

1 UNITED STATES COURT OF APPEALS

2 FOR THE SECOND CIRCUIT

3 August Term, 2007

4 (Argued: October 18, 2007

Decided: August 29, 2008

5 Errata Filed: October 7, 2008)

6
7 Docket No. 07-3107-cr

8 -----
9 UNITED STATES OF AMERICA,

10 Appellant,

11 - v -

12 VIKTOR KOZENY, DAVID PINKERTON,

13 Defendants,*

14 FREDERIC BOURKE JR.,

15 Defendant-Appellee.
16 -----

17 Before: SACK, KATZMANN, and HALL, Circuit Judges.

18 Appeal by the government from a judgment of the United
19 States District Court for the Southern District of New York
20 (Shira A. Scheindlin, Judge) dismissing several counts of an

* Viktor Kozeny and David Pinkerton were both named as defendants in the indictment. Kozeny, a resident of the Bahamas, is appealing an order committing him to extradition to the United States and is therefore not a party to this appeal. See United States v. Kozeny, No. 1:05-cr-00518-SAS (S.D.N.Y. Apr. 17, 2007) (minute entry). Pinkerton was initially an appellant, but the government withdrew all charges against him after this appeal was argued. See United States v. Kozeny, No. 1:05-cr-00518-SAS (S.D.N.Y. July 2, 2008) (order of nolle prosequi as to Pinkerton). The government's appeal as to Pinkerton was withdrawn by stipulation filed July 16, 2008.

1 indictment. The district court concluded that an application
2 pursuant to 18 U.S.C. § 3292 to suspend the running of a statute
3 of limitations pending a request for foreign evidence must be
4 filed before the statute of limitations expires.

5 Affirmed.

6 JONATHAN S. ABERNETHY, Assistant United
7 States Attorney (Michael J. Garcia,
8 United States Attorney for the Southern
9 District of New York, Jonathan S.
10 Kolodner, Assistant United States
11 Attorney, New York, NY, on the brief,
12 Robertson Park, Assistant Chief, Fraud
13 Section, United States Department of
14 Justice, Washington, DC, of counsel),
15 New York, NY, for Appellant.

16 EMILY STERN, Proskauer Rose LLP (Robert
17 J. Cleary, Dietrich L. Snell, Proskauer
18 Rose LLP, New York, NY, and Dan K. Webb,
19 Gene C. Schaerr, J. David Reich, Jr.,
20 Winston & Strawn LLP, Chicago, IL, on
21 the brief), New York, NY, for Defendant-
22 Appellee.

23 SACK, Circuit Judge:

24 The government appeals from a judgment of the United
25 States District Court for the Southern District of New York
26 granting defendant-appellee Frederic Bourke Jr.'s motion to
27 dismiss as to most of the counts on which he had been indicted.
28 The court concluded that the charges against him in those counts
29 were barred by the statute of limitations. The government had
30 previously applied for, and had been granted, a suspension of the
31 applicable statute of limitations pursuant to 18 U.S.C. § 3292.
32 The district court held that this suspension was invalid because
33 the government's application was filed after the limitations

1 period for the crimes under investigation had expired. The court
2 concluded that although the statutory text was ambiguous, the
3 legislative history of section 3292, the structure of the
4 provision, the policy rationale behind statutes of limitations,
5 and the doctrine of constitutional avoidance all pointed toward
6 an interpretation of section 3292 that does not permit the
7 government to apply to suspend a statute of limitations after the
8 limitations period has expired.

9 Unlike the district court, we do not view the text of
10 section 3292 as ambiguous. But we conclude that the plain
11 language of the provision, and the structure and content of the
12 law by which it was enacted, require the government to apply for
13 a suspension of the running of the statute of limitations before
14 the limitations period expires. We therefore affirm.

15 **BACKGROUND**

16 In a sealed indictment returned on May 12, 2005,
17 defendant-appellee Frederic Bourke Jr. was charged with five
18 counts of violating the Foreign Corrupt Practices Act (the
19 "FCPA"), 15 U.S.C. § 78dd-1 et seq.; two counts of violating the
20 Travel Act, 18 U.S.C. § 1952; one count of conspiracy to violate
21 the FCPA and the Travel Act, 18 U.S.C. § 371; two counts of money
22 laundering, 18 U.S.C. § 1956; one count of conspiracy to commit
23 money laundering, 18 U.S.C. § 371; and one count of making false
24 statements to FBI agents in violation of 18 U.S.C. § 1001. The
25 charges all relate to an alleged scheme to bribe senior
26 government officials in Azerbaijan in an effort to ensure the

1 privatization of the State Oil Company of the Azerbaijan Republic
2 and to guarantee that Bourke profited from this privatization.

