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AN OUTLINE AND APPRAISAL OF THE FEDERAL SPEEDY TRIAL ACT

*by Frederick B. Lacey**

On January 3, 1975, President Ford signed Public Law 93-619, now known as the Speedy Trial Act [Act] of 1974.[1] The avowed purpose of the Act, according to Congress, was "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 Act has the dual objective of assuring the defendant and the public of a speedy trial.[3] Its effect is to accelerate the time between the apprehension of an accused and the final resolution of the case at trial.

A defendant's right to a speedy trial is guaranteed by the Sixth Amendment, which provides in part that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury." This right was slow in its decisional development.[4] Indeed, not until 1967, in *Klopfer v. North Carolina*,[5] was this right applied to the states through the Fourteenth Amendment. In 1972, in *Barker v. Wingo*,[6] the Court stated the criteria for measuring whether a speedy trial had been denied. It established a balancing test of four factors: the length of the delay, the reason for the delay, the defendant's assertion of his or

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1 Speedy Trial Act of 1974, Pub. L. No. 93-619, 88 Stat. 2076, codified at 18 U.S.C. § 3161 *et seq.* (Supp. 1976).

2 1974 U.S. CODE CONG. & AD. NEWS 7402.

3 Congress specifically stated that "the Sixth Amendment is a right of the community as well as of any particular defendant." S. Rep. No. 1021, 93 Cong., 2d Sess. 15 (1974) [hereinafter cited as S. Rep. No. 1021].

4 In 1905, the Supreme Court held in Beavers v. Laubert, 198 U.S. 77 (1905) that the right to a speedy trial is necessarily relative. It is consistent with delays and depends upon circumstances.

5 386 U.S. 213 (1967).

6 407 U.S. 514 (1972).

her right, and the delay-caused prejudice to the defendant.[7] At that time it emphasized the importance of the right to both the accused and the public.[8]

At approximately the same time, a federal rule change was taking place requiring each federal district court to adopt a plan to promote the rapid disposition of criminal cases. This requirement, Rule 50(b) of the Federal Rules of Criminal Procedure, became effective in April of 1972.[9] In 1971, however, the Senate Judiciary Committee had already begun hearings on S. 895, the forerunner of the Speedy Trial Act.[10]

In passing the Speedy Trial Act, Congress in effect determined that neither the previous decisions of the Supreme Court nor the implementation of Rule 50(b) had provided the courts with adequate guidance on the speedy trial question.[11]

Outline of the Act.

The Speedy Trial Act, 18 U.S.C. § 3161 *et seq.*, contains two parts. The first part, and the heart of the Act, provides that all criminal cases brought to the federal courts must proceed to trial within a specified time after arrest.

The basic scheme is to divide the time between arrest or other initiating steps and the commencement of trial into three parts, providing time limits within which each segment must be completed. The periods are: (1) from arrest or the service of a summons to the filing of the indictment or information; (2) from the filing of the indictment or information to arraignment; and (3) from arraignment to trial. Any information or indictment charging an accused with the commission of an offense must be filed within 30 days from the time of arrest or from the time that he or she was served with a summons in connection with such charges.[12] In the case of felonies, an additional 30 days are added to the first period from arrest to indictment if there is no grand jury in session.[13]

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[7] *Id.* at 526-33.

[8] *Id.* at 519.

[9] The rule became law under the Rules Enabling Act, 18 U.S.C. § 3771 (1970), which allows the Supreme Court to submit rules to Congress which become law within 90 days after they are reported.

[10] Rule 50(b) of the Fed.R.Crim.P. is still in effect and does cover some aspects of the criminal justice system that are not covered by the Speedy Trial Act. For instance, plans submitted by each district pursuant to Rule 50(b) provide a time limitation during which sentencing must take place after a defendant is found guilty.

[11] 1974 U.S. CODE CONG. & AD. NEWS 7404-05.

[12] 18 U.S.C. § 3161(b) (Supp. 1976).

