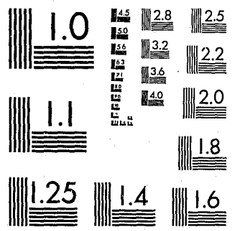

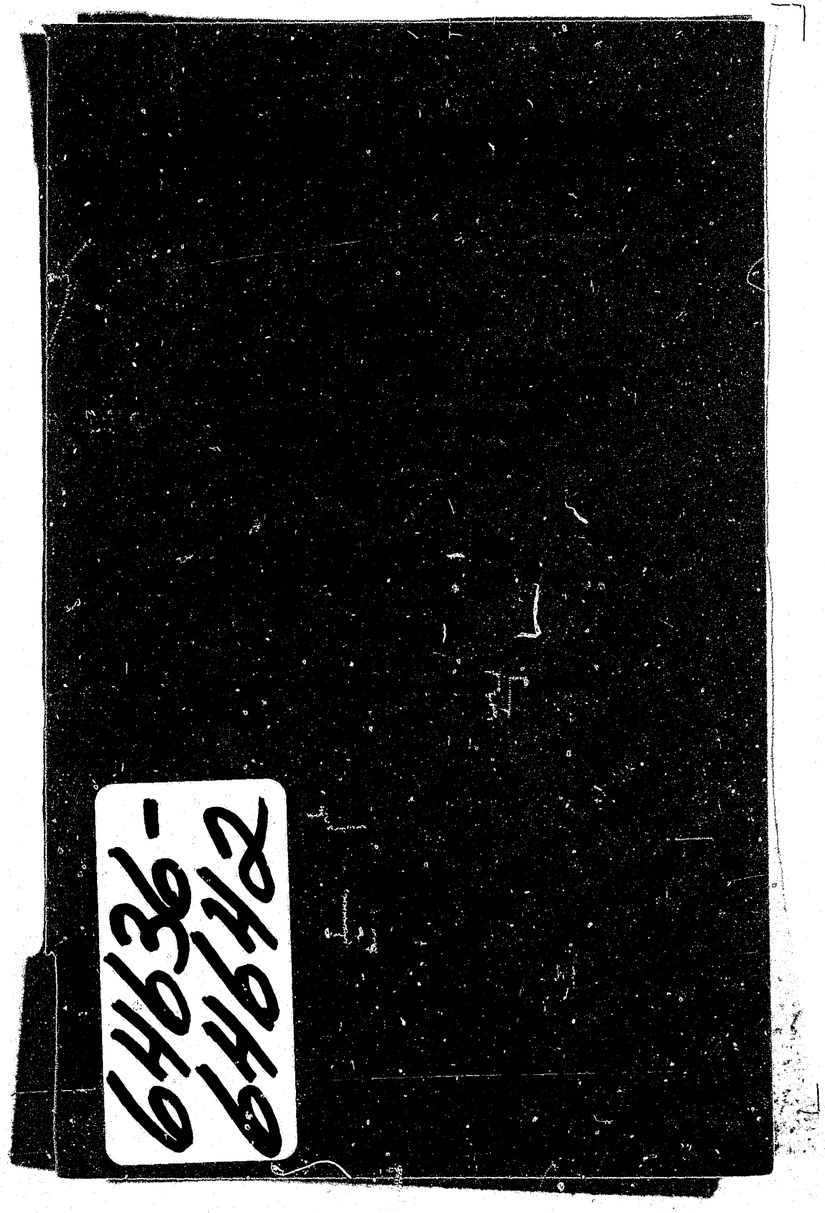

CONTENTS

OPENING STATEMENT

PROPOSED LEGISLATION

CHRONOLOGICAL LIST OF WITNESSES

WEDNESDAY, MAY 2, 1979

THURSDAY, MAY 10, 1979

ALPHABETICAL LISTING AND MATERIALS SUBMITTED

APPENDIX

PART 1.—ADDITIONAL STATEMENTS AND CORRESPONDENCE

WITNESSES BEFORE THE SUBCOMMITTEE HEARINGS

[1] These materials may be found in the files of the Subcommittee on the Constitution.

U.S. CIRCUIT COURTS

U.S. DISTRICT COURTS

NATIONAL ORGANIZATIONS

[1] These materials may be found in the files of the Subcommittee on the Constitution.

STATE ORGANIZATIONS

CITIZENS STATEMENTS

PART 2.—NEWSPAPER AND NEWSLETTER ARTICLES

PART 3.—REPORTS AND STUDIES

[1] These materials may be found in the files of the Subcommittee on the Constitution.