3 The parties do not dispute that 18 U.S.C. § 3282(a)
4 establishes the statute of limitations for all of the crimes that
5 Bourke is alleged to have committed. Under that provision,
6 "[e]xcept as otherwise expressly provided by law, no person shall
7 be prosecuted, tried, or punished for any offense, not capital,
8 unless the indictment is found or the information is instituted
9 within five years next after such offense shall have been
10 committed." Id.

11 The counts charging violations of the Travel Act and
12 the money laundering statute, and four of the five counts
13 charging violations of the FCPA, allege conduct that occurred no
14 later than early July 1998. Barring any tolling or other
15 suspension of the statute of limitations, then, the five-year
16 limitations period for each of these offenses would have expired
17 in early July 2003. The fifth count charging violations of the
18 FCPA alleges conduct that occurred in September 1998. The
19 statute of limitations for that charged crime would have run in
20 September 2003.

21 The conduct related to the charge of making false
22 statements occurred in or before May 2002. Barring any tolling
23 or other suspension of the statute of limitations, the five-year
24 limitations period for that offense would have run in or before
25 May 2007.

1 Finally, the conduct related to the conspiracy charges
2 continued until September 1998 for the money laundering
3 conspiracy and until February 1999 for the FCPA and Travel Act
4 conspiracy. Barring any tolling or other suspension of the
5 statute of limitations, the five-year limitations periods for
6 these offenses would have expired in September 2003 and February
7 2004, respectively.

8 Prior to the indictment, the government submitted
9 requests to the governments of the Netherlands and Switzerland
10 for evidence relating to activity it was investigating. Each
11 request was made pursuant to a treaty on mutual legal assistance
12 ("MLAT"). See Treaty on Mutual Assistance in Criminal Matters,
13 U.S.-Neth., June 12, 1981, 1359 U.N.T.S. 209; Treaty on Mutual
14 Assistance in Criminal Matters, U.S.-Switz., May 25, 1973, 1052
15 U.N.T.S. 61. The request to the Netherlands was made on October
16 29, 2002; the request to Switzerland on January 13, 2003. On
17 July 21, 2003, the government applied for an order under 18
18 U.S.C. § 3292 to suspend the running of the statute of
19 limitations based on its MLAT requests. At that point the
20 statute of limitations had run for all of the crimes under
21 investigation other than the false statements charges, the
22 conspiracy charges, and one FCPA count.

23 Section 3292 provides:

24 (a)

25 (1) Upon application of the United
26 States, filed before return of an
27 indictment, indicating that evidence of
28 an offense is in a foreign country, the

1 district court before which a grand jury
2 is impaneled to investigate the offense
3 shall suspend the running of the statute
4 of limitations for the offense if the
5 court finds by a preponderance of the
6 evidence that an official request has
7 been made for such evidence and that it
8 reasonably appears, or reasonably
9 appeared at the time the request was
10 made, that such evidence is, or was, in
11 such foreign country.

12 (2) The court shall rule upon such
13 application not later than thirty days
14 after the filing of the application.

15 (b) Except as provided in subsection (c) of
16 this section, a period of suspension under
17 this section shall begin on the date on which
18 the official request is made and end on the
19 date on which the foreign court or authority
20 takes final action on the request.

21 (c) The total of all periods of suspension
22 under this section with respect to an
23 offense --

24 (1) shall not exceed three years; and

25 (2) shall not extend a period within
26 which a criminal case must be initiated
27 for more than six months if all foreign
28 authorities take final action before
29 such period would expire without regard
30 to this section.

31 (d) As used in this section, the term
32 "official request" means a letter rogatory, a
33 request under a treaty or convention, or any
34 other request for evidence made by a court of
35 the United States or an authority of the
36 United States having criminal law enforcement
37 responsibility, to a court or other authority
38 of a foreign country.

39 18 U.S.C. § 3292.