[13] *Id.*

The arraignment must then take place within 10 days from the time of filing of the information or indictment.[14] Upon a plea of not guilty, the trial must be held within 60 days after the arraignment. Therefore, assuming arrest, the defendant must be brought to trial within 100 days thereafter.[15] If the defendant is to be tried again after a declaration of a mistrial by the trial judge, an order for a new trial, an appeal or a collateral attack, the trial must commence within 60 days from the date the action causing retrial becomes final. The court retrying the case may, however, extend the period for retrial not to exceed 180 days if unavailability or other factors resulting from the passage of time makes trial within 60 days impractical.

These "permanent limits," however, are not effective until July 1, 1979. Congress has given the courts four years within which to comply fully with the Act. Gradually decreasing time limits, imposed in yearly succession, commencing July 1, 1976, are provided for court accommodation to the Act. From July 1, 1976 to June 30, 1977, the first period, the time limitations are: 60 days from arrest to indictment, 10 days from indictment to arraignment and 180 days from arraignment to trial. In the next period, July 1, 1977 to June 30, 1978, the time is decreased from arrest to indictment to 45 days and from arraignment to trial to 120 days. These time limits in the final interim period, July 1, 1978 to June 30, 1979, decrease still further: 35 days from arrest to indictment and 80 days from arraignment to trial. The "permanent limits" then become effective.

Subject to certain qualifications later discussed, the timetable is relatively fixed. The Act does provide, however, for a number of delay periods which are to be excluded in computing the relevant time limitations.[16] These delays, considered justifiable within the terms of the Act, include: delays resulting from other proceedings in which the defendant is involved, such as trials relating to other charges against the accused, interlocutory appeals, hearings on pretrial motions, and examinations and hearings concerning the mental competency or physical incapacity of the accused;[17] delays which are requested by the government and consented to by the accused, with the approval of the court, "for the purpose of allowing the defendant to demonstrate his good

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[14] *Id.* § 3161 (c).

[15] *Id.*

[16] *Id.* § 3161(h).

[17] *Id.* § 3161(h)(1).

conduct";[18] delays caused by the absence or unavailability of the accused or an essential witness;[19] delays resulting from the defendant's mental or physical incompetency to stand trial;[20] and delays resulting from the granting of a continuance when "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."[21]

Under Section 3161 (h) (3) (B) a defendant or an essential witness is considered absent when his or her whereabouts is unknown and cannot be determined by due diligence and, in addition, he or she is attempting to avoid apprehension or prosecution. One is also considered unavailable whenever his or her whereabouts is known but presence for trial cannot be obtained by due diligence or he or she resists appearing at or being returned for trial.[22]

With respect to the granting of a continuance, the Act provides for the consideration of certain factors. They include: (1) whether the failure to grant a continuance would be likely to make a continuation of the proceeding impossible or would result in a miscarriage of justice; (2) whether the case is so unusual or complex due, for example, to the number of defendants or the nature of the prosecution that it would be unreasonable to expect adequate representation within the periods established by the Act; and (3) 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.[23]

Section 3162 provides for sanctions if the provisions of the Act are not complied with. Thus, after July 1, 1979, given non-compliance with any of the time limitations in the Act, the court must dismiss an indictment if none of the exceptions applies. Whether the dismissal is with or without prejudice is up to the court, which must consider the seriousness of the offense, the facts and circumstances surrounding the dismissal and the impact of a reprosecution on the administration of this provision and on the administration of justice.[24] In order to invoke sanctions, however, a defendant

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[18] *Id.* § 3161(h)(2).

[19] *Id.* § 3161(h)(3)(A).

[20] *Id.* § 3161(h)(4).

[21] *Id.* § 3161(h)(8)(A).

[22] *Id.* § 3161(h)(3)(B).

[23] *Id.* § 3161(h)(8)(B).

[24] These requirements are identical to those enunciated in Barker v. Wingo, 407 U.S. 514, 528-33 (1972).

must move for dismissal of the case prior to trial or the entry of a plea of guilty or nolo contendere.

