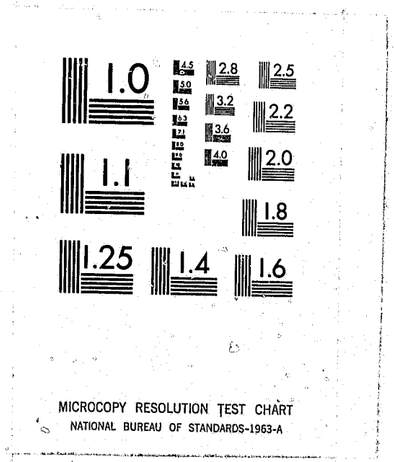

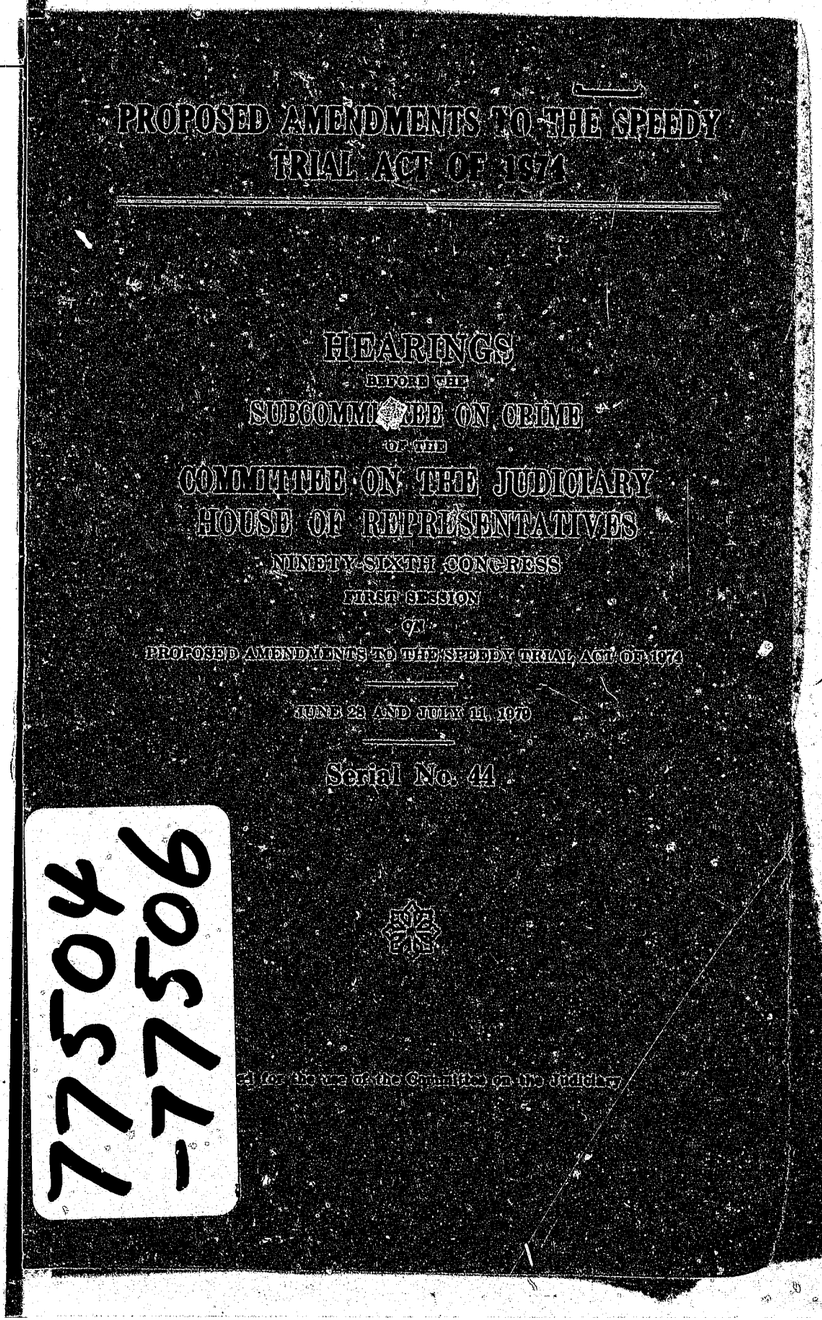
PROPOSED AMENDMENTS TO THE SPEEDY TRIAL ACT OF 1974

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BEFORE THE
SUBCOMMITTEE ON CRIME
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COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES
NINETY-SIXTH CONGRESS
FIRST SESSION
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U.S. GOVERNMENT PRINTING OFFICE
58-721 O WASHINGTON : 1980

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CONTENTS

HEARING HELD

WITNESSES

APPENDIX

PROPOSED AMENDMENTS TO THE SPEEDY TRIAL ACT OF 1974

THURSDAY, JUNE 28, 1979

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON CRIME
OF THE COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The subcommittee met at 9:30 a.m. in room 2237 of the Rayburn House Office Building, Hon. John Conyers, Jr. (chairman of the subcommittee) presiding.

Present: Representatives Conyers, Kastenmeier, Gudger, Volkmer, Hyde, and Sensenbrenner.

Staff present: Hayden Gregory, counsel; and Roscoe Stovall, Jr., associate counsel.

Mr. CONYERS. The subcommittee on crime will come to order. The sixth amendment of the Constitution states that in all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, and as a result of two Supreme Court cases, the Speedy Trial Act of 1974 was passed.

The Speedy Trial Act provides that after July 1, 1979, accused persons must be indicted within 30 days of arrest, arraigned within 10 days, and tried within 60 days of arraignment.

There are numerous flexible exclusions of time that are provided in the act to extend the time limits as well as broad provisions allowing the Court to grant continuances if they are found to be in the interest of justice. And so, we begin hearings today that are the result of 2 years of planning, some nearly 4 years after the act has been passed, and this subcommittee is now being convened to hear testimony that would ask that some reconsideration of key provisions of the Speedy Trial Act be considered.

We begin with our first witness from the Department of Justice, the Assistant Attorney General, Criminal Division, Mr. Philip Heymann, whom we welcome again to the subcommittee. He is before us from time to time and we appreciate his cooperation. He has an extensive background in the Government, including the State Department, and has written numerous law review articles and books, and he comes here today with Mr. Robert Fiske, U.S. Attorney, who has been named a Fellow in the American College of Trial Lawyers, and has testified previously before the subcommittee at Rutgers University in connection with our economic crime considerations.

We also have Ms. Shirah Neiman, who has been an Assistant U.S. Attorney since 1970, has worked with the Watergate Special Prosecution Force, has held a position as department chief of the Criminal Division in the Southern District of New York and is involved in a seminar in child practice at Columbia University.

And Mr. Jerry Goren, special assistant to Mr. Heymann.

We welcome you all this morning, incorporate the Assistant Attorney General's statement into the record in its entirety and invite him to proceed in his own way.

TESTIMONY OF PHILIP HEYMANN, ASSISTANT ATTORNEY GENERAL, CRIMINAL DIVISION, DEPARTMENT OF JUSTICE, ACCOMPANIED BY ROBERT FISKE, U.S. ATTORNEY, SOUTHERN DISTRICT OF NEW YORK; SHIRAH NEIMAN, DEPUTY CHIEF OF THE CRIMINAL SECTION OF THE SOUTHERN DISTRICT OF NEW YORK, AND JERRY GOREN, SPECIAL ASSISTANT TO MR. HEYMANN

Mr. HEYMANN. Thank you very much, Mr. Chairman. On the basis that my statement is incorporated, I will try to shorten it some as I go through and just hit the high spots. I think it would be a good idea if we could add to the statement a very interesting memo that was received from a U.S. Attorney in the Southern District of Indiana, Virginia Dill McCarty. It would be good if she were able to be here, but it is too far.

Mr. CONYERS. We will receive it and examine it and probably be very happy to comply with your request.

[The material referred to follows:]

STATEMENT OF PHILIP HEYMANN, ASSISTANT ATTORNEY GENERAL, CRIMINAL DIVISION, DEPARTMENT OF JUSTICE

Mr. Chairman and Members of the Committee: It is a great pleasure to appear before you to present the Department of Justice position on amendment of the Speedy Trial Act of 1974.

As you are well aware, this is a critical juncture in the life of this important piece of legislation. After a four-year period of phasing in progressively narrower interim time limits within which the various stages of a federal criminal prosecution must occur, the final time limits will go into effect next week, on July 1, 1979.

These final time limits are: (1) 30 days from arrest to the filing of a charge with the court; (2) 10 days from filing to arraignment on the charge; and (3) 60 days from arraignment to trial. These time limits can be extended by excluding certain periods of delay as specified in the Act. When the Act becomes fully effective next week the sanction for exceeding the statutory time limits, after deducting excludable periods, will be mandatory dismissal of the action with or without prejudice to reprosecution at the discretion of the court.

While the Department of Justice strongly urges amendment of the Act I want to make it clear that we support the Act's major objectives.

We support the interest expressed by the drafters of the Act in assuring the sixth amendment rights of all criminal defendants including limiting the possibility that the defense of the accused will be impaired, and minimizing the anxiety, public scorn, and suspicion created by unresolved charges.

We support the Act's recognition of the societal interest in providing a speedy trial to prevent further criminal activity by those charged while awaiting trial.

We support the Act's efforts to minimize the unfairness and expense to the defendant and the community of keeping an individual in jail for lengthy periods of time pending trial.

Finally, we strongly support the need to balance the above interests against the necessity of permitting adequate trial preparation for defense counsel as well as for the prosecutor.

It is this last interest that most concerns the Department under the current law. Our experiences in trying to comply with the Act's decreasing time limits and the available data clearly indicate that as currently written the Act does not represent a realistic and efficient solution for properly achieving this essential balance.

Since its enactment, the Department has made considerable, good faith efforts to comply with the time limits mandated by the Act. While these efforts have

resulted in substantial success, they have also clearly demonstrated the limits of our ability to comply with the Act as written and the costs that we will have to accept if we are forced to so comply.

Examination of case processing by the United States Attorneys' Offices shows a steady decline in the time it takes to bring cases to trial. While comparable figures are not easily obtained, this can he clearly seen by reviewing the data available through the reports of the Administrative Office of the United States Courts (AOUSC) and a recent study by the Department's own Office for the Improvements in the Administration of Justice (OIAJ). From such a review, we can see that in the past 5 years there has been a 32 percent reduction in pending criminal cases while only a 15 percent reduction in criminal filings. This reduction in pending criminal cases certainly suggests more rapid handling of criminal matters.

More specifically we know that the overall length of time to dispose of cases ending in guilty pleas has decreased in the past 5 years from an average of 90 days to an average of 78 days. (Neither figure takes into account periods of excludable time.)

Finally we know from the OIAJ study that overall compliance by the United States Attorneys' Offices, measured under the 100-day time limits, is 83 percent, a substantial increase over the figures cited in earlier studies and during the original 1974 hearings on the Speedy Trial Act. It should be noted that this decrease in processing time was occurring at a time when the emphasis was on developing more complex cases in the priority areas of white-collar crime, narcotics, and organized crime. Viewed in this light, the United States Attorneys' success in decreasing case-processing time should certainly be considered substantial.

Further, in support of these efforts, the Department has issued instructions and guidance on complying with the Act in the United States Attorneys' Manual and the United States Attorneys' Bulletin; it has held briefings for new United States Attorneys and Assistant United States Attorneys; the United States Attorneys have taken an active part in the planning groups in every judicial district; we have actively cooperated with the judicial committee appointed by Judge Rubin to study the Act; two senior attorneys have been made available to answer telephone inquiries from attorneys in the field; and officials of the Department have been designated to serve on Bar Association committees concerned with Speedy Trial problems. In addition, the Attorney General is in the process of issuing instructions to the investigative agencies regarding expediting the preparation of laboratory analyses and case reports particularly when an arrest has been made or an indictment or information has been filed. This is being done as a result of the OIAJ study which cited this problem as a major source of delay.

Finally in the Spring of 1978 the Department commissioned an in-depth study by a team of lawyers and statisticians of the problems being confronted under the Act. I would ask that a copy of that report to the Attorney General from the Office for Improvements in the Administration of Justice (OIAJ), be made a part of the record of this hearing.

However, in addition to substantial improvement in case processing, our experience in trying to comply with the demands of the Act have also clearly demonstrated the limits of our ability to comply with the Act's final time limits and the costs of such compliance if the Act is not amended.

The limits are most dramatically seen in terms of the dismissal potential of cases on the criminal docket. Of course without the dismissal sanction in effect, it is not possible to be sure how the system will respond. However, the OIAJ study does present a "worst-case" picture indicating how many cases are not now meeting the 100-day limits at each stage (and thus must be brought into compliance) and what type of cases they are.

The study estimates that, if the Speedy Trial Act's permanent time limits and dismissal sanction had been in effect in the year ending June 30, 1978, the courts would have been required to dismiss approximately 5,174 felony cases, or 17 percent of the criminal cases to which the provisions of the Act apply that were terminated during that period. On the basis of the distribution of different types of felony offenses in the OIAJ study sample, it appears that cases involving burglary, larceny and stolen property would be dismissed most frequently (23.4 percent), followed by fraud and embezzlement offenses (17.5 percent), forgery and counterfeiting offenses (13.9 percent), drug-related offenses (13.7 percent), weapons and firearms offenses (13.6 percent), miscellaneous other offenses (11.2 percent), violent personal offenses (6.2 percent), and unlawful flight to avoid prosecution (0.5 percent). While it is likely that the system will not allow 5,000 of this type case to be dismissed, this "worst case" figure graphically illustrates that the dismissal risks here are very high.

Perhaps as disquieting are the figures for noncompliance with the longer interim time limits actually in effect during the prior phase-in periods.

1. The 60-day interval between arrest and indictment in effect between July 1, 1976, and June 30, 1977, was not met in 4.7 percent of the cases. The 45-day interval, in effect between July 1, 1977, and June 30, 1978, was not met in 5.8 percent of the cases, or over 500 cases. Only 41 of the 94 districts were able to comply with the 45-day limit in all cases (Third Report of the Administrative Office of the United States Courts, p. 5–6).

2. The 10-day arraignment interval was not met during the first transitional year in more than 5,700, or 13 percent of the cases. In the second transitional year the failure rate was reduced to 9.6 percent of the caseload, or over 2,500 cases. (Third Report, p. 7). It should be noted that criminal case filings for this period were down by 5,600, attributable at least in part to an effort to keep caseloads within proportions manageable under the constraints of the Act (Third Report, p. 1–2).

3. During the period July 1, 1976, to June 30, 1977, the 180-day interval between arraignment and disposition was exceeded in more than 1,300 cases. The 120-day limit in effect between July 1, 1977 and June 30, 1978, was exceeded in over 900 cases. Only 19 of the 94 districts were able to complete disposition within 120 days (Third Report, p. 9).

United States Attorneys who have been more or less successful in meeting the limits set by the Act have warned that the disability of a judge, the loss of experienced attorneys, or a radical increase in their caseload, such as a "sting operation" might precipitate, could easily change success to failure

In addition, without greater flexibility built into the Speedy Trail Act the emphasis on criminal trials will continue to have a disastrous effect on the administration of civil justice in the federal courts. In most districts relatively few civil cases have been tried in almost two years. The nationwide civil case backlog rose for the year ending June 30, 1977, by more than 14,000 cases to an alltime high of 153,606 cases (Second Report, p. 4). That record was surpassed in the year ending June 30, 1978, when the backlog rose by close to 13,000 cases to a total of 166,462 (Third Report, p. 13). As you are well aware civil cases in federal court involve such vital concerns as habeas corpus matters and civil rights; civil antitrust suits; actions to collect taxes or recover those improperly paid; admiralty and patent cases that cannot be brought in state courts; suits to enforce or enjoin orders of governmental agencies where the health and well-being of thousands of citizens, their investments in businesses and employment are at stake; as well as many other cases in which Congress has seen fit to provide a federal forum.

Finally, as I described extensively in my testimony before the Senate Judiciary Committee on May 2, 1979, the costs of complying with the Act as written will be felt in other ways also. Cases will of necessity go to the grand jury or to trial inadequately prepared, or the system will develop ways to get more time to prepare cases, such as imprudently modifying plea bargaining practices, increasing the number of declinations, or where possible, postponing arrests to avoid "starting the clock" on the arrest-to-arraignment period.

Although it is true that our ability to meet the ultimate limits cannot be truly tested until they are in effect, the inability of the system to meet the more generous interim limits makes it improbable that the more rigorous limits can be met. Legislation must often be based upon probability, not certainty. Although there was improvement from the first year's operation as familiarity with the Act grew and changes in prosecutorial policies of the Department and law enforcement agencies made their impact, without some legislative relief the point of diminishing returns has, I think, been met.

The Department believes that the risks are too high, the potential costs too great, to allow the Act to go into effect for an appreciable period without amendment. Our original proposals supported by the Judicial Conference, to enlarge the final time limits and clarify the operation of some of the excludable time provisions were designed to solve these problems by amending the Act in a manner consistent with the intent of Congress, assuring that most federal cases will be tried promptly without injury to public justice or the rights of the defendant.

In the alternative, and as a result of hearings and much discussion, the Senate has passed a compromise bill which maintains the 100-day time limits but amends some of the crucial excludable time and other provisions so as to address many of the major problems identified by our experiences in dealing with the Act. Most

important, in recognition of the need for additional time to determine if these changes will make the Act workable, the bill postpones the imposition of the dismissal sanction for two years, until July 1, 1981.

While we favored our original proposal to permanently expand the arrest-to-indictment and the indictment-to-trial periods, the Department supports as a reasonable alternative, and strongly urges favorable action by this committee upon, the Senate proposals contained in S. 961, "The Speedy Trial Act Amendments Act of 1979," as passed by the Senate on June 19, 1979.

In addition to postponing the operative date of the dismissal sanction for two years, S. 961 would effect the following changes in current law:

The separate 10-day indictment-to-arraignment period will be merged with the 60-day arraignment-to-trial period to form a single 70-day interval;

The defense will be assured a minimum of 30 days following arraignment for trial preparation;

The same limitations for trials to be held before United States Magistrates will be fixed as are provided for district court trials;

Limitations under which trial may be had upon indictments reinstated following appeals are prescribed;

The applicability and scope of a number of the existing provisions dealing with excludable delays are clarified, some new ones are added, and the limits of some others are liberalized;

A more effective means to deal with judicial emergencies is provided;

Further and more intensive reporting requirements are imposed upon the courts and the Department so as to furnish the Congress with meaningful data as to the Act's impact.

The deferral of the dismissal sanctions will provide a necessary further opportunity to meet the demands of the Act and will afford a testing space which will be productive of much useful data when the Congress reassesses the Act in two years' time, while avoiding the risk of significant unmerited dismissals occurring within this interval.

Although the Congress wisely provided in the Act as originally drafted for a phase-in of the time limits, and for the annual collection and reporting of the experience of the judicial system by the Administrative Office of the United States Courts, it unfortunately neglected to provide a chance for the system to operate without sanctions under the ultimate limits. The amendatory legislation will allow the opportunity of one year's operation without sanctions under the ultimate limits, and provide time in the succeeding year for the collection and analysis of the data in time for the Congress to assess whether the ultimate limits should be maintained or altered; determine what other changes should be made in the Act; and what budgetary provision should be made to bring the system to peak performance.

Given the applicability of the sanctions on July 1, the passage of amendatory legislation like S. 961 is of paramount importance. The Act is very ambiguous as to the application of sanctions to pending cases, and, indeed, is not entirely clear as to the effect of changing time limits upon cases already in process. The fact that the Act as originally enacted will not go into effect for some period of time clear as to the effect of changing time limits upon cases already in process. The fact that the Act as originally enacted will go into effect for some period of time until the House and Senate agree upon amendatory legislation and the President's approval is obtained, will further exacerbate the situation and lead to considerable litigation. It is essential that this unfortunate state of affairs be terminated as rapidly as possible. It is for this reason that the Department is now strongly urging passage of the Senate's compromise bill, even though it falls short of what the Department believes is the optimal solution. We find solace in the fact that in two years' time we will again have the opportunity to review this important piece of legislation, and, with the additional experience and data, be able to determine whether additional amendments are warranted.

Mr. Chairman, this concludes my prepared remarks, and I shall be pleased to try to answer any questions you may have.

Mr. HEYMANN. Mr. Chairman, as you are well aware, this is a critical juncture in the life of this important piece of legislation which is about to go into effect in 2 days.

You mentioned the time limits in your statement: 30 days from arrest to indictment, 10 days from the indictment to arraignment, 60 days from arraignment to trial.

There are excludable provisions, and one of the subjects that we will be discussing is how broadly they were meant to be construed. In many districts, they are construed quite narrowly. One of the advantages of having Shirah Neiman and Bob Fiske here is that they come from the second circuit where a broader construction has been given to those provisions and the act has been less troublesome.

While the Department of Justice strongly urges amendment of the act, I want to make it clear that we support a system that imposes mandatory time limits on Federal criminal trials. It is our strongly held position that the 100-day limit as presently construed poses grave dangers starting July 1, that in one way or the other something has to be done. Indeed, I think it is fair to say that there is some consensus that something has to be done, and soon.

Our own proposal, the one we presented in the Senate and the one we continue to believe is the better, would be to extend the time limits to 180 days total. The crucial time period for Federal cases, because arrests are relatively rare for us, would be extended from 70 days now under the act, to 120 days from indictment to trial. We would be taking about a 50-day increase. This 50-day change period ought to be viewed in light of the fact that we are dealing with a 3-year or 5-year statute of limitations. We are talking about a minimum of 3 years plus 70 days. But we are not here urging our own first preference, which is the extension of the time limit to a total of 180 days from 100 days.

The reason for this is that we think the greatest priority and the greatest importance has to be attached to doing something as soon as possible after July 1, 1979, after a couple of days from now.

On that basis, we are urging you, Mr. Chairman and the subcommittee, to adopt something as close as possible to the Senate provisions which, while not our choice, are provisions that continue to impose 100 days on us, but which set up a process that gives us a year or two more of experience in getting there, and makes clear that the exclusions are to be read rather broadly in a way that we have not read them in many cases.

Let me, having said that, go back just a little and tell you what we have done for 4 years, what the situation looks like to us, and why we think it is urgent that something be done. We are urging that the Senate approach as close as possible, or whatever the House thinks in the same neighborhood be enacted.

Since its enactment 4 years ago, the Department has made considerable good faith efforts to comply with the time limits mandated by the act. This is indicated by figures that show a steady decline in the length of time it takes us to try cases countrywide. It is also shown by the percentages that are compiled with ever shortening time limits. Comparable figures are not easy to find. The figures I am about to quote to you are not the best. They are the best you can find, but not what one would want. They're the best there are, and they show there is a record of improving performance.

In the past 5 years, there has been a 32-percent reduction in the backlog of pending criminal cases while there has been only a 15-percent reduction in criminal filings, because the delay is going down. We know, as an example, the overall length of time it takes to dispose of those cases that have ended in guilty pleas and we know that that period of time has decreased in the past 5 years from an average of

90 days to an average of 78 days. Neither figure takes into account periods of excludable time.

In terms of percentages, we know from a Department of Justice study which you may want to consider including in the record, Mr. Chairman, that measured against the 100-day limits, those are the ultimate time limits, about 83 percent of our cases would be in compliance, 17 percent would not be in compliance. This is a substantial increase over the figures cited in earlier studies and during the original 1974 hearings on the Speedy Trial Act. What's more, this was occurring at a time when our emphasis was moving toward bigger and more complicated cases.

I could go on, but I'm going to skip, in the interest of time, referring to the things that we have done to accomplish that. These things have been set forth in my written statement itself.

In the spring of 1978, over 1 year ago, we commissioned a study of what the situation would be now with regard to the Speedy Trial Act, and many of the figures I am giving you have come out of that study. The result of that study was a proposal by the Office for Improvement in the Administration of Justice that the best answer would be a delay of the sort that the Senate has proposed in order to get additional figures and additional information.

Despite that, I myself recommended, and the Attorney General recommended, rather than a delay, an extension of the alternate period to 180 days from 100. The need for some action one way or the other is what I want to call to your attention. Taking what is admittedly a worst case picture, which isn't realistic because it's worse than anything that will actually take place, 17 percent of our cases out of compliance would mean that over 5,000 felony cases would have to be dismissed.

Now, I want to say right away and very clearly, it would not be 5,000. If the act were in effect, some of those would be handled differently. The exclusionary provisions might be read otherwise, but while we don't know whether we are talking about 5,000, 4,000, 3,000, 2,000, we are talking about a large number of cases. We can tell a little bit about the cases, and what we can tell causes us considerable concern.

Most of the cases involve burglary, larceny, stolen property; that's about a quarter of them. Then fraud and embezzlement cases, another 17 percent; forgery and counterfeit cases, another 14; drugs, another 14 percent; and weapons and firearms.

The cases we are talking about are a serious group of cases and if it is not 5,000, it may be many. If we try and get a figure that is a little more realistic than 5,000 and we say how many of our cases were out of line with the time periods that were required at the time we did the study, because 100 days wasn't required then, again we find a substantial number of cases—and it's spelled out in the written statement—out of line with the lesser than 100-day time limits that were in effect then, despite, in short, a record of improving performance over time.

The fact remains that the act never—perhaps as a flaw in design—imposed the dismissal sanction during the period of testing. That leaves us unsure as to what would happen if it was imposed, and it leaves us with considerable concern, based on the figures we have, that literally thousands of serious cases might have to be dismissed.

There is another side, in addition to this dismissal side, that while less clear, seems to me to be a little bit more solid, and that is the cost

compliance in many parts of the country. We do have a record. What I mean by the cost compliance is what measure prosecutors are taking in order to get as close to the time limits as they are getting. Those are sort of hidden costs, things you don't see right away. Some of them are serious.

We do see a substantial reduction in arrests, Mr. Chairman. I estimated that we were seeing a reduction in the last year. We had figures of a 50-percent reduction in arrests, or 40 percent. The Senate had additional witnesses that came in later and perhaps did a better job with the figures than I did, and they show that the arrests go down from 40 percent of our cases beginning with arrests to 31 percent. That in itself is close to a 25-percent drop in arrests.

We fear, as the Virginia McCarty letter says, we fear that this is happening because U.S. Attorneys in some places are telling agents not to arrest because they can't live with the 30-day time period that takes place immediately after that.

Mr. CONYERS. Is that good or bad?

Mr. HEYMANN. Depends on whether the arrests are necessary, Mr. Chairman. If the arrests were unnecessary, then it is good. If the arrests were necessary, it's bad.

But you wouldn't like to accomplish it this way. We would like to say to U.S. Attorneys, arrest only—or to investigative agencies—arrest only where necessary and not where unnecessary, not have them simply fail to arrest on the basis of a 30-day time period.

The civil caseload is another cost that otherwise might be invisible in the present system. It has gone up rather substantially. There are problems that we can't document. Earl Silbert, the U.S. Attorney for the District of Columbia, points out situations where cases will not, in his jurisdiction, be investigated as thoroughly as they should between arrest and indictment, and the indictment will have to come down.

The consequence of that is that people may be indicted who should not be indicted. That is one consequence. Another is that we may not be prepared for trial adequately in cases where we should be. The list of costs can go on and on. I simply want to call to your attention that there are costs that don't immediately appear in compliance figures and we see that we are not complying in 17 percent of the cases.

The issue has come down in many ways, Mr. Chairman. The issue at this stage of the procedure has come down to the following question: Whether the better way to handle—I am sorry, Mr. Chairman——

Mr. CONYERS. Excuse me.

Mr. HEYMANN. The issue is not stated in my written statement, which is why I wanted to pause for 1 minute. In many ways the issue on the other side of the Hill came down to this and this is the issue on which we lost on the other side of the Hill. It is possible, it was argued strongly by some on the Senate side, that with a sufficiently broad—and they would say—sensible view of the exceptions, and with the excludable time provisions in the present law, we could come int o compliance with something like the 100-day period without paying great costs and without having to dismiss many cases.

We are skeptical, we don't know whether that can happen or not. We argued instead for a relatively tight reading of the exclusion provisions, but said give us 180 days or increase the period from indictment to trial from 70 days to 120 days. And we said that time doesn't

really make much difference; what is important is that there be a fixed time limit and people move relatively quickly.

We lost on that issue, but we lost in a way that makes some sense. We lost in a way that said—in which the Senate said "we believe that the way that the second circuit has construed the exclusionary provisions is what we and the Government think was intended."

Now they said "well, if you are still worried," as I am still worried, "about whether we can live with 100 days, let's try it now with the sensible view of the exclusion any provisions over a 2-year period with reporting requirements in the meantime, and let's see whether you can do it or not."

That is not our first choice. We thought very hard about coming over here and fighting against that or fighting against that in the Senate, but it is a provision—it is a system that is sensible, and that we can live with.

What is important is that some action be taken by both Houses at a relatively early date. The uncertainties are severe and dangerous. The risks are very real, the costs are very real and we need at least the time and the encouragement to use the exclusionary provisions that the Senate gave us if the situation is going to be a tolerable one.

Thank you, Mr. Chairman.

Mr. CONYERS. Thank you, Mr. Assistant Attorney General. I know that this is an abbreviated statement, that your argument is spelled out longer and in more detail both in your Senate presentation and in the written statement that you submitted to us this morning.

I appreciate your summary. I would also like to receive the document that you referred to in your remarks prepared by the Department.

Mr. HEYMANN. I appreciate that.

Mr. CONYERS. We will examine it and in all likelihood include it in the record of these proceedings.

We will now turn to Mr. Robert Fiske, U.S. Attorney in the Southern District of New York.

Mr. FISKE. Good morning, Mr. Chairman, it is a pleasure to be back before you again. As you undoubtedly know in the Southern District of New York the judges from the very beginning days of the act set forth on a pilot program whereby six of the judges in the court operated as early as April 1976, under the deadlines that are scheduled to become effective July 1, 1979. The purpose of that program was to see whether or not those deadlines were feasible and whether they were realistic, and I am sure that you already have heard from different sources the result of that project.

Basically what it showed was that with the exception of one judge who was tied up on several long cases, the other five were able to keep up with the 60 day time between arraignment and trial. The concern I think that our office had and I think members of the court had was whether or not it could be accurately assumed that that same experience could be transferred to the entire court, recognizing two things: One, that the judges that were selected for that pilot program were among the most efficient judges in the court, and the fact that they were able to do it didn't necessarily mean that all their colleagues would be able to do it.

The other point that is important is that our office was able to meet the deadlines set by those six judges by reassigning cases, by putting

more assistants to work on the cases that were assigned to those judges, and to a large extent it was true that while 25 percent of the court was on the pilot program, more than 25 percent of our office was devoted to the cases that those six judges had.

So, I think there was a real concern in the southern district and in the second circuit as to whether or not it would be possible to continue compliance once the deadlines became final on July 1, 1979.

And I think the guidelines that were promulgated by the second circuit were drafted and were conceived as a result of a recognition that something did have to be done in the second circuit, that if nothing were done and if the act became effective exactly as the statutory language was written on July 1, 1979, there would be serious problems.

There is a problem already in the eastern district. They have applied already for an extension. The southern district has not, because I think the judges in the southern district feel that they can live within the guidelines promulgated by the second circuit. Shirah Neiman, whom you introduced before, was very active in the drafting of those guidelines, and she can provide some legislative history if that is a fair way to analogize that, in case you want more information as to how those guidelines were put together.

Basically the way we see it in the Southern District of New York is that we do not see the need for an extension of the deadlines themselves. We do not see a need for extending the deadlines to a total of 180 days. Indeed, I think it would be counterproductive to have an extension to 180 days and also have the guidelines that are now in effect in the second circuit, because I think if you put the two of those together, you might very well end up by stretching the time periods out so far that the basic purpose of the act which we all endorse would be lost.

So, because we are already operating under the guidelines in the second circuit, because we think they are realistic, and because we think they are going to work, we would favor as between the two approaches toward amendment of the Speedy Trial Act, the approach that the Senate has taken, which in a very general way embodies many of the same interpretations of the act that are now in the second circuit guidelines.

And I think the idea of allowing that to become effective across the country, so that there can be sort of a 2-year study period to see whether or not with these liberalized exclusions the act can be lived with by all of us before sanctions are imposed is an eminently reasonable solution, and it is certainly one that we would favor.

In terms of the impact on our offices, there are two things that I think the Senate bill and the second circuit guidelines do that are very important. One, they deal with the arrest to indictment stage which Phil Heymann alluded to just a moment ago by making it very clear that it is appropriate to give an H–8 continuance in cases where by reason of the nature of the investigation it simply isn't possible to return an indictment within 60 days of an arrest.

One of the most common problems, and one of the most common concerns is the situation where you have a syndicate, a network of criminals working together. Take a narcotic case, for example, you many have to arrest one of the defendants for valid law enforcement reasons. He may be able to flee or something else. That immediately

starts the time period running for an indictment of that particular defendant. Under ordinary circumstances we would much rather not indict that defendant until we have completed the investigation of the entire syndicare and can indict everyone at once, because once you indict the first defendant, the time starts running for his trial and you may end up having to go to trial against that particular individual and give up an informant and witnesses before you are ready to go forward with the others.

So, this is the most compelling case really for a continuance that would allow the indictment period to be extended until after the investigation was complete. That concept is written into the second circuit guidelines and also in the Senate bill, and it is of great value to law enforcement.

Mr. CONYERS. Are you suggesting now that we not break it up into three distinct periods of time and have it collapse?

Mr. FISKE. No; I think the idea of having an arrest to indictment stage, and indictment to trial stage, the way it is now done in the Senate bill is very desirable. I think it is probably a good idea to get rid of the 10-day indictment to arraignment period for reasons that apply much more to the rural districts than they do to the Southern District of New York.

I think the best system is if you have two periods, one from arrest to indictment, and then second from indictment to trial, but recognizing that you could get an H–8 continuance for either one of those two periods as the second circuit guidelines now provide.

The other area where I think the guidelines are important and the Senate bill is helpful in terms of the impact on our office is in avoiding what is presently an occurring problem of overlapping and duplicate work. Occasioned by the fact that cases are set down for trial, a very short time period after an indictment is returned and this is done because the judge feels he may have to do this in order to put the trial down within 60 days.

It may be that the time period he has free is the time period 2 weeks after the indictment and he puts the case down maybe only 2 or 3 weeks after the indictment has come down. That does two things. It usually doesn't give the defense counsel enough time to thoroughly investigate the case, so if there is going to be a plea of guilty, which there often is, it comes at the very last minute and that means in turn that our assistants have put a great deal of time into preparing the case that would be unnecessary if the trial date were further into the future and the defense counsel could tell our assistants 1 month before trial, don't worry about it, there is going to be a plea. Then our assistants can go off and do something else.

Mr. CONYERS. My impressions and limited experiences were to the contrary. It was my feeling that in the criminal court in Detroit prosecution and defense were frequently there on the day of trial in which a plea arraignment was resolved and there wasn't any clear understanding in many of those cases that there was going to be a plea. Whether there was a plea or not turned on fine tuning that happens usually at the last moment.

Since we know most criminal cases are plea bargained, as a matter of fact, you can predict that that would happen. But frequently it took place at the end and nowhere in the beginning. So, everybody had to be ready. That is my point.

Mr. FISKE. Well, Mr. Chairman, undoubtedly there are cases that no matter how much time you allow there will not be a plea until the last minute because the defendant is not willing to face that moment of truth until he absolutely has to.

On the other hand, our experience in the southern district has been with a number of defense lawyers, including the Legal Aid Society. If they have time to evaluate a case they will do it and they will come to our office and say you don't have to worry about this one. There is going to be a plea. And then our assistant doesn't waste the time to prepare it. When the trial is set down only 2 or 3 weeks after indictment, there just simply isn't time for the defense counsel to do that and complete that evaluation until just 1 or 2 days before trial, and, in the meantime, our assistant has to spend that time getting ready for trial.

There are two provisions in the Senate bill which go directly to that problem; one is the rule that says the case without the defendant should not be set down less than 30 days after indictment, and the other is the provision that specifically recognizes as the grounds for an H–8 exclusion, the need for continuity of counsel on the Government side as well as on the defense side, which would mean that if you have an assistant with three cases that he has worked on all the way through to indictment there would be grounds for a continuance in one of them that that assistant was tied up trying the other two.

We wouldn't have to reassign that third case to a different assistant who would have to learn it all over again. So, I guess to end up very silently, we think that the approach taken by the judges in the second circuit is a very realistic and very viable approach, and to the extent that the Senate bill follows that same approach, we would like to see that adopted.

Mr. VOLKMER. Mr. Chairman?

Mr. CONYERS. Yes; the gentleman from Missouri is recognized.

Mr. VOLKMER. A little bit of my problem is I'm listening to the concept of what is occurring in the Southern District of New York basically. And I see all the other districts and I am sure there is quite a distinction that can be drawn between the individual districts. And the same problems that confront you in the Southern District of New York aren't necessarily the same problems that confront the U.S. Attorney in the Eastern District of Missouri or the Western District of Virginia, or what have you. And here we are with a time frame imposed upon us to do something if we are going to do something. But I am afraid if I follow what you would like us to do it may impact adversely on other cases.

That is why, Mr. Chairman, I would rather we continue on with this. But as far as I am concerned, the only approach that I can see, if we are going to do something is to do very little, but maybe expand the time and very little else as far as I am concerned.

My personal feeling is that we ought to permit the extended time and then have the hearings and develop any amendments for the purpose and not just on what you or a few other people say, but very comprehensive hearings, Mr. Chairman.

I don't mind hearing all of this, but I don't personally feel like doing a dang thing of what you are talking about.

Mr. CONYERS. Our colleague is from Missouri and we speak rather direct and blunt.

Mr. VOLKMER. There is no sense in wasting time.

Mr. HEYMANN. They even do that in Michigan.

Mr. Volkmer, the letter that I have asked to have introduced from Virginia McCarty is from Indiana and indeed, we are aware that problems in the rural districts are different from problems in Detroit or Washington or Boston or New York. So, your point is quite well taken. Virginia McCarty points out things like that. In Indiana the grand jury only meets 1 day a month. She says if it is 30 days, if you have to indict within 30 days of arrest, that means that she is going to have to tell the investigative agencies that there is 1 day that they are not allowed to arrest in any 30-day month.

She said her agents are scattered all over the State of Indiana and if they take testimony in one corner of Indiana it takes 7 days to get it back to the U.S. Attorney's Office. There is a variety of problems that are distinctly based on whether you deal with a highly compact urban area or a very spread out rural one.

Mr. VOLKMER. You are also dealing with a different type of crime, development of the prosecution, the witnesses, everything.

Mr. HEYMANN. Bob mentioned that on the arraignment, it was not much of a problem for him, but he thought arraignment should be within 10 days of indictment. In the rural areas, Ms. McCarty points out they are moving people hundreds of miles just to go in there and say what do you plead—not guilty—and they move them hundreds of miles back, hundreds of people.

I only have two things to say about all this, one is that we have tried to factor in and consider those needs and that is why the figure that we originally proposed of 180 days is considerably longer than 100 days. We could live—we have looked at figures from all over the country and we could live with 180 days. So, your suggestion that you're not willing to act until we know more is exactly what the Senate has come down with, and we are prepared to live with that. It makes good sense.

I wish we could have 180, but we could live with learning more as long as we get some relief from what looks to us like a guillotine hanging over our head in about 2 days.

Mr. VOLKMER. Could I address that very briefly, Mr. Chairman? Those dismissals are with or without prejudice, right or wrong, prejudice of the judge.

Mr. HEYMANN. Correct.

Mr. VOLKMER. And if the judge feels inclined he can make that without prejudice, which means he can retrial. So, even though there may be 3,000, 4,000 dismissals, that doesn't necessarily mean the cases are terminated—all of them.

Mr. HEYMANN. That is correct, too.

Mr. VOLKMER. Thank you.

Mr. CONYERS. Could I recognize Ms. Neiman at this time for her comments here? We're glad that you could join us here today.

Ms. NEIMAN. Thank you. It's a pleasure to be here. It's hard going through it. I don't have that much to add, but perhaps I can answer some questions if there are any.

Mr. CONYERS. OK.

Ms. NEIMAN. Just in terms of Congressman Volkmer's question, I think that the extent of the effect of postponing the sanctions of the act would certainly help the rural districts, but in addition, the amendments the Senate proposes can only help the rural districts.

58-721 O - 80 - 2

In other words, the rural districts are really in worse shape under the statute than any of the urban districts. So, the amendments that are a part of the Senate bill can only assist the rural districts in operating within the framework of the act.

So, I do think that it's important that something be done now to the extent that it is possible to modify the act where it is ambiguous.

I would like to address myself a little bit to the second circuit guidelines. They came about, I think, as a result of the fact that the Judicial Council, the circuit judges, realized that July 1, 1979, was upon us and the whole court would be going on the 30/10/60-day calendar system. There would be some fear, largely upon the part of defense counsel, that the time limits would be impossible to deal with. They would not have enough time to prepare cases.

In addition, the judges felt that the entire court could not deal effectively with the 60-day limit unless the statute was construed in a reasonable fashion. When we began drafting the guidelines, it was not real clear if the act that was originally passed was intended to be very flexible. Legislative history is very sparse and there are parts of it that would indicate that Congress did not intend the act to be that flexible.

Indeed, the Administrative Office of the U.S. Courts, under the supervision of Tony Partridge, who is counsel in charge of administering the Speedy Trial Act, takes the position that the exceptions under the present act are not flexible and he has specifically disagreed with the second circuit guidelines in letters and in meetings with us.

We, in a way, went out on a limb with the guidelines. We felt that the guidelines were a correct interpretation of the spirit of the act. We felt they were the only fashion in which we could live with the act because otherwise it was somewhere in the clouds and could not possibly be administered.

And again, I think we went out on limb and we interpreted the act to be as flexible as it could be and we had two purposes in mind. One was that cases got tried speedily and any time we were flexible we insisted on prompt action and insisted on hearings within 10 days and things like that that were not even required by the statute.

On the other hand, we did want the court to understand that they were not under the gun and did not have to constantly schedule and reschedule cases and give you 3 days' notice of trial which forced defense attorneys to be unprepared and assistants to be reassigned from case to case, so sometimes we had three attorneys being prepared for it because of the pleading on the day of the trial.

But because he did not have sufficient time to consult with his client, many times a case would fold. The court would simply call a criminal case and say OK, you be ready next week.

This resulted in an enormous waste of time.

The guidelines, if followed, should remedy that. I think that some of the things that this committee can accomplish is, as the Senate did, recognize and accept the second circuit's guidelines and reflect an accurate correct interpretation of the act.

I think that it would be very helpful to have that be a part of the legislative history of any amendment.

Second, I think that some of the provisions, in fact, all of the provisions in the Senate bill follow some of the suggestions of the guidelines and are helpful. These were mentioned by Bob Fiske, the provisions

which permit continuity of counsel. In other words, simply because a case has to be rescheduled 1 or 2 weeks later that the defendant can have the same attorney and the Government can be represented by the same attorney, should be something that is reasonable and is permissible under H–8. The guidelines provide for that. And the Senate amendments to H–8 provide for that.

The 30-day minimum time limit where defendants cannot be tried without his consent, before 30 days after indictment or his appearance before an officer in the court is something that will be helpful, especially to the defense attorneys who feel they do not have enough time to discuss matters with their clients. Whether it be related to a plea of guilty or to trial, many attorneys, many defense attorneys feel that when judges schedule trials on short notice, they are indeed pushed into pleading guilty and all the interest in the world that they may attempt for their client, there is no way that they can go to trial for that.

Mr. CONYERS. I don't know whether that ever happens. All the defense attorneys I know state that it takes so long to get to trial. Of course you can understand why though, there are a lot of defendants who don't want to go to trial. That's very natural in criminal court. But I am not aware of any jurisdictions, especially Federal, where people are rushed into criminal courts, and lawyers receive telephone calls that this trial is going to commence.

Usually in a criminal jacket, the delays are outrageous for every reason under the sun plus a few extra. I mean, there's a whole skill about how to delay coming to trial. I'm sure it is studied by my friends in the trial arm of our profession.

I have never heard of anybody being jammed into this thing. These are very dramatic tales that I'm being told today, and I'm sure that they have occurred somewhere at some time, after all, we have been here 4 years. Everybody who could read in the profession knew that on July 1, 1979, what was going to happen. Everybody.

We furnished you with 2 years' worth of preparation in advance. We put extra money in the program. We had periodic reports, we had trial runs, and now we are being confronted with it as if the Congress has a deadline to meet. Well, my friends, it isn't the Congress that has a deadline to meet; it's the courts that have a deadline to meet.

Ms. NEIMAN. I think Mr. Fiske wants to respond, but I don't think my remarks were addressed to the extent of the act. I think the court has more of a problem than the prosecutor's office in our district in meeting the statute.

Mr. CONYERS. Well, we will let the courts speak for themselves. They are very able to explain their problem. I appreciate the Department of Justice explaining to us what the judicial problem is, but the judges are going to be able to have their day before the committee. They were very helpful in helping us frame this legislation and also examining it during the 4-year period.

Mr. HEYMANN. If I may respond for us, the prosecutors, and maybe Bob Fiske will want to too. There are a couple things that are worth saying. One is there was no magic that you, Mr. Chairman, or Senator Irvin on the Senate side, attached to the figures that you had to devise without great experience when you first wrote the act.

You put together what seems now to be something pretty close to a workable set of figures. If we have 83 percent compliance considering

urban districts and rural districts, you weren't way off the mark. But you intended and planned to have 4 years of experience and learning, not only 4 years of experience and learning, but 4 years of pressure on the prosecutors, the judges, and the defense bar to move closer and closer to compliance.

Those things have happened. We have moved closer and closer. You have been successful in both aspects. You and Senator Irvin and everyone else that was associated with it. We have moved closer and closer, but we have also learned, we have learned that we can comply in 83 percent of the cases. We learned that we can comply in many, certainly, of the remaining 17 percent, but we have also learned that there are remaining dangers and problems.

Without sacrificing any gain, what we are urging on you is that at this stage we need a trial period. We need an extension of the trial period and a clarification that Ms. Neiman and Mr. Fiske have been referring to of the exclusionary provisions. We have even been prompt in raising the issues.

In the spring of 1978, we did what seems to me to be for any branch of government, legislative or executive, as good a study as we get. That is the OIAJ study which I think the committee ought to have. It's not perfect, but compared to the things we generally deal with, you gentlemen and me, it's good.

And we called early to your attention, Mr. Chairman, maybe not as early as we should, but we called early to your attention that we did think there was a need for an amendment.

Mr. CONYERS. I have been hearing it from you as attorneys in every jurisdiction. It isn't that I didn't hear the plaintive appeals from you Federal prosecutors. There wasn't any lack of notice. Everywhere I went they said, "Oh, this Speedy Trial Act is going to kill us." I said, "Have you ever looked at it?" "No, but we hear there is no way it can work; it's just a dream. You have destroyed the court system as we know it."

There were very serious young people that approached me. I don't doubt their conviction about how horrible the results would be if we were to move into this whole notion of staying with the law as it exists at this moment. I'm not at all sure of whether you would lose 1 of the 5,000 cases. And if you do, it will be because a member of the Federal judiciary determined that there was a failure of the effort on someone's part, not necessarily yours, but someone's.

And so that is the nature of these kinds of sanction. Nobody ever wants to move into sanctions anxiously. It is incredible that we have done as well as we have. It speaks to the modesty of the language. We do not have all of our judges into place yet. They're still coming on board.

Mr. HEYMANN. I think when you passed this act you contemplated additional judges and additional prosecutors, neither of them is on board yet. If I may put it in terms of a deal, part of the understanding was time pressure would be put on and judges and prosecutors would be made available to handle it, I think. And it's just now that the prosecutors and judges are coming on board.

Mr. CONYERS. Well, everything is coming together at the right time almost. I recognize my colleague, Mr. Gudger from North Carolina.

Mr. GUDGER. Thank you, Mr. Chairman.

I want to commend the witnesses here for their very significant testimony; and I come from the State of North Carolina, and from the Western District of North Carolina which has been able to comply generally with the Speedy Trial Act because of very hard work on the part of very diligent trial judges.

I know of adjoining districts in which the backlog of cases has risen to 1,000 civil cases in a district ordinarily served by 2 district court judges, and you know what that means. So the problems are staggering in some areas, but the problems are spotty from district to district, depending upon a lot of circumstances peculiar to the areas involved.

One thing I wonder if the Speedy Trial Act fully addresses is the situation of your arraignment date motions, your motions to quash the indictment, the motions to make for specific and certain, the motion to suppress these pretrial motions that ordinarily are triggered by arraignment.

Now you say we wash out the arraignment fixed date 10 days from indictment to arraignment. Doesn't that, or isn't that likely to prejudice the disclosure of the defense motions and the disposition of those motions in a timely fashion?

Mr. FISKE. I don't think it will make any difference. The Senate bill which does wash out, as you put it, the arraignment period, specifically provides that there is an exclusionary period for the period of time that motions are filed and are under advisement.

Mr. GUDGER. Isn't the general rule of most districts that the motions addressed to the indictment to make it more clear and certain or to quash it, must be filed within 10 days after arraignment, regardless of the time of disposition.

Mr. FISKE. That is certainly the general rule absent——

Mr. GUDGER. But if you do not specify when an arraignment is going to take place, aren't we prejudicing the situation trying to get those motions out of the way?

Mr. FISKE. Well, you could still have the rule that the motions had to be filed within 10 days of the arraignment.

Mr. GUDGER. But if the arraignment can be 40 days after indictment——

Mr. FISKE. Yes, but if that happens then you are just eating up the basic 70-day period from indictment to trial. If somebody wants to wait 30 days to arraign someone then there is only 40 days left between arraignment and trial, and I think no court system is going to tolerate that.

I think the arraignment will be set down as soon as practicable, but I think what the concept of eliminating the mandatory 10-day rule is defined to do is allow some flexibility for some rural districts where that is a problem.

Mr. GUDGER. What you are saying in effect is that the trial judge will have judgment enough not to let the situation get away from him because it would get away if there were a lot of pretrial motions which were filed at the date of arraignment and it was much more than the 30 days after indictment situation. The government could be confronted late with a motion to quash, and several motions for discovery, and one or more motions to suppress, all of that could present a serious problem in getting ready for trial if you only had 30 days remaining.

Mr. FISKE. That is right. And I think most will see that that doesn't happen because they are just using up their own time.

Mr. GUDGER. Do you see anyway in which, in your felony cases, which must go through the district court process, if a jury trial is available, other than the waiver of a jury trial and these other techniques that are available, do you see anyway of accelerating the processing of the case by pretrial hearing of motions to suppress and that sort of thing, getting that out into the open earlier?

Mr. FISKE. Well, that is a very good question. We have tried to focus on that in our court, and one judge had a rule that any defense lawyer that wanted to plead his client guilty, to let the prosecution know 10 days before the trial or else print in an affidavit as to why he hadn't done that. And that turns out to be a slight paperwork burden put in the affidavit. It didn't really help the situation very much.

But what we also tried to do is to offer a disposition of the case to the defendant, allow you to plead to half of the indictment if you let us know 2 weeks before trial. If you haven't told us 2 weeks before trial, then all bets are off, and if you want to plead you have to plead to the entire indictment.

Mr. GUDGER. I have seen that exercised, too.

Mr. FISKE. But again, whether that works or not depends on the particular district judge you are appearing before.

Mr. GUDGER. It depends a good deal on the district attorney and his staff as well. Wouldn't you say that the district attorney's diligence in getting the defense counsel in for early conference——

Mr. FISKE. Yes, certainly that is a factor. It is in his interest because he would have to prepare a case on the morning of the trial. It should be in his interest to get whatever disposition there is going to be before he takes the time to prepare it.

Mr. GUDGER. There is one observation here. To my experience—and I have been at the trial bar most all of my life, and done a good little bit of criminal trial—generally I would say at least four-fifths of the time it is the defendant who wants the delay, not the government. And yet the Speedy Trial Act would make it appear that the government is the party except in the delay experience that the courts have understanding prior to the recent Speedy Trial Act.

Should there be some situations where the Speedy Trial Act should be clearly waived by both sides, because of the complexity of the case, the conditions of the situation that you were addressing by your earlier remarks, should there be a clear exception where you're dealing with a highly complex situation where the court would be aware of the dilemmas that are confronting and probably making arrests in three different States in dealing with the presentation and development of highly complex evidence where you are bringing witnesses from various and sundry points and trying to get points admitted that should be admitted. And this should result in these cases that you cannot accommodate within a 70-day frame.

Mr. FISKE. I think we all feel very definite that there should be room for an exclusion in that type of situation, and I think both the Senate bill and the second circuit guidelines do specifically cite that precise type of situation as the type of situation which is proper for extending the deadlines.

Mr. GUDGER. But if you allow for this too freely, make this too readily available by concept and waiver, do we rob the Speedy Trial Act of its lever?

Mr. FISKE. It can't be done by consent.

Mr. GUDGER. I say consent, waiver and/or order. I should have included court order because there has to be a court order, but when you create that situation do you allow a situation where this can become practice rather than the exception?

Mr. FISKE. Well, I think it will depend on how it is administered by the district judges, and I am sure there is always the arrest situation in which a particular judge might grant these too liberally. I think that is a risk under the act as it is now written, and I don't think you are ever going to totally cure this.

Mr. GUDGER. Mr. Volkmer earlier asked about the situation where you have dismissal because of the failure to reach a trial within the speedy trial frame. Where you have a dismissal without prejudice, so that the government may provide subsequently with its case.

What is the situation with respect to bond? Doesn't that defendant stand down? And isn't he going to have to be rearrested?

Mr. FISKE. Yes.

Mr. GUDGER. And so there would be the substantial jeopardy to the government's case in the loss and control of the accused?

Mr. FISKE. Yes.

Mr. GUDGER. Is there any way that could be avoided, or do you think it needs to be avoided?

Mr. HEYMANN. I was going to say that there are lots of problems with the dismissal without prejudiced sanction, too. Obviously it means you have that many more cases again to proceed through. It means you're making more delays, you're making it harder and harder to comply with the 100-day period.

In many ways, it's the only sanction. If we had another sanction to suggest to you, we would be up here suggesting it. If we had a solution that didn't apply just to a prosecutor but also to the defense attorneys who want time more than we do, we would be up here suggesting it to you.

We have no alternative sanction to the dismissal sanction, but it is unsatisfactory even when it is dismissal without prejudice. We have no better ones, so we aren't recommending the change, even though dismissal without prejudice causes inconvenience and backs everything up.

Mr. GUDGER. Thank you.

Mr. CONYERS. Are there any further questions of the subcommittee?

I want to express our appreciation to all of you gentlemen and lady for coming, and I want you to be assured that we are aware of the much longer and more rigorous examination that went on in the other body. We are not short-circuiting the argument and positions of the Department of Justice; we are very sensitive to it.

We recognize that this is a sensitive matter. I know that you have visited with me and talked to me about it before and indicated your concern. I want to give it my best thinking, and I'm sure that this subcommittee will approach this in a manner that is fair to the interests of the Department of Justice and to all citizens who have the benefits of the constitutional amendment on which this legislation is sitting.

Mr. Stovall, counsel, do you have one question?

Mr. STOVALL. About this letter, yes.

Mr. CONYERS. Go ahead.

Mr. STOVALL. Thank you, Mr. Chairman.

Gentlemen and lady, we have taken the opportunity during your comments to make duplications of the Virginia McCarty letter, and in reading through it, I wonder if you would, whoever would like to, would care to comment on your analysis of the letter and to what extent the various claims made by Ms. McCarty permeate the system. She makes a substantial number of complaints and she gives several examples, noting, of course, she talks about four criminal results because of the problem.

She talks about a technical problem of not being able to continue investigation pursuant to a bank holdup, for example, because the arrest limits keep the Federal authorities in some cases from examining coconspirators. She talks of technical problems requiring actual dismissal of the cases pending, this sort of investigation; she speaks of a drastic cut in arrests that have been necessitated here. She speaks of problems in getting, as you mentioned, Mr. Heymann, early grand jury meetings every 30 days.

She also talks about the extensive travel in Indiana which, she says, is a rural State. It sometimes takes 3 hours of travel. These are some areas she touches upon.

Could you make a few comments as to whether or not she is accurately portraying the general nature of the problem throughout the U.S. district court jurisdictions?

Mr. HEYMANN. Well, I do think there is a big difference between rural and urban areas. A study for the administration of justice showed what Mr. Gudger or Mr. Volkmer said.

We see substantial differences between offices and, as Mr. Gudger said, in one office in North Carolina, we see substantial compliance and in neighboring offices we see problems.

I wanted the McCarty letter introduced in the record, if it could be, because it shows it was Virginia McCarty's very honest expression of her own exasperation with the difficulty the act might cause her.

They are obviously not complaints that are countrywide, as Mr. Fiske and Ms. Neiman indicate; most of these are not problems in New York City and they are not necessarily problems in Washington or Boston.

I think they are real problems in Indiana, and I think we would find that they were real problems in a number of districts around the country.

Mr. STOVALL. Do you have any estimate of how many districts they might apply to?

Mr. HEYMANN. I really don't, but we could check how many districts have a grand jury that meets only once a month. We have 95 Federal districts. There would be a number that would have a grand jury meeting only once every month or twice a month.

There are a variety of little problems that we haven't mentioned that come up. The Financial Privacy Act says that the subject has 10 days to object to the revealing of the bank records. It means that this 10-day period has to somehow or other fit into the 30 days from arrest to indictment.

These problems and others like them are the type that McCarty brings up.

I think the important thing is, as I was saying to you, Mr. Chairman, that when this bill was passed, you contemplated learning, and

what Virginia McCarty is pointing to are difficulties that we are now aware of as a result of our 4-year experience under the act.

A number of these problems were called to the attention of the other body. I think all of them that we can, are addressed directly in the Senate bill; beyond that, it's hard to say how widespread the objections are, but we would happily give you something more on it if you would like.

I'm sorry not to be more helpful.

Mr. STOVALL. Could you possibly follow up with a response in writing to the specifics of Ms. McCarty's letter?

Mr. HEYMANN. Yes. We may find some things in there that we thought not relevant problems that she thought were relevant.

Mr. CONYERS. Well, we are going to need to move on because Judge Oliver is under restraint, too. Sometimes when we examine these enormous litigation hurdles that on second blush begin to be handleable, don't you think that happens quite frequently?

It looks formidable, but somehow we always manage, and I would admonish all of my friends in the Department of Justice to take heart, be of stout hope, do not waiver under the time limit adversities which Congress, sometimes less thoughtful than you, imposes.

I think we shall be able to resolve these matters in a way that will not seriously encumber your operation and will advance the notion of a speedy trial, which has been quite a long time coming in American jurisprudence.

It is about time we all tried to move it forward as fast as we can, and we look to your continued support and cooperation in that direction.

I am very glad you gave us your time this morning. Thank you again.

The subcommittee welcomes at this time Judge John Oliver, who has been president of the District Judges Association for the Eighth Circuit, chairman of the American Bar Association's National Conference of Federal Trial Judges, has authored a number of treatises on the subject of improved jurisprudence, has been appointed to the Federal Bench since 1962, was on the Committee on the Administration of Probation of the U.S. Judicial Conference, and we know he comes to the subcommittee with a grave concern for the matter under discussion.

We appreciate not only your statement, but as well, the work that you have done on this subject, touching on matters that are very close to the speedy trial, really court administration, of which speedy disposition of cases is merely one part.

So we are very pleased and honored to have you with us, Judge Oliver.

[The material referred to follows:]

STATEMENT OF HON. JOHN W. OLIVER, CHIEF JUDGE, U.S. DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI

My name is John W. Oliver. I am Chief Judge of the United States District Court for the Western District of Missouri, a court which I have served as district judge from 1962 to 1977, and as Chief Judge since that time. This statement is presented pursuant to the request of Chairman Peter W. Rodino and the Notice to Witnesses attached thereto.

Chairman Rodino's letter advised me that this Subcommittee was taking testimony on the progress which has been made in implementing the Speedy Trial Act of 1974 and on proposals to amend that Act which, in general, reflect amendments suggested by the Judicial Conference of the United States and by the Department of Justice. I am confident that the Subcommittee is familiar with the Comptroller General's Report to the Congress on the Speedy Trial Act, GGD–79–55, dated May 2, 1979. The Western District of Missouri was selected as one of the eight districts for study. Nothing has changed which would alter the judgment expressed in the Report that the time limitations of the 1974 Act can, without substantial difficulty, be complied with in the Western District of Missouri.

I believe the most orderly way to give the Subcommittee my views of the questions presented is (1) review briefly the Comptroller General's Report; (2) outline the procedures under which the Western District of Missouri has been able to comply with requirements of the 1974 Act under procedures provided in the Court en banc order our Court entered November 26, 1968; and (3) to state a general view of other factors relating to the administrative structure of the judiciary established forty years ago, which I believe that the Congress may appropriately take a fresh look at as it considers the complex problems of present day federal judicial administration which, in my judgment, are best illustrated by apparent difficulties in compliance with the time requirements of the Speedy Trial Act of 1974.

In a final part of this statement, I will (4) respond to the request that I state my views concerning Title II of the Act, in light of the experience the Western District of Missouri has had as one of the test pretrial release districts.

I. COMPTROLLER GENERAL'S REPORT ON SPEEDY TRIAL ACT

I agree with the view and most of the reasons stated by the Comptroller General in opposition to the proposals made by the Judicial Conference of the United States, the Administrative Office of the United States Courts, the Federal Judicial Center and the Department of Justice which, in substance, suggest that the Act's time frame cumulatively be lengthened from 100 to 180 days. I also agree with the Comptroller General's suggestion that more accurate data should be developed which will attempt to show why cases in some districts are not being processed within the present 100 day time frame, and why the safety mechanisms of the 1974 Act have not been utilized by district courts to grant appropriate extensions of excludible time under the circumstances of a particular case. That information, I suggest, will not be easy to obtain.

It is my further view, however, in light of the strong views expressed by the Judicial Conference, the Administrative Office, the Federal Judicial Center and the Department of Justice, that the Congress should adopt the alternative proposal suggested by the Comptroller General that the present Act be modified in a manner which would postpone the effective date of the dismissal sanction for an 18 month or two year period.

I am not at all sure that the period of moratorium should not be for a longer period of time. The problems of speedy trial should, I believe, be viewed in light of our constitutional history and experience. Such a view, I suggest, supports the conclusion that particularly in the federal system, we have made more progress toward an effective compliance with the Sixth Amendment's speedy trial mandate since the enactment of the Speedy Trial Act of 1974 than at any other time in our history.

The Bill of Rights has been an integral part of the Constitution for almost two hundreds years. It must, however, be recognized that the Sixth Amendment's guarantees of an accused's "right to a speedy and public trial" and his right to have "the assistance of counsel for his defense" were long honored only by their breach during most of our history. Although *Powell* v. *Alabama*, 287 U.S. 45 (1932), was decided in 1932 while I was in law school, it was not until the Court decided *Johnson* v. *Zerbst*, 304 U.S. 458 (1938) in 1938, two years after I was admitted to the Bar, that an accused's right to the assistance of counsel was given any real recognition in the trial of a federal criminal case.

And it was not until the Court's 1963 decision of *Gideon* v. *Wainwright*, 372 U.S. 335 (1963), which expressly overruled *Betts* v. *Brady*, 316 U.S. 455 (1943), decided after I had become a federal judge, did all persons accused of a State criminal offense really have an effective right to the assistance of counsel in the trial of a State criminal case.

I think it can fairly be said that the Court's definitive rulings in the seminal cases of *Johnson* v. *Zerbst* and *Gideon* v. *Wainwright* effectively established the

Sixth Amendment's guarantee of an accused's right to the assistance of counsel. The Court simply and flatly held that any conviction obtained in violation of that guaranteed Sixth Amendment right was void, absent a waiver as defined in *Johnson* v. *Zerbst*, 304 U.S. at 464, as "an intentional relinquishment or abandonment of a known right." That clear and concise construction of the Sixth Amendment's right to counsel clause prompted the Congress and the various State legislative bodies to make provision for the appointment of counsel for the trial of both State and federal criminal cases.

The Sixth Amendment's guarantee of the right to a speedy and public trial, however, for reasons I do not quite understand, did not receive much definitive attention in the Supreme Court until 1971 when *United States* v. *Marion*, 404 U.S. 307 (1971) was decided. That case presented a three year pre-indictment delay. A divided Court concluded that in such a case an accused could not look to the Sixth Amendment for the reason that "on its face, the protection of the Amendment is activated only when a criminal prosecution has begun and extends only to those persons who have been 'accused' in the course of that prosecution." 404 U.S. at 313. *Marion*, for reasons which were not articulated in detail, called attention to the fact that "No federal statute of general applicability has been enacted by Congress to enforce the speedy trial provisions of the Sixth Amendment * * * " 404 U.S. at 319.

In the year following *Marion*, the Court considered a post-indictment delay of over five years in a State prosecution when it decided *Barker* v. *Wingo*, 407 U.S. 514 (1972). Although the speedy trial clause of the Sixth Amendment was held to be applicable to State criminal prosecutions, the Court concluded that "The right to a speedy trial is generically different from any of the other rights enshrined in the Constitution for the protection of the accused," 407 U.S. at 519. Indeed, an accused's constitutional right to a speedy trial was described as a right of "amorphous quality" and that the Sixth Amendment's speedy trial right must be given some sort of different treatment than other constitutional rights. 407 U.S. at 522.

Barker v. *Wingo* expressly rejected "the suggestion that we hold that the Constitution requires a criminal defendant to be offered a trial within a specified time period," explaining that "we find no constitutional basis for holding that the speedy trial right can be quantified into a specified number of days or months." 407 U.S. at 523.

The end result of *Barker* v. *Wingo* was that trial courts, both State and federal, were required to apply a "balancing test," a test which the Court conceded "necessarily compels courts to approach speedy trial cases on an ad hoc basis." 407 U.S. at 530.

House Report (Judiciary Committee) No. 93–1508 of November 27, 1974, which accompanied and recommended passage of The Speedy Trial Act of 1974, placed a much more strict construction on the Sixth Amendment's speedy trial mandate than did the Court in *Marion* and *Barker*. In apparent response to the implication of *Marion* that Congress should pass a statute of general applicability, that Report concluded that "the adoption of speedy trial legislation is necessary in order to give real meaning to that Sixth Amendment right." The Report also concluded that "while the Committee believes that the adoption of Rule 50 (b)at the initiative of the courts is a laudable attempt to provide the criminally accused with a speedy trial, it finds that this plan suffers from the same defect which characterizes the decisions of the Supreme Court on the issue of the denial of the right to a speedy trial." U.S. Code Cong. & Adm. News, 93d Cong. 2d Sess. 1974 p, 7406.

I believe that the Congress made the right decision five years ago when it passed the Speedy Trial Act of 1974. I also believe that no one can successfully maintain that the 1974 Act has failed to give real meaning to the speedy trial clause of the Sixth Amendment. To say that, however, is not to say that all problems of implementing the speedy trial mandate of the Sixth Amendment have been solved. It is to say that the Congress should give the most careful consideration to any amendment of the 1974 Act. It is my view that of all the proposals suggested, the alternative recommendation of the Comptroller General is appropriately designed to maintain the progress made over the past five years and, at the same time, permits a necessary moratorium for further study of amendments which may improve the practical application of the principles presently incorporated into the present Act.

One of the most difficult problems of improving district court judicial administration is that the lines of communication between the widely scattered federal district courts is so fragile and ineffective that one district court learns of the existence of more effective and efficient procedures of another district court quite by accident. My suggestion, therefore, is that during the moratorium period your

Subcommittee study the district courts that have done the best jobs in an effort to learn the reasons why those courts have been able to do so. It may be that such a study may throw sufficient light on the subject to suggest other alternatives less radical than a dismissal sanction.

There are many problems relating to speedy trial which simply cannot, in my judgment, be effectively approached by any legislation. As the 1974 House Report stated, the "causes of delay . . . can be remedied only by the concerted action of those who are responsible for operating the system." The problems of delay occasioned by the arrest of defendants prior to indictment, for example, are largely within the control of the Department of Justice. The pre-indictment arrest table on page 42 of Appendix II of the Comptroller General's Report shows a tremendous variance in the percentage of defendants arrested prior to indictment, ranging from only 8.8% in the Eastern District of Virginia and the Western District of Missouri (two of the four districts which believe compliance with the present Act can be achieved) to 33.9% in Central California (a court which expressed the view that full compliance would result in undesirable trade-offs that would decrease the system's ability to promote equal justice).

The question of why it is necessary to arrest a defendant before indictment in other than a relatively small percentage of exceptional cases is a question which should, in my judgment, be regulated by an official policy decision of the Department of Justice rather than by an Act of Congress. So far as I know, however, there is no national policy in regard to that question, with the result that particular districts may be placed under time pressures which could easily be avoided.

And as a further example, I do not think that Congressional legislation, other than a mandatory expansion of the Federal Public Defender system, can really do much about solving the problem of affording court-appointed defense attorneys sufficient time to prepare their cases. That problem is within the control of the district court. Particular district courts, including the court I serve, long ago promulgated Court en banc orders which require the appointment of defense counsel at the very earliest point in the processing of a criminal case. Experience establishes that the earlier defense counsel are appointed and the sooner they are given full access to the details of the government's case in all other than exceptional cases, the earlier everyone will know whether the case will be terminated by plea or trial.

The complexity of the problems relating to speedy trial is reflected by the fact that some of the data submitted by the Comptroller General may be subject to the same criticism which his Report directed to the figures collected by the Judicial Conference of the United States and the Administrative Office of the United States Courts. Specifically, the Report classifies the Western District of Missouri as a district having "a below average caseload per judge." (p. 65). On the other hand, the Middle District of North Carolina, the Eastern District of Michigan and the Western District of Michigan are all described as districts having "above average criminal caseloads per judge." The data describing the characteristics of each of those districts, however, show on its face that Western District of Missouri terminated an average of 200 criminal cases per judge for the year ending July 30, 1974, as contrasted with the terminations of 198 criminal cases per judge in the same period of time in the Middle District of North Carolina; 197 cases per judge in the Eastern District of Michigan and 188 cases per judge in the Western District of Michigan.

The only reason why the caseload of a district which terminated more cases per judge than did three other districts was described as "a below average caseload" must be related to the apparent weight given to the fact that the Western District of Missouri reported that more than ten trial days were devoted only in regard to cases tried in Kansas City, Springfield and Jefferson City and a lesser number of trial days was reported for the trial of cases filed in our St. Joseph and Joplin divisions.

I believe that experience establishes that the number of days a court is required to spend on the bench trying cases, either civil or criminal, is directly related to the effectiveness of its pretrial procedures in both types of cases. Such figures, however, do not bear any established relationship to either the weighted caseload processed by a particular district court or to the efficiency of the procedures utilized by such a court in the administration of either civil or criminal justice.

The strongest caveat that I would state in regard to all raw figures, regardless of who collects and prepares the data, is that a much more detailed evaluation of the type of cases processed in a particular court must be made in order to get any judgment about the difficulty of the caseload of a particular district. A district which, for example, has an office of Special Attorneys attached to the Organized

Crime and Racketeering Section of the Department of Justice out of Washington, D.C. (a so-called "Strike Force" office), as does the Western District of Missouri, must necessarily process a type of case which is not filed in districts not having such an office located in their district. A district having a large military base, as does the Western District of Missouri with Fort Leonard Wood, is required under 18 U.S.C. § 13 to try cases which other districts never hear of. The presiding judge of our Southern Division at Springfield, for example, has on his current docket four first degree murder cases which were allegedly committed on the Fort Leonard Wood reservation.

It is my considered view that the procedures under which all criminal cases are processed in a particular district has a great deal more to do with whether the time requirements of the Act can be complied with than even the type of case processed. However, the type of case processed does have an impact upon whether a particular district will be forced to adjust its procedures and to adopt more modern methods of administering criminal justice.

Circumstances relating to the Congressional determination that the Western District of Missouri did not need any additional judicial manpower from 1961 until the passage of the recent Omnibus Judgeship bill forced the four judges of our Court over the past fifteen years to explore and adopt procedures under which the speedy trial requirements of the Sixth Amendment could be complied with long before the Speedy Trial Act of 1974 was enacted by the Congress. Those procedures will be discussed in the next section of this statement.

II. WESTERN DISTRICT OF MISSOURI PRETRIAL AND TRIAL PROCEDURES

The basic pattern of the procedures of judicial administration which have been followed in the Western District of Missouri for over the past ten years, under which all ordinary criminal cases on its Western Division (Kansas City) docket are processed, are adequately described in a paper I presented to the Seventeenth Annual Meeting of the Judicial Conference of the State of Michigan in 1972. That paper, entitled "Omnibus Pretrial Proceedings: A Review of the Experience for the Western District of Missouri," is published in 58 F.R.D. 270 and includes four Appendices which reproduced (A) the Western District of Missouri Court en banc order providing for omnibus hearings required to be held in all criminal cases which pend on our docket, promulgated November 26, 1968; (B) the form of the omnibus hearing report from the Magistrate to the District Judge; (C) the form of notice of final pretrial conference to be held in all criminal cases than being processed by the Judges of Division I and Division II of our Court, who were then experimenting with a joint criminal trial docket for ordinary criminal cases; and (D) the form of notice and order setting the trial docket for ordinary criminal cases which pended before those two judges.

Appendix A and B are still in current use; no modification being required by the passage of the Speedy Trial Act of 1974. I am attaching a copy of a General Order of our Court en banc entered December 12, 1975, which authorized our magistrates to arraign defendants and to accept pleas of not guilty, together with a copy of the Notice of Pretrial Conference, filed January 5, 1979; a copy of the Notice and Order entered January 12, 1979, setting a joint trial docket to commence January 22, 1979, and a copy of the Amended Notice and Order entered January 18, 1979, which set the docket of cases actually to be tried. The attached orders and notices have taken the place of Appendix C and Appendix D attached to my 1972 paper and reflect the present procedures applicable to all criminal cases filed in our Western Division at Kansas City.

The attached notices and orders show the manner in which the 14 cases on the original trial docket, in which pretrial conferences were conducted before the Magistrate on January 11 and 12, 1979, were reduced to 6 cases which actually were set for trial for the week commencing January 22, 1979. Examination of the table set forth later in this statement shows that 7 of the original 14 cases were terminated by guilty pleas, between January 11, 1979, and January 22, 1979; only one case was actually tried (guilty verdict); and 6 cases were continued for processing on the March 12, 1979, docket, on which all 6 cases were terminated by pleas of guilty.

The principal modification made in the procedures described in the 1972 paper has been to expand the two-judge joint criminal docket experiment which we were conducting in 1972 to include all four judges of our Court. The joint dockets for the trial of ordinary criminal cases must, of course, be set at least a year in advance so that all judges are able to hold themselves available for at least one week of concentrated judicial time to handle such trial dockets at intervals of approximately 60 or 70 days.

As a practical matter, known availability of sufficient judicial manpower to try every case on a particular trial docket produces the generally predictable number of guilty pleas so that it has indeed been a rare docket when all four judges have been required to sit. The joint trial docket system for four rather than only two judges was put in effect shortly after the Speedy Trial Act of 1974 went into effect.

I requested the Clerk to give me accurate data since May, 1976, in regard to all joint trial dockets of ordinary criminal cases on our Western Division docket conducted since that date. Those results are tabulated as follows:

Date of joint trial docket	Defendants	Guilty pleas	Trials	Dismissals	Cases continued
May 24, 1976	36	23	3	8	2
July 12, 1976	14	4	4	4	2
Oct. 4, 1976	29	13	3	3	10
Dec. 13, 1976	27	19	1	2	5
Feb. 14, 1977	38	18	2	2	16
Apr. 18, 1977	32	16	5	5	6
June 20, 1977	52	27	9	5	11
Sept. 2, 1977	59	25	5	7	22
Nov. 14, 1977	52	25	5	2	20
Jan. 3, 1978	19	15	0	2	2
Jan. 27, 1978	21	10	5	1	5
Apr. 17, 1978	16	5	8	3	0
June 5, 1978	23	15	4	2	2
July 24, 1978	15	7	5	2	1
Sept. 11, 1978	14	5	1	0	8
Oct. 23, 1978	10	6	2	1	1
Dec. 11, 1978	13	6	0	1	6
Jan. 22, 1979	14	7	1	0	6
Mar. 12, 1979	26	12	1	3	10
Apr. 16, 1979	32	19	1	6	6
June 4, 1979	20	8	2	3	7
Total	562	285	77	62	143

It must be understood that the above figures do not include all criminal cases which have pended on the criminal docket of the Western District of Missouri. They include only cases filed in the Western Division (Kansas City) of our Court which have been classified as an "ordinary criminal case;" the trial of which is considered likely to take not longer than three days.

It must also be understood that each Judge of our Court must arrange special settings for his complex criminal cases, such as cases filed by the Strike Force, mail fraud, net worth income tax, and criminal antitrust cases. The figures also do not include any of the criminal cases filed in any of our four outstate divisions in which we are required to hold court in St. Joseph, Jefferson City, Joplin and Springfield, Missouri. The presiding judge of each of the outstate divisions must set and try all those criminal cases without the help of the other judges. The criminal docket in our Southern Division at Springfield alone requires the presiding judge of that division to process more criminal cases in that division alone than are processed in many of the other judicial districts in the federal system.

The system of joint trial of ordinary criminal cases, however, has enabled the four judges of the Western District of Missouri to keep their dockets current and in compliance with the present requirements of the Speedy Trial Act of 1974. A glance at the table reflecting the processing of ordinary Western Division criminal cases shows that a system of appropriate pretrial procedures and regularly established trial dockets permitted our court to dispose of 562 of those cases with only 77 trials, scattered over 21 regular trial dockets, none of which extended beyond one week in duration. Only two of those dockets required more than five defendants to be tried; certainly not an impossible task for four judges ready and available for a full week's service. The dockets which involved trials of eight and nine defendants, respectively, were cleaned up in one week of trials.

Experience in our district establishes that we can usually count on only 10 to 15 percent of the cases which are set for trial actually going to trial. Approximately 50 percent of all cases are terminated by pleas of guilty and somewhere between 5 to 10 percent are dismissed. It is also to be anticipated that a substantial number of cases will be continued to the next regular trial docket, usually upon motion filed by the defense.

The 148 total continuances granted, however, is a somewhat deceptive raw figure. For we have learned by experience that cases which have only been pending for an exceedingly short period of time should nevertheless be placed on the next regular trial docket even though the omnibus hearing proceeding and the mandatory pretrial hearing will have been completed only a day or two before the order setting the regular trial docket is entered. Experience establishes that if such cases are set for trial, the usual anticipated percentage of defendants will enter pleas of guilty and the case is thus terminated. On the other hand, if defense counsel need more time, a defense motion for continuance to the next regular trial docket may be granted and the case will be disposed of on the next regularly scheduled docket. The important principle of judicial administration to be applied as a general rule is that all cases in which continuances are granted must be placed on the next regular trial docket; otherwise judicial control of the case will be lost.

I am convinced that our Court en banc procedures under which we process our criminal docket is sound for our particular district and that with the two additional judges allocated to our Court, our Court will be able to meet the present requirements of the Speedy Trial Act of 1974 without substantial difficulty. Whether other districts will be able to do so will depend, in my judgment, upon the procedures and principles of judicial administration they adopt to meet the challenge.

One of the overriding difficulties in this and other areas of district court judicial administration is created by what the Comptroller General's Report calls the "Administrative Structure of the Judiciary" (p. 5), a matter I shall discuss in the next part of this statement.

III. THE ADMINISTRATIVE STRUCTURE OF THE JUDICIARY

The Comptroller General's Report devotes three pages to what is labeled "The Administrative Structure of the Judiciary" (p. 5–7). The first paragraph of that description states:

"The judicial branch of the Government has 3 levels of administration—the Judicial Conference of the United States, the judicial councils of the 11 circuits, and the district courts. Associated with this structure are the judicial conferences of the circuits, the Administrative Office of the U.S. Courts, and the Federal Judicial Center."

The Report does not advise the Congress that two of the "levels of administration"—the Judicial Conference of the United States and judicial councils of the 11 circuits—were created by the Act of August 7, 1939, 53 Stat. 1223, and that, except for the addition of token district judge representation on the Judicial Conference of the United States, by an amendment of 28 U.S.C. 331 in 1957, there has been no real examination or change in the basic administrative structure of the judicial branch for a period of forty years.

The Administrative Office of the U.S. Courts was also created by the Act of August 7, 1939. Legislation creating the Federal Judicial Center is, of course, of more recent vintage and reflects a recognition on the part of the Congress that the hopes held by the Congress in 1939 in regard to how the Administrative Office was to function had not been realized.

The Comptroller General's Report accurately states that "the Judicial Conference is not vested with the day-to-day administrative responsibilities for the federal judicial system" (p. 5). It is thus apparent that what is implicitly described as the top level of administration has neither power nor responsibility to improve the administration of justice in the district courts of the United States. The Report somewhat vaguely suggests that each of the 11 circuit judicial councils, implicitly described as the middle level of administration, "take such action as may be appropriate" and that "additionally, the councils promulgate orders to promote the effective and expeditious administration of the business of the courts within their circuit." (p. 5). The Report does not make reference to any action or any orders which any circuit judicial council may have promulgated at any time over the past forty years to promote the expeditious administration of the business of the courts within their circuits.

The Congress, however, continues to enact legislation imposing still additional duties upon the circuit councils, including the appointment or approval of officers which serve only a district court, apparently acting under the impression that the circuit councils do in fact provide a viable and appropriate second level of judicial administration for the district courts within each of the eleven circuits.

After having described "the district courts" as some sort of a unit which comprised one of the three "levels of administration," the Report recognizes that 89 separate and independent district courts have been ordained and established by the Congress. The Report implicitly concedes that those separate courts cannot properly be considered a monolithic and separate "level of administration." For the Report accurately states that "the judges of each district court * * * formulate local rules and orders and generally determine how the court's internal affairs will be handled." Such an arrangement, I suggest, can hardly be called a "level" of a national administrative structure.

Some five years ago I was asked to deliver a paper to the then recently organized National Conference of Federal Trial Judges at the 1974 annual meeting of the American Bar Association. That paper is published under the title "Reflections on the History of Circuit Judicial Councils and Circuit Judicial Conferences," 64 F.R.D. 201. Much of the history reviewed in that paper is accurately stated in Mr. Justice Harlan's concurring opinion in *Chandler* v. *Judicial Council*, 398 U.S. 74 (1970), a case involving one of the few orders ever promulgated by a circuit judicial council. Mr. Justice Harlan accurately stated that one of the major reasons relied upon by the Congress for creating a judicial council composed solely of appellate judges was that such judges "would have a great deal of first hand knowledge about the district courts and about the work and conduct of the individual district judges." 398 U.S. at 127.

Mr. Justice Harlan was, of course, referring to a statement made by Chief Justice Hughes during the course of the legislative proceeding in which he stated that "the circuit judges know the work of the district judges by their records that they are constantly examining, while the Supreme Court gets only an occasional one."

I reviewed and summarized in my 1974 paper Professor Fish's article entitled "The Circuit Councils: Rusty Hinges of Federal Judicial Administration," which Mr. Justice Harlan cited with approval in *Chandler*; the views expressed by the present Chief Justice at a regional meeting of the American Bar Association at Atlanta, back in 1958, when he was a circuit judge, in which he reviewed the Report of the 1957 Attorney General's Conference on Court Congestion; the conclusions stated in the report prepared in 1959 by Paul J. Cotter at the request of the Senate Appropriations Committee; and comments made by former Chairman Cellar of the House Judiciary Committee, all of which reflected unhappiness with the manner in which the judicial machinery provided by the Congress for the judicial branch in the Act of 1939 was actually operating.

I concluded that paper with a suggestion that the federal trial judges should take it upon themselves to form voluntary district judges associations in each of the various circuits so that, after an appropriate period of time, Congressional relief could be sought to provide a more adequate administrative structure for the judicial branch in a sound and intelligent manner. In support of that idea I ended my paper with the following three paragraphs:

"I believe the history of Judicial Councils and Judicial Conferences teaches that no one can reasonably expect any immediate or fundamental change in the judicial administration machinery presently provided by the Congress. Twice in the past thirteen years, first in 1961 and most recently in this year of 1974, the Judicial Conference, dominated by appellate judges, has concluded that no changes are necessary in the judicial administration machinery of the federal judicial system.

"I am convinced in my own mind that one of the reasons the present machinery has not operated as well as Congress expected is that the machinery was designed on the basis of theories which were based on inaccurate factual assumptions and not upon the basis of experience. I, for one, simply do not believe that appellate judges can become informed of the problems which trial judges face by reading the transcripts of the relatively few cases processed by the trial court which are appealed to the court of appeals.

"And, finally, I am convinced that there is a great deal of unharnessed manpower on the district courts and among members of the Bar who practice in every district in the land which feel a collective sense of frustration in regard to the lack of official specific attention being paid to the many acute problems of judicial administration which exist on the trial court level. * * * Nothing, however, in my judgment is going to be done about those problems in a concrete manner until a careful, thoughtful, appropriately documented report, complete with a recommendation of a specific course of Congressional or judicial action is prepared and presented to those who have the duty, power, and responsibility to take official action. And I frankly do not believe that anyone other than experienced district judges and experienced trial lawyers, assisted by adequate staff support, can effectively accomplish such a mission."

In 1974 there were only two voluntary district judges associations in existence. The first voluntary District Judges Association was organized in the Ninth Circuit in the 1950's. The organization of that single voluntary association had a great deal to do with the enactment of the 1957 amendment which gave token representation to district judges on the Judicial Conference of the United States. The district judges of the Fifth Circuit formed a voluntary association sometime in the early 1970's.

Since 1974, however, the district judges in all circuits, except the First, Second and District of Columbia, have organized voluntary associations. Those voluntary associations are very closely integrated with the National Conference of Federal Trial Judges which, for the past several years, has cooperated with the Federal Judicial Center in holding workshops for federal district judges at regular intervals throughout the country.

I do not have any specific recommendations as to how the administrative structure of the judiciary should presently be changed other than expressing the view that, in my judgment, adequate and appropriate representation should be accorded the district judges who have the experience, responsibility, and interest in dealing with the most complicated problems of judicial administration with which all district judges must deal on a daily basis.

I am fully convinced, however, that the question of whether the judicial branch has an adequate administrative structure at the present time is a question which challenges all of us who occupy positions of responsibility. It is my view that the Congress should take a long, hard look at the administrative machinery designed forty years ago and that it consider whether that machinery is the best that can be designed to meet such problems as compliance with the Speedy Trial Act of 1974 and other equally complex and difficult problems of district court judicial administration which are likely to get more rather than less complicated as time goes on.

As a past chairman of the District Judges Association for the Eighth Circuit and as a past chairman of the National Conference of Federal Trial Judges, I am confident that the district judges of the United States will respond to any inquiry with accurate information and will welcome the opportunity to contribute ideas to the reexamination which I urge.

IV. TITLE II OF THE SPEEDY TRIAL ACT—PRETRIAL SERVICES

Subcommittee Counsel Hayden Gregory advised me that the Subcommittee would like for me to comment on the experience of the Western District of Missouri as one of the ten districts selected as a pretrial service agency demonstration district under Title II of the Speedy Trial Act of 1974.

It is appropriate to state as a matter of background that when I entered upon service in 1962, the Western District of Missouri's practices and procedures in regard to bail were quite typical of the federal system generally; the rich made bail—the poor stayed in jail. Within a year after I was appointed, however, I received and studied a copy of the 1963 "Report of the Attorney General's Committee on Poverty and the Administration of Federal Criminal Justice." That Report recommended that the Department of Justice adopt a policy favoring the pretrial release of accused persons on their own recognizance. The following year, in May, 1964, the National Conference on Bail and Criminal Justice was held here in Washington. The final report of that conference described bail procedures which had been adopted by, and were being followed in the Eastern District of Michigan under the leadership of Judge Wade H. McCree, Jr. After consultation with Judge McCree, and with the late Judge Talbot Smith of the same court, the Western District of Missouri made quite fundamental changes in its practices and procedures relating to bail in 1964 and, generally speaking, adopted the progressive procedures then in effect in the Eastern District of Michigan.

It is thus apparent that the enactment of the Bail Reform Act of 1966, 18 U.S.C. § 3141 did not require any substantial change in the procedures which our Court had adopted by order of our Court en banc. Experience with the operation of the Bail Reform Act of 1966, however, established that while the judicial officer granting bail was authorized by § 3146(a)(1) to "place the person in the custody of a designated person or organization agreeing to supervise him," such persons and organizations were extremely difficult to find. The provisions of the 1966 Act were also deficient in providing how accurate information concerning an accused could be given the judicial officer setting bail before the bail hearing was conducted.

58-721 O - 80 - 3

Our Court was therefore pleased to learn that Congress had tacked Title II establishing Pretrial Service Agencies onto the Speedy Trial Act of 1974. We were also happy to have been selected as one of the courts which would experiment with a Board of Trustees Pretrial Service Agency. I was designated to serve as Chairman of our Board of Trustees and have so served throughout the experimental period.

It is my understanding that the Director of the Administrative Office of the United States Courts will soon file his Fourth Annual Report which, pursuant to § 3155, will include data regarding the effectiveness of the ten pretrial service agencies which have been in operation and a recommendation as to whether pretrial service agencies should be expanded to other district courts. I am familiar with the three previous Annual Reports of the Director, with the Comptroller General's Report entitled "The Federal Bail Process Fosters Inequities," (GGD 78–105), and with the study conducted by the Federal Judicial Center.

Based on that data and on the first-hand experience with our Pretrial Service Agency in the Western District of Missouri it is my view that:

1. Congress should mandatorily require the establishment of a pretrial service agency in all district courts which have a sufficient volume of criminal cases to qualify for the establishment of a Federal Public Defender's office. I believe an additional provision, however, should be made which would permit a district court with a lesser volume of criminal cases to establish a pretrial service agency provided, however, that such establishment would not require the addition of any personnel other than that authorized for the Probation Office of such district.

2. It is my view that the Pretrial Service Agencies should be independent of the Probation Office at least to the extent that the Chief Pretrial Service officer should, in the same pattern as the Chief Probation Officer, be appointed by, report directly to, and be responsible to the District Court en banc.

I am familiar with the fact that different persons have different views in regard to this matter. My study of the question and my direct experience convinces me that there is a foreseeable likelihood that the mission of a pretrial service agency could very well be frustrated unless the Chief Pretrial Service officer has the same independent status as does the Chief Probation Officer under present law. I would not oppose, indeed I think there is merit in the idea, an arrangement under which line-officers in the probation office could be trained to serve as pretrial service officers so that they could be shifted from one service to the other as the circumstances may require.

3. It is my most considered judgment that the Chief Pretrial Service officer should be appointed by the judges of the district court, sitting en banc, in accordance with minimum qualifications and standards as may be established by the Administrative Office. I would strongly oppose the shuffle of such an appointment duty to either the Judicial Council of the Circuit, to the Director of the Administrative Office, or to any other agency other than the judges of the District Court, sitting en banc.

I see no reason why the district courts should not be required to publicly announce a vacancy in the office and to receive and consider all applications and nominations which may be forthcoming from interested members of the public. The Western District of Missouri has followed such a practice for the past fifteen years in connection with all appointments which our Court is authorized to make. Our experience has been most satisfactory.

4. I would be most hopeful that the Congress will receive a firm recommendation from the Director of the Administrative Office in regard to the question of expansion and that this question is not left up in the air for some future determination by either the Judicial Conference of the United States or the Judicial Council of a particular circuit.

I believe that experience has established that district courts which were sensitive to the Eighth Amendment's command that excessive bail shall not be required did not need a Congressional enactment to alter their procedures in a manner which permitted the release of all persons on their personal recognizance who could be released without predictable danger to the community.

Experience establishes that those district courts which did not hold such a view did nothing about their bail procedures until the Bail Reform Act of 1966 was passed by the Congress. District courts which may view pretrial release procedures in the same manner that earlier courts viewed bail are not likely, in my judgment, to take any action, nor would such courts permit the Administrative Office or the Judicial Council of their Circuit to take any action in regard to pretrial release unless and until required to do so by an express expansion of Title II of the Speedy Trial Act of 1974 by the Congress.

5. The data presented to the Congress quite clearly indicates that particular districts have done a much better job in interviewing the accused before this initial appearance before the judicial officer who sets bail. Western District of Missouri experience suggests that a great number of factors influence the ability to comply with the spirit of Title II which anticipates that the judicial officer will have accurate and verified information at the time the bail decision is made. Our Court has been able to persuade all arresting agencies to immediately contact the pretrial service officer upon arrest. Such a practice tends to smooth and accelerate the procedural flow of the particular case.

I entertain some doubt, however, that such a detail should be included in an Act of Congress. It seems to me that if even a reluctant district court is required to operate a pretrial service agency, it will soon figure out that solution for itself. A directive from the Department of Justice would accomplish that objective on a national scale.

I am grateful for the opportunity of having been invited to express my personal views in regard to both Title I and Title II of the Speedy Trial Act of 1974. I commend the Congress on its enactment of that legislation. I am hopeful that what has been stated may be helpful in improving the administration of criminal justice in accordance with the mandates of the Sixth and Eighth Amendments to the Constitution of the United States.

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI COURT EN BANC

GENERAL ORDER AUTHORIZING UNITED STATES MAGISTRATES TO ARRAIGN CRIMINAL DEFENDANTS AND ACCEPT PLEAS OF NOT GUILTY

Until further order of the Court en banc, it is

ORDERED that the United States magistrates, pursuant to Section 636, Title 28, United States Code, and Rule 26(A)(3)(p) of the Rules of Procedure of the United States District Court for the Western District of Missouri, be, and they are hereby, authorized to arraign criminal defendants at any time that a defendant is appearing before a magistrate in connection with any proceeding or is appearing solely for arraignment on the order of the magistrate or on the request of a defendant or counsel. At any such arraignment, the magistrate is authorized to accept and record a plea of not guilty. If the defendant announces an intention to enter a plea of guilty or nolo contendere, the magistrate shall enter a plea of not guilty for the defendant and immediately notify a district judge of the announcement by the defendant of the intention to enter a plea of guilty or nolo contendere and recommend that the criminal action be set before the district judge for a change of plea. During the arraignment proceeding, the magistrate shall set a time for the making of all pretrial motions or requests, which time shall be 10 days after the date of the arraignment in absence of exceptional circumstances.

WILLIAM H. BECKER,
Chief District Judge.
JOHN W. OLIVER,
District Judge.
WILLIAM R. COLLINSON,
District Judge.
ELMO B. HUNTER,
District Judge.

Kansas City, Mo., December 12, 1975.

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI WESTERN DIVISION

NOTICE OF PRETRIAL CONFERENCE

Pursuant to the directions of the Court en banc acting by and through Judge John W. Oliver, the following criminal actions are set for pretrial conferences before Chief United States Magistrate Calvin K. Hamilton on January 11 and 12, 1979, commencing at the times shown below, or as soon thereafter as they may be reached or heard. No defendant or counsel will be excused because of failure to reach the criminal action at the precise time fixed unless otherwise hereafter formally ordered by the Chief United States Magistrate.

Counsel and defendants are requested to appear at least ten (10) minutes before their case is schedule to be heard. The attorneys, including counsel for the Government, who actually will handle the trial shall attend the pretrial conference. Each defendant is required to be present.

On or before Noon, January 10, 1978, counsel shall file with the Clerk the following:

(*a*) Requested instructions to the jury (each instruction is to be numbered);
(*b*) Requested questions to be asked of the jury on voir dire examination;
(*c*) Appropriate memorandum briefs on anticipated questions on the admissibility of evidence;
(*d*) Appropriate memorandum briefs on any other questions of law on which the parties desire pretrial rulings;
(*e*) Suggestions of any additional matters that should be added to the agenda as stated below.

The agenda at the pretrial conference will include:

(*a*) Pending motions
(*b*) Estimated time for trial
(*c*) Discovery
(*d*) Stipulations
(*e*) Premarking of exhibits
(*f*) Witnesses to be called at trial
(*g*) Change of plea or dismissal of charge.

Attorneys are instructed to be prepared to make such announcements as may be necessary in order that the cases may be set for trial or other disposition. It is contemplated that these cases will be set for trial on an accelerated joint jury trial docket with all the available judges of the Court sitting, commencing Monday, January 22, 1979. After Noon, Tuesday, January 16, 1979, a plea bargain agreement, including dismissal of counts, will not be considered or accepted, in the absence of exceptional circumstances or for good cause shown or appearing.

Counsel are directed to meet to discuss exhibits, stipulations, and other matters before the pretrial conference.

All documents and other exhibits to be offered in evidence at the trial shall be brought to the pretrial conference so that they can be premarked.

All pretrial conferences shall be held in Room 907A, United States Courthouse, 811 Grand Avenue, Kansas City, Missouri.

JAN. 11, 1979

78-00153-01-CR-W-1 (9 a.m.)	United States v. Paul V. Bowman	Cynthia A. Clark/David Williams.
78-00173-01-CR-W-1 (9:20 a.m.)	United States v. Jerry L. Mulnix	Robert E. Larsen/ Roy W. Brown, James A. Wheeler.
78-00181-01-CR-W-1 (9:40 a.m.)	United States v. Marilyn Gorman	J. Whitfield Moody/J. Martin Kerr.
78-00049-01-CR-W-2 (10 a.m.)	United States v. Richard C. Hiscott	Cynthia A. Clark/John W. Frankum.
78-00184-01-CR-W-2 (10:40 a.m.)	United States v. Efton Lyle Means	Anthony P. Nugent, Jr./A. Glenn Sowders.
78-00172-01-CR-W-2 (11:20 a.m.)	United States v. Anthony M. Latorre	J. Whitfield Moody/John W. Frankum.
78-00141-01-CR-W-2 (1:30 p.m.)	United States v. Vincent P. Sheehan	J. Whitfield Moody/James R. Wyrsch.
78-00127-01-CR-W-3 (2:10 p.m.)	United States v. Deborah R. Lamb	Stephen L. Hill/Thomas M. Bradshaw.

JAN. 12, 1979

78-00182-01-CR-W-3 (9:30 a.m.)	United States v. Robert W. Gorman	J. Whitfield Moody/Thomas M. Bradshaw.
78-00183-01/02-CR-W-3 (9:50 a.m.)	United States v. Leslie M. Hughes, Diana K. Hughes.	Anthony P. Nugent, Jr./Daniel J. Matula, Daniel J. Matula.
78-00175-01-CR-W-4 (10:10 a.m.)	United States v. Junious T. Hamilton	Stephen L. Hill/Benjamin D. Entine.
78-00180-01-CR-W-4 (10:30 a.m.)	United States v. Donald G. Beardslee	J. Whitfield Moody/Robert B. Thomson.
78-04012-01-CR-C (10:50 a.m.)	United States v. Richard A. Cooper	J. Whitfield Moody/Ronald L. Hall.
78-04014-01-CR-C (11:10 a.m.)	United States v. Sheron Ann Prater	Stephen L. Hill/Gary Fleming.
78-05008-01-CR-SJ (11:30 a.m.)	United State v. Faye Carol Elbert	J. Whitfield Moody/Thomas M. Bradshaw.

CALVIN K. HAMILTON,
Chief United States Magistrate.
Kansas City, Missouri, January 5, 1979.

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI WESTERN DIVISION

NOTICE AND ORDER SETTING ACCELERATED CRIMINAL JURY TRIAL DOCKET

I. By order of the Court en banc, the following accelerated criminal jury trial docket is set before the Honorable Judges John W. Oliver, William R. Collinson, Russell G. Clark and Elmo B. Hunter.

II. The trial of the cases will begin in all divisions at 9:30 a.m., Monday, January 22, 1979. The trial of the cases will continue during the period commencing January 22, 1979, and continuing to the including Saturday, February 3, 1979. Unless otherwise noted all cases will be tried in the order they are listed on the amended docket which will be published by or before January 18, 1979. Trial of the next case on the docket will commence when the trial of a preceding case is concluded and will, at that time, be assigned to the first open division.

III. Counsel are requested to arrange their schedules for this period so that no request for postponement will be made. None of the cases set for trial during this period will be continued because of conflicting engagements.

IV. Counsel are directed to follow the progress of the preceding cases. It is absolutely necessary that the Clerk be notified if a change of plea is to be tendered so that counsel in other cases may be kept advised when their case(s) is expected to be reached for trial.

V. A change of plea tendered prior to the time the case is assigned to a judge for trial will be taken and sentence will be imposed by the judge to whom the case was assigned by random selection when the indictment or information was filed. A change of plea tendered after the case is assigned to a judge for trial will be taken and sentence will be imposed by that judge.

VI. After Noon, Tuesday, January 16, 1979, a plea bargain agreement, including the dismissal of counts, will not be considered or accepted, in the absence of exceptional circumstances or for good cause shown or appearing.

VII. If not previously filed, counsel for each party is requested to file, in writing, with the Clerk, not later than Noon on Friday, January 19, 1979:

A. Requests in regard to the Court's instructions to the jury that can be anticipated; and

B. Requests in regard to any questions they would like the Court to ask on voir dire examination of the jury.

VIII. Counsel for each party is directed to file such requests for instructions to be included in the charge not later than the time the plaintiff is given opportunity to make an opening statement.

78-00153-01-CR-W-1	United States of America v. Paul V. Bowman.	Cynthia A. Clark/David F. Williams.
78-00184-01-CR-W-2	United States of America v. Efton Lyle Means.	Anthony P. Nugent, Jr./A. Glenn Sowders.
78-00176-01-CR-W-3	United States of America v. Deborah R. Lamb.	Stephen L. Hill/Thomas M. Bradshaw.
78-00180-01-CR-W-4, 78-00180-02-CR-W-4.	United States of America v. Robert W. Gorman, Donald G. Beardslee.	J. Whitfield Moody/Thomas M. Bradshaw, Robert B. Thomson.
78-00173-01-CR-W-1	United States of America v. Jerry L. Mulnix.	Robert E. Larsen, Roy W. Brown.
78-00049-01-CR-W-3	United States of America v. Richard C. Hiscott	Robert E. Larsen/John W. Frankum.
78-00183-01-CR-W-3, 78-00183-02-CR-W-3.	United States of America v. Leslie M. Hughes, Diana K. Hughes.	Anthony P. Nugent, Jr./Daniel J. Matula, Daniel J. Matula.
79-00006-01-CR-W-3, 79-00006-02-CR-W-3.	United States of America v. Gus Badale, James Giordana.	William Zleit, Sheryle Randol/Byron Fox, Gerald Rosen.
79-00007-01-CR-W-4	United States of America v. Haskell A. Cothran.	Eugene C. Napier/Benjamin D. Entine.
79-00009-01-CR-W-4	United States of America v. Charles V. Scola.	William Keefer/C. John Forge, Jr.
78-00175-01-CR-W-4	United States of America v. Junious T. Hamilton.	Stephen L. Hill/Benjamin D. Entine.

By direction of the court en banc, United States District Court for the Western District of Missouri.

R. F. CONNOR, *Clerk.*

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

AMENDED NOTICE AND ORDER SETTING ACCELERATED CRIMINAL JURY TRIAL DOCKET

I. By order of the Court en banc, the following accelerated criminal jury trial docket is set before the Honorable Judges John W. Oliver, William R. Collinson, Elmo B. Hunter, and Russell G. Clark.

II. The trial of the cases will begin in all divisions at 9:30 a.m., Monday, January 22, 1979. The trial of the cases will continue during the period commencing January 22, 1979, and continuing to and including Saturday, February 3, 1979, unless all trials are completed before February 3, 1979. All cases on this docket will be tried in the order they are listed. Trial of the next case on the docket will commence when the trial of a preceding case is concluded and will, at that time, be assigned to the first open division.

III. Counsel are requested to arrange their schedules for this period so that no request for postponement will be made. None of the cases set for trial during this period will be continued because of conflicting engagements.

IV. Counsel are directed to follow the progress of the preceding cases so that they may be aware when their cases(s) will be expected to be reached for trial.

V. If not previously filed, counsel for each party is requested to file, in writing with the Clerk, not later than Noon on Friday, January 19, 1979:

A. Requests in regard to the Court's instructions to the jury that can be anticipated; and

B. Requests in regard to any questions they would like the Court to ask on voir dire examination of the jury.

VI. Counsel for each party is directed to file such requests for instructions to be included in the charge not later than the time the plaintiff is given the opportunity to make an opening statement.

78-00153-01-CR-W-1	United States of America v. Paul V. Bowman.	Cynthia A. Clark/David F. Williams.
78-00049-01-CR-W-3	United States of America v. Richard C. Hiscott.	J. Whitfield Moody/John W. Frankum.
78-00173-01-CR-W-1	United States of America v. Jerry L. Mulnix.	Robert E. Larsen/Roy W. Brown.
78-00176-01-CR-W-3	United States of America v. Deborah R. Lamb.	Stephen L. Hill/Thomas M. Bradshaw.
78-00183-01-CR-W-3. 78-00183-02-CR-W-3.	United States of America v. Leslie M. Hughes, Diana K. Hughes.	Anthony P. Nugent, Jr./Daniel J. Matula, Daniel J. Matula.
79-00007-01-CR-W-4	United States of America v. Haskell A. Cothran.	Eugene C. Napier/Benjamin D. Entine.

By direction of the court en banc, United States District Court for the Western District of Missouri.

R. F. CONNOR, *Clerk*.

TESTIMONY OF HON. JOHN W. OLIVER, CHIEF JUDGE, U.S. DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI, FORMER PRESIDENT OF THE DISTRICT JUDGES ASSOCIATION FOR THE EIGHTH CIRCUIT, PAST CHAIRMAN OF THE AMERICAN BAR ASSOCIATION'S NATIONAL CONFERENCE OF FEDERAL TRIAL JUDGES

Judge OLIVER. Thank you very much, Mr. Chairman. I am very happy to be here and make any contribution that can be made.

It always seemed to me that discussion of the Speedy Trial Act, in the final analysis, reduces itself to whether someone is really in favor of the sixth amendment and whether the sixth amendment should mean what it says.

Our court became concerned both with the right-of-assistance clause and a speedy trial clause back in the sixties. I remember that one of my law clerks suggested that because we had honored a breach of the constitutional guarantees over the years, that I didn't read the

Speedy Trial Act properly. He said you don't understand, Judge, defendants want an unspeedy trial, that is what the Constitution means as far as the defendant is concerned.

I think the second prefatory observation I would make is that when studies are conducted in connection with compliance with the Speedy Trial Act of 1974, which in my judgment gave more real meaning to the sixth amendment than anything that has happened throughout our history, those studies must focus attention on the specific time frames provided in the act which the Supreme Court almost explicitly invited the Congress to establish. The Supreme Court considered the sixth amendment to be some sort of amorphous character and to be treated differently from other constitutional guarantees.

When studies are made, however, it seems to me that concentration is devoted on districts which, for one reason or other, simply have not modified their practice and procedures to meet the challenge of the new act. Such districts are prone to present all kinds of reasons why one can't get from A to B.

Districts which have been able to comply and which have adapted procedures different from the past, which they have been carrying out over a substantial period of time, are not studied.

The principles of judicial administration consideration applied in the various districts aren't written up anywhere; with the result that this difficult, complex area almost reduces itself to a study of the total raw figures from 89 separate, independent district courts running pretty much under their own supervision and without any conscious effort of applying established procedures of judicial administration that have been applied successfully in any number of districts.

I have filed at the request of Chairman Rodino, a statement that is divided in four parts basically. The first part contains an expression of my views in regard to the various proposals to amend title I as suggested by the Department of Justice and the Judicial Conference. For reasons I have stated in detail. I expressed the view that the alternative suggestion made by the Comptroller General to simply postpone the dismissal sanction for a period of 18 months or 2 years or perhaps even longer, may be the best available proposals to accept at the present time. I recommended keeping the present time frames as they are.

The first part of my statement is therefore focused on the Comptroller General's report. The Western District of Missouri was one of the eight districts that were studied in detail in connection with that report.

Part II of my statement outlines the procedures which have been followed in the Western District of Missouri since the promulgation of an order of the court en banc order on November 26, 1968, effective December 7, Pearl Harbor Day, 1968.

I said what I knew about the omnibus hearing procedures which are applied to every case on the docket of the Western District of Missouri. And I set forth the experience in the Western District of Missouri for the first 4 years of our experiment with that court order, 1968 to 1972.

Part III of the statement was prepared as a result of telephone conversations that I had with Mr. Gregory and generally reiterates and expands views I have expressed over the years in regard to what I believe to be the inadequate administrative structure for the judicial branch of the United States, created some 40 years ago for a relatively small judiciary. That structure was created in the aftermath of President Roosevelt's proposed Supreme Court legislation during the first part of his second administration.

And except for some very minor changes, that administrative structure is what we operate under today.

Mr. CONYERS. Pretty outdated, isn't it?

Judge OLIVER. In my judgment it is. The ability to communicate a good idea of judicial administration is extremely difficult and good ideas are learned almost by accident by contacts that the experienced judges, one with the other, have with each other when we are talking shop. Any systematized transmittal of effective principles of judicial administration, as distinguished from the transmittal of a few law review articles, simply doesn't take place.

The fourth part of this statement was again prepared at the request of counsel. It expresses my views in regard to title II of the Speedy Trial Act which the Congress tacked on to title I back in 1974. The Western District of Missouri was one of the demonstration districts of the 10 provided, our district being a board of trustees district, operating independently from the probation office.

In part IV, in general, I expressed a hope for substantial expansion of title II and also for the maintenance of the independence in the pretrial services agencies, which has a bit of a different mission than probation. I recommend that the chief pretrial service officer should be appointed by the court en banc of the district court which he serves or she serves, and he or she be given an equal status to that of the chief probation officer of the district. I view the pretrial services agency experiment with great favor.

We learned a great deal about bail a number of years ago from the Eastern District of Michigan and the court made substantial changes by the adoption of court en banc procedures long before the Congress was almost compelled to pass the Bail Reform Act of 1966. Prior to 1966, the Department of Justice and most of the district courts did not do anything about bail except to treat bail as it had always been treated. It really didn't make much difference how long you kept people in jail without bail whether they needed to be kept there or whether they didn't.

My general overall reaction is one of high commendation to the Congress for its passage of the Speedy Trial Act. That act has certainly produced improvement. Such is my reaction to both title I and title II.

I will be happy to respond to any questions that I am able to, under the circumstances.

Mr. CONYERS. Well, thank you, Judge. I only have one thing that has begun to enter my mind as we get down to business along with the Federal legislature. I keep thinking that all of these experiments that were going on in the last couple of years were helpful; they were instructive, but only relatively so. And we will never know until we start off somewhere.

And what I'm thinking, really, is to just go back and forth with you at this point. What if we let the act go into operation as it is now? And it seems to me, coming back to it now after a number of years. I see some places that we might be able to improve. I don't know if we need the three distinctions. I might even find merit in some very small extension of the time period upon which the sanctions would be operative.

But there is something to me that is fundamentally important about the Congress keeping its word after 4 years, to begin and take care of business. We don't know what is going to happen. Of all the testimony that has gone on before us today, no one has mentioned that there are more than two dozen excludable contingencies. The truth of the matter is that someone specializing in loopholes could blow us all away. It wouldn't matter, you could have two Speedy Trial Acts, if you have got the wrong attitude on the bench, a camel could get through the eye of a needle in this bill.

In one sense it is enormously generous. You can in the interest of justice, grant a continuance.

Taking the spectrum of judges in the 94 districts, anything could meet the ends of justice. We have one provision after another that anticipates every single objection that has been raised here and in the Senate, there is nobody who can deny that.

And so in a way, if you really want to ignore the mandates behind this act, you can do it. It can go into effect and we won't lose one case in the Federal system, not one.

On the other hand, if you want to play this game of everybody's supposed to be working so hard and we get these very questionable documentation results that come up in certain areas and there are places where it is very difficult to get documentation, of course we will never implement the Speedy Trial Act.

You can have discussion at the end of the sanctions and if you're not going to cooperate, you're not going to cooperate. If you are determined to oppose this motion, it can be done. It could be defeated in particular Federal districts.

I know I can't stop that and neither can Congress. If there are members on the judiciary that want to enlarge these loopholes, there is no way we can stop them.

I keep thinking about extending it to 1981 and then in 1981, a different judiciary will talk to a different set of justice, just as it is now, and somebody will come up with some more study plans or by that time they will say, "Well, let's throw this thing away."

Or thinking positively, maybe there will be enough improvement made, because we finally have been forced to think about administration which you have been specializing in for all these years and we have made enormous progress just throwing the bill out there. I don't doubt that.

But we could do some fine tuning and not hurt the administration of criminal justice in this country. So I just wonder what I'm going to be gaining by putting this back into the file for 2 more years. I just can't figure it out.

Judge OLIVER. I suspect, Mr. Chairman, that I am weakest in a working knowledge of the safety valve provisions that were written in 3161–H. We have not had to become very expert in regard to excludable time for the basic reason that our procedures simply do not require

us very frequently to take a look at those provisions. I brought copies of figures which I don't think your committee can get over at the Administrative Office.

I realize that the Administrative Office has changed its manner of keeping score after the Judicial Center attempted to commence some research in regard to speedy trial only to find out that all of these figures which were tabulated in the Administrative Office simply didn't fit the appropriate time intervals in the caseflow of a criminal case, from the time a case started until the end of it.

I called the clerk's office for its regular summary of our various joint trial dockets. Looking at a docket in April, the longest period of time involved in regard to the 25 cases processed on the docket in April 1979, from the time of arraignment to the time of disposition of that case was 40 days. The next longest period was 29 days. The docket in June is about the same; although there are a couple of strike force cases that pended a little longer. Strike force cases are a little more difficult to process because the strike force reports to the Department in Washington rather than the local district attorney.

I'll get back to Kansas City tonight. I have three cases in which motions are filed in connection with a 30-count indictment. I will rule those motions on Friday after I hear the evidence in order that this case be ready for trial next Monday.

Mr. CONYERS. We have a recorded vote and we will be coming back. We will recess for a brief period of time.

[Short recess.]

Mr. CONYERS. The subcommittee will come to order. We will proceed with the testimony of Judge Oliver. We welcome the addition of our ranking member of Judiciary, Mr. Kastenmeier, at this time.

Judge OLIVER. Mr. Chairman, I would complete what I would suggest in stating that our district, for the reasons that I have suggested, simply has not been called upon to make use of the excludable time provisions of the act.

I'm reasonably confident that if the Congress decided to make no amendment whatsoever, not even a moratorium as far as dismissal, that most U.S. attorneys' offices and district judges would like to be able to find a legitimate ground for appropriate exclusion, so that the number of cases actually dismissed—I'm speculating—would likely be small in number. There are a number of excludable items that a change and shift in procedures would make those periods quite short.

For example, examination of the hearing for mental competency or physical capacity. This requires an appointment under section 4244 in chapter 33 of title 28. When I was first on the bench, I wasted a great deal of time attempting to suggest to the Congress that of all the statutes that need to be amended, 4244 was the first because Springfield Medical Center, located in our district, was the recipient at tremendous cost to the United States of most persons to be given the very simple evaluation as to whether or not the defendant was competent to stand trial in the sense that he understood the charge against him and whether he could cooperate with counsel.

None of the complications of the *Durham* rule or McNaughton was presented in such an evaluation. To solve the problems in our district,

we appointed a local panel of psychiatrists for examination of defendants in our district. The Department of Justice finally recommended that other district courts do the same thing.

The Department of Justice, after a long battle and I don't know how many attorneys general, finally set out a directive to other district courts to quit sending a 4244 examination to Springfield Medical Center and for those courts to set up a local panel. So that problem of delay in regard to 4224 examinations is, or should be, substantially eliminated at the present time. That, of course, assumes that the directives have been followed out in the boondock offices of the various U.S. attorneys' offices.

The instructions, however, in the manual for district attorneys—every time I have worked with someone in the Department to attempt to rewrite those, he gets put into some other office and it's never been done and there is more misinformation from U.S. attorneys in that manual than you can shake a stick at.

Most courts do not have many 244 cases. We, of course, look at 4244 from all of the other 88 districts in the country and we have to become familiar with that aspect. The question of number five hearings on pretrial motions—inquiry was made by Mr. Gudger as to how many days a motion should be filed—that is really not the significant factor. The question is when the motion, once filed, is going to be put on the docket for final determination, particularly if an evidentiary hearing is required.

I have a 35-count indictment set for trial on July 11 on our next regular joint docket. Counsel has indicated, after the U.S. attorney stated that there was a necessity for calling 55 witnesses, that he had to really file a bunch of motions.

I've set that case specially for next Monday, together with a pretrial conference, in which I'm going to make inquiry of the U.S. attorney as to why it's necessary to try 35 counts against a particular doctor for having presented false material to HEW, to Blue Cross, or whatever detail I don't quite know. I have already telegraphed to the Government that it should select the counts which are the strongest counts to be tried.

