decades, the emergence of MLATs has considerably streamlined the international evidence-gathering procedure in certain countries.[42] Rather than requiring that requests for evidence be passed through diplomatic channels, MLATs to which the United States is a party generally provide for direct communication between the Justice Department and the "central authority"—most frequently the justice ministry—of the foreign jurisdiction.[43] In addition, MLATs provide specific procedures by which requests for evidence are made and processed, and frequently provide as well that domestic privacy laws of the requested state cannot be used to circumvent the evidence-gathering process.[44]

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38. To be sure, American law enforcement authorities can sometimes circumvent the letter rogatory procedure by building working relationships with their foreign counterparts and exchanging information directly. *See, e.g., United States v. Wardrick*, 141 F.3d 1161 (Table); 1998 WL 169223 (4th Cir. 1998) (describing telephone request made by American prosecutor to his Pakistani counterpart in order to avoid the more time-consuming process of letters rogatory). However, such informal assistance is dependent upon the willingness of individual foreign prosecutors to cooperate and thus cannot be counted upon in all or even a majority of cases.

39. *See* Peter Vassalo, *The New Ivan the Terrible: Problems in International Criminal Law Enforcement and the Specter of the Russian Mafia*, 28 CASE W. J. INT'L L. 173, 189 (1996); *see also* Barry Kellman & David S. Gualtieri, *Barricading the Nuclear Window: A Legal Regime to Curtail Nuclear Smuggling*, 1996 U. ILL. L. REV. 667, 726 (1996) (stating that letters rogatory are normally transmitted through diplomatic channels); Inter-American Convention on Letters Rogatory, 14 I.L.M. 339 (1975) (entered into force Aug. 27, 1988), at art. 5 (stating that letters rogatory must be certified by a diplomatic or consular agency).

40. *See Tiedemann v. The Signe*, 37 F. Supp. 819, 820 (E.D. La. 1941) (describing the history of letters rogatory and stating that their enforcement is "entirely within the [requested state's] control").

41. *See* Vassalo, *supra* note 39, at 189 n.114 (stating that enforcement of letters rogatory is "limited by the laws of specific jurisdictions" from which evidence is requested); *see also* Kellman & Gualtieri, *supra* note 39, at 726 (stating that "there is no duty [upon the requested state] to provide assistance").

42. Vassalo, *supra* note 39, at 189–91.

43. *Id.*

44. *Id.*

Since the United States first entered into a mutual legal assistance treaty with Switzerland in 1973,[45] American law enforcement authorities have gained the benefit of mutual legal assistance in more than 20 countries,[46] including such key drug and money laundering countries as Russia,[47] Italy,[48] and the Cayman Islands.[49] However, MLATs are still the exception rather than the rule. Although the United States has functioning MLATs with more than 20 foreign jurisdictions, it must resort to letters rogatory in obtaining evidence from more than 150 others. These include such key drug production and transshipment states as Pakistan and Nigeria, with which an MLAT was signed in 1989 but never ratified by the United States Senate.[50]

It is not an exaggeration to conclude that obtaining evidence via letters rogatory frequently takes years.[51] Because letters rogatory must be passed through diplomatic channels, no fewer than four Cabinet-level ministries are involved in their processing—the United States Departments of Justice and State, and the foreign and justice ministries of the requested state.[52] Since the diplomatic authorities are essentially political in nature, this also means that their interests will at times differ from those of the law enforcement agencies seeking foreign cooperation.[53]

Moreover, since letters rogatory are handled exclusively according to the procedures and laws of the requested state—with which American prosecutors are frequently not familiar—law enforcement authorities in the United States often run afoul of procedural tripwires in foreign jurisdictions.[54] In the Indian legal system, for instance, nearly every ruling

45. Treaty of Mutual Legal Assistance in Criminal Matters, U.S.-Switz., May 25, 1973, U.S.-Switz., 27 U.S.T. 2019.

46. *See Extradition, Mutual Legal Assistance, and Prisoner Transfer Treaties: Before the S. Comm. on Foreign Relations*, 105th Cong. 3–7 (1998) (statement of Jamison S. Brook, Deputy Legal Advisor, Department of State).

47. *See* Agreement Between the United States and Russia in Cooperation on Criminal Law Matters, June 30, 1995, U.S.-Russ., Hein No. 96-38.

48. *See* Treaty of Mutual Legal Assistance in Criminal Matters, Nov. 9, 1982, U.S.-Italy, 24 I.L.M. 1536.

49. *See* Treaty Concerning the Cayman Islands and Mutual Legal Assistance in Criminal Matters, July 3, 1986, U.S-U.K., 26 I.L.M. 536 S. Treaty Doc. No. 100-8.

50. *See* Marcus Maher, *International Protection of United States Law Enforcement Interests in Cryptography*, 5 RICH. J. L. & TECH. 13, 18 n.53 (1999) (listing the countries with which the United States had effective MLATs in 1999).

51. *See* Kellman & Gualtieri, *supra* note 39, at 726.

52. *Id.*

53. *See* Jorge A. Vargas, *Enforcement of Judgments and Arbitral Awards in Mexico*, 5 U.S.-MEX. L.J. 137, 146 (1997) (stating that "political repercussions" can impede enforcement of American letters rogatory in Mexico).

54. *See* Mark Cohen, *A Prosecution in Tel Aviv Under Israeli Law for a Narcotics Offense Committed in New York*, 4 CRIM. L. F. 597, 603 (1993) (discussing the standing of American prosecutors in Israeli criminal courts).

can be appealed to an endless succession of state and federal courts, with the result that routine civil and criminal cases frequently require more than 20 years to resolve.[55] Since no MLAT currently exists between the United States and India, a request for evidence from Indian authorities must run the full gamut of the local judicial system, which may frequently have the effect of rendering a timely investigation impossible.[56] Moreover, because diplomatic channels are required for the transmission of the letters rogatory, political difficulties leading to breakdown in diplomatic relations between the United States and India may also effectively block American authorities from obtaining the evidence they need to complete an investigation within the applicable limitation period.[57]

Even where a functioning MLAT is in place, obtaining evidence from abroad is still frequently a time-consuming process.[58] Obtaining documents or testimony in a foreign jurisdiction still requires that local courts issue subpoenas, search warrants or other legal process requiring that the evidence be produced.[59] Such process is often subject to legal challenge and appeal in the requested state—a process which may require months or years to resolve.[60] Moreover, even an MLAT does not permit American law enforcement to apply for legal process in foreign courts on its own authority.[61] Rather, such applications must be filed on behalf of the United States by foreign authorities—who frequently act according to their own priorities rather than those of United States prosecutors.[62]

In addition, due to American authorities' lack of official standing in foreign jurisdictions, criminal defendants were able in many cases to challenge the production of evidence in foreign countries without notice to the United States.[63] As the House of Representatives noted in the report that accompanied the enactment of 18 U.S.C. § 3292, "[i]t is not unknown . . . for a defendant to seek to block compliance with the re-

55. *See Bhatnagar v. Surrendra Overseas Ltd.*, 52 F.3d 1220, 1228 (3d Cir. 1995); *see also* Douglas W. Durham & Eric F. Gladbach, *Forum Non Conveniens and Foreign Plaintiffs in the 1990s*, 24 BROOK. J. INT'L L. 665, 678 (1999) (discussing the Bhatnagar case).

56. *See Bhatnagar*, 52 F.3d at 1227–28 (stating that the Indian legal system raised "the prospect of a judicial remedy becoming so temporally remote that it is no remedy at all").

