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The Speedy Trial Act: An Empirical Study

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INTRODUCTION

Few statutes have engendered as much opposition as the Speedy Trial Act of 1974 (Act). The Act embodies Congress' recognition that the public, as well as a defendant, possesses a right to a speedy trial. Although not the first attempt to safeguard society's interest in the prompt disposition of criminal cases, the Act is unprecedented in the stringency of its measures. On July 1, 1979, the Act's permanent limits become operative: subject to certain excludable delays, a defendant must be brought to trial within 100 days of arrest. The penalty for violation is dismissal of the charges. To lessen the shock, Congress provided that the three years prior to that date would serve as a phase-in period during which the time limits would be gradually tightened, and that violation of these traditional limits would not result in dismissal. Nevertheless, the enunciation of the permanent limits has provoked under-

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3. See notes 28-64 infra and accompanying text.

4. 18 U.S.C. § 3161(b)-(c) (1976); see notes 65-68 infra and accompanying text.


6. Id. § 3161(f)-(g). During the transitional period, the time from arrest to indictment has decreased from 60 (1976-77), to 45 (1977-78), to 35 days (1978-79). 18 U.S.C. § 3161(f) (1976). Pursuant to § 3161(g), the time from arraignment to trial has decreased from 180 (1976-77), to 120 (1977-78), to 80 days (1978-79). Through all stages, however, the time from indictment to arraignment has remained 10 days. Id. §§ 3161(b), 3163(a).

7. Id. § 3163(c).
standable outcries of resistance from a federal system that had often tolerated pretrial delays of several years. 

Much of the controversy stems from the unique “planning” nature of the Act. During the interim period before the effective date of the permanent limits, federal courts must report problems encountered under the transitional limits, make recommendations for amendment of the statute, and request additional resources needed to expedite criminal cases. Several districts have taken that opportunity to join in the predictions of commentators that compliance with the permanent limits will be difficult to impossible.

The criticism centers predominantly on the Act’s effect upon courts, defendants, and defense attorneys. District judges complain that, notwithstanding the Act’s caveat that speedy criminal dispositions should not prejudice civil litigation, the pressure to comply even with the transitional limits has forced them to neglect their civil dockets. Indeed, the pending civil caseload for all districts has risen almost twenty percent since the imposition of the transitional limits. In addition, several districts report that the short limits...
impede court scheduling flexibility, and prevent effective calendar administration in general.\textsuperscript{15} They allege that the number of judges is simply inadequate to cope with these additional strains on an already congested judicial system.\textsuperscript{16}

Perhaps the heaviest burdens of the Act have fallen upon defendants and defense counsel. Defense attorneys argue that the Act provides insufficient time to prepare an effective defense, especially when indictment precedes arrest.\textsuperscript{17} In that situation, the defense has only minimal time to prepare for trial. The prosecutor, on the other hand, can prepare his case extensively before indictment.\textsuperscript{18}

Moreover, several districts allege that the ten day period from indictment to arraignment is too short to determine an appropriate plea.\textsuperscript{19} As a result, defendants have entered more pro forma not guilty pleas,\textsuperscript{20} thereby increasing the number of cases proceeding to trial that would otherwise have been terminated by guilty pleas.\textsuperscript{21} Even when the initial plea is later changed to guilty, substantial effort is wasted in the interim while prosecutors ready the case for trial.\textsuperscript{22} Finally, both defense attorneys and prosecutors have argued that the short limits have led judges to deny continuances for attorneys' scheduling conflicts.\textsuperscript{23} Both groups have accordingly been forced to reallocate more cases.\textsuperscript{24} In addition to requiring duplication of effort, increased reassignments have forced defense attorneys to reduce their federal criminal caseloads.\textsuperscript{25} Representation of defendants in federal court has thus been rendered more unattractive for the private practitioner.

Based largely on these complaints, most published analyses have concluded that the Act is sufficiently disruptive of the present system to warrant relaxation of its time strictures.\textsuperscript{26} And, as the permanent limits draw near, the calls for amendment increase.\textsuperscript{27} This study will contend, however, that extending


\textsuperscript{16} Speedy Trial Report, supra note 10, at 13.

\textsuperscript{17} Speedy Trial Report, supra note 10, at 13. Thirty-four of the 94 planning groups reported this problem.

\textsuperscript{18} Id.; see notes 178-81 infra and accompanying text.

\textsuperscript{19} 1978 Speedy Trial Report, supra note 10, at 14; Frase, supra note 1, at 679; Suggestion, supra note 1, at 917.

\textsuperscript{20} See notes 184-85 infra and accompanying text.

\textsuperscript{21} Eight district plans indicated that these pleas added to court congestion. 1978 Speedy Trial Report, supra note 10, at 14.

\textsuperscript{22} Id.; Frase, supra note 1, at 679; Suggestion, supra note 1, at 917.

\textsuperscript{23} Id.; see notes 178-81 infra and accompanying text.

\textsuperscript{24} Id. at 10, at 13.

\textsuperscript{25} Id.

\textsuperscript{26} See Address by Warren E. Burger, Chief Justice of the United States, American Bar Association Midyear Meeting (Feb. 11, 1979); note 1 supra and accompanying text.

\textsuperscript{27} 65 A.B.A. J. 23 (1979); Address by Warren E. Burger, Chief Justice of the United States, American Bar Association Midyear Meeting (Feb. 11, 1979). The Subcommittee on the Constitu-
the time strictures is presently too hasty a solution.

Analysis of the Act's effect in the Districts of Connecticut, New Jersey, and Eastern New York, focusing primarily on the experiences of judges, prosecutors, and defense attorneys, indicates that the Act has found greater acceptance and created fewer difficulties than many of its opponents presume. Moreover, the problems created or exacerbated by the short time limits, especially those encountered by defendants and their counsel, can be effectively remedied by proper use of measures presently contained within the Act. Consequently, lengthening the final limits is at this juncture both unnecessary and, in view of Congress' intent to protect society's interest in speedy trials, undesirable.

Part I of this Project examines the rules and standards that governed the prompt disposition of criminal cases prior to the Act. It reveals that the Act is not a sudden encroachment upon the unfettered discretion of federal courts over their criminal calendars, but is in fact the last in a series of statutory and regulatory pronouncements recognizing the need to protect society's interest in speedy trials. Part II outlines the methodology of the study and presents a brief comparison of the three districts in which the study was conducted. Part III examines the relation of the Act to the civil dockets within the three districts, and concludes that the increased emphasis on criminal cases has had little measurable effect on the districts' efficiency in handling their civil caseloads. Part IV addresses the hardships faced by defendants and defense attorneys under the Act. It argues that the problems of insufficient preparation time and attorney scheduling conflicts can be remedied by liberal use of the Act's excludable time provisions, and that increasing the time limits is therefore presently unwarranted. Part V considers the propriety of waiver of the Act by the defendant, and concludes that use of that mechanism at once contravenes legislative intent and is unnecessary as a method of alleviating the pressures of compliance.

I. ORIGINS OF THE ACT

A. Pre-Act Developments—Recognition of the Public's Right to a Speedy Trial

As early as 1905, the Supreme Court explicitly recognized that the sixth amendment guarantee of a speedy trial protects the public as well as the accused.28 The Court has also noted, however, that the interests of society in prompt dispositions frequently are opposed to those of the defendant.

The public is concerned with the effective prosecution of criminal cases, both to restrain those guilty of crime and to deter those contemplating it. 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. Moreover, while awaiting trial, an accused who is at large may become a fugitive from justice or commit other criminal acts. And the greater the lapse of time
tentatively scheduled hearings on amendment proposals for March 1979, but declared that they would probably be held only if the Committee were convinced the Act is unworkable despite good faith efforts of the districts to comply. 65 A.B.A. J. 23 (1979).

between the commission of an offense and the conviction of the offender, the less the deterrent value of his conviction.29 Consequently, while a defendant's decision not to demand a speedy trial may work to his advantage, it may also cause substantial public injustice.

Despite the traditional legitimacy accorded the public's right to speedy justice, little was done until the late 1960's to alleviate the hardships to society caused by excessive delays. That decade witnessed alarming rises in the backlogs of federal and state court calendars,30 to which frequent delays in bringing criminal cases to trial increasingly contributed. The test employed to determine a defendant's speedy trial rights was inadequate to decrease the backlogs, as it turned on an ad hoc assessment of the merits in each case and therefore often added to the delay.31 It soon became apparent that protection of the public's interest and reduction of court congestion demanded the imposition of specific standards for prompt disposition of criminal cases.32

The American Bar Association (ABA) promulgated the first such guidelines in 1968. Its Standards Relating to Speedy Trial33 recommended that each state establish a single overall time limit within which trial must begin,34 to be triggered by a specified event such as arraignment or first appearance.35 In clear deference to the broader societal interests at stake, the Standards advised that the time limits should commence regardless of the defendant's failure to demand a speedy trial.36

The ABA plan also permitted the court to exclude periods of delay for


30. See United States ex rel. Frizer v. McMann, 437 F.2d 1312, 1314-15 (2d Cir. 1971) (en banc).

31. In Barker v. Wingo, 407 U.S. 514 (1972), the Court refused to quantify the sixth amendment guarantee, reasoning that to do so would require the Court "to engage in legislative or rulemaking activity, rather than in the adjudicative process." Id. at 523; see 1974 House Report, supra note 2, at 12, reprinted in [1974] U.S. Code Cong. & Ad. News at 7405. The Court declared, however, that state legislatures, and presumably Congress, "are free to prescribe a reasonable period consistent with constitutional standards . . . ." 407 U.S. at 523; see Frase, supra note 1, at 667. The Court identified four factors to be considered in determining whether deprivation of a defendant's sixth amendment right has occurred: length of delay; reason for delay; defendant's assertion of his right; and prejudice to the defendant. 407 U.S. at 530.


33. ABA Standards, supra note 29.

34. Id. § 2.1, Commentary at 14-16; see Poulos & Coleman, Speedy Trial, Slow Implementation: The ABA Standards in Search of a Statehouse, 28 Hastings L.J. 337, 365 (1976).

35. ABA Standards, supra note 29, § 2.1; see Poulos & Coleman, supra note 34, at 365.

36. ABA Standards, supra note 29, § 2.2; see Poulos & Coleman, supra note 34, at 365.
certain specified events, but required the court to consider the public's interest in determining whether to grant a continuance. The ABA maintained that a strict excludable time policy was crucial to the success of any speedy trial legislation, and that courts should grant continuances only upon a showing of good cause and for reasonable periods. As a further deterrent to delay, the Standards provided that violations of the time limits would result in dismissal of the charges against the defendant with prejudice.

The ABA Standards, however, were largely ignored by the states. Their impact upon federal tribunals was also negligible until 1971, when the United States Court of Appeals for the Second Circuit used them as a model for its own standards. The court announced that, as of July 5, 1971, the Second Circuit Rules Regarding Prompt Disposition of Criminal Cases would govern all district court criminal proceedings in the circuit. The Second Circuit Rules required that the Government must be ready for trial within six months of arrest, service of summons, detention, or filing of complaint or formal charge against the defendant, whichever occurred earliest. With the ABA Standards, the Rules provided for excludable periods of delay and dismissal with prejudice as the sole sanction for violation. In addition, demand by the defendant was not necessary to trigger the operation of the limits, but failure

37. ABA Standards, supra note 29, § 2.3. Excludable delays included such events as other proceedings against the defendant, id. § 2.3(a), and absence or unavailability of the defendant. Id. § 2.3(e).

38. Id. § 1.3; see Poulos & Coleman, supra note 34, at 365. Continuances could be granted to alleviate congestion of the trial docket if attributable to "exceptional circumstances," such as the unavailability of the prosecutor or the judge at the time trial is scheduled. ABA Standards, supra note 29, § 2.3(b), Commentary at 27-28. Delays resulting from crowded court dockets alone, however, were not excludable. Id.; see Poulos & Coleman, supra note 34, at 374-76.

39. ABA Standards, supra note 29, § 1.3; see Poulos & Coleman, supra note 34, at 371-73.

40. ABA Standards, supra note 29, § 4.1; see Poulos & Coleman, supra note 34, at 366, 376-77. Dismissal is also the remedy for violation of the sixth amendment speedy trial guarantee. E.g., Strunk v. United States, 412 U.S. 434, 438-40 (1973). The ABA Standards declared that a defendant's failure to move for dismissal prior to trial or entry of a guilty plea would constitute a waiver of that right. ABA Standards, supra note 29, § 4.1; see Poulos & Coleman, supra note 34, at 366-67.

41. See Note, Poulos & Coleman, supra note 34, at 378; Speedy Trial: A Constitutional Right in Search of Definition, 61 Geo. L.J. 657, 662 (1973) [hereinafter cited as Constitutional Right].

42. In United States ex rel. Frizer v. McMann, 437 F.2d 1312 (2d Cir. 1971) (en banc), the court found that a more precise delineation of the speedy trial guarantee was necessary both to safeguard society's interest in prompt dispositions and to induce more effective calendar control. It observed that resolutions of disputes over the length of and justifications for delay in each case had increased state and federal court congestion to a level of alarming proportions. Id. at 1314-15. That congestion had in turn contributed to the incidences of delay, further infringing upon the defendant's and the public's right to a speedy trial. The court thus deemed the creation of specific standards essential. Id. at 1317.

43. Id. at 1317-18. The Rules are reprinted in 8B Moore's Federal Practice ¶ 48.03[1], at 48-11 n.1 (2d ed. 1972), and will be cited hereinafter as 2d Cir. R. In 1973, the Rules were superseded by the district court plans for speedy trials, which were adopted pursuant to Fed. R. Crim. P. 50(b). See note 53 infra and accompanying text.

44. 2d Cir. R. 4.

45. Id. R. 5; see Vital Right, supra note 1, at 355-56.

46. 2d Cir. R. 4; see Vital Right, supra note 1, at 355, 358.
to move for discharge prior to trial or guilty plea constituted a waiver of the right to dismissal.\footnote{47}

Despite their stated objectives, the Second Circuit Rules were only marginally effective in breaking the logjam of pretrial delays. Most disappointing was the "notice of readiness" provision of rule 4, which required that the Government file within the appropriate six month period a notice with the court that it was ready to proceed to trial. Unless the court called the case for trial promptly after the notice was filed—and there was no incentive to do so—trials could begin eight or more months after arrest or indictment, rather than the six months presumably intended by the Rules.\footnote{48} Furthermore, rule 5(h) permitted delay in instances not enumerated in the other excludable time provisions, if the delay was "occasioned by exceptional circumstances."\footnote{49}

Several Second Circuit panels applied this rule strictly, noting that an overly broad reading of the provision would subvert the goal of prompt dispositions.\footnote{50} Other decisions in the circuit, however, intimated that court congestion was an excusable event;\footnote{51} one judge suggested that the Rules could not penalize a court for its crowded calendars.\footnote{52} These loopholes prevented the Rules from achieving the degree of success in eliminating delays that the Second Circuit had desired.

At about the same time as the Second Circuit Rules were instituted, the Judicial Conference of the United States was drafting its own speedy trial proposals which would be applicable in all federal courts. One of these proposals was adopted as Federal Rule of Criminal Procedure 50(b), and became effective on October 1, 1972.\footnote{53} It required that all districts prepare and adopt plans for the prompt disposition of criminal cases,\footnote{54} and conduct continuing

\footnote{47} See United States v. Pierro, 478 F.2d 386, 389 (2d Cir. 1973); \textit{Vital Right}, supra note 1, at 355. \textit{See also 1974 Senate Report, supra note 2, at 22.}

\footnote{48} See United States v. Pierro, 478 F.2d 386, 389 (2d Cir. 1973); \textit{Vital Right}, supra note 1, at 355. \textit{See also 1974 Senate Report, supra note 2, at 22.}

\footnote{49} 2d Cir. R. 5(h).

\footnote{50} The Second Circuit interpreted "exceptional circumstances" to exclude understaffed court conditions, United States v. Bowman, 493 F.2d 594, 597 (2d Cir. 1974), and turnovers in personnel causing periodic understaffing in the United States Attorney's Office. United States v. Favaloro, 493 F.2d 623, 625 (2d Cir. 1974).

\footnote{51} See United States v. Counts, 471 F.2d 422, 427 (2d Cir.), \textit{cert. denied}, 411 U.S. 935 (1973). Under rule 6, delays traced to the courts could result in dismissal of all charges against the defendant. \textit{See United States v. Roemer, 514 F.2d 1377, 1382 (2d Cir. 1975); United States v. Drummond, 511 F.2d 1049, 1054 (2d Cir. 1975); United States v. Didier, 401 F. Supp. 4, 8 (S.D.N.Y. 1975). Rule 6, however, applied only to trials and retrials ordered by appellate courts. \textit{See Vital Right, supra note 1, at 357-61.}

\footnote{52} United States v. Infant, 474 F.2d 522, 527-28 (2d Cir. 1973).

\footnote{53} Fed. R. Crim. P. 50(b); \textit{see 1974 House Hearings, supra note 2, at 1091; Frase, supra note 1, at 675 n.68. Rule 50(b) was inspired by the Second Circuit Rules. 1974 Senate Report, supra note 2, at 18. Justice Douglas, dissenting from the Supreme Court's adoption of the rule, stated: "There may be several better ways of achieving [speedy trials]. This Court is not able to make discerning judgments between various policy choices where the relative advantage of the 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." Amendments to Federal Rules of Criminal Procedure, 406 U.S. 979, 981-82 (Douglas, J., dissenting); \textit{see 1974 Senate Report, supra note 2, at 19.}

\footnote{54} Fed. R. Crim. P. 50(b); \textit{1974 House Hearings, supra note 2, at 1091. The plans which the
studies of the administration of criminal justice. Pursuant to rule 50(b), the Administrative Office of the United States Courts prepared and submitted a model plan to the district courts for their consideration.

Each district, however, was free to determine the applicable time limits. As the rule authorized no sanctions for noncompliance other than the release of defendants in custody, it offered little motivation to improve court administration. The greatest drawback of the rule was the lack of uniformity created by the establishment of differing time limits by each jurisdiction. Instead of implementing methods to insure speedy trials and to relieve court congestion, busier districts merely adopted time limits that reflected their existing rate of criminal caseload movement. In those districts the rule did nothing more than encourage "the perpetuation of the status quo."

Thus, despite all prior rules and plans to encourage more rapid disposition of criminal cases, pretrial delays and court congestion remained a major problem, and federal courts exhibited little motivation to rectify the situation. The need for more specific guidelines became even more acute in view of recent studies establishing that long delays increased the likelihood of pretrial recidivism. Prompted largely by these considerations, Congress enacted the Speedy Trial Act of 1974.

55. Such studies were to be submitted to a reviewing panel for approval, and, if approved, were to be forwarded to the Administrative Office. The Administrative Office was required to report annually on the operation of such plans to the Judicial Conference of the United States. 1974 Senate Report, supra note 2, at 18. Rule 50(b), however, did not allow courts to request additional resources needed to achieve its goals. Because districts were allowed to set their own limits, such a provision was probably unnecessary.


