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DELAY, DOCUMENTATION AND THE SPEEDY TRIAL ACT

ROBERT L. MISNER*

INTRODUCTION

Prompted by a desire to reduce criminal activity by persons released pending trial,¹ and by a wish to erect a fitting memorial to retiring Senator Sam Ervin,² the Ninety-Third Congress passed the Speedy Trial Act of 1974.³ The Act stems from the basic congressional assumption that the participants in the criminal justice system (*i.e.*, the judges, prosecutors and defense counsel) cannot be trusted with the task of adequately protecting society's interests in the swift administration of justice.⁴ To

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¹ The introduction to the Act states its purpose: "To assist in reducing crime and the danger of recidivism by requiring speedy trials and by strengthening the supervision over persons released pending trial, and for other purposes." Speedy Trial Act of 1974, Pub. L. No. 93-619, 88 Stat. 2076 (1974). Congress relied upon Bureau of Standards statistics to support the proposition that the criminal defendant awaiting trial is not only a financial and administrative burden to society, but often is a danger to his community as well. In a study of 712 defendants during four weeks in 1968, the Bureau report found that of 426 defendants on pretrial release, 47 were re-arrested and formally charged with crimes committed while on release. The study also purported to show that defendants have an increased propensity to be re-arrested when released more than 280 days. H.R. REP. NO. 1508, 93d Cong., 2d Sess. 15-16 (1974) [hereinafter cited as HOUSE REPORT]. See also S. REP. NO. 93-1021, 93d Cong., 2d Sess. 8 (1974) [hereinafter cited as SENATE REPORT].

² See, *e.g.*, the statement of Representative Conyers, Chairman of the Judiciary Committee's Subcommittee on Crime. *Hearings on S. 754, H.R. 7873, H.R. 207, H.R. 658, H.R. 687, H.R. 773, and H.R. 4807 Before the Subcomm. on Crime of the House Comm. on the Judiciary*, 93d Cong., 2d Sess. 157 (1974) [hereinafter cited as *House Hearings*]. For a discussion of Senator Ervin's role in the passage of the Speedy Trial Act, see Frase, *The Speedy Trial Act of 1974*, 43 U. CHI. L. REV. 667, 673-74 (1976).

³ The Speedy Trial Act was signed by President Ford on January 3, 1975. It is codified at 18 U.S.C. § 3161 *et seq.* (Supp. IV 1974).

⁴ Senator Ervin believed that society's interests in speedy trials of criminal defendants were being inadequately protected by the participants in the legal system. Consequently, separate speedy trial legislation was deemed necessary. *House Hearings*, *supra* note 2, at 158. The Congress also relied heavily upon a report by Yale

date, however, the Act has been met with an unwelcome reception by the criminal justice system.⁵ This article suggests that the participants in the system may well take every opportunity to undermine the effect of the Act, and thereby defeat the goals it was intended to achieve.

The Act requires, with certain exceptions, that a criminal defendant be tried within 100 days of arrest or service of summons.⁶ Consequently, one likely approach to subvert the intent of the Act will be for the defense to claim that the time limits of the Act are in conflict with the defendant's ability to retain the counsel of his choice and are inconsistent with the defendant's right to be represented by adequately prepared counsel. It may be argued that the Act causes such a rush to judgment that it is inconsistent with a defendant's right to an adequately investigated and prepared defense.

Law School Professor Daniel Freed, which concluded that the goal of the Judicial Conference's Model 50(b) Plan, then in effect in all district courts, to reduce the time required to bring a defendant to trial was largely unrealized. *House Hearings*, *supra* note 2, at 261-333. See also HOUSE REPORT, *supra* note 1, at 12-13. Testifying in favor of handling the speedy trial issue through F.R. CRIM. P. 50(b) plans to achieve the prompt disposition of criminal trials were Rowland F. Kirks, director of the Administrative Office of the U.S. Courts, *House Hearings*, *supra* note 2, at 176-93; W. Vincent Rakestraw, assistant attorney general, Office of Legislative Affairs, *House Hearings*, *supra* note 2, at 196-209; United States District Judge Alphonso J. Zirpoli, Northern District of California, Chairman of the Committee on the Administration of the Criminal Law of the Judicial Conference of the United States, *House Hearings*, *supra* note 2, at 365-84. (Rule 50(b) calls for the formulation of plans, by district courts, for achieving the prompt disposition of criminal cases.)

Another objection to the rule 50(b) plans is found in Justice Douglas' dissent to the promulgation of rule 50(b): There may be several better ways of achieving the desired result [speedy trial]. This Court is not able to make discerning judgments between various policy choices where the relative advantage of several alternatives depends on extensive fact finding. That is a "legislative" determination. Under our constitutional system that function is left to the Congress with approval or veto by the President.

406 U.S. 981-82 (1972) (Douglas, J., dissenting).

⁵ See text accompanying notes 114-44 *infra*.

⁶ 18 U.S.C. § 3161 (Supp. IV 1974).

Based upon adequacy of preparation claims, defense counsel will argue that the "ends of justice" require the time limits of the Act be extended.⁷ This article asserts that the "ends of justice" exclusion of the Act, when properly interpreted and carefully administered, can be used to strike a proper balance between society's interest in quick resolution of criminal cases and the defendant's right to a fair trial conducted by counsel in whom

he has confidence and with whom a confidential relationship can be maintained.