The district judge has power to separate for trial particular counts in any indictment and to cut that case down to a reasonable size so it will not get bogged into a category of being "complex" and cannot be handled on a regular trial docket. So that election on the part of government will likely be made next Monday.

Another cause of delay involves motions to produce grand jury testimony. Different views of that question are held by the Department at the present time than has been the case during all the time I have been on the bench. Still there is a great deal of mythology that the Republic is going to fall if you make a finding of a particularized need to allow defense counsel to examine a grand jury transcript in camera. Under the codification of the *Jencks* case in section 3500 of title 28, it isn't a question of whether that grand jury testimony is going to be made available; it is a question of when, and the easy thing for the Government to do under the circumstances, is to adopt as a matter of policy that unless there is some substantial legitimate reasons for a late disclosure, is to say: Your Honor, here is an approved

order with the finding of particularized need and we will let defense counsel take a look at the grand jury transcripts of the witnesses to be called at trial, thus eliminating any occasion for delay.

If you struggle around with this grand jury question you're very apt to have missed the regular trial date, go over it for the next docket, and this is true for any motion that isn't automatically set and determined promptly.

The Congress has been very generous in permitting excludable time simply by reason of the pendency of a defense motion. I doubt seriously whether you would deem it part of Congressional function to really lay out a set of local rules for 89 district courts all over the country in regard to how those motions should be processed.

I think, however, you have provided a great stimulus for the district courts to do so. The real reason that I think consideration should be given to the Comptroller General's suggested moratorium is one, basically alluded to in a little different context by Chief Justice Marshall when he tried the *Burr* case. He suggested, in connection with production of some executive documents, that confrontation between the branches of government should be avoided and that a reasonable accommodation should be worked out to satisfy different interests. So I think it's really a matter of courtesy to say to the Department, the Judicial Conference, the Judicial Center people and to anybody else who says we need a moratorium, that the Congress simply exercise good manners and say that while we disagree with you on the merits of that, nonetheless we're going to give you the benefit of the doubt and allow a little bit more time in light of the tremendous progress that has been made as a result of the Speedy Trial Act in the last 5 years.

Mr. CONYERS. Judge Oliver, the only problem is that these were the same people who testified before so strenuously against the bill. What are they going to tell us in 1981? They'll have cooked up a new set of rationalizations. Memorandums from the boondocks will be sent forward and we will be going through this again and the Federal courtesies will be suggested again and I'm sure we'll have made some more progress.

I think we are on the right track here and I think your suggestion is a most welcome one. I'm just thinking that if by chance nothing happens to occur at the legislative arena, no great harm to the law enforcement system will probably occur. That is all I'm trying to do. So to take the stark drama, it's 5 minutes to 12, just before midnight, and it is occurring to some of our witnesses that we're going to go over the edge. Things'll never be the same; felons will be roaming the countryside laughing because of a congressional piece of legislation that unwittingly let them all out and they're laughing, thumbing their noses at the U.S. Government.

I just really don't see us up against that kind of decision. I think in a more rational light we might extend them this courtesy. On the other side, we may say, can't you believe the Congress means it, after 4 or 5 years, gentlemen?

So I think that that's the decision that this subcommittee has to recommend to its larger committee, and I appreciate the way that you brought your administrative experience to bear.

Let me ask you this one question, and I'm going to ask my colleague, Mr. Kastenmeier, to finish with your testimony and then we are going to come back at about 1:30 to begin the other witnesses.

Don't you find that there has been a great deal of administrative difficulty that is now being cleared up as a result of our having to look at this thing for the last 4 years? For example, many of the members of the bench are beginning to appreciate the court administrators, even frequently those around in this Judicial Conference are beginning to see that there are some things that have been done the old way. You refer to 1939, a system that has literally been untouched for a generation, and we're beginning to see that a lot of this protocol, a lot of this rigidity is just simply going to have to be addressed. You have cited a half dozen instances already.

Judge OLIVER. I really can't express a judgment as to whether those administrative difficulties have been cleared up or whether they haven't because no one keeps books on these and nobody writes down what the administrative procedures are.

I think it must be taken into account that my court and our concern with improvement of our procedure did not need the stimulus of the passage of the 1974 act, because we were forced by reason of inadequate manpower to devise ways and means, both on the civil side and on the criminal side, to make use of our limited judicial time in the best manner. We simply could not afford to have loose administrative procedures where we would set something for trial and have the trial blow up one way or the other.

I'm amazed, frankly, at the amount of discussion in the Comptroller General's report and elsewhere in regard to the impact of arrest before indictment. It may be significant that the districts which expressed to the Comptroller General at the time of the study that they would not have substantial difficulty in complying with the present time frames, three other districts, including the Western District of Missouri, all reported that the number of defendants arrested before indictment was substantially less than 10 percent. The districts that had expressed the view that they were going to have great difficulty and all kinds of adverse trade-offs, the percentage was quite high.

I haven't heard anyone say what the circumstances are that suggest that a target for criminal prosecution who is being presented to the grand jury, has to be arrested while that process is going forward. Absent some highly exceptional cases where there may be danger of flight, danger of violence, or something of that kind, I suggest that there is no necessity to arrest a defendant in a routine case and thereby bring down the meter on the Speedy Trial Act.

Let me suggest that there isn't any apparent reason for doing so in our district. I don't know what these other districts are doing or why they do this, but they create distinct problems as far as the administrative flow of the cases to be processed under the Speedy Trial Act. Of course, this is a problem that the court can do nothing about, except to suggest to a new U.S. attorney when he comes on board, probably never having tried a criminal case in his life, and having to learn a great deal about the criminal process in a very short period of time, that he should have a very good reason before he authorizes an arrest before indictment. My curiosity is really piqued by those

districts that have this high percentage of arrests which obviously put them in a bind as far as the Speedy Trial Act is concerned.

Take the case of a young teller with no past record in a bank, the usual situation. If the defendant had had a record, he wouldn't have been employed in the bank. What earthly reason is there to arrest such a person before indictment? I just don't know, but I know that if you had a policy in a particular district that this is the way we run things in our district, because this is the way we have been running it for 25, 30, 40 years, and with no knowledge the other districts don't do this, the chance of change is slight. Such a district, it seems to me, with a high preindictment arrest tradition, is going to continue to have difficulties in meeting the speedy trial time frame and the other districts simply can't understand why they create a situation over which they have some control, provided they can persuade the U.S. attorney to get clearance in Washington to change from doing something today, simply because that is the way we did it yesterday.

Mr. CONYERS. What about the fact that the criminal caseload is going down and so are the arrests?

Judge OLIVER. Well, this depends on the type of caseload. I take a little exception, for example, with the Comptroller General, because he describes the Western District of Missouri as having a light caseload. When you take his own figures for the period of time he studied, it comes out exactly at 200 criminal dispositions per judge. Three other districts, however, were classified as having a higher than average caseload. Those districts, however, disposed of, per judge, 190 and 188 and 185 cases, respectively.

Now, how can one put a label on a caseload that requires a disposition per judge of 200 as being a low caseload and an over average label on 195 or 190 and 188? All labels are deceptive, if I may say so. It depends on what kind of case. While the overall caseload is slightly down, I think there is general agreement that the Government is filing more complex and difficult types of cases than has been true in the past. The problem is complicated in our district by the fact that we hold court in five different places.

Mr. CONYERS. In one U.S. Federal district court there are five locations?

Judge OLIVER. I'm sorry, I didn't get that.

Mr. CONYERS. You say there are five locations within the one district or within the State?

Judge OLIVER. We have five separate locations. We hold court in Kansas City; that's the site of the court, and the principal volume of cases. But we also hold court and try cases at St. Joseph, Jefferson City—the capital city—Springfield, where the medical center is located, and Joplin, the southwest division.

Now, for reasons that are not articulated, the Comptroller General apparently thought that there was some great significance that the handling of the docket in our southern division in Springfield did not require more than 10 trial days during the particular period of study.

What they do not understand is that cases filed in Jefferson City, for example, can very very easily be moved and put on the joint docket in the western division at Kansas City. The same thing is true of St. Joseph. Everyone knows, or should know, that of all criminal cases filed, only 10 to 15 percent will actually be tried. If a court can set

cases firmly and have sufficient manpower there to develop a credibility with the Bar that none of the cases is going to be continued except for a highly legitimate reason, the docket will stay current.

Mr. GUDGER. Gentlemen, I wanted to pursue this a little bit to see how you did manage your criminal docket. In the separate divisions at Jefferson City especially, I can see Springfield undoubtedly, but how often do they have cases?

Judge OLIVER. It is a little different, Congressman, for the reason that the county immediately north of that is in the St. Joseph division and this produces a substantial volume of cases particularly with the increase of population occasioned by the airport.

Mr. GUDGER. I understand that. I would just like to know how does a judge go regularly there or does he go on a need basis or what? How does he go to a division? Is there a regular time frame, regular days of the month, or the third Wednesday of April or anything like that, or what? How do you manage that?

Judge OLIVER. On the out-of-State division, the presiding judge follows procedures substantially the same as outlined in my statement for the western division in Kansas City except with the bringing of the cases from St. Joseph and Jefferson City in to take them on the tail end of a regularly scheduled joint docket which——

Mr. GUDGER. What if the defense attorney says he doesn't want to do it?

Judge Oliver. Why, he doesn't have anything to do with it. If the court doesn't run the docket, it isn't going to be run.

Mr. GUDGER. That means he must appear when the docket is called?

Judge OLIVER. That's right, but you see, dockets are scheduled and official notices are scheduled from the time of the omnibus hearing within days after the arrests. A regularly scheduled time for the holding of a pretrial conference and every case of the docket, a preliminary docket, is set out so you have almost a month's notice as to when they have to be there, that they are expected to be there and they are not to be excused unless there is some highly legitimate reason.

Mr. GUDGER. I understand that.

Now, are these cases tried in Kansas City?

Judge OLIVER. Yes, although I have tried cases—I think I'm the only judge ever to sit in the Western District of Missouri that has sat at each of the outside districts. This is easy because I grew up outside the western district and I didn't have any home base. So when a new judge was appointed from out of the division, he sits on that particular division. So when someone came on from Springfield, I moved to another division.

But it's been a broadening experience, very helpful as far as discharging administrative duties. And also a very wide acquaintance with the bar.

Mr. GUDGER. What about the cases in Joplin and Springfield, are they tried there? The criminal cases?

Judge OLIVER. Yes.

Mr. GUDGER. And therefore, the judge does have to schedule a time down there in order to comply?

Judge OLIVER. Yes, sir.

Mr. GUDGER. And he does do that without any difficulty?

Judge OLIVER. Yes.

Mr. GUDGER. Well, that's what brings me to the point that I would like to bring to the attention of the staff. When we examine in the future the memorandum from the U.S. attorney from Indianapolis—and what bothers me a little bit is the previous testimony of the Department of Justice in regard to that letter, because one of the things that she says is an impossibility under the Speedy Trial Act is the fact that Indianapolis has divisions in Terre Haute and elsewhere, and therefore they can't comply because the judges aren't there.

I would like to read one other thing, because I knew there had to be a process by which you were doing it. The Western District of Missouri is very similar as far as area, et cetera, and population-wise to the Southern District of Indiana. One major site, Kansas City, and Indianapolis, both of them have Federal penal institutions, and you can just look at it and you are doing it. And they say it is impossible and it will never work. And you say that's because they haven't addressed it and you have.

I would like to point one other thing out that she says that I think is a self-condemnation. I would like to read this to you and you can comment please.

> Fragmentation of the act's total time periods into three subdivisions of the act have already resulted in timekeeping by each judge, the clerk's office and the U.S. attorney's office.
>
> I find it hard to believe that this recordkeeping is cost productive. Further, the only nonlawyer of the group, a deputy clerk, makes the semiofficial decision as to what time is excludable. The clerk is the least prepared person to do so because she is not in possession of the records and not in court when the records are made.
>
> The deputy clerks in this district who are keeping the statistics and making the reports to the administrators of the courts have had no training. Their semimonthly reports developed by them for their judges are not helpful to me. I have not yet had an opportunity to work this out with them.
>
> The result is that each of the four judges is keeping records for his own benefit, my office is keeping records and the clerk is keeping records. Many of these records agree with each other, leading me to believe that the law is much too complicated and vague. It has really created a nightmare of paperwork and recordkeeping.

Would you say the law has done that or the personnel have done that?

Judge OLIVER. Well——

Mr. GUDGER. You undoubtedly manage this problem.

Judge OLIVER. Yes.

Mr. GUDGER. Thank you very much.

Mr. KASTENMEIER. Judge Oliver, I am pleased to see you. I'm sorry not to have had a chance to hear your testimony, although your colleague, John Hunter, has been a witness before my subcommittee a number of times on the diversity question and has been very helpful.

The only question I have, and possibly it has been asked before, but having heard the Assistant Attorney General, Mr. Heymann, and colleagues, to what extent do you agree or disagree with his recommendations or his observations?

Judge OLIVER. I'm sorry, I didn't get the full thrust of the question.

Mr. KASTENMEIER. To what extent do you agree or disagree with his recommendations?

Judge OLIVER. I do for the reasons I suggested simply as a matter of good relations between the branches of the Government in bending over backwards on the part of the Congress to accept the judgment, not totally ignore the results that persons with responsibility have decided that have wholly different views than I have.

And it is not because I think there would be tremendously adverse impacts if you stated precisely what you have, because as I suggested earlier, I think, that the provisions really should be given some very, very close attention.

The number of cases really dismissed with prejudice is apt to be very small. I happen to have gotten into the new Parole Revocation Act, which I am sure, as you know, requires a preliminary hearing close to the point of the alleged violation to be followed by full-dress hearing at the institution.

In the fifth circuit case, however, the time frame provided for the full hearing had not been compiled by the Parole Board. The defendant on habeas corpus, of course, said he was entitled to release. The court said, "No, that's not right."

What the Congress really had in mind was that the Parole Board give a speedy hearing within the timeframe, but your remedy is for the district court to order the Parole Commission to give the hearing now promptly for the witness.

But the real remedy of voiding the whole parole revocation procedure simply didn't follow, and that's basically what you would have if you had this moratorium.

But even if the moratorium is not granted, the alternative of dismissal without prejudice is still there. And the manner is which the Supreme Court suggests that you keep time on requirements of the sixth amendment, you almost go up to the period of statute of limitations before there could be theoretically no refiling of a claim that may be dismissed, if you leave the sanctions as are.

The only real danger would be if the indictment has been obtained very, very close to the expiration of the statute, which is not a frequent occurrence, although it is a situation that I would say over the years, cases where indictments are obtained the day before the expiration of the statute, but that's not the usual situation.

Mr. KASTENMEIER. Thank you, Judge Oliver.

Does counsel have a question?

Mr. STOVALL. Yes, Mr. Chairman. Thank you.

Judge Oliver, the time extension for examination, rehabilitation under the narcotic treatment statute, in ordinary pleadings and practices, have been allowed to extend the time period presently under the act. Some judges, however, apparently count the number of days of extension time as the entire time period beginning on the initial day occasioned by the request and ending upon the final disposition of the activity.

Apparently, other judges grant additional time extension by counting only actual days in hearing on the delay matter, thereby leaving time periods of 10, 15, 20 days of delay which are not allowable under the exclusions.

In other words, we have information that some U.S. district courts follow nonuniform counting practices. Is there anything that you can see to remedy that problem, or do you see a need to remedy that problem of disparity and how you count the number of excluded days?

Judge OLIVER. By amendment of the act, you would say?

Mr. STOVALL. I'm asking you if you think there is a method either by amendment of the act or by the Judicial Council. The committee has

58-721 O - 80 - 4

been given a copy of recommendations for one district. Judges Mansfield, Oakes, and Gurfein submitted that to us, and in those guidelines they include a definition of what that time period would be.

There is some question in my mind as to whether it is legally permissible under the Speedy Trial Act and whether or not that would be attacked later in court for being impermissible under the act.

So if you would like to comment on that practice, it would be helpful to us. If you would like to comment on possible changes in the act, it would be helpful. It's a problem of disparity.

Judge OLIVER. I'm not sure I get the full purport.

Mr. STOVALL. In 25 words or less, let me ask it more simply. There are different ways of counting what is excludable. Some judges will count delays as being the entire period from the time an attorney files a motion for a competency examination until that examination is conducted. That may be 30 days. So that extends the time frame of the Speedy Trial Act. Some judges will simply allow the 1 day of hearing, perhaps the 1 day of examination to count as excludable time, which means that the different district judges are following different tests.

So can you see a way to put the time frame in a total number of days instead of segments.

Well, is there a way you can see of ameliorating this problem, because some say the act is unclear and allows that disparity?

Judge OLIVER. Well, my general view on this excludable time base—and I have seen the suggestion made—that the particular point in the flow of the case from the time of indictment to disposition are not realistic provisions and that all of these ought to be put in one total frame to give more flexibility as to where the various events and the process may take place.

My first reaction is that I do not think that the present segments of the total time frame are unreasonable, and I think there is a very good reason for requiring a 10-day period to be in the first stage between arrest and arraignment, if not earlier. But if you remove this—you remove the pressure of doing it within that particular period of time, I think that a court that is disturbed and is hunting grounds for excludable time reasons is a court that quite likely should be making a pretty fundamental reaction of their total process of the manner in which those cases are being handled routinely in the court.

And I really think that these time frames in the various segments provide more time than would be necessary in the ordinary case, so that in the ordinary case you never have to worry about——

Mr. STOVALL. If you have to send a defendant across the State to be examined at the medical center and it requires the scheduling of the psychiatrist's time and that necessitates a delay, do you allow the prosecution more time to bring their prosecution to final trial? Or do you dismiss the case because this delay causes a breach of the speedy trial rule?

Judge OLIVER. Which cases cause the most delay?

Mr. STOVALL. No; what do you do in the case where you have to send the defendant on to a psychiatrist for competency examination and that requires more delay in the case?

Judge OLIVER. Well, we have a local panel on that. I received a copy of the examination back yesterday which I studied and which I will have on the docket Friday. The examination was ordered—well, this one actually took a little longer than we ordinarily have. It was

about 2 weeks ago, but this is under a local rule 23 which is written up someplace in the FRD as to the utilization of the local panel for this competency business.

Mr. STOVALL. Do you allow the limit of the act to be extended by those 2 weeks?

Mr. VOLKMER. I would like to make something clear here. You use a local panel, you don't send them all the way to Springfield?

Judge OLIVER. Yes, they serve on a rotating basis. In fact, I think the Congress at the present time has worked out a method under which these people can be paid. They don't get paid a lot, but when we first put in local rule 23 they responded to a plea of our court to volunteer their services in an experiment that might make some contribution to the administration of criminal justice.

It's our experience that psychiatrists feel a little more sense of public obligation and really want to make the contribution if afforded an opportunity to do so.

Mr. STOVALL. Judge Oliver, would you think it's helpful if all courts followed the same kind of guideline? Will you allow that time period to extend the deadline?

Judge OLIVER. Yes.

Mr. STOVALL. Is that correct?

Judge OLIVER. Yes.

Mr. STOVALL. OK. Thank you, sir. Thank you, Mr. Kastenmeier.

Mr. KASTENMEIER. Thank you for your testimony this morning, and on behalf of the committee we are very grateful.

Judge OLIVER. Thank you. I also want to commend this committee which had a great deal to do with the Public Defender Act, and also for taking on pretrial services in title II which I think your—which I think has been very, very worthwhile, and has improved the administration of criminal justice in the United States.

Mr. GUDGER. I would just like to commend your testimony and say that I appreciate it very much.

Judge OLIVER. Thank you.

Mr. KASTENMEIER. On behalf of the chairman, I would like to announce the subcommittee will be in recess, until 1:30 this afternoon, at which time the chairman will hear the testimony of Professor Martin, Professor Frase, and Professor Misner. Until that time, the subcommittee stands in recess.

[Whereupon, at 12:20 p.m., the hearing was recessed, to reconvene at 1:30 p.m., this same day].

Mr. CONYERS. The subcommittee will come to order. Our next witness is Prof. Robert Misner, currently a professor of law at Arizona University, and served as a reporter for the district of Arizona and southern California in connection with the speedy trial legislation.

He has held positions of lecturer in law at Sydney University, Australia. He was deputy attorney general of Arizona, executive assistant to the Governor of that State, and assistant attorney general of Oregon.

He has had an opportunity to examine many of the phases of the legislation now under reconsideration by the subcommittee and we are very, very pleased to have him with us. And without objection, we will incorporate any material that he has brought along with him in his discretion.

Welcome to the subcommittee, Professor.

STATEMENT OF ROBERT L MISNER, PROFESSOR OF LAW, COLLEGE OF LAW, ARIZONA STATE UNIVERSITY, TEMPE, ARIZ., ON H.R. 3630 AND H.R. 4051 TO AMEND THE SPEEDY TRIAL ACT OF 1974

Mr. Chairman and Members of the Subcommittee: I would first like to thank the Committee for the opportunity to testify concerning the Speedy Trial Act. During the last four years I have served as the Reporter for the Planning Groups for three of the federal districts with the highest criminal caseloads—the federal districts of Arizona, Southern California and Central California and presently remain the Reporter for the districts of Arizona and Southern California.

I have always viewed the Speedy Trial Act in a positive light. I believe that the Act is procedurally an imaginative and beneficial piece of legislation. I base this conclusion primarily on the fact that the Act is a realistic appraisal of the criminal justice system as it actually operates. The realism of the Act relies on three assumptions: one, that the participants of the criminal justice system—the judge, the prosecutor, the defense counsel—all have independent reasons for sanctioning delay; second, that Congress cannot anticipate all practical problems involved in implementing the Speedy Trial Act and, therefore, needs the advice and experience of each federal district court in drafting the final time standards; third, additional resources are necessary if the goals of the Speedy Trial Act are to be reached. We are here today because Congress and the participants of the system have, for the most part, not lived up to the responsibilities given to each under the Act.

The most innovative and beneficial aspect of the Speedy Trial Act was the responsibility Congress delegated to the local district courts to assist in amending the Act prior to 1979 and to seek additional resources in order to comply with the 1979 time standards. Basically Congress said to the local courts, "We believe that by 1979 criminal defendants should be tried within 100 days after arrest. You have four years to plan for those 1979 standards and to assist you we will give each district a Planning Group and some planning money." One would have thought that this approach would have made the local courts ecstatic. Unfortunately, such was not the case. Many judges saw the Act as a Congressional verdict that the judges were lazy. Many prosecutors viewed the Act as another irresponsible inroad made into their prosecutional perogatives. Many defense counsel saw the Act as the "Speedy Convictions Act." With this lack of enthusiasm at the local level, the prophecy of doom became self-fulfilling. Very few districts have attempted earnestly to plan for the 1979 standards. Very few districts have gathered the data necessary to advise Congress as to the needs for changes in the Act and to the needs for additional resources. In short, the districts have basically ignored the planning provisions of the Act. It is not surprising, therefore, that the Justice Department and others are scurrying before Congress some three weeks before the 1979 time limits are to come into effect crying that no one is ready.

Again, the prophecy of doom is a self-fulfilling one. What is ironic, however, is that the Act itself creates an escape provision—the judicial emergency provision of 18 U.S.C. 3174. Yet since many districts have not fulfilled their planning function under the Act and have collected little or no data on implementation of the Act in their individual districts, they have no data upon which to base their applications to have judicial emergencies declared. Fuller elaboration on the disdain for the Speedy Trial Act evidenced by judges, prosecutors and defense counsel, as well as evidence of the lack of planning by individual districts can be found in two articles which I have written and are attached to this statement: Misner, "District Court Compliance with the Speedy Trial Act of 1974: The Ninth Circuit Experience," 1977 Ariz. St. L.J. 1 (attachment 1); Misner, "Delay, Documentation and the Speedy Trial Act," 70 J.C.L. and Crim. 214 (1979) (attachment 2).

However, Congress like the individual districts, has not lived up to promises made prior to passage of the Act. In 18 U.S.C. § 3166(d), as well as in comments made during debate and statements found in the House and Senate Reports, one purpose of the planning aspects of the Act was to develop data which Congress would use in allocating more resources. Congress has not lived up to this promise. The recent Omnibus Judgeship Bill allocated new judgeships to the individual district courts but these allocations were made on the basis of data which does not reflect the impact of the Speedy Trial Act. I would like to use the District of Arizona's experience to elaborate on the resource problem.

Over the course of the last four years the District of Arizona has gained a national reputation for its leadership in the area of the Speedy Trial Act. From the very beginning Arizona chose to attempt to comply with the 1979 time limits. In its attempt the District Planning Group decided to create its own Speedy

Trial Plan which has served as an alternative model to the local plan distributed by the Administrative Office of the United States Courts. The judges have been adamant in stressing the need to attempt to comply with the recording and planning provisions of the Act. The Clerk of the District Court, Wallace J. Furstenau, has developed innovative ways to monitor cases and alert both the United States Attorney and the Federal Public Defender to upcoming deadlines. I, personally, have written two lengthy reports for our planning group on various aspects of the Speedy Trial Act as well as speaking at the Ninth Circuit Judicial Conference, the Ninth Circuit District Judges Association meeting and the Federal Court Clerks Association on the topic of the Speedy Trial Act. Thomas O'Toole, our Federal Public Defender, litigated the first case in the Ninth Circuit on the interim time limits of the Act and Michael Hawkins, the United States Attorney, has been very helpful in implementing our local plan. In short, the District of Arizona has taken the planning provisions of the Speedy Trial Act to heart and has found the Planning Group concept to be a practical way for segments of the criminal justice system to meet and discuss common problems.

But the District of Arizona found that although we had developed new administrative procedures to handle criminal cases and made a concerted effort to record excludable time that from July 1, 1976 to April 30, 1979, approximately 21 percent of defendants were exceeding the 60-day limit from arraignment to trial. (Attachment 3.) Four major facts contributed to this percentage. First, the District of Arizona's criminal caseload is staggering, considering that only four Judges, plus one Senior Judge, are available. The District consistently has the fourth or fifth highest felony criminal caseload of all 95 Districts. Second, is the percentage of time devoted to criminal trials. During fiscal year 1977, 95.9 percent of jury trials were criminal, and during fiscal year 1978 93.4 percent were criminal trials. It is impossible to further cannibalize the criminal docket to comply with the Speedy Trial Act. In many ways it is misleading to say that the District of Arizona has an active federal civil calendar. Third, the Judges in the District of Arizona, based on Management Statistics for the U.S. Courts for fiscal year 1976 and fiscal year 1977, which are the latest available, have had the highest number of trials completed per judge than all Districts other than the Canal Zone. Finally, the District of Arizona presently is operating with four judges when its full authorized complement is eight. Due to these facts, the District of Arizona has applied to the Judicial Council of the Ninth Circuit for a suspension of the 60-day arraignment to trial time limits.

It is the general consensus of the Planning Group that with the full complement of eight judges, the District of Arizona will be able to comply with the 60-day arraignment to trial time standard.

It is with this introductory material in mind that I make the following observations. First, although there is a great tendency to "punish" those who have not attempted to implement the Act by making no changes to the Act, it seems to me that such an approach would, once more, sublimate societal interests to the private interest of the participants of the criminal justice system.

Second, I seriously doubt whether many districts and many circuits are capable of using the judicial emergency provisions of 18 U.S.C. Section 3174 to grant suspensions of the time limits from arraignment to trial. In order to be granted a suspension, the chief judge of a district must convince the circuit judicial council that existing resources are being efficiently utilized. One would expect that a district could only meet this showing of need if the district had been accurately making and accurately recording excludable time determinations as required by 18 U.S.C. Section 3161. A quick perusal of the Speedy Trial Act Reports for 1976, 1977 and 1978 published by the Administrative Office of the United States Courts indicates that for many districts such information has not been collected. Furthermore, Section 3174 requires that the circuit judicial council "shall evaluate the capabilities of the district, the availability of visiting judges from within and without the circuit, and make any recommendations it deems appropriate to alleviate calendar congestion resulting from the lack of resources." Without the required information from the district courts, and without a fairly elaborate circuit-wide and nationwide network of evaluating the feasibility of visiting judges coming into a troubled district, it appears that the findings required by Section 3174 are incapable of being made.

Third, in those districts with which I am personally familiar, the authorized judgeships will go a long way toward making compliance with the Speedy Trial Act a reality. But, incidentally, quick confirmation of a new judge does not guarantee that the courthouse will have courtrooms and chambers to accommodate the new judges.

Fourth, even with the confirmation of new judges, the civil docket will continue to suffer. In keeping with the language of section 3165(b) which requires that the implementation of the Act avoid "prejudice to the prompt disposition of civil litigation" and section 3166 which requires the experience under the Act to be used in seeking additional resources, hearings on the effect of the Speedy Trial Act upon the civil docket must begin.

Fifth, it has been proposed the time limits in Interval I (arrest to indictment) and Interval III (arraignment to trial) be amended. In my experience with the Speedy Trial Act, the best indicator of compliance with the Act has been the degree to which the ends of justice exclusion has been used. The use of the ends of justice exclusion is a good indicator of compliance because it is virtually the only exclusion which only the judge can make and therefore indicates the judge's involvement in implementing the Act. Also the ends of justice exclusion was included in the Act so that complex and otherwise "special" cases could be handled within the time frames. I imagine that any request for additional time within Intervals I and III would be based upon the fact that presently the Act does not give sufficient time. In other words, the Act must be amended because the present exclusion process has been tried and found wanting. However, for the period of July 1, 1977 to June 30, 1978 of the 41,419 defendants terminated during that period in only 571 for approximately 1 percent of the cases, exclusions were made during Interval I. Out of 41,419 defendants terminated only 67 ends of justice exclusions were made. The overpowering conclusion is that although the Justice Department claims that it has difficulty indicting persons within 30 days after arrest, it has never sought to bring those difficulties within the ends of justice exclusion. It has not even attempted to play the game by the rules of the Act.

The same type of analysis is also true regarding Interval III. Of the 41,419 defendants terminated, only 1,835 ends of justice exclusions have been made, approximately a 4 percent rate. Therefore when the Justice Department claims that the 1979 standards would result in 17 percent of all defendants exceeding the time limits, it is assuming that all possible exclusions are being made and the cases still fall outside the time frame. My point is simple: if the federal cases are so complex as to require additional time, why have so few attempts been made to seek ends of justice exclusions for those cases? The data being used to support the proposed extension of time limits is better suited to show that compliance with the Act has not been attempted than it is to show that the Act imposes unrealistic deadlines.

Finally, it has also been proposed that the chief judge of the district court be authorized to suspend the time limits for a period not to exceed thirty days. I believe that such a system may lead to mass confusion and surely would lead to disparity of treatment of defendants throughout a circuit.

In summary, then, I make the following recommendations:

1. Congress defer the implementation of the dismissal sanction of Section 3162 for six months in order that the presently authorized judgeships can be filled;
2. Congress require that on November 15 each district report the information required to be kept pursuant to Section 3166 for the four month period of July through October, 1979;
3. Congress schedule hearings to determine the number of additional judgeships needed to offset the full impact that the Speedy Trial Act will have upon both the criminal and civil docket;
4. Congress retain the present time limits of the Act; and
5. Congress retain the present judicial emergency provisions.

TESTIMONY OF ROBERT MISNER, PROFESSOR OF LAW AT ARIZONA UNIVERSITY

Mr. MISNER. Mr. Chairman, thank you very much. It is a pleasure to be here, and I am honored to be able to speak to you and your committee on the problem of the Speedy Trial Act.

Mr. Chairman, much of what I'm going to say is more fully elaborated upon in my prepared statement, and I will try to be as brief as possible, and try to answer any questions.

My own personal view of the act, and it is one that I have held since the day the act was passed, is that it is one of the most creative

innovative pieces of legislation in the criminal law field with which I am familiar.

I think that giving to the local districts the opportunity and the resources to do their own planning was a stroke of genius, and I would only hope that Congress would follow this pattern in the future.

I speak from my own experience that the planning committee was given an opportunity in the district for the various segments of the criminal system to meet and plan, and there is a great deal more understanding now than there had been 4 years ago within our district.

One would have thought perhaps naively that the districts would have been ecstatic over the freedom to control their own destiny, but unfortunately, Mr. Chairman, the reaction of some districts in the planning process has been somewhat less than ecstatic.

Out of the Speedy Trial Act, it appeared to me there were two basic assumptions from which the Act operated. One was that during the first 4-year phase-in period the districts would attempt to record, attempt to collect data, to come back to Congress to seek more resources, and suggest amendments.

The second assumption, I think, was the one that you referred to in statements during the legislative history of the act itself that Congress was going to make more resources available if the case could be made for more resources.

Now unfortunately, in some degree, both of those major assumptions have not panned out. Many districts have failed to plan at all. Many districts have just ignored the act entirely, and I think the evidence which buttresses that comes from the excludable time determinations.

If a district was complying with the act, one would think they would have excludable time determination. Probably one of the most significant pieces of data, I think, in terms of whether or not a district is complying with the act, is the number of ends of justice exclusions.

Mr. Chairman, I think the evidence is overwhelming that the districts have not attempted to plan and comply. And that in my estimate, Mr. Chairman, is why there is a rush to judgment now as the chimes toll at midnight.

The last fiscal year, out of 41,419 defendants terminated, there were only 4 percent of those defendants having ends of justice excludable time.

Interval one, as we recall, is the time from arrest to indictment, and if there is any interval which can be seen to be the U.S. attorney's interval, it is interval one.

Now out of the over 41,000 defendants terminated during the last fiscal year, there were only 67 ends of justice exclusions made within interval one. Out of 41,000 defendants, only 67 defendants had excludable time determination in the ends of justice within interval one.

Now there are only two conclusions one can make. One is the cases aren't complex and perhaps we are being misled somewhat as to the nature of the caseload in the Federal criminal system.

If there are only 67 cases which were so complex as to demand the ends of justice, one would have to conclude the caseload is not very complex. I don't think that is the case.

The other is, if the act has been ignored. If the caseload is complex, why was not the act used? The act has an escape valve. The legislative

history is very clear that that is what it was intended for. Many districts just have not attempted to comply with the provision. For example, last year the Central District of California terminated 1,863 defendants; yet there were three ends of justice exclusions made in the Central District of California all last year.

There are at least 16 districts by my counting which have had less than 11 percent of their defendants with any excludable time whatsoever.

The point is, Mr. Chairman, I think it is clear that the act has been ignored and we can't ignore that the act has been ignored.

Congress said to the districts, this is where we think you should be in 4 years, here are the resources, come back and tell us what's going on. And what is even more disturbing, I think, is that the act itself has a provision which says that if you cannot meet the time limits, come in and have a judicial emergency declared. Only eight districts have come in and had their emergency petitions approved.

Now why should one extend either the time limits to 180 days or why should one put off the implementation of the sanctions 2 years, when first of all there has been no attempt to comply with the act?

Second, why not use the act's own mechanism, forgetting the extension. If you couldn't comply with the Speedy Trial Act as it is presently written, one can give these extensions.

My point is, Mr. Chairman, that the prophesies of gloom and doom have been self-fulfilling, and I think that is basically what has brought us to the problem we have now.

Again, the Justice Department talks about the fact that a good number of cases could not be met under the present time limits, and I don't understand this dragging out of the figure of 5,000, when even the Justice Department's own representative says that's an exaggerated figure.

It seems to me there is something involved and I don't want to call it a scare tactic, but it is like hitting someone over the head with a board to make a point.

Mr. Chairman, if you don't believe it is 5,000 you shouldn't say it is 5,000. But the problem with that figure is also that since your districts have not made excludable time determinations, most of those cases are gross time and not net time. It's calendar time, not speedy trial time, that there is no way to determine how many of those cases would have fallen in the guidelines, had they made these determinations. And that again is the problem.

Now, Mr. Chairman, the second assumption is the problem of resources. And later on in my presentations, if I might, I would like to make at least two alternative suggestions regarding resources and how we might deal with that problem now.

Before I get on to the recommendations, if, with your tolerance, Mr. Chairman, I would just like to respond to a few statements which were raised this morning.

I have answered the problem of the 17 percent not in compliance, saying that there is no compliance because no excludable time determinations were made

Second, the notion of hidden costs and the rest, well of course, you're going to have problems with that if you believe that you can't use ends of justice exclusion in the proper cases.

We saw 67 out of 41,000 defendants. The Justice Department sought excludable time determinations within interval one. If you have trouble, if you are going to envision the case—and I think, however, with much of the testimony this morning, the tail was wagging the dog.

Of course we can pick these things out of the closet and wave them before you, but at the same time, in the tough cases, the ends of justice can be used.

Let me just respond briefly to Judge Oliver's—what I would refer to as his Amy Vanderbilt's good manners' argument, that is that we should extend the guidelines because it is good manners directed to the other branches of government to defer their wishes.

Well, what about the good manners to Congress? What about the fact that the act hasn't been used? What about the fact that you are not seeking an extension of time through the emergency provisions? What about the dragging out of these 5,000 defendants termination rate? What about the fact that an extension would vindicate those people who have dragged their feet?

It vindicates the judges who didn't like it, the U.S. attorneys who didn't like it and the clerks who didn't like it. Now why should we assume, Mr. Chairman, that things are going to be different in the next 2 years? It has been 4 years—why would one assume that the phase-in period of time of an additional 2 years is going to change anything?

Let me then, Mr. Chairman, go on to just two possible recommendations that I think might be helpful. As we all are aware, Congress in the omnibus judgeship bill, has seen fit to produce more resources for the speedy courts and I would think that perhaps the Federal Speedy Trial Act, with full implementation, could be tied to the coming on line of more of those additional judgeships.

For example, one could defer the implementation of the sanction to 6 months in order to allow the judges to get on line and totally functioning. I would like to see an amendment to the judicial emergency provision which would specifically state that districts awaiting judges to come on line could apply for judicial emergency. It would fill out a bit, those kinds of guidelines which already exist in the act, and would take into account the fact that many districts will be able to comply with the additional judgeships.

Mr. CONYERS. Do you think we need special legislation? Wouldn't the emergency provision catch districts? Wouldn't that be a logical cause for an emergency petition?

Mr. MISNER. I would think so, Mr. Chairman, except the emergency provision is fairly specific as to the duties of the judicial counsel. It shall evaluate the capabilities of the districts, evaluate visiting judges, and so on.

I would think that a broad interpretation surely could include such a reading. But it also says to the districts that we aren't going to leave you in the lurch.

Mr. Chairman, most of my experience is as a reporter in the district of Arizona. Year after year, the district of Arizona, because of its closeness to the Mexican border, has an extraordinarily high criminal caseload, usually of second, third, or fourth in the country.

Mr. Chairman, we applied for a judicial emergency, not because we don't believe in the act, but we have been operating at half strength.

We are authorized eight judges; we have four on line. It is the viewpoint of our district court judges that we can operate under the act with additional resources, and we have sought the judicial emergency in hopes that the additional resources would come on line.

Mr. Chairman, I would only ask that one other thing be done and that is for the proper committee to schedule hearings now to take into account the problems of the civil calendar and the effect that the speedy trial would have on the civil calendar.

And I would hope that hearings could be set so that that question might be raised.

Mr. CONYERS. What do you think we should be looking for there?

Mr. MISNER. Well, for example, in Arizona, and I think this is terribly unfair to our civil litigants, about 96 percent of our trial time is criminal. It is misleading to say that there is a Federal civil docket in the State of Arizona. There just isn't.

Four percent of the trial time is dedicated to civil. With the new judges, that is going to help. But I think we need an airing of the issue, and perhaps Mr. Martin will speak to the issue of the civil calendar.

I would think that hearings there would be instructive.

Mr. Chairman, if there are no questions or if there are further questions, I would be happy to answer them.

Mr. CONYERS. Well, I want to thank you for giving us the benefit of your experience here, and I think you have been extremely perceptive in ways of us meeting this issue that is before the subcommittee, and I am indebted to you for it.

I am sure the other members, my colleagues, will feel the same way when they review your testimony.

In looking over the emergency districts, I noticed my own eastern district of Michigan is on there and I'm wondering if there is any way that this subcommittee could determine what was the nature of the problem in each of the eight Federal districts that required an emergency petition to be granted?

Do you happen to know offhand or do you know where those results are?

Mr. MISNER. I do not know if the Administrative Office has copies. The circuit executives at all the circuit levels would have the petitions sent in by the various districts. And I would think that merely a telephone call would suffice.

Mr. CONYERS. I would like to find out without raising any pessimism or skepticism, just how meritorious these requests would be. I think they should be very carefully examined in and of themselves and the reasons that were considered for moving to have the petition granted in each of the eight districts.

I am sure there were different reasons. I'm wondering how many judges or how short of judges is each district, what the relationship of their criminal docket is to their civil docket, and the nature of these cases in complexity and quantity.

These are questions that would help us understand this part of the law that is being used now.

My counsel suggests, as you imply, that we probably would be using the law to provide a shortage of members of the judiciary as a basis for filing an emergency petition.

It could be felt that that was not envisioned in the language as it is presently written.

Mr. MISNER. Mr. Chairman, Mr. Frase, who will speak subsequently, is the reporter for northern Illinois, which is one of the districts that has been granted an emergency suspension. And perhaps that question can be directed, again, to him.

My own experience in Arizona is that is just a question of manpower, Mr. Chairman.

Mr. CONYERS. Are you 50 percent short?

Mr. MISNER. We have, after the omnibus bill, we are authorized eight, and unfortunately the death of Judge Frey reduced us to four. And so that has put us to four active judges out of a full complement of eight.

Mr. CONYERS. I recognize staff counsel for a question or two and then our colleague, Congressman Hyde, whenever he choses to.

Mr. STOVALL. Thank you, Mr. Chairman. Mr. Misner, in your statement you allude to problems you have had in Arizona and you've just mentioned them. And then you also mentioned earlier in your oral remarks to us that you thought it was somewhat unreasonable to want to amend the act, yet you have applied for an extension of the provision yourself and the district of Arizona.

Don't you find that to be somewhat conflicting to say that the Congress shouldn't take this action?

Mr. MISNER. Oh, not at all. I think it is just the reverse. What we have done is, if we can use the terminology, played the game for 4 years. Congress told us—and we took them seriously—that in the beginning, 1975, we should attempt to implement the act and we went immediately to 1979 standards. We have always used the 30/10/60 standards. And what we have done is monitor what we can do.

Now one thing about the Speedy Trial Act is that it neither creates criminal cases nor does it adjudicate criminal cases. You have the same number before and after. The only thing it does is give you less flexibility in when you can try them.

What we have done is, and I think documented it well, is to admit that presently we are unable to comply with the act, not because we think the act needs to be amended, but because we are at half manpower.

And I think that Congress in 1974 saw the fact that some districts may have trouble for very legitimate reasons and that is why the judicial emergency provision is there.

Now, we haven't come lobbying to have the act amended, we have not come lobbying to have it put off for 6 months. What we said is, Congress told us how we should come and we are coming. We need more judges, that is all.

Mr. STOVALL. How do you arrive at that being the implementation of guidelines in the districts, where some districts may find that there is a need to interpret guidelines to suit their needs? We have had that example brought before us today. Do you see that as a possible remedy to the problems that some districts claim they have?

Mr. MISNER. Well, sir, all my life I have been extraordinarily cynical, but I am not going to be so cynical to believe that the Federal judges will not take their oath of office seriously, and I think that we must assume that they will interpret the act in a legitimate sort of way.

Now, I do not mean to say that and in one of my articles that I have written and attached to my statement, this point is more fully elaborated upon—it will be up to the circuit court of appeals to demand some regularity in interpretation of the exclusions.

Now, I think that the interpretations of the excludable times eventually will be a matter of litigation. I think it will be a matter of time, perhaps, until certain things are set; I think it is inevitable.

Mr. STOVALL. Then the question becomes: If you say, as you have, that changes to court interpretation through guidelines, as a method of determining whether the exclusions should be narrowly construed or broadly construed, then why would you criticize the Congress for possibly considering legislation to make that more specific, rather than waiting until the litigation occurs?

Mr. MISNER. Sir, perhaps I haven't made myself clear.

I think it is totally within Congress power, and within their responsibility, to amend an act which they think is improper, or they think was poorly chosen, or whatever. I just don't happen to think it was either poorly drafted nor poorly chosen.

Mr. STOVALL. But you agree, don't you, that this is going to be a great problem of litigation, because the litigation I assume you speak of, will be the case of a defendant questioning whether or not the circuit or the district has the option of making its own interpretation of what the act says. There is a disparity around the country in the various districts, as to how you count the days in exclusionary time; isn't there?

Mr. MISNER. That's true.

Mr. STOVALL. Well, how do you see that being resolved, if not by legislation?

Mr. MISNER. It can be resolved in any number of different ways. It can be resolved, first and foremost, if it is not through legislation, through local district rules. But what will eventually determine the tough questions, of course, is the litigation.

Mr. STOVALL. Well, that is the point. If the Congress acts affirmatively, there will not be litigation. The law is fixed in concrete. If it does not act affirmatively, then we go by standard guidelines, if you will, such as the Judicial Council has brought before us today. And that will create more litigation and more uncertainty. Do you not agree with that?

Mr. MISNER. Well, we will have some litigation, but I would believe—and I haven't seen any drafts of this—I would believe the Congress would find it very difficult to plug every potential loophole in any act which is passed. We rely on people's good common sense.

Mr. STOVALL. Now, sir, you report on civil cases—or would you prefer that we wait on those questions until someone else comes in?

Mr. MISNER. Well, I will attempt to answer any questions put to me.

Mr. STOVALL. The Administrative Office of the U.S. Courts, in a 1978 report, told the Congress that pending civil caseloads for all U.S. district attorneys had risen almost 20 percent since the 1974 Speedy Trial Act began to take effect.

In light of such an increase, should a higher level of priority be given to civil case dockets?

Mr. MISNER. Sir, it was Winston Churchill that said that ultimately, the hallmark of any civilized nation is how it treats its unfortunates; and I think the sixth amendment right to a speedy trial,

and the notions that have been within our own jurisprudential systems, have said that criminal cases will get priority. And I think I agree with that.

Mr. STOVALL. So do you agree that the entire U.S. district court system would be well served if all were to follow the Arizona example, if you will, of 93 to 97 percent of its caseload to criminal cases?

Mr. MISNER. No; certainly not. And that's why I suggested to the Chairman that I would like to see hearings in the future so that we can, in Arizona, upgrade our civil calendar. No one is happy with that. If we have determined that certain types of cases, civil cases, should be heard in the Federal court, it is a facade to say they will, when you don't have any trial time.

I would think that the civil calendar should move as expeditiously as it can.

Mr. CONYERS. May I ask whether you have a view on the strict or loose construction? It seems to me that we really don't have any reason, unless it is a jurisdiction election, to be more technical than to permit loose construction, as long as it doesn't violate the spirit or the letter of that act.

Mr. MISNER. Mr. Chairman, as I read the legislative history, the concerns which were voiced by many people were that the Speedy Trial Act would prohibit the Justice Department from being involved in tax cases or conspiracy cases, or the massive drug cases; and the congressional reaction to that was no, it won't if you have a legitimate problem. "Come in. Tell us on the record what's wrong. All we're asking is that continuances, as a matter of stipulation, are no longer allowed; and that continuances for good cause will be granted under the ends of justice exclusion." That is my understanding.

Mr. CONYERS. And the lawyers would plead both sides of the question of speedy trial, and exclusionary question, so that the judge wouldn't be trying to carry this burden somewhere underneath his robes.

It would be litigated with the other kinds of procedural questions that are bound to come in a Federal trial.

Mr. MISNER. Mr. Chairman, in the district of Arizona, and a number of other districts with which I am familiar, by local rule we have required that every motion in criminal cases make reference to the Speedy Trial Act. And that the lawyers make that a part of their motion practice, as they would making reference to jurisdiction or any other matter. And the burden—it shouldn't and isn't on the judge. It is a question of complying with the law.

In the other areas of the law, lawyers argue both sides. That is what the adversary system is all about. There is no reason why that shouldn't be applied in the area of speedy trial.

Mr. CONYERS. Mr. Hyde, do you have questions of the witness?

Mr. HYDE. I do not.

Mr. CONYERS. Mr. Volkmer, do you have questions of the witness?

Mr. VOLKMER. Did the Arizona district court keep a record on the exclusionary time, or not? It appears, from your statement, that they do not.

Mr. MISNER. Mr. Chairman, Mr. Volkmer, we record all excludable time, and I think over the course of the last 2 years that we have averaged somewhere in the neighborhood of 20 to 30 percent of all defendants who have excludable times recorded in their case.

My own personal opinion is that that is not 100 percent, but it is good.

Mr. VOLKMER. Now, do you have two judges?

Mr. MISNER. No, sir, we were given three. In the Omnibus bill, you mean?

Mr. VOLKMER. Yes.

Mr. MISNER. Well, our full complement is eight, and we presently have four, four active judges.

Mr. VOLKMER. And none of those have been appointed yet?

Mr. MISNER. Well, I think, Mr. Volkmer, that Judge Val Cordova, who will be our first Chicano Federal judge, is to be sworn in next week.

Mr. VOLKMER. I have no further questions.

Mr. CONYERS. Well, we want to thank you very much.

You have been very helpful, of course, and I know you will continue to watch our progress and our resolution of these issues.

You have contributed greatly, and I commend you and all of the other reporters who have given of their time and expertise so generously. I think you have helped to make this act the success that it is going to be. Thanks.

Mr. MISNER. Thank you. Mr. Chairman.

Mr. CONYERS. Our next witness is another reporter, Mr. Michael Martin, professor at Fordham University School of Law in New York City, who reported for the Southern District of New York.

He has written extensively on evidentiary law and has served on the committee that drafted the second circuit guidelines which have been distributed to all the members of this subcommittee. I am very pleased that you have taken the time out to join the subcommittee in the resolution of this difficult problem. We will incorporate your very excellent statement in full, at this time, and that will leave you to make your presentation.

[The statement follows:]

STATEMENT OF MICHAEL M. MARTIN, REPORTER, SPEEDY TRIAL PLANNING GROUP, SOUTHERN DISTRICT OF NEW YORK

[Biographical note: Michael M. Martin is a Professor at Fordham University School of Law in New York City. Since December 1975 he has served as Reporter to the Speedy Trial Planning Group in the Southern District of New York. He was also a member of the committee, chaired by Judge Robert J. Ward (S.D.N.Y.), that drafted the "Guidelines to the Speedy Trial Act" which were promulgated by the Second Circuit Judicial Council.]

STATEMENT

Mr. Chairman: I am pleased to be given this opportunity to share with your Committee some of the experiences of the Southern District of New York in implementing the Speedy Trial Act, as well as some of my observations regarding the Act.

In 1976, when our Planning Group was preparing the transitional Speedy Trial Plan, we estimated that there were 1150 defendants on the Southern District docket whose cases did not comply with the Act's 1979 time limits. Even though our district has many of the most complex criminal and civil cases, the Planning Group and the Board of Judges, under the leadership of Chief Judge David N. Edelstein, made the decision not just to hope that the Act would go away. Rather, we in the Southern District decided to make a good-faith effort to achieve compliance and to eliminate that backlog of 1150 defendants before July 1, 1979.

With the cooperation of all concerned, especially the U.S. Attorney's office under Robert B. Fiske and the clerk's office under Raymond F. Burghardt, the Court has attained its goal. As a result of this effort, we do not expect that imposition of the sanctions on July 1 will have any significant effect on the disposition of either criminal or civil cases in the Southern District.

Let me now tell you how we accomplished our plan and some of the principal lessons derived from the experience. A major feature of our plan was establishment of a Pilot Group, consisting of 6 judges, who adopted the permanent 60-day arraignment-to-trial limit beginning October 1, 1976. Those judges continued to take their full complements of criminal and civil cases by random assignment. They met together periodically with the U.S. Attorney and me to identify problem areas and exchange ideas about successful techniques and with the Chief Judge to review their progress.

In the course of the pilot program we observed three phenomena which I believe are relevant to the issues your Committee is considering. First, we learned that the transition period involves additional pressures that largely disappear once the backlog is removed. Second, there are techniques available to speed up the processing of criminal cases without impairing the quality of justice delivered. Third, there was a tendency at the beginning not fully to utilize the flexibility that was written into the Act. As we gained experience, we found that many apparent problems had in fact been anticipated within the legislation.

As to the first point, the pressures unique to the transition period: We found that it took four to six months for the Pilot Group judges to eliminate their backlogs and complete the transition to a 60-day calendar. During that period they had to concentrate a disproportionate share of their time on the criminal docket, with some decrease in civil trials and terminations. Once the transition was complete, however, civil dispositions returned to or surpassed prior levels. Another consequence of the transition was that the U.S. Attorney's office was disproportionately engaged in serving the Pilot Group. I was told that at one time one-third or more of the Assistant U.S. Attorneys were serving the Pilot Group judges, who constituted only one-fifth of the Court. Once the backlog was removed, however, the disparity disappeared. This experience suggests to me that many of the problems in other districts may be attributable to inadequate temporary resources being made available during the transition period, rather than to pressures inherent in the Act's shorter time limits. Incidentally, it was the discovery of this four-month transition period and its peculiar pressures that led us to put successive groups of judges on the permanent limits beginning a year ago. Since April 1, 1979, the whole Court has been working under the 60-day limit.

Second, the pilot program enabled us to identify a number of techniques which can be used to expedite criminal cases. The willingness of the judges to modify their procedures and share their knowledge of successful techniques with their colleagues has been a significant factor in the Court's achievement. Of course, different judges have success with different techniques, but some of those generally found to be successful include: encouraging informal discovery; holding pretrial conferences shortly after arraignment to resolve discovery issues and schedule necessary motion hearings; avoiding formal submissions and written rulings on motions; and putting civil cases on short notice to fill trial time when criminal cases plead out. Above all, the not-surprising conclusion was that the judge's early and consistent attention to his criminal calendar leads to speedy terminations.

The third major lesson of the pilot program was that case processing can become too fast if flexibility built into the Act is not utilized. We found at the beginning a tendency among the judges to schedule as if the Act had imposed an absolute 60-day limit for arraignment to trial, rather than 60 days net of excluded time. I suspect that tendency was attributable in part to a "fish-bowl effect"—that is, the judges realized they were involved in a demonstration project and feared that it would be interpreted as a sign of weakness if they had to resort to excluded time in scheduling their calendars.

There was also probably a factor of unfamiliarity with the excluded time provisions on the parts of both the judges and the clerical personnel. Given that those provisions are complex, as well as frequently imprecise and without authoritative interpretation, there was probably a desire just to avoid using them in scheduling. These or other factors may account for the wide disparities between districts in the incidence of excluded time.

The consequences of not using excluded time were some major difficulties which now serve as the basis for attacks upon the Act. I am speaking specifically of the judge's lack of flexibility in scheduling; restrictions on defendants' right to counsel of choice and frequent changes in attorneys for both prosecution and defense; and inadequate time for preparation by the defense in complex cases.

Once those problems and their sources were identified, steps were taken to reach solutions. Efforts were made to improve the recording and communication of excluded time, so that the judges could have up-to-date and accurate information before them when scheduling cases. The deleterious consequences of not using excluded time were publicized, leading, for example, to a seven-fold increase in the rate of using the (h)(8) exception in early 1978. Finally, a committee chaired by Judge Robert J. Ward of the Southern District prepared Guidelines to the Speedy Trial Act for use throughout the Second Circuit. Those Guidelines establish rules for recurrent excluded time situations and give guidance for exercise of the judge's discretion that is sufficiently specific to be helpful. They interpret the Act's excluded time provisions so as to give defendants the maximum time for preparation consistent with the public's interest in prompt dispositions. For example, the problem of defendants being at a disadvantage in terms of time to prepare for complex cases is addressed in at least two ways. First, in situations where the judge decides that written submissions are required, time is excluded under section 3161(h)(1) from the date the judge makes that decision through the date of any argument or post-argument submissions. Second, the involvement of numerous documents or wire taps, for example, are specifically stated as grounds for (h)(8) continuances.

Finally, the Guidelines emphasize both the importance of the defendant's interest in counsel of choice and the inefficiencies of unnecessary changes of counsel on either side. As those Guidelines are implemented, I believe that it will be possible to achieve compliance with the Act's permanent limits, without undue pressure on either the rights of the parties or the efficient administration of criminal justice in the federal courts.

Before I conclude I should like to speak briefly to two other matters arising out of our experience implementing the Act. First, there is no question but that the Act has imposed significant and sometimes onerous record-keeping requirements on the clerical personnel. I am not sure that I would, as an original proposition, structure a speedy trial act with three time-keeping intervals and fourteen or so categories of excluded time. Even with our three years of experience, operating the system seems expensive and complicated. Nevertheless, I would concur in the Judicial Conference recommendation only to the extent it eliminates the indictment-to-arraignment time limit. The Conference's proposal to expand the time limits and provide excluded time only in the judge's discretion seems to me to eliminate the major virtues of the present Act.

As it is now drafted, the Act sets a norm of rather speedy dispositions, but it permits extensions of the time limits, when warranted, through use of the excluded-time device. The excluded time categories not only encompass the wide variety of situations giving rise to a need for extended limits, but they also extend the statutory limits automatically, avoiding expenditure of judge time in most instances. I believe the Judicial Conference proposals would encourage delay in the vast bulk of cases that are not complex and would provide no relief for the truly complex cases beyond that available under the present (h)(8).

The second matter to be noted is that part of our success over the transition period may be attributable to a decrease in criminal filings. That decline reduced the pressure involved in disposing of the backlog. Once the backlog is eliminated, however, an increasing level of filings can be disposed of on a current basis. For your information I have included in my prepared statement a table comparing the numbers of cases filed in fiscal year 1976 (the last fiscal year before the Act took effect) and in fiscal year 1978 (the last for which statistics are available). As the table shows, the smallest percentage decrease was in the most complex cases and the greatest decrease in the least complex and other cases categories. Thus, to the extent, if any, that the Act led to more declinations, at least they were not disproportionately concentrated in the more serious cases.

CRIMINAL CASES FILED, BY TYPE, SOUTHERN DISTRICT OF NEW YORK

[Fiscal years]

Administrative Office weight: Offenses	1976	1977	1978	Change 1976–78 (percent)
Heavier than average	488	417	397	−18.6
Homicide, robbery, assault, sex offenses	107	76	72	
Fraud	230	183	207	
Forgery, counterfeiting	151	158	118	
Average	413	407	323	−21.8
Drug offenses	260	168	180	
Burglary, larceny	130	155	143	
Liquor, Internal Revenue	0	0	0	
Selective Service	23	84	0	
Lighter than average	158	115	121	−23.4
Weapons, firearms	69	23	25	
Auto theft	1	0	3	
Embezzlement	82	91	74	
Immigration	6	1	19	
Other	189	166	64	−66.1
Total	1,248	1,105	905	−27.5

Sources: Administrative Office of U.S. Courts, Management Statistics 24 (1976); id. at 24 (1977); id. at 24 (1978). The Administrative Office's weighting system is described at id. 129 (1978).

I would conclude my prepared statement with the observation that the experience of the Southern District shows that the Speedy Trial Act is workable with conscientious cooperation of all the concerned parties. Further, I think we have not only identified some of the problems that may arise with full compliance, but also through the Second Circuit Guidelines (which were largely derived from our experience) have pointed the way to avoiding those problems.

Mr. CONYERS. Welcome.

TESTIMONY OF PROF. MICHAEL MARTIN, REPORTER FOR THE SOUTHERN DISTRICT OF NEW YORK

Mr. MARTIN. Thank you, Mr. Chairman. I am pleased to be given the opportunity to share with your committee some of the experiences of the Southern District of New York in its implementation of the Speedy Trial Act, as well as some other observations regarding the act.

When our planning group got started in 1976 and was preparing the transitional speedy trial plan, we estimated that there were 1,150 defendants in the southern district dockets whose cases did not comply with the act's 1979 time limits.

Now, even though our district has some of the most complex civil and criminal cases in the country, it was the decision of the planning group and the board of judges under the leadership of Chief Judge Edelstein that we were not going to just hope this act would go away. We decided, in the southern district, to make a good faith effort to achieve compliance and to eliminate this backlog of 1,150 cases.

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I am pleased to say that, with the cooperation of all those concerned, particularly Mr. Fiske, who spoke to you this morning, and the clerk of the court, we have achieved that goal. We do not expect, with the imposition of sanctions, that we are going to have any significant problems, either on the criminal or on the civil side.

Now, as Mr. Fiske described this morning, one of the major features of our planning process was the implementation of the six-judge pilot group. They adopted the permanent time limit on October 1, 1976, but they continued to take their full complement of cases, both civil and criminal, through random assignment.

In the course of the pilot program, we observed three phenomena which, I believe, are probably applicable in most districts and are certainly relevant to the issues your committee is considering.

First: We learned that the transitional period involves some additional pressures that largely disappear once the backlog is removed.

Second: We learned about techniques that can speed up the processing of criminal cases without impairing the quality of the justice delivered.

Third: We learned there is a tendency, particularly in the beginning, not to fully utilize the flexibility that was written into the act.

As we gained experience, we found that many apparent problems had, in fact, been anticipated within the legislation.

Now, as to the first point, the pressures unique to the transition period, we found that it took 4 to 6 months for the pilot judges to eliminate their backlog and complete the transition to the 60-day calendar. During that period, it's clear that they had to spend a disproportionate amount of time on their criminal docket, and that led to some decrease in the civil trials and terminations. But once the transition period was over, their civil dispositions returned to, or even exceeded, the previous levels.

As Mr. Fiske mentioned, another point to the transition was that an additional number of the assistant U.S. attorneys had to be serving the pilot group. At one time, I think it was probably about as high as one-third of the assistants working at that. Once they got rid of that backlog, it came to a normal level; that is, a fifth of assistant U.S. attorneys were serving the fifth of judges on the pilot program.

What this experience suggests to me is that many of the problems in the other districts may be attributable to inadequate temporary resources, not anything inherent in the act, but just a lack of resources during the transitional period of getting the excess cases out of the way.

Incidentally, we figured out, on the basis of that experience, or discovered that it is about a 4-month transitional period. We put additional groups of judges on the permanent limits beginning a year ago, and every 3 months we put another group of judges on; and since April 1, 1979, the whole court has been working to the 60-day limit.

The second point is that the pilot program enabled us to identify a number of techniques which can be used to expedite criminal cases. The willingness of the judges to modify their procedures and share their knowledge of successful techniques with their colleagues has been a significant factor in the court's achievement.

Now it is clear, of course, that different judges have success with different techniques; but some of those generally found to be successful include: encouraging informal discovery; holding pretrial conferences

shortly after arraignment to resolve discovery issues and schedule necessary motion hearings; avoiding formal submissions and written rulings on motions; and putting civil cases on short notice to fill trial time when criminal cases plead out.

I think our major conclusion, of course, would be that the judge's early and consistent attention to his criminal calendar leads to speedy terminations.

The third lesson that came out of the pilot program was that case processing can become too fast if the flexibility built into the act is not used. The judges in the beginning had a tendency to schedule as if the act had imposed an absolute 60-day limit for arraignment to trial, rather than 60 days net of excluded time. Whatever the reasons, for these practices, we saw some of the problems that are now serving as the basis for attacks on the act, that is, the concern that the judge lacks flexibility in scheduling, that there are restrictions of the defendant's rights to counsel of choice, and that there are frequent changes in attorneys for both prosecution and defense and inadequate time for preparation by the defense in complex cases.

We noticed these things in the pilot program. We identified them and then steps were taken to reach solutions.

Mr. CONYERS. Are any of those problems subject to the excludable provisions?

Mr. MARTIN. Well, the main point was that once we recognized the judges were scheduling cases as if they had to do things in 60 calendar days, and yet were causing these problems, we got them conscious of using the excluded time in the act, so they didn't feel that they had to schedule within 60 calendar days, and they could stretch it out maybe 90 calendar days, using the time that's in the act.

For example, in the first few months of 1978, after we had identified some of these consequences and published them, we saw a sevenfold increase in the use of (h)(8). The judges became conscious, "Look, you're putting undue pressure on defense counsel by not using (h)(8). You're causing too many changes." So they started using the (h)(8).

The other major change that was made was the promulgation of the guidelines for the Speedy Trial Act drafted under Judge Ward of the southern district. These are the second circuit guidelines which establish rules for recurrent excluded time situations and give guidance for the judge's exercise of discretion.

For example, the problem of defendants' being at a disadvantage in terms of time to prepare for complex cases, we handle in at least two ways.

One: In the complex case where written submissions are necessary—and ordinarily we say written motions should not be made—motions should be handled orally; but when they are necessary, we say that that is time to be excluded under (h)(1); that is, proceedings involving the defendant.

Second: When there are numerous documents or wiretaps, or any of the other characteristics that make a case complex, then we have said those are specifically grounds for an (h)(8), and we encourage the judges in those cases to give an (h)(8) exclusion.

Finally: Throughout the guidelines there is emphasis, and maybe it is just a reminder to the judge, of the defendant's interest in counsel of choice and of the inefficiencies that come about when it's necessary to change counsel on either side. So we hope that the guidelines will avoid some of these problems.

I would like to talk to two other matters before I conclude my prepared statement. One is the problem that the act has imposed rather significant and onerous timekeeping requirements on clerical personnel. I'm not sure that if I were drafting a speedy trial act from the beginning, I would have set up three timekeeping intervals. We found from 3 years of experience that operating that system is complicated, but I certainly would not agree with the judicial conference recommendation where it would expand the time limit and provide excluded time on the judge's discretion. It seems to me that would eliminate major virtues of the present act.

The act now written, sets a norm of rather speedy dispositions, but it permits extensions of the time limits when they are warranted, through the use of the excluded time device and the excluded time categories. This includes not only the wide variety of situations giving rise to a need for extended limits, but they act automatically in these cases. The judge doesn't have to spend time deciding, "Do I have to exercise my discretion in order to give some more time?" So I think that the act sets a short norm, but has excluded time for the appropriate instances.

I would think that the Judicial Conference's proposal will only encourage delay in the vast bulk of cases that are not complex, and would provide no relief for the truly complex beyond that available under the present (h)(8).

The second matter is the proposal in the Senate bill to postpone the effective date of the sanctions. I believe, first, that postponement is unnecessary and second, that it would be unwise, as Mr. Misner has already pointed out, and I would agree with him.

It is unnecessary because few districts have even asked to use emergency provisions. That does not suggest that the country as a whole is facing a judicial emergency because of the Speedy Trial Act. I think it would be unwise to suspend the time limits because it would put into question whether Congress is really serious about this act.

Many people have gone through the transitional period, either hoping or believing that the act would just go away. I'm afraid postponement would only encourage that. I don't think it should be encouraged. If we are talking about an Amy Vanderbilt notion of giving deference, I think we have to give deference to the districts like Arizona and southern New York and all of the others where there has been a good-faith substantial effort and everyone is now ready to go for sanctions. For those not in a position to do so, the judicial emergency provisions are available.

So I conclude with the suggestion that the experience of the southern district shows that the Speedy Trial Act is workable with the conscientious cooperation of all concerned. I think we have identified some of the problems that may arise with full compliance, but we have pointed the way to avoid these problems.

Mr. CONYERS. Well, I certainly appreciate your thoughtful statement and examination of these issues. Are you still short of judges in the district?

Mr. MARTIN. I must confess that we have not had a significant shortage of judges, to the best of my knowledge. In the past 4 years, we have never had a point in which we have had more than three vacancies and in a court that has 27 authorized slots, that's a very insignificant number. Most of the time we have had one or two vacancies at the most.

Mr. CONYERS. What about the pilot program; is that still going on?

Mr. MARTIN. Well, in a sense, we're keeping an eye on what the pilot judges are doing, but as I suggested, we have actually moved all the units of court, each of the judges, now to the permanent time limits. The second group of six judges went on 1 year ago, July 1, 1978. We keep an eye, as to whether they were having trouble with compliance, and they weren't. Again, it is the same thing. It takes a little while, when their civil dispositions fall off, but once they get down to a 60-day limit, their civil dispositions pick up.

A question was asked earlier about the rise in the caseload in the United States in the past 4 years. It seems to me that, well, there are two points I would like to make about that. I don't know what the increase in filings has been, so I'm not sure what credence we can give to the notion that there has been a 20-percent rise in pending civils.

The second is related to what I have just spoken about, and that is the backlog problem. During the transitional period, as we're trying to get our cases from what may have been a 180-day calendar down to a 60-day arraignment-to-trial calendar, I think there is a backlog of cases that have to be disposed of, and during that time you can't dispose of as many civil cases.

The real question, I think, that is going to come up is going to be once you get everybody on the 60-day calendar, can you maintain civil dispositions. Our experience is yes, there is no trouble maintaining civil dispositions on the 60-day calendar.

Mr. CONYERS. Do you experience the national phenomena that arrests are declining, criminal is going down and civil going up?

Mr. MARTIN. We have certainly experienced both of those. Arrests have gone down in the southern district, but the decline has been more in the less serious cases. I have attached, as part of my prepared statement, a table that shows it is the least serious cases which have shown——

Mr. CONYERS. In arrest?

Mr. MARTIN. No; in filings, I'm sorry, I don't know what the change has been in arrests in the southern district. I can find out, but I don't know.

Mr. CONYERS. Let's go to the other end of the spectrum. Ought we not be concerned about the ripoff that is possible under the provisions?

Mr. MARTIN. I think we ought to be, to a certain extent. That Congress in putting that emergency provision in, relies on the good faith of the judicial council of each circuit, and the Judicial Conference of the United States, which authorizes those. I am not sure with respect to all the districts, but in the figures I have seen, most of the districts which have asked for judicial emergencies show significant judicial vacancies. Now I think that is not true with the eastern New York district which is the district with which I am most familiar. But districts like Arizona and others which have been asking for judicial emergency are ones which are showing a large number of vacancies, and to me that seems to be the clearest situation.

But I certainly don't think that going across the board and postponing the implementation of the act would be desirable.

Mr. CONYERS. Well, we can never find out how good or bad the act is. It seems clear to me that if we were actually, for some reason not yet foreseeable, to experience some buildup of cases, the Congress could and would move rapidly to ameliorate the situation. I couldn't imagine us refusing to act in a clear judicial emergency.

Mr. MARTIN. That would be my opinion, also.

Mr. CONYERS. Well, I am very grateful to you for your comments and I turn now to Mr. Hyde.

Mr. HYDE. Well, I have no questions other than to commend the witness for a very fine and illuminating statement. Thank you.

Mr. CONYERS. Mr. Volkmer, would you care to question?

Mr. VOLKMER. I would like to have the witness' comments on the following—let's say we eliminate the indictment-to-arraignment limit and have a single indictment-to-trial limit. A defendant, prior to indictment, would have 30 days for arrest to the indictment, OK? And then 70 days or the time afterwards to bring to trial, OK?

So for arrest, actually the indictment is 10 days after arrest. You have 90 days, and then if it is arrest-after-indictment, it would be within 70 days.

What do you think of that?

Mr. MARTIN. I would have no problems with that. It does provide a little more flexibility as Mr. Fiske suggested this morning, the 10-day arraignment or—excuse me, the indictment-to-arraignment period has not been a significant problem in the southern district. I realize it has been in a lot of districts, and if we can give flexibility by taking that out and focusing only on the arrest indictment and trial days, I think that would have some advantages.

Mr. VOLKMER. These are some of the things we can find out as we pursue the matter, but that may work all right with you? It may work all right, but somewhere else, it might cause some problem.

Mr. MARTIN. I can't see that going to essentially two time periods from three is going to cause any problem. I think it is probably going to make things easier.

Mr. VOLKMER. You do disagree as to the proposal to extend the sanctions even for 1 year?

Mr. MARTIN. Oh, yes, I think it is unnecessary and unwise with only eight districts——

Mr. VOLKMER. You think in this short period of time that we should make any permanent changes?

Mr. MARTIN. I think short term—no. I think what we really need is experience under the sanctions. We have had over 2—we have had 2 years of experience with no sanctions.

Mr. VOLKMER. We need to review the totals, what's happening in all districts?

Mr. MARTIN. Yes, if you want to go along and continue the planning process, I believe that the Senate bill does to next year. That seems to me to make some sense, but in terms of postponing sanctions, I don't believe in that at all.

Mr. VOLKMER. So you don't want to see the dire consequences of those?

Mr. MARTIN. No, I still don't understand why the Department of Justice throws out the figure of 5,000 dismissals. They know it isn't true or close to being true.

Mr. VOLKMER. Well, we will find out.

Mr. CONYERS. Well, we appreciate your contribution. Our final witness for the afternoon is Prof. Richard Frase of the University of Minnesota, and a reporter for the northern district of Illinois. He is a member of both Illinois and Minnesota bars and has published articles on speedy trial and other matters.

Sir, we are grateful for your joining us. We apologize that it took so long to get you before the microphones, but we appreciate your prepared statement, and we welcome your oral exposition.

[Statement by Prof. Richard Frase follows:]

STATEMENT SUBMITTED BY RICHARD S. FRASE, ASSOCIATE PROFESSOR OF LAW, UNIVERSITY OF MINNESOTA, AND REPORTER TO THE SPEEDY TRIAL ACT PLANNING GROUP, NORTHERN DISTRICT OF ILLINOIS

HEARINGS ON AMENDMENTS TO THE SPEEDY TRIAL ACT OF 1974

This will summarize my views on the proposed amendments to the Speedy Trial Act of 1974, 18 U.S.C. § 3161 et seq. Some of these points are elaborated in greater detail in my article, "The Speedy Trial Act of 1974," University of Chicago Law Review, Vol. 43, pages 667–723 (1976).

I believe that the basic concept of the Act is sound and that, with appropriate amendments, it will improve the administration of criminal justice in federal courts. The Act should also serve as a model for state legislation, because it embodies two very important innovations: first, the Act explicitly recognizes the important public interest in prompt disposition of criminal cases, and attempts to make this public interest enforceable even if the defendant is not interested in a speedy trial; second, the research and planning components of the Act are an important step toward more informed and rational evaluation of criminal justice procedures.

As with any innovative statute, the Act is not without its problems, but I believe it is extremely important that Congress see this effort through; the inevitable pressures to repeal or substantially emasculate the provisions of the Act must be resisted. With the changes recommended below, the Act will be workable, and the experience gained in the first few years of full effectiveness of the Act will permit further adjustments and revisions to be made.

My specific recommendations are as follows:

1. *Effective date of sanctions.*—In its recent report, the General Accounting Office has recommended that the effective date of sanctions be delayed for 18–24 months, while additional data on implementation problems is gathered. I believe any postponement of the effective date would be extremely unwise and totally unproductive. The major difficulty with the planning process in the last four years is precisely the absence of sanctions, and consequently the absence of a sufficiently "live" problem to motivate all parties to take the Act seriously. As a result, the data collected thus far is of questionable predictive value in estimating future compliance problems, and this will continue to be the case if the sanctions are delayed. I believe it would be much wiser to extend the length of the statutory time limits, as discussed below, at least for the first two years of effectiveness of sanctions. This would motivate judges, prosecutors, and defense counsel to meet those time limits, and would permit the scope and meaning of the various statutory provisions to receive concrete judicial and appellate definition. Apart from the problems of this particular act, I think it is extremely important that Congress "keep its promises"; when the parties affected by a new statute are told that they have a certain period of time in which to prepare for the effective date, I think that warning should be taken seriously.

2. *Structure of time limits.*—The present three-stage structure of time limits has advantages and disadvantages. Separate time limits are desirable because they give the parties incentive to expedite each stage of procedure. Thus, for example, a defendant arrested prior to indictment should not have to wait 100 days to discover whether or not he will be indicted or whether prosecution will be declined; if such a defendant is indicted after 90 days, it is also unfair to the courts and defense counsel to have only 10 remaining days to try the case.

However, the use of multiple time limits increases the number of cases which will fail to meet all statutory requirements. Thus, studies we conducted in the Northern District of Illinois showed that non-compliance rates were twice as high using a three-stage time limit structure than they were under a single time limit of the same overall length; the reason for this is simply that some cases which are very slow in one of the three stages are very fast in other stages, so that the overall delay is not excessive. One way to avoid this problem is to permit the so-called "banking" of time saved in earlier time periods. Thus, if a defendant is indicted with 15 days to spare on the arrest-to-indictment limit, this 15 days

would then be available in the post-indictment period. Such an approach gives the parties an incentive to save time in the earlier stages, which they can then use, if necessary, in later stages.

Another way to ameliorate the problems of multiple limits is to reduce the number of limits from three to two. I would therefore recommend eliminating the indictment-to-arraignment limit, in favor of a single indictment-to-trial limit. This change also avoids the apparent disproportionateness of enforcing a 10-day limit with the dismissal sanction. The "banking" of time saved during the pre-indictment period should also be permitted; this could be implemented as follows: defendants arrested prior to indictment would be required to be indicted within, e.g., thirty days of arrest, and trial would have to begin within 100 days of arrest; defendants arrested after indictment would have to be tried within 70 days.

3. *Length of the time limits.*—The third report on the Speedy Trial Act, submitted by the Administrative Office of U.S. Courts, shows that about 22 percent of defendants disposed of in the two years preceding June 30, 1978, required more than 60 net days from a plea of not-guilty to trial or other disposition,[1] and the more recent Department of Justice study confirms that there is still substantial noncompliance with the permanent time limit for this stage of procedure. The Administrative Office report also shows that, although pending criminal cases had been reduced about 20 percent in the two-year period mentioned above, the number of civil cases pending had increased by almost that much, thus suggesting that the courts were "robbing Peter to pay Paul." Although prediction of compliance rates after the sanctions become effective is largely an exercise in speculation, it seems very unlikely that the courts will be able to comply with the 60-day limit without either excessive use of excludable time, large numbers of dismissals without prejudice, or major reliance on the judicial emergency provisions.

There is obviously no precise formula for determining how much to raise the limits, but the goal should be a time limit which is achievable, but still short enough so that it will require the courts to further shorten their disposition times and begin to interpret the statutory exceptions; using these criteria, I would recommend that the single indictment-to-trial limit proposed in paragraph 2 above be set at no greater than 120 days, since it appears that about 90 percent of defendants are already being processed within these limits. (See the Administrative Office Report.) If it is believed that the courts have been making insufficient use of the excludable time provisions, and that these provisions will withstand challenges by defendants after the sanctions become effective, then perhaps a 100-day limit is workable.

As for the pre-indictment time limit, I think proposals to increase this to 60 days may be excessive. The Administrative Office Report mentioned above indicates that approximately 80 percent of defendants were indicted within 30 days, and that 90 percent were indicted within 45 days; therefore, a 45-day limit from arrest to indictment would appear to be adequate. In light of the fact that there is no judicial emergency provision for this time period, however, a somewhat longer period may be justified initially, while further experience is gained with the sanctions in place.

4. *Excludable time provisions.*—The excludable time provisions are an important part of any speedy trial statute, but they are particularly important in a statute which attempts to set very strict time limits. It must be recognized, however, that such provisions are themselves a potential source of delay, and that the goals of speedy trial are measured in "real time" not "net days." Thus, I think an effort must be made to make the excludable time provisions as clear and automatic as possible, and to also try to make their use the exception rather than the rule. It is probably premature to substantially revise the excludable time provisions prior to their actual use and interpretation by the courts, but if changes were to be made, I would recommend the following:

(*a*) *Pretrial motions exclusion.*—This provision is ambiguous. Viewed most narrowly, it would cover only actual hearing days; at the other extreme, it could cover all time from the filing of the motion to the time at which such motion was taken

[1] See p. F–1 of the Administrative Office Report. This estimate is based on the combined figures for the two years ending June 30, 1978. The separate figures reported for the 1976 and 1977 "speedy trial years" should be disregarded, since they reflect a statistical artifact: many of the defendants who "began" each interval in 1977 did not complete that interval prior to June 30, 1978 (hence the much smaller numbers shown for 1977), and these pending cases obviously tend to be the slowest cases of all those that began in 1977. Thus, it is invalid to conclude, from these tables, that the U.S. courts "improved" their disposition times between 1976 and 1977.

under advisement. Under either interpretation. I think the exclusion should be eliminated. Under the broad interpretation, which I believe courts would be sorely tempted to adopt, there is very little incentive for the courts and litigants to consolidate motions and see that they are promptly briefed and heard. On the other hand, an exclusion that is limited to one or two actual hearing days is hardly worth the effort, and an intermediate approach would be the hardest to define. Thus, I think the provision should be eliminated, and that truly complex cases with numerous pretrial motions and briefs should be handled under the ends of justice provision; alternatively, this exception should have some outside limit (e.g., 30 days), after which a separate ends of justice exclusion would have to be justified on the record.

(*b*) *Transfers from other districts.*—If we are serious about expediting such transfers, and minimizing the hardships which defendants face, then I think some limit on the amount of excludable time should be adopted, e.g., ten days. Such cases, of course, raise difficult legal and practical problems, but that is all the more reason not to totally exempt them from the speedy trial provisions. I therefore do not support the proposals under which the trial limit would not begin to run until a defendant arrived in the charging district.

(*c*) *Procedures "under advisement."*—The preliminary data on the use of this exclusion shows a clustering around the 30-day maximum, which in turn suggests that the exclusion is being rather routinely entered for the maximum allowable time. Rather than turn the Speedy Trial Act into an exercise in loophole-spotting, I think it would be more honest and more consistent with the spirit of the Act to simply lengthen the time limits and eliminate this provision. Again, I do not think the statute should be written in such a way that it encourages the filing of motions and lengthy periods of "advisement" for the sake of gaining additional time.

(*d*) *Ends of Justice continuances.*—Eventually, I believe it will be necessary to add additional specific categories of delay to this provision, to prevent distortion in existing language, but this may have to wait until we have some concrete experience with it. Given the goals of the statute and its legislative history, I have always assumed that this provision implies very strongly that defendants may not waive the time limits of the Act in advance, although they may waive their right to dismissal by not moving to dismiss prior to trial or plea. This non-waiver concept is absolutely essential to the protection of the public interest in prompt disposition, and I would recommend that the statute be amended to make this explicit. Such a non-waivable time limit does pose some problems; in particular, it means that normal principles of estoppel should not apply, and that the defendants must be permitted to contest continuances which they requested or acquiesced in. Otherwise, we will be right back where we started, in terms of uncontrolled defense delays.

5. *Sanctions.*—I think the sanction of dismissal with prejudice is absolutely essential, but the option of dismissal without prejudice should be eliminated. It is absurd to say that the remedy for a stale case is to start all over again at square one, and it is also not clear why there should be two sets of standards for mitigating the statutory time limits in a given case (i.e., the exclusion provisions and the dismissal provisions). If the seriousness of the offense is a basis for denying dismissal with prejudice, it can just as easily be made a basis for granting excludable time. I also assume that excludable time can be granted nunc pro tunc, but this should be made explicit.

As for the other sanctions under the Act, I agree with those who have argued that no distinction should be made between different types of attorneys, and that all should be subject to the same kinds of fines. Finding suitable sanctions for violation of the Act is a difficult problem, however, and Congress should continue to search for new ways to enforce the Act other than through the drastic remedy of dismissal. For example, I think it may be appropriate to fine a defense counsel who allows trial to be set on a day when he knows that he will be unavailable. Furthermore, it may be appropriate for courts to take into account the number of times a particular attorney has had cases dismissed for violation of the Act; for example, perhaps any attorney with more than two dismissals on his or her record should be barred from further representations or prosecutions for some limited period of time.

6. *Special priority cases.*—If the permanent time limits are extended, then I think the special priority granted to defendants in custody should be retained. However, it is necessary to make clear that the excludable time provisions do apply to this separate time limit. Also, it may be useful to clarify the procedures applicable to defendants entitled to be released for violation of this special limit; thus, the Act should specify that release from custody can be made subject to

certain conditions, so long as those conditions do not prevent release initially, and that defendants may be further restricted or even reincarcerated for violation of such reasonable conditions.

As for the "high risk" provision, I think this should be eliminated. Like the District of Columbia Preventive Detention Statute, this provision is very unlikely to be used, and the potential prejudice to defendants in such a designation outweighs the advantages of its use in any event.

7. *The planning process.*—It is unfortunate that the planning and research program envisioned by the Act was confined exclusively to the pre-sanction period. As I indicated at the outset of this statement, the absence of sanctions meant that some courts did not take the planning process seriously, and even those that did could not really tell how judges and attorneys would act once the sanctions became effective. In retrospect, it would have been much better if the sanctions had gone into effect on July 1, 1976, along with the first set of "transitional" time limits (60–10–180). Given the lack of success with the last four years of "planning," it may not now be possible to realize the potential of this device in the context of the Speedy Trial Act, but it is worth a try. At the very least, each court should be required to continue to submit statistics similar to those contained in the 1976 and 1978 district plans, and funds should be made available to those districts which feel that additional planning and research would be productive. Alternatively, the Federal Judicial Center could be instructed to carry out selective surveys, in representative districts, of the problems of implementation and compliance.

Whoever conducts the research, I think two areas should be examined in greater detail than they have been up to now. First, it seems essential to examine some of the problems which led to the passage of the Act, namely: failures to appear (both temporary and long-term "fugitives"); pretrial crime committed by released defendants; and weakening of the prosecution case with the passage of time. These problems are extremely difficult to measure, and some equally important values (e.g., due process, respect for the law, deterrent effectiveness of swift punishment) may not be measurable at all. Nevertheless, there is no excuse for not even trying to ascertain the incidence of problems associated with delay, and the extent to which the Act serves to mitigate such problems. Second, some research should be done, in each district, on two groups of defendants: those who obtain dismissal under the Act, and those who would have been dismissed but for the use of excludable time or other exceptions. The first group of cases should reveal special problems of delay which require either greater preventive efforts, additional excludable time provisions, or greater resources. The second group are equally important, because they may reveal cases which *should* have been dismissed, which were not because of excessive use of excludable time; on the other hand, such cases might also display justifiable delays which call either for new categories of excludable time, or lengthening of the overall time limits.

Ultimately, however, it must be recognized that, in the present state of the art, court management and planning is not a very precise business. The danger of any speedy trial statute is that it tends to focus attention on the most easily quantifiable elements in what is, inevitably, a very complex equation. This does not mean that statistical research is never useful, but it does counsel humility and patience in the pursuit of speedier justice.

TESTIMONY OF RICHARD S. FRASE, PROFESSOR, UNIVERSITY OF MINNESOTA, AND REPORTER FOR THE NORTHERN DISTRICT OF ILLINOIS

Mr. FRASE. Thank you, Mr. Chairman. I guess one of the problems with speedy trial is that lawyers like to talk, and law professors are even worse, but I will try to be very brief. Most of my comments are summarized in my statement and also in an article that I wrote, which is referred to in the statement.

In general, I support much of what was said by the previous two witnesses. I think it is important that Congress see this effort through. The Speedy Trial Act has a couple of concepts which are very important, very innovative, and there are naturally some problems. First, there is the concept of a detailed planning process by which Congress may obtain information about implementation problems, and feed

that back into the appropriations process. I think that is the kind of informed and rational lawmaking that should be encouraged.

Second, the act incorporates an important concept of the public interest in speedy trial. I think it is important to recognize that even if the defendant does not want to have a speedy trial, and wants to postpone his day of judgment, that there are important public interests involved. I think that was very clear in the legislative history and in the wording of the statute, particularly the H–8 provision.

So I think it is important to see this act through, and I would just like to summarize six or seven points, I guess, that are in my statement.

First of all, I think the most important point at this stage is whether to delay the effective date of sanctions. And I agree with the two previous witnesses that such a delay would be both unnecessary and unwise. I think that the districts have done as good a job as they could in the last 4 years, in what is essentially a hypothetical planning exercise. Playing a game without any money riding on it, so to speak. I think it is time that we found out how the act works in practice.

I agree that the provisions of the act have not been fully used. Some of the studies we did in the Northern District of Illinois corroborate the studies that Professor Misner referred to. We saw that there was a large difference among the judges in their use of excludable time, even though the judges receive cases on a random basis, and thus have comparable caseloads. So either some judges are overusing excludable time, or some are grossly underusing it; I think it is probably on the side of underuse. So I think we have not yet seen full use of all of the provisions of the act which allow for mitigation of the time limits on the sanctions.

And the other thing is, you never know until there is money riding on the game, how hard people can work. New innovative procedures will come forward. Necessity is the mother of invention, and I think it is essential to have a live issue so we can start getting everyone motivated to work on these problems. We can start getting some real judicial definitions of the provisions of the act, which I think we haven't really had except for the guidelines, up to this point.

And finally, as a general matter, I think Congress should keep its promises, and I think the effective date was announced far in advance. There will be some problems, but there are plenty of mitigating provisions in the statute which will allow those problems to be resolved.

So I strongly urge Congress to go forward with this. The question then is, should there be any changes made now. And I think—I'm not sure about this—I think that it would probably be desirable to extend the length of the time limits slightly, if only to reassure the parties out in the field, and those districts who have not applied for judicial emergencies, that all heck is not going to break loose. But it's difficult to say exactly how much. And I think we could probably live with the limits as they are now.

Mr. CONYERS. Have you ever tried to open a cattle gate a couple of inches when 2,000 angry bulls were on the other side of it?

Mr. FRASE. Yes; sometimes it is better not to open it up at all. I think that is probably true, but if the limits were to be extended, I doubt if they would have to be extended as much as has been suggested. In my statement I have suggested that, as I read the available statistics, we could probably live with a 45-day indictment and a 120-day trial limit. The existing disposition time limits should be improved somewhat, so the time limits should be less than current

disposition times. We should force the system to do even better than it has done up to this point, but the goal must be a feasible one. And in the Northern District of Illinois. I'm not sure that they could live with the 30–10–60 limits. I'm pretty sure that they could with 45–120. They have applied for a judicial emergency, and if they get that, at least until they get their new judges on line, then they won't have to worry.

But I do think that some extension of the time limits is probably necessary. The question of the length of limits is very closely related to the exclusion provisions themselves, and also to the structure of the limits.

I would like to address those separately, the structure of the limits, the present three-step system—indictment, arraignment, and trial limits—is, on the one hand, the best way to encourage speed at each stage of the procedure. You give the parties shorter limits at each stage rather than giving them 100 days and saying, do what you want. There is no reason why an arrested defendant should have to wait 100 days to find out whether he or she is indicted or that prosecution is going to be declined. So there is a reason to have at least a couple of stages in there. But studies we did in northern Illinois show that the more stages you use, the more noncompliance you have. We found that the noncompliance rates were about twice as high if you used three limits as if you used one limit of the overall length.

So I think there is an argument for maybe cutting back to two, and also the idea of dismissing a case for violating the 10-day limit seems a bit disproportionate.

Mr. CONYERS. I don't know if that is, in fact, our intention. The 10 days in between arraignment and indictment——

Mr. FRASE. That it perhaps would not have a sanction at all? That is the way the act seems to be written now, which raises other problems, I think, as to whether there should be a time out period in the middle of the case.

Mr. CONYERS. Well, speaking of one legislator's intent on that subject, it was not my intention that that would occur in the 10-day period.

Mr. FRASE. But again, the problem can be avoided as I think everyone has been suggesting, by the consolidation of the second and third periods. I think that makes sense.

It has also been suggested, I think it was Congressman Volkmer just now, was suggesting an idea that I have heard referred to as "banking" time. If you get through the first period with some time to spare, why shouldn't that be available in the postindictment period?

I think that is a good idea. It could be done fairly simply. You say, for defendants arrested prior to indictments, that their indictment period and their trial period both begin with arrest, so you have 30 days to indict them and 100 days to try them. And the effect of that is that you can use the full 100 days to get to trial even if you indict after 5 days.

Mr. CONYERS. Well, if we took to that idea, and it is not unattractive, would it not be more appropriate to let 6 months go by and let's see what it looks like right now, play ball. Start the game up and see what happens, then looking toward the actual track record, this modification might seem much more logical and reasonable than it does at this point.

Mr. FRASE. I think all of my suggestions, except the one about

keeping the effective date, are ones that don't have to be acted upon immediately. And I do think that again, using the image of the gate and the bulls, I really think there really are some problems in starting to tinker with the act.

But I do think you have some concrete experience with the act. So I don't think that waiting would be a bad idea.

I think we should also probably hold off on the question of what to do with the exclusions. The way they are written now, they accommodate just about every form of delay or problem that you could imagine, with one possible exception. I don't know how you can use these provisions, or whether you should use these provisions, to deal with the problem of summer schedules. In many courts, there is a period when judges and other personnel traditionally take vacations, and when everyone is understaffed. They are very concerned about that in some districts.

Mr. CONYERS. Well, I would suggest that the sixth amendment would have precedence over summer schedules.

Mr. FRASE. Well, certainly it has to, to the extent that the act is riding in step with the sixth amendment. That has to be the conclusion. Of course, the Congress is not prevented, for the sake of the public interest, from adopting a stricter set of time limits, going beyond defendants' rights.

Mr. HYDE. Isn't there something in the Constitution about involuntary servitude that some of these judges might raise during summer months? [Laughter.]

Mr. FRASE. I do think it is important that while being strict with all the parties in the field, including the reporters, that we keep the judiciary on the side of the statute, and I think that some of the early problems with the act were caused by some judicial reluctance to use the act, feeling that it was not in line with their prerogatives, not seeing the act, as I think it should be seen, as another tool judges may use to enforce the public's interest. And I don't think we should turn off the judges who are going to make the statute work and are going to define just how strict it is. So I think we should be somewhat concerned about their problems.

I would just like to make two other points, then, of the things I have here. One is, I think that if we do extend the time limit, it's very important to retain the priority for custody cases, and I think that would probably be done in most districts, anyway. We found that, despite the problems with the caseload, generally we were able to deal with the custody cases in the northern district, and we would continue to do that.

I'm not sure that the high-risk category should be retained. I think there are problems in calling anybody a high risk. I'm not sure that that provision should be kept.

Mr. CONYERS. The Senate examined that very closely when the subcommittee held its hearings.

Mr. FRASE. And their conclusion was?

Mr. CONYERS. Well, they didn't look very favorably upon that provision and they voiced your concern about it.

Mr. FRASE. I think the virtual nonuse of it tells us something, although again we were in a planning period where it might not have made any difference anyway.

As I said before, many districts have done what they could with a hypothetical planning process. We like to deal with live cases, not

hypothetical ones, but I think many districts did take it seriously and I think that the example of the Southern District of New York has shown that court leadership can make the process work.

But I think it is important that it continues after the sanctions come into effect. In retrospect, it might have been better to phase in the statutory time limits with sanctions, so that some of the planning information could feed back on live cases. But I think we can still do that, and still achieve the promise of this very innovative approach to legislation.

And so I would encourage Congress to maintain an active research and planning component. Whether this is done through the vehicle of planning groups or through the Judicial Center or the Administrative Office is, perhaps, less important.

Mr. CONYERS. Well, I hope that the Judicial Center would be receptive and positive about it so that we could continue a planning mechanism with their involvement.

Why did your district end up on the emergency list?

Mr. FRASE. Well, I think it's somewhat similar to the problems that were mentioned in Arizona. At present we have five vacancies. With the new bill, we have 16 authorized judgeships. And we have had for the last few years, a chronic case of vacancies. We had two vacancies for most of the time that the planning process was going on. So we have quite a backlog, and the civil cases have also been mounting. One would have to conclude that either we're going to have to make tremendous use of the excludable time provisions, or take an emergency. And although I think the exclusion provisions can be used more in the northern district, we are already one of the heaviest users. So I was not optimistic in seeing us comply without the judicial emergency.

Mr. CONYERS. The main reason is the shortage of judges?

Mr. FRASE. Yes, I think it may be a temporary problem. I am told that when they get the full judges on, they may be able to live with the 100-day limit, and they could certainly live with the longer limits that have been discussed.

Mr. CONYERS. Well, thank you very much. I appreciate that.

Mr. Hyde?

Mr. HYDE. I just want to comment as I listen to this, that we did have trouble during the Ford Administration in getting these judges authorized, so there was a delay until there was a change in the administration. I don't know why.

Thank you.

Mr. CONYERS. That was a disclaimer from our colleague from Illinois. I would like to thank you very much and all of the reporters in particular.

To me, your testimony is from the frontline of this thing. I must confess as one of the authors of the bill, we have perhaps not paid as much attention as we should. Again, we have held oversight hearings and rounded people up on an annual or semiannual basis. We might have headed off the inertia that may have developed in some quarters if we had known how serious this was going to be, but that, too, is hindsight and won't help us much from here.

But your testimony today sure did and we thank you all. The subcommittee stands adjourned.

[Whereupon at 3:04 p.m., the Subcommittee on Crime was adjourned.]

PROPOSED AMENDMENTS TO THE SPEEDY TRIAL ACT OF 1974

WEDNESDAY, JULY 11, 1979

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON CRIME
OF THE COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The subcommittee met at 10:10 a.m., in room 2237 of the Rayburn House Office Building, Hon. John Conyers, Jr. (chairman of the subcommittee), presiding.

Present: Representatives Conyers, Edwards, Volkmer, Synar, Hyde, and Sensenbrenner.

Staff present: Hayden Gregory, counsel, and Ros Stovall, associate counsel.

Mr. CONYERS. The Subcommittee on Crime of the House Judiciary Committee will come to order, as the subcommittee continues to hear witnesses on the subject of the Speedy Trial Act of 1974.

This is our second hearing on this question which has been raised because of the fact that after July 1, 1979, accused persons in the Federal system must be indicted within 30 days of arrest, and arraigned within 10 days of indictment, and tried within 60 days of arraignment, or subject their case to being dismissed with or without prejudice.

There are, however, numerous flexible exclusions of time provided in the act within the aforementioned time limits, as well as a broad provision which permits the court to order continuances that are found to be in the interest of justice.

In connection with these hearings we are very pleased to have as our witness the distinguished jurist from the Eastern District of Michigan, the Honorable John Feikens. Judge Feikens has been a very distinguished member of the Michigan bar, has served as an expert trial attorney while with a firm in private practice; he was co-chairman for many years of the Michigan Civil Rights Commission; and was in fact the president of the Detroit Bar Association.

He has been extremely concerned as a member of the Federal bar with the questions of procedure and with matters of keeping the court dockets in order. He has been very helpful to the Judiciary Committee of the House of Representatives in more than one respect in this matter.

One of the areas of concern has been the Speedy Trial Act, and from the beginning in 1974, Judge Feikens was examining the ramifications and expected problems of that act. He has honored this subcommittee with his testimony, and now, several years later, he has agreed to come back. I suppose this is a revisit of sorts.

We welcome Judge Feikens to the subcommittee, and we will incorporate his statement in full, and I invite you to proceed in your own way.

[The prepared statement of Judge Feikens follows:]

STATEMENT OF HON. JOHN FEIKENS, JUDGE, U.S. DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN

The Subcommittee afforded me the privilege and honor of appearing before it five years ago to testify regarding then pending legislation now known as the Speedy Trial Act of 1974. At that time I was of the opinion that the purpose of this legislation was, on balance, good, that it should be supported, and that the sanctions for noncompliance should be strengthened. I took the position then that cases which were not tried within the time limits required by the Speedy Trial legislation should be dismissed with prejudice.

I have again been asked to appear before the Subcommittee at the invitation of Congressman Peter W. Rodino, Jr., Chairman of the Committee on the Judiciary. I am happy to comply with this request.

My thoughts regarding Speedy Trial, after five years, have changed somewhat. I know that my attitude has been influenced by the heavy case loads that my judicial district, the Eastern District of Michigan, has had in those five years. Some reference to statistics is necessary. Five years ago there were ten active and two senior District Judges on our Court. Presently there are ten active and two senior District Judges. Parenthetically, I might add that one of our Judges, Chief Judge Cornelia G. Kennedy, has been nominated by the President to the United States Court of Appeals for the Sixth Circuit and, thus, it is to be expected that in a matter of one or two months, our number of active District Judges will temporarily decrease.

It is significant that during this period, from the date of the enactment of the Speedy Trial Act to today, our case load has increased substantially. As of June 30, 1974, there were pending 803 criminal cases and 2,295 civil cases. As of June 30, 1979, there were pending 323 criminal cases and 5,274 civil cases.

Thus, with no increase in our judicial personnel, we are now under the mandate of the Speedy Trial Act. While the Omnibus Judgeship Bill provides the Eastern District of Michigan with three additional Judges, the process of selection and confirmation has been extraordinarily slow. As I prepare this statement for the Subcommittee, I have no information nor have I been able to obtain such indicating when hearings on the nomination of candidates for this office will occur. It is against this background that these remarks are prepared.

I am still of the opinion that the Speedy Trial Act of 1974 is good legislation. I believe that with the spur provided by this law, the bench and bar have, with few exceptions, conducted themselves admirably and have complied with its mandate. It is only in one particular that I am of the opinion that the Act should be amended. Title 18 U.S.C. 3161(c) provides:

"(c) The arraignment of a defendant charged in an information or indictment with the commission of an offense shall be held within ten days from the filing date (and making public) of the information or indictment, or from the date a defendant has been ordered held to answer and has appeared before a judicial officer of the court in which such charge is pending whichever date last occurs. Thereafter, where a plea of not guilty is entered, the trial of the defendant shall commence within sixty days from arraignment on the information or indictment at such place, within the district, as fixed by the appropriate judicial officer."

I am of the opinion that the second sentence of subsection (c) should be amended to make the time period one hundred twenty (120) days from arraignment on the information or indictment. It has been my experience that the nature of federal criminal cases is changing significantly. In a letter to me dated May 22, 1979, our United States Attorney, James K. Robinson, indicated that while the total number of criminal cases filed in the federal courts nationally had decreased by 21 percent, the number of white collar crime cases filed nationally by the Department of Justice had increased by 13 percent. He pointed out that the Department of Justice and his office in the Eastern District of Michigan have substantially changed prosecutive priorities. He writes that the current priority areas are: white collar crime, public corruption, large scale narcotics trafficking and organized crime. He projects that the number of criminal case filings in this District will increase from 825 cases with 1,000 defendants in 1979 to 1,130 cases with 1,430 defendants by 1983.

Since cases involving white collar crime, public corruption, large scale narcotics trafficking and organized crime are usually complex, it follows that the time period between arraignment and trial must be enlarged to meet the ends of justice. This change should be made by Congress rather than in a case by case determination.

Usually in cases of this kind, the Department of Justice has had an extensive period of time for investigation before an indictment is obtained. Thus in these cases, defense counsel immediately request trial delay claiming that such cases cannot be prepared for trial under the present time stringencies of the Speedy Trial Act. There is merit in this contention.

Due to the nature of these so-called white collar crimes, etc., the proposal for legislative change made by the Judicial Conference of the United States suggesting that the time period be increased to 180 days also has considerable merit.

I do not favor changing the sanctions as they now appear in the Speedy Trial Act. On reflection, they seem fit for the purpose for which they are intended, and while I would not increase their severity, neither would I seek their elimination.

TESTIMONY OF HON. JOHN FEIKENS, U.S. DISTRICT COURT JUDGE, DETROIT, MICH.

Judge FEIKENS. Thank you Mr. Chairman. Congressman Conyers and members of the subcommittee, I am honored to be invited again to attend your subcommittee and to assist you if I may.

Mr. CONYERS. Judge Feikens, we have just been notified that there is a recorded vote taking place on the floor. Had I not been so busy in my introduction I would have noted that.

I ask the committee to stand in recess now for 10 minutes.

[Recess.]

Mr. CONYERS. The subcommittee will come to order.

We have before us Judge Feikens as our first witness for the day. We invite you to proceed in your own way.

Judge FEIKENS. Thank you, Mr. Chairman.

I believe I have indicated my appreciation to the chairman and to the members of the subcommittee for affording me this opportunity to appear before you and to answer any questions that you have.

I will not read my statement. I will say simply this: One of the reasons that impel me to come before the committee is because of the experience that I have in my own judicial district.

I know that the Congress when it passed the Speedy Trial Act in 1974 was not unresponsive to the needs of the judiciary, and, as a result, the omnibus judgeship bill is now a reality.

But, Mr. Chairman, in our district, three persons who were selected by the Commission in May 1978, and who have been nominated by the President, are still not yet confirmed; and as I sit here today, I have no knowledge as to when their hearing dates will occur.

As a consequence, in my statement I point out that 5 years ago when I was here, we had the same number of judges that we have now—no increase. But there are 2,500 cases more on our dockets today than there were 5 years ago.

I hope that you will understand that it is against that background that I am in part reacting.

Mr. Chairman, the Speedy Trial Act has been a good act. It is wholesome legislation. And I believe that it has brought about a response both by the bench and bar which has been good.

Judges must manage litigation, and the Congress, through the Speedy Trial Act, has given us a tool in criminal cases to do that.

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The real concern that I believe my colleagues and I have in the Eastern District of Michigan is not with the purpose of the bill—it is good; not with the sanctions—they are in order. Our concern is with the time limit between arraignment and indictment and trial. Mr. Chairman, in particularly complex criminal cases—and more of the cases that are being prosecuted today are in that category, because the Department of Justice has changed its philosophy and is bringing more and more prosecutions in white-collar crime areas and the like.

Where these cases are complex, the U.S. Attorneys who are making these cases do not obtain their indictments until their cases are just about prepared. At that point, the indictment is obtained and under the act now, of course, 60 days following the arraignment, the case would have to be tried.

I am worried about that from a standpoint of the defendant or defendants in those cases getting an adequate defense.

Now, we could arrive at that conclusion by using the ends-of-justice exemption that is provided for in the present statute. But, Mr. Chairman, that would be on an ad hoc basis. Busy judges may not always be as sensitive as they should be to bringing these things up on their own motion.

And if appointed counsel, faced with the need to try a case within 60 days of the date of arraignment, does not ask for an ends-of-justice exclusion, the court might not grant one; and I would be concerned about whether or not that defendant was adequately represented.

It seems to me that the subcommittee might well consider not having the judges decide those ends-of-justice exemptions or exclusions on an hoc basis, but itself set the guidelines for the judiciary.

And, thus, my statement suggests that the pertinent section of the present statute, title 18, 3161(c), which provides for that 60-day time limit, be extended to 120 days.

I suppose what the subcommittee faces is a decision that comes down somewhat to this: Should you extend the time for trial in all cases, and perhaps tighten up on the exclusions? Or should you leave the time limit where it is and allow judges—which they are going to do—to fashion exclusions under the ends-of-justice proviso?

I would tend quite strongly to have the Congress set that guideline by making the time limit 120 days rather than 60.

But I would like to end my prepared remarks and answer questions if you have some.

Mr. CONYERS. Well, I think that that is an extremely pointed issue that you referred to, and it is a point on which this subcommittee will have to make recommendations to our larger Judiciary Committee.

Might I say, just as background for you, Judge Feikens, that question had been raised in the Senate hearing, and the decision apparently made there was that rather than extend the time limits and tighten up on the exclusions, they would merely delay the operation of the time limits, to give it a little more time for study. That's one option that I do not feel very happy about.

Perhaps you could respond to that.

The other suggestion, of course, is to tighten up on the exclusions and extend the time limit; but it seems to me there may be one other possibility: That before we decide to do either of these two, we might want to let the bill go into effect in its present form, and examine what we do when we're all "playing hard ball" so to speak.

In other words, Judge, this act is unique in that it had a planning mechanism built in. I can't remember legislation that had its acutal operation forestalled by 3 years while we got ready. There were, as you know, planning organizations; there were experts working with each of the districts. We have oversighted it. We have shortened these limitations periods until after this month, of course. We are operating under the exigencies of the legislation passed in 1974.

So one suggestion that has been very impressed upon my mind is the simple fact that maybe we ought to take some time out and see what happens when we are really up against it. I mean, it is one thing to be practicing or getting ready for the Speedy Trial Act of 1974; it's another thing to be planning for it.

It is yet another thing to be in it. I mean, how much energy, how much effort, how much good common sense, how much sensitivity will be exercised by all of the appropriate parties really remains to be seen.

I have no reason to doubt that the Department of Justice will be sensitive to the nature of this problem, a constitutional problem that we've only recently in our American jurisprudence system addressed, and one in which, thanks to the former Senator from North Carolina, Sam Ervin, we might in all likelihood never have come up with this solution.

So what I am asking you is that without trying to draw an opinion as to where we are on our options, would it not be permissible to let us get into this and see what happens when we are all out there "playing ball"—to use a poor analogy.

Judge FEIKENS. I wish that I could respond to that in better form. I must say to you, Mr. Chairman, that under the present law, because of the heavy workload in our district, we did apply for and did obtain an exception from the Judicial Conference. So that our own district would perhaps provide a false basis right now for that kind of an observation.

And in the frame of reference in which you make it, I wish we hadn't obtained that exception, so that I could learn firsthand what it would be like to be under this.

I guess I must admit that there's nothing like having to live under a situation to know what it's like. I do believe that the wisdom in the act, though, in giving us that 5 years from 1974 to the present time to become acquainted with our needs, did result in many judges getting the experience to which you speak.

And I am not sure if I can ever be comfortable about a situation in which a defendant is found guilty, because he wasn't given enough time to prepare—that's the thing that's bothersome to me.

You know, of course, and I am sure many persons who have appeared before your subcommittee have said that lawyers to a man—and a woman—never ask for any speedy trials. But the wisdom in this legislation is it puts the responsibility where it should be—on the judiciary—to achieve the ends that are envisaged by the sixth amendment, and to manage this litigation and to bring it about.

In doing that I don't think we should be so speedy that a person's basic rights are implicated. That I am not sure we can determine.

May I answer that question you asked as to the Senate version?

I don't think that's the right way to go. The Senate has simply put the whole thing off to 2 years, and if anything, I would like to see the act commence.

Mr. CONYERS. Your view today is that we should begin to have the operation of the act, and also to immediately evolve legislation that would extend the time limits; and I believe that would then put you into the category of a strict constructionist as to certain language that is contained in this legislation.

Judge FEIKENS. Yes. I think that's part of the responsibility in asking for an extension of time.

Mr. CONYERS. I turn now to my colleague from California, Mr. Edwards.

Mr. EDWARDS. Thank you, Mr. Chairman. I thank the judge for his excellent testimony, I have no questions.

Mr. CONYERS. I recognize counsel—oh, excuse me. We have our distinguished colleague from Missouri, who hasn't said anything today, and that's why I didn't notice you were here.

Mr. VOLKMER. That's all right.

Judge, I would like to know for what period is the exception—that you are excepted from the sanctions?

Judge FEIKENS. One year.

Mr. VOLKMER. One year. And that began when?

Judge FEIKENS. The actual date——

Mr. VOLKMER. Was it July?

Judge FEIKENS. Well, I think it's dated back to July 1.

Mr. VOLKMER. It would be July 1 to June 30, next year?

Judge FEIKENS. Yes.

Mr. VOLKMER. So in the event that we would do anything by law, everybody else would be treated basically the same way that you are?

Judge FEIKENS. Yes.

Mr. VOLKMER. And if we were to do anything, if we were to do that for those who were having difficulties, such as you are, that would give us another year during which to really look at any permanent changes that may be necessary.

Judge FEIKENS. Yes, I would say that.

Mr. VOLKMER. All right.

Now, because, you know, I would like to look at the whole broad spectrum—all the judges, all the districts—because we are finding in different testimony that different ones have different problems with it. I don't want to correct a problem somewhere and cause you another problem. I think of necessity there's going to be time involved in evaluating any cases.

Judge FEIKENS. If I understand you correctly, what you are saying is that the present law provides for an extension such as we have obtained for 120 days for a period of 1 year; and that those districts that are in need of it under present law can obtain that exemption from the Judicial Conference. And that will afford an opportunity to all of us to see what may happen.

Mr. VOLKMER. The other thing is, you are getting more judges. You point out in your testimony that that is a known fact, but you don't know when those are going to be filled.

Judge FEIKENS. Yes.

Mr. VOLKMER. I assume it is valid that they will be filled within this year.

Judge FEIKENS. All right.

Mr. VOLKMER. Now, would that alleviate your situation insofar as starting next year?

Judge FEIKENS. Well, it will alleviate it, of course; three new judges have got to be helpful.

I don't think it attacks the point, though, that I addressed when I was being questioned by the chairman.

I just don't think that in the kinds of cases that are now being presented to us, 60 days is enough time to prepare. That's the difficulty that I have.

I think that even with additional judges, there ought to be more time allotted to the defendants and their attorneys to prepare for trial than 60 days.

Mr. VOLKMER. Thank you very much. I yield back my time.

Mr. CONYERS. Judge, let me focus in on that point; it's really critical.

Consider the circumstances we are in in terms of our court districts. Only about 9 or 10 of them have applied for the emergency waiver of the application of the law. Your district was one.

But as my colleague from Missouri pointed out, sometimes you fix up one problem and unfix something that was working.

What is suggested to me merely on the face of the ability of every district to function is I can't help but believe that the majority of the districts feel at least sufficiently comfortable with the act to begin to try to operate under it, with the provisions of exemptions; and then if necessary, to move to a more drastic relief measure.

And so, what we get onto is: What is it like in most cases, what is the nature of most of the trials? And it seems to suggest to me—and this is where we are very short of information in terms of the Department of Justice's information on the matter—is that most Federal courts have a very small criminal docket.

Second, many of the pile of civil filings may or may not be related to increased criminal filings. It is not as simple as looking from one column to another and extrapolating and concluding—"therefore, this is happening, or that, because of the Speedy Trial Act." We know it's far more complicated than that.

But what has been suggested so far is everybody doesn't have an Aladdin-type case where, as a matter of record, you have been involved in an extraordinary length of time in a very complicated matter; but most of the cases are not complex. Frequently—and I think it is fair to say, increasingly frequently—they are complex. There is a new emphaisis, and the subcommittee is pleased that the Department of Justice is moving to more complex, economic-type crimes, which would mean much longer periods of trial.

So what I am suggesting is that perhaps we need to examine how much time is required for criminal trials in the Federal courts, and then we would be more accurate in our appraisal of whether 60 days is long enough.

We might find, as it was inferred by my colleague from Missouri, that the eastern district needs more time; that does not mean we should give everybody in Montana, Iowa, Florida, twice as much time, that they didn't even need in the beginning—they may, but they may not.

And the simple fact is that the subcommittee is operating off the seat of its pants. We do not know really, notwithstanding piles of statistics. This question is not resolved with authority, for me.

Judge FEIKENS. I don't know if you'll ever find an answer to that question. Some questions can't be answered simply by statistics.

You mentioned that there are any number of judicial districts that have not asked for relief. I don't know what their civil caseloads are like.

For a number of years until criminal cases began to go down, at least in the Eastern District of Michigan, we didn't try civil cases. And I think you are right, that many of the civil case numbers that seem so staggeringly high right now, are the result of the application of judges to the criminal side of their dockets.

That leads one to believe that maybe what we ought to have is a speedy trial mechanism for civil cases. [Laughter.]

I do not know that you can find the answer to that. But what I told you from my experience—and I can only speak from the Eastern District of Michigan's experience—is that a case needs more than 60 days in order to be prepared for trial.

And that, it seems to me, is something that is uniform, whether that happens in Montana, or Michigan, or in Missouri. I think that is uniform. That has been my experience.

Mr. CONYERS. I want to thank you again. Your visits to our hearings are always important to us. I appreciate the concern you have given to our questions.

Oh, I want to recognize Counsel Stovall who, on behalf of some of the Republican members, would like to ask questions.

Mr. STOVALL. Thank you, Mr. Chairman.

Your Honor, you mentioned the civil problem; do you have any idea off the top of your head what delays may or may not be occasioned in the civil docket in the district which you occupy because of the Speedy Trial Act?

Judge FEIKENS. Yes; for the years during which we experienced very heavy criminal case filings—I will speak only in the last 5 years—certainly the years 1975, 1976, 1977, were years in which very few civil cases were tried.

What kept the system afloat is that statistically, of course, many civil cases are filed—and that is also true in the Eastern District of Michigan—and through good management, trial judges in our court were able to get rid of cases through settlement and other dispositions. But they have only tried, in those 3 years I have given you, criminal cases.

It was only until the present Attorney General changed the philosophy of prosecution, and the case filings dropped dramatically in the civil case field that we began trying civil cases.

Mr. STOVALL. Well, to what extent do civil attorneys and their clients in your view suffer because of this problem?

Judge FEIKENS. I think that there is a suffering that the litigant experiences, not necessarily the lawyer. I must confess that even in the civil field there are very few lawyers that ask me to set a case for trial earlier than I do.

Lawyers are geniuses when it comes to asking for continuances, whereas in the lack of speedy trials of civil cases, it is the litigants that suffer. I think that's where the judge must manage civil litigation. And I think that without backing away one bit from the wholesomeness of the Speedy Trial Act.

I would think we have a responsibility, also, on the civil side.

Mr. STOVALL. Thank you.

Your Honor, some have said that under the Speedy Trial Act, in situations that now exist, it may be very difficult to make the arrest in time for the indictment after the information is filed, and the U.S. Marshall may not be able to locate and arrest defendants in time.