40 On July 22, 2003, the district court (George B.
41 Daniels, Judge) entered a sealed order suspending the statute of
42 limitations for the offenses under investigation. Pursuant to 18

1 U.S.C. § 3292(b), the district court ordered that "the periods of
2 suspension shall begin on the dates on which the official
3 requests were made and shall end on the date on which the
4 authorities of the Governments of the Netherlands and the Swiss
5 Confederation take final action on the official requests, such
6 periods not to exceed a total of three years." The Swiss
7 authorities produced documents in response to the MLAT on several
8 dates, the last of which was September 10, 2004. The Dutch
9 authorities produced documents on November 8, 2005. As noted,
10 the indictment was returned on May 12, 2005, after the date on
11 which Switzerland did so but before the date on which the
12 Netherlands took final action. Because the suspension of the
13 running of the statute of limitations was to "end on the date on
14 which the authorities of the Governments of the Netherlands and
15 the Swiss Confederation [took] final action" (emphasis added), at
16 the time of the indictment, the statute of limitations was still
17 ostensibly suspended because of the outstanding MLAT request to
18 the Netherlands.

19 On October 20, 2006, Bourke filed a motion to dismiss
20 all but the false statements charges on statute of limitations
21 grounds pursuant to Rule 12 of the Federal Rules of Criminal
22 Procedure. He argued that section 3292 does not permit the
23 government to apply for a suspension of the statute of
24 limitations after it has expired. The district court (Shira A.
25 Scheindlin, Judge) granted Bourke's motion, dismissing all but
26 the false statements charges. The district court held that

1 although the statutory text was "ambiguous," the legislative
2 history of section 3292, the structure of the provision, the
3 policy rationale behind statutes of limitations, and the doctrine
4 of constitutional avoidance all pointed toward an interpretation
5 that does not permit the government to apply to suspend the
6 statute of limitations after it has expired.

7 On July 16, 2007, the district court reinstated all of
8 the conspiracy charges and one FCPA count against Bourke on the
9 grounds that the statute of limitations had not run for these
10 charges when the section 3292 application was filed. That order
11 is not before us on appeal.

12 The government appeals the district court's judgment
13 insofar as it dismissed charges against Bourke on statute of
14 limitations grounds.

15 **DISCUSSION**

16 Federal court interpretations of 18 U.S.C. § 3292 are
17 sparse.¹ Only two decisions -- neither of them ours -- speak to

¹ See United States v. Atiyeh, 402 F.3d 354, 362-67 (3d Cir.) (application must be filed before government has received all requested foreign evidence), cert. denied, 546 U.S. 1068 (2005); United States v. Trainor, 376 F.3d 1325, 1330 (11th Cir. 2004) (interpreting "preponderance of the evidence" standard in subsection 3292(a)); United States v. DeGeorge, 380 F.3d 1203, 1215 (9th Cir. 2004) ("'Final action' for purposes of § 3292 means a dispositive response from the foreign sovereign" (citations and internal quotation marks omitted)); United States v. Torres, 318 F.3d 1058, 1063 (11th Cir.) (same), cert. denied, 540 U.S. 827 (2003); DeGeorge v. U.S. Dist. Court for the Cent. Dist. of Cal., 219 F.3d 930, 937, 939-41 (9th Cir. 2000) (holding, under a standard of review for mandamus petitions, inter alia, that district court did not clearly err in concluding that section 3292 allows ex parte applications and does not require that a grand jury be impaneled and hearing evidence on

1 the question presented here. Both, United States v. Bischel, 61
2 F.3d 1429 (9th Cir. 1995), and United States v. Neill, 940 F.
3 Supp. 332 (D.D.C.), vacated on other grounds, 952 F. Supp. 831
4 (D.D.C. 1996), found that section 3292 imposed no requirement
5 that the government apply for a suspension of the statute of
6 limitations before the statute of limitations has run. We
7 disagree.

8 I. Standard of Review

9 This court reviews a district court's statutory
10 interpretation de novo. United States v. Rood, 281 F.3d 353, 355
11 (2d Cir. 2002).