57. *See* note 52 *supra* and accompanying text.

58. *See* Vassalo, *supra* note 39, at 195–202.

59. *See* Letter from Swiss Central Authority to United States Justice Department Office of International Affairs, dated December 1, 1996 (on file with authors) (describing Swiss legal challenges mounted by grand jury targets and continuing difficulties in obtaining release of requested evidence).

60. *Id.*

61. *See* Cohen, *supra* note 54, at 603.

62. *See id.*

63. House Report, *supra* note 12, at 3578.

quest for [foreign evidence] by initiating, without notice to the United States, an action in the courts or other official forum of the other country."[64] In cases where defendants commenced such actions without notice to American prosecutors, "the [Government] may be unable to respond to the foreign action in a timely manner [or] forced to delay seeking an indictment."[65]

Another factor which frequently delays investigations occurs when evidence obtained from a foreign jurisdiction leads to yet a third country. This is not an unrealistic or even an uncommon possibility in an era when a bank executive in St. Petersburg could conceal his fraudulently obtained assets through bank accounts in no fewer than ten countries.[66] Frequently, the fact that evidence exists in third countries will not be immediately apparent to American prosecutors beginning an investigation of an international offense, and will not come to light until further evidence is obtained from abroad.[67] In that event, the prosecutor must then initiate an official request for evidence to the third country—and wait while the request winds its way through the prevailing judicial procedures.[68]

Thus, even the existence of a functioning MLAT is not a panacea to prosecutors who are working to complete international investigations within the statute of limitations. In one case cited by Deputy Assistant Attorney General Mark M. Richard to the House Subcommittee on Criminal Justice, for instance, Federal prosecutors required "records located in Switzerland and three other countries" in order to complete a complex fraud and tax investigation.[69] According to Richard's testimony, "[t]he procedures necessary to get records in Switzerland took some 26 months to complete and included a formal request to the Swiss Central Authority, an appeal to the Swiss Federal Court, and an appeal to a special 'consultative' commission."[70] Moreover, "[a]fter the records were obtained, prosecutors found that the names of allegedly uninvolved third parties were excised, and additional proceedings were necessary in order to learn their names."[71] In this context, it should be noted that Switzerland is a country that has a record of cooperation with

64. *Id.*

65. *Id.* at 3578–79.

66. *See* Abraham Abramovsky, *Prosecuting the Russian Mafia: Recent Russian Legislation and Increased Bilateral Cooperation May Provide the Means*, 37 VA. J. INT'L L. 191, 198–99 (1996).

67. *See* Vassalo, *supra* note 39, at 200.

68. *See id.*

69. House Report, *supra* note 12, at 3579.

70. *Id.* at 3579.

71. *Id.*

American authorities and has had a functioning MLAT with the United States since 1973.[72] In countries where no MLAT exists or where no working relationship has been established with United States law enforcement authorities, investigations are likely to require an even longer time.

B. *18 U.S.C. § 3292*

Thus, by the 1980s, it was clear that the increasing globalization of crime combined with the time-consuming nature of international evidence-gathering procedures was straining the ability of American prosecutors to enforce the law.[73] This was readily apparent in drug cases, which frequently involved importation of narcotics from foreign jurisdictions and laundering of proceeds through foreign bank accounts.[74] Moreover, even in cases which did not involve narcotics, foreign financial institutions were frequently used to hide the proceeds of crime or protect it from seizure pursuant to the judgments of American courts.[75]

In such cases, "delays attendant in obtaining records from other countries create[d] both statute of limitation and Speedy Trial Act problems."[76] Thus, the House of Representatives noted that, where evidence from abroad was necessary to meet the prosecution's burden of proof, "the delay in getting the records might prevent filing an information or returning an indictment within the time period specified by the relevant statute of limitation."[77] By 1984, international evidence-gathering had become unwieldy enough to Federal prosecutors to prompt the Justice Department to urge Congress for reforms.

Accordingly, several provisions addressing the problems of foreign evidence-gathering were included by Congress at the behest of the Justice Department in the Comprehensive Crime Control Act of 1984.[78] Among these were provisions that facilitated the admission of foreign documents into evidence in Federal courts and required that defendants challenging the production of evidence in foreign countries serve copies of their pleadings on the Justice Department.[79] The most sweeping reform included in the 1984 act, however, provided for a discretionary

72. *See* note 45 *supra* and accompanying text.
73. House Report, *supra* note 12, at 3578.
74. *Id.*
75. *Id.*
76. *Id.* at 3579.
77. *Id.*
78. H.R.J. Res. 98-433, 98th Cong., 2d Sess. (1984).
79. *See* 18 U.S.C. § 3505, 3506(a)(1994).

extension of the statute of limitations in Federal criminal cases to compensate for delays in obtaining evidence from abroad.[80]

1. The Statute

18 U.S.C. § 3292 enables a Federal prosecutor to apply to the district court in which a grand jury has been empaneled for tolling of the statute of limitations when evidence of an offense under investigation exists in a foreign country. In order to grant an application for tolling, the court must find "by a preponderance of the evidence that an official request has been made for such evidence and it reasonably appears, or reasonably appeared at the time the request was made, that such evidence is, or was, in such foreign country."[81] An "official request" is a letter rogatory, a request made under a mutual legal assistance 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."[82]

If the application is granted, the period of limitation is suspended from the date an official request for foreign evidence was made to the requested state until the date the foreign government takes "final action" concerning the request.[83] However, the period during which the statute of limitations is suspended cannot be more than three years.[84] Moreover, if the foreign country takes final action on the official request for evidence prior to the expiration of the original five-year limitation period, the statute of limitations is only extended for six months.[85]

An application for tolling under Section 3292 must be made before the expiration of the original statute of limitations.[86] This is consonant with the long-standing principle of Federal law that a defendant acquires a "vested right" in the applicable statute of limitations after its expiration.[87] However, if a timely application for tolling is made, the tolling period is retroactive; in other words, the tolling begins as of the date the official request was made to the foreign country, not the date the application is

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80. House Report, *supra* note 12, at 3580 (describing the proposed legislation subsequently enacted as 18 U.S.C. § 3292).

81. 18 U.S.C. § 3292(a).

82. 18 U.S.C. § 3292(d).

83. 18 U.S.C. § 3292(b).

84. 18 U.S.C. § 3292(c)(1).

85. 18 U.S.C. § 3292(c)(2).

86. *United States v. Davis*, 767 F.2d 1025 (2d Cir. 1985); *see also United States v. Baron*, No. 92 CR 898 (TPG), 1994 WL 63251 (S.D.N.Y. 1994).

87. *See United States v. Haug*, 21 F.R.D. 22 (D. Oh. 1957), *aff'd*, 274 F.2d 885 (6th Cir. 1960), *cert. denied*, 365 U.S. 811 (1961).

granted by the court.[88] Moreover, the statute does not provide that the application for tolling be made within any time limit after the filing of the official request. Thus, a prosecutor may apply for tolling months, or even years, after the official request has been made, and still obtain tolling retroactive to the date the request was filed.