Sanctions may also be invoked against an attorney under certain circumstances: if he or she knowingly allows a case to be set for trial without disclosing that a necessary witness will be unavailable, files a frivolous motion solely for delay purposes, makes a false statement in support of a motion for a continuance, or wilfully fails to proceed to trial without justification as outlined in the Act. A retained lawyer can be fined up to 25 per cent of his or her fee and an appointed lawyer can have a fee reduced up to 25 per cent. An attorney for the government can be fined up to $250. There is no express provision for fining a federal public defender. In addition to the fines, an attorney may be denied the right to practice before a court for up to 90 days or a court may file a report with an appropriate disciplinary committee.[25] These sanctions become effective July 1, 1979.[26]

Planning Groups

Recognizing that many problems would be caused by the Act, Congress directed that each district convene a planning group to study and produce reforms in the criminal justice system and to prepare interim plans for the prompt disposition of criminal matters.[27] The group consists of district court judges, a United States Magistrate, the Clerk of the Court, the United States Attorney, the Federal Public Defender, a private attorney experienced in the defense of criminal cases, and the Chief Probation Officer.[28] Among the subjects to be reviewed are the functioning of the grand jury system, the finality of criminal judgments (including habeas corpus and collateral attack), pretrial diversion, pretrial detention, the desirable reach of federal criminal law, simplification and improvement of pretrial and sentencing procedures, and appellate delay.

The plans for each district, operative July 1, 1976, may vary from district to district. One district, for example, the District of

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[25] 18 U.S.C. § 3162(b) (Supp. 1976).

[26] *Id.* § 3163(c).

[27] The members of the Speedy Trial Act Planning Group for the District of New Jersey are: Honorable Lawrence A. Whipple, Chief Judge, United States District Court; Honorable Frederick B. Lacey, United States District Judge; Honorable William J. Hunt, United States Magistrate; Honorable Angelo W. Locascio, Clerk of the Court; Honorable Jonathan L. Goldstein, United States Attorney; Roger Lowenstein, Federal Public Defender; Richard A. Levin, Esquire; Brayton B. Crist, Chief United States Probation Officer; Professor Livingston Baker, Reporter; Honorable Carl E. Hirschman, United States Marshal.

[28] 18 U.S.C. § 3168 (Supp. 1976).

Arizona, has already adopted in its Plan for the Prompt Disposition of Criminal Cases the final 1979 statutory limitations, instead of the interim limits suggested by the Act. Peripatetic attorneys would do well to familiarize themselves with the differences in the plans of the districts in which they practice.

Calendar Assignment System

The first and major issue confronting the district courts upon signing of the Speedy Trial Act into law was whether, given the current judge power and the number of supporting personnel, the courts could fully comply with the demands of the Act. The bill contained no provisions for additional prosecutors, judgeships or public defenders. Certain immediate changes were necessary in order to make an affirmative answer possible.

The judges of the District of New Jersey moved promptly to meet the challenge. We adopted the Individual Calendar Assignment system for criminal cases. This system had been used for civil cases for about 30 years in this district. Thus each judge now has his own calendar for both civil and criminal cases. When an indictment or information is returned, it is assigned on a rotational basis to a specific judge for all purposes, including trial. At the same time the clerk notices the defendant of the arraignment, which is immediately set consistent with the 10-day requirement. The assigned judge conducts the arraignment, imposes routinely a discovery order, sets a limiting date for all motions, and, most importantly, sets a certain trial date, once again consistent with the Speedy Trial Act requirements. In the past fiscal year (ending July 30, 1976), the district court, working largely on the criminal list, substantially reduced its backlog of criminal cases. Unfortunately, this was accomplished only by neglecting the civil calendar.[29]

In any case, we will continue on the Individual Calendar Assignment system, with certain modifications from time to time. Thus, if one judge is involved in a protracted trial, and the time limitations of the Act require that another case be started, the reassignment of the latter case to another judge may be necessary. Such adjustments are imperative if there is to be compliance with the Act.

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[29] For example, the five active federal judges sitting in Newark tried only twelve civil jury trials to a conclusion in the last fiscal year. Sixty-eight criminal jury trials were tried to a conclusion by the same judges.

The overall management of criminal calendars rests with the office of the Clerk; and each judge's courtroom deputy clerk must now monitor the progress of each and every case.