PART 4.—COURT CASES AND LAW REVIEW ARTICLES

PART 5.—SPEEDY TRIAL ACT LEGISLATION AND AMENDMENTS

[1] These materials may be found in the files of the Subcommittee on the Constitution.
[2] Tentative printing for vol. 47, 1979, not available to the public at the time of this hearing.

64640

PREPARED STATEMENT BY DAVID B. ISBELL AND MARK D. NOZETTE ON BEHALF OF THE AMERICAN CIVIL LIBERTIES UNION

We are grateful for this opportunity to present the views of the American Civil Liberties Union on the two proposals that are before you for amendment of the Speedy Trial Act of 1974: S. 961 and S. 1028. The ACLU is, as you know, a national organization of some 200,000 members, dedicated to the protection of individual liberties and rights guaranteed by the Constitution. The law that the proposals in question would amend was intended to implement one of the most fundamental of those rights, the Sixth Amendment right of an accused to a speedy trial, and the ACLU strongly supported the enactment of that law.

On July 1, 1979, less than two months from now, the final time limits and sanctions of the Speedy Trial Act are scheduled to become effective. The Department of Justice and the Judicial Conference, both of whom opposed the Act when it was originally passed, are now seeking to amend it by extending the time limits it would impose for the processing of criminal cases in the Federal courts. The ACLU doubts that these proposals can be justified in terms of protecting the constitutional rights of defendants. No serious and systematic study appears to have been given to how the proposals would affect those rights. Until there has been such study, and such justification can be offered, the ACLU opposes amendments to the Speedy Trial Act. As we will explain, we also think that the justifications offered for the proposals, even considered within their own terms, have little support in either fact or reason.

The Speedy Trial Act of 1974 represented an attempt by Congress to fulfill the promise of the Sixth Amendment that "in all criminal prosecutions the accused shall enjoy the right to a speedy * * * trial." For one presumed to be innocent, yet incarcerated while awaiting trial, the importance of this guarantee is obvious. And, whether the defendant is free on bail or not, unreasonable delay can only add to the inevitable disruptions in the life of any individual accused of a crime and make the task of preparing a defense more difficult. In Chief Justice Warren's words, the right to a speedy trial is "as fundamental as any of the rights secured by the Sixth Amendment." *Klopfer* v. *North Carolina*, 386 U.S. 213 (1967).

Prior to 1974, the speedy trial guarantee was often little more than a hortatory slogan in the federal courts. As the Congress was considering speedy trial legislation that year, the Federal Judicial Center reported that the average delay between arrest and indictment in busier federal district courts was over 100 days and the delay between indictment and trial over 200 days. Indeed, in many instances, cases could not be disposed of in less than 350 days. In the words of Assistant Attorney General Rehnquist, testifying before this Committee in 1971:

"None of us interested in the administration of justice . . . whether inside or outside of the Government, whether within or without the bench or bar, can fail to be struck by the stark fact of intolerable delays in our system of administering criminal justice.

* * * * * * * *

"* * * For it may well be * * * that the whole system of federal justice needs to be shaken by the scruff of its neck, and brought up short with a relatively peremptory instruction of prosecutors, defense counsel, and judges alike that criminal cases must be tried within a particular period of time." *Speedy Trial: Hearings on S. 895 Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary*, 92 Cong., 1st Sess. 96 (1971).

The courts seemed impotent in the face of this problem. As late as 1967, Mr. Justice Brennan commented that "many—if not most—of the basic questions about the scope and content of the speedy trial guarantee remain to be resolved." *Dickey* v. *Florida*, 398 U.S. 30, 56 (1967) (Brennan, J., concurring). The cases revealed attempts by prosecutors to use delay for tactical advantage,[1] not to mention instances where simple incompetence on the part of United States Attorneys' offices[2] and court personnel[3] had devastating consequences for defendants awaiting trial. And, when the Supreme Court attempted to define the right in 1972, the Court found it impossible to describe with precision when a denial had occurred, and was forced to rely instead upon trial courts to balance a variety of factors on a case-by-case basis. *Barker* v. *Wingo*, 407 U.S. 514 (1972).

[1] United States v. Didier, 542 F. 2d 1182 (2d Cir. 1976); United States v. Correia, 531 F. 2d 1095 (1st Cir. 1976).
[2] United States v. Mann, 291 F. Supp. 268 (S.D.N.Y. 1968) Cf. United States v. Roemer, 514 F. 2d 1377 (2nd Cir. 1975).
[3] United States v. Fay, 505 F. 2d 1037 (1st Cir. 1974).