12 II. Principles of Statutory Construction

13 Statutory construction "must begin with the language
14 employed by Congress and the assumption that the ordinary meaning
15 of that language accurately expresses the legislative purpose."
16 United States v. Albertini, 472 U.S. 675, 680 (1985) (quoting
17 Park 'N Fly, Inc. v. Dollar Park & Fly, Inc., 469 U.S. 189, 194
18 (1985)). Where the statute's language is "plain, 'the sole
19 function of the courts is to enforce it according to its terms.'" United States v. Ron Pair Enters., Inc., 489 U.S. 235, 241 (1989)

the target offenses at time of application); United States v. Meador, 138 F.3d 986, 992 (5th Cir. 1998) (holding that "a determination of when 'final action' has been taken by a foreign government, within the meaning of § 3292(b), must turn on whether a dispositive response to an official request for evidence from our government has been obtained"); United States v. Miller, 830 F.2d 1073, 1075-76 (9th Cir. 1987) (section 3292 is retroactive as to offenses committed before its enactment and does not require the government to file an application before obtaining evidence), cert. denied, 485 U.S. 1033 (1988).

1 (quoting Caminetti v. United States, 242 U.S. 470, 485 (1917));
2 see also Conn. Nat'l Bank v. Germain, 503 U.S. 249, 253-54 (1992)
3 ("We have stated time and again that courts must presume that a
4 legislature says in a statute what it means and means in a
5 statute what it says there.").

6 Statutory enactments should, moreover, be read so as
7 "to give effect, if possible, to every clause and word of a
8 statute." Duncan v. Walker, 533 U.S. 167, 174 (2001) (quoting
9 United States v. Menasche, 348 U.S. 528, 538-39 (1955)); see also
10 United States v. Nordic Vill., Inc., 503 U.S. 30, 36 (1992)
11 (noting "settled rule that a statute must, if possible, be
12 construed in such fashion that every word has some operative
13 effect"); United States v. Anderson, 15 F.3d 278, 283 (2d Cir.
14 1994) ("[C]ourts will avoid statutory interpretations that render
15 provisions superfluous." (citations omitted)). And "[t]he 'whole
16 act' rule of statutory construction exhorts us to read a section
17 of a statute not 'in isolation from the context of the whole Act'
18 but to 'look to the provisions of the whole law, and to its
19 object and policy.'" United States v. Pacheco, 225 F.3d 148, 154
20 (2d Cir. 2000) (quoting Richards v. United States, 369 U.S. 1, 11
21 (1962) (internal quotation marks omitted)), cert. denied, 533
22 U.S. 904 (2001).

23 If the text of the statute itself is not clear,
24 however, a court applying the statute may consult the legislative
25 history to discern "the legislative purpose as revealed by the
26 history of the statute." Concrete Pipe & Prods. of Cal., Inc. v.

1 Constr. Laborers Pension Trust for S. Cal., 508 U.S. 602, 627
2 (1993). "Our obligation is to give effect to congressional
3 purpose so long as the congressional language does not itself bar
4 that result." Johnson v. United States, 529 U.S. 694, 710 n.10
5 (2000) (citations omitted).

6 When interpreting a code provision related to a statute
7 of limitations, we adhere to "the principle that criminal
8 limitations statutes are to be liberally interpreted in favor of
9 repose." Toussie v. United States, 397 U.S. 112, 115 (1970)
10 (citations and internal quotation marks omitted); accord United
11 States v. Podde, 105 F.3d 813, 819-20 (2d Cir. 1997). This rule
12 comports with the policy rationale behind such statutes by (1)
13 "protect[ing] individuals from having to defend themselves
14 against charges when the basic facts may have become obscured by
15 the passage of time," (2) "minimiz[ing] the danger of official
16 punishment because of acts in the far-distant past," and (3)
17 "encouraging law enforcement officials promptly to investigate
18 suspected criminal activity." Toussie, 397 U.S. at 114-15.

19 III. The Meaning of Section 3292

20 A. "Plain Language"

21 Bourke argues that, under section 3292, an application
22 to "suspend the running" of the statute of limitations must be
23 filed before the statute of limitations has expired. 18 U.S.C.
24 § 3292(a)(1). The government maintains to the contrary that the
25 timing of an application is constrained only by the requirement
26 that it be filed "before return of an indictment." Id. Both

1 parties argue that their interpretation of section 3292 is
2 required by the language of the statute.

3 Subsection 3292(a)(1) states:

4 Upon application of the United States, filed
5 before return of an indictment, indicating
6 that evidence of an offense is in a foreign
7 country, the district court before which a
8 grand jury is impaneled to investigate the
9 offense shall suspend the running of the
10 statute of limitations for the offense if the
11 court finds by a preponderance of the
12 evidence that an official request has been
13 made for such evidence and that it reasonably
14 appears, or reasonably appeared at the time
15 the request was made, that such evidence is,
16 or was, in such foreign country.