Civil Case Backlog

Setting aside the immediate and relatively minor difficulties, the courts, the government, defense attorneys, the Clerk, and others affected by the Act must anticipate certain more far-reaching problems the Act will produce. With respect to the courts, there has been a marked reduction in the judicial time available for civil cases. Alleviation of this state depends upon Congress' creation of additional judgeships and expansion of personnel in the offices of the Clerk, the United States Marshal and Probation. As emphasized by Chief Justice Burger: "If we are not given the tools to meet the demands of the Speedy Trial Act . . . the federal courts may be confronted with a crisis."[30]

Put another way, the judicial manpower presently available can comply with Speedy Trial Act requirements. It cannot at the same time fulfill the court's obligation to the public, the litigant and the bar in the disposition of civil cases. Thus, in the District of New Jersey, in the last fiscal year (July 1, 1975 to June 30, 1976), the civil backlog increased by approximately 10 per cent to 2,453 cases.

The reduction in available judicial time accorded to civil cases is unfair to the litigants and their lawyers. More civil cases will have to be set on call calendars. Yet, as the high priority criminal case comes along, the civil case must then be side-tracked to allow the criminal case to be tried. Attorneys in civil cases will find their own schedules more difficult to arrange. With the ever-increasing trial demands in state courts, busy trial lawyers may well find it to their advantage to avoid committing their time to federal court matters.

Further Burdens of the Act

The inflexibility of the Act will require the federal courts to insist upon the trial of criminal cases only several weeks old when the defense attorney has a state court engagement in a trial several years old. Federal-state relations are likely to be thereby impaired. Eventually, however, if our criminal cases are disposed of as expeditiously as the Act envisions, all of our criminal cases will

30 Address by Chief Justice Burger, American Bar Association, Mid-Winter Meeting, February 23, 1975.

be substantially newer than the competing state matters, but will take precedence over them.

The effects of the Act on the federal prosecutor's office will obviously be substantial. The United States Attorney will be well advised to reduce the number of prosecutions, and to consider anew what may be achievable through sentence bargaining. Those cases considered by the government to be borderline may of necessity be dropped. Former Attorney General William Saxbe has stated that "the time limits will discourage U. S. Attorneys from bringing complicated cases—white collar criminals will go uncharged and only violent criminals will be prosecuted."[31] Only time will disclose whether this dire prediction is accurate.

When the Department of Justice asked each of the 94 United States Attorneys how each felt about the Act, of the 92 who responded, all were opposed to its passage.[32]

Federal prosecutors, under increased pressure to decline prosecution, will increasingly defer to state prosecution whenever possible, especially with respect to cases dealing with petty offenses. This means an increased caseload for the state courts.

The Department of Justice, notwithstanding the problems within the Act, has made every effort to implement it. A coordinator was appointed in the Executive Office for United States Attorneys under Deputy Attorney General Harold Tyler, Jr., to marshal efforts of attorneys in the Attorney General's Office of Policy and Planning, the Criminal Division, and the United States Attorneys to fulfill the government's responsibilities under the Act.

The added strain imposed by the Act upon the courts and the government is, as has already been suggested, matched by that imposed upon defense attorneys who must also adhere to the statutory time limitations. An attorney, once retained in a criminal matter, will be required to shelve other business to ready his case for trial in the all too brief period allotted. This and the already mentioned calendar conflicts will inevitably create difficulties and result in lower quality representation.

Many other changes are predicted to occur as a result of the passing of the Speedy Trial Act. One commentator has stated that a substantial change will occur in pretrial tactics.[33] Defendants may refuse to plea bargain in hopes that the time limitations will expire before trial. On the other hand, prosecutors may be more

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[31] H.R. Rep. No. 1508, 93d Cong. 2d Sess. 55 (1974) [hereinafter cited as H.R. Rep. No. 1508].

[32] *Id.* at 54 (Letter from William Saxbe to Peter Rodino, November 15, 1974).