In June 1972, the Supreme Court submitted to Congress an amendment to Rule 50(b) of the Federal Rules of Criminal Procedure that required district courts to "prepare a plan for the prompt disposition of criminal cases."[4] The Rule became effective in January 1973, and soon thereafter the Administrative Office of the United States Courts submitted a Model Plan to district courts throughout the country. Although this effort at self-reform was laudable, it soon became clear that the 50(b) plans developed by many districts merely ratified current practices, with little attempt at real reform.

II

It was in this context that Congress decided that legislation was needed. But in making that judgment, it is clear, Congress also recognized the complexities of the speedy trial problems and designed a comprehensive scheme that attempted to balance the defendant's right to a speedy trial against the need for flexibility in the criminal justice system.

The most striking feature of the Speedy Trial Act is, of course, the establishment of significant time limits for the prosecution of criminal cases. After July 1 of this year, the Act requires that indictments or informations be filed within thirty days of arrest; that arraignments be held within ten days of the filing of charges; and that the defendant's trial begin within sixty days of arraignment. 18 U.S.C. § 3161(b), (c). However, in view of the marked impact this legislation was expected to have on the criminal justice system, Congress also enacted a number of provisions to ease the burden of its implementation. Not only were the time limits and sanctions delayed, but the Act provided for a gradual four-year phase-in period during which the time limits would become progressively narrower. 18 U.S.C. § 3161(f), (g). And learning from the states' experience with speedy trial plans, Congress required each district court to establish a planning group to report on the district's progress in meeting the time limits, to identify the reasaons for delay, to describe the act's effect on the quality of justice and to recommend changes in the legislation.

The act also included a number of features to avoid the oppressiveness of mechanical deadlines. Section 3161(h)(1)–(7) excludes from the time limit computations a series of events for which delays are reasonable in any criminal proceeding. And, under section 3161(h)(8)(A), continuances may be granted where the court explicitly finds "that the ends of justice served by taking such action outweigh the best interests of the public and the defendant in a speedy trial." These "factors" include the possibility that failure to grant a continuance would make the proceeding impossible or "result in a miscarriage of justice." 18 U.S.C. § 3161(h)(8)(B)(i). And, of course, the decision on whether reprosecution is permissible rests ultimately with the court. 18 U.S.C. § 3162(a)(2).

III

The impact of the Speedy Trial Act has been dramatic. The Administrative Office of the United States Courts reports that by June 30, 1978, the act's final time limits—not due to come into effect until a year later—were already being met in the overwhelming majority of cases opened and closed that year. In 82.5 percent of these cases, the defendant was charged within thirty days of arrest; in 90.4 percent of the cases, the defendant was arraigned within ten days of indictment, and in 81 percent of the cases, trial or other disposition was reached within sixty days of arraignment. And the Justice Department's own Office for Improvements in the Administration of Justice surveyed nine representative districts[5] and found that the compliance level in those districts roughly matched the nation as a whole.

Equally enlightening is the Justice Department's analysis of the reasons for failure to meet the deadlines. The Report concluded that 68% of the days of delay observed in its sample cases resulted from correctable factors: that is, miscellaneous administrative problems (such as court scheduling), consideration of plea offers and the unavailability of investigative reports. By contrast, the Report found no "meaningful correlation" between delay and the number of pre-trial motions granted, except where defense counsel successfully raised

[4] The Second Circuit had already spearheaded efforts in this area by publishing Rules Regarding prompt Disposition of Criminal Cases. See *Hilbert v. Dooling*, 476 F. 2d 355 (2d Cir. 1973).
[5] The districts were Maryland, Western New York, Western North Carolina, Northern Illinois, Eastern Michigan, New Jersey, Oregon, Central California and Massachusetts.

important issues such as the sufficiency of the indictment, or the need for severance and additional discovery. Indeed, the Justice Department concluded that the need for extension of the deadline was "less than clear," because:

"[i]t can be expected, that, in response to the threat posed by the dismissal requirement, the work patterns of prosecutors in courts will adapt to the new situation, additional resources will be devoted to meeting the deadlines of the Act, and, in consequence, the dismissals will be held to a less drastic level."

The report of the General Accounting Office confirms these findings. That report found most court officials agreeing that the Act's final deadlines had not been complied with before 1979 simply because there had been no requirement to do so. And it also concluded that "no objective evidence exists for deciding that the Act's permanent time frames should be adjusted or procedures should be changed to effectively process defendants within the existing time frames."