17 Id. (emphasis added). We think that the words "suspend" and
18 "running" require that we agree with Bourke.

19 It seems to us unnecessary to canvas entries in general
20 dictionaries,² or specialized legal ones,³ or even to inquire into
21 the case law surrounding the "Suspension Clause,"⁴ to conclude
22 that "to suspend" is to cause to stop, at least for a time,
23 something that is otherwise in operation or effect. And a
24 statute of limitations is only in operation or effect if it is
25 running. It is equally obvious, we think, that a statute of
26 limitations cannot be "running" if it has already "run," i.e., if

² See, e.g., Random House Webster's Unabridged Dictionary 1917 (2d ed. 2001) (defining "suspend" as "to cause to cease for a time from operation or effect").

³ See, e.g., Black's Law Dictionary 1487 (8th ed. 2004) (defining "suspend" as "[t]o interrupt; postpone; defer").

⁴ U.S. Const. art. I, § 9, cl. 2 ("The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.").

1 it has expired at the end of the prescribed period.⁵ It follows
2 that a district court can "suspend the running of [a] statute of
3 limitations," 18 U.S.C. § 3292(a)(1), only if the limitations
4 period has not yet expired. To restart the running of an expired
5 statute of limitations would be to "revive" it. We see no basis
6 upon which to read the word "suspend" in section 3292 to include
7 the distinct concept of revival.⁶

8 The government urges upon us the opposite conclusion by
9 arguing that the only time limit explicitly set by the statute is
10 the requirement that the application be "filed before return of
11 an indictment." Id. But a requirement that the application be
12 filed before the return of the indictment and a requirement that
13 it be filed before the statute of limitations runs are not
14 mutually exclusive. In the normal course of a criminal
15 prosecution, an indictment must, of course, be handed up before
16 the statute of limitations expires. Indeed, the same code
17 provision establishing the statute of limitations for the crimes

⁵ See Black's Law Dictionary 1361 (8th ed. 2004) (defining "run" as having "expire[d] after a prescribed period").

⁶ Compare Stogner v. California, 539 U.S. 607, 632-33 (2003) (concluding that "a law enacted after expiration of a previously applicable limitations period violates the Ex Post Facto Clause when it is applied to revive a previously time-barred prosecution" (emphasis added)), with Bridges v. United States, 346 U.S. 209, 222 (1953) (concluding that 18 U.S.C. § 3287 "suspend[s] the running of . . . [a] statute of limitations . . . only where fraud against the Government is an essential ingredient of the crime [alleged]" (emphasis added)); see also Black's Law Dictionary 1346 (8th ed. 2004) (defining "revival" as, inter alia, "the act of restoring . . . validity or legal force").

1 at issue in this appeal defines that time period by reference to
2 the window in which such an indictment must be returned. See 18
3 U.S.C. § 3282 (providing that "[e]xcept as otherwise provided by
4 law, no person shall be prosecuted, tried, or punished for any
5 offense, not capital, unless the indictment is found or the
6 information is instituted within five years after such offense
7 shall have been committed"). Because indictment ordinarily
8 precedes the expiration of the statute of limitations period,
9 then, the words "before return of an indictment" actually imply a
10 time frame before the statute of limitations has run.

11 The government's reliance on United States v. Miller,
12 830 F.2d 1073 (9th Cir. 1987), cert. denied, 485 U.S. 1033
13 (1988), is misplaced. The Miller court said that "[t]he statute
14 itself specifies the only relevant time the application must be
15 made: 'before return of an indictment.'" Id. at 1076 (quoting 18
16 U.S.C. § 3292(a)(1)). However, the Miller court sought to
17 resolve the question of whether a section 3292 application can be
18 filed after evidence from a foreign government has already been
19 received, not whether such an application can be filed after the
20 statute of limitations has run. Indeed, the section 3292
21 application in Miller was filed before the statute of limitations
22 would have otherwise expired. Id. at 1075. Miller, therefore,
23 does not speak to the question posed here.⁷

⁷ For the same reasons we think Miller inapposite, we think that Bischel and Neill, which relied on Miller, carry little persuasive force. Like the government, the Bischel and Neill courts reasoned that because, according to Miller, a section 3292