[33] 10 U. RICH. L. REV. 449, 453, n. 30 (1976).

willing to enter into sentence bargaining, especially in urban areas, where the courts are more congested.[34]

It has also been projected that the Act will likely provide a new and fertile source of federal prisoner petitions, particularly in the application of provisions dealing with excludable delay and sanctions.[35]

Sanctions Under the Act

The sanctions imposed by the Act for a time-violation have been the target of much criticism and the cause for much concern. When a case is dismissed with prejudice, a defendant is set free without a trial on the merits. Even when a case is dismissed without prejudice, reprosecution may be contraindicated. When a case is reprosecuted, the entire proceeding must start from the beginning at the grand jury level. It is noted that members of the House of Representatives attempted to amend the Act to cure this fault to provide that, whenever time limits expired due to the prosecutor's fault, the government would still be given one last chance to prepare its case before the court dismissed it.[36] This effort failed.

The sanctions ultimately chosen by Congress were a result of much debate and controversy in both houses. Originally, it was provided that, once a case was dismissed, it could not be reprosecuted.[37] This position was modified by the Senate which proposed that the government be barred from reprosecution unless the court dismissed a case without prejudice and the government was able to show "exceptional circumstances" as to why the charges should be renewed.[38] The bill was then amended by the House Judiciary Committee to provide once again that all cases would be dismissed with prejudice regardless of the circumstances if the case was not timely processed[39] in order to avoid any confusion over the prosecutor's right to reprosecute a case.[40] Additionally, the Supreme Court in *Strunk v. United States* [41] had held that, once a determination had been made that a defendant was

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34 1974 U.S. CODE CONG. & AD. NEWS 7450.

35 Hon. Wm. Hunt (United States Magistrate), *Habeas Corpus and Collateral Attacks*, at 5 (March 31, 1976) (unpublished) (submitted for consideration by the Speedy Trial Act Planning Group).

36 H.R. Rep. No. 1508, *supra* note 31, at 82.

37 S. Rep. No. 1021, *supra* note 3, at 2.

38 *See* S. Rep. No. 1021, *supra* note 3, at 3.

39 *See* H.R. Rep. No. 1508, *supra* note 31, at 82.

40 *Id.* at 38.

41 412 U.S. 434 (1973).

denied a speedy trial, the only remedy was to dismiss the charges. Consequently, the Committee feared that any other sanction might be unconstitutional.[42] The sanction which finally became law was a compromise decision. Congress agreed on a provision permitting dismissals with or without prejudice. It postponed imposition of the sanction until July 1, 1979, thereby giving Congress time to amend the Act if the courts cannot conform to the time limits.

90-day Limit

One of the most controversial sections of the Speedy Trial Act, Section 3164, establishes a 90-day limit for continuous confinement of persons detained in custody "solely because they are awaiting trial," and for defendants who have been released pending trial but have been designated by the attorney for the government as "high risks" of failing to appear for trial. While the other time limitations are gradually phased in, this section provides for stricter time periods for "high risk" defendants on bail. Trial must begin within 90 days of detention or designation as "high risk." These limitations also expire June 30, 1979 and, unlike the transitional periods, carry sanctions. Incarcerated defendants who have not been brought to trial within the prescribed period must be released from custody for the balance of the proceedings and "high risk" defendants may, in certain circumstances, suffer modification of the nonfinancial conditions of their release. The Act does not explicitly provide that the excludable time provisions which apply to the other sanctions also apply to Section 3164; it is simply silent. However, the exceptions and the final and interim limits are placed in the same section while the other limits are, as mentioned, placed in Section 3164. The first interpretation of this section occurred in the Ninth Circuit. In *United States v. Tirasso*,[43] two foreign nationals were indicted in the Southern District of New York on a charge of conspiracy involving the smuggling of cocaine into the United States from Colombia. They were arrested on November 19, 1975. A criminal complaint was subsequently issued in the District of Arizona and the New York indictment was dismissed, although their custody continued. As evidence was gathered, the dimensions of the criminal conspiracy greatly expanded. On January 5, 1976, a magistrate ordered the defendants' removal to the District of Arizona, the alleged center of the con-

[42] *See* H.R. Rep. No. 1508, *supra* note 31, at 57.