And if in fact he does make the arrest in time the defendant may not be able to have an opportunity to review the charges and determine the appropriateness of a guilty plea at time of arraignment.

Do you share that view?

Judge FEIKENS. No; I think under our present statute there is room for a judge to take care of that.

Mr. STOVALL. What methods would be used?

Judge FEIKENS. Granting an extension of the arraignment date.

Mr. STOVALL. Is it your view that all judges can apply it liberally, as perhaps you would, sir?

Judge FEIKENS. I have not had occasion to do that. I have not been faced with that. But from my experience I would not think that was a very significant problem. I would not hesitate, if the facts of the situation suggest, to act.

Mr. STOVALL. Now, the problem of excludable time, have you had occasion to exclude time?

Judge FEIKENS. No.

Mr. STOVALL. Why is it that you have asked for a waiver of the implementation of the act, but there has been no necessity to exclude time? Is that because the attorneys aren't asking for it?

Judge FEIKENS. Oh, well, we are excluding statutory time wherever possible.

Mr. STOVALL. That's what I meant.

Judge FEIKENS. Yes.

And at the end of April of this year, we had 33 cases which, if the Speedy Trial Act had been in full effect, we would have been in violation; 33 criminal cases.

Mr. STOVALL. Would those cases have been dismissed if the act had been in place?

Judge FEIKENS. Unless the ends-of-justice exclusion had been entered, as it might have been in some of those cases; yes.

Mr. STOVALL. Judge Feikens, do you find that in the application of the exclusionary times that you apply your time of the hearing in the case of a competency hearing, or do you apply the broad range of time, ranging from the time that the motion for such a hearing might be filed on through the conduct of an examination of the defendant's competency to stand trial, and terminating at the time of the hearing?

In other words, do you apply all of those dates, or do you only apply the day of the hearing?

Judge FEIKENS. All of those dates.

Mr. STOVALL. Do you know of any cases where courts have used other methods of application?

Judge FEIKENS. I do not.

Mr. STOVALL. Do you find the problem in talking with other judges—in other districts, that is—that the remoteness of holding courts, for example, in New Mexico, traveling a 400-mile circuit, round trip? We find judges find remoteness causes time lags.

Judge FEIKINS. I would think so, but I have no experience with that.

Mr. STOVALL. How about the case where you have multiple defendants where there is a desire on behalf of the U.S. attorney not to prosecute one defendant at a particular time, and to hold that prosecution in abeyance until the defendants are located?

Some have complained and written in correspondence to the subcommittee that being required to hold a trial immediately jeopardizes informants and jeopardizes the possibility of arrest in other cases. Have you had occasion to assess that?

Judge FEIKENS. No; but if that is all that it was, I could deal with that in pretrial conference. I think I would want to determine how genuine that prosecutor's thinking was in that regard. I've got the tools to bring that case to trial; and I would simply bring it on to trial. If it was a game that was being played, I would end it.

Mr. STOVALL. You are saying you would then force the trial?

Judge FEIKENS. But there is an excludable delay, you know, in a multiple-defendant case; if one of them has not yet been found, or has not yet been arraigned, or has not yet been able to obtain counsel, an excludable delay can be fashioned to take care of that.

Mr. STOVALL. Have you been able to do so successfully? Or have you had occasion to do so?

Judge FEIKENS. I would not have, but I would have no difficulty with that, if it was a genuine situation.

Mr. STOVALL. Is there a problem of fewer cases being brought in before your court because there is a fear by Federal agents that the U.S. attorney may not be able then to bring the case to final resolution, because of the Speedy Trial Act?

Judge FEIKENS. I think all those cases are being resolved before they arrive at that point through the cooperative efforts of the U.S. attorneys and the agents. I don't think they are working at cross-purposes.

Mr. STOVALL. You think that there have been cases where the agents have been instructed by U.S. attorneys not to pursue arrest because they can't handle the volume?

Judge FEIKENS. I feel that, yes.

Mr. STOVALL. Do you feel a relaxation of the Speedy Trial Act might allow more arrests to occur?

Judge FEIKENS. No, I don't think so. I don't think that would be a good way to go at all.

I think the Speedy Trial Act is a good law. I think we all should try to live with it. Its purpose is good. I don't think I can put that together with the question you asked and say that relaxing the Speedy Trial Act will get more arrests. I think that is a matter of good law enforcement.

Mr. STOVALL. The American Bar Association originally actively supported and in fact was responsible for the original drafting of the Speedy Trial recommendations. Since that time the ABA shifted its position and supported relaxation.

Do you feel that the ABA recommendations to bring about a relaxation of the act are wise and judicious?

Judge FEIKENS. Well, to the extent I hear them asking for a relaxation in one particular, I would say I would not be critical of the ABA's request. If they go beyond that, and I am not sure what they do ask, I would not be supportive of it.

You know, there has been a kind of reaction around the United States on the part of some people, without even looking at the fact that there are judges who turn purple whenever you say "Speedy Trial Act"; but that does not mean that their positions are sound. There may be some people in the ABA that feel that way.

Lawyers—I used to be one—do not want cases to come up for trial.

Mr. STOVALL. Your Honor, you mentioned earlier, defense attorneys would be pleased to find excuses for delay. But do you find, though, that there are defense interests that would be served?

Judge FEIKENS. Now you are at the point where I am.

Mr. STOVALL. One question I have specifically is, you are saying more than 60 days, or at least it takes 60 days to prepare for trial; what about the case where a defendant does not have counsel when he comes to arraignment, and he needs time to then locate counsel?

Do you think the present act provides for that?

Judge FEIKENS. There is no concern with what the present law gives me in that regard; I can handle that.

But the point you made, earlier, the emphasis, I think, by the subcommittee ought to be on trial preparation, and the adequacy of trial preparation.

I can tell you when a case is prepared; within a little while after it starts, I know whether or not the lawyers have done their homework. The trouble is, is that there is so much litigation these days, and lawyers don't know how to say "no"—that they take more cases than they should.

And, unfortunately, that happens, and judges have to manage. Judges need tools like the speedy trial law, to manage. If we didn't have it, and things are like they are now—let's assume the statute had not been passed—I am sure we would be in chaotic condition with all of the civil litigation, because defendants' lawyers would want to delay and delay and delay. That's helpful to the defendant if the cases never come up to trial.

Judges have to manage these things. In the needs of justice there are more rights involved than just defendant's rights; but I do believe that the 60-day limitation can cut into the defendant's right to be adequately represented. And that is where I think the Congress can give us some guidance.

Mr. STOVALL. Thank you, Judge.

Thank you, Mr. Chairman.

Mr. CONYERS. Might I just close on this point:

Aren't we in the best situation possible—maybe we accidentally got there—that is to say that in your district and in seven others, we have extended the period from arraignment to trial on the request; and in all of the rest where no such request has been made, there is the statutory limitation.

Therefore, one might suggest that we proceed to seek first of all what you experience and these seven other districts experience with the extension period, and also learn what are the experiences with the rest of the Federal districts, to whom no emergency exemption has been allowed.

Judge FEIKENS. Speaking as one person, I think I could live with that; because at the end of this next year I will be in a better position to answer your question.

Mr. CONYERS. And so will we.

Judge FEIKENS. But, sir, one of the reasons I still talk about this need to give more time is because of a fact which I don't believe I can ever develop by statistics or by argument, and that is an instinct that there has to be a little more time given for preparation.

Now, I don't know whether at the end of a year I will be able to say, "Mr. Chairman, we don't need 120 days. I don't know that I could ever say that, but I certainly could live with the suggestion you made, as one person; because in effect we now have what I am asking your subcommittee for.

Mr. CONYERS. I want to express, on behalf of all the members of this subcommittee, our appreciation for your joining us. We are very grateful.

Judge FEIKENS. I hope it has been helpful.

Mr. CONYERS. It has been, very much; thank you.

If the remaining witnesses would indulge us, I would like to take a 10-minute recess at this time.

[Recess.]

Mr. CONYERS. Our next witness is Attorney David Isbell, a practicing member of the bar. He is also a member of the board of directors of the National American Civil Liberties Union, and he is testifying in connection with a statement prepared by himself and Mr. Mark D. Nozette, on behalf of the ACLU.

We are pleased to have you before the subcommittee, and we will incorporate your entire statement in the record, and I invite you to proceed in your own way.

[The full statement follows:]

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

We are grateful for the opportunity to submit this statement of the views of the American Civil Liberties Union on the proposals that are before you for amendment of the Speedy Trial Act of 1974. 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 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, the final time limits and sanctions of the Speedy Trial Act became effective. The Department of Justice and the Judicial Conference, both of whom opposed the Act when it was originally passed, originally sought to amend it by extending the time limits it would impose for the processing of criminal cases in the federal courts. Subsequently, Senators Kennedy, Bayh and Biden proposed, and the Senate passed, a revised version of S. 961, the principal effect of which would be to delay implementation of the Act's sanctions until 1981.

In evaluating any proposed change to the Speedy Trial Act, we start from one fundamental premise. The 1974 legislation stands at the crossroads between two fundamental Sixth Amendment rights: the defendant's right to a speedy trial and his right to effective assistance of counsel. Accordingly, we believe that no amendment should be adopted unless its proponents have convincingly demonstrated it does not endanger either of the basic rights.

I

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 the Senate Judiciary 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 1976, 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).

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 original 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

[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 1277 (2d Cir. 1975).
[3] *United States* v. *Fay*, 505 F. 2d 1037 (1st Cir. 1974).
[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).

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 reasons for delay, to describe the Act's effect on the quality of justice and to recommend changes in the legislation.

The original 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 deadlines. The Report concluded that 68 percent 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 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 deadlines 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 are opposed to the attempts of the Justice Department and Administrative Conference to tamper with the basic provisions of the Act. The experience to date shows that deadlines established in the Act have been 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 obstacles to full compliance do not appear insurmountable.

[5] The districts were Maryland, Western New York, Western North Carolina, Northern Illinois, Eastern Michigan, New Jersey, Oregon, Central California and Massachusetts.

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, and once again lengthen the time limits for completion of various phases of a criminal case, 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 Justice Department and Administrative Conference have also failed to provide soundly reasoned support for their own position. For example, the sole evidence the Justice Department provided 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 casual nexus, let alone a thorough evaluation of the policies of United States Attorneys' Offices throughout the country.

No more soundly justified was 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. 316(h)(1) (E), (F), (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.

All this is not to say that we are unalterably wedded to the legislation as now written, for we recognize the complexity of the scheme originally adopted by Congress. Thus, although we would prefer that the Act's final sanctions and deadlines go into effect as scheduled, we do not oppose S. 961 as it was passed by the Senate. Section 6 of the bill, which amends 18 U.S.C. 3163(c) and extends the deadline for the Act's final deadlines to July 1, 1981, is not likely to pose a threat to the Sixth Amendment rights of defendants so long as those involved in the criminal justice system continue to work in good faith to see that the Act is enforced. Similarly, we have no objection to sections 2 and 3(b) of the Senate bill which merge the 10 day period between indictment and arraignment and the 60 day period between arraignment and trial, for we believe that these provisions are consistent with the Act's basic purposes.

Moreover, there are a number of provisions of the Senate bill which we wholeheartedly endorse. Section 5(a) amends 18 U.S.C. 3161(h)(8)(B)(ii) to leave no doubt that the court may grant continuances in complex cases where "it is unreasonable to expect adequate preparation for pretrial proceedings or for the trial itself within the time limits established by this section." Section 2 amends 18 U.S.C. 3161(c) to prohibit the commencement of trial within less than thirty days from the defendant's first appearance without the defendant's written consent. Section 7 amends 18 U.S.C. 3164 to make permanent the special provisions for those detained prior to trial.[6] And Section 4 rewrites the exclusions contained in 18 U.S.C. 3161(h)(1) to delineate more clearly the periods of time covered by those exclusions.

In the final analysis, the success or failure of the Speedy Trial Act must be determined on the basis of the actual experience of the courts in applying them. Further changes may be required but those changes should be made only after courts and lawyers grow more accustomed 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.

[6] We continue to object to the use of the overly vague concept of "high risk" defendants.

[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.

CONTINUED

1 of 5

TESTIMONY OF DAVID B. ISBELL, ON BEHALF OF THE AMERICAN CIVIL LIBERTIES UNION

Mr. ISBELL. I appreciate your doing that, Mr. Chairman, and I also appreciate the opportunity to testify.

I had not anticipated before yesterday afternoon that I would be both testifying and submitting a statement, but I am glad to have the opportunity to do both on behalf of the ACLU.

I would like to confine my oral testimony initially to a couple of relatively general observations.

I do not come here purporting to advise the committee as to how Congress should come out in its deliberations on the subject of whether and how the Speedy Trial Act should be amended, but I would like to suggest some general considerations that, in my view and the view of the ACLU, ought to govern the manner in which Congress reaches its conclusions on the subject—considerations of two kinds, one substantive, the other procedural.

By substantive, I mean the standards by which Congress should be making the judgments that it must make with regard to the act and amendments thereto. The act was intended to serve two purposes. One purpose was to assist in reducing crime and the danger of recidivism. That was to be accomplished by requiring speedy trials and by strengthening the supervision of persons released pending trial, according to the preamble of the act as enacted.

The other purpose was to give effect to the sixth amendment right to speedy trial for persons charged with criminal offenses. That additional purpose appeared in the preamble of the Senate bill, and while it was dropped from the House bill prior to the enactment of the statute, the reports of both the Senate and the House make clear that that was an important—not an exclusive, but an important—purpose of the statute.

That purpose, of course, sounds in the U.S. Constitution. It is a purpose of fundamental importance, and I urge that this committee and the Congress generally, in considering this statute and amendments thereto, should keep in mind that fundamental purpose; that is, implementation of the right of individual defendants under the sixth amendment to a speedy trial.

It is altogether possible that a given statutory scheme intended to implement that right and also to accomplish the other purposes of this act could infringe upon another equally fundamental constitutional right of individual defendants, also arising under the sixth amendment, and that is the right to effective assistance of counsel.

It is possible that time limits or procedures may be too tight, too Procrustean, to allow for the effective assistance of counsel, but I suggest to you that Congress ought not to tamper with this act except upon a showing that one or another of those fundamental individual rights is adversely affected by the statute as it now stands.

So I am suggesting that the focus ought to be, in significant part, on those considerations and not merely considerations of expediency or preventing crime or preventing recidivism, the convenience of prosecutors, or the administrative convenience of the courts.

With regard to the matter of the procedure by which Congress reaches its determination, there is a fundamental choice between two ways of proceeding. All the witnesses are talking about what the practical effects of the statute will be when the statute as presently designed will go into effect.

Those witnesses who suggest that the statute should be changed are making predictive judgments about how the statute as now designed will operate as a practical matter.

I suggest to you that an alternative way of making this judgment is to let the statute go into effect, and make those judgments about practical effect on the basis of actual experience with the statute as it is now designed.

The ACLU does not oppose the Senate bill, which would postpone the date on which sanctions come into effect for 2 years, but its initial preference, at least, would have been to let the statute go into effect so as to see what the experience is. It may be that the difficulties which are pointed to by proponents of change will, indeed, prove to be experienced and provide compelling reasons for further amendment. We will not know that until we have seen how the statute actually works in accordance with its shape.

Mr. CONYERS. Well, thank you very much.

I can't understand what happened in the other body. Maybe you can help me out.

I remember the distinguished Senator from Delaware voiced almost the same kinds of conclusions, and yet we end up with a recommendation of a 2-year delay. I don't know if that was a compromise position.

I hear your organization, which is outstanding in its concern for constitutional rights, say: let's see what happens; but if you suspend it for 2 years, it does not really make too much difference. We will abide by that.

I just don't know what happened over there. I wish I could get to the core of this matter, because we all start off from one aspect and then the finished product seems to belie all of the assertions we held in between.

Can you help me in any way?

Mr. ISBELL. I cannot. [Laughter.]

Mr. CONYERS. I didn't think so.

Well, in other words, we have a neutral position that is sort of saying, well, you guys leave your work alone, but if you suspend the dismissal provisions for a couple more years, we'll see what you do. There's a lot of room between these positions. It gives everybody on every side to say, well, ACLU said—is there any way we can pin this down?

Mr. ISBELL. All I can tell you, Mr. Chairman, is that our preference would be to let the act go into effect; but we cannot, on grounds of any sort of general and fundamental principle, oppose an extension of the deadline for sanctions.

I assume what happened on the other side is that a compromise was reached; that compromise was reached not between contending principles but between contending preferences, I suppose.

Mr. CONYERS. Well, the last question, Mr. Isbell: Would you venture a personal comment on the suggestion made by our previous witness who indicated a preference that, rather than delay the effectiveness of the sanctions, we modify the period of time between arraignment and trial? Does that strike you as favorable?

Mr. ISBELL. Those periods of time are the essence of the act. They were the essence of the act as a means of implementing the speedy trial. They may well be the essential fault of the act; if it is a fact that the act, as structured, is impinging unduly upon the right of defendants to effective assistance of counsel. But the question is, has a showing

been made? Has a showing been made in those terms, that these time periods are unduly affecting in an adverse way the rights of defendants?

It is my sense that that showing has not been made. It is my sense that the judgment as to whether the effect will be adverse ought not to be made in a predictive way but, rather, on the basis of an actual showing of experience.

Mr. CONYERS. Thank you very much.

Counsel Stovall, do you have any questions to be raised on behalf of the Republican members?

Mr. STOVALL. Mr. Chairman, thank you very much.

Sir, in looking at the problems nationwide, would you say that the ACLU chapters around the country might have different opinions from the position that you raised, as I understand, as a result of the executives of the ACLU?

Mr. ISBELL. It is possible, Mr. Stovall, that individual affiliates of the ACLU have formulated differing views on this statute and proposed amendments to the statute. I am not aware of it if so. I think it is unlikely, though by no means impossible.

The structure of the ACLU is such as to allow some latitude for individual judgments to be made on matters of policy by the component entities of the organization.

Mr. STOVALL. So your position does not necessarily bind the ACLU in various States?

Mr. ISBELL. It would not necessarily bind the affiliates; that is correct.

Mr. STOVALL. Now, in the aid of States where the district court judge might have to travel some distance to handle cases—and I cited New Mexico in questions to Judge Feikens, but there are other districts. Just 2 weeks ago we had hearings on that same issue, and the State of Indiana has told us they had problems.

Do you see a difficulty in the time constraints presently required that might make it difficult for the criminal defendant to adequately prepare for his own defense?

Mr. ISBELL. In light of the problem of judges traveling?

Mr. STOVALL. Yes.

Mr. ISBELL. I meant to indicate when I made the general observations that the time limits could have an adverse effect on the rights of individual defendants to effective assistance of counsel. That is entirely conceivable to me. I do not think that that has been shown to be the case in the testimony taken either on the Senate side or before this subcommittee.

If such a showing were made, I would be persuaded; and I believe the ACLU would be persuaded that that would be a reason to change the time limit.

Mr. STOVALL. Do you concur with Judge Feikens' view that many defense attorneys, in fact, would prefer to allow delays?

Mr. ISBELL. Yes; I believe that it is true many defense attorneys feel that way. I understand the ABA has formally adopted a position favoring the extension of the deadlines. I gave you a document earlier which I had in my possession.

Mr. STOVALL. I am sorry.

Mr. ISBELL. I don't know whether you've got it now or I've got it back in my possession, but I can't find it.

That view, as I understand it, was the views of defense attorneys; but those views of defense attorneys have not been presented, to

any substantial extent, by witnesses speaking directly of their own experiences as defense attorneys before either the other committee or this committee.

So I share the impression that Judge Feikens has referred to. His impression, I am sure, is more direct than mine, but in either case, I think it is an impression, it is hearsay.

I would like this committee to hear that from the mouths of the attorneys who have experienced it—mind you, speaking not in terms of the attorneys' experience in itself, but in terms of what that experience shows about the effects of the act upon the rights of defendants.

The important thing is not the convenience of defense counsel; the important thing is the rights of defendants to effective assistance of counsel. That is not necessarily the same question.

Mr. STOVALL. Do you think that under the present situation there might be plea bargains that would be effectuated that might possibly be required under the pressure of time and might deter adequate investigations and preparation for trial?

Mr. ISBELL. It's conceivable. I would hope the committee would get testimony on that subject. Then it could make judgments, not on the basis of speculations, but on the basis of direct evidence.

Mr. STOVALL. Do you have any opinions as to the excludable time, whether or not the excludable time is applied uniformly throughout the country?

Mr. ISBELL. I know less about this than you; I am less familiar with the materials that have been sent to the committee. It is, however, my impression that they have not been applied uniformly.

Mr. STOVALL. Thank you for your fine comments.

Mr. CONYERS. We are grateful to you, Mr. Isbell, for coming before us on such short notice. We felt it important that the ACLU be present. We appreciate the organization's willingness to address this problem. Thank you.

Mr. CONYERS. The next witness is the Director of the General Government Division of the General Accounting Office, Mr. Allen R. Voss, who brings with him the Assistant Director, John Ols, and Mr. Ken Mead of the Office of General Counsel.

We welcome you, gentlemen, before the subcommittee. We know you have investigated this matter extensively. We express at the outset our appreciation for the detailed work you have done in this regard, and we incorporate, without objection, your entire statement and the accompanying documents into this record.

[The full statement follows:]

STATEMENT OF ALLEN R. VOSS, DIRECTOR, GENERAL GOVERNMENT DIVISION, GENERAL ACCOUNTING OFFICE, BEFORE THE SUBCOMMITTEE ON CRIME, HOUSE JUDICIARY COMMITTEE

Mr. Chairman and Members of the Subcommittee: It's a pleasure to be here today to testify on the results of our review of the implementation of Title I of the Speedy Trial Act of 1974. Our report was issued on May 2, 1979, and I have attached a copy of our report digest. (See attachment V.)

As you know, the act represents an effort by Congress to address the problem of delays in the handling of Federal criminal cases. The act established uniform time frames that generally must be followed by Federal district courts in processing criminal cases. The Congress recognized that problems might develop with statutory time frames and therefore gave the criminal justice system over 4 years to prepare for the Speedy Trial Act's full implementation.

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SPEEDY TRIAL ACT OF 1974

In general, the act requires that, effective July 1, 1979, district courts must bring criminal defendants to trial within 100 days of arrest; however, the act does permit time extensions in certain situations. The 100-day time frame is divided into three intervals with a specific time limit for each interval: arrest to indictment (30 days); indictment to arraignment (10 days); and arraignment to start of trial (60 days).

The act prescribes sanctions if the time frames are not met. Effective July 1, 1979, the court must generally dismiss a case (1) if an indictment or information has not been filed within the allotted time or (2) at the defendant's request, if an indictment or information has been filed, but trial was not commenced within the act's time frames. Once a case is dismissed, the propriety of reprosecution depends in part on whether the charges, indictment, or information was dropped with or without prejudice. In addition, sanctions, in the form of fines, reduced compensation, and/or denial to practice before a particular court, can be levied against prosecuting and defense attorneys who knowingly delay a case without justification.

The Congress recognized that particular facts and needs of certain cases would prevent indictment, arraignment, and trial from occurring within rigid and fixed time frames. The Speedy Trial Act therefore specifies events or contingencies, referred to as excludable periods of delay, that for the duration of their occurrence suspend the running of the act's timetables. Unavailability of a defendant or an essential witness would be one such contingency.

In addition to authorizing excludable periods of delay for specific events, the Speedy Trial Act permits the court to grant a continuance that will suspend the running of the act's timetables when, in the judgment of the court, the ends of justice will best be served by granting a continuance. The act further provides that in the event any district court is unable to comply with the time limits due to the status of its court calendar, the chief judge, where existing resources are being efficiently used, may apply for a suspension of the time limits, referred to as a judicial emergency.

I would now briefly like to summarize the results of our review.

CURRENT LEVEL OF COMPLIANCE WITH THE PERMANENT TIME FRAMES

Our analysis of court statistics shows that there has been a marked improvement in all three intervals between the year ending June 30, 1977, and the year ending June 30, 1978.

For the year ending June 30, 1977, 4,013 defendants exceeded the arrest to indictment interval (30 days allowed) as compared to 1,604 for the year ending June 30, 1978. (See attachment I.) For the year ending June 30, 1977, 5,737 defendants exceeded the indictment to arraignment interval (10 days allowed) as compared to 2,589 for the year ending June 30, 1979. (See attachment II.) Finally, for the interval between arraignment to trial (60 days allowed), 11,422 exceeded the time frame for the year ending June 30, 1977, as compared to 5,469 for the year ending June 30, 1978. (See attachment III.) These statistics show that the courts are moving in the direction of complying with the 100-day time frame imposed by the act.

VIEWS OF DISTRICT COURT OFFICIALS

District court officials cited the lack of a current dismissal sanction, the need for additional resources, and the changes in criminal caseload as difficulties in fully implementing the act's timetables during the 4-year transition period. These officials also stated that meeting the act's time frames may result in undesirable trade-offs that could decrease the system's ability to promote equal justice. These are:

U.S. attorneys may be unable to prosecute all criminal defendants effectively leading to a greater number of cases being declined and/or pressures to accept undesirable plea bargains.

Defense attorneys may not have sufficient time to prepare their clients' cases.

Civil litigants, whose cases are not subject to statutory time frames, may have a longer wait for their day in court since criminal cases will receive priority.

Criminal cases may cost more to process.

Lack of data to fully support these potential problems adversely affects the courts' ability to establish a sound basis for deciding the legislative modifications

needed in the act or procedural changes necessary to allow for full compliance and minimize the potential adverse trade-offs.

The act has had a favorable impact on the court system. The 1978 implementation report of the Administrative office of the U.S. Courts stated that there have been benefits from the act. These include—

A more rapid disposition of criminal cases and a decrease in the criminal backlog;

More efficient administrative procedures and improved cooperation and planning between the courts, prosecutive attorneys, clerks' offices, and defense counsel;

An improved quality of justice;

Witnesses' memories remaining fresh and the greater availability of witnesses; and

A greater association between punishment and the crime, if the defendant is convicted.

ANALYSIS OF SAMPLED CASES

We reviewed 393 cases terminated during the 6-month period ending June 30, 1977, in eight district courts. For each case, court statistics showed that the July 1979 time frame for one or more of the three intervals had been exceeded.

Because district court case files did not contain sufficient information to identify the specific reasons why defendants were not being processed within the act's time frames, we had to rely on opinions and observations from judicial officials. This detailed information was needed by the district courts to gain a perspective on the specific implementation problems that existed, and by the Administrative Office of the U.S. Courts to gain a comprehensive understanding of the extent of the problems nationwide. The Administrative Office's Speedy Trial Act Coordinator told us that he did not request this type of information but agreed that the information was needed for assessing implementation problems.

Court officials told us that many of these 393 cases would have been processed within the required intervals had the permanent time frames and the dismissal sanction been in effect. However, officials in three districts said that additional resources would be needed, while officials in another district cautioned that changes in the volume and nature of criminal cases could affect the district's ability to meet the permanent time frames.

These officials told us that at least 103, or 26 percent, of the 393 defendants exceeded the time frames simply because the district was attempting to meet longer time frames and/or the dismissal sanction was not in effect. An additional 86, or 22 percent, of the defendants actually met the permanent time frames but had been reported as exceeding them because allowable excludable time had not been computed or had been computed improperly.

Specific problems cited as reasons for processing delays were: plea bargaining negotiations were in process (16 percent); case was unusual or complex (9 percent); investigative reports were received too late (8 percent); grand juries were not readily available (6 percent); and case could not be scheduled because of court congestion (4 percent).

DEPARTMENT OF JUSTICE STUDY OF SPEEDY TRIAL ACT IMPLEMENTATION PROBLEMS

The Department of Justice recognized the importance of compliance problem data and conducted its own study which was recently released. This study notes that given the degree to which a more exhaustive analysis was precluded by such limitations as lack of systematic and accurate record-keeping in the district visited and the time and budgeting constraints on the project, the description of the sources and types of delays that occurred in the districts visited must be regarded as tentative.

Nevertheless, the report points out that—

The most frequent causes of delay were time spent waiting for investigative reports, time spent considering plea offers, and time spent waiting for defense counsel,

The single most significant source of delay, in terms of days of delay, was time spent considering plea offers, and

The most significant cost of compliance with the act was continued and aggravated delay in the disposition of civil cases.

SUMMARY

In our opinion, the lack of sufficient data on implementation problems undercuts the ability of the judicial system to systematically evaluate the impact of the Speedy Trial Act. As a result, neither the courts nor the Congress has sufficient evidence for deciding legislative or procedural changes necessary to allow full compliance and minimize potential adverse trade-offs. Two questions as to the act's effect on the judicial system persist:

Will the criminal justice system be able to process all cases within the act's time frames when the dismissal sanction takes effect on July 1, 1979?

What needs to be done to insure that all defendants receive a speedy trial without affecting the system's ability to administer justice equitably?

These basic questions cannot be answered with any degree of certainty because too little is known about the reasons for implementation problems incurred by the judicial system in attempting to meet the act's time frames. Information available deals basically with anticipated problems rather than information obtained from systematic evaluations of actual experience during the act's phase-in period.

The Judicial Conference, the Administrative Office of the U.S. Courts, and the Department of Justice have taken the position that the Congress should lengthen the act's time frames cumulatively from 100 to 180 days. Their opinions must be weighed carefully. However, this position was based largely on anticipated problems rather than systematic evaluation of actual experiences during the act's phase-in period. Without better empirical data neither they nor the Congress can be assured that the extended time frames are necessary or that an extension would avert the problems anticipated.

Officials from the Administrative Office of U.S. Courts, the Federal Judicial Center, and the Department of Justice have told us that even though specific evidence is not available, they believe there is reasonable evidence to support the 180-day time frame. They further believe that if such a time frame is enacted, the impact on the judicial system would be less severe. We agree that such an extension would probably result in fewer cases exceeding the time frame. However, data, such as the additional resources needed and the administrative burdens resulting from more frequent grand juries, is not available to show the changes which would be needed to meet a specific time frame to assure that trials are conducted in an expeditious manner.

Neither the Congress nor the components of the criminal justice system want to achieve a speedy trial if it results in an ineffective criminal justice system. Logically, increasing the act's time frames by 80 percent would lessen the adverse trade-offs identified to date. However,

Is such a long extension in the time frames necessary?

Would a shorter time frame be possible if additional resources were made available?

What combination of time extensions and additional resources would preserve both the quality of justice and the goals of the act?

Does existing law provide sufficient safety mechanisms with which to minimize or prevent adverse trade-offs?

The Congress needs answers to these questions and the judicial system components need to do more to provide them.

RECOMMENDATIONS TO THE JUDICIARY

Therefore, we have recommended that the Judicial Conference of the United States, in cooperation with the Administrative Office of the U.S. Courts and the Judicial Councils—

Develop data on a representative basis that clearly shows why cases are not processed within the act's 100-day arrest-to-trial time frame;

Quantify the problems and identify the various alternatives at the district court level, as well as systemwide, which could be used to overcome these problems and which would allow for the act's effective implementation without decreasing the quality of justice; and

Provide periodic reports to the Congress to demonstrate the problems with the act and needed improvements.

ALTERNATIVES FOR CONSIDERATION BY THE CONGRESS

The Congress is faced with the decision as to whether the Speedy Trial Act should be implemented as now required on July 1, 1979, or be modified. The Judicial Conference and Department of Justice have taken the position that there is a need to increase the time frame from 100 to 180 days so that a large number of criminal cases will not be dismissed. However, they have not specifically identified the problems that cannot be resolved within the framework of the act's safety mechanisms. In view of the unavailability of detailed data to support the position of the Judicial Conference and the Department of Justice, we believe that a viable alternative is to modify the act to require the courts to use the 100-day time frame and postpone the implementation of the dismissal sanction for 18 to 24 months.

The latter alternative would leave intact the 100-day time frame; however, because the dismissal sanction would not be in effect, criminal cases would not be dismissed. If the Congress adopts this latter alternative, it should require the courts to fully identify and document the problems encountered for those cases exceeding the 100-day time frame. That information would provide a more adequate basis for deciding what the appropriate time frame should be.

Mr. Chairman, this concludes our statement. We will be glad to respond to any questions you may have.

ATTACHMENT I

DEFENDANTS PROCESSED WITHIN THE PERMANENT INTERVAL I TIMEFRAME FOR DISTRICT COURTS REVIEWED JULY 1, 1976, TO JUNE 30, 1978

District	Year ending June 30, 1977			Year ending June 30, 1978 [1]		
	Total defendants processed	Total defendants meeting 30-day timeframe	Total defendants exceeding net 30-day timeframe [2]	Total defendants processed	Total defendants meeting 30-day timeframe	Total defendants exceeding net 30-day timeframe [2]
Middle North Carolina	113	103	10	86	86	0
Eastern Virginia	571	499	72	115	81	34
Eastern Michigan	377	235	142	158	118	40
Western Michigan	126	104	22	55	47	8
Southern Iowa	18	17	1	23	22	1
Western Missouri	79	79	0	54	50	4
Arizona	778	680	98	271	258	13
Central California	880	823	57	632	602	30
Total	2,942	2,540	402	1,394	1,264	130
Total for 94 districts	18,849	14,836	4,013	9,169	7,565	1,604

[1] Statistics do not reflect 15,847 pending cases, of which 2,436 were pending over 6 months without fugitive defendants. Thus, statistics for the period are subject to change.
[2] Defendants exceeding interval after excludable time allowed by 18 U.S.C. 3161 had been deducted, as reported by district court.

ATTACHMENT II

DEFENDANTS PROCESSED WITHIN THE PERMANENT INTERVAL II TIMEFRAME FOR DISTRICT COURTS REVIEWED JULY 1, 1976, TO JUNE 30, 1978

District	Year ending June 30, 1977			Year ending June 30, 1978 [1]		
	Total defendants processed	Total defendants meeting 10-day timeframe	Total defendants exceeding net 10-day timeframe [2]	Total defendants processed	Total defendants meeting 10-day timeframe	Total defendants exceeding net 10-day timeframe [2]
Middle North Carolina	317	290	27	263	263	0
Eastern Virginia	969	939	30	885	865	20
Eastern Michigan	1,299	1,097	202	609	512	97
Western Michigan	227	186	41	126	109	17
Southern Iowa	102	92	10	74	69	5
Western Missouri	617	608	9	463	453	10
Arizona	1,403	1,323	80	667	644	23
Central California	2,220	2,096	124	1,261	1,180	81
Total	7,154	6,631	523	4,348	4,095	253
Total for 94 districts	44,859	39,122	5,737	26,966	24,377	2,589

[1] Statistics do not reflect 15,847 pending cases, of which 2,436 were pending over 6 months without fugitive defendants. Thus, statistics for the period are subject to change.
[2] Defendants exceeding interval after excludable time allowed by 18 U.S.C. 3161 had been deducted, as reported by district court.

ATTACHMENT III

DEFENDANTS PROCESSED WITHIN THE PERMANENT INTERVAL III TIMEFRAME FOR DISTRICT COURTS REVIEWED JULY 1, 1976, TO JUNE 30, 1978

District	Year ending June 30, 1977			Year ending June 30, 1978[1]		
	Total defendants processed	Total defendants meeting 60-day timeframe	Total defendants exceeding net 60-day timeframe[2]	Total defendants processed	Total defendants meeting 60-day timeframe	Total defendants exceeding net 60-day timeframe[2]
Middle North Carolina	334	321	13	276	276	0
Eastern Virginia	966	929	37	916	895	21
Eastern Michigan	1,337	707	630	697	392	305
Western Michigan	229	152	77	145	104	41
Southern Iowa	97	85	12	85	83	2
Western Missouri	642	568	74	514	487	27
Arizona	1,445	1,073	372	718	619	99
Central California	2,273	1,833	440	1,396	1,200	196
Total	7,323	5,668	1,655	4,747	4,056	691
Total for 94 districts	45,815	34,393	11,422	29,400	23,931	5,469

[1] Statistics do not reflect 15,847 pending cases, of which 2,436 were pending over 6 mo without fugitive defendants. Thus, statistics for the period are subject to change.
[2] Defendants exceeding interval after excludable time allowed by 18 U.S.C. 3161 had been deducted, as reported by district court.

ATTACHMENT IV

CRIMINAL DEFENDANTS MEETING THE JULY 1, 1979, SPEEDY TRIAL TIME STANDARDS FOR THE 2-YR PERIOD ENDING JUNE 30, 1978

Interval	Permanent timeframes	Year ending June 30, 1977			Year ending June 30, 1978[1]		
		Total defendants processed	Total defendants meeting permanent timeframe[1]		Total defendants processed	Total defendants meeting permanent timeframe[2]	
			Number	Percent		Number	Percent
Arrest to indictment	30	18,849	14,836	78.8	9,169	7,565	82.5
Indictment to arraignment	10	44,859	39,122	87.2	26,966	24,377	90.4
Arraignment to trial	60	45,815	34,393	75.0	29,400	23,931	81.4

[1] Statistics do not reflect 15,847 pending cases, of which 2,436 were pending over 6 months without fugitive defendants.
[2] Defendants meeting interval after excludable periods of delay authorized by 18 U.S.C. 3161(h).

ATTACHMENT V

COMPTROLLER GENERAL'S REPORT TO THE CONGRESS—SPEEDY TRIAL ACT—ITS IMPACT ON THE JUDICIAL SYSTEM STILL UNKNOWN

DIGEST

Four years ago, the Congress passed the Speedy Trial Act, which requires that a Federal criminal case be processed within the established time frames totaling 100 days. Generally, cases not processed within this period, as extended by allowable delays, must be dismissed with or without prejudice.

To allow district courts to move smoothly toward the 100-day limit, the act provided a 4-year phase-in period during which specific steps within the time limit were to become effective gradually. GAO found that the district courts did not develop sufficient data to identify the reasons for implementation problems. During the phase-in period, the courts relied on limited data and subjective judgments of court officials, judges, and U.S. attorneys rather than on a systematic evaluation of empirical data to document the problems in meeting the time frames. As a result, limited evidence exists for suggesting either procedural or legislative time frame changes.

ACT REQUIRES PROCESSING DEFENDANTS WITHIN ESTABLISHED TIME FRAMES

Beginning on July 1, 1979, the Speedy Trial Act requires the dismissal of certain Federal criminal cases where a defendant is not processed within the following time frames:

Arrest to indictment, 30 days;
Indictment to arraignment, 10 days;
Arraignment to start of trial, 60 days.[1]

At dismissal, a district judge will determine if the defendant will be freed from future prosecution.

If large numbers of cases are dismissed, the purposes of the act could be frustrated. Criminal defendants, if guilty, will escape justice or the criminal justice system will incur additional costs to retry the case.

Court statistics show that many criminal defendants have not been processed within the act's permanent 100-day arrest-to-trial time frame. At least 5,469, or 18.6 percent, of the cases completed during the year ended June 30, 1978, exceeded one or more time frames.

COURT OFFICIALS ANTICIPATE PROBLEMS IN IMPLEMENTING THE ACT

Some district court officials dismiss the fact that full implementation had not been achieved on the grounds that had the permanent time frames and the dismissal sanction been in effect, steps would have been taken to insure implementation of the act's time frames. Officials in three districts cautioned that additional resources would be needed, while officials in another district cautioned that changes in the volume and nature of criminal cases could affect the district's ability to meet the permanent time frames.

However, many court officials and U.S. attorneys believe that achieving full compliance with the act will be a reactive process resulting in the following undesirable trade-offs.

U.S. attorneys may be unable to prosecute all criminal defendants effectively (e.g., more cases declined for prosecution or more lenient plea bargains accepted).

Defense attorneys may not have sufficient time to prepare their client's case.

Civil litigants whose cases are not subject to statutory time frames may have a longer wait for their day in court since criminal cases will receive priority.

Criminal cases may cost more to process (e.g., additional travel costs or multiple trials).

LACK OF OBJECTIVE, DOCUMENTED DATA FRUSTRATES EFFORTS TO COPE WITH PROBLEMS

District courts have not developed the data essential to identify problems that will hinder compliance when the permanent 100-day time frame becomes effective. As a result, no objective evidence exists for deciding if the act's permanent time frames should be adjusted or if procedures should be changed to effectively process defendants within the existing time frames.

Nonetheless, the Judicial Conference, the Administrative Office of the U.S. Courts, and the Department of Justice have taken the position that Congress should lengthen the act's time frames cumulatively from 100 to 180 days. While this position comes from those whose opinion must be given great weight, neither they nor the Congress can be assured that the action called for is necessary and that it would have the desired effect.

Neither the Congress nor the components of the criminal justice system want a speedy trial if it results in an ineffective system. Logically, increasing the act's time frames by 80 percent would lessen the adverse trade-offs identified to date. However—

Is such a long extension in the time frames necessary?

Would a shorter time frame be possible if additional resources were made available?

[1] Delays occasioned by certain statutorily prescribed contingencies or "excludable periods of delay" are not included in the time frame computations.

What combination of time extensions and additional resources would preserve both the quality of justice and the goals of the act?

Does existing law provide sufficient safety mechanisms with which to minimize or prevent adverse trade-offs?

The Congress needs answers to these questions and the justice system components need to do more to be able to provide them.

RECOMMENDATIONS TO THE JUDICIARY

GAO recognizes that implementing the act as scheduled entails some risk. Numerous problems associated with meeting the act's time frames may adversely affect the justice system. However, without information on the magnitude and severity of the impact, neither GAO, the justice system, nor the Congress can adequately weigh the adverse effects to formulate appropriate remedial actions.

The Judicial Conference of the United States in cooperation with the Administrative Office of the U.S. Courts and the Judicial Councils should—

Develop data on a representative basis that clearly shows why cases are not being processed within the 100-day arrest-to-trial time frame;

Assess the cause, severity, and impact of these problems to formulate and justify rule changes, additional resources, or amendments to the act;

Quantify the problems and identify the various alternatives at the district court level, as well as systemwide, which could be used to overcome these problems and allow effective implementation of the act without decreasing the quality of justice; and

Periodically report the problems with the act and improvements needed to the Congress.

AGENCY COMMENTS

The Administrative Office of the U.S. Courts, the Federal Judicial Center, and the Department of Justice all disagreed with GAO's conclusions that there was insufficient data available to consider proposed amendments to the Speedy Trial Act. All three agencies contend that data now available provides a substantial enough basis for formulating and considering recommendations for remedial action by Congress before July 1, 1979. In this regard, all three agencies have suggested that the time frames be extended from 100 to 180 days. (See ch. 3 and apps. VI, VII, VIII.)

GAO disagrees and believes that because there is limited data on the implementation problems, neither the Congress nor the courts have enough evidence to decide what legislative time frames or procedural changes are necessary to allow for full compliance and to minimize potentially adverse trade-offs. As a result, no one can be assured that an extended time frame is necessary or that it will avert the expected problems. Increasing the time frame by 80 percent would logically lessen the adverse trade-offs identified to date. However, no one knows what combination of time extensions and additional resources would preserve both the quality of justice and the goals of the act.

GAO believes more attention should be paid to the system's ability to resolve problems within the framework of existing law and within the permanent time frames. GAO points out that the act specifically suspends the running of the time frames for any 1 of 15 specified contingencies. This includes an authorization to provide a continuance when, among other matters, it would serve the "ends of justice" to do so. In situations involving an especially congested court calendar, there are circumstances where a judicial emergency may be declared, thus suspending the applicability of certain permanent time frames. However, the problems that cannot be resolved within this framework of safety mechanisms have not been specifically identified.

ALTERNATIVES FOR CONSIDERATION BY THE CONGRESS

The Congress is faced with the decision as to whether the Speedy Trial Act should be implemented as now required on July 1, 1979, or modified. The Judicial Conference, Administrative Office of the U.S. Courts, and the Department of Justice have taken the position that there is a need to increase the time frame from 100 to 180 days so that a large number of criminal cases will not be dismissed. However, problems that cannot be resolved within the act's safety mechanisms have not been specifically identified. Therefore, GAO believes in view of the unavailability of detailed data to support the position of increasing the time frame by 80 percent, that a viable alternative would be to modify the act to require

the courts to use the permanent 100-day time frame and postpone the implementation of the dismissal sanction for 18 to 24 months.

This alternative would leave intact the 100-day time frame; however, because the dismissal sanction would not be in effect, criminal cases would not be dismissed. If the Congress adopts this alternative, it should require the courts to fully identify and document the problems encountered for those cases exceeding the 100-day time frame. This information would provide a more adequate basis for deciding what the appropriate time frame should be.

Mr. CONYERS. We invite you to proceed in any way you choose.

TESTIMONY OF ALLEN R. VOSS, DIRECTOR, GENERAL GOVERNMENT DIVISION, GENERAL ACCOUNTING OFFICE, ACCOMPANIED BY KEN MEAD AND JOHN OLS

Mr. Voss. Thank you, Mr. Chairman.

I will basically summarize my statement in just a few minutes, if I may.

It is a pleasure to be here today and testify on the results of our review of the implementation of title I of the Speedy Trial Act. Our report, as you know, was issued on May 2, 1979, and I've attached a copy of our report digest to my statement.

As you know, the act represents an effort by Congress to address the problem of delays in the handling of Federal criminal cases. The act established uniform timeframes that generally must be followed by Federal district courts in processing criminal cases. The Congress recognized that problems might develop with statutory timeframes, and therefore gave the criminal justice system over 4 years to prepare for the Speedy Trial Act's full implementation.

I will now briefly summarize the results of our review.

Our analysis of court statistics shows that there has been a marked improvement by the Federal district courts in processing criminal cases for the year ending June 30, 1978.

For example, the interval between arraignment to trial in over 11,000 cases exceeded the timeframe of 60 days for the year ending June 30, 1977, as compared to only a little over 5,400 cases for the year ending June 30, 1978.

Statistics for all intervals show that the courts are moving in the right direction of meeting the 100-day overall timeframe imposed by the act.

District court officials, however, stated that meeting the act's timeframes may result in several undesirable trade-offs that could decrease the system's ability to promote equal justice.

These are: U.S. attorneys may be unable to prosecute all criminal defendants effectively, leading to a greater number of cases being declined and/or pressures to accept undesirable plea bargains.

Defense attorneys may not have sufficient time to prepare their clients' cases.

Civil litigants whose cases are not subject to statutory timeframes may have a longer wait for their day in court since criminal cases will receive priority.

Criminal cases may cost more to process.

However, lack of data to fully support these potential problems adversely affects the courts' ability to establish a sound basis for

deciding the legislative modifications needed in the act, or the procedural changes necessary to allow for full compliance and minimize the potential adverse trade-offs.

I must mention here that there have been benefits attributable to the Speedy Trial Act. These include a more rapid disposition of criminal cases and a decrease in the criminal backlog.

An improved quality of justice. Witnesses' memories remaining fresh, and the greater availability of witnesses, and a greater association between punishment and the crime, if the defendant is convicted.

We reviewed in detail, Mr. Chairman, 393 cases that were terminated during the 6-month period ending June 30, 1977, in 8 district courts. For each case, court statistics showed that the July 1979 timeframe for one or more of the three intervals had been exceeded.

Because district court case files did not contain sufficient information to identify the specific reasons why defendants were not being processed within the act's timeframes, we had to rely on opinions and observations from judicial officials.

At least 103 or 26 percent of the 393 cases exceeded the timeframes simply because the district was attempting to meet longer timeframes and/or the dismissal sanction was not in effect. An additional 86, or 22 percent of the cases, actually met the permanent timeframes, but had been reported as exceeding the allowable excludable time because it had not been computed or had been computed improperly.

This, in effect, Mr. Chairman, represents almost half of the cases that we looked at.

Mr. CONYERS. What is the implication?

Mr. VOSS. I would say that if we could project on the basis of these 393 cases, we have about 50 percent of the 5,400 cases where the Department of Justice stated that criminals would walk free where, in fact, they may not have walked free.

That is pretty much what that means. We cannot project statistically, though.

Mr. CONYERS. I am not sure if I understand you there.

Mr. VOSS. Well, 393 cases, Mr. Chairman, were reported as exceeding the timeframe by the Administrative Office of the U.S. Courts, which in effect said that these particular cases, had the dismissal sanction been in effect, could have walked free.

Our sample of 393 cases shows that half of that sample really were not cases that may have or could have walked free.

Mr. CONYERS. All right, now, when we say "walk free," that's a general term. And we assume you mean dismissal with prejudice.

Mr. VOSS. That's correct.

And we are also assuming that there were no good reasons for the remaining 50 percent of the sample cases that would have fit into the excludable delays.

Mr. CONYERS. Those are some pretty important caveats, I think. And I am glad that you make your disclaimer that you are not trying to suggest that your sampling would, without further investigation, be the uniform rate of error across the board.

You know, I am impressed by one of the witnesses who said that for many, even though we've had the trial period, many of the judges and the personnel in the courts are just getting used to using all of these provisions; and some remedies are used and some—they hardly know they exist.

Mr. VOSS. You are absolutely correct on that.

Mr. CONYERS. And there will be some period of time before this is all worked out and they realize the full ramifications of the law.

Mr. VOSS. Yes, sir.

We, of course, did our work at eight Federal district courts; and, for instance, if you look at the percentage of cases that continuances were granted nationwide, the percentage was only about 5½ percent of the cases. In the eight districts we visited, we had one district that went as high as 5 percent; most districts went 3 percent and lower, even close to zero percent, which would indicate that even though they were overrunning the 100-day period, and even though there were situations where cases were very complex, you had very little use of continuances in the eight districts we visited.

One reason for this is that the dismissal sanction was not in effect, obviously.

Mr. CONYERS. You know, I am impressed by the conscientious nature of the Federal judiciary, that so few districts applied for the emergency remedy that's available. They all examined it, they knew it was available; and yet, very few of them—and from what I can tell, those who did apply were the ones that needed it. They have been moving in good faith. They may not be raising this closely to their bosom, but it's understandable that judges like to take care of matters by themselves. They are by the nature of their work individualists.

And here is the Congress exerting its jurisdiction. But it would seem that the judges are moving in a very good faith approach to this measure. And I am impressed that your statistics continue to support that. They feel they have an obligation to move it and in fairness to give it a good try.

Mr. VOSS. My position when testifying in front of the Senate Committee on the Judiciary—and you say this much better than I do—is just that: The courts are moving in good faith to meet the 100-day timeframe. There are some problems, and there's some misunderstanding; and I think those things will be straightened out as we go down the road.

Mr. CONYERS. Well, we'll need your office's continued help in this. It seems to me, as has been indicated, we are really not in the time for the real testing. It's one thing to be preparing for the sanctions to become operative; but it's another matter when they are operative.

This subcommittee will be advising you of this by letter. We need to make a comparison of the effectiveness that occurred in each district that has had the emergency review provision applied for the entire district. We need to know in what instances excludable time has been granted, and when the ends of justice have been used. We need to get really down to the fine details of this so that we can in the legislature determine this all-important question: Whether we modify the law from the beginning, whether we extend the time period, whether to keep the interpretation strict, or whether to relax the time period; or whether we postpone the operation of the dismissal sanction, and do something else.

So we have about three major positions, it seems to me, that have emerged in these hearings.

Mr. VOSS. Yes.

Mr. CONYERS. And everybody has been hesitant to say we do not have the most competent statistics in the world even though they

are better than anything we've had before. Much of it is traceable to your office and it is good work, and the work of the planning groups who were very important in getting the implementation of this in shape in the various court districts.

Mr. Voss. Our recommendation to the Judicial Conference of the United States and to the Administrative Office of the U.S. Courts was to gather that kind of data you are talking about which is not readily available. It should be obtained and made available in periodic reports to this committee and the cognizant committee on the other side of the House.

Mr. CONYERS. Thank you. Please finish your statement; I interrupted you.

Mr. Voss. Let me just summarize, Mr. Chairman.

We believe, as you have pointed out, the lack of sufficient data on implementation problems undercuts the ability to systematically evaluate the impact of the Speedy Trial Act. As a result, neither the courts nor the Congress have sufficient evidence for deciding legislative or procedural changes necessary to allow for compliance and minimize the potential adverse effects.

Officials from the Administrative Office of the U.S. Courts, the Federal Judicial Center, and the Department of Justice have told us that even though specific evidence is not available, they believe there is reasonable evidence to support a 180-day timeframe as opposed to a 100-day timeframe.

They further believe that if such a timeframe was enacted, the impact on the judicial system would be less severe. However, there are questions unanswered, such as: Is such a long extension in timeframe necessary? Would a shorter timeframe be possible with additional resources made available? What combination of time extension and additional resources would preserve both the quality of justice and the goals of the act? Does existing law provide sufficient mechanism with which to minimize or prevent adverse trade-offs?

The Congress needs answers to these questions and the judicial system needs to do more to try to provide them. However, the Congress today is faced with the decision as to whether the Speedy Trial Act should be modified.

In view of the unavailability of detailed data to support a position of an increase to the 100-day timeframe, we believe that a viable alternative is to modify the act to require the courts to use the 100-day timeframe and postpone the implementation of the dismissal sanction.

Such an alternative would leave intact the 100-day timeframe; however, because the dismissal sanction would not be in effect, criminal cases would not be dismissed. If the Congress adopts this latter alternative, it should require the courts to fully identify and document the problems and report to the Congress the problems encountered for those cases exceeding the 100-day timeframe.

That information would provide a more adequate basis for deciding what the appropriate timeframe should be.

Mr. Chairman, this concludes our statement, and we will be happy to respond to questions you might have.

Mr. CONYERS. Thank you very much, Mr. Voss; we've been over this ground pretty thoroughly. You have been here and heard our colloquy with the previous witnesses.

So I am going to turn now to Mr. Volkmer.

Mr. VOLKMER. I don't have any questions.

Mr. CONYERS. Then I will refer to Counsel Stovall, who may have questions.

Mr. STOVALL. Thank you, Mr. Chairman, Mr. Voss, I refer to a letter dated April 12, 1979, from the Department of Justice to you, written by Kevin Rooney, Assistant Attorney General for Administration. At that time, in that letter, he indicated that a change in arrest policy had been necessitated by the act—this is commenting on the GAO study. Because of the rapid fire deadline periods involved, the complaint goes that arrests are deferred until indictments are able to be filed, and, therefore, fewer criminal arrests are made by police agencies.

Have you had an opportunity to determine whether or not this is in fact the case?

Mr. Voss. We have had this much of an opportunity: Of the eight districts we went to, we talked to all eight U.S. attorneys; and seven of those U.S. attorneys would not agree with that letter from the Department of Justice.

One of them said if the act went into effect this might well be something he would use, so that he would not have to worry about the 30-day limit.

But overall, the eight districts we went to did not support the Department of Justice statement.

Mr. STOVALL. What were those districts?

Mr. Voss. We went to middle North Carolina, eastern Virginia, eastern Michigan, western Michigan, southern Iowa, western Missouri, Arizona. and central California.

Mr. STOVALL. And those that you named, which of those said this is not a problem?

Mr. Voss. The one that said it was a problem was middle North Carolina.

Mr. STOVALL. He was the U.S. attorney there?

Mr. Voss. Yes.

Mr. STOVALL. Now, the problem may in fact arise at the Federal police level where a Treasury agent or FBI agent is not able to make an arrest because of problems with that.

Have you had an opportunity to evaluate whether or not the police agencies find these strictures to be inhibiting their arrests?

Mr. Voss. No, sir, I am sorry; we did not address that question.

Mr. STOVALL. All right. One other question is whether or not the complicated nature of some trials—major drug conspiracy cases, white collar trials, official corruption cases which involve protracted pretrial procedures, and numerous witness gathering and document analysis—might cause immobilization of other trial activities.

Do you think the present act the way it is written allows for protection of dismissal in the event of such a flood of activity?

Mr. Voss. I think it does, where you have an unusual, complex case like that, that is one of the exceptions in the act. I might add this situation would be covered under the ends of justice exclusion. We have not had a lot of experience, I guess, over the last 3 or 4 years in testing that; whether judges will agree is another story.

And I guess until the time comes that it's actually done, we won't know. But I believe the act is pretty good that way. I don't see where we need any additional language in it to protect us and to protect the individuals where you have a complex situation.

Mr. CONYERS. Mr. Voss, I am intrigued by your response. I want to ask you, you mention not that much experience. Well, the Federal courts have been trying complex cases during these last several years. That should provide some experience, should it not?

Mr. Voss. You are right on that, Mr. Chairman; but as we looked at our 393 cases, as I mentioned before, we talked about 50 percent of them, and there is another 50 percent where they did exceed the timeframe of 100 days, and approximately 9 percent were complex cases. And no one requested a delay.

Mr. CONYERS. In other words, they proceeded to trial without the necessity of extending the time limit?

Mr. Voss. They overran the time limit because they didn't ask for an exception. That is one of the basic reasons why the time limit was overrun, because there are cases that are complex and unusual, and they are not requesting this tolling of the time.

I assume that is because the dismissal sanction was not in effect in those years; and when the time comes for trial-by-fire, I assume they will be requesting it, the tolling of the time.

Mr. CONYERS. In other words, we have to put these statistics in perspective to understand that while we are getting acquainted and familiar with this——

Mr. Voss. There wasn't any immediate rush to use it because there was no dismissal.

Mr. CONYERS. Now we are playing "hard ball," we are "keeping score" now. Presumably no judge, certainly no counsel, would just sleep through a provision in the law that determines whether there will even be a trial or not.

Here they are worried about an infinite number of legal problems, and the basic one is obviously not going to go unnoticed by all counsel and the Federal judge himself.

Mr. Voss. I would hope not.

Mr. CONYERS. I would hope not. We all desperately hope not.

But I think your comment provides some insight as to what we are getting, and if you have a difference of view with what I say now, I would like you to express that on the record.

What I seem to be hearing is: One, there are not that many complex cases really being brought, at least from the sampling experience; and when they were brought many of the sanctions, the exclusions, were not put into effect because there were no dismissals; the dismissal sanctions were not operative and, presumably, that figure would have been reduced greatly if they were in the period after July 1, 1979?

Mr. Voss. I would agree with everything you said there, Mr. Chairman.

I would just say that, you know, presumably they would have done these things. Of the 393 cases there were a number of cases beyond the 50 percent we talked about where, had there been a dismissal sanction in effect, I am sure they had the proper basis to have a tolling of the time.

Mr. CONYERS. Is there anything where we could do a study to determine, you know, what the judge conceived as a reason for not tolling the time period?

Mr. Voss. He was not advised that they needed a tolling of the time.

Mr. CONYERS. So it's just like the old days.

Mr. Voss. Let me also mention this, I have to put additional information on the table here:

The 100-day period is what we used. We went to three districts that were using the 100-day time limit.

Mr. CONYERS. They were using the 100-days already?

Mr. Voss. That's right, in fiscal year 1978.

And we went to five districts that were not using the 100 days; four were using 175 days whereas the fifth district was using 135 days.

Now, the 100 days passed and they didn't request the tolling of the time because they're operating on a large number of days. I can give you the breakdown as to how many of those fit into three districts where they were operating on the test basis at 100 days, and in the other five districts where they were not operating on a 100-day period—and I did not mention that before, and it is very important.

Mr. CONYERS. It is very important. I had forgotten it as well, because there are court jurisdictions that have been using the 100 days successfully for years.

Mr. Voss. It is my recollection that in fiscal year 1979 there were 29 district courts that were planning to use the 100-day period. Prior to that, in fiscal year 1978, there were 19.

Mr. CONYERS. Thank you.

Mr. Stovall, do you have further questions?

Mr. STOVALL. Yes, Mr. Chairman.

The complexity of cases question that we are talking about ought to be elaborated on, perhaps in another hearing.

What about those cases, Mr. Voss, in which other criminal cases are being held in abeyance during the trial of the protracted white collar crime case, for example? And under what provision might those trials that are being held in abeyance be extended—the emergency provisions?

Mr. Voss. If I may call on my colleague to help me a little bit on this?

Mr. MEAD. I do not believe the "ends of justice" exclusion could be invoked in cases that were not novel or complex, but were merely delayed by reason of a congested calendar.

If the delay results from docket congestion, we're talking about a judicial emergency, and as the judge noted, one has already been implemented in his district.

Mr. STOVALL. In other words, if there is a general overcrowding, it can be suspended across the board?

Mr. MEAD. Existing law seems to provide a mechanism to accommodate that type of situation.

Mr. STOVALL. I do not recall the statute. I thought there was a provision in the statute presently that said overcrowding of docket shall not be sufficient basis for an extension of time. Am I not reading that correctly?

Mr. OLS. The judge can get an emergency declared for his district if there are problems he can't handle, because he's got a complex case.

Mr. CONYERS. Are we talking about the district docket or the individual judge's docket?

Mr. OLS. The district docket. Otherwise, they would transfer those cases to another judge.

Mr. STOVALL. Let me be a little more specific. In one case, in the western district of Pennsylvania, there was a big accident, insurance mail fraud, the *United States* v. *Boscia* case, which took 4 weeks, while that of a severed codefendant, who had filed 40 pretrial motions in another case, *United States* v. *Houmis*, required an additional 5 weeks. A major narcotics conspiracy trial, *United States* v. *Patton*, lasted 8 weeks.

Now, there are backed-up cases, and what I am asking is, if you can't use a crowded docket—and I don't think you can, and please correct me if I'm wrong—if you can't use a crowded docket in those cases, what can you do?

Mr. MEAD. The provision you are talking about excludes consideration of calendar congestion as a basis for excludable delay; it applies to the ends of justice exclusion. However, the provision authorizes the use of a judicial emergency, which triggers specifically on calendar congestion.

Mr. STOVALL. Which means that your ends of justice basis would not be applicable but judicial emergency might; but that requires a finding in an entire district. It is not a remedy to be brought by the U.S. district attorney when he comes up to try the next case and finds that the prior case took up 2 weeks more time than was figured.

Mr. OLS. I would think the chief judge would have to ask for that judicial emergency, and because the delay of one complex case affects all those cases down the road, any case is going to back up against that block for some time.

I agree with what you are saying on ends of justice. It doesn't apply to that specific case as it comes up; he's going to have to declare it for his whole district, as they've obtained in Detroit.

Mr. STOVALL. Can it physically be done—something arises very quickly and you don't anticipate this 2-week overlap of trial time—can judicial emergency be effectuated that quickly?

Mr. OLS. I think it can.

Mr. STOVALL. Has it been?

Mr. OLS. As a matter of fact, I was surprised when I heard the judge say it had been granted; I didn't realize that myself and that the other eight districts had been granted the judicial emergency. I am sure that can be done very quickly.

Mr. STOVALL. That would be an emergency request that would be in the mill for quite some time?

Mr. OLS. I don't know.

Mr. VOSS. I don't know whether they would have, prior to July 1, needed an emergency request.

Mr. STOVALL. Now, the other area—one more question, if I can ask your indulgence as to a civil question.

I know, the letter we spoke of earlier from Department of Justice mentioned its concern that the draft report could also benefit from greater attention to the increased delay in civil cases.

Civil case processing which has occurred since 1974, while the nationwide civil cases backlog has risen—apparently in 1977 it rose by more than 14,000 cases, to an all-time high of 153,606 cases. That record was surpassed in the year ending June 30, 1978. The backlog rose by close to 13,000 cases to a total of 166,462 cases.

Well, if in civil cases in the Federal court system which involve vital matters such as habeas corpus matters, civil rights cases, civil antitrust

suits, actions to collect back taxes, patent cases, civil accident claims, litigants are waiting at the door or having perhaps to settle a case too quickly—do you see this as becoming a problem under the Speedy Trial Act?

Mr. VOSS. First of all, I do not want to blame it on the Speedy Trial Act, but I would say this: Civil case backlog was a problem at the eight districts we went to. Also, little attention had been given to it.

What must not be overlooked is, you have 117 new judges either on board or coming on board; 630 new positions in the Department of Justice were authorized for the Senate Judiciary Committee for the fiscal year 1980, a considerable increase in resources both in the Department of Justice and in the court system.

Now what effect will all those new resources have on the civil backlog and the criminal situation? It's going to take time again to find out.

There's no disagreement that the backlog has been increasing. I am not too sure that backlog can be laid entirely at the feet of the Speedy Trial Act.

Mr. STOVALL. What occurred during that time other than the Speedy Trial Act to be causing such tremendous backlogs in civil case resolution?

Mr. OLS. Numerous other laws that have allowed the public to file civil suits in U.S. district courts.

Now, I can't give you the laws right now, but more and more people are taking their cases to the Federal courts. That's why you have in process the diversity bill, trying to remove those, to reduce that civil backlog.

I am not saying that's a direct cause. I personally won't agree that it is always the Speedy Trial Act. That's been thrown out to us many times, but there are other aspects to the criminal justice system. The various bills in process, the magistrates bill, the diversity bill, are being considered to try to reduce these other aspects of the criminal law to handle that backlog.

There are a lot of Federal laws that now allow the public to go into the Federal court system that we never had before; I think that has had an effect. I would have to go back and check and make an analysis of that over the years to see if it really comes out that way, but that's been my experience based on what I've looked at.

Mr. MEAD. The private antitrust actions; there's been a tremendous increase in that area.

Mr. STOVALL. Between now and the time the U.S. attorneys' offices are increased in their staffing capability, and the time the new Federal judges may come into place, assuming we are relying on those two elements to ameliorate the problem, what do the attorneys handling civil cases and litigants do between now and then, that point in time?

Mr. VOSS. Well, I would hope that point in time is not that far away. We are talking about fiscal year 1980 appropriations starting October 1 for Department of Justice; the judgeships are being appointed. I heard this morning one member of this committee mention that he felt it would be within the next year that we'd have them all sitting; I don't know.

Mr. STOVALL. Do you have any response to the request by Kevin Rooney in the letter I spoke of earlier, dated April 12, asking you to

58-721 O - 80 - 8

look at the civil problem and the great increase in delay of civil process to determine whether or not, in fact, that can be attributed to the Speedy Trial Act?

Mr. OLS. We have a review underway in a preliminary stage to go in and look at the civil case backlog. What we are interested in is what the actual impact on the litigants is in the civil cases that are sitting in the wings, if you will. Is there really an impact for the litigants, or do we just have a voluminous number of cases so that really there is no impact on anyone?

I am not saying all cases are like that.

Mr. STOVALL. We have heard testimony in this room that there are cases in U.S. district courts where there are, in fact, no civil cases being heard.

Mr. OLS. That's true in some of the eight districts we went to. A lot of courts are not even dealing with it.

Also, as the judge mentioned, many civil cases are settled outside of court. They never come up on the court docket anyhow, even though they would be listed in the civil case backlog statistics.

Mr. STOVALL. Judge Feikens said earlier this may, in fact, be a harm to many of the litigants because they may be forced to settle.

Mr. OLS. I beg to differ with you. There is an emphasis on trying to get the settlement out of the courtroom; that's where the emphasis is going.

Mr. STOVALL. Whose emphasis?

Mr. OLS. Justice Department's; they are trying to settle more cases outside. That's what's happening; a lot of civil cases never reach the courtroom.

Mr. STOVALL. You agree there's a difference of opinion; Judge Feikens earlier alluded to this problem. You would agree there are differences of opinion here?

Mr. OLS. I would agree. You and I might have a difference of opinion, too.

I do say, based on the work I have done, not only on the Speedy Trial Act, but many other jobs, that Speedy Trial is always used as a crutch. That's the problem. We've got to find a lot of things, not just the Speedy Trial Act or extending it to 180 days; that doesn't mean the civil case backlog will be reduced.

The main point in the report is that there is no data. The representative from ACLU said it, there is no data. Everybody said that; all the testimony this morning and what I've heard on the Senate side, everyone agrees we don't have the finite data, the quality data, to go along with the statistical data we do have. We don't have it.

Mr. STOVALL. You do say Justice Department has a goal of resolution of civil litigation, yet Mr. Rooney does allude to the fact there is an increased delay in the civil case process. Apparently the Justice Department does have a concern about the unavailability of the court docket to handle civil cases.

Mr. VOSS. Sure.

Mr. STOVALL. Now, in consonance with that concern and our subcommittee's concern, and your expertise in the area, would you be able to supply us with any data, preliminary or otherwise, that would answer this question of the civil case docket problem.

Mr. OLS. Not without a detailed analysis, because it's not available.

Mr. STOVALL. Well, I would like to suggest to the chairman that it might be something that the Chair might entertain as a further inquiry.

Mr. CONYERS. Yes; I appreciate that.

I would like to recognize Counsel Gregory.

Mr. GREGORY. The data I received from the Administrative Office of the Courts is aggregate data for the various districts. It's not broken down by judges.

Did you in your study look at individual judges? What we found when we looked at a couple of districts and went into the actual breakdown wasn't really a districtwide problem, but one or two judges had problems.

Mr. VOSS. No; we looked at the total district.

Mr. GREGORY. Did you go to the crux of that, whether it might be I think that's significant. One or two judges, maybe they've got a big case——

Mr. VOSS. I understand your question. I am sorry, we can't directly reply to it. We did not break it down by the different judges within the district.

Mr. GREGORY. It is interesting that in the 393 cases you looked at, you immediately accounted for over half of them, either by reason of the fact that the time limits weren't in effect or the fact that the sanction wasn't in effect, and the court, of course, did not have to meet the ultimate time limit; so that takes care of half of them.

We see that a large number of others were taken care of in large part by the fact that the judicial emergency is available and has been invoked. You look at the data, and obviously some districts have had no trouble, but in others there is.

You mentioned the 117 new judges, and the possibility of termination of jurisdiction in the magistrates bill. So that 5,400 cases that we get from the Justice Department shrinks considerably; does it not?

Mr. VOSS. Oh, yes. There's absolutely no doubt in my mind it shrinks very greatly.

Where we are coming from goes something on this order: We do not and did not agree with the Department of Justice, or the Administrative Office of the U.S. Courts, that they need 180 days. Basically they were coming forward that they need 180 days or many, many criminals will be walking free.

We do not agree with that. It's very difficult for the General Accounting Office, with the lack of data, to support 100 days with the dismissal sanction, indeed, as of July 1, 1979, because there are many knowledgeable people who have said, we are going to have problems with this, even though we can't document it. We are going to have problems.

So our position was basically, we don't think the law needs amending to increase the days from 100 to 180. However, it would be difficult for us to go on record and say, we should go right into the trial-by-fire situation, because we don't have the data to support the fact that there won't be some number of people walking free.

We don't think that 5,400 people will be allowed to walk free because of failure to meet the timeframes of the act.

Mr. GREGORY. We still come back to the ultimate question, don't we? Whether or not we are going to get a meaningful test without

sanctions. You mentioned yourself in your prepared statement, that the lack of sanction was a stated reason for not seeking extension.

Mr. Voss, Yes.

Mr. Gregory. Does that give you trouble as far as making that recommendation?

Mr. Voss. I have no trouble with the recommendation, because if we go along with the view that the courts will make the needed effort to document fully why case 1, 2, 3, etc. was not able to be handled in the timeframes, including considering all the safety valves we have in in the law, and you bring this information together on a nationwide basis, it will be difficult for anyone to undermine that kind of a system.

If the timeframe cannot be met in certain types of cases, and there isn't anything in the law that helps the judicial system, and there are a number of those types of cases, that kind of information would be helpful to the Congress. Maybe we do need other exceptions in the law. I think anyone will have a difficult time, with a good reporting system, to not go forward in all good faith.

And I think basically everyone wants to go forward in good faith in implementing the provisions of the Speedy Trial Act.

Mr. Gregory. That raises another consideration. We get the impression in talking to a lot of courts and a lot of U.S. attorneys that withholding sanctions is going to be a setback even among courts that are not enthusiastic about it.

Mr. Voss. Everybody is looking for some adjustment. It is hard for me to disagree with you. You won't have a test until you go forward with the sanctions. It is a policy decision that will have to be made by the Congress.

Mr. Gregory. One final question.

The act calls for that already and there's less than total optimism about what would happen if the recommendation is followed; that is, let's go back and get useful, valid data. Didn't Congress call for that?

Mr. Voss. They didn't spell it out quite that clearly. The Senate bill spells it out very clearly. I was very pleased at the detail they went into as to the kinds of things they would be wanting.

Mr. Gregory. The reporting requirement says it requires a data-collecting requirement and report to Congress. It shall contain pertinent information such as state of the criminal docket; description of the time limits, new techniques and innovations, and so forth. It does say, tell us what the problems are.

Mr. Voss. Yes, I am sorry that I would have to suggest that it should be more detailed, because some of what you've read, I would think the data today could have given you the information; but it does not give you the information.

Mr. Ols. I might add one thing, though, I think the one point we are overlooking that relates to that point of information is that there were only up until this current year 19 districts that were actually trying to implement the 100-day timeframe. Therefore, any data that the other districts were providing went on an extended timeframe; starting at 200, some going down to 125 during this last year.

Now we are all to 100 days. The data you will receive from this point on will mean all districts are complying, even though the dismissal sanction is not there you would hope that the judges would try to move the case as fast as they can, or if we can't they will try

to demonstrate the reason why so when they come back to the Congress in a year, they can say, this is the reason why they need this extension. We need it, as the honorable judge said, in interval 3; we don't need it in interval 1.

You only had 19 districts working with the 30-10-60 timeframe; and that's the thing I think we are overlooking, that many courts—the central district of California has a very heavy caseload—the judges out there say, we'll meet it. There's going to be trade-offs. As Mr. Stovall said, there will be civil problems as we get more cases; however, judicial officials said we'll meet it. Somehow or other we are going to meet the timeframe. Somehow or other we'll go into it on July 1; we'd like to see some changes made, but we'll go ahead and meet it some way or another.

But I think that's the thing that's missing on that data, even in the original planning requirement. It's easy to go back, but it's hard to start and say, I am trying to meet 175 days, and say, well, could I have met 100 days? That's pretty difficult to do an analysis on.

Mr. Conyers. This is only a relative kind of experience. We are now in an experimental stage, and it's the record from July 1 forward, not only in the districts that did not seek an emergency solution, but the ones that have. We now have the eastern district with exactly what they wanted, with exactly what one judge wants in the law. We want to see how they operate and compare it to the ones that did not require an extension.

And I think that if anything, Counsel Stovall's suggestion—more specificity—and you, too, Mr. Voss—in the act, that that might be a very important thing that we might do to make sure that we come up with all the information from July 1 forward.

Mr. Voss. Yes.

Mr. Conyers. And you will probably be meeting with our staff to determine how we might do that; and maybe that part of the Senate amendment may be most helpful to us.

You've been very helpful here in giving us an insight on where we will be from experience, and I congratulate you all. You have done an excellent job in GAO.

Mr. Voss. We thank you for inviting us, Mr. Chairman.

Mr. Conyers. The subcommittee stands adjourned.

[Whereupon, at 12:50 p.m., the hearing was adjourned.]

APPENDIX

United States Department of Justice
ASSISTANT ATTORNEY GENERAL
CRIMINAL DIVISION
WASHINGTON, D.C. 20530

JUL 2 0 1979

Honorable John M. Conyers, Jr.
Chairman, Subcommittee on Crime
House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

Upon the conclusion of my testimony before your Subcommittee on June 28, 1979, Minority Counsel Ross Stovall asked if I would supplement it with additional information concerning the difficulties the United States Attorneys are experiencing as a result of the Speedy Trial Act of 1974.

Assisted by the Executive Office of United States Attorneys, which has been in touch with all the U. S. Attorneys on this matter, I have summarized these concerns below.

It is important to note that the Department has been aware of these problems and its original proposed bill attempted to deal with many of the most serious ones. The Senate report indicates that the bill passed by the Senate on June 19, 1979, while failing to adopt the longer permanent time limits proposed by the Department, has adopted most of our other proposed changes. These amendments are directed at the problems faced by both urban and non-urban districts and, in our opinion, will make the Act more workable in a manner consistent with the original intent of Congress.

As might be expected from such geographically and otherwise diverse offices, their success in meeting time limits, pinpointing trouble spots, and forecasting the future have shown substantial variations. Nevertheless, concern has been consistently expressed over

certain aspects of the Act as sources of present or anticipated problems. Chief among these was the inflexibility of the Act.

Specifically, the complaint is that the Act fails to recognize the variations in the 95 judicial districts with respect to their geography, population density, number of judges and magistrates, and places for holding court, as well as the number and types of cases on their docket. The Act also treats all cases as if they are identical, and as though there were only one case in process at a time. The reality is that each case is only part of a caseload of judge, prosecutor and defense counsel, and that they cannot be expected to prepare and try several cases at the same time. Neither can cases be reassigned to fellow judges or attorneys whose own calendars are already full. Nor can unprepared colleagues adequately represent litigants with whose cases they are unfamiliar.

Although a few Districts have experienced little difficulty and anticipate none, others found themselves meeting the interim deadlines, but anticipated difficulties with the final abbreviated limits. In some cases, the meeting of the limits was fortuitous, turning, for example, on the availability of visiting judges, as in the Southern District of California, or on an abnormally high plea ratio as in the Eastern District of Louisiana. There, pleas of guilty or nolo were obtained from 68 of 75 defendants indicted in connection with a grain industry investigation, from 45 of 51 defendants indicted after the ILA pension fund investigation; and from 24 of 27 persons indicted for vote fraud in a Congressional election. In Delaware thirty-one indictments for FHA violations and corruption resulted in 30 pleas. Had a larger fraction of these defendants sought trial, it is doubtful that the districts would have been able to cope. Prosecutors are concerned that mass demonstrations such as the demonstration which took place at the New Hampshire nuclear plant will occur in their district and totally disrupt the calendar.

The inflexibility of the Act does not allow individual districts to cope with their unique caseloads. In districts such as the Western District of Texas, caseloads consist of a tremendous number of single defendant cases, which, even if they are characterized as "short trial" or "simple"

cases, require a multiplicity of individual arraignment, indictment, motion and trial proceedings. Problems of a different order are faced by districts with a number of complex cases. These cases, generally major drug conspiracies, white-collar frauds or official corruption matters, involve protracted pretrial proceedings, numerous witnesses and masses of documents. The pretrial and trial proceedings "immobilize" - as one United States Attorney put it - the presiding judge, and one or more of the experienced assistants. The Western District of Pennsylvania, for example, recently conducted a fake accident insurance insurance mail fraud case (U.S. v. Boscia) which took four weeks, while that of a severed codefendant, who had filed 40 pre-trial motions (U.S. v. Houmis) required an additional five weeks. A major narcotics conspiracy trial (U.S. v. Patton), lasted eight weeks.

The short indictment to arraignment limit places a heavy burden on the U.S. Marshal to locate and arrest defendants, and often does not provide defense counsel opportunity to review the charges and determine the appropriateness of a guilty plea on arraignment. Thus, the court has to schedule more hearings as pro forma not guilty pleas are commonly used to comply with the statute (the "real" pleas coming later). An additional cause of delay is the fact that many indigent defendants who have not been previously arrested appear at arraignment without counsel, thus requiring the scheduling of more hearings. Four recent cases in the Eastern District of North Carolina illustrate this (U.S. v. Massenberg, U.S. v. Trie, U.S. v. Jennings, and U.S. v. Jennings, Jr.).

Moreover, this short interval often requires the use of remote places for holding court. In the Southern District of Mississippi, for example, Assistant U. S. Attorneys must often travel 340 miles round trip to be present for an arraignment on which the ten day limit is about to run. In the District of New Mexico and other large western districts, arraignments and other appearances are held in outlying cities, requiring as much as a 440 mile round trip for an Assistant U. S. Attorney. Some 39 one or two-judge districts find constant interruptions,

travel, and inconvenience the price of meeting the ten day limit. This is especially true in geographically large districts, such as the Northern District of Florida, where each judge handles certain divisions. In Montana and other states with Indian reservations, great difficulties in serving indictments, making arrests, etc., are experienced and ten days is often not enough.

While not a common occurrence, but illustrative of our worst concerns with this indictment to arraignment interval, in the Western District of Pennsylvania, a bank robber was ordered released from federal custody because the ten day limit had been exceeded. A pending state detainer prevented his virtual flight. (U.S. v. Murphy).

Multi-Defendant Cases

Special problems are being encountered in multi-defendant cases, The United States Attorney for the Northern District of Florida, in response to questions regarding his Speedy Trial concerns, stated:

> "Lastly, one other undesirable problem encountered since implementation of the Act is the piecemeal handling of multi-defendant cases. For example, in multi-member drug conspiracy cases, it has often been the experience that lesser defendants are arrested in the course of off-loading operations or arrangements for distribution; the principals in the conspiracy are not properly subject to arrest until a later investigative stage if they are not apprehended redhanded. Usually, by time of indictment, these higher-ups are fugitives so that those already arrested proceed to trial ahead of the principal defendants. The obvious disadvantage to this procedure is that the government's case is fully disclosed to these absent defendants as are informants and other protected witnesses. One case in this district of such nature is

> United States v. Stimpert, PCR 75-59. Also; as each absent defendant is arrested, he is readied for trial and tried even though other fugitives are to be arrested."

Another problem in multi-defendant cases is that a severance granted the defendants creates two or more cases, each entitled to immediate trial. The situation is aggravated by the likelihood that only one Assistant U.S. Attorney is prepared to try the cases. Conversely, to avoid multiple trials, which could not be accomplished within the time allowed, U. S. Attorneys have had to forego the use in the joint trial of significant evidence, under compulsion of Bruton, and similar rules. Although excludable delay in the case of one codefendant is technically excludable from the calculations relating to an unsevered codefendant, judges have frequently granted severances to avoid speedy trial problems in the first defendant's case. Orders compelling severances have been entered where one defendant had numerous pretrial motions pending; or where one was committed for examination; or where an interlocutory appeal was taken from a suppression motion affecting only one defendant. Indeed, some courts have refused to defer trial of some counts of an indictment while an interlocutory appeal was pending on others. The resulting multiplicity of proceedings has further clogged the calendar and burdened the resources of the criminal justice system.

Geographical Considerations

Geography has conspired with the imperatives of the Speedy Trial Act to aggravate existing problems: the U.S. Attorney for the District of Colorado complained that the provisions requiring prompt indictment have necessitated the holding of many more grand jury sessions than was heretofore customary, causing great inconvenience to the jurors who must travel considerable distances to the centrally located courthouse in Denver at great expense to the government. The U.S. Attorneys for the Western District of Texas, and the Western District of Arkansas, on the other hand, complained that their Assistants waste many hours travelling to grand juries - now held more frequently - in the several far-flung divisions of their districts. The U.S. Attorney for the Western District of Arkansas - "a rural district with six widely spaced divisions" - wrote that "Before the Speedy

Trial Act, it had been our policy to take the court to the people. Since the Speedy Trial Act, we have had to bring people to the court." He cited an instance where defendan forced to travel 230 miles from their home for arraignment were effectively denied counsel of their choice. The smal staff of the U.S. Attorney for Montana is compelled to tra to court sessions held in seven different locations by its three judges.

One U.S. Attorney aptly described the trial problems a district with a large geographic area and several divisi in which trials must be held:

> "With only two judges trying cases within the four divisions, it often happens that a trial term is stacked sequentially division to division; consequently, if trials in one division last longer than anticipated, the judge is unable to hold court as scheduled in the next division. As an illustration, Judge Stafford tried United States v. Kieffer, et al, GCR 77-702, a multi-member drug conspiracy case in Gainesville commencing March 29. This trial ran longer than anticipated and into the following week; as a result, Judge Stafford was unable to hold trial of United States v. Kitchen, MCR 77-202, which had been scheduled for trial in Marianna, Florida, on April, 5, in that division. This was the second such continuance for the Kitchen case as a result of scheduling requirements imposed by the Act. Thus, at some expense to the Government, witnesses and jurors had to be called off and this matter re-scheduled for a later time. Our Chief Judge was unable to fill in because under the Act, he was busy trying cases in the Pensacola division at the same time. This onerous phenomenon has occurred on more than one occasion, but the above should be

> sufficient illustration of one of the problems generated under the Act."

Arrest Policy

Arrests often cannot be avoided: some defendants are caught redhanded, while others must be apprehended to put an end to on-going criminal activity or prevent flight. The sudden arrest of out-of-state subjects can create special problems. Several recent cases in Delaware involving theft of mail from postal trucks and forgeries resulted in charges being brought in Pennsylvania and Delaware. Since there was a variance in the time of arrest and indictment between the two jurisdictions, one office (Delaware) was forced to indict, arraign, hold pre-trial conferences and a set trial date before plea discussions pursuant to Rules 20 and 21, Federal Rules of Criminal Procedure could be arranged.

In the Northern District of Illinois, the incarcerated defendant has created a particularly severe problem in criminal copyright cases. Defendants are frequently transient in the conduct of such criminal activities. If they are not arrested, their crimes continue unabated and the risk of flight and concealment is substantial. However, to prepare those cases for prosecution, it is necessary to collect a wealth of copyright information and to submit samples of infringing items to the FBI lab for comparison with certified standards provided by the recording companies who hold the copyrights. The time necessary to investigate and analyze the evidence thoroughly, and determine the scope of criminal activity is considerably greater than that provided by the Act.

Laboratory and Expert Analysis

In addition to the problems in copyright cases, a number of U.S. Attorneys have reported difficulty securing indictments within the time allowed by section 3161(b) because the investigative agencies are unable to complete their case reports in time where laboratory work is required. Many cases turn on fingerprint and handwriting comparisons. These require time-consuming expert analysis. The labs are overworked and the experts are in great demand as witnesses. In one case, the complaints against a husband and wife, arrested while dealing in stolen state and federal checks, were dismissed because the analysis could not be completed

within the sixty days then allowed. Upon their release, the couple promptly became and remain fugitives. (U.S. v. Hanson & Mc Kenzie, N.D. Ill.). Delays in obtaining original treasury checks from storage resulted in a defendant being charged with only one stolen check transaction, although checks totalling more than $100,000 had been negotiated by him. (U.S. v. Ogbo, N.D. Ill). In still another case (U.S. v. Kiethely, et al., N.D. Ill.) hundreds of documents seized pursuant to warrant required laboratory analysis as well as extensive field investigation; the case could not have been prosecuted within the ultimate time limits fixed by the Act.

Clerical Burden

Numerous complaints were received of the clerical burden the Act places upon the court clerks and U.S. Attorneys' offices. The thrust of the complaints has been that the complexity of the Act and its multiplicity of exceptions and exclusions increase the paperwork beyond reasonable bounds and multiply the chance of error.

U.S. Marshals Service

Several U.S. Attorneys (e.g., M. D. Tenn., W. D. Arkansas) report that the marshals are unable to serve summonses or effect arrest by the dates fixed by the court for arraignment. The dates must constantly be reset. The problem is particularly acute in those districts where judges and magistrates are not always available.

Marshals have difficulty in transporting prisoners promptly from places of incarceration, to and from examinations, or from removal hearings held in other districts. The Act does not permit the Marshal service to delay processing so that several prisoners can be transported at the same time. The time required for transportation is, according to the Act as interpreted by the Guidelines, not currently excludable. The Senate bill would exclude time taken to transport a defendant from other districts and for examination or hospitalization. This has created scheduling and other serious administrative burdens on the Marshals Service. The more extensive use of the Marshals in travel status has detracted from their ability to provide adequate security for the court, witnesses and jury. Service of subpoenas in criminal and civil cases has also suffered.

Grand Jury Issues

Difficulty in securing timely indictments is being experienced or anticipated by many U.S. Attorneys. Those districts in which grand juries are not in session daily are experiencing or will experience difficulty in meeting the time limits of §3161(b). The grand jury for the District of Colorado, for example, meets for only a four-day session each month. It is often impossible to prepare the case of one arrested on the eve of or during the session for presentation; yet, the second sentence of §3161(b), which was intended to aid just such a district, does not permit deferring the presentation until the next grand jury. This situation requires the U.S. Attorney to dismiss the complaint and risk the defendant's flight. To avoid this, it seems likely that the grand jury in this district and others, will be called into session more frequently in the future - a burden to the jurors and expensive to the government.

One district advises that it has discontinued the waiver of indictment procedure because it cannot risk by-passing a scheduled grand jury session. Statistics of the Administrative Office of the U.S. Courts indicate that the use of this valuable procedural tool has fallen off sharply in all districts. Section 5(a) of the Senate bill deals with this problem.

Excludable Time

Complaints were received that the excludable time provisions were unrealistically drawn. The time for preparation and service of motions and responses is apparently not excludable under §3161(h)(1). No consideration is given to the clerical problems of logging-in, assigning, transmitting, and typing of papers, to say nothing of research and drafting. Lack of clarity and faulty research deny courts the effective presentation that is the aim of the adversarial system, cast a heavier burden on the courts and potentially foster error.

Several districts have noted that inadequate excludable time is allowed for mental and other examinations. The Northern District of Texas cites a routine case in which the examination was conducted with relative celerity yet fell far short of meeting the ten day limit allowed for arraignment;

the defendant's first appearance and appointment of counsel occurred on April 4th, the defense motion for psychiatric examination was made April 9th (a Friday), and granted on Monday, April 11th; the examination was conducted locally on April 13th, and the report received by the Court on April 15th, and copies were mailed to counsel. On April 22nd, following a hearing, the defendant was arraigned. Of the eighteen days which elapsed, only three were excludable. It is clear that in most districts and in most cases this would not have been accomplished within 15 days. More typical are the cases of U.S. v. Doris Ada Frost, which required three months, and in the extreme, was U.S. v. Greene, et al., which required nearly a year, both from the S. D. of Mississippi. Several provisions of the Senate bill in Section 4 attempt to deal with these concerns.

Re-Trial

A few districts have experienced difficulty in retrying complex cases after reversal on appeal. The reversal and/or denial of certiorari may come two or three years after the trial. Not only have witnesses dispersed, but by that time, the Assistant who tried the case and the investigating officers have often left government service. Although §3161(e) takes the witness problem into consideration, it will not be clear, until case law develops, what other grounds will permit continuances. It is not at all clear, for example, that the exclusions of §3161(h) apply to cases under §3161(e). Section 3 of the Senate passed bill addresses this problem.

Right to Counsel

Although most U.S. Attorneys confined their complaints to their problems in meeting the Speedy Trial Act's mandates, several of them raised two issues of fundamental importance in the administration of justice in the federal courts: the impact of the Act upon the defendant's right to counsel of his choice, and upon the civil docket.

In order to accomplish a timely arraignment, three defendants in one district were compelled to travel 230

miles to court. If the arraignment could have been deferred 3 weeks, the Court would have been sitting within 30 miles of their residence, the place where trial was ultimately held. One defendant could not afford to pay transportation expenses of counsel of her choice; while counsel appointed for arraignment of a codefendant withdrew because he was unwilling to travel to the place of trial.

The profusion of discovery and suppression motions available to defense counsel, the need to make them or have one's professional competency challenged places inordinate pressure on counsel. Private attorneys, unable to accept retainers which will lead to possible conflicting court dates; unable to secure payment before disposition; unable to conduct adequate investigations, negotiations, and trial, will find the practice of criminal law less appealing. Counsel of one's choice will become the privilege of only the very rich. The dire predictions of the single private practitioner who testified before the Senate subcommittee drafting the Speedy Trial Act will have been fully borne out.

Section 5(a) of the Senate Bill clearly establishes denial of reasonable time to obtain counsel and the need for continuity of counsel as legitimate factors to be considered in granting a continuance under Section 3161(h)(8).

Civil Docket

In addition, the U. S. Attorneys seem to feel that without greater flexibility built into the Speedy Trial Act the emphasis on criminal trials will continue to have a disastrous effect on the administration of civil justice in the federal courts. In most districts relatively few civil cases have been tried in almost two years. The nationwide civil cases backlog rose for the year ending June 30, 1977, by more than 14,000 cases to an all-time high of 153,606 cases. That record was surpassed in the year ending June 30, 1978, when the backlog rose by close to 13,000 cases to a total of 166,462. As you are well aware, civil cases in federal court involve such vital concerns as habeas corpus matters and civil rights; civil antitrust suits; actions to collect taxes or recover those improperly paid; admiralty and patent cases that cannot be brought in state courts; suits to enforce or enjoin orders of governmental agencies

58-721 O - 80 - 9

where the health and well-being of thousands of citizens, their investments in businesses and employment are at stake; as well as many other cases in which Congress has has seen fit to provide a federal forum.

Problems in Meeting Trial Limits

Some jurisdictions have introduced calendar procedures such as the "combined" or "consolidated trial calendar" which heavily tax the U.S. Attorney. In one district, although he had only a week free, a judge set four cases, involving 60 witnesses, before himself on a single day. The first case went to trial and consumed three days; the second defendant changed his plea after the impaneling of the jury, and the third defendant changed his plea as well; the fourth case had to be continued. In still another district all criminal cases, regardless of the time elapsed since indictment, are put on a single docket. On commencement date, all four judges and any visiting judge hear cases in the order docketed with fail cases first. Trial is generally had without regard to the judge to whom the case was initially assigned. This practice makes it virtually impossible to marshal the witnesses. It also compels on-the-spot reassignment to Assistant U. S. Attorneys who must undertake the trial of cases with which they are unfamiliar and without adequate preparation. Many U.S. Attorneys have complained that the courts have not recognized - or feel constrained to ignore - the fact that forcing trial by an Assistant who is justifiably unprepared deprives the United States of the effective representation of counsel to which it is entitled as a litigant in the constitutionally mandated adversarial system. The Senate bill's continuity of counsel provisions will apply to prosecution as well as defense attorneys.

Other U.S. Attorneys report that the assignment of "firm" trial dates to individual cases has not proved successful either. For any one of a number of reasons, the dates have had to be passed, and the cases rescheduled. The rescheduling is difficult because all available time for a considerable period is ostensibly spoken for. If the limitations prohibit extended delay in the case in question, a number of other cases must be "bumped" to make room for it, creating Speedy Trial Act problems where they may not have previously existed. In short, none of the several calendar

systems provides an adequate response to the Act's inflexible provisions.

In order to meet the deadlines, certain expedients have been adopted which are fraught with danger. Lengthy trials are commenced and interrupted so that others may be timely commenced. In several districts, cases are routinely recessed after the impaneling of the jury. In one district where this was done, an incarcerated defendant was released under the provisions of §3164 when a crucial government witness was too ill to appear; meanwhile, his jury remained sequestered. The dilemma of sequestration or risk of taint is aggravated when juries are impaneled in cases that cannot, because of calendar congestion, proceed promptly to trial.

I hope this information is helpful. As I stated in my testimony before you on June 28th, these problems are real and immediate amendment of this Act is essential if the problems outlined above are to be prevented. Thank you for your cooperation.

Sincerely,

Philip B. Heymann
Assistant Attorney General
Criminal Division

By: John C. Keeney
John C. Keeney
Deputy Assistant Attorney General
Criminal Division

cc: Ross Stovall
Minority Counsel
House SubCommittee on Crime

UNITED STATES GOVERNMENT

Memorandum

TO : Ms. Pat Wald
Assistant Attorney General for Litigation

DATE: January 30, 1978

FROM : Virginia Dill McCarty, United States Attorney
Southern District of Indiana, Indianapolis

SUBJECT: Speedy Trial Act Problems in the United States Attorney's Office

Some of our primary problems with the Speedy Trial Act are:

1. Fewer and fewer dangerous street crime offenders are being arrested, including bank robbers and narcotics violators, because the Act allows only thirty days between arrest and indictment and is ambiguous as to whether time following dismissal of a complaint and prior to charging by information or indictment is excludable.

Defendants have tried to dismiss two recent cases involving street crime on grounds that the Speedy Trial Act has been violated.

The first is a heroin case. The defendants were arrested so the heroin could be confiscated. As required, we filed a complaint. We knew that we could not continue to investigate and get to the higher-ups in the ring if we immediately indicted the defendants arrested. Narcotics cases of significance are made only by arresting those at the lower level in possession of the narcotic, and convincing them to become informants concerning the people who are selling to them. Working up the line in this manner can develop good cases for the government which will dry up the supply of narcotics in the District. In this case, we did not want to indict the people we had arrested because they were cooperating. The state filed charges and the federal complaint was thereafter dismissed. According to our present interpretation of the Speedy Trial Act, the time between dismissal of a complaint and return of an indictment is excludable. A hearing on the record to declare the federal time excludable if the complaint had remained pending would have disclosed the informant whom we needed in another case. Therefore, as stated, we surrendered these defendants to the state. When we had completed our investigation, including that of the persons who sold to the defendants, a federal indictment was returned charging a felony, and the state charge was dismissed. The defendants' lawyers moved to dismiss our indictment under the Speedy Trial Act on the grounds that the dismissal of the federal complaint and the state charges were merely a sham to get around the Speedy Trial Act. The judge indicated that he would have sustained

the dismissal motion except for the fact that while the state charge was pending the Supreme Court of Indiana construed the state charge to be a misdemeanor in the state system. Otherwise, he would have dismissed this charge.

An additional case involved a felon in the possession of firearms, various amounts of stolen property and a truck load of stolen television sets. In that case, one defendant was found in possession of firearms and stolen property. One of the objects of the agent and this office was to recover the stolen television sets. The major defendant has a reputation in the community for being the biggest fence in this area. The major defendant was arrested as a convicted felon in possession of firearms and the firearms were confiscated. He also was arrested for possession of stolen property. A complaint was filed. The fact that we had arrested the major offender led the agents to believe that further investigation could uncover a number of other persons involved in what the agents believed to be a ring. Therefore, we dismissed the complaint and the agent continued to investigate. We have now recovered more than half of the stolen television sets. The grand jury has indicted the major offender and others in two separate indictments, one including the television sets.

The Act indicates at one point that a complaint is a charge, §3161(b), (d) and §3162(a)(1). At another point it indicates that a complaint may not be a charge, §3161(h)(6)(a complaint is not mentioned). We have been met in both of these cases with motions that want the defendant dismissed with prejudice. We are going to have these motions, which are quite time consuming to argue and brief, in every case in which an arrest is made, a complaint is filed and later dismissed and an indictment returned. Because these cases involve offenders who are deemed by Congress and by me to be very dangerous to the public, I cannot believe this result was intended by the Congress.

We have another investigation involving eight bombings in the small town of Speedway, Indiana, over the Labor Day weekend and three succeeding nights. The last bombing resulted in the loss of one leg and other physical damage to a man, and physical injury to his wife. This case has been a media event in this area, although my office and the federal agents have not commented on it. The media has reported that our chief suspect is a young man whom they describe as "a Broad Ripple businessman." The investigation is not yet concluded, and no indictments have been returned. One evening in September, the CID called the FBI to report that they had a young man dressed in a Department of Defense uniform who had asked a printer to make copies of the Presidential Seal, top-secret stamps, and other material which should have been

ordered only by a government employee. The FBI investigated the matter that evening, called us, and we authorized an arrest.

As it turned out, the young man had given a false name. The next morning we discovered that the person arrested was none other than the young man the news media have described as our chief suspect in the bombing case. We did file a complaint, and obtained three search warrants, two for his automobile and one for his residence. At our request, the magistrate sealed the affidavits of the search warrants. At the preliminary hearing, the defendant asked that the search warrant affidavits be unsealed. In order to protect our informant, and because we do not know whether that offense is one "arising from the same criminal episode" as the bombing offense, §3161(d), we dismissed the complaint. The public does not believe that justice has been served. The Speedy Trial Act was the reason for the dismissal.

In our District, the number of arrests has been cut drastically by the Speedy Trial procedures. I would predict that the same effect would be had in other districts by the Speedy Trial Act. I realize it is a policy matter to be decided by Congress whether persons in possession of narcotics or stolen property or the proceeds of bank robberies should be arrested on the spot to confiscate the stolen or contraband materials, even though we are not ready to indict that person and everyone else involved. However, I find it difficult to believe that Congress really favors a policy of not arresting those people or, if an arrest is made, allowing those people to go free.

2. Our Grand Jury traditionally meets once a month. The thirty days allowed between arrest and indictment will cause us severe problems.

The thirty-day time period which will go into effect in July between arrest and indictment is going to upset our grand jury system considerably. Since it normally meets once a month, on the third Monday, we will be required to do constant rescheduling in order to be certain we are within the thirty days. During the periods of bad weather in Indianapolis and in the whole Southern District of Indiana, we cannot be absolutely certain that we will have a grand jury quorum on the scheduled date, whether it is the normal date or one established just for Speedy Trial purposes in a particular month. We could easily miss the thirty days through no one's fault. Furthermore, as the grand jurors have pointed out to us numerous times, even the new federal pay and travel allowances for grand jurors do not meet their expenses. Grand jurors from Evansville, Indiana, for

example, have at least a three-and-a-half-hour one-way trip from Evansville to Indianapolis, and certainly are required to stay overnight and eat their meals out. I personally dislike to disrupt the schedules of these good citizens, who are performing their public duty as requested, by calling them in at odd times in order to accommodate the thirty-day rule. Furthermore, this will exacerbate even more the problem of arrest. Perhaps we shall have to instruct agencies that not only will they not arrest a suspect unless it is absolutely necessary, but in months which have thirty-one days, there is one day during the month when under no circumstances whatsoever can they arrest unindicted suspects.

3. The Speedy Trial Act requires over-preparation of cases which will be resolved by a guilty plea.

Because one of our judges has had his own Speedy Trial Act for years, we must be prepared for trial in each case at the time we indict a defendant, although very few of our cases go to trial.

To my surprise, I discovered on examing the Administrative Office of the United States Courts Reports dated September 30, 1978, Third Report on the Implementation of Title I and Title II of the Speedy Trial Act of 1974, this District has the lowest percentage in the nation of criminal cases going to trial. No doubt that is because one of our judges will normally schedule the trial of a criminal case within a week or less of arraingment. Only 3% of our cases are tried. Ninety-seven percent are pled, according to the Report. Perhaps that is because we do prepare our cases so thoroughly. However, it does cut down the number of cases we can prepare for indictment. It also means that we are doing a lot of unnecessary case preparation. If a case is not set within the next week or so after arraignment, the AUSA's must spend a week or more if the case is complicated in further trial preparation immediately before the trial date. In order to alleviate unnecessary trial preparations, I have instituted a rule that we will not make any bargain in a plea agreement if the agreement is made less than ten days prior to the trial date. I do not like to waste the government's time or the work of my assistants, the work of the judges, or in paying juries and inconveniencing those jurors who are present and ready to try the case when the defendant pleads. However, even with these efforts, I am convinced that we are many times better prepared than we need to be.

4. The Speedy Trial Act will cause declination of many criminal cases now prosecuted in other districts.

Our prosecutions are decreasing in number. One reason is the speedy trial practice of one of our judges, supra. In this District, we are following the Justice Department's priorities -- that is, economic crime, including fraud against the government, against consumers, and against business, significant narcotics cases, organized crime and political corruption. Those cases are all time consuming to investigate, and my assistants must be involved from the beginning of the case. The FBI in this District is cooperating fully with me.

We have adopted a policy with our FBI office on declinations which is absolutely in line with the FBI Director's and the Attorney General's policy. These priorties cause us to decline many cases which used to be the bread-and-butter of the United States Attorney's offices. Matters such as individual stolen cars, bank robberies which the locals have investigated and solved and other matters which are serious crimes, but not on our priority list, are routinely declined by us. The Speedy Trial Act itself will therefore not cause us to decline large numbers of cases we are now taking. However, I predict that other United States Attorneys' offices would have to decline many cases they are now taking in order to be as thoroughly prepared as we are at indictment.

5. The result of the Act as it applies to defendants in our three divisions outside Indianapolis is to delay arrests and indictments.

Our three divisions meet for trial as follows:

Terre Haute -- commencing the first Monday of October, the third Monday of January and the third Monday of May

Evansville -- commencing the first Monday of October, the first Monday of February and the fourth Tuesday of May

New Albany -- commencing the third Monday of September, the third Monday of January and the third Monday of May

Three of our judges rotate to hold court at the times and places designated. AUSA's attend those courts as necessary. The judges normally attempt to dispose of all criminal cases pending in an outer division during the first week of a session. Nevertheless, we have problems when an AUSA has, for example, several criminal matters ready to indict in the Evansville Division in November, but is unable to do so in that month or in December, because almost certainly the Speedy Trial Act of seventy total days from indictment to trial will be violated. (Our new judge, when in place, may help cure this problem if, as anticipated, the judge holds

court most of the year in Evansville, and travels to the other two divisions as needed. However, once the judge is sworn in, no one can force the judge to follow that plan.) As cases age, AUSA's and agents tend to lose interest and witnesses disappear. The public and press decry slow justice. Re-preparation is required before indictment.

6. The Act outlaws local procedures which have been developed to eliminate delay. In our district, it has been the custom of two of the judges, recently joined by a third, to arraign a defendant and enter a not guilty plea for him on paper. This operates quite expeditiously. If the defendant in one of those courts desires to change his plea, he files a petition to change his plea. The matter of the change of plea is heard by the judge on the same day in which he sentences if he accepts the guilty plea. Therefore, the pre-sentence report is prepared as soon as possible after the petition to change the plea is entered. As a practical matter, almost all guilty pleas are accepted by the court. Only once in a year and a half since I have been in office has the court refused to accept a change of plea petition -- and that was when the defendant at the hearing stated that he just entered the guilty plea to get it over with, he really didn't commit the crime charged. (One has to wonder if this is the wave of the future for avoidence by a defendant of speedy trial restrictions.) When our district has run over our interim time period between arraignment and trial, it has been in almost every instance the result of a change of plea petition entered before one of those judges, and the delay thereafter in accepting the plea and sentencing. Of course, the Speedy Trial Act does not set any time limits after a change of plea is accepted. The judges have attempted to cure speedy trial problems by requiring that a petition to change a plea be accompanied by a waiver of the Speedy Trial Act. Whether that waiver will be effective after July 1, 1979, is not clear to me. I believe it will not. The judges believe it will. I think we are going to have a number of appeals on that matter.

7. Delay in conflicts in the trial schedule of an AUSA is not excludable time. The result will be poor representation of the people of the United States.

We have four judges, who may be trying cases in four different places at one particular time, plus three full time magistrates, and four part time magistrates, who all may be holding hearings or trying cases at the same time. I have at the present time ten AUSA's. In my opinion, an AUSA who has prepared a case is not a fungible item.

The priority cases are quite complex and often involve investigation over a period of more than one year. Wire taps

also complicate case preparation, as do countless records in fraud cases.

I assign each of my assistants to a specific category of criminal cases, and expect each to become an expert in his field. Assistants work with the investigative agents from the beginning of a case, in order that all the proper legal steps are taken. For example, we have not had a search warrant lead to supression of evidence for a number of years in this District because I require the agents to get the signatures of two of my assistants on any warrant before it is taken into court. We are moving, as quickly as we can, away from our inherited practice of one assistant's taking a court's calendar of dispositions, changes of pleas, and arraignments of a number of defendants set during one morning or one afternoon. Even in those matters, the absence of the assistant who prepared the case and the case agent who investigated the case can bring bad results, particularly in dispositions. I believe that our efficiency for our client, the United States, is finally beginning to compare favorably with that of lawyers in private law firms of our size. In the cases which to go to trial, one assistant is not replaceable by another at the last minute. The Speedy Trial Act is causing, and will continue to cause, more last minute scheduling of cases and more trial conflicts and poor government representation.

8. The Act does not allow sufficient time for investigative agents to write and file case reports and for federal laboratories and departments to send reports and evidence. The problem is especially acute when the defendant is arrested at the scene of the crime.

Agents who investigate federal crimes are going to have an extremely difficult, if not impossible, time in getting in all of their reports and paperwork in time for trial. The FBI offcies, for examply, are scattered throughout the state in resident agencies, with the main office in Indianapolis. There is no one in any resident agency to type for the agents. There is no recording equipment for telephone dictation for out of town agents. The usual procedure by the FBI agents in outlying areas is to mail dictated tapes to Indianapolis. The typed material must be mailed back to the resident agency. All errors which should be corrected are either left in the material or are mailed back to Indianapolis again for correction. DEA agents and ATF agents have their own methods of reporting. These reports are essential to the AUSA's before trial.

Laboratory reports from the FBI and ATF routinely take four to six weeks. Although the FBI and the DEA, since they are

in the Justice Department, certainly can be forced by the Attorney General to expedite their reporting, what can we do with the Treasury Department which routinely takes weeks and weeks and weeks to send back the original of a stolen check? Again, this problem is much more difficult in the cases in which a defendant is arrested.

9. The Act's requirement that a judge must approve pre-trial diversion in order for diversion time to be excludable will make pre-trial diversion less attractive to defendants. We desperately need this alternative to prosecution for low priority cases.

In order to have time to handle priority cases, we send the Postal Inspectors cases of mail theft of small checks to the municipal courts of the state. We are handling many of their stolen checks and all the Secret Service's stolen checks of small amounts through pre-trial diversion when the offender is one who has no other criminal record. Our experience is that pre-trial diversion is a sufficient sanction to prevent open season on mail and government checks.

The reason that pre-trial diversion is attractive to pretrial defendants is that there is no record whatsoever of the defendants' having been in the program, although we will require the defendant to inform a potential employer of the situation. The requirment of a judge's approval will sabotage this program, because the diversion will be a public record. In the year and a half I have been in office, we have had to charge only one person on pre-trial diversion with the crime of which he was originally accused. All other potential defendants have successfully completed the program and re-entered life with no record.

10. Civil cases, including the government's own cases, have become very backlogged. The government is a party in a large percentage of the civil cases in this district. The government for its own interest as well as in the interests of justice for private litigants, has an interest in decreasing the time a civil case pends.

The types of civil cases of real concern which are being delayed and delayed on the docket include pollution cases, land condemnations, school desegregation, swine flu tort claims, condemnation of drugs and food products unsuitable for human consumption, tort claims by the government and against the government, many of which are medical malpractice suits against the Veterans Administration involving thousands and even millions of dollars (maybe the grizzly bear case is the most unusual tort claim we have). Private plaintiff's civil rights cases are being severely delayed. For example,

we were able to conclude the Department of Justice's civil rights claim against the City of Indianapolis Police and Fire Departments because it has been under investigation for three or four years and settlement for minorities was already worked out when the suit was filed. We filed that suit in July of 1978; the minority issues were settled in July and we just settled the women's issues this month. However, a suit brought by Indianapolis Black policeman had been pending for almost four years, with no movement whatsoever prior to the time we managed to work out our action. We have a suit against the government trying to set aside EPA regulations which was tried more than a year ago. The same judge who will set a criminal case for trial within a week of the defendant's arraignment has had the EPA case under advisement for a year. I am keenly interested in collecting the money which is owed the government by veterans who received grants from the VA and did not stay in school, and from former students loaned money by the government. We also have cases involving thousands of dollars loaned by the Small Business Administration, by the Department of Agriculture and by HUD. All of those cases are being delayed by the Speedy Trial Act. The new judge we have been given will help solve this problem. How long it will take, and the extent of the solution, remains uncertain.

11. Fragmentation of the Act's total time periods into three plus ambiguities of the Act have already resulted in time keeping by each judge, the clerk's office and the USA's office. I find it hard to believe that this record keeping is cost-productive. Further, the only non-lawyer of the group, a deputy clerk, makes the semi-official decision as to what time is excludable. The clerk is the least prepared person to do so because she is not in possession of the records and not in court when the records are made. The deputy clerks in this district who are keeping the statistics and making the reports to the Administrators of the Courts have had no training. Their semi-monthly reports developed by them for their judges are not helpful to me. I have not yet had an opportunity to work this out with them. The result is that each of the four judges is keeping records for his own benefit; my office is keeping records, and the clerk is keeping records. None of these records agree with each other, leading me to believe that the law is much too complicated and vague. It has really created a nightmare of paperwork and record keeping.

12. The Act clearly spells out the effect of the interim sanctions as they become applicable to pending cases. The Act is silent as to the effect of the July 1, 1979, sanctions on cases pending prior to July 1, 1979. In our District,

where we are phasing in the Speedy Trial Act, compliance difficulties will abound. In order to be sure that no defendants are walking the streets free when they should be in jail, we will have to assume that the sanctions will apply to cases pending prior to that date, which may not be what Congess intended.

13. The sanction of dismissing a criminal charge when the Speedy Trial law is not followed seems to me quite inappropriate, if the purpose of the law is to give justice to the public.

Section 3162(a)(1) of the Speedy Trial Act makes it quite clear that when an individual is charged with a complaint and no indictment or information is filed within the time limit required by 3161(b) the charge shall be dismissed or otherwise dropped. Whether it is to be dismissed with or without prejudice is quite ambiguous in that considering "the impact of a reprosecution or the administration of this chapter and on the administration of justice" can easily be taken by a judge to mean that it should always be dismissed with prejudice if it is not brought within the prescribed time, particularly since Senator Ervin has said in the record that the public demands a speedy trial. I personally cannot believe that the public need for a speedy trial is so great that defendants guilty of street crimes should be let go because the prosecutor needs further time to investigate after an arrest. I further find it very difficult to believe that this is the correct reward for an agent who does his duty and arrests someone who is committing a crime.

14. While I represent the government, I feel that I must say on behalf of defendants that when the government is totally prepared to go to trial at time of indictment in a case which has been investigated for more than a year, the defense may have a very good argument that forcing them to trial in a period of sixty days is unconstitutional. Although there are provisions in the Act indicating that cases can be continued for such a reason, the judges are so diverse -- and many are so strict -- in their interpertation of the Act, that it is quite uncertain as to how this will finally be determined. (These are precisely the type of cases which are now the highest priority of the Justice Department, and which we are much more involved in than we were even last year.)

In our Speedy Trial committee meetings, one of the very best defense lawyers in this area, a former United States Attorney, stated at each meeting (in fact he was on a soap box) that the time period between arraignment and trial which will be, at most, 60 days, will result in his refusing to

handle any complicated criminal case. His posture is that the result will be that only the shady and inexperienced lawyers will agree to handle complicated criminal cases. I am not too long from the private practice to remember that every client is looking over every lawyer's shoulder today with the thought of a malpractice suit if the desired results are not achieved for the client. I have never been a criminal defense lawyer, but I have some sympathy with the thought that a case we have investigated for one or two years is not subject to a good defense in a period of less than seventy days. And here I would give a reminder that sixty days is the most time that can be given. Therefore, there are going to be extensive pleas for more time for the defendants. And what will the result be if the defendant asks for time, is given it, and later when he is in prison, files the habeas corpus suit we are so familiar with in this District because of the Terre Haute prison, and alleges that the judge erred in granting him time and, therefore, he should be set free?

Addendum: If I were asked to give my honest opinion of the necessity for the Speedy Trial Act, I would have to say that I firmly believe the Supreme Court of the United States took the necessary step toward forcing the defendants to be brought to trial expeditiously. The Supreme Court's ruling on this constitutional matter must be obeyed by both federal and state courts. The State of Indiana, through rules adopted by the Indian Supreme Court, has a very simple and understandable procedure for expediting the ruling of the U. S. Supreme Court. I am attaching a copy of Rule 4 of the Rules of Criminal Procedure of the State of Indiana. The case of State ex rel. Wickliffe v. Marion Criminal Ct. is one I tried for the State of Indiana when I was a Deputy Prosecutor. We successfully prevailed upon the Supreme Court to declare that an arrest followed by a charge in Municipal Court (the equivalent of the federal arrest and filing of a complaint in the Magistrate's court) did not start the clock running on the Speedy Trial Rule. It would seem that a much more simple and better way than the present federal Speedy Trial Act could be worked out to implement the defendant's right and the public's right to a speedy trial, with sanctions which would benefit instead of hurting the public.

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Robert L. Misner

Reprinted From: Arizona State University Law Journal
Volume 1977 Number One

DELAY, DOCUMENTATION AND THE SPEEDY TRIAL ACT

The Speedy Trial Act of 1974[1] requires, with certain exceptions, that a defendant be tried within 100 days of arrest or service of summons.[2] Initially it may be thought that such a rush to judgment is inconsistent with a defendant's right to an adequately investigated and prepared defense; however, the "ends of justice" exclusion[3] of the Act, when properly interpreted and carefully administered, can be used to strike a proper balance between society's right,as acknowledged by the Act, in quick resolution of criminal cases and a defendant's right to a fair trial conducted by counsel in whom he has confidence and with whom a confidential relationship can be maintained.

Some participants of the criminal justice system -- judges, prosecutors, and defense counsel -- have expressed outright disdain for the Act and may take every opportunity to undermine the effect of the Act.[4] One likely approach to subvert the intent of the Act will be for the defense to claim that the time limits of the Act are in conflict with the defendant's ability to retain counsel of his choice and are inconsistent with the defendant's right to be represented by adequately prepared counsel. Based upon these claims, defense counsel will seek a continuance arguing that the "ends of justice" demand that the time limits of the Act be extended. In order to protect society's interests in speedy trials, which are often inconsistent with the defense and

prosecution motives for seeking delay, the court must require specific information from defense counsel to bolster the right to counsel claim and not rely upon the stipulation of the defense and prosecution that a basis exists. Confidential or potentially damaging informtion may, when necessary, be communicated to the trial judge or to another judge ex parte and in camera, thus avoiding the need to frustrate the purposes of the Speedy Trial Act under the guise, acquiesced to by both the defense and the prosecution, that the time requirements of the Act are inconsistent with the Sixth Amendment right-to-counsel provision. Such a solution, which recognizes that the Speedy Trial Act now prohibits stipulated continuances,[5] assumes the good faith attempt by the judiciary to implement the Speedy Trial Act irrespective of a judge's individual, personal beliefs in the wisdom of Congress' action in passing the Act.