1 The government's final textual argument looks to
2 subsection 3292(b), which provides that the "period of
3 suspension . . . shall begin on the date on which the official
4 request [for evidence from the foreign nation] is made and end on
5 the date on which the foreign court or authority takes final
6 action on the request." 18 U.S.C. § 3292(b). The government
7 argues that because the period of suspension begins "on the date
8 the official request [for evidence] is made" and not on the date
9 that the application for a suspension is granted, section 3292
10 contemplates retrospective tolling.⁸ The government further
11 maintains that there is nothing in the language of subsection
12 3292(b) to suggest that such tolling cannot be effective even
13 after the limitations period has run. In making this argument,
14 the government relies on Bischel and Neill, which cite subsection

application is limited only by the requirement that it be filed before the return of an indictment, see Miller, 830 F.2d at 1076, it need not be filed before the statute of limitations runs. See Bischel, 61 F.3d at 1434; Neill, 940 F. Supp. at 336. However, because Miller did not consider whether an application must be filed before the statute of limitations has expired, the Bischel and Neill courts' reliance on that decision was misplaced.

⁸ The court must rule upon an application filed under section 3292 "not later than thirty days after the filing of the application." 18 U.S.C. § 3292(a)(2). Accordingly, there could be a scenario in which the government files an application under section 3292 before the statute of limitations has expired but the court does not rule on that application until after the expiration of the limitations period. Because we are not confronted with that scenario in the instant case, we address only whether an application under section 3292 must be filed before the statute of limitations has expired and not whether the district court must also rule on such application before expiration of the limitations period.

1 3292(b) for the same proposition. See Bischel, 61 F.3d at 1434;
2 Neill, 940 F. Supp. at 336.

3 We find this reasoning unpersuasive. The fact that the
4 statute requires a retroactive starting date for the suspension
5 period does not speak to whether applications for a suspension
6 must be filed before the statute of limitations has otherwise
7 run. We find nothing inconsistent about section 3292 requiring
8 that applications to suspend the statute of limitations be filed
9 before the statute of limitations has expired and also requiring
10 that the starting date of the suspension period be backdated to
11 the day on which the request for foreign evidence was made. When
12 interpreting a statute, we are required "to give effect, if
13 possible, to every clause and word of a statute," Duncan, 533
14 U.S. at 174 (citations and internal quotation marks omitted), and
15 to "avoid statutory interpretations that render provisions
16 superfluous," Anderson, 15 F.3d at 283. We therefore consider
17 the language of subsection 3292(b), which requires the court to
18 start the suspension period retroactively on the date the
19 evidence was requested, together with subsection 3292(a), which,
20 as we have said, contemplates that a statute of limitations be
21 "running" at the time an application for suspension is filed. We
22 will not adopt a statutory interpretation that would render
23 superfluous the timing provision of subsection 3292(a) when it
24 can be read consistently with the retroactive start date
25 requirement of subsection 3292(b).

1 We therefore conclude that the "plain language" of 18
2 U.S.C. § 3292 requires that an application to suspend the running
3 of the statute of limitations be filed before the limitations
4 period has expired.⁹

5 B. The "Whole Act" Rule

6 We also reject the government's reading of section 3292
7 on account of the "whole act" rule, which "exhorts us to read a
8 section of a statute not 'in isolation from the context of the

⁹ The legislative history of section 3292 is meager. It consists of a single House Report. H.R. Rep. 98-907 (1984), reprinted in 1984 U.S.C.C.A.N. 3578. Referring broadly to the motivation for the Comprehensive Crime Control Act of 1984, the Report notes:

The use of offshore banks to launder the proceeds of criminal activities and to evade taxes has become an increasing problem for federal prosecutors. . . . Once funds are traced to offshore banks, federal prosecutors face serious difficulties in obtaining records from those banks in both the investigative and trial stages of a prosecution. . . . The procedures that must be undertaken in other countries in order to obtain the records generally take a considerable period of time to complete. . . . The delays attendant in obtaining the records from other countries create both statute of limitation and Speedy Trial Act problems. If the records are essential to the bringing of charges, 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.

Id. at 3578-79.

"[W]e do not resort to legislative history . . . [when] a statutory text . . . is clear." Ratzlaf v. United States, 510 U.S. 135, 147-48 (1994). Having found such clarity in section 3292, we see no reason to depart from the general rule here.