[43] 532 F.2d 1298 (9th Cir. 1976).

spiracy, where they were indicted on January 20, 1976 for engaging in a series of criminal transactions involving 22 defendants in 10 states, Puerto Rico and four foreign countries. A superseding indictment was issued February 18, 1976 and trial was set for April 1976.

The defendants then moved for release from custody on their own recognizance, which motion was denied by the district court. On appeal they relied upon Section 3164 of the Speedy Trial Act which they alleged unconditionally mandated their release in that they had been in continuous custody for more than 90 days awaiting trial. In moving for their release, the defendants did not dispute either the fact that the delay was occasioned by a lengthy investigation of what appeared to be a massive criminal scheme, the good faith of the government, or the high probability that they would flee to a foreign country. Defense counsel all but admitted that the defendants, if released, would probably flee.[44] The court of appeals, however, ordered the release of the defendants. It found Section 3164(i) straightforward and providing no exceptions for special circumstances in complex cases. Both indictments were based on the same operative facts so that the 90-day requirement began running when the defendants were arrested on the original charge. The court made its decision with an understanding of the dangers involved, knowing the consequences of its action:

> We release a man alleged to be the head of a foreign criminal organization dedicated to the smuggling of large quantities of illegal drugs, so that he may quickly cross the border and resume operating his business. We are also releasing his alleged right-hand man, as if to make certain that the enterprise continues to operate at top efficiency. But this result is the only one open to us under the plain terms of the statute.[45]

The court found it "discouraging that our highly refined and complex system of criminal justice is suddenly faced with implementing a statute that is so inartfully drawn as this one."[46]

The defendants were released: one pled guilty to a greatly reduced charge; the other fled the country before trial.[47]

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[44] *Id.* at 1300.

[45] *Id.* at 1300-01.

[46] *Id.* at 1301.

[47] A. Kozinski, *That Can of Worms: The Speedy Trial Act*, 62 A.B.A.J. 862, 864 (July, 1976).

Two district courts have rejected the *Tirasso* ruling: *United States v. Mejias,*[48] and *United States v. Masko.*[49] Both courts recognized the literal words of the statute but concluded that Congress could not have intended an absurd result. Affirming the district court in *Mejias,* retired Supreme Court Justice Tom Clark, sitting on the Second Circuit Court of Appeals, based his decision on two grounds:

> The first is a constitutional one which we will not elaborate further than to note that there is a question under the doctrine of separation of powers that the Congress can exercise judicial authority to the extent indulged here.[50]

He further found that the defendants were at fault for the delay of the commencement of trial because of their untimely filing of pretrial motions and prolonged hearings.[51]

In *Masko,* the court explained that it rejected the view that Congress chose to deal with the problem of excessively prolonged pretrial detentions by imposing a flat 90-day limit on them with no extensions allowed.[52] It felt that not only was Section 3164 an integral part of the Act which included the enumerated exclusions within it, but that it would be illogical not to apply Section 3161(h) to time computations under it. The court agreed that Congress was particularly concerned with problems attendant upon pretrial detainers and high risk defendants and that Section 3164 was enacted to provide for more attention to these problems than the Act would otherwise require. But Congress could not have intended, according to the court's rationale, that the courts treat these cases with more urgency during the transitional period than during the indefinite period folowing July 1, 1969. Reading Section 3164's 90-day limit as absolute would achieve this anomalous result because that section expires when the permanent pattern becomes effective and there will be no special provision for those now covered by it.[53]

The Department of Justice offered on June 23, 1976 an amendment to the Act, H.R. 14521, to clarify that the Section 3161(h)

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[48] Docket No. 76-164 (S.D.N.Y., May 24, 1976), *aff'd on other grounds sub nom.*, United States v. Martinez, 538 F.2d 921 (2nd Cir. 1976).

[49] 45 U.S.L.W. 2040 (W.D.Wis., July 27, 1976). *See also* Moore v. United States District Court, 525 F.2d 328 (9th Cir. 1975).

[50] 538 F.2d at 923.

[51] *Id.* at 924.

[52] 45 U.S.L.W. at 2040-41.

[53] *Id.* at 2041.

exclusions apply to the Section 3164 interim time period. No further legislative action has been taken.