In fact, the application for tolling may be made *after* final action has been taken on the official request. In *United States v. Miller*,[89] the Ninth Circuit held that the statute of limitations had been validly tolled under Section 3292 even though the Government had not applied for tolling until after it had received the evidence requested from abroad.[90] Specifically, the court held that the terms of the statute permitted an application for tolling to be made at any time after the filing of an official request, and that prosecutors could thus obtain tolling even if their only purpose was to gain additional time to sift through the evidence obtained from abroad.[91] The court noted that the statutory language specifying that tolling could be granted if evidence "is or was" in a foreign country at the time an official request was filed demonstrated that "Congress set no store upon the evidence still being abroad as a precondition for granting the [Government's] application."[92]

Moreover, by providing that an "official request" includes not only requests pursuant to treaties or letters rogatory but "any other request for evidence,"[93] the statute allows for tolling when evidence is obtained by informal as well as formal means. This was recently recognized by the Fourth Circuit in *United States v. Wardrick*,[94] which held that an informal request via telephone to a Pakistani prosecutor was a sufficient "official request" to justify statutory tolling.[95] The *Wardrick* court, in fact, specifically noted that the prosecutor was entitled to utilize this "shortcut [to avoid] the more formal (and time consuming) procedure of a letter rogatory."[96] It remains undecided, however, whether a request that is made pursuant to a treaty or letter rogatory, but is defectively made, would qualify as an "official request" under the terms of the statute.

88. *See United States v. Miller*, 830 F.2d 1073 (9th Cir. 1987).
89. 830 F.2d 1073 (9th Cir. 1987).
90. *Id.*
91. *Id.*
92. *Id.* at 1076.
93. 18 U.S.C. § 3292(a).
94. 141 F.3d 1161 (Table); 1998 WL 169223 (4th Cir. 1998).
95. *Id.*
96. *Id.*

2. Constitutionality

Constitutional challenges to 18 U.S.C. § 3292 have thus far been uniformly denied by Federal courts. In the few cases where such challenges have been raised, they have been mounted on two grounds: that retroactive extension of the statute of limitations violates the prohibition on *ex post facto* legislation, and that the tolling provision violates the defendant's due process right to a definite statute of limitations. Neither of these grounds, however, has yet been found persuasive by any Federal court.

In *United States v. Bischel*,[97] for instance, the Ninth Circuit summarily rejected the defendant's contention that Section 3292 violated his due process rights, noting that the defendant "fail[ed] to locate the source of any [constitutional] right to a fixed period of limitations."[98] Moreover, even though the offenses with which the defendant was charged occurred prior to the effective date of Section 3292, the Ninth Circuit found that they did not violate the *ex post facto* prohibition.[99] Rather, the court concluded, in conformance with long-standing Federal authority, that the *ex post facto* clause prohibited only legislation which made legal conduct illegal or added to the penalty for already-criminal behavior.[100] Legislation that simply eased the procedures by which already-criminal offenses could be prosecuted did not fall within the ambit of the *ex post facto* prohibition.[101] A similar result was reached by the Ninth Circuit in *United States v. Miller*,[102] which likewise held that the tolling provisions of 18 U.S.C. § 3292 were applicable even to offenses committed prior to 1984.

The lack of merit to any facial constitutional challenge to Section 3292 is also reflected in the fact that no defendant outside the Ninth Circuit has attempted to challenge its constitutionality in the sixteen years since it was enacted. Rather, defendants have focused instead on the Government's alleged violation of the statute's substantive provisions.[103] It is important to note, however, that the Ninth Circuit and other courts have explicitly recognized that the facial constitutionality of the statute does not rule out the possibility that its application in certain

97. 61 F.3d 1429 (9th Cir. 1995).
98. *Id.* at 1435.
99. *Id.* at 1436.
100. *Id.*(*citing Collins v. Youngblood*, 497 U.S. 37, 50 (1990)).
101. *Id.* at 100.
102. 830 F.2d 1073 (9th Cir. 1987).
103. *See* notes 106–62 *infra* and accompanying text (describing cases in which the meaning of Section 3292's substantive provisions has been litigated).

cases and by certain methods—such as when applications for tolling are made *ex parte*—may violate the constitutional rights of the accused.[104]

3. What Constitutes "Final Action"

While Section 3292 has been held constitutional, several notable omissions in its language pose ambiguities for defendants and risks for prosecutors seeking to avail themselves of statutory tolling. One key omission in the language of 18 U.S.C. § 3292 is that the statute does not define the term "final action." This lack of definition is critical in that "final action" by the requested state is determinative of the end of the tolling period.[105] To date, only two decisions have been rendered which interpret the meaning of "final action" under Section 3292. While these two decisions contain certain consistent elements, they also provide conflicting indications for prosecutors.

The first decision to construe the meaning of "final action" was *Bischel*.[106] In *Bischel*, the Government filed an official request for evidence with the Central Authority of the United Kingdom.[107] Subsequently, British authorities supplied certain requested documents but omitted the certificate of authenticity required to render them admissible in an American court.[108] At the time of trial, the British authorities had still not supplied authenticated documents.[109] On appeal, the defendant contended that the initial British response, despite the lack of authentication for the documents, constituted "final action" on the prosecutor's request and thus operated to end the tolling of the statute of limitations.[110] The Ninth Circuit rejected this argument, holding that final action required a "dispositive response by the foreign sovereign to both the request for records and for a certificate of authenticity of those records, as both were identified in the 'official request.' "[111] In arriving at its conclusion, the *Bischel* court implied, although it did not specifically state, that "final action" must be evaluated from the standpoint of the foreign authority, not the United States Justice Department.[112]

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104. *See In re Grand Jury Investigation*, 3 F. Supp. 2d 82, 83 (D. Mass. 1998).
105. *See* 18 U.S.C. § 3292(b).
106. 61 F.3d 1429 (9th Cir. 1995)
107. *Id.* at 1432.
108. *Id.* at 1433.
109. *Id.* at 1432.
110. *Id.* at 1433.
111. *Id.* at 1434.
112. *Id.* (stating that "the district court could reasonably have found that at that time *British officials had not yet finally decided* whether to comply with the United States's request for a certification of authenticity") (emphasis added).

In the recent case of *United States v. Meador*,[113] the Fifth Circuit further refined the definition of "final action." In *Meador*, the Government requested certain evidence from Germany after obtaining a Section 3292 extension, and the German government responded by supplying the documents along with a letter stating that it had fully complied with the request.[114] However, Federal prosecutors were unsatisfied with this response, contending that the German government had not supplied all the documents and testimony it had requested.[115] Thus, soon after the German response, the prosecutor requested additional documents from Germany, which were supplied.[116] However, the United States Attorney's office did not seek an extension of the tolling previously granted by the district court.[117]

The duration of Section 3292 tolling was the central issue in the *Meador* appeal. The Government argued that "final action" was not taken by Germany until American prosecutors were fully satisfied with German compliance with the request.[118] However, citing *Bischel*, the court held that "final action" must be evaluated from the viewpoint of the foreign government, and that the tolling of the statute of limitations had ended when the German central authority stated that it had responded to the request in full.[119] Specifically, the court held that "when the foreign government believes it has completed its engagement and communicates that belief to our government, that foreign government has taken a 'final action' for the purposes of § 3292(b)."[120] In addition, the court stated that the Government's position—that it was the judge of what constituted final action by a foreign state—was "untenable."[121] Specifically, the court noted that:

> Under the government's view, any response to its official request is not complete and thus not final until it decides it is final, subject to only the three-year limit on the suspension period in § 3292(c)(1). This reading would rend the statutory scheme detailed in § 3292. If Congress wished to provide the government with a blanket three-year suspension period to collect evidence from foreign countries, it could have done so . . .[122]

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113. 138 F.3d 986 (5th Cir. 1998)
114. *Id.* at 989–90.
115. *Id.*
116. *Id.*
117. *Id.*
118. *Id.* at 992.
119. *Id.* at 992–94.
120. *Id.* at 992.
121. *Id.* at 993.
122. *Id.*

Instead, the court held that "hinging 'final action' to a dispositive response by the foreign government is consistent with this statutory scheme and strikes a bright-line test for terminating the suspension period."[123] Thus, it was immaterial that the German central authority did not provide all the documents requested by the prosecutor, as long as the German government concluded "by its lights" that it had fully complied with the United States' request.[124]

While *Bischel* and *Meador* both define "final action" as a dispositive response by the requested authority, certain discrepancies also exist between the holdings of the two cases. In *Bischel*, final action is defined as the production of the certified documents "as . . . identified in the official request."[125] This would seem to provide a bright-line test under which production of an authenticated copy of each and every document or other item of evidence identified in the official request would constitute final action.