Furthermore, this article asserts that in order to protect society's interests in speedy trials, courts should require specific information from defense counsel to bolster the right to counsel claim, rather than relying upon the stipulation of the defense and prosecution that a basis for delay exists. This is important because the parties' motives for seeking delays conflict with society's interest in prompt actions. Confidential or potentially damaging information may, when necessary, be communicated to the trial judge or to another judge *ex parte* and *in camera*. This will avoid the need to frustrate the purposes of the Speedy Trial Act under the pretense that the time requirements of the Act are inconsistent with the sixth amendment right-to-counsel provision. Such a solution, which recognizes that the Speedy Trial Act now prohibits stipulated continuances,⁸ assumes a good faith attempt by the judiciary to implement the Speedy Trial Act irrespective of a judge's personal beliefs in the wisdom of Congress' action in passing the Act.

The right to counsel problem serves to highlight the general problems of implementing The Speedy Trial Act and is chosen because it is a common criticism of the Act, because it offers a good illustration of attorney excuses for delay, and because it involves the interrelationship of two separate and potentially conflicting constitutional concerns.

I. PROVISIONS OF THE ACT

The Speedy Trial Act sets out to remedy delay in three separate ways. First, it requires that from July 1, 1975, to July 1, 1979, trials of all persons held in detention solely because they are awaiting trial shall commence no later than ninety days following the beginning of continuous detention.⁹ Second, it mandates that after July 1, 1979, criminal defendants be tried within 100 days after arrest or service of summons excluding certain limited periods of delay.¹⁰ Finally, it creates experimental, pre-trial service agencies in ten selected districts to provide support and supervisory services to non-custodial defendants awaiting trial.¹¹

Although at first glance it may appear that Congress has merely set time limits for the key

⁷ 18 U.S.C. § 3161(h)(8) (Supp. IV 1974).

(h) The following periods of delay shall be excluded in computing the time within which an information or an indictment must be filed, or in computing the time within which the trial of any such offense must commence:

(8)(A) Any period of delay resulting from a continuance granted by any judge on his own motion or at the request of the defendant or his counsel or at the request of the attorney for the Government, if the judge granted such continuance on the basis of his findings that the ends of justice served by taking such action outweigh the best interest of the public and the defendant in a speedy trial. No such period of delay resulting from a continuance granted by the court in accordance with this paragraph shall be excludable under this subsection unless the court sets forth, in the record of the case, either orally or in writing, its reasons for finding that the ends of justice served by the granting of such continuance outweigh the best interests of the public and the defendant in a speedy trial.

(B) The factors, among others, which a judge shall consider in determining whether to grant a continuance under subparagraph (A) of this paragraph in any case are as follows:

(i) Whether the failure to grant such a continuance in the proceeding would be likely to make a continuation of such proceeding impossible, or result in a miscarriage of justice.

(ii) Whether the case taken as a whole is so unusual and so complex, due to the number of defendants or the nature of the prosecution or otherwise, that it is unreasonable to expect adequate preparation within the periods of time established by this section.

(iii) Whether delay after the grand jury proceedings have commenced, in a case where arrest precedes indictment, is caused by the unusual complexity of the factual determination to be made by the grand jury or by events beyond the control of the court or the Government.

(C) No continuance under paragraph (8)(A) of this subsection shall be granted because of general congestion of the court's calendar, or lack of diligent preparation or failure to obtain available witnesses on the part of the attorney for the Government.

⁸ See, e.g., *United States v. LaCruz*, 441 F. Supp. 1261, 1264 (S.D.N.Y. 1977).

⁹ 18 U.S.C. § 3164(b) (Supp. IV 1974).

¹⁰ 18 U.S.C. § 3161 (Supp. IV 1974).

¹¹ 18 U.S.C. §§ 3152-55 (Supp. IV 1974).

events in the criminal justice process much in the same vein as most state speedy trial statutes,¹² in fact the Speedy Trial Act is a unique approach to correct delays in the administration of criminal justice. The special quality of the Act lies in Congress' decision to place the responsibility to experiment, to critique, and to plan compliance efforts on the individual courts during the transitional stages when the ultimate time limits and sanctions of the Act are not in total operation.¹³ Unfortunately, most district courts have totally ignored the planning aspects of the Act and consequently many have little or no experience with the day-to-day practical difficulties presented by it.¹⁴ For these recalcitrant districts, July 1, 1979 (the date on which the time limits and sanctions go fully into effect), may be the first day on which serious concern will be shown for the Speedy Trial Act, if any concern is shown at all.

For purposes of this article it is unnecessary to go into great detail regarding the interim time limits or the pre-trial service agencies. The interim limits relating to the in-custody defendant do little more than assure in-custody cases the highest priority in trial scheduling.¹⁵ If the in-custody defendant is not tried within ninety days, he is to be released.¹⁶ The experimental services agencies, which are gov-

erned by the administrative office of the United States Courts, are of little immediate concern to the majority of individual district courts.¹⁷ The comparatively complicated and far-reaching provisions relating to the 1979 standards, on the other hand, directly involve the individual district courts and are a legitimate source of concern.

The ultimate 100 day arrest-to-trial standard is divided into three segments: a thirty-day limit between arrest and the filing of an indictment or information;¹⁸ a ten-day limit between indictment and arraignment;¹⁹ and a sixty-day limit between arraignment and trial.²⁰ However, these time periods do not become effective until the fifth year after the enactment of the Act and during the five year phase-in period, the time standards vary.