The right to counsel problem serves to highlight the general problems of implementing the Speedy Trial Act and is chosen because it is a common criticism of the Act, it is a good example to explore attorney excuses for delay and it involves the interrelationship of two separate and potentially conflicting constitutional concerns.

I. Provisions Of The Act

Prompted by a desire to reduce criminal activity by persons released pending trial,[6] and also by a wish to erect a fitting memorial to the retiring Senator Sam

Ervin,[7] the Ninety-Third Congress, in its waning days, passed the Speedy Trial Act of 1974.[8] After much controversy over the merits of the recently adopted rule 50(b) plans promulgated to encourage the prompt disposition of criminal cases, Congress concluded that the plans were inadequate to force the speedier administration of justice.[9] To correct the perceived difficulties inherent in rule 50(b) plans, Congress passed legislation to deal directly with the issue of trial delay.[10]

The Speedy Trial Act sets out to remedy delay in three separate ways. First, it requires that from July 1, 1975, to July 1, 1979, trials of all person held in detention solely because they are awaiting trial shall commence no later than ninety days following the beginning of continuous detention.[11] Second, it mandates that after July 1, 1979, criminal defendants be tried within 100 days after arrest or service of summons excluding certain limited periods of delay.[12] Finally, it creates experimental, pre-trial service agencies in ten selected districts to provide support and supervisory services to non-custodial defendants awaiting trial.[13]

The interim limits relating to the in-custody defendant do little more than assure in-custody cases the highest priority in trial scheduling.[14] If the in-custody defendant is not tried within ninety days, he is to be released.[15] The experimental services agencies, which are administered

by the Administrative office of the United States Courts, are of little immediate concern to the majority of individual district courts.[16] The comparatively complicated and far-reaching provisions relating to the 1979 standards, on the other hand, directly involve the individual district courts and are the legitimate source of concern.

The ultimate 100-day arrest-to-trial standard is divided into three segments: a thirty-day limit between arrest and the filing of an indictment or information;[17] a ten-day limit between indictment and arraignment;[18] and a sixty-day limit between arraignment and trial.[19] However, these time periods do not become effective until the fifth year after the enactment of the Act and during the five-year phase-in period, the time standards vary.

All time periods are tolled by a limited number of exceptions which mitigate somewhat the apparent stringency of the Act.[20] The Act specifically excludes from the restrictions' limits delay resulting from physical and mental examinations, trials on other charges, interlocutory appeals, hearings on pre-trial motions, and Federal Rules of Criminal Procedure rule 40 transfers.[21] The Act also recognizes other exclusions such as delays due to deferred prosecution to allow the defendant to demonstrate his good behavior, the absence of defendants and witnesses, and other procedural difficulties.[22] The Act finally contains an escape clause which allows the court to delay the trial if,

in granting the continuance, the ends of justice "outweigh the best interest of the public and the defendant in a speedy trial."[23] Because it is possible to use this exception to emasculate the Speedy Trial Act, such a delay cannot be granted unless the court finds on the record that a miscarriage of justice would likely result if the continuance was not granted; that the nature of the case is such that adequate preparation cannot be expected within the statutory time frame; or that the delay is caused by the complexity of the case before the grand jury.[24] The Act specifically states, however, that general court congestion, lack of diligent preparation by the government, or failure of the government to obtain an available witness are unacceptable causes of delay.[25]

Sanctions during the phase-in period are limited to the release of those persons being held in detention solely to await trial and to the review of the conditions of release for "high risk" defendants who are not tried within ninety days after that designation has been made.[26] After July 1, 1979, more severe sanctions become effective. At that point the court may, upon motion of the defendant, move to dismiss the complaint, information, or indictment against the individual with or without prejudice.[27] Failure of the defendant to move for dismissal prior to trial or plea will constitute a waiver of his right to dismissal.[28]

Sanctions are also provided against attorneys who intentionally delay the proceedings.[29]

Finally, the Act provides an all-purpose escape clause which authorizes the Judicial Conference, upon application of a district court, to suspend in that district for not more than one year the time limits of section 3161(c) that govern the arraignment-to-trial interval.[30] For the time limits to be suspended, the district must be in a state of "judicial emergency,"[31] and even then time limits are not truly suspended but are extended from 60 to 180 days.[32] The Judicial Conference can grant a suspension only after the Judicial Council of the circuit finds, among other conclusions, that the existing resources of the district are being efficiently utilized.[33]

To leave a discussion of the substantive provisions of the Speedy Trial Act without mentioning the planning aspects of the Act would be misleading.

The Speedy Trial Act is first and foremost a planning bill, and this fact is most often overlooked. The Act assumes that its substantive provisions are workable, but gives the district courts a four-year period in which to comment on the substantive provisions and to determine the resources they will need to comply with the mandated time restraints. The House Report summarized the issue:

> The heart of the speedy trial concept is the planning process. These provisions recognize the fact that the Congress -- by merely imposing uniform time limits for the disposition of criminal cases, without providing the mechanism for increasing the resources of the courts and helping to initiate criminal justice reform which would increase the efficiency of the system -- is making a hollow promise out of the Sixth Amendment.[34]

Similar characterizations of the Act, which show congressional consensus, can be found in the Senate Report,[35] the House Hearings,[36] the House debate,[37] and the Senate debate.[38]

The legislative history of the Speedy Trial Act, and sections of the Act itself, clearly indicate that Congress intended to legislate in a unique way. Although Congress set maximum time limits for the key events in the criminal justice process, the responsibility to experiment, to critique, and to plan during the transitional stages of the Act was left to the individual district courts.[39]

II. Protected Interests of the Sixth Amendment: Societal v. Defendant Interests

In enacting the Speedy Trial Act, Congress was aware of the various interests that have been viewed as falling under the protection of the Sixth Amendment.[40] As Justice Brennan has written in Dickey v. Florida:

> "The Speedy Trial Clause protects societal interests, as well as those of the accused... Just as delay may impair the ability of the accused to defend himself, so it may reduce the capacity of the government to prove its case."[41]

More specifically, the societal, as opposed to the

defendant's interest in speedy trials, can be viewed in the traditional terminology as encompassing elements of specific and general deterrence, retribution, isolation and rehabilitation. The isolation or quarantine argument for a speedy trial can be found in the Speedy Trial Act itself. The introduction of the Act states as its purpose "to assist in reducing crime and the danger of recidivism by requiring speedy trials and by strengthening the supervision over persons released pending trial, and for other purposes."[42] Congress relied upon Bureau of Standards statistics to support the proposition that the criminal defendant awaiting trial is not only a financial and administrative burden to society, but often is a danger to his community as well. The Bureau of Standards study also purported to show that defendants had an increased propensity to be re-arrested when released more than 280 days.[43] In addition to this isolation interest, society also can claim both specific and general deterrence benefits gained in the swift and sure punishment of wrongdoers. To impress upon the individual defendant as well as potential, unknown offenders that wrongdoing will be punished, society has a legitimate interest in quick administration of criminal justice.[44] Similarly, societal need for a retributive response to crime may require a strong temporal nexus between the act and the punishment.[45] Finally, rehabilitative efforts focused upon those eventually found guilty may be lessened if there

is a long, non-productive time wasted awaiting trial.[46]

Defendant's Sixth Amendment interest can be characterized as an interest in his physical freedom awaiting the outcome of charges, his freedom from the anxiety of a pending criminal prosecution, and his interest in a fair trial not marred by faulty memories nor evaporated evidence.[47]

Although the courts have been long on rhetoric into defendant's theoretical interests in a speedy trial, the fact remains that most defendants benefit more by delay than by speed. Even in the relatively few cases decided in the Supreme Court[48] and in most of the cases decided at the appellate level,[49] the discussion of defendant's right to a speedy trial have centered on the fact that at least part of delay is attributable directly to the defendant. Delay, not quick resolution, appears at the trial level to be defendant's major concern.

III. Participants' Interest in Delay

The greatest difficulty in effectuating the societal and defendant interests protected by the Sixth Amendment is that often those charged with protecting the societal interests--the prosecution--or those upon whom the speedy trial right is individually conferred--the defendant--wish not a speedy trial but a delayed trial. As Senator Sam Ervin noted in his testimony concerning the Speedy Trial Act before the House Judiciary Committee:

58-721 O - 80 - 16

> "There is no question in my mind that speedy trial will never be a reality until Congress makes it clear that it will no longer tolerate delay. Unfortunately, while it is in the public interest to have speedy trials, the parties involved in the criminal process do not feel any pressure to go to trial. The Court, defendant, his attorney, and the prosecutor may have different reasons not to push for trial, but they all have some reason. The over-worked courts, prosecutor, and defense attorneys depend on delay in order to cope with their heavy caseloads. The end of one trial only means the start of another. To them, there is little incentive to move quickly in what they see as an unending series of cases. The defendant, of course, is in no hurry for trial because he wishes to delay his day of reckoning as long as possible."[50]

One of the major goals of the Speedy Trial Act is to avoid the situation where the prosecutor and defense counsel can stipulate to delay and thus infringe upon society's right to a speedy trial of those charged with violating a criminal provision.

A. Defense Interest in Delay.

Delay can be sought and used by the defense in a myriad of ways. On one end of the spectrum, delay may be constitutionally mandated in order to preserve the defendant's right to an adequately prepared defense while at the other end defendant delay may be totally inconsistent with an efficient and just system if it results in witnesses failing to appear at trial.

Defendant's desire for delay can be viewed roughly in four separate ways: lawyer-directed delay, defendant's

"comfort" delays, pre-trial tactical delays and trial tactical delays.

There is some indication that defense counsel unhappiness with the Speedy Trial Act stems not so much because the way the Act affects defendants but rather the havoc it wreaks with defense counsel's ability to control his own calendar.[51] Some of the lawyer-directed reasons, such as health problems of counsel,[52] are valid reasons for delay and, just as clearly, delay to allow the defendant to "earn" money to pay counsel[53] or delay because lawyers generally would rather not spend a great deal of time in court[54] are unacceptable reasons. Within this category of lawyer-oriented delay, however, are classifications such as vacations by lawyers and presence of the lawyer in other criminal cases which demand more attention.[55] Although conflicting schedules may pose issues of professional courtesy between the participants in the system,[56] continuances should be granted for conflicts only for short periods of time and only when such conflicts are totally unavoidable.[57] Such policy is dictated by the Congressional decision that speedy trials are of high priority. Other than continuances which are constitutionally mandated,[58] defense counsel must be brought to the same standard of readiness demanded in the Speedy Trial Act of the Court and of the prosecution.[59]

Just as some delay is associated with the convenience interests of the lawyer, other delay is sought to further creature-comforts for the defendant. The most obvious delay of this type is delay sought for the defendant who is awaiting trial while on bond.[60] But it is to the on-bond defendant to which the Speedy Trial Act particularly is directed.[61] Another instance of delay to benefit the defendant's physical surroundings are those situations in which a jailed defendant seeks delay in order to avoid going to another institution.[62] Finally, particularly in those cases where the defendant is a substance-addict, delay may be justifiably sought in order that his health might be restored.[63]

The variations on reasons for delay increase as one approaches trial. Considering the high percentage of criminal cases which terminate in guilty pleas, it is no surprise that much of the delay in the pre-trial stages are tactically directed at bettering the defendant's bargaining position.[64] There is a widely-held belief that continuances are granted because of the defense threat of maintaining a plea of not guilty and actually conducting a full-length trial.[65] Although Levin questions this conclusion,[66] it would appear that defense counsel and defendants believe time is an ally in bargaining.[67] Where appropriate defendant's delay may even be used to convince the prosecutor to grant him immunity from prosecution.[68]

Not all pre-trial delay, of course, is sought for purely tactical reasons. Often pre-trial motions are legitimate and are made to further justice -- not to defeat it. Motions, such as those authorized by Rule 20, are definitely efficiency-oriented.[69]

A separate set of delay motives comes into play in relation to the trial itself. Defense delay may be used to avoid "hard" judges.[70] Delay may also be used by the defense to undermine the prosecution's case. Memories of witnesses dim and the greater the time from the criminal event to the trial the greater the defense hope that witnesses will be less convincing and more easily confused on cross-examination.[71] The longer the trial is delayed the greater the possibility that witnesses will be intimidated by the defendant or friends of the defendant.[72] Long trial delays may prove so inconvenient to a witness that soon the witness becomes uncooperative[73] or unavailable.[74] There is also the widespread belief among defense counsel that a jury is less likely to convict or at least more likely to convict of a less serious crime if a long period of time has elapsed between the criminal event and the trial.[75] Again there are clearly legitimate trial delay tactics such as lessening the effect of pre-trial publicity,[76] and the need for further preparation time.[77]

B. Prosecutor's Interest in Delay.

In many ways the prosecutor's interests in delay

are similar to those of the defense counsel.[78] Lawyer-directed delays such as schedule conflicts[79] and vacation plans are shared by both sides.

As is true with some defendant delays, some prosecutorial pre-trial delays are clearly unacceptable. Delays which are tactically designed to harass the defendant,[80] indicate bad faith,[81] or hamper the ability of the defendant to defend himself[82] "strike at the fairness of our criminal process"[83] and are unacceptable.[84] Yet other tactical delays, such as proceedings under Rule 20,[85] interlocutory appeals,[86] incompetancy proceedings[87] and other motions are justifiable.[88] Prosecutors may want to delay trial in order to protect informers.[89] Prosecutors may also seek a delay in order to better prepare their cases,[90] await an appeal of a co-defendant,[91] try "important" cases first,[92] finish another investigation,[93] or await the availability of a witness.[94] During the pre-trial stage, plea negotiations will be underway and may consume a great deal of time while parties bargain for immunity, for reduced charges and for sentences.[95] Again a parallel set of motives for trial tactic delays to that of the defense arise. Prosecutors may wish to avoid the "easy" judge,[96] or await the testimony of witnesses in other pending cases,[97] join defendants for trial[98] or await prosecution by state officials.[99]

But the parallel to defense interests in delay are not complete. There are two major differences between defense

and prosecutor delay. First, there are no constitutional rights involved in denying to the prosecution the right to be represented by a particular counsel or an adequately prepared counsel. There may well be strong policy arguments for guaranteeing to the prosecution the time to be adequately prepared but that policy choice does not rise to the level of a constitutional right.[100] Second, it is clear from the case law that the burden of speedy determination of criminal cases falls upon the prosecution. In the words of the court in Strunk v. United States[101] citing the ABA standards:[102]

> "Although a great many accused persons seek to put off the confrontation as long as possible, the right to a prompt inquiry into criminal charges is fundamental and the duty of the charging authority is to provide a prompt trial." (footnote omitted).[103]

Since the prosecution has the duty of expediting criminal trials, it is the prosecutor who must ultimately account for all non-defendant caused delay.[104] Consequently in looking at the prosecutor's interest in delay, one must keep in mind that often the prosecutor must be arguing for delay caused by events totally out of his control. Often the prosecutor may be arguing for delay based on the fact of congested court calendars,[105] of recusal of judges,[106] of judges ill[107] or out of the district,[108] and other "court business" problems.[109]

C. Judicial Interest in Delay.

The motives for court-desired delay in criminal cases

are much harder to pinpoint and more difficult to characterize. From one standpoint, manpower used to expedite criminal cases is taken away from trying civil cases. This some judges find unacceptable.[110] Again, some judges feel that criminal cases delayed are criminal cases which are more likely to "plead out."[111] This is to their advantage. Finally, some judges find their calendars are so overpowering --there is no light at the end of the tunnel--that it makes little difference to them how quickly they progress. With this attitude in mind, many judges would just as soon abide by the wishes of the prosecution and defense.[112]

The motives for delay--lawyer-oriented, defendant comfort-oriented, and court-oriented--can be translated in delay through many separate tactics whether the mechanism to achieve delay is the right to adequately prepared counsel argument or another argument. It is because prosecutors and defense counsel will have a more difficult time manipulating delay to suit their own purposes that there was, and is, opposition to The Speedy Trial Act by the practicing bar. The danger is that the participants will join together, for whatever their motives, and attempt to stipulate to a waiver of the Speedy Trial Act.[113] This fear is a real fear as can be seen in the statement of the participants themselves which shows a great dislike and distrust of the Act.

IV. Participants' Disdain of the Act.

During the gestation period of the Speedy Trial Act in Congress, it became a common occurence for each participant in the criminal justice system to blame another component of the system for delay.[114] In the words of Representative Conyers, Chairman of the House Subcommittee on Crime:

> Prosecutors blamed backlogged court dockets and judges blamed prosecutors for filing indiscriminate, multi-count indictments. For their part, prosecutors and defense counsel alike found the dilatory tactics of their adversaries as the principal cause of delay.[115]

None of the participants were willing to admit to the obvious--all of them benefitted in their own way from delay. Although the participants were unable to agree on the cause of delay, they did agree on one thing: The Speedy Trial Act was an ill-conceived idea that will affect their individual delay interest adversely.

The Justice Department had long been a foe of proposed speedy trial legislation.[116] In the legislative events which immediately preceded the passage of the Speedy Trial Act of 1974, Justice Department opposition continued.[117] Attorney General Saxbe, for example, outlined six major areas in which the Justice Department was opposed to the pending legislation. He claimed that the 50(b) plans were effective, mandatory dismissal was not in society's interest,

no additional resources had been provided, complicated cases required longer time to prepare than the time to prepare than the time provisions allowed, rate of guilty pleas would be adversely affected and the legislation would result in more hearings and more appeals thereby further clogging court calendars.[118] Even after changes were made in response to some of these objections, the Justice Department continued to express its displeasure with the bill.[119] The opposition of the Justice Department to the Act prompted Represetative Conyers to comment upon Attorney General's Saxbe's criticisms of the Act:

> It mystifies me that the Department persists in these arguments, especially since they have been in full partner in some forty-two months of refinement, and have seen all but a few of over two dozen of their suggested changes included in what is now before the Committee.[120]

Strong opposition to passage of the Speedy Trial Act also came from the judiciary. Director Kirks of the Administrative Office of the United States Courts not only contended that such legislation should await further study of the effect of the Rule 50(b) plans,[121] but also complained that the planning process of the Act and the pretrial services program were inappropriate.[122] Kirks summarized the opinion of his office and of the Judicial Conference:

> The Conference has felt rather strongly that the goal of achieving a speedy trial for every defendant charged with crime in the district courts could be achieved within the court structure without the need for legislation.[123]

Individual district court judges also appeared before Congress to make their objections known.[124]

The defense bar was represented in the House hearings by three practitioners. One gets the distinct impression from their testimony that they viewed the pending legislation as assisting their defenses of clients as much of their testimony centered on the issue of dismissal with prejudice--clearly a matter of concern to defense counsel.[125]

Subsequent to passage of the Speedy Trial Act, evidence exists that the distrust of the Act by the participants has not abated. Some Federal judges have continued to express their displeasure with the Act.[126] Some judges have ignored its existence,[127] others have referred to it in opinion as "oppressive and onerous."[128] Others have sought its repeal[129] or sought major alterations in order to return basically to the Rule 50(b) situation.[130] Some judges have even gone so far as to flaunt the intent of the Act by "empanelling juries and then continuing the trial for weeks, or even months."[131] Two judges have even gone so far to find that the Act is so onerous and so constraining of the judiciary, it violates the separation of powers clause.[132] Other judges have vented their frustration by predicting, and not without some justification, that the consequential effects of the Act will have devastating

effects upon all judicial business.[133]

However, other judges have found the Act to be a necessary element to remedy "excessive and inexcusable delay in bringing a defendant to trial."[134] Still others have intimated a basic disagreement with the wisdom of passing the Act, but believe it is their duty to enforce the Act irrespective of whether it is "good law, bad law, or law which is partly good and partly bad."[135] This attitude is best expressed by Judge McGarr:

> It [Speedy Trial Act] has provoked more violent and emotional rhetoric than any other act that's affected the judiciary and nobody has been more violent or emotional than I have. I have written letters to Congressmen and everyone else about it. I think it's improvident, and I think it's ill considered. It's wrecking our dockets. It's going to force us into total moratoria on civil cases while we force to trial defendants who don't want to go to trial anyway . . .
>
> Congress is congratulating itself that it has done a worthwhile thing, and incidentally, very happy that they have shown once again to the judiciary whose the boss in this government. But it cannot be ignored. A lot of people are devoting a lot of time to it. We've got to comply with it.[136]

The wisdom of the Act has not escaped the pointed criticism of appellate courts as well.[137]

At various points in time criticism of the Act by defense counsel and prosecutors filters through court decisions. Defense counsel are beginning to learn that "it

is obvious that the Speedy Trial Act of 1974 was not written with the rights of defendants in mind."[138] And also that it was not written with the schedule conflicts of defense counsel nor the delay tactics, whether legitimate or illegitimate, in mind.[139] Consequently, when asked what legislative action should be taken to make the Act more amenable to defense counsel, the answer now proferred is a simple "Repeal it." Some defense counsel now refer to the Act as the "Speedy Convictions Act."[140]

Prosecutors have come to the same basic conclusions regarding the Act as have defense counsel. United States Attorneys, in response to a questionnaire circulated by the United States Attorney for the District of Columbia expressed grave reservations about the Act: The complaints centered on the effect of the narrow time frames of the Act and upon the multi-defendant cases. At the heart of the complaints was the fact that the prosecutors were losing control over their own calendars. Some United States Attorneys suggested that the Act should be amended to allow parties to stipulate to a waiver of the Act and thus return greater power to the litigating parties.[141]

All of the statements made by the participants that each has an articulable reason or reasons to be suspicious of the Act is further buttressed by the available data concerning court experience during the phase-in, planning stage. As the House Report commented:

> The primary purpose of the planning process is to monitor the ability of the courts to meet the time limits of the bill and to supply the Congress with information concerning the effects on criminal justice administration of the time limits and sanctions, including the effects on the prosecution, the defense, the courts and the correctional process, and the need for additional rule changes and statutes which would operate to make a speedy trial a reality.[142]

Yet many courts have virtually ignored the Act during this period and consequently have been unable to experiment with procedures and learn from doing.[143] And neither the prosecution nor the defense have raised objections that the courts have failed to operate under the Act.[144] There is a certain Kafkaesque irony in that the participants in the criminal justice system have all predicted that great calamitites will flow from the Act and by refusing to use the planning provisions of the Act the participants have gone out of their way to make this a self-fulfilling prophecy.

V. A Mechanism of Subterfuge

One clear mechanism to translate the motives for delay to actual delay will be for the defendant to seek a period of excludable delay arguing that the defendant's Sixth Amendment right to counsel--either his "right" to counsel of his choice or his right to adequately prepared counsel--will be jeopardized if he is immediately forced to trial. Such a delay, it would be argued, is excludable

under the Speedy Trial Act's "ends of justice" excludable time provision. What may well happen is that the prosecutor will not oppose this motion because he has his own motives for delay which are not inconsistent with the defendant's wishes. It is submitted that the Court, irrespective of its own beliefs as to the wisdom of the Speedy Trial Act,[145] must guard with great vigilance the independent societal reasons, as expressed through the Speedy Trial Act, for quick adjudication of criminal cases.

A. Right to Particular Counsel

The Sixth Amendment right to counsel has been seen as a "cornerstone of our national system of ordered liberty."[146] However, the right to counsel does not confer upon the defendant an absolute right to a particular counsel.[147] The federal case law is abundantly clear that

> the right of an accused to choose his own counsel cannot be insisted upon in a manner that will obstruct reasonable and orderly court procedure.[148]

However, once past this rhetoric the appellate courts give little guidance as to the factors to be weighed in this balancing test. The standard raised on appeal is seen as the question of whether the trial court abused its discretion in granting or denying the motion for continuance for the purpose of allowing defendant to be represented by counsel of his own choice.[149]

In the balancing test, some factors have been given

short shrift by the courts. For example, a claim that the defendant is entitled to a change of counsel because the Federal Public Defender System unconstitutionally contravenes the spirit of a true adversary system since both the federal defender and the United States Attorney are employed by the federal government, has been of no assistance to the defendant.[150] Again, a defendant has no right to be represented by unlicensed counsel[151] and no absolute right to be represented by out of state counsel.[152]

In the area of speedy trial, right to counsel of one's choice most often arises in the context of defendant seeking a change of counsel. In the reported cases--all of which concerned with the initial denial of change of counsel --attention is centered upon defendant's motives for change as well as the effect such a change of counsel would have upon court management issues. If the change of counsel is seen as a defense ploy to gain a delay, the request is often viewed with suspicion.[153] If the defendant is presently represented by adequate counsel and a change of counsel would cause a delay that would effect the efficient management of the court[154] or would effect witness availability[155] or effect the speedy trial of co-defendants,[156] the request can be denied even when the defendant is willing "to waive any and all constitutional and statutory right to a speedy trial and to remain in detention."[157] Again it must be emphasized that the reported case law may not

represent the practice at the trial level since granting of motion to change counsel would lie unappealed. Although for the most part the reported decisions are not very helpful in establishing a framework for subjugating defendant's desire to be represented by a particular counsel to speedy trial considerations, in a few instances courts have given better insights into the problem. For example, in United States v. Declet[158] in appointing new counsel, apparently on its own motion, the court considered the uncertainty of the legal aid lawyer's calendar because of trial conflicts, the congested court calendar and the societal interests in speedy trials as codified in the Speedy Trial Act. The court clearly appointed new counsel in order to further the court's ability to deal swiftly with its calendar.[159]

B. Right to Prepared Counsel

The second major way in which delay may be sought is through a defense claim that it needs additional time in which to prepare for trial. The attractiveness of the argument to allow more time for the defense to prepare must be understood not only in the context of the motives for delay by the defense, the court and the prosecutor; but also in the procedural context that the time limits of the Speedy Trial Act do not begin to run until after an arrest has been made or an indictment handed down. Consequently, there will be instances where the prosecution will have had months or years to investigate and prepare before the time limits

begin to run. Again it must be emphasized that the reported decisions in the area deal basically with the denial of the continuance and therefore may not accurately depict what actually occurs at the trial level.

The case law is most often conclusory and merely claims that the record does not support a claim that the trial court's inherent ability to control its own docket was abused.[160] Although one may isolate cases which recite, for example, that defendant's counsel had six weeks to prepare for what the court found to be a rather simple case,[161] the reference to the time available to defense counsel is usually always followed with the rhetoric:

> The parties agree that a ruling denying a motion for a continuance is not subject to review unless there is a clear showing of an abuse of discretion or that a manifest injustice would result. . . . It has likewise long been recognized that there are no mechanical tests to be applied and that '[t]he answer must be found in the circumstances [of] each case, particularly in the reasons presented to the trial judge.'[162]

The Supreme Court has marched in this same direction. It is only when the facts of the given case are so egregious that the Supreme Court has stepped in. For example, in Avery v. Alabama, the defendant was forced to trial two days after his arrest and two days after the appointment of counsel.[163] In upholding the conviction the Supreme Court stated the classic approach which appellate courts have taken toward continuances and their relation to adequate

representation by counsel.

> Since the Constitution nowhere specifies any period which must intervene between the required appointment of counsel and trial, the fact, standing alone, that a continuance has been denied, does not constitute a denial of the constitutional right to assistance of counsel. In the course of trial, after due appointment of competent counsel, many procedural questions necessarily arise which must be decided by the trial judge in the light of facts then presented and conditions then existing. Disposition of a request for continuance is of this nature and is made in the discretion of the trial judge, the exercise of which will ordinarily not be reviewed.
>
> But the denial of opportunity for appointed counsel to confer, to consult with the accused and to prepare his defense, could convert the appointment of counsel into a sham and nothing more than a formal compliance with the Constitution's requirement that an accused be given the assistance of counsel. The Constitution's guarantee of assistance of counel cannot be satisfied by mere formal appointment.[164]

The difficulty in applying the past case law to the perceived possibility of defense-prosecution joint undermining of the Speedy Trial Act is that the past case law has been basically unconcerned with the common practice of continuances stipulated to by both the defense and prosecution.[165] In the words of the Seventh Circuit, commenting upon the Speedy Trial Act:

> The necessary expeditious disposal of criminal cases requires the most effective use of the time permitted for trial for trial preparation without reliance

> upon the routine continuances that may have been customary in the past.[166]

What must be done is for the trial courts to take the broad guidelines as suggested by the case law,[167] the standards of the American Bar Association,[168] and commentators[169] and flesh out those guidelines with the facts of a particular case whenever a continuance is sought. Not only would such a process present a meaningful record on appeal but also it would help guard against defense-prosecution complicity in undermining the Speedy Trial Act.

VI. The Process of Adequate Documentation.

Past case law regarding the granting of continuances contains a truism: The correctness of the decision to grant or deny a motion for continuance turns upon the facts of the given case. This statement is undoubtedly true as the resolution of all cases depends upon the particular facts. But the Speedy Trial Act demands more. In order to guarantee that societal reasons in speedy resolution of criminal matters do not receive short shrift, courts can no longer grant continuances at the concurrence of the participants' wishes. The Act is structured in such a way that all time from arrest to indictment must be accounted for.[170] What this means, in practice, is that parties may not stipulate to continuances,[171] nor waive applicability's of the

Act provisions.[172] The Act requires that the court balance, on the record, the oft-times competing interests of court-management and participants' desires.[173]

The procedure needed to make the goals of the Act possible to attain can best be illustrated in analyzing ends of justice exclusion as it applies to the right-to-counsel delay mechanism. Two subject matters need to be discussed: The degree of specificity required to justify a continuance and some indication of the balancing technique to be used with the competing interests.

In terms of the defendant's desire to be represented by a particular counsel and his right to be represented by adequately prepared counsel, those continuances which in the past have been granted in a routine, uncritical way must now be justified under 18 U.S.C. § 3161 (h)(8).[174] The statute, itself, requires that reasons for finding that "the ends of justice served by the granting of such continuance outweigh the best interests of the public and the defendant in a speedy trial."[175] The statute lists three non-exclusive factors which are to be considered when making the determination regarding the "ends of justice." They are:

> "(i) Whether the failure to grant such a continuance in the proceeding would be likely to make a continuation of such proceeding impossible, or result in a miscarriage of justice.
>
> "(ii) 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.
>
> "(iii) Whether delay after the grand jury proceedings have commenced, in a case where arrest precedes indictment, is caused by the unusual complexity of the factual determination to be made by the grand jury or by events beyond the control of the court or the Government.[176]

The provision concludes with the statement that no continuance is available "because of general congestion of the courts' calendar, or lack of diligent preparation of failure to obtain available witnesses on the part of the attorney for the Government."[177]

It would appear that the legislative intent in establishing the "ends of justice" exclusion was that

> In order to avoid the pitfalls of unnecessary rigidity on the one hand, and a loop-hole which would nullify the intent of the legislation on the other, a balancing test is established in order to enable the judge to determine when the 'ends of justice' require an extraordinary suspension of the time limits.[178]

But in order to guarantee that the Act is not made a sham at the trial level, as well as giving the appellate court an adequate record on appeal, specific findings supporting the three listed factors of § 3161 (h)(8) must be required.

The degree of specificity required of the trial court can be gleaned from the legislative history. In the Senate Report, for example, the "Watergate case" is discussed on

terms of the "ends of justice" exclusion.

> Although a case like the alleged conspiracy involving the so-called 'Watergate case' might normally be subject to a continuance under this provision because of its complexity, society's interest in a speedy trial in light of the then upcoming election might have outweighed that consideration.[179]

Again in discussing the applicability of the three listed factors, the Senate Report detailed, somewhat carefully, what types of factual situations would fall within the three categories. One example given in the Senate Report is when determining whether to give counsel more time to prepare, the court should look to the probable length of trial based upon the weighted caseload formula developed by the Federal Judicial Center to determine the actual amount of time actually spent on different kinds of cases.[180] Although Congress rejected a blanket exception for complicated federal prosecutions such as anti-trust and organized crime cases, experience with certain types of cases will put the Court on notice of the potential need for further time.[181] In contrast to the old case law which virtually guaranteed disparity from case to case as to when continuances would be granted, the Speedy Trial Act creates a process which requires specific reasons for delay at the trial level which will result, in time, in a body of the common law continuances which will give guidance to the district courts on how to strike the balance among the competing interests in the

speedy trial area.[182]

Other types of factors regarding the need for additional time can be identified. If a continuance is arguably extremely apparent, one would think that the need for a continuance would be recognized early in the process.[183] Of course this is not to suggest that "surprises" can occur in criminal cases.[184]

In the right to adequately prepared counsel when the claim is made in a broad statement that the case is complex and further time to prepare is needed, the court should require from the defense counsel what specifically is yet to be done and how long it will take him to accomplish it. Also, possible motives for delay should be scrutinized. In the change of counsel situation, the court should require what differences exist between counsel and defendant that require change of counsel. It is only upon a record of this specificity can realistic review and precedential use of the case be made.

In order to accomplish the need for rather detailed justifications for continuances under the "ends of justice" exclusion, the local criminal rules may need to be modified in a number of ways. Whenever possible, motions for continuances under this provision should be in writing and should be accompanied by a proposed set of findings of fact.[185] Where appropriate motions for continuances should contain an affidavit of counsel referring to the facts which underlie

the need for additional time. The onus should be placed upon counsel in the "ends of justice" cases just as the burden is placed upon counsel in the other facets of the criminal trial. Secondly, procedures must be established so that upon motion of either the defense or the prosecution, determinations regarding excludable time may be made by a judge other than the trial judge, or a judge ex parte and in camera when questions of confidentiality arise.[186] Finally, in order that a judge may make informed decisions about the effect of delay upon the administration of the calendar within the district, the clerk must have in a usable format the data which the clerk is required to compile under 18 U.S.C. §§ 3166 and 3170.[187]

In the limited experience to date with the ends of justice exclusion during the phase-in stage of the Act, every indication is that the court has not been very specific in justifying continuances. For example, in the United States District Court for the District of Arizona, whenever an interest of justice exclusion is found by the Court, the courtroom deputy clerk merely checks a form indicating under which of the three listed factors the judge has determined the case falls.[188] No factual basis appears. In fact, there is every indication that in most district courts continuances are routinely being made as if the Speedy Trial Act had never been passed.[189]

The district court decision in United States v. Tussell[190]

is an example of an inadequate finding in regard to the ends of justice exclusion. It is not that the district judge was unconcerned with the Act or unwilling to state his reasons on the record, the record just does not go quite far enough. This multi-defendant case contained motions by defendants to suppress allegedly illegally obttained evidence. In excluding certain time periods the court wrote:

> Eight of the defendants have trial deadlines of July 18, 1977, and one of the two remaining defendants has a deadline of July 20. Consideration of the suppression motions will require a hearing, which will commence on Thursday, July 28, 1977, at 10:00 A.M. The period of time beginning with these deadlines and ending in July 27, the day before the hearing, will be excluded in accordance with 18 U.S.C.A. § 3161(h)(8). The number of defendants involved in this matter, along with a proliferation of joint and individual pretrial motions, has complicated management of this case. When a case is made especially complex by the "number of defendants, or the nature of the prosecution, or otherwise," Congress has provided for additonal periods of excludable time. See id. § 316(h)(8), and will order periods of exclusion up until the day of the hearing, and additonal periods if thereafter necessary and appropriate.[191]

In excluding the time between July 18 and July 27, the court had before it facts which should have led it to conclude that judicial time could best be spent considering defendant's motions together as they apparently involved similar or identical facts, and that the delay would be relatively short. Specific reference to the facts of the crowded

docket as supplied by the clerk under § 3166,[192] as well as how judicial time would better be spent, should have been made. At this point the Court should have referred to § 3161 (h)(8)(A) and made the balance of the above facts to conclude that "the ends of justice served by taking such action outweigh the best interest of the public and the defendant in a speedy trial."

Instead of this course of action, the court incorrectly moved into subsection (B) and attempted to use one of the non-inclusive factors to incorrectly justify that which was clearly justifiable. The trial court took out of context the statement "number of defendants, or the nature of the prosecution, or otherwise"[193] and applied it to the continuance to consolidate motions for a hearing when the subsection only applies as to whether a continuance should be granted for further preparation.

It is not that the process of giving specific reasons need be an onerous task. It does require that the continuance be justified and justified on the record. For example, in the trial of Governor Mandel, the court justified a delay under the ends of justice with the following:

> The Court has been advised by counsel that as many as four members of the Maryland Legislature can be expected to be called as witnesses for both the Government and the defense on any given day of the trial. These officials were elected by the citizens of Maryland to serve them in government. The Court is of the opinion that the legislators

> cannot adequately serve the citizenship unless the Governor is present at the legislative session to confer with them from time to time. In addition, a trial date which would require legislators to be absent from the present session may serve to disrupt the legislative process.[194]

The Court then continues on into a second reason for delay:

> Several of the defendants contend that much of the publicity surrounding the first trial will dissipate if the trial is delayed for a reasonable time. The Court has examined many of the newspaper clippings and television and radio transcripts submitted by defendant Mandel. An April 13 trial date wil result in a four month period between th late the mistrial was declared and the date of the retrial. In the opinion of the Court, it is likely that much of the publicity surrounding the first trial will dissipate during this time.[195]

It is obvious that this second reason is much more difficult to factually justify than the first. It may very well be true that a four-month delay would dissipate much of the pre-trial publicity. It is hoped as the pre-trial publicity issue arises in cases over time, that better insights might be gained into the area of pre-trial publicity delay. For example, issues of the use of opinion polls and the differing effects of publicity in large versus small com munities can be developed through case law. However, in the Mandel case regarding pre-trial publicity, the court should have commented on the effect the delay would have upon the court's calendar as well as well as the possibility of a change of venue[196]

to avoid both the delay and the problem of pre-trial publicity.[197]

It is impossible to exhaust all possible situations in which the ends of justice exclusion might arise. In anticipating the July 1, 1979 effective date of the Act, one can set up broad guidelines as to how the balancing process may work and then rely, over the course of time, that the framework will be filled in through the ongoing process of developing a body of precedential law for the ends of justice exclusion.

There are certain types of delay that fall outside the ends of justice exclusion. The Act states that no continuance "shall be granted because of general congestion of the court's calendar, or lack of diligent preparation or failure to obtain available witnesses on the part of the attorney for the Government."[198] Obviously these do not apply to the right to counsel situations. Toward this end of the spectrum of acceptable reasons for delay, however, one would expect to find delay motivated by a concern for defendant's comfort. Moving toward more acceptable reasons for delay one finds health problems of defense counsel and schedule conflicts of defense counsel, as justifying short delays but delays longer than two weeks should be granted only when the case is so complex or the lawyer-client relationship so unique that substitution of other counsel would be inappropriate. If a continuance is sought for additional preparation time, detailed facts about what is

yet unprepared and why preparation will take the amount sought by the defendant, should be required.[199] Information of the time the prosecution requires to prepare its case may be influential here as well as court records as to the amount of billable time private counsel has billed for representation pursuant to the Criminal Justice Act.[200] But merely because a case is, for example, a tax conspiracy case, is not in and of itself sufficient to justify a continuance.

The final topic area that requires discussion in balancing societal interests and defendant's interest in speedy trial is the situation in which defense counsel is dilatory yet the defendant himself has not participated in the delay. It is suggested that the court be guided by the House Report:

> Although the Committee cannot foresee any excuses for institutional delay which would justify granting a continuance, it does believe that the lack of diligent preparation or failure to obtain available witnesses on the part of the defendant or his attorney could result in a miscarriage of justice and, therefore, exempts these reasons from prohibiting a defendant or his counsel from seeking a continuance. For example, when a defendant's counsel, either intentionally or by lack of diligence fails to properly prepare his client's case, either he or the defendant might seek a continuance on the ground that forcing the defendant to go to trial on the date scheduled would deny the defendant the benefits of a prepared counsel. The court in this situation would determine whether

> the defendant participated actively in the delay or whether his counsel alone was responsible for it. If the defendant did not cause the delay, he should not be penalized by being forced to go to trial with an unprepared counsel. In this case, he should be permitted enough time to seek a new counsel and to properly prepare his case for trial. In the event that the defendant actively participated in the delay, then no miscarriage of justice has occurred and the court should deny the defendant's or his counsel's request for a continuance and require the trial to commence on the scheduled date. This is consistent with the well-reasoned view that a defendant should not profit doubly from delay he is responsible for.[201]

Although a strong, aggressive policy of continuance-justification is absolutely necessary, one cannot punish the defendant by taking away his day in court because of the antics of his counsel. In these situations other sanctions of the Act may be appropriate.[202]

VII. Conclusion

The Speedy Trial Act was prompted by a legislative determination that societal interests in quick resolution of criminal charges were inadequately protected. To adjust the situation Congress required the defense and prosecution to justify every time a continuance was sought. The judiciary must require specificity in granting continuances and cease the time-honored practice of allowing counsel to stipulate to delay. Only then will the goals of the Speedy Trial Act be reached.

FOOTNOTES

1. 18 U.S.C. § 3161 et seq. (Supp. IV 1974).

2. 18 U.S.C. §3161 (Supp. IV 1974).

3. 18 U.S.C. § 3161 (h)(8) (Supp. IV 1974).

> (h) The following periods of delay shall be excluded in computing the time within which an information or an indictment must be filed, or in computing the time within which the trial of any such offense must commence:
>
> (8)(A) Any period of delay resulting from a continuance granted by any judge on his own motion or at the request of the defendant or his counsel or at the request of the attorney for the Government, if the judge granted such continuance on the basis of his findings that the ends of justice served by taking such action outweigh the best interest of the public and the defendant in a speedy trial. No such period of delay resulting from a continuance granted by the court in accordance with this paragraph shall be excludable under this subsection unless the court sets forth, in the record of the case, either orally or in writing, its reasons for finding that the ends of justice served by the granting of such continuance outweigh the best interests of the public and the defendant in a speedy trial.
>
> (B) The factors, among others, which a judge shall consider in determining whether to grant a continuance under subparagraph (A) of this paragraph in any case are as follows:
>
> (i) Whether the failure to grant such a continuance in the proceeding would be likely to make a continuation of such proceeding impossible, or result in a miscarriage of justice.
>
> (ii) 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.
>
> (iii) Whether delay after the grand jury proceedings have commenced, in a case where arrest precedes indictment, is caused by the unusual complexity of the factual determination to be made by the grand jury or by events beyond the control of the court or the Government.
>
> (C) No continuance under paragraph (8)(A) of this subsection shall be granted because of general congestion of the court's calendar, or lack of diligent preparation or failure to obtain available witnesses on the part of the attorney for the Government.

4. Infra text at note 142.

5. See, e.g., United States v. La Cruz, 441 F. Supp. 1261, 1264 (S.D.N.Y. 1977).

6. The introduction to the Act states its purpose: "[to] assist in reducing crime and the danger of recidivism by requiring speedy trials and by strengthening the supervision over persons released pending trial, and for other purposes." 18 U.S.C. § 3161 et seq. (Supp. IV 1974). Congress relied upon Bureau of Standards statistics to support the proposition that the criminal defendant awaiting trial is not only a financial and administrative burden to society, but often is a danger to his community as well. In a study of 712 defendants during four weeks in 1968, the Bureau report found that of 426 defendants on pretrial release, 47 were re-arrested and formally charged with crimes committed while on

58-721 O - 80 - 18

release. The study also purported to show that defendants has an increased propensity to be re-arrested when released more than 280 days. H.R. Rep. No. 1508, 93d Cong., 2d Sess. 15-16 (1974) [hereinafter cited as HOUSE REPORT], supra note 2, at 15-16. See also S. R. no. 93-1021, 93d Cong., 2d Sess. 8 (1974) [hereinafter cited as SENATE REPORT].

7. See, e.g., the statement of Representative Conyers, Chairman of the Judiciary Committee's Subcommittee on Crime. Hearings on S. 754, H.R. 7873, H.R. 207, H.R. 658, H.R. 687, H.R. 773, and H.R. 4807 Before the Subcomm. on Crime of the House Comm. on the Judiciary, 93d Cong., 2d Sess. 157 (1974) [hereinafter cited as House Hearings]. For a discussion of Senator Ervin's role in the passage of the Speedy Trial Act, see Frase, The Speedy Trial Act of 1974, 43 U. CHI. L. REV. 667, 673-74 (1976).

8. The Speedy Trial Act was signed by President Ford on January 3, 1975.

9. The Congress relied heavily upon a report by Yale Law School Professor Daniel Freed, which concluded that the goal of the Judicial Conference's Model 50(b) Plan to reduce the time required to bring a defendant to trial was largely unrealized. House Hearings, supra note 7, at 261-333. See also HOUSE REPORT, supra note 6, at 12-13. Testifying in favor of handling the speedy

trial issue through rule 50(b) plans were Rowland F. Kirks, Director of the Administrative Office of the U.S. Courts, House Hearings, supra note 7, at 176-93; W. Vincent Rakestraw, Assistant Attorney General, Office of Legislative Affairs, House Hearings, supra note 7, at 196-209; United States District Judge Alphonso J. Zirpoli, Northern District of California, Chairman of the Committee on the Administration of the Criminal Law of the Judicial Conference of the United States, House Hearings, supra note 7, at 365-84.

10. Senator Ervin believed that society's interests in speedy trials of criminal defendants were being inadequately protected by the participants in the legal system. Consequently, separate speedy trial legislation was necessary. House Hearings, supra note 7 at 158.

Another objection to the rule 50(b) plans is found in Justice Douglas' dissent to the promulgation of rule 50(b):

> There may be several better ways of achieving the desired result [speedy trial]. This Court is not able to make discerning judgments between various policy choices where the relative advantage of several alternatives depends on extensive fact finding. That is a "legislative" determination. Under our constitutional system that function is left to the Congress with approval or veto by the President.

406 U.S. 981-82 (1972).

11. 18 U.S.C. § 3164(b) (Supp. IV 1974).

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12. 18 U.S.C. § 3161 (Supp. IV 1974).

13. 18 U.S.C. §§ 3152-3155 (Supp. IV 1974).

14. See, e.g., REVISED MODEL STATEMENT OF TIME LIMIT AND PROCEDURES FOR ACHIEVING PROMPT DISPOSITION OF CRIMINAL CASES 2 (Speedy Trial Directive No. 11, Feb. 18, 1976).

15. 18 U.S.C. § 3164(c) (Sup. IV 1974). It is questionable whether the computation of the 90-day period can take into account the excludable time provisions of 18 U.S.C. § 3161(h). The Administrative Conference has taken the position that the exclusions do not apply to the in-custody defendant during the interim period. The Justice Department has taken the contrary position. In the first case dealing with the issue, the Ninth Circuit held that the excludable time provisions are not applicable to the in-custody defendant, United States v. Tirasso, 532 F.2d 1298 (9th Cir. 1976). Other courts have failed to follow the Ninth Circuit. See, e.g., United States v. Corley, 548 F.2d 1043 (D.C. Cir. 1977); United States v. Mejias, 417 F. Supp. 579 (S.D.N.Y.) aff'd on other grounds sub nom. United States v. Martinez, 538 F.2d 921 (2d Cir. 1976); United States v. Masko, 415 F. Supp. 1317 (W.D. Wis. 1976). For a discussion of excludable time, see notes 19-24 infra and accompanying text.

16. The individual districts chosen as experimental districts

are: District of Maryland, Eastern District of Michigan, Western District of Missouri, Eastern District of New York, Eastern District of Pennsylvania, Central District of California, Northern District of Georgia, Northern District of Illinois, Southern District of New York, and Northern District of Texas. For a discussion of the pretrial service agencies, see ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, REPORT ON THE IMPLEMENTATION OF TITLE I AND TITLE II OF THE SPEEDY TRIAL ACT OF 1974, 25-44 (1976).

17. 18 U.S.C. § 3161(b) (Supp. IV 1974).

18. 18 U.S.C. § 3161(c) (Supp. IV 1974).

19. Id.

20. The applicability of 18 U.S.C. § 3161(h) to 18 U.S.C. § 3164 is discussed at note 14 supra.

21. 18 U.S.C. § 3161(h) (Supp. IV 1974). Rule 40 of the Federal Rules of Criminal Procedure regulates the removal of persons from one federal district court to another.

22. Id.

23. 18 U.S.C. § 3161(h)(8)(A) (Supp. IV 1974).

24. 18 U.S.C. § 3161(h)(8)(B) (Supp. IV 1974). For a discussion of the types of delay envisioned by Congress to fall within the "ends of justice" exclusion, see ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, GUIDELINES OF THE ADMINISTRATION OF THE SPEEDY TRIAL

ACT OF 1974, 18-21 (1975) [hereinafter cited as GUIDELINES]. See also ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, AMENDED GUIDELINES TO THE ADMINISTRATION OF THE SPEEDY TRIAL ACT OF 1974, 22C-22G (1976) [hereinafter cited as AMENDED GUIDELINES]; HOUSE REPORT, supra note 6, at 33-34; SENATE REPORT, supra note 5, at 39-41.

25. 18 U.S.C. § 3161(h)(8)(C) (Supp. IV 1974).

26. 18 U.S.C. § 3164(c) (Supp. IV 1974).

27. 18 U.S.C. § 3162(a)(1) (Supp IV 1974).

28. 18 U.S.C. § 3162(a)(2) (Supp. IV 1974).

29. Sanctions are detailed in 18 U.S.C. § 3162(b) (Supp. IV 1974):

> In any case in which counsel for the defendant or the attorney for the Government (1) knowingly allows the case to be set for trial without disclosing the fact that a necessary witness would be unavailable for trial; (2) files a motion solely for the purpose of delay which he knows is totally frivolous and without merit; (3) makes a statement for the purpose of obtaining a continuance which he knows to be false and which is material to the granting of a continuance; or (4) otherwise willfully fails to proceed to trial without justification consistent with section 3161 of this chapter, the court may punish any such counsel or attorney, as follows:
>
> (A) in the case of an appointed defense counsel, by reducing the amount of compensation that otherwise would have been paid to such counsel pursuant to section 3006A of this title in an amount not to exceed 25 per centum thereof;

> (B) in the case of a counsel retained in connection with the defense of a defendant, by imposing on such counsel a fine of not to exceed 25 per centum of the compensation to which he is entitled in connection with his defense of such defendant;
> (C) by imposing on any attorney for the Government a fine of not to exceed $250;
>
> (D) by denying any such counsel or attorney for the Government the right to practice before the court considering such case for a period of not to exceed ninety days; or
>
> (E) by filing a report with an appropriate disciplinary committee.
>
> The authority to punish provided for by this subsection shall be in addition to any other authority or power available to such court.

30. 18 U.S.C. § 3174(a)-(b) (Supp. IV 1974).

31. "Judicial emergency" is the term used by the Act itself. 18 U.S.C. § 3174 (Supp. IV 1974).

32. The Act also provides that the Judicial Conference can generally grant only one extension. 18 U.S.C. § 3174(c) (Supp. IV 1974). Additional extensions must be granted by Congress. Id. If Congress fails to act on the request within six months, the Judicial Conference may grant an additional suspension. Id.

33. 18 U.S.C. § 3174(a) (Supp. IV 1974).

34. HOUSE REPORT, supra note 6, at 23.

35. > The overall function of S. 754 is to encourage the Federal criminal justice system to engage in comprehensive planning and budgeting toward the goal of achieving speedy trial. The most widely known

> section of the bill is the first section which imposes the time limits. However, the most important sections of the bill are the planning process sections (sections 3165-69) which provide a planning process whereby each district court formulates a plan for the implementation of speedy trial, and sets out the additional resources necessary to meet the limits of section 3161.
>
> The planning process sections are critical to the bill's success because they provide the vital link between the Federal criminal justice system and the appropriations process. In summary they provide the courts and the United States Attorneys with a mechanism to plan for the implementation of 90-day trials in a systematic manner, to try innovative techniques on a pilot basis, to itemize the additional resources necessary to achieve the 90-day trial goal, and to communicate with Congress concerning its plans and the additional budget requests.

SENATE REPORT, supra note 6, at 45.

36. In the House hearings on the Act, Senator Ervin commented:

> I believe, after years of studying this problem, that S. 754 can begin to end this seemingly hopeless morass. The bill is based upon the premise that the courts, undermanned, starved for funds, and utilizing 18th century management techniques, simply cannot cope with burgeoning caseloads. The consequence is delay and plea bargaining. The solution is to create initiative within the system to utilize modern management techniques and to provide additional resources to the courts where careful planning so indicates.

House Hearings, supra note 7, at 158.

37. Representative Cohen stated: "[T]he most important provisions of this bill concern the process by which the district courts shall study the problems of pretrial

delay and plan for the implementation of the act's time limits." 120 Cong. Rec. 12, 5522 (daily ed. Dec. 20, 1974) [hereinafter cited as HOUSE DEBATE], at H12,552.

38. 120 CONG. REC. §13,178 (daily ed. July 23, 1974) [hereinafter cited as Senate Debate].

39. For a general description of the bill, see HOUSE REPORT, supra note 6, at 21-28.

40. See, e.g., HOUSE REPORT, supra note 6, at 15. The imprecision of the constitutional right to a speedy trial was recognized by the Supreme Court in Barker v. Wingo, 407 U.S. 514 (1971):

> Finally, and perhaps more importantly, the right to speedy trial is a more vague concept than other procedural rights. It is, for example, impossible to determine with precision when the right has been denied. We cannot definitely say how long is too long in a system where justice is supposed to be swift but deliberate. (footnote omitted)

at 521.

41. 398 U.S. 30, 42 (1970). See also, Barker v. Wingo, 407 U.S. 514, 519 (1972).

42. 18 U.S.C. § 3161 (Supp. IV 1974). See also, Barker v. Wingo, 407 U.S. 514, 519 (1972).

43. HOUSE REPORT, supra note 6 at 15-16.

44. Dickey v. Florida, 398 U.S. 30, 42 (1970) citing American Bar Association Standards for Criminal Justice, Speedy Trial 10-11 (Approved Draft 1978); United States ex rel. Solomon v. Mancuri, 412 F.2d 88, 93 (2d Cir.

1969) (Feinberg, J., dissenting).

45. See, Barker v. Wingo, 407 U.S. 514, 520 (1971) citing J. Bentham, The Theory of Legislation 326 (Ogden ed. 1931).

46. Barker v. Wingo, 407 U.S. 514, 532 (1971) citing To Establish Justice, To Insure Domestic Tranquility, Final Report of the National Commission on The Causes and Prevention of Violence, 152 (1969).

47. In Barker v. Wingo, 407 U.S. 514, 530 (1971), the United States Supreme Court constructed a four-prong balancing test to determine whether an individual's speedy trial rights had been violated. The balancing test includes: length of delay, reasons for delay, defendant's assertion of his right and prejudice to the defendant. Defendant's speedy trial interests are considered when discussing the fourth factor. For a detailed summary of the case law subsequent to Barker v. Wingo, and an account of the use of the fourth factor in the lower courts, see, Rudstein, The Right to a Speedy Trial: Barker v. Wingo in the Lower Courts, 1975 Ill. L.F. 11.

48. See, e.g., Strunk v. United States, 412 U.S. 434 (1973); Barker v. Wingo, 407 U.S. 514 (1971). For a compilation of cases from the United States Supreme Court, see Rudstein, The Right To A Speedy Trial:

Barker v. Wingo in the Lower Courts, 1975 Ill. L.F. 11, 11-13.

49. See, e.g., United States v. Jones, 524 F.2d 834, 850 (D.C. Cir. 1975).

50. House Hearings, supra note 7, at 158.

51. Infra text at note 136.

52. See, e.g., United States v. Gray, 565 F.2d 881 (5th Cir. 1978), cert. denied 435 U.S. 955 (1978).

53. In his study of delay in the Chicago preliminary hearing court, the Chicago criminal division court, the Pittsburgh common pleas court, the district court of the District of Columbia, and the Minneapolis district court, Levin concluded:

> The paramount goals of a private defense attorney in criminal court center around his fee and the amount of time he devotes to a case. First, the attorney wants to be certain to receive his fee. This is likely to be a problem because of the typical defendant's low income (even if he can "afford" a private attorney). If the case were disposed of with minimum delay, this type of defendant usually would not have enough time to scrape together a fee. More importantly, the attorney wants to receive the fee before the final disposition of the case. Afterward a defendant may be incarcerated, which greatly reduces the probability of receiving a fee, or he may lose his job or simply "disappear." Also, even when he is acquitted or receives probation afterward the defendant is often hostile toward his attorney.

Levin, Delay in Five Criminal Court, 4 J. Legal Studies 83, 91 (1975). But this motive is not relevant to the public defender. Levin id. at 113.

54. Id. at 104.

55. The issue of counsel's schedule conflicts most often arises in defendant's claim that he has a right to choose his own particular counsel to represent him. See, e.g., United Staes v. Poulack, 556 F.2d 83 (1st Cir. 1977), cert. denied 434 U.S. 986 (1977).

56. "Typical of individuals involved in daily face-to-face relations, the judges and the defense attorneys actively stress 'getting along with each other' and minimizing conflict. For this reason and others even when the defense attorneys' actions increase delay, the judges (except in Minneapolis) tend to accommodate them a good deal." Levin, supra note 53 at 91.

57. The apparent reason for counsel unavailability due to schedule conflicts is that there are relatively few competent defense counsel. The observation concerning the limited number of available defense counsel has been made without documentation in a number of articles critical of the Speedy Trial Act. See, e.g., Kozinski, That Can of Worms: The Speedy Trial Act, 62 A.B.A.J. 862, 863 (1973).

58. Text infra at note 161.

59. "No continuance under paragraph (8)(A) of this subsection shall be granted because of general congestion of the court's calendar, or lack of diligent preparation or failure to obtain available witnesses on the party

of the attorney for the Government." 18 U.S.C. § 3161(h)(8)(C) (Supp. IV 1974).

60. Levin, supra note 53, at 109.

61. See supra note 42 and accompanying text.

62. United States v. Johnson, 579 F.2d 122, 124 (1st Cir. 1978).

63. A delay for health reasons of the defendant is allowable under 18 U.S.C. § 3161(h)(4): "Any period of delay resulting from the fact that the defendant is mentally incompetent or physically unable to stand trial." However, the courts have been aware that the alleged ill health of the defendant can be used as a ploy to gain additional delay. The issue of defendant's health can be used in devious ways by counsel. See, e.g., United States v. Goldman, 439 F. Supp. 352, 358 (S.D.N.Y. 1977).

64. See United States v. Beberfeld, 408 F. Supp. 1119, 1126 (S.D.N.Y. 1976). In the legislative history, there is constantly expressed a fear that the Speedy Trial Act will result in better plea bargains for defendant. The argument states that if all defendants were to demand jury trials, the system could not handle all the cases. Consequently, by threatening to go to trial, the defendant has a stronger baraining tool under the Act. See, HOUSE REPORT, supra note 6, at 19-21, 55, 58. See also, House Hearings, supra note 7,

at 197; McGarr, Anatomy of a Criminal Case, 75 F.R.D. 89, 285 (1976).

65. See, Barker v. Wingo. 407 U.S. 514, 519 (1971).

66. Levin, supra note 53, at 117-18.

67. United States v. Vispi, 545 F.2d 328, 332 (2d Cir. 1976). However, even when a defendant initially cooperates with the government, this will not prevent a defendant from claiming that the government must bear the risk that the defendant will renege on his agreement to cooperate which will result in unaccounted for time under the Speedy Trial Act. For a not entirely satisfying response to this issue see United States v. Lopez, 426 F. Supp. 380 (S.D.N.Y. 1977).

68. The closest explicit continuance allowed under the Speedy Trial Act analagous to the bargaining-position delay is that under court supervision the prosecution of a defendant may be deferred in order that the defendant may demonstrate his good conduct. 18 U.S.C. § 3161(h)(2).

69. F. R. Crim. P. 20 regulates the transfer of a criminal case from one district to another for purposes of plea and sentence.

70. Neubauer and Cole, A Political Critique of the Court Recommendations of the National Commission on Criminal Justice Standards and Goals, 24 Emory L.J. 1009, 1024 (1975).

71. Barker v. Wingo, 407 U.S. 514, 521 (1971).

72. Scaring Off Witnesses, Time Sept. 11, 1978, 41.

73. Speedier trials would also help witnesses less patient than Patricia Finck, a Philadelphia A & P cashier who went back to court 46 times to get two stickup men convicted. "After three or four continuances of a case," says Patrick Healy, the executive director of the National District Attorneys Association, "unless you're really a devoted witness, you'll kiss it off. After all, what's in it for your? This business of civic pride goes only so far. And the smart defendant and the smart defense lawyer will delay a case to death."

Time, id.

74. Barker v. Wingo, 407 U.S. 514, 521 (1971).

75. See Banfield and Anderson, Continuances in the Cook County Criminal Courts, 35 U. Chi. L. Rev. 259, 261-62 (1968).

76. See, Nebraska Press Association v. Stewart, 427 U.S. 539, 603 n.28 (1975) (Brennan concurring).

77. Text infra at note 157.

78. The Sixth Amendment Speedy Trial guarantee attaches only after a person has been accused of a crime. However the Due Process Clause may provide a basis for dismissing an indictment in certain limited situations. United States v. Marion, 404 U.S. 307 (1971).

79. United States v. Jones, 524 F.2d 834, 850 (D.C. Cir. 1975).

80. United States v. Marion, 404 U.S. 307, 325 (1971).

81. United States v. Lara, 520 F.2d 460, 464 (D.C. Cir. 1975).

82. See, United States v. Johnson, 579 F.2d 122, 123, (1st

Cir. 1978). In United States v. Roberts, 515 F.2d 646 (2d Cir. 1975), the government's intentional inactivity prevented the defendant from obtaining a youthful offender probationary sentence since the criminal proceeding was delayed beyond his 26th birthday.

83. Dickey v. Florida, 398 U.S. 30, 45 note 7 (Brennan concurring).

84. United States v. Marion, 404 U.S. 307, 324 (1971).

85. F.R. Crim. P. 20.

86. 18 U.S.C. § 3161(h)(1)(D) (Supp. IV 1974).

87. 18 U.S.C. § 3161(h)(1)(A) (Supp. IV 1974).

88. See 18 U.S.C. § 3161(h) (Supp. IV 1974) for a listing of excludable times for various motions.

89. See United States v. Lopez, 426 F. Supp. 380, 385 (S.D.N.Y. 1977) in which the government admitted that the sole reason for not proceeding against Lopez was the desire to keep concealed the informer status of a co-defendant. In disallowing the request for an excludable time determination to be made, the court stated:

> If the government's position here was sustained, it could obtain at will an open-ended toll of the requirements of the Speedy Trial Plan solely upon its desire to conceal the existence of an informer or cooperating co-defendant. "If there [was] anything [the Rules were] not intended to cover, it is the blanket type of exclusion proposed by the Government here."

United States v. Furey, 500 F.2d 338, 343 (2d Cir.

1974). In the area of informers and pre-indictment delay, see United States v. Lovasco, 431 U.S. 783, 797 (1976) citing Amsterdam, Speedy Criminal Trial: Rights and Remedies, 27 Stan. L. Rev. 525, 527-528 (1975).

90. Under 18 U.S.C. § 3161(h)(8)(C) (Supp. IV 1974), the prosecutor must have diligently prepared in order to have delay time excluded.

91. United States v. Didier, 542 F.2d 1182 (2nd Cir. 1976).

92. See United States v. Douglas, 504 F.2d 213, 217 (D.C. Cir. 1974) in which Chief Judge Bazelon, in a concurring opinion, stated that prosecuting "important" cases before prosecuting "lesser" cases did not justify delay in trial.

93. United States v. Rollins, 487 F.2d 409, 419 (2d Cir. 1973).

94. See Barker v. Wingo, 407 U.S. 514, 531 (1971); United States v. Douglas, 504 F.2d 213, 218 (D.C. Cir. 1974); United States v. Hillegas, 443 F. Supp. 221, 227 (S.D.N.Y. 1977; United States v. Salzmann, 417 F. Supp. 1139 (S.D.N.Y. 1976), aff'd 548 F.2d 395 (2d Cir. 1977); 18 U.S.C. § 3161(h)(3)(A) (Supp. IV 1974).

95. Thus, if the government wishes to bargain for this condition, it may but it should do so mindful of the risks which it thereby assumes of dismissed indictments for unconstitutional delay.

United States v. Carini, 562 F.2d 144, 149 (2d Cir. 1977).

96. United States v. Lara, 520 F.2d 460, 464 (D.C. Cir 1975).

97. Barker v. Wingo, 407 U.S. 514, 516 (1971) (delay in order to secure accomplice's testimony after his conviction).

98. United States v. Howard, 440 F. Supp. 1106, 1109 (D. Md. 1977).

99. See, United States v. Mejias, 552 F.2d 435 (2d Cir. 1977), cert. denied 434 U.S. 847 (197); United States v. Cordova, 537 F.2d 1073, 1076 (9th Cir. 1976), cert. denied 429 U.S. 960 (1977). United States v. LaCruz, 441 F. Supp. 1261, 1267 (S.D.N.Y. 1977).

100. United States v. Correia, 531 F.2d 1095, 1098 (1st Cir. 1976).

101. 412 U.S. 434 (1972).

102. Prompt disposition of criminal charges.
(a) It is unprofessional conduct for a prosecutor intentionally to use procedural devices for delay for which there is no legitimate basis.
(b) The prosecution function should be so organized and supported with staff and facilities as to enable it to dispose of all criminal charges promptly. The prosecutor should be punctual in attendance in court and in the submission of all motions, briefs and other papers. He should emphasize to all witnesses the importance of punctuality in attendance in court.
(c) It is unprofessional conduct to misrepresent facts or otherwise mislead the court in order to obtain a continuance.

American Bar Association, Standards Relating To The Prosecution Function and The Defense Function (Approved Draft, 1971).

103. 412 U.S. 434, 437 (1972).

104. A more neutral reason such as negligence or overcrowded courts should be weighed less heavily but nevertheless should be considered since the ultimate responsibility for such circumstances must rest with the government rather than with the defendant.

Barker v. Wingo, 407 U.S. 514, 531 (1971). Many cases have dealt with applying the analytical process of Barker v. Wingo including the weighing of "neutral" factors such as crowded docket and understaffed prosecutors' offices. See, e.g., Strunk v. United States, 412 U.S. 434 (1972). United States v. Carini, 562 F.2d 144, 148-52 (2d Cir. 1977); United States v. Urispi, 545 F.2d 328, 333-37 (2d Cir. 1976); United States v. Simmons, 536 F.2d 827, 829-35 (9th Cir. 1976), cert. denied 429 U.S. 854 (1977); United States v. Jones, 524 F.2d 834, 849-53 (D.C. Cir. 1975); United States v. Salzmann, 417 F. Supp. 1139, 1165-1171 (E.D.N.Y. 1976), aff'd 548 F.2d 395 (2d Cir. 1977). See also Rudstein, supra note 47.

105. See, e.g., United States v. Jones, 524 F.2d 834, 839 (D.C. Cir. 1975).

106. United States v. Vispi, 545 F.2d 328, 336 (2d Cir. 1976).

107. United States v. Carini, 562 F.2d 144, 149 (2d Cir. 1977); United States v. Lord, 565 F.2d 831, 840 (2d Cir. 1977).

108. United States v. Douglas, 504 F.2d 213 (D.C. Cir. 1974) (judge attending a professional meeting); United States v. Didier, 542 F.2d 1182, 1184 (2d Cir. 1977) (judge holding court outside of his district).

109. United States v. Carini, 562 F.2d 144, 149 (2d Cir. 1977) (summer recesses).

110. Infra note 130.

111. Levin, supra note 53, at 114.

112. Levin, id. at 114-116.

113. "If courts are to exercise effective calendar control and to expedite the cases before them, they must reject consent of the parties as a basis for granting adjournments." The President's Commission on Law Enforcement and Administration of Justice, Task Force Report: The Courts, 86 (1967).

114. See, e.g., HOUSE REPORT, supra note 6, at 17, 20; SENATE REPORT, supra note 6, at 8-9. But see Judge Zirpoli's statement that the judiciary can make the speedy trial guarantee a reality, House Hearings, supra note 7, at 375.

115. HOUSE REPORT, supra note 6, at 56.

116. For a brief history of speedy trial legislation, including previous opposition by the Justice Department, see Hansen and Reed, The Speedy Trial Act in Constitutional Perspective, 47 Miss. L.J. 365, 400-06 (1976). See also, United States v. Salzmann, 417 F. Supp. 1139, 1147-1151 (E.D.N.Y. 1976), aff'd 548 F.2d 395 (2d Cir. 1977).

117. See, HOUSE REPORT, supra note 6, at 13, 17, 54, 58, 78; House Hearings, supra note 7, at 196-222 (statements and testimony of W. Vincent Rakestraw, Assistant Attorney General, Office of Legislative Affairs; H.M. Ray, United States Attorney, Northern District of Mississippi; James L. Treece, United States Attorney, District of Colorado; Earl Silbert, United States Attorney for the District of Columbia; Mac Redwine, Legislative Counsel, Office of Legislative Affairs.

118. HOUSE REPORT, supra note 6, at 55.

119. HOUSE REPORT, supra note 6, at 55-58.

120. HOUSE REPORT, supra note 6, at 58.

121. HOUSE REPORT, supra note 6, at 50-54. See also, House Hearings, supra note 7, at 176-196.

122. HOUSE REPORT, supra note 6, at 50-54.

123. House Hearings, supra note 7, at 176.

124. Judge John Feikens, United States District Court for the District of Eastern Michigan commented:

> Now what I fear, Mr. Chairman and members of the subcommittee, is this: That if we have to put all of our attention on criminal cases, we will not reach our civil docket. I am in danger

> right now of that. And I point out in my statement--and I think you ought to consider this--that there are very important cases on the civil docket that we have to try--the prisoners' rights petitions, the civil rights cases, the habeas corpus applications, the civil rights cases in which the United States is a party, and the onslaught of cases that we are getting under title 7 in private civil rights cases. . . .
>
> In other words, what I am saying to you, Mr. Chairman, is this: Whether we talk about the speedy trial bill or whether we talk about plans under rule 50(b) of the Federal Rules of Criminal Procedure, in courts like the Eastern District of Michigan we already have problems. And if you say to us "Now put these criminal cases front and center to the exclusion of the civil cases," we can do that, but the civil litigants are going to suffer.

House Hearings, supra note 7, at 241.

Judge Alfred Arraj, United States District Court for the District of Colorado, was quoted by United States Attorney Treece as saying that he had such a backlog of criminal cases that he cannot get to the civil cases. Therefore, Judge Arraj was going to dismiss criminal cases. See also, the statements of Judge Alphonoso Zispoli, United States District Court for the District of Northern California, House Hearings, supra note 7, at 365-384.

125. See, House Hearings, supra note 7, at 223-238, 248-259, 335-348.

126. See, e.g., United States v. Bullock, 551 F.2d 1377, 1382 (5th Cir. 1977).

127. See, United States v. Carpenter, 542 F.2d 1132, 1134 n.1 (9th Cir. 1976). See also, Misner, District Court Compliance with the Speedy Trial Act of 1974; The Ninth Circiut Experience, 1977 Ariz. St. L.J. 1, 15-25.

128. Wood, Federal Prisoner Petitions in the Proceedings of the Seminar for Newly Appointed United States District Judges, 75 F.R.D. 89, 340 (1976).

129. Report of the Ad Hoc Subcommittee on the Speedy Trial Act (Administrative Office of the United States Court, undated, chaired by Judge Carl B. Rubin) [hereinafter cited as Ad Hoc Report]. App. B, Summary of Responses on Speedy Trial Act (8th, 9th and 10th Circuits), 8; App. A. Analysis of Sixth Circuit Responses, 2-3. The Ad Hoc Report was the product of a meeting in Washington, D.C. on June 27, 1977, sponsored by the Administrative Office and the Federal Judicial Center. Representatives from the twelve district courts which had already moved to the 1979 standards were present, as well as a cross section of other interested individuals including public defenders, United States Attorneys, United States Magistrates, circuit reporters, members of the criminal defense bar, and staff counsel from subcommittees of the Senate Judiciary Committee and the House Judiciary Committee. In order to obtain a broad-base of information, requests for information

were submitted to the Chief Judge of all the districts. In addition, Earl J. Silbert, United States Attorney for the District of Columbia, solicited views of all United States Attorneys on the problems created by the Act.

130. See, Ad Hoc Report, id. App. A, D.C. Circuit at 4; Second Circuit at 1. Another way to severely limit the Act is to expand the judicial emergency provisions of 18 U.S.C. § 3174 (Supp. IV 1974). See, Ad Hoc Report, id. App. A, D.C. Circuit 1, Second Circuit, 1; Third Circuit, 4; Fourth Circuit, 2.

131. Ad Hoc Report, id. App. C, 4.

132. For the most in-depth discussion, see United States v. Howard, 440 F. Supp. 1106 (D. Md. 1977). In United States v. Martinez, 538 F.2d 921, 923 (2d Cir. 1976). Mr. Justice Clark, sitting by designation, noted in passing that he viewed the Act as being constitutionally suspect.

133. It is feared that the Speedy Trial Act will have a number of consequential adverse effects. The most prominent fear is the fear that the Act will totally dissrupt the civil calendar. This point was made by Chief Justice Burger in Proceedings of the 37th Annual Judicial Conference of the District of Columbia Circuit Court, 73 F.R.D. 147, 245 (1976). See also, United States v. Frazier, 547 F.2d 272, 274 (5th Cir.

1977); Lasher, The Court Crunch: The View From the Bench, 76 F.R.D. 245, 249 (1977); Ad Hoc Report, supra note 129, at 6-7. Other effects will be that district judges will be so involved with criminal cases, magistraters will be forced to handle more civil matters. See, e.g., Loral Corp. v. McDonnell Douglas Corp., 558 F.2d 1130, (2d Cir. 1977). See also, the remarks made by Attorney-General Bell, Proceedings of the 38th Annual Judicial Conference of the District of Columbia Circuit Court, 77 F.R.D. 251, 308 (1977). There is also concern that the Act will cause prosecutors to forego some re-trials, Marting v. United States, 411 F. Supp. 1352, 1360 (D.N.J. 1976); and not to proceed with some "minor" crimes, United States v. Bennett, 563 F.2d 879, 884 (8th Cir. 1977). There seems to be some trend to blame all judicial administrative problems on the judicial administrive problems on the Speedy Trial Act. See, e.g., Acha v. Beame, 438 F. Supp. 70, 80 (S.D.N.Y. 1977) in which the court commented that because of the Speedy Trial Act, and its effect upon his workload, factual disputes in a discriminatory hiring practices case must be turned over to a special matter.

134. United States v. Vispi, 545 F.2d, 328, 330 (2d Cir. 1976).

135. United States v. Koch, 438 F. Supp. 307, 310 (S.D.N.Y. 1977).

136. McGarr, Anatomy of a Criminal Case, 75 F.R.D. 269, 285 (1976).

137. See, Burger, Year-End Report, 12 Ariz. B.J. 16 (1977). In United States v. Tirasso, 532 F.2d 1298, 1299, 1301 (9th Cir. 1976), Judge Kennedy commented:

> It is discouraging that our highly refined and complex system of criminal justice is suddenly faced with implementing a statute that is so unartfully drawn as this one. But this is the law, and we are bound to give it effect.

138. United States v. Rothman, 567, F.2d 744, 747 (7th Cir. 1977). It is also clear that some counsel are ignorant of the Act. See, United States v. Strand, 566 F.2d 530, 532 (5th Cir. 1978).

139. See, Ad Hoc Report supra note 129, App. B., Ninth Cir. at 2.

140. Id. at 6.

141. Ad Hoc Report, supra note 129, App. C.

142. HOUSE REPORT, supra note 6, at 23.

143. Misner, supra note 127, at 15-25.

144. Id.

145. Supra, note 132, and note 133.

146. United States v. Poulack, 556 F.2d 83, 86 (1st Cir. 1977), cert. denied 434 U.S. 986 (1977), citing Powell v. Alabama, 287 U.S. 335 (1963).

147. See, e.g., United States v. Poulack, id. and cases cited therein. See also, United States v. Taylor, 569 F.2d 448 (7th Cir. 1978), cert. denied 435 U.S. 952 (1978); United States v. Gray, 565 F.2d 881 (5th Cir. 1978; In re Rappaport, 558 F.2d 87 (2d Cir. 1977); United States v. Robinson, 553 F.2d 429 (5th Cir. 1977), cert. denied 434 U.S. 1016 (1978); United States v. Freitas, 440 F. Supp. 241 (D.W.J. 1976).

148. United States v. Poulack, id. at 86. But see, Drumgo v. Superior Court, 8 Cal. 3d 390, 394 506 P.2d 1007, 1011 (1973)(Mosk, J., dissent).

149. Id.

150. See, United States v. Robinson, 553 F.2d 429 (5th Cir. 1977), cert. denied 434 U.S. 1016 (1978).

151. United States v. Taylor, 569 F.2d 448 (7th Cir. 1978).

152. See, In re Rappaport, 558 F.2d 87 (2d Cir. 1977).

153. See, United States v. Jones, 524 F.2d 834 (D.C. Cir. 1975). Compare, United States v. Gray, 565 F.2d 881 (5th Cir. 1978), cert. denied 435 U.S. 955 (1978).

154. Carey v. Rundle, 409 F.2d 1210, 1214 (3rd Cir. 1969), cert. denied, 397 U.S. 946 (1969).

155. United States v. Gray, 565 F.2d 881 (5th Cir. 1978).

156. United States v. Poulack, 556 F.2d 83 (1st Cir. 1977), cert. denied, 434 U.S. 986 (1977).

157. Id. at 84.

158. 432 F. Supp. 622 (S.D.N.Y. 1977).

159. Id. at 623-24.

160. See, United States v. Correia, 531 F.2d 1095, 1098-99 (1st Cir. 1976).

161. United States v. Rothman, 567 F.2d 744, 747 (7th Cir. 1977). See also, United States v. Powers, 572 F.2d 146, 153 (8th Cir. 1978) (19 days to prepare); United States v. Taylor, 562 F.2d 1345, 1363 (2d Cir. 1977), cert. denied 432 U.S. 909 (9 days to prepare); United States v. Anderson, 561 F.2d 1301, 1303 (9th Cir. 1977), cert. denied 434 U.S. 943 (1977)(2 months to prepare); United States v. Olivas, 558 F.2d 1366, 1371-8 (10th Cir. 1977), cert. denied 434 U.S. 866 (1977)(33 days to prepare); United States v. Savage, 430 F. Supp. 1024 (M.D.Pa. 1977)(10 days to prepare) aff'd 566 F.2d 1170 (3d Cir. 1977); Pope v. State 140 Ga. App. 549, 550, 231 SE 2d 549, 550-51 (1976)(1 week to prepare); Russell v. State 559 SW 2d 7, 9-10 (Ark. Sup. Ct. 1978)820 days to prepare).

162. United States v. Rothman, 567 F.2d 744, 747 (7th Cir. 1977).

163. 308 U.S. 444 (1939).

164. Id. at 446.

165. The judges almost never forcefully interfere with the attorneys pursuit of their goals, even though they are aware that they often are associated with delay. . For instance, the judges' routine granting

of continuances, especially without a time-consuming formal explanation, allows the attorney to use them to his own ends . Nor did criminal division judges require reasons for continuances; some judges in this court were willing to permit as many continuances as the defense and prosecution were willing to arrange.

Levin, supra note 53, at 114.

166. United States v. Rothman, 567 F.2d 744, 749 (7th Cir. 1977).

167. The individual cases discussed in this article may be of some assistance as similar factual situations recur. The difficulty is that often the reputed cases do not contain sufficient information on all relevant factors. For a more detailed court synopsis of delay cases see, United States v. Salzmann, 417 F. Supp. 1139, (E.D.N.Y. 1976), aff'd 548 F.2d 395 (2d Cir. 1977).

168. American Bar Association, Standards Relating to Speedy Trial (Approved Draft, 1968) §1.3.

169. National Advisory Commission on Criminal Justice Standards and Goals, Courts, Standard 4.12; President's Commission on Law Enforcement and Administration of Justice, Task Force Report: The Court, 84-90.

170. See, United States v. Hillegas, 443 F. Supp. 221, 225 (S.D.N.Y. 1977); United States v. La Cruz, 441 F. Supp. 1261, 1264 (S.D.N.Y. 1977).

171. See United States v. Rothman, 567 F.2d 744, 749 (7th Cir. 1977).

172. Underlying the goverment position is the premise that the public, the defendant and the prosecutor all have the same interest in prompt disposition, and thus the public interest is adequately represented when the defendant and the prosecutor agree to a waiver. But if such were the case, there would have been no need to enact the Plan. The court in promulgating the Plan--and Congress in enacting the Speedy Trial Act--has determined that the immediate participants cannot be relied upon to further the public interest in prompt disposition. . .It would be antithetical to this entire design if the parties were permitted to free themselves from the constraints imposed by the Plan through the simple expedient of the willing defendant signing a waiver. United States v. Beberfeld, 408 F. Supp. 1119, 1122-23 (S.D.N.Y. 1976).

173. 18 U.S.C. 3161 (h)(8) (Supp. IV 1974).

174. Id.

175. Id.

176. Id.

177. 18 U.S.C. 3161 (h)(8)(C) (Supp. 1974).

178. SENATE REPORT, supra note 6, at 21.

179. Id. at 40.

180. Id. For a discussion of the weighted caseload formula see The Annual Report of the Director of the Administrative Office of the United States Courts, 1971. Administrative Office of the U.S. Courts, 167.

181. Id. at 30.

182. See, e.g., Plan for the United States District Court for the District of Arizona for Achieving Prompt Disposition of criminal Cases § 4a which requires the

clerk to maintain a separate file for all orders authorizing ends of justice exclusions.

183. See, United States v. Rothman, 567 F.2d 744, 749 (7th Cir. 1977).

184. The Guidelines of the Administrative Office, supra note 23, discuss additional factors.

> The other instance involves the "complex" case. Complexity in criminal cases results inter alia from complex issues, multimple parties or extensive documentary evidence. Cases fitting into this patterin frequently include antitrust, mail fraud, conspiracy and net worth income tax cases, among others, which cases may require a whole series of pretrial conferences, as well as other protracted proceedings. See: "Pre-Trial Procedures in Big Criminal Cases", Judicial Conference Handbook of Recommended Procedures for the Trial of Protracted Cases, pp. 47-50; Judge Irving R. Kaufman, "Problems in Protracted Criminal Cases", 23 F.R.D. 551; Judge Joe E. Estes, "Pre-Trial Conferences in Criminal Cases", 23 F.R.D. 560. After an indictment is filed, the court can determine from the nature of the case whether it is "unusual or complex" within the meaning of Section 3161(h)(8)(B)(ii).
>
> Finally, it should be noted that cases may be held in abeyance awaiting a decision of the court of appeals or Supreme Court which would be dispositive of the case. Section 3161(h)(8) would be applicable.

185. See United States District Court for the District of Arizona, Rule 91. See also, Nationa Advisory Commission on Criminal Justice Standards and Goals, Courts, 97 (1973).

186. In the analagous situation of allowing counsel to withdraw for an alleged conflict of interest, a similar processs was suggested by Judge (now Justice) Stevens. United States v. Jeffers, 520 F.2d 1256, 1265 (7th Cir. 1975). See Lowenthal, Joint Representation in Criminal Cases: A Critical Appraisal, 65 Va. L. Rev. _____ (1978).

187. 17 U.S.C. §§ 3166, 3170 (Supp. IV 1974).

§ 3166. District plans--contents.

(a) Each plan shall include a description of the time limits, procedural techniques, innovations, systems and other methods, including the development of reliable methods for gathering and monitoring information and statistics, by which the district court, the United States attorney, the Federal public defender, if any, and private attorneys experienced in the defense of criminal cases, have expedited or inted to expedite the trial to other disposition of criminal cases, consistent with the time limits and other objectives of this chapter.

(b) Each plan shall include information concerning the implementation of the time limits and other objectives of this chapter, including:

(1) the incidence of and reasons for, requests or allowances of extensions of time beyond statutory or district standards;

(2) the incidence of, and reasons for, periods of delay under section 3161(h) of this title;

(3) the incidence of, and reasons for, the invocation of sanctions for noncompliance with time standards, or the failure to invoke such sanction, and

the nature of the sanction, if any, invoked for noncompliance;

(4) the new timetable set, or requested to be set, for an extension;

(5) the effect on criminal justice administration of the prevailing time limits and sanctions, including the effects on the prosecution, the defense, the courts, the correctional process, costs, transfers and appeals;

(6) the incidence and length of, reasons for, and remedies for detention prior to trial, and information required by the provisions of the Federal Rules of Criminal Procedure relating to the supervision of detention pending trial;

(7) the identity of cases which, because of their special characteristics, deserve separate or different time limits as a matter of statutory classifications; and

(8) the incidence of, and reasons for, each thirty-day extension under section 3161(b) with respect to an indictment in that district.

(c) Each district plan required by section 3165 shall include information and statistics concerning the administration of criminal justice within the district, including, but not limited to:

(1) the time span between arrest and indictment, indictment and trial, and conviction and sentencing;

(2) the number of matters presented to the United States Attorney for presecution, and the numbers of such matters prosecuted and not prosecuted;

(3) the number of matters transferred to other districts or to States for prosecution;

58-721 O - 80 - 20

(4) the number of cases disposed of by trial and plea;

(5) the rates of nolle prosequi, dismissal, acquittal, conviction, diversion, or other disposition; and

(6) the extent of preadjudication detention and release, by numbers of defendants and days in custody or at liberty prior to disposition.

(d) Each plan shall further specify the rule changes, statutory amendments, and appropriations needed to effectuate further improvements in the administration of justice in the district which cannot be accomplished without such amendments or funds.

(e) Each plan shall include recommendations to the Administrative Office of the United States Courts for reporting forms, procedures, and time requirements. The Director of the Administrative Office of the United States Courts, with the approval of the Judicial Conference of the United States, shall prescribe such forms and procedures and time requirements consistent with section 3170 after consideration of the recommendations contained in the district plan and the need to reflect both unique local conditions and uniform national reporting standards.

§ 3170. Speedy trial data.

(a) To facilitate the planning process and the implementation of the time limits and objectives of this chapter, the clerk of each district court shall assemble the information and compile the statistics required by sections 3166(b) and (c) of this title. The clerk of each district court shall assemble such information and compile such statistics on such forms and under such regulations as the Administrative Office of the United States Courts shall prescribe with the approval of the Judicial Conference and after consultation with the Attorney General.

(b) The clerk of each district court is authorized to obtain the information required by sections 3166(b) and (c) from all relevant sources including the United States Attorney, Federal Public Defender, private defense counsel appearing in criminal cases in the district, United States district court judges, and the chief Federal Probation Officer for the district. This subsection shall not be construed to require the release of any confidential or privileged information.

(c) The information and statistics complied by the clerk pursuant to this section shall be made available to the district court, the planning group, the circuit council, and the Administrative Office of the United States Courts.

188. The form used by the United States District Court for the District of Arizona is on file at _____.

189. See Misner, supra note 127, at 21-22.

190. 445 F. Supp. 1 (M.D. Pa. 1977).

191. Id. at 1-2.

192. 18 U.S.C. § 3166 (Supp. IV 1974).

193. 18 U.S.C. § 3161 (h)(8)(B) (Supp. IV 1974).

194. United States v. Mandel, 431 F. Supp. 90, 93 (D. Md. 1977).

195. Id.

196. The court in Mandel did discuss the venue issue but not in its possible relationship with the Speedy Trial Act. Id. at 98.

197. In his concurring opinion in Nebraska Press Association v. Stuart, 427 U.S. 539 (1975), Mr. Justice Brennan anticipated the publicity problem. "However, even

short continuances can be effective in attenuating the impact of publicity, especially as other news crowds past events off the front pages. And somewhat substantial delays designed to ensure fair proceedings need not transgress the speedy trial guarantee. See Groppi v. Wisconsin, 400 U.S. 505, 510 (1971); cf. 18 U.S.C. § 3616(h)(8) (1970 ed., Supp. IV)" at 602 note 28.

198. 18 U.S.C. § 3161(h)(8)(C) (Supp. 1974).

199. Text supra at note 184.

200. 18 U.S.C. 3006 (Supp. 1978).

201. HOUSE REPORT, supra note 6, at 33.

202. Supra note 23.

ATTACHMENT 3

DISTRICT OF ARIZONA, July 1, 1976 thru April 30, 1979:

INTERVAL 3 -- ARRAIGNMENT TO TRIAL

	Net Days Excessive										Total Exces	% of Total Exces	Total Defts Disposed of
	61 - 80		81 - 100		101 - 120		121 - 180		181 & Over				
	Reptd	%	Reptd	%	Reptd	%	Reptd	%	Reptd	%			
7/1/76 - 6/30/77	141	9.76	99	6.85	45	3.11	52	3.60	35	2.42	372	25.74	1445
7/1/77 - 6/30/78	47	6.55	28	3.90	10	1.39	12	1.67	2	.28	99	13.79	718
7/1/78 - 4/30/79	38	4.36	25	2.87	24	2.75	22	2.52	50	5.73	159	18.23	872

77505

FOREWORD

The following guidelines have been approved by the Judicial Council for the Second Circuit for the guidance of bench and bar and for eventual inclusion in the Speedy Trial Act plan of each district court.

The guidelines are not court rules. They do not have the force of law and do not create any rights or remedies. On the other hand they have been drafted by a Committee consisting of experienced judges, prosecutors, defense counsel, court officials, Speedy Trial Act reporters and academicians and represent their best judgment as to how various provisions of the Speedy Trial Act should be interpreted to achieve its purpose.

The Judicial Council has not passed upon the validity of the interpretations of the Speedy Trial Act contained in the guidelines. However, in view of the experience and outstanding competence of the group which prepared the guidelines, the Council believes that they are entitled to considerable respect by the judiciary in its interpretation and application of the Act.

It is hoped that the experience of each district with the guidelines in the coming months and any suggestions for revisions resulting therefrom will be reflected in:

(1) recommendations by the planning group in each district under 18 U.S.C. § 3168 to the district court of guidelines to be incorporated in the Speedy Trial Act plan for the district;

(2) preparation and submission by the district court in each district to the reviewing panel under 18 U.S.C. § 3165(c) of such guidelines, with necessary revisions, as part of the district's modified plan; and

(3) submission of such modified plans to the Judicial Council under 18 U.S.C. § 3165(d) for review and approval prior to July 1, 1979.

Judicial Council Speedy Trial Act
Coordinating Committee

Judge Mansfield
Judge Oakes
Judge Gurfein

Approved: January 16, 1979

TABLE OF CONTENTS

77505

GUIDELINES UNDER THE SPEEDY TRIAL ACT

PREAMBLE

1. The basic purpose of these guidelines is to interpret the Speedy Trial Act, 18 U.S.C. § 3161 *et seq.* ("the Act"), in a manner that avoids both undue pressure and unnecessary delay in the fair disposition of criminal cases. They are intended:

(a) to define the three statutory intervals—arrest-indictment or information; indictment or information-arraignment; and arraignment-trial; and other time limits imposed by the Act;

(b) to define the categories of times which are automatically excluded under § 3161(h)(1)-(h)(7), and which may justify a continuance under § 3161(h)(8);

(c) to prescribe the starting and ending dates for computing excluded time in each category;

(d) to make uniform the recording of excluded time; and

(e) to suggest factors to be considered by the Court in scheduling a trial date that both satisfies the purposes of the Act and takes into account the legitimate needs of the parties for counsel of their choice, reasonable notice of trial and reasonable time to prepare for trial.

2. In connection with 1(a), 1(b) and 1(c) above, the specific illustrations set forth in § 3161(h)(1)(A)-(h)(1)(G) do not encompass all "proceedings concerning the defendant" which are to be automatically excluded under § 3161(h)(1). These guidelines set forth certain proceed-

ings which come within that phrase, but are not included within the Act's specific provisions. Each of these proceedings would also be appropriate for an (h)(8) continuance, but they have been placed within the (h)(1) excluded time categories in order to provide a greater degree of uniformity, permit more precise planning by Court and counsel, and avoid having to devote court time to making (h)(8) findings in recurring situations in which the ends of justice are invariably served by granting a continuance. Moreover, these guidelines do not undertake to set forth all the additional proceedings which may be covered by the phrase "proceedings concerning the defendant," but leave that question to the Court for determination on a case by case basis. However, the guidelines do undertake to set forth the maximum reasonable periods of time which would appear necessary in most cases for the handling of pretrial motions and hearings. In so doing, it is not intended to preclude the Court from fixing lesser or greater periods of time, where appropriate and in keeping with all the purposes of the Act and the United States Constitution.

3. In connection with 1(d) above, periods defined in these guidelines as excluded shall, in each case where applicable, be recorded by the clerk as excluded from computation in the running of the statutory time limits. The clerk of each district shall develop a procedure for notifying the Court and counsel on a regular basis of excluded time as recorded and of the last day by which trial must commence under the Act. Moreover, at each appearance of counsel before the Court, the Court should require counsel to examine the clerk's record of excluded time and (h)(8) continuances for completeness and accuracy and to bring to the Court's immediate attention any claim that the clerk's record is in any way incorrect.

4. In connection with 1(b), 1(d) and 1(e) above, although excluded time automatically extends the time limits under the Act, the Court does not have to utilize excluded time in setting a trial date, and its occurrence does not, automatically, operate as an adjournment of a trial date previously set by the Court. The extent, if any, to which excluded time should be taken into account in the setting or rescheduling of the trial date, lies within the discretion of the Court. Where a trial date previously set is adjourned, in exercising its discretion, the Court has available, depending upon the circumstances, three alternative courses:

(a) It may adjourn the trial to any date within sixty (60) days after arraignment without regard to the availability of excluded time;

(b) It may adjourn the trial to any date within sixty (60) days after arraignment, exclusive of excluded time recorded under h(1)-h(7); or

(c) It may adjourn the trial to a date beyond sixty (60) days after arraignment, exclusive of excluded time, by granting an h(8) continuance and making the findings prescribed by that section. *See* III *infra.*

To insure the accomplishment of the goal of accommodating the interests of speedy disposition of the charges with reasonable requests by counsel for adjournments, whenever the time between arraignment and the scheduled trial date does not exceed thirty (30) days, the Court shall (a) view a request for an adjournment of trial to a date beyond thirty (30) days but within the sixty (60) day limit, liberally and (b) where such a request is denied, set forth its reasons for finding that the denial of the adjournment does not interfere with the defendant's or Government's choice

of counsel, or the parties' ability to prepare for trial without undue pressure.

To insure compliance with the Act, the following procedures are suggested beginning with arrest:

I.

SCHEDULING OF PROCEEDINGS

A. Arrest-Indictment or Information Interval

1. This section deals with defining and determining the date of arrest on a complaint filed in this district for the thirty (30) day arrest-indictment or information interval. The following situations recur:

(a) there is an arrest in this district on the complaint; the "arrest" is the date of the actual arrest;

(b) the defendant is arrested in another district; the "arrest" is again the date of actual arrest. However, the time between that arrest and the defendant's appearance (or arrival) in this district is automatically excluded from the arrest-indictment or information interval, as a proceeding relating to removal from another district. The Government attorney is directed to obtain promptly the defendant's presence in this district by way of removal. *See* II(F) *infra*;

(c) the defendant is not actually arrested because he is in the custody of a local or federal penal institution (on other charges); the Government attorney may either produce the prisoner, or file an arrest warrant issued on the complaint as a detainer. Of course, where the Government attorney chooses to file a detainer he must comply with the applicable provisions of § 3161(j) of the Act. In either case, the defendant has not been arrested within the meaning of the ar-

rest-indictment or information interval until he appears before a federal judicial officer in his district for presentment on the complaint; or

(d) there is warrantless arrest by federal law enforcement officers in this district who thereafter, promptly, turn the defendant over to local law enforcement authorities, and no complaint charging the defendant with a federal crime is filed in this district. In such situations, no "arrest" has taken place within the meaning of the arrest-indictment or information interval.

2. At the time of the earliest appearance before a federal judicial officer of a person who has been arrested for an offense not charged in an indictment or information, the judicial officer shall establish for the record the date on which the arrest took place.

Comment

See "Proceedings Relating to Removal or Transfer from Other Districts", II(F) *infra*.

B. Arraignment

1. *Definition*

An arraignment shall be considered to take place on the date of the defendant's appearance before a federal judicial officer in this district with counsel who has filed a notice of appearance or his designee, or in the event the defendant expressly waives counsel and elects to proceed *pro se*, without counsel, and a plea to an indictment or information is entered.

2. *Time Within Which Arraignment Must be Held*

A defendant shall be arraigned within ten (10) days of the latest of the following dates: (a) The date on which

an indictment or information is filed; (b) The date on which a sealed indictment or information is unsealed; or (c) Where a defendant has been arrested on an indictment or information, the date of the defendant's initial appearance before a federal judicial officer in this district. In the event a defendant consents to a transfer pursuant to Rule 20, Fed. R. Crim. P., the date on which the transferee district receives the papers, shall be deemed the date of the filing of the indictment.

COMMENT

(a) The arraignment-trial interval should not commence until the defendant is in a position to prepare for trial. Therefore, arraignment as defined above does not take place until the defendant is present in court with counsel who plans to represent him (or such counsel's designee) and a plea is entered. The Court may grant a very brief adjournment of arraignment for counsel and the defendant to decide upon a plea. Should a non-indigent defendant appear without counsel, the Court should take steps to insure that the defendant retains counsel promptly so that the arraignment can be held.

(b) In order to avoid unnecessary confusion, the Court should not order the entry of a not guilty plea where the arraignment as defined in 1 above has not taken place. Cases can be assigned to individual judges without this confusing procedure.

(c) The filing of a notice of appearance binds counsel and the defendant unless counsel is subsequently relieved by the Court.

(d) It should be noted that although the Act requires arraignment within ten (10) days of indictment, there will be occasions when a defendant may need a brief adjournment beyond that period in order to obtain counsel. Since

there are no sanctions for failure to comply with the indictment-arraignment time interval, such an adjournment can and should be granted.

C. MOTIONS AND SETTING OF TRIAL DATE

1. *Bill of Particulars and Informal Discovery*

Within ten (10) days of arraignment, defense counsel and the Government attorney shall confer with regard to discovery and a bill of particulars and seek to resolve promptly on an informal basis all such matters. Within five (5) days of such conference, the Government attorney shall furnish defense counsel with the bill of particulars and the discovery he or she has agreed to provide or, if the material is not then in his or her possession, shall inform defense counsel when such material will be available. Within ten (10) days of such conference, defense counsel shall serve upon the Government and file with the judge to whom the case has been assigned:

(a) a listing of all material which the Government has agreed to furnish, but has not yet provided, together with a schedule of the dates the Government has indicated the material will become available; and

(b) a statement of all remaining bill of particulars and discovery matters which the parties could not resolve.

2. *Pre-Trial Conference*

Unless the Court determines that it can resolve all the matters listed below prior to the thirtieth day after arraignment without a formal pre-trial conference, the Court, following completion of informal discovery, as described in paragraph 1 above, but no later than thirty (30) days after arraignment, shall hold a pre-trial conference at which the Court shall:

58-721 O - 80 - 21

(a) resolve any disputed discovery matters and set a date for the completion of discovery which, absent unusual problems, shall be within five (5) days of the pre-trial conference;

(b) to the maximum extent feasible, dispose of all other motions without the filing of papers, or, in the event the Court determines that the proper resolution of a particular motion requires the filing of written papers, set a schedule for the filing of motion papers and for oral argument, if desired by the Court, as provided in paragraph 3(b) below;

(c) where the Court determines that an evidentiary hearing is required, set the date for any such hearing, as provided in paragraph 4 below; and

(d) fix a trial date, as provided in paragraph 5 below.

3. *Time for Making Motions—Excluded Time*

(a)(i) In the case of a motion which the Court has determined requires the filing of papers, unless the Court, for good cause, grants additional time, the motion papers shall be filed within ten (10) days after the Court has made its determination, opposing papers shall be filed within ten (10) days and reply papers, if any, shall be filed within three (3) days thereafter. If the Court desires oral argument or post-argument submissions, oral argument shall be held at such time as the Court directs, but no later than ten (10) days after the date on which reply papers are due, and post-argument submissions, if any, shall be due five (5) days after oral argument.

Where papers are served by mail, the time for filing the response shall be extended an additional three (3) days.

(ii) Except by leave of Court, no motion other than those described above shall be made. However, leave shall be freely granted where such motion is based upon information obtained through discovery furnished after the pre-trial conference.

(b) With respect to the motions described in paragraph (a)(i), the time beginning with the date the Court determines that papers are required and ending with the date of oral argument (or the due date of any post-argument submission) or, if there is to be no oral argument, the due date of the reply papers, is excluded as a proceeding concerning the defendant under § 3161(h)(1). In the case of motions made with leave of the Court as described in paragraph (a)(ii), the time beginning with the date the Court grants leave for the filing of the motion and ending with the date of oral argument (or the due date of any post-argument submission) or, if there is to be no oral argument, the due date of the reply papers, is also excluded. In addition, with respect to all motions, a period not to exceed thirty (30) days while the Court has any motion under advisement is excluded under § 3161(h)(1)(G).

4. *Motions Requiring a Hearing*

In the event the Court determines that an evidentiary hearing is required, the hearing shall commence as soon as possible after the Court determines that a hearing is required, preferably well in advance of the scheduled trial date. The dates on which the hearing is held, together with a reasonable time period necessary for the making of post-hearing submissions, followed by a period not to exceed thirty (30) days while the Court has the motion under advisement is excluded under §§ 3161(h)(1)(E), h(1) and (h)(1)(G).

5. *Setting a Trial Date*

(a) The Court shall fix a trial date preferably at the pre-trial conference, but in no event later than ten (10) days following the determination of all motions. *See* Preamble (4)(c) *supra*. Moreover, it is suggested that scheduling trials for dates certain constitutes a reasonable way to secure compliance with the Act. Requiring the Government attorney and defense counsel to be ready on weekly or other short term calendars may be unreasonable. Uncertainty of trial dates, including the acceleration of trial dates previously fixed, may frequently lead to situations where the interests of the defendant, the Government, counsel, and the public suffer, and should be avoided.

(b) If the date of trial is to be beyond sixty (60) days of arraignment, the Court shall ascertain whether all counsel agree with the Court's determination that there is either automatically excluded time available or that a proper basis exists for an (h)(8) continuance and that the appropriate findings have been made.

D. Notice of Efforts to Dispose of Charges Without Trial

At least seven (7) days before the date fixed for trial, or earlier if possible, defense counsel shall advise the Court that a conference has been held with the defendant within the prior five (5) days, and with the Government attorney, and that no disposition of the charges appears likely without a trial.

Comment

The purpose of this provision is to encourage the parties to arrange dispositions, where possible, at least a week before trial is scheduled. The provision is not intended to

deter a defendant from changing his mind either with respect to going to trial or entering a guilty plea.

E. Trial

Definitions

a. In a case tried to a jury, the trial shall be deemed to commence on the date the voir dire begins, which is the day the oath is administered to the jury panel. Jury selection shall proceed forthwith and shall be completed as promptly as possible. The opening statements and the taking of testimony shall commence promptly thereafter.

b. In a non-jury case, the trial shall be deemed to commence on the day the case is called, provided that some step in the trial procedure immediately follows.

Comment

The above is not intended to preclude the selection by the Court of several petit juries at the beginning of a month. However, where this is done, the trial shall not be deemed to have commenced until the opening statements have been made or the taking of testimony has commenced.

F. Retrial

1. The provisions of § 3161(h) apply to the period for retrial required by § 3161(e).

2. The sixty (60) day retrial period begins to run on the date:

(a) a mistrial is declared, or

(b) an order granting a new trial becomes final, or

(c) following a successful attack on the original judgment, an order setting aside the original judgment becomes final.

3. Where a defendant is convicted on one or more counts of an indictment or information and a mistrial is declared on one or more remaining counts:

(a) in the event the defendant takes no appeal from his conviction, the sixty (60) day period for any retrial of the remaining counts begins on the last date when the notice of appeal could be filed;

(b) in the event the defendant appeals his conviction, the sixty (60) day period for any retrial of the remaining counts begins on the date that the mandate of the court of appeals is filed with the district court.

4. The Court should take the following steps to insure compliance with the Act:

Upon the declaration of a mistrial, the Court shall immediately ascertain whether the defendant intends to move for dismissal of the indictment, and if he does, the Court shall set up a briefing schedule designed to insure the prompt disposition of the motion to dismiss; the Court shall thereafter promptly ascertain whether either party intends to appeal from the Court's decision and take steps to insure that any such appeal is prosecuted as soon as practicable.

COMMENT

One reading of the Act would preclude applying the provisions of § 3161(h) to the sixty (60) day retrial period. This view finds support in the failure of the Act to provide specifically for the applicability of § 3161(h) to retrials, and in the provision limiting the Court's power to extend the period for retrial to one hundred eighty (180) days. It should also be noted that the Act mysteriously fails to provide sanctions for non-compliance with the retrial provisions. The Committee believes that Congress

could not have intended to prohibit excluding periods of § 3161(h) delay in computing the sixty (60) day retrial limit; moreover, the Committee can think of no logical reason for Congress to do so. For example, it is obvious that exclusions must be taken into account where a defendant cannot be retried as a result of temporary mental incompetency or physical incapacity ((h)(1)(A)), or because he must stand trial on other charges ((h)(1)(C)), or because he is unavailable ((h)(3)). Indeed, the Committee believes that it can be fairly argued that § 3161(e) is simply the product of Congress' intent to make it clear that retrials, like initial trials, are also subject to the sixty (60) day statutory limit—lest it be thought that the Act did not apply to retrials. Moreover, it appears logical that the one hundred eighty (180) day provision embodies Congress' recognition that a retrial—which might occur years after the initial trial—may require an extension of the statutory sixty (60) day limit, to one hundred eighty (180) days. It would only frustrate this latter purpose to read the Act to proscribe the use of excluded time in determining the latest date on which retrial must commence.

G. WITHDRAWAL OF PLEA

1. Where a defendant pleads guilty to any or all counts in an indictment or information, in the event the defendant is permitted to withdraw his guilty plea, the sixty (60) day period for trial on the *entire* indictment will commence on the date the order permitting the withdrawal of the plea becomes final.

2. Where a defendant pleads guilty to any or all counts in an indictment or information, and preserves an issue on appeal with the consent of the Government attorney, in the event the conviction is reversed on appeal, the sixty (60) day period for trial on the *entire* indictment will com-

mence on the date the order setting aside the original judgment becomes final.

COMMENT

It is important that where a defendant pleads guilty to less than all counts, the "open counts" not be dismissed prior to sentence so that in the event of a plea withdrawal, the Government is not prejudiced by statute of limitations problems or time wasted in order to represent a case to a grand jury.

II.

AUTOMATICALLY EXCLUDED PERIODS OF DELAY UNDER SECTION 3161(h)(1)-(h)(7)

A. EXAMINATIONS AND HEARINGS ON DEFENDANT'S MENTAL COMPETENCY OR PHYSICAL INCAPACITY (Section (h)(1)(A))

1. Where the Court orders an examination of the defendant's physical and mental competency to stand trial, the Court shall order an early examination and a prompt report of examination, and the Court shall hold a hearing —where deemed necessary—within ten (10) days of the receipt of a report, and render a decision as soon as possible.

2. *Starting Date.* Date of the Court's order for the examination.

3. *Ending Date.* Date on which the Court receives the report of examination, or the last date of any hearing, whichever is later. (Additional excluded time is available to cover a reasonable time period necessary for the making of post-hearing submissions and the time during which the

issue of competency or incapacity is under advisement. §§ 3161(h)(1) and (h)(1)(G).)

COMMENT

See II(J) *infra.*

B. EXAMINATION OF THE DEFENDANT PURSUANT TO 28 U.S.C. SECTION 2902 (Section (h)(1)(B))

1. Where the defendant elects to submit to an examination pursuant to 28 U.S.C. § 2902, the Court shall order an early examination and a prompt report of examination, and the Court shall hold a hearing—where deemed necessary—within ten (10) days of the receipt of a report, and render a decision as soon as possible.

2. *Starting Date.* Date the Court advises the defendant that he may elect to submit to an examination under 28 U.S.C. § 2902.

3. *Ending Date.* Date on which the defendant advises the Court that he does not elect to undergo an examination under 28 U.S.C. § 2902; or where the defendant elects to submit to such an examination, the date the Court receives the report of examination, or the last day of any hearing, whichever is later. (Additional excluded time is available to cover a reasonable time period necessary for the making of post-hearing submissions and the time during which the issue of whether the defendant should be civilly committed is under advisement. §§ 3161(h)(1) and (h)(1)(G).)

COMMENT

See II(K) *infra.*

Under the provisions of 28 U.S.C. § 2902 the defendant has a maximum of five (5) days within which to make his election.

C. Trials with Respect to Other Charges Against the Defendant (Section (h)(1)(C))

1. "Other charges" includes any pending state and federal charges as well as any counts severed from the indictment or information pending before the Court.

2. This exclusion covers not only the actual trial of the defendant on other charges, but also (under the catchall phrase "proceedings" in (h)(1)) reasonable time required for pretrial motions and trial preparation for the other charges.

3. The Court shall order both the Government and defense counsel to keep the Court apprised on a periodic basis of the status of the other charges against the defendant.

4. The Court should schedule trials in a way that accommodates the purposes of the Act and the interests of the defendant and the public in resolving the other charges. Factors that should be considered are:

(a) Which charges were filed first;

(b) Which charges are more serious;

(c) Which trial was scheduled first;

(d) Whether there are co-defendants in the instant case or in the other case;

(e) The expected length of each trial; and

(f) Whether the defendant is in custody on the charge in this district.

5. Because of the variety of situations that may arise under this exclusion, starting and ending dates cannot be specified; instead it is anticipated that these dates will be determined by the Court on a case-by case basis, and ap-

propriate entries will be made on the clerk's record of excluded time.

Comment

Paragraph 1 above includes the situation where on motion of the defendant or the Government the Court has severed counts from the trial of the indictment or information. Trial on the severed counts will obviously have to await, and follow, trial on the remaining counts—which are now "other charges" vis a vis the severed counts. After the granting of the severance, the clerk should record excluded time and continuances separately for the severed counts. Continuances under (h)(8) can, where appropriate, be granted to further delay trial of the severed counts until after any appeals from or conviction on the remaining counts are completed. Such a continuance may be warranted where, for example, the Government represents that it will dismiss the severed charges if the conviction is affirmed; or where it becomes apparent during the course of the trial that a severance requested by the defendant was unnecessary and improper, and the Government wants to try the severed counts together with any counts that may be reversed on appeal.

Paragraph 4 above addresses the situation where more serious charges, such as homicide, are pending and it is in the interest of the public to dispose of them first. There may even be times where the final disposition of the other charges will lead to a disposition in this district without a trial.

D. Interlocutory Appeals (Section (h)(1)(D))

1. This exclusion applies to appeals taken by the United States under 18 U.S.C. § 3731, to similar appeals under 18 U.S.C. § 2518(10)(b), and to appeals taken under 28

U.S.C. § 1291 and 18 U.S.C. § 3147(b). It also applies to applications for extraordinary writs (which can also be excluded under § 3161(h)(1), and/or under § 3161(h)(8)).

2. *Starting Date.* Date the notice of appeal is filed in the district court, or the date the application for an extraordinary writ is filed with the court of appeals.

3. *Ending Date.* Date the mandate of the court of appeals is filed in the district court, or twenty-one (21) days following the decision of the appellate court, whichever is later.

COMMENT

There are times where an appeal is taken on the day a trial is scheduled to begin and where there is no remaining time under the Act. To require the parties to be prepared to begin trial immediately upon the filing of the mandate is unreasonable, that being a date unknown. To alleviate this problem, the Committee has suggested that twenty-one (21) days is automatically excluded following the decision of the court of appeals. It is further suggested that the Court fix a new trial date no fewer than twenty-one (21) days following the decision of the appellate court.

E. HEARINGS ON PRETRIAL MOTIONS
(Section (h)(1)(E))

See "Motions Requiring a Hearing", I(C)(4) *supra.*

F. PROCEEDINGS RELATING TO REMOVAL OR TRANSFER FROM OTHER DISTRICTS
(Section (h)(1)(F))

1. *Pre-Indictment or Information*

Where no indictment or information is pending, the time between the defendant's arrest in another district on a

complaint from this district and his appearance (or arrival) in this district is excluded from the arrest-indictment or information interval. Where there has been an unreasonable delay in the production of a defendant in custody, the period of delay found by the Court to be unreasonable shall not be excluded. *See* I(A) *supra.*

2. *Post-Indictment or Information*

Where the defendant is arrested in another district upon an indictment or information from this district, he is not "arraigned" under the Act, so that the arraignment-trial interval has not commenced. *See* I(B) *supra.*

3. *Prompt Removal*

(a) After the defendant's arrest in another district on a complaint, indictment or information from this district, the Government attorney should diligently proceed to obtain his person in this district by way of removal.

(b) Where a warrant of removal has issued outside this district ordering the defendant's removal to this district, the United States Marshal for this district is directed to arrange for the defendant's prompt removal to this district and should institute procedures to insure that he is immediately informed by all other districts when such warrants are issued.

4. *Defendant in Custody on Other Charges*

When at the time of indictment in this district the defendant is in the custody of a local or federal penal institution (on other charges), the Government attorney may either produce the prisoner in this district for arraignment, or file an arrest warrant issued on the indictment as a detainer. Where the Government attorney chooses to file a detainer he must also comply with the provisions of

§ 3161(j) of the Act. In either case, the defendant has not been arraigned within the meaning of the arraignment-trial interval until his appearance before a federal judicial officer in this district as described in I(B)(1) *supra*.

5. *Rule 20*

The time from the date on which the defendant consents to a Rule 20 transfer and up until the date when the case is actually docketed in the transferee district, is automatically excluded.

6. *Change of Venue*

Time periods which are reasonably necessary under all the circumstances for both parties are excludable from the arraignment-trial interval.

COMMENT

The Committee believes that "proceedings relating to transfer from other districts" encompasses the entire time from arrest in the other district until the defendant appears before a federal judicial officer in this district. There are several important reasons for excluding this period during the arrest-indictment interval. For example, once the defendant is present with counsel in this district he may enter into plea negotiations with the Government which result in disposition of the charges by a plea to an information. A requirement that the Government indict while the defendant is out of the district would result in wasted resources. In addition, under recently promulgated Department of Justice Grand Jury Guidelines, the Government attorney will often want to provide a defendant with an opportunity to appear before the grand jury, which cannot be done during removal proceedings. Furthermore, the grand jury may seek to subpoena the defendant to give testimony, or

furnish documents, or provide non-testimonial evidence—handwriting, major-case fingerprints, etc., all of which cannot take place in the midst of removal proceedings. Such situations may also be covered by § 3161(h)(3). *See* II(I) *infra*.

G. PROCEEDINGS UNDER ADVISEMENT
(Section (h)(1)(G))

1. *Starting Date.* *See* I(C)(3)(b) & (4) *supra*.

2. *Ending Date.* The earliest of (a) the date the judge's decision is filed; (b) the date the judge renders the decision orally in open court; or (c) the expiration of the thirty (30) day maximum period.

COMMENT

A maximum of thirty (30) days is available unless the Court finds an h(8) continuance appropriate.

H. DEFERRED PROSECUTION
(Section (h)(2))

1. This exclusion covers cases in which prosecution is deferred pursuant to a written agreement between the Government attorney and the defendant, with the approval of the Court, for the purpose of allowing the defendant to demonstrate his good conduct.

2. *Starting Date.* Date of court approval of the deferral agreement.

3. *Ending Date.* Date of dismissal of the case pursuant to the deferral agreement, or date of receipt by the Court of a copy of the Government attorney's notice to the defendant of the Government's intention to resume prosecution:

(a) Where the Government attorney receives information from the Probation Department or other sources which warrants considering the defendant's removal from the deferred prosecution program, the Government attorney shall act promptly in making a decision.

(b) The Government attorney shall communicate the decision to resume prosecution to the defendant and the Court immediately.

I. Absence or Unavailability of Defendant or Essential Witness (Section (h)(3))

1. This exclusion applies to the following situations:

(a) The whereabouts of a defendant or essential Government witness are *unknown* and either (i) he is attempting to avoid apprehension or (ii) his whereabouts cannot be determined by due diligence.

(b) The whereabouts of a defendant or essential Government witness are *known,* but either (i) he is resisting appearing at or being returned for trial or (ii) his presence cannot be obtained by due diligence.