The *Meador* case also espouses a bright-line test, but a subtly different one. Under *Meador*, final action occurs whenever the foreign authority states that it has taken final action, regardless of whether all items of evidence "as identified in the official request" have been produced. The *Meador* formulation thus requires that American prosecutors act to protect their rights, whenever a foreign jurisdiction indicates that it considers its compliance with the official request to be at an end, even where foreign authorities' compliance with an official request for evidence is incomplete. This test also leaves prosecutors unsure of their legal position in cases where a foreign authority has made an ambiguous communication which indicates that it may or may not consider its response final.

4. Interpretation Of Other Statutory Terms

At least one other court has construed the scope of the tolling provided by Section 3292. In *United States v. Neill*,[126] the United States District Court for the District of Columbia held that the tolling is "offense-specific"—that is, that it relates to the offense which is under investigation by the grand jury and not to any unrelated offense which

123. *Id.* (emphasis added).

124. *See id.* at 993–94. *See also United States v. King*, 2000 WL 362026, *17–18 (W.D.N.Y. 2000) (final action on request for evidence from Hong Kong occurred when Hong Kong court determined that it had fully complied, not when evidence was received by Government).

125. 61 F.3d at 1425.

126. 952 F. Supp. 831 (D.D.C. 1996).

may be revealed by evidence obtained from the foreign jurisdiction.[127] However, the *Neill* court held that the tolling would encompass offenses related to the offense under investigation by the grand jury.[128] Thus, while a request for tolling to investigate a narcotics offense would not toll the statute of limitations as to an unrelated charge of transportation of stolen property, it would toll the limitation period as to money laundering charges related to the drug crime under investigation.[129] Moreover, the *Neill* court declined to interpret the terms of the statute hypertechnically, holding that there is no requirement that the official request made to the foreign jurisdiction cite the specific offenses under investigation.[130]

In addition, the *Neill* court held that, while Section 3292 tolling is offense-specific, it is not "person-specific."[131] The court noted that a grand jury is empaneled to investigate conduct constituting an offense rather than any specific person, and that the statutory tolling thus applies to any participant in the offense under investigation.[132] Thus, if the results of the request for foreign evidence reveal the complicity of a person not previously under suspicion, the statute of limitations is tolled as to him even though he was not named in the official request for evidence or notified that he was a target of the grand jury investigation.[133]

Finally, the expiration of the grand jury's term does not end the period of tolling.[134] In *King*,[135] the United States District Court for the Western District of New York rejected the defendant's contention that the Government was required to seek an additional extension each time a new grand jury was empaneled to investigate the defendant's possible crimes.[136] The court reasoned that, since the very purpose of Section 3292 was to prevent the Government from becoming bogged down in delaying litigation every time evidence was required from a foreign country, it would not impose the burden of making such repeated requests where an investigation is carried on by a continuous succession of grand juries.[137]

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127. *Id.* at 832–34. *but see DeGeorge v. United States District Court*, 219 F.3d 930, 938–39 (9th Cir. 2000) (questioning, although not determining, whether a grand jury actually has to be empaneled as a jurisdictional prerequisite to tolling under Section 3292).

128. *Id.* at 833 n. 2.

129. *Id.*

130. *Id.*

131. *Id.*

132. *Id.* at 833–34.

133. *Id.* at 833–34.

134. *United States v. King*, 2000 WL 362026, *21–22 (W.D.N.Y. 2000).

135. *Id.*

136. *Id.*

137. *See id.* at *22.

5. Implied Prosecutorial Obligations: Ex Parte Filing and Good Faith

Additional ambiguities in the enforcement of Section 3292 exist due to its failure to specify a procedure by which requests for tolling are to be made. Since tolling is conducted in tandem with a grand jury investigation, prosecutors frequently apply for tolling *ex parte* in order to preclude the possibility that the investigation might be compromised.[138] The statute itself, however, is silent as to whether *ex parte* applications for tolling may can be granted. Despite the lack of specific authorization in the statute, it appears that courts have frequently granted or considered such applications without analyzing whether they have been filed in a procedurally valid fashion.[139]

At least one court has taken the view that applications for an extension of the statute of limitations may not be granted ex parte. In *In re Grand Jury Investigation*,[140] a Federal prosecutor made an ex parte request to the court for an extension of the statute of limitations under Section 3292. The District Court, however, stated that "[n]othing in section 3292 . . . expressly contemplates secretly extending certain statutes of limitation as to certain individuals."[141] Accordingly, citing due process concerns, the court denied the application without prejudice to renewal upon notice to the targets of the grand jury investigation.[142]

Two other courts, however, have taken the contrary view. In *DeGeorge*,[143] the Ninth Circuit rejected the defendant's application for a writ of mandamus requiring the district court to dismiss the prosecution against him, holding that the lower court's application of Section 3292 was not "clearly erroneous."[144] In doing so, it specifically rejected the defendant's contention that requests for tolling could not be made *ex parte*, stating that "to follow that interpretation would be to ignore the traditionally non-adversarial and secret nature of grand jury investigations."[145] Likewise, in *United States v. King*,[146] the District Court held that tolling requests could properly be made *ex parte* due to the secrecy of the grand jury process.[147] The court additionally opined that the lan-

138. *See* Schoenfeld motion.

139. *See In re Grand Jury Investigation*, 3 F. Supp. 2d 82, 83 (D. Mass. 1998) (listing cases).

140. 3 F. Supp. 2d 82, 83 (D. Mass. 1998)

141. *Id.* at 83.

142. *Id.*

143. 219 F.3d 930 (9th Cir. 2000).

144. *See id.* at 934, 937–39.

145. *Id.* at 937.

146. 2000 WL 362026 (W.D.N.Y. 2000).

147. *See id.* at *20.

guage in the statute requiring the Government to prove "by a preponderance of the evidence" that relevant materials existed in a foreign country did not require an adversarial hearing but merely indicated that the Government was required to produce evidence of sufficient quality and reliability.

Courts have also generally been reluctant to imply other due process rights, such as due diligence or good faith, that are not specified by the plain language of the statute. Over the objections of the defendant, the court in *Bischel*[148] rejected a due process claim that prosecutors are obligated to exercise due diligence in pursuing official requests for evidence after such a request has been made.[149] Rather, the court held that the three-year cap on the statutory tolling period was sufficient by itself to ensure that prosecutors would not be able to delay the running of the limitation period indefinitely.[150] The same court in *DeGeorge*, however, implied in dicta that prosecutors who used Section 3292 as an "abusive stalling tactic" by filing requests for evidence readily available in the United States might properly be denied the benefits of tolling under the statute.