All time periods are tolled by a limited number of exceptions which mitigate somewhat the apparent stringency of the Act.²¹ The Act specifically excludes from the restrictions delay resulting from physical and mental examinations, trials on other charges, interlocutory appeals, hearings on pre-trial motions, and Federal Rules of Criminal Procedure rule 40 transfers.²² The Act also recognizes other exclusions such as delays due to deferred prosecution to allow the defendant to demonstrate his good behavior, the absence of defendants and witnesses, and other procedural difficulties.²³ The Act contains an escape clause which allows the court to delay the trial if, in granting the continuance, the ends of justice "outweigh the best interest of the public and the defendant in a speedy trial."²⁴ Because it is possible to use this exception to emasculate the operation of the Speedy Trial Act, such

¹² For a discussion of state speedy trial statutes, see Poulos and Coleman, *Speedy Trial, Slow Implementation: The ABA Standards in Search of a Statehouse*, 28 HASTINGS L.J. 357 (1976).

¹³ For a general description of the bill, see HOUSE REPORT, *supra* note 1, at 21-28.

¹⁴ Misner, *District Court Compliance with the Speedy Trial Act of 1974: The Ninth Circuit Experience*, 1977 ARIZ. ST. L.J. 1, 15-25.

¹⁵ See, e.g., REVISED MODEL STATEMENT OF TIME LIMIT AND PROCEDURES FOR ACHIEVING PROMPT DISPOSITION OF CRIMINAL CASES 2 (Speedy Trial Directive No. 11, Feb. 18, 1976).

¹⁶ 18 U.S.C. § 3164(c) (Supp. IV 1974). It is questionable whether the computation of the 90-day period can take into account the excludable time provisions of 18 U.S.C. § 3161(h). The Administrative Conference has taken the position that the exclusions do not apply to the in-custody defendant during the interim period. The Justice Department has taken the contrary position. In the first case dealing with the issue, the Ninth Circuit held that the excludable time provisions are not applicable to the in-custody defendant. *United States v. Tirasso*, 532 F.2d 1298 (9th Cir. 1976). Other courts, however, have failed to follow the Ninth Circuit. See, e.g., *United States v. Corley*, 548 F.2d 1043 (D.C. Cir. 1977); *United States v. Mejias*, 417 F. Supp. 579 (S.D.N.Y.) *aff'd on other grounds sub nom.* *United States v. Martinez*, 538 F.2d 921 (2d Cir. 1976); *United States v. Masko*, 415 F. Supp. 1317 (W.D. Wis. 1976). For a discussion of excludable time, see text accompanying notes 21-26 *infra*.

¹⁷ The individual districts chosen as experimental districts are: District of Maryland, Eastern District of Michigan, Western District of Missouri, Eastern District of New York, Eastern District of Pennsylvania, Central District of California, Northern District of Georgia, Northern District of Illinois, Southern District of New York, and Northern District of Texas. For a discussion of the pretrial service agencies, see ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, REPORT ON THE IMPLEMENTATION OF TITLE I AND TITLE II OF THE SPEEDY TRIAL ACT OF 1974, 25-44 (1976).

¹⁸ 18 U.S.C. § 3161(b) (Supp. IV 1974).

¹⁹ 18 U.S.C. § 3161(c) (Supp. IV 1974).

²⁰ *Id.*

²¹ The applicability of 18 U.S.C. § 3161(h) to 18 U.S.C. § 3164 is discussed at note 16 *supra*.

²² 18 U.S.C. § 3161(h) (Supp. IV 1974). Rule 40 of the Federal Rules of Criminal Procedure regulates the removal of persons from one federal district court to another.

²³ *Id.*

²⁴ 18 U.S.C. § 3161(h)(8)(A) (Supp. IV 1974).

a delay cannot be granted unless the court finds on the record that a miscarriage of justice would likely result if the continuance was not granted; that the nature of the case is such that adequate preparation cannot be expected within the statutory time frame; or that the delay is caused by the complexity of the case before the grand jury.²⁵ The Act specifically states, however, that general court congestion, lack of diligent preparation by the government, or failure of the government to obtain an available witness are unacceptable causes of delay.²⁶

Sanctions during the phase-in period are limited to the release of those persons being held in detention solely to await trial and to the review of the conditions of release for "high risk" defendants who are not tried within ninety days after that designation has been made.²⁷ After July 1, 1979, more severe sanctions become effective. At that point the court may, upon motion of the defendant, move to dismiss the complaint, information, or indictment against the individual with or without prejudice.²⁸ Failure of the defendant to move for dismissal prior to trial or plea will constitute a waiver of his right to a dismissal.²⁹ Moreover, sanctions are provided against attorneys who intentionally delay the proceedings.³⁰

²⁵ 18 U.S.C. §3161(h)(8)(B) (Supp. IV 1974). For a discussion of the types of delay envisioned by Congress to fall within the "ends of justice" exclusion, see ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, GUIDELINES OF THE ADMINISTRATION OF THE SPEEDY TRIAL ACT OF 1974, 18-21 (1975) [hereinafter cited as GUIDELINES]. See also ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, AMENDED GUIDELINES TO THE ADMINISTRATION OF THE SPEEDY TRIAL ACT OF 1974, 22C-22G (1976) [hereinafter cited as AMENDED GUIDELINES]; HOUSE REPORT, *supra* note 1, at 33-34; SENATE REPORT, *supra* note 1, at 39-41.

²⁶ 18 U.S.C. § 3161(h)(8)(C) (Supp. IV 1974).

²⁷ 18 U.S.C. § 3164(c) (Supp. IV 1974).

²⁸ 18 U.S.C. § 3162(a)(1) (Supp. IV 1974).

²⁹ 18 U.S.C. § 3162(a)(2) (Supp. IV 1974).