The first of these situations is referred to as "absence", the second as "unavailability". Absence or unavailability of a defense witness is not covered by this category, but under § 3161(h)(8).

2. *Starting Date*

(a) Absence (whereabouts unknown): The date on which a defendant or essential Government witness fails to make a required appearance, if it should ultimately be determined that he was attempting to avoid apprehension or prosecu-

tion or that his whereabouts could not be determined by due diligence on the part of the Government. Alternatively, if earlier, the date on which the Court receives notice that the whereabouts of the defendant or witness are unknown.

(b) Unavailability (whereabouts known): The date for which an appearance was scheduled at which the defendant or essential Government witness was to appear.

3. *Ending Date*

(a) Absence (whereabouts unknown): The date the prosecutor receives notice of the whereabouts of the defendant or witness.

(b) Unavailability (whereabouts known): The date preceding the date on which the defendant or witness could have been produced in Court by the Government.

Comment

Whether a witness is "essential" will require a judicial determination in each case in which this exclusion is claimed on the basis of absence or unavailability of a witness. Periods of unavailability may be quite short, as where a witness has become ill or a Government chemist is unavailable on a particular day because of an obligation to testify in another trial.

This exclusion applies only to the days on which the defendant or witness is actually absent or unavailable. Sometimes the starting date of a trial will have to be postponed because of the anticipated unavailability of a witness. Those days on which the witness is actually unavailable will be excluded under (h)(3). Any additional time will require the use of an (h)(8) continuance.

Section 3161(h)(3) should not be used to govern the absence or unavailability of a defense witness due to the

58-721 O - 80 - 22

anomaly that would be created under § 3162(a)(2). Instead, § 3161(h)(8) should be used to cover the period of delay caused by the absent or unavailable defense witness.

J. Period of Mental Incompetency or Physical Inability to Stand Trial (Section (h)(4))

1. *Starting Date.* The date of the Court's determination of the existence of mental incompetency or physical inability to stand trial.

2. *Ending Date.* The day the Court determines the defendant is mentally competent or physically able to stand trial.

K. Period Defendant is Civilly Committed for Treatment Pursuant to 28 U.S.C. Section 2902 (Section (h)(5))

1. This exclusion covers cases in which prosecution is held in abeyance for the purpose of allowing the defendant who is an addict to be rehabilitated through civil treatment as provided under the Narcotics Addict Rehabilitation Act, 28 U.S.C. § 2902.

2. *Starting Date.* Date the Court determines to civilly commit the defendant to the custody of the Surgeon General for treatment.

3. *Ending Date.* Date the Court dismisses the case after receiving a certification from the Surgeon General that the defendant has successfully completed the treatment program, or the date the Court terminates the defendant's commitment and orders the resumption of the pending criminal proceeding.

L. Subsequent Charges (Section (h)(6))

1. If, after an indictment or information has been filed, a complaint, indictment or information ("subsequent charge") is filed which includes the same offense or any offense required to be joined with that offense ("originally charged offenses"), the time limits (indictment or information-arraignment-trial) applicable to the originally charged offenses will be determined as follows:

(a) If the original indictment or information was dismissed on motion of the defendant before the filing of the subsequent charge, all the time limits shall be computed without regard to the existence of the original charge. (§ 3161(d)).

(b) If at the time the subsequent charge is filed, the original indictment or information has been dismissed on the motion of the Government attorney:

(i) the time within which the subsequent charge must be filed and the time within which an arraignment on the subsequent charge must be held shall be computed without regard to the existence of the original charge; and

(ii) the trial of the originally charged offenses included in the subsequent charge shall commence within the time limit for commencement of trial on the original indictment or information, but the period during which the defendant was not under charges shall be excluded from the computations. As indicated in (i) above, such period is the period between the dismissal of the original indictment or information and until the date of the arraignment on the subsequent charge which arraignment must

be held without regard to the existence of the original charge.

(c) If the original indictment or information is pending at the time the subsequent charge is filed, (at that time) the statutory period for the trial of the original indictment or information ceases to run until the arraignment on the subsequent charge is held. The time within which arraignment on the subsequent charge must be held shall be computed without regard to the existence of the original indictment or information. The trial of the originally charged offenses included in the subsequent charge shall commence within the time limit for commencement of trial on the original indictment or information.

2. If after a complaint has been filed, it is dismissed (on motion of the Government attorney, the defendant or the Court) or (for whatever reason) is otherwise dropped, and thereafter a complaint, indictment or information is filed which charges the defendant with the same offense, or an offense based on the same conduct, or arising from the same criminal episode, all time limits (arrest—indictment or information—arraignment—trial) applicable to the subsequent charge, shall be computed without regard to the existence of the original charge. (§ 3161(d)).

COMMENT

In connection with 1(b) above, assume that on April 1st the Government attorney moves to dismiss an indictment because an essential witness has disappeared after fifty-five (55) days of non-excluded time has run in the arraignment—trial interval. On July 1st, the witness is found and the Government attorney arrests the defendant on a complaint. The Government attorney has until July 31st, that

is, the full statutory period to obtain an indictment. In addition, the full statutory period for arraignment as defined above in I(B) is available. Only when the defendant has been arraigned on the new indictment or information will the clock on the "arraignment—trial" interval begin to run, shortened, however, by the period of non-excluded "arraignment—trial" time used up on the original indictment or information. Thus, in the hypothetical above, following the arraignment on the new indictment or information, there is only five (5) days of non-excluded "arraignment—trial" interval time left. This, of course, would not preclude the use of excluded periods under (h)(1)-(7) or an (h)(8) continuance.

In connection with 1(c) above, assume that after fifty-five (55) days of non-excluded time has run in the arraignment-trial interval and while the first indictment is still pending, a superseding indictment is handed up containing the same charges as well as new ones. Under guideline 1(c) above, the clock stops running until the arraignment on the new indictment has taken place. This is a result required by both practical considerations and a fair reading of the statute. If this period were not excluded, then the trial on the original charges would have to go forward while the trial on the new counts would have to be delayed if the arraignment has not taken place. This would call for wholly unnecessary duplication of efforts. Moreover, since under the statute, the Government attorney could obtain the same result by dismissing the original indictment prior to the running of the statutory period, it makes little sense to read the statute in such a way so as to require this step. Thus, in this hypothetical, following the arraignment on the superseding indictment, there are only five (5) days of non-excluded "arraignment—trial" interval time left for trial of those offenses in the superseding in-

dictment that are contained in the original indictment. If the Government wishes to try all counts of the superseding indictment together, which is presumably the case, it will have to be prepared to try the entire indictment five (5) days after arraignment if no (h)(8) continuance is granted.

It should be noted that 1 above, using the language of § 3161(h)(6), applies to the same offense "or any offense required to be joined with that offense." The latter phrase is troublesome. The Double Jeopardy Clause of the Constitution is the only legal principle which can be said to require criminal offenses to be "joined" with one another. While the Department of Justice has a policy that all charges arising out of the same transaction which are known to the Government, should be disposed of in one indictment, such charges are not required by any law to be filed simultaneously. Moreover, when the Government first learns of the other potential charges after the first indictment is filed, the new charges could not have been filed in the original indictment. Furthermore, while the Government may be prepared for trial, the defendant *may* need additional time during which to prepare for trial on the new charges. In sum, where a superseding indictment is filed containing the original charge and adding new charges, the new charges are not "offenses required to be joined with that offense" under (h)(6), and thus the indictment—arraignment, and arraignment—trial intervals on those new charges are not affected by the original indictment. However, because it is obviously in the interests of the public, the defendant and the Government to dispose of all the charges in one trial, the Court should, where necessary, grant an (h)(8) continuance for trial of the original charges so that all the charges can be tried together. Similarly, where after the filing of an indictment, the Government makes the tactical decision to supersede

and add new charges that do not arise out of the same transaction—*e.g.*, additional bank robberies committed by one defendant—regardless of whether the Government was aware of those charges when the first indictment was filed, the new charges are not "offenses required to be joined with that offense." The Court should, where necessary, grant an (h)(8) continuance so that there is only one trial of all properly joined charges. It is noted that often, before the filing of a superseding indictment, the defendant is advised by the Government attorney that the Government will offer evidence of other charges at trial, and full discovery is conducted with respect to such other charges. Where these other charges are incorporated in a superseding indictment, the Court may wish to adhere to the originally scheduled trial date, after finding that under the circumstances, neither party needs any additional time to prepare for trial on the superseding indictment. Nothing in these comments precludes such action by the Court.

In connection with 2 above, § 3161(d) clearly makes the existence of the complaint that was dismissed totally irrelevant to the computations of all time limits on the subsequently filed charges. *Cf. United States* v. *Hillegas*, 578 F.2d 453 (2d Cir. 1978).

M. Reasonable Period When Defendant Joined for Trial With Co-Defendant for Whom Time Has Not Run (Section (h)(7))

1. The Court shall, as early as practicable, but no later than the day before the last day for commencement of trial for the particular defendant, determine what reasonable period of delay should be afforded so that the defendant can be tried with his co-defendant(s). In making that determination, the Court should consider the following factors:

(a) the length of the expected delay;

(b) in the case of the absent or unavailable co-defendant, the likelihood that the Government can determine his whereabouts or obtain his presence within a known time period; and

(c) the expected length of trial.

2. *Starting Date.* The day following the day that would otherwise have been the last day for commencement of trial for the particular defendant.

3. *Ending Date.* Day on which trial starts or day on which severance is granted. (The Court should consider granting an h(8) continuance to give the parties time to prepare from the date on which the severance is granted.)

COMMENT

Examples of situations where the time for trial of a co-defendant has not run:

(a) Co-defendant's proceedings are lengthier, because his motions are more complex, he undergoes a mental examination, or he takes an interlocutory appeal;

(b) Co-defendant is absent or unavailable.

III.

CONTINUANCES SERVING THE ENDS OF JUSTICE UNDER SECTION 3161(h)(8)

A. WHEN "ENDS OF JUSTICE" CONTINUANCES MAY NOT BE EMPLOYED

1. Section 3161(h)(8)(C) provides that a continuance under this provision may not be granted in three instances:

(a) general congestion of the Court's calendar; (b) lack of diligent preparation on the part of the attorney for the Government; and (c) failure on the part of the attorney for the Government to obtain an available witness. Any other circumstances or combination of circumstances may provide a basis for a continuance.

COMMENT

(a) A continuance because of general congestion of the Court's calendar would have undercut Congress' desire that the federal district courts undertake to plan their work to achieve the statute's speedy trial timetable.

(b) The meaning of "lack of diligent preparation" raises a host of problems. Neither the statute nor the legislative history appear to provide a definition or guidance as to the meaning of the term. Moreover, the statute refers to lack of diligent preparation on the part of the "attorney for the Government". What if the delay is not caused by the attorney but by others in the prosecutorial system over whom the Government attorney has no direct or even indirect control, for example, the investigative agency? Surely, the Congress did not intend that the investigative agencies should not comply with the time limits of the statute. Yet if the term "lack of diligent preparation" is extended to cover the actions of other than the Government attorney, the difficulty of defining "lack of diligent preparation" will be incommensurably more difficult. The courts will have to determine whether laboratory tests should have been completed by the Federal Bureau of Investigation or the Drug Enforcement Administration within the requisite period or whether the tax returns of the defendant or a witness could have been obtained more promptly. It is suggested that "lack of diligent preparation" must be made applicable to all facets of the prosecution, but to

avoid the necessity of the Court's becoming involved in the day-to-day operations of investigative agencies, the term "lack of diligent preparation" should normally be defined to include only those mistakes, errors, inefficiencies which clearly are unjustifiable.

(c) When a witness is available is inferentially defined in (h)(3)(B). *See* II(I) *supra*.

B. When "Ends of Justice" Continuances May be Employed

1. Except in the three situations specifically mentioned in (h)(8)(C), any other circumstances or combination of circumstances may afford the basis for an "ends of justice" continuance provided the Court sets forth why these circumstances outweigh the interests of either the public or the defendant in a speedy trial. Subsection (h)(8)(B) sets forth three factors for the Court to consider in making its ruling. The first is a general guideline while the second and third address the more specific problem of complex cases and investigations. Subsection (h)(8)(B) makes clear that the Court is not limited to these three factors.

Moreover, an (h)(8) continuance is available during the two major intervals: arrest-indictment or information, and arraignment-trial.

2. Whether viewed as a circumstance "likely to make a continuation of [the] proceeding imposible" under (h)(8)(B)(i) or as a separate factor, it is suggested that the "ends of justice" almost always outweigh the speedy trial interests in the following circumstances:

(a) emergencies such as:

(i) natural disasters including blizzards, hurricanes and other extraordinary weather conditions;

(ii) blackouts;

(iii) public transportation or other strikes which substantially affect the Court's ability to operate or the ability of the party to prepare for or proceed to trial; and

(iv) illness or death of defense counsel, the prosecutor or the judge as well as mourning periods observed by the parties, counsel or the Court; and

(b) a defendant's corporation.

Comment

(a) The continuance need not be limited to only the actual period of the emergency; it may well be of such a nature or duration that it has collateral effects which make a trial immediately upon the termination of the actual period of the emergency impossible. In that event, the case must be rescheduled at some future date and the entire period should fall within the (h)(8) continuance.

(b) It is evident that a plea agrement or an agreement to terminate the prosecution of a cooperating defendant can often not be made until well after the statutory periods have run. Consequently, an (h)(8) continuance would be most appropriate.

3. Whether viewed as a continuance required to avoid a "miscarriage of justice" under (h)(8)(B)(i) or as a distinct factor, it is suggested that the "ends of justice" require that in all cases—not only in complex cases—the legitimate needs of the Government and especially the defendant for continuity of counsel as well as the defendant's right to counsel of his choice be considered. A reasonable continuance to accommodate these interests should be liberally granted.

COMMENT

The best way to protect a party's right to continuity of and counsel of choice is by fixing a trial date early in the proceedings. Nevertheless, there are occasions where this has been done but, though no one is at fault, the trial date has had to be rescheduled. Often it may be possible to reschedule the trial date within the statutory period, but if this requires that either the Government attorney or defense counsel be charged, the court should consider whether granting an (h)(8) continuance would avoid this unfairness to the parties and waste of resources. Such a continuance to accommodate the interests of the parties in counsel of their choice must be of reasonable duration or the statutory purpose will be subverted. In other words, the engagement of either a Government attorney or defense counsel in other proceedings cannot be a justification for unreasonably extended continuances.

4. Prevention of a "miscarriage of justice" may require granting an (h)(8) continuance even in a non-complex case where either the Government attorney or defense counsel can demonstrate due diligence in all available time, but nevertheless still require additional time for preparation.

COMMENT

Congress has made the judgment that most cases can be prepared and ready for trial within sixty (60) days. Unless the case is a complex one, the sixty (60) days should be sufficient. However, even in non-complex cases, circumstances may arise justifying delaying the trial beyond the statutory period. Examples are: (1) the attempt to locate an important witness whom defense counsel has been diligently seeking but has not been able to locate and (2) belated discovery motions or notice of alibi defense which require additional time to investigate or expert analysis.

It should also be noted that the Government is required diligently to prepare a case for trial. However, there are circumstances where even though the Government has diligently prepared during the available time period, that trial should not reasonably commence within the time period mandated by the Act. An (h)(8) continuance is available to cover such situations. An example is a case in which discovery consumes most of the time that is not automatically excluded under the Act. This can occur in some routine cases as well as in complex cases. The Government (and the defense) should not be forced to trial when they have not had a reasonable opportunity to prepare.

5. Whether viewed as a complex case under (h)(8)(B)(ii) or as a separate factor, the need for substantial preparation by the Government attorney or defense counsel for the case as a whole or a portion thereof is a compelling basis for utilizing an "ends of justice" continuance to assure that both the defendant and the Government be represented by counsel of choice and by the same attorney throughout the proceedings.

COMMENT

There are times where, at the scheduling of the original trial date or because of the rescheduling of the original trial date, counsel for the Government and/or the defendant are unavailable for either the date chosen by the Court, or the last date on which trial could commence under the Act. Such unavailability may be the result of an actual trial engagement scheduled in either federal district court or a state or local court. Alternatively, there may be inadequate time to prepare for this trial following conclusion of counsel's last trial. Unavailability may even result from a brief vacation planned well in advance of the trial date. In such situations and especially in complex or un-

usual cases, the court should grant a continuance under (h)(8). Among the factors to be considered are: the degree of complexity of the case, the date of counsel's first involvement with the case, the good faith of counsel in trying to avoid conflicting dates, the length of time for which the continuance is sought, the availability of substitue counsel acceptable to the parties and the effect of the continuance on co-defendants.

6. Complex or unusual cases are not defined by the Act. The normal sixty (60) day period for preparation might well be inadequate in antitrust, securities fraud, mail fraud, narcotics conspiracy and net worth income tax cases. But complexity can arise just as much from complex issues in an otherwise simple case, multiple parties or extensive documentary evidence. Consequently, an (h)(8) continuance should be available in any case where there are extensive tapes, records, documents and financial analyses. Moreover, this period should include, for example, a reasonable period for the Government to prepare transcripts of wiretap tapes or reproducing documents for defense counsel. While this work is often done prior to indictment, there will be instances where such extensive preindictment preparation is not possible.

7. When the Court orders the severance of the trial of one or more co-defendants either before trial commences or during trial, then "ends of justice" will generally require that an (h)(8) continuance be granted to postpone trial of the severed defendant(s) to a date after the conclusion of the first trial that affords the Government attorney time to prepare for the second trial. In the event the Court finds that the defendant's rights will be prejudiced by reason of lengthy incarceration, the Government attorney shall either arrange for the separate prompt trial

of the defendant or for the release of the defendant from custody.

8. Under (h)(8)(B)(iii), continuances during the arrest-indictment or information interval are justified not only in complex cases but by events beyond the control of the Court or the Government attorney. Whether viewed as an interpretation of these factors or as independent factors, the existence of the following circumstances among others should justify an (h)(8) continuance during the arrest-indictment or information interval:

(a) the Government's desire to pursue leads furnished by the defense;

(b) a reasonable time needed for the completion of laboratory examinations;

(c) emergencies such as the sickness of the Government attorney;

(d) cooperation by the defendant;

(e) a reasonable period not to exceed sixty (60) days beginning with the defendant's request to be considered for deferred prosecution, while the Government attorney is considering referring that request to the Probation Department, while the Probation Department is determining the eligibility of the defendant for the deferred prosecution program and writes its report, while the Government attorney reviews the report and, until he decides whether to place the defendant on the program; and

(f) the time needed so that the Government attorney can comply with the Grand Jury Guidelines progated by the Department of Justice.

COMMENT

With respect to paragraph (e) above, if a decision is made not to place an as yet unindicted defendant on deferred prosecution, the Government attorney should be granted a reasonable period within which to seek indictment or file an information. [Example: Assume no excluded periods of delay have yet occurred, and the defendant first makes a request for consideration for deferred prosecution twenty (20) days after his arrest. The Government attorney agrees to refer the matter to the Probation Department four (4) days later. The next thirty (30) days are consumed by the Probation Department's investigation. Upon receipt of the report and recommendation of the Probation Department, the Government attorney promptly decides not to place the defendant on deferred prosecution. There would, however, be little arrest-indictment time available in which to indict the defendant. Thus, the Government attorney might well be unable to present the case and, accordingly, the Court should grant a continuance under § 3161(h)(8).]

9. The "ends of justice" may also require an (h)(8) continuance where the failure to indict or start the trial within the statutory period is due to excusable error or neglect. Examples include a miscalculation in the excluded time available, the failure of a clerk to file a dismissal of the complaint although directed by the Government to do so, or the Court's determination that a period of time previously held automatically excluded was incorrect.

10. The "ends of justice" may also require a continuance in such circumstances as:

(a) reasonable vacation periods; and

(b) where a case may be disposed of after other proceedings are concluded: [Examples: (i) pending Supreme Court case determinative of outcome; and (ii) where appellate affirmance of another proceeding involving the defendant will result in the Government's dismissal of this case].

COMMENT

Each of these circumstances is difficult to justify by a strict reading of the statute, especially the first. Nevertheless, it seems equally unjustifiable to make no provision for reasonable vacation periods or wasting resources for what may prove to be a completely unnecessary trial.

C. PROCEDURE FOR GRANTING "ENDS OF JUSTICE" CONTINUANCES

1. Upon application of the Government or the defense or upon its own motion, the Court can grant a continuance under (h)(8) at the time that the facts warranting that continuance become known. The Court does not have to wait until the day that would otherwise have been the last day for commencement of trial (or for indictment) before granting the continuance. Similarly, if a valid request for a continuance is made beyond the last day for commencement of trial (or for indictment or information) which relates to events that took place earlier, the Court may still grant the continuance *nunc pro tunc*. The mere fact that the Court grants a continuance under (h)(8) does not necessarily mean that the Court in scheduling a trial date must utilize all available excluded time.

2. The Court may grant a continuance under (h)(8) for either a specific period of time or a period to be deter-

58-721 O - 80 - 23

mined by reference to an event (such as recovery from illness) not within the control of the Government. If the continuance is to a date not certain, the Court shall require one or both parties to inform the Court promptly when and if the circumstances that justify the continuance no longer exist. In addition, the Court shall require one or both parties to file periodic reports bearing on the continued existence of such circumstances. The Court shall determine the frequency of such reports in the light of the facts of the particul case.

3. In either the arrest-indictment or information or arraignment-trial interval, in appropriate circumstances, counsel when seeking an (h)(8) continuance may request that some or all of the supporting material be considered *ex parte* and *in camera*.

COMMENT

Implicit in the foregoing is a clarification of the definition of "starting" and "ending" dates set forth in the August 4, 1976 Guidelines issued by the Committee on the Administration of the Criminal Law of the Judicial Conference. Those guidelines defined the starting date of an (h)(8) continuance as the "day following the day that would otherwise have been the last day for commencement of trial (or for indictment or arraignment)" and the ending date as the "date to which the trial (or indictment or arraignment) was continued."

This definition is unnecessarily rigid and hard to apply. It also seems to assume that (h)(8) continuances are to be granted only on the eve of trial when all otherwise excluded periods have run out. Nothing in the statute requires such an approach and indeed such an approach would often be unworkable. Thus where, because of the

complexity of the pretrial motions, a judge grants an (h)(8) continuance beyond the normal thirty (30) day period for deciding pretrial motions, the judge may not be able to fix the trial date until he has actually decided the motions and sees the effect of the rulings on the case. Moreover, there may still be substantial unused non-excluded time available. In other words, just as the availability of excluded time does not necessarily require a delay of trial, there is nothing inconsistent with the statutory purpose in reading an (h)(8) continuance as a form of excluded time. This reading permits more rational scheduling of cases and at the same time avoids the necessity of determining at the last minute whether an (h)(8) continuance will be available.

IV.

SANCTIONS
(Section 3162)

1. General Approach—In determining whether a dismissal is warranted for failure to comply with the arrest-indictment or information interval or the arraignment-trial interval, the statute mentions three factors—although the court may consider others—which should be considered in determining whether the dismissal should be with or without prejudice. They are the seriousness of the offense, the facts and circumstances of the case which led to the dismissal, as well as the impact of a reprosecution on the purposes of the Act and on the administration of justice.

2. The foregoing guidelines have generally attempted to construct a liberal interpretation of excluded periods as well as (h)(8) "ends of justice" continuances without creating loopholes. To the extent that the case law that develops confirms this approach, the need for dismissals

without prejudice will be diminished and less justifiable. Presumably, only egregious neglect by the Government will result in no excluded time available or no basis for an (h)(8) continuance. Where those situations occur, a dismissal with prejudice will be called for if the statutory purposes are to be effective. By contrast, if the courts follow a narrow interpretation of what constitutes an excluded period or an (h)(8) continuance, the public's interest in securing the conviction of those guilty of serious crimes must inevitably lead to a broader use of dismissals without prejudice. The approach adopted by these guidelines, it is suggested, is more workable and is in accord with the purposes of the Act.

V.

GENERAL MATTERS APPLICABLE TO AUTOMATICALLY EXCLUDED PERIODS OF DELAY UNDER SECTION 3161(h)(1) THROUGH (h)(7) AND CONTINUANCES UNDER SECTION 3161(h)(8)

1. When computing the total amount of all recorded excluded periods of delay, periods that overlap shall be counted only once.

2. The time excluded for proceedings or hearings is not reduced on account of short interruptions in proceedings or hearings that are essentially continuous. Example: If a hearing commences on a Wednesday and ends the following Tuesday, seven (7) days are excluded even though there were only five (5) days of hearings.

3. For matters relating to time generally, *see* Rule 45, Fed. R. Crim. P.

VI.

REVISION OF GUIDELINES

It is anticipated that these guidelines will be revised from time to time as a result of Court decisions and comments from the bench and bar.

Dated: January 16, 1979

HIGHLIGHTS OF THE SECOND CIRCUIT SPEEDY TRIAL ACT GUIDELINES

Michael M. Martin, Reporter
Speedy Trial Planning Group, S.D.N.Y.

February 16, 1979

On January 16 the Judicial Council of the Second Circuit promulgated Guidelines Under the Speedy Trial Act. The Guidelines had been prepared by a committee chaired by Judge Robert J. Ward of the Southern District. Other members of the committee were: Judge Thomas C. Platt (E.D.N.Y.), Judge T. F. Gilroy Daly (D. Conn.), Hon. Richard Blumenthal (U.S. Att'y, D. Conn.), Hon. David G. Trager (U.S. Att'y, E.D.N.Y.), Shira Neiman, Esq. (Deputy Chief, Crim. Div., U.S. Att'y, S.D.N.Y.), Murray Mogel, Esq. (Chief, Federal Defender Services Unit, N.Y.C.), Charles Stillman, Esq. (defense att'y, N.Y.C.), Patrick Wall (Esq.) (defense att'y, N.Y.C.), Prof. Daniel Freed (Yale), Prof. Michael M. Martin (Reporter, Speedy Trial Planning Group, S.D.N.Y.), and Prof. Maurice McDermott (Reporter, Speedy Trial Planning Group, E.D.N.Y.).

The Judicial Council made it clear that the Guidelines were not to be treated as having force of law nor as being advisory opinions on ~~Speedy Trial issues~~ that might come before the Court of Appeals in the ~~ordinary course~~ of litigation. Nevertheless, the Council recommended that the District Courts use the Guidelines, with their distinguished and experienced authorship, at least as a point of departure in developing procedures that will best accommodate all interests involved in implementation of the Speedy Trial Act.

The purpose of this memorandum is to give a summary statement of the principal provisions of the Guidelines, as well as the rationales behind them, so that they may be utilized most effectively in the Southern District.

I. Premises on Which the Guidelines Were Based

In preparing the Guidelines, Judge Ward's committee was trying to solve four major problems that had become apparent during the transitional stage of implementing the Speedy Trial Act:

1. Lack of flexibility in scheduling. This problem was seen as largely attributable to the narrow interpretations by the Judicial Conference's Committee on Administration of the Criminal Law of the Act's excluded time provisions. The narrow interpretations, which had been followed in the absence of local or circuit rulings, made compliance with the Act's short time limits onerous in many instances. Judge Ward's committee believed that interpretations allowing more flexibility could be framed consistently with the Act's language and purposes.

2. Undue pressure on counsel. The committee was especially concerned that the defendant's right to counsel of his choice not be infringed and that unnecessary changes in attorneys representing either defense or prosecution be avoided. Although experience in the first two years under the Act indicated that compliance with the short time limits could be achieved, there was a consensus that some of the procedures which had been used to achieve that compliance involved undue pressure, as well as other

substantial and unnecessary costs. Specifically, there was a perception especially among defense counsel that preparation of the defense case was being unnecessarily rushed; furthermore, the short time limits being imposed meant frequent changes of counsel on both sides, to the detriment of the defendant's right to counsel of his choice and the efficient operations of prosecutors' offices.

3. Ambiguity in the statutory requirements. The guidelines prepared by the Judicial Conference Committee on the Administration of the Criminal Law and distributed by the Administrative Office did not specifically deal with a number of situations, leading to confusion among courts and clerks. Those guidelines were especially deficient in suggesting criteria for application of the (h)(8) "ends of justice" excluded time provision. A major purpose of Judge Ward's committee was to establish rules for the recurrent excluded time situations and to give guidance for exercise of the court's discretion that would be sufficiently specific to be helpful.

4. Insufficient communication of successful case management techniques. In over two years under the Speedy Trial Act (as well as in the years before), the more than fifty district judges in this circuit have utilized many different ways of managing their criminal cases. The committee believed that it could serve a useful function by suggesting procedures that have proved themselves effective in accommodating the public interest in prompt dispositions, the defendants' interest in fair and orderly proceedings, and the public interest in efficient use of judicial and prosecutorial resources, as well as considering, inter alia, the special concerns of the defense bar and the state courts.

II. Principal Features of the Guidelines

A. Arraignment.

Under the Guidelines arraignment does not take place until the defendant appears before the court and pleads (i.e., ordinarily with counsel). (I.B.1., at 6.) Thus, when a defendant is not present, or appears without counsel, a not guilty plea should not be entered on his behalf. That formality is not necessary in order to assign the case to a judge under Local Calendar Rule 7, and it leads to confusion in keeping the Speedy Trial clocks. The clock for Interval 3 (arraignment-trial) should not be started until the defendant is in a position to prepare for trial. If a defendant appears in Part I without counsel, the presiding judge may adjourn the proceedings to enable the defendant to obtain counsel. The Part I judge may either order the defendant to return to Part I with counsel or may assign the case and direct the defendant to appear with counsel before the assigned judge. In any event, the assigned judge should always ascertain whether a plea has been taken from (and not just entered for) each defendant.

B. Motions.

The Guidelines (I.C., at 7-9) establish a procedure that (a) encourages informal discovery and calls for court intervention only for discovery matters the parties cannot resolve; (b) allows "substantive" motions to await completion of discovery; (c) encourages resolution of substantive motions without papers, but if the court decides that written submissions are necessary runs excluded time from that date; and (d) calls for arguments on motions and evidentiary hearings to be held a

reasonable time before trial. Under this procedure the Part I judge will no longer order "10 days for motions" (which tends to be followed only rarely, anyway), but will order compliance with the Guidelines schedule unless the assigned judge desires other arrangements.

The Guidelines schedule is as follows:

Arraignment--defendant with counsel enters not guilty plea.

Within 10 days of arraignment--counsel confer regarding discovery and bill of particulars.

Within 5 days of conference—Government furnishes bill of particulars, discovery material available, and schedule of when remaining discovery material to be provided.

Within 10 days of conference—defense serves on Government and files with court: (a) list of discovery material promised and schedule for delivery; (b) statement of unresolved discovery and bill of particulars matters.

Within 30 days of arraignment--court holds pretrial conference (unless unnecessary) to: (a) resolve remaining discovery matters; (b) dispose, to maximum extent feasible, of all other motions; (c) schedule filing of papers and hearings, if necessary, of motions requiring written submissions; (d) schedule evidentiary hearings, if necessary; (e) fix a trial date, preferably a reasonable time after any pretrial hearings.

Guidelines I.C.3.-4. (at 9-10) suggest a schedule for motions requiring written submissions and provide excluded time for preparation time (ordinarily not to exceed 10 days for filing the motion), hearings and arraignments, post-hearing submissions, and time under advisement.

C. Trial date.

The Guidelines provide that a trial date should be fixed as early as practicable for a date certain (I.C.5., at 10-11), subject to two principal limitations. First, in order to avoid undue pressure on the defense, with the consequent inefficiencies for the prosecution (e.g., trial preparation

wasted by eve-of-trial pleas), the trial ordinarily ought not be set for less than 30 days after arraignment. (Preamble 4., at 3-4; see I.C.5., at 10.) Second, in order to avoid inefficiencies and the possible appearance of pre-judgment, the trial ordinarily ought not immediately follow pretrial hearings. (I.C.4., at 10.)

D. Notice of efforts to dispose of charges without trial.

In addition to providing for a minimum time period between arraignment and the date fixed for trial, the Guidelines attempt to reduce the number of eve-of-trial guilty pleas by requiring defense counsel to notify the court a week before the scheduled trial date that he has conferred with his client and with the prosecutor within the preceding 5 days and that no disposition appears likely without trial. (I.D., at 11.)

E. Excluded time.

1. Definitions; starting and ending dates. Part I of the Guidelines (at 15-33) generally follows the substance of the guidelines prepared by the Judicial Conference's Committee on the Administration of the Criminal Law, but attempts to restate more precisely the definitions and the starting and ending dates.

2. Expanded excluded time. In certain instances the Ward Committee believed ~~either~~ that the Judicial Conference Committee had taken an unnecessarily ~~narrow~~ view of the statutory excluded time category, or that delays related to the specified categories should be excluded under (h)(1), as "proceedings concerning the defendant," or under (h)(8), as recurring situations in which the "interests of justice" would invariably call for excluding the time from Speedy Trial computations. (See Preamble 2, at 1-2.) As a result, the excluded time available was expanded in the following situations:

(a) Motions (I.C.3.-4., at 9-10): Excluded time runs from date court authorizes filing of written motions through due date of any post-argument submissions.

(b) Physical, mental, NARA exams (II.A.-B., at 15-16): Excluded time runs from date court orders examination through date of hearing and post-hearing submissions.

(c) Trials on other charges (II.C.2., at 17): Excluded time includes reasonable time for pretrial motions and trial preparation related to other charges.

(d) Interlocutory appeals (II.D., at 19): Excluded time applies to extraordinary writs as well as interlocutory appeals. Excluded time ends on later of filing of court of appeals mandate with district court or 21 days following decision by appellate court.

(e) Removals or transfers (II.F.1., at 20): Interval 1 (arrest-indictment/information) does not begin until defendant arrives in this district, unless delay is unreasonable.

(f) Superseding charges (II.L.1.(c), at 27-30): When original charges pending at time superseding charges filed, Interval 3 clock for original charges stops running until arraignment is held on subsequent charges.

3. Time excluded under (h)(8). Part III of the Guidelines (at 33-45) sets out a number of situations in which the court may consider it appropriate to grant a continuance in order to promote "the ends of justice." Attention is called especially to III.B.3. (at 37) and III.B.5. (at 39), which emphasize the importance of continuity of representation on both defense and prosecution sides in the decision to grant (h)(8) continuances.

4. Relation between excluded time and continuances. The Guidelines make it clear that although excluded time is to be recorded as, and in each instance when, it occurs, the court is not required to utilize excluded time in setting a trial date. (Preamble 4., at 3.)

5. Excluded time records. Pursuant to the Guidelines (Preamble 3., at 2), the clerk of the court is developing a procedure to notify the court and counsel on a regular basis of excluded time as recorded and of the last date by which trial must commence under the Act. The Guidelines suggest that the court require counsel to check the excluded time records at each appearance and give prompt notification of any errors or disputes regarding the records. (Preamble 3., at 2-3.)

The University of Chicago Law Review

VOLUME 43 NUMBER 4 SUMMER 1976

The Speedy Trial Act of 1974

Richard S. Frase†

The sixth amendment guarantees all criminal defendants in state[1] and federal courts the right to a speedy and public trial. The right exists to prevent oppressive pretrial detention, to limit the possibility that the defense of the accused will be impaired, and to minimize the anxiety, public scorn and suspicion, and potential "chilling effect" of unresolved charges.[2] The Supreme Court has held that the protection of these interests is so important that the only possible remedy for violation of the right is dismissal of the charges.[3]

The sixth amendment does not, however, specify the period of delay after which a prosecution is no longer "speedy," and the Court has held that the constitutional limit depends entirely on the facts of the particular case.[4] Although fixed time limits would facilitate definition and enforcement of the right, the creation of such rules has been held to be a legislative function.[5] In the absence of such

† Research Associate, Center for Studies in Criminal Justice, The University of Chicago Law School, and Reporter, Speedy Trial Act Planning Group, Northern District of Illinois. The author wishes to thank all members of the Planning Group, and particularly Mr. H. Stuart Cunningham, Clerk of the Court, for their advice and contributions to this paper. The opinions expressed herein, however, are those of the author and do not necessarily reflect the views of the Planning Group or the court.

[1] The speedy trial right is "fundamental" and is thus imposed on the states through the due process clause of the fourteenth amendment. Klopfer v. North Carolina, 386 U.S. 213 (1967).

[2] Barker v. Wingo, 407 U.S. 514, 532 (1972); Klopfer v. North Carolina, 386 U.S. 213, 221-22 (1967).

[3] Strunk v. United States, 412 U.S. 434 (1973).

[4] Barker v. Wingo, 407 U.S. 514, 521-22 (1972).

[5] *Id.* at 523.

legislation, therefore, an appeal is generally required to resolve the issue in a particular case.

An even more serious limitation to the constitutional guarantee is that it fails to protect the public interest in speedy trials, which is distinguishable from, and often in conflict with, the interests of the defendant.[6] Many defendants, it seems, do not want a speedy trial; since the Government carries the burden of proof, the passage of time is more likely to weaken the prosecution's case and strengthen the bargaining position of the defendant.[7] Not surprisingly, therefore, delays in state and federal criminal cases frequently exceed even the broad limits imposed under the sixth amendment.[8]

These delays seriously weaken the effectiveness of the criminal justice system. Not only are convictions lost or "bargained down," as memories fade, witnesses disappear or lose interest, and evidence is lost, but more fundamentally there is a weakening of public respect and cooperation with a system which moves so slowly.[9] Furthermore, even if a defendant is eventually convicted, the sentence imposed may be so removed in time from the offense that the deterrent impact and prospects for rehabilitation are attenuated.[10] If the defendant is unable to provide assurances that he will appear for trial, he must be detained at public expense. If he is released, he may commit further crimes before finally being brought to trial, and there is evidence to suggest that the likelihood of recidivism increases substantially if he is released for more than a few months.[11]

[6] *Id.* at 519. Of course, any delays attributable to the defendant constitute a waiver of his rights under the sixth amendment and are not counted in determining whether a constitutional violation has occurred. *Id.* at 529.

[7] *Id.* at 519, 521. A 1967 study of delay in Chicago criminal courts suggests that the probability of acquittal or conviction on reduced charges increases with increasing age of the case. Banfield & Anderson, *Continuances in the Cook County Criminal Courts*, 35 U. Chi. L. Rev. 259, 287-90 (1968).

[8] In Hedgepeth v. United States, 364 F.2d 684, 686 (D.C. Cir. 1966), it was held that delays exceeding one year would raise a constitutional claim with "prima facie" merit. In 1968, about 25 percent of felony defendants in Cuyahoga County (Cleveland), Ohio took longer than one year from arrest to disposition; 57 percent took more than six months. L. Katz, L. Litwin & R. Bamberger, Justice Is the Crime: Pretrial Delay in Felony Cases app., Table 1 (1972). As of June 30, 1975, 17 percent of all active federal criminal cases without fugitives had been pending for more than one year; 33 percent were over six months old. Administrative Office of the U.S. Courts, 1975 Annual Report of the Director A-70, Table D8B [hereinafter cited as 1975 Annual Report]. Although these statistics do not focus specifically on arrest-to-trial time, they are probably fairly representative of that interval.

[9] In October, 1970, the Harris Poll found that 78 percent of the public believes arrested defendants are not brought to trial quickly enough. M. Hindelang, C. Dunn, A. Aumick & L. Sutton, Sourcebook of Criminal Justice Statistics-1974, at 206, Table 2.73 (1975).

[10] Barker v. Wingo, 407 U.S. 514, 520 (1972).

[11] *See* studies cited note 267 *infra*.

While released he may also threaten the witnesses, tamper with evidence, or flee the jurisdiction of the court.[12]

To protect these important public interests and to clarify the rights of defendants, Congress passed the Speedy Trial Act of 1974.[13] Although the Act is necessarily limited to federal offenses, it embodies two extremely important and innovative concepts which, if they prove workable in the federal context, may be adaptable to state criminal justice systems.[14] The first is the concept of an enforceable public right to speedy trial, independent of the defendant's rights and wishes. Accordingly, the time limits established by the Act begin to run automatically upon arrest or summons, without the need for a "demand" for trial by the defendant;[15] and except for certain enumerated events of excludable delay, the limits may be extended only by court order, in accordance with strict statutory guidelines.[16]

The second major innovation is the extensive program for research and planning required by the Act.[17] The effective date of the prescribed time limits and sanctions is delayed for four years,[18] during which time the courts are to study the problem of delay, recommend changes in the Act or other statutes and procedures, and submit requests for any additional resources needed to achieve speedier trials. The Act also requires the compilation of comprehensive statistics on the criminal justice process in each district, and this data base will be of value to court management and research independent of speedy trial implementation efforts.

The Act is far from a "model" in its present form, however. It contains numerous unresolved policy issues, ambiguities, and draft-

[12] As of June 30, 1975, 58 percent of the federal cases over six months old involved one or more fugitive defendants. 1975 ANNUAL REPORT, *supra* note 9, at A-70, Table D8B.

[13] 18 U.S.C. §§ 3161-74 (Supp. IV, 1974) (tit. I); *id.* §§ 3162-66 (tit. II). All textual citations to statutory material refer to Title 18 of the United States Code. Title I of the Act contains the speedy trial provisions, which apply in all federal districts. Title II provides for the establishment of "pretrial services" agencies in ten "representative" districts to supervise defendants placed on pretrial release, recommend appropriate release conditions, and perform other services designed to maximize the number of defendants released, while minimizing rearrest and failure-to-appear rates. Titles I and II have similar origins and objectives, but their scope and problems of implementation are obviously very different. Due to space limitations, this article focuses on Title I.

[14] Most states already have some sort of statutory or constitutional speedy trial provision, but none contain either of the two features described in the text. *See also* text at notes 150, 259 *infra*.

[15] *See* note 56 *infra*.

[16] *See* text at note 150 *infra*.

[17] *See* text at note 259 *infra*.

[18] The Act provides for certain interim provisions however. *See* text at note 47 & pp. 711-20 *infra*.

ing errors which must be carefully considered and resolved prior to the effective date of the permanent time limits and sanctions. This paper is an attempt to identify, and help to resolve, the major issues and problems.

I. A General Summary of the Act

When the Speedy Trial Act becomes fully effective on July 1, 1979,[19] it will establish a set of three fairly short time limits keyed to the major events in the prosecution of federal criminal cases. (1) If the defendant is arrested on a magistrate's complaint, prior to the filing of an indictment or information in district court, then such filing[20] must take place within 30 days of arrest,[21] subject to certain excludable time periods;[22] (2) the defendant must then be arraigned and enter a plea within 10 days after the indictment;[23] (3) if a plea of not guilty is entered, the trial must commence within 60 days thereafter,[24] subject again to certain exclusions. If a defendant is not arrested or summonsed until after indictment (which frequently occurs in "white collar" and other nonviolent federal offenses), then the 10-day arraignment limit begins to run when the defendant first appears before a judicial officer,[25] after which the same 60-day trial limit applies.

Thus, a defendant arrested prior to indictment, who enters an initial plea of not guilty, has an effective time limit of 100 days from arrest or summons to trial; similarly, defendants arrested or summonsed after indictment have an overall limit of 70 days. These time limits are somewhat shorter than the limits provided under state speedy trial acts, local federal rules, and the recommendations of both national crime commissions;[26] they are also much shorter

[19] Section 3163 ("effective dates") provides that the statutory time limits become effective twelve months after July 1, 1975, but sections 3161(f) and (g) further postpone the effective date of the "permanent" time limits until July 1, 1979. Beginning on July 1, 1976, certain "transitional" time limits (without sanctions) are provided. *See* note 42 *infra*.

[20] The term "indictment" will hereinafter include the filing of a prosecutor's information, unless otherwise indicated.

[21] 18 U.S.C. § 3161(b) (Supp. IV, 1974). If the defendant is served with a summons in lieu of arrest, pursuant to Federal Rule of Criminal Procedure 4, then the 30-day time limit begins to run on the day of service.

[22] *See* text at note 28 *infra*.

[23] 18 U.S.C. § 3161(c) (Supp. IV, 1974).

[24] *Id.* § 3161(c). Failure to move for dismissal prior to trial or the entry of a plea of guilty or nolo contendere constitutes a waiver of the right to dismissal under the Act. *Id.* § 3162(a)(2). If the defendant is permitted to withdraw his plea of guilty or nolo contendere, the 60-day trial limit starts to run anew. *Id.* § 3161(i).

[25] *Id.* § 3161(c).

[26] *See* text and notes at notes 82-84 *infra*.

58-721 O - 80 - 24

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3 OF 5

than average criminal disposition times in many federal districts.[27]

In an effort to temper the harshness of these relatively short time limits, and to provide the courts with some guidance in distinguishing between "good" and "bad" delays, Congress provided a series of exceptions and excludable time periods. The following specified events of "unavoidable" delay are excludable: other proceedings concerning the defendant;[28] deferred prosecution;[29] absence or unavailability of the defendant or an essential witness;[30] periods of mental incompetency,[31] physical inability to stand trial,[32] or treatment under the Narcotic Addict Rehabilitation Act;[33] delay between the dropping of charges by the Government and refiling of the same charges,[34] and a "reasonable period of delay" caused by slower processing of a codefendant.[35] Additional flexibility is provided by a provision permitting the exclusion of any continuance granted after a written finding that "the ends of justice served by the granting of such continuance outweigh the best interests of the public and the defendant in a speedy trial."[36]

The sanction for violation of the statutory time limits, after deduction of excludable periods, is dismissal either with or without prejudice.[37] The dismissal without prejudice alternative thus provides additional flexibility in the administration of the strict time limits, and permits refiling and reprosecution subject only to the applicable statute of limitations.[38] Sanctions for intentional delay and other forms of misconduct by government or defense attorneys are also provided.[39] All sanctions become effective on July 1, 1979.[40]

To avoid large numbers of unjustified dismissals, due to unfore-

[27] *See* text at note 85 *infra*.

[28] 18 U.S.C. § 3161(h)(1) (Supp. IV, 1974). Such "other proceedings" include, but are expressly not limited to, delays resulting from mental competency or physical incapacity hearings; narcotic addict examinations; other trials involving the defendant; interlocutory appeals; hearings on pretrial motions; transfer from other districts; and periods, up to 30 days, during which any such proceedings are "actually under advisement."

[29] 18 U.S.C. § 3161(h)(2) (Supp. IV, 1974).

[30] *Id.* § 3161(h)(3).

[31] *Id.* § 3161(h)(4).

[32] *Id.*

[33] *Id.* § 3161(h)(5).

[34] *Id.* § 3161(h)(6).

[35] *Id.* § 3161(h)(7).

[36] *Id.* § 3161(h)(8).

[37] *Id.* § 3162.

[38] Except for a few offense-specific limits, an indictment or information in noncapital cases must be filed within five years of the offense charged. 18 U.S.C. § 3282 (1970); *cf.* 26 U.S.C. § 6531 (1970) (three- and six-year limits for various tax violations).

[39] 18 U.S.C. § 3162(b) (Supp. IV, 1974); *see* note 196 *infra*.

[40] 18 U.S.C. § 3163(c) (Supp. IV, 1974).

seen crises or the failure of Congress to quickly provide needed additional resources, a district-wide "judicial emergency" exception is provided. Any court which finds that it is unable to comply with the arraignment and trial limits, despite the efficient use of available resources, may apply for a one-year suspension of these limits.[41]

Prior to the effective date of the permanent time limits and sanctions, the Act provides a set of "transitional" time limits which become increasingly shorter each year prior to July 1, 1979.[42] These limits are without sanctions; their purpose is simply to assist the courts in preparing to meet the "permanent" limits. Closely related to this graduated timetable are the elaborate planning procedures established under the Act. In June of 1976 and 1978, each district court is to submit a detailed district plan to the Administrative Office of the United States Courts,[43] containing extensive statistical material on the impact and effectiveness of implementation efforts, general background data on the administration of criminal justice in the district; descriptions of the systems and procedures being used to achieve and study implementation; and requests for statutory amendments, rule changes, and appropriations.[44] The plans are to be developed by a planning group consisting of the principal court and prosecution officials, representatives of the defense bar, and an outside research consultant.[45] Within three months of the filing of the district plans (*i.e.*, by September 30, 1976 and 1978), the Administrative Office is required to make an overall report to Congress, detailing the plans submitted.[46]

In addition to the permanent and transitional time limits, the Act provides a special "interim" trial limit during the period beginning September 29, 1975, and ending June 30, 1979.[47] This 90-day

[41] *Id.* § 3174. The 60-day trial time limit must be replaced by a longer limit of up to [illegible] days, but no substitute arraignment limit is specifically provided. *See* note 206 *infra*.

[42] During the three years prior to July 1, 1979, the indictment limit is 60 days (1976-77), 45 days (1977-78), and 35 days (1978-79). 18 U.S.C. § 3161(f) (Supp. IV, 1974). During the same three-year period, the trial limit is first 180 days, then 120 days, then 80 days. *Id.* § 3161(g). The arraignment limit remains 10 days on and after July 1, 1976, as provided in section 3163(b).

[43] *Id.* § 3165(e). The plan which is due on June 30, 1976, is to govern the disposition of offenses during the period July 1, 1977, through June 30, 1979, although most courts will probably put their 1976 plan into effect starting on July 1, 1976. The plan which is due June 30, 1978, is for the period following July 1, 1979, which is the point at which the permanent time limits and sanctions become applicable.

[44] *Id.* § 3166.

[45] *Id.* § 3168(a). An initial $2,500,000 was authorized to compensate these consultants and pay for supporting staff, facilities and other planning group expenses. *Id.* § 3171.

[46] *Id.* § 3167.

[47] *Id.* § 3164.

limit, which is not keyed to prosecution stages, applies to only two categories of defendants: (1) pretrial detainees and (2) defendants released on bail or recognizance who have been designated as being of "high risk." Special sanctions are provided for each of these two categories: pretrial detainees must be released from custody if, through no fault of their own, trial has not begun within 90 days after the beginning of detention; "high risk" releasees who intentionally cause delay may have their release conditions tightened after 90 days. Given the low pretrial detention rate in most federal districts and certain inherent problems with the "high risk" concept,[48] the interim provisions will apply to a fairly small proportion of defendants.

II. The Legislative History

The Speedy Trial Act was introduced as S. 3936 by Senator Ervin in 1970,[49] and grew out of his strong opposition to the preventive detention provisions of the 1970 District of Columbia Crime Bill.[50] Ervin maintained that preventive detention was both unconstitutional and unworkable, and that speedy trial legislation was its constitutional alternative.[51] S. 3936 contained three titles. Title I, "Speedy Trials," was the predecessor of Title I of the Speedy Trial Act of 1974 and provided for trial within 60 days of arrest or indictment, whichever came later.[52] Title II, which was subsequently dropped from the legislation, provided additional penalties for any crime committed while on release pending trial, appeal, or sentence.[53] Title III, "Pretrial Services Agencies," was the predecessor of Title II of the Speedy Trial Act of 1974. All three titles were intended to deal with the problem of crime committed by bailed defendants, and the trial limits in Title I were derived from the preventive detention proposals for the District of Columbia.[54] This

[48] *See* text and notes at notes 248-58 *infra*.

[49] S. 3936, 91st Cong., 2d Sess. (1970).

[50] The District Court Reform and Criminal Procedure Act of 1970, Pub. L. No. 91-358, § 1 (July 29, 1970); D.C. Code Ann. §§ 23-1321 to -1332 (1973); *see* 116 Cong. Rec. 18,844 (1970) (remarks of Senator Ervin, introducing S. 3936). *See also* Ervin, *Forward: Preventive Detention—a Step Backward for Criminal Justice*, 6 Harv. Civ. Rights-Civ. Lib. L. Rev. 291-94 (1971).

[51] *See* Ervin, *supra* note 50.

[52] S. 3936, 91st Cong., 2d Sess. § 3161(b)(1) (1970).

[53] *Id.* § 3150A (up to three years additional imprisonment, consecutive to the sentence imposed for the offense committed while on release).

[54] S. 3936 provided a four-step, phased implementation process based on the seriousness of the offense and the defendant's pretrial release status. *Id.* § 3163. Ninety days after its effective date the Act was to become applicable to defendants in custody charged with the

early focus on bail crime, together with the 1967 report of the President's Crime Commission[55] and the American Bar Association's 1968 "minimum standards" for speedy trial (*ABA Standards*),[56] inspired the emphasis on "public" speedy trial rights manifested in the Act and throughout its legislative history.

S. 3936 was reintroduced in the Ninety-Second Congress as S. 895, which duplicated all of S. 3936 except for Title II.[57] Hearings on S. 895 resulted in an amended version,[58] which was reintroduced in the Ninety-Third Congress as S. 754.[59] The final Senate amendments were made in March 1974,[60] and in July S. 754 was passed and sent to the House. After hearings by the Subcommittee on

kinds of dangerous or violent offenses covered by preventive detention proposals; defendants held in preventive detention would thus be assured speedy trial priority. After 120 days, the Act would become applicable to released defendants charged with these more serious offenses; other defendants in custody would be covered after 180 days, and other released defendants would be covered eighteen months after the effective date.

The choice of the 60-day time limit was also derived from preventive detention considerations. That was the period of time during which defendants could be preventively detained, and it was also the period of time after which the risk of crime on bail had been found to increase substantially, according to several empirical studies of the problem. *See* H.R. Rep. No. 1508, 93d Cong., 2d Sess. 14 (1974); S. Rep. No. 1021, 93d Cong., 2d Sess. 8 (1974). *See also* studies cited note.267 *infra*.

[55] President's Comm'n on Law Enforcement and Administration of Justice, The Challenge of Crime in a Free Society (1967) [hereinafter cited as The Challenge of Crime]. The Commission noted that delay undermines the law's deterrent effect and, in the case of released defendants, results in lost convictions and potential danger to the public. *Id.* at 155.

[56] ABA Project on Minimum Standards for Criminal Justice, Standards Relating to Speedy Trial (Approved Draft, 1968) [hereinafter cited as ABA Standards]. Standard 1.3 attempts to limit the granting of continuances, and the commentary states that "the need for prompt disposition of criminal cases transcends the desires of the immediate participants in the proceedings." Standard 2.2 provides that the time for trial shall commence to run without demand by the defendant, and the commentary notes that the demand requirement is inconsistent with the public interest in prompt disposition of criminal cases. "[T]he trial of a criminal case should not be unreasonably delayed merely because the defendant does not think that it is in his best interest to seek prompt disposition of the charge."

[57] S. 895, 92d Cong., 2d Sess. (1971).

[58] *Hearings on S. 895 Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary*, 92d Cong., 1st Sess. (1971) [hereinafter cited as *1971 Senate Hearings*]. The amended version was reported to the Judiciary Committee in 1972. S. Rep. No. 1021, 93d Cong., 2d Sess. 4-5 (1974). Significant changes included addition of the interim provisions of section 3164; removal of the original blanket exemption for certain complex cases (antitrust, securities, and tax violations); and addition of special sanctions against government and defense attorneys.

[59] S. 754, 93d Cong., 1st Sess. (1973); *see Hearings on S. 754 Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary*, 93d Cong., 1st Sess. (1973) [hereinafter cited as *1973 Senate Hearings*].

[60] S. Rep. No. 1021, 93d Cong., 2d Sess. 2-3 (1974). The original sanction of dismissal with prejudice was replaced with a provision permitting reprosecution under "exceptional circumstances." Other important changes included further expansion of the planning process and addition of the three statutory guidelines which judges must consider in deciding whether to grant an excludable, "ends of justice" continuance.

Crime of the House Judiciary Committee,[61] Representive Conyers of Michigan introduced H.R. 17409,[62] which substantially duplicated S. 754 with some major exceptions.[63] When the bill was presented before the House, the sponsors of the bill agreed to a change in the dismissal with prejudice sanction which would give the trial judge an option to dismiss either with or without prejudice.[64] The bill was thereupon approved by the House, and Senate confirmation soon followed.[65]

During most of its legislative history, the Act was opposed by the two major agencies responsible for the administration of federal criminal justice. The Justice Department's major objections, which related to the dismissal with prejudice sanction,[66] were eventually withdrawn.[67] The Judicial Conference of the United States opposed the Act on the grounds that rule 50(b)[68] and other judicially-

[61] *Hearings on S. 754, H.R. 7873, H.R. 207, H.R. 658, H.R. 687, H.R. 773 and H.R. 4807 Before the Subcomm. on Crime of the House Comm. of the Judiciary*, 93d Cong., 2d Sess. (1974) [hereinafter cited as *1974 House Hearings*].

[62] H.R. 17409, 93d Cong., 2d Sess. (1974).

[63] The exceptions are as follows: (1) H.R. 17409 contained the judicial emergency provision found in the final version of the Act; (2) The sanction of dismissal with prejudice, removed by the Senate amendments to S. 754, was restored; (3) The separate 10-day limit applicable to the period between indictment and arraignment was added, thus increasing the overall time from indictment to trial under the permanent time limits to 70 days. *See* H.R. REP. No. 1508, 93d Cong., 2d Sess. 9-10 (1974).

[64] 120 CONG. REC. H 12,670-72 (daily ed., Dec. 20, 1974).

[65] *Id.* at S 22,483-89.

[66] *See 1973 Senate Hearings, supra* note 59, at 109-16 (statement of Deputy Att'y Gen. Joseph Sneed). Two years earlier, however, then-Attorney General Rehnquist had stated that the Department did not "categorically oppose" the mandatory dismissal provisions. *1971 Senate Hearings, supra* note 58, at 96.

[67] 120 CONG. REC. S 22,489 (daily ed., Dec. 20, 1974) (letter from Attorney General Saxbe to Chairman Rodino, dated December 13, 1974).

[68] The Committee on Rules of Practice and Procedure of the Judicial Conference of the United States had been working on its own proposals for speedy trial, in the form of proposed amendments to rule 45 of the Federal Rules of Criminal Procedure. In March of 1971, the Committee released two alternate drafts. *1971 Senate Hearings, supra* note 58, at 317-34. Alternate No. 1 was subsequently adopted with little change as rule 50(b). FED. R. CRIM. P. 50(b). Effective October 1, 1972, rule 50(b) provided that each district must adopt a plan for the prompt disposition of criminal cases. Such plans were to include separate limits for the pretrial, trial, and sentencing stages, as well as special provisions for the trial of defendants in custody and dangerous released defendants. Unlike the Speedy Trial Act, however, the plans allowed each court to determine the length of its own limits and the sanctions, if any, to be imposed. Alternate No. 2 was not adopted as part of the Federal Rules, but it apparently formed the basis for the "model" district plan promulgated by the Judicial Conference in August of 1972. Admin. Office of U.S. Courts, Model Plan for the U.S. District Courts for Achieving Prompt Disposition of Criminal Cases, Aug. 10, 1972, *reprinted in 1973 Senate Hearings, supra* note 59, at 217 [hereinafter cited as 1972 Model Plan]; Cohn, Rule 50(b): Response of the District Courts, July 5, 1973 (report prepared for the Criminal Justice System Workshop at Yale Law School), *reprinted in 1973 Senate Hearings, supra* note 59, at 220.

administered remedies[69] were sufficient.[70] This opposition was apparently never withdrawn and remains a matter of some concern since the degree of flexibility inherent in the statutory scheme[71] presupposes a level of judicial support which may be lacking.

III. The Major Problems of Policy and Interpretation

Despite its lengthy legislative history, the Speedy Trial Act contains a large number of ambiguities and unresolved policy issues. In addition to the usual problems created by last-minute revisions and compromises, there are major difficulties in defining excludable time periods, interim provisions, and allowable sanctions. The more fundamental difficulty is whether the structure and length of the permanent time limits represent a realistic and efficient solution to the problem of pretrial delays. Moreover, the Act's elaborate planning procedures may not provide alternative solutions as quickly as Congress hoped.

The discussion which follows attempts to identify the more serious issues—those which go to the heart of the statutory scheme—and to suggest some workable solutions which are consistent with the apparent legislative intent.[72] This intent is to be

[69] At about the time of the Judicial Conference proposals, the Circuit Council of the Second Circuit Court of Appeals had promulgated its own set of detailed and ambitious rules regarding prompt disposition of criminal cases. *Second Circuit Rules Regarding Prompt Disposition of Criminal Cases*, 8 Crim. L. Rptr. 2251 (1971). These rules provided that detained defendants must be released if the Government was not ready for trial within 90 days of detention, and all defendants not tried within six months of arrest were to have their charges dismissed. Many of the same exceptions and exclusions found in the Senate bills and the *ABA Standards* were made applicable to each of these time limits.

[70] *See 1974 House Hearings, supra* note 61, at 176-82 (statement of Rowland Kirks, Director, Administrative Office of U.S. Courts). The Judicial Conference voted its disapproval of S. 754 in September 1973. *Id.* at 177.

[71] *See* pp. 689-711 *infra*.

[72] Some of the issues to be discussed have already been addressed. *See* Comm. on Administration of the Criminal Law of the Judicial Conference, Guidelines to the Administration of the Speedy Trial Act of 1974, Aug. 8, 1975, *revised*, Aug. 4, 1976 [hereinafter cited as Judicial Conference Guidelines]. The Judicial Conference and the Administrative Office of the U.S. Courts have subsequently issued a series of numbered "advisories" and "directives" relating to the Act. Although the Judicial Conference Committee is composed entirely of federal judges, the *Guidelines* were presented as "tentative advisory interpretations" of the Act and are not to be regarded as "binding interpretations." *Id.* The *Guidelines* do help to explain, however, certain statutory problems which are not resolved in the legislative history and they also indicate the approach federal judges are likely to follow. Another useful interpretative source, which generally follows the *Guidelines*' interpretations, is the "model" statement of time limits prepared for inclusion in the 1976 district plans required by the Act. *See* Administrative Office of U.S. Courts, Model Statement of Time Limits and Procedures for Achieving Prompt Disposition of Criminal Cases, Feb. 18, 1976 (Speedy Trial Advisory No. 11) [hereinafter cited as 1976 Model Statement]. *See also* Administrative Office of U.S.

gleaned from the House and Senate reports,[73] the lengthy published hearings, correspondence, and other materials considered by Congress,[74] and the final House debates.[75]

A. The Structure and Length of the Time Limits

The most difficult policy issues raised by the Act concern the structure and length of its permanent time limits. The Act provides separate, relatively short limits for each principal stage of prosecution, and it remains to be seen whether the greater incentives created by such a scheme outweigh the administrative problems. It may be that a single, somewhat longer time limit (with fewer excludable time periods) could achieve substantially the same objectives more efficiently, or that separate time limits should be established for each district court, or for different classes of offense or methods of disposition. Even if the three-stage approach is retained, certain ambiguities relating to the arraignment limit should be resolved by statutory amendment.

1. *Separate Time Limits: Pro and Con.* During most of the legislative history, the statutory scheme consisted of a single 60-day time limit from arrest or indictment (whichever was later) to trial.[76] The 30-day arrest-to-indictment limit was added in March of 1974, apparently in response to research results which showed significant delays in the preindictment period.[77] The 10-day arraignment limit

Courts, Model Plan for Achieving Prompt Disposition of Criminal Cases, June 19, 1975 [hereinafter cited as 1975 Model Plan]. The *1976 Model Statement* is similar in structure and content to the *1972 Model Plan*, prepared pursuant to rule 50(b). *See* 1972 Model Plan, *supra* note 68. Like the earlier model, it will probably be adopted in most districts with relatively few changes. *See* Cohn, *supra* note 68. However, neither the *1976 Model Statement* nor the specific rules adopted in a given district should be considered completely authoritative; the model statement is only advisory, and interpretations of the Act which are adopted for purposes of a district plan should not be considered controlling in subsequent litigation. This latter principle is recognized in section 10(a) of the *1976 Model Statement*, which provides that defendants are not to be released from custody for violation of the "interim" time limits unless this result is required by the terms of the Act itself. Section 10(a) was apparently added to show disapproval of the reasoning in United States v. Soliah, No. 75-[illegible] E.D. Cal., Jan. 14, 1976), which held that, regardless of the proper construction of the Act, the provisions of the local district plan constituted an independent ground for refusing to apply the section 3161 exclusions to the interim limits. *See* pp. 711-20 *infra*.

[73] *See* notes 58, 63 *supra*.

[74] *See* notes 58-59, 61 *supra*.

[75] *See* 120 CONG. REC. H 12, 518-22 (daily ed., Dec. 19, 1974); *id.* at H 12, 549-73 (daily ed. Dec. 20, 1974).

[76] S. 3936, 91st Cong., 2d Sess. § 3161(b)(1) (1970); S. 895, 92d Cong., 2d Sess. § 3161(b)(1) (1971).

A study by the Federal Judicial Center found that in 1970 "the average delay between arrest and indictment in the busier federal courts was over 100 days." S. REP. No. 1021, 93d

was added by the House in October of 1974, for reasons which are not clear.[78]

The final three-stage approach has certain inherent advantages. First, not all defendants pass through each stage of procedure. Some are arrested and subsequently discharged, without being indicted; others are not arrested or issued a summons until after an indictment or information has been filed; and some defendants plead guilty at their initial arraignment, so that they never appear in the "awaiting trial" status. In each of these cases, the statute provides a shorter overall time limit than would be the case if a single arrest-to-trial time limit were used. Another advantage of multiple limits is that participants in the later stages of plea and trial are not disadvantaged by excessive delays in the preindictment stage, nor is extra time gained simply because the earlier stages were brief.

On the other hand, the allowable time which is "lost" by rapid processing of early stages may be needed later on to permit adequate trial preparation.[79] One consequence of this problem will be a general tendency to "take the limit" at each stage, whether or not extra

Cong., 2d Sess. 7 (1974). Ten of the twelve districts studied were chosen because they were found to include "a substantial number of ordinary cases exceeding an acceptable interval" from filing to disposition. *1971 Senate Hearings*, *supra* note 58, at 541. The study was repeated two years later in twenty courts, with similar findings. *See 1973 Senate Hearings*, *supra* note 59, at 299-339. *See also id.* at 217.

[78] According to the *House Report*, the separate arraignment limit was added, at the suggestion of the Justice Department, so that the trial limit would begin at "a logical point in the proceedings." The Department had argued that "it would be a waste of judicial resources to require the courts to schedule trials at the time of the filing of an indictment, due to the possibility that the defendant may choose to plead either guilty or *nolo contendere*, thus making trial unnecessary." H.R. REP. No. 1508, 93d Cong., 2d Sess. 30-31 (1974). This reasoning is not entirely satisfactory, since the old version did not require the court to set a trial date prior to arraignment, but only "at the earliest practicable time." S. 3936, 91st Cong., 2d Sess. § 3161(a) (1970). A better reason for setting separate arraignment and trial limits is to encourage promptness at the outset of the case by means of a short-term and a longer-term deadline, instead of a single long-term limit.

[79] Although certain forms of delay may be specific to different stages of procedure, it seems likely that delays related to trial preparation and plea negotiations can take place at any time after arrest. Whether these delays take place prior to indictment or after may be largely fortuitous, and it is likely that many cases which move quickly from arrest to indictment or from indictment to arraignment may move relatively slowly thereafter, while the parties "catch up" on their trial preparations. One study found a negative correlation between indictment-to-arraignment and arraignment-to-trial intervals. 1976 District Plan for the Northern District of Illinois, app. A, June 11, 1976 (on file in the Office of the Clerk of the Court) [hereinafter cited as 1976 Northern Illinois Plan]. The study also indicated that a significantly smaller percentage of defendants meet all applicable time limits than meet the combined totals of 100 or 70 days. *Id.* at 27-28. These findings suggest that some cases which fail to meet a particular time limit nevertheless meet the overall limit, because excessive delays at one stage are balanced by speedier processing at other stages.

time is actually needed, and this could have the effect of slowing down some cases. Since the timing of indictment and arraignment is largely under the control of the U.S. Attorney, these events can be manipulated in order to maximize the time available for preparation of the case. There might even be a tendency to arrest more defendants on magistrates' complaints, if the need for an arrest is strong, in order to gain the additional 30 days afforded by the arrest-to-indictment limit. Another consequence of the multi-stage limit is that postindictment arrest cases receive less overall time for trial preparation than preindictment arrests, even though postindictment arrests typically involve white-collar and other complex charges which require lengthy periods of trial preparation or plea negotiation or both. Although the U.S. Attorney may be able to achieve 30 days worth of trial preparation by the time an indictment or information is filed, the defense attorney certainly would not. Congress may therefore want to provide a longer trial limit for postindictment arrests.

The separate 10-day arraignment limit is particularly problematic. Its purpose of course is to discourage delay at the outset of the case; the sooner the defendant and his counsel appear in court and receive a specific schedule for discovery and pretrial motions, the sooner the court will be able to set a realistic trial date. Indeed, the expeditiousness of these early proceedings could well determine the whole tempo and style of the litigation; thus, as a matter of principle, arraignments should be held as soon as possible. The difficulty with this rationale, however, is that the entry of a plea of not guilty bears no necessary relationship to the disposition of later pretrial matters. The enforcement of a strict 10-day arraignment limit could result in nothing more than the entry of "pro forma" not guilty pleas. It would also complicate the entry of initial guilty pleas, for such a plea generally requires more time to prepare than does an initial plea of not guilty.[80] In the past courts were free to delay the arraignment in order to allow for this preparation. Under the Act, however, a not guilty plea must be entered within 10 days even if the defendant intends to plead guilty; the result is an extra, unnecessary court appearance.

The separate arraignment limit is also very troublesome to enforce. On the one hand, it seems unduly harsh to require dismissal of the case—even dismissal without prejudice—simply because the defendant was not arraigned until the eleventh day; to avoid this

[80] *Id.* at Table 8.

result, courts would almost certainly resort to very liberal use of the excludable time provisions. On the other hand, if no sanction is provided to enforce the arraignment limit, it is not likely to be respected. As it turns out, an apparent mistake in draftsmanship may have effectively eliminated the separate arraignment limit in favor of a single, 70-day postindictment limit.[81] Even if this was not the actual intent of Congress, the Act should be amended to make this result explicit.

2. *The Length of the Statutory Time Limits.* Whether or not the three-stage delimitation is retained, there is some question whether the overall length of the time limits is appropriate for all cases in all districts. To begin with, the time limits are shorter than comparable time limits prescribed by most state statutes,[82] the federal rules,[83] and the recommendations of the President's Crime Commission.[84] The limits are also much shorter than existing disposition times in federal criminal cases. A Federal Judicial Center study[85] of all defendants terminated in 1974 showed, for example, that only two of the ninety-four districts were able to dispose of more than 90 percent of their defendants within 70 days.[86] Of course,

[81] *See* text at note 112 *infra*.

[82] This comparison is all the more significant in view of the fact that state statutes generally permit the defendant routinely to waive the speedy trial limit. *See, e.g.*, ILL. REV. STAT. ch. 38, § 103-5 (1973) (120 days from the beginning of custody, or 160 days from the date trial was demanded, if defendant is not in custody). *See also* note 102 *infra*.

[83] The *1972 Model Plan*, which was adopted by most districts pursuant to Federal Rule of Criminal Procedure 50(b), provides a time limit of 180 days from plea of not guilty to trial in noncustody cases; for custody cases, the limit is 90 days. *See* note 68 *supra*.

[84] The Crime Commission recommended that courts establish standards for the completion of various stages of criminal cases, and that "the period from arrest to trial of felony cases be not more than 4 months." THE CHALLENGE OF CRIME, *supra* note 55, at 155. The applicability of this limit to federal cases has been questioned: "While this seems to be an appropriate standard for common-law felonies, it may be unrealistic in the type of white-collar criminal cases with which the federal courts are frequently occupied. Particularly is this so in view of the continually expanding scope of pretrial proceedings." 8A J. MOORE, FEDERAL PRACTICE ¶ 48.03[1], at 48-22 (2 ed. rev. 1975).

The National Advisory Commission on Criminal Justice Standards and Goals adopted a somewhat different approach. National Advisory Comm'n on Criminal Justice Standards and Goals, Report on Courts, Jan. 23, 1973. The *Report on Courts*, in Standard 4.1, states that the time from arrest to trial in a felony case "generally should not be longer than 60 days." The standard for misdemeanors is 30 days. The commentary to these standards notes the contrast with the recommendations of the Crime Commission, but argues that the shorter standards "are realistic if it is recognized that they relate only to the norm or average and do not impose outside limits."

[85] Administrative Office of U.S. Courts, Speedy Trial Advisory No. 4, Dec. 5, 1975.

[86] *Id.* The two districts were Middle Alabama and the Canal Zone. The study also showed that one-fourth of the defendants took more than 160 days from indictment to dismissal, entry of a guilty plea, or commencement of trial, and almost one-half took more than 70 days. Nationwide figures on arrest-to-indictment intervals are not yet available, but the elaborate

these figures do not necessarily imply that the statutory limits are unrealistic, given the substantial resources and incentives which the Act is specifically designed to provide. But whether the limits are realistic remains to be seen, for there is certainly no inherent wisdom to the precise limits chosen. The 60-day trial limit, for example, was based largely on studies of pretrial recidivism[87] which failed to address the crucial issue of the amount of time needed to dispose of criminal cases. Although Congress received testimony on this issue, it failed to analyze the problem carefully.[88] As for the 30-day indictment limit, this standard was based on a survey of fifteen districts,[89] and Congress decided without enlisting supportive evidence that the average arrest-to-indictment interval achieved by the three fastest districts should serve as the *maximum* allowable limit for all cases in all districts.

Thus, even if significant improvements in previous disposition times are achieved, it is quite likely that many cases will still take more than 70 or 100 days from arrest to trial or plea. Consequently, many courts will find it necessary to make frequent use of the various statutory exclusions and exceptions, to avoid undue pressure on the parties or large numbers of dismissals with prejudice. As will be demonstrated in the discussion which follows,[90] the language of these provisions is flexible enough to accomodate almost any form of delay. The combination of this flexibility with the short statutory

research and planning procedures required under sections 3165 through 3171 of the Act should insure that this and other statistical data pertaining to speedy trial will soon be available for all defendants in all federal districts. *See* text at note 259 *infra*. A 1973 survey of fifteen districts revealed an average arrest-to-indictment interval of 50.9 days, and only three districts had an average of less than 40 days. *1973 Senate Hearings*, *supra* note 59, at 217. In earlier Federal Judicial Center studies, none of the districts examined had an average arrest-to-indictment interval of less than 40 days. *See* note 77 *supra*.

[87] *See* H.R. Rep. No. 1508, 93d Cong., 2d Sess. 14 (1974); S. Rep. No. 1021, 93d Cong., 2d Sess. 8 (1974); text and note at note 54.

[88] Testimony and correspondence were received from a large number of federal prosecutors, defense attorneys, and judges regarding the feasibility of the proposed trial limit, but Congress appears to have given greater weight to the more optimistic views expressed. For example, the *Senate Report* refers to a speech by Whitney North Seymour, former U.S. Attorney for the Southern District of New York, indicating that his office was "ready for trial" within 60 days of arrest in "the overwhelming bulk of cases." S. Rep. No. 1021, 93d Cong., 2d Sess. 8 (1974); *see 1973 Senate Hearings*, *supra* note 59, at 174-76 (transcript of speech). A subsequent letter from Mr. Seymour states, however, that it is "totally unrealistic" to believe that all federal cases can be brought to trial within 60 days. *Id.* at 190-91. Figures contained in his letter indicate that in 1972, less than 40 percent of defendants in the Southern District were tried or pled guilty within 60 days. *See* Administrative Office of U.S. Courts, Speedy Trial Advisory No. 4, Dec. 5, 1975 (presenting similar data for 1974).

[89] *See* note 77 *supra*; S. Rep. No. 1021, 93d Cong., 2d Sess. 32 (1974).

[90] Pp. 689-711 *infra*.

limits has one major advantage: it provides the maximum potential incentive to expedite all cases—even those which move fairly quickly—while giving the courts the power to tailor the effective, "net" time limits to the particular circumstances of the cases which take longer.

Flexibility is obviously a mixed blessing. It is entirely possible that liberal construction of the statutory exceptions could achieve technical "compliance" with little or no change in previous disposition times. In fact, excessive use of some of these provisions could even result in greater delays.[91] In any case, the frequent application of these exceptions would involve considerable expenditures of court and attorney resources which ought to be spent in disposing of cases on the merits. Thus, from the standpoint of efficiency, as well as effectiveness, it may prove desirable to limit the application and use of certain exceptions, and this in turn would require either lengthening the current limits, or adopting separate limits for different kinds of cases.

A second reason for lengthening the time limits is to reduce the need for frequent case reassignment. Under the so-called individual calendar system,[92] the processing of cases is sometimes delayed due to illness, vacations, or extended trials. To the extent that such delays are not covered by one of the statutory exceptions, the oldest criminal cases on a given docket must be transferred to another judge to permit compliance with the Act. Such transfers, however, inevitably involve certain disruptions, inefficiencies, and the possibility of inconsistent rulings. Perhaps most important, widespread transfer of cases would ultimately weaken the valuable incentive for rapid processing of cases which the individual calendar system provides. Since cases are assigned randomly under this system, all judges receive comparable workloads over time, and this fosters a healthy spirit of competition and pride in the volume of work accomplished by each judge. The widespread transfer of cases, by disrupting the comparability of workloads, tends to remove this incentive. Thus, if experience with the Act shows that many reassignments are required, even after initial backlogs have been re-

[91] *See* text and notes at notes 126-36 *infra*.

[92] Under this system, which is now used by most federal courts, a single judge normally handles all aspects of a case from filing to disposition. Unlike the so-called master calendar system used in some jurisdictions, it only rarely involves reassignment. *See* Campbell, *Judicial Responsibility for Calendar Control*, 28 F.R.D. 63 (1961). For a discussion of this system and the problems caused by the Act, see 1976 Northern Illinois Plan, *supra* note 79, at 33-39.

duced and additional resources provided, then Congress should consider lengthening the statutory time limits in some or all cases.

The advantage of adopting separate limits for different kinds of cases is that this preserves the incentive to expedite those cases which really can be tried within 70 or 100 days.[93] For example, bank embezzlement and postal theft cases typically move much faster than those involving fraud or extortion charges;[94] if experience with the Act shows that such differences remain, despite efforts to expedite all cases,[95] then it might make sense to adjust the statutory time limits accordingly. The difficulty with this approach, however, is that it fails to account for the tremendous variations within offense categories, no matter how narrowly defined. A major cause of this variation is the effect of method of disposition: commencement of trial generally takes longer than the process of negotiating a change of plea, and such "later" guilty pleas take longer than initial pleas.[96] Thus, trials in embezzlement cases may take considerably longer than pleas in fraud and extortion cases.

The most precise tailoring of fixed time limits to individual case necessities would therefore involve limits based on both the type of offense and the method of disposition. For example, postal theft cases could be given a certain period of time for entry of a guilty plea, after which no guilty plea would be acceptable, and the case would have to go to trial within a longer time limit. However, such a statutory "plea cutoff" could result in substantially fewer guilty

[93] Congress anticipated that such an approach might be desirable. As part of the planning process established under the Act, each district plan must include data on "the identity of cases which, because of their special characteristics, deserve separate or different time limits as a matter of statutory classifications." 18 U.S.C. § 3166(b)(7) (Supp. IV, 1974). There are actually several distinct reasons why it might be important to establish separate time limits for different offenses. First, as suggested in the text, some offenses may characteristically require more or less than the average amount of time for preparation, even after statutory exclusions are deducted. Second, there may be some cases which, like the detention and high risk categories under the interim provisions, require shorter (or longer) time limits due to relative differences in the value of speedy trial in such cases. Finally, the value of successful prosecution, relative to the value of speedy trial, may require *longer* limits in some cases, to minimize the incidence of dismissals under the Act.

[94] *See* 1976 Northern Illinois Plan, *supra* note 79, at Table 10. In 1974 the average indictment-to-trial (or plea) intervals, by offense, ranged from 50 days (postal offenses) to 178 days (extortion, racketeering, and threats).

[95] For a discussion of the problems inherent in expediting cases and estimating future compliance rates prior to the effective date of the statutory sanctions, see pp. 720-22 *infra*.

[96] *See* 1975 ANNUAL REPORT, *supra* note 8, Table D6. In another study the average time from filing to trial or guilty plea was 50 days for initial pleas of guilty; 119 days for later pleas of guilty; and 180 days for trials. *See* 1976 Northern Illinois Plan, *supra* note 79, at Table 8. The differences due to method of disposition appear to be greater than the differences due to offense. *Id.* at Tables 10, 10a.

pleas, which would compound court congestion problems and result in unnecessary trials. A simpler alternative would be to have a single set of time limits for all offenses in a given district, adjusting the limits to take account of the average complexity and typical methods of disposition found in each district. This would be the easiest system for a court to administer, but preliminary determination of the exact formula to be applied would be difficult, and problems would be created in cases where prosecution is transferred between districts. Moreover, the variation in disposition times within districts is substantial,[97] and if the limits were set low enough to expedite the faster cases, it would be necessary to make frequent use of statutory exceptions to account for the slower ones.

None of these alternatives can be fully evaluated until the courts have had more experience with the Act, but the best scheme would probably be a single set of somewhat longer limits, applicable to all cases in all districts. Although this tends to sacrifice incentive in the faster cases, there are certain inherent administrative pressures, at least in courts using the individual calendar system, which tend to encourage prompt disposition of "easy" cases.[98] A somewhat longer set of limits would still have the beneficial effect of lowering average disposition times, while eliminating the most extreme "stragglers." These more modest achievements are definitely attainable, at relatively little additional cost. Ultimately, Congress must decide whether further reductions in disposition time are worth the administrative costs and inefficiencies: the difference between three years and three months is significant and well worth the price; the difference between three months and two months (assuming the latter is attainable) may not be.

3. *Interpreting the Arraignment Limit.* In the event that the present three-stage structure of time limits is retained, it will be necessary to resolve certain ambiguities in the language relating to the 10-day arraignment limit. When this limit was added in the last few months before passage, a number of related sections which had been keyed to the previous indictment-to-trial time limit were apparently not conformed to the final version, and a potential loophole was created by the language which defines when the arraignment limit commences to run.

The first sentence of section 3161(c) provides as follows:

[97] *See* Administrative Office of U.S. Courts, Speedy Trial Advisory No. 4, Dec. 5, 1975.

[98] *See* text and note at note 92 *supra*. In addition to the competitive spirit fostered by the individual calendar system, judges like to keep their pending caseload down to a manageable size.

> The arraignment of a defendant charged in an information or indictment with the commission of an offense shall be held within 10 days from the filing date (and the making public) of the information or indictment, or from the date a defendant has been ordered held to answer and has appeared before a judicial officer of the court in which such charge is pending, whichever date last occurs.

The reference to publication of the charge serves to delay the start of the arraignment limit in the case of a sealed indictment; the second half of the quoted sentence also serves to delay the starting date in those cases where the defendant has not previously appeared before a magistrate in the charging district, *e.g.*, where the prosecution begins with the filing of an information or an indictment.

The reference to appearance in court means that the first time limit applicable to a defendant arrested after indictment does not begin to run immediately upon arrest.[99] In the case of a defendant arrested in another district, the entire period of transportation or unsupervised travel to the charging district is exempted,[100] as well as any period after arrival but prior to the initial appearance. Similarly, defendants arrested within the district are not subject to any time limit until their first appearance before the judge,[101] which is often at the arraignment itself. Since arraignments are usually scheduled by the U.S. Attorney in cooperation with defense counsel, the Act permits the parties to gain extra time by agreeing to delay the defendant's first "appearance."

The *House Report* clearly indicates that no such loophole was intended.[102] To effectuate this intent the Act should be amended to provide that, where the defendant is found within the district, the arraignment limit begins to run upon arrest (or service with a summons).[103] Of course, the Government could still gain time by delaying the arrest itself, since there does not appear to be any statute or rule requiring prompt issuance of an arrest warrant or summons after the filing of charges.[104] The result is a substantial loophole, unregulated by either the Act or the statute of limitations.[105] If lengthy delays are found to occur at this stage, it may be necessary to set some sort of limit by statute or local rule.

In the case of arrests outside the district, a different rule may be required. Even if Congress wanted merely to control delays occuring after arrival in the charging district, it would have been better to have the arraignment limit begin at that point. However, the *House Report* recognizes that considerable delays take place prior to arrival, particularly in the case of prisoners in custody,[106] and the *Report* goes on to state that the inconvenience or expense of promptly transporting such prisoners does not justify delaying the arraignment.[107] Nevertheless, the language of the Act permits such delays to go unregulated, resulting in a major loophole and considerable hardships to defendants in custody.[108]

To resolve these problems and effectuate the legislative intent, the Act may have to be amended to provide a limited period of time for transportation or travel to the charging district. For example, the

[99] On the other hand, the 30-day indictment limit begins to run upon arrest or service with a summons. 18 U.S.C. § 3161(b) (Supp. IV, 1974).

[100] Federal Rule of Criminal Procedure 40 requires that a defendant arrested outside the charging district be taken before a magistrate "without unnecessary delay" for a "removal" hearing. After that point, however, there are no limits on the timing of his prosecution.

[101] When a defendant is arrested pursuant to a magistrate's complaint, he must be brought before the nearest available federal magistrate "without unnecessary delay." FED. R. CRIM. P. 5. In contrast, the initial court appearance of a defendant arrested pursuant to an indictment or information is not regulated by the Federal Rules. *See* FED. R. CRIM. P. 9. The *1972 Model Plan* under rule 50(b) requires arraignment within 30 days of indictment or arrest, whichever is later (20 days, if the defendant is in custody), but there are no sanctions to enforce this standard. *See* note 68 *supra*.

[102] "This provision is not intended to give the attorney for the Government the discretion to extend the time for arraignment beyond 10 days where the defendant's presence could have been obtained by the exercise of prosecutorial initiative." H.R. REP. No. 1508, 93d Cong., 2d SESS. 14 (1974).

[103] If additional time is needed to permit the newly-arrested defendant to secure counsel, this could be handled by means of an exclusion or by simply providing that the arraignment limit for postindictment arrests will be 20 days, rather than 10.

[104] Federal Rule of Criminal Procedure 9(a) provides that a warrant or summons shall issue "upon the request of the attorney for the government," although the court may also order the issuance of a summons. *Cf.* FED. R. CRIM. P. 4 (warrant or summons "shall issue" upon filing of a complaint).

[105] The filing of formal charges within five years of the offense satisfies the general federal statute of limitations, 18 U.S.C. § 3282 (1970), and even if such charges are later dropped after the five-year period has expired, the Government is granted an additional six months to refile. *Id.* § 3288.

[106] "[P]risoners aren't moved immediately when ready because the marshals try to make their trips worthwhile by combining the movement of several prisoners. So it may take several weeks to get a prisoner from Florida to Colorado . . . ." H.R. REP. No. 1508, 93d Cong., 2d Sess. 31 (1974) (testimony of U.S. Att'y Treece, D. Colo.).

[107] *Id.*

[108] *See* note 106 *supra*. The prisoner transportation system operated by the U.S. Marshal's Service frequently results in a series of short trips from one local jail to another. (There are only three federally-operated jails in the country.) These trips may or may not take the most direct route to the charging district—that depends on how many prisoners are going in a given direction on a given day—and conditions in the local jails are generally poor. *See* GOLDFARB, JAILS: THE ULTIMATE GHETTO (1975); LAW ENFORCEMENT ASSISTANCE ADMIN., NATIONAL JAIL CENSUS—1970 (1971). Moreover, due to the unpredictability of daily movements within the prisoner transportation network, communication with friends, family, defense counsel, or business partners is difficult or impossible. Such prisoners are unlikely to obtain a bond reduction hearing until they arrive in the charging district, and the result may be several weeks of unnecessary detention.

58-721 O - 80 - 25

Act could provide that the arraignment limit will begin to run 10 days after arrest outside the charging district, and that additional time may only be provided in exceptional circumstances. Alternatively, a longer limit could be established, not subject to any exception. Prior to such amendments, the frequency and duration of postindictment removals should be monitored closely to determine the most efficient and realistic approach to the problem.

Another category of defendants are those who are transferred from other authorities, rather than being arrested or served with a summons. If the transfer is made outside the district, the prisoner must be transported back to the charging district, and the delays discussed above are likely to occur. Thus, the Act should be keyed to the date of transfer, rather than the date of first appearance in court.

In the case of defendants who are serving a term of imprisonment, however, Congress apparently intended to permit inclusion of time *prior* to either transfer or initial appearance. Section 3161(j) requires the government promptly to request transfer or file a detainer[109] as soon as charges are filed, but since neither the indictment nor arraignment "clock" would be running, this duty may be difficult to enforce. To deal with this problem, the *House Report* suggests that

> if the attorney for the Government is responsible for unreasonable delay either in causing a detainer to be filed with the custodial official or seeking to obtain the prisoner's presence for trial in lieu of filing a detainer or upon receipt of a certificate of demand for trial, any such period of delay should be counted in ascertaining whether the time for trial has run in connection with the defendant's demand for dismissal under Section 3161(a)(2).[110]

Such a rule[111] has no basis in the language of the Act, and an amendment of section 3161(j) will be needed if preappearance (or pretransfer) delays are to be counted.

[109] Transfer of a prisoner prior to expiration of his sentence is normally accomplished by means of a writ of habeas corpus *ad prosequendam*. A detainer is simply a request for custody of the defendant upon his release or upon expiration of his sentence. The Act gives the Government the choice of filing a writ or a detainer, and if the latter alternative is chosen, the defendant may then demand immediate trial (*i.e.*, prior to expiration of his sentence). 18 U.S.C. § 3161(j)(2) (Supp. IV, 1974). If he does demand trial, the Government must "promptly" seek to obtain his presence by means of a writ. *Id.* § 3161(j)(3). *See* text at note 138 *infra*.

[110] H.R. REP. No. 1508, 93d Cong., 2d Sess. 36 (1974). The reference to subsection 3161(a)(2) is probably a typographical error, since no such section existed at the time of the *House Report*. The context suggests that section 3162(a)(2), dealing with dismissal for failure to meet the time limit for commencement of trial, was probably intended.

[111] For a similar rule, see ABA STANDARDS, *supra* note 56, Standard 3.2.

Another set of problems relating to the arraignment limit appears to reflect simple mistakes in draftsmanship. Section 3162(a)(2) provides that the sanction of dismissal applies "if the defendant is not brought to *trial* within the time *limit* required by Section 3161(c) . . . ."[112] The reference to the time limit for "trial," and the use of the singular in referring to section 3161(c) would mean, taken literally, that there is no sanction for failure to hold the arraignment within 10 days. The *House Report* does not discuss this question directly, but the "general description" of the bill indicates that the sanction of dismissal "applies to both the period between arrest and indictment and between indictment and trial."[113] This suggests that the indictment-to-arraignment period was not intended to be exempt from sanctions.

In order to effectuate this apparent intent, one of two interpretations must be adopted. Either the sanctions apply directly to the arraignment limit, or else 10 days are to be added on to the 60-day trial limit, so that all defendants must be brought to trial or plead guilty within 70 days of indictment or initial appearance in the district. The latter approach, which treats the two postindictment limits as a single "trial" limit for purposes of sanctions, is probably preferable because it avoids the harshness of dismissing the case simply because the defendant was not arraigned within the relatively short 10-day limit.[114] The former approach involves reading more into the literal terms of section 3162 and would probably result in either more dismissals or excessive use of exclusions, but it does serve to emphasize the importance of prompt arraignments, and it gives some independent meaning to the arraignment limit. Failure to adopt either of these interpretations permits a substantial "time out" period at the outset of every prosecution; if the 10-day arraignment limit is merely a voluntary guideline, without sanctions, arraignments could be delayed indefinitely. It seems highly unlikely that Congress intended such a result.

A similar problem involves the application of section 3161 exclusion provisions during the indictment-to-arraignment period. Section 3161(h) provides that these exclusions apply "in computing

[112] (Emphasis added.)

[113] H.R. REP. No. 1508, 93d Cong., 2d Sess. 23 (1974).

[114] If "unreasonable" pretransfer delays are counted, in the case of imprisoned defendants, violation of the 10-day limit would be inevitable. *See* text and notes at notes [illegible] *supra*.

the time within which an information or an indictment must be filed, or in computing the time within which the trial of any such offense must commence." Thus, unless the reference to "trial" is construed broadly enough to include both of the postindictment time limits, the exclusions do not apply to the arraignment limit. Of course, if there is no sanction for violation of the 10-day arraignment limit, then there is no real need to calculate excludable time. But if sanctions are applicable, either directly or by means of an overall 70-day indictment-to-trial limit, then the statutory language should be amended to permit the use of exclusions. For example, if a defendant became a fugitive during this period, it would be absurd to expect to hold the arraignment within either 10 days or 70 days. Although the *House Report* does not address this problem directly, the various descriptions of section 3161(h) imply that the exclusions would apply to the arraignment limit;[115] since this is the most reasonable approach, the failure to point out a different interpretation probably means that the problem was a result of a last-minute drafting error.[116]

B. Statutory Exceptions: The Search for Controlled Flexibility

Congress recognized that it could not realistically expect the indictment, arraignment, and trial of all defendants within a single set of relatively short, nonwaiveable time limits, and therefore combined these limits with a large number of statutory exclusions and escape clauses.

These provisions can be viewed as operating at four levels. (1) The narrowest exceptions are the provisions for excludable time contained in sections 3161(h)(1) through (7), dealing with "other proceedings concerning the defendant," deferred prosecution, unavailable parties, codefendant delays, and other specified events of excusable delay. (2) A much broader exception is contained in section 3161(h)(8), which permits the court to exclude periods of delay resulting from continuances granted to serve the "ends of justice." Although several statutory guidelines are provided for the granting of such continuances, this provision clearly gives the court considerable discretion.[117] (3) If the statutory time limits are violated, the statutory dismissal sanction permits dismissal without prejudice.[118] (4) If all of the foregoing exceptions are insufficient to permit a court to substantially comply with the statutory time limits, the "judicial emergency" provisions permit the chief judge to apply for a district-wide suspension of the arraignment and trial time limits.[119]

The attempt to combine the strict time limits with the necessary flexibility is full of paradoxes. On the one hand, Congress seemed to be saying that the courts had shown insufficient commitment to the goal of speedy trial and must, therefore, be forced to address this objective by means of statutory time limits. On the other hand, the diversity of individual cases and special circumstances requires a degree of flexibility in direct proportion to the strictness of the time limits, and this same flexibility gives the courts complete control over the extent to which prosecutions will actually be expedited. A second paradox relates to the "cost" of statutory flexibility: the more exceptions and exclusions permitted, the more administrative, judicial, and attorney time must be consumed in construing and applying these provisions. The time required to administer the statutory exceptions might therefore equal or exceed any savings in disposition time to be achieved by application of the statutory time limits.

Furthermore, the attempt to define periods of excludable delay presupposes that there are certain kinds of delay which are justified and others which are not. This approach seems plausible enough, since certain kinds of delay—such as where the defendant is a fugitive or incompetent to stand trial—should plainly be excluded from even the most generous statutory time limit. Other kinds of delay, however, are less easily appraised, and a legislature is not likely to agree on which delaying activities are "worthy" of exclusion or on statutory language specifying when such delays are excusable. In the case of plea bargaining delays, for example, it is quite possible that such out-of-court activities actually tend to expedite the disposition of cases by avoiding lengthy and expensive trials, but how

[115] For example, the *House Report* indicates that the exclusion for "proceedings relating to transfer from other districts" includes "proceedings with respect to transfer for plea and sentence" under rule 20 of the Federal Rules. Such proceedings would normally take place prior to the entry of the initial plea. H.R. REP. No. 1508, 93d Cong., 2d Sess. 21 (1974).

[116] Another apparent oversight relates to the treatment of defendants who are permitted to withdraw their guilty pleas. Section 3161(i) provides that upon withdrawal of a guilty plea to any of the charges "the defendant shall be deemed indicted with respect to all charges . . . within the meaning of § 3161, on the day the order permitting withdrawal of the plea becomes final." Taken literally, this would provide a 10-day arraignment limit, followed by the 60-day trial limit, even though the defendant has already been arraigned. Thus, such a defendant should probably be deemed indicted *and arraigned* as of the date of the withdrawal, so that his trial must commence within 60 (not 70) days thereafter. *See* 1976 Model Statement, *supra* note 72, § 5(c).

[117] *See* text at note 146 *infra*.

[118] 18 U.S.C. § 3162(a) (Supp. IV, 1974).

[119] *Id.* § 3174.

much time ought to be allocated to this process? The answer obviously depends on the facts of the particular case.

The following discussion examines each of the four levels of flexibility incorporated in the Act. Although some of these provisions could operate both effectively and efficiently if judiciously construed, the Act in general appears to be overly complex. A more workable compromise between firmness and flexibility could be reached by allowing fewer exceptions, combined with somewhat longer statutory time limits.

1. *Specific Categories of Excludable Delay.* Sections 3161(h)(1) through (7) list the fairly specific events and proceedings which are to be excluded from the calculation of elapsed time.[120] Many of the exclusions are straightforward and easy to apply, such as those involving delays caused by deferred prosecution,[121] by incompetency to stand trial,[122] by commitment for drug treatment,[123] or by interlocutory appeals.[124] Such delays are readily defined by court orders or administrative procedures which occur independently of the Act; thus there is relatively little risk that events will be manipulated to maximize excludable time and defeat the purposes of the Act.

Some of the other enumerated exclusions in section 3161 are both more difficult to define and much more likely to be invoked and abused.[125] Particular problems may be caused by the exclusions relating to (1) pretrial motions, (2) proceedings "under advisement," (3) unavailability of the defendant or an essential witness, and (4) superseding charges.

a. *Pretrial Motions.* Section 3161(h)(1) permits the exclusion of "any period of delay resulting from other proceedings concerning the defendant, including but not limited to . . . delay resulting

[120] Most of these provisions were included in the earliest drafts of the legislation, and they were apparently derived from the *ABA Standards*. For a discussion of the legislative history, see pp. 673-76 *supra*. Similar provisions are found in some state speedy trial statutes. *See, e.g.*, N.Y. CODE CRIM. PRO. § 30.30(4) (McKinney 1971). But since most of these statutes also provide that any defense continuance tolls the statute, such detailed exceptions are rarely at issue. *See* text at note 150 *infra*. The statutes also tend to have somewhat longer time limits. *See generally* text and note at note 82 *supra*.

[121] 18 U.S.C. § 3161(h)(2) (Supp. IV, 1974).

[122] *Id.* § 3161(h)(4).

[123] *Id.* § 3161(h)(5).

[124] *Id.* § 3161(h)(1)(D).

[125] In the Northern District of Illinois, for example, the three most common exclusions entered during the first three months of 1976 were pretrial motions (56 percent of all exclusions); "under advisement" proceedings (26 percent); and unavoidable defendant/witness unavailability (19 percent). 1976 Northern Illinois Plan, *supra* note 79, at Table 2.

from hearings on pretrial motions . . . ."[126]

The language of this provision is ambiguous. The narrowest interpretation would exclude only the days actually consumed by the hearing itself; the broadest would permit exclusion of the entire period from filing to disposition of the motion (or the point at which it was taken "under advisement," thus triggering the application of a separate exclusion provision).[127] The broad interpretation is suggested by the comprehensive term "proceedings" and by the reference to delay "resulting from" hearings. On the other hand, such an interpretation would make the word "hearings" superfluous.

The legislative history, while not conclusive, suggests that Congress intended a narrow interpretation. The principal sponsor of the bill in the House, Representative Conyers, apparently believed that the exclusion was limited to "actual hearings on pretrial motions."[128] The *Senate Report* does not discuss the scope of this exception directly, but it does indicate that the analogous provision applicable to Narcotic Addict Rehabilitation Act[129] "proceedings" permits exclusion only of "time actually consumed in hearings on the issue of addiction."[130]

A narrow interpretation is also supported by strong policy considerations. If the entire period from filing to hearing is excluded (or from filing to receipt of all briefs, where no hearing is held), then the Act would provide no incentive to limit either extensions of time to file briefs or postponements of the hearing date. Such extensions

[126] This provision is identical to Standard 2.3 of the *ABA Standards* and remained virtually unchanged throughout the legislative history. ABA STANDARDS, *supra* note 56. (There was one temporary change. *See* note 130 *infra*.)

[127] A similar ambiguity affects several other excludable events defined in section 3161(h)(1): competency hearings, trials of other charges, and transfers from other districts. These provisions will not be considered separately because they apply much less frequently than the pretrial motions exclusion, but many of the same arguments in favor of narrow construction are applicable.

[128] 120 CONG. REC. H 12,550 (daily ed., Dec. 20, 1974).

[129] 28 U.S.C. § 2902 (1970).

[130] S. REP. NO. 1021, 93d Cong., 2d Sess. 38 (1974). *See also id.* at 37-38 ("exclusion of time consumed in competency hearings").

At one point the bill contained a provision expressly limiting all of the section 3161(h)(1) exclusions to "such court days as are actually consumed," S. 754, 93d Cong., 1st Sess. § 3161(e)(1)(B) (1973). The subcommittee added this language for the sole purpose of prohibiting exclusion of posthearing "under advisement" time; the language was removed when the full committee subsequently added subsection 3161(h)(1)(G), which expressly permits such exclusions. *See* S. REP. NO. 1021, 93d Cong., 2d Sess. 36 (1974). Thus, *prehearing* delays were never at issue, and the removal of this language does not imply an intent to permit exclusion of such delays. Moreover, the legislative history indicates that, prior to these changes, the pretrial motions exclusion was viewed as including, *at most*, "the period consumed by the hearing" plus "under advisement" time. *Id.*

and postponements are probably a major cause of pretrial delay.[131] Moreover, an automatic exclusion of all delays relating to pretrial motions without regard to duration or justification would seem inconsistent with the strict provisions governing the granting of "excludable" continuances.[132] A broad rule would actually tend to encourage delays in the disposition of pretrial motions, since judges would not be required to give any reasons for extending a briefing schedule or postponing a hearing. Judges might also be tempted to permit filing of belated or frivolous motions, because each such event would provide substantial additional "breathing room." The narrower the exclusion, the more incentive judges will have to require early filing and briefing of all pretrial motions.[133]

Unfortunately, an exclusion that is limited to one or two "actual hearings days" is hardly worth the effort, and an intermediate approach would be the hardest to define. (How much delay necessarily "results" from a pretrial motion?) The simplest answer is to eliminate the exclusion entirely and deal with the problem either by means of the excludable continuance provisions or with somewhat longer time limits. The latter alternative seems preferable, particularly if experience with the Act reveals a tendency to overuse the continuance provisions.

b. *Proceedings Under Advisement.* Subsection 3161(h)(1)(G) permits the exclusion of "delay reasonably attributable to any period, not to exceed 30 days, during which any proceeding concerning the defendant is actually under advisement." This provision was added by the Senate Judiciary Committee so that such exclusions would not have to be made under the "ends of justice" continuance provision;[134] the 30-day limitation was later added by the House.[135] The *Senate Report* indicates that this new exclusion provision was intended to be fairly narrow.

[131] The 1970 Federal Judicial Center study revealed that, in the 12 districts studied, about 94 percent of the delays between indictment and trial or entry of a guilty plea occurred prior to disposition of the last "substantive motion." *1971 Senate Hearings*, *supra* note 53, at 544. Even if delays between indictment and the filing of the first pretrial motion were subtracted, it is likely that the disposition of such motions would still have accounted for more than half the pretrial delay in these districts.

[132] 18 U.S.C. § 3161(h)(8) (Supp. IV, 1974); *see* text at note 146 *infra*.

[133] For a discussion of the importance of preventing "[s]uccessive pretrial motions . . . filed on a 'one-at-a-time basis,'" see S. REP. No. 1021, 93d Cong., 2d Sess. 10 (1974).

[134] *Id.* at 36.

[135] H.R. REP. No. 1508, 93d Cong., 2d Sess. 32 (1974). The 30-day limitation does not prevent the court from excluding additional time pursuant to section 3161(h)(8), provided the required "ends of justice" finding is set forth in the record. *Id.* at 33.

> It was not the intent of the Committee in adopting this amendment to give a blanket exception to matters under advisement for the time excluded must be "reasonably attributable" and the matter must be "actually under advisement." Therefore the judge must be actually considering the question, for example, conducting the research on a novel legal question.[136]

Of course, the judge himself will determine whether the period of delay meets this definition, and there is nothing to prevent judges from routinely taking all motions "under advisement" for the maximum period of 30 days. Thus, since Congress intended to limit the frequency and duration of such delays, it probably should have relied instead on the "ends of justice" continuance provision, which at least requires the judge to justify the reasons for delay in each case. Conceivably, the "under advisement" exclusion as presently formulated could be so widely invoked that overall ("gross") disposition times in some cases would actually increase.

c. *Unavailability of Defendant or Essential Witness.* Section 3161(h)(3) permits exclusion of

> (A) Any period of delay resulting from the absence or unavailability of the defendant or an essential witness.
> (B) For purposes of subparagraph (A) of this paragraph, a defendant or an essential witness shall be considered absent when his whereabouts are unknown and, in addition, he is attempting to avoid apprehension or prosecution or his whereabouts cannot be determined by due diligence. For purposes of such subparagraph, a defendant or an essential witness shall be considered unavailable when his whereabouts are known but his presence for trial cannot be obtained by due diligence or he resists appearing at or being returned for trial.[137]

The necessity of excluding periods of defendant or witness una-

[136] S. REP. No. 1021, 93d Cong., 2d Sess. 36 (1974).

[137] The wording of this provision is almost identical to Standard 2.3(e) of the *ABA Standards*, *supra* note 56, except that the latter does not extend to "essential" witnesses. The *Senate Report* defines this term as follows:

> By an "essential witness" the Committee means a witness so essential to the proceeding that continuation without the witness would either be impossible or would likely result in a miscarriage of justice. For example, a chemist who has identified narcotics in the defendant's possession would be an "essential witness" within the meaning of this subsection.

S. REP. No. 1021, 93d Cong., 2d Sess. 37 (1974). This standard is very similar to the provisions of section 3161(h)(8), which allows "excludable" continuances to be granted to serve the "ends of justice," except that exclusions based on unavailable witnesses do not require a statement of reasons.

vailability seems clear enough, but the language of this exclusion, like the pretrial motions provision, is troublesome and ambiguous. Narrowly construed, the exclusion can be said to apply only to continuances of court proceedings made necessary by the nonappearance of the defendant or witness. A broader construction would also exclude any period during which the prosecution or defense counsel is unable to contact the defendant or witness for purposes of discovery or plea negotiation. Although such out-of-court "unavailability" can often lead to subsequent trial delays, even if these persons appear for all the required court proceedings, the reference in subsection 3161(h)(3)(B) to "presence for trial" suggests that unavailability is grounds for an exclusion only to the extent that the delay results from nonappearance. This narrow interpretation is also favored by the special difficulty of determining factually, as to out-of-court events, precisely when a defendant or witness is "attempting to avoid apprehension or prosecution" or when his "whereabouts cannot be determined by due diligence." Thus the narrow interpretation should probably be adopted, but court appearances should be scheduled with sufficient frequency to insure prompt detection of out-of-court unavailability.

In some circumstances the language of this exclusion could conflict with the separate provision applicable to defendants serving a term of imprisonment for other offenses, section 3161(j). Although section 3161(j) would generally apply *prior* to the defendant's initial appearance (hence, prior to the point at which the time limits and exclusions become applicable), both provisions could apply simultaneously if a defendant were released on bond and subsequently began serving a term of imprisonment on unrelated charges. At that point, subsection 3161(h)(3)(B) would require "due diligence" to obtain the defendant's immediate presence for trial, whereas section 3161(j) permits the government to file a detainer and, if no demand for trial is received, wait out the prisoner's sentence.[138]

Section 3161(j) was taken directly from the *ABA Standards*,[139] but neither the commentary to these standards nor the legislative history of the Act explain why the trial of defendants in prison should be postponed by nonaction of the prosecutor and the defendant. Both the *ABA Standards* and the Act are premised on the notion of a public right to speedy trials, independent of the wishes of the parties,[140] but since there is no additional cost associated with

[138] 18 U.S.C. § 3161(j)(3) (Supp. IV, 1974).

[139] H.R. Rep. No. 1508, 93d Cong., 2d Sess. 34 (1974); *see* ABA Standards, *supra* note Standard 3.1.

[140] See note 56 *supra*.

such correctional custody, nor any of the risks associated with pretrial release, a limited exception to the public right concept may be appropriate. If so, then the stricter rule implicit in section 3161(h)(3) should be considered subordinate to the "demand" rule of section 3161(j).

d. *Superseding Charges.* Section 3161 of the Act contains several provisions dealing with situations in which a complaint, indictment, or information has been dismissed, and subsequently the same offense is charged in a new document. Section 3161(d) provides that the time limits for indictment, arraignment, and trial begin to run anew when the original charge is dismissed upon motion of the defendant, or if the original charge was a complaint and it is dismissed by either party or on the court's own motion.[141]

If, however, an information or indictment is dismissed upon motion of the Government, the time limits applicable to any refiled charges apparently do not begin to run anew. Section 3161(h)(6) permits an exclusion under the following circumstances:

> If the information or indictment is dismissed upon motion of the attorney for the Government and thereafter a charge is filed against the defendant for the same offense, or any offense required to be joined with that offense, any period of delay from the date that the charge was dismissed to the date the time limitation would commence to run as to the subsequent charge had there been no previous charge [is excludable].

If the period between the dismissal of the first charge and the filing of the second is excludable, this implies that the "clock" is still running.[142]

Since the filing of superseding charges is entirely within the control of the Government, such a rule makes sense: the Government should not be permitted to obtain additional time simply by filing slightly different charges against the same defendant for the same criminal episode. Yet section 3161(d) clearly permits the Government to do just that with respect to charges in a complaint.[143]

[141] Section 3161(d) is obviously limited to dismissals without prejudice. If the charge is dismissed with prejudice, pursuant to section 3162(a) or for other reasons, it cannot be refiled.

[142] The *Senate Report* confirms this interpretation. S. Rep. No. 1021, 93d Cong., 2d Sess. 38 (1974).

[143] The distinction between preindictment and postindictment dismissals appears to derive from the *ABA Standards*. ABA Standards, *supra* note 56, Standards 2.2(a), 2.3(f). The commentary to Standard 2.2(a) justifies this distinction as follows:

> Were it otherwise, the time for trial would begin running because of the action of the police and magistrate, even though the prosecutor later concluded he had insufficient evidence to file a charge and caused the outright release of the defendant.

Moreover, it would seem to allow the Government to file a new complaint before dismissing the old one, in which case the defendant would not have to be released from custody or from his bail obligations at any time. Clearly such a paper shuffle would violate the spirit if not the letter of the law, and if experience with the Act reveals a tendency for dismissed and refiled complaints to increase, section 3161(d) should be amended to conform to the "tacking" approach applicable to superseding indictments.

Whether or not the "tacking" rule is extended to superseding complaints, the wisdom of automatically excluding all of the time between dismissal and refiling of charges is also questionable. The public interest in speedy trials clearly favors prompt refiling of charges, and lengthy delays are particularly damaging to the defense. Although the defendant does not suffer the concrete disadvantages of pending charges, he must still deal with the problems of lost witnesses, stale evidence, and unresolved accusations. Moreover, any continuing preparations or investigations by the Government are not likely to be matched by equal efforts on behalf of the defendant, and the Government can control the timing of refiling to maximize this advantage. This is always a problem at the outset of a prosecution, and section 3161(h)(6) seems to give the Government a second chance to gain the upper hand in trial preparation.[144] On the other hand, when charges are dismissed it is reasonable to expect that grand jury delays, further investigations, or problems of unavailable evidence might necessitate some delay in refiling. Such events are generally excludable under other provisions of the Act, however,[145] so it may be possible to eliminate the automatic exclusion provided in section 3161(h)(6). This would give the Government less of an incentive to "stop the clock" and would prevent

There are two reasons why this argument should not apply to the Speedy Trial Act. First, since the Act provides a separate time limit from arrest to indictment, the "tacking" of time periods under separate complaints charging the same offense would not lessen the time available for arraignment and trial, but only the time for indictment. Second, given the nature of federal offenses and offenders, arrests on federal charges are much more likely to be coordinated with or directed by the prosecutor's office. Such advance planning helps to minimize the number of unnecessary arrests, and should be encouraged by providing that any time between arrest and government dismissal of a complaint counts against the arrest-to-indictment limit.

[144] The "ends of justice" continuance provisions can be used to give the defendant extra time for preparation, but the result is obviously further delay of an already stale case.

[145] *E.g.*, 18 U.S.C. § 3161(b) (Supp. IV, 1974) (if no grand jury is in session, the indictment limit may be extended for up to 30 days); *id.* § 3161(h)(3) (unavailability of the defendant or an essential witness); *id.* § 3161(h)(8) (continuances granted to serve the "ends of justice," including unavoidable delays in grand jury proceedings).

exclusion of delays which the Act does not specifically recognize as excusable.

2. *Excludable Continuances.* If none of the specific exclusions provided in sections 3161(h)(1) through (7) is applicable, section 3161(h)(8) permits the court to grant an excludable continuance on its own motion, or at the request of either party. Such a continuance is excludable only if the judge 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." This seemingly indeterminate standard is substantially confined by certain statutory guidelines,[146] and the judge is required to set forth his reasons for granting the continuance in the record of the case, either orally or in writing.

The Senate viewed this provision as "the heart of the speedy trial scheme" created by the Act, because it allows the necessary flexibility to make compliance with the strict time limits a "realistic goal."[147] Yet section 3161(h)(8) is of central importance for another reason as well: the strict standards governing the granting of such excludable continuances represent a clear expression of Congress's determination to enforce the public right to speedy trials.[148] The court is expressly required to consider this right along with the rights of the defendant; accordingly, the defendant's consent or waiver of his rights is not a sufficient basis for an extension of the statutory time limits,[149] nor may such extensions be obtained "by agreement" if they do not meet the strict standards of section 3161(h)(8).

Such strict control of defense continuances is virtually unprecedented in prior speedy trial statutes and rules. Most state statutes provide that any delay on defendant's motion[150] or "application"[151] automatically tolls the time limits, and few standards are provided to govern the granting of such continuances. Other statutes exclude defense continuances but, like the Act, contain standards which

[146] *See* text at note 155 *infra*.

[147] S. REP. No. 1021, 93d Cong., 2d Sess. 39 (1974). The option of dismissal without prejudice and the judicial emergency provisions, both of which were subsequently added by the House, allow additional flexibility. *See* text at notes 175, 200 *infra*.

[148] The "public right" concept is also reflected in the Act's rejection of the traditional "demand rule." *See* note 66 *supra*. The importance of this concept is mentioned frequently in the legislative history. *See* S. REP. No. 1021, 93d Cong., 2d Sess. 6-8 (1974); H.R. REP. No. 1508, 93d Cong., 2d Sess. 15 (1974).

[149] However, the right to dismissal may be waived by failure to make a timely motion. *See* note 24 *supra*. *See also* text at note 195 *infra* (suggesting that certain forms of intentional defense delay might bar dismissal with prejudice under section 3162(a)).

[150] *See, e.g.*, IND. R. CRIM. P. 4.

[151] *See, e.g.*, MO. REV. STAT. § 545.900 (1949).

recognize the public interest in speedy trials and restrict the granting of such continuances.[152] The enforcement of such standards, however, is generally left entirely to the judge; unlike the Act, no reviewable record of his reasoning is required.[153] The standard of review under the Act is unclear, but even if a narrow "abuse of discretion" standard is followed,[154] the need to articulate the exercise of this discretion should serve to encourage adherence to the statutory formula.

The Act sets out three factors which the court must consider, "among others,"[155] in deciding whether to grant an excludable continuance. First, the court must consider

[152] *See, e.g.*, ILL. REV. STAT. ch. 38, § 103-5(f) (1973) ("delay occasioned by the defendant" tolls the statutory time limits); *id.* § 114-4 (court may require any motion for a continuance filed more than 30 days after arraignment to be supported by affidavit; the statute specifies the situations in which such a motion may be granted, but provides that the court may also grant the motion if it finds that "the interests of justice so require"; these provisions are designed to protect both "the rights of the defendant and the state to a speedy, fair and impartial trial"). *See also* N.Y. CODE CRIM. PRO. § 30.30(4)(b) (McKinney 1971) (excludable continuance may be granted if postponement is "in the interest of justice, taking into account the public interest in the prompt disposition of criminal charges"). The Illinois standards are contained in a separate statutory provision governing all continuances in criminal cases, whereas the New York Statute, like the Act, places the standards within the speedy trial exclusion provisions. The latter arrangement implies that *non*excludable continuances may be granted without regard to the standards; that is, the standards only set the conditions for excludability.

In addition to the structure of the Act, there are strong policy reasons why section 3161(h)(8) should not be interpreted to prohibit nonexcludable continuances. There are bound to be situations in which a case must be put over for a few days due to temporary scheduling problems or other difficulties, and judges should not be required to make a separate finding in each and every case. Even if such extensions would not be justified under the strict "ends of justice" standard, they do not jeopardize the effectiveness of the statute if they are not excluded. Moreover, if *all* continuances must meet the standards of section 3161(h)(8), courts would be under considerable pressure to expand and dilute these standards. Thus, the availability of nonexcludable continuances promotes effectiveness as well as efficiency in the administration of the Act.