57. Id. at 12, reprinted in [1974] U.S. Code Cong. & Ad. News at 7406. The model plan prepared by the Administrative Office and submitted to the district courts contained tripartite limits similar to those established by the Speedy Trial Act. The Administrative Office suggested a 20 day indictment-to-arraignment period for defendants in custody, and a 30 day period for defendants released prior to trial. The time between arraignment and trial was 90 days for defendants in custody, and 180 days for released defendants. Id., reprinted in [1974] U.S. Code Cong. & Ad. News at 7406; 1974 House Hearings, supra note 2, at 276. The 180 day period, however, was measured from indictment and not arrest. As the Senate Committee on the Judiciary noted: "[T]here may be months additional delay between arrest and indictment in a majority of Federal criminal cases. Thus the 50(b) model plan promise[d] little improvement in overall delay." 1974 Senate Report, supra note 2, at 19.


59. Id. at 13, reprinted in [1974] U.S. Code Cong. & Ad. News at 7406. The Subcommittee on Crime of the House Judiciary Committee noted as an example that the time limits set in Georgia varied from 30 days from arraignment to trial in the Middle District, to 180 days in the Northern District. Id.

60. Id.; see Suggestion, supra note 1, at 909-10.


B. The Speedy Trial Act

The passage of the Act represents the most determined effort to enforce the public's right to speedy criminal dispositions. Although the statute codified various provisions of prior schemes, it contains several innovations designed to promote the societal interest more effectively. Under its permanent time provisions, the Act requires that the defendant be indicted within thirty days of arrest or service of summons; that the defendant be arraigned within ten days of indictment; and that, when a plea of not guilty is entered, the defendant be tried within sixty days of arraignment. If indictment precedes arrest, the ten day period to arraignment does not begin until the defendant's first appearance before the judicial officer. As under the previous rules, the time limits begin to run regardless of the defendant's failure to demand trial, reflecting the importance attached by Congress to enforcement of the public's right to speedy trials.

Although the tripartite limits are much shorter than those under prior standards, other provisions mirror those of its predecessors, and were designed primarily to mitigate the comparatively harsh demands of the Act. As under the Second Circuit Rules, certain designated delays toll the running of the time limits. To date, the most common events justifying a continuance study conducted by the National Bureau of Standards in 1970 and presented to Congress indicated that if a defendant were released before trial, the likelihood that he would engage in criminal activity increased significantly if he were not brought to trial within 60 days. 1974 Senate Report, supra note 2, at 8. The Committee was also influenced by the report of the National Advisory Commission on Criminal Justice Standards and Goals, which concluded that faster and more efficient criminal processing would increase the deterrent effect of the criminal law, aid rehabilitation, and reduce crime. 1974 House Report, supra note 2, at 16, reprinted in [1974] U.S. Code Cong. & Ad. News at 7409. But see Frase, supra note 1, at 681 (the precise time limits chosen by Congress were arbitrary and not realistic).

63. 1974 Senate Report, supra note 2, at 7-8; 1974 House Hearings, supra note 2, at 5.
66. Id. § 3161(c).
67. Id.; see Frase, supra note 1, at 681 n.88.
68. 18 U.S.C. § 3161(c) (1976).
69. See notes 36, 47 supra and accompanying text.
70. 18 U.S.C. § 3161(b)-(c) (1976). The time limits begin to run automatically upon arrest, summons or, where indictment precedes arrest, the defendant's first appearance. See Frase, supra note 1, at 669.
71. See note 49 supra and accompanying text.
72. 18 U.S.C. § 3161(b) (1)-7 (1976) provides: "The following periods of delay are excluded in computing the time within which the trial of the defendant must commence:

  (1) any period of delay resulting from other proceedings concerning the defendant, such as:
    (A) examinations and hearings on mental competency or physical incapacity,
    (B) examinations under 28 U.S.C. § 2902,
    (C) trials of other charges against the defendant,
    (D) interlocutory appeals,
    (E) hearings on pretrial motions,
    (F) transfer proceedings,
    (G) motions actually under advisement;"
under these provisions are hearings on pretrial motions, motions held under advisement, and the unavailability of the defendant or an essential witness.\(^7\)

In addition, in those instances not specifically covered by the other excludable time provisions, section 3161(h)(8) of the Act provides that continuances may be granted at the discretion of the trial judge (upon his own motion or that of counsel) whenever the “the ends of justice served by taking such action outweigh the best interest of the public and the defendant in a speedy trial.”\(^7\) The Senate Report called this provision “the heart of the speedy trial scheme” established by the Act, because it imbued the strict time limits with enough flexibility to make compliance “a realistic goal.”\(^7\)

Aware, however, that too much flexibility would defeat the statutory objective, Congress expressly provided that a continuance shall not be available when the delay is attributable to “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.”\(^7\) The general congestion provision is especially significant for its elimination of the loopholes in the Second Circuit Rules;\(^7\) backlogged dockets are no longer to be an excuse for delay.

The Act, however, contains several other provisions designed to mitigate the stringency of its short time limits, some of which are not found in prior schemes. One salient example of the flexibility intended by the framers is found in section 3162(a)(1). It provides that, under the permanent limits, when charges against the defendant must be dismissed upon violation,\(^7\) the trial court in its discretion shall determine whether the dismissal should be with or without prejudice.\(^7\) The factors to be considered in that decision are the seriousness of the offense, the circumstances of the case that led to the

\(^{73}\) 1978 Speedy Trial Report, \textit{supra} note 10, at 15. During the 12 month period ending June 30, 1978, hearings on pretrial motions, motions held under advisement, and unavailability of the defendant or essential witnesses accounted for 34\%, 18.8\%, and 11.3\%, respectively, of all excludable delays. \textit{Id}.

\(^{74}\) 18 U.S.C. \$ 3161(h)(8)(A) (1976); see 1974 Senate Report, \textit{supra} note 2, at 39. Originally, a blanket exception was proposed for certain classes of complex cases, such as antitrust and organized crime conspiracies. Because of the difficulty of labeling actions as simple or complex, however, Congress finally deemed the case-by-case approach of \$ 3161(h)(8) a more appropriate test. \textit{Id. See generally Frase, supra note 1, at 698-704. The interests of justice exclusion constituted 16.2\% of the 14,301 incidents of excludable delay reported by all districts in the year ending June 30, 1978. 1978 Speedy Trial Report, \textit{supra} note 10, at 15.

\(^{75}\) 1974 Senate Report, \textit{supra} note 2, at 39; see Frase, \textit{supra} note 1, at 698.

\(^{76}\) 18 U.S.C. \$ 3161(h)(8)(C) (1976).

\(^{77}\) See notes 48-52 \textit{supra} and accompanying text.

\(^{78}\) 18 U.S.C. \$ 3163(c) (1976). For discussion of the dismissal sanction, see Frase, \textit{supra} note 1, at 704-08.

dismissal, and the impact of reprosecution on the administration of the Act and justice. 80

The Act is also unique in its concern that the districts' compliance with the permanent limits does not cause major disruptions of their calendars or drains on their resources. 81 It established detailed planning procedures, under which each district submitted plans to the Administrative Office of the United States Courts. 82 The plans summarize the experiences of the districts under the phase-in limits, report difficulties encountered, and include recommendations for legislative changes or additional appropriations needed to achieve compliance with the final strictures. 83 Finally, in the event that a district cannot comply with the permanent time limits, the Act permits the Judicial Conference, upon application of the judicial council of the appropriate circuit, to suspend the indictment-to-arraignment and arraignment-to-trial intervals for one year. 84

To date, most districts predict that they will be able to achieve substantial compliance with the permanent limits. 85 Although many of the final district plans propose that the tripartite limits, especially the arraignment-to-trial period, should be lengthened, apparently no district has yet applied for the one year emergency suspension. 86 Despite the flexibility with which Congress intended the public's right to prompt dispositions be implemented, however, most districts allege that the costs of compliance are stiff. 87 Accordingly, determination of the accuracy of those allegations is a crucial prerequisite to Congress' decision whether to lengthen the Act's time strictures.

80. Id. Dismissal with prejudice bars any future prosecution against the defendant for offenses which were or reasonably should have been known at the time of dismissal. 1974 House Report, supra note 2, at 37, reprinted in [1974] U.S. Code Cong. & Ad. News at 7429. If, however, the Government presents compelling evidence that failure to meet the time limits was caused by exceptional circumstances which the Government and the court could not have foreseen or avoided, it can reinstate charges; e.g., where the defendant or his counsel perjured himself in alleging circumstances which led the judge to dismiss charges. 1974 Senate Report, supra note 2, at 43.


82. 18 U.S.C. § 3165 (1976); see note 55 supra and accompanying text. The Administrative Office in turn compiles the district reports and statistical information concerning the Act's impact and effectiveness and progress of the Act and periodically reports to Congress. 18 U.S.C. § 3167 (1976).


84. 18 U.S.C. § 3174 (1976); see 1974 House Report, supra note 2, at 26, 42-44, reprinted in [1974] U.S. Code Cong. & Ad. News at 7419, 7434-37. Under the "judicial emergency" provision, the arraignment-to-trial limit may not be increased to exceed 180 days. The indictment-to-arraignment period, however, is subject to no limitation on its extension in case of suspension. For a detailed treatment of this section, see Frase, supra note 1, at 708-11.

85. 1978 Speedy Trial Report, supra note 10, at 1. Available data indicates that, in over 90% of the cases, the courts have been able to operate within the transitional time limits. Id.

86. Id. at A 1. Although the Administrative Office reported that a few districts requested amendment of the Act regarding the procedural grounds for obtaining a suspension of the time limits, no application for a suspension was noted. Id. at A 6.

87. Id. at 13-15.
II. METHODOLOGY OF THE STUDY

To ascertain the effect of the Act\(^88\) in the Districts of Connecticut, New Jersey and Eastern New York,\(^89\) this study was launched in August 1978. Varying numbers of district judges, assistant United States Attorneys, and defense attorneys were interviewed in each of the three districts.\(^90\) Interviews were conducted with each judge whose schedule permitted and who had sufficient experience under the phase-in limits.\(^91\) Four judges in Connecticut, eight in New Jersey, and six in Eastern New York consented to questioning. Similarly, all available, experienced prosecutors—five in Connecticut and ten in New Jersey—participated in the study. The United States Attorney's Office for the Eastern District of New York approved only one interview; the prosecutor interviewed, however, was authorized to speak on behalf of his colleagues.

Four defense attorneys in Connecticut, six in New Jersey, and ten in the Eastern District of New York were interviewed. The attorneys' names were obtained from the docket sheets of the district courts and through recommendations of other interviewees. Again, care was taken to interview those lawyers with the most experience under the Act. Unfortunately, many of the attorneys with the busiest schedules in federal court were consequently unavailable for interviews. The study found little indication, however, that the experiences of those lawyers who were questioned do not adequately reflect the difficulties faced under the transitional limits.

The interviews were broad in scope.\(^92\) Each individual was encouraged to relate his\(^93\) experiences under the Act and his recommendations, if any, for its future implementation. Although separate lists of direct questions were em-

\(^88\) As the permanent limits and sanctions are not effective until July 1, 1979, any study conducted before that time in the District of New Jersey and the Eastern District of New York, which did not immediately adopt the permanent limits, cannot reflect the full impact of the Act with complete accuracy. The District of Connecticut, however, has applied the permanent time limits of the Act since July 1, 1976, District of Connecticut, Final Plan for the Prompt Disposition of Criminal Cases II-2 to -5 (1978) [hereinafter cited as D. Conn. Final Plan], and to that extent may provide a more reliable base for prediction.

\(^89\) Both the District of Connecticut and the Eastern District of New York are in the Second Circuit. The Eastern District of New York encompasses Brooklyn, Queens, Staten Island, and Nassau and Suffolk Counties. The District of New Jersey is part of the Third Circuit. Despite its proximity to the Fordham University School of Law, the Southern District of New York was not chosen as a subject for study, primarily because of its unusually large size. See 1978 Administrative Office Report, supra note 14, at 66. In addition, the district has been the target of at least two other recent analyses. See Speedy Trial Planning Group, Southern District of New York, Report on Problems in Implementing the Speedy Trial Act of 1974 (May 6, 1977) [hereinafter cited as Report on Problems]; Southern District Evaluation, supra note 1.

\(^90\) Although the accuracy of interview references has been carefully checked by the editors of the Fordham Law Review, no citations are provided in order to preserve the promise of confidentiality given to each person interviewed.

\(^91\) Some judges declined interviews because of their senior status, or because their tenures on the bench were too short to acquaint them sufficiently with the Act.

\(^92\) All interviews took place at the office of the interviewees and lasted from one to two hours. Although some interviews were tape-recorded, notes were taken in most interviews and immediately transcribed to avoid any potential inhibitions that might be caused by the presence of recording devices. Interview transcripts are on file at the Fordham Law Review, but are unavailable for public inspection.

\(^93\) The male pronoun will be used to preserve anonymity.
ployed for each of the three groups, all were encouraged to recount specific instances that would illustrate their answers. In addition, all interviewees were asked whether their experiences differed prior to the implementation of the transitional limits. Whenever possible, answers were compared with available statistical information. Previous experiences and the statistical comparisons were employed to distinguish those problems created or exacerbated by the Act from those upon which the Act has had little apparent effect.

A comparison of several districts' operation under the Act was deemed to be the most profitable method of gauging its effects; comparative analysis lessens the possibility that the conclusions of the study rest on atypical or unrepresentative foundations. Although no one district is a microcosm of national experience, the districts chosen are sufficiently diverse to highlight most problems that have been encountered during the phase-in period.

All three districts varied in their adherence to the transitional limits. Connecticut elected to adopt the permanent limits immediately on July 1, 1976. New Jersey adhered to the transitional limits during the first eighteen months of operation under the Act, but switched to the final limits on January 1, 1978. Eastern New York, preferring the gradually reducing limits of the phase-in period, has not yet adopted the permanent limits. In addition, the districts differ as to the makeup of their yearly filings. While Connecticut has a predominantly civil calendar with few criminal actions, large numbers of criminal actions were filed in Eastern New York and New Jersey during the phase-in period of the Act.

Moreover, the districts show considerable variance with respect to caseload per authorized judgeship. While New Jersey's caseload, as measured against national figures, is average, Connecticut's is relatively

94. The questions are set forth in the Appendix.
95. D. Conn. Final Plan, supra note 88, at III-1; see note 88 supra and accompanying text.
96. District of New Jersey, Final Plan for Prompt Disposition of Criminal Cases 30 (1978) [hereinafter cited as D.N.J. Final Plan]. Statistical information for the latter period is not yet available.
98. The term "year" will be used throughout this article to refer to a fiscal year beginning on July 1 and ending on June 30.
100. Id. at 23, 30.
101. Comparison of the districts on a per judgeship basis, however, may have its own inadequacies. The number of authorized judgeships does not account for vacancies. 1978 Management Statistics, supra note 99, at 21, 23, 30. The actual number of cases assigned to each active judge would be higher if the district experienced a vacancy. In fact, judicial seats have been unoccupied for certain periods in Eastern New York and Connecticut since the effective date of the transitional limits. See id. at 21, 23. Active judges in those districts, therefore, may have been busier than the statistics reveal. On the other hand, the statistics do not account for the number of active senior judges. Id. at d. Each of the districts studied has at least two active senior judges. See Administrative Office of the United States Courts, United States Court Directory 41, 84, 89 (1978). These judges may help to reduce the pressures of compliance with the Act's limits, and perhaps partially offset the added burdens resulting from judicial vacancies.
102. The national average of criminal and civil filings per authorized judgeship was 411 in 1977 and 417 in 1978. 1978 Management Statistics, supra note 99, at 129.
103. New Jersey reported 352 filings per judge in 1977 and 375 in 1978. Id. at 30.
high. On the other hand, Eastern New York's caseload per judgeship is smaller than most federal jurisdictions, despite the large number of cases filed. If the cases are weighted to indicate relative degrees of complexity, Connecticut also shows the highest weighted caseload per judge of the three districts, and indeed has one of the highest figures nationwide. Both Eastern New York and New Jersey rank behind most other districts in this category.

III. Effect on Civil Litigation

Although the Act provides that priority should be given to the acceleration of criminal cases, it cautions that courts should "seek to avoid . . . prejudice to the prompt disposition of civil litigation." Yet, as the permanent sanctions approach, almost half of the districts report increased neglect of their civil calendars. Chief Justice Burger, prominent among advocates of judicial efficiency, recently proclaimed that the Act "has required a virtual moratorium of civil cases in some districts." His call for amendment echoes

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105. The figures in Eastern New York were 362 filings per authorized judgeship in 1977 and 359 in 1978. Id. at 23.
106. Weighted filings reflect an attempt by the Administrative Office to assess a district's total filings in terms of case complexity. Civil cases are weighted based upon the amount of court trial time in fiscal 1963 and 1964 for that particular type of action divided by the total number of terminations reported for this type of action. Thus, patent cases accounted for 6% of the trial effort by judges, but only 1.5% of total terminations; 6.0 divided by 1.5 yields a weight of 4.0 for all patent cases. Judicial Conference of the United States, Annual Report 157 (1964). Criminal actions are weighted by the same procedure, except that each defendant in a criminal action is accorded an additional weight of .60 to assure that multidefendant criminal actions are weighted more heavily than single defendant actions. Id. at 160.
107. In 1977, Connecticut reported 452 weighted filings per judge and in 1978 this figure reached 486. 1978 Management Statistics, supra note 99, at 21. In contrast, the figures for the weighted filings per judge in New Jersey were 416 in 1977 and 412 in 1978. Id. at 30. In Eastern New York, the figures were 405 in 1977 and 371 in 1978. Id. at 23.
108. In terms of weighted caseloads, only 28 districts had a higher average in 1978. Id. at 21.
109. New Jersey was ranked fifty-fifth in 1978. Id. at 30. Eastern New York was sixty-eighth. Id. at 23.
110. 18 U.S.C. § 3165(b) (1976); see Fed. R. Crim. P. 50(b).
111. 18 U.S.C. § 3165(b) (1976). This language appears to have been derived predominantly from the additions to the bill proposed by Professor Daniel J. Freed of the Yale Law School. Letter from Daniel J. Freed to Senator Ervin (Aug. 6, 1973), reprinted in Speedy Trial: Hearings on S. 754 Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary, 93d Cong., 1st Sess. 154 (1973) [hereinafter cited as 1973 Senate Hearings]. The earlier draft of the bill was devoid of any reference to civil litigation. See S. 754, 93d Cong., 1st Sess. § 3165 (b) (1973); 1973 Senate Hearings, supra, at 23. The final bill, however, contained the exact wording of Professor Freed's proposal. See 1974 House Hearings, supra note 2, at 259 (statement of Prof. Freed).
112. Forty-four of the planning groups reported increased delay in the disposition of civil cases. 1978 Speedy Trial Report, supra note 10, at 13. The Second Circuit, however, has not reported major difficulties with its civil calendar. 65 A.B.A. J. 23 (1979).
the concern of several commentators that relaxation of the time limits is essential to avoid further detriment to civil litigants.114

The most common fear is that the greater time devoted to criminal matters will spur substantial increases in the number of civil cases remaining on the courts' calendars at the close of each fiscal year (the pending rate).115 The already alarming levels of congestion in federal courts underscore the necessity of avoiding additional backlogs.116 Furthermore, courts' neglect of civil cases will force judges to encourage, and civil litigants to accept, more settlements as the only remaining method to end lawsuits quickly.117 Settlement, insofar as it precludes the opportunity of determining a case on the merits, may arguably be an undesirable consequence of the shorter limits. In addition, it has been predicted that the increased pressures to dispose of criminal matters will lead judges to reassign more civil and criminal cases.118 When a case is reassigned, time is wasted as the new judge familiarizes himself with often complex legal and factual disputes. In short, contrary to the congressional directive, operation of the time limits could only operate to the detriment of civil litigation.