³⁰ Sanctions are detailed in 18 U.S.C. § 3162(b) (Supp. IV 1974):

In any case in which counsel for the defendant or the attorney for the Government (1) knowingly allows the case to be set for trial without disclosing the fact that a necessary witness would be unavailable for trial; (2) files a motion solely for the purpose of delay which he knows is totally frivolous and without merit; (3) makes a statement for the purpose of obtaining a continuance which he knows to be false and which is material to the granting of a continuance; or (4) otherwise willfully fails to proceed to trial without justification consistent with section 3161 of this chapter, the court may punish any such counsel or attorney, as follows:

(A) in the case of an appointed defense counsel,

Finally, the Act provides an all-purpose escape clause which authorizes the Judicial Conference, upon application of a district court, to suspend in that district the time limits of section 3161(c) which govern the arraignment-to-trial interval for up to one year.³¹ For the time limits to be suspended, the district must be in a state of "judicial emergency,"³² and, even then, time limits are not truly suspended but are extended from 60 to 180 days.³³ The Judicial Conference can grant a suspension only after the Judicial Council of the circuit finds, *inter alia* that the existing resources of the district are being efficiently utilized.³⁴

To leave a discussion of the substantive provisions of the Speedy Trial Act without mentioning the planning aspects of the Act would be misleading. The Speedy Trial Act is first and foremost a planning bill, a fact which is often overlooked. The Act assumes that its substantive provisions are workable, but gives the district courts a four-year period in which to comment on the substantive provisions and to determine the resources they will need to comply with the mandated time restraints. As the House Report summarized the issue:

The heart of the speedy trial concept. . . is the planning process. These provisions recognize the

by reducing the amount of compensation that otherwise would have been paid to such counsel pursuant to section 3006A of this title in an amount not to exceed 25 per centum thereof; (B) in the case of a counsel retained in connection with the defense of a defendant, by imposing on such counsel a fine of not to exceed 25 per centum of the compensation to which he is entitled in connection with his defense of such defendant;

(C) by imposing on any attorney for the Government a fine of not to exceed \$250;

(D) by denying any such counsel or attorney for the Government the right to practice before the court considering such case for a period of not to exceed ninety days; or

(E) by filing a report with an appropriate disciplinary committee.

The authority to punish provided for by this subsection shall be in addition to any other authority or power available to such court.

³¹ 18 U.S.C. § 3174(a)-(b) (Supp. IV 1974).

³² "Judicial emergency" is the term used by the Act itself. 18 U.S.C. § 3174 (Supp. IV 1974).

³³ The Act also provides that the Judicial Conference can generally grant only one extension. 18 U.S.C. § 3174(c) (Supp. IV 1974). Additional extensions must be granted by Congress. *Id.* If Congress fails to act on the request within six months, the Judicial Conference may grant an additional suspension. *Id.*

³⁴ 18 U.S.C. § 3174(a) (Supp. IV 1974).

fact that the Congress—by merely imposing uniform time limits for the disposition of criminal cases, without providing the mechanism for increasing the resources of the courts and helping to initiate criminal justice reform which would increase the efficiency of the system—is making a hollow promise out of the Sixth Amendment.³⁵

Similar characterizations of the Act can be found in the Senate Report,³⁶ the House Hearings,³⁷ the House debate,³⁸ and the Senate debate.³⁹

II. PROTECTED INTERESTS OF THE SIXTH AMENDMENT: SOCIETAL VS. DEFENDANT INTERESTS

In enacting the Speedy Trial Act, Congress was aware of the various interests generally viewed as

³⁵ HOUSE REPORT, *supra* note 1, at 23.

³⁶ The overall function of S. 754 is to encourage the Federal criminal justice system to engage in comprehensive planning and budgeting toward the goal of achieving speedy trial. The most widely known section of the bill is the first section which imposes the time limits. However, the most important sections of the bill are the planning process sections (sections 3165-69) which provide a planning process whereby each district court formulates a plan for the implementation of speedy trial, and sets out the additional resources necessary to meet the limits of section 3161.

The planning process sections are critical to the bill's success because they provide the vital link between the Federal criminal justice system and the appropriations process. In summary they provide the courts and the United States Attorneys with a mechanism to plan for the implementation of 90-day trials in a systematic manner, to try innovative techniques on a pilot basis, to itemize the additional resources necessary to achieve the 90-day trial goal, and to communicate with Congress concerning its plans and the additional budget requests. SENATE REPORT, *supra* note 1, at 45.

³⁷ In the House hearings on the Act, Senator Ervin commented:

I believe, after years of studying this problem, that S. 754 can begin to end this seemingly hopeless morass. The bill is based upon the premise that the courts, undermanned, starved for funds, and utilizing 18th century management techniques, simply cannot cope with burgeoning caseloads. The consequence is delay and plea bargaining. The solution is to create initiative within the system to utilize modern management techniques and to provide additional resources to the courts where careful planning so indicates.

House Hearings, *supra* note 2, at 158.

³⁸ Representative Cohen stated: "[T]he most important provisions of this bill concern the process by which the district courts shall study the problems of pretrial delay and plan for the implementation of the act's time limits." 120 CONG. REC. 41,775 [hereinafter cited as HOUSE DEBATE].