In sum, judicial interpretation of 18 U.S.C. § 3292 has been sparse, and has only begun to fill in the many omissions in the language of the statute. These omissions are especially glaring in light of the limited legislative history—which is restricted to a total of three pages in a House of Representatives report and the testimony of Mark Richard before the Criminal Justice Subcommittee—to provide insight as to the intent of Congress. Moreover, the Federal courts' construction of the provisions of the statute has not provided prosecutors or defendants with uniform guidance as to their rights and obligations. This lack of guidance is especially critical in light of the fact that the stakes are high—a mistake which results in the statute of limitations inadvertently expiring will result in the dismissal of an indictment and the forfeiture of a years-long investigation. Accordingly, despite the intent of Congress to ease the burden on prosecutors in completing international investigations, the statute remains fraught with pitfalls for law enforcement authorities and has thus been cautiously invoked.[151]

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148. 61 F.3d 1429 (9th Cir. 1995).

149. *Id.* at 1435.

150. *Id.*

151. To date, a total of 12 reported decisions exist—all of which are cited in this article—in which substantive provisions of Section 3292 have been construed. This is an average of less than one reported decision per year since the enactment of the statute, which seems a low number given the number of international investigations conducted during that time and the near-certainty that any defendant subject to Section 3292 tolling would raise the issue on a pretrial motion to dismiss.

C. *Defining the Extent of Tolling Under 18 U.S.C. § 3292*

While 18 U.S.C. § 3292 satisfies a need in the Government's arsenal for conducting international investigations, the cases in which the statute has been utilized indicate that it also has great potential for abuse. The issues addressed in the reported decisions that exist thus far under Section 3292 provide a window into the manner in which the statute is utilized by prosecutors—a manner which is all too frequently at odds with the legislative intent of the statute. From the facts of the cases discussed above, it appears that certain prosecutors have used Section 3292, not as a last-resort means of obtaining the additional time necessary to complete an investigation, but as a method of obtaining a secret extension of the statute of limitations.[152]

The statute of limitations should not be circumvented in such a cavalier manner. A reasonable period of limitation beyond which a prosecution may not be commenced has been traditionally held to be "fundamental to our society and criminal law."[153] As the United States Supreme Court has recognized, limitation periods afford potential defendants the important right of finality—in other words, a guarantee that the Government cannot keep criminal charges hanging over their heads for protracted periods of time while memories lapse and their ability to mount a defense decreases.[154] Numerous courts and legal scholars have commented on the importance of the statute of limitations and the critical need to balance the Government's right to prosecute crimes with the injustice which results when an individual is kept in legal limbo.[155] In keeping with this, the Supreme Court has held that statutes of limitations must be strictly construed against the Government.[156] Accordingly, resort to Section 3292 as a routine method of circumventing the statute of limitations does not comport either with the purpose of the statute or the fundamental rights of the accused in the American legal system.

This is dramatically emphasized when Section 3292 tolling is compared with the other grounds for tolling which have been recognized under Federal law. It is noteworthy that the only grounds for tolling a statute of limitations as to a criminal defendant are those recognized by statute; in keeping with their history of strict construction of limitation periods, Federal courts have declined to recognize any form of tolling

152. *See* notes 89–91 *supra* and accompanying text.

153. *United States v. Laut*, 17 F.R.D. 31, 36 (S.D.N.Y. 1955).

154. *Toussie v. United States*, 397 U.S. 112, 114–15 (1970); *see also United States v. O'Neill*, 463 F. Supp. 1205, 1208 (E.D. Pa. 1979).

155. *See United States v. DiSantillo*, 615 F.2d 128, 135–36 (3d Cir. 1980).

156. *United States v. Marion*, 404 U.S. 307, 322 n. 17 (1971).

not specifically provided for by law.[157] Moreover, the other grounds for tolling provided by statute are based primarily on the defendant's forfeiture of his right to a fixed limitation period rather than on prosecutorial convenience.

With the exception of Section 3292, there are only three Federal statutes that provide for tolling of the limitation period in criminal cases during peacetime.[158] These include instances where the defendant conceals assets during a bankruptcy proceeding[159] or is a fugitive from justice.[160] In addition, sexual assaults against children may be prosecuted until the 25th birthday of the victim.[161]

An examination of these statutes reveals their fundamental difference from Section 3292. The statute providing for tolling during the pendency of bankruptcy proceedings, for instance, is necessitated by the fact that civil and criminal cases are commonly stayed while bankruptcy proceedings are in progress,[162] rendering crimes more difficult to investigate. In addition, the law has recognized for more than a century that a defendant should not gain the benefit of a limitation period when he himself has precluded prosecution by fleeing the jurisdiction.[163] Accordingly, each of these tolling periods is directly attributable to the defendant's own conduct. Even the provision tolling the statute of limitations for offenses against minors is attributable to the defendant's choice of victim, and results from a circumstance well-known to the defendant at the time the offense is committed.

Moreover, the issue of whether the statute of limitations is tolled according to any of these provisions is not resolved *ex parte*. Rather, the Government has the burden of proving its entitlement to tolling in an adversarial setting during pre-trial motion practice.[164] In addition, at least in the case of alleged fugitives from justice, the prosecution must show that it made a good-faith effort to inform them that they were facing charges,[165] and a defendant can defeat tolling by demonstrating his own good faith in attempting to surrender.[166]

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157. *See id.*

158. During wartime, the statute of limitations is tolled as to certain frauds against the United States by military contractors. *See* 18 U.S.C. § 3287.

159. 18 U.S.C. § 3284.

160. 18 U.S.C. § 3290.

161. 18 U.S.C. § 3283.

162. 11 U.S.C. § 362 (1994).

163. *See United States v. Brown*, 24 F. Cas. 1263, 1264 (D. Mass. 1873)(No. 14665).

164. *See Brouse v. United States*, 68 F.2d 294, 296 (1st Cir. 1933).

165. *See United States v. Singleton*, 702 F.2d 1159, 1170 (D.C. Cir. 1983); *see also United States v. Duff*, 931 F. Supp. 1306, 1310–11 (E.D. Va. 1996).

166. *United States v. Gonsalves*, 675 F.2d 1050, 1052 (9th Cir. 1982).

In contrast, Section 3292 exists solely for the prosecutor's convenience and is not always attributable to any conduct by the putative defendant that would work a forfeiture of his rights. For instance, the prosecution's entitlement to tolling under 18 U.S.C. § 3292 might be triggered by an event as simple as a witness moving out of the country without the knowledge of the defendant. In fact, the circumstances that give rise to Section 3292 tolling may remain unknown to the defendant until he is indicted. This is especially true since, as noted above, prosecutors commonly apply for tolling *ex parte* and have not been held to any obligation of good faith or diligence.[167]

Accordingly, it is all the more important that judicial interpretation of 18 U.S.C. § 3292 should adhere to the traditional balancing test in limitations cases and construe the statute so as to limit its use to its legislative purpose and minimize the damage to potential defendants' right of finality and due process. This is especially challenging to the courts because, since many applications for tolling are filed *ex parte*, judges must consider relevant issues *sua sponte* without prompting from the defense. This section will suggest means by which courts may accomplish this goal while at the same time maintaining or even enhancing the statute's use as a legitimate prosecutorial device.