IV

Under these circumstances, we do not see the need to extend the Act's deadlines. The experience to date shows that the Act is working and that Congress has been successful in forcing Courts and prosecutors to modernize their approach to the handling of criminal cases. Evidence of real problems is scanty and the additional obstacle to full compliance do not appear insurmountable.

More significantly, however, the Justice Department/Judicial Conference position seems to lose sight of a fundamental purpose of the legislation: to guarantee defendants in federal prosecutions the constitutional right to a speedy trial. The legislation was designed to end the extraordinary delays that had previously characterized the federal system; it relies upon a combination of specific time limits and well-defined judicial discretion to implement the Sixth Amendment. To turn back the clock—to relieve the pressure toward achieving the goals aimed at—just as the final stage of the Act's implementation begins, should not be done without the most careful consideration of the effect of such a step upon the rights of the defendants for whom the Act's protections were designed.

The proponents of these amendments have also failed to provide soundly reasoned support for their own position. For example, the sole evidence the Justice Department provides for seeking to double the interval between arrest and indictment is statistics showing that the number of arrests made in the year ending June 30, 1978, declined from the previous year's total. The Department has offered no empirical analysis of individual cases to prove a causal nexus, let alone a thorough evaluation of the policies of attorneys' offices throughout the country.[6]

No more soundly justified is the Department's request to increase the interval between the arraignment (or arrest) and trial. Its basic contention seems to be that 60 days is insufficient for complex, multi-defendant cases. Yet this reading of the act simply fails to account for the flexibility that Congress has built into it.

In addition to the exclusions that may be particularly suitable for complex cases (*e.g.*, 18 U.S.C. 3161(h)(1) (E), (D), (G)) one of the factors the court must consider in determining whether to grant a continuance under 18 U.S.C. § 3161(h)(8)(A) is whether "the case taken as a whole is so unusual and so complex, due to the number of defendants or the nature of the prosecution or otherwise, that it is unreasonable to expect adequate preparation within the periods of time established by this section." 18 U.S.C. § 3161(h)(8)(B)(ii). As the Second Circuit has indicated in the *Matter of Sam Ford*, —— F.2d —— (2d Cir. 1978), the power to grant a continuance plays an important role in the act's implementation.

There is one area that does give us pause. Experience may show that the act's requirements interfere with the defendant's constitutional right to effective assistance of counsel, especially if counsel has insufficient time to prepare. The act as currently written provides the court authority to grant continuances in the event additional time is needed for pre-trial preparation. If that "escape hatch" is interpreted arbitrarily, and the act creates real difficulties for defense counsel, it may be necessary to amend the statute to rectify the problem.

In the final analysis, the success or failure of the Speedy Trial Act's deadlines and sanctions must be determined on the basis of the actual experience of

[6] Similarly, the Department seeks to merge the 10 day interval between the filing of charges and arraignment with its proposed arraignment to trial interval by noting that "people have had to travel as much as 350 miles a day for a 15 minute pro forma hearing" without establishing the extent of the problem or the availability of devices to alleviate it (e.g., more frequent us of magistrates, rescheduling of grand juries).

the courts in applying them. Changes may be required but those changes should be made only after courts and lawyers grow more accoustomed to the act's requirements. Moreover, other important developments in the federal judicial system—the appointment of over 100 district judges[7] and proposals to eliminate diversity jurisdiction—will undoubtedly better enable courts and prosecutors to provide defendants the guarantee of a speedy trial to which they are entitled.

V

We would also like to make a few comments on the other provisions of the bills pending before you.

A. S. 961 (Justice Department Bill)

Section 3 would amend Section 3161(c) to provide that trial before a magistrate upon complaint must be commenced within one hundred twenty days of the filing of the defendant's consent to be tried by a magistrate. We oppose this provision as currently written because, as explained, it extends the time limits without adequate justification; although we would support the application of the current 60-day time limit (running from the date of arraignment) to trial held before a magistrate with the defendant's consent.

Section 3 would also amend section 3161(c) to provide that trials cannot begin within thirty days of indictment without the defendant's consent. We support the concept of a minimum time limit, but would have the thirty-day period begin from the date of arraignment in keeping with the three-interval approach of current law.

Section 4 would amend section 3161(e) to provide time limitations for trials where the district court's dismissal of an indictment is reversed on appeal. These cases would be treated in the same manner as those in which a defendant is retried after appeal and we have no objection to this provision.

Section 5 would amend section 3161(h) to redefine and expand the exclusions from the time limitations for pretrial proceedings concerning mental competency, physical incapacity, examinations under 28 U.S.C. § 2902 (Narcotic Addiction Rehabilitation Act) and pre-trial motions. We oppose these amendments until such time that experience under the Act shows that they are necessary.