³⁹ 120 CONG. REC. 24,660 (1974) [hereinafter cited as SENATE DEBATE].

falling under the protection of the sixth amendment.⁴⁰ As Justice Brennan noted in *Dickey v. Florida*: "The Speedy Trial Clause protects societal interests, as well as those of the accused . . . Just as delay may impair the ability of the accused to defend himself, so it may reduce the capacity of the government to prove its case."⁴¹

More specifically, the societal, as opposed to the defendant's, interest in speedy trials can be viewed in the traditional terminology as encompassing elements of specific and general deterrence, retribution, isolation and rehabilitation. The isolation or quarantine argument for a speedy trial can be found in the Speedy Trial Act itself. The introduction of the Act states as its purpose "to assist in reducing crime and the danger of recidivism by requiring speedy trials and by strengthening the supervision over persons released pending trial, and for other purposes."⁴² Congress relied upon Bureau of Standards statistics to support the proposition that the criminal defendant awaiting trial is not only a financial and administrative burden to society, but often is a danger to his community as well. The Bureau of Standards study purported to show that defendants had an increased propensity to be re-arrested when released more than 280 days.⁴³ In addition to this isolation interest, society also can claim both specific and general deterrence benefits gained in the swift and sure punishment of wrongdoers. Society has a legitimate interest in the quick administration of criminal justice and in impressing upon both actual and potential offenders the fact that wrongdoing will be punished.⁴⁴ Similarly, societal need for a retributive response to crime may require a strong temporal nexus

⁴⁰ See, e.g., HOUSE REPORT, *supra* note 1, at 15. The imprecision of the constitutional right to a speedy trial was recognized by the Supreme Court in *Barker v. Wingo*, 407 U.S. 514 (1971):

Finally, and perhaps more importantly, the right to speedy trial is a more vague concept than other procedural rights. It is, for example, impossible to determine with precision when the right has been denied. We cannot definitely say how long is too long in a system where justice is supposed to be swift but deliberate.

407 U.S. at 521 (footnote omitted).

⁴¹ 398 U.S. 30, 42 (1970). See also 407 U.S. at 519.

⁴² Speedy Trial Act of 1974, Pub. L. No. 93-619, 88 Stat., 2076 (1974). See also *Barker v. Wingo*, 407 U.S. at 519.

⁴³ HOUSE REPORT, *supra* note 1, at 15-16.

⁴⁴ 398 U.S. at 42 (citing ABA STANDARDS FOR CRIMINAL JUSTICE, SPEEDY TRIAL 10-11 (Approved Draft 1978)); *United States ex rel. Solomon v. Mancusi*, 412 F.2d 88, 93 (2d Cir. 1969) (Feinberg, J., dissenting).

between the act and the punishment.⁴⁵ Finally, rehabilitative efforts focused upon those eventually found guilty may be lessened if there is a long, non-productive time wasted awaiting trial.⁴⁶

The defendant's sixth amendment interest can be characterized as an interest in his physical freedom awaiting the outcome of charges, his freedom from the anxiety of a pending criminal prosecution, and his interest in a fair trial not marred by faulty memories or disappearing or diminished evidence.⁴⁷ Although the courts have been long on rhetoric concerning defendant's theoretical interests in a speedy trial, the fact remains that most defendants benefit more by delay than by speed. In the relatively few cases decided by the Supreme Court⁴⁸ and in most of the cases decided at the appellate level,⁴⁹ the discussion of the defendant's right to a speedy trial has centered on the fact that at least part of delay is attributable directly to the defendant. Delay, not quick resolution, thus appears to be defendant's major concern at the trial level.

III. PARTICIPANTS' INTEREST IN DELAY

The greatest difficulty in effectuating the societal and defendant interests protected by the sixth amendment is that often those charged with protecting the societal interests (the prosecution) and those upon whom the speedy trial right is individually conferred (the defendants) wish to have not a speedy trial, but a delayed one. As Senator Ervin

noted in his testimony before the House Judiciary Committee:

There is no question in my mind that speedy trial will never be a reality until Congress makes it clear that it will no longer tolerate delay. Unfortunately, while it is in the public interest to have speedy trials, the parties involved in the criminal process do not feel any pressure to go to trial. The Court, defendant, his attorney, and the prosecutor may have different reasons not to push for trial, but they all have some reason. The over-worked courts, prosecutor, and defense attorneys depend on delay in order to cope with their heavy caseloads. The end of one trial only means the start of another. To them, there is little incentive to move quickly in what they see as an unending series of cases. The defendant, of course, is in no hurry for trial because he wishes to delay his day of reckoning as long as possible.⁵⁰

With this concern one of the major goals of the Speedy Trial Act is to avoid a situation in which the prosecutor and defense counsel can stipulate to delay and thus infringe upon society's right to a speedy trial of those charged with violating a criminal provision.

A. Defense Interest in Delay

Delay can be sought and used by the defense in a number of ways. On the one hand, delay may be constitutionally mandated to preserve the defendant's right to an adequately prepared defense, while on the other hand, defendant delay may be totally inconsistent with an efficient and just system if it results in witnesses' failing to appear at trial.

Defendant's desire for delay can be viewed roughly in four separate ways: lawyer-directed delays, defendant's "comfort" delays, pre-trial tactical delays and trial tactical delays.

There is some indication that defense counsel unhappiness with the Speedy Trial Act stems not so much from the way the Act affects defendants, but rather from the havoc it causes to counsel's ability to control his own calendar.⁵¹ Some of the lawyer-directed reasons, such as health problems of counsel,⁵² are obviously valid. Just as clearly, delay to allow the defendant to "earn" money to pay counsel,⁵³ or delay because lawyers would rather

⁵⁰ House Hearings, *supra* note 2, at 158.

⁵¹ See text accompanying note 136 *infra*.

⁵² See, e.g., United States v. Gray, 565 F.2d 881 (5th Cir.), cert. denied, 435 U.S. 955 (1978).

⁵³ In his study of delay in the Chicago Preliminary Hearing Court, the Chicago Criminal Division Court, the Pittsburgh Common Pleas Court, the District Court

⁴⁵ See *Barker v. Wingo*, 407 U.S. 514, 520 (1971) (citing J. BENTHAM, THE THEORY OF LEGISLATION 326 (Ogden ed. 1931)).