1. Ex Parte Filing

One of the areas where 18 U.S.C. § 3292 has the greatest potential for abuse is in the manner in which applications for tolling are filed and granted. In many cases, such applications are filed *ex parte* and under seal, with no notice to the targets of the grand jury investigation.[168] This means that the targets have no opportunity to present evidence in opposition to the prosecutor's assertion that the statute of limitations should be tolled, and in fact may not even know until they are indicted that the statute of limitations has been extended.

A number of courts appear to have granted *ex parte* applications under 18 U.S.C. § 3292 without examining the propriety of this procedure.[169] In its *sua sponte* consideration of the issue, however, the District Court articulated several compelling reasons why *ex parte* applications for tolling should not normally be granted. Specifically, the court stated that:

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167. *See* notes 148–150 *supra* and accompanying text.

168. *See In Re Grand Jury Investigation*, 3 F. Supp. 2d 82 (D. Mass. 1998) (noting that several courts seem to have granted *ex parte* applications for Section 3292 tolling without analysis).

169. *Id.*

> Nothing in section 3292 ... expressly contemplates secretly extending certain statutes of limitation as to certain individuals. Such a course would implicate due process concerns ... Moreover, this Court generally eschews ex parte practice whenever possible, since action ex parte so fundamentally undercuts the values secured by the adversary process.[170]

The holding of the Massachusetts district court with respect to ex parte practice also finds support in the reasoning of the Fifth Circuit in *Meador*. Specifically, the *Meador* court stated that Section 3292:

> should not be an affirmative benefit to prosecutors, suspending the limitations period, pending completion of an investigation, whenever evidence is located in a foreign land. It is not a statutory grant of authority to extend the limitations period by three years at the prosecutors' option.[171]

In other words, tolling under 18 U.S.C. § 3292 should not be granted as a *pro forma* matter whenever an official request for evidence has been made to a foreign country. Rather, the Government should be required to prove the merits of its application for tolling, and the preferred method for accomplishing this end in the Anglo-American adversarial system is by providing notice to the targets of the grand jury investigation and affording them the opportunity to contest the prosecutor's assertions.[172]

Moreover, a requirement that grand jury targets be notified is implicit in the language of Section 3292 itself. Specifically, the statute sets forth conditions for tolling which the Government must establish "by a preponderance of the evidence."[173] By establishing a preponderance standard, the statute clearly contemplates an adversarial proceeding in which the district court will hear evidence and arguments from both sides prior to issuing a ruling. A finding based on a preponderance of the evidence is meaningless if a critical party is not afforded the opportunity to present any evidence at all.

Nor is *ex parte* practice ordinarily required to protect the integrity of the grand jury process. The extension of the statute of limitations provided by 18 U.S.C. § 3292 applies, by the terms of the statute, only to subjects of grand jury investigations.[174] In many or even the majority of

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170. *Id.* at 83.

171. *United States v. Meador*, 138 F.3d 986, 994 (5th Cir. 1998).

172. *See In re Grand Jury Investigation*, 3 F. Supp. 2d at 83 (stating that *ex parte* practice is disfavored).

173. 18 U.S.C. § 3292(b).

174. *See United States v. Neill*, 952 F. Supp. 831, 832 (D.D.C. 1996).

cases, grand jury targets will already have been notified by the Government that the grand jury has focused on their activities.[175] Thus, providing notice of the Government's Section 3292 application will not ordinarily create a risk that targets will be informed for the first time of the existence of a confidential investigation. Moreover, a great percentage of evidence sought from foreign jurisdictions—such as banking or corporate records—is beyond the control of the targets and thus not readily subject to tampering.[176] In addition, as Congress itself noted, requests for evidence from foreign countries frequently trigger domestic legislation providing that the subject of the records in question be given notice.[177] Accordingly, disclosure of the fact that a request for such evidence has been made will not normally create an unwarranted risk that evidence tampering will occur.

Thus, the reasoning of courts such as *DeGeorge* and *King* that requiring adversarial hearings would undermine the secrecy of the grand jury process is misplaced. Because the targets of the grand jury investigation have frequently been notified that they are targets and will in any event receive notice of the request for evidence from the foreign court, the issue in most cases is not whether grand jury secrecy will be breached but merely when. While *ex parte* practice may arguably be justifiable when the secrecy of an investigation would be irretrievably compromised, such an intrusion on a defendant's due process rights is certainly not justified where the only benefit to prosecutors is that secrecy will be maintained for a few more days or weeks.

Nevertheless, there are conditions under which *ex parte* filing should be allowed. Specifically, the Government should be permitted to apply for statutory tolling *ex parte* in the minority of cases where a demonstrable risk exists that evidence or witness tampering will occur. Such conditions might exist, for instance, where secrecy is necessary to protect the identity of a confidential informant,[178] where the evidence sought from the foreign jurisdiction is the testimony of a witness who may be subject to intimidation,[179] or where a request has been made for documents to which the targets have ready access.[180] In other words, the Government's right to secrecy in applying for Section 3292 tolling

175. *See In re Grand Jury Investigation*, 3 F. Supp. 2d at 83 (noting that targets of grand jury had been identified by Government and were entitled to notice of Section 3292 tolling application).

176. *See United States v. Turkish*, 458 F. Supp. 874, 881 (S.D.N.Y. 1978) (noting that documents were "by their nature" less susceptible to tampering than human witnesses).

177. House Report, *supra* note 12, at 3579.

178. *See Roviaro v. United States*, 353 U.S. 53, 59–62 (1957).

179. *See Turkish*, 458 F. Supp. at 881.

180. *See id.*

should be scrutinized according to standards similar to those used in determining whether it is entitled to withhold documents or names of witnesses during pretrial discovery.

However, because tolling under 18 U.S.C. § 3292 compromises the targets' right to finality, *ex parte* applications should be the exception rather than the rule. Instead, the Government should be required to make the same stringent showing which is necessary whenever it seeks forfeiture of the rights of an accused. In other words, the Government should be required to show by clear and convincing evidence not only that the documents or testimony sought are subject to tampering, but that a demonstrable risk exists that the grand jury targets will attempt to engage in such tampering.[181] This burden of proof may be met, for instance, by demonstrating that the grand jury targets have engaged in evidence tampering or witness intimidation in the past, or that they have threatened to do so in the case under investigation.[182]

This standard is not a unique one in criminal justice, as it has been employed by certain courts as a precondition for empaneling an anonymous jury.[183] Moreover, the underlying rationale regarding empanelment of anonymous juries is at least somewhat analogous to Section 3292 tolling, because both issues concern the circumstances under which a defendant may be deemed to have forfeited a statutory right.[184] Just as defendants in certain states have a statutory right to learn the names of potential jurors,[185] targets of Federal grand jury investigations have a statutory right to be indicted within a certain period of time.[186] Such a right should not be forfeited except in exigent circumstances.

Accordingly, it is appropriate to require that the Government show a demonstrable and credible risk of evidence-tampering by the putative defendants as part of an *ex parte* application for Section 3292 tolling. In many cases, such as those involving organized crime, the Government will be able to carry this burden by presenting wiretap transcripts, or the

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181. *See United States v. Thevis*, 665 F.2d 616, 630–31 (5th Cir. 1982) (requiring clear and convincing showing of witness intimidation for forfeiture of right to confrontation); *but see United States v. Aguiar*, 975 F.2d 45, 46–47 (2d Cir. 1992) (requiring that witness intimidation be proven only by a preponderance of the evidence).