Another uncertainty under the Act has to do with arraignments. Section 3161(i) requires that arraignment must take place within a certain period. Sanctions are imposed for delays in indictment or commencing trial, but the penalty for a deferred arraignment is unknown. Also, the Act omits arraignments from the ultimate filing and trial deadlines at the end of the phase-in period. Legislation is now being drafted appropriately amending Section 3161(f).

Excludable Delays

The "excludable time" provisions of Section 3161(h) may create many interpretive problems. The impact of the Act on the criminal justice system may well depend on how strictly the courts interpret these provisions.

In deciding whether a delay is excludable, a court must weigh the rights of the defendant and the government against the additional right of the public to a speedy trial. The Act is not designed to safeguard only the rights of the accused, and the consent of both parties is not determinative of whether a trial should be delayed.

The legitimacy of motions by the defense must be carefully considered by the court. A request to delay trial to permit the dissipation of the effects of harmful pretrial publicity may be a proper basis for a continuance but the court must be careful of defense strategy to prolong the period an accused can stay free on bail.

The court must also consider the propriety of a delay because of the defense counsel's prior commitments to other criminal clients. A delay may be crucial to a proper defense and the result of a refusal may in a specific case be inadequate representation.

Exceptions to the rigid timetables set up by the Act include delays due to transfer between districts, when there are hearings on pretrial motions, or when such motions are under advisement with the court. Only 30 days, however, is allowed for the last exception.

The Act also provides that any period of time between the dismissal of a charge and the filing of a new charge will not be counted. There is an allowance for a "reasonable period of delay" where a defendant is joined for trial with a co-defendant whose time for trial has not expired.

Finally, there are two important exceptions. One excludes any delay during which the prosecution of a defendant is deferred by the government under a written agreement with the defendant, with the approval of the court, for the purpose of allowing the defendant to demonstrate his good conduct.[54] In some districts this form of deferred prosecution is utilized with the cooperation of the probation officer. The defendant is placed under the supervision of the probation office for a certain period of time, as if on parole, and if his or her conduct is good, the prosecution is dropped.

Another important exception allows the court to grant a continuance on its own motion, or at the request of the government or defense attorney, if the court concludes that "the ends of justice served by taking such action outweigh the best interest of the public and the defendant in a speedy trial."[55] Reasons must be set forth, by the court, on the record. Factors to be considered include: (1) whether failure to grant a continuance will make a continuation of the proceedings impossible or result in a miscarriage of justice; (2) whether the case is so unusual and complex due to the number of defendants or the nature of the case, or otherwise, that adequate preparation requires more time; or (3) whether a delay after the grand jury proceedings have commenced (where arrest precedes indictment) is caused by the unusual complexity of the determination to be made by the grand jury or by events beyond the control of the court or government.[56]

The Act makes perfectly clear, however, that a continuance may not be granted because of court congestion, lack of diligent preparation, or failure to obtain available witnesses on the part of the government prosecutor. Section 3161(h) does not specifically allow exclusion of a reasonable amount of time for travel or the preparation of necessary reports.

Excludable time was involved in both *United States v. Hearst*[57] and *Moore v. United States District Court.*[58] The court held in *Moore* that, when the demands of due process so require, both the period of time during which a defendant is detained for a study of his or her mental competency pursuant to court order and the time consumed by court hearings on the defendant's competency are excluded from the 90-day period set forth in Section 3164(b).

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[54] *See* United States v. Furey, 500 F.2d 338 (2d Cir. 1974); United States v. Beberfeld, 408 F. Supp. 1119 (S.D.N.Y. 1976).

[55] 18 U.S.C. § 3161(h)(8)(A) (Supp. 1976).

[56] *Id.* § 3161 (h)(8)(B).

[57] Crim. No. 74-364 (N.D. Cal. Jan. 1976).

[58] 525 F.2d 328 (9th Cir. 1975).

The defendant under those circumstances is not detained solely because he or she is awaiting trial.[59] Such exclusions are justified and within the spirit of the Act.

The exclusion for delay caused by unavailable witnesses is ambiguous. Some would interpret this to apply only to defense witnesses. It is doubtful whether this result was intended by Congress.