Experience in the three districts surveyed, however, reveals that the Act

114. Black, supra note 1, at 251; Frase, supra note 1, at 702-03; Lacey, supra note 1, at 8, 16; Suggestion, supra note 1, at 934; Nat'l L.J., Mar. 12, 1979, at 5, col. 1. The Southern District of New York has expressed fears that the Act would unduly interfere with the processes of long civil trials. Report on Problems, supra note 89, at 5.

Several critics in the debates prior to passage of the Act reported that even under less stringent speedy trial schemes civil litigants had suffered. “1200 civil cases are now awaiting trial whereas the court was current on its civil docket before [Rule 50(b) was adopted].” 1974 House Hearings, supra note 2, at 206 (statement of James L. Treece). “[W]e are giving priority to the defendants in criminal cases, but we are doing it at the expense of the civil docket.” Id. at 246 (statement of Judge Feikens). “[T]he yeoman efforts of our District Courts to speed up the trials in criminal matters has [sic] resulted in . . . the shunting aside of virtually all civil matters . . . .” Id. at 336 (statement of Ivan E. Barris). “[E]ven under the pressures of the Rule 50(b) plan, it has become difficult to process civil cases and so difficult in fact that they have had to declare a virtual moratorium on civil cases.” Id. at 370 (statement of Judge Zirpoli).

115. See 1978 Speedy Trial Report, supra note 10, at 13; Suggestion, supra note 1, at 914-15; D. Conn. Final Plan, supra note 88, at III-4; D.N.J. Final Plan, supra note 96, at 30-31; E.D.N.Y. Final Plan, supra note 97, at III-5. “[T]he Speedy Trial Act has made calendar control even more difficult than it was previously.” United States v. Wendy, 575 F.2d 1025, 1031 (2d Cir. 1978). “[I]t is not fair to say how, with the present number of judges assigned to this district, how [sic] the Court will be able to try all criminal cases unless we just stop trying civil cases and devote all our attention to criminal matters.” United States v. Clendening, 526 F.2d 842, 845 (5th Cir. 1976) (quoting lower court record).

116. 1978 Speedy Trial Report, supra note 10, at 13. “[A] civil case in the federal court system may not come to trial for many months or even years after it is filed.” Shelak v. White Motor Co., 581 F.2d 1155, 1158 n.5 (5th Cir. 1978).

117. Lacey, The Judge's Role in the Settlement of Civil Suits 4 (Federal Judicial Center, Educ. and Training Series 1977). The Act may have an indirect effect on the number of civil filings. If the greater time spent on criminal matters leads to excessive delays on the civil dockets, it may not be practical for a plaintiff to sue in federal court when a similar action can be maintained in state court. This same judge has noted that the Act will make federal civil practice quite unappealing to many attorneys, who will more often resort to state courts whenever possible. Id. at 7.

118. “[L]arge numbers of such reassignments would also seriously impair the effectiveness of the individual calendar system.” Frase, supra note 1, at 702; see Lacey, supra note 1, at 6.
may not be as culpable on these counts as its detractors have charged. While the majority of judges interviewed agreed that the number of civil cases on their dockets was increasing yearly, a substantial number declared that the Act was not a factor in the status of their dockets. Moreover, that the rise in the civil pending rate is not entirely, if at all, the fault of the Act is supported by an analysis of the caseloads in the three districts.

A. Civil Pending Rates

Theoretically, as the time limits for disposition of criminal matters shorten, more judicial resources will be allocated to the criminal dockets. The corresponding reduction in time addressed to civil matters will cause decreases in the number of civil cases terminated and consequently higher pending caseloads. Accordingly, pending caseloads have formed the basis of several critical assessments of the Act, including the final plans for all three districts studied. The pending caseload, however, is only the first step in a review of the Act's effect on civil litigation; a complete analysis requires a study of filing and termination rates. For even if the rate of terminations is increasing, the pending civil caseload will increase as long as the rate of civil filings increases faster than the rate of terminations. Thus, although judges acting under the Act's constraints may have improved their efficiency in terminating both civil and criminal cases, a simultaneous rise in the number of cases filed might nevertheless exacerbate court congestion. Since the Act presumably has no effect on the number of civil actions instituted, it could not, in that instance, be blamed for an increase in the number of pending civil matters.

Graph 1 indicates the number of pending civil cases in each district for the

119. See notes 152-55 infra and accompanying text.
120. Because each individual defendant must be brought to trial within a short time, a judge must devote considerable attention to his criminal dockets to ensure that the time limits for any one defendant do not expire.
121. If 100 civil cases are filed during the year, and the district judges terminate 80, 20 cases are carried over to the following year as pending matters. If in that following year the judges manage to terminate only 70 cases while an additional 100 cases are filed, then the pending caseload would be 50—an increase of 30 cases, or 150%.
122. 1978 Speedy Trial Report, supra note 10, at 13; see Address by Warren E. Burger, Chief Justice of the United States, American Bar Association Midyear Meeting (Feb. 11, 1979); note 115 supra.
123. The District of Connecticut planning group has reported gains in the dispositions of criminal matters but at a cost to the civil docket in terms of pending matters. D. Conn. Final Plan, supra note 88, at III-4. Although New Jersey has decreased its civil backlogs in the past two years, it fears that "[w]ith civil filings for the year beginning July 1, 1977, running approximately 8.0% ahead of the previous 12-month period, it is difficult to imagine any significant reduction occurring in the civil caseload if the court continues to expend the same amount of time or increases its efforts on the criminal side in order to meet the requirements of the Speedy Trial Act." D.N.J. Final Plan, supra note 96, at 31. This same fear was expressed by the planning group in Eastern New York. "[T]he backlog will increase at a more rapid rate, when, in 1979, 100% compliance with the Speedy Trial Act will be required." E.D.N.Y. Final Plan, supra note 97, at III-6.
124. For example, assume that filings in one year exceed those of the previous year by 150. If the district terminates 100 cases more than in the previous year, 50 cases remain. Thus, the pending civil caseload increases by 50, regardless of the increased terminations.
125. See note 117 supra.
Effective Date
PRE-ACT
POST-ACT

FISCAL YEARS
(July 1–June 30)

LEGEND
- - - - District of Connecticut
--- --- District of New Jersey
- - - - Eastern District of New York

PENDING CIVIL CASES

GRAPH 1
years 1975 to 1978.\textsuperscript{126} The area to the left of the bold line indicates the period prior to July 1, 1976, the effective date of the first transitional time limits. In conformity with prior trends,\textsuperscript{127} the number of civil cases pending in

\begin{center}
\begin{tabular}{|c|c|c|c|c|}
\hline
\textbf{FISCAL YEARS} & \multicolumn{4}{|c|}{\textbf{(July 1–June 30)}} \\
\hline
\textbf{1975} & \textbf{1976} & \textbf{1977} & \textbf{1978} \\
\hline
\end{tabular}
\end{center}

\begin{center}
\textbf{LEGEND}
\begin{tabular}{|c|}
\hline
\text{- District of Connecticut} \\
\text{- District of New Jersey} \\
\text{- Eastern District of New York} \\
\hline
\end{tabular}
\end{center}

\begin{center}
\textbf{CIVIL CASES FILED}
\end{center}

\textbf{GRAPH 2}


\textsuperscript{127} During 1976, one year before implementation of the transitional limits, the number of
both Eastern New York and Connecticut rose during both years under the Act. In New Jersey, however, the pending civil caseload dropped during 1977 and increased slightly in 1978. From these statistics, it might appear that the Act has increased civil backlogs in Eastern New York and Connecticut, but has had little effect on New Jersey's calendars. However, the filing and termination rates for each district in that two year period reveal that the Act may have spawned few adverse consequences even in Connecticut and Eastern New York. As illustrated by Graph 2, the number of civil actions filed each year increased in all three districts.

More importantly, as shown by Graph 3, the districts managed to increase their terminations during both years under the Act. Indeed, the decreased terminations in Connecticut and New Jersey during the year before the time limits were imposed renders the improvement in judicial efficiency in these districts under the constraints of the Act even more surprising. Hence, the congestion in the districts' pending civil dockets is more probably the result of the rise in civil actions commenced in federal court rather than a neglect of those cases fostered by the Act.

Connecticut's rise in terminations, and arguably in judicial efficiency, is even more surprising in view of the district's decision to adopt the Act's permanent limits immediately. Given the comparatively small criminal caseload in the district, this sudden transition was perhaps less of a shock than might be expected. Nevertheless, its corresponding improvement in termination rates for civil matters indicates that compliance with the Act after 1979 may not be as prejudicial to civil litigation as has been predicted.

An increase in terminations, however, may not provide a totally reliable

128. The pending caseload for 1977 was 20.2% higher in Connecticut and 10.7% in Eastern New York. See 1977 Administrative Office Report, supra note 126, at 84. For 1978, the increases were 19.5% in Connecticut and 9.1% in Eastern New York. See 1978 Administrative Office Report, supra note 14, at A-14.

129. After increasing 9.8% in 1976, 1976 Administrative Office Report, supra note 126, at 82, the pending civil caseload dropped 5.4% in 1977, see 1977 Administrative Office Report, supra note 126, at 84, and then increased by only 1% in 1978. See 1978 Administrative Office Report, supra note 14, at A-14.


132. See note 131 supra.

133. See notes 88, 95 supra and accompanying text.

134. See note 99 supra and accompanying text.

135. See note 131 supra.
indication that the Act has had little effect on civil dockets. Terminations include cases whose disposition requires little court action as well as those that end only after a full trial on the merits. Indeed, if increased terminations stem primarily from a rise in the number of actions terminated at early stages of litigation, it is arguable that the amount of judicial time available for civil litigation has decreased under the phase-in limits. Specifically, the greater attention required for criminal cases may have compelled courts to devote less time to civil trials, and thus either to abandon their civil dockets or to induce terminations at earlier stages. If so, civil litigants, as a result of either more insistent prodding by the court or a desire to end their disputes without undue delay, would be forced to settle more cases.\(^{136}\)

\(^{136}\) Indeed, the overall number of early terminations increased in all three districts each
Experience in the three districts, however, suggests that settlements have not markedly increased under the transitional limits. Three of four judges in Connecticut and five of six judges in Eastern New York could not specifically attribute any rises in settlement to the Act. Indeed, two of four judges in Connecticut and three of six in Eastern New York had not increased settlements during the years under the Act for any reason. Of those judges who did induce more settlements, only two would attribute the increases to the Act. The growing termination rates of these two districts thus are probably not the result of drastic rises in settlements. On the other hand, one half of the judges interviewed in New Jersey, the district whose pending civil

year. Table 1 shows the total terminations yearly (except land condemnations and prisoner petitions) by stage of the proceedings. The table is divided into four categories. The first division involves those cases terminated without any action by the district court, e.g., voluntary dismissal. Cases terminated before pretrial include actions disposed of either before or after a complaint has been answered, but after any motion has been made. For example, assume that a complaint is unanswered, and the plaintiff moves for a default judgment. If the motion is granted, the termination would appear in this category. Actions ending during or after pretrial encompass cases disposed of after at least one pretrial conference has been held. The final category presents cases terminated either during or after the actual trial. See Administrative Office of the United States Courts, Guide to Policies and Procedures, Clerk's Manual, Civil Docket Reporting Instructions (1978).

<table>
<thead>
<tr>
<th>COURT ACTION</th>
<th>No Court Action</th>
<th>Total Court Action</th>
<th>Before Pretrial</th>
<th>During or After Pretrial</th>
<th>Nonjury</th>
<th>Trial</th>
</tr>
</thead>
<tbody>
<tr>
<td>D.C.CONN.</td>
<td>356</td>
<td>476</td>
<td>574</td>
<td>640</td>
<td>655</td>
<td>695</td>
</tr>
<tr>
<td>D.N.J.</td>
<td>1,054</td>
<td>1,290</td>
<td>1,240</td>
<td>1,099</td>
<td>1,430</td>
<td>1,660</td>
</tr>
<tr>
<td>E.D.N.Y.</td>
<td>955</td>
<td>1,035</td>
<td>1,331</td>
<td>1,000</td>
<td>1,134</td>
<td>1,100</td>
</tr>
</tbody>
</table>

The table was prepared from the following sources: 1978 Administrative Office Report, supra note 14, at A-28; 1977 Administrative Office Report, supra note 126, at A-26; 1976 Administrative Office Report, supra note 126, at I-26. The number of total court action dispositions in 1976, however, is not equal to the sum of the various parts for any district. This error is not explained in the reports.

Examination of terminations without court action, or before pretrial conferences are held, indicates that the actual number of cases disposed of in these early stages has increased in each district. As a percentage of total dispositions, these early dispositions in Connecticut increased from 78.6% in 1976 to 81.4% in 1977 and to 85.9% in 1978. Eastern New York's percentages rose from 81.8% in 1976 to 85.7% in 1977, and finally to 87.1% in 1978. However, the percentage of early dispositions in New Jersey declined from 77.9% in 1976 to 74.4% in 1977 and to 69.1% in 1978.

These increases, however, do not necessarily indicate a rise in the number of settlements. The statistical information set forth in Table 1 does not reveal the proportion of early case dispositions that are settlements. In addition, even if the increases reflect a drastic rise in the number of settlements, whether they were brought about as a result of the Act is at best conjectural.
caseload showed the greatest improvement, stated that they had stepped up their settlement procedures and attributed that intensification to the decreased time available to devote to civil litigants.

It is at least questionable, however, whether those increased settlements indicate a decline in judicial efficiency in New Jersey. One Connecticut judge stated that as a result of the time constraints of the Act, he has developed a new method of civil calendar calls which has increased settlements. On the first Monday of each month the judge schedules approximately sixty-five civil cases for calendar call; each call is approximately five to ten minutes in length. In so doing, the judge ensures that all civil cases are kept active. When the parties realize that their case is progressing, they are more likely to settle in order to avoid the prospect of an adverse ruling. In his opinion, therefore, increased settlements under the Act reflected more efficient management of civil caseloads. Insofar as settlements and other early dispositions reflect increased court activity and better case administration, they can be viewed as promoting judicial efficiency. In short, even though the Act may have forced courts to devote less attention to civil litigation, the time remaining may be well spent.

B. Criminal Docket Activity

A second factor which must be considered in an analysis of civil termination rates is criminal docket activity. The status of a district's criminal calendars may provide some insight into a district's efficiency in disposing of civil cases. A drop in the number of pending criminal cases, unaccompanied by changes in the number of criminal filings, arguably demonstrates that judges are devoting more time to terminating criminal cases under the short limits. A corresponding increase in the number of civil cases terminated in the district would indicate that judges' efficiency in disposing of civil cases has not diminished despite the greater attention paid to criminal matters. On the other hand, if criminal filings decline during that period, a simultaneous rise in civil terminations could not confidently be ascribed to judicial efficiency. The higher disposition rate would more plausibly stem simply from the greater time available to devote to civil litigation. Reduced criminal filings may, therefore, cast doubt on the equation of increased civil terminations with greater judicial efficiency.

Although the civil calendars of all three districts have shown improvement, the criminal dockets of Connecticut and Eastern New York have not met with the same success. Here again pending rates may be misleading. Given the pressure to dispose of criminal matters imposed by the Act, the pending caseloads might be expected to, and did in fact, decline in these districts.

137. See Graph 1 supra.

138. To that extent, therefore, the rising levels of early case dispositions in all districts do not necessarily reflect a neglect of civil calendars. See note 136 supra and accompanying text.

139. Indeed, the planning groups in the three districts assumed that increased judicial time would be afforded to criminal litigation. See note 123 supra.

140. In 1976, one year before the Act's effective date, the pending criminal caseload dropped 15.6% in Connecticut and increased 3% in Eastern New York. See 1976 Administrative Office Report, supra note 126, at II-2. Beginning in 1977, pending caseloads decreased in both districts.
That drop, however, was not caused by increased terminations. Despite the shorter time limits, criminal terminations in the two districts generally declined. The primary reason for their lower pending rates is a decrease in the number of criminal cases filed, due largely to decisions by the United States Attorney's Offices in both districts to adopt more selective policies of prosecution. The increased efficiency with which the districts have disposed of their civil matters may thus be traceable in part to the fact that judges have fewer criminal cases on their calendars and consequently more time to concentrate on civil litigation. If these districts abandon their policies of selective prosecution or acquire additional prosecutors, the resulting rise in criminal filings may increase their civil congestion.

Experience in New Jersey, however, suggests that selective criminal prosecution may not have a direct impact on civil efficiency. In the two years following the effective date of the transitional limits, the United States


143. See D. Conn. Final Plan, supra note 88, at III-3; E.D.N.Y. Final Plan, supra note 97, at V-4. Although a majority of the assistant United States Attorneys interviewed denied that they were prosecuting fewer cases as a result of the Act, it is likely that institution of the policy in Connecticut and Eastern New York at approximately the same time as the effective date of the Act is somewhat more than coincidental. One author has posited five possible reasons for selective prosecution: a desire to win; a lack of resources; law enforcement considerations; public opinion; and lack of collegial organization (e.g., inability of fellow prosecutors to work together effectively). Cox, Prosecutorial Discretion: An Overview, 13 Am. Crim. L. Rev. 383, 413-17 (1976). Of these, only the first two seem applicable to the districts studied. Apparently, fewer defendants are being acquitted after indictment. All districts showed decreases during 1978 from 1977 in the percentages of defendants in felony and misdemeanor actions who were not convicted. See 1978 Administrative Office Report, supra note 14, at Table D7FMD; 1977 Administrative Office Report, supra note 126, at Table D7FMD. In addition, pursuant to the Act's provision allowing the districts to request additional resources necessary to comply with the permanent limits, both New Jersey and Eastern New York have requested additional assistant United States Attorneys in their plans. D.N.J. Final Plan, supra note 96, at 51 (8 new assistants); E.D.N.Y. Final Plan, supra note 97, at V-4 to -5 (some). Connecticut has not requested new prosecutors. D. Conn. Final Plan, supra note 88, at V-1. The higher conviction rates in 1977 and 1978 and the requests for additional prosecutors for 1979 are at least indicative of greater prosecutorial discretion under the Act.

144. The reduced criminal filings in the districts may also be traced to the efforts of prosecutors to dispose of the backlog of pending criminal cases filed prior to the Act. When those backlogs are eliminated, the additional time to attend to more recent matters may prompt criminal filings to climb.