182. *See* Abraham Abramovsky and Jonathan I. Edelstein, *Anonymous Juries: In Exigent Circumstances Only*, 13 ST. JOHN'S J. LEGAL COMMENT. 457 (1999) (advocating a similar standard for determining whether threats of jury tampering justify empanelment of an anonymous jury).

183. *See People v. Watts*, 173 Misc.2d 373 (Sup. Ct., Richmond Co. 1997).

184. *See id.* at 375; *see also Morgan v. Bennett*, 204 F.3d 360, 368 (2d Cir. 2000)(listing anonymous juries among a number of measures that could be taken when a defendant's misconduct threatened the safety or integrity of the judicial process).

185. *See* N.Y. Crim. Proc. Law. § 270.15(1)(a).

186. *See* 18 U.S.C. § 3282.

sworn testimony of confidential informants or law enforcement authorities, to establish previous evidence tampering or present threats by the targets.[187] Thus, in cases where a Federal investigation may truly be compromised if the targets are given notice, the Government will be able to make an *ex parte* application for tolling. However, permission to proceed *ex parte* should not be granted as a matter of course, nor should it be allowed based on the affirmation of a prosecutor unsupported by evidentiary facts.

2. Requirement Of Good Faith And Due Diligence

A second issue which has raised the potential for abuse of Section 3292 by the prosecution is the Ninth Circuit's holding that the statute does not contain an implied obligation on the part of prosecutors to proceed in good faith. While such a duty is not contained in the express language of the statute, several compelling reasons exist why one should be implied.

First among these reasons is the proposition, as the Fifth Circuit correctly asserted, that 18 U.S.C. § 3292 "should not be an affirmative benefit to prosecutors, suspending the limitations period, pending completion of an investigation, whenever evidence is located in a foreign land."[188] In other words, Section 3292 should be used as a method of gaining extra time to complete an investigation which is stalled due to a foreign government's failure to provide evidence in a timely manner. It should not be utilized as a routine method of extending the statute of limitations in order to allow the prosecutor to follow other leads and complete other avenues of investigation. Simply put, 18 U.S.C. § 3292 was intended to be used only when necessary, not as a means of allowing Federal prosecutors to shirk their obligation to complete investigations in a timely manner.

Absent an implied good faith obligation, Section 3292 is unquestionably an "affirmative benefit to prosecutors,"[189] going so far as to provide a nearly routine extension of the statute of limitations from five to eight years simply because evidence happens to exist in foreign countries. If the only requirement for statutory tolling is that an official request for evidence have been made pursuant to a pending grand jury investigation, the Government can file a request for evidence which is marginal or even irrelevant to its case and thus obtain additional time to pursue more promising domestic leads. Similarly, if the Government is

187. *See Watts*, 173 Misc. 2d at 377 (noting the Government's access to wiretaps and informants).

188. *Meador*, 138 F.3d at 994.

189. *See id.*

not required to pursue foreign evidence in good faith, it could "file and forget" an official request in order to delay final action and thus obtain the benefit of a full three years' tolling rather than some shorter time.[190]

A good faith requirement should also be accompanied by a standard of materiality under which requests for evidence that are incidental to the Government's case will not justify tolling. At least one court, the United States District Court for the District of Columbia, has already come close to reading a materiality requirement into Section 3292. In *United States v. Neill*,[191] the court held that a request for tolling under 18 U.S.C. § 3292 should be "offense-specific"—that is, that it must be relevant to the offense under investigation by the grand jury. Thus, the court stated by way of illustration that a request for tax records would not operate to toll the statute of limitations for sale of narcotics.[192] However, the *Neill* court did not go far enough. Rather than applying a standard which allows tolling based on requests for relevant but marginal evidence, courts should instead require that the evidence sought be material to the offense under investigation.[193] In other words, while the evidence being requested need not be essential to the prosecution's case, it should at least be significant enough that the Government's interest in obtaining additional time to pursue it can fairly be held to take precedence over the grand jury target's right to a timely completion of the investigation. A mere showing of relevancy, without materiality, does not guarantee that the evidence sought will be of sufficient importance to justify the damage to the putative defendant's right to finality.

In addition, the Government should be required to file and pursue requests for evidence in good faith and with due diligence. The good faith prong of this obligation should require the Government to file official requests for foreign evidence as soon as it becomes reasonably apparent that such evidence exists, rather than waiting until the statute of limitations is about to expire in order to gain additional investigatory time. Official requests for evidence from foreign jurisdictions are commonly initiated by a letter from the investigating United States Attorney to the Justice Department, accompanied by the background information supporting his assertion that foreign evidence exists. Such an

190. *See People v. Luperon*, 85 N.Y.2d 71, 82 (1993) (Bellacosa, J., dissenting) (noting that relief might be available under New York speedy trial act if local police department made a habit of "filing and forgetting warrants" in order to circumvent its obligation to locate a defendant's whereabouts).

191. 952 F. Supp. 831, 832–33 (D.D.C. 1996).

192. *Id.*

193. This is not an onerous standard. *See United States v. Guariglia*, 962 F.2d 160, 164 (2d Cir. 1992) (defining materiality for purposes of perjury statute to include any evidence or testimony that might influence the jury in its investigation).

application is not difficult to compile, and can readily be made once investigators have obtained the necessary background evidence. Thus, prosecutors should be required to initiate official requests for evidence only within a reasonable period after the existence of, and need for, foreign evidence becomes apparent. If such a request is filed as a last-minute stalling device for obtaining additional time rather than as an integral part of an ongoing investigation, tolling should be denied.

In addition, the Government's good faith obligation should require it to file and pursue official requests by the most expeditious means. Thus, if a mutual legal assistance treaty exists between the United States and the jurisdiction from which evidence is required, the prosecution should not be permitted to obtain tolling if it made its request via the more time-consuming method of letters rogatory. Similarly, if it is feasible for the prosecution to obtain foreign evidence expeditiously by informal means, it should be required to use such methods. Since Section 3292 specifically allows tolling in cases where informal requests for evidence are made,[194] the Government should be required to obtain evidence by these methods if available in order to achieve the minimum prejudice to the defendant's right to speedy indictment and trial.

The second prong of the Government's obligation, due diligence, should require that the investigating United States Attorney and the Justice Department's Office of International Affairs take reasonable measures to pursue the foreign evidence listed in the official request. The Government should not simply be allowed to make an official request and then ignore it in the hope that the foreign government will fail to take final action and thus create a longer tolling period. Rather, if the foreign jurisdiction does not respond to the request in a timely manner, the Government should be required to make inquiry and take all reasonable measures within its power to obtain an expeditious response. Any period of time during which the Government does not exercise such diligence should accordingly be excluded from the tolling provided by statute.[195]

Establishing due diligence, or lack thereof, provides potentially complex issues of proof, but these issues are not insurmountable. In construing other statutes which require due diligence on the part of prosecutors, such as statutes setting time limits on readiness for trial, courts have achieved a satisfactory balance of the Government's needs

194. *United States v. Morrow*, 177 F.3d 272 (5th Cir. 1999).

195. *See* Abraham Abramovsky & Jonathan I. Edelstein, *Prosecutorial Readiness, Speedy Trial and the Absent Defendant: Has New York's 25-Year Dilemma Finally Been Resolved?*, 15 TOURO L. REV. 25 (1998)(noting that similar due diligence obligation exists in order to obtain tolling of trial readiness deadline where defendant cannot be located).

and obligations.[196] Such a balance could also be achieved in the case of Section 3292.