1 whole Act' but to 'look to the provisions of the whole law, and
2 to its object and policy.'" Pacheco, 225 F.3d at 154 (quoting
3 Richards, 369 U.S. at 11 (internal quotation marks omitted)),
4 cert. denied, 533 U.S. 904 (2001).

5 Here, the relevant "whole act" is the Comprehensive
6 Crime Control Act of 1984, Pub. L. No. 98-473, tit. II, 98 Stat.
7 1837 (1984) (the "CCCA"). The CCCA amended the United States
8 Code by adding, inter alia, 18 U.S.C. § 3292, the statute at
9 issue on this appeal, and 18 U.S.C. § 3161(h)(9), a complementary
10 provision of the Speedy Trial Act.

11 Section 3292, the statute we are examining, permits an
12 extension of the statute of limitations if a proper application
13 is "filed before return of an indictment." 18 U.S.C.
14 § 3292(a)(1) (emphasis added). The Speedy Trial Act provides for
15 a period of time after the return of the indictment within which
16 the trial of the defendant on criminal charges contained in that
17 indictment must begin -- subject to a variety of exclusions. See
18 18 U.S.C. § 3161(c)(1). The provision added to the Speedy Trial
19 Act by the CCCA was such an exclusion. It permits a "period of
20 delay, not to exceed one year," 18 U.S.C. § 3161(h)(9), to "be
21 excluded . . . in computing the time within which the trial . . .
22 must commence," id. § 3161(h), if the district court finds that
23 "an official request, as defined in section 3292 of this title,

1 has been made for evidence" from a foreign country. Id.

2 § 3161(h) (9).¹⁰

3 Thus, when section 3292 is read alongside the CCA's
4 complementary amendment to the Speedy Trial Act, the significance
5 of section 3292's phrase "before return of an indictment" is
6 clear. If the government anticipates a delay on account of a
7 request for foreign evidence before indictment, it can seek to
8 suspend the statute of limitations pursuant to section 3292. If
9 it anticipates such a delay after the indictment is returned, but
10 before trial, it can separately apply for relief under section
11 3161(h) (9) of the Speedy Trial Act. In other words, indictment
12 serves as the dividing line between when the government can turn
13 to section 3292 and when, instead, it must turn to section
14 3161(h) (9). Consequently, and contrary to the government's
15 contention, requiring that an application under section 3292 be
16 filed before the statute of limitations expires does not render
17 superfluous section 3292's requirement that the application be
18 filed before the indictment is returned.¹¹ That requirement

¹⁰ This section does not require that the statute of limitations be suspended pursuant to section 3292 in order for the court to exclude time under the Speedy Trial Act. It requires only that, after indictment, a party be able to demonstrate that it has made the type of request for foreign evidence "defined in section 3292." 18 U.S.C. § 3161(h) (9).

¹¹ Our interpretation of section 3292 is also consistent with internal Justice Department guidelines. A manual advises federal prosecutors: "Make sure you file [the section 3292 application] before the statute runs; don't wait until the foreign country responds to the request." Executive Office for United States Attorneys, Evidence for Experienced Criminal Litigators E-18 (1993).

1 remains fully relevant to the extent that it distinguishes
2 between when it is appropriate for a prosecutor to apply for
3 relief under section 3292 and when it is appropriate to seek
4 relief under section 3161(h)(9).

5 C. The Doctrine of Constitutional Avoidance

6 Neither party disputes the constitutionality of an
7 interpretation of section 3292 that requires an application to be
8 filed before the statute of limitations expires. But Bourke
9 argues that an interpretation of section 3292 that permits an
10 application to be filed after the statute of limitations has run
11 would violate the Ex Post Facto Clause and the Due Process
12 Clause. Because we reject that interpretation of section 3292,
13 we need not determine whether Bourke's constitutional arguments
14 have merit. We note, however, that "where a statute is
15 susceptible of two constructions, by one of which grave and
16 doubtful constitutional questions arise and by the other of which
17 such questions are avoided, our duty is to adopt the latter."
18 Jones v. United States, 529 U.S. 848, 857 (2000) (citations and
19 internal quotation marks omitted). Although we do not think that
20 this principle alone requires the result we reach, this result
21 allows us to avoid close analysis of what is, at least, a non-
22 frivolous constitutional objection.

23 **CONCLUSION**

24 For the foregoing reasons, the judgment of the district
25 court is affirmed.