145. See note 143 supra.
Attorney's Office in that district did not formally limit the number of criminal cases to be filed. Nevertheless, despite increases in both civil and criminal filings in 1977, the district managed to terminate more cases in both dockets than in the previous year. Because criminal filings exceeded terminations, however, pending criminal matters also rose. Terminations were slightly lower in 1978 because of a corresponding decrease in filings, the number of pending criminal cases declined. New Jersey's management of its criminal calendars thus surpassed that of Connecticut and Eastern New York despite the absence of a formal policy of selective prosecution to cope with the Act. Therefore, the concern that an increase in the number of criminal actions filed will adversely affect civil dockets may not be entirely well-founded.

C. Judicial Reaction

Despite New Jersey's apparent success in managing both its civil and criminal dockets under the Act, six of the eight judges interviewed in that district stated that the Act has disrupted their civil calendars. These judges contended that in contrast to their experience before the Act, it is now difficult to schedule civil cases. They also claimed to have fewer trial days for civil litigation. The remaining two judges stated that the Act has not affected their civil caseloads. In fact, one judge declared that he may be trying more civil trials now than before the Act. The second judge's response paralleled the statistical trend in the district's civil dockets. He stated that during the first year under the transitional limits, he and the other judges in his vicinage pushed to dispose of pending criminal matters, an effort which necessarily spurred an increase in pending civil caseloads. Since that time, however, they have been actively clearing their civil dockets.

146. See D.N.J. Final Plan, supra note 96, at 33.
147. Civil filings increased over all three years studied. See note 130 supra and accompanying text. Moreover, in 1977, criminal filings rose by a remarkable 71.4%. See 1977 Administrative Office Report, supra note 126, at A-44.
151. Filings decreased 25.5% in 1978. See id. The decreases in filings, offset by the slight decrease in terminations, resulted in a 46.9% decrease in criminal cases pending in 1978. See id.
152. One of those interviewed in this district was a magistrate. He stated that a significant amount of his workload consisted of preliminary civil matters referred to him pursuant to the Federal Magistrates Act, 28 U.S.C. § 636(b)(1)(A)-(B) (1976). This portion of his workload, he said, was caused by a growing propensity of judges to devote a large percentage of time available for civil litigation to civil trials. The magistrate did express optimism, however, that his civil calendar would be reduced in the future if the United States Attorney continues to prosecute criminal matters more selectively.
153. This district, however, has conducted more trials each year under the Act. See Table 1, note 136 supra.
154. See notes 127-32 supra and accompanying text.
In contrast to the majority view in New Jersey, the experience of most judges in Connecticut and Eastern New York mirrored the constant improvement found in their civil dockets. Three out of four judges in Connecticut and four out of six in Eastern New York found that the Act has had little effect on their calendars. One judge believed that the Act has neither improved nor hindered his performance. In his words, "I have my own Speedy Trial Act." A second judge squeezes civil cases into every available time slot after first scheduling his criminal matters, and thereby manages to devote equal time to both calendars. As discussed above, another judge had adopted a new method of civil calendar calls which he said increased terminations at earlier stages. Three judges in those two districts, however, expressed concern that they would be unable to handle their civil calendars in the future if the United States Attorney's Offices abandoned their policies of selective prosecution.

Experience thus far in the three districts also mitigates the fear that reassignments of civil and criminal cases among judges will increase under the Act. Only two out of the eighteen judges interviewed reported that they had reassigned more cases because of scheduling difficulties created by the short limits. Although most judges had reassigned cases, the most commonly cited reason was protracted litigation. For example, one judge was involved in a year long antitrust case which consumed most of his time. He was therefore forced to reassign his entire criminal calendar to the other judges in his district. Another judge, overburdened by an eleven week criminal trial, transferred some civil and criminal cases to senior judges for trial. In neither instance did pressure to comply with the Act in other cases influence the decision to reassign.

In sum, none of the three districts has abandoned its civil calendar since 1976. To the contrary, as measured by civil termination rates, judicial efficiency has steadily improved during the Act's phase-in period. Increased settlements may partially explain that improvement in New Jersey; however, as settlements may reflect more effective case management, they cannot be viewed necessarily as an adverse consequence of speedier criminal trials. Similarly, although fewer criminal filings in Connecticut and Eastern New York undoubtedly expanded the time available for civil dockets, experience in New Jersey suggests that a sudden influx of criminal cases will not necessarily wreak havoc with civil calendars. Most importantly, the preponderance of judges declared that the constraints of the time limits have not unduly restricted their attention to civil matters or disrupted their scheduling procedures on either docket.

Of course, when the sanction of dismissal for violation of the permanent limits becomes effective, the increased pressures of compliance may create

155. See note 138 supra and accompanying text.
156. The three dissenting judges in Connecticut and Eastern New York claimed that the Act had indeed affected their civil calendars. One judge in Eastern New York claimed that the short criminal limits had forced him to reduce the time he could devote to civil litigation by 25%. Another judge who had been forced to put his civil matters on the "back burner" was nevertheless optimistic that he will be able to devote increased time to civil litigation in the future as long as the policy of selective prosecution continues. The third judge summarily expressed his feelings towards the Act by stating that civil litigants were "getting the short end."
unforeseen difficulties. Nevertheless, from the foregoing analysis, it is apparent that the statutory directive to avoid prejudice to civil litigation has not yet been subverted. If these districts are at all representative, the Speedy Trial Act should not make life miserable for civil litigants in federal courts after 1979.

IV. Adequacy of Defense Under the Act

Since the implementation of the Act, defense attorneys have declared that it undermines a defendant's ability to prepare an effective defense to a criminal prosecution. Indeed, compliance with the short time limits within which a case must proceed to trial can place severe burdens on the defense. Especially in complex cases, in which defendants have approximately two months to review documents which the prosecution may have taken years to collect and master, strict application of the limits may be a significant handicap. The short time periods may also impede a defendant's ability to procure and retain the attorney of his choice. These problems have prompted numerous calls for relaxation of the permanent limits. It is submitted, however, that the exist-

158. Although the rises in the pending rates in the districts may not be the result of the Act, they must nevertheless be reduced. Several alternate remedies for court congestion should be considered, however, before amendment of the Act. See notes 332-39 infra and accompanying text.
159. See notes 181-84 infra and accompanying text. Thirty-four of the 94 districts indicated that defense attorneys had encountered insufficient time to prepare for trial. 1978 Speedy Trial Report, supra note 10, at 13-14; see, e.g., D. Conn. Final Plan, supra note 88, at III-6 to -7; Report on Problems, supra note 89, at 8; Southern District of New York, Final Plan for Prompt Disposition of Criminal Cases, III-6 to -9 (1978) [hereinafter cited as S.D.N.Y. Final Plan]. Sufficient preparation time under the Act was a concern prior to its enactment. E.g., 1973 Senate Hearings, supra note 111, at 128 (statement of James R. Thompson), 145-50 ("ultimate destruction of the private Defense Bar" predicted because attorneys would be unable to prepare or obtain continuances for schedule conflicts) (statement of Gilbert Rosenthal); 120 Cong. Rec. 41790-91 (1974) (rushed preparation would deny due process) (statement of Rep. Dennis). The fears, however, were either ignored, 1973 Senate Hearings, supra note 111, at 151, or assuaged by proclamations of the flexibility of the excludable time provisions. 120 Cong. Rec. 41791 (1974) (statement of Rep. Cohen). Commentators, however, were unconvinced that the Act would not prejudice defendants' ability to prepare. Black, supra note 1, at 244; Frase, supra note 1, at 669; Lacey, supra note 1, at 13-15; Platt, supra note 1, at 770-73; Suggestion, supra note 1, at 917.
160. See note 1 supra. The planning groups of the District of Connecticut and the Eastern District of New York have recommended extending the time periods to 60 days for arrest to indictment, 20 days for indictment to arraignment, and 100 days for arraignment to trial. D. Conn. Final Plan, supra note 88, at VI-1; E.D.N.Y. Final Plan, supra note 97, at VI-1 to -2. The planning group of the District of New Jersey recommends retention of the 30 day arrest-to-indictment period. It would, however, change the indictment-to-arraignment period to a maximum of 20 days; ambiguously, the 10 day period would be retained only "when feasible." D.N.J. Final Plan, supra note 96, at 52-53 (emphasis omitted). Finally, it advocates extension of the arraignment-to-trial period to 90 days. Id. Several judges and attorneys in the Southern District of New York have called for a single limit of four to six months from arrest or indictment until trial, or, in the alternative, lengthening of the arraignment-to-trial period to "120 days or so." Report on Problems, supra note 89, at 9-10. The planning group of the Southern District, however, recommends extension of the last interval to only 90 days. S.D.N.Y. Final Plan, supra note 159, at VI-1; see Frase, supra note 1, at 680-84; Platt, supra note 1, at 774; Suggestion, supra note 1, at 933-34.
ing statutory scheme is sufficient to assure defendants adequate pretrial preparation time, and that amendment of the time limits is therefore unnecessary.

A. The Burdens Upon Defendants and Their Counsel

The legislative history of the Act indicates that many of the burdens placed on defendants were not inadvertent. Although the Act was at least partially intended to clarify the speedy trial rights of defendants, its sponsors' major concern was to protect society from crimes committed by defendants who are released pending trial. In fact, Congress noted that the public interest in speedy trials is often in opposition to the interests of defendants, who may favor delay because it lessens the chance of conviction or postpones punishment. Convinced, therefore, that quicker dispositions would result in "better quality justice," Congress took steps to limit the defendant's ability to manipulate the pretrial process.

161. In introducing the original Senate bill, Senator Ervin stated that it was intended "to give effect to the sixth amendment right to speedy trial for persons charged with offenses against the United States." 116 Cong. Rec. 18844 (1970). Compliance with the Act, however, does not "bar . . . any claim of denial of speedy trial as required by amendment VI of the Constitution." 18 U.S.C. § 3173 (1976); see United States v. Herman, 576 F.2d 1139, 1144 n.3 (5th Cir. 1978); United States v. MacDonald, 531 F.2d 196, 204 n.15 (4th Cir. 1976), rev'd on other grounds, 435 U.S. 850 (1978); United States v. Sebastian, 428 F. Supp. 967, 975 (W.D.N.Y. 1977); Russ & Mandelkern, supra note 1, at 13.


Senator Ervin also saw the bill as the "constitutional alternative" to preventive detention, a procedure under which trial judges could deny bail to defendants who were likely to commit additional crimes before trial. Ervin, supra note 62, at 298; Preventive Detention: Hearings Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary, 91st Cong., 2d Sess. 1209 (1970) ("[P]reventive Detention prostitutes the purpose of bail and runs afool of the Eighth Amendment.").


164. Senator Ervin cited evidence from the Southern District of New York where a pilot program designed to hold trial within 60 days of arrest had resulted in "the increase in convic-
Under the permanent limits, the Act allows the defendant a theoretical maximum, excluding continuances, of one hundred days to prepare for trial. The time actually available, however, is often less than the periods prescribed by Congress. For example, if a defendant is not arrested prior to indictment, the initial thirty day period is inapplicable and arraignment must be held within ten days after the defendant’s first appearance before a judicial officer. The assistant United States Attorneys interviewed in the three districts indicated that generally arrest is not required unless the defendant is dangerous or likely to flee the jurisdiction. Because only about four out of ten federal prosecutions commence with arrest, the preponderance of defendants are limited to a maximum preparation time of seventy days.

165. See notes 65-68 supra and accompanying text.
166. 18 U.S.C. § 3161(b)-(c) (1976); see Russ & Mandelkern, supra note 1, at 10.
167. Many prosecutors stated that as a result of the Act more arrests are delayed until after indictment whenever possible. Cf. 120 Cong. Rec. 41623 (1974) (“The Government should not initiate prosecution until it is ready to move fairly rapidly to trial.”) (statement of Sen. Ervin).
168. From July 1, 1976 to June 30, 1978, 28,018 defendants were arrested or summoned prior to indictment or information. 1978 Speedy Trial Report, supra note 10, at D1. The number of defendants indicted during that period was approximately 71,825. This figure is conservative; it does not include indictments that were dismissed prior to arraignment. Id. at E2. The nationwide percentage of defendants arrested prior to indictment may therefore be estimated at 38%. See Letter from E. L. Miller to Senator Ervin (Oct. 7, 1970), reprinted in 1971 Senate Hearings, supra note 162, at 173-74; Black, supra note 1, at 246; Russ & Mandelkern, supra note 1, at 10.

Comparable figures for each of the districts surveyed reveal that only New Jersey approximates the national average; 44.7% of defendants in that district were arrested before indictment. See 1978 Speedy Trial Report, supra note 10, at D2, E4. That figure drops to 20.6% in Connecticut. Id. at D2, E3. In Eastern New York, however, 53.1% of defendants required pre-indictment arrest. That high figure may in part be attributable to the comparatively large percentage of crimes involving violence prosecuted in Eastern New York. Over 10% of the cases filed there in 1978 involved homicide, robbery, or assault. See 1978 Administrative Office Report, supra note 14, at A-56. The national average for that period was 6.1%. See id. In addition, one judge in Eastern New York stated that, because of the district’s proximity to airports and ports of entry, it handles a disproportionately large number of smuggling cases, which usually require arrest. Moreover, the judge indicated that, unlike the practice in some districts, the United States Attorney’s Office retained bank robbery cases for prosecution in federal court, rather than referring them to state authorities.

In many cases, indictment occurs on the same day as arrest. Nationally, the events of indictment and arrest occurred within 24 hours of each other for 20% of federal defendants in 1978. 1978 Speedy Trial Report, supra note 10, at D1. Percentages for the same period in Connecticut, New Jersey, and the Eastern District are, respectively, 54.2%, 67.9%, and 11.4%. Id. at D2-D3. For those defendants in this category whose arrest preceded indictment, the potential 30 day period is eliminated.

169. Unless the defendant is summoned to appear before the grand jury, or otherwise aware of the pending charges, he cannot begin preparation until the indictment is filed. One defense attorney in the Eastern District, however, stated that most of his major corporate clients were not only aware of the pending indictment but were extensively prepared in anticipation of the charges. In these instances the prosecution’s control over the commencement of the limits does not prejudice the defendant.
Moreover, preparation time may be further limited to sixty days or less. The ten day indictment-to-arraignment period is often eliminated by holding arraignment on the day of indictment or, when indictment precedes arrest, on the day of the first appearance.\textsuperscript{170} Although this most often occurs when the defendant has already retained counsel, post-indictment preparation is still limited to sixty days. Even when the full ten days are available, it is misleading to assume that the entire period can be devoted to preparing a defense. Effective trial preparation usually cannot begin until the defendant procures counsel.\textsuperscript{171} Unless the defendant was represented prior to indictment, he must spend part of that time searching for an attorney. Moreover, although the plans in the three districts surveyed require that the proper steps be taken at the initial appearance “to assure that the defendant is represented by counsel,”\textsuperscript{172} they allow the court to enter a not guilty plea for the defendant if he is not represented at arraignment. In that event the sixty day clock to run even though no trial preparation has commenced.\textsuperscript{173}

In contrast, the shortness of the time limits apparently has had minimal effect on the ability of the prosecutors in the three districts to prepare for trial.\textsuperscript{174} As noted above, the majority of federal cases do not require arrest.\textsuperscript{175} Thus, the time limits in those instances do not begin to run until after indictment. Because the assistant United States Attorney determines when to seek an indictment from the grand jury,\textsuperscript{176} he can forestall the operation of the Act

\textsuperscript{170} Arraignment was held on the same day that indictment was filed or on the date of first appearance after indictment in 41\% of all federal cases in 1978. 1978 Speedy Trial Report, supra note 10, at E2. The comparable figures for the three districts are: Connecticut, 18.2\%; New Jersey, 55\%; and Eastern New York, 22.2\%. Id at E3, E4.


\textsuperscript{172} D. Conn. Final Plan, supra note 88, at II-5; D.N.J. Final Plan, supra note 96, at 6; E.D.N.Y. Final Plan, supra note 97, at II-3.

\textsuperscript{173} D. Conn. Final Plan, supra note 88, at II-4; D.N.J. Final Plan, supra note 96, at 9; E.D.N.Y. Final Plan, supra note 97, at II-4.

\textsuperscript{174} Preparation difficulties for prosecutors have apparently stemmed from sources independent of the Act. "Several plans indicated a communication problem between law enforcement agencies and the U. S. Attorney's Office. Failure to communicate an arrest delayed presentment to the grand jury, reduced preparation time, and hence, reduced the likelihood of obtaining a timely indictment." 1978 Speedy Trial Report, supra note 10, at 14; see notes 195-97 infra and accompanying text.

\textsuperscript{175} See notes 167-69 supra and accompanying text.

\textsuperscript{176} "U. S. attorneys (or their assistants) make the following types of decisions in most federal criminal cases: whether grand juries should be called; what they will investigate; what evidence and witnesses are presented to them; whether the federal investigative agency working on a case will be authorized to make an arrest, investigate further, or drop the matter; what charges will be lodged against arrested suspects and (frequently) on how many counts . . . ." J. Eisenstein, Counsel for the United States 13 (1978); see United States v. Lovasco, 431 U.S. 783, 791-93 (1977) (prosecutor need not indict even when probable cause established); id. at 799-800 (Stevens, J., dissenting) (pre-indictment manipulation by prosecutors); United States v. Marion, 404 U.S. 307, 331 & n.3 (1971) (Douglas, J., concurring); M. Frankel & G. Naftalis, The Grand Jury 21-22, 47-50 (1977); cf. United States v. Watson, 423 U.S. 411, 431 (1976) (Powell, J., concurring) ("[g]ood police practice" to delay arrest until investigation complete).
until he is well prepared.\textsuperscript{177} The ability to postpone the commencement of the
time limits is most advantageous in complex white collar cases such as tax
frauds or securities violations.\textsuperscript{178} The prosecutors interviewed indicated that
because suspects in these cases are ordinarily neither violent nor apt to leave
the jurisdiction, arrests are seldom required. Indictment can therefore be
delayed until the case is substantially ready for trial.\textsuperscript{179} As a result, minimal
post-indictment preparation is necessary. Indeed, most of the prosecutors felt
that the Act had a beneficial effect; more thorough pre-indictment preparation
ensures that the evidence presented to the grand jury is usually more complete
than prior to the Act.\textsuperscript{180} Conversely, however, extensive pre-indictment
preparation by the Government can place defendants who become aware of

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\textsuperscript{177} The prosecutorial delay is limited, of course, by the applicable statute of limitations.
\textsuperscript{178} Ironically, in cases which require only minimal preparation, such as bank robberies, the
prosecution is unable to delay indictment because arrest is usually necessary. Defendants in those
instances, therefore, may have the entire 30 day period to prepare when it is least necessary.
\textsuperscript{179} Whitney North Seymour, then United States Attorney for the Southern District of New
York, testified before the Senate that the prosecutors on his staff increasingly delayed indictments
to ensure sufficient preparation time under that district's speedy trial rules. 118 Cong. Rec. 30405
(1972). The practice has continued under the Act in many districts. 1978 Speedy Trial Report,
supra note 10, at 13-14; see Frase, supra note 1, at 697; Lacey, supra note 1, at 15; Russ &
Mandelkern, supra note 1, at 10; Steinberg, \textit{Right to Speedy Trial: The Constitutional Right and Its
(1975); Uviller, Barker v. Wingo: \textit{Speedy Trial Gets a Fast Shuffle}, 72 Colum. L. Rev. 1376, 1384
(1972); \textit{Bail, supra} note 163, at 2.