To begin with, the due diligence obligation should only be initiated after a reasonable time has passed since the filing of the official request for foreign evidence.[197] The Government should not be required to deluge a foreign nation with status inquiries a day or a week after the request has been filed. Instead, the Government's obligation to pursue evidence diligently should begin only after the foreign jurisdiction has had a reasonable time to comply with the request.

Nor should the due diligence obligation should be an overly onerous one for the Government. The United States should not be required to take extreme steps in order to obtain compliance with its official request for evidence. Instead, only reasonable measures which are within the Justice Department's power should be required.[198] For instance, the Government might be able to carry its burden of proving due diligence by demonstrating that it sent inquiry letters or made telephone requests to the foreign jurisdiction, that it provided legal assistance in overcoming obstacles to the collection of evidence in the foreign country, or that it filed supplemental requests clarifying its initial application for foreign evidence when necessary.[199] In most cases, this burden will not be a difficult one for the Government if it made its request in a genuine effort to obtain foreign evidence. Only when the Government's official request is made as a ruse for the sole purpose of obtaining additional time will such a due diligence obligation be an obstacle.

3. The Prosecutor's Burden Of Proof

The most critical omission in Section 3292 is the lack of a set procedure for adjudicating requests for tolling. In order to give effect to the terms and purpose of the statute, a hearing should be held prior to tolling at which the prosecutor must prove by a preponderance of the evidence that (1) a grand jury investigation is in progress; (2) an official request for evidence has been made to a foreign jurisdiction; (3) the request was made in good faith and pursued with due diligence; (4) the evidence is material to the offense under investigation; and (5) it is not available to the Government via more expeditious means. Except under the limited circumstances where an *ex parte* filing is warranted, the targets of the investigation should have an opportunity to contest the prosecutor's allegations by demonstrating that the evidence at issue is

196. *See id.*
197. *See id.*
198. *See id.*
199. *See id.*

irrelevant or immaterial, that the prosecutor acted in bad faith, or that other channels are available through which the prosecutor may obtain the evidence more expeditiously. Moreover, even under circumstances where *ex parte* filing is justified, the district court should nevertheless inquire into the basis upon which tolling is sought and require the prosecution to substantiate its application with evidentiary facts rather than conclusory allegations. The statutory requirement that the district court make findings by a preponderance of the evidence clearly contemplates more than mere reliance on the unsupported affirmation of an assistant United States attorney.

Even where the prosecution is able to carry its burden of proof, the targets of the investigation should still be afforded the opportunity to forestall the need for tolling through voluntary action. Specifically, if the court finds that material evidence exists in a foreign jurisdiction, the targets should be granted the opportunity to obviate the need for tolling either by consenting to the release of the evidence or by agreeing to produce it themselves within a definite period of time. This is analogous to tolling under 18 U.S.C. § 3290, which provides that an alleged fugitive from justice may defeat tolling by proving that he attempted in good faith to answer the charges against him.[200] In cases where tolling is sought under Section 3292, the putative defendants should likewise be allowed to prevent tolling by making a good-faith attempt to facilitate the evidence-gathering process and thus speed the progress of the investigation.

If the targets agree to produce the evidence themselves, the court could issue a conditional order providing that the statute of limitations would be tolled in the event of their noncompliance within a certain period of time. In this way, the targets will be afforded the opportunity to make an informed decision concerning whether their right to contest the production of evidence or to hold the prosecution to the applicable statute of limitations is more important. No matter which course the targets choose to pursue, the prosecution will achieve its legitimate goal of obtaining the necessary evidence in time to complete its investigation, and the targets will have the advantage of being able to choose whether to preserve their right to finality.

In addition, an adversarial hearing will serve the prosecutor's, as well as the targets', interest in finality by reducing the possibility that a district court might erroneously apply 18 U.S.C. § 3292. At present, the first opportunity to resolve issues raised by Section 3292 tolling arises at the pretrial motion stage, by which time the original five-year statute

200. *See* note 165 *supra* and accompanying text.

of limitations has already lapsed. Once the statute has expired, the only remedy for an erroneous application of Section 3292 is dismissal of the indictment.[201] This situation becomes even more disadvantageous for the Government if an *appellate* court finds that 18 U.S.C. § 3292 was erroneously applied. In such a case, the Government's work in litigating a criminal case to verdict will be for nought even though it may have reasonably relied on the tolling granted by the district court. This may well be among the reasons why Federal prosecutors do not appear to have utilized Section 3292 as frequently as they otherwise would.[202] The Government is no doubt aware that the statute contains many vaguely defined areas and that the drastic remedy of dismissal will be the penalty if a prosecutor makes the wrong judgment about its meaning.

An adversarial hearing at the pre-indictment stage will reduce this risk. By ensuring that any dispute concerning the applicability of Section 3292 is dealt with at the earliest possible stage, the procedure described above will minimize the possibility that misinterpretation of the statute will lead to a trial or appellate court ultimately finding that reversible error occurred. Moreover, since the criminal action has not yet commenced, the district court's ruling on the Government's application will be a final order that will be immediately appealable.[203] Thus, appellate review of the propriety of tolling will be available at a time when the original statute of limitations has not yet expired, and prosecutors will still be able to prosecute in the event that tolling is found not to be warranted. With this elimination of much of the gamble which is currently involved in a decision to seek statutory tolling, the interests of the Government and judicial economy, as well as those of grand jury targets, will be served by a timely adversarial hearing.

CONCLUSION

18 U.S.C. § 3292 was enacted in order to meet a compelling prosecutorial need—the increasing necessity of obtaining evidence from abroad via procedures which are frequently time-consuming.[204] However, the statute contains numerous ambiguities, as well as built-in disadvantages both to prosecutors and defendants, which diminish its

201. *See Meador*, 138 F.3d at 996 (dismissing indictment).

202. *See* note 151 *supra* and accompanying text.

203. A number of other orders relating to grand jury investigations have been held to be immediately appealable. *See In re Backiel*, 906 F.2d 78 (3d Cir 1998).(order compelling or denying subpoena is immediately appealable); *see also* 18 U.S.C. 3744 (defining circuit courts' jurisdiction over appeals by the Government).

204. *See* notes 23–80 *supra* and accompanying text.

value as a prosecutorial evidence-gathering device while increasing the possibility that defendants' rights and expectations will be violated. However, it is possible to interpret the statute in a manner which is consistent with its terms and purpose and which concomitantly preserves the rights of the Government and of grand jury targets.

This can be done by prohibiting *ex parte* filing except upon a showing that evidence tampering is likely, by obligating the prosecutor to demonstrate the materiality of the requested evidence, and by requiring the prosecutor to file and act upon the request for foreign evidence in good faith. Critical to equitable enforcement of the statute is an adversarial procedure at the application stage in which the district court has the opportunity to hear from both sides and resolve disputed issues at a time when the original statute of limitations has not yet expired. This procedure—which is clearly contemplated by the statutory language calling for findings by a preponderance of the evidence—will preserve the due process right of grand jury targets to insist on a timely end to the Government's investigation while at the same time eliminating much of the risk and uncertainty currently faced by prosecutors who contemplate the utilization of Section 3292 tolling. In this manner, 18 U.S.C. § 3292 will become considerably more useful as a device for facilitating international investigations, while at the same time becoming less prone to abuse and less violative of the due process rights of defendants.