Section 6 would amend section 3164 to make permanent the interim provisions governing pre-trial detainees and "high risk" persons. We support the amendment insofar as it relates to detained persons awaiting trial, but oppose it as it relates to "high risk" defendants. The "high risk" concept is a vague one, impossible of definition, and imposes an additional stigma on persons who have not been convicted of a crime.

Section 6 would also eliminate a conflict among the circuits over whether the exclusions of 3161(h) apply to the time limits of 3164(a), by making the exclusions applicable. Assuming that the time limits of section 3164(a) are made permanent for pre-trial detainees, we would oppose this approach. The exclusions of 3161(h) relate to events which necessarily delay a defendant's trial but which are irrelevant to the issue of whether he should remain incarcerated. Nor should a defendant be further penalized through additional incarceration because he has made pretrial motions or is awaiting the outcome of an interlocutory appeal filed by the government.

Section 8 would amend section 3174 to provide a more streamlined procedure for the suspension of time limits in the event of judicial emergency. Although it may well prove that the current procedure involving both the Judicial Council of the Circuit and the Judicial Conference of the United States are unduly cumbersome, we would prefer to await the experience under the Act before making any change.

B. S. 1028 (Judicial Conference Bill)[8]

Section 3 would amend section 3161(h) to eliminate the concept of automatic exclusions and would provide the trial court discretion to extend the time limits to accommodate delays necessitated by the types of events that would currently toll the time limitations. The rationale of this approach is to avoid delays where the exclusions do not require them and to eliminate the possibility of litigation over when exclusions begin and end. Here too we would prefer to

[7] In Massachusetts for example, where the Justice Department reported the lowest rate of compliance for the interval between arraignment and trial, four new judges have been appointed, confirmed and sworn-in.

[8] The provisions of the Judicial Conference bill governing trials before magistrates, trials within less than 30 days and judicial emergencies are identical to those proposed by the Justice Department.

base any change on experience under the Act, especially the manner in which courts interpret the relationship between exclusions and the power to grant continuances.

Mr. ISBELL. I would like to take a couple of minutes to make a couple of general observations. The important fact I suggest—the reason why the ACLU is represented at these hearings—is that involved here are fundamental constitutional rights.

There is, first of all, the very fundamental constitutional right under the sixth amendment, of an accused to a speedy trial.

It was a purpose—not the only purpose, but a principal purpose—of the Speedy Trial Act to implement and make effective that right.

For reasons that I am not able to explain, the bill that was enacted, that is Public Law 93–619, carried a preamble describing it as a bill to assist in reducing crime and the danger of recidivism, sounding as if those were the only purposes of the act.

In fact, an additional purpose was to give effect to the sixth amendment right to a speedy trial. That was spelled out in the preamble of the Senate bill. Why it was dropped before the act was enacted, I do not know. But that that was a purpose both in the Senate and in the House is made clear by the reports of the respective committees.

Now, there is a possibility that an act which implements the right of speedy trial by time periods that are too tight, or that are too inflexible, might trammel another constitutional right of equally fundamental importance, which is the right, also under the sixth amendment and also a right of the criminally accused, to effective assistance of counsel.

It seems to us that the key issue to be decided by Congress, as it addresses the question of whether the Speedy Trial Act should be amended, is whether indeed the act as it is contemplated to go into effect on July 1, 1979, does on the one hand effectively implement the constitutional right to a speedy trial or, on the other, goes too far and impinges upon the right of the criminally accused to effective assistance of counsel. That, we suggest, is the fundamental issue.

There is also an issue as to whether the Congress should determine that question on a predictive basis: That is, attempting to make a judgment as to what the act will be like when it comes fully into effect; or whether, on the contrary, the more sensible course would be to allow the act to go into effect as it is now perceived, and then to make the judgment as to how the act works with respect to those two governing considerations after there has been experience under the act.

It is our inclination to recommend that Congress should follow the latter course. That is, let's see how the act works. Perhaps adjustments will be required. But it would appear to be more sensible to make the judgment as to whether adjustment is required after having seen the actual experience under the act as now designed.

Those are my general observations.

Senator BIDEN. You say that it is your inclination. Is that a recommendation to this subcommittee?

Mr. ISBELL. It is.

Senator BIDEN. Fine. Thank you.

Mr. MARTOCHE. Senator, thank you very much. As I explained before, I am pinch-hitting for Gilbert Rosenfeld, who could not be here. Therefore, my remarks have not been transmitted in writing, and I will be doing that shortly.