\textsuperscript{180} Nine out of 15 prosecutors interviewed indicated that they were now almost fully pre-
pared at indictment. The New Jersey planning group noted that although this practice had
originally forced a reduction in criminal filings, the trend is reversing. D.N.J. Final Plan, supra
note 96, at 34. One prosecutor explained that a bribery case might require a full year of investiga-
tion to find two witnesses willing to testify to the grand jury; after indictment, however, he
would need only hours to prepare for trial. This result parallels the experience of prosecutors
operating under the Second Circuit Rules. The United States Attorney for the Southern District of New
York said that the time limits established by that district pursuant to the Rules had resulted
in the "increased quality of the indictments themselves." 118 Cong. Rec. 30405 (1972) (statement
of Whitney North Seymour). He attributed the rise in quality to increased efficiency of investiga-
tive agencies in compiling and relaying information to the prosecutors and more critical examina-
tion of evidence by the assistant United States Attorneys prior to arrest. \textit{Id.}; see \textit{Southern District
Evaluation, supra} note 1, at 20. The greater degree of care in drafting indictments was favorably
noted by one judge interviewed in the Eastern District of New York. \textit{Accord, 1978 Speedy Trial
Report, supra} note 10, at 14; D. Conn. Final Plan, supra note 88, at III-6 to -7.

The Supreme Court has held that the practice of delaying arrest or indictment does not deprive
a defendant of his rights to a speedy trial and due process of law. United States v. Lovasco, 431
U.S. 783 (1977); United States v. Marion, 404 U.S. 307 (1971). In \textit{Marion}, the Court held that the
sixth amendment speedy trial right does not attach until there is an accused, which requires either
arrest or indictment. \textit{Id.} at 313. For a pre-indictment delay to deny a defendant due process of
law, it must cause "substantial prejudice to [defendant's] rights to a fair trial" and be used as "an
intentional device to gain tactical advantage over the accused." \textit{Id.} at 324; \textit{accord, United States
v. Terjeson}, 424 F. Supp. 16, 17-18 (E.D.N.Y. 1976). Furthermore, the prejudice to the defendant
must be balanced against the prosecution's need to investigate fully. United States v. 
Lovasco, 431 U.S. at 796; \textit{see United States v. Watson}, 423 U.S. 411, 431 (1976) (Powell, J.,
concurring); Hoffa v. United States, 385 U.S. 293, 310 (1966) (no constitutional right to be
arrested as soon as prosecution has probable cause). \textit{But see Steinberg, supra} note 179, at 237.
the charges against them only after indictment at a serious strategic disadvantage.181

The vast majority of the defense attorneys interviewed in the District of New Jersey and the Eastern District of New York declared the limits insufficient to prepare an adequate defense. Only two of the sixteen interviewed thought the time limits were adequate for all cases; one of the two, however, handled only simple court-appointed work, and was thus not likely to experience pressure even under the most restrictive limits. Ten out of sixteen had not been ready to proceed to trial within the periods fixed by the courts, and attributed this primarily to the tighter scheduling procedures adopted by judges to avoid violation of the statutory restraints.

A common complaint was that the limits did not allow enough time to obtain and analyze what often amounted to thousands of pages of documents, such as financial records or wiretap transcripts, that the prosecution had spent months collecting and digesting. The problem was aggravated when the prosecution was late in turning over discoverable materials. Others noted the massive communication difficulties in coordinating a defense among several defendants and their counsel in large conspiracy cases. One defense attorney recalled a case in which a hired investigator had to fly to South America, spend several days dealing with the local bureaucracy to obtain the necessary documents, and then return before the attorney's firm could begin digesting the materials. Despite these unusual circumstances, the requested continuance was denied. Four attorneys who felt the limits too short but had nevertheless been able to prepare adequately were able to do so only by double and triple teaming attorneys on difficult cases and increasing the use of private investigators and accountants, at great additional expense to defendants. Moreover, most defense counsel in large metropolitan areas, are either sole practitioners or members of three to five person firms, and are consequently unable to provide these additional services.182

The defense attorneys interviewed in the District of Connecticut had far fewer complaints about the Act. Three of six thought the time limits were always sufficient. Of the three who criticized the limits, only one had experienced inadequate preparation time. The five attorneys who had been able to prepare adequately indicated that the judges were reasonable in granting additional time in complex cases, thereby averting undue pressure. Two attorneys, however, were unsure that judicial cooperation would continue once the sanction of dismissal becomes effective.183


182. See S.D.N.Y. Final Plan, supra note 159, at III-8. The attorneys interviewed noted that many defendants are unable to afford these expenditures. In one case, for example, the extra cost of using accountants, investigators, and additional attorneys approached $26,000.

183. Judge Platt of the Eastern District of New York has written that when the dismissal sanction becomes operative, appellate courts may hold more motions for § 3161(h)(8) continuances not in the "ends of justice," and will thus discharge those cases because trial will not have commenced within the prescribed limits. Platt, supra note 1, at 769.
Commentators predicted that the limited preparation time available to defendants would foster several corollary problems. Prominent among their concerns was the expectation that the Act would induce more pro forma not guilty pleas. They reasoned that the ten day indictment-to-arraignment period is insufficient to determine the appropriateness of a guilty plea. At arraignment, therefore, more defendants would automatically plead not guilty. The later switch to a plea of guilty, by requiring an additional court appearance, would waste the time of both the court and the assistant United States Attorney, who is generally present at the entry of the plea. In addition, the earlier claim of innocence would force the prosecutor to engage in unnecessary trial preparation. Finally, entry of the guilty plea immediately before trial might disrupt the already inflexible schedule of a court hampered by the time constraints of the Act.

At least in the three districts surveyed, however, the number of pro forma not guilty pleas apparently has not increased since the effective date of the transitional limits. The great majority of defense attorneys and prosecutors interviewed stated that pro forma not guilty pleas entered shortly after indictment had been standard defense strategy prior to the Act, and their frequency had not thereafter increased. In addition, last minute guilty pleas were common prior to the Act. Several defense attorneys and prosecutors stated that it is psychologically difficult for defendants to accept what is often a virtual certainty of conviction; many will therefore not plead guilty until trial is imminent. Although the short limits of the Act have reduced the time to postpone that realization, they have not forced more defendants to plead only on the eve of trial.

The permanent limits may induce appellate courts to strike down other practices of more dubious validity. Under one method, trial is deemed to commence on the date on which voir dire, i.e., jury selection, begins. D. Conn. Final Plan, supra note 88, at II-5 to -6; D.N.J. Final Plan, supra note 96, at 9; E.D.N.Y. Final Plan, supra note 97, at II-6. Several judges indicated that to avoid violation of the Act, they often held voir dire on a date within the prescribed limits but then delayed actual hearing of testimony up to one month thereafter. The Second Circuit Speedy Trial Coordinating Committee, apparently aware that this procedure subverts the legislative intent, called upon courts in its Guidelines to minimize all delays after voir dire begins: “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.” Second Circuit Guidelines, supra note 171, at 7. When a court selects “several petit juries at the beginning of a month, . . . the trial shall not be deemed to commence until the opening statements have been made or the taking of testimony has commenced.” Id.

Evidence was presented to the House Subcommittee on Crime to the effect that defendants who would ultimately plead guilty usually did not do so until 30 to 45 days after arraignment. The House Committee on the Judiciary believed that the Act would not substantially affect that practice. 1974 House Report, supra note 2, at 30, reprinted in [1974] U.S. Code Cong. & Ad. News at 7423.

One assistant United States Attorney stated that preparation that results in a guilty plea
Opponents of the Act also predicted that it would substantially hinder defendants' efforts to procure and retain counsel. Interviews with defense attorneys confirm these forecasts. Several attorneys found that the short time periods prior to arraignment curtail the time that defendants have to obtain counsel and limit their ability to arrange financing. Because most criminal defense attorneys require payment before they agree to represent a client, defendants who cannot marshal sufficient funds may thus be forced to select attorneys who are not the counsel of their choice. Moreover, many defense attorneys declared that the pressure to hold trials within the period allowed by the Act has led judges to deny continuances to accommodate good faith conflicts in attorneys' schedules. This inflexible attitude often forces attorneys to reassign cases, which in turn causes duplication of efforts. As a result, the purpose of preparation is to convict the defendant; a conviction obtained without need for a trial saves time. Prosecutors in the Southern District of New York reason that more pleas occur on the eve of trial simply because trial is closer to arraignment. Interview with Prof. Michael Martin, Speedy Trial Reporter, Southern District of New York, in New York City (Feb. 28, 1979); see Report on Problems, supra note 159, at 9.

Five of six defense attorneys in the District of New Jersey and six of ten in the Eastern District indicated that many defendants were denied their services because of inability to raise the necessary retainer fee. None of the six attorneys in the District of Connecticut had turned down clients for that reason. The Connecticut Final Plan, however, indicates that judges used excludable time to ensure that defense counsel was present at arraignment in that district. D. Conn. Final Plan, supra note 88, at III-9. That additional time may have permitted more defendants to obtain sufficient funds to obtain counsel.

Many criminal defense attorneys require that clients pay a substantial percentage of their fee before accepting cases because fees are much harder to collect after trial, especially if the defendant is convicted. Moreover, federal judges are reluctant to relieve defense counsel from their obligations to clients on the ground of nonpayment of the fees. See Second Circuit Guidelines, supra note 171, at 4 (filing of notice of appearance binds counsel). But see ABA Code of Professional Responsibility, DR 2-110(C)(f) (1976) (nonpayment of fee grounds for withdrawal). Critics of the Act had predicted that the short time limits would not provide the defendant with enough time to raise the necessary money. See 1973 Senate Hearings, supra note 111, at 145-46, 148.

Ten of the 23 defense attorneys interviewed had been denied continuances for schedule conflicts. The plans of the three districts state that continuances for attorney schedule conflicts are not available as a matter of right. D. Conn. Final Plan, supra note 88, at II-7; D.N.J. Final Plan, supra note 96, at 9; E.D.N.Y. Final Plan, supra note 97, at II-7. The District of Connecticut Plan further provides that "under existing interpretations," an attorney schedule conflict is not grounds for a § 3161(h)(8) continuance. According to one New York City Bar Association Committee, federal judges believe that defense attorneys are fungible; they view forced substitution of counsel, therefore, as an acceptable means to avoid violation of the Act. Criminal Courts and Procedure Comm. of the Association of the Bar of the City of New York, Comments on the Guidelines Under the Speedy Trial Act 6 (Dec. 8, 1978). Several planning groups reported that the difficulty in obtaining continuances had made the representation of defendants in federal criminal cases less desirable. 1978 Speedy Trial Report, supra note 10, at 14.

See, e.g., D. Conn. Final Plan, supra note 88, at III-6 to -7.
result, several defense attorneys have been compelled to reduce their federal criminal caseloads.\textsuperscript{195}

Prosecutors, on the other hand, found that the Act had not created serious scheduling conflicts for their offices.\textsuperscript{196} According to the assistant United States Attorneys interviewed, though reassignment is occasionally necessary when a previous trial in which the prosecutor is engaged is delayed or lasts longer than expected, the instances in which reassignment is required have not increased since the effective date of the transitional limits. The minimal effect of the Act on prosecutors' schedules presumably stems, at least in part, from the degree of control that they exercise over the initial stages of the majority of proceedings.\textsuperscript{197}

Given these minimal scheduling conflicts, the prosecutors interviewed had few difficulties in complying with the Act.\textsuperscript{198} The defense attorneys, however, almost invariably called for the relaxation of the permanent limits. In fact, the problems of insufficient preparation time, procuring counsel, and attorney scheduling conflicts are cited in the final plans of two of the three districts surveyed as reasons for their recommendations of amendment.\textsuperscript{199} All three plans called for the extension of the arraignment-to-trial period;\textsuperscript{200} two advocated the liberalization of the other two intervals as well.\textsuperscript{201}

\textbf{B. The Statutory Solution}

Despite the constraints placed upon defendants by the Act, proposals to lengthen the time limits overlook its intrinsic remedial measures. More liberal use of the excludable time provisions, especially section 3161(h)(8), can effectively alleviate the difficulties encountered by defendants and their counsel under the permanent limits.

\textsuperscript{195} Accord, 1978 Speedy Trial Report, supra note 10, at 14. Reassignment appeared most necessary in the District of New Jersey and the Eastern District of New York. Several attorneys recalled that judges often responded to requests for continuances by advising the defendant to find himself another lawyer.

\textsuperscript{196} Their experiences contradict the expectations of at least one commentator. Suggestion, supra note 1, at 916 & n.55. Other commentators have reasoned that the Act contains enough loopholes to permit prosecutors to circumvent its effect. Russ & Mandelkern, supra note 1, at 1. Thus, prosecutors might dismiss indictments to toll the time limits pursuant to § 3161(h)(6) and then reindict for a similar offense, delay arrest or indictment, or obtain a sealed indictment, thereby tolling the limits until it is unsealed pursuant to § 3161(c). Id. at 9-11; see Frase, supra note 1, at 685. Judicial interpretations of the Act have also helped the prosecutor. The Second Circuit has held that the 30 day arrest-to-indictment limit begins to run from the date of federal arrest, not state arrest, thus aiding the federal prosecutor's control over the commencement of the limits. United States v. Mejias, 552 F.2d 435, 441 (2d Cir.), cert. denied, 434 U.S. 847 (1977). Another court has held the arrest-to-indictment limit applicable only when the defendant is arrested on a complaint. United States v. Dixon, 446 F. Supp. 58, 62 (D.D.C. 1978).

\textsuperscript{197} See notes 175-77 supra and accompanying text.

\textsuperscript{198} Accord, D. Conn. Final Plan, supra note 88, at III-5 to -6. But see D.N.J. Final Plan, supra note 96, at 32.

\textsuperscript{199} D. Conn. Final Plan, supra note 88, at VI-3 to -4; D.N.J. Final Plan, supra note 96, at 53-54.

\textsuperscript{200} D. Conn. Final Plan, supra note 88, at VI-1; D.N.J. Final Plan, supra note 96, at 53; E.D.N.Y. Final Plan, supra note 97, at VI-2.

\textsuperscript{201} D. Conn. Final Plan, supra note 88, at VI-1; E.D.N.Y. Final Plan, supra note 97, at VI-1 to -2.
The Act does not list insufficient preparation time as a specific ground for excludable delay. Section 3161(h)(8), however, provides that the trial judge may, in his discretion, grant a continuance if he determines 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."202 The section states that general court congestion, failure of the government to obtain an available witness, or lack of diligent preparation by the United States Attorney, cannot justify a delay.203 In all other instances, however, a section 3161(h)(8) continuance may be granted upon consideration of the following factors: whether without the delay continuation would be impossible or result in a miscarriage of justice; whether complex issues before the grand jury or events beyond the control of the Government would delay indictment; and whether the case is so complex that it would be unreasonable to expect adequate preparation within the specified limits.204

The legislative history indicates that section 3161(h)(8) was at least partly intended to protect the rights of defendants.205 The Senate Report declared the section central to the legislation because "[i]t allows for the necessary flexibility to make [the Act] a realistic goal . . . ."206 Accordingly, in response to fears that defendants would be unable to prepare for complex cases or to retain the counsel of their choice, the bill's sponsors declared that a section 3161(h)(8) continuance should be available in those instances.207 Congress was thus cognizant that the public's right to speedy justice should not prejudice the defendant's interest in reasonable delays.208

In spite of the flexible application of section 3161(h)(8) intended by Congress, approximately half of the judges interviewed in the three districts construed the provision narrowly.209 The explanations for this reticence to grant excludable continuances ranged from hostility toward the Act to unfamiliarity with its provisions. One judge, whose antipathy was obvious, reasoned that "the best way to get rid of a bad law is to enforce it strictly."210 Several judges noted that granting continuances increased their administrative burden because they only "rented time"; postponed trials must be squeezed into time slots that may already be overcrowded.211 Others, perhaps unaware of the

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203. Id. § 3161(h)(8)(C).
204. Id. § 3161(h)(8)(B).
207. Id. at 21.
208. "The Committee believes that both delay and haste in the processing of criminal cases must be avoided; neither of these tactics inures to the benefit of the defendant, the Government, the courts nor society. The word speedy does not, in the Committee's view, denote assembly-line justice, but efficiency in the processing of cases which is commensurate with due process." 1974 House Report, supra note 2, at 15, reprinted in [1974] U.S. Code Cong. & Ad. News at 7408.
209. Eight of 14 judges adopted a narrow construction.
flexibility intended by the drafters, feared criticism that they would subvert the congressional mandate of speed if they did not try every case within sixty days.\(^{211}\)

An inflexible judicial policy toward continuances is inconsistent with the congressional directive of section 3161(h)(8).\(^{212}\) Regardless of the complexity of the case, continuances should be granted in order to give both the defendant and the prosecutor sufficient time to prepare. In cases involving extensive documents, detailed financial records, lengthy wiretap transcripts, or several defendants, compliance with the sixty day arraignment-to-trial limit may be unduly burdensome on one or both parties. Especially when lengthy discoverable materials are not received until shortly before trial, denial of a continuance would cause a "miscarriage of justice."\(^{213}\)

To determine the appropriateness of a continuance for additional preparation time, courts must balance the public's and the defendant's right to a speedy trial against the possible prejudice to the defendant or the Government if the continuance is denied.\(^{214}\) The Second Circuit's Speedy Trial Guidelines Committee, which advocates a liberal policy toward excludable time, suggests that several factors should be included in the balancing test: the diligence with which the defendant and his counsel used the time available; the time needed for discovery; and the amount and complexity of the evidence.\(^{215}\) In addition to these factors, courts should consider the relative equality of preparation (S.D.N.Y. 1977); D. Conn. Final Plan, \textit{supra} note 88, at III-5; Report on Problems, \textit{supra} note 89, at 3.

\(^{211}\) \textit{Accord,} D. Conn. Final Plan, \textit{supra} note 88, at III-5; Platt, \textit{supra} note 1, at 769; \textit{Southern District Evaluation, supra} note 1, at 521. "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." \textit{In re Ford, No. 78-3011,} slip op. at 2 (2d Cir. Mar. 30, 1978) (quoting the trial judge).

\(^{212}\) \textit{See In re Ford, No. 78-3011,} slip op. at 5 (2d Cir. Mar. 30, 1978) ("Expedition, even under the Speedy Trial Act, is a means to justice, not the end."); United States v. Uptain, 531 F.2d 1281, 1291 (5th Cir. 1976) ("[A] scheduled trial date should never become such an overarching end that it results in the erosion of the defendant's right to a fair trial."); Second Circuit Guidelines, \textit{supra} note 171, at 33-38; notes 206-08 \textit{supra} and accompanying text; \textit{cf.} Gavino v. MacMahon, 499 F.2d 1191, 1196 (2d Cir. 1974) (Second Circuit Rules not meant "to permit a district court to ride roughshod over the right of a defendant to prepare for trial"); Stans v. Gagliardi, 485 F.2d 1290, 1291 (2d Cir. 1973) (public interest in speedy trials under Second Circuit rules "must be carefully weighed against a defendant's claim of need for a short delay to permit proper preparation").