⁴⁶ *Barker v. Wingo*, 407 U.S. 514, 532 (1971) (citing NATIONAL COMM. ON THE CAUSES AND PREVENTION OF VIOLENCE, TO ESTABLISH JUSTICE, TO INSURE DOMESTIC TRANQUILITY, FINAL REPORT OF THE NATIONAL COMMISSION ON THE CAUSES AND PREVENTION OF VIOLENCE, 152 (1969)).

⁴⁷ In *Barker v. Wingo* the United States Supreme Court constructed a four-prong balancing test to determine whether an individual's speedy trial rights had been violated. Factors to be considered in the balancing test include the length of delay, the reasons for delay, defendant's assertion of his right and prejudice to the defendant. 407 U.S. at 530. Defendant's speedy trial interests are considered when discussing the fourth factor. For a detailed summary of the case law subsequent to *Barker* and an account of the use of the fourth factor in the lower courts see Rudstein, *The Right to a Speedy Trial: Barker v. Wingo in the Lower Courts*, 1975 U. ILL. L.F. 11 (1975).

⁴⁸ See, e.g., *Strunk v. United States*, 412 U.S. 434 (1973); *Barker v. Wingo*, 407 U.S. 514 (1971). For a compilation of cases from the United States Supreme Court, see Rudstein, *supra* note 47, at 11-13.

⁴⁹ See, e.g., *United States v. Jones*, 524 F.2d 834, 850 (D.C. Cir. 1975).

not spend a great deal of time in court⁵⁴ are unacceptable reasons. Within this category of lawyer-oriented delay, however, are classifications such as vacations by lawyers, and presence of the lawyer in other criminal cases which demand more immediate attention.⁵⁵ Although conflicting schedules may pose issues of professional courtesy between the participants in the system,⁵⁶ continuances should be granted for conflicts only for short periods of time and only when such conflicts are totally unavoidable.⁵⁷ Such a policy is dictated by the congressional decision that speedy trials are of high priority. Other than continuances which are constitutionally mandated,⁵⁸ defense counsel must be brought to the same standard of readiness de-

manded of the Court and of the prosecution in the Speedy Trial Act.⁵⁹

Just as some delays are associated with the convenience interests of the lawyer, other delays are sought to further the creature-comforts of the defendant. The most obvious delay of this type is that sought for the defendant who is awaiting trial while on bond.⁶⁰ But it is the on-bond defendant to which the Speedy Trial Act particularly is directed.⁶¹ Other instances of delays to benefit the defendant's physical surroundings are those situations in which a jailed defendant seeks a delay in order to avoid going to another institution.⁶² Finally, particularly in those cases where the defendant is a substance-addict, delay may be justifiably sought in order that his health might be restored before trial.⁶³

The variations on reasons for delay increase as one approaches trial. Considering the high percentage of criminal cases which terminate in guilty pleas, it is no surprise that many of the delays in the pre-trial stages are tactically directed at bettering the defendant's bargaining position.⁶⁴ There is a widely held belief that continuances are granted because of the defense threat to plead not guilty and conduct a full-length trial.⁶⁵ Although this conclusion has been questioned,⁶⁶ it would appear

of the District of Columbia, and the Minneapolis District Court, Levin concluded:

The paramount goals of a private defense attorney in criminal court center around his fee and the amount of time he devotes to a case. First, the attorney wants to be certain to receive his fee. This is likely to be a problem because of the typical defendant's low income (even if he can "afford" a private attorney). If the case were disposed of with minimum delay, this type of defendant usually would not have enough time to scrape together a fee. More importantly, the attorney wants to receive the fee before the final disposition of the case. Afterward a defendant may be incarcerated, which greatly reduces the probability of receiving a fee, or he may lose his job or simply "disappear." Also, even when he is acquitted or receives probation afterward the defendant is often hostile toward his attorney.

Levin, *Delay in Five Criminal Courts*, 4 J. LEGAL STUDIES 83, 91 (1975). But this motive is not relevant to the public defender. *Id.* at 113.

⁵⁴ *Id.* at 104.

⁵⁵ The issue of counsel's schedule conflicts most often arises in a defendant's claim that he has a right to choose his own particular counsel to represent him. *See, e.g., United States v. Poulack*, 556 F.2d 83 (1st Cir.), *cert. denied*, 434 U.S. 986 (1977).

⁵⁶ Typical of individuals involved in daily face-to-face relations, the judges and the defense attorneys actively stress "getting along with each other" and minimizing conflict. For this reason and others even when the defense attorneys' actions increase delay, the judges (except in Minneapolis) tend to accommodate them a good deal.

Levin, *supra* note 53, at 91.

⁵⁷ The apparent reason for counsel unavailability due to schedule conflicts is that there are relatively few competent defense counsel. The observation concerning the limited number of available defense counsel has been made without documentation in a number of articles critical of the Speedy Trial Act. *See, e.g., Kozinski, That Can of Worms: The Speedy Trial Act*, 62 A.B.A.J. 862, 863 (1973).

⁵⁸ *See* text accompanying note 161 *infra*.

⁵⁹ "No continuance under paragraph (8) (A) of this subsection shall be granted because of general congestion of the court's calendar, or lack of diligent preparation or failure to obtain available witnesses on the party of the attorney for the Government." 18 U.S.C. § 3161(h)(8)(C) (Supp. IV 1974).

⁶⁰ Levin, *supra* note 53, at 109.

⁶¹ *See* text accompanying note 42 *supra*.

⁶² *United States v. Johnson*, 579 F.2d 122, 124 (1st Cir. 1978).