[153] The state of Arizona briefly experimented with such a procedure, but then abandoned the effort. Rule 8.5 of the 1973 Rules of Criminal Procedure issued by the Arizona Supreme Court (effective Sept. 1, 1973) provided that continuances would be granted only upon a written order, "specifically enumerating" the reasons therefor. Rule 8.5 further provided that, after two continuances, any further continuances could be granted only by the presiding judge of the court. In Schultz v. Peterson, 111 Ariz. 421, 531 P.2d 1128 (1975), it was held that failure to make the required written finding made a prosecution continuance nonexcludable, so that the defendant was entitled to dismissal (even though his counsel had agreed not to contest the continuance). Perhaps in reaction to the *Schultz* case, the requirements of written justification and control by the presiding judge were eliminated on May 7, 1975 (effective August 1, 1975).

[154] The standard of review is not mentioned in the legislative history. For a discussion of the common law "abuse of discretion" standard, see C. WRIGHT, FEDERAL PRACTICE AND PROCEDURE § 832, at 333-40 (1969). *See also* S. REP. No. 1021, 93d Cong., 2d Sess. 41 (1974) (denial of an excludable continuance not subject to interlocutory appeal).

[155] The reference to such "other" factors obviously indicates that the statutory guidelines

> [w]hether the failure to grant such a continuance in the proceeding would be likely to make a continuation of such proceeding impossible, or result in a miscarriage of justice.[156]

The *Senate Report* suggests that any of the following circumstances would be sufficient to warrant the granting of an excludable continuance under the above standard:

> where the judge trying the case, the attorney for the Government, defense counsel, the defendant or an essential witness is ill or unable to continue, or the defense counsel has been permitted by the court to resign from the case, or the court has removed counsel from the case.[157]

The "miscarriage of justice" standard also authorizes the courts to subordinate the demands of speedy trial if necessary to secure important rights of the defendant. The *House Report* suggests, for example, that an excludable continuance could be granted to preserve the defendant's right to due process and effective representation by counsel;[158] trial postponement based on pretrial publicity should also be justified under this provision.[159]

The second factor which the court must consider in determining whether to grant an excludable continuance is

> [w]hether 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.[160]

This provision focuses on delays related to the nature of the case itself, and recognizes that some cases simply take longer than other cases to reach trial. The number of defendants (or perhaps more

are not an exhaustive list of the factors which the court may consider, and that a certain residual discretion remains to construe the "ends of justice" standard. *See* text at note 168 *infra*.

[156] 18 U.S.C. § 3161(h)(8)(B)(i) (Supp. IV, 1974).

[157] S. REP. No. 1021, 93d Cong., 2d Sess. 40 (1974). For a definition of "essential witness," see note 137 *supra*.

[158] H.R. REP. No. 1508, 93d Cong., 2d Sess. 33-34 (1974). The *Report* attempts to distinguish between delays caused solely by the defendants' counsel, and delays in which the defendant "participated actively." Application of this rule lessens but does not avoid the potential conflicts between the Speedy Trial Act and the due process clause. Presumably, the trial date or other court proceeding could be scheduled so unreasonably early in the case that, even if a defendant "participated" in the failure to proceed on that date, it would be fundamentally unfair to deny him a continuance.

[159] *See* Judicial Conference Guidelines, *supra* note 72, at 20.

[160] 18 U.S.C. § 3161(h)(8)(B)(ii) (Supp. IV, 1974).

precisely, the number of defense counsel) is undoubtedly a measurable determinant of disposition time,[161] and statistical research may be able to provide the courts with fairly precise guidelines regarding the number of defendants (or counsel) beyond which extra time is usually needed.

The more general standard of "complexity" is harder to define and measure. At one extreme, this standard could be construed so broadly that any case which was more "complex" than the average case would be eligible for an exclusion. Such an interpretation, however, would tend to affirm the status quo,[162] which is clearly not what Congress intended.[163] A narrower interpretation is implied in the *Senate Report*, which states that exclusion is appropriate in "protracted" prosecutions such as antitrust and "complicated organized crime conspiracy cases."[164] The *Report* also suggests that such complexity could be measured by means of the case weighting system used by the Administrative Office of U.S. Courts.

> It would be very appropriate to grant continuances under Section 3161(h)(8) for a bribery case which has a weighted caseload index of 5.90 [the second highest value assigned], while in the typical auto theft case where the index is only .63 a continuance based on complexity would not be appropriate.[165]

The third factor which the statute permits the court to consider is

> [w]hether delay after Grand Jury proceedings have commenced, in a case where arrest precedes indictment, is caused by the unusual complexity of the factual determination to be made by the Grand Jury or by events beyond the control of the court or the Government.[166]

This provision applies only during the arrest-to-indictment interval, and is to be narrowly construed. The *Senate Report* indicates that the exclusion

[161] *See* 1976 Northern Illinois Plan, *supra* note 79, app. A. A statistically significant correlation was found between number of defendants and "gross" indictment-to-trial times in 1974.

[162] About half of all defendants are already tried or plead guilty within 70 days of indictment. *See* note 86 *supra*.

[163] *See* 120 CONG. REC. H 12,569 (daily ed., Dec. 20, 1974) (exchange between Rep. Conyers and Rep. Dennis).

[164] S. REP. No. 1021, 93d Cong., 2d Sess. 39 (1974).

[165] *Id.* at 40.

[166] 18 U.S.C. § 3161(h)(8)(B)(iii) (Supp. IV, 1974).

> is not designed to cover every situation where Grand Jury proceedings are delayed—only where the delay was caused when an unusual amount of new or complex evidence is elicited in those proceedings.[167]

In addition to these three factors, the Act grants the courts a certain residual discretion to determine what the "ends of justice" require in a given case.[168] Although this power was intended to be "rarely used,"[169] there are several common situations which would justify an exclusion but which are not covered by any of the section 3161(h)(8) guidelines or by a specific exclusion provision. Thus, if Congress wishes to discourage the exercise of the residual "ends of justice" exclusion, it may be necessary to specify additional guidelines or specific exclusions.

For example, an exclusion seems appropriate when a judge becomes bogged down in a lengthy trial on another matter. Given the unpredictability of settlement processes and plea bargaining, as well as the difficulty in forecasting the exact length of trials, such temporary conflicts in court scheduling are often unavoidable. It would be inefficient and unfair to the litigants in the case on trial to require that a recess be held to permit trial of criminal cases approaching the statutory time limits. Moreover, if the case on trial is a criminal case, it too may be approaching the statutory deadline; and if it is a civil trial, consideration must be given to Congress's desire that the Speedy Trial Act not cause "prejudice to the prompt disposition of civil litigation."[170]

That leaves two alternatives: either reassign the criminal cases which are not on trial, or enter an excludable continuance in each of those cases. If the scheduling conflict could not have been avoided, then the situation is similar to a case in which the original judge becomes "ill or unable to continue."[171] In both cases, it is more efficient to tolerate a slight delay than to require reassignment (which may cause some delay anyway); large numbers of such reassignments would also seriously impair the effectiveness of the individual calendar system.[172] There is some question, however, whether

[167] S. REP. No. 1021, 93d Cong., 2d Sess. 41 (1974). The *Report* goes on to suggest that the exclusion would not be appropriate in cases where the arrest was premature. *Id.*

[168] *See* note 155 *supra*.

[169] S. REP. No, 1021, 93d Cong., 2d Sess. 41 (1974).

[170] *See* 18 U.S.C. § 3165(b) (Supp. IV, 1974).

[171] *See* text at note 157 *supra*. Subsection 3161(h)(8)(C) which prohibits the granting of an excludable continuance based on "general congestion of the court's calendar," should not be a bar to exclusions based on such temporary scheduling conflicts. *See* text at note 174 *infra*.

[172] *See* text at note 92 *supra*.

58-721 O - 80 - 26

the granting of an excludable continuance in such a case could be based on the "impossibility" or "miscarriage of justice" standard. Either rationale seems rather contrived; to avoid diluting the statutory language it seems preferable to add a specific provision permitting such exclusions.

A similar problem arises when the subject case involves a legal question that is pending decision by the court of appeals or the Supreme Court. The *Judicial Conference Guidelines* suggest that if the legal question would be dispositive of the subject case, an excludable continuance is justified under section 3161(h)(8).[173] Here again, continuation of the case would not be "impossible," nor would it necessarily result in a "miscarriage of justice." but it would certainly involve the inefficiency of litigating the same issue in two courts simultaneously. Thus, a decision to await the outcome of the case on appeal would have to be based on more general "ends of justice" considerations.

The "ends of justice" standard is qualified by the provisions of subsection 3161(h)(8)(C), specifying that an excludable continuance may not be granted where delay results from

> general congestion of the court's calendar, or lack of diligent preparation or failure to obtain available witnesses on the part of the attorney for the Government.

Such "general congestion" would presumably be grounds for a request to invoke the "judicial emergency" provisions. As for the apparent distinction between prosecutor and defense "diligence," one justification might be that an unprepared prosecutor has the option of dropping the case, whereas an unprepared defendant must carry on. If the defendant himself "participated" in the delay, however, he can apparently be forced to go to trial unprepared.[174] This distinction between client and attorney stalling is not possible in the case of prosecution delays, so it is necessary to adopt either a strict or an indulgent approach; Congress chose the former.

One other major source of delay in federal courts, which is not mentioned anywhere in the Act or the legislative history, is the traditional summer "recess." Since the Act attempts to define all

In the final House debates, Representative Conyers stated that conflicts caused by the trial of long and complicated cases are generally foreseeable, and that courts must anticipate these problems and attempt to reassign other cases approaching the statutory limits. 120 CONG. REC. H 12,570 (daily ed., Dec. 20, 1974). Unfortunately, the result would seem to be a major decrease in court efficiency, in return for a fairly minor increase in disposition time.

[173] Judicial Conference Guidelines, *supra* note 72, at 21.

[174] *See* note 158 *supra*.

forms of delay which are excusable (hence, excludable), the failure to mention this practice presumably means that it is not a basis for an exclusion. To some extent the Government can avoid this problem by limiting the number of prosecutions commenced in the months immediately prior to the recess. But some defendants must be arrested immediately in order to terminate their illegal activity, and judges may be compelled to reduce or stagger their vacations to accommodate these arrests, as well as cases left over from earlier months.

3. *The Dismissal Sanction.* In addition to the excludable time provision, the Act provides further flexibility through the application of the dismissal sanction. If the statutory time limits are exceeded, after the deduction of excludable time, the court is authorized to dismiss the charge either with or without prejudice, and although the Act contains certain guidelines for this determination,[175] the amount of discretion given to the courts appears to be at least as great as that implicit in the "ends of justice" continuance provisions.

The dismissal sanction was a source of controversy and compromise throughout the legislative history. Many state speedy trial acts do not provide for dismissal with prejudice,[176] and neither rule 48 nor rule 50(b) of the Federal Rules of Criminal Procedure requires dismissal with prejudice, absent a sixth amendment violation.[177] How-

[175] *See* text at note 183 *infra*.

[176] *See, e.g.*, S.D. CODE § 23-34-6 (1967). *See generally* Annot., 50 A.L.R.2d 943 (1956); ABA STANDARDS, *supra* note 56, commentary to Standard 4.1.

[177] Rule 48(b) provides as follows:

> If there is unnecessary delay in presenting the charge to a grand jury or in filing an information against a defendant who has been held to answer to the district court, or if there is unnecessary delay in bringing a defendant to trial, the court may dismiss the indictment, information or complaint.

The Advisory Committee note to subdivision (b) indicates that this rule is a "restatement of the inherent power of the court to dismiss a case for want of prosecution," although the rule also implements the right of an accused to a speedy trial under the sixth amendment. Violation of the constitutional right apparently requires dismissal with prejudice. Strunk v. United States, 412 U.S. 434 (1973); Barker v. Wingo, 407 U.S. 514, 522 (1972); Mann v. United States, 304 F.2d 394, 398 (D.C. Cir. 1962) (dictum). However, a dismissal solely for want of prosecution may be either with or without prejudice. *See* Mann v. United States, *supra* (without prejudice); United States v. Furey, 514 F.2d 1098, 1103 (2d Cir. 1975) (with prejudice). Prior to the *Furey* case, it was unclear whether federal courts were empowered to dismiss with prejudice in the absence of a constitutional violation. Previous cases, such as *Mann*, had only upheld the validity of dismissal without prejudice, and the two cases relied upon by the court in *Furey* did not expressly approve dismissal with prejudice for nonconstitutional violations. *See* White v. United States, 377 F.2d 948 (D.C. Cir. 1967); District of Columbia v. Weems, 208 A.2d 617 (D.C. Mun. App. 1965).

Rule 50(b) requires each district court to prepare a "plan for achieving prompt disposition of criminal cases," but the rule itself does not specify the sanctions which may be

ever, the *ABA Standards* recommended that violation of the applicable time limits should lead to absolute discharge, on the theory that this is the only effective remedy,[178] and the initial drafts of the Act adopted this approach.[179] Early in 1974, the Senate Judiciary Committee amended the dismissal sanction, to permit reprosecution if there were "compelling evidence that the delay was caused by exceptional circumstances which the government and the court could not have foreseen or avoided."[180] The House Judiciary Committee disagreed with this change, and reinstated the requirement that all violations must lead to dismissal with prejudice.[181] However, the Department of Justice, and several members of the Committee, strongly opposed that requirement,[182] and when the bill came up for debate on the House floor an amendment was offered, and agreed to by the bill's sponsors, giving the judge discretion to dismiss with or without prejudice.[183]

How this discretion is to be exercised is very unclear, however. Section 3162(a)(1) simply states that the complaint, indictment, or information "shall be dismissed," and that

> [i]n determining whether to dismiss the case with or without prejudice, the court shall consider, among others, each of the following factors: the seriousness of the offense; the facts and circumstances of the case which led to the dismissal; and the impact of a reprosecution on the administration of this chapter and on the administration of justice.

The reference to other factors makes it clear that the three statutory factors do not constitute an exhaustive list. In particular, the final House debates indicate that the degree of prejudice to the defendant is also a relevant consideration, though not a determinative one.[184]

imposed to achieve this aim. *See* note 68 *supra*. The *1972 Model Plan* states that "subject to the power of the court to dismiss a case for unnecessary delay, the failure to conform with the time limits herein prescribed shall not require the dismissal of the prosecution." 1972 Model Plan, *supra* note 68, § 5. The reference to "unnecessary delay," which is the standard for dismissal under rule 48(b), suggests that rule 50(b) does not provide a basis for dismissal independent of rule 48. *See* United States v. Furey, *supra* (upholding the dismissal provisions of the rule 50(b) plan for the Eastern District of New York, as a codification of preexisting common law).

[178] *See* ABA STANDARDS, *supra* note 56, Standard 4.1 & commentary at 40.

[179] S. 3936, 91st Cong., 2d Sess. § 3162 (1970); S. 895, 92d Cong., 2d Sess. § 3162 (1971).

[180] S. 754, 93d Cong., 2d Sess. § 3162(b) (1974).

[181] H.R. 17409, 93d Cong., 2d Sess, § 3162 (1974); *see* H.R. REP. No. 1508, 93d Cong., 2d Sess. 36-38 (1974).

[182] H.R. REP. No. 1508, 93d Cong., 2d Sess. 54-55, 80-82 (1974).

[183] 120 CONG. REC. H 12,570-72 (daily ed., Dec. 20, 1974).

[184] *See* note 190 *infra*.

Unlike the excludable continuance provisions, section 3162 contains no statement of the "general rule" within which all such factors must operate, although the legislative history suggests at one point that a balancing test similar to the one provided in section 3161(h)(8) is to be used.[185] It seems anomalous that the important dismissal decision is subject to fewer restrictions than the granting of continuances, and the Act should probably be amended to specify that the same standards apply. Thus, courts would be required to determine whether the "ends of justice" served by dismissing without prejudice outweigh the best interests of the public and the defendant in a speedy trial. Courts might also be required to state on the record the reasons for such a finding, as they are under section 3161(h)(8).

There is some similarity between the standards for dismissal under the Act and under the sixth amendment, and the *House Report* suggests that the drafters of the statutory dismissal provisions intended to adopt this prior law.[186] In *Barker v. Wingo*[187] the Supreme Court listed four factors which should be considered in deciding a sixth amendment claim: (1) the length of the delay; (2) the reasons for the delay; (3) the extent to which the defendant asserted his right to speedy trial; and (4) the degree of prejudice to the defendant's rights.[188] The first factor was said to depend on the nature of the case, including perhaps the seriousness of the offense,[189] and the second factor—reasons for the delay—seems very similar to the "facts and circumstances" rule of the Act. The "degree of prejudice" is also a relevant factor under both constitutional and statutory principles.[190]

However, the legislative history subsequent to the issuance of

[185] 120 CONG. REC. H 12,571 (daily ed., Dec. 20, 1974) (remarks of Rep. Cohen).

[186] In discussing the powers of the federal courts under Federal Rule of Criminal Procedure 48(b), the *House Report* indicated that the proposed amendment would "continue current law." H.R. REP. No. 1508, 93d Cong., 2d Sess. 81-82 (1974). Prior to United States v. Furey, 514 F.2d 1098 (2d Cir. 1975), however, rule 48 only appeared to justify dismissal with prejudice when there had been a constitutional violation. *See* note 177 *supra*.

[187] 407 U.S. 514 (1972).

[188] *Id.* at 530 (1972).

[189] As an example of the different time limits appropriate in different cases, the Court stated that "the delay that can be tolerated for an ordinary street crime is considerably less than for a serious, complex conspiracy charge." 407 U.S. at 531. Apparently both complexity and seriousness are relevant factors.

[190] None of the four factors enunciated in *Barker v. Wingo* was intended to constitute either a necessary or a sufficient condition for dismissal. 407 U.S. at 533. The operation of the statutory standards is less clear, but the House debates indicate that the "prejudice" factor is neither a necessary nor a sufficient consideration. *See* 120 CONG. REC. H 12,571-72 (daily ed., Dec. 20, 1974).

the *House Report* plainly indicates that the statutory provisions were designed to permit dismissal with prejudice under circumstances where this sanction would not be required by the sixth amendment,[191] and the important "public interest" rationale behind the Act would also seem to require this result. Under sixth amendment standards, any delay "attributable" to the defendant is automatically excluded in determining the right to dismissal,[192] but the application of such a broad rule to the statutory dismissal sanction would tend to nullify the strict limitations on the granting of excludable continuances.[193]

On the other hand, it seems unnecessary to ignore completely the defendant's responsibility for delay, particularly where such delay is intentional and without any justification. An earlier version of the Act made the sanction of dismissal conditional on the absence of defendant or defense counsel "fault,"[194] and the final House debates clearly indicate an intent to prevent defendants from taking advantage of their own "deliberate stalling" to seek dismissal under the Act.[195] The debates suggested that the problem could be handled either by means of the separate sanctions against attorneys for "willful" delay[196] or through the use of excludable time,[197] but neither approach is completely satisfactory. The attorney sanctions do not deal with the problem of misconduct by the defendant himself, and, even if he is blameless, a dismissal with prejudice would tend to reward his counsel's misconduct. The entry of an exclusion equal to the period of such "deliberate delay" makes more sense, unless such period has already been excluded (*e.g.*, if defense counsel obtained an excludable continuance on the basis of false

[191] In a letter dated Dec. 9, 1974, from Attorney General Saxbe to Rep. Madden, Chairman of the House Rules Committee, the proposed amendment was said to permit dismissal with prejudice either for denial of sixth amendment rights or where the judge "believes circumstances warrant a dismissal." 120 CONG. REC. H 12,519 (daily ed., Dec. 20, 1974). A letter from the Attorney General to Rep. Rodino, dated Dec. 13, 1974, makes the same point. 120 CONG. REC. S 22,489 (daily ed., Dec. 20, 1974).

[192] Barker v. Wingo, 407 U.S. 514, 529 (1972).

[193] *See* text at note 149 *supra*.

[194] S. 3936, 91st Cong., 2d Sess. § 3162 (1970).

[195] 120 CONG. REC. H 12,554 (daily ed., Dec. 20, 1974) (remarks of Rep. Cohen).

[196] *Id.* (remarks of Rep. Conyers). Section 3162(b) of the Act permits the court to impose fines and other penalties on any government or defense attorney who

> (1) knowingly allows the case to be set for trial without disclosing the fact that a necessary witness would be unavailable for trial; (2) files a motion solely for the purpose of delay which he knows is totally frivolous and without merit; (3) makes a statement for the purpose of obtaining a continuance which he knows to be false and which is material to the granting of a continuance; or (4) otherwise willfully fails to proceed to trial without justification consistent with Section 3161 of this chapter . . . .

[197] 120 CONG. REC. H 12,554 (daily ed., Dec. 20, 1974) (remarks of Rep. Wiggins).

representations). In that situation, some sort of dismissal may be required, but it seems reasonable to deny dismissal with prejudice unless the degree of government "fault" is equally great.[198] Thus, although the "facts and circumstances" factor should relate primarily to the justification offered by the Government or the court for failure to meet the statutory limits, there may be situations in which consideration of defense "fault" would also be appropriate.

The number of dismissals without prejudice must be kept within limits, however. Section 3162 requires the court to consider "the impact of a reprosecution on the administration of justice," and this provision suggests two reasons for minimizing such dismissals. First, widespread dismissals without prejudice would weaken the deterrent impact of the Act and decrease its effectiveness in protecting public and private speedy trial rights. Moreover, the need to reindict large numbers of defendants would significantly add to the workload and expense of the grand jury system.[199] Thus, dismissals without prejudice should be the exception, not the rule.

To summarize, the dismissal decision should be the product of a balancing test similar to that employed under the "ends of justice" continuance provisions. Dismissal with prejudice is permitted under circumstances which would not require dismissal under the sixth amendment, and the number of dismissals without prejudice should be limited. Seriousness of the offense is a factor which weighs against dismissal with prejudice, while the extent of prejudice to the defendant, government "fault," and defense "fault" are other factors which weigh in the balance.

4. *The Judicial Emergency Provision.* In the event that the exclusions and exceptions discussed above do not permit a district to comply with the permanent time limits, section 3174 permits the chief judge to apply for a temporary suspension of the arraignment and trial time limits contained in section 3161(c).[200] This provision was added by the House of Representatives, at the request of the Department of Justice and the Administrative Office of U.S.

[198] A similar "comparative fault" standard is provided under section 3164 (interim limits). *See* text at note 253 *infra*.

[199] This was one of the major reasons why the House Judiciary Committee decided to reinstate the mandatory dismissal with prejudice sanction. *See* H.R. REP. No. 1508, 93d Cong., 2d Sess. 37 (1974).

[200] The judicial emergency provisions were added contemporaneously with the 10-day arraignment limit and thus do not contain the apparent last minute drafting errors discussed earlier. *See* text at notes 112-16 *supra*. Section 3174 refers consistently to "the time limits set forth in § 3161(c)," so it seems clear that both the arraignment and trial limits contained in that section may be suspended. However, the two limits are treated differently in the event of a suspension. *See* text and note at note 206 *infra*.

Courts, to prevent "unjustifiable dismissals" caused by factors beyond the control of the court.[201] In particular, the concern was that if Congress failed to appropriate the necessary additional resources fast enough, or if unforeseen circumstances arose, then "wholesale dismissals" would result.[202] Although the House indicated that the number of other safeguards contained in the Act would make such a contingency unlikely, it felt that the matter should not be left to chance.[203]

The *House Report* makes clear, however, that this provision should not be invoked "as a matter of course,"[204] and both the statutory language and the legislative history substantially restrict the scope of the suspension and the circumstances under which it may be invoked. Only the arraignment and trial time limits may be suspended,[205] and in place of the permanent 60-day arraignment-to-trial limit, a longer limit not exceeding 180 days must be substituted.[206] This "suspension" may not exceed a period of one year, and does not apply to indictments or informations which were filed prior to the effective date of the suspension.[207]

The procedure for requesting and obtaining suspension is itself designed to limit and control the use of this provision. The chief judge must first seek the recommendations of the Speedy Trial Act Planning Group, and must then submit his request to the judicial council of the circuit.[208] The circuit council, if it finds that a suspension is justified, then makes application to the Judicial Conference

[201] H.R. REP. No. 1508, 93d Cong., 2d Sess. 9, 42-44 (1974).
[202] *Id. See also* 120 CONG. REC. H 12,552 (daily ed., Dec. 20, 1974).
[203] H.R. REP. No. 1508, 93d Cong., 2d Sess. 42 (1974).
[204] *Id.* at 44.
[205] Section 3174(b) specifically provides that "the time limits from arrest-to-indictment, set forth in § 3161(b), shall not be reduced," and further specifies that "the time limits for the trial of cases of detained persons who are being detained solely because they are awaiting trial shall not be affected by the provisions of this section." The first limitation may be unwise. *See* text at note 218 *infra*.
[206] 18 U.S.C. § 3174(b) (Supp. IV, 1974). The Act does not place similar restrictions on extensions of the arraignment limit. Given the brevity of this limit, Congress may have felt that the degree of extension granted for arraignments should be handled on a case-by-case basis. However, if the need to encourage prompt arraignments is to be taken seriously, and a major "loophole" avoided, some upper limit seems desirable. The 180-day maximum set for suspensions of the trial limit corresponds to the trial limit permitted for bailed defendants under the *1972 Model Plan*, so adoption of the 30-day arraignment limit in that plan might be appropriate. *See* notes 83, 101 *supra*.
[207] H.R. REP. No. 1508, 93d Cong., 2d Sess. 43 (1974).
[208] 18 U.S.C. § 3174(a) (Supp. IV, 1974). The *House Report* states that such recommendations "should be in writing and must set forth compelling reasons why a suspension should either be requested or not requested . . . . The chief judge should also seek the recommendations of the judges of his district." H.R. REP. No. 1508, 93d Cong., 2d Sess. 42-43 (1974).

of the United States, which makes a further determination of necessity.[209] The Judicial Conference may then grant a suspension for up to one year, unless the request is for a further suspension within six months of a prior suspension. In the latter case, the request for a further suspension must be reported to Congress, and if Congress approves or fails to act within six months, the further suspension may be ordered.[210]

Throughout this procedural sequence, the standards for defining a "judicial emergency" are fairly strict. The court's inability to comply with the arraignment and trial time limits must be due to "the status of its court calendars,"[211] which presumably does not encompass problems caused by shortages of prosecutors, defense counsel, or other noncourt resources. The court and the circuit council must also find that "existing resources are being efficiently utilized,"[212] and that "the availability of visiting judges from within and without the circuit," as well as other remedial actions, will not "reasonably" alleviate the court's problem.[213]

One question left open by these standards is how many untried cases or defendants constitute a noncompliance "emergency"; a related question is whether the measuring of such noncompliance should include dismissals without prejudice. The concern over "wholesale" dismissals suggests that the noncompliance rate would have to be substantial;[214] but the disruptive effects of large numbers of dismissals without prejudice[215] suggests that including such dismissals in the calculation of the noncompliance rate is desirable. Of

[209] Section 3174(b) merely requires the Judicial Conference to find "that such calendar congestion cannot be reasonably alleviated," but this standard probably incorporates the more specific standards provided to guide the determination of the chief judge and the circuit council. *See* text at notes 211-13 *infra*.
[210] 18 U.S.C. § 3174(c) (Supp. IV, 1974). Since a second suspension will not go into effect until at least six months after the application to Congress, the second suspension should be requested during the pendency of the first; otherwise a gap would result, during which new indictments and informations would be subject to the permanent arraignment and trial time limits. *See* H.R. REP. No. 1508, 93d Cong., 2d Sess 44 (1974).
[211] 18 U.S.C. § 3174(a) (Supp. IV, 1974).
[212] *Id.* The Act does not expressly require the circuit council to consider this factor, but the standards for review include an evaluation of the "capabilities of the district," which suggests that the council may review the chief judge's determination of efficiency.
[213] 18 U.S.C. §§ 3174(a), (b) (Supp. IV, 1974).
[214] *See* text and note at note 202 *supra*.
[215] *See* text and note at note 199 *supra*. The possibility that dismissals without prejudice would "backlog calendars with reindictments" was one of the reasons advanced for adding the judicial emergency provisions. *See* H.R. REP. No. 1508, 93d Cong., 2d Sess. 42 (1974). Although the House thought it had resolved that particular problem by eliminating the alternative of dismissal without prejudice, the problem returned when the dismissal without prejudice alternative was reinstated on the floor of the House.

course, a rule that excluded dismissals without prejudice would have the advantage of discouraging excessive use of that sanction alternative.[216]

Another problem of interpretation relates to the degree of "impossibility" required to justify a suspension of the time limits. Many courts, it seems, can substantially comply with the Speedy Trial Act in criminal cases by simply abandoning or sharply reducing their disposition of civil cases. Given the congressional mandate to avoid "prejudice to the prompt disposition of civil litigation,"[217] such a drastic approach should not be required before the noncompliance standard may be satisfied. Similarly, courts should not liberally construe the "ends of justice" and other exclusion provisions simply to avoid the need to invoke the judicial emergency provision. Congress intended to speed up criminal cases, even if this required additional resources, and the judicial emergency provision was intended to permit strict construction of the Act, while allowing for possible delays or mistakes in the appropriations and planning processes.

It is not apparent why Congress failed to provide an emergency provision for the arrest-to-indictment time limit. The result of this oversight may be either unjustified dismissals or overuse of the few exclusions and exemptions applicable to the preindictment period. For example, prosecutors may be encouraged to take maximum advantage of the nontacking rule for dismissed complaints[218] in order to gain additional time for the filing of an information or indictment. An additional 30 days is also available in felony cases if no grand jury was in session during the first 30-day period after arrest,[219] and this rule could encourage intentional delays of grand jury convening in order to obtain an additional 30 days for a particular block of defendants. Such problems of compliance with the indictment limit should be monitored closely to determine whether the coverage of the judicial emergency provisions should be extended.

C. Section 3164: The Interim Limits

The most difficult section of the Act to interpret is also, unfortunately, the one which goes into effect soonest. Section 3164 provides that, between September 29, 1975, and June 30, 1979, all

[216] *See* text at note 199 *supra*.
[217] 18 U.S.C. § 3165(b) (Supp. IV, 1974).
[218] *See* text and note at note 143 *supra*.
[219] 18 U.S.C. § 3161(b) (Supp. IV, 1974).

defendants held in pretrial detention must be brought to trial within 90 days or be released from custody, unless the delay was attributable to the "fault of the accused or his counsel."[220] Released defendants who are designated as "high risk" must also be tried within 90 days, measured from the date of designation, but there are no sanctions against the Government to enforce this limitation. Instead, such defendants may have their "nonfinancial" release conditions tightened after 90 days if they have "intentionally delayed the trial" and the Government is not at "fault."[221] However, none of these terms is adequately defined in the Act or its legislative history, and there is also a need to clarify the relationship between section 3164 and other important provisions of the Act, in particular the exclusion provisions.

1. *Applicability of the Section 3161 Exclusions.* In *United States v. Tirasso*,[222] the Ninth Circuit held that the detailed exclusion provisions in section 3161(h) do not apply to the calculation of elapsed time under section 3164, and that defendants must be released from custody after 90 days, regardless of the reasons for delay by the Government. The two defendants in *Tirasso* were foreign nationals accused of smuggling twenty kilograms of cocaine as part of a conspiracy which involved twenty other defendants in ten states, Puerto Rico, and four foreign countries. Counsel for the defendants conceded that the delays by the government were reasonable, given the scope of the alleged conspiracy and the need to transfer the proceedings from New York to Arizona, and it was also apparently conceded that the defendants, if released, would be likely to flee across the Mexican border, so that their release from custody would be tantamount to dismissal.[223] The court was acutely aware of these criticisms of the result reached, but stated that the language of section 3164 is "straight-forward and unambiguous". since section 3164 itself contains no provision for excludable time, the court concluded that none could be ordered,[221] at least in the

[220] *Id*, § 3164(c).
[221] *Id*.
[222] No. 76-1571 (9th Cir. Mar. 25, 1976), *reprinted in* Administrative Office of the Courts, Speedy Trial Advisory No. 12, Mar. 30, 1976.
[223] *Id*. The court did not consider whether the district court could require the defendants to post a bond or agree to restrictions on their pretrial movements. *See* text at note 245 *infra*.
[221] This was also the interpretation adopted in the Judicial Conference Guidelines, see note 72, at 29. As noted earlier, however, these *Guidelines* are not binding on any judge, and it should also be recognized that such preliminary advisories would, by their nature, tend to reflect conservative or literal interpretations of the Act.

An earlier decision by the Ninth Circuit also declined to apply the exclusion provisions to the interim limits. *See* Moore v. United States Dist. Ct., 525 F.2d 328 (9th Cir. 1

absence of any "fault" on the part of the defendant.[225]

The result in *Tirasso* was not only undesirable but unnecessary. Both the language of the Act and its legislative history justify application of the exclusion provisions of section 3161(h) during the interim period. In *United States v. Mejias*[226] the court found three persuasive reasons for applying the section 3161(h) exclusions to section 3164. First, section 3164 was designed to provide "minimal speedy trial requirements . . . pending the full effectiveness of Sections 3161 and 3162."[227] As the court observed, it is unlikely that Congress intended such "minimal" requirements to operate more harshly than the permanent provisions. Secondly, the legislative history does not indicate any intent to prohibit the application of excludable time during the interim period; and the exclusion provisions were provided "in recognition of the impossibility of providing rigid time limits for the trial of criminal cases."[228] Flexible time limits are not only a practical necessity; they also serve to ensure that "the rights of the individual to a complete and full hearing are not trampled in the headlong rush for the disposition of a trial."[229]

The origins of section 3164 provide a third basis for permitting exclusions under that section. As the *Mejias* court pointed out, section 3164 was based in part upon the Second Circuit Rules,[230] and the interim plans to be adopted pursuant to section 3164 were expected to be similar to those rules.[231] However, the Second Circuit Rules permitted most of the exclusions contained in section 3161 of

Although the issue was not directly decided in that case, the court suggested that the only way to avoid the strict 90-day limit on government delays would be to exclude periods during which the defendant was not "awaiting trial" within the meaning of subsection 3164(a)(1). In particular, the court felt that the periods during which the defendant was undergoing competency examination or hearings on competency should not be counted. Such an approach has obvious limitations, however, since many forms of unavoidable prosecution delay would not be excludable. Moreover, the failure of the court in *Tirasso* to apply this approach to the delays caused by transfer of the defendants to Arizona casts some doubt on its scope and continuing validity. *See also* United States v. Soliah, No. 75-523 (E.D. Cal., Jan. 14, 1976) (holding, *inter alia*, that section 3164 is not subject to excludable time because it makes no express reference to the section 3161(h) provisions).

[225] For a discussion of the fault standard, see text at note 238 *infra*.

[226] No. 76 Cr. 164 (S.D.N.Y., May 24, 1976), *aff'd on other grounds sub nom.* United States v. Padilla-Martinez, No. 76-1236 (2d Cir., June 4, 1976). (The text of both opinions is contained in Administrative Office of U.S. Courts, Speedy Trial Advisory No. 14, June 24, 1976.) The Second Circuit adopted a narrower basis for denying release of the defendants, based on the "fault" exception, and expressed no opinion as to the applicability of the section 3161(h) exclusions to section 3164. *See* text and note at note 238 *infra*.

[227] See S. Rep. No. 1021, 93d Cong., 2d Sess. 45 (1974).

[228] *See* H.R. Rep. No. 1508, 93d Cong., 2d Sess. 21 (1974).

[229] *Id.* at 15.

[230] S. Rep. No. 1021, 93d Cong., 2d Sess. 5 (1974).

[231] *Id.* at 45.

the Act, and Congress was well aware of this fact.[232] A related point is that section 3164 apparently replaced an earlier "interim" provision which also permitted exclusion of time.[233] Of course, it is possible that Congress intended to adopt a stricter version in section 3164, but if so, it is odd that such an important difference was not noted in the *Senate Report*, which carefully describes the major revisions and changes made at each stage of the legislative history.[234]

Thus, it seems reasonable to assume that Congress intended the exclusion provisions of section 3161(h) to apply to the interim time limits in section 3164, and the language of the statute is certainly broad enough to permit this interpretation. Subsection 3161(h) provides that:

> The following periods of delay shall be excluded in computing the time within which an information or an indictment must be filed, *or in computing the time within which the trial of any such offense must commence* . . .[235]

The location of this provision in section 3161 suggests that it is limited to the permanent and transitional time limits contained in that section, but the italicized language could be construed to cover the interim "trial" limits as well. As the *Mejias* court observed, the Act "must be read in such a way as to render it a sensible and workable whole,"[236] and the result reached in *Mejias* certainly makes more sense than the narrow, technical approach adopted in the *Tirasso* case.[237] It is to be hoped that other federal courts will

[232] *Id.* at 17.

[233] These earlier provisions were closely tied to preventive detention proposals. *See* note 54 *supra*. When it became clear that a nationwide preventive detention bill would not be passed, there was no longer any need for the Act to provide accelerated coverage of detained and released defendants charged with the more serious offenses subject to preventive detention. However, in light of the delayed effective date of the Act, it was felt that some sort of interim provision should still be provided for defendants in custody and dangerous released defendants. *See 1971 Senate Hearings*, *supra* note 58, at 140 (testimony of Professor Daniel J. Freed).

[234] S. Rep. No. 1021, 93d Cong., 2d Sess. 2-6 (1974).

[235] (Emphasis added.)

[236] United States v. Mejias, No. 76 Cr. 164 (S.D.N.Y., May 24, 1976). *See also* United States v. Masko, No. 76 Cr. 15 (W.D. Wis., June 24, 1976), *reprinted in* Administrative Office of U.S. Courts, Speedy Trial Advisory No. 15, July 19, 1976. *Masko* holds that section 3164 must be viewed as an "integral part of the grand scheme of the Act," not as an "independent enactment"; hence, that section should be construed to embody "by implication" the provisions of section 3161(h).

[237] Failure to read section 3164 in the context of the entire Act could lead to further difficulties not raised in the *Tirasso* and *Mejias* cases. For example, section 3164, unlike section 3161, is not specifically limited to defendants charged with an "offense," as defined in section 3172(2). The latter section excludes military and petty offenses, and it is highly

follow the reasoning in the *Mejias* case, but in any case section 3164 should be amended to provide specifically for application of the exclusion provisions.

2. *Detainee "Fault."* Section 3164(c) provides that a detainee will be released from custody only if the failure to meet the interim time limit was "through no fault of the accused or his counsel." Relying on this provision, the Second Circuit affirmed the result in the *Mejias* case, without approving or rejecting the applicability of the section 3161(h) exclusions.[238] On the basis of the facts recited in the court of appeals' decision, it appears that the defendants were guilty of at least knowing, if not intentional, delay. The local rules of the Southern District of New York require pretrial motions to be filed within 10 days of arraignment,[239] and the trial judge had extended this limit for an additional 30 days. Nevertheless, the defendants filed eight pretrial motions subsequent to the extended deadline, and the hearings on these motions lasted for 5 days. The court of appeals found that the defendants' "fault in delaying the filing and hence the decision on their motions . . . and their prolonging of the hearing on the motions was a specific cause of the delay in commencing the trial after the 90th day."[240]

unlikely that Congress intended the interim limits to apply to defendants who would not be covered under the permanent limits. Similarly, section 3164 does not contain any provision dealing with superseding charges, yet if the "tacking" rule implicit in section 3161 is not applied to the interim limits, the latter could be completely avoided by the simple expedient of filing revised charges. Congress could not have intended such a result, so it must have assumed that defendants covered by the interim provisions would also be covered by the general principles of section 3161.

[238] United States v. Padilla-Martinez, No. 76-1236 (2d Cir. June 4, 1976). The opinion, by retired Supreme Court Justice Clark, also makes an obscure reference to constitutional issues which required affirmance of the refusal to release the defendants. Justice Clark declined to elaborate this constitutional objection "further than to note that there is question under the doctrine of separation of powers that the Congress can exercise judicial authority to the extent indulged here." *Id.* In a footnote, the opinion states that "[s]ome of the language of the Act is so sweeping that it might well be construed as more than procedural, assuming that Congress has the power to enact the latter." *Id.* at n.4. The three cases cited in the footnote deal with judicial powers to control admission to practice and budgeting for judicial operations, and the *Martinez* opinion does not indicate which judicial functions the Speedy Trial Act may have impaired.

The court of appeals may have overlooked an even narrower basis for affirming the trial court's opinion, namely, that the commencement of trial prior to the decision on appeal made the issue of release moot. *Id.* Section 3164 only applies to defendants "awaiting trial," and the release sanction bars continued custody "pending trial." This language suggests that defendants may be reincarcerated once trial has begun, but neither the trial court nor the court of appeals considered this possibility. As for the conditions of release, either prior to or during trial, see text at note 245 *infra*.

[239] S.D.N.Y.R. CRIM. P. 8(b).

[240] United States v. Padilla-Martinez, No. 76-1236 (2d Cir. June 4, 1976).

Under the circumstances, the reasoning adopted by the court of appeals appears to be a sensible application of the fault standard. However, this exception is not a suitable substitute for the exclusion provisions discussed above, and it is submitted that the Second Circuit would have done better to adopt the reasoning advanced by the trial court. For one thing, as the *Tirasso* case demonstrates, there are numerous kinds of unavoidable prosecution delay which are not attributable to the defendant at all, and it seems unlikely that Congress intended to penalize the Government for delays which the Act recognizes are beyond its control (*e.g.*, unavailability of an essential witness). Moreover, if the fault exception is to serve as a substitute for the exclusion provisions, then the standard of fault is likely to be construed very broadly, and the result will be a failure to protect the public interest in speedy trial during the interim period. The public interest in speedy trial of detained defendants may be somewhat less than in the case of released defendants,[241] but there is no indication that the interim detainee provisions were passed solely for the benefit of these defendants. Thus, the degree of defendant fault required to bar release should be set high enough to ensure that waiver of the 90-day limit does not become a routine matter.

Another difficulty with the Second Circuit opinion is that it fails to specify the precise consequences of a finding of defendant fault. The court stated that the Act and the local speedy trial plan "require the exclusion of the time consumed in pretrial matters."[242] The reference to "exclusion" of time suggests that defendant fault is neither a permanent bar to release, nor a basis for starting the 90-day time limit running anew, but since the trial in the *Mejias* case began two weeks after the expiration of the 90-day limit,[243] any of these three rationales would have been sufficient to bar release of the defendants. If the standard of "fault" is kept fairly narrow, as proposed above, then it seems appropriate to start the 90-day time limit over again, perhaps by analogy to the treatment of defendants dismissed without prejudice under the permanent sanction provi-

[241] For example, the problems of pretrial recidivism, obstruction of justice, and flight to avoid prosecution are not at issue in the case of detained defendants. However, the cost of extensive pretrial detention is certainly a matter of public concern, and the general problems of stale prosecution evidence, missing witnesses, loss of deterrent impact, and interference with rehabilitative efforts jeopardize the public interest whether or not the defendant is in custody. *See* text at note 8 *supra*. The provisions of section 3164 dealing with released defendants designated as being of "high risk" are obviously intended to serve public interests. *See* text at note 248 *infra*.

[242] United States v. Padilla-Martinez, No. 76-1236 (2d Cir. June 4, 1976).

[243] *Id.*

sions.[244] The "exclusion" of the period of delay for which the defendant was to blame might provide only a few more days for the Government to bring the defendant to trial, and it also appears to be an inadequate penalty for willful delay. On the other hand, permanent forfeiture of the right to release seems too severe a consequence even for the most aggravated defense delays, since it could also result in permanent loss of the public right to a speedy trial.

3. *Conditions of Release from Custody.* In the event that the 90-day period (however calculated) has expired and the defendant was not at fault, he may no longer be "held in custody."[245] The statute is silent, however, regarding the conditions which may be attached to the defendant's release. May he be required to post bond or other collateral, and can he be reincarcerated if he violates conditions of residency, travel, court attendance, etc.? Defendants may argue that their right to release is absolute, and that the court may neither put conditions on the terms of their release, nor permit them ever to be held in pretrial custody again on the same charge.[246]

As usual, the legislative history fails to address this problem, but it seems unlikely that Congress intended to create such a strict remedy. The Second Circuit Rules, which Congress considered to be the model for section 3164, specifically permitted bond and other release conditions, as well as reincarceration.

> [T]he defendant shall be released upon bond or his own recognizance or upon such other conditions as the district court may determine . . . . This shall not apply to . . . any defendant who, subsequent to release under this rule . . . has violated the conditions of his release.[247]

A similar construction should be adopted under section 3164, although an amendment of the statutory language may be necessary to avoid litigation on the issue. Such an amendment should specify that the court may conduct an investigation into the defendant's financial condition, to determine what bail amount, if any, he can reasonably be required to post. Any conditions on travel, residence, association, and supervision which would be valid under the Bail

[244] Where the charges are dismissed without prejudice, pursuant to section 3162, the provisions of section 3161(d) become applicable. Dismissal of the indictment upon motion of the defendant starts the time limits running anew. *See* text at note 141 *supra*.

[245] 18 U.S.C. 3164(c) (Supp. IV, 1974).

[246] As for detention *during* the trial, see note 238 *supra*.

[247] 2D. CIR. R. 3. The *ABA Standards* provide that defendants should be released on their own recognizance, subject only to the penalties for failure to appear. ABA STANDARDS, *supra* note 56 (Standard 4.2). The provision of the *ABA Standards* is not mentioned in the *Senate Report* however.

Act should be permissible, provided such conditions are no more restrictive than are necessary to insure the defendant's presence at trial.[248]

4. *"High Risk" Releasees.* The provisions governing released defendants who have been designated "high risk" contain some of the same ambiguities discussed above, as well as other problems, both statutory and constitutional. The most basic problem involves the nature of the "risk" to be avoided. The origins of the Act in the preventive detention controversy suggest that the Senate intended to include risks of further crime or obstruction of justice, as well as nonappearance in court,[249] but it is clear that the House Judiciary Committee intended a narrower definition.

> [T]he Committee . . . believes that the words "high risk" should be construed to mean a high risk that the defendant will not appear for trial.[250]

It is arguable that the latter statement, which was made shortly before passage of the Act, is a more reliable indicator of congressional intent, but the final views of the Senate are unknown.[251] In the event that danger to the community is held to be a relevant consideration, it will be especially important to take steps to insure that the defendant's "fair trial" rights are protected.[252]

a. *Fault Standards in High Risk Cases.* If a "high risk" defendant is not tried within 90 days of designation, his release conditions may be revised, provided that (1) the defendant is found to have "intentionally delayed the trial of his case," and (2) the Government was not at "fault" for the delay.[253] Although the meaning of government "fault" is nowhere defined in the Act or the legislative history, it seems reasonable to restrict this term to the kinds of "intentional" delay for which "high risk" defendants will be held responsible. Otherwise, the courts would be applying a double stan-

[248] *See* text and note at note 257 *infra*.

[249] *See* text at note 49 *supra*. In the 1971 Senate Hearings, which led to the drafting of section 3164, "high risk" defendants were described as "dangerous," which suggests that "preventive detention" issues were still very much alive at that point. *See 1971 Senate Hearings*, *supra* note 58, at 140 (testimony of Prof. Daniel J. Freed).

[250] H.R. REP. No. 1508, 93d Cong., 2d Sess. 39 (1974).

[251] The drafters of the *1975 Model Plan* and the *1976 Model Statement* apparently believed that risk of further crime was a relevant consideration. *See* 1975 Model Plan, *supra* note 72, § 10; 1976 Model Statement, *supra* note 72, § 6(b) (a "high risk" defendant is one designated as "posing a danger to himself, or any other person, or to the community")

[252] *See* 1976 Model Statement, *supra* note 72, § 6(d)(3) (a "high risk" designation may be sealed "for such period as may be necessary to protect the defendant's right to a fair trial").

[253] 18 U.S.C. § 3164(c) (Supp. IV, 1974).

dard, releasing defendants who cause intentional delay on the basis of less culpable government delays.

If the Government is found to be at fault, or if the defendant did not cause intentional delay, then sanctions may not be invoked against the defendant, but the statute does not indicate whether this bar is temporary or permanent. The approach suggested previously[254]—"recycling" the 90-day clock—seems appropriate in cases where the defendant is blameless, but if both parties have caused intentional delay, it may be more appropriate to keep the original "clock" running and hold the defendant responsible for further stalling committed any time after the first 90 days (provided the Government is not also at fault).

b. *"Modification" of Release Conditions.* Assuming there has been a finding of intentional defense delay and the Government was not at fault, the court is authorized to "modify" the defendant's nonfinancial release conditions "to insure that he shall appear at trial as required."[255] The reference to nonfinancial conditions apparently rules out raising the amount of bond and, by implication, prevents outright revocation of bail,[256] so presumably all the court can do is impose tighter restrictions on the defendant's travel, residence, associations, and supervision. However, this narrowing of the sanction does not avoid constitutional difficulties. The Supreme Court has held that bail set at a figure higher than an amount "reasonably calculated" to assure appearance at trial is "excessive" within the meaning of the eighth amendment, and this suggests that nonfinancial release conditions which are unrelated to appearance might also be suspect.[257]

To avoid all of these problems, U.S. Attorneys will probably forgo the use of "high risk" designations,[258] particularly since the supposed benefits of this procedure can generally be achieved informally. Potential "high risk" defendants can be detained on high

[254] *See* text and note at note 244 *supra*.

[255] 18 U.S.C. § 3164(c) (Supp. IV, 1974).

[256] In contrast, the *1972 Model Plan* permitted revocation of *any* released defendant's bail if he were found to be "responsible" for the failure to commence trial within 180 days of indictment, and there was no "good cause" for the delay. 1972 Model Plan, *supra* note 68, § 5.

[257] Stack v. Boyle, 342 U.S. 1 (1951). Even if the eighth amendment is inapplicable to nonfinancial conditions of release, it is arguable that the need to assure appearance at trial is the only government interest justifying restrictions on the pretrial liberty of the accused. If so, the due process clause prohibits any restrictions not rationally related to that interest. *See generally* Note, *Constitutional Limitations on the Conditions of Pretrial Detention*, 79 YALE L.J. 941, 949 (1970).

[258] As of July 1, 1976, no instances of "high risk" designation had come to the attention of the author.

bonds, and those who secure release can usually be tried quickly, with the cooperation of the court. Thus, from a policy standpoint, "intentional" defense delay is actually only a problem in the large number of "low risk" cases, where courts and prosecutors lack the incentives or resources to require promptness on the part of the defendant. In short, the interim "high risk" provisions are awkward, unnecessary, and worthy of neglect or repeal.

D. The Planning Process

The Speedy Trial Act includes an extensive research and planning component, which finds no counterpart in previous state speedy trial acts or state and federal court rules.[259] Congress considered these provisions to be even more important than the operative sections of the statute, for they provide the vital link between strict statutory time limits and the appropriations process through which any additional resources needed to implement these limits would be provided.[260] The required research into the causes of pretrial delay was also intended to better inform Congress of the nature of the problem and the best way to focus and refine the statute to achieve its goals.[261] Independent of the speedy trial problem, the detailed offender-based statistics[262] contemplated by the planning provisions should produce, for the first time, comprehensive statistics on all levels of the federal criminal justice process, which will facilitate system-wide research and planning, as well as improved judicial administration.[263]

[259] Rule 50(b) requires each district court to conduct "a continuing study of the administration of criminal justice," but the rule makes no provision for the hiring of staff to conduct such a study, and no particular issues are required to be covered. The *1972 Model Plan* to implement the rule is simply a statement of time limits and procedures, not an analysis of the problem of delay and methods for resolving it. *See* note 68 *supra*. Neither rule 50(b) nor the *Model Plan* permits courts to request the additional resources necessary to achieve the time limits set forth.

[260] S. REP. No. 1021, 93d Cong., 2d Sess. 22, 45 (1974); H.R. REP. No. 1508, 93d Cong. 2d Sess. 23; 120 CONG. REC. H 12, 552 (daily ed., Dec. 20, 1974) (remarks of Rep. Cohen).

[261] In the final House debates on the Act, Congressman Conyers described the Act as "essentially a planning piece of legislation," 120 CONG. REC. H. 12, 550 (daily ed., Dec. 20, 1974), and the legislative history indicates that neither house of Congress felt that it could understood the precise nature and causes of delay in federal criminal cases. *See* S. REP. No. 1021, 93d Cong., 2d Sess. 9 (1974); H.R. REP. No. 1508, 93d Cong., 2d Sess. 18 (1974).

[262] "The individual offender is the unit of count as he proceeds through the various processing stages of the criminal justice system, and this provides the means of linking various segments to one another." C. Pope, Offender-Based Transaction Statistics 12 (1975). Such statistics are essential for any analysis of the lengths of time required for various stages of procedure, and they also permit analysis of the interaction of events taking place at different times or at different levels of the process (e.g., pretrial release status vs. disposition).

[263] Prior to the Act, retrievable data on federal defendants was limited to the basic offense

Although the statute does not specify how such data collection and analysis are to be carried out, the sheer magnitude of the task clearly indicates that computerized systems are required. Some of the larger federal courts and U.S. Attorneys' offices have been working on sophisticated computer-based management systems for several years, and the Act should serve to accelerate the development and dissemination of this technology.[264] Congress reasonably believed that the use of these systems would be of substantial assistance to courts in complying with the strict statutory time limits.[265] Certainly the instantaneous retrieval of data on a particular case or set of cases would permit the courts to detect crises and bottlenecks more easily. Sophisticated analysis may also reveal patterns of delay attributable to certain individuals or types of cases. However, the utility of computers may be limited. They are not likely to help, for example, in defining the crucial distinction between "delay" and legitimate trial preparation or plea negotiation; nor are they likely to pinpoint or resolve the underlying "causes" of delay, for these are probably as myriad and complex as the cases themselves.

The anticipation of future implementation problems and resource needs is also problematic. The basic limitation of the planning process is that it attempts to predict disposition rates and times *after* the effective date of the statutory sanctions on the basis of current experience *without* these sanctions, which is like trying to predict the outcome of a tennis match on the basis of the warm-

and disposition data compiled by the Administrative Office of U.S. Courts. Thus, nothing was known about arrest rates and disposition times prior to filing of charges in district court, nor was the timing of events such as pleas and release from custody recorded in any retrievable form. One result was that Congress had limited information on the exact extent of the "problem" it was attempting to solve by passing the Act.

[264] The Federal Judicial Center has been working with representatives of the larger metropolitan courts to develop an on-line computerized system known as COURTRAN. *See 1973 Senate Hearings*, *supra* note 59, at 367-383. The scope of this project was expanded somewhat in response to the Speedy Trial Act and the COURTRAN II system, which should become operational late in 1976, is expected to store and permit instant retrieval of all data customarily kept on court docket sheets, including current stage of proceeding, identity of attorneys, motions filed and decided, and pretrial release status. Since 1970, the U.S. Attorney's Office for the District of Columbia has been using a computer-based management system known as PROMIS. *See* Watts & Work, *Developing an Automated Information System for the Prosecutor*, 9 AM. CRIM. L.Q. 164-69 (1970). This system permits instantaneous retrieval of the status of all cases and all defendants pending in the office, including a case-weighting system to assign prosecution priorities to different offenses and offenders. This data base, and the ability instantly to retrieve the information on any case or any defendant, permits daily caseload review by assistant U.S. attorneys and supervisors, as well as automatic notification of witnesses and parties in a given case. The system also permits statistical analysis of disposition patterns and attorney performance, and allows more systematic allocation of resources within the office.

[265] S. REP. No. 1021, 93d Cong., 2d Sess. 10-11 (1974).

up. Judges and other participants are likely to work much harder after 1979 than during the interim, but how much harder they can work and how effective their efforts will be is unpredictable. Judges are also likely to make much greater use of excludable time provisions after 1979, whereas data for the first few months of 1976 suggests that, if anything, judges have been *under*utilizing these provisions in the presanction period.[266] Thus, Congress will probably not know until after 1979 just how broadly the exclusion provisions will be interpreted, and it will certainly not know until then how often the dismissal without prejudice option will be used.

Notwithstanding the volume of data and analysis required under the planning provisions, one of the most important questions related to the Speedy Trial Act will not be investigated—namely, the incidence of further crime,[267] failures to appear, and obstruction of justice among released defendants awaiting trial. Except for the ten pilot districts which will operate Pretrial Services Agencies under Title II of the Act,[268] Congress will receive no data on the incidence of these problems or the extent to which speedier trials serve to mitigate them. Thus some of the major reasons for creating a "public right" to speedy trial will not be examined in most districts.[269]

CONCLUSION

The attempt to enforce the public and private interests in prompt disposition of criminal charges is a worthy goal, but Con-

[266] During the first three months of 1976, only 27 percent of the defendants disposed of in the Northern District of Illinois had any excludable time entered; most of the exclusions related to the pretrial motions and "under advisement" provisions, but it did not appear that maximum use was made of either, and the "ends of justice" continuance provisions were almost never used. *See* 1976 Northern Illinois Plan, *supra* note 79, Table 2; note 125 *supra*.

[267] Past studies of pretrial recidivism involved defendants charged with state or local rather than federal offenses, so the results are probably not representative of either the rate or the timing of pretrial recidivism in most federal districts. *See* U.S. Dep't of Commerce, Compilation and Use of Criminal Court Data in Relation to Pretrial Release of Defendants: Pilot Study, 1970 (Nat'l Bureau of Standards Technical Note 535); *Preventive Detention: An Empirical Analysis*, 6 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 289 (1971).

[268] *See* note 13 *infra*. The ten pilot districts are Central California, Northern Georgia, Northern Illinois, Maryland, Eastern Michigan, Western Missouri, Eastern New York, Southern New York, Eastern Pennsylvania, and Northern Texas. 8 The Third Branch, March 1976, at 2.

[269] The data available in the ten pilot districts will, of course, permit at least a limited assessment of these important issues. Section 3155 of Title II of the Act requires the Director of the Administrative Office to report annually to Congress on the "accomplishments" of these agencies, with particular attention to their effectiveness in (1) reducing crimes committed by bailed defendants, (2) reducing the volume and cost of "unnecessary pretrial detention," and (3) "improving the operation" of the Bail Act. The third topic presumably refers to the failure-to-appear rate.

gress may have set its sights somewhat higher than the realities of federal criminal justice administration will tolerate. Both the length and the structure of the permanent time limits established under the Act need to be reconsidered; the ready alternative—extensive use of excludable time—appears to be both a waste of resources and an invitation to emasculation of the Act. Lengthening of the time limits, by contrast, would permit elimination of the more troublesome exceptions and stricter interpretation of those that remain. Other provisions of the statute also need to be amended in order to eliminate potential loopholes or conform to the necessities of court administration; and numerous ambiguities and drafting problems must be resolved. With the exception of the interim provisions, which need to be clarified as soon as possible, all of these changes should wait until the courts have gained further experience with the Act, and have compiled more reliable data on disposition times and patterns. However, a final decision on the scheme and timetable to be followed should be made well in advance of July 1, 1979, so the courts can be assured that the necessary resources and statutory amendments will be forthcoming in time to avoid major disruption of court functions.

DELAY, DOCUMENTATION AND THE SPEEDY TRIAL ACT

ROBERT L. MISNER*

INTRODUCTION

Prompted by a desire to reduce criminal activity by persons released pending trial,[1] and by a wish to erect a fitting memorial to retiring Senator Sam Ervin,[2] the Ninety-Third Congress passed the Speedy Trial Act of 1974.[3] The Act stems from the basic congressional assumption that the participants in the criminal justice system (*i.e.*, the judges, prosecutors and defense counsel) cannot be trusted with the task of adequately protecting society's interests in the swift administration of justice.[4] To date, however, the Act has been met with an unwelcome reception by the criminal justice system.[5] This article suggests that the participants in the system may well take every opportunity to undermine the effect of the Act, and thereby defeat the goals it was intended to achieve.

The Act requires, with certain exceptions, that a criminal defendant be tried within 100 days of arrest or service of summons.[6] Consequently, one likely approach to subvert the intent of the Act will be for the defense to claim that the time limits of the Act are in conflict with the defendant's ability to retain the counsel of his choice and are inconsistent with the defendant's right to be represented by adequately prepared counsel. It may be argued that the Act causes such a rush to judgment that it is inconsistent with a defendant's right to an adequately investigated and prepared defense.

* Professor of Law, Arizona State University. B.A. 1968, University of San Francisco; J.D. 1971, University of Chicago. Reporter, Speedy Trial Planning Groups for the United States District Court for the Districts of Arizona and Southern California.

[1] The introduction to the Act states its purpose: "To assist in reducing crime and the danger of recidivism by requiring speedy trials and by strengthening the supervision over persons released pending trial, and for other purposes." Speedy Trial Act of 1974, Pub. L. No. 93-619, 88 Stat. 2076 (1974). Congress relied upon Bureau of Standards statistics to support the proposition that the criminal defendant awaiting trial is not only a financial and administrative burden to society, but often is a danger to his community as well. In a study of 712 defendants during four weeks in 1968, the Bureau report found that of 426 defendants on pretrial release, 47 were re-arrested and formally charged with crimes committed while on release. The study also purported to show that defendants have an increased propensity to be re-arrested when released more than 280 days. H.R. REP. No. 1508, 93d Cong., 2d Sess. 15-16 (1974) [hereinafter cited as HOUSE REPORT]. *See also* S. REP. No. 93-1021, 93d Cong., 2d Sess. 8 (1974) [hereinafter cited as SENATE REPORT].

[2] *See, e.g.*, the statement of Representative Conyers, Chairman of the Judiciary Committee's Subcommittee on Crime. *Hearings on S. 754, H.R. 7873, H.R. 207, H.R. 658, H.R. 687, H.R. 773, and H.R. 4807 Before the Subcomm. on Crime of the House Comm. on the Judiciary*, 93d Cong., 2d Sess. 157 (1974) [hereinafter cited as *House Hearings*]. For a discussion of Senator Ervin's role in the passage of the Speedy Trial Act, see Frase, *The Speedy Trial Act of 1974*, 43 U. CHI. L. REV. 667, 673-74 (1976).

[3] The Speedy Trial Act was signed by President Ford on January 3, 1975. It is codified at 18 U.S.C. § 3161 *et seq.* (Supp. IV 1974).

[4] Senator Ervin believed that society's interests in speedy trials of criminal defendants were being inadequately protected by the participants in the legal system. Consequently, separate speedy trial legislation was deemed necessary. *House Hearings*, *supra* note 2, at 158. The Congress also relied heavily upon a report by Yale Law School Professor Daniel Freed, which concluded that the goal of the Judicial Conference's Model 50(b) Plan, then in effect in all district courts, to reduce the time required to bring a defendant to trial was largely unrealized. *House Hearings*, *supra* note 2, at 261-333. *See also* HOUSE REPORT, *supra* note 1, at 12-13. Testifying in favor of handling the speedy trial issue through F.R. CRIM. P. 50(b) plans to achieve the prompt disposition of criminal trials were Rowland F. Kirks, director of the Administrative Office of the U.S. Courts, *House Hearings*, *supra* note 2, at 176-93; W. Vincent Rakestraw, assistant attorney general, Office of Legislative Affairs, *House Hearings*, *supra* note 2, at 196-209; United States District Judge Alphonso J. Zirpoli, Northern District of California, Chairman of the Committee on the Administration of the Criminal Law of the Judicial Conference of the United States, *House Hearings*, *supra* note 2, at 365-84. (Rule 50(b) calls for the formulation of plans, by district courts, for achieving the prompt disposition of criminal cases.)

Another objection to the rule 50(b) plans is found in Justice Douglas' dissent to the promulgation of rule 50(b):

> There may be several better ways of achieving the desired result [speedy trial]. This Court is not able to make discerning judgments between various policy choices where the relative advantage of several alternatives depends on extensive fact finding. That is a "legislative" determination. Under our constitutional system that function is left to the Congress with approval or veto by the President.

406 U.S. 981-82 (1972) (Douglas, J., dissenting).

[5] *See* text accompanying notes 114-44 *infra*.

[6] 18 U.S.C. § 3161 (Supp. IV 1974).

Based upon adequacy of preparation claims, defense counsel will argue that the "ends of justice" require the time limits of the Act be extended.[7] This article asserts that the "ends of justice" exclusion of the Act, when properly interpreted and carefully administered, can be used to strike a proper balance between society's interest in quick resolution of criminal cases and the defendant's right to a fair trial conducted by counsel in whom he has confidence and with whom a confidential relationship can be maintained.

Furthermore, this article asserts that in order to protect society's interests in speedy trials, courts should require specific information from defense counsel to bolster the right to counsel claim, rather than relying upon the stipulation of the defense and prosecution that a basis for delay exists. This is important because the parties' motives for seeking delays conflict with society's interest in prompt actions. Confidential or potentially damaging information may, when necessary, be communicated to the trial judge or to another judge *ex parte* and *in camera*. This will avoid the need to frustrate the purposes of the Speedy Trial Act under the pretense that the time requirements of the Act are inconsistent with the sixth amendment right-to-counsel provision. Such a solution, which recognizes that the Speedy Trial Act now prohibits stipulated continuances,[8] assumes a good faith attempt by the judiciary to implement the Speedy Trial Act irrespective of a judge's personal beliefs in the wisdom of Congress' action in passing the Act.

The right to counsel problem serves to highlight the general problems of implementing The Speedy Trial Act and is chosen because it is a common criticism of the Act, because it offers a good illustration of attorney excuses for delay, and because it involves the interrelationship of two separate and potentially conflicting constitutional concerns.

I. Provisions of the Act

The Speedy Trial Act sets out to remedy delay in three separate ways. First, it requires that from July 1, 1975, to July 1, 1979, trials of all persons held in detention solely because they are awaiting trial shall commence no later than ninety days following the beginning of continuous detention.[9] Second, it mandates that after July 1, 1979, criminal defendants be tried within 100 days after arrest or service of summons excluding certain limited periods of delay.[10] Finally, it creates experimental, pre-trial service agencies in ten selected districts to provide support and supervisory services to non-custodial defendants awaiting trial.[11]

Although at first glance it may appear that Congress has merely set time limits for the key

[7] 18 U.S.C. § 3161(h)(8) (Supp. IV 1974).

> (h) The following periods of delay shall be excluded in computing the time within which an information or an indictment must be filed, or in computing the time within which the trial of any such offense must commence:
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> (8)(A) Any period of delay resulting from a continuance granted by any judge on his own motion or at the request of the defendant or his counsel or at the request of the attorney for the Government, if the judge granted such continuance on the basis of his findings that the ends of justice served by taking such action outweigh the best interest of the public and the defendant in a speedy trial. No such period of delay resulting from a continuance granted by the court in accordance with this paragraph shall be excludable under this subsection unless the court sets forth, in the record of the case, either orally or in writing, its reasons for finding that the ends of justice served by the granting of such continuance outweigh the best interests of the public and the defendant in a speedy trail.
>
> (B) The factors, among others, which a judge shall consider in determining whether to grant a continuance under subparagraph (A) of this paragraph in any case are as follows:
>
> (i) Whether the failure to grant such a continuance in the proceeding would be likely to make a continuation of such proceeding impossible, or result in a miscarriage of justice.
>
> (ii) 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.
>
> (iii) Whether delay after the grand jury proceedings have commenced, in a case where arrest precedes indictment, is caused by the unusual complexity of the factual determination to be made by the grand jury or by events beyond the control of the court or the Government.
>
> (C) No continuance under paragraph (8)(A) of this subsection shall be granted because of general congestion of the court's calendar, or lack of diligent preparation or failure to obtain available witnesses on the part of the attorney for the Government.

[8] *See, e.g.*, United States v. LaCruz, 441 F. Supp. 1261, 1264 (S.D.N.Y. 1977).

[9] 18 U.S.C. § 3164(b) (Supp. IV 1974).

[10] 18 U.S.C. § 3161 (Supp. IV 1974).

[11] 18 U.S.C. §§ 3152–55 (Supp. IV 1974).

events in the criminal justice process much in the same vein as most state speedy trial statutes,[12] in fact the Speedy Trial Act is a unique approach to correct delays in the administration of criminal justice. The special quality of the Act lies in Congress' decision to place the responsibility to experiment, to critique, and to plan compliance efforts on the individual courts during the transitional stages when the ultimate time limits and sanctions of the Act are not in total operation.[13] Unfortunately, most district courts have totally ignored the planning aspects of the Act and consequently many have little or no experience with the day-to-day practical difficulties presented by it.[14] For these recalcitrant districts, July 1, 1979 (the date on which the time limits and sanctions go fully into effect), may be the first day on which serious concern will be shown for the Speedy Trial Act, if any concern is shown at all.

For purposes of this article it is unnecessary to go into great detail regarding the interim time limits or the pre-trial service agencies. The interim limits relating to the in-custody defendant do little more than assure in-custody cases the highest priority in trial scheduling.[15] If the in-custody defendant is not tried within ninety days, he is to be released.[16] The experimental services agencies, which are governed by the administrative office of the United States Courts, are of little immediate concern to the majority of individual district courts.[17] The comparatively complicated and far-reaching provisions relating to the 1979 standards, on the other hand, directly involve the individual district courts and are a legitimate source of concern.

The ultimate 100 day arrest-to-trial standard is divided into three segments: a thirty-day limit between arrest and the filing of an indictment or information;[18] a ten-day limit between indictment and arraignment;[19] and a sixty-day limit between arraignment and trial.[20] However, these time periods do not become effective until the fifth year after the enactment of the Act and during the five year phase-in period, the time standards vary.

All time periods are tolled by a limited number of exceptions which mitigate somewhat the apparent stringency of the Act.[21] The Act specifically excludes from the restrictions delay resulting from physical and mental examinations, trials on other charges, interlocutory appeals, hearings on pre-trial motions, and Federal Rules of Criminal Procedure rule 40 transfers.[22] The Act also recognizes other exclusions such as delays due to deferred prosecution to allow the defendant to demonstrate his good behavior, the absence of defendants and witnesses, and other procedural difficulties.[23] The Act contains an escape clause which allows the court to delay the trial if, in granting the continuance, the ends of justice "outweigh the best interest of the public and the defendant in a speedy trial."[24] Because it is possible to use this exception to emasculate the operation of the Speedy Trial Act, such

[12] For a discussion of state speedy trial statutes, see Poulos and Coleman, *Speedy Trial, Slow Implementation: The ABA Standards in Search of a Statehouse*, 28 Hastings L.J. 357 (1976).

[13] For a general description of the bill, see House Report, *supra* note 1, at 21–28.

[14] Misner, *District Court Compliance with the Speedy Trial Act of 1974: The Ninth Circuit Experience*, 1977 Ariz. St. L.J. 1, 15–25.

[15] *See, e.g.*, Revised Model Statement of Time Limit and Procedures for Achieving Prompt Disposition of Criminal Cases 2 (Speedy Trial Directive No. 11, Feb. 18, 1976).

[16] 18 U.S.C. § 3164(c) (Supp. IV 1974). It is questionable whether the computation of the 90-day period can take into account the excludable time provisions of 18 U.S.C. § 3161(h). The Administrative Conference has taken the position that the exclusions do not apply to the in-custody defendant during the interim period. The Justice Department has taken the contrary position. In the first case dealing with the issue, the Ninth Circuit held that the excludable time provisions are not applicable to the in-custody defendant. United States v. Tirasso, 532 F.2d 1298 (9th Cir. 1976). Other courts, however, have failed to follow the Ninth Circuit. *See, e.g.*, United States v. Corley, 548 F.2d 1043 (D.C. Cir. 1977); United States v. Mejias, 417 F. Supp. 579 (S.D.N.Y.) *aff'd on other grounds sub nom.* United States v. Martinez, 538 F.2d 921 (2d Cir. 1976); United States v. Masko, 415 F. Supp. 1317 (W.D. Wis. 1976). For a discussion of excludable time, *see* text accompanying notes 21–26 *infra*.

[17] The individual districts chosen as experimental districts are: District of Maryland, Eastern District of Michigan, Western District of Missouri, Eastern District of New York, Eastern District of Pennsylvania, Central District of California, Northern District of Georgia, Northern District of Illinois, Southern District of New York, and Northern District of Texas. For a discussion of the pretrial service agencies, see Administrative Office of the United States Courts, Report on the Implementation of Title I and Title II of the Speedy Trial Act of 1974, 25–44 (1976).

[18] 18 U.S.C. § 3161(b) (Supp. IV 1974).

[19] 18 U.S.C. § 3161(c) (Supp. IV 1974).

[20] *Id.*

[21] The applicability of 18 U.S.C. § 3161(h) to 18 U.S.C. § 3164 is discussed at note 16 *supra*.

[22] 18 U.S.C. § 3161(h) (Supp. IV 1974). Rule 40 of the Federal Rules of Criminal Procedure regulates the removal of persons from one federal district court to another.

[23] *Id.*

[24] 18 U.S.C. § 3161(h)(8)(A) (Supp. IV 1974).

a delay cannot be granted unless the court finds on the record that a miscarriage of justice would likely result if the continuance was not granted; that the nature of the case is such that adequate preparation cannot be expected within the statutory time frame; or that the delay is caused by the complexity of the case before the grand jury.[25] The Act specifically states, however, that general court congestion, lack of diligent preparation by the government, or failure of the government to obtain an available witness are unacceptable causes of delay.[26]

Sanctions during the phase-in period are limited to the release of those persons being held in detention solely to await trial and to the review of the conditions of release for "high risk" defendants who are not tried within ninety days after that designation has been made.[27] After July 1, 1979, more severe sanctions become effective. At that point the court may, upon motion of the defendant, move to dismiss the complaint, information, or indictment against the individual with or without prejudice.[28] Failure of the defendant to move for dismissal prior to trial or plea will constitute a waiver of his right to a dismissal.[29] Moreover, sanctions are provided against attorneys who intentionally delay the proceedings.[30]

Finally, the Act provides an all-purpose escape clause which authorizes the Judicial Conference, upon application of a district court, to suspend in that district the time limits of section 3161(c) which govern the arraignment-to-trial interval for up to one year.[31] For the time limits to be suspended, the district must be in a state of "judicial emergency,"[32] and, even then, time limits are not truly suspended but are extended from 60 to 180 days.[33] The Judicial Conference can grant a suspension only after the Judicial Council of the circuit finds, *inter alia* that the existing resources of the district are being efficiently utilized.[34]

To leave a discussion of the substantive provisions of the Speedy Trial Act without mentioning the planning aspects of the Act would be misleading. The Speedy Trial Act is first and foremost a planning bill, a fact which is often overlooked. The Act assumes that its substantive provisions are workable, but gives the district courts a four-year period in which to comment on the substantive provisions and to determine the resources they will need to comply with the mandated time restraints. As the House Report summarized the issue:

> The heart of the speedy trial concept. ... is the planning process. These provisions recognize the fact that the Congress—by merely imposing uniform time limits for the disposition of criminal cases, without providing the mechanism for increasing the resources of the courts and helping to initiate criminal justice reform which would increase the efficiency of the system—is making a hollow promise out of the Sixth Amendment.[35]

Similar characterizations of the Act can be found in the Senate Report,[36] the House Hearings,[37] the House debate,[38] and the Senate debate.[39]

II. Protected Interests of the Sixth Amendment: Societal vs. Defendant Interests

In enacting the Speedy Trial Act, Congress was aware of the various interests generally viewed as falling under the protection of the sixth amendment.[40] As Justice Brennan noted in *Dickey v. Florida*: "The Speedy Trial Clause protects societal interests, as well as those of the accused .... Just as delay may impair the ability of the accused to defend himself, so it may reduce the capacity of the government to prove its case."[41]

More specifically, the societal, as opposed to the defendant's, interest in speedy trials can be viewed in the traditional terminology as encompassing elements of specific and general deterrence, retribution, isolation and rehabilitation. The isolation or quarantine argument for a speedy trial can be found in the Speedy Trial Act itself. The introduction of the Act states as its purpose "to assist in reducing crime and the danger of recidivism by requiring speedy trials and by strengthening the supervision over persons released pending trial, and for other purposes."[42] Congress relied upon Bureau of Standards statistics to support the proposition that the criminal defendant awaiting trial is not only a financial and administrative burden to society, but often is a danger to his community as well. The Bureau of Standards study purported to show that defendants had an increased propensity to be re-arrested when released more than 280 days.[43] In addition to this isolation interest, society also can claim both specific and general deterrence benefits gained in the swift and sure punishment of wrongoers. Society has a legitimate interest in the quick administration of criminal justice and in impressing upon both actual and potential offenders the fact that wrongdoing will be punished.[44] Similarly, societal need for a retributive response to crime may require a strong temporal nexus

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[25] 18 U.S.C. §3161(h)(8)(B) (Supp. IV 1974). For a discussion of the types of delay envisioned by Congress to fall within the "ends of justice" exclusion, see Administrative Office of the United States Courts, Guidelines of the Administration of the Speedy Trial Act of 1974, 18–21 (1975) [hereinafter cited as Guidelines]. *See also* Administrative Office of the United States Courts, Amended Guidelines to the Administration of the Speedy Trial Act of 1974, 22C–22G (1976) [hereinafter cited as Amended Guidelines]; House Report, *supra* note 1, at 33–34; Senate Report, *supra* note 1, at 39–41.

[26] 18 U.S.C. § 3161(h)(8)(C) (Supp. IV 1974).

[27] 18 U.S.C. § 3164(c) (Supp. IV 1974).

[28] 18 U.S.C. § 3162(a)(1) (Supp. IV 1974).

[29] 18 U.S.C. § 3162(a)(2) (Supp. IV 1974).

[30] Sanctions are detailed in 18 U.S.C. § 3162(b) (Supp. IV 1974):

> In any case in which counsel for the defendant or the attorney for the Government (1) knowingly allows the case to be set for trial without disclosing the fact that a necessary witness would be unavailable for trial; (2) files a motion solely for the purpose of delay which he knows is totally frivolous and without merit; (3) makes a statement for the purpose of obtaining a continuance which he knows to be false and which is material to the granting of a continuance; or (4) otherwise willfully fails to proceed to trial without justification consistent with section 3161 of this chapter, the court may punish any such counsel or attorney, as follows:
>
> (A) in the case of an appointed defense counsel, by reducing the amount of compensation that otherwise would have been paid to such counsel pursuant to section 3006A of this title in an amount not to exceed 25 per centum thereof;
>
> (B) in the case of a counsel retained in connection with the defense of a defendant, by imposing on such counsel a fine of not to exceed 25 per centum of the compensation to which he is entitled in connection with his defense of such defendant;
>
> (C) by imposing on any attorney for the Government a fine of not to exceed $250;
>
> (D) by denying any such counsel or attorney for the Government the right to practice before the court considering such case for a period of not to exceed ninety days; or
>
> (E) by filing a report with an appropriate disciplinary committee.
>
> The authority to punish provided for by this subsection shall be in addition to any other authority or power available to such court.

[31] 18 U.S.C. § 3174(a)-(b) (Supp. IV 1974).

[32] "Judicial emergency" is the term used by the Act itself. 18 U.S.C. § 3174 (Supp. IV 1974).

[33] The Act also provides that the Judicial Conference can generally grant only one extension. 18 U.S.C. § 3174(c) (Supp. IV 1974). Additional extensions must be granted by Congress. *Id.* If Congress fails to act on the request within six months, the Judicial Conference may grant an additional suspension. *Id.*

[34] 18 U.S.C. § 3174(a) (Supp. IV 1974).

[35] House Report, *supra* note 1, at 23.

[36] The overall function of S. 754 is to encourage the Federal criminal justice system to engage in comprehensive planning and budgeting toward the goal of achieving speedy trial. The most widely known section of the bill is the first section which imposes the time limits. However, the most important sections of the bill are the planning process sections (sections 3165-69) which provide a planning process whereby each district court formulates a plan for the implementation of speedy trial, and sets out the additional resources necessary to meet the limits of section 3161.

The planning process sections are critical to the bill's success because they provide the vital link between the Federal criminal justice system and the appropriations process. In summary they provide the courts and the United States Attorneys with a mechanism to plan for the implementation of 90-day trials in a systematic manner, to try innovative techniques on a pilot basis, to itemize the additional resources necessary to achieve the 90-day trial goal, and to communicate with Congress concerning its plans and the additional budget requests. Senate Report, *supra* note 1, at 45.

[37] In the House hearings on the Act, Senator Ervin commented:

> I believe, after years of studying this problem, that S. 754 can begin to end this seemingly hopeless morass. The bill is based upon the premise that the courts, undermanned, starved for funds, and utilizing 18th century management techniques, simply cannot cope with burgeoning caseloads. The consequence is delay and plea bargaining. The solution is to create initiative within the system to utilize modern management techniques and to provide additional resources to the courts where careful planning so indicates.

House Hearings, *supra* note 2, at 158.

[38] Representative Cohen stated: "[T]he most important provisions of this bill concern the process by which the district courts shall study the problems of pretrial delay and plan for the implementation of the act's time limits." 120 Cong. Rec. 41,775 [hereinafter cited as House Debate].

[39] 120 Cong. Rec. 24,660 (1974) [hereinafter cited as Senate Debate].

[40] *See, e.g.*, House Report, *supra* note 1, at 15. The imprecision of the constitutional right to a speedy trial was recognized by the Supreme Court in Barker v. Wingo, 407 U.S. 514 (1971):

> Finally, and perhaps more importantly, the right to speedy trial is a more vague concept than other procedural rights. It is, for example, impossible to determine with precision when the right has been denied. We cannot definitely say how long is too long in a system where justice is supposed to be swift but deliberate.

407 U.S. at 521 (footnote omitted).

[41] 398 U.S. 30, 42 (1970). *See also* 407 U.S. at 519.

[42] Speedy Trial Act of 1974, Pub. L. No. 93-619, 88 Stat. 2076 (1974). *See also* Barker v. Wingo, 407 U.S. at 519.

[43] House Report, *supra* note 1, at 15-16.

[44] 398 U.S. at 42 (citing ABA Standards for Criminal Justice, Speedy Trial 10-11 (Approved Draft 1968)); United States *ex rel.* Solomon v. Mancusi, 412 F.2d 88, 93 (2d Cir. 1969) (Feinberg, J., dissenting)).

between the act and the punishment.[45] Finally, rehabilitative efforts focused upon those eventually found guilty may be lessened if there is a long, non-productive time wasted awaiting trial.[46]

The defendant's sixth amendment interest can be characterized as an interest in his physical freedom awaiting the outcome of charges, his freedom from the anxiety of a pending criminal prosecution, and his interest in a fair trial not marred by faulty memories or disappearing or diminished evidence.[47] Although the courts have been long on rhetoric concerning defendant's theoretical interests in a speedy trial, the fact remains that most defendants benefit more by delay than by speed. In the relatively few cases decided by the Supreme Court[48] and in most of the cases decided at the appellate level,[49] the discussion of the defendant's right to a speedy trial has centered on the fact that at least part of delay is attributable directly to the defendant. Delay, not quick resolution, thus appears to be defendant's major concern at the trial level.

III. Participants' Interest in Delay

The greatest difficulty in effectuating the societal and defendant interests protected by the sixth amendment is that often those charged with protecting the societal interests (the prosecution) and those upon whom the speedy trial right is individually conferred (the defendants) wish to have not a speedy trial, but a delayed one. As Senator Ervin noted in his testimony before the House Judiciary Committee:

> There is no question in my mind that speedy trial will never be a reality until Congress makes it clear that it will no longer tolerate delay. Unfortunately, while it is in the public interest to have speedy trials, the parties involved in the criminal process do not feel any pressure to go to trial. The Court, defendant, his attorney, and the prosecutor may have different reasons not to push for trial, but they all have some reason. The over-worked courts, prosecutor, and defense attorneys depend on delay in order to cope with their heavy caseloads. The end of one trial only means the start of another. To them, there is little incentive to move quickly in what they see as an unending series of cases. The defendant, of course, is in no hurry for trial because he wishes to delay his day of reckoning as long as possible.[50]

With this concern one of the major goals of the Speedy Trial Act is to avoid a situation in which the prosecutor and defense counsel can stipulate to delay and thus infringe upon society's right to a speedy trial of those charged with violating a criminal provision.

A. Defense Interest in Delay

Delay can be sought and used by the defense in a number of ways. On the one hand, delay may be constitutionally mandated to preserve the defendant's right to an adequately prepared defense, while on the other hand, defendant delay may be totally inconsistent with an efficient and just system if it results in witnesses' failing to appear at trial.

Defendant's desire for delay can be viewed roughly in four separate ways: lawyer-directed delays, defendant's "comfort" delays, pre-trial tactical delays and trial tactical delays.

There is some indication that defense counsel unhappiness with the Speedy Trial Act stems not so much from the way the Act affects defendants, but rather from the havoc it causes to counsel's ability to control his own calendar.[51] Some of the lawyer-directed reasons, such as health problems of counsel,[52] are obviously valid. Just as clearly, delay to allow the defendant to "earn" money to pay counsel,[53] or delay because lawyers would rather

[45] *See* Barker v. Wingo, 407 U.S. 514, 520 (1971) (citing J. Bentham, The Theory of Legislation 326 (Ogden ed. 1931)).

[46] Barker v. Wingo, 407 U.S. 514, 532 (1971) (citing National Comm. on the Causes and Prevention of Violence, To Establish Justice, To Insure Domestic Tranquility, Final Report of the National Commission on The Causes and Prevention of Violence, 152 (1969)).

[47] In *Barker v. Wingo* the United States Supreme Court constructed a four-prong balancing test to determine whether an individual's speedy trial rights had been violated. Factors to be considered in the balancing test include the length of delay, the reasons for delay, defendant's assertion of his right and prejudice to the defendant. 407 U.S. at 530. Defendant's speedy trial interests are considered when discussing the fourth factor. For a detailed summary of the case law subsequent to *Barker* and an account of the use of the fourth factor in the lower courts *see* Rudstein, *The Right to a Speedy Trial: Barker v. Wingo in the Lower Courts*, 1975 U. Ill. L.F. 11 (1975).

[48] *See, e.g.*, Strunk v. United States, 412 U.S. 434 (1973); Barker v. Wingo, 407 U.S. 514 (1971). For a compilation of cases from the United States Supreme Court, see Rudstein, *supra* note 47, at 11-13.

[49] *See, e.g.*, United States v. Jones, 524 F.2d 834, 850 (D.C. Cir. 1975).

not spend a great deal of time in court[54] are unacceptable reasons. Within this category of lawyer-oriented delay, however, are classifications such as vacations by lawyers, and presence of the lawyer in other criminal cases which demand more immediate attention.[55] Although conflicting schedules may pose issues of professional courtesy between the participants in the system,[56] continuances should be granted for conflicts only for short periods of time and only when such conflicts are totally unavoidable.[57] Such a policy is dictated by the congressional decision that speedy trials are of high priority. Other than continuances which are constitutionally mandated,[58] defense counsel must be brought to the same standard of readiness demanded of the Court and of the prosecution in the Speedy Trial Act.[59]

Just as some delays are associated with the convenience interests of the lawyer, other delays are sought to further the creature-comforts of the defendant. The most obvious delay of this type is that sought for the defendant who is awaiting trial while on bond.[60] But it is the on-bond defendant to which the Speedy Trial Act particularly is directed.[61] Other instances of delays to benefit the defendant's physical surroundings are those situations in which a jailed defendant seeks a delay in order to avoid going to another institution.[62] Finally, particularly in those cases where the defendant is a substance-addict, delay may be justifiably sought in order that his health might be restored before trial.[63]

The variations on reasons for delay increase as one approaches trial. Considering the high percentage of criminal cases which terminate in guilty pleas, it is no surprise that many of the delays in the pre-trial stages are tactically directed at bettering the defendant's bargaining position.[64] There is a widely held belief that continuances are granted because of the defense threat to plead not guilty and conduct a full-length trial.[65] Although this conclusion has been questioned,[66] it would appear

of the District of Columbia, and the Minneapolis District Court, Levin concluded:

> The paramount goals of a private defense attorney in criminal court center around his fee and the amount of time he devotes to a case. First, the attorney wants to be certain to receive his fee. This is likely to be a problem because of the typical defendant's low income (even if he can "afford" a private attorney). If the case were disposed of with minimum delay, this type of defendant usually would not have enough time to scrape together a fee. More importantly, the attorney wants to receive the fee before the final disposition of the case. Afterward a defendant may be incarcerated, which greatly reduces the probability of receiving a fee, or he may lose his job or simply "disappear." Also, even when he is acquitted or receives probation afterward the defendant is often hostile toward his attorney.

Levin, *Delay in Five Criminal Courts*, 4 J. Legal Studies 83, 91 (1975). But this motive is not relevant to the public defender. *Id.* at 113.

[54] *Id.* at 104.

[55] The issue of counsel's schedule conflicts most often arises in a defendant's claim that he has a right to choose his own particular counsel to represent him. *See, e.g.*, United States v. Poulack, 556 F.2d 83 (1st Cir.), *cert. denied*, 434 U.S. 906 (1977).

[56] Typical of individuals involved in daily face-to-face relations, the judges and the defense attorneys actively stress "getting along with each other" and minimizing conflict. For this reason and others even when the defense attorneys' actions increase delay, the judges (except in Minneapolis) tend to accommodate them a good deal.

Levin, *supra* note 53, at 91.

[57] The apparent reason for counsel unavailability due to schedule conflicts is that there are relatively few competent defense counsel. The observation concerning the limited number of available defense counsel has been made without documentation in a number of articles critical of the Speedy Trial Act. *See, e.g.*, Kozinski, *That Can of Worms: The Speedy Trial Act*, 62 A.B.A.J. 862, 863 (1973).

[58] *See* text accompanying note 161 *infra*.

[59] "No continuance under paragraph (8) (A) of this subsection shall be granted because of general congestion of the court's calendar, or lack of diligent preparation or failure to obtain available witnesses on the party of the attorney for the Government." 18 U.S.C. § 3161(h)(8)(C) (Supp. IV 1974).

[60] Levin, *supra* note 53, at 109.

[61] *See* text accompanying note 42 *supra*.

[62] United States v. Johnson, 579 F.2d 122, 124 (1st Cir. 1978).

[63] A delay for health reasons of the defendant is allowable under 18 U.S.C. § 3161(h)(4): "Any period of delay resulting from the fact that the defendant is mentally incompetent or physically unable to stand trial." However, the courts have been aware that the alleged ill health of the defendant can be used as a ploy to gain additional delay. The issue of defendant's health can be used in devious ways by counsel. *See, e.g.*, United States v. Goldman, 439 F. Supp. 352, 358 (S.D.N.Y. 1977).

[64] *See* United States v. Beberfeld, 408 F. Supp. 1119, 1126 (S.D.N.Y. 1976). In the legislative history, there is constantly expressed a fear that the Speedy Trial Act will result in better plea bargains for defendants. The argument states that if all defendants were to demand jury trials, the system could not handle all the cases. Consequently, by threatening to go to trial, the defendant has a stronger bargaining tool under the Act. *See* House Report *supra* note 1, at 19-21, 55, 58. *See also House Hearings*, *supra* note 2, at 197; McGarr, *Anatomy of a Criminal Case*, 75 F.R.D. 89, 285 (1976).

[65] *See* Barker v. Wingo, 407 U.S. 514, 519 (1971).

[66] Levin, *supra* note 53, at 117-18.

that defense counsel and defendants believe time is an ally in bargaining.[67] Where appropriate, defendant's delay may even be used to convince the prosecutor to grant him immunity from prosecution.[68]

Not all pre-trial delay is sought for purely tactical reasons. Often, pre-trial motions are legitimate and are made to further justice rather than to defeat it. Motions, such as those authorized by rule 20, are clearly efficiency-oriented.[69]

A separate set of delay motives comes into play in relation to the trial itself. For instance, defense delay may be used to avoid "hard" judges.[70] Delay may also be used by the defense to undermine the prosecution's case. Memories of witnesses dim as time passes, and the greater the time from the criminal event to the trial the greater the defense hope that witnesses will be less convincing and more easily confused on cross-examination.[71] The longer the trial is delayed, the greater the possibility that witnesses will be intimidated by the defendant or friends of the defendant.[72] Moreover, long trial delays may prove so inconvenient to a witness that the witness becomes uncooperative[73] or unavailable.[74] There is a widespread belief among defense counsel that a jury is less likely to convict, or at least more likely to convict of a less serious crime, if a long period of time has elapsed between the criminal event and the trial.[75] Again, there are also legitimate trial delay purposes such as lessening the negative effects of pre-trial publicity,[76] and meeting the unexaggerated need for further preparation time.[77]

B. Prosecutor's Interest in Delay

In many ways the prosecutor's interests in delay are similar to those of the defense counsel.[78] Lawyer-directed delays such as schedule conflicts[79] and vacation plans are shared by both sides.

As is true with some defendant delays, some prosecutorial pre-trial delays are clearly unacceptable. Delays which are tactically designed to harass the defendant,[80] indicate bad faith,[81] or hamper the ability of the defendant to defend himself[82] "strike at the fairness of our criminal process"[83] and are unsupportable.[84] Yet, other tactical delays, such as proceedings under rule 20,[85] interlocutory appeals,[86] incompetency proceedings[87] and similar motions are justifiable.[88] Prosecutors may want to

[67] United States v. Vispi, 545 F.2d 328, 332 (2d Cir. 1976). However, even when a defendant initially cooperates with the government, this will not prevent a defendant from claiming that the government must bear the risk that the defendant will renege on his agreement to cooperate, which will result in unaccounted for time under the Speedy Trial Act. For a not entirely satisfying response to this issue see United States v. Lopez, 426 F. Supp. 380 (S.D.N.Y. 1977).

[68] The closest explicit continuance allowed under the Speedy Trial Act analagous to the bargaining-position delay is that under court supervision the prosecution of a defendant may be deferred so that the defendant may demonstrate his good conduct. 18 U.S.C. § 3161(h)(2).

[69] F. R. CRIM. P. 20 regulates the transfer of a criminal case from one district to another for purposes of plea and sentence.

[70] Neubauer & Cole, *A Political Critique of the Court Recommendations of the National Commission on Criminal Justice Standards and Goals*, 24 EMORY L.J. 1009, 1024 (1975).

[71] Barker v. Wingo, 407 U.S. 514, 521 (1971).

[72] *Scaring Off Witnesses*, TIME, Sept. 11, 1978, at 41.

[73] Speedier trials would also help witnesses less patient than Patricia Finck, a Philadelphia A & P cashier who went back to court 46 times to get two stickup men convicted. "After three or four continuances of a case," says Patrick Healy, the executive director of the National District Attorneys Association, "unless you're really a devoted witness, you'll kiss it off. After all, what's in it for you? This business of civic pride goes only so far. And the smart defendant and the smart defense lawyer will delay a case to death."
Id.

[74] Barker v. Wingo, 407 U.S. 514, 521 (1971).

[75] *See* Banfield & Anderson, *Continuances in the Cook County Criminal Courts*, 35 U. CHI. L. REV. 259, 261–62 (1968).

[76] *See* Nebraska Press Association v. Stewart, 427 U.S. 539, 603 n.28 (1975) (Brennan, J., concurring).

[77] *See* text accompanying note 157 *infra*.

[78] The sixth amendment's speedy trial guarantee attaches only after a person has been accused of a crime. However, the due process clause of the fifth and fourteenth amendments may also provide a basis for dismissing an indictment in certain limited situations. United States v. Marion, 404 U.S. 307 (1971).

[79] United States v. Jones, 524 F.2d 834, 850 (D.C. Cir. 1975).

[80] United States v. Marion, 404 U.S. 307, 325 (1971).

[81] United States v. Lara, 520 F.2d 460, 464 (D.C. Cir. 1975).

[82] *See* United States v. Johnson, 579 F.2d 122, 123 (1st Cir. 1978). In United States v. Roberts, 515 F.2d 646 (2d Cir. 1975), the government's intentional inactivity prevented the defendant from obtaining a youthful offender probationary sentence since the criminal proceeding was delayed beyond his 26th birthday.

[83] Dickey v. Florida, 398 U.S. 30, 45 n. 7 (Brennan, J., concurring).

[84] United States v. Marion, 404 U.S. 307, 324 (1971).

[85] F.R. CRIM. P. 20.

[86] 18 U.S.C. § 3161(h)(1)(D) (Supp. IV 1974).

[87] 18 U.S.C. § 3161(h)(1)(A) (Supp. IV 1974).

[88] *See* 18 U.S.C. § 3161(h) (Supp. IV 1974) for a listing of excludable times for various motions.

delay trial in order to protect informers.[89] Prosecutors may also seek a delay to better prepare their cases,[90] await an appeal of a co-defendant,[91] try "important" cases first,[92] finish another investigation,[93] or await the availability of a witness.[94] During the pre-trial stage, plea negotiations will be underway and may consume a great deal of time while parties bargain for immunity, for reduced charges and for sentences.[95] A set of motives for trial tactic delays parallel to that of the defense may also arise. Prosecutors may wish to avoid the "easy" judge,[96] or await the testimony of witnesses in other pending cases,[97] join defendants for trial[98] or await prosecution by state officials.[99]

But the parallel to defense interests in delay is not complete. There are two major differences between defense and prosecutor delay. First, there are no constitutional rights involved in denying to the prosecution the right to be represented by a particular counsel or the ability to prepare adequately. There may well be strong arguments for guaranteeing the prosecution the time to be adequately prepared, but that is a policy choice, not a constitutional right.[100] Second, it is clear from the case law that the burden of speedy determination of criminal cases falls upon the prosecution. As the Court stated in *Strunk v. United States*,[101] citing the ABA standards:[102] "Although a great many accused persons seek to put off the confrontation as long as possible, the right to a prompt inquiry into criminal charges is fundamental and the duty of the charging authority is to provide a prompt trial."[103]

Since the prosecution has the duty of expediting criminal trials, it is the prosecutor who must ultimately account for all non-defendant caused de-

[89] *See* United States v. Lopez, 426 F. Supp. 380 (S.D.N.Y. 1977), in which the government admitted that the sole reason for not proceeding against the defendant was the desire to keep concealed the informer status of a co-defendant. In disallowing the request for an excludable time determination to be made, the court stated:

> If the government's position here was sustained, it could obtain at will an open-ended toll of the requirements of the Speedy Trial Plan solely upon its desire to conceal the existence of an informer or cooperating co-defendant. "If there [was] anything [the Rules were] not intended to cover, it is the blanket type of exclusion proposed by the Government here."

Id. at 385. *See also* United States v. Furey, 500 F.2d 338, 343 (2d Cir. 1974). In the area of informers and pre-indictment delay see United States v. Lovasco, 431 U.S. 783, 797 (1976) (citing Amsterdam, *Speedy Criminal Trial: Rights and Remedies*, 27 STAN. L. REV. 525, 527–528 (1975)).

[90] Under 18 U.S.C. § 3161(h)(8)(C) (Supp. IV 1974), the prosecutor must have diligently prepared in order to have delay time excluded.

[91] United States v. Didier, 542 F.2d 1182 (2d Cir. 1976).

[92] *See* United States v. Douglas, 504 F.2d 213, 217 (D.C. Cir. 1974), in which Chief Judge Bazelon, in a concurring opinion, stated that prosecuting "important" cases before prosecuting "lesser" cases did not justify delay in trial.

[93] United States v. Rollins, 487 F.2d 409, 419 (2d Cir. 1973).

[94] *See* Barker v. Wingo, 407 U.S. 514, 531 (1971); United States v. Douglas, 504 F.2d 213, 218 (D.C. Cir. 1974); United States v. Hillegas, 443 F. Supp. 221, 227 (S.D.N.Y. 1977); United States v. Salzmann, 417 F. Supp. 1139 (S.D.N.Y. 1976), *aff'd*, 548 F.2d 395 (2d Cir. 1977); 18 U.S.C. § 3161(h)(3)(A) (Supp. IV 1974).

[95] "Thus, if the government wishes to bargain for this condition, it may but it should do so mindful of the risks which it thereby assumes of dismissed indictments for unconstitutional delay.'" United States v. Carini, 562 F.2d 144, 149 (2d Cir. 1977) (quoting United States v. Roberts, 515 F.2d, 642, 647 (2d Cir. 1975)).

[96] United States v. Lara, 520 F.2d 460, 464 (D.C. Cir. 1975).

[97] Barker v. Wingo, 407 U.S. 514, 516 (1971) (delay in order to secure accomplice's testimony after his conviction).

[98] United States v. Howard, 440 F. Supp. 1106, 1109 (D. Md. 1977).

[99] *See* United States v. Mejias, 552 F.2d 435 (2d Cir.), *cert. denied*, 434 U.S. 847 (1977); United States v. Cordova, 537 F.2d 1073, 1076 (9th Cir. 1976), *cert. denied*, 429 U.S. 960 (1977). United States v. LaCruz, 441 F. Supp. 1261, 1267 (S.D.N.Y. 1977).

[100] United States v. Correia, 531 F.2d 1095, 1098 (1st Cir. 1976).

[101] 412 U.S. 434 (1972).

[102] Prompt disposition of criminal charges.

(a) It is unprofessional conduct for a prosecutor intentionally to use procedural devices for delay for which there is no legitimate basis.

(b) The prosecution function should be so organized and supported with staff and facilities as to enable it to dispose of all criminal charges promptly. The prosecutor should be punctual in attendance in court and in the submission of all motions, briefs and other papers. He should emphasize to all witnesses the importance of punctuality in attendance in court.

(c) It is unprofessional conduct to misrepresent facts or otherwise mislead the court in order to obtain a continuance.

AMERICAN BAR ASSOCIATION, STANDARDS RELATING TO THE PROSECUTION FUNCTION AND THE DEFENSE FUNCTION (Approved Draft 1971).

[103] 412 U.S. at 437.

lay.[104] Consequently, in looking at the prosecutor's interest in delay, one must keep in mind that often the prosecutor will be arguing for delay caused by events totally outside his control. Often the prosecutor will be arguing for delay due to congested court calendars,[105] recusal of judges,[106] judge's illness[107] or absence from the district,[108] and other such "court business" problems.[109]

C. Judicial Interest in Delay

The motives for court-desired delay in criminal cases are much harder to pinpoint and more difficult to characterize. From one standpoint, manpower used to expedite criminal cases is taken away from trying civil cases. Some judges find this unacceptable.[110] Other judges feel that criminal cases delayed are criminal cases which are more likely to "plead out."[111] Finally, some judges find their calendars so full that it makes little difference to them how quickly they progress. Given these factors, many judges will readily accept the wishes of the prosecution and defense to delay trial.[112]

The motives for delay (lawyer-oriented, defendant comfort-oriented, and court-oriented) can be realized through many separate tactics, whether the mechanism to achieve delay is the "right to adequately prepared counsel" argument or some other argument. Under the legislative mandate both prosecutors and defense counsel will have a more difficult time manipulating delay to suit their own purposes. As a result there was, and is, continued opposition to the Speedy Trial Act by the practicing bar. The danger looms large that these parties will join together to stipulate to a waiver of the Act.[113] That this fear is real can be seen in the statements of the participants themselves, indicating both a great dislike and significant distrust of the Act.

IV. Participants' Disdain of the Act

During the gestation period of the Speedy Trial Act in Congress, it became a common occurrence for each participant in the criminal justice system to blame another component of the system for delay.[114] In the words of Representative Conyers, chairman of the House Subcommittee on Crime, "Prosecutors blamed backlogged court dockets and judges blamed prosecutors for filing indiscriminate, multi-count indictments. For their part, prosecutors and defense counsel alike found the dilatory tactics of their adversaries as the principal cause of delay."[115] None of the participants were willing to admit to the obvious fact that all of them benefited in their own way from delay. Although the participants were unable to agree on the cause of delay, they did agree on one thing: the Speedy Trial Act was an ill-conceived idea that they thought would have an adverse effect on individual justice.

The Justice Department had long been a foe of proposed speedy trial legislation.[116] In the legislative events which immediately preceded the passage of the Speedy Trial Act of 1974, Justice Department opposition heightened.[117] For instance, Attorney General Saxbe outlined six major areas in which the Justice Department was opposed to the pending legislation. He claimed that rule 50(b) plans were sufficiently effective, that mandatory dismissal was not in society's interest, that no additional resources had been provided, that complicated cases required longer time to prepare than the provisions allowed, that the rate of guilty pleas would be adversely affected and that the legislation would result in more hearings and more appeals which would further clog court calendars.[118] Even after changes were made in response to some of these objections, the Justice Department continued to express its displeasure with the bill.[119] Justice Department opposition even prompted Representative Conyers to comment upon Attorney General Saxbe's criticisms of the Act by saying that: "It mystifies me that the Department persists in these arguments, especially since they have been in full partner in some forty-two months of refinement, and have seen all but a few of over two dozen of their suggested changes included in what is now before the Committee."[120]

Strong opposition to passage of the Speedy Trial Act also came from the judiciary. Director Kirks of the Administrative Office of the United States Courts not only contended that such legislation should await further study of the effect of the rule 50(b) plans,[121] but also complained that the planning process of the Act and the pre-trial services program were inappropriate.[122] As Kirks noted, "[t]he Conference has felt rather strongly that the goal of achieving a speedy trial for every defendant charged with crime in the district courts could be achieved within the court structure without the need for legislation."[123]

Furthermore, individual district court judges appeared before Congress to make their objections known.[124]

The defense bar was represented in the House hearings by three practitioners. Their testimony implies that they viewed the pending legislation as assisting their defense of clients because much of testimony centered on the issue of dismissal with prejudice, a matter of much concern to defense counsel.[125]

Subsequent to the passage of the Speedy Trial Act, evidence exists that the participants' distrust has not abated. For instance, some federal judges have continued to express their displeasure with the Act.[126] Furthermore, some judges have ignored its existence,[127] while others have referred to it in opinion as "oppressive and onerous."[128] Still others

[104] As the Court noted in *Barker v. Wingo*: "A more neutral reason such as negligence or overcrowded courts should be weighed less heavily but nevertheless should be considered since the ultimate responsibility for such circumstances must rest with the government rather than with the defendant," 407 U.S. at 531. Many cases have dealt with applying the analytical process of *Barker v. Wingo*, including the weighing of "neutral" factors such as crowded docket and understaffed prosecutors' offices. *See, e.g.*, Strunk v. United States, 412 U.S. 434 (1972); United States v. Carini, 562 F.2d 144, 148–52 (2d Cir. 1977); United States v. Vispi, 545 F.2d 328, 333–37 (2d Cir. 1976); United States v. Simmons, 536 F.2d 827, 829–35 (9th Cir. 1976), *cert. denied*, 429 U.S. 854 (1977); United States v. Jones, 524 F.2d 834, 849–53 (D.C. Cir. 1975); United States v. Salzmann, 417 F. Supp. 1139, 1165–71 (E.D.N.Y. 1976), *aff'd*, 548 F.2d 395 (2d Cir. 1977). *See also* Rudstein, *supra* note 47.

[105] *See, e.g.*, United States v. Jones, 524 F.2d 834, 839 (D.C. Cir. 1975).

[106] United States v. Vispi, 545 F.2d 328, 336 (2d Cir. 1976).

[107] United States v. Carini, 562 F.2d 144, 149 (2d Cir. 1977); United States v. Lord, 565 F.2d 831, 840 (2d Cir. 1977).

[108] United States v. Douglas, 504 F.2d 213 (D.C. Cir. 1974) (judge attending a professional meeting); United States v. Didier, 542 F.2d 1182, 1184 (2d Cir. 1977) (judge holding court outside of his district).

[109] United States v. Carini, 562 F.2d 144, 149 (2d Cir. 1977) (summer recesses).

[110] *See* note 130 *infra*.

[111] Levin, *supra* note 53, at 114.

[112] *Id.* at 114–16.

[113] "If courts are to exercise effective calendar control and to expedite the cases before them, they must reject consent of the parties as a basis for granting adjournments." The President's Commission on Law Enforcement and Administration of Justice, Task Force Report: The Courts, 86 (1967).

[114] *See, e.g.*, House Report, *supra* note 1, at 17, 20; Senate Report, *supra* note 1, at 8–9. *But see* Judge Zirpoli's statement that the judiciary can make the speedy trial guarantee a reality, *House Hearings*, *supra* note 2, at 375.

[115] House Report, *supra* note 1, at 56.

[116] For a brief history of speedy trial legislation, including previous opposition by the Justice Department, *see* Hansen & Reed, *The Speedy Trial Act in Constitutional Perspective*, 47 Miss. L.J. 365, 400–06 (1976). *See also* United States v. Salzmann, 417 F. Supp. 1139, 1147–51 (E.D.N.Y. 1976), *aff'd*, 548 F.2d 395 (2d Cir. 1977).

[117] *See*, House Report, *supra* note 1, at 13, 17, 54, 58, 78; *House Hearings*, *supra* note 2, at 196–222 (statements and testimony of W. Vincent Rakestraw, Assistant Attorney General, Office of Legislative Affairs; H. M. Ray, United States Attorney, Northern District of Mississippi; James L. Treece, United States Attorney, District of Colorado; Earl Silbert, United States Attorney for the District of Columbia; Mac Redwine, Legislative Counsel, Office of Legislative Affairs).

[118] House Report, *supra* note 1, at 55.

[119] *Id.* at 55–58.

[120] *Id.* at 58.

[121] *Id.* at 50–54. *See also House Hearings*, *supra* note 2, at 176–96.

[122] House Report, *supra* note 1, at 50–54.

[123] *House Hearings*, *supra* note 2, at 176.

[124] Judge John Feikens, United States District Court for the District of Eastern Michigan commented:

> Now what I fear, Mr. Chairman and members of the subcommittee, is this: That if we have to put all of our attention on criminal cases, we will not reach our civil docket. I am in danger right now of that. And I point out in my statement—and I think you ought to consider this—that there are very important cases on the civil docket that we have to try—the prisoners' rights petitions, the civil rights cases, the habeas corpus applications, the civil rights cases in which the United States is a party, and the onslaught of cases that we are getting under title 7 in private civil rights cases. . . .
>
> In other words, what I am saying to you, Mr. Chairman, is this: Whether we talk about the speedy trial bill or whether we talk about plans under rule 50(b) of the Federal Rules of Criminal Procedure, in courts like the Eastern District of Michigan we already have problems. And if you say to us "Now put these criminal cases front and center to the exclusion of the civil cases," we can do that, but the civil litigants are going to suffer.

House Hearings, *supra* note 2, at 241.

Judge Alfred Arraj, United States District Court for the District of Colorado, was quoted by United States Attorney Treece as saying that he had such a backlog of criminal cases that he could not get to the civil cases. Therefore, Judge Arraj was going to dismiss criminal cases. *Id.* at 215. *See also* the statements of Judge Alphonoso Zirpoli, United States District Court for the District of Northern California, *Id.* at 365–84.

[125] *See Id.* at 223–38, 248–59, 335–48.

[126] *See, e.g.*, United States v. Bullock, 551 F.2d 1377, 1382 (5th Cir. 1977).

[127] *See* United States v. Carpenter, 542 F.2d 1132, 1134 n.1 (9th Cir. 1976). *See also* Misner, *supra* note 14, at 15–25.

[128] Wood, *Federal Prisoner Petitions in the Proceedings of the Seminar for Newly Appointed United States District Judges*, 75 F.R.D. 89, 340 (1976).

have sought its repeal[129] or sought major alterations in order to return to the Rule 50(b) situation.[130] Some judges have even flouted the intent of the Act by "empanelling juries and then continuing the trial for weeks, or even months."[131] Two judges have gone so far as to find that the Act is so onerous and such a constraint on the judiciary, that it violates the separation of powers clause.[132] Finally, others have vented their frustration by predicting, not without some justification, that the consequential effects of the legislation will have devastating effects upon all judicial business.[133]

However, other judges have found the Act to be a necessary element to remedy "excessive and inexcusable delay in bringing a defendant to trial."[134] Some have intimated a basic disagreement with the wisdom of passing the Act, but believe it is their duty to enforce it whether they think it is "good law, bad law, or law which is partly good and partly bad."[135] This attitude is best expressed by United States District Court Judge McGarr, who has stated that:

> It [the Speedy Trial Act] has provoked more violent and emotional rhetoric than any other act that's affected the judiciary and nobody has been more violent or emotional than I have. I have written letters to Congressmen and everyone else about it. I think it's improvident, and I think it's ill considered. It's wrecking our dockets. It's going to force us into total moratoria on civil cases while we force to trial defendants who don't want to go to trial anyway . . . .
>
> Congress is congratulating itself that it has done a worthwhile thing, and incidentally, very happy that they have shown once again to the judiciary whose the boss in this government. But it cannot be ignored. A lot of people are devoting a lot of time to it. We've got to comply with it.[136]

The wisdom of the Act has not escaped the pointed criticism of appellate courts as well.[137]

[129] REPORT OF THE AD HOC SUBCOMMITTEE ON THE SPEEDY TRIAL ACT (Administrative Office of the United States Court, undated, chaired by Judge Carl B. Rubin) [hereinafter cited as AD HOC REPORT]. App. B, Summary of Responses on Speedy Trial Act (8th, 9th and 10th Circuits), 8; App. A, Analysis of Sixth Circuit Responses, 2–3. The AD HOC REPORT was the product of a meeting in Washington, D.C. on June 27, 1977, sponsored by the Administrative Office and the Federal Judicial Center. Representatives from the twelve district courts which had already moved to the 1979 standards were present, as well as a cross section of other interested individuals including public defenders, United States attorneys, United States magistrates, circuit reporters, members of the criminal defense bar, and staff counsel from subcommittees of the Senate Judiciary Committee and the House Judiciary Committee. To obtain a broad-base of information, requests for information were submitted to the chief judges of all the districts. In addition, Earl J. Silbert, United States attorney for the District of Columbia, solicited views of all United States attorneys on the problems created by the Act.

[130] *See* AD HOC REPORT, *supra* note 129, App. A, D.C. Circuit, 4; Second Circuit, 1. Another way to limit the Act severely is to expand the judicial emergency provisions of 18 U.S.C. § 3174 (Supp. IV 1974). *See* AD HOC REPORT, App. A, D.C. Circuit, 1, Second Circuit, 1; Third Circuit, 4; Fourth Circuit, 2.

[131] AD HOC REPORT, App. C, 4.

[132] For the most in-depth discussion, see United States v. Howard, 440 F. Supp. 1106 (D. Md. 1977). In United States v. Martinez, 538 F.2d 921, 923 (2d Cir. 1976), Mr. Justice Clark, sitting by designation, noted in passing that he viewed the Act as being constitutionally suspect.

[133] It is feared that the Speedy Trial Act will have a number of adverse effects. The most prominent fear is that the Act will totally disrupt the civil calendar. This point was made by Chief Justice Burger in Proceedings of the 37th Annual Judicial Conference of the District of Columbia Circuit Court, 73 F.R.D. 147, 245 (1976). *See also* United States v. Frazier, 547 F.2d 272, 274 (5th Cir. 1977); Lasher, *The Court Crunch: The View From the Bench*, 76 F.R.D. 245, 249 (1977); AD HOC REPORT, *supra* note 129, at 6–7. Other effects will be that district judges will be so involved with criminal cases, magistrates will be forced to handle more civil matters. *See, e.g.*, Loral Corp. v. McDonnell Douglas Corp., 558 F.2d 1130 (2d Cir. 1977). *See also* the remarks made by Attorney General Bell, Proceedings of the 38th Annual Judicial Conference of the District of Columbia Circuit Court, 77 F.R.D. 251, 308 (1977). There is also concern that the Act will cause prosecutors to forego some re-trials, Marting v. United States, 411 F. Supp. 1352, 1360 (D.N.J. 1976); and not to proceed with some "minor" crimes, United States v. Bennett, 563 F.2d 879, 884 (8th Cir. 1977). There seems to be some trend to blame all judicial administrative problems on the Speedy Trial Act. *See, e.g.*, Acha v. Beame, 438 F. Supp. 70, 80 (S.D.N.Y. 1977), in which the court commented that because of the Speedy Trial Act and its effect upon the workload, factual disputes in a discriminatory hiring practices case must be turned over to a special master.

[134] United States v. Vispi, 545 F.2d 328, 330 (2d Cir. 1976).

[135] United States v. Koch, 438 F. Supp. 307, 310 (S.D.N.Y. 1977).

[136] McGarr, *Anatomy of a Criminal Case*, 75 F.R.D. 269, 285 (1976).

[137] *See*, Burger, *Year-End Report*, 12 ARIZ. B.J. 16 (1977). In United States v. Tirasso, 532 F.2d 1298 (9th Cir. 1976), Judge Kennedy commented that: "It is discouraging that our highly refined and complex system of criminal justice is suddenly faced with implementing a statute that is so unartfully drawn as this one. But this is the law, and we are bound to give it effect." 532 F.2d at 1301.