\(^{213}\) Second Circuit Guidelines, \textit{supra} note 171, at 35; \textit{cf.} Gavino v. MacMahon, 499 F.2d 1191, 1196 (2d Cir. 1974) (belated reception of extensive discovery material); Stans v. Gagliardi, 485 F.2d 1290, 1291 (2d Cir. 1973) (complicated discovery completed 13 days before trial and amended bill of particulars received on eve of trial).


\(^{215}\) Second Circuit Guidelines, \textit{supra} note 171, at 35, 37; \textit{accord,} United States v. Waldman, 579 F.2d 649, 653 (1st Cir. 1978); United States v. Rothman, 567 F.2d 744, 747 (7th Cir. 1977); United States v. Little, 567 F.2d 346, 348 (8th Cir. 1977), \textit{cert. denied,} 435 U.S. 969 (1978); United States v. Uptain, 531 F.2d 1281, 1286 (5th Cir. 1976). The Guidelines also advise that emergencies such as acts of God, strikes, and sudden illness of the defense attorney, prosecutor, or judge should generally be grounds for excludable time. Second Circuit Guidelines, \textit{supra} note 171, at 31-32.
time available to each side; extensive pre-indictment investigation by the
prosecution may justify a limited delay to allow defense counsel to become
more familiar with that evidence. For example, in a bank robbery where the
sole defendant involved is arrested immediately, the evidence is usually sim-
ple and discovery should be readily available; because both the prosecution
and the defendant became aware of the charge at the same time, preparation
time is equal. In this instance no continuance should be required.

Consider, however, a narcotics conspiracy case with seven defendants,
under investigation by the government for a year, entailing extensive discov-
ery, voluminous wiretap transcripts, and witnesses scattered throughout
Mexico. In such a case defendant's counsel must travel to a foreign
country, arrange for an interpreter, interrogate witnesses, review the
transcripts, prepare a suppression motion, and coordinate his client's defense
with six other defendants and their counsel. Moreover, the additional twelve
months of preparation may have given the prosecutor a substantial edge over
his opponent. The denial of defense counsel's motion for a continuance could
depribe his client of an effective defense even though he had prepared
diligently. Unless a compelling public interest could be shown in opposition,
"the ends of justice" would merit at least a short continuance.

To alleviate the difficulties of obtaining counsel, excludable time should
also be used to ensure that the arraignment-to-trial interval does not com-
mence until the defendant is in a position to begin preparation. If a reason-
able delay of arraignment would provide the time necessary for the defendant
to retain counsel, an "ends of justice" continuance should be granted. To
determine reasonableness, courts should consider the length of the requested
delay, the diligence of the defendant's search for counsel, the complexity
of the case, and a realistic appraisal of the defendant's financial position.

Thus, an indigent defendant charged with burglarizing a mailbox would be in

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216. This hypothetical is taken from the facts of Gavino v. MacMahon, 499 F.2d 1191 (2d Cir. 1974).
218. The statute is unclear whether the dismissal sanctions and the excludable time provi-
sions apply to the indictment-toarraignment interval. See Frase, supra note 1, at 688. The
Second Circuit Guidelines suggest that neither the sanctions nor the excludable time provi-
sions apply to that interval. Second Circuit Guidelines, supra note 171, at 4-5. Allowing indefinite
delays of arraignment, however, may ultimately delay trial, and would thus undermine the
Congressional intent that trials be promptly held. See 1974 House Report, supra note 2, at 31,
219. Second Circuit Judicial Council Speedy Trial Coordinating Committee, Revised Guide-
lines Under the Speedy Trial Act 7 (Jan. 8, 1979) [hereinafter cited as Revised Second Circuit
Guidelines].
220. See United States v. Lustig, 555 F.2d 737, 744 (9th Cir. 1977), cert. denied, 434 U.S.
denied, 397 U.S. 946 (1970); Glenn v. United States, 303 F.2d 536, 543 (5th Cir. 1962).
222. Ideally, the quality of a defendant's representation should not reflect his wealth. See
United States ex rel. Carey v. Rundle, 409 F.2d 1210, 1213 (3d Cir. 1969), cert. denied, 397 U.S.
946 (1970). Accordingly, the Second Circuit Guidelines state that "[s]hould a nonindigent defen-
dant appear without counsel, the court should take steps to insure that the defendant retains
a poor position to request an extended delay. The preparation required for the case presumably is minimal and uncomplicated, and there is accordingly less need for a counsel with special expertise. The likelihood that the defendant would benefit from the delay is slight; even with an extended continuance his ability to raise the money to retain a particular attorney is doubtful. On the other hand, a defendant with considerable assets charged with violation of the Internal Revenue Code would have a more compelling reason for a continuance. The necessity of obtaining a particular counsel is greater because of the complexity of the charges. Moreover, the delay is more likely to be worthwhile because the defendant would have time to liquidate assets in order to raise the money necessary to retain counsel.

An "ends of justice" continuance should also be available to resolve reasonable attorney scheduling conflicts. Both the defendant and the Government have strong interests in retaining their original counsel throughout the proceedings. If the retained attorney is particularly skilled in the complex issues of the case, or preparation is well advanced, forced substitution of counsel could severely prejudice the defendant. Similarly, however, protracted delay would be contrary to the public's and the defendant's rights to a speedy trial.

As the Second Circuit Guidelines recommend, conflicts can often be averted by scheduling the trial date as soon as possible. Even when a date is set well in advance of trial, however, conflicts may subsequently arise. In those cases the Guidelines advise that the defendant's interest in delay should be determined by examining "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
Perhaps the most troublesome example of "unavoidable" defense attorney scheduling conflicts is state court commitments. Many state courts, because of large numbers of cases that are in comparable states of readiness, are unable to schedule trials for a date certain as in federal court. Telephone Interview with Leon Polsky, Chief of Criminal Defense Division of the Legal Aid Society of New York (Mar. 14, 1978). As a result, it is very difficult for an attorney representing a client at arraignment in federal court to be sure that his representation in state court will not eventually conflict with the trial date set by the federal judge. Apparently many federal judges, because they set dates so far in advance, are intolerant of these later-acquired conflict, and deny continuances that would enable the attorney to retain both his federal and state cases. See Criminal Courts and Procedure Comm. of the Association of the Bar of the City of New York, Comments on the Guidelines Under the Speedy Trial Act 1-5 (Dec. 8, 1978). One state court judge, reflecting the practice of his colleagues, stated that in this situation, "I let the lawyer go to federal court because I know he is going to have his head in a sling if I don't." Id. at 3.

Agreements between federal and state courts have been arranged to help reduce these conflicts. For example, the Eastern District of New York has an agreement with the Appellate Division of the Second Department in New York under which the federal court issues a Certificate of Engagement to the defense attorney at least 21 days before the scheduled trial date. State court judges in Kings County usually recognize these certificates, thereby avoiding conflicts. Letter from Hon. Jacob Mishler, Chief Judge, Eastern District of New York (Feb. 27, 1979) (on file with the Fordham Law Review). State court judges have complained, however, that most federal court judges, evidently hesitant to exceed the bounds of the speedy trial rules, do not reciprocate and honor prior state court commitments. See Lacey, supra note 1, at 7. That reluctance has prompted the New York City Bar Association Committee on Criminal Courts and Procedure to request that the Second Circuit include within its Guidelines engagements of counsel in other courts as specific grounds for a continuance, using the factors adopted by the Circuit for resolving scheduling conflicts in general. See notes 224-27 supra, 229-30 infra and accompanying text.

In view of the flexibility intended by the framers of the Act, the Committee's recommendation is meritorious. Although other court commitments should not constitute automatic grounds for excludable time, the interests of justice may often warrant reasonable continuances to enable attorneys to honor those commitments. In addition to the factors described at notes 224-27 supra, 229-31 infra and accompanying text for resolving schedule conflicts in general, courts should in these instances examine the diligence of the attorney in informing the court of the commitment, the proximity of the request to the scheduled federal court trial date, and the prejudicial effect of denial of the continuance on the participants in the state proceeding. As an example, consider an attorney scheduled for trial in state court the week of June 1st; he believes the proceeding will take one week to complete. In the interim, he agrees to represent a defendant charged with securities fraud in federal court. At the April 10th arraignment, he informs the federal judge of the commitment, and trial is accordingly scheduled for June 8th (59 days after arraignment). Unforeseen complications that arise in the middle of the state trial, however, make it certain that the proceeding will not terminate until June 12th. If the attorney immediately contacts the federal court judge, a short continuance should be granted. Because the conflict did not arise until the state proceeding was underway, it would be unreasonable to demand that the state court yield; at the same time it would also be prejudicial to require that the federal defendant seek new counsel for a complicated defense only days before trial. If, however, the conflict resulted because the commencement of the state trial were postponed to the week of June 12th and the state court is likely to defer the proceeding even further, the grounds for the federal court to grant a continuance would be less tenable.

If, despite the attorney's lack of diligence in bringing the commitment to the federal court's attention, the defendant would be severely prejudiced by denial of a continuance, the court should consider granting the continuance but penalizing the attorney pursuant to the sanctions provided by the Act in 18 U.S.C. § 3162(b) (1976). See In re Sutter, 543 F.2d at 1035-36; 1974 House Report, supra note 2, at 34, reprinted in [1974] U.S. Code Cong. & Ad. News at 7426.
In weighing the public's interest, courts should consider the length of the requested delay and its effect on the overall operation of the court. Moreover, in view of the legislative intent to reduce pretrial recidivism, courts should also examine the propensity of the defendant to commit other crimes before trial. For example, assume that a single practitioner in a busy metropolitan area appears at arraignment as counsel for a defendant charged with attempting to smuggle a small amount of heroin. Ten days later counsel requests that the trial be postponed for ninety days because he had previously accepted cases that are set for trial in the same period as the date set by the court. The continuance should be denied. The facts and issues in the case are presumably simple. The good faith of counsel is suspect for having accepted the case without informing the court of his prior commitments. In addition, the defendant, if released, may be likely to continue his smuggling activities if not tried soon. Finally, in such a large metropolitan area substitute counsel should be readily available and able to prepare this simple case within the time remaining.

Contrast, however, a prosecution for conspiracy, involving lengthy wiretap transcripts and a defense of mistaken identity. Preparation has been diligent and is nearly complete. Unexpectedly, however, the court is forced to postpone the original trial date three weeks to a date on which counsel will be trying a murder trial in state court. The requested continuance should be granted; the conflict is not the fault of the defense and the requested delay is brief. Furthermore, reassignment to an attorney who is unfamiliar with the complicated issues of the case may severely prejudice the defendant's ability to marshal an effective defense, especially if the conflict arose immediately prior to trial.

229. Second Circuit Guidelines, supra note 171, at 39; see United States v. Lustig, 555 F.2d 737, 744 (9th Cir. 1977) (defendant wealthy enough to find substitute counsel), cert. denied, 434 U.S. 1045 (1978); United States v. Brown, 495 F.2d 593, 600 (1st Cir.) (defendant seeking second continuance to procure counsel for third time), cert. denied, 419 U.S. 965 (1974); United States v. Sexton, 473 F.2d 512, 514 (5th Cir. 1973) (may not use "right to counsel" as a delaying tactic).

230. As an illustration of appropriate lengths for delay, the Second Circuit Guidelines Committee initially posited a situation in which a trial judge must reschedule the trial date to a day which conflicts with the schedule of the defense attorney. The Guidelines suggest that if further postponement for one week would reconcile the conflict, a continuance should be granted. If, however, the attorney were to need a month-long continuance, substitute counsel should be required. Second Circuit Guidelines, supra note 171, at 34. This suggestion, however, prompted strong criticism from the New York City Bar Association's Committee on Criminal Courts, Law and Procedure, which noted that "[w]hether the first case is simple or complex, we know of no earthly reason why the defendant should be deprived of the attorney he selected or the government should be forced to pull an attorney off some other matter to start from scratch on a case prepared by someone else. Barring extraordinary situations, the only interest served by the forced substitution is that of statisticians interested only in how fast the work is turned out." Criminal Courts and Procedure Comm. of the Association of the Bar of the City of New York, Comments on the Guidelines Under the Speedy Trial Act 7 (Dec. 8, 1978). The example was thus deleted from the Revised Guidelines, and replaced with a brief caveat that continuances "must be of reasonable duration or the statutory purpose will be subverted." Revised Second Circuit Guidelines, supra note 219, at 37.

231. See note 162 supra and accompanying text.

When the competing interests appear equally strong, such as when the requested delay is lengthy but the prejudice caused by denial of the continuance would be serious, a careful examination of the nature of the offense is necessary. For example, assume that delays of equal length are requested in an international drug conspiracy case and in a securities fraud case against a broker. If the continuances are denied, the effect of forced substitution of counsel will be equally severe on both defendants. If the narcotics conspirators are released pending trial, a speedy conviction may be necessary to halt their continued sales of drugs. The strong public interest in bringing the conspirators to trial quickly might, therefore, warrant denial of their request in spite of the possible prejudice. Merely indicting the broker, however, may effectively deter him from additional violations; the opprobrium of the criminal charges should severely curtail his ability to conduct further securities transactions. The less compelling public interest in his swift conviction, therefore, should justify a continuance to avoid similar prejudice.

In sum, liberal, but nonabusive, use of section 3161(h)(8) can accommodate the legitimate needs of defendants without subverting the congressional intent. Congress has declared that cases be tried within sixty days of arraignment in order to protect the public's right to speedy trials. At the same time it provided for excludable periods of delay in order to safeguard a defendant's ability to prepare and retain counsel. When denial of a continuance would prejudice that ability, and the need for delay outweighs the public interest in prompt adjudications, the continuance should be granted. Properly employed, therefore, the "ends of justice" provision should make relaxation of the time limits unnecessary.

V. WAIVER

To alleviate the often burdensome time pressures imposed by the Act, several courts have allowed defendants to waive the time limits. Indeed, some judges deem the device necessary to preserve the constitutionality of the Act. In contrast to the excludable time provisions, which provide only temporary relief from the applicable limits, waiver terminates the operation

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233. The Supreme Court has indicated that the public interest in speedy trials varies according to the relative danger of defendants to society. Barker v. Wingo, 407 U.S. 514, 531 (1971). Two judges interviewed felt that for this reason the Act should apply only to crimes which threaten the security of society, such as kidnapping or narcotics transactions. Accord, 1978 Speedy Trial Report, supra note 10, at A2, A4. The legislative history, however, indicates that a similar proposal was rejected. The original version of the Act did not apply to certain categories of cases such as securities, tax, and antitrust. S. 3936, 91st Cong., 2d Sess. § 3163 (1970), 116 Cong. Rec. 18846-48. This "blanket exemption" was subsequently deleted in favor of a case-by-case approach using the excludable time provisions of § 3161(h)(8). 119 Cong. Rec. 3267 (1973) (memorandum by Sen. Ervin).

234. Waiver is traditionally defined as "an intentional relinquishment or abandonment of a known right or privilege." Brewer v. Williams, 430 U.S. 387, 404 (1977) (quoting Johnson v. Zerbst, 304 U.S. 458, 464 (1938)).


236. See notes 257, 300-01 infra and accompanying text.

of the time strictures. Thereafter, the defendant may invoke only his sixth amendment speedy trial guarantee for subsequent unjustified delay.

All participants in a criminal case benefit from a waiver. A permanent lift of the speedy trial limits allows a judge to schedule the case at his convenience, free from the threat of dismissal for excessive delay. Moreover, the ability to waive the Act may serve the interests of both prosecutors and defendants to whom delay is often just as desirable. As such, however, waiver is a potentially dangerous expedient, capable of subverting the public's interest in prompt dispositions. In addition, it is also unnecessary as a means to protect defendants against unduly harsh operation of the time limits.

A. The Use of Waiver

The Act grants no explicit right to waive its provisions. It does, however, permit a "constructive" waiver of a defendant's right to dismissal. Section 3162(a)(2) states that a defendant's failure to move to dismiss for violation of the time limits prior to trial or entry of a plea of guilty or nolo


240. 18 U.S.C. § 3173 (1976) provides: "No provision of this chapter shall be interpreted as a bar to any claim of denial of speedy trial as required by amendment VI of the Constitution." In determining whether a defendant's constitutional right to speedy trial has been violated, the Supreme Court has enunciated four factors which the court must consider: length of delay, reason for delay, defendant's assertion of his right, and prejudice to the defendant. Barker v. Wingo, 407 U.S. 514, 530 (1972). Practically, the lower courts have "considerable discretion" in interpreting these factors, and claims of a violation of the constitutional right to speedy trial "are rarely successful." Russ & Mandelkern, supra note 1, at 6; see Constitutional Right, supra note 41, at 688-94. A valid affirmative waiver of the sixth amendment right to speedy trial deprives the defendant of the ability to claim a violation of that right. See, e.g., Francis v. Henderson, 425 U.S. 536, 548 n.2 (1976) (Brennan, J., dissenting); Schneckloth v. Bustamonte, 412 U.S. 218, 235-46 (1973); Uviller, supra note 179, at 1391, 1400.


242. See notes 304, 317 infra and accompanying text.


244. The District of New Jersey has interpreted this provision to require that the defendant move to dismiss not less than ten days prior to the trial date. D.N.J. Final Plan, supra note 96, at 10-11. See generally 1978 Speedy Trial Report, supra note 10, at A5. The Eastern District of New York and the District of Connecticut, on the other hand, require only that the motion be
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contendere shall be deemed to constitute a waiver of that privilege.246 Voluntary pretrial waiver of the Act by a defendant might therefore be properly inferred from this language.247 The argument contends that because a defendant may inadvertently waive by failing to move for dismissal within the specified time period, Congress must have presumed that the defendant could affirmatively waive the provisions of the Act.248 Moreover, it has also been argued that because the defendant is accorded the right to move for dismissal, he thereby should be accorded the right to forfeit this statutory privilege.249

The legislative history of the Act indicates that Congress paid scant attention to the subject of waiver. The only reference to its propriety is found in the House hearings on the Act250 which discussed a report evidencing some concern that waiver would subvert the public right to speedy trials.251 The report declared that a defendant should not be permitted to waive the Act "except in highly unusual circumstances."252 Nevertheless, it failed to discuss the exceptional circumstances which would justify a decision to waive.

Given the ambiguity of congressional intent, it is not surprising that the final plans of the three districts differ in their treatment of pretrial waiver of the Act. Although the Final Plans of the Districts of Connecticut and New Jersey are silent on the matter, the Final Plan of the Eastern District of New

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made prior to trial. See D. Conn. Final Plan, supra note 88, at II-14 to -15; E.D.N.Y. Final Plan, supra note 97, at II-15.


246. 18 U.S.C. § 3162(a)(2) (1976) provides: "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. . . . 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."

247. Platt, supra note 1, at 772; see Suggestion, supra note 1, at 923 n.74.

248. Platt, supra note 1, at 772. Section 3162(a)(2), however, may also be interpreted to mean that the time strictures should be limited only by § 3161(h). Steinberg, supra note 179, at 235. See generally 1974 House Hearings, supra note 2, at 174 (statements of Sen. Ervin and Rep. Conyers); ABA Standards, supra note 29, § 2.1.