⁶³ A delay for health reasons of the defendant is allowable under 18 U.S.C. § 3161(h)(4): "Any period of delay resulting from the fact that the defendant is mentally incompetent or physically unable to stand trial." However, the courts have been aware that the alleged ill health of the defendant can be used as a ploy to gain additional delay. The issue of defendant's health can be used in devious ways by counsel. *See, e.g., United States v. Goldman*, 439 F. Supp. 352, 358 (S.D.N.Y. 1977).

⁶⁴ *See United States v. Beberfeld*, 408 F. Supp. 1119, 1126 (S.D.N.Y. 1976). In the legislative history, there is constantly expressed a fear that the Speedy Trial Act will result in better plea bargains for defendants. The argument states that if all defendants were to demand jury trials, the system could not handle all the cases. Consequently, by threatening to go to trial, the defendant has a stronger bargaining tool under the Act. *See House Report supra* note 1, at 19-21, 55, 58. *See also House Hearings, supra* note 2, at 197; McGarr, *Anatomy of a Criminal Case*, 75 F.R.D. 89, 285 (1976).

⁶⁵ *See Barker v. Wingo*, 407 U.S. 514, 519 (1971).

⁶⁶ Levin, *supra* note 53, at 117-18.

that defense counsel and defendants believe time is an ally in bargaining.⁶⁷ Where appropriate, defendant's delay may even be used to convince the prosecutor to grant him immunity from prosecution.⁶⁸

Not all pre-trial delay is sought for purely tactical reasons. Often, pre-trial motions are legitimate and are made to further justice rather than to defeat it. Motions, such as those authorized by rule 20, are clearly efficiency-oriented.⁶⁹

A separate set of delay motives comes into play in relation to the trial itself. For instance, defense delay may be used to avoid "hard" judges.⁷⁰ Delay may also be used by the defense to undermine the prosecution's case. Memories of witnesses dim as time passes, and the greater the time from the criminal event to the trial the greater the defense hope that witnesses will be less convincing and more easily confused on cross-examination.⁷¹ The longer the trial is delayed, the greater the possibility that witnesses will be intimidated by the defendant or friends of the defendant.⁷² Moreover, long trial delays may prove so inconvenient to a witness that the witness becomes uncooperative⁷³ or unavail-

able.⁷⁴ There is a widespread belief among defense counsel that a jury is less likely to convict, or at least more likely to convict of a less serious crime, if a long period of time has elapsed between the criminal event and the trial.⁷⁵ Again, there are also legitimate trial delay purposes such as lessening the negative effects of pre-trial publicity,⁷⁶ and meeting the unexaggerated need for further preparation time.⁷⁷

B. Prosecutor's Interest in Delay

In many ways the prosecutor's interests in delay are similar to those of the defense counsel.⁷⁸ Lawyer-directed delays such as schedule conflicts⁷⁹ and vacation plans are shared by both sides.

As is true with some defendant delays, some prosecutorial pre-trial delays are clearly unacceptable. Delays which are tactically designed to harass the defendant,⁸⁰ indicate bad faith,⁸¹ or hamper the ability of the defendant to defend himself⁸² "strike at the fairness of our criminal process"⁸³ and are unsupportable.⁸⁴ Yet, other tactical delays, such as proceedings under rule 20,⁸⁵ interlocutory appeals,⁸⁶ incompetency proceedings⁸⁷ and similar motions are justifiable.⁸⁸ Prosecutors may want to

⁶⁷ *United States v. Vispi*, 545 F.2d 328, 332 (2d Cir. 1976). However, even when a defendant initially cooperates with the government, this will not prevent a defendant from claiming that the government must bear the risk that the defendant will renege on his agreement to cooperate, which will result in unaccounted for time under the Speedy Trial Act. For a not entirely satisfying response to this issue see *United States v. Lopez*, 426 F. Supp. 380 (S.D.N.Y. 1977).

⁶⁸ The closest explicit continuance allowed under the Speedy Trial Act analogous to the bargaining-position delay is that under court supervision the prosecution of a defendant may be deferred so that the defendant may demonstrate his good conduct. 18 U.S.C. § 3161(h)(2).

⁶⁹ F. R. CRIM. P. 20 regulates the transfer of a criminal case from one district to another for purposes of plea and sentence.

⁷⁰ Neubauer & Cole, *A Political Critique of the Court Recommendations of the National Commission on Criminal Justice Standards and Goals*, 24 EMORY L.J. 1009, 1024 (1975).

⁷¹ *Barker v. Wingo*, 407 U.S. 514, 521 (1971).

⁷² *Scaring Off Witnesses*, TIME, Sept. 11, 1978, at 41.

⁷³ Speedier trials would also help witnesses less patient than Patricia Finck, a Philadelphia A & P cashier who went back to court 46 times to get two stickup men convicted. "After three or four continuances of a case," says Patrick Healy, the executive director of the National District Attorneys Association, "unless you're really a devoted witness, you'll kiss it off. After all, what's in it for you? This business of civic pride goes only so far. And the smart defendant and the smart defense lawyer will delay a case to death."

Id.

⁷⁴ *Barker v. Wingo*, 407 U.S. 514, 521 (1971).

⁷⁵ See *Banfield & Anderson, Continuances in the Cook County Criminal Courts*, 35 U. CHI. L. REV. 259, 261-62 (1968).

⁷⁶ See *Nebraska Press Association v. Stewart*, 427 U.S. 539, 603 n.28 (1975) (Brennan, J., concurring).

⁷⁷ See text accompanying note 157 *infra*.

⁷⁸ The sixth amendment's speedy trial guarantee attaches only after a person has been accused of a crime. However, the due process clause of the fifth and fourteenth amendments may also provide a basis for dismissing an indictment in certain limited situations. *United States v. Marion*, 404 U.S. 307 (1971).