Inadequate time for preparation by a government prosecutor is not grounds for a continuance.[60] This seems particularly ironic because the Sixth Amendment protects a defendant from less than prepared counsel. In light of the avowed purpose of the Act to assist in reducing crime and the danger of recidivism, it would seem that equality of treatment of the prosecutor and defense counsel was indicated.

A criticism of the Act is that it deals only with a portion of the problem of delay in the criminal justice system.[61] Delay in sentencing, for example, is not covered by the Act. Also, one commentator has suggested that a time limitation should be included in the Act which would attach when the prosecution acquires sufficient evidence to bring charges against the accused rather than when the accused is arrested or served with a summons or when an indictment or information is filed.[62] While these delays do not normally subject the accused to incarceration, anxiety, or public accusation, the argument goes, they may impair the ability of the accused to defend himself or herself.[63] Where no formal accusation has been made, " 'the State may proceed methodically to build its case while the prospective defendant proceeds to lose his.' "[64] Whether this suggestion will be incorporated into the Act by amendment remains to be seen.

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[59] *Id.* at 329.

[60] 18 U.S.C. § 3161(h) (8)(C) (Supp. 1976).

[61] *See* Taylor, *The Long Wait for a Speedy Trial*, 80 CASE & COMMENT 3 (1975).

[62] Steinberg, *Right to Speedy Trial: The Constitutional Right and Its Applicability to the Speedy Trial Act of 1974*, 66 JOURNAL OF CRIMINAL LAW AND CRIMINOLOGY 229, 236-39 (1975).

[63] *Id.* at 236. *See also* United States v. Marion, 404 U.S. 307, 331 (1971) (Douglas, J., concurring).

[64] Steinberg, *supra* note 61, at 237. The majority in United States v. Marion, 404 U.S. 307 (1971) admitted this possibility but felt it was "not itself sufficient reason to wrench the Sixth Amendment from its proper context." 404 U.S.. at 321-22. *See also* United States v. Ewell, 383 U.S. 116, 122 (1966). See, Steinberg, *supra*, at 238-39 for the development of his three-step process which he argues should be employed to determine when the constitutional and statutory right to a speedy trial should attach and for his proposed amendment to the statute.

Conclusion

The Speedy Trial Act, in my opinion, is overall desirable legislation. It will not generate additional cases to try; and in time the courts will cope with it. It has served to bring about judicial reappraisal of calendar control. Chief Justice Burger and the majority of judges in the Judicial Conference of the United States disapproved of the Act because they thought it unnecessary to supplant the Rule 50(b) plans and because they anticipated a crisis in the courts as a result of the Act unless more federal judgeships were provided and more money appropriated overall for the courts.[65] The testimony presented by other federal judges to Congress, however, indicated that because of the graduated time limitations, the federal judiciary might well adjust to the provisions of the Speedy Trial Act without any additional personnel or appropriations.[66] My own view, already stated, is that the demands of the Act can be met, but only at great cost to those involved in civil litigation.

In conclusion, it is clear that as case law develops, weaknesses in the Act will be revealed. The Act directs the Administrative Office of the United States Courts to inform members of Congress periodically of the Act's success and to make any recommendations for necessary changes in the law, including requests for more appropriations if they are essential to the successful implementation of the Act.[67]

I am certain that the judicial branch will respond to the tremendous demands placed upon its members and that the Act will advance the criminal justice system. I am equally certain that, unless the Congress responds to the call of the judicial branch for more judges and supporting staff, civil litigants and their lawyers are going to be increasingly deprived of access to the federal courts.

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65 *See* W. Burger, *The State of the Judiciary—1975*, 61 A.B.A.J. 439, 442-43 (1975).

66 1974 U.S. CODE CONG. & AD. NEWS 7407.

67 18 U.S.C. § 3167 (Supp. 1976). On September 30, 1976, the Administrative Office of the United States Courts submitted to Congress a report describing the judicial implementation of the Speedy Trial Act. *See* REPORT ON THE IMPLEMENTATION OF TITLE I AND TITLE II OF THE SPEEDY TRIAL ACT OF 1974 (September 30, 1976).