249. Platt, supra note 1, at 772.


251. The report stated: "The right to waiver of the speedy trial right should not be granted solely to the defendant, for society has an equal interest in ensuring that a defendant is brought to justice promptly . . . ." Id. at 164 (quoting H.R. Rep. No. 358, 93d Cong., 1st Sess. 152 (1973)).

252. "The Committee firmly endorses the idea that the right to a speedy trial is an absolute right, one that cannot be waived, except in highly unusual circumstances. Speedy trial statutes must contain clearly defined guidelines, specifically enunciating . . . the amount of time permitted to elapse before the required trial, acceptable reasons for delay, and the penalties for non-compliance." Id. (quoting H.R. Rep. No. 358, 93d Cong., 1st Sess. 152 (1973)).
York expressly permits a written waiver of the Act by a defendant. 253 The Plan expressly requires, however, that the waiver be granted "in accordance with the provisions of section 3161(h)(8) of the Speedy Trial Act." 254 Presumably, therefore, the waiver should be granted only if the trial court finds that it serves the interests of justice. 255 Unlike the grant of a section 3161(h)(8) continuance, however, the waiver presumably nullifies the defendant's right to move for dismissal under the Act for subsequent excessive delays.

In accordance with the plan, four out of six judges interviewed in Eastern New York permit defendants to waive the Act. 256 Two of those judges asserted that the use of waiver saved the statute's constitutionality. They suggested that the excludable time provisions do not allow for continuances in many situations where delay is clearly justified. One example cited was a defendant's request for a continuance to obtain a particular attorney who was unavailable for trial within the statutory limits. It was asserted that the excludable time provisions, including the section 3161(h)(8) "interests of justice" catch-all, would not justify delay in this instance. The defendant, therefore, would be deprived of his sixth amendment right to choice of counsel if he were not permitted to waive the Act. 257

In New Jersey and Connecticut, where the Plans do not address the permissibility of waiver, the interviews revealed opposite results. In New Jersey, as in Eastern New York, six out of eight judges permitted defendants to waive the Act. One of that majority, however, questioned the ultimate propriety of its use. 258 He noted that by permanently suspending the operation of the statute's time limits, waiver can effectively render the Act meaningless; the device is thus probably adverse to congressional intent. 259 Accordingly, the judge predicted that the courts of appeals will refuse to permit waiver after the final limits and sanctions become operative. The alternative, he suggested, is the more extensive use of the excludable time limits, especially the liberal application of section 3161(h)(8).

Because Connecticut immediately adopted the permanent time limits, 260 it presumably should have been operating under more severe time pressures than the Eastern District of New York or New Jersey. The district might therefore be expected to employ additional methods, including waiver, to

253. In addition to the requirement that the waiver be in writing, the court must determine if the waiver is voluntary by addressing the defendant in open court or in camera. The waiver is initiated by a request from either the defendant or defense counsel. E.D.N.Y. Final Plan, supra note 97, at II-12. The Eastern District Final Plan differs from that of the Southern District of New York, which expressly excludes waiver of the Act by the defendant, and declares that the trial court may grant a continuance only pursuant to § 3161(h)(8). S.D.N.Y. Final Plan, supra note 159, at II-8.

254. E.D.N.Y. Final Plan, supra note 97, at II-12; see notes 282-93 infra and accompanying text.


256. The remaining two judges did not comment on their use of waiver.

257. Accord, Platt, supra note 1, at 770-71; see notes 294-301 infra and accompanying text.

258. Several judges in the Southern District of New York have also questioned the defendant's power to waive. Wall St. J., Sept. 1, 1977, at 28, col. 2.

259. See notes 266-72 infra and accompanying text.

260. See note 88 supra and accompanying text.
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alleviate the strain. Ironically, however, the judges interviewed in the district refused to permit waiver. The Speedy Trial Reporter for the district indicated that one judge not interviewed did permit defendants to waive the Act but questioned its permissibility.\textsuperscript{261} The judge nevertheless continued to grant waivers because of uncertainty as to the precise limits of the excludable time provisions.\textsuperscript{262}

The interviews also reveal that the term "waiver" may be used to describe procedures not within the traditional definition\textsuperscript{263} of the term. Several judges interviewed, in apparent deference to the statutory mandate of prompt dispositions, permit defendants to "waive" the Act only for a defined period of time.\textsuperscript{264} In essence, however, this practice incorporates a method already encompassed in the Act. By tolling the operation of the time limits, the waiver is a mere pseudonym for excludable time continuances. Nevertheless, in instances where a continuance would not be warranted under the excludable time provisions, even this limited use of waiver circumvents the legislative purpose.

B. The Propriety of Waiver

The use of waiver to alleviate the Act's time pressures is contrary to congressional intent and should be prohibited. The concept of waiver proceeds from the assumption that the right forfeited is personal to the individual exercising the waiver.\textsuperscript{265} The rights created under the Act, however, were not intended to rest exclusively with the defendant. The Act was primarily designed to protect the public interest in speedy dispositions by preventing undue delay in bringing criminal cases to trial.\textsuperscript{266} A major impetus for its enactment was the congressional concern that the Supreme Court's interpretation of a defendant's sixth amendment right to a speedy trial did not adequately protect that societal interest.\textsuperscript{267} Congress also recognized that many

\textsuperscript{261} Telephone Interview with Aviam Soifer, Speedy Trial Reporter for the District of Connecticut (Jan. 25, 1979). Three assistant United States Attorneys interviewed also indicated that a majority of judges utilize waiver.

\textsuperscript{262} Id. Presumably, the judge was apprehensive that the granting of the continuance would be reversed upon appellate review.

\textsuperscript{263} See notes 234 & 240 supra.

\textsuperscript{264} Several judges employ another possibly more deleterious procedure. They permit defendants to waive a specific time interval of the Act, usually the arraignment-to-trial limit. In effect, this practice nullifies the constraints of the Act.


\textsuperscript{267} "The task of balancing [the Supreme Court] factors and arriving at a conclusion which is fair in all cases is a difficult task. [The Supreme Court test] provides no guidance to either the defendant or the criminal justice system. It is, in effect, a neutral test which reinforces the legitimacy of delay." 1974 House Report, supra note 2, at 11-12, reprinted in [1974] U.S. Code
criminal defendants do not share the public's interest in speed.268 Defendants often desire delay, hopeful that prosecution witnesses will become unavailable or that essential evidentiary documents will be lost.269 Accordingly, many defendants will never demand their speedy trial rights.270 To eliminate that possibility, Congress provided that the time limits commence without demand by the defendant.271 By permitting a permanent suspension of the time limits, however, waiver is antithetical to that congressional design.272 Through use of the device, a defendant effectively regains control over the operation of the statutory constraints. Even the most liberal interpretation cannot justify relinquishment by one not the primary beneficiary of rights that were originally constructed to preclude such manipulation.273

Prosecutors and defendants have argued that agreement by the United States Attorney and the trial court to a defendant's waiver of the Act will ensure society's right to prompt dispositions.274 This argument presumes that the interests of the United States Attorney and the court in speed are consistent with that of the public. The fallacy of that premise, however, is readily apparent. Courts and prosecutors often have little more incentive than defen-
dants to expedite dispositions. Prosecutors are often favorably disposed to a defendant's request for delay, since this provides additional time to negotiate a plea. Moreover, courts and prosecutors often use delay as a tactic to balance their often burdensome caseloads. Because a court which grants waiver is not thereafter subject to the restrictions of the Act, waiver can effectively alleviate the strain of overcrowded dockets. Several judges interviewed declared that the device enabled them to place cases at the end of their trial lists for scheduling at a time which is more convenient. In these instances, waiver effectively circumvents an express prohibition of the Act, which precludes the court from granting a continuance for calendar congestion. The device thus cannot acquire legitimacy simply through the assent of two parties who may disfavor speed as much as the defendant.

Waiver is also inconsistent with the legislative scheme. The statute expressly delineates excludable time provisions which were designed to avoid prejudice to the parties caused by unduly harsh operation of the time limits. In addition, in those instances not listed as specific grounds for delay, the section 3161(h)(8) "catch-all" provision allows the trial court to grant a continuance if, in the interests of justice, delay is necessary. As one court has noted, this comprehensive list of exceptions "compel[s] the conclusion that it was intended to exhaust the permissible reasons for delay. It makes waivers

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276. Some assistant United States Attorneys indicated that a plea is more desirable than going to trial because a trial takes more time and the verdict is always uncertain. But see Wall St. J., Sept. 1, 1977, at 28, col. 2.
277. The courts are pressured to try cases within the time limits, as court congestion is not a ground for a continuance. 18 U.S.C. § 3161(h)(8)(C) (1976); see United States ex rel. Frizer v. McMann, 437 F.2d 1312, 1315 (2d Cir. 1971) (en banc). The purpose of the statutory limitation on the discretion of the trial court is to prevent abuse of the § 3161(h)(8) "catch-all" provision. 1974 House Report, supra note 2, at 22, reprinted in [1974] U.S. Code Cong. & Ad. News at 7415.
278. Although a court may transfer cases to alleviate the pressure of its caseload, "in smaller districts reassignment may be impracticable, and even in larger ones Judges are reluctant to impose the burden [of reassignments] on their fellows, who are already dealing with full calendars and short time limits." Report on Problems, supra note 89, at 2.
279. The interviews did not reveal, however, that the practice of placing the waived case at the end of the trial list was deliberately used to circumvent the strictures of the Act. Additionally, some judges required "good cause" before permitting waiver, in an apparent attempt to justify the waiver by applying standards similar to those required by § 3161(h)(8). See note 264 supra.
280. 18 U.S.C. § 3161(h)(8)(C) (1976). Even if the Act did not expressly preclude a continuance for court calendar congestion, some judges indicated that such continuances would not be as useful as waivers for the purpose of delay. When the reason for the continuance is ended, the court would have to try the case within the remaining limits, which might fall within a particularly congested calendar period.
281. See Frase, supra note 1, at 698; Lacey, supra note 1, at 13.
unnecessary in those instances where a further extension of time is justi-
fied."

Moreover, the excludable time provisions contain checks on their abuse that are not applicable to the use of waiver. A statutory continuance merely tolls the running of the time limits until the reason for the extension has ended. Thereafter, the operation of the time limits resumes, and the defendant retains his right to move for dismissal of the charges for any further unjustified delay. Even in cases where an “interests of justice” continuance is applicable, section 3161(h)(8) places stringent requirements on the trial court. Although the provision is broad in scope, it expressly requires that the trial court establish “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.” The court's reasons for granting the continuance are subject to appellate review to ensure that the public interest in speed has not been subverted. Finally, section 3161(h)(8) expressly forbids a court to grant a continuance because of court calendar congestion.

Upon the exercise of a waiver, however, the Act ceases to bind either the parties or the judge. The statutory time strictures and the excludable time provisions, with their attendant requirements, are effectively nullified. Moreover, an appellate court, in determining the propriety of a waiver, can ask only whether the waiver was voluntary and knowingly made; the reasons why it was granted are irrelevant. Consideration of the public's interest in prompt dispositions, incorporated into the statutory framework of the Act, is thus precluded. To avoid this violation of congressional intent, courts should

285. Id. at 1123; see United States v. Lasker, 481 F.2d 229, 234 (2d Cir. 1973), cert. denied, 415 U.S. 975 (1974).
288. In determining the propriety of a § 3161(h)(8) continuance, the trial court “is not re-stricted to factors set forth under [§ 3161(h)(8)(B)] in its determination as to whether the ends of justice [are] served by the granting of [the] continuance.” Committee on the Administration of the Criminal Law of the Judicial Conference of the United States, Guidelines to the Administration of the “Speedy Trial Act of 1974” at 27 (1977).
290. The standards of review applicable to the provision, however, are undefined. Frase, supra note 1, at 698.
292. See note 238 supra and accompanying text.
employ the excludable time provisions of the Act as the exclusive means to grant justified continuances.

Supporters of waiver have marshalled several constitutional arguments to justify its use. Least persuasive is the contention that waiver of the speedy trial guarantees established by the Act is properly inferred from the defendant's ability to waive the sixth amendment right to speedy trial. The rights protected by the Act differ markedly from those ensured by the sixth amendment. Although the sixth amendment recognizes a societal interest in prompt dispositions, it primarily safeguards the defendant's speedy trial right. As such, the amendment is properly waivable by a defendant. As noted above, however, because of the Act's greater concern for society's interest in speedy justice, a defendant should not be permitted to waive rights that are not his alone to relinquish.

A more fundamental argument contends that waiver is necessary to preserve the constitutionality of the Act. Specifically, it is asserted that the excludable time provisions do not allow delay in many circumstances where denial of a continuance would deprive the defendant of his rights to assistance and choice of counsel as well as due process of law. If the defendant cannot in those instances free himself from the statutory constraints through the expedient of waiver, the argument proceeds, the Act is to that extent unconstitutional. Deprivation of the right to waive the Act, however, does not necessarily infringe the defendant's constitutional rights.

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294. See Platt, supra note 1, at 722.
295. Generally, in states which establish statutory time limits for the prompt disposition of criminal cases, the courts have upheld the defendant's right to waive the statute's strictures. Many of these state statutes, however, ensure the defendant's sixth amendment speedy trial rights and are interpreted, as is the sixth amendment, as involving the personal right of the defendant. E.g., State v. Lyles, 225 N.W.2d 124, 125-26 (Iowa 1975); State v. Harper, 473 S.W.2d 419, 424 (Mo. 1971); State v. Hicks, 353 Mo. 950, 950, 185 S.W.2d 650, 651 (1945); People v. White, 2 N.Y.2d 220, 223-24, 140 N.E.2d 258, 260-61, 159 N.Y.S.2d 168, 172-73, appeal dismissed, 353 U.S. 969 (1957); see Appraisal, supra note 269, at 360-61; Annot., 57 A.L.R.2d 302 (1958). Those state statutes which recognize a public right to a speedy trial, e.g., N.Y. Code Crim. Proc. § 30.30(4)(b) (McKinney Supp. 1978-1979), are also distinguishable from the Act in at least one other respect. "The enforcement of such standards . . . is generally left entirely to the judge; unlike the Act, no reviewable record of his reasoning is required." Frase, supra note 1, at 699 (footnote omitted).
296. Frase, supra note 1, at 668; see Uviller, supra note 179, at 1378-79.
297. See cases cited note 265 supra.
298. See notes 266-72 supra and accompanying text.
299. See Uviller, supra note 179, at 1379.
300. Platt, supra note 1, at 768; see 1978 Speedy Trial Report, supra note 10, at 13-14.
301. See Platt, supra note 1, at 764-66, 771; note 257 supra and accompanying text. The Act has also been attacked as "an unconstitutional legislative encroachment on the judiciary." United States v. Howard, 440 F. Supp. 1106, 1109 (D. Md. 1977), aff'd, No. 78-5047 (4th Cir. Jan. 16, 1979); accord, Platt, supra note 1, at 767-68; see United States v. Martinez, 538 F.2d 921, 923 & n.4 (2d Cir. 1976). The Howard court contended that the Act violates the separation of powers doctrine because Congress cannot "unduly interfere with purely judicial functions," and specifically, cannot establish timetables for judicial action. 440 F. Supp. at 1109-13. One commentator, however, has disagreed, arguing that under article III of the Constitution, Congress has the primary responsibility over court administration. 91 Harv. L. Rev. 1925 (1978).
Proper application of the excludable time provisions of the Act can adequately safeguard defendant's constitutional rights without resort to waiver. 302 Section 3161(h)(8) provides that continuances may be granted when necessary to prevent a "miscarriage of justice." Violation of the Constitution is perhaps the most obvious example of the contingencies that this provision was designed to forestall. 303 The legislative history of the Act expressly indicates that the miscarriage of justice provision was intended to prevent the harsh operation of the time limits upon the defendant. 304 Thus, in instances where delay is required to uphold the defendant's constitutional guarantees, excludable time should be granted. 305 A brief examination of several constitutional privileges that may be infringed absent reasonable delays will illustrate the adequacy of the statutory solution.

The right to effective assistance of counsel is among the guarantees protected by a section 3161(h)(8) continuance. 306 This privilege, which includes the right to prepare an adequate defense, 307 falls "within the parameters" of the sixth amendment 308 and due process clause of the fifth amendment. 309 Pursuant to the Sixth Amendment, a defendant is entitled to the effective assistance of counsel for his defense. 310


307. See White v. Ragen, 324 U.S. 760, 764 (1945); Avery v. Alabama, 308 U.S. 414; 446 (1940); Gandy v. Alabama, 569 F.2d 1318, 1328 (5th Cir. 1978). In United States v. Burton, 584 F.2d 485 (D.C. Cir. 1978), the court stated: "If preparation time is unreasonably short, counsel cannot competently represent his client, and may make negligent omissions or acts that deprive defendant of his constitutional right to the assistance of counsel for his defense." Id. at 489 n.10; see United States v. Fessel, 531 F.2d 1275, 1281 (5th Cir. 1976); United States v. DeCoster, 487 F.2d 1197, 1204 (D.C. Cir. 1973); Finer, Ineffective Assistance of Counsel, 58 Cornell L. Rev. 1077, 1089-93 (1973); Lacey, supra note 1, at 13; Report on Problems, supra note 89, at 8; Wall St. J., Sept. 1, 1977, at 28, col. 2.

suant to this right, however, "[c]ounsel is not entitled to unlimited preparation time," but only "reasonable preparation time." In construing that constitutional right, courts will not permit a continuance if the delay would interfere with the court's orderly disposition of its cases. Courts usually consider the following factors in the determination of reasonable preparation time under the right to counsel clause: the time available for preparation; likelihood of prejudice absent the continuance; the accused's role in causing the delay; complexity of the case; and the availability, skill, and experience of the attorney. As discussed above, section 3161(h)(8) also permits reasonable, limited continuances to provide a defendant with adequate time to prepare. The factors proposed in the foregoing section to determine the propriety of such delays are substantially similar to those enunciated pursuant to the constitutional guarantee. When denial of additional time is sufficiently prejudicial to infringe the defendant's sixth amendment right, the miscarriage of justice provision should always warrant a section 3161(h)(8) continuance.

The right to choice of counsel has also been recognized as an integral part of the sixth amendment right to the assistance of counsel and due process generally Banfield & Anderson, supra note 269, at 267-68; Schaefer, Federalism and State Criminal Procedure, 70 Harv. L. Rev. 1, 8 (1956).

309. "[T]he right to counsel theme of the due process clause has at least four important variations: the right to have counsel, the right to a minimal quality of counsel, the right to a reasonable opportunity to select and be represented by chosen counsel, and the right to a preparation period sufficient to assure at least a minimal quality of counsel." Gandy v. Alabama, 569 F.2d 1318, 1323 (5th Cir. 1978).

310. United States v. Burton, 584 F.2d 485, 489 n.10 (D.C. Cir. 1978); see In re Sutter, 543 F.2d 1030, 1035 (2d Cir. 1976).


312. Actual prejudice to the defendant, absent a claim of incompetence of the attorney, would probably have to be shown in order to reverse because of insufficient time to prepare a defense. See Chambers v. Maroney, 399 U.S. 42, 53-54 (1970). But see Hawk v. Olson, 326 U.S. 271 (1945); Finer, supra note 307, at 1089.