Criticism of the Act by defense counsel and prosecutors filters through court decisions. Defense counsel are beginning to learn that "it is obvious that the Speedy Trial Act of 1974 was not written with the rights of defendants in mind."[138] It was also not written with the schedule conflicts or the delay tactics of counsel in mind, whether legitimate or not.[139] Consequently, when asked what legislative action should be taken to make the Act more amenable to defense counsel, the general recommendation is to repeal it. Some defense counsel now refer to the Act as the "Speedy Convictions Act."[140]

Prosecutors have come to the same basic conclusions regarding the Act as have defense counsel. United States attorneys, in response to a questionnaire circulated by the United States attorney for the District of Columbia, expressed grave reservations about the Act. Their complaints centered on the effect of the narrow time frames of the Act and upon multi-defendant cases. At the heart of the complaints was the fact that prosecutors were losing control over their calendars. Some United States attorneys suggested that the Act should be amended to allow parties to stipulate to a waiver of the Act and thus return greater power to the litigating parties.[141]

Resistant attitudes of the participants have been buttressed by the available data concerning court experience during the phase-in, planning stage. As the House Report commented:

> The primary purpose of the planning process is to monitor the ability of the courts to meet the time limits of the bill and to supply the Congress with information concerning the effects on criminal justice administration of the time limits and sanctions, including the effects on the prosecution, the defense, the courts and the correctional process, and the need for additional rule changes and statutes which would operate to make speedy trial a reality.[142]

Despite this, many courts have virtually ignored the Act during the trial period and thus have been unable to experiment with procedures to make it effective.[143] Moreover, neither the prosecution nor the defense have objected to the courts' failure to operate under the Act.[144] There is a certain Kafkaesque irony in all this because the participants in the criminal justice system have all predicted that great calamities will flow from the Act, and by refusing to use the planning provisions of the Act they may have made their predictions a self-fulfilling prophecy.

V. A MECHANISM OF SUBTERFUGE

One clear mechanism to translate the motives for delay into actual delay is for the defendant to seek a period of excludable delay by arguing that the defendant's sixth amendment right to counsel (either his "right" to counsel of his choice or his right to adequately prepared counsel) will be jeopardized if he is immediately forced to trial. Such a delay, the argument goes, is excludable under the Speedy Trial Act's "ends of justice" provision. What can easily happen as a result is that the prosecutor will not oppose this motion because he has his own motives for delay. The court must guard, with great vigilance, the independent societal reasons for quick adjudication of criminal cases, irrespective of its own beliefs as to the wisdom of the Speedy Trial Act.[145]

A. Right to Particular Counsel

The sixth amendment right to counsel has been seen as a "cornerstone of our national system of ordered liberty."[146] However, the right to counsel does not confer upon a defendant the absolute right to a particular counsel.[147] Instead, federal case law is abundantly clear that "the right of an accused to choose his own counsel cannot be insisted upon in a manner that will obstruct reasonable and orderly court procedure."[148]

Once past this rhetoric, the appellate courts give little guidance as to the factors to be weighed in a balancing test. The standard raised on appeal is

[138] United States v. Rothman, 567 F.2d 744, 747 (7th Cir. 1977). It is also clear that some counsel are ignorant of the Act. *See* United States v. Strand, 566 F.2d 530, 532 (5th Cir. 1978).

[139] *See* AD HOC REPORT, *supra* note 129, App. B, Ninth Circuit, 2.

[140] *Id.* at 6.

[141] AD HOC REPORT, *supra* note 129, App. C.

[142] HOUSE REPORT, *supra* note 1, at 23.

[143] Misner, *supra* note 14, at 15–25.

[144] *Id.*

[145] *See* notes 132–33 *supra*.

[146] United States v. Poulack, 556 F.2d 83, 86 (1st Cir.), *cert. denied*, 434 U.S. 986 (1977) (citing Powell v. Alabama, 287 U.S. 335 (1932)).

[147] *See, e.g.*, United States v. Poulack, 556 F.2d 83 (1st Cir. 1977), and cases cited therein. *See also* United States v. Taylor, 569 F.2d 448 (7th Cir.), *cert. denied*, 435 U.S. 952 (1978); United States v. Gray, 565 F.2d 881 (5th Cir. 1978); *In re* Rappaport, 558 F.2d 87 (2d Cir. 1977); United States v. Robinson, 553 F.2d 429 (5th Cir. 1977), *cert. denied*, 434 U.S. 1016 (1978).

[148] 556 F.2d at 86. *But see* Drumgo v. Superior Court, 8 Cal. 3d 390, 394, 506 P.2d 1007, 1011 (1973) (Mosk, J., dissenting).

seen as the question of whether the trial court abused its discretion in granting or denying the motion for continuance for the purpose of allowing the defendant to be represented by counsel of his own choice.[149]

In the balancing test, some factors have been given short shrift by the courts. For example, a claim that the defendant is entitled to a change of counsel because under the federal public defender system both the federal defender and the United States attorney are employed by the federal government, unconstitutionally contravenes the spirit of a true adversary system has been of no assistance to the defendant.[150] Moreover, a defendant has no right to be represented by unlicensed counsel[151] and no absolute right to be represented by out-of-state counsel.[152]

In the area of speedy trial, the right to the counsel of one's choice most often arises in the context of a defendant seeking a change of counsel. In the reported cases, attention is entered upon the defendant's motives for change, as well as the effect that such a change would have upon court management issues. If the change of counsel is seen as a defense ploy to gain a delay, the request is often viewed with suspicion.[153] If the defendant is presently represented by adequate counsel, and a change of counsel would cause a delay that would affect the efficient management of the court,[154] affect witness availability,[155] or the speedy trial of co-defendants,[156] the request can be denied, even when the defendant is willing "to waive any and all constitutional and statutory right to a speedy trial and to remain in detention."[157] Again, it must be emphasized that the reported case law may not represent the practice at the trial level since the granting of a motion to change counsel would lie unappealed. Although for the most part the reported decisions are not very helpful in establishing a framework for subjugating defendant's desire to be represented by a particular counsel to speedy trial considerations, in a few instances courts have given clear insights into the problem. For example, in *United States v. Declet*,[158] the court appointed new counsel upon consideration of the uncertainty of the legal aid lawyer's calendar because of trial conflicts, the congested court calendar and the societal interests in speedy trials as codified in the Speedy Trial Act. The court clearly appointed new counsel in that case to further the court's ability to deal swiftly with its calendar.[159]

B. Right to Prepared Counsel

The second major way in which delay may be sought is through a defense claim that it needs additional time in which to prepare for trial. The attractiveness of the argument to allow more time for the defense to prepare must be understood not only in the context of the motives for delay by the defense, the court, and the prosecutor but also in its procedural context. The time limits of the Speedy Trial Act do not begin to run until after an arrest has been made or an indictment handed down. Consequently, there will be instances where the prosecution will have had months or years to investigate and prepare before the time limits begin to run. The reported decisions in the area deal basically with the denial of the continuance and therefore may not accurately depict what actually occurs at the trial level.

The case law is most often conclusory and merely limited to findings that the record does not support a claim that the trial court's inherent ability to control its own docket was abused.[160] Although one may isolate cases which recite, for example, that defendant's counsel had six weeks to prepare for what the court found to be a rather simple case,[161]

[149] *See* sources cited in note 148 *supra*.

[150] *See* United States v. Robinson, 553 F.2d 429 (5th Cir. 1977), *cert. denied*, 434 U.S. 1016 (1978).

[151] United States v. Taylor, 569 F.2d 448 (7th Cir. 1978).

[152] *See In re* Rappaport, 558 F.2d 87 (2d Cir. 1977).

[153] *See* United States v. Jones, 524 F.2d 834 (D.C. Cir. 1975). *But see* United States v. Gray, 565 F.2d 881 (5th Cir.), *cert. denied*, 435 U.S. 955 (1978).

[154] Carey v. Rundle, 409 F.2d 1210, 1214 (3d Cir.), *cert. denied*, 397 U.S. 946 (1969).

[155] United States v. Gray, 565 F.2d 881 (5th Cir. 1978).

[156] United States v. Poulack, 556 F.2d 83 (1st Cir.), *cert. denied*, 434 U.S. 986 (1977).

[157] *Id.* at 84.

[158] 432 F. Supp. 622 (S.D.N.Y. 1977).

[159] *Id.* at 623–24.

[160] *See, e.g.*, United States v. Correia, 531 F.2d 1095, 1098–99 (1st Cir. 1976).

[161] United States v. Rothman, 567 F.2d 744, 747 (7th Cir. 1977). *See also* United States v. Powers, 572 F.2d 146, 153 (8th Cir. 1978) (19 days to prepare); United States v. Taylor, 562 F.2d 1345, 1363 (2d Cir.), *cert. denied*, 432 U.S. 909 (1977) (9 days to prepare); United States v. Anderson, 561 F.2d 1301, 1303 (9th Cir.), *cert. denied*, 434 U.S. 943 (1977) (2 months to prepare); United States v. Olivas, 558 F.2d 1366, 1371–78 (10th Cir.), *cert. denied*, 434 U.S. 866 (1977) (33 days to prepare); United States v. Savage, 430 F. Supp. 1024 (M.D.Pa.) (10 days to prepare), *aff'd*, 566 F.2d 1170 (3d Cir. 1977); Pope v. State, 140 Ga. App. 549, 550, 231 S.E.2d 549, 550–51 (1976) (1 week to prepare); Russell v. State 559 S.W.2d 7, 9–10 (Ark. 1978) (20 days to prepare).

the reference to the time available to defense counsel is usually followed by rhetoric to the effect that:

> The parties agree that a ruling denying a motion for a continuance is not subject to review unless there is a clear showing of an abuse of discretion or that a manifest injustice would result.... It has likewise long been recognized that there are no mechanical tests to be applied and that "[t]he answer must be found in the circumstances [of] each case, particularly in the reasons presented to the trial judge."[162]

The Supreme Court has adopted this analysis as well. In fact, it is only when the facts of the given case are so egregious as to be shocking that the Supreme Court has stepped in. For example, in *Avery v. Alabama*,[163] the defendant was forced to trial two days after his arrest and the appointment of counsel. However, even in this seemingly outrageous situation, the Court continued its historical hands-off policy and upheld the conviction. The Court took the classic approach that appellate courts have since used in viewing continuance requests and their relation to adequate representation by counsel:

> Since the Constitution nowhere specifies any period which must intervene between the required appointment of counsel and trial, the fact, standing alone, that a continuance has been denied, does not constitute a denial of the constitutional right to assistance of counsel. In the course of trial, after due appointment of competent counsel, many procedural questions necessarily arise which must be decided by the trial judge in the light of facts then presented and conditions then existing. Disposition of a request for continuance is of this nature and is made in the discretion of the trial judge, the exercise of which will ordinarily not be reviewed.
>
> But the denial of opportunity for appointed counsel to confer, to consult with the accused and to prepare his defense, could convert the appointment of counsel into a sham and nothing more than a formal compliance with the Constitution's requirement that an accused be given the assistance of counsel. The Constitution's guarantee of assistance of counsel cannot be satisfied by mere formal appointment.[164]

The difficulty in applying the past case law to the perceived possibility of defense and prosecution jointly undermining the Speedy Trial Act is that the past case law has been basically unconcerned with the common practice of continuances stipulated to by both the defense and prosecution.[165] In the words of the Seventh Circuit, commenting upon the Speedy Trial Act, "the necessary expeditious disposal of criminal cases requires the most effective use of the time permitted for trial preparation without reliance upon the routine continuances that may have been customary in the past."[166] What must be done is for the trial courts to take the broad guidelines as suggested by the case law,[167] by the standards of the American Bar Association,[168] and by commentators,[169] and flesh out those guidelines with the facts of a particular case whenever a continuance is sought. Not only would such a process present a meaningful record on appeal, but also it would help guard against defense-prosecution complicity in undermining the Speedy Trial Act.

VI. The Process of Adequate Documentation

The correctness of the decision to grant or deny a motion for continuance turns upon the facts of the given case. However, the Speedy Trial Act demands more. In order to guarantee that societal interests in speedy resolution of criminal matters do not receive short shrift, courts can no longer grant continuance merely because the participants agree. The Act is structured to account for all the

[162] United States v. Rothman, 567 F.2d 744, 747 (7th Cir. 1977).

[163] 308 U.S. 444 (1939).

[164] *Id.* at 446.

[165]

> The judges almost never forcefully interfere with the attorneys' pursuit of their goals, even though they are aware that they often are associated with delay. For instance, the judges' routine granting of continuances, especially without a time-consuming formal explanation, allows the attorney to use them to his own ends.... Nor did criminal division judges require reasons for continuances; some judges in this court were willing to permit as many continuances as the defense and prosecution were willing to arrange.

Levin, *supra* note 53, at 114.

[166] United States v. Rothman, 567 F.2d 744, 749 (7th Cir. 1977).

[167] The individual cases discussed in this article may be of some assistance as similar factual situations recur. The difficulty is that often the reputed cases do not contain sufficient information on all relevant factors. For a more detailed court synopsis of delay cases, see United States v. Salzmann, 417 F. Supp. 1139 (E.D.N.Y. 1976), *aff'd*, 548 F.2d 395 (2d Cir. 1977).

[168] American Bar Association, Standards Relating to Speedy Trial (Approved Draft, 1968) § 1.3.

[169] National Advisory Commission on Criminal Justice Standards and Goals, Courts, Standard 4.12; President's Commission on Law Enforcement and Administration of Justice, Task Force Report: The Court, 84–90.

time between arrest and indictment.[170] Thus, in practice, parties may not stipulate to continuances,[171] nor waive the applicability of the Act's provisions.[172] The Act requires that the court balance, on the record, the competing interests of court management and participants' desires.[173] The documentation process recommended is a simple one that will not contribute to the problem of delay. The process, however, does require that lawyers be prepared to justify their requests for additional time and that judges will be unswerving in their resolve not to honour undocumented requests for delay.

The procedure needed to make the goals of the Act attainable can best be illustrated by analyzing the ends of justice exclusion as it applies to the right-to-counsel delay mechanism. Two subject matters need to be discussed: the degree of specificity required to justify a continuance and the balancing technique to be used in weighing the competing interests.

In terms of the defendant's desire to be represented by a particular counsel and his right to be represented by adequately prepared counsel, those continuance which in the past have been granted in a routine, uncritical way must now be justified under 18 U.S.C. § 3161(h)(8).[174] The statute requires reasons for finding that "the ends of justice served by the granting of such continuance outweigh the best interests of the public and the defendant in a speedy trial."[175] The statute lists three non-exclusive factors which are to be considered when making the determination regarding the "ends of justice":

> (i) Whether the failure to grant such a continuance in the proceeding would be likely to make a continuance of such proceeding impossible, or result in a miscarriage of justice.
> (ii) 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.
> (iii) Whether delay after the grand jury proceedings have commenced, in case where arrest precedes indictment, is caused by the unusual complexity of the factual determination to be made by the grand jury or by events beyond the control of the court or the Government.[176]

The provision concludes with the statement that no continuance is available "because of general congestion of the courts' calendar, or lack of diligent preparation or failure to obtain available witnesses on the part of the attorney for the Government."[177]

It would appear that the legislative intent in establishing the "ends of justice" exclusion was that:

> In order to avoid the pitfalls of unnecessary rigidity on the one hand, and a loop-hole which would nullify the intent of the legislation on the other, a balancing test is established in order to enable the judge to determine when the 'ends of justice' require an extraordinary suspension of the time limits.[178]

But, to guarantee that the Act is not made a sham at the trial level and to give the appellate court an adequate record on appeal, specific findings supporting the three listed factors must be required.

The degree of specificity required of the trial court can be gleaned from the legislative history. In the Senate Report, for example, the "Watergate case" is discussed in terms of the "ends of justice" exclusion. As the report states, "Although a case like the alleged conspiracy involving the so-called 'Watergate case' might normally be subject to a continuance under this provision because of its complexity, society's interest in a speedy trial in

[170] *See* United States v. Hillegas, 443 F. Supp. 221, 225 (S.D.N.Y. 1977); United States v. La Cruz, 441 F. Supp. 1261, 1264 (S.D.N.Y. 1977).

[171] *See* United States v. Rothman, 567 F.2d 744, 749 (7th Cir. 1977).

[172] Underlying the government position is the premise that the public, the defendant and the prosecutor all have the same interest in prompt disposition, and thus the public interest is adequately represented when the defendant and the prosecutor agree to a waiver. But if such were the case, there would have been no need to enact the Plan. The court in promulgating the Plan—and Congress in enacting the Speedy Trial Act—has determined that the immediate participants cannot be relied upon to further the public interest in prompt disposition . . . It would be antithetical to this entire design if the parties were permitted to free themselves from the constraints imposed by the Plan through the simple expedient of the willing defendant signing a waiver. United States v. Beberfeld, 408 F. Supp. 1119, 1122–23 (S.D.N.Y. 1976).

[173] 18 U.S.C. § 3161(h)(8) (Supp. IV 1974).

[174] *Id.*

[175] *Id.*

[176] 18 U.S.C. § 3161(h)(8)(B) (Supp. IV 1974).

[177] 18 U.S.C. § 3161(h)(8)(C) (Supp. 1974).

[178] SENATE REPORT, *supra* note 1, at 21.

light of the then upcoming election might have outweighed that consideration."[179]

In discussing the applicability of the three listed factors, the Senate Report detailed what factual situations would fall within the categories. One example given in the Senate Report is that when determining whether to give counsel more time to prepare, the court should look to the probable length of trial based upon a weighted caseload formula developed by the Federal Judicial Center to determine the actual amount of time spent on different kinds of cases.[180] Although Congress rejected a blanket exception for complicated federal prosecution, experience with certain types of cases will put the court on notice of the potential need for further time.[181] In contrast to the old case law which virtually guaranteed disparity from case to case, the Speedy Trial Act creates a process which requires specific reasons for delay at the trial level which will eventually result in a body of common law continuances giving guidance to the district courts on how to strike the balance among the competing interests in the speedy trial area.[182]

Other types of factors regarding the need for additional time can be identified. If the need for a continuance is arguably urgent, it should be recognized early in the process.[183] This is not to suggest, however, that "surprises" will not occur in criminal cases.[184]

In the right to adequately prepared counsel when the claim is made in a broad statement that the case is complex and further time to prepare is needed, the court should require the defense counsel to show specifically what is yet to be done and how long it will take to accomplish. Possible motives for delay should be scrutinized. In the change of counsel situation, the court should inquire as to what differences exist between counsel and defendant that make the change necessary. Only upon a record of this specificity can realistic review and precedential use of the case be made.

In order to accomplish the need for rather detailed justifications for continuances under the "ends of justice" exclusion, the local criminal rules may need to be modified in a number of ways. Whenever possible, motions for continuances under this provision should be in writing and should be accompanied by a proposed set of findings of fact.[185] Where appropriate, motions for continuances should contain an affidavit of counsel referring to the facts which underlie the need for additional time. The onus should be placed upon counsel in the "ends of justice" cases just as the burden is placed upon counsel in the other facets of the criminal trial. Secondly, procedures must be established so that upon motion of either the defense or the prosecution, determinations regarding excludable time may be made by a judge other than the trial judge, or a judge *ex parte* and *in camera* when questions of confidentiality arise.[186] Finally, to assure that a judge can make informed decisions about the effect of delay upon the administration of the calendar within the district, the clerk must

[179] *Id.* at 40.

[180] *Id.* For a discussion of the weighted caseload formula see ADMINISTRATIVE OFFICE OF THE U.S. COURTS, THE ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS 1971, at 167.

[181] SENATE REPORT, *supra* note 1, at 30.

[182] *See, e.g.*, Plan for the United States District Court for the District of Arizona for Achieving Prompt Disposition of Criminal Cases § 4a, which requires the clerk to maintain a separate file for all orders authorizing ends of justice exclusions.

[183] *See* United States v. Rothman, 567 F.2d 744, 749 (7th Cir. 1977).

[184] The GUIDELINES of the Administrative Office, *supra* note 25, discuss additional factors.

> The other instance involves the "complex" case. Complexity in criminal cases results *inter alia* from complex issues, multiple parties or extensive documentary evidence. Cases fitting into this pattern frequently include antitrust, mail fraud, conspiracy and net worth income tax cases, among others, which cases may require a whole series of pretrial conferences, as well as other protracted proceedings. See: "Pre-Trial Procedures in Big Criminal Cases", Judicial Conference Handbook of Recommended Procedures for the Trial of Protracted Cases, pp. [illegible]; Judge Irving R. Kaufman, "Problems in Protracted Criminal Cases", 23 F.R.D. 551; Judge Joe E. Estes, "Pre-Trial Conferences in Criminal Cases", 23 F.R.D. 560. After an indictment is filed, the court can determine from the nature of the case whether it is "unusual or complex" within the meaning of Section 3161(h)(8)(B)(ii).
>
> Finally, it should be noted that cases may be held in abeyance awaiting a decision of the court of appeals or Supreme Court which would be dispositive of the case. Section 3161(h)(8) would be applicable.

[185] *See* United States District Court for the District of Arizona, Rule 91. *See also* NATIONAL ADVISORY COMMISSION ON CRIMINAL JUSTICE STANDARDS AND GOALS, COURTS 97 (1973).

[186] In the analagous situation of allowing counsel to withdraw for an alleged conflict of interest, a similar process was suggested by Judge (now Justice) Stevens. United States v. Jeffers, 520 F.2d 1256, 1265 (7th Cir. 1975). *See* Lowenthal, *Joint Representation in Criminal Cases: A Critical Appraisal*, 65 VA. L. REV. 939 (1978).

have in a usable format the data required under 18 U.S.C. §§ 3166 and 3170.[187]

[187] 18 U.S.C. §§ 3166, 3170 (Supp. IV 1974).
§ 3166. District plans—contents.
(a) Each plan shall include a description of the time limits, procedural techniques, innovations, systems and other methods, including the development of reliable methods for gathering and monitoring information and statistics, by which the district court, the United States attorney, the Federal public defender, if any, and private attorneys experienced in the defense of criminal cases, have expedited or intend to expedite the trial to other disposition of criminal cases, consistent with the time limits and other objectives of this chapter.
(b) Each plan shall include information concerning the implementation of the time limits and other objectives of this chapter, including:
(1) the incidence of, and reasons for, requests or allowances of extensions of time beyond statutory or district standards;
(2) the incidence of, and reasons for, periods of delay under section 3161(h) of this title;
(3) the incidence of, and reasons for, the invocation of sanctions for noncompliance with time standards, or the failure to invoke such sanction, and the nature of the sanction, if any, invoked for noncompliance;
(4) the new timetable set, or requested to be set, for an extension;
(5) the effect on criminal justice administration of the prevailing time limits and sanctions, including the effects on the prosecution, the defense, the courts, the correctional process, costs, transfers and appeals;
(6) the incidence and length of, reasons for, and remedies for detention prior to trial, and information required by the provisions of the Federal Rules of Criminal Procedure relating to the supervision of detention pending trial;
(7) the identity of cases which, because of their special characteristics, deserve separate or different time limits as a matter of statutory classifications; and
(8) the incidence of, and reasons for, each thirty-day extension under section 3161(b) with respect to an indictment in that district.
(c) Each district plan required by section 3165 shall include information and statistics concerning the administration of criminal justice within the district, including, but not limited to:
(1) the time span between arrest and indictment, indictment and trial, and conviction and sentencing;
(2) the number of matters presented to the United States Attorney for prosecution, and the numbers of such matters prosecuted and not prosecuted;
(3) the number of matters transferred to other districts or to States for prosecution;
(4) the number of cases disposed of by trial and plea;
(5) the rates of nolle prosequi, dismissal, acquittal, conviction, diversion, or other disposition; and
(6) the extent of preadjudication detention and release, by numbers of defendants and days in custody or at liberty prior to disposition.
(d) Each plan shall further specify the rule changes, statutory amendments, and appropriations needed to effectuate further improvements in the administration of justice in the district which cannot be accomplished without such amendments or funds.
(e) Each plan shall include recommendations to the Administrative Office of the United States Courts for reporting forms, procedures, and time requirements. The Director of the Administrative Office of the United States Courts, with the approval of the Judicial Conference of the United States, shall prescribe such forms and procedures and time requirements consistent with section 3170 after consideration of the recommendations contained in the district plan and the need to reflect both unique local conditions and uniform national reporting standards.
§ 3170. Speedy trial data.
(a) To facilitate the planning process and the implementation of the time limits and objectives of this chapter, the clerk of each district court shall assemble the information and compile the statistics required by sections 3166(b) and (c) of this title. The clerk of each district court shall assemble such information and compile such statistics on such forms and under such regulations as the Administrative Office of the United States Courts shall prescribe with the approval of the Judicial Conference and after consultation with the Attorney General.
(b) The clerk of each district court is authorized to obtain the information required by sections 3166(b) and (c) from all relevant sources including the United States Attorney, Federal Public Defender, private defense counsel appearing in criminal cases in the district, United States district court judges, and the chief Federal Probation Officer for the district. This subsection shall not be construed to require the release of any confidential or privileged information.
(c) The information and statistics compiled by the clerk pursuant to this section shall be made available to the district court, the planning group, the circuit council, and the Administrative Office of the United States Courts.

In the limited experience to date with the "ends of justice" exclusion, every indication is that the courts have not been very specific in justifying continuances. For example, in the United States District Court for Arizona, whenever an interest of justice exclusion is found by the Court, the courtroom deputy clerk merely checks a form indicating under which of the three listed factors the judge

has determined the case falls.[188] No factual basis appears. In fact, it appears that in most district courts continuances are routinely being made as if the Speedy Trial Act had never been passed.[189]

The district court decision in *United States v. Tussell*,[190] is an example of an inadequate finding in regard to the "ends of justice" exclusion. In that case the inadequate finding was not the result of the district judge's being unconcerned with the Act or unwilling to state his reasons on the record. Rather, the record simply did not go far enough. This multi-defendant case contained motions by defendants to suppress allegedly illegally obtained evidence. In excluding certain time periods, the court said:

> Eight of the defendants have trial deadlines of July 18, 1977, and one of the two remaining defendants has a deadline of July 20. Consideration of the suppression motions will require a hearing, which will commence on Thursday, July 28, 1977, at 10:00 A.M. The period of time beginning with these deadlines and ending in July 27, the day before the hearing, will be excluded in accordance with 18 U.S.C.A. § 3161(h)(8). The number of defendants involved in this matter, along with a proliferation of joint and individual pretrial motions, has complicated management of this case. When a case is made especially complex by the "number of defendants, or the nature of the prosecution, or otherwise," Congress has provided for additional periods of excludable time. *See id.* § 3161(h)(8), and will order periods of exclusion up until the day of the hearing, and additional periods if thereafter necessary and appropriate.[191]

The court had before it facts which should have led to the conclusion that judicial time could best be spent considering defendant's motions together as they apparently involved similar or identical facts and the prospective delay would have been relatively short. Specific reference to the facts of the crowded docket as supplied by the clerk under section 3166,[192] as well as how judicial time would better be spent, should have been made. The Court should have referred to section 3161(h)(8)(A) and made the balance of the above facts to conclude that "the ends of justice served by taking such action outweigh the best interest of the public and the defendant in a speedy trial."

[188] The form used by the United States District Court for the District of Arizona is available upon request from the author.
[189] *See* Misner, *supra* note 14, at 21–22.
[190] 445 F. Supp. 1 (M.D. Pa. 1977).
[191] *Id.* at 1–2.
[192] 18 U.S.C. § 3166 (Supp. IV 1974).

Instead, the court incorrectly moved into subsection (B) and attempted to use one of the non-inclusive factors to justify what was already justifiable. The trial court took out of context the statement "number of defendants, or the nature of the prosecution, or otherwise"[193] and applied it to the continuance to consolidate motions for a hearing when the subsection only applies to the question of whether a continuance should be granted for further preparation.

The process of giving specific reasons need not be an onerous task. It does, however, require that the continuance be justified on the record. For example, in the fraud and racketeering trial of Governor Marvin Mandel, the district court justified a delay under the "ends of justice" with the following:

> The Court has been advised by counsel that as many as four members of the Maryland Legislature can be expected to be called as witnesses for both the Government and the defense on any given day of the trial. These officials were elected by the citizens of Maryland to serve them in government. The Court is of the opinion that the legislators cannot adequately serve the citizenship unless the Governor is present at the legislative session to confer with them from time to time. In addition, a trial date which would require legislators to be absent from the present session may serve to disrupt the legislative process.[194]

Additionally, the court addressed a second reason for the delay:

> Several of the defendants contend that much of the publicity surrounding the first trial will dissipate if the trial is delayed for a reasonable time. The Court has examined many of the newspaper clippings and television and radio transcripts submitted by defendant Mandel. An April 13 trial date will result in a four month period between the date the mistrial was declared and the date of the retrial. In the opinion of the Court, it is likely that much of the publicity surrounding the first trial will dissipate during this time.[195]

This second reason is much more difficult to justify factually than the first. It may very well be true that a four-month delay would dissipate much of the pre-trial publicity. It is hoped as the pre-trial publicity issue arises in cases over time that better insights might be gained into the area. For example, issues concerning the use of opinion polls and the differing effects of publicity in large versus

[193] 18 U.S.C. § 3161(h)(8)(B) (Supp. IV 1974).
[194] United States v. Mandel, 431 F. Supp. 90, 93 (D. Md. 1977).
[195] *Id.*

small communities can be developed. However, in *Mandel*, the court should have commented on the effect that the delay would have had upon the court's calendar and on the possibility of a change of venue[196] to avoid both the delay and the problem of pre-trial publicity.[197]

It is impossible to cover all situations in which the "ends of justice" exclusion might arise. In anticipating the July 1, 1979, effective date of the Act, one can set up broad guidelines as to how the balancing process may work and then anticipate that, over the course of time, the framework will be filled in through the ongoing process of litigation.

There are certain types of delay that fall outside the "ends of justice" exclusion. The Act states that no continuance "shall be granted because of general congestion of the court's calendar, or lack of diligent preparation or failure to obtain available witnesses on the part of the attorney for the Government."[198] These do not apply to the right-to-counsel situations. Toward this end of the spectrum of acceptable reasons for delay, however, one would expect to find delay motivated by a concern for defendant's comfort. Moving toward more acceptable reasons for delay, one finds health problems of defense counsel and schedule conflicts of defense counsel as justifying short delays, but delays longer than two weeks should be granted only when the case is so complex or the lawyer-client relationship so unique that substitution of other counsel would be inappropriate. If continuance is sought for additional preparation time, detailed facts about what is yet unprepared and why preparation will take the time sought by the defendant should be required.[199] Information as to the time that the prosecution requires to prepare its case may be influential here, as well as court records concerning the billable time of private counsel for representation pursuant to the Criminal Justice Act.[200]

Merely because a case is, for example, a tax conspiracy case, is not in and of itself sufficient to justify a continuance.

The final topic area requiring discussion in the balancing of societal interests and defendant's interest in speedy trial, is the situation in which defense counsel is dilatory, yet the defendant himself has not participated in the delay. In this area it is suggested that the court be guided by the House Report:

> Although the Committee cannot foresee any excuses for institutional delay which would justify granting a continuance, it does believe that the lack of diligent preparation or failure to obtain available witnesses on the part of the defendant or his attorney could result in a miscarriage of justice and, therefore, exempts these reasons from prohibiting a defendant or his counsel from seeking a continuance. For example, when a defendant's counsel, either intentionally or by lack of diligence fails to properly prepare his client's case, either he or the defendant might seek a continuance on the ground that forcing the defendant to go to trial on the date scheduled would deny the defendant the benefits of a prepared counsel. The court in this situation would determine whether the defendant participated actively in the delay or whether his counsel alone was responsible for it. If the defendant did not cause the delay, he should not be penalized by being forced to go to trial with an unprepared counsel. In this case, he should be permitted enough time to seek a new counsel and to properly prepare his case for trial. In the event that the defendant actively participated in the delay, then no miscarriage of justice has occurred and the court should deny the defendant's or his counsel's request for a continuance and require the trial to commence on the scheduled date. This is consistent with the well-reasoned view that a defendant should not profit doubly from delay he is responsible for.[201]

Although a strong, aggressive policy of continuance-justification is absolutely necessary, one cannot punish the defendant by taking away his day in court because of the misguided antics of his counsel. In these situations, other sanctions of the Act may be appropriate.[202]

Conclusion

The Speedy Trial Act is a proper legislative response to the real problem of delay in the administration of criminal justice. To remedy this problem, it was Congress' judgment that societal interests in quick resolution of criminal charges were

[196] The court in *Mandel* did discuss the venue issue, but not in its possible relationship with the Speedy Trial Act. *Id.* at 98.

[197] In his concurring opinion in Nebraska Press Association v. Stuart, 427 U.S. 539 (1975), Mr. Justice Brennan anticipated the publicity problem. "However, even short continuances can be effective in attenuating the impact of publicity, especially as other news crowds past events off the front pages. And somewhat substantial delays designed to ensure fair proceedings need not transgress the speedy trial guarantee. *See* Groppi v. Wisconsin, 400 U.S. 505, 510 (1971); cf. 18 U.S.C. § 3616(h)(8) (1970 ed., Supp. IV)" *Id.* at 602 n.28 (Brennan, J., concurring).

[198] 18 U.S.C. § 3161(h)(8)(C) (Supp. IV 1974).

[199] See text accompanying note 184 *supra*.

[200] 18 U.S.C. § 3006 (Supp. 1978).

inadequately addressed by the participants of the system. The inadequate protection stems basically from the fact that all participants in the system have separate, but identifiable reasons for delay. In order to further their individual delay interests, it is very possible that the prosecutor and defense counsel may attempt to stipulate to waivers of the Act's time provisions and the common practice of stipulated continuances may be perpetuated. If the practice of stipulated continuances is allowed to exist after the July 1, 1979, full implementation date of the Speedy Trial Act, the Act will be rendered virtually useless.

To avoid this result and to implement the mandated legislative solution to the delay problem in criminal cases, courts *must* require that all requests for delay be adequately documented and that all excludable time decisions under the broad "ends of justice" provision be factually supported. If defense counsel seeks an "ends of justice" exclusion based upon either a claimed need for more preparation time or upon a claim that the defendant's choice of retained counsel is unavailable within the time required by the Act for trial, the trial judge must investigate the factual basis for the request.

As the Speedy Trial Act goes into full effect, the judiciary must require specificity in granting continuances and cease the time-honored practice of allowing counsel to stipulate to delay. Without such a commitment from the courts, the goals of the Speedy Trial Act will not be reached and justice will again be delayed and denied.

[201] House Report, *supra* note 1, at 33.

[202] *See, e.g.*, 18 U.S.C. § 3162(b) (Supp. IV 1974).

Office of the Attorney General
Washington, A. C. 20530
April 10, 1979

1252

The Honorable Thomas P. O'Neill, Jr.
The Speaker
U.S. House of Representatives
Washington, D.C. 20515

Dear Mr. Speaker:

Enclosed for your consideration and reference is a legislative proposal to amend the provisions of Title I of the Speedy Trial Act of 1974, 18 U.S.C. 3161 et seq.

The Speedy Trial Act prescribes time limits within which the various stages of a federal prosecution must occur. After a four year period of phasing-in progressively narrower interim time limits, the final time limits will go into effect on July 1, 1979. These are: (1) thirty days from arrest to the filing of a charge with the court; (2) ten days from filing to arraignment on the charge; and (3) sixty days from arraignment to trial. These time limits can be extended by excluding periods of delay as specified in the Act. When the Act becomes fully effective this July, the sanction for exceeding the statutory time limits, after deducting excludable periods, will be dismissal of the action. Such dismissal is mandatory, although it may be with or without prejudice to reprosecution at the discretion of the court.

The phase-in period for the Act has been monitored by the Administrative Office of the U.S. Courts, and the results of that monitoring have been reported to the Congress. Also, the Department of Justice recently has completed an intensive study of delays in the processing of criminal cases under the Act in nine representative judicial districts.

The data contained in the reports of the Administrative Office and the Department of Justice indicate that, if current levels of compliance with the Act are maintained, a significant number of dismissals can be expected when the final time limits take effect on July 1, 1979.

Specifically, dismissals could occur in as many as 17 percent of criminal cases filed; in 1978 this percentage represented 5,174 cases.

While this estimate of dismissals may be reduced by the addition of new judges and prosecutors, by increases in prosecutorial productivity, and by prosecutive policies emphasizing cases in priority areas, it is clear that final implementation of the Speedy Trial Act this July will have damaging effects on the workings of the Federal criminal justice system. Even for those cases dismissed without prejudice, problems of logistics and the passage of time may impair reprosecution. Finally, timely scheduling of criminal proceedings under the Act will be a major factor in trial delays of civil cases in the federal courts.

The enclosed legislative proposal will amend the Speedy Trial Act of 1974 to redress these problems in a manner consistent with the intent of Congress to safeguard the speedy trial rights of criminal defendants. This will be achieved primarily through amending the Act's final time limits (sections 2 and 3 of the proposal) to require that a defendant be charged within 60 days of arrest, and that trial begin within 120 days of the filing of the charge. [The latter interval includes the period from filing of the charge to arraignment that is now in the Act.] The penalty of dismissal will continue to be applicable, as under the current law, to cases that exceed these time limits. Based on the data reported by the Administrative Office and the Department of Justice, an estimated 97 percent of all criminal defendants would be charged within 60 days of arrest and tried within 120 days of filing of the charge.

In proposing this enlargement and reconfiguration of the Act's time limits, the Department has included two important additional safeguards for criminal defendants. First, the proposal will carry forward a provision of the Act otherwise due to expire with the interim time limits on July 1, 1979, which requires expedited trials for persons designated by the U.S. Attorney as being of high risk and for pre-trial detainees. The excludable time provisions are made expressly applicable to the expedited trial limits for pretrial detainees and designated high risk defendants. Second, trial cannot be scheduled sooner than 30 days after the filing of an information or indictment, without the consent of the defendant, thus assuring sufficient time for the selection of counsel of choice and preparation of defenses.

The Department's proposal includes several other amendments. The first will provide a 120 day limit, running from the time of consent of the defendant, for trial before a magistrate upon a complaint. The time limits of the Act also will apply to trial upon indictments ordered reinstated by an appellate court and the excludable delay and dismissal provisions of the Act will be expressly applicable. The excludable time provisions will be amended to allow a reasonable time for determining the mental or physical capacity of the defendant, or his eligibility for treatment under the Narcotics Addiction Rehabilitation Act, as well as delay attendant to preparation and hearing of pretrial motions. Finally, the Act is amended to allow a less cumbersome procedure for dealing with judicial emergencies.

In submitting this proposal the Department of Justice is acting to fulfill its responsibility to the public to assure the effective and equitable working of the criminal justice system, consistent with the right of criminal defendants to a speedy trial. Several of the Department's proposed amendments, and particularly the changes in the Act's time limits, are consistent with the position of the Judicial Conference of the United States. Thus the changes proposed here represent the product of careful study by both the executive and the judiciary.

The Office of Management and Budget has advised that there is no objection to the submission of this legislative proposal from the standpoint of the Administration's program.

The Department urges the prompt consideration and enactment of this legislation.

Yours sincerely,

Griffin B. Bell

Griffin B. Bell
Attorney General

SECTION-BY-SECTION ANALYSIS OF THE
"SPEEDY TRIAL ACT AMENDMENTS OF 1979"

The bill amends provisions of Title I of the Speedy Trial Act of 1974, 18 U.S.C. 3161 et seq.

Section 2 of the bill amends 18 U.S.C. 3161(b) to enlarge the time allowed for the filing of an indictment or information following the arrest of a defendant, or the service upon him of a summons based upon a complaint, from thirty to sixty days. A conforming change is made in the second sentence of the section, dealing with felony charges in a district where no grand jury has been in session during the period.

Section 3 will merge the ten-day interval now provided by 18 U.S.C. 3161(c) for arraignment after filing of an indictment or information with the sixty-day arraignment-to-trial interval, and enlarge the consolidated interval to 120 days. The section also provides that trial before a magistrate upon a complaint must be commenced within 120 days of the filing of the defendant's consent to be tried by a magistrate. Finally, the section provides that trial cannot be scheduled sooner than thirty days after the filing of an information or indictment, without the consent of the defendant.

Section 4 of the bill amends 18 U.S.C. 3161(e) to apply to trial upon indictments ordered reinstated by an appellate court the time limits currently provided for retrial necessitated by appellate proceedings. The amendment provides that the excludable delay provisions of 18 U.S.C. 3161(h) and the sanctions of 18 U.S.C. 3162 are applicable to the time limits governing trial upon a reinstated indictment.

Section 5 amends the excludable delay provisions of 18 U.S.C. 3161(h). Amendments of 18 U.S.C. 3161(h)(1)(A) and (B) modify the current provisions to allow exclusion of delay resulting from examinations and hearings on the defendant's mental competency or physical incapacity; and from election, examination, and determination of the defendant's eligibility for treatment under the Narcotic Addiction Rehabilitation Act, 28 U.S.C. 2902. The section also adds a provision to exclude delay attendant to preparation and hearing of pretrial motions.

Section 6 of the bill amends 18 U.S.C. 3164 to carry forward the provision otherwise due to expire with the interim time limits on July 1, 1979, which requires trial within ninety days from the beginning of continuous pretrial detention of a person or the designation of a person as being of high risk. The amendment also provides that the excludable delay provisions of 18 U.S.C. 3161(h) are applicable

to this expedited trial limit. See, e.g., United States v. Corley, 548 F.2d 1043, 1044 (D.C. Cir. 1976) (per curiam); United States v. Mejias, 417 F. Supp. 579, 581-83 (S.D.N.Y.), aff'd on other grounds, sub nom. United States v. Martínez, 583 F.2d 921 (2d Cir. 1976); Note, The Interim Provisions of the Speedy Trial Act, An Invitation to Flee?, 46 Fordham L. Rev. 528, 530-34 (1977).

Section 7 of the bill amends the analysis at the beginning of Chapter 208 of Title 18 to conform with the amendments contained in section 6 of the bill.

Section 8 amends 18 U.S.C. 3174 to authorize the chief judge of a district, upon stated conditions of a judicial emergency, to order the time limits of the Act suspended for no more than thirty days. An application to the judicial council of the circuit, under 18 U.S.C. 3174(a), must be filed within ten days of such an order.

58-721 O - 80 - 29

HDD 3630

ADMINISTRATIVE OFFICE OF THE
UNITED STATES COURTS
SUPREME COURT BUILDING
WASHINGTON, D.C. 20544

WILLIAM E. FOLEY
DIRECTOR

JOSEPH F. SPANIOL, JR.
DEPUTY DIRECTOR

April 20, 1979

Honorable Thomas P. O'Neill, Jr.
Speaker of the House of Representatives
Washington, D.C. 20515

1382

MAY 16 1979

Dear Mr. Speaker:

At the direction of the Judicial Conference of the United States, I am hereby transmitting a draft bill to amend Title I of the Speedy Trial Act of 1974 (18 U.S.C. 3161 - 3174).

Since the Speedy Trial Act went into effect on an interim basis in July of 1975, the Judicial Conference has carefully monitored developments under the Act through the work of special and standing committees. Under the Conference's supervision the Administrative Office has fulfilled its obligation to report to the Congress, under 18 U.S.C. 3167, with annual reports filed in September of 1976, 1977, and 1978.

In light of its studies, the Judicial Conference approved and recommended amendments to Title I of the Speedy Trial Act in September of 1977. Although an appropriate draft bill was transmitted to the Ninety-fifth Congress on September 21, 1977, that proposal was not introduced in either the House of Representatives or the Senate during the Ninety-fifth Congress.

In preparation for the Proceedings of the Judicial Conference which were held March 7-9, 1979, the Conference's Criminal Law Committee fully reviewed the draft legislation which had been transmitted to the Ninety-fifth Congress and again recommended transmission of the proposal. The Conference approved that recommendation during its March 1979 Proceedings.

Last week the Chairman of the House Committee on the Judiciary introduced H.R. 3630, a bill to amend Title I of the Speedy Trial Act, which had been transmitted by the Attorney General. In remarks published in the *Congressional Record* on April 10, the Chairman announced that the Judiciary Committee would "take a close look at these amendments" in the near future. Although H.R. 3630 is substantially similar to the draft proposal approved by the Judicial Conference, it is not identical.

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On behalf of the Conference, I am formally transmitting the enclosed draft bill to you as Speaker of the House. By direct correspondence I am notifying the Chairman that I have done so, and requesting introduction of the draft bill, so that the Judicial Conference's proposal may be considered by the House Judiciary Committee in conjunction with H.R. 3630.

Representatives of the Judicial Conference and of this office will, of course, be available to be of assistance to the Congress in connection with this referral.

Sincerely yours,

William E. Foley
Director

Enclosure

58-721 059

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A BILL

To amend the Speedy Trial Act of 1974.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 3161(b) of title 18 of the United States Code is amended (1) by striking out "thirty" in the first sentence thereof and inserting in lieu thereof "sixty", and (2) by striking out "thirty-day" in the second sentence thereof and inserting in lieu thereof "sixty-day".

SEC. 2. Section 3161(c) of title 18 of the United States Code is amended to read as follows:

"(c)(1) The trial of a defendant charged in an information or indictment with the commission of an offense shall commence within one hundred twenty days from the filing date (and making public) of the information or indictment, or from the date the defendant has appeared before a judicial officer of the court in which such charge is pending, whichever date last occurs. If a defendant consents in writing to be tried before a magistrate on a complaint, the trial shall commence within one hundred twenty days from the date of such consent.

"(2) The trial of a defendant shall not commence less than thirty days from the date specified in paragraph (1) without the consent of the defendant."

SEC. 3. Section 3161(h) of title 18 of the United States Code is amended to read as follows:

"(h)(1) Any time limit provided herein may be extended by order of the court, on its own motion or at the request of the defendant or his counsel or at the request of the attorney for the Government, if the court sets forth in the record of the case, either orally or in writing, reasons consistent with this subsection for granting an extension of the duration ordered.

"(2) Extensions may be granted by the court to accommodate delays in the filing of an indictment or information[, in the arraignment of a defendant,]* or in the commencement of a trial or retrial reasonably necessitated by --

"(A) Examinations of defendants to determine mental competency or physical capacity;

"(B) Examinations of defendants pursuant to section 2902 of title 28, United States Code;

"(C) Trials with respect to other charges against the defendant;

"(D) Interlocutory appeals;

"(E) Proceedings relating to the transfer of cases or the removal of defendants from other districts under the Federal Rules of Criminal Procedure;

*Bracketed material to be included only if the separate time limit to arraignment is retained.

"(F) Transportation of defendants from other districts, or to and from places of examination or hospitalization, provided that any time consumed in excess of ten days from the date of an order of removal or an order directing such transportation and the defendant's arrival at his destination shall be deemed unreasonable;

"(G) Pretrial proceedings of unusual complexity;

"(H) Deferral of prosecution pursuant to section 2902 of title 28, United States Code, or by the attorney for the Government pursuant to written agreement with the defendant, with the approval of the court, for the purpose of allowing the defendant to demonstrate his good conduct;

"(I) The unavailability of a defendant or essential witness (including the defendant's incompetence or physical inability to stand trial);

"(J) The fact that the defendant is joined for trial with one or more codefendants;

"(K) Consideration by the court of a proposed plea agreement that has been entered into by the defendant and the attorney for the Government; and

"(L) The withdrawal by the defendant of a plea of guilty or nolo contendere previously entered or tendered to the court to any or all of the charges against him.

"(3) Extensions may also be granted on the basis of the court's finding that the ends of justice served by taking such action outweigh the best interest of the public and the defendant in a speedy trial. The factors, among others, which the court shall consider in determining whether to grant an extension under this paragraph are as follows:

"(A) Whether the failure to grant such an extension in the proceeding would be likely to make a continuation of such proceeding impossible, or result in a miscarriage of justice.

"(B) 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.

"(C) Whether delay after the grand jury proceedings have commenced, in a case where arrest precedes indictment, is caused by the unusual complexity of the factual determinations to be made by the grand jury or by events beyond the control of the court or the Government.

"(4) No extension shall be granted under this subsection because of general congestion of the court's calendar, or lack of diligent preparation or failure to obtain available witnesses on the part of the attorney for the Government."

Section 3161(i) of title 18 of the United States Code is repealed.

SEC. 4. Section 3164 of title 18 of the United States Code is amended by adding at the end thereof a new subsection (d), as follows:

"(d) The provisions of section 3161(h) shall be applicable to the time limit specified in section 3164(b) for the commencement of trial."

SEC. 5. Section 3174 of title 18 of the United States Code is amended as follows:

(1) By striking out the first two sentences of subsection (b), and inserting the following sentence in lieu thereof: "If the judicial council of the circuit shall find that no remedy for such congestion is reasonably available, such council may grant a suspension of the time limits in section 3161(c) for a period of time not to exceed one year for the trial of cases for which indictments are filed during such period.";

(2) By striking out "arrangement" in the third sentence of subsection (b), and inserting in lieu thereof "arraignment";

(3) By striking out subsection (c), and inserting in lieu thereof the following:

"(c) Any suspension of time limits granted by a judicial council shall be reported within ten days of approval to the Director of the Administrative Office of the United States Courts, together with a copy of the application for such suspension, a written

report setting forth detailed reasons for granting such approval, and a proposal for alleviating congestion in the district. The Director of the Administrative Office of the United States Courts shall forthwith transmit such report to the Congress and to the Judicial Conference of the United States. The judicial council of the circuit shall not grant a suspension to any district within six months following the expiration of a prior suspension without the consent of the Congress. If the judicial council concludes that an additional period of suspension within such six-month period is necessary, it shall report that conclusion to the Judicial Conference of the United States, together with the application from the district court for such additional period of suspension and any other pertinent information. If the Judicial Conference agrees that such additional period of suspension is necessary, it may request the consent of the Congress thereto. Should the Congress fail to act on any such request within six months, the suspension may be granted for an additional period not to exceed one year."; and

(4) By adding after subsection (c) a new subsection (d), as follows:

"(d) If the chief judge of the district court concludes that the need for suspension of the

time limits under this section is of great urgency, he may order the limits suspended for a period not to exceed thirty days. An application to the judicial council of the circuit pursuant to subsection (a) shall be filed within ten days of such order."

United States
Department of Justice

DELAYS IN THE PROCESSING OF CRIMINAL CASES UNDER THE SPEEDY TRIAL ACT OF 1974

MARCH 1979

United States Department of Justice
ASSISTANT ATTORNEY GENERAL
LEGISLATIVE AFFAIRS
WASHINGTON, D.C. 20530

March 16, 1979

Honorable John Conyers
House of Representatives
Washington, D.C. 20515

Dear Congressman Conyers:

On July 1, 1979 the final phase of the Speedy Trial Act (P.L. 93-619), enacted by Congress in 1974, goes into effect. After July 1, a failure to meet the standards of the Act will result in a dismissal of a criminal case. Such dismissal may be with or without prejudice at the discretion of the trial court.

Because of the Department's concern about the possibility that a substantial number of federal criminal cases might be subject to dismissal, the Attorney General directed the Office for the Improvements in the Administration of Justice to conduct a detailed study of the current level of compliance with the Act's requirements and to project likely capability to meet the July 1 standards. This study has now been completed and a copy is enclosed for your information.

The Department of Justice expects to submit, for consideration by Congress, proposals for changes in the statutory standards in the near future. We hope that you will consider these proposals in light of the findings set forth in the OIAJ report. If you have any questions on this matter, please do not hesitate to get in touch with me.

Sincerely,

Patricia M. Wald
Assistant Attorney General

REPORT

DELAYS IN THE PROCESSING OF CRIMINAL CASES UNDER THE SPEEDY TRIAL ACT OF 1974

Office for Improvements in the
Administration of Justice

March 1, 1979

TABLE OF CONTENTS

TABLE OF APPENDICES

58-721 O - 80 - 30

CONTINUED

4 OF 5

Report on Delays in the Processing of Criminal Cases Under the Speedy Trial Act of 1974

I. Introduction

A. The Requirements of the Speedy Trial Act

The Speedy Trial Act of 1974 represents a comprehensive effort by Congress to address the related problems of delay in the handling of federal criminal cases and of commission of crime by persons released pending trial of those cases. 1/ The stated purpose of the Act is "to assist in reducing crime and the danger of recidivism by requiring speedy trials and by strengthening the supervision over persons released pending trial." 2/ The speedy trial goal is to be achieved principally by recognizing the right of society, independent of the rights or wishes of defendants, to the prompt disposition of criminal charges; by establishing automatic time limits that may be extended only by the court in accordance with Congressional guidelines, to ensure the speedy termination of the three major phases of criminal trial litigation; and by requiring dismissal of cases not processed within the prescribed time limits.

At the heart of the statutory scheme for accelerating the disposition of federal criminal cases is the Act's formal division of the period between arrest and trial into three

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1/ Title I of the Act (18 U.S.C. 3161-3174) addresses the speedy trial issue; the question of release pending trial is the subject of title II of the Act (18 U.S.C. 3152-3156). References hereafter to the "Speedy Trial Act" are to Title I of the Act.

The basic provisions of Title I of the Act -- 18 U.S.C. 3161 and 3162 -- are appended as Appendix A.

2/ Preamble, P.L. No. 93-619; 88 Stat. 2076 (1974).

distinct intervals: the time from arrest to the filing of a charge with the court (Interval 1) 3/; the time from filing to arraignment on the charge (Interval 2); and the time from arraignment to trial (Interval 3). As of July 1, 1979, when the Act will become fully effective, the time limits will be thirty, ten, and sixty days for Intervals 1, 2, and 3, respectively. 4/

In an effort to ameliorate the rigidity of these arbitrary time limits, Congress provided for the exclusion of processing time attributable to certain unavoidable circumstances, such as the unavailability of an essential witness, or occasioned by activities necessary to making the case ready for trial, such as determining the mental competence of the defendant. To the same end, the Act also permits exclusion of time under a continuance granted upon an on-the-record finding by the court that "the ends of justice served by the granting of such continuance outweigh the best interests of the public and the defendant in a speedy trial." 5/

When the Act becomes fully effective in July, 1979, the sanction for exceeding the statutory time limits, after deducting excludable periods, will be dismissal of the action. This sanction is mandated irrespective of the stage of the

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3/ The charging instrument may be either a grand jury indictment or, in cases not requiring an indictment, an information presented by the prosecutor. As used hereinafter, the term "indictment" includes an information.

4/ For cases begun with the filing of an indictment rather than with an arrest, the Interval 1 time limit is inapplicable.

5/ 18 U.S.C. § 3161(h)(8)(A)

proceeding at which the delay occurs and without regard for whether the pretrial period as a whole exceeds the hundred-day aggregate of Intervals 1, 2, and 3. However, although dismissal is mandatory, it may be with or without prejudice to reprosecution, at the discretion of the court. In determining whether to dismiss a case with or without prejudice, the court is directed to consider, among other factors, the seriousness of the offense, the circumstances leading to dismissal. and the impact of reprosecution on the administration of the Act and on the administration of justice.

In recognition of the potentially far-reaching consequences of the Act, Congress provided for a gradual, four-year phase-in-period, beginning in 1975, during which the dismissal sanction would be held in abeyance and the time limits would become progressively narrower. 6/ Also, to facilitate evaluation of the impact of the Act, Congress required each district court to establish a planning group to report on the district's progress in meeting the time limits, determine the reasons for delay, describe the Act's effect on the quality of justice, and recommend appropriate changes in the legislation.

6/ The interim limits were set at 60-10-180 days for the first year, 45-10-120 days for the second year, and 35-10-80 days for the third year (ending June 30, 1979).

B. Concerns Expressed about the Impact of the Act

Since it went into effect on an interim basis in July 1975, the Speedy Trial Act has been the subject of intense scrutiny and considerable critical comment by a number of observers interested in assessing the effectiveness of the Act in achieving its goals and concerned over the potential costs it might impose on the due administration of justice. 7/ The impetus for much of this interest and concern was the publication in September of 1977 of the Administrative Office of the United States Court's (AOUSC) Second Report on the Implementation of Title I and Title II of the Speedy Trial Act of 1974. That report showed a 13.4 percent reduction in the nation's federal criminal case backlog from the preceding year. However, the report also showed that the civil backlog had increased by almost 10 percent to its highest level ever. Many observers attributed these changes to the Speedy Trial Act and forecast that further decreases in the criminal case backlog would result in even greater delays in the disposition of civil cases.

7/ Among these are the Ad Hoc Committee on the Speedy Trial Act of the United States Judicial Conference (see Appendix B), the Judicial Conference of the United States (see Appendix C), and the Subcommittee on Legislation and Special Projects of the Attorney General's Advisory Committee of United States Attorneys (see Appendix D).

Experience under the interim time limits of the Act has given rise to a number of other questions as well. Foremost among these are:

- Whether the time limits will result in a tendency towards a "no arrest" policy by U.S. Attorneys.
- Whether the time limits will cause U.S. Attorneys to decline a greater number of otherwise prosecutable cases.
- Whether the time limits will allow sufficient time to prepare cases begun by arrest for presentation to a grand jury.
- Whether the time limits will impair the rights of defendants to obtain counsel of their choice.
- Whether meeting the time limit for arraignment will prove excessively costly in districts that cover large geographic areas.
- Whether plea negotiations will be affected by the time limits.
- Whether the time limits leave insufficient time for defense preparation.

- Whether a greater number of trials will be required because of severances granted to defendants in order to avoid delays that would breach the time limits.
- Whether failure to meet the time limits will result in an intolerable number of dismissals with prejudice.

C. The OIAJ Study

In early 1978, the Department of Justice's Office for Improvements in the Administration of Justice (OIAJ) undertook an empirical study of the implementation of the Speedy Trial Act, with special emphasis on the areas of concern noted above. Although it was understood from the beginning that some of the issues presented would probably not be amenable to empirical "testing" and resolution, nevertheless the goal of the study was to develop as much relevant information as possible in a limited period of time to permit a realistic assessment of the probable benefits and costs of the Act when fully implemented.

This report is based upon a review of the information developed by the OIAJ study and information developed by the AOUSC and others. The three primary sources of data upon which it relies are: (1) AOUSC reports on the implementation of the

Speedy Trial Act; 8/ (2) analyses of 460 cases 9/ found by OIAJ not to have been in compliance with the Act's 1979 time limits in nine representative judicial districts; 10/ and (3) OIAJ interviews with judges, U.S. Attorneys, and private counsel in the same nine districts.

The AOUSC data were found to be particularly useful in addressing broad issues such as the Act's effect on the civil docket, the national levels of compliance with Interval 1, 2, and 3 time limits, and the estimated number of dismissals that can be expected once the dismissal sanction becomes effective. These aggregate data, however, do not provide the case-specific information needed to address many of the issues under examination. It was in an effort to obtain more detailed information about cases in which delays were occurring that the OIAJ study reviewed U.S. Attorney case files and court dockets with respect to approximately fifty such cases in each of

8/ Particularly useful is the Third Report on the Implementation of the Speedy Trial Act of 1974: Title I, published in September of 1978 (hereinafter referred to as the AOUSC's "Third Report").

9/ As used in this report, the term "case" means the case of a single defendant even though more than one defendant is named in the indictment.

10/ The sample districts were Maryland, Western New York, Western North Carolina, Northern Illinois, Eastern Michigan, New Jersey, Oregon, Central California, and Massachusetts. For a detailed description of the process by which these districts and the delinquent cases were chosen, see Appendix E.

the nine sample districts. 11/ The interviews were conducted to supplement the aggregate AOUSC data and the specific-case data; those interviewed were federal judges, prosecuting and defense attorneys, court clerks and other administrative personnel, and members of the civil litigation bar, who were questioned about their experiences with, and their perceptions of, the Speedy Trial Act.

D. Outline of Discussion

Parts II through V of this report discuss the current levels of compliance with the Act's final time limits (Part II), summarize the apparent causes of non-compliance (Part III), attempt to identify the more significant apparent "costs" of compliance as they relate to the due administration of justice (Part IV), and assess the major proposals for modification of the Act (Part V).

The discussion of compliance levels in Part II tracks the Act's division of the arrest-to-trial period into three intervals. The present extent of compliance with the thirty-day requirement for Interval 1 is examined first, both on a national basis and for the nine study districts surveyed.

11/ Data were gathered on the offenses committed; the elapsed time from arrest to indictment, indictment to arraignment, and arraignment to final disposition; the number and types of motions filed by prosecutors and defense attorneys; the number and types of motions granted by the court; and the observed sources of excludable and non-excludable processing time that were substantiated by dated documents or docket entries. The pre-coded form used to extract these data is reproduced in Appendix F.

The purpose is to determine general levels of delay during Interval 1 12/ and to identify the points of greatest and most frequent delay. The same examination and analysis is then conducted with respect to Intervals 2 and 3.

In Part III, the data set forth in Part II are summarized in a manner designed to identify the sources of delay, the frequency with which they occur, and the magnitude of the delays they cause.

In Part IV, the focus of discussion shifts from degrees of compliance and causes of noncompliance to consideration of the collateral consequences -- or implicit "costs" -- of compliance with respect to various aspects of the administration of justice, including prosecutorial policies, fairness to defendants, administrative efficiency, and civil caseloads.

Finally, Part V reviews, in light of the findings presented in Parts II, III, and IV, various proposed changes in the Act.

D. Summary of Findings

The most significant findings reported here are that:

1. The degree of compliance with the Speedy Trial Act in terms of the ultimate time limits for each interval was relatively high for the year ending June 30, 1978; at least four out of five cases were processed within the time permitted for each interval.

2. Overall compliance with the Act's ultimate time limits was equally high; about four out of five cases were processed within the time permitted for all intervals.

3. The greatest delays occurred during Interval 3 processing; the shortest occurred during Interval 2.

4. The most frequent causes of delay were time spent waiting for investigative reports, time spent considering plea offers, and time spent waiting for defense counsel to become available.

5. The single most significant source of delay, in terms of the number of days of delay caused, was time spent considering plea offers.

6. The most significant cost of compliance with the Act is continued and aggravated delay in the disposition of civil cases.

12/ As used in this report, "delay" means processing time (in days) that exceeds the final time limits of the Act for each interval after all applicable exclusions are taken into account. For example, if it takes 35 days to process a case from arrest to indictment and exclusions are applicable to only two such days, the report will refer to a three-day delay in the case during Interval 1.

II. Current Levels of Compliance with the Ultimate Time Limits of the Speedy Trial Act

This section describes current levels of compliance by federal district courts with the ultimate time limits of the Speedy Trial Act. Data from the AOUSC are used to compare delays in criminal cases for all districts with delays in the nine sample districts for the purpose of determining general levels of delay as well as identifying the points of greatest and most frequent delay. In addition, this section supplements the AOUSC data with information obtained from the individual sample cases encountering delays that were analyzed in detail in the OIAJ survey. Comparison of the degrees of compliance and non-compliance revealed by these two data sources aids in assessing the validity of the findings based on AOUSC data.

A. Compliance with Interval 1 Limits

AOUSC data for the twelve-month period ending June 30, 1978 show that the national level of compliance for Interval 1 was 82.5 percent. That is, in 82.5 percent of the cases that were begun with an arrest and terminated that year, the defendant was charged within thirty days of arrest. In fewer than 3 percent of such cases was the time from arrest to indictment greater than sixty days. 13/

13/ Third Report, p. D1.

Among the nine districts that were the subject of the OIAJ study, AOUSC data show that compliance with the Interval 1 time limit ranged from a high of 97.9 percent in the Western District of North Carolina to a low of 35.4 percent in the Northern District of Illinois, and that the average level of compliance in these districts was 81.5 percent. 14/

Data obtained by OIAJ from these same districts on cases encountering delay show an average compliance level of 57 percent, with approximately 17 percent of the cases requiring more than sixty days to process from arrest to indictment.

The data thus show a relatively high level of compliance with the time limit for indictment following arrest, although among cases that were delayed at some stage of the proceedings, delay at this point was fairly common (43 percent of the delayed cases experienced delay during this Interval). Nevertheless, the relative incidence of delays greater than thirty days during this period was low.

B. Compliance with Interval 2 Limits

According to AOUSC data, the national level of compliance for the ten-day interval between indictment and arraignment was 90.4 percent in the year ending June 30, 1978. In only 4 percent of the cases was the time required to arraign the defendant more than twice the amount permitted under the Act. 15/ Among all

14/ Ibid, p. D2-D18.

15/ Ibid, p. E1.

districts, delays for this interval were infrequent and when they occurred, were short in duration.

For the OIAJ sample districts, AOUSC data show that the average level of compliance was 89.4 percent, ranging from a high of 99.6 percent in the Western District of North Carolina to a low of 75.8 percent in the Northern District of Illinois. 16/

OIAJ data for the sample cases experiencing delay in these districts reflect that arraignment took place within the ten-day limit in only 63.2 percent of such cases, and that in almost 8 percent of the sample cases the delays experienced exceeded thirty days.

In sum, compliance with the time limit for Interval 2 generally is relatively high, although, in cases experiencing delay at some point, delay during this interval is almost as common as it is for Interval 1. Very few cases experienced delays of more than five days during this interval.

C. Compliance with Interval 3 Limits

In approximately 81 percent of all federal criminal cases entering Interval 3 and terminated in the year ending June 30, 1978, trial or other final disposition was reached within sixty days after arraignment. In about 3 percent of such cases, an additional sixty days or more elapsed before final disposition. 17/ Although these findings parallel the

16/ Ibid, pp. E1-E18.

17/ Ibid, p. F1.

national level of compliance for Interval 1, delays occurring during this interval were generally longer than those in Interval 1.

Among the nine sample districts, the highest level of compliance -- according to AOUSC data -- was recorded in the Western District of North Carolina, where 96.5 percent of all cases were brought to trial or final disposition within sixty days of arraignment. The lowest compliance level, 48.6 percent, occurred in the District of Massachusetts. The average level of compliance among all nine districts was 75.1 percent. 18/

The most frequent and longest delays encountered in the OIAJ study sample occurred during Interval 3. Only 50.8 percent of these cases reached trial or final disposition within sixty days. Moreover, in 27.8 percent of the sample cases it took more than thirty days longer than the Act would permit to reach disposition.

Although most cases reach trial or final disposition within the sixty day limit after arraignment, delays that do occur during Interval 3 tend to be lengthy. Of the cases encountering delay during this period, over one-half require more than thirty extra days to reach disposition or trial. Thus, unlike delays occurring in the earlier stages of prosecution, those that occur during Interval 3 may result in significant increases in overall processing time.

18/ Ibid, pp. F1-F17

D. Compliance Over All Intervals

As noted earlier, the dismissal sanction of the Act does not become effective until July of 1979. Consequently, the cases that failed to meet any of the Act's ultimate time limits were not dismissed, and thus it is possible that some of those cases were delinquent during more than one interval. For this reason it is difficult to measure current compliance with the Act over all intervals.

The AOUSC data show that on a nationwide basis, the average degree of compliance with the time limits of Intervals 1, 2, and 3 is approximately 82, 90, and 81 percent, respectively. This does not mean, of course, that the national level of compliance with the Act's time limits is approximately 85 percent, the average of these three figures. An overall compliance average must reflect the progressive decline in the number of cases in compliance with the Act as litigation proceeds through the three intervals.

To obtain a more accurate measure of overall compliance with the Act, a sample of cases must be followed through the process to see how many comply with the time limits of each successive interval. This involves using AOUSC data on compliance and total cases processed, and then applying OIAJ survey data to estimate the extent to which cases exceed the time

limits of one, two or all three intervals. Using this procedure, the estimate of overall compliance is 83 percent. 19/

E. Summary

In all ninety-four federal districts, including the nine sample districts, levels of compliance with the limits of each of the three intervals were relatively high in the most recent court year. At each state of prosecution, most defendants were processed within the final time limits of the Speedy Trial Act. Moreover, delays were relatively short in most cases failing to meet the statutory standard in at least one stage. Nevertheless, about one-fifth of the cases failed to meet one or another of the prescribed limits, and at each stage of prosecution some cases were delayed more than thirty days. Some of the factors apparently contributing to delays in the sample cases will be summarized in the following section of this report.

19 This is the most accurate single estimate of total compliance that can be made given the currently available data and current levels of effort to implement the Act. Appendix G sets forth in greater detail the method by which this figure has been reached.

58-721 O - 80 - 31

III. Factors Causing Non-compliance with the Ultimate Standards of the Act

A major objective of the OIAJ study was to identify the causes of delay in the processing of criminal cases. 20/ To this end, delinquent cases from the sample districts were examined to determine whether certain case characteristics were associated with delay, to identify the types of events occurring during periods of delay, and to establish the magnitude of such delays. 21/

The case characteristics that were examined were:

- type of offense;
- number of defendants;
- number of counts;
- number of motions granted; and
- type of motions granted.

A. Causes of Delay Generally

To determine whether cases involving certain types of offenses experience longer delays than others, cases from the sample districts that resulted in convictions were ranked by the

20/ An incidental purpose of the study was to determine independently the validity of the relevant AOUSC data. This aspect of the study which is discussed more fully in Appendix H, confirmed the accuracy of the AOUSC data in most significant respects.

21/ The research method used in this part of the study is described in Appendix E. A detailed presentation of the data summarized in this section appears in the tables in Appendix I.

length of delay encountered over all three intervals. It was found that only those cases involving drug-related offenses experienced significant delays; whereas overall delay in drug cases averaged 40 days, delays in cases involving other types of offenses were substantially shorter.

Multiple-defendant cases were found to have experienced longer delays than single-defendant cases, but no direct relationship was found between the total number of counts on which defendants were convicted and length of delay. Delay in cases involving more than five counts was similar in frequency and length to delay in cases involving only one count. Thus, it appears that, although case complexity affects length of delay, it is the number of defendants rather than the number of counts that is the more useful measure of complexity for this purpose.

Examination of cases in terms of number and types of motions granted revealed no meaningful correlation between delay and the number of motions granted, but did show a significant relationship between delay and the types of motions granted. In the latter connection, it was found that delays exceeding 30 days occurred in more than 25 percent of cases in which the courts granted motions addressed to the sufficiency of the indictment, motions for severance, or motions for additional discovery.

B. Causes of Delay over All Districts

Examination of the 460 sample cases revealed a total of 4,251 days of delay over the nine sample districts. 22/ The three most frequent causes of delay were the consideration of plea offers (46 instances), the unavailability of investigative reports (33 instances), and the unavailability of defense counsel (30 instances). Together, these causes accounted for 55 percent of the identifiable instances of delay.

In terms of the magnitude of delay, the three factors with the greatest impact were miscellaneous problems (e.g., court scheduling difficulties and cases involving cooperating defendants), consideration of plea offers, and the unavailability of investigative reports. These factors contributed delays of 1,525, 736, and 650 days, respectively, or more than 68 percent of the number of days of delay observed.

C. Causes of Delay by District Level of Compliance

The events causing delay, the frequency with which the events occurred, and the magnitude of the resultant delays, were also examined with reference to the sample districts' degree of compliance with the Act. 23/

22/ By contrast, there were 6,239 days of excludable processing time in these cases. Such processing time resulted most frequently from hearings on pretrial motions, the holding of motions under advisement, and the unavailability of defendants or essential witnesses. The longest periods of such processing time occurred when motions were being held under advisement, when the trial of other charges took priority, and when the defendant or a principal witness was unavailable.

23/ The sample districts were designated as "low", "medium," or "high" compliance districts depending on their degree of compliance with the Act's time limits over all three intervals. See Appendix E.

In "low" compliance districts, the most frequently observed causes of delay were miscellaneous problems (29 instances), the unavailability of investigative reports (14 instances), and consideration of plea offers (11 instances). In terms of magnitude of delay, the longest average delays resulted from the unavailability of investigative reports (26 days), miscellaneous problems (23 days), and consideration of plea offers (15 days).

In "medium" compliance districts, delay was most frequently attributable to consideration of plea offers (20 instances), unavailability of defense attorneys (19 instances), and unavailability of investigative reports (14 instances). The longest average delays in these districts were caused by the unavailability of investigative reports (31 days), the unavailability of defense counsel (21 days), and miscellaneous problems (21 days).

Finally, in "high" compliance districts the principal source of delay was consideration of plea offers (16 instances). The longest average delays resulted from this factor (21 days) and from miscellaneous problems (25 days).

Summary

Delays were most frequently observed in cases involving drug related offenses; cases involving multiple defendants, and cases in which the courts granted motions addressed to the indictment, motions for severance, and motions for additional discovery.

The most frequently observed sources of delay were consideration of plea offers, unavailability of investigative reports, and unavailability of defense counsel. Finally, the lengthiest delays were found to have been caused by consideration of plea offers.

IV. The Collateral Consequences of Compliance with the Act

As demonstrated above, on a nationwide basis there is already a relatively high degree of compliance with the ultimate time limits of the Speedy Trial Act. The discussion below will examine the collateral consequences or implicit "costs" of the existing level of compliance, as well as the "costs" of full compliance, in terms of specific concerns about the criminal justice system and the administration of justice generally. For convenience, with the exception of costs discussed under the headings "Dismissals" and "Effect upon the Civil Docket", these costs are discussed in connection with the stage of litigation at which they are most likely to accrue.

A. Interval 1 Consequences

Interval 1 begins when a person is arrested before being formally charged by indictment or information and continues for up to thirty days thereafter. Whether the arrested person is released or remains in custody, the United States Attorney will be obliged to obtain an indictment or, if possible, file an information within the thirty-day period. As a consequence of this constraint, it appears that the processing of federal criminal cases is being altered in three significant respects.

1. Fewer Arrests: As reported by several planning groups, 24/ and confirmed by United States Attorneys, many United States Attorneys have instructed law enforcement agencies in their

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24/ Third Report, p. 15.

districts to avoid making arrests before indictment whenever possible, notwithstanding the existence of clear, or even abundant, probable cause. The reason is obvious: whereas an arrest "starts the clock", an investigation not interrupted by an arrest may continue without artifical limitation until completed. Apparently, the practice of deferring arrests is not uncommon. AOUSC data show that for the twelve months ending on June 30, 1978, as compared to the previous year, the number of defendants who began Interval 1 (whose arrests preceded formal charge) decreased by more than half from 18,849 to 9,169.

One consequence of the deferral of arrests is that persons who might otherwise be detained remain at large and may continue their criminal activity. Another result is that, in the absence of an arrest, no preliminary hearing to establish probable cause is required. While elimination of the preliminary hearing saves time for magistrates, prosecutors, and defense counsel, it also has the collateral consequence of leaving the defense less informed about the government's case since there is then no public preview of the evidence. This leads to complaints of defense attorneys entering a case at arraignment that they have insufficient time within which to learn about the case, consult with the client regarding the advisability of a guilty plea, or prepare appropriate pretrial motions.

2. Fewer Prosecutions: In OIAJ interviews United States Attorneys reported an increase in declinations of prosecution and a decrease in federal prosecutions, 25/ particularly with respect to matters that apparently can be handled by a state or local prosecutor with concurrent jurisdiction over the offense. AOUSC data confirm reports that filings have decreased. They show that in the year ending June 30, 1978, criminal case filings declined by 13.4 percent nationally from the previous year. 26/ AOUSC data also show that in fourteen districts the decreases in case filings exceeded 30 percent, with the Southern District of Georgia reporting 70 percent fewer case filings than in the previous year. 27/ Available statistics do not confirm the reported increase in declinations, but it should be noted that such statistics probably do not reflect the full extent of declinations. 28/

25/ As used here, the term "declination" means all instances in which federal prosecutors determine not to prosecute a putative violation of federal law, and includes deferral to state or local authorities.

26/ Administrative Office, 1978 Annual Report of the Director, p. 106 (hereinafter referred to as the 1978 "Annual Report"). Felony prosecutions overall decreased by 11.6 percent; Drug Abuse Prevention and Control Act prosecutions by 23.7 percent; larceny and theft prosecutions by 16.1 percent; robbery prosecutions by 21.3 percent; fraud prosecutions by 7.4 percent; and auto theft prosecutions by 31.3 percent. Ibid, p. 110.

27/ 1978 Annual Report, p. 107.

28/ Third Report, p. C-2. Where a law enforcement agency has had ample experience with a United States Attorney's "blanket declination" policy, e.g., no marijuana possession cases involving less than one kilogram of the drug, many forego the futile exercise of preparing the case for presentation to the prosecutor's office. Such instances would not be reflected in the declination statistics.

The extent to which the Speedy Trial Act has contributed to the substantial decline in the number of federal prosecutions is difficult to determine. 29/ Although some planning groups have urged the local United States Attorney to be very selective in the criminal cases he brings in order to facilitate, through diminished volume, the expeditious handling of more serious offenses and more culpable offenders, the data analyzed by OIAJ do not suggest that declinations and compliance with the Act are closely related across all districts. 30/ While this does not negate the possibility that the Act has had some impact on declination policies, it does suggest that any such impact is not associated with higher levels of compliance with the time requirements of the Act.

3. Incomplete Investigations: Although the frequency of such occurrences cannot be determined with any degree of certainty, prosecutors are concerned that the short Interval 1 time period precludes adequate investigation prior to indictment in some cases that are begun with an arrest. Speaking for the United States Attorneys, Earl J. Silbert, United States Attorney for the District of Columbia, has observed that:

> Time is needed for investigators to follow out leads, for prosecutors to conduct a thorough exploration of the case in the grand jury, and for chemists and other experts to complete their scientific analyses. United States Attorneys cited examples of being forced to return indictments when the investigation was only partially done. Some have used "holding" indictments and followed up thereafter with superseding indictments. Others have only been able to include a limited number of violations in the indictment since the complete investigation could not be concluded in 30 days.
>
> The unreasonably compressed period of time for post arrest investigation will, in our view, create three highly undesirable results: (i) Innocent persons who would be exonerated by a thorough grand jury investigation will be indicted; (ii) dangerous offenders against whom all available evidence to support a conviction cannot be uncovered in the truncated period will be acquitted; and (iii) persons who should be arrested and brought under control of the court, whether released prior to trial or detained, will be allowed to remain at liberty to commit additional offenses because the prosecutor, recognizing that the 30 day arrest to indictment period is too short, foregoes an arrest despite ample probable cause. 31/

The United States Attorney for the Northern District of Illinois expressed similar concern in reporting the difficulties his office experienced when it was operating under the sixty-day interim time limit for Interval 1:

> Many cases turn on fingerprint and handwriting comparisons. These require painstaking expert analysis. The labs are overworked and the experts are in great demand as witnesses. In one case, the complaints against a husband and wife, arrested while dealing in stolen state

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29/ Probably the primary cause is the recent policy directive of the Attorney General with respect to federal prosecutorial priorities.

30/ See discussion at p. 35, infra.

31/ Letter of June 29, 1977, to Judge Carl B. Rubin. See Appendix D.

and federal checks, were dismissed because the analysis could not be completed within the sixty days allowed. Upon their release the couple promptly became and remain fugitives. (U.S. v. Hanson & McKenzie, N.D. Ill.) Delays in obtaining original treasury checks from storage resulted in the defendant being charged with only one stolen check transaction, although checks totalling more than $100,000 had been negotiated by him. (U.S. v. Ogbo, N.D. Ill.). In still another case (U.S. v. Kiethely, et al., N.D. Ill.) hundreds of documents seized pursuant to warrant required laboratory analysis as well as extensive field investigation; the case could not have been prosecuted within the ultimate time limits fixed by the Act. 32/

B. Interval 2 Consequences

The ultimate time limit for Interval 2 -- the period between indictment and arraignment -- is the same as the interim time limit: ten days. The actual task to be accomplished in this period is both simple and brief, and compliance is now being achieved nationally in approximately nine out of ten cases. Nevertheless, there is reason to believe that the ten-day limit may occasionally impose undue burdens on defendants, defense counsel, prosecutors, and courts.

1. Hastier Defense Preparation before Arraignment: The most recent AOUSC report summarizes the experience of the district planning groups with the Interval 2 requirement as follows:

32/ This report was made to Earl Silbert, Chairman of the Sub-committee on Legislation and Special Projects of the Attorney General's Advisory Committee of United States Attorneys.

Some planning groups suggested that the 10 day period from indictment to arraign-ment was too short for the defendant to choose counsel and arrange financing. Several planning groups mentioned that the 10 day period to arraignment was too short to decide on what plea to enter. The plans from eight districts indicated that pro forma not guilty pleas are being entered which results in some cases going to trial that might otherwise have been disposed of by plea. In addition, too little time to formulate a plea means a possible second appearance to change a plea which causes scheduling problems for the court and counsel. 33/

2. Increased Travel Requirements: The reaction of those interviewed concerning the Act's ten day limit tends to reflect the geographic and demographic characteristics of the district in which they are involved. Thus, in a compact, densely populated district, where, typically, the court sits at only one site, little difficulty is usually encountered in complying with the Act's requirement. In larger, more sparsely populated districts, however, where court is held at more than one site, meeting the ten-day requirement frequently means that judges, court personnel, and counsel must travel hundreds of miles to participate in a proceeding which lasts but a few minutes.

In an instance reported by the United States Attorney for the Western District of Arkansas, 34/ in order to accomplish timely arraignments, three defendants were compelled to travel

33/ Third Report, p. 14.

34/ This report was made to Earl Silbert, Chairman of the Sub-committee on Legislation and Special Projects of the Attorney General's Advisory Committee of United States Attorneys.

more than two hundred miles to court. If the arraignment could have been deferred for three weeks, the court would have been sitting within thirty miles of their residence, the place where trial was ultimately held. Moreover, one of the defendants could not afford to pay the transportation expenses of counsel of her choice, and counsel appointed for the arraignment of a codefendant withdrew because he was unwilling to travel to the place of trial.

C. Interval 3 Consequences

The Speedy Trial Act requires that cases be brought to trial or other disposition within sixty days after arraignment without regard for the nature and complexity of the charges or the number of defendants involved. Critics of this requirement concede that the sixty-day period is wholly adequate for bringing a routine case to trial, but contend that it does not allow sufficient time to prepare for trial in the types of complex criminal cases that are being brought with increasing frequency in the federal courts. The shortness and rigidity of the Interval 3 time limit, it is claimed, have unfortunate consequences for three important aspects of the criminal justice system -- plea bargaining, judicial efficiency, and defense preparation and representation.

1. Pressures to Plea Bargain: In testifying before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary in 1971, Professor Daniel J. Freed of Yale Law School

observed that fixed time limits, such as are incorporated in the Speedy Trial Act of 1974, represent an effort:

> to vindicate the Sixth Amendment right of accused persons to a speedy trial as well as the classic goal of public law enforcement -- swift and certain prosecution of criminal offenders. While its premise is that both interests may be prejudiced by delay, perhaps the greatest cost of delay lies in compelling the reduction of charges through plea bargaining, thereby impairing society's ability to establish guilt. Delay in overcrowded courts more often wears out the prosecution when the defense is in no hurry to settle. The zeal of complainants and victims cools, memories fail, witnesses stop coming to court. 35/

Whether the Act has to date had any effect in reducing the number of plea dispositions that are unduly favorable to the defendant cannot be determined on the basis of available data. 36/ Nevertheless, some observers believe that, far from having had such an effect, the Act has increased the pressure on prosecutors to dispose of more cases through plea bargains, something that usually can be accomplished only by making plea offers more attractive. Some support for this view was found in one of the

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35/ "Proposals to Enforce the Sixth Amendment Right to Speedy Trial: Hearings on S. 895 Before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary," 92d Cong., 1st Sess. 7(1971).

36/ The most that the data show is that plea dispositions have been slightly more frequent since the Act went into effect than in the year before. Whereas 83.3 percent of federal criminal cases were disposed of by plea in the year ended June 30, 1975, the comparable yearly figures since then have been 84.9, 85.2 and 85.2 percent, respectively. See Annual Report for the years 1976, 1977, and 1978 at pp. II-16, A-54, A-73, respectively.

districts surveyed, where the prosecutors reported a "bargain basement sale" in an effort to reduce the criminal case backlog.

2. Disregard of Judicial Efficiency: The term "judicial efficiency" is used to describe the principle that defendants who are properly charged with the joint commission of an offense should ordinarily be tried together to save the time, expense, and inconvenience of separate prosecutions. It has been reported that, because of the Interval 3 time limit, this principle has been ignored by some trial judges who have granted severances in multi-defendant cases "so that a defendant whose case is moving slowly does not hold up the trial of his co-defendants." 37/ Neither the OIAJ study nor the published AOUSC data however, reflects the occurrence of such incidents. 38/ Moreover, it should be noted that the Act specifically provides for this situation by permitting "a reasonable period of delay when the defendant is joined for trial with a co-defendant as to whom time for trial has not run." 39/

3. Less Thorough Defense Preparation and Representation: The attitude of defense counsel toward the Speedy Trial Act is best summarized by their frequent reference to it as the "Speedy

37/ Earl Silbert letter of June 29, 1977 to Judge Carl B. Rubin. See Appendix D.

38/ The OIAJ study included examination of approximately 180 multiple-defendant cases.

39/ 18 U.S.C. 3161(h)(7).

Conviction Act." Such an attitude is not surprising. As noted earlier, a defense attorney's first contact with a case usually occurs at, or shortly before, arraignment. At that time the court normally sets a date one-to-three weeks in the future for the filing by the defense of pretrial motions. Notwithstanding his already-existing professional commitments, the defense counsel has only that period within which to meet with his client, familiarize himself with the case, attempt to negotiate voluntary discovery disclosures by the prosecutor, complete any relevant legal research, and prepare his motion papers. Many defense attorneys feel placed at a disadvantage under such circumstances, particularly in light of the prosecutor's general state of readiness for trial even before the 60-day period begins. 40/

Not only does the Act restrict the time available for preparation of the defense case, it also makes it more difficult for a defendant to secure representation at trial by the attorney of his choice. An illustration of this problem occurred in the recent case of United States v. Ford, S.D.N.Y. (1978), in which mandamus was sought to compel the trial judge to grant a continuance to enable the defendant's retained attorney to complete a prior trial commitment. 41/

40/ It should be noted that, although the Act permits the scheduling of trial on the 60th day after arraignment, it is far more probable that the date set for trial will be much earlier during Interval 3 and that, consequently, defense counsel will not have even the full 60 days to prepare the defense.

41/ The opinion of the United States Court of Appeals for the Second Circuit denying the petition is reproduced in Appendix J.

58-721 O - 80 - 32

These and other concerns on the part of defense counsel regarding the Act have been noted by district planning groups and summarized by the Administrative Office as follows:

> One district planning group suggested that if defendants believe they have not had a fair opportunity to prepare their defense the judicial system can only suffer.
>
> Because of the short time available for trial preparation, defense attorneys need to devote their full attention to a few criminal cases and are not available for assignment to other criminal cases. In addition, the shortness of time increases the number of instances in which defense counsel has to refer a case to another lawyer due to a conflict with another criminal or civil proceeding. As a result of these problems several planning groups reported that representing criminal defendants in federal court was made unattractive to many defense attorneys. 42/

The extent to which the Act hampers a defendant in the preparation of his case or interferes with representation by counsel of his choice is probably not susceptible to objective verification. As for subjective impressions, OIAJ interviews with defense counsel in the sample districts confirmed the views of defense counsel as reported by the planning groups.

D. Dismissals

On July 1, 1979, the dismissal sanction of the Speedy Trial Act will become effective, and district courts will be required to dismiss cases that are not processed within the 30-10-60 day limits of the Act. The consequences of requiring dismissal in such cases could be severe, depending upon the

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42/ Third Report, p. 14.

number and nature of cases dismissed and whether such dismissals are with or without prejudice to reprosecution. One starting point in attempting to assess the potential seriousness of the problem is the number of cases that the courts would have been required to dismiss in the year ending June 30, 1978, if the final time limits and the dismissal sanction had been in effect during that period. AOUSC data indicate that this figure is approximately 5,174 cases, or 17 percent of criminal cases filed that year. 43/

Common sense indicates that such a level of dismissals will probably not in fact occur. Instead, it can be expected that, in response to the threat posed by the dismissal requirement, the work patterns of prosecutors and 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 remainder of this section examines the problem of dismissals in relation to five specific factors that are likely to affect levels of compliance with the Act's timetables: (1) prosecutorial policies; (2) criminal and civil case backlogs; (3) productivity of courts and prosecutors; (4) prosecutorial and judicial resources; and (5) judicial interpretation and application of the Act's excludable time provisions.

43/ See p. 16 and fn. 19, supra.

The first four of these factors are major determinants of the volume of criminal litigation conducted in the federal courts; the fifth factor controls the degree to which case processing time is regarded as justified under the Act. Accordingly, careful consideration should be given to the effect of each of these factors, singly and in combination, on the ability of the federal court system to satisfy the ultimate requirements of the Act.

1. Prosecutorial Policies: The prosecutorial policies of United States Attorneys largely determine the volume of new criminal business that comes before the courts each year, and have an impact on the frequency with which such business is disposed of by plea rather than trial. Thus, it would seem that, to the extent that such policies result in fewer criminal filings and more frequent plea dispositions, the level of compliance with the Act should increase. In fact, between July of 1977 and June of 1978, when overall compliance with the Act increased by about 13 percent, criminal filings decreased by 14 percent. 44/ Moreover, although there was no change in the rate of dispositions by guilty pleas, one prosecutor interviewed in the study districts reported that the Act has caused his office to acceed to the acceptance of pleas that might otherwise be rejected in order to "move" cases.

44/ 1978 Annual Report, p. 107.

The correlation between criminal case filings and compliance levels does not appear across all districts, however. In fact, analysis of information reported by the Justice Department's Executive Office for United States Attorneys (EOUSA) for 1977 45/ indicates that districts with high declination rates achieve high levels of compliance with no greater frequency than those with lower declination rates. 46/ For this reason, changes in declination policies in response to the Act -- that is, changes in the ratio of the volume of all criminal cases filed to all criminal matters received by United States Attorneys -- may have little independent effect on district compliance levels and possible dismissal rates. Unless such changes are significant in magnitude and radically alter the types of criminal cases prosecuted in the federal courts, particularly in low compliance districts, compliance levels and projected dismissals rates will probably remain unaffected. 47/

45/ U. S. Attorney's Stat. Rep., FY 1977.

46/ This method used in deriving this finding is outlined in Appendix K.

47/ The use of pretrial diversion is another area in which prosecutorial policy affects the volume of criminal cases that must be disposed of by the court. The OIAJ study did not examine compliance levels in relation to the use of pretrial diversion, but information obtained by OIAJ in connection with a study of the prosecutorial policies and practices of United States Attorneys suggest that the use of pretrial diversion as an alternative to prosecution is not so prevalent as to affect substantially the levels of compliance with the Act in cases that are prosecuted. In any event, wholesale use of pretrial diversion as a means of ensuring compliance with the Act would raise serious questions about the propriety of routinely imposing sanctions without the benefit of a judicial determination of guilt.

2. Criminal and Civil Case Backlogs: Another factor related to a court's ability to comply with the Act is the court's backlog of criminal and civil cases awaiting trial or other disposition. As of June 30, 1978, there were 15,847 criminal cases pending in the United States District Courts, a decrease of 7.6 percent from the previous year and a continuation of the steady decline in pending criminal caseloads from the figure of 25,438 pending on June 30, 1972. 48/ This reduction in national criminal backlog reflects the 13 percent decrease in criminal filings by the United States that was discussed above. Fourteen districts reported decreases in case filings exceeding 30 percent, with the Southern District of Georgia reporting 70 percent fewer case filings than in the previous year.

The volume of pending civil cases in federal district courts as of June 30, 1978, reached an unprecedented high of 166,462, an 8.4 percent increase over the previous year. The number of civil cases terminated during the year rose by 7.5 percent to 125,914, but still fell 12,856 short of the 138,770 new civil cases filed. This volume of new cases represented an increase of 6.3 percent over the previous year. Exclusive of land condemnation cases, 16,054 civil cases had been pending three years or more, an increase of 4,219 from the previous year. In Massachusetts, for example, 4,426 cases -- or just short of

48/ 1978 Annual Report, p. 107.

one-third of all pending civil cases in that district -- were at least three years old. 49/

Districts in which civil and criminal backlogs are high exhibit lower levels of compliance with the Act than do districts with smaller backlogs. By the same token, districts which process and terminate high volumes of criminal cases demonstrate higher levels of compliance than do districts handling and disposing of fewer such cases. 50/ Thus, an increase in a given court's ability to process and terminate criminal cases, accompanied by a reduction in the filing of new criminal cases, would reduce that court's criminal backlog, and thereby would serve to enhance its prospects for compliance with the Act and to reduce the potential for dismissals.

3. Prosecutorial and Judicial Resources: A third factor to consider in assessing the system's ability to comply with the Speedy Trial Act is the number of judges and prosecutors available to process the business of the federal courts. It would appear that measures to augment the resources of the federal courts -- such as the recently enacted Omnibus Judgeship Act -- should increase the overall productivity of the courts and thereby reduce the likelihood of dismissals resulting from non-compliance

49/ 1978 Annual Report, p. 71.

50/ The method used in deriving this finding is outlined in Appendix K.

with the Act. Whether the addition of 113 new judgeships to the federal district courts will actually have such an effect, however, depends on two additional factors: a concomitant increase in the number of prosecutors and a concentration of the added prosecutorial and judicial resources on reducing backlogs of pending criminal cases.

4. Productivity of Courts and Prosecutors: The productivity of courts and prosecutors, as well as prosecutorial policies, case backlogs, and numbers of judges and prosecutors, are also linked to the number of cases that can be processed within the Act's time limits. During the year ending June 30, 1978, 37,286 criminal cases were tried or otherwise terminated in the federal courts, a decrease of 15.7 percent from the previous year. 51/ On the other hand, civil terminations increased by 7.5 percent to 125,914. 52/ Given the existing numbers of Assistant United States Attorneys, federal judges and full-time magistrates, this means that each Assistant terminated approximately 42 criminal cases and that each judge or magistrate disposed of approximately 300 criminal and civil cases. 53/

51/ 1978 Annual Report, p. 62

52/ These figures are estimates based on the average number of AUSA's and the number of judges and full-time magistrates in 1977.

53/ 1978 Annual Report, p. 62

The overwhelming majority of these cases were terminated by a guilty plea or out-of-court settlement; only about 15 percent went to trial. 54/

Over all districts, however, the levels of compliance with the Act are not significantly affected by these measures of prosecutorial and judicial workload, or even by the ratio of attorneys to judges. Districts with high case termination rates and even high attorney-judge ratios experience no fewer delays in criminal cases than do districts in which case terminations or attorney-judge ratios are low. 55/ For this reason, it is uncertain whether enhancing the productivity of judges and prosecutors in terms of case terminations will have an immediate effect on the number of potential dismissals, although it may influence aggregate levels of delay over a period of years. Only if such increased productivity is accompanied by significant reductions in case backlogs can higher levels of compliance be expected in the short term.

5. Judicial Interpretation and Application of Excludable Time Provisions: An essential feature of the Speedy Trial Act is its provision for excluding the time attendant upon certain pretrial events from the computation of time chargable during each interval in the processing of a case. Since processing time that

54/ 1978 Annual Report, p. A-73.

55/ The method used in deriving this finding is outlined in Appendix K. It is recognized that consideration should be given to the complexity of cases terminated by districts and by judges to assess the full effects of workload on termination rates. Because current estimates of case weights were not available for this analysis, the estimates of workload here reflect only the volume of cases terminated.

falls within one of the Act's exclusions should not count against the 30-10-60 day time limits, the manner in which courts interpret the excludable time provisions, and the extent to which they apply them to various pretrial events, will have a significant bearing on compliance levels and, therefore, on dismissals.

In this connection, the OIAJ study found repeated and marked inconsistencies in the way in which some of the exclusions are being interpreted and applied by the courts. In some districts, for example, more than half of the incidents prompting the exclusion of processing time were attributable to hearing and deciding pretrial motions, while in other districts these events produced not one instance of excluded processing time. Similarly, in one district, 80 percent of the examined cases experienced at least one incident of excluded processing time, while in another district the figure was only 4 percent.

Experience with the Act's exclusion of processing time when "the ends of justice" served by a continuance "outweigh the best interests of the public and the defendant in a speedy trial" 56/ is particularly instructive. On a national scale, this category accounts for approximately one-third of all incidents of excluded processing time. Yet, in one sample district it accounted for two-thirds of excluded incidents and, in another sample district, almost none.

56/ 18 U.S.C. 3161(h)(8)(A).

While continuation of inconsistencies of this sort after the Act becomes fully effective will make compliance in some districts extremely difficult, and thus increase the likelihood of dismissals, it seems likely that more uniform and more realistic applications of the exclusions will occur. As one trial judge reassuringly expressed it during an OIAJ interview, greater use of the excludable time provisions will be made "when it counts", i.e., when the consequence for non-compliance is dismissal.

E. Effect upon the Civil Docket

In the previous section it was reported that the volume of pending civil cases reached an unprecendentedly high level during the court year 1978, and that the civil backlog increased by more than 8 percent over the previous year. Both the extent and rate of increase in this backlog have been attributed to the Speedy Trial Act. Because districts with a high volume of pending criminal cases generally have high levels of pending civil cases, there is concern that efforts to reduce the volume of pending criminal cases, in order to ensure compliance with the provisions of the Act, may result in more frequent and longer delays in civil cases. 57/ AOUSC data lend substance to this concern.

57/ Earl Silbert letter of June 29, 1977 to Judge Carl B. Rubin. See Appendix D.

The AOUSC data for all federal districts show that "low" compliance districts experienced lower increases in civil filings than "medium" or "high" compliance districts over the past year. While filings in "low" compliance districts rose just less than 5 percent from the previous year, filings in both "medium" and "high" compliance districts rose over 7 percent. Furthermore, increases in civil case termination rates in "low" compliance districts were approximately 1.5 times higher than those in other districts.

These increases in filing and termination rates are directly reflected in changes in the sizes of civil backlogs. Districts operating at "low" compliance levels experienced lesser increases in the number of civil matters pending from 1977 to 1978 than other districts. While "medium" and "high" compliance districts experienced average increases of 6.7 percent and 6.0 percent during this period, "low" compliance districts experienced an average increase of only 2.9 percent.

Delay in civil cases then -- at least as reflected by increases in civil backlogs -- seems to be a function of criminal case terminations. Although other factors may have affected the observed shifts in civil filings, terminations, and pending cases, 58/ it appears that swifter processing of criminal cases

58/ The complexity of civil cases is one relevant variable. For example, an antitrust case requires more judicial resources than the average civil case, and filings in such cases increased 110 percent from 1968 to 1978 compared to 94.4 percent for all civil cases. However, filings in antitrust cases during the year ending June 30, 1978, dropped 10.8 percent even though the over-all civil caseload continued to grow. 1978 Annual Report, pp. 77-78.

is achieved at the expense of civil litigation. Furthermore, this analysis suggests that significant increases in civil backlogs may be anticipated once the final provisions of the Act become effective. Districts currently operating at low levels of compliance may be forced to shift the resources of the courts and United States Attorney away from the civil docket in order to improve compliance in criminal cases. And, unless dramatic reductions in overall civil filings are achieved in 1979 -- a reduction that can not readily be effected by the policies of the government -- civil backlogs and case processing time will probably increase proportionately.

V. Proposals to Amend the Speedy Trial Act

Because of the perceived impact of the Speedy Trial Act on the overall administration of justice in its nearly three-and-one-half years of operation, various proposals to amend the Act have been put forth by the district planning groups, trial judges, prosecutors, and others. Some of these proposals call for outright repeal of the Act. Less drastic proposals focus upon changes in the time limits for each of the three pretrial intervals, abolition of the separate intervals themselves, or creation of special exceptions for special cases. Another proposal is to postpone the use of the sanction of mandatory dismissal for noncompliance in order that some experience may be had with the operation of the ultimate time limits before the sanction becomes effective.

Any evaluation of these various proposals must take three factors in account.

First, the need for the particular change, in light of the matters discussed earlier in this report, must be assessed.

Second, the likelihood of increased efforts to comply with the limits must be recognized. As indicated in interviews, and confirmed by analyses of cases, judges and lawyers can be expected to perform their functions with greater attention to time limits and provisions for excludable time when either the final time limits or the dismissal sanction becomes operative, as each is scheduled to in July 1979. For example, few

observers would anticipate that in the Central District of California incidents of excludable delay will continue to be found in less than one case in twenty-five, especially if any substantial number of defendants begin to enjoy the windfall of a dismissal because of non-compliance with the Act's limits.

Third, account must be taken of the increased ability of the federal courts to keep abreast of the judicial workload, as well as to reduce the existing backlog, which is promised by the passage of the Omnibus Judgeship Act. That legislation provides for an increase of almost thirty percent in the number of federal trial judges. Hopes that this will soon relieve the problems of meeting the requirements of the Speedy Trial Act, however, must be tempered by recognition of several realities: (a) there will be some delay in filling these positions because of the time required for the processes of judicial selection and confirmation; (b) some time will be necessary before the new judges can achieve the level of productivity of experienced trial judges; (c) corresponding increases will be necessary in other parts of the federal system -- e.g., United States Attorneys' Offices, Federal Public Defenders' Offices, the Probation Service -- if delay is to be reduced rather than its causes shifted, and a "lag-time" is also involved in the training of prosecutors, defense attorneys, and other such participants in the process; and (d) the current

concentration of investigative and prosecutive priorities on more significant, and often more complex, criminal cases will increasingly be felt at the trial level, and presumably the added difficulty posed by such cases will itself absorb some measure of any expansion of the federal system's capacity.

A. Repealing the Act

Some proposals call for outright repeal of the Speedy Trial Act. This was the position taken by eleven planning groups in their most recent submissions to the Administrative Office of the United States Courts. 59/ Given the plainly desirable goal of the Act and the rationality of some sort of standards for guiding processing timetables, simple repeal, as opposed to modification of provisions believed to cause problems, does not appear supportable at this time. Nor does this solution appear to be practical.

B. Changing the Pretrial Time Limits

1. Changing the Overall Time Limit

Some proposals urge abolition of the Act's three pretrial intervals entirely, and substitution of a limited, but undivided period of time, such as ninety, one hundred-twenty, or one hundred-eighty days. 60/ A criminal case would be required

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59/ Third Report, p. A6.

60/ Some United States Attorneys, in responding to the survey conducted for the Advisory Committee of United States Attorneys, recommended an approach of this kind. See Appendix D.

to move from initiation to trial or other disposition within that time, with provisions for excludable time being retained in some proposals and eliminated in others. The principal benefit that is sought to be realized by such proposals is accommodation of the differences that exist among cases, and among districts, without abandoning the concept of an overall limit on the pretrial process. Thus, for example, an accused wishing to be represented at arraignment by a counsel who is unavailable during the present ten-day period, but who would be available shortly thereafter, could be represented a few days later by counsel of his choice without violence to the real goal of achieving trial within a specified period of time.

An apparent shortcoming in these proposals is that, absent some restriction, a prosecutor could utilize almost all of the specified time to accomplish his tasks up through arraignment, leaving little time for the defense counsel to fulfill his responsibilities unless a continuance were granted in the interest of justice under 18 U.S.C. 3161(h)(8).

2. Changing the Time Limits of Particular Intervals

Other proposals to modify the Speedy Trial Act's pretrial time limits would retain the system of Intervals but would enlarge the period of time applicable to each. The Judicial Conference, for example, has recommended that Interval 1 be increased to sixty days, Interval 2 to twenty days, and

58-721 O - 80 - 33

Interval 3 to one-hundred days.- 61/ ,United States Attorneys, responding to a survey conducted for the Advisory Committee of United States Attorneys, generally favoreda similar expansion of the pretrial time limit to one-hundred eighty days. 62/

a. Interval 1: Most proposals here would enlarge the time for filing a formal charge from the Act's thirty days to either forty-five or sixty days. Data from the Administrative Office of the United States Courts show that for the twelve month period ending on June 30, 1978, 82.5 percent of all defendants 63/ beginning Interval 1 were indicted within thirty days of arrest; 94.3 percent within forty-five days; 97.3 percent within sixty days; and 98.8 percent within ninety days. 64/

61/ Those recommendations appear as Appendix A to the Third Report prepared by the Administrative Office of the United States Courts. The Director of the Administrative Office has recommended that Congress approve the changes proposed by the Judicial Conference. Third Report, p. 28.

62/ The report of the Ad Hoc Subcommittee on the Speedy Trial Act of the United States Judicial Conference, containing the results of that survey, is attached to this report as Appendix D.

63/ This category does not include defendants whose cases were still pending on June 30, 1978.

64/ Third Report, p. D1.

Thus, by adding fifteen days to the period in which criminal charges must be investigated and filed, compliance would -- at current volume and performance levels -- be enhanced by almost 12 percent, with approximately nineteen of each twenty cases satisfying the requirement. Doubling the Act's thirty days would raise the compliance rate by only an additional 3 percent over that which would be derived from a fifteen-day increase.

In terms of numbers of cases rather than percentages, if Interval 1 were enlarged to forty-five days and current caseload levels were maintained, out of more than 9,000 cases all but approximately 486 cases would be in compliance, as opposed to the 1,604 that now exceed a thirty-day standard. Were the Judicial Conference recommendation of enlargement to sixty days adopted, only some 248 cases would fail to be in compliance. Moreover, it could be expected that these projected figures would be reduced by several other factors, including: more frequent decisions not to arrest; 65/ assignments of priority in laboratory analyses of, for example, chemicals and fingerprints, to assure shorter "turn-around time" when necessary;

65/ During the past court year there was a 50 percent decrease in the number of defendants arrested before charges were filed. Third Report, p. D1.

increased number of days of grand jury sittings; and closer case management in prosecutor's offices. 66/

The disadvantage of enlarging Interval 1, even to forty-five days, is, of course, the increase by at least 15 percent in the delay in determining criminal charges, and, hence, the greater risk of recidivism during the pretrial period.

b. Interval 2: The proposed amendments here seek to avoid the expense, inconvenience, and adverse effect on a defendant's choice of counsel that sometimes arise in meeting the Act's ten-day arraignment requirement. This would be done by enlarging the period by either five or ten days, or by abolishing it as a separate interval and requiring trial within seventy days of indictment.

AOUSA data show that in the twelve months ended on June 30, 1978, 90.4 percent of all defendants were arraigned within ten days of being charged; 94.8 percent within fifteen days; and 96.2 percent within twenty days. 67/ At current volume and performance levels, this means that the 2,592 defendants

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66/ Most of the cases which require substantial time for investigation, for example, fraud and corruption cases, are not originated with an arrest and, therefore, are not affected by the constraints of Interval 1.

67/ Third Report, p. E2.

not in compliance in this Interval could be reduced to approximately 1,400 by enlarging the time to fifteen days. Were the Congress to adopt the recommendation of the Judicial Conference to double the time available, to twenty days, the number of cases out of compliance would be reduced to 1,025. The "trade off" involved in a five-day extension is a 46 percent reduction in non-compliance at a cost of a 5 percent increase in delay; a ten-day extension would produce a 60 percent reduction in non-compliance at a cost of increasing delay by 10 percent.

An alternative to this proposal -- merging Interval 2 and Interval 3 into a seventy-day indictment-to-trial period -- would allow for some of the flexibility that critics of the Speedy Trial Act find missing without adding to the prospects for delay. If additional time were required for counsel of a defendant's choosing to appear at arraignment, time would be available; the prospect of judges, court personnel, and lawyers travelling hundreds of miles to meet an awkward arraignment date would be eliminated; and yet the pretrial period as a whole would not have to be enlarged. It would be desirable, however, that such a modification include some formulation of standards for the timing of an arraignment beyond ten days so that the time available for preparation of the defendant's case would not be unfairly reduced.

c. Interval 3: In lieu of the Speedy Trial Act's 1979 standard of sixty days from arraignment to trial, most proposals regarding Interval 3 would substitute a standard of

ninety, one-hundred-twenty, or even one-hundred-eighty days. 68/ The Judicial Conference has recommended that Interval 3 be changed to a period of time of not less than thirty 69/ nor more than one-hundred days.

Data from the Administrative Office of the United States Courts show that of the approximately 29,400 cases that began this Interval and were terminated in the twelve months ended on June 30, 1978, 81.4 percent were brought to trial or disposition within sixty days of arraignment, 89 percent within eighty days; 93.5 percent within one hundred days; 96.7 percent within one-hundred-twenty days; and 99.2 percent within one-hundred-eighty days. Thus, by following the recommendation of the Judicial Conference, the number of cases out of compliance with this Interval could be reduced from approximately 5,468 to approximately 1,911, a 65 percent reduction, at the cost of increasing the time from arrest to trial by some 67 percent.

This degree of additional delay may be considered by some to be too heavy a cost, especially since the need for such a change is less than clear. Certainly, some relief from the current pressures will be provided, without a change in the time limit, by the increase in judgeships and, it is hoped, by a

68/ Third Report, p. A1.

69/ This is to assure defendants and their counsel of a minimum time, which may be waived, for preparation.

concomitant increase in personnel in related agencies. Moreover, a rate of compliance higher than current levels can be expected to result from more extensive and uniform application of the Act's excludable time provisions, as well as from closer case management by courts and prosecutors alike.

3. Providing Special Limits for Special Cases: Some proposals seek to exempt from application of the Speedy Trial Act certain categories of cases that traditionally involve complex litigation problems. It is not urged that these cases have no time limits whatever, but that any strictures imposed reflect the exceptional nature of the proceeding for all concerned: the accused, the public, the court, and the counsel. Placing a case into such a specially exempted category could be conditioned upon concurrence by the trial court and counsel that the case merited such treatment, or upon a finding by the court, on motion of either side, that specific criteria for special designation had been satisfied. The latter method would provide greater certainty that special designation would be utilized only in the kinds of instances intended. 70/

Among the special case categories most frequently mentioned by the planning groups 71/ were:

70/ As noted by the planning groups, instead of automatically exempting such a case from the time limits, a court could await developments in the case, including the settlement of pretrial motions, and then consider an extension of time.

71/ Third Report, pp. A1-A2.

1. Complex criminal actions in which court-authorized electronic interception of wire communications was used during the investigation;

2. Mail fraud;

3. Wire fraud;

4. Violation of the Internal Revenue Code;

5. Interstate travel or transportation in aid of a racketeering enterprise;

6. Interstate transportation of wagering paraphernalia;

7. Operating or participating in the operation of an illegal gambling business;

8. Conspiracy;

9. Political and sensational cases; and

10. Multi-defendant prosecutions which require more time for pretrial processing.

Any such system would present problems of administration, and it is questionable whether it would constitute a real improvement over 18 U.S.C. 3161(h)(8), which empowers a judge to grant a continuance in the interests of justice. Although not all cases are identical, as the proponents of this change point out, there is a question whether all multiple defendant or all conspiracy cases, for example, are so alike as to form the basis for a rational, particularized, statutory classification. The general "interest of justice" provision, intelligently applied, may be sufficient.

C. Delaying the Effective Date of the Dismissal Sanction

A proposal which appears to make sense at this point is to delay for a period of time the sanction of mandatory dismissal for non-compliance in order that some experience may be had with the operation of the ultimate time limits before the sanction becomes effective. 72/ This proposal would seem to be in keeping with the legislative history of the Speedy Trial Act, while avoiding "tinkering" based more on informed speculation than on reliable information.

As the House Committee on the Judiciary emphasized:

> The heart of the speedy trial concept embodied in H.R. 17409 is the planning process. These provisions recognize the fact that the Congress -- by merely imposing uniform time limits for the disposition of criminal cases, without providing the mechanism for increasing the resources of the courts and helping to initiate criminal justice reform which would increase the efficiency of the system -- is making a hollow promise out of the Sixth Amendment. The primary purpose of the planning process is to monitor the ability of the courts to meet the time limits of the bill and to supply the Congress with information concerning the effects on criminal justice administration of the time limits and sanctions, including the effects on the prosecution, the defense, the courts and the correctional process, and the need for additional rule changes and statutes which would operate to make speedy trial a reality. 73/

72/ That recommendation was made earlier this year by the Legislation and Special Projects Section of the Criminal Division of the Department of Justice. It is anticipated that the same recommendation will be included in the report to be submitted to Congress by the General Accounting Office, based upon its survey of the experience of eight district courts under the Act.

73/ H. Rep. No. 93-1508, 93rd Cong., 2d Sess. 23 (1974).

The benefits of the Act's unique, graduated approach will be substantially dissipated, it now appears, if the ultimate limits and the dismissal sanction come into effect simultaneously. Certainly the federal system would be deprived of an opportunity to gain substantial nationwide experience under the ultimate limits without the sanction. Individual districts would also be deprived of the chance to operate under the one-hundred day time limit free of a threat that may divert the participants' performance from a professionally acceptable level. Modification of the Act to allow sufficient time to analyze the system's performance under the 1979 time limits will enable Congress thereafter to determine with greater accuracy what other adjustments, if any, may be needed in the Act or in the allotted resources of the various elements of the system.

It must be recognized that delaying the effective date of the dismissal sanction may result in a less than maximum effort to attain the one-hundred day standard, and that any substitute encouragements will not have quite the same effect. But the more significant danger would seem to lie in not withholding the effective date of the sanction for a period of time. Error on the side of withholding the sanction would simply affect the degree of certainty to be accorded the additional data concerning compliance with the ultimate time limits; error on the side of permitting the simultaneous imposition of the 100-day limit and

the sanction would permit a windfall -- in the form of cases dismissed -- of as yet unknown proportions to individuals and corporations accused of crime.

VI. Conclusion

Analysis of the data developed and reviewed during the course of the OIAJ study suggests that the federal system is capable of a high degree of compliance with the time limits of the Speedy Trial Act that will come into effect on July 1, 1979. It is apparent, however, that a substantial number of criminal cases will be dismissed after the dismissal sanction of the Act becomes effective, unless measures are taken to improve current compliance with the Act. Among the steps that might be taken, singly or in combination, are: (1) extension, by legislation, either of the time limits of the Act or of the effective date of the dismissal sanction, or both; (2) interpretation and application, by the courts, of the Act's exclusions in a manner that reduces the number of delinquent cases; and (3) provision, by Congress, of additional resources to process criminal cases. In the absence of effective measures along these lines, an unacceptable level of dismissals can be avoided only through reduction, by prosecutors, of the number of criminal cases accepted for processing by the system.

APPENDICES

18 U.S.C. §3161 and 3162

CHAPTER 208—SPEEDY TRIAL

§ 3161. Time limits and exclusions

(a) In any case involving a defendant charged with an offense, the appropriate judicial officer, at the earliest practicable time, shall, after consultation with the counsel for the defendant and the attorney for the Government, set the case for trial on a day certain, or list it for trial on a weekly or other short-term trial calendar at a place within the judicial district, so as to assure a speedy trial.

(b) Any information or indictment charging an individual with the commission of an offense shall be filed within thirty days from the date on which such individual was arrested or served with a summons in connection with such charges. If an individual has been charged with a felony in a district in which no grand jury has been in session during such thirty-day period, the period of time for filing of the indictment shall be extended an additional thirty days.

(c) The arraignment of a defendant charged in an information or indictment with the commission of an offense shall be held within ten days from the filing date (and making public) of the information or indictment, or from the date a defendant has been ordered held to answer and has appeared before a judicial officer of the court in which such charge is pending whichever date last occurs. Thereafter, where a plea of not guilty is entered, the trial of the defendant shall commence within sixty days from arraignment on the information or indictment at such place, within the district, as fixed by the appropriate judicial officer.

(d) If any indictment or information is dismissed upon motion of the defendant, or any charge contained in a complaint filed against an individual is dismissed or otherwise dropped, and thereafter a complaint is filed against such defendant or individual charging him with the same offense or an offense based on the same conduct or

arising from the same criminal episode, or an information or indictment is filed charging such defendant with the same offense or an offense based on the same conduct or arising from the same criminal episode, the provisions of subsections (b) and (c) of this section shall be applicable with respect to such subsequent complaint, indictment, or information, as the case may be.

(e) If the defendant is to be tried again following a declaration by the trial judge of a mistrial or following an order of such judge for a new trial, the trial shall commence within sixty days from the date the action occasioning the retrial becomes final. If the defendant is to be tried again following an appeal or a collateral attack, the trial shall commence within sixty days from the date the action occasioning the retrial becomes final, except that the court retrying the case may extend the period for retrial not to exceed one hundred and eighty days from the date the action occasioning the retrial becomes final if unavailability of witnesses or other factors resulting from passage of time shall make trial within sixty days impractical.

(f) Notwithstanding the provisions of subsection (b) of this section, for the first twelve-calendar-month period following the effective date of this section as set forth in section 3163(a) of this chapter the time limit imposed with respect to the period between arrest and indictment by subsection (b) of this section shall be sixty days, for the second such twelve-month period such time limit shall be forty-five days and for the third such period such time limit shall be thirty-five days.