⁷⁹ *United States v. Jones*, 524 F.2d 834, 850 (D.C. Cir. 1975).

⁸⁰ *United States v. Marion*, 404 U.S. 307, 325 (1971).

⁸¹ *United States v. Lara*, 520 F.2d 460, 464 (D.C. Cir. 1975).

⁸² See *United States v. Johnson*, 579 F.2d 122, 123 (1st Cir. 1978). In *United States v. Roberts*, 515 F.2d 646 (2d Cir. 1975), the government's intentional inactivity prevented the defendant from obtaining a youthful offender probationary sentence since the criminal proceeding was delayed beyond his 26th birthday.

⁸³ *Dickey v. Florida*, 398 U.S. 30, 45 n. 7 (Brennan, J., concurring).

⁸⁴ *United States v. Marion*, 404 U.S. 307, 324 (1971).

⁸⁵ F.R. CRIM. P. 20.

⁸⁶ 18 U.S.C. § 3161(h)(1)(D) (Supp. IV 1974).

⁸⁷ 18 U.S.C. § 3161(h)(1)(A) (Supp. IV 1974).

⁸⁸ See 18 U.S.C. § 3161(h) (Supp. IV 1974) for a listing of excludable times for various motions.

delay trial in order to protect informers.⁸⁹ Prosecutors may also seek a delay to better prepare their cases,⁹⁰ await an appeal of a co-defendant,⁹¹ try "important" cases first,⁹² finish another investigation,⁹³ or await the availability of a witness.⁹⁴ During the pre-trial stage, plea negotiations will be underway and may consume a great deal of time while parties bargain for immunity, for reduced charges and for sentences.⁹⁵ A set of motives for trial tactic delays parallel to that of the defense may also arise. Prosecutors may wish to avoid the "easy" judge,⁹⁶ or await the testimony of witnesses

in other pending cases,⁹⁷ join defendants for trial⁹⁸ or await prosecution by state officials.⁹⁹

But the parallel to defense interests in delay is not complete. There are two major differences between defense and prosecutor delay. First, there are no constitutional rights involved in denying to the prosecution the right to be represented by a particular counsel or the ability to prepare adequately. There may well be strong arguments for guaranteeing the prosecution the time to be adequately prepared, but that is a policy choice, not a constitutional right.¹⁰⁰ Second, it is clear from the case law that the burden of speedy determination of criminal cases falls upon the prosecution. As the Court stated in *Strunk v. United States*,¹⁰¹ citing the ABA standards:¹⁰² "Although a great many accused persons seek to put off the confrontation as long as possible, the right to a prompt inquiry into criminal charges is fundamental and the duty of the charging authority is to provide a prompt trial."¹⁰³

Since the prosecution has the duty of expediting criminal trials, it is the prosecutor who must ultimately account for all non-defendant caused de-

⁸⁹ See *United States v. Lopez*, 426 F. Supp. 380 (S.D.N.Y. 1977), in which the government admitted that the sole reason for not proceeding against the defendant was the desire to keep concealed the informer status of a co-defendant. In disallowing the request for an excludable time determination to be made, the court stated:

If the government's position here was sustained, it could obtain at will an open-ended toll of the requirements of the Speedy Trial Plan solely upon its desire to conceal the existence of an informer or cooperating co-defendant. "If there [was] anything [the Rules were] not intended to cover, it is the blanket type of exclusion proposed by the Government here."

Id. at 385. See also *United States v. Furey*, 500 F.2d 338, 343 (2d Cir. 1974). In the area of informers and pre-indictment delay see *United States v. Lovasco*, 431 U.S. 783, 797 (1976) (citing *Amsterdam, Speedy Criminal Trial: Rights and Remedies*, 27 STAN. L. REV. 525, 527-528 (1975)).

⁹⁰ Under 18 U.S.C. § 3161(h)(8)(C) (Supp. IV 1974), the prosecutor must have diligently prepared in order to have delay time excluded.

⁹¹ *United States v. Didier*, 542 F.2d 1182 (2d Cir. 1976).

⁹² See *United States v. Douglas*, 504 F.2d 213, 217 (D.C. Cir. 1974), in which Chief Judge Bazelon, in a concurring opinion, stated that prosecuting "important" cases before prosecuting "lesser" cases did not justify delay in trial.

⁹³ *United States v. Rollins*, 487 F.2d 409, 419 (2d Cir. 1973).

⁹⁴ See *Barker v. Wingo*, 407 U.S. 514, 531 (1971); *United States v. Douglas*, 504 F.2d 213, 218 (D.C. Cir. 1974); *United States v. Hillegas*, 443 F. Supp. 221, 227 (S.D.N.Y. 1977); *United States v. Salzmann*, 417 F. Supp. 1139 (S.D.N.Y. 1976), *aff'd*, 548 F.2d 395 (2d Cir. 1977); 18 U.S.C. § 3161(h)(3)(A) (Supp. IV 1974).

⁹⁵ "Thus, if the government wishes to bargain for this condition, it may but it should do so mindful of the risks which it thereby assumes of dismissed indictments for unconstitutional delay." *United States v. Carini*, 562 F.2d 144, 149 (2d Cir. 1977) (quoting *United States v. Roberts*, 515 F.2d, 642, 647 (2d Cir. 1975)).

⁹⁶ *United States v. Lara*, 520 F.2d 460, 464 (D.C. Cir. 1975).

⁹⁷ *Barker v. Wingo*, 407 U.S. 514, 516 (1971) (delay in order to secure accomplice's testimony