314. See notes 202-13 supra and accompanying text.

315. See notes 214-16 supra and accompanying text.

316. See United States v. Burton, 584 F.2d 485, 488-89 (D.C. Cir. 1978); Platt, supra note 1, at 770; Report on Problems, supra note 89, at 7-8; Southern District Evaluation, supra note 1, at 519-20.

317. Congress anticipated the possibility that an attorney would need additional time to prepare: "[W]hen a defendant's counsel . . . 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." 1974 House Report, supra note 2, at 33, reprinted in [1974] U.S. Code Cong. & Ad. News at 7426. The Senate Report expressly authorizes the granting of a section 3161(h)(8) continuance where the "defense counsel . . . is ill or unable to continue, or . . . has been permitted by the court to resign from the case, or the court has removed counsel from the case." 1974 Senate Report, supra note 2, at 40; see In re Ford, No. 79-3011, slip op. at 5 (2d Cir. Mar. 30, 1978); Russ & Mandelkern, supra note 1, at 22.
clause of the fifth amendment.\textsuperscript{318} The privilege of selecting and retaining a particular attorney, however, is not absolute.\textsuperscript{319} Similar to the right of adequate preparation, it may not unreasonably delay the proceedings and thereby deprive courts of their power to control the efficient administration of justice.\textsuperscript{320} In considering what constitutes a reasonable continuance to obtain particular counsel,\textsuperscript{321} the courts have traditionally utilized factors which are similar to those suggested by the Second Circuit Guidelines to determine the propriety of a section 3161(h)(8) continuance.\textsuperscript{322} The constitutional factors include: length of delay; availability of substitute counsel; prior continuances granted; inconvenience to the litigants, witnesses, counsel, and court; material prejudice to the defendant absent the delay; complexity of the case; and legitimacy of the reasons for the request.\textsuperscript{323} Moreover, several courts, in applying these factors, have employed a balancing test to determine the reasonableness of a continuance under which the public's interest in prompt dispositions is weighed against the defendant's interest in selecting counsel.\textsuperscript{324} That test essentially mirrors the considerations necessary to justify a section 3161(h)(8) continuance. Such a continuance, therefore, should be available to prevent a constitutional violation of the right to choice of counsel.\textsuperscript{325}

Finally, in situations not involving adequate preparation time or right to counsel, denial of a continuance may still violate a defendant's right to due process of law.\textsuperscript{326} Here again, waiver is unnecessary to provide the required

\begin{footnotes}
\footnotetext{320}{United States v. Burton, 584 F.2d 485, 489-90 (D.C. Cir. 1978); Gandy v. Alabama, 569 F.2d 1318, 1323 (1978); United States v. Poulack, 556 F.2d 83, 86 (1st Cir.), cert. denied, 434 U.S. 986 (1977); see United States v. Lustig, 555 F.2d 737, 744 (9th Cir. 1977), cert. denied, 434 U.S. 1045 (1978).}
\footnotetext{321}{Generally, the grant of a continuance is in the discretion of the trial court. United States v. Siegel, 587 F.2d 721, 728 (5th Cir. 1979); that discretion, however, cannot be abused. See Ungar v. Sarafite, 376 U.S. 575, 589 (1964).}
\footnotetext{322}{See notes 226-29 supra and accompanying text.}
\footnotetext{323}{United States v. Burton, 584 F.2d 485, 490-91 (D.C. Cir. 1978); Gandy v. Alabama, 569 F.2d 1318, 1324 (5th Cir. 1978); Giacalone v. Lucas, 445 F.2d 1238, 1240 (6th Cir. 1971), cert. denied, 405 U.S. 922 (1972).}
\footnotetext{324}{United States v. Burton, 584 F.2d 485, 490-92 (D.C. Cir. 1978); Giacalone v. Lucas, 445 F.2d 1238, 1240 (6th Cir. 1971), cert. denied, 405 U.S. 922 (1972). "Desirable as it is that a defendant obtain private counsel of his own choice, that goal must be weighed and balanced against an equally desired public need for the efficient and effective administration of criminal justice." United States v. Poulack, 556 F.2d 83, 86 (1st Cir.) (quoting United States ex rel. Carey v. Rundle, 409 F.2d 1210, 1214 (3d Cir. 1969), cert. denied, 434 U.S. 986 (1977). This public interest "has great force" in determining whether a continuance should be granted. United States v. Burton, 584 F.2d at 489.}
\footnotetext{325}{See Revised Second Circuit Guidelines, supra note 219, at 37. See generally 65 A.B.A. J. 23 (1979).}
\footnotetext{326}{See Platt, supra note 1, at 768.}
\end{footnotes}
delay. The House Report expressly states: "The word speedy does not . . .
denote assembly-line justice, but efficiency in the processing of cases which is
commensurate with due process."327 For example, the publicity surrounding a
criminal case may make it impossible to commence trial within the statutory
time limits. Although the defendant might be amply prepared, with no desire
to procure a new attorney, his due process rights would be protected only if
trial were scheduled at a later date.328 Given the legislative intent, the pro-
priety of a section 3161(h)(8) continuance to alleviate the prejudicial impact of
that publicity would seem unquestionable.

In sum, waiver is an unnecessary and undesirable device to protect the
legitimate interests of defendants in delay. The ends of justice and miscarriage
of justice provisions of section 3161(h)(8) are sufficiently broad to permit
continuances whenever reasonable extensions of the statutory time limits are
required. Moreover, Congress could not have intended to superimpose the
device of waiver upon an already comprehensive statutory scheme. To the
contrary, by permitting the defendant to suspend the operation of the Act for
the duration of the proceedings, waiver thwarts the public interest in speedy
dispositions, and to that extent is antithetical to congressional intent. To
prevent further subversion of the statutory purpose, Congress should clarify
the Act to preclude the use of waiver.

CONCLUSION

Enforcement of the Speedy Trial Act in the districts of Eastern New York,
Connecticut, and New Jersey, although not free from difficulty, has largely
proven successful. Many of the adverse effects upon civil litigation foretold by
the Act's detractors have not materialized. More importantly, the difficulties
encountered, especially by defendants and their counsel, are not insurmount-
able. Hence, if the three districts studied are at all representative, the re-
peated and variegated calls for amendment of the Act seem unwarranted.

Of course, the conclusions of this study must be qualified. Because the
sanction of dismissal for excessive delay is not yet effective,329 analysis of the
districts' efforts to comply with the time limits is beset with pitfalls—the
threat of dismissal may provoke unforeseen difficulties.330 In addition, during
most of the period under scrutiny, Eastern New York and New Jersey had

News at 7408. "[S]ection 3165(b) of the bill specifically mandates that the planning process seek to
avoid underenforcement, overenforcement, and discriminatory enforcement of the law. The
Committee believes that both delay and haste in the processing of criminal cases must be avoided;
neither of these tactics inures to the benefit of the defendant, the Government, the courts nor
society." Id.

328. Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 553 (1976); Groppi v. Wisconsin, 400
532, 536 (1965); Rideau v. Louisiana, 373 U.S. 723, 727 (1963); Irvin v. Dowd, 366 U.S. 717,
725-29 (1961).

329. The sanctions for noncompliance with the Act's time limits do not become effective until

not yet adopted the permanent limits;\textsuperscript{331} that their successful operation under
the Act will continue after 1979 accordingly must be viewed as a reasonable prediction. Finally, the study is only a sampling. The strains on courts, defendants, and prosecutors fostered by the Act are not easily catalogued even in an examination of three jurisdictions, and it is not suggested that the foregoing observations necessarily reflect the experience of all districts.

Nevertheless, even if the deleterious effects of the Act exceed those indicated by this study, amendment remains a premature solution in view of several alternative methods that can be employed to reduce court congestion and, as a result, the stress on defendants and prosecutors. In response to the pleas of the federal courts to reduce their growing congestion, Congress recently passed the Omnibus Judgeship Act of 1978.\textsuperscript{332} Under this statute, new trial judgeships are created in most federal districts.\textsuperscript{333} These additional judgeships should absorb a large part of the increasing civil filings and decrease criminal caseloads per judge, thereby permitting greater scheduling flexibility. In addition, increases in the number and use of magistrates, as permitted under the Federal Magistrates Act,\textsuperscript{334} can also reduce backlogs. Finally, congressional determination of the propriety of the permanent limits should not ignore the bills to abolish the diversity jurisdiction of the federal courts.\textsuperscript{335} That legislation, if enacted, will drastically reduce federal civil calendars\textsuperscript{336} and can only ameliorate any prejudicial impact of the Act upon

\begin{itemize}
  \item \textsuperscript{331} See notes 110-12 supra and accompanying text.
  \item \textsuperscript{333} The legislation has provided for one judge each in both Eastern New York and Connecticut, and two additional judgeships in New Jersey. \textit{id.} § 11(a).
  \item \textsuperscript{334} 28 U.S.C. §§ 631-639 (1976). Civil actions may be assigned to magistrate for all pretrial purposes with appeal to the district court only if the magistrate's ruling is "clearly erroneous or contrary to law." \textit{id.} § 636(b)(1)(A); see United States v. Jones, 581 F.2d 816, 818 (10th Cir. 1978); Taylor v. Oxford, 575 F.2d 152, 154 (7th Cir. 1978); Carmena v. International Union of Operating Eng'rs Local 406, 572 F.2d 1031, 1032 (5th Cir. 1978); Kendall v. Davis, 569 F.2d 1330, 1331 (5th Cir. 1978). Furthermore, motions which would be case dispositive (e.g., motion for summary judgment) may be referred to the magistrate who may then recommend the appropriate action to the district court. 28 U.S.C. § 636(b)(1)(B) (1976); Mitchell v. Beaubouef, 581 F.2d 412, 415 (5th Cir. 1978); Rees v. District Court, 572 F.2d 700, 701 (9th Cir. 1978). Some have advocated broader powers for the magistrates. 1978 Speedy Trial Report, \textit{supra} note 10, at 28; Address by Warren E. Burger, Chief Justice of the United States, American Bar Association Midyear Meeting (Feb. 11, 1979). In fact, a recent Senate bill to increase the use of magistrates, S. 1613, 95th Cong., 1st Sess., was passed by the House of Representatives in slightly amended form and is now in a joint conference committee. \textit{Diversity of Citizenship Jurisdiction/Magistrate Reform: Hearings Before the Subcomm. on Courts, Civil Liberties and the Administration of Justice of the House Comm. on the Judiciary, 95th Cong., 1st Sess. 36-44 (1977)}.
  \item \textsuperscript{336} Diversity jurisdiction accounted for 31,678 civil filings out of 130,597 total civil filings in 1977. 1977 Administrative Office Report, \textit{supra} note 126, at A-14. This represents almost 25% of
\end{itemize}
civil litigants. Although the success of these alternatives in decreasing judicial backlogs is presently a matter for speculation, the likelihood that they will free courts from at least some of the constraints caused by the Act renders amendment unnecessary at this date.

Perhaps the two most preferable alternatives to amendment are found in the Act itself. First, the Act authorizes each district planning group to request additional resources that are needed to comply with the permanent limits.337 Second, if the Act proves totally unworkable in a district, the judicial emergency section allows the Judicial Conference to suspend the permanent limits in that jurisdiction for one year.338 Although Congress did not intend that the provision be liberally applied, it permits at least temporary relief for a district with unusually serious docket congestion.339 Relaxation of the limits without first exploring the use of these built-in "safety valves" would be an unwarranted and hasty step.

The Speedy Trial Act, like any other statute, does not please everyone. But the repeated calls for its amendment ignore the fundamental urgency: the public's interest in speedy criminal trials simply can no longer take second place to crowded court calendars. Of course, restrictive application of the excludable time provisions might indeed promote "speed for speed's sake"; such, however, was not the legislative design. Congress constructed the Act to accommodate all reasonable interests in delay, especially those of defendants. Indeed, despite three years of vigorous opposition, the drafters remain firm in their conviction that the Act is a workable piece of legislation: "If some courts find the law too rigid, it is because they have interpreted it more stringently than was intended."340 It is difficult to see how injection of even

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337. "Each plan shall further specify the . . . appropriations needed to effectuate further improvements in the administration of justice in the district which cannot be accomplished without such amendments or funds." 18 U.S.C. § 3166(d) (1976). These additional resources may include new judgeships, magistrates, court reporters, clerks, probation officers, and supporting personnel in the defender services and Department of Justice. 1978 Speedy Trial Report, supra note 10, at 25-26. The three districts studied have requested additional resources in their final plans. See D. Conn. Final Plan, supra note 88, at V1-V2; D.N.J. Final Plan, supra note 96, at 50-51; E.D.N.Y. Final Plan, supra note 97, at V1-V6.

338. 18 U.S.C. § 3174 (1976); see note 84 supra and accompanying text. A recent Justice Department report suggests that the dismissal sanctions be postponed: "The benefits of the act's unique, graduated approach, will be substantially dissipated if the ultimate time limits and the dismissal sanction come into effect simultaneously." Nat'l L.J., Mar. 12, 1979, at 5, col 1 (quoting report). According to the report, if the final limits had been in effect in 1978, 5,000 cases would have been dismissed. That conclusion, however, was based on a study of only 460 cases, and concedes that "common sense indicates that such a level of dismissals will probably not in fact occur" when the permanent limits become effective. Id.

339. The process for application to relax the Act's limits is quite stringent. 18 U.S.C. § 3174(a) (1976). The district must prove to the satisfaction of the chief judge, planning group, and judicial council that no other remedy for its court congestion is available. 18 U.S.C. § 3174 (a)-(b) (1976).

more relaxed measures into this inherently pliable statute would promote the interests of justice.

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APPENDIX
INFORMATION GATHERED FROM JUDGES, PROSECUTORS, AND DEFENSE ATTORNEYS

A. Questions Asked of All Interviewees
1. What was his opinion concerning the effectiveness and/or desirability of standards for the prompt disposition of criminal cases prior to the Speedy Trial Act?
2. Had he had experience under:
   a) a state plan following the ABA Standards?
   b) the Second Circuit Rules?
   c) Federal Rule of Criminal Procedure 50(b)?
3. Did he believe that problems which he may have encountered under these prior rules were remedied or exacerbated by the Act?
4. Were there certain procedures which were useful in practice in the past that can no longer be used under the shorter limits of the Act?
5. What techniques, if any, had he adopted to cope with the time constraints of the Act?
6. Could he point to specific instances or illustrations which demonstrate the difficulties of compliance with the Act?
7. Did he believe that other factors, such as lack of manpower or case complexity, account for failures to meet the Act’s time limits, or are the Act’s limits unreasonable per se?
8. Did he advocate increased use of magistrates to help relieve court congestion?
9. Would he prefer a single overall time limit?
10. Did he believe there should be separate time limits for certain enumerated types of cases?
11. Did he feel the permanent time limits should be postponed to allow more time for adjustment and compliance?
12. Did he advocate:
   a) the continued existence of the Act without amendment?
   b) the continued existence of the Act with a relaxation of the time limits?
   c) the repeal of the Act and a return to the ad hoc balancing test of Barker v. Wingo?
   d) a return to the district plans enacted under Federal Rule of Criminal Procedure 50(b)?

B. Questions Asked of Judges
1. What effect had the Act had upon his general calendar?
2. Had the Act created greater backlogs or could he identify other possible causes of present court congestion?
3. How many trial days can he now afford to spend on civil litigation?
4. Had there been a change in the number of days per month he spends on trials?
5. Had the overall time he devoted to civil and criminal cases changed?
6. Had the proportion of time he devoted to civil trials increased or decreased?
7. To what extent did he use excludable time to give himself scheduling flexibility?
8. If he foresaw scheduling conflicts did he grant excludable time more readily?
9. What arrangements did he make for scheduling cases when planning vacations for himself and his staff? What effect has the Act had upon such planning?
10. Under what circumstances would he grant a section 3161(h)(8) interests of justice exclusion?
11. Had his use of the interests of justice exclusion increased as the permanent limits grew near?
12. Pursuant to section 3161(h)(1)(G), which allows for reasonable continuances, not to exceed thirty days, for motions held under advisement, did he routinely grant a full thirty day continuance in those instances.
13. Did he believe that the Act reduces a judge's time for reflection?
14. Had he reassigned more cases as a result of the imposition of the Act's time limits, and, if so, did he believe that this caused significant disruption of the single calendar system?
15. Had he increased settlements under the Act? In his opinion, what effect did increased settlements have on civil litigation?
16. Did he often grant motions for hearings on the eve or day of trial, and, if so, had this practice increased under the Act?
17. Did he rule on more motions from the bench as a result of the Act?
18. Did he hold evidentiary hearings on the eve or day of trial more often than before the Act?

C. Questions Asked of Prosecutors
1. Did he delay arrests more often in order to obtain more preparation time before the limits were triggered?
2. How often was the first appearance of the defendant delayed under the Act in order to gain more time?
3. Under what circumstances did judges deny or grant an interests of justice exclusion?
4. In his experience, what were the most common grounds on which excludable time had been granted?
5. In his experience, had judges usually granted excludable time from the bench or taken the motion under advisement?
6. Had judges often granted excludable time continuances sua sponte?
7. Did he feel that judges held evidentiary hearings on the eve or day of trial more often than before the Act?
8. Had he experienced insufficient time before trial to study complex
9. Had he found that judges would grant excludable time if the cases were unusually complex?
10. Did he prosecute fewer cases than before the Act in order to cope with the short time limits or to concentrate on more serious offenses?
11. Had he been forced to reassign more cases as a result of the time limits?
12. Did he foresee that more prosecutors will be needed to reduce the pressures of the Act?

D. Questions Asked of Defense Attorneys
1. Had the Government been cooperative in turning over discoverable material?
2. Had he experienced insufficient time before trial to study complex materials?
3. Did he believe that assistant U.S. Attorneys were unsympathetic to the pressures upon defense attorneys created by the Act?
4. How often was the first appearance of the defendant delayed in order to gain more time?
5. Had he experienced scheduling conflicts that forced him to reduce his representation of defendants in federal court because federal judges would not accommodate such schedule conflicts? Do the short time limits make representation unattractive?
6. Had he been forced to reassign more cases as a result of the Act's time limits?
7. Did he hesitate to make an appearance at arraignment for fear that judges would not allow him to withdraw thereafter, even on the ground that the client could not pay him for his services?
8. In his experience, had judges granted continuances when the defendant was not represented by counsel at time of arraignment?
9. In his experience, what were the most common grounds on which excludable time had been granted?
10. In his experience, had judges usually granted excludable time from the bench or taken the motion under advisement?
11. Had judges often granted excludable time periods sua sponte?
12. Had he found that judges would grant excludable time if the case were unusually complex?
13. Under what circumstances had judges denied or granted an interests of justice exclusion?
14. Did he believe that judges held evidentiary hearings on the eve or day of trial more often than before the Act?
15. Did he advise clients to plead guilty on the eve of trial more often since the enactment of the Act?
16. Did he enter more pro forma not guilty pleas to avoid violation of the ten day indictment-to-arraignment limit?
17. Did he believe that the permanent limits provide insufficient time to prepare a defense? Had he experienced insufficient time to prepare a defense under the phase-in limits?
18. What were the major effects of the Act on defendants and his ability to represent them?