(g) Notwithstanding the provisions of subsection (c) of this section, for the first twelve-calendar-month period following the effective date of this section as set forth in section 3163(b) of this chapter, the time limit with respect to the period between arraignment and trial imposed by subsection (c) of this section shall be one hundred and eighty days, for the second such twelve-month period such time limit shall be one hundred and twenty days, and for the third such period such time limit with respect to the period between arraignment and trial shall be eighty days.

(h) The following periods of delay shall be excluded in computing the time within which an information or an indictment must be filed, or in computing the time within which the trial of any such offense must commence:

(1) Any period of delay resulting from other proceedings concerning the defendant, including but not limited to—

(A) delay resulting from an examination of the defendant, and hearing on, his mental competency, or physical incapacity;

(B) delay resulting from an examination of the defendant pursuant to section 2902 of title 28, United States Code;

(C) delay resulting from trials with respect to other charges against the defendant;

(D) delay resulting from interlocutory appeals;

(E) delay resulting from hearings on pretrial motions;

(F) delay resulting from proceedings relating to transfer from other districts under the Federal Rules of Criminal Procedure; and

(G) delay reasonably attributable to any period, not to exceed thirty days, during which any proceeding concerning the defendant is actually under advisement.

(2) Any period of delay during which prosecution is deferred by the attorney for the Government pursuant to written agreement with the defendant, with the approval of the court, for the purpose of allowing the defendant to demonstrate his good conduct.

(3)(A) Any period of delay resulting from the absence or unavailability of the defendant or an essential witness.

(B) For purposes of subparagraph (A) of this paragraph, a defendant or an essential witness shall be considered absent when his whereabouts are unknown and, in addition, he is attempting to avoid apprehension or prosecution or his whereabouts cannot be determined by due diligence. For purposes of such subparagraph, a defendant or an essential witness shall be considered unavailable whenever his whereabouts are known but his presence for trial cannot be obtained by due diligence or he resists appearing at or being returned for trial.

(4) Any period of delay resulting from the fact that the defendant is mentally incompetent or physically unable to stand trial.

(5) Any period of delay resulting from the treatment of the defendant pursuant to section 2902 of title 28, United States Code.

(6) If the information or indictment is dismissed upon motion of the attorney for the Government and thereafter a charge is filed against the defendant for the same offense, or any offense required to be joined with that offense, any period of delay from the date the charge was dismissed to the date the time limitation would commence to run as to the subsequent charge had there been no previous charge.

(7) A reasonable period of delay when the defendant is joined for trial with a codefendant as to whom the time for trial has not run and no motion for severance has been granted,

(8)(A) Any period of delay resulting from a continuance granted by any judge on his own motion or at the request of the defendant or his counsel or at the request of the attorney for the Government, if the judge granted such continuance on the basis of his findings that the ends of justice served by taking such action outweigh the best interest of the public and the defendant

in a speedy trial. No such period of delay resulting from a continuance granted by the court in accordance with this paragraph shall be excludable under this subsection unless the court sets forth, in the record of the case, either orally or in writing, its reasons for finding that the ends of justice served by the granting of such continuance outweigh the best interests of the public and the defendant in a speedy trial.

(B) The factors, among others, which a judge shall consider in determining whether to grant a continuance under subparagraph (A) of this paragraph in any case are as follows:

(i) Whether the failure to grant such a continuance in the proceeding would be likely to make a continuation of such proceeding impossible, or result in a miscarriage of justice.

(ii) 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.

(iii) Whether delay after the grand jury proceedings have commenced, in a case where arrest precedes indictment, is caused by the unusual complexity of the factual determination to be made by the grand jury or by events beyond the control of the court or the Government.

(C) No continuance under paragraph (8)(A) of this subsection shall be granted because of general congestion of the court's calendar, or lack of diligent preparation or failure to obtain available witnesses on the part of the attorney for the Government.

(i) If trial did not commence within the time limitation specified in section 3161 because the defendant had entered a plea of guilty or nolo contendere subsequently withdrawn to any or all charges in an indictment or information, the defendant shall be deemed indicted with respect to all charges therein contained within the meaning of section 3161, on the day the order permitting withdrawal of the plea becomes final.

(j)(1) If the attorney for the Government knows that a person charged with an offense is serving a term of imprisonment in any penal institution, he shall promptly—

(A) undertake to obtain the presence of the prisoner for trial; or

(B) cause a detainer to be filed with the person having custody of the prisoner and request him to so advise the prisoner and to advise the prisoner of his right to demand trial.

(2) If the person having custody of such prisoner receives a detainer, he shall promptly advise the prisoner of the charge and of the

prisoner's right to demand trial. If at any time thereafter the prisoner informs the person having custody that he does demand trial, such person shall cause notice to that effect to be sent promptly to the attorney for the Government who caused the detainer to be filed.

(3) Upon receipt of such notice, the attorney for the Government shall promptly seek to obtain the presence of the prisoner for trial.

(4) When the person having custody of the prisoner receives from the attorney for the Government a properly supported request for temporary custody of such prisoner for trial, the prisoner shall be made available to that attorney for the Government (subject, in cases of interjurisdictional transfer, to any right of the prisoner to contest the legality of his delivery).

Added Pub.L. 93-619, Title I, § 101, Jan. 3, 1975, 88 Stat. 2076.

§ 3162. Sanctions

(a)(1) If, in the case of any individual against whom a complaint is filed charging such individual with an offense, no indictment or information is filed within the time limit required by section 3161(b) as extended by section 3161(h) of this chapter, such charge against that individual contained in such complaint shall be dismissed or otherwise dropped. In determining whether to dismiss the case with or without prejudice, the court shall consider, among others, each of the following factors: the seriousness of the offense; the facts and circumstances of the case which led to the dismissal; and the impact of a reprosecution on the administration of this chapter and on the administration of justice.

(2) If a defendant is not brought to trial within the time limit required by section 3161(c) as extended by section 3161(h), the information or indictment shall be dismissed on motion of the defendant. The defendant shall have the burden of proof of supporting such motion but the Government shall have the burden of going forward with the evidence in connection with any exclusion of time under subparagraph 3161(h)(3). In determining whether to dismiss the case with or without prejudice, the court shall consider, among others, each of the following factors: the seriousness of the offense; the facts and circumstances of the case which led to the dismissal; and the impact of a reprosecution on the administration of this chapter and on the administration of justice. Failure of the defendant to move for dismissal prior to trial or entry of a plea of guilty or nolo contendere shall constitute a waiver of the right to dismissal under this section.

(b) In any case in which counsel for the defendant or the attorney for the Government (1) knowingly allows the case to be set for trial without disclosing the fact that a necessary witness would be unavailable for trial; (2) files a motion solely for the purpose of delay which he knows is totally frivolous and without merit; (3) makes a statement for the purpose of obtaining a continuance which he knows

58-721 O - 80 - 34

to be false and which is material to the granting of a continuance; or (4) otherwise willfully fails to proceed to trial without justification consistent with section 3161 of this chapter, the court may punish any such counsel or attorney, as follows:

(A) in the case of an appointed defense counsel, by reducing the amount of compensation that otherwise would have been paid to such counsel pursuant to section 3006A of this title in an amount not to exceed 25 per centum thereof;

(B) in the case of a counsel retained in connection with the defense of a defendant, by imposing on such counsel a fine of not to exceed 25 per centum of the compensation to which he is entitled in connection with his defense of such defendant;

(C) by imposing on any attorney for the Government a fine of not to exceed $250;

(D) by denying any such counsel or attorney for the Government the right to practice before the court considering such case for a period of not to exceed ninety days; or

(E) by filing a report with an appropriate disciplinary committee.

The authority to punish provided for by this subsection shall be in addition to any other authority or power available to such court.

(c) The court shall follow procedures established in the Federal Rules of Criminal Procedure in punishing any counsel or attorney for the Government pursuant to this section.

Added Pub.L. 93-619, Title I, § 101, Jan. 3, 1975, 88 Stat. 2079.

§ 3163. Effective dates

(a) The time limitation in section 3161(b) of this chapter—

(1) shall apply to all individuals who are arrested or served with a summons on or after the date of expiration of the twelve-calendar-month period following July 1, 1975; and

(2) shall commence to run on such date of expiration to all individuals who are arrested or served with a summons prior to the date of expiration of such twelve-calendar-month period, in connection with the commission of an offense, and with respect to which offense no information or indictment has been filed prior to such date of expiration.

(b) The time limitation in section 3161(c) of this chapter—

(1) shall apply to all offenses charged in informations or indictments filed on or after the date of expiration of the twelve-calendar-month period following July 1, 1975; and

(2) shall commence to run on such date of expiration as to all offenses charged in informations or indictments filed prior to that date.

REPORT OF THE AD HOC SUBCOMMITTEE ON THE SPEEDY TRIAL ACT

I

NATURE OF INQUIRY

The task enjoined upon this Ad Hoc Subcommittee involves recommendations for improvement in the Speedy Trial Act, 18 U.S.C. §3161 et seq. The thrust of our investigation was on a "best results possible" inquiry rather than "best possible results." It is assumed that a repeal of the Speedy Trial Act is unlikely and that recommendations for repeal or substantial revision would be useless. It is our conclusion, however, that relatively minor adjustments in the Act can produce substantial benefits and enable the Federal judiciary to comply with its strictures without excessive impairment of other judicial functions.

In order to obtain as broad-based a source of information as possible, requests for information were submitted to the Chief Judges of all districts in the United States. In addition, a personal letter was addressed to each District Judge in the Sixth Circuit. The responses were almost identical. Thirty-one of the eighty-five districts outside of the Sixth Circuit responded, which is a percentage response of 36 1/2%. In the Sixth Circuit the individual responses totaled 36.84%. The responses by circuits ranged from a low of 7.14% in the Ninth Circuit to a high of 83.33% in the Third Circuit. Information from the Ninth Circuit, however, was supplemented by an excellent analysis from Professor Robert Mismer, Circuit Plan Reporter.

It should be pointed out that not all responses have equal weight. There are twenty districts in the United States that have adopted the most stringent standards which will be applicable in 1979. Clearly, their experiences would be far more significant that those of the districts which while operating under present limitations, have not yet reached the most strict standards.

Of the twenty districts so involved, six responded, a response rate of approximately 30%. No response was received from the Southern District of Florida, the Southern District of New York, the Northern District of Illinois, and the Southern District of California, all of which are reported to have severe problems with criminal dockets.

To assist the Subcommittee in obtaining additional sources of information, the Administrative Office and the Federal Judicial Center organized a meeting on June 27, 1977. Representatives from twelve of the districts with the most stringent standards were present, as well as a cross section of individuals affected by the Speedy Trial Act. Included were public defenders, United States Attorneys, United States Magistrates, circuit reporters, members of the criminal defense bar, and staff counsel from subcommittees of the Senate Judiciary Committee and the House Judiciary Committee.

Based upon the information obtained from all of the foregoing sources, the Subcommittee does make the following recommendati

II

RECOMMENDATIONS

Substantive Changes

1. Section 3161(b) and (c)

a. The time periods in §3161(b) and (c) should be changed as follows:

(1) "30 days" from arrest to indictment should be "60 days";

(2) "10 days" from indictment to arraignment should be "20 days";

(3) "60 days" from arraignment to trial should be "not less than 30 nor more than 100 days".

B. Discussion

(1) The general concensus seems to be that the time strictures of 1979 are simply too short. Once the concept of time limit is accepted, there appears to be no greater validity to a 30-10-60 schedule than there is to a 60-20-100 schedule. The criminal justice apparatus can function on a 30-10-60 basis, but to do so apparently exacts a price that is out of proportion to the benefits obtained. United States Attorneys are seeking indictments where indictments should not be issued and are refraining from indictment in cases where they should. In situations relating to narcotics where a messenger might be arrested, there is insufficient

time to establish involvement of other persons and the indictment of the messenger might very well make it impossible to develop a case against other conspirators. United States Attorneys, in some instances where time is beginning to run out, are seeking indictments which may be ignored for insufficient evidence or which may be issued and later dismissed because further investigation has indicated that no offense can be proved.

(2) The ten-day period between indictment and arraignment has caused substantial trouble in districts that extend over large areas. Judges and magistrates, clerks and reporters, are forced to travel substantial distances or in the alternative to hold arraignments at one place in the district that might be inconvenient to many defendants. Of all the time limitations, this one seems to be the least meaningful. While a twenty-day limitation does not solve all of the problems, it does reduce them substantially.

It should be pointed out that a ten-day period includes at least two days of a weekend and imposes an unncessary burden upon the United States Marshal or upon the Clerk's office to see to it that notice is promptly sent.

(3) Sixty days for trial appears to be insufficient time. There are situations where the United States Attorney has taken a year or more to prepare indictments and defense counsel must duplicate his effort within a short period. It should be pointed out that a sixty-day limitation does not mean that all trials will be set on the fifty-ninth day. It more likely means that trials will be set between the thirtieth and forty-fifth day.

The Speedy Trial Act imposes a severe burden upon defense counsel. It is true in almost all jurisdictions that the great majority of criminal representation is done by a relatively small group of attorneys. Sixty days is simply not enough time and must inevitably result in a reduced standard of defense representation. The sixty-day limitation likewise places difficulties where an assistant United States Attorney has prepared a specific case and is then involved in the trial of another criminal case: the assignment of a new assistant is duplicative and inefficient.

(4) A significant suggested change in the statute is the concept of a minimum period intended to assist defense counsel. While the

Speedy Trial Act has been likewise termed the "Speedy Convictions Act", it seems only fair to assure defense counsel that there will be a miniuum time for preparation.

(5) It will never be possible to submit hard evidence that the 1979 strictures will affect the quality of the work of the Federal judiciary. There is no known way to demonstrate a reduction in quality. In those districts that have adopted the 1979 limitations, there is evidence already that the judges feel the pressures of time; that there is an air of urgency and speed about all the activities; and that their opportunity to deal with the civil docket has been reduced.

The Speedy Trial Act does not exist in a vacuum. It is not possible and will not be possible to obtain statistical results in a district where variables such as an excess number of complex cases, a judge who is sick, a vacancy that is not filled, or an influx of a particular type of case, may distort the statistical results. Two examples come immediately to mind. Congressional action on Black Lung disability presented those districts with coal mines therein with a sudden and unexpected onslaught of Black Lung cases. The

determination by the United States to condemn a large area of land in Florida for a national park added a large burden to the Southern District of Florida. While neither of these situations bear upon the Speedy Trial Act, they do bear upon a distortion that affects the validity of statistical information on activities of the Federal courts.

The Southern District of New York established a pilot program whereby five judges bound themselves to the 1979 standards and tried their assigned cases accordingly. In the early stages, their efforts required substantially more than 20% of the total resources of the supporting personnel. They have proved that it is possible to meet the strictures, but it is neither clear nor provable whether they met them at the expense of other judicial activities.

2. Section 3161(h) - Preamble

   a. The periods of delay which are excluded in §3161(h) should also include time computations concerned with arraignment, with retrial, and should specifically include the exclusions during the interim period. While the position of the Ninth Circuit in United States v. Tirasso, 532 F.2d 1293, has not been followed elsewhere, the conclusion of that court can be obviated by including the interim periods in exclusion.

3. Section 3161(h) - Content

a. This change represents a policy determination that should be made by the Judicial Conference. The two positions that may be taken are these: Either minor adjustments in §3161(h)(1) might be made or a suggestion that §3161(h)(1) through (h)(7) be repealed and that §3161(h)(8), which is a general "escape hatch", be used to leave all delays in the hands of the trial judge and his discretion.

b. Policy Discussion: The Congressional debates on §3161(h)(8) indicate that it is or may be the very heart of the Speedy Trial Act. (See Appendix B) Many of the situations complained of to the Subcommittee by trial judges could be handled by the use of (h)(8). Conversely, the entire intent of the Speedy Trial Act can be frustrated by an indiscriminate or excessive use of this section. It is the Subcommittee's position that attempting to detail all exclusions from allowable time create more problems than are solved. Each exclusion gives an opportunity for further motions, appeals and delays.

With the time adjustments as recommended by the Subcommittee, together with a judicious use of (h)(8), the necessity for many of the exceptions may disappear.

It should be noted, however, that it is the very unwillingness of Congress to entrust the matter of speedy trials to the discretion of the courts that resulted in the Speedy Trial Act as against the previous proposal of Rule 50(b). It would seem that the most appropriate course is

not to recommend repeal at this time of the other exclusions of time but rather to make those minor adjustments that will deal with the problems that are raised.

c. Specific Changes: Accordingly, the Subcommittee suggests the following:

(1) In §3161(h)(1), change the word "examination" to the word "motion";

(2) The minimum time period provided in §3161(b), i.e., trial not less than 30 nor more than 120 days from arraignment, permit the minimum time of 30 days to be waivable by the defendant;

(3) §3161(c) should include "complaints before Magistrates".

(4) The phrase in §3161(c), "held to answer" should be eliminated.

d. Specific Discussion:

(1) While a minimum time period is intended to protect a defendant against too rapid a trial, any such matter which is intended for his protection should be open to a waiver by him. Although the general concept of waiver is frowned upon in the Speedy Trial Act, there appears to be little reason why a defendant should not be permitted to waive a provision intended for his benefit.

(2) The foregoing do not warrant extended discussions. §3161(c) does not apparently include complaints before the Magistrates and since this represents probably a growing portion of minor criminal offenses and their

disposition, it would seem that it should also be included in the Speedy Trial Act.

(3) The phrase, "held to answer", appears to have little meaning and no significance in §3161(c). It should accordingly be eliminated.

We attach for your information the following:

Appendix A - Analysis of Responses by Circuit

Appendix B - Research Memorandum on Congressional Intent 18 U.S.C. §3161(h)(8)

Appendix C - Letter from United States Attorney Earl Silbert, Chairman, Subcommittee on Legislation and Court Rules of the Attorney Generals Advisory Committee of United States Attorneys

Respectfully submitted,

THE AD HOC SUBCOMMITTEE
ON THE SPEEDY TRIAL ACT

Honorable Carl B. Rubin, Chairman

Honorable George L. Hart, Jr.

Honorable Earl E. O'Connor

D. C. CIRCUIT

Recommend:

1. Delete the limit for arraignment, adding the 10 days presently allowed to the time limit for trial.

2. Increasing the capacity to respond to judicial emergencies. Under 18 USC §3174 an elaborate multitude of procedural steps is required to deal with emergency situations in which court resources are simply unequal to the task of meeting time limits. If a district court is engaged in the trial of lengthy cases, others will necessarily back up, if outside help is unavailable. Even though impossibility in meeting time deadlines is obvious and justifiable, the chief judge must seek the recommendations of the planning group and apply to the judicial council of the circuit. The circuit judicial council is required to conduct an evaluation of the resources of the district and the availability of judges within and outside the circuit. Then it must apply to the Judicial Conference of the United States for a suspension of the time limits. The latter, after further evaluation may grant an extension of up to one year. While this procedure is conceivably appropriate to deal with chronic shortages of resources pending action by the Congress, it is grossly inadequate to deal with acute backlogs.

RECOMMENDATION: The chief judge of a district should be authorized to order a shorter suspension of time limits, say of up to 60 days. The judicial council of the circuit should have authority to terminate such orders or to extend the suspension to, say, six months. The Judicial Conference of the United States should have similar review and extension authority, to perhaps two years. The latter seems a more reasonable time to initiate a process which may include authorization of additional judges, their appointment, and their confirmation.

3. Making the interim time limits explicitly subject to the exclusions.

Due to casualness of statutory drafting, it is possible for a literalistic court to construe the interim time limits of 18 USC §3164 to be absolute, dysfunctionally making the interim time limits in some cases more restrictive than those after the Act goes fully into effect. The conflict of circuits* should be resolved by statutory clarification. *Compare United States v. Tirasso, 532 F2d 1298 (CA 9, 1976) (exclusions inapplicable) with United States v. Corley, 548 F2d 1043 (CADC, 1976) (exclusions applicable).

4. Facilitating the exercise of judicial discretion in granting continuances under 18 USC §3161(h)(8). The Act presently combines relatively specific allowances of "excludable time" with a general provision (§3161(h)(8) authorizing the ordering of continuances. Mr. Anthony Perkins of the Federal Judicial Center has persuasively argued that the common cause of delay, such as pretrial motions, should not require determinations of excludable time, as the normal limits should be broad enough to accomodate such procedures. (Memorandum for the ABA Speedy Trial Committee, February 15, 1977.) The general continuance authority (§3161(h)(8)) would then be utilized for the exceptional situation in which delay is needed. While this has the advantage of simplicity, it would require many applications to the courts for rulings where delays are now allowed automatically. This would be especially disadvantageous in districts where judicial manpower is acutely short in supply or even sometimes nonexistent. It might also encourage more prolonged time limits for simple cases than are necessary.

RECOMMENDATION: Strengthen §3161(h)(8) by making clear that it can overlap other cases for excluding time, rather than being merely suppletive. Authorize nunc pro tunc orders.

Provide that the decision of the district court is assigned to its discretion, with appellate reversal only for situations of clear abuse.

The above would clarify and fortify the authority of the district courts and encourage reliance by the parties on trial judges' orders. It would also minimize the number of cases in which appellate courts would reverse and remand for violation of the Act, making the trial itself a waste of time and sometimes resulting in retrials to secure speedy trial rights. Conceivably this might result in excessive utilization of continuances by the district courts. Such an assumption would appear excessively distrustful. In any event, further consideration of the problem of potential abuse should be deferred until after a period of experience with the Act.

5. Special time limits for complex cases.

The Speedy Trial Act focuses on relatively routine cases, presumably leaving the extraordinarily lengthy cases for separate treatment under the safety valve section, 3161(h)(8). An alternative would have been to have attempted to draft

statutory classifications giving different limits for defined groups of cases, e. g., Class A with the shortest limits, Class B for more lengthy ones, et cetera. While such a scheme would create pressure for more nationally-uniform treatment, it would be difficult to administer. It would also be inappropriate to the facts of many individual cases. Wide variations in needed time is suitable for different multiple defendant, multiple count conspiracy cases. Not all net worth tax evasion cases are of similar character. Furthermore, a rational statutory classification would have to consider the resources available to investigators, prosecution, defense, and courts, together with the particular public and private interests in a more (or less) speedy trial. Continuation of the present ad hoc consideration of the complex case seems the wiser course, at least absent additional experience which might make further legislative effort productive.

RECOMMENDATION: It is suggested that no further definition of classes of cases for statutorily-prescribed separate treatment be attempted at this time.

58-721 O - 80 - 35

6. Sanctions for delayed indictments and trials. Perhaps the most perplexing question faced by the Congress in the consideration of the Speedy Trial Act was the one of sanctions. While monetary and disciplinary penalties were authorized for limited situations involving intentional misconduct (§3162(2)(b)), the only sanction for failure to meet the indictment or trial time limits is dismissal, either with or without prejudice. The latter may be the usual result. In United States v. Perkins, Cr. No. 75-874 (1976), the government injustifiably delayed obtaining an indictment of the defendant for a period of 4 days beyond the period allowed by the local 45 day rule. Judge Flannery, relying upon what he interpreted to be the purpose of the Speedy Trial Act, dismissed the case with prejudice under the authority of the Rule 50(b) Plan and Rule 48(b), FRCrimP. He concluded that Congress intended that dismissal without prejudice "was intended only for the most exceptional cases and the absence of prejudice to the defense, while a factor to be considered by the court, is not sufficient standing alone to justify continued prosecution of charges contained in a tardy indictment." "To do otherwise would emasculate the rule."

RECOMMENDATIONS:

(1) Monetary fines should be imposable on attorneys for the government who injustifiably fail to attempt to

obtain either an indictment or a continuance within time limits established by statute or rule.

(2) Dismissal for tardy indictment should be discretionary with the court and reviewable only for clear abuse of discretion.

Dismissal with prejudice, while possibly effective, is surely expensive to society. Furthermore, in some cases it doubtlessly is disproportionate to the offense of delay. Yet the dilemma is a difficult one. Dismissal without prejudice increases the delay it is intended to prevent. The first recommendation, supra, is intended to add an alternative sanction to the court's armory. Its utilization would avoid Justice Cardozo's criticism that "The criminal is to go free because the constable has blunder." (In People v. Defore, 242 N.Y. 13, 15 N.E. 2d 585 (1926)). Since the timely obtaining of either an indictment or a continuance is commonly within the power of the prosecution, the threat of a fine for unjustifiable failure to do so could operate as an effective encouragement to compliance without harming the public by frustrating further proceedings in the criminal case. While determination of prosecutorial fault would itself be time-consuming, much of the record would likely be made in motions for continuance or dismissal.

SUMMARY OF COMMENTS
ON SPEEDY TRIAL ACT

FIRST CIRCUIT

DC/Puerto Rico

Has had problems with 10 day limitation on arraignments. Problem arises where defendant is arraigned before a magistrate and indicates desire to plead guilty. Matter then has to be referred to a Judge. A simple solution is to enter a plea of not guilty before Magistrate and then refer to a Judge for guilty plea.

DC/ R.I.

No problems. Small criminal case load.

DC/N.H.

No problems. Small criminal case load.

DC/ Mass.

Would extend arraignment period from 10 to 20 days.

Would repeal section 3162(b) and allow Court to impose such sanctions as deemed necessary

DC/Vermont

Amend Act to provide a time not to exceed 45 days between a defendant's consent to presentence investigation prior to entry of a guilty plea and delivery of report to the Court as excludable under 3161(h)(1).

SECOND CIRCUIT

ND/N.Y.

Holds court in 4 cities which are 100 to 180 miles apart.

Recommends amending arraignment period from 10 to 20 days and 60 day trial deadline to 90 days.

During past 4 months 50% of all defendants would not have been disposed of had 1979 60-day limit been applicable.

Recommends waiver of limits by consent of U. S. Attorney and defense counsel with approval of Judge.

DC/Conn.

Adopted lower limits. No serious difficulties in meeting time limits but has resulted in slow down of handling civil cases.

Recommends amendment to section 3174, "judicial emergency" provision, to allow time and flexibility in circumstances which do not meet stringent requirements of 3174.

THIRD CIRCUIT

DC/N.J.

Make clear whether excludable time periods are applicable to 3164 situations.

Provide for waiver of limits by consent of U. S. Attorney and defense counsel with approval of Judge.

DC/Delaware

Time limits have been set as follows:

Arrest to Indictment	
7/1/76 to 7/1/79	30 days

Arraignment to Trial	
7/1/76 to 7/1/77	120 days
7/1/77 to 7/1/78	80 days
7/1/78 to 7/1/79	60 days

The above limits have given no problem to date.

Recent experience shows 27% of cases would not have met final 60 day limit.

Suggested amendments:

Pretrial Motions: Amend 3161(h)(1)(2) to make explicit that all reasonable delay between filing and disposition of pretrial motions is excludable, whether or not a hearing is held.

Mental Examinations: Amend 3161(h)(1)(A) to provide for exclusion of all reasonable delay from the time a

ED/Pa.

At present 35% of criminal trials would exceed eventual 60 day limit. Recommend 90 day eventual limit with provision for special type cases.

10 day arraignment provision should be eliminated with time being merged into period for commencement of trial.

At present 45% of cases would not meet ultimate 30 day limit for indictment. Recommend 60 days for indictment.

If waiver is not presently permitted, as indicated by the Federal Judicial Center, the Act should be amended to permit waiver by defendants of any limits involved.

Would be more efficient to delete most of the specific exclusions of 3161(h) in favor of a more general exclusionary provision similar to 3161(h)(8).

3161(h) exclusion should apply to in custody defendants.

Conflicts between provision and time limits under Interstate Agreement O.K. Detainer should be resolved by making them compatible with each other.

Time limits should be established within which motions for dismissal must be brought or be waived.

WD/Pa.

Suggest rewrite waiver provisions of 3162(a)(2) to compel defendant to move for a dismissal at least 10 days before trial date if he contends time for trial has elapsed, unless time elapses within 10 day period preceding trial.

DIST. CT of Virgin. Islands

Suggests 3172(2) defining "offenses" should be amended as necessary to include trial by this Court of felonies in violation of statues enacted by Legislature of the Virgin. Islands.

MD/Pa.

Recommend:

1. 10 day arraignment be changed to exclude Saturdays, Sundays and holidays or be enlarged to 15 days.

2. Sudden death or illness of a Judge doesn't seem to be covered by excludables under 3161(h) but appears to come under 3174, Judicial Emergency. With only 60 days to commence trial many cases will be scheduled to start a few days before the deadline. If sudden illness strikes just before trial, it will be difficult, if not impossible, to go through the steps required by Section 3174 in so short a time. Other Judges would have their own deadlines and reassignment would not be possible. It is suggested that this situation be covered by a limited excludable period, say 30 days, for the recovery of the Judge or reassignment and re-scheduling.

A motion to transfer to or from another district under Rule 21 often comes several days after arraignment. While time can be excluded for the hearing on the motion other time consumed in the transferring district must still be counted. Thus, much less than 60 days may be available in the transferred to district. Suggest exclusion of maximum of 30 days from the filing of motion.

ANALYSIS OF FOURTH
CIRCUIT RESPONSES

Of the nine districts in the Fourth Circuit, four have responded. They are the District of Maryland, the Eastern District of North Carolina, the Middle District of North Carolina, and the Western District of North Carolina.

Number of Judges: 28 U.S.C. §133 - District of Maryland, seven; Eastern District of North Carolina, two; Middle District of North Carolina, two; Western District of North Carolina, two.

Seats of Court: District of Maryland, 28 U.S.C. §100, four; North Carolina, 28 U.S.C. §113: Eastern District, eight; Middle District, six; Western District, five.

General Analysis: Two of the four districts have adopted the most stringent standards, one district recommends no change in procedure. Three of the districts find the time between indictment and arraignment too short (18 U.S.C. §3161(c)); two districts recommend that more authority be given to magistrates; and three districts recommend in one form or another additional discretion in the district court for granting continuances. This item is of particular significance and I refer you to my separate memorandum on the subject.

Specific Recommendations: Middle District of North Carolina - Of note in the recommendations of this district is a suggestion that time be computed by weeks in calendar months rather than days. This seems to be particularly pertinent in terms of the ten-day restriction. This district also complains of the burdensome

statistical reporting by the Clerk's office which may be outside of our responsibility. Complex and sensational cases are of concern to this district in terms of the trial limitations.

The Eastern District of North Carolina - Concerned about complex cases and the insufficient time for preparation, particularly by the defendant. This district suggests that there should be some method for a waiver by the defendant.

District of Maryland - This district raises a question as to the distinction between "minor offenses" and "petty offenses." See 18 U.S.C. §3172(2). I suspect this has significance to any district with a military installation located within its borders. This district also complains of the statistical obligations imposed upon the Clerk of Courts. A suggestion of a continuance at the Court's discretion is made and concern has been expressed in a situation where there are multiple defendants, some of whom remain at large and thereby require severance where under ordinary circumstances all defendants could be tried together.

ANALYSIS OF FIFTH CIRCUIT RESPONSES

Of the nineteen districts in the Fifth Circuit, seven have responded. An additional response has also been received from the Chief Judge of the Fifth Circuit. Those districts responding were:

The Northern District of Alabama
The Southern District of Alabama
The District of the Canal Zone
The Northern District of Florida
The Northern District of Mississippi
The Southern District of Texas
The Western District of Texas

Number of Judges

28 U.S.C. §133	Northern District of Alabama	4
	Middle District of Alabama	2
	Southern District of Alabama	2
	Northern District of Florida	2
	Middle District of Florida	6
	Southern District of Florida	7
	Northern District of Georgia	6
	Middle District of Georgia	2
	Southern District of Georgia	2
	Eastern District of Louisiana	9
	Middle District of Louisiana	1
	Western District of Louisiana	4
	Northern District of Mississippi	2
	Southern District of Mississippi	3
	Northern District of Texas	6
	Southern District of Texas	8
	Eastern District of Texas	3
	Western District of Texas	5

Seats of Court

28 U.S.C. §81	Northern District of Alabama	8
	Middle District of Alabama	3
	Southern District of Alabama	2

28 U.S.C. §89	Northern District of Florida	5
	Middle District of Florida	8
	Southern District of Florida	4
28 U.S.C. §90	Northern District of Georgia	4
	Middle District of Georgia	7
	Southern District of Georgia	6
28 U.S.C. §98	Eastern District of Louisiana	1
	Middle District of Louisiana	1
	Western District of Louisiana	6
28 U.S.C. §104	Northern District of Mississippi	5
	Southern District of Mississippi	5
28 U.S.C. §124	Northern District of Texas	7
	Southern District of Texas	6
	Eastern District of Texas	6
	Western District of Texas	7

General Analysis

Apparently none of the reporting districts have adopted the most stringent standards and two districts recommend no change in procedure. One of the two is the District of the Canal Zone and I suggest that its problems are unique. Four of the districts found the time between indictment and arraignment too short (18 U.S.C. §3161(c)). Three districts recommended that more authority be given to magistrates and two districts indicated that their civil dockets were suffering as a result of the Speedy Trial Act.

Specific Recommendations

Western District of Texas -

The distances the judges must travel in order to make arraignments at the proper time has placed a severe burden upon them. In some instances they must travel 600 miles for such purposes. This district suggests that where there are unusual circumstances there should be an excludable delay for indictment. It is also suggested that where the legal issue is on appeal, time should be excluded and that where out-of-District defendants are transferred, additional time should likewise be given.

Northern District of Florida -

The distance problem in this district was likewise noted, particularly requirements of traveling from Pensacola, Florida to Gainesville, Florida - a distance of 350 miles.

Northern District of Alabama -

A suggestion has been made that additional time should be granted where defense counsel is scheduled on other criminal cases.

Northern District of Mississippi -

This district has found it necessary to concentrate all criminal trials in Oxford, Mississippi causing defendants and witnesses to travel quite some distance. This district also notes that its civil litigation is suffering.

Southern District of Texas -

The Southern District of Texas has conducted tests to determine its performance based upon the ultimate limit. In over 35% of the cases the district was unable to comply with the ten-day rule between indictment and arraignment. This district has likewise experienced problems where the defendant was already incarcerated at a place other than the place of indictment. It is suggested that the time not begin to run until the defendant is available to the court in the district where the trial would be had.

58-721 O - 80 - 36

ANALYSIS OF SIXTH CIRCUIT RESPONSES

A more detailed analysis has been made of the Sixth Circuit than any of the other circuits. In addition to the original memorandum to the Chief Judges of each district, a personal letter by me was sent to all of the judges. Interestingly enough, the response from the circuit as a whole was approximately the same as the average response from other circuits. Thirteen responses were received from the other thirty-eight judges in this circuit.

The breakdown of the Sixth Circuit is as follows: Eastern District of Michigan, ten judges; seats of Court at Ann Arbor Detroit, Flint, Port Huron and Bay City. Western District of Michigan, two judges; seats of Court at Grand Rapids, Kalamazoo, Lansing, Marquette and Sault Sainte Marie (28 U.S.C. §102). Ohio - Northern District of Ohio, eight judges; seats of Court at Cleveland, Youngstown, Akron, Lima and Toledo. Southern District of Ohio, five judges; seats of Court at Columbus, Steubenville, Dayton and Cincinnati (28 U.S.C. §115). Kentucky - Eastern District of Kentucky, two and one-half judges; seats of Court at Catlettsburg, Covington, Frankfort, Jackson, Lexington, London, Pikeville and Richmond. Western District of Kentucky, three and one-half judges; seats of Court at Bowling Green, Louisville, Owensboro, and Paducah * (28 U.S.C. §97). Tennessee - Eastern District of Tennessee, three judges; seats of Court at Knoxville,

* The commission of Judge Eugene Siler is for both the Eastern and the Western Districts of Kentucky, although he sits almost exclusively in the Eastern District.

Greeneville, Chattanooga and Winchester. Middle District of Tennessee, two judges; seats of Court at Nashville, Cokeville and Columbia. Western District of Tennessee, three judges; seats of Court at Jackson, Memphis and Dyersburg.

Two responses were received from the Eastern District of Michigan, one of which, from Judge Guy, pointed out that as a previously appointed United States Attorney, he was not yet taking any criminal cases. The other had no specific recommendations but expressed concern over the state of the civil docket in view of the priority of criminal cases.

From the Northern District of Ohio, six responses were received. This appears to be a district wherein the minimum — standards of time have already been enforced. Three of the judges express concern about the delay in civil trials, one urged the exemption of complex, multiple defendant, or conspiracy trials from the time strictures, and one expressed concern over the rights of a defendant who must go to trial with only sixty days preparation. While there was an gentle expression of dissatisfaction, all of the judges indicated that they were coping with the Speedy Trial Act, although they urged its repeal.

In the Southern District of Ohio, two judges responded; one suggesting that the ten-day time between arrest and indictment was insufficient, and the other recommending that complex and protracted litigation, both criminal and civil, be a ground for continuance. That judge also noted an adverse effect upon the civil docket.

In the Eastern District of Tennessee, one judge responded

CONTINUED

5 of 5

recommending only that the time between indictment and arraignment be extended.

In the Middle District of Tennessee, one judge responded and noted the adverse effect of the Speedy Trial Act upon civil cases. The Middle District of Tennessee has apparently also invoked the minimum time standards.

In the Western District of Tennessee, one judge responded, noting that the defendant has inadequate time for preparation; that the civil docket suffers; and that sixty days is insufficient time for complex conspiracy trials to be prepared.

These individual responses follow the pattern that has been observed in other circuits. There is a general dissatisfaction with the Speedy Trial Act and a desire for its repeal. Specific objections center upon the time from indictment to arraignment and the adverse effect upon the civil docket. The suggestion for exemption where the trial is complex or protracted occurs with some frequency but this would seem to be grounds under 3161(h)(8) for a continuance by the judge.

While I do not have the figures immediately available, it is my impression that the Bill before Congress seeking to add district judges will provide approximately ten for the Sixth Circuit, which is an increase of 25%. It is not possible to determine at this point what effect this will have upon congested dockets but it will provide a ready answer to those who will resist amendments of the Speedy Trial Act and assert that the problems are caused by an insufficient number of district judges.

ANALYSIS OF SEVENTH CIRCUIT RESPONSES

An analysis of responses from this Circuit would be misleading since only one district out of seven responded. The Chief Judge of the Western District of Wisconsin and the Chief Judge of the Circuit both indicated no specific difficulties worthy of reporting. A letter was also received from Professor Frank J. Remington, the reporter of the planning group and he has called attention to the problems of the defense bar. The Chief Judge of the Circuit noted that some district judges were reporting difficulties with the civil docket, but the lack of response from such districts puts this almost in the category of "hearsay".

SUMMARY OF RESPONSES
ON SPEEDY TRIAL ACT
(8th, 9th, and 10th Circuits)

EIGHTH CIRCUIT

Of the ten districts in the Eighth Circuit four have responded. They are the District of North Dakota, Western District of Arkansas, Eastern District of Arkansas, and the Western District of Missouri.

District of North Dakota

Number of Judges. 2
Number of Divisions . . . 4

This district has adopted the ultimate time limits. Experience has been that the time limits are too short generally. A six-weeks trial prevented other pending criminal matters being handled expeditiously.

One specific criticism is the ten-day arraignment requirement. It presents real problems because of distance between Fargo and Grand Forks, the latter location being where most of the criminal lo exists. This causes special trips solely for arraignment purposes.

Western District of Arkansas

Number of Judges. . . . . 1 + 1
Number of Divisions . . . 6

Because of the six divisions, extensive travel is required to meet the speedy trial provisions. Some relief has been obtained by

ermitting "each defendant to ask for a continuance so that it will be excludable time."

Chief Judge estimates the Act has increased expenses of distric at least "six times." Also, it has caused civil cases to be neglect in each division.

The problems could be solved if the district were provided with three additional district judges.

Eastern District of Arkansas

Number of Judges. . . . . 1 + 1
Number of Divisions . . . 5

General Observations: This district has implemented the 1979 limitations. The Act has generally helped improve the processing f criminal cases, but at the same time it has caused the civil docket to "continue to deteriorate." There is great need to improve "the delivery of civil justice." The Act should give more discretio to judges to deal with particular problems presented in individual cases.

Specific Recommendations:

1. Certain types of cases present problems that may require time limits. Example: Rule 20 and Rule 40 cases require a better inter-district communications system.

2. Problems of interpretation.

(a) Section 3161(b) -- 30-day interval between arrest and indictment should be changed to 45 days;

(b) Section 3161(c) -- Not clear whether a defendant "whos whereabouts are known by the government must be held t answer and brought before a judicial officer of the court within 10 days of the indictment or information;

(c) Section 3161(h) -- Periods (beginning and ending dates) of excludable delay time need specifying so that every district, as well as each clerk's office within a district, may apply them uniformly;

(d) Section 3161(h) -- Should be made clear whether periods of excludable delay apply to interim limits of §3164;

(e) Section 3162(a)(1) and (2) -- Should be clarified as to whether sanctions extend to the failure to arraign a defendant within 10 days of indictment or information.

Western District of Missouri

Number of Judges. . . . . 3 + 1
Number of Divisions . . . 5

This district has mandatory omnibus hearing procedure before mangistrates. Because of this procedure, no difficulty is anticipated in meeting the ultimate time limitations of the Act. An 80-day trial period limitation is suggested as being more "reasonable;" 60 days does not "allow much play at the joints." Experience thus far, however, is that substantially all cases have been disposed of within the 60-day limitation. This has been accomplished too as the result of a "joint criminal docket" where multiple judges sit at one location on a day certain for trial of all pending criminal cases. Chief Judge expresses opinion that the Act has had a generally beneficial effect upon the administration of criminal justice.

Specific Recommendations:

1. Section 3161(h) should be amended to provide that excludable time be applicable to time within which a defendant must be arraigned.

2. Section 3164 should be amended to specifically provide that delays resulting from matters covered in Section 3161(h)(1)(A) and (B); Section 3161(h)(3)(A); Section 3161(h)(4) and (5) be excludable.

NOTE: This seems to be a common criticism, i.e. excludable delays as provided in Section 3161(h) should be specifically applicable to interim limits (§3164).

3. Section 3161(c) should be amended to provide that trial shall commence within 80 days.

4. Section 3161(h)(1)(A) and (B) should be amended to make clear that excludable time for mental competency examination should commence with entry of court order directing examination. (Present guidelines of AO provide time does not begin until date of defendant's first visit to examining physician.)

NINTH CIRCUIT

Of thirteen districts in the Ninth Circuit we received responses only from the District of Nevada, and a comprehensive report by Professor Robert L. Misner, through the Circuit Executive.

District of Nevada

Number of Judges 2
Locations of Court 4

Very critical that continuance cannot be granted under Section 3161(h)(8)(C) for congestion of court calendar. Some burden involved in this district since there are only two judges holding court at opposite ends of the state.

Also critical of AO guideline concerning psychiatric examinations in that excludable time begins to run only upon psychiatrist's first visit with defendant, which often is 10 days or two weeks after an examination is ordered.

Recommends there be a specific provision whereby the defendant, his counsel, and government counsel, with approval of the court, may waive the time requirements imposed by this "impossible piece of legislation."

Comments of Defense Counsel:

The Chief Judge of the District of Nevada sent along letters from two members of the defense bar. Both carried much the same message.

Where there is no arrest or detention, the government has plenty of time to thoroughly investigate and prepare its case

before an indictment is returned. Once charges are initiated then the defendant and counsel are placed under the stringent limitations of the Act, often without adequate time to prepare the defendant's case. Satisfactory financial arrangements between the defendant and his attorney often cannot be made in such a short time -- both as to attorney's fees and fees for investigative work.

Although the Act may be primarily concerned with speedy trial for persons in custody, those are the very persons who often need more time, because greater investigative burden falls on counsel.

The rigid and stringent time limitations of the Act preclude a lawyer specializing in criminal work from representing more than a few clients at one time. The time to prepare a case is too short from the defense standpoint. As one lawyer summed up the situation, "the plain result is that an act which was designed to be of aid and benefit to defendants defeats its purpose."

Professor Misner's Report -- "District Court Compliance With The Speedy Trial Act of 1974: The Ninth Circuit Experience" June 14, 1977.

This extremely comprehensive report is rather difficult to digest for a brief summary and analysis. The report is really a survey of the effect of the Act in the Ninth Circuit.

The emphasis of the report is on planning and adequate record keeping. Obstacles to the planning process appear to be (1) the Act itself and interpretation of the Act by the AO in its guidelines; and (2) difficulty in maintaining the proper statistical information to serve the purposes of the Act (p. 13).

For example, recording of "excludable time" (p. 16) et seq.).

Problem areas of concern to every district court (p. 30 et seq.):

A. Need to improve excludable time recording;

B. Need for district planning groups to determine what resources will be needed to comply with the 1979 standards set by the Act;

C. Planning groups should investigate the effect of the Act on civil dockets.

TENTH CIRCUIT

Of the eight districts in the Tenth Circuit, only the three districts of Oklahoma have responded.

Oklahoma has experienced no difficulty in meeting the limitations of the Act; in fact, they are for the most part meeting the 1979 limitations. Main criticism is the excessive record keeping and burden on the clerk's office, as well as the expense involved from more frequent sessions of grand juries.

Judges recommend outright repeal of the Speedy Trial Act. Congress should concentrate on those districts experiencing inordinate delays and attack the problems specifically by appointing additional judges or taking other necessary steps.

M E M O R A N D U M.

Re: 18 U.S.C. §3161(h)(8)

Scope

The scope of this memorandum concerns the legislative intent in enacting 18 U.S.C. §3161(h)(8). Of general concern is the breadth of the section. Three issues are of specific concern: (1) Did the Legislature intend the periods of excludable delay, including §3161(h)(8), to apply to the interim limits of §3164?; (2) Was the legislative intent to apply §3161(h)(8) to the interval between indictment and arraignment?; and (3) Should §3161(h)(8) specifically allow a continuance where a lengthy trial of another case makes it impossible for the judge to try or otherwise dispose of the subject matter?

Section 3161(h)(8) is described by the Administrative Office of the United States Courts as "the safety-valve provision", and in the Senate Report as "the heart of the Speedy Trial scheme". Cong. Rec., 93rd Congress 2d Sess., Vol. 136 - Part 31, p. 41622 (December 20, 1974).

This section permits a judge on his own motion, at the request of the defendant or his counsel, or at the request of the attorney for the government, to grant a continuance which would toll the time limits of the bill. Before deciding whether a continuance should be granted, the Court must determine whether the ends of justice served by taking such action outweigh the best interest of the public and the defendant in a speedy trial. The Court is not restricted to the factors set forth under §3161(B)(i), (ii) and (iii) in its determination. The court is required to note in the record the reasons for granting such continuance.

The legislative purpose of this section was "to provide the court with the flexibility to extend the time limits of the bill so that they will not operate harshly on the defendant, the government or society." S. Rep. No. 1021, 93 Cong., 2d Sess., 4 U.S.Code Cong. & Admin. News p. 7415 (1974).

A motion would be appropriate under this section "when the continuation of the proceeding would be made impossible or result in a miscarriage of justice; where the case as a whole is unusual or complex, due to the number of defendants or the nature of the prosecution and it is unreasonable to expect adequate preparation within the time periods; and where the factual determination before a grand jury is complex." U.S.Code Cong., supra at 7415.

In the House Debates, Representative Conyers emphasized the broad applicability of §3161(h)(8):

> But the most important ground for extention of all - and this is also available to the judge - is when the continuance of the proceeding interrupted would be impossible or would result in a miscarriage of justice for failure to grant a continuance. Whenever there may be such a miscarriage or other injustice, he [the judge] has the responsibility, indeed the obligation, to suspend the running of the time limits by motion to continue.
> House Debate, Representative Conyers, 120 Cong. Rec. H 12370-72, p. 41774 (Dec. 20, 1974).

Application of §3161(h)(8) to the interim limits of §3164.

In United States v. Tirasso, 532 F.2d 1298 (9th Cir. 1976), the court held that §3164 "does not provide any periods of exclusions for delay occasioned by the special circumstances of difficult cases." The court found the language of §3164 unambiguous and refrained from applying

any §3161(h) exceptions or exclusions. The court also concluded that strict application of this unambiguous language was required by the following language in the Senate Report on the bill which became the Speedy Trial Act:

> Failure to commence the trial of a detained person under [§3164] results in the automatic review of the terms of release by the court and, in the case of a person already under detention, release from custody.
>
> S. Rep. No. 1021, 93 Cong., 2d Sess., 4 U.S. Code Cong. & Ad. News pp. 7401, 7416 (1974).

In United States v. Mejias, 417 F. Supp. 579 (S.D.N.Y. 1976), aff'd on other grounds sub nom, United States v. Martinez, 538 F.2d 921 (2d Cir. 1976), the court held contrary to Tirasso and applied the §3161(h) exclusions to §3164.

The court found that the purpose of §3164 was "that certain minimal speedy trial requirements be placed into operation . . . pending the full effectiveness of Section 3161 and Section 3162. Senate Committee on the Judiciary, Speedy Trial Act of 1974, Report on S. 754, S. Rep. No. 93-1021, 93rd Cong., 2d Sess., at p. 45 (1974). " The court concluded that it was highly doubtful that the "minimal speedy trial requirements" of §3164 operate more strictly and with harsher results than will apply under §3161(a) and (c) when the Act has taken full effect.

The court stated that there was no indication in the legislative history that §3164 was intended to create a separate category of cases to which the excludable periods would not apply, but that Congress provided for exclusions "in recognition of the impossibility of providing rigid time limits for the trial of criminal cases. House Committee on

the Judiciary, Speedy Trial Act of 1974, Report on H.R. 17409, H. Rep. No. 93-1508, 93rd Cong., 2d Sess., at 21 (1974), U.S. Code Cong. & Ad. News 1974, p. 7401." The court noted that the legislative intent in providing exclusions was to insure "that the rights of the individual to a complete and full hearing are not trampled" and to avoid "assembly-line justice."

The court examined the origins of §3164 and found that the Senate Committee Report indicated that the interim plans were to be similar to the plan which had been adopted by the United States Court of Appeals for the Second Circuit, a plan which incorporated the traditional exclusions.

In U.S. v. Masko, 415 F. Supp. 1317 (W.D. Wis. 1976), the court in agreeing with the Mejias opinion held that for purposes of §3164 such interim limits should be construed to embody by implication statutorily enumerated excludable periods of delay.

The court started with the same proposition followed in Mejias: "§3164 must be viewed as an integral part of the grand scheme of the Act, and more particularly as an integral part of the transitional phase of the Act." Masko, supra at 1321. The court rejected the view of construing §3164 as if it were virtually an independent enactment. This view was rejected for two reasons. The first was that §3164 appears within the Act, and rules of statutory construction require it to be viewed as playing its part in the grand scheme of the Act. The second is:

58-721 O - 80 - 37

> It is unreasonable to conclude that Congress intended that during the period in which its permanent legislative program will be operative, the time for automatic review of the pretrial freedom of persons of high risk and the time for imposition of the sanction of compelled release from pretrial detention will be subject to computation in which the periods of delay defined in §3161(h) may be excluded, but that during the transitional period the §3161(h) excludable periods are of no effect.
>
> Masko, supra at 1323.

In United States v. Corley, 548 F.2d 1043 (1976) defendant filed a motion for release from custody under the Speedy Trial Act. The district court held that the excludable time periods enumerated in Section 3161 of the Speedy Trial Act apply to computation of the ninety-day period under Section 3164. In determining the length of pretrial detention, the court excluded periods of delay resulting from illness and the filing of pretrial motions. The Court of Appeals for the District of Columbia stated:

> For the reasons outlined in United States v. Mejias, 417 F. Supp. 579 (S.D.N.Y.), aff'd on other grounds, sub nom. United States v. Martinez, 538 F.2d 921 (2d Cir. 1976); and United States v. Masko, 415 F. Supp. 1317 (W.D. Wis. 1976), we agree with the trial court that the exclusions of Section 3161 apply to the interim limits of Section 3164, and we decline to follow the Ninth Circuit's decision in United States v. Tirasso, 532 F.2d 1298 (9th Cir. 1976).
>
> Corley, supra at 1044.

It is clear that Mejias and Masko and Corley are the better reasoned opinions. These courts based their conclusions on a close reading of the legislative history and construction of the Speedy Trial Act as a whole. Moreover, these decisions avoid the results of Tirasso.

A bill, H. R. 14521, has been introduced in the Congress to make the excludable time limits specifically applicable to the interim time periods.

Application of §3161(h)(8) to the interval between indictment and arraignment

The issue is whether the legislative intent was to apply the exclusions to the interval between indictment and arraignment or whether this interval was purposefully excluded.

Again, the legislative purpose of §3161(h) is "to provide the court with the flexibility to extend the time limits of the bill so that they will not operate harshly on the defendant, the Government or society." U. S. Code. Cong., supra at 7415. However, no court has construed this section as applying to the interval between arraignment and indictment.

On July 23, 1974, the Senate passed S. 754 (Speedy Trial Act). At this time the Act contained only two intervals: a thirty-day arrest-to-indictment interval; and a sixty-day indictment-to-trial interval. Section §3161(h) applied to both. Cong. Rec. 93rd Congress, 2d Sess., Vol. 120 - Part 19, p. 24667, (July 23, 1974). On Decebar 20, 1974, the amendments of the House of Representatives to the bill were laid before the Senate. This amended bill included the ten day indictment-to-arraignment interval. Proponents of the Speedy Trial Act of 1974 were determined to pass such legislation prior to termination of the 93rd Congress. It is clear from a section-by-section analysis that the Senate considered §3161(h) as applicable to all three time intervals:

Subsection 3161(h) excepts from the time limits imposed in Subsections 3161(b) and (c) the following periods of delay:

(1) Delays caused by proceedings relating to the defendant such as hearings on competency to stand trial, hearings on pretrial motions, trials on other charges, and interlocutory appeals;

(2) Delays caused by deferred prosecution upon agreement of defense counsel, prosecutor, and the court for the purpose of demonstrating the defendant's good conduct;

(3) Delays caused by absence or unavailability of the defendant;

(4) Delays resulting from the fact that the defendant is incompetent to stand trial;

(5) Delays resulting from the treatment of the defendant pursuant to the Narcotic Addict Rehabilitation Act;

(6) Delays between the dropping of a charge and the filing of a new charge for the same or related offense;

(7) Reasonable periods of delay when the defendant is joined for trial with a co-defendant, and neither defendant has shown good cause to grant a severance; and

(8) Any other delay resulting from a continuance granted at the request of defense or prosecution upon a finding that the judge that the ends of justice cannot be met unless the continuance is granted. The judge must balance the right of the defendant and the interest of the public in speedy trial against the 'ends of justice', and set forth in the record his reasons for granting the continuance.

Cong. Rec., 93rd Congress, 2d Sess., Vol. 136-Part 31, p. 41621. (December 20, 1974), (emphasis added)

Considering the lack of importance of the indictment-to-arraignment interval, the fact that it was not provided for in the original Senate bill and was the result of a last minute compromise, and the problems confronted by the courts in meeting the limits of this interval, the legislative intent mandates that the exclusions and exceptions of §3161(h) apply.

Application of §3161(h) where a lengthy trial of another case makes it impossible to try or otherwise dispose of the subject matter.

Section 3161 was intended to allow a continuance for both complex litigation and unusual circumstance:

> The bill does more, of course, than merely impose prosecution limits on the Federal criminal trial. It has carefully constructed exclusions and exceptions which permit normal pretrial preparation in the ordinary noncomplex cases which represent the bulk of business in the Federal courts. The bill also accommodates complex cases which require long periods of preparation by prosecutors and defense counsel. While the bill does not automatically exclude certain criminal trials by type, it does set forth a method by which the complex case can be identified. The bill also provides for unusual circumstances which may demand exceptions to the normal time limits. In order to avoid the pitfalls of unnecessary rigidity on the one hand, and a loop-hole which would nullify the intent of the legislation on the other, a balancing test is established in order to enable the judge to determine when the 'ends of justice' require an extraordinary suspension of the time limits. Cong. Rec., 93rd Congress, 2d Sess., Vol. 120-Part 19 pp. 24665-24666 (July 23, 1974).

Congress rejected a blanket exception for specific cases and opted for a case-by-case approach:

> Although it is intended that continuances under 3161(h)(8) should be given only in unusual cases, it is anticipated that the provision will be necessary in many protracted and complicated Federal prosecutions, that is antitrust cases, and complicated organized crime conspiracy cases. However, the Committee has rejected a blanket exception for these cases and opted for a case-by-case approach (see p. 44). Cong. Rec., 93rd Congress, 2d Sess., Vol. 135-Part 31 p. 41622 (December 20, 1974).

The provision allows a judge to grant a continuance where he finds the "ends of justice" outweigh the best interest of the public and the best interest of the defendant in a speedy trial.

Section 3161(h)(8)(3), however, specifically states that general court congestion, lack of diligent preparation by the

Government or failure of the Government to obtain an available witness are unacceptable causes for delay.

If a lengthy trial of another case making it impossible to try or dispose of the subject matter is the result of general congestion of the court's calendar, then §3161(h)(8) does not apply. If, however, this is not the case and the "ends of justice" outweight the best interest of the public and defendant in a speedy trial, then §3161(h)(8) may apply. Congress could not provide specifically for each contingency. The court is faced with the responsiblity of making this determination. A special section added to the Act for this contingency is not needed or desirable.

Conclusions

Section 3161(h)(8) was intended by the Congress as a catch-all provision. It allows for the necessary flexibility to make a speedy trial a realistic goal. The section applies to complex litigation and unusual circumstances. Congress rejected a blanket exception for specific cases and opted for a case-by-case approach.

(1) Though there are cases to the contrary, the better reasoned opinions apply the periods of excludable delay in §3161(h) to the interim limits of §3164. These decisions avoid the otherwise untenable results of such cases as Tirasso, infra.

(2) Section 3161(h) should be applied to the interval between indictment and arraignment for four reasons: (a) the interval lacks importance and is a vestige of the common law; (b) the interval was not provided for in the original Senate Bill and was the result of a last minute compromise

in which the failure to provide for this interval in §3161(h) may have been overlooked; (c) a section-by-section analysis in the Senate Report indicates that the Senate believed §3161 applied to this interval; and (d) the problems confronted by the courts in meeting the limits of this interval demand the flexibility of §3161(h).

(3) Section 3161(h)(8) may apply where a lengthy trial of another case makes it impossible for a judge to try or otherwise dispose of the subject case, if the "ends of justice" outweigh the best interest of the public and defendant in a speedy trial, and if the cause is not "general congestion of the court's calendar." Congress intended that unusual circumstances be dealt with on a case-by-case basis. As a catchall provision, §3161(h) was not intended to specify each possible contingency.

REPORT ON THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES (1977) PP. 53-54

Federal Right to Support

The Conference disapproved H.R. 6196, a bill to establish the federal right to every unemancipated child to be supported by such child's parents or parent. The Conference noted the Committee's comment that such legislation in establishing a federal right to support could have a substantial impact upon the workload of the federal judiciary although it purports only to affect state court jurisdiction.

Minimum Level for Retirement Salaries

The Conference voted its disapproval of H.R. 5781, as it had similar legislation in the 93rd and 94th Congresses, which would provide a minimum level for retirement salaries of certain federal judges in territories and possessions by amending Section 373 of Title 28, United States Code. The Conference again expressed the view that such legislation involved matters that are essentially private relief bills and that the objective should not be achieved by amending Title 28, United States Code.

Witness Fees

The Conference approved the concept involved in H.R. 8220 which would amend Section 1821 of Title 28, United States Code, to increase the fees of a witness in a federal court proceeding from $20 to $30 per day and to provide an allowance for expenses of travel and subsistence on the same basis as is provided for travel and subsistence of salaried members of the federal government.

Speedy Trial Act

At the direction of the Conference at its March session, the Committee, through an ad hoc committee, reviewed the operation of the Speedy Trial Act and proposed to the Conference certain amendments to the act, as follows:

1. The ultimate time strictures of §3161 of 30 days arrest-to-indictment, ten days indictment-to arraignment, and sixty days arraignment-to-trial should be changed instead to sixty days from arrest to indictment, twenty days from indictment to arraignment, and not less than thirty nor more than one hundred days from arraignment to trial.

2. The exclusions of periods of delay enumerated in §3161 (h) should also include the time computations concerned with arraignments, with retrial, and should specifically include the applicability of all exclusions during the interim period that will end July 1, 1978, as provided in §3161 (g).

3. The word "examination," in §3161 (h) (1) should be changed to the word "motion."

4. The minimum time period of thirty days for trial following arraignment provided in §3161 (b) should be waivable by the defendant.

5. Section 3161 (c) should apply to complaints before magistrates so as to read: "The arraignment of a defendant charged in an information or indictment, or in a complaint before a magistrate, with the commission of an offense shall be held . . . "

6. The phrase in §3161 (c), "held to answer," should be eliminated.

Upon review of these recommendations, the Conference expressed its approval of them and authorized the Director of the Administrative Office to transmit to the Congress the report of the ad hoc committee.

Biennial Survey of Judgeship Needs

The Conference at its March 1977 session approved a recommendation that the Subcommittee on Judicial Statistics be authorized to make biennial surveys of the judgeship needs of the district courts and of the courts of appeals, commencing in 1978. Inasmuch as the Congress has not yet enacted an omnibus judgeship bill based on prior surveys, the Conference agreed that the Subcommittee should be granted discretion as to the time when the first of the biennial surveys is started.

Supporting Personnel

Satellite Libraries

The Committee, pursuant to a mandate of the Judicial Conference at the March 1975 session (conf. Rept., p. 7). received and examined reports prepared both by the Judicial Council of the Third Circuit and by the Administrative Office concerning the satellite library study under way in that circuit. The Conference agreed that since the entire subject matter of libraries for the federal courts is being studied under the aegis of the Federal Judicial Cen-

58-721 O - 80 - 38

LETTER FROM EARL J. SILBERT TO JUDGE CARL B. RUBIN, DATED JUNE 29, 1979

UNITED STATES DEPARTMENT OF JUSTICE

OFFICE OF THE UNITED STATES ATTORNEY

WASHINGTON, D.C. 20001

SEND ALL MAIL TO:
UNITED STATES ATTORNEY
[illegible]
UNITED STATES COURT HOUSE BUILDING
3RD AND CONSTITUTION AVENUE NW.

June 29, 1977

IN REPLY, PLEASE REFER TO INITIALS AND NUMBER

Honorable Carl B. Rubin
United States District Judge
Southern District of Ohio
Dayton, Ohio 45402

Dear Judge Rubin:

In response to your request in April of this year for a report on the problems United States Attorneys are presently having with the Speedy Trial Act, I solicited the views of all United States Attorneys around the country. A large number responded with extremely helpful comments. However, since the ultimate sanction of dismissal for failure to meet the time limits is not yet in effect, many offices indicated that their problems now are not as great as they expect them to be after July 1, 1979, when dismissals begin to occur. Notwithstanding this, many offices are presently having serious problems complying with the Act. I will try to summarize for you the comments, both written and oral, I have received from the various United States Attorneys. A number of offices cited specific cases in which problems have occurred. If this latter information would be helpful, I will be happy to supply you with copies of the individual written responses of the United States Attorneys.

The provisions of the Speedy Trial Act which are presently creating specific problems for a number of United States Attorneys are as follows:

(1) the 30 day limit for indictment (Section 3161 (b))

(2) the 10 day limit for arraignment (Section 3161 (c))

(3) the 60 day limit for trial (Section 3161 (c))

(4) the imprecision of the excludable periods under Section 3161 (h))

(5) the pressure the Act as a whole puts on judges to sever the defendants in multi-defendant cases.

(6) the 90 day interim time limit for in-custody defendants (Section 3164)

(7) the 60 day limit for retrials following appeals and collateral attacks (Section 3161 (e))

A brief discussion of each of these problem areas hopefully will be helpful.

(1) The 30 day limit for indictment — A number of United States Attorneys, recognizing that 30 days is not sufficient time for the investigatory agencies to complete their follow-up investigation and reports, or for the prosecutor and grand jury to do an adequate job, have instituted policies against arrest prior to indictment, since the 30 day clock does not start running until an arrest is made. However, sometimes arrests are compelled; for example, a defendant is caught in the act, or an arrest is necessary to prevent further crimes or the defendant's flight from the jurisdiction. Where the arrest is unavoidable, the United States Attorneys are having difficulty doing a thorough investigation within the 30 day limit. This is not only because of limited staff, but more importantly because 30 days is simply an inadequate period of time to do a professional follow-up investigation. Time is needed for investigators to follow out leads, for prosecutors to conduct a thorough exploration of the case in the grand jury, and for chemists and other experts to complete their scientific analyses. United States Attorneys cited examples of being forced to return indictments when the investigation was only partially done. Some have used "holding" indictments and followed up thereafter with superseding indictments. Others have only been able to include a limited number of violations in the indictment since the complete investigation could not be concluded in 30 days.

The unreasonably compressed period of time for post arrest investigation will, in our view, create three highly undesirable results: (i) Innocent persons who would be exonerated by a thorough grand jury investigation will be indicted; (ii) dangerous offenders against whom all available evidence to support a conviction cannot be uncovered in the truncated period will be acquitted; and (iii) persons who should be arrested and brought under control of the court, whether released prior to trial or detained, will be allowed to remain at liberty to commit additional offenses because the prosecutor, recognizing that the 30 day arrest to indictment period is too short, foregoes an arrest despite ample probable cause.

(2) The 10 day limit for arraignment -- One fourth of the United States Attorneys responding vehemently complained about the 10 day provision. The problems seem to be the greatest in large geographic districts. In order to meet the 10 day limit, defendants, prosecutors, and defense attorneys have been required to travel several hundred miles roundtrip in order to appear before an arraignment judge. Judges, too, have been required to travel with their staffs. The disruption of schedules and the expense have been unacceptable with the deadlines still impossible to comply with in some instances. Moreover, because of the short period of time allotted, defense attorneys do not have an adequate time to evaluate the case prior to the arraignment and therefore pro forma not guilty pleas are entered. Many defendants appear at 10 day arraignments without counsel because the time to obtain counsel is too short. In addition, where the defendant requires a mental examination prior to the entry of his plea, it is extremely difficult to comply with the ten day requirement since not all of the delay arising out of the mental examination is excludable; apparently only delay resulting from the examination itself and the hearing itself is excludable. To alleviate the present difficulties the 10 day time period should be increased to 30 days.

(3) The 60 day limit for trial -- The experience of United States Attorneys is that the sixty day time limit for trial is wholly insufficient for many of the cases--fraud, white collar crime, public corruption, organized crime, income tax cases, conspiracies, etc.--on which United States Attorneys are concentrating their prosecutorial resources. The number of these cases has increased to the point where they are hardly the exception in the federal courts. Yet the sixty day time limit, perhaps adequate for the simple narcotic sale case, is as fully applicable to these complicated cases as it is to the simple cases. The only relief is under Section 3161(h)(8). A number of judges, however, restrict this section to the extraordinary cases. Consequently the sixty day limit is completely inadequate for what has become the nonexceptional case but which still requires substantial time to prepare for trial.

Some of the results of this overly brief time for trial are as follows:

i. Judges, faced with the sixty day time limit, have refused to grant a continuance where the Assistant assigned the case is in trial before another judge. This has forced the government to reassign the prosecution of the case to another Assistant. This is done even though the new Assistant assigned to the case, unlike the first Assistant, has no familiarity with or knowledge of the case. The result is an unjustified duplication of work and often a lack of preparation of the reassigned case. This deprives the public of its right to adequate representation. Assistant U. S. Attorneys are not fungible; the sixty day trial limit, however, has caused them to be treated as such.

ii. To achieve compliance with the sixty day limit, more cases referred to United States Attorneys Offices by agencies are being declined outright, felonies are being reduced to misdemeanors handled by magistrates, and cases are being referred to the local and state prosecutors. Although there obviously are cases which would be so declined, reduced, or referred, a declination, reduction or referral to avoid failure to comply with the time limit is hardly consistent with the public interest.

iii. To satisfy the unreasonably short sixty day limit, some judges are empanelling juries and then continuing the trial for weeks, or even months. This is clearly an undesirable result but one far preferable to outright dismissal of a criminal indictment where the defendant has suffered no prejudice.

iv. As explained more fully below, the strict time limit as applied to multi-defendant cases is causing unwarranted severances. The resulting multiple trials are a gross waste of precious court and attorney time and resources and a wholly unwarranted imposition on witnesses.

Sixty days as a norm for trials to commence after arraignment is simply unrealistic. A far more realistic period of time as a norm is, we suggest, ninety days. If the time limit is so increased, the need to resort to Section (h)(8) for continuances should decrease although a number of the more complicated cases will still require more than ninety days to prepare.

(4) The imprecision of the excludable periods under Section 3161 (h) -- Unfortunately, because many of the exclusions in the Act are so vague, no one knows for sure when the time limits have expired. This has caused and will continue to cause a great deal of wasted time litigating the precise meaning of the exclusions. To take just one example, Section 3161(h)(1)(E) provides that the period of "delay resulting from hearings on pretrial motions" should be excluded in computing the time limits under the Act. But just what does this clause mean? Is the period

of time from the filing of the pretrial motions until the court decides them excludable? Is only the one or two days the hearing is held on the motions to be excluded? Or maybe none of the time consumed by the pretrial motions is excludable unless there is a showing that it actually delayed the trial date. Of course, no one really knows the answer. It will take years and countless wasted hours of court and litigants' time to settle the meaning of the exclusions. This is especially unfortunate because instead of trying criminal cases, a great deal of time is going to be spent on litigating whether the case was tried within some arbitrary time limit. Many of the other exclusions are equally as imprecise as Section 3161(h)(1)(E). The answer to this particular problem is rather simple: Congress should amend the exclusions so that their application is clear.

(5) Multi-defendant cases — The Act has caused some courts to sever defendants in multi-defendant cases, so that the defendant whose case is moving slowly does not hold up the trial of his co-defendants. Section 3161(h)(7) allows "A reasonable period of delay when the defendant is joined for trial with a codefendant as to whom the time for trial has not run." Judges faced with the pressure of the time limits and the general uncertainty of the exclusions, however, have granted severances to avoid speedy trial problems, notwithstanding this exclusion. For example, severances have been granted where one defendant had numerous pretrial motions pending; severance has been granted where one defendant underwent a mental examination; severance has been granted where an interlocutory appeal was taken from a suppression motion affecting only one defendant. Thus, the Act, rather than speeding up the process in all respects, has caused more cases and more trials with greater inconvenience to the witnesses and cost to the taxpaying public, in addition to consuming needlessly court and attorney resources.

(6) The 90 day interim time limit for in-custody defendants — The issue whether the exclusions of Section 3161(h) apply to the 90 day interim time limits for in-custody defendants has caused a substantial amount of discussion and litigation. The Ninth Circuit in United States v. Tirasso, 532 F.2d 1298 (9th Cir. 1976) stated that the exclusions do not apply to the interim time limits for detained defendants. However, the District of Columbia Circuit ruled the other way in United States v. Corley, 548 F.2d 1043 (D.C. Cir. 1976). In April of 1976, the Judicial Conference of the United States recommended that Congress amend the Act to make clear that the exclusions of Section 3161(h) apply to the interim time limits of Section 3164. Such an amendment is obviously needed and is supported by the United States Attorneys.

(7) The 60 day limit for retrials following appeals and collateral attacks — Several United States Attorneys complained about the 60 day time limit to retry cases after a reversal on appeal or collateral attack. Oftentimes, the case is several years old by the time it returns for retrial. To be able to resurrect the case in 60 days would be the exception and not the rule. More often than not, the original trial attorney has left government service and the case agent or investigator has been transferred to another jurisdiction. Thus, a new attorney and agent must be assigned to the case and they need time to learn the facts, find the witnesses and evidence, and reconstruct the case. While it is true that the Act provides that the court may extend the time for retrials up to 180 days under Section 3161(e), it makes little sense to have a time limit that in most cases will have to be extended. Therefore, we would recommend that the time limit be expanded to 120 days following reversal on appeal or collateral attack with the proviso that the court can extend the time limit another 60 days.

In addition to the above specific problem areas, a number of United States Attorneys made general comments concerning the effects of the Speedy Trial Act. Four main points were made:

(A) The civil dockets are suffering and delays in reaching important civil cases are increasing. Indeed, some courts are unable to try any civil cases at all.

(B) It is unfair to the public to give a criminal defendant a windfall of an absolute dismissal simply because an arbitrary time limit has not been met, especially where there has been no actual prejudice to the defendant and the prosecutor is not at fault for the delay. Dismissal with prejudice should be permitted only where the defendant is prejudiced or there is a gross violation of the time limits which is the fault of the prosecution.

(C) The time limits of the Act are unrealistic and simply too short; the time limits should be expanded to a 60-30-90 day scheme, or to a flat 180 days from arrest to trial. In addition, the Court should have the authority to grant continuances for "good cause" and the parties should be able to stipulate to a waiver of the Act.

(D) Unless the necessary resources are allocated to the United States Attorney's Offices and the federal investigatory agencies and an adequate number of judges are provided, it will be unlikely that the Speedy Trial Act will be complied with in a number of jurisdictions, and as a result a number of criminal defendants, most of whom would have been convicted, will be set free.

I hope these comments of the United States Attorneys will be useful. I recognize that these comments are not supported by statistics. The reason is that the problems discussed are not actually susceptible of proof by statistics; there are too many variables to make them meaningful. Instead I have tried to present you with the informed views of those who have the experience of operating under the Speedy Trial Act on a day to day basis. The problems we have encountered are very real and will substantially increase as the ultimate time limits and sanctions become applicable unless the Speedy Trial Act is amended as suggested.

The comments in this letter are, of course, only the views of United States Attorneys and do not necessarily represent official policy of the Department of Justice. If this office or the Attorney General's Advisory Committee of United States Attorneys can be of further assistance to you and your committee, please call upon us.

Sincerely,

Earl J. Silbert

EARL J. SILBERT
United States Attorney

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OIAJ SURVEY METHOD

The OIAJ survey covered approximately 50 cases in each of the nine sample federal district courts. The districts (hereinafter the sample districts) were selected because taken together they were representative of all districts with regard to such characteristics of Assistant United States Attorneys (AUSA's), geographical location, and degree of compliance with the time limits of the Act. 1/ This was done to assure that the results, although based on these nine districts 2/ would be generalizable to the aggregate of all districts.

In each of these sample districts, a list of all cases filed and terminated in the 15-month period between January 1, 1977 and March, 1978 was obtained from the AOUSC. Cases recorded by the AOUSC as not in compliance with the 1979 time

1/ The number of AUSA's was used to categorize the size of United States Attorney's offices. "Small" offices were defined as having 15 or fewer AUSA's; "medium" offices as having more than 16 but fewer than 50 AUSA's and "large" offices as having more than 50. Geographic location was arranged into four areas: Northeast, Mid-Altantic and Southeast; Midwest; and Far West. Finally, district compliance was estimated from records gathered by the AOUSC for the court year 1977. Districts clustered into three general categories of compliance: "high compliance" districts in which the percentage of overall compliance falls above 70% of all criminal cases; "medium compliance" districts in which the percentage of overall compliance falls below 70% but above 50% of all criminal cases; and "low compliance" districts in which the percentage of overall net compliance falls below 50% of all criminal cases.

2/ The nine districts selected by this sampling procedure were Maryland, Western New York, Western North Carolina, Northern Illinois, Eastern Michigan, New Jersey, Oregon, Central California, and Massachusetts.

limits of the Act, for any interval, comprise the population of cases for this part of the survey. These cases were sampled to select at least fifty cases from each district which were representative of all such cases in the district. For each case the U.S. Attorney case files and court docket were reviewed in detail. Information on the characteristics of 460 cases was obtained from these files using a precoded form (Appendix F). Data were gathered on the offenses the defendants were alleged to have committed; the time intervals between arrest, indictment, arraignment and final disposition; the number and types of motions filed by prosecutors and defense attorneys; the number and types of motions granted by the court; and finally, any other observed sources of excludable and non-excludable processing time that were substantiated with dated documents in the United States Attorney's files or the court dockets.

Given the degree to which a more exhaustive analysis was precluded by such limitations as lack of systematic and accurate recordkeeping in the districts visited and time and budgetary constraints on the project, the description of the sources and types of delays that occur in these districts must be regarded as tentative.

Finally, interviews were conducted in the sample districts with federal judges, attorneys, clerks of the court and other administrative personnel, and members of the private bar who practiced in the federal court. Although not guided by a structured interview agenda, the discussions focused on the concerns noted in Section IB of the report.

OIAJ SURVEY DATA FORMS

SPEEDY TRIAL DATA CODING FORM

ID#____ (1-3)

CARD# 2 (4)

1. District: ____ (5-6)
2. Docket Number: ____ (7-13)
3. Defendant Number: ____ (14-15)

   ____ (16)
4. Date of Birth: ____ (17-22)
5. Number of Prior Convictions: ____ (23-24)
6. Referring Agency: ____ (25-26)
7. Number of Codefendants: ____ (27-28)
8. Release: P.R. (1) Cashbond (2) Detained (3) Other (4) ____ (29)
9. Number of Days Detained: ____ (30-32)
10. Original Charges:
    a. Offense Code: ____ (33-35)

       Number of Counts: ____ (36-38)

    b. Offense Code: ____ (39-41)

       Number of Charges: ____ (42-44)

    c. Offense Code: ____ (45-47)

       Number of Counts: ____ (48-50)

    d. Offense Code: ____ (51-53)

       Number of Counts: ____ (54-56)

11. Charges at Conviction:

a. Offense Code: (57-59)

Number of Counts: (60-62)

b. Offense Code: (63-65)

Number of Counts: (66-68)

c. Offense Code: (69-71)

Number of Counts: (72-74)

d. Offense Code: (75-77)

Number of Counts: (78-80)

ID# (1-3)

CARD# 3 4

11. Critical Dates (Code as "999999" if unknown)

Arrest (leave blank if no arrest): (5-10)

Indictment or Information: (11-16)

Indictment (1) Information (2) Unknown (9) (17)

Arraignment: (18-23)

Superceding Indictment or Information: (24-29)

Indictment (1) Information (2) Unknown (9) (30)

First Plea: (31-36)

Type G(1) NG(2) (37)

Final Plea: (38-43)

Type G(1) NG(2) (44)

Beginning of Trial: (45-50)

12. Disposition Other Than Conviction:

Dismissed (1) Acquitted (2) (51)

ID# _____ (1-3)

CARD# 4 (4)

13. Government Motions:

a. Type (Code Responses) _____ (5-6)

Granted Y(1) N(2) DK(9) _____ (4)

b. Type: _____ (8-9)

Granted: _____ (10)

c. Type: _____ (11-12)

Granted: _____ (13)

14. Defense Motions:

a. Type (Code Response) _____ (26-27)

Granted Y(1) N(2) DK(9) 28

b. Type: _____ (29-30)

Granted: 31

c. Type: _____ (32-33)

Granted: 34

d. Type: _____ (35-36)

Granted: 37

e. Type: _____ (38-39)

Granted: 40

f. Type: _____ (41-42)

Granted: 43

g. Type: _____ (44-45)

Granted: 46

PHASE I DELAY

ID# (1-3)

CARD# 5 (4)

REASON: (Code "999" IF LENGTH UNKNOWN)

NON-EXCLUDABLE TIME PERIODS (PHASE I)

Prosecution Deferred:

Type: (5-7)

Unavailability of Defense Attorney: (8)

Awaiting Investigative Report/Agency: (9-11)

Prosecution Under Consideration: (12-13)

Unavailability of Prosecutor: (14-16)

Fugitive: (17-19)

Other Custody: (20-22)

Plea Negotiations: (23-25)

Other: (26-28)

(29-31)

EXCLUDABLE TIME PERIODS (PHASE I)

Physical/Mental Examination: (32-34)

NARA Examination: (35-37)

State or Federal Trials on Other Charges: (38-40)

Interlocutory Appeals: (41-43)

Hearings on Pre-trial Motions: (44-46)

Transfers from Other Districts: (47-49)

Motion Under Advisement: (50-52)

Probation/Parole Revocation Hearing: (53-55)

EXCLUDABLE TIME PERIODS (PHASE I)

Deportation Hearing: (56-58)

Extradition: (59-61)

Prosecution Deferred (Mutual): (62-64)

Type: (65)

Unavailability of Defendant/Witness: (66-68)

Period of Mental/Physical Incompetence: (69-71)

Period of NARA Commitment: (72-74)

Superceding Indictment: (75-77)

ID# (1-3)

CARD# 6 (4)

EXCLUDABLE TIME PERIODS (PHASE I)

Awaiting Trial of Codefendant:

Ends of Justice: (5-7)

Grand Jury Time Extension 30 Days: (8-10)

Time Up to Withdraw Guilty Plea: (11-13)

Total Days Between Arrest and Indictment: (14-17)

PHASE II DELAY

Prosecution Deferred: (18-20)

Type: (21)

Unavailability of Defense Attorney: (22-24)

Awaiting Investigative Report/Agency: (25-27)

NON-EXCLUDABLE TIME PERIODS

Prosecution Under Consideration: (28-30)

Unavailability of Prosecutor: (31-33)

Fugitive: (34-36)

Other Custody: (37-39)

Plea Negotiations: (40-42)

Other: (43-45)

EXCLUDABLE TIME PERIODS (PHASE II)

Physical/Mental Examination (46-48)

NARA Examination: (49-51)

State or Federal Trials on Other Charges: (52-54)

Interlocutory Appeals: (55-57)

Hearings on Pre-trial Motions: (58-60)

Transfers from Other Districts: (61-63)

Motion Under Advisement: (64-66)

Probation/Parole Revocation Hearing: (67-69)

Deportation Hearing: (70-72)

Extradition: (73-75)

Prosecution Deferred (Mutual): (76-78)

Type: (79)

ID# (1-3)

CARD# 7 4

EXCLUDABLE TIME PERIOD (PHASE II)

PHASE II DELAY (Continued)

Unavailability of Defendant/Witness: (5-7)

Period of Mental/Physical Incompetence: (8-10)

Period of NARA Commitment: (11-13)

Superceding Indictment: (14-16)

Awaiting Trial of Codefendant: (17-19)

Ends of Justice: (20-22)

Grand Jury Time Extension 30 Days: (23-25)

Time up to Withdraw Guilty Plea: (26-28)

Total Days Between Indictment and Arraignment: (29-32)

NON-EXCLUDABLE TIME PERIODS (PHASE III)

PHASE III DELAY

Awaiting Department's Instructions: (33-35)

Prosecution Deferred/Reason: (36-38)

Type: (39)

Unavailability of Defense Attorney: (40-42)

Awaiting Investigative Report/Agency: (43-45)

Prosecution Under Consideration: (46-48)

Unavailability of Prosecutor: (49-51)

Fugitive: (52-54)

Other Custody: (55-57)

Plea Negotiations: (58-60)

Other: (61-63)

EXCLUDABLE TIME PERIODS (PHASE III)

Physical/Mental Examination: (64-66)

NARA Examination: (67-69)

State or Federal Trials on Other Charges: (70-72)

Interlocutory Appeals: (73-75)

Hearings on Pre-trial Motions: (76-78)

PHASE III (Continued)

ID#_____

CARD# 8 4

Transfers from Other Districts:	(5-7)
Motion Under Advisement:	(8-10)
Probation/Parole Revocation Hearing:	(11-13)
Deportation Hearing:	(14-16)
Extradition:	(17-19)
Prosecution Deferred (Mutual):	(20-22)
Type:	(23)
Unavailability of Defendant/Witness:	(24-26)
Period of Mental/Physical Incompetence:	(27-29)
Period of NARA Commitment:	(30-32)
Superceding Indictment:	(33-35)
Awaiting Trial of Codefendant:	(36-38)
Ends of Justice:	(39-41)
Grand Jury Time Extension 30 Days:	(42-44)
Time Up To Withdraw Guilty Plea:	(45-47)
Total Days Between Arraignment and Final Disposition or Trial:	(48-51)

OFFENSE CODES

Violent Personal Offenses

011 Homicide

012 Rape (forcible): (Code other sex offenses as miscellaneous)

013 Robbery

014 Aggravated Assault (with weapon or serious injury): (Code simple assault as miscellaneous)

Burglary, Larceny, and Stolen Property

022 Mail theft or possession of stolen mail -- postal employee

029 Mail theft or possession of stolen mail -- other

023 Theft of government property

024 Theft from interstate shipment (TFIS)

025 Transportation or possession of stolen motor vehicle (Dyer Act)

026 Interstate transport or possession of other stolen property (ITSP): Except securities -- See 051

027 All other theft, transport, or possession of stolen property

028 Bank Robbery

Drug-related Offenses

031 Possession of any controlled substance

032 Sale, distribution, or possession with intent to sell or distribute marijuana or hashish

033 Manufacture of marijuana or hashish

034 Importation of marijuana or hashish

036 Sale, distribution, or possession with intent to sell or distribute other drugs

037 Manufacture of other drugs

038 Importation of other drugs

Fraud and Embezzlement

041 Mail fraud

042 Income tax fraud

043 False statements (e.g., giving false statements in bank or job application or welfare application)

044 Embezzlement

045 Miscellaneous fraud

Forgery and Counterfeiting

051 Transportation of forged securities

052 Counterfeiting

053 Other forgery (e.g., forgery U.S. treasury check)

054 Forgery and stolen mail

Weapons, Firearms and Explosives

061 Illegal possession or transfer of or dealing in, with no reference to use of weapon in other offense

062 Illegal possession or transfer of or dealing in, with reference to use of weapon in other offense

Escape

071 Failure to appear/bond jumping/ other escape

072 Unlawful flight to avoid prosecution (UFAP) (non-violent state offense)

073 Unlawful flight to avoid prosecution (UFAP) (violent state offense)

Extortion, Racketeering, and Threats (includes white slave traffic)

Bribery

Perjury

Selective Service

Miscellaneous Offenses

121 Postal Offenses (except mail theft and mail fraud)

122 Liquor laws (IRS)

123 Gambling and lottery offenses

124 Immigration offenses

125 All other

126 Civil rights

127 Simple Assault

128 Bootleg tapes (copyright)

129 Custody kidnapping

OIAJ OVERALL COMPLIANCE ESTIMATION METHOD

The distribution of delays observed in the OIAJ sample data, together with the national statistics reported by the AOUSC, was employed to estimate the overall level of compliance with the Act. The relative proportions of delay occurring at each interval were established initially from the sample data and then used to estimate relative incidence of delay in the national figures, taking into account the fact that some cases experienced delay at more than one point in processing. Unless delay occurring during more than one interval in a case is accounted for, levels of non-compliance at any one interval will appear to be higher than they are in fact, and a biased estimate of overall compliance will result.

The relative proportions of cases observed in the OIAJ sample data by interval and type of delay are as follows:

Type of Delay	Percentage
Interval 1 only	15
Interval 2 only	16
Interval 3 only	36
Interval 1 and 2	6
Interval 2 and 3	17
Interval 1 and 3	4
Interval 1, 2, and 3	6
	100

The levels of non-compliance at any interval may be described in terms of the types of delay that occur during the interval. The incidence of delay at Interval 1, for example, is composed of: (a) cases that experience delay only at this stage; (b) cases that experience delay at this stage and in Interval II; (c) cases that experience delay at this stage and in Interval III; and (d) cases that experience delay across all three stages or intervals. In the OIAJ sample of cases, these specific types of delay represent 31 percent of all cases.

The total number of cases reported by the AOUSC as falling out of compliance during Interval 1 was 1,604. Using the OIAJ figures on the distribution of delays as representative of all delays that occur, it appears that the AOUSC figure represents 31 percent of all cases experiencing delay -- accounting for overlapping delays in cases -- can be estimated from the average of these figures at 5,174. This figure represents 17 percent of all criminal cases terminated in the federal courts to which the provisions of the Act apply. Consequently, overall compliance is estimated at 83 percent of all federal criminal cases for the most recent court year.

ANALYSIS OF VALIDITY OF AOUSC DATA

One aspect of the OIAJ study consisted of attempting to determine the accuracy of AOUSC data with respect to the reported frequency of delay during each interval and to assess whether those data provide a reasonably accurate description of current compliance with the Speedy Trial Act.

Relative frequency of delay shown by the AOUSC data for each interval was compared with relative frequency of delay shown by the OIAJ data for the same interval. Because all cases examined by OIAJ encountered delay at some stage of the process, we would expect that a higher proportion of these cases than of the AOUSC cases would have experienced delays at each stage of processing. This is what the comparison found.

Arrest to Indictment

The AOUSC reports that, for the period between July 1, 1977, and June 30, 1978, 18.5 percent of all criminal cases in the nine sample districts experienced delays in the period between arrest and indictment. 1/ In low compliance districts, 36.5 percent experienced delays during the period; among medium compliance districts, 15.5 percent experienced delays; and among high compliance districts, 3.4 percent experienced delays. 2/

Among the sample of cases in the OIAJ survey, 43 percent experienced delays between arrest and indictment. This level

1/ Third Report, p. D 1

2/ Third Report, pp. D1-D18

is significantly greater than that observed by the AOUSC and thus is expected. Of the cases sampled in "low" compliance districts, 46 percent experienced delays at this interval of processing.

Among "medium" and "high" compliance districts, the proportions of sample cases that experienced delays in this interval were, respectively, 39.7 and 20 percent. These levels are significantly larger than those reported by the courts. Thus, the expected disparities between the levels of delay encountered by all criminal cases and those in the OIAJ survey are observed .

Indictment to Arraignment

The AOUSC data indicate that appriximately 10.9 percent of all cases terminated during the court year 1977 required more than ten days between indictment and arraigment. 3/ In "low" compliance districts, 18 percent experienced delays during this interval in "medium" compliance districts, 11.4 percent experienced such delays; and in "high" compliance districts, 3.4 percent experienced such delays.

Among all cases in the study sample, 36.3 percent required more than ten days between indictment and arraignment. In "low" compliance districts, 43 percent of those sampled experienced

3 / Third Report, E1

4/ Third Report, E1-E18

delays at this stage; in "medium" compliance districts, 42 percent experienced delays. Finally, 24 percent of the defendants in "high" compliance districts encountered delays during this interval. Again, these are significantly greater than those observed by the AOUSC.

Arraignment to Trial or Disposition

The AOUSC data indicate that 25.2 percent of all criminal cases experienced delays between arraignment and trial or disposition. 5/ Delays were most frequent in "low" compliance districts -- 43.1 percent of criminal cases required more than sixty days to process. In "medium" compliance districts, 22.9 percent encountered delays. Finally, delays occurred in 9.6 percent of all cases prosecuted in "high" compliance districts. 6/

The incidence and levels of delay encountered in cases sampled by OIAJ in these districts are much higher than those observed for all criminal defendants as reported by the AOUSC. Approximately 51 percent of the sampled case over all nine districts required more than sixty days to reach trial or disposition. Among "low" compliance districts, over 63 percent required more than sixty days; in medium" compliance districts, almost 46 percent required this much time; and in "high" compliance

5 / Third Report, F2

6/ Third Report, F2-F18

districts, just 44 percent required over sixty days.

In sum, the data sampled by OIAJ on individual cases in the nine districts generally supports the levels and incidence of delay reported by the AOUSC. The sampled cases disproportionately experienced longer processing time and higher levels of delays than the general population of criminal cases. This suggests that the data reported by the AOUSC provides a reasonably valid description of compliance with the Act.

STATISTICAL TABLES

Table I-1

Total Delays in Processing

Length of Delay in Days	Frequency of Delays	%
0*	124	56
1-30	39	17
31-90	34	15
91+	22	12
	219	100

*Includes all cases in which delays are negative; that is, less time was required to process these defendants than the Speedy Trial Act requires.

Table I-2

Delays in Processing: Arrest to to Indictment

Length of Delays in Days	Frequency of Delays	%
0*	147	57
1-10	12	3
11-30	34	13
31+	64	25
	257	100

* Includes all cases in which delays are negative; that is less time was required to process these defendants than the Speedy Trial Act requires.

58-721 O - 80 - 40

Table I-3

Delays in Processing: Indictment to Arraignment

Length of Delays in Days	Frequency of Delays	%
0*	278	64
1-10	78	18
11-30	43	10
31+	35	8
	434	100

*Includes all cases in which delays are negative; that is, less time was required to process these defendants than the Speedy Trial Act requires.

Table I-4

Delays in Processing: Arraignment to Final Disposition

Length of Delays in Days	Frequency of Delays	%
0*	203	51
1-10	40	10
11-30	45	11
31+	118	28
	405	100

*Includes all cases in which delays are negative; that is, less time was required to process these defendants than the Speedy Trial Act requires.

TABLE I-5

Median Delay Ranked by Offense 1/

Offense Type	Median Delay in Days	Rank	(N)
Drug Related (Sale & Distribution)	40.0	1	(45)
Forgery & Counterfeiting Offenses	10.0	2	(47)
Weapons & Firearms Offenses	1.5	3	(46)
Fraud & Embezzlement Offenses	0.0	4	(59)
Other Offenses (Postal, Gambling, Civil Rights)	0.0	4	(38)
Burglary, Larceny & Stolen Property	0.0	4	(79)
Violent Personal Offenses	0.0	4	(21)
Escape (Unlawful Flight to Avoid Prosecution)	0.0	4	(2)

1/ Rankings are made on disaggregated lengths of delay for offenses resulting in conviction.

Table I-6

Delay by Case Disposition 1/

Length of Delays in Days	Plead Guilty	Convicted at trial	Charges Dismissed	Acquitted
0*	155 (55)	1 (33)	20 (54)	7 (44)
1-30	46 (16)	2 (67)	8 (22)	2 (12)
31-90	53 (19)	0 (0)	4 (11)	5 (31)
90+	28 (10)	0 (0)	5 (13)	2 (12)
	282 (100)	3 (100)	37 (100)	16 (99)

1/ The numbers in parentheses represent the percentage of defendants observed in the categories of delay by disposition type.

*Includes all cases in which delays are negative; that is, less time was required to process these defendants than the Speedy Trial Act requires.

Table I-7

Delay by the Number of Defendants 1/

Length of Delay in Days	Number of Defendants 1	2+
0*	135 (59)	67 (44)
1-30	29 (13)	111 (27)
31-90	47 (21)	23 (15)
90+	16 (7)	20 (13)
	227 (100)	151 (100)
Median Delay	0.0	3.3

1/ The numbers in parentheses represent the percentage of defendants observed in the categories disposition type by the length of delay.

*Includes all cases in which delays are negative; that is, less time was required to process these defendants than the Speedy Trial Act requires.

Table I-8

Delay by Total Counts Convicted 1/

Length of Delays in Days	Number of Counts 1	2-5	6+
0*	133 (56)	36 (51)	12 (66)
1-30	31 (13)	17 (24)	4 (22)
31-90	48 (20)	11 (16)	1 (6)
90+	26 (11)	6 (9)	1 (6)
	N = 238	70	18

1/ The numbers in parentheses represent the percentages of defendants observed in the category of counts upon which they were convicted by length of delay.

*Includes all cases in which delays are negative; that is, less time was required to process these defendants than the Speedy Trial Act requires.

Table I-9

Delay by Total Motions Granted 1/

Length of Delay in Days	Motions Granted 0	1	2+
0*	163 (55)	34 (60)	15 (47)
1-30	48 (16)	11 (19)	5 (15)
31-90	56 (19)	10 (17)	6 (19)
90+	31 (10)	2 (4)	6 (19)
	298 (100)	57 (100)	32 (100)

1/ Numbers in parentheses represent the percentage defendants in the categories of motions granted by length of delay.

*Includes all cases in which delays are negative; that is, less time was required to process these defendants than the Speedy Trial Act requires.

Table I-10

Delay By Types of Motions Granted 1/

Length of Delay in Days	Motions: Dismiss Part of Indictment	Suppress Evidence	Reduction of Bail	Bill of Particulars	Request Continuance
0*	6 (41)	0 (0)	8 (89)	4 (57)	19 (53)
1-30	2 (13)	1 (33)	0 (0)	0 (0)	7 (19)
31-90	5 (33)	1 (33)	1 (11)	0 (0)	6 (17)
90+	2 (13)	1 (33)	0 (0)	3 (43)	4 (11)
	15 (100)	3 (100)	9 (100)	7 (100)	36 (100)

1/ The entries in this table represent the number of defendants in whose case the motion in question was granted. Numbers in parentheses represent the percentage of defendants in the categories of motions granted by length of delay.

*Includes all cases in which delays are negative; that is, less time was required to process these defendants than the Speedy Trial Act requires.

Table I-11

The Observed Incidence of Excludable Sources of Processing Time 1/

Source	Frequency	%
Physical or Mental Examination (includes NARA Examination)	20	7
State or Federal Trials on Other Charges	19	7
Hearings on Pretrial Motions	54	18
Transfers from Other Districts	32	11
Motions Under Advisement	65	22
Prosecution Deferred by Mutual Agreement	12	4
Unavailability of the Defendant or a Witness	52	18
Period of Mental or Physical Incompetence	6	2
Awaiting Trial of Codefendants	13	4
Interlocutory Appeals	2	1
Continuance Granted in "Ends of Justice"	14	5
Others (Superseding Indictments, Extension of Grand Jury time, Time up to Withdraw Guilty Plea and other Miscellaneous Proceedings)	6	2
N =	295	100

1/ This table reports the observed evidence of sources of processing time excluded under the provisions of the Act.

Table I-12

Excludable Sources of Processing Time Ranked by Median Estimated Length of Processing Time

Source	Median	N
State or Federal Trials on Other Charges	62.0	18
Period of Mental or Physical Incompetence	49.0	6
Physical or Mental Examination (includes NARA Examination)	45.0	10
Interlocutory Appeals	45.0	2
Awaiting Trial of Co-defendant	35.0	13
Prosecution Deferred by Mutual Agreement	32.5	11
Continuances Granted in the "Ends of Justice"	31.0	14
Motions Under Advisement	25.0	64
Unavailability of Defendant or a Witness	19.5	43
Transfers From Other Districts	14.0	31
Others (Superceding Indictments, Extension of Grand Jury Time, Time up to Withdraw Guilty Plea and Other Miscellaneous Proceedings)	10.0	6
Hearings on Pre-Trial Motions	2.0	54

Table I-13

The Observed Incidence of Sources of Delay 1/

Source	Frequency	%
Plea Offers Under Consideration	46	23
Awaiting Investigative Reports from Agencies	33	17
Unavailability of Defense Attorneys	30	15
Prosecution Under Consideration	15	8
Unavailability of Prosecutor	9	6
Others (Defendant cooperating in ongoing investigations, end of court term, court unable to schedule case, etc.)	61	31
	194	100

1/ This table reports observed incidences of sources of delay not excluded under provisions of the Speedy Trial Act.

Table I-14

Sources of Delay Ranked
by Median Estimated Length of Delay

Sources	Median Delay in Days	N
Prosecution Under Consideration	50.0	(10)
Unavailability of Prosecutor	30.0	(8)
Awaiting Investigative Reports from Agencies	26.0	(25)
Others (Defendant cooperating in ongoing investigations, end of court term, court unable to schedule case, etc.)	25.0	(61)
Unavailability of Defense Attorney	20.0	(30)
Plea Offers Under Consideration	16.0	(46)

Table I-15

Total Delays in Processing Defendants by District Compliance

Length of Delay in Days	Low Compliance Districts		Medium Compliance Districts		High Compliance Districts	
	Frequency of Delay	%	Frequency of Delay	%	Frequency of Delay	%
0*	26	34	41	53	58	75
1-30	12	16	7	9	10	13
31-90	22	30	15	20	6	8
91+	15	20	14	18	3	4
	75	100	77	100	77	100

* Includes all cases in which delays are negative; that is, less time was required to process these defendants than the Speedy Trial Act requires.

Table I-16

Delays in Processing Defendants by District Compliance: Arrest to Indictment 1/

Length of Delay in Days	Low Compliance Districts		Medium Compliance Districts		High Compliance Districts	
	Frequency of Delay	%	Frequency of Delay	%	Frequency of Delay	%
0*	46	54	33	39	68	80
1-10	3	3	6	7	2	2
11-30	11	13	18	21	7	9
31+	27	30	28	33	8	7
	87	100	85	100	85	100

* Includes all cases in which delays are negative; that is, less time was required to process these defendants than the Speedy Trial Act requires.

Table I-17

Delays in Processing Defendants by District Compliance: Indictment to Arraignment

Length of Delay in Days	Low Compliance Districts		Medium Compliance Districts		High Compliance Districts	
	Frequency of Delay	%	Frequency of Delay	%	Frequency of Delay	%
0*	78	59	94	58	103	76
1-10	33	24	35	22	13	9
11-30	14	10	20	12	9	7
31+	10	7	12	7	11	8
	135	100	161	100	136	100

* Including all cases in which delays are negative; that is, less time was required to process these defendants than the Speedy Trial Act requires.

58-721 O - 80 - 41

Table I-18

Delays in Processing Defendants by District Compliance: Arraignment to Final Disposition

Length of Delay in Days	Low Compliance Districts		Medium Compliance Districts		High Compliance Districts	
	Frequency of Delay	%	Frequency of Delay	%	Frequency of Delay	%
0*	50	38	80	56	75	58
1-10	9	7	11	8	17	13
10-30	9	7	20	14	19	14
31+	61	48	33	23	19	14
	129	100	144	100	130	100

* Includes all cases in which delays are negative; that is, less time was required to process these defendants than the Speedy Trial Act requires.

Table I-19

The Observed Incidence of Sources of Delay by District Compliance

Source	Low Compliance Districts		Medium Compliance Districts		High Compliance Districts	
	Frequency	%	Frequency	%	Frequency	%
Plea Offers Under Consideration	11	17	20	25	15	40
Awaiting Investigative Reports from Agencies	14	22	14	17	2	5
Unavailability of Defense Attorneys	6	9	19	24	5	12
Prosecution under Consideration	4	6	4	5	3	8
Unavailability of the Prosecutor	1	2	4	5	3	8
Other (Defendant cooperating in ongoing investigations, end of court term, court unable to schedule case, etc.)	29	44	19	24	11	27
	65	100	80	100	40	100

Table I-20

Median Estimated Length of Delay by Source and District Compliance

Sources	Low Compliance District		Medium Compliance District		High Compliance District	
	Median Delay in Days	N	Median Delay in Days	N	Median Delay in Days	N
Plea Offers Under Consideration	15.0	11	20.0	20	21.0	16
Awaiting Investigative Reports from Agencies	26.0	14	31.0	14	--	*
Unavailability of Defense Attorneys	10.0	6	21.0	19	5.0	5
Prosecution Under Consideration	--	*	--	*	--	*
Unavailability of the Prosecutor	--	*	--	*	--	*
Other (Defendant cooperating in ongoing investigations, end of court term, court scheduling probelm, etc.)	23.0	29	21.0	9	25.0	.1

SECOND CIRCUIT COURT OF APPEALS
OPINION: IN THE MATTER OF SAM FORD

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 30th day of March, one thousand nine hundred and seventy-eight.

Present:
Hon. Wilfred Feinberg,
Hon. Walter R. Mansfield,
Hon. James L. Oakes,
Circuit Judges.

In the matter of
SAM FORD,
Petitioner. 78-3011

ORDER

In Stans v. Gagliardi, 485 F.2d 1290 (2d Cir. 1973), this court held, Judge Lumbard dissenting, that it was without power, either by way of appeal or mandamus, to set aside an order setting a trial date, no matter how serious the alleged consequences for a defendant. Although this is at least as strong a case for the grant of mandamus as was Stans, we adhere to its majority ruling. Here as in Stans, however, we express the hope that the district judge will reconsider his denial of the requested continuance until counsel of petitioner's choice (Richard Kuh, Esq.) completes his prior commitment to the state court for the trial of a double homicide case, a time which -- it was represented to us on argument -- will occur in mid-May, 1978, only four weeks after the date set for trial below.

The 22-count indictment in this not uncomplicated securities fraud/conspiracy/perjury case was filed on March 2, 1978, and follows upon fairly lengthy SEC and grand jury investigations. Counsel who had been retained prior to the indictment appeared at the arraignment of petitioner on March 9 and informed the court below of his commitment to try the state court homicide case commencing March 20, and of the anticipated length of the state court trial as five weeks (since altered to six weeks by the state court judge). The district judge informed counsel that as chairman of "the committee which puts the 60-Day Rule into effect," that is the so-called "pilot group," he "would like to [try this case] in April" (Mar. 9, 1978, Hearing, Tr. 6), that "you'll have to get out of this case," and that

> The 60-Day Rule is flat. That's all there is to it ... It will get you nowhere to argue against the 60-Day Rule. I didn't make it. I'm stuck with it and so are you and all of us .... [Y]ou are here before a Judge who is directed by the Circuit Court, 60 Days.

Id. at 6-7.

The 60-Day Rule* to which the court below referred is the time limit of sixty days after arraignment established by 18 U.S.C. § 3161(c), the Speedy Trial Act, for trial of defendants. The effective date under that Act of this requirement is July 1, 1979. Id. § 3163(c). Under the Interim Speedy Trial Plan of the United States District Court for the Southern District of New York, the effective date of the 60-day rule is also July 1, 1979, Rule 5, and in the interim, pursuant to 18 U.S.C. § 3166, the Plan contains a 120-day requirement for arraignments such as the one at bar after July 1, 1977, but before July 1, 1978. Rule 5(a)(3). Thus absent the "pilot group" and its experimentation, no speedy trial limit whatsoever would have been involved in fixing the trial date for mid-May.

With at least the tacit approval of the Second Circuit Court's speedy trial committee (two of whose three members sit on this panel), a "pilot group" of judges in the Southern District, chaired by Judge MacMahon (who are also serving as the pilot judges for the "Courtran II" or computerized case management information system) were asked to "[institute] the Act's time limits on an accelerated basis, so that we can identify problems and work out solutions before the permanent time limits become effective." (Letter of Michael M. Martin, Reporter, Speedy Trial Planning Group, Southern District of New York, Mar. 15, 1976, to Second Circuit Executive.) This pilot group has evidently been functioning with great efficiency and eclat since this is the first case coming to our attention in which a genuine problem has been "identified."

The problem is, of course, that imposition of the Speedy Trial Act's time limits, whether under the statute itself, an interim plan or a pilot program, may unduly interfere with a criminal defendant's right to counsel of his own choosing under the Sixth Amendment.

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* We note that even under a 60-day time limit, trial could have been scheduled as of May 8.

Such a right is obviously subject to limitations of reasonableness, but we see none such involved here. Here there is no question of counsel-juggling, cf. Rastelli v. Platt, 534 F.2d 1011 (2d Cir. 1976), or counsel's failure adequately to inform the trial court of his state court commitments, In re Sutter, 543 F.2d 1030 (2d Cir. 1976), or even of an unduly long commitment elsewhere. Mr. Kuh's commitment to the State Supreme Court here was made prior to petitioner's arraignment, and he promptly informed the district court of the commitment. No attempt has been made to delay for delay's sake; rather it was represented to us by Mr. Kuh, and we accept his representation, that he will be ready to commence trial at the conclusion of his homicide case and irrespective of other commitments.

Under 18 U.S.C. § 3161(h)(8)(A), applicable also to the Interim Plan (Rule 10(a)) (and by implication to the Pilot Group's Experimental Plan), continuances may be granted (and the period of delay caused thereby accordingly excluded) where the judge explicitly finds "that the ends of justice served by taking such action outweigh the best interest of the public and the defendant in a speedy trial ...." Under § 3161(h)(8)(B), the "factors, among others," for the judge to consider in making such a determination clearly do not prevent the judge's grant of a continuance here. In other words, in the present circumstances we see no reason to prevent the judge from granting a continuance to a set date in mid-May or, say, the first Monday following completion of the state court trial in question, whichever date is earlier. And we see good reason to grant such a continuance as a matter of basic fairness or "in the interests of justice" and in view of the constitutional aspects of not doing so, see Stans, supra, 485 F.2d at 1292; Ungar V. Sarafite, 376 U.S. 575 (1964); Chandler v. Fritag, 348 U.S. 3 (1954). The Speedy Trial Act is not an inflexible document. United States v. Lustig, 555 F.2d 737, 744-45 & n.6 (9th Cir. 1977). It surely was enacted with the right to counsel of one's choice in mind, as well as the necessity, if that counsel is required to resign, of a reasonably adequate time for preparation by new counsel. Expedition, even under the Speedy Trial Act, is a means to justice, not the end.

Absent reconsideration below, it will be open on appeal following trial, Stans, supra, 485 F.2d at 1292, to urge the considerations here presented.

Petition for writ of mandamus denied.

/s/ Wilfred Feinberg

/s/ Walter R. Mansfield

/s/ James L. Oakes

OIAJ MODEL OF DELAY

Because the organizational structure of districts influences general rates at which defendants are processed, an important part of the project examined delays over all 94 districts to identify how such delays are linked to the work of the courts and the United States Attorneys.

Analysis of the work and structure of the courts and United States Attorneys for the period between July 1, 1976 and June 30, 1977, is based on a statistical model of delay that was developed to estimate:

- the linkages between aggregate delays in processing defendants and the systemic characteristics of districts; and
- the possible effects of changes in litigation practices or in prosecutorial and judicial resources on delays in criminal cases and the level of civil backlogs in the courts.

First, a model similar to that shown in Figure 1 (attached) was created to study the work of the court and the United States Attorneys. An alternative form of this model is presented Figure 2. In both diagrams, delays among all districts are equated to the productivity of the courts, United States Attorneys, and defense attorneys, as well as to the number of pending civil and criminal cases.

Systematic data for all 94 districts on the work of defense attorneys (public defenders, private defense attorneys, and all others) are not available. As a result, the model used here (Figure 3) describes delay solely in terms of the work of the United States Attorneys and the courts. The intake policies

and work of the United States Attorneys included in the model on a district-by-district basis for court year 1977 are measured by the average number of AUSA's, the total number of criminal case terminations per AUSA, the total number of court hours per AUSA, the volume of criminal matters filed with the United States Attorney, the volume of criminal and civil cases filed in the courts by the United States Attorneys, and the volume of pending criminal and civil cases in each United States Attorneys office. Measures of the work of the court for 1977 included the total number of active judges and magistrates, the volume of civil and criminal cases filed, the number of criminal and civil cases terminated per judge (and magistrate), the total number of court trials conducted per judge, the number of criminal and civil cases pending from the previous year, and the prosecutor-judge ratio. Finally, one measure of delay is used -- the average percentage of cases falling out of compliance in 1977 over the three phases of prosecution. Descriptive statistics on these variables are presented in Table K-1.

The "effects" of each variable on delay are derived from the correlations among the variables reached by using a multi-equation method for analyzing statistical correlations. This method, LISREL, is discussed in depth by Joreskog. 1/ The statistical solution to the model is available from the authors upon request.

1/ Joreskog, K. G., "A General Method for Estimating a Linear Structural Equation System," In Goldberger, A. S. and Duncan, O.D. eds. Structural Equation Models in the Social Sciences, New York: Seminar Press, 1973, pp. 85-112.

FIGURE 1

A GENERAL STRUCTURAL MODEL OF AGGREGATE DELAYS IN CRIMINAL CASES

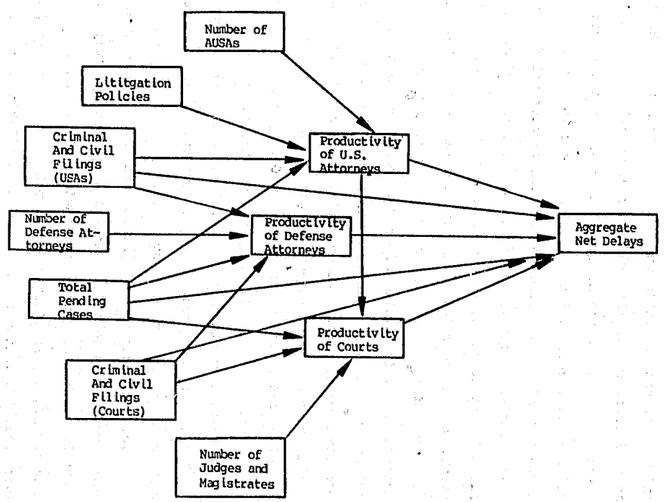

FIGURE 2

STRUCTURAL COMPONENTS OF DELAY AND PRODUCTIVITY IN CRIMINAL LITIGATION

Aggregate Net Delay in Criminal Cases	=	Productivity of Courts, U.S. Attorneys and Defense Attorneys	+	Total Pending Criminal Cases	+	Total Pending Civil Cases in Courts and U.S. Attorney Offices
Aggregate Productivity of U.S. Attorneys	=	Lititgation Policies of U.S. Attorneys	+	Criminal and Civil Case Filings	+	Pending Civil and Criminal Cases + Available Office Staff
Aggregate Productivity of Courts	=	Criminal and Civil Case Filings	+	Pending Civil and Criminal Cases	+	Available Judges and Magistrates
Aggregate Productivity of Defense Attorneys	=	Criminal Case Filings	+	Pending Criminal Cases	+	Available Defense Attorneys

FIGURE 3

A STRUCTURAL MODEL OF AGGREGATE DELAY IN FEDERAL CRIMINAL CASES

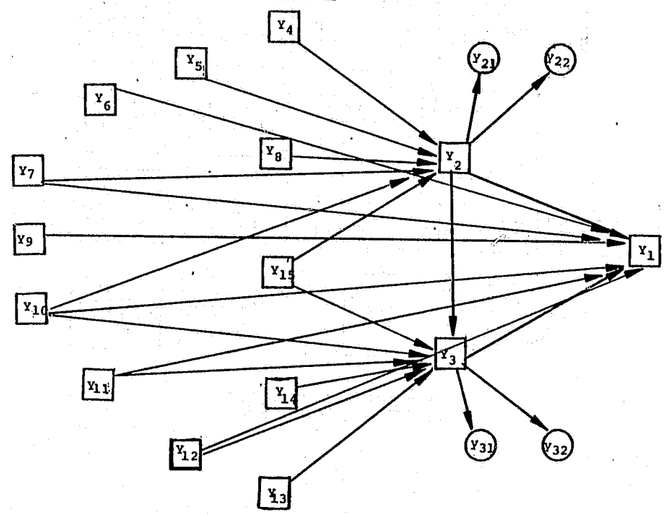

Figure 3 (continued)

A STRUCTURAL MODEL OF AGGREGATE DELAY IN FEDERAL CRIMINAL CASES

Where:

Y_1 = Average percentage of defendants out of compliance over all three time intervals (1977)

Y_2 = Workload of United States Attorneys (1577)
- Y_{21} = Total criminal cases terminated per AUSA
- Y_{22} = Total court hours per AUSA

Y_3 = Workload of Federal Judges (1977)
- Y_{31} = Total cases terminated per Judge
- Y_{32} = Total trials per Judge

Y_4 = Ratio of criminal matters filed with U.S. Attorney to Criminal cases filed by U.S. Attorney (1977)

Y_5 = Ratio of criminal cases filed to civil cases filed by U.S. Attorney (1977)

Y_6 = Civil cases pending (U.S. Attorneys,1976)

Y_7 = Criminal cases filed (U.S. Attorneys,1977)

Y_8 = Average number of AUSAs (1977)

Y_9 = Civil cases filed (U.S. Attorneys , 1977)

Y_{10} = Criminal cases pending (1977)

Y_{11} = Civil cases pending (Courts,1976)

Figure 3 (continued)

A STRUCTURAL MODEL OF AGGREGATE DELAY IN FEDERAL CRIMINAL CASES

Where:

Y_{12} = Criminal cases filed (Courts , 1977)

Y_{13} = Civil cases commenced (Courts ,1977)

Y_{14} = Number of Judges and Magistrates (Full-time) 1977

Y_{15} = Ratio of AUSAs to Judges (1977)

Table A-1

THE STRUCTURAL CHARACTERISTICS OF THE COURTS AND UNITED STATES ATTORNEYS: 1977

Variable	Mean (94)*	Standard Deviance (94)
Average Net Percentage of Defendants out of Compliance	15.1	12.6
Criminal Cases Terminated per AUSA	41.7	27.2
Total Court Hours per AUSA	344.6	173.3
Total Cases Terminated Per Judge	309.5	161.5
Total Trials Per Judge	54.7	42.2
Ratio of Criminal Matters Received to Criminal Cases Filed (USA)	4.2	2.0
Criminal Cases Filed (USA)	425.0	374.8
Civil Cases Filed (USA)	524.3	433.6
Civil Cases Commenced (Courts)	603.6	622.7
Criminal Cases Pending (1976)	132.9	157.8
Civil Cases Pending (Courts:1976)	1491.4	1695.3
Criminal Cases Filed (Courts)	440.6	398.8
Civil Cases Commenced (Courts)	1389.0	1200.7
Average Number of AUSAs	14.2	18.3
Total Number of Judges (includes Full-time Magistrates)	6.0	5.3
Ratio of AUSAs to Judges	2.2	.99

*Numbers in paratheses represent the numbers of districts upon which these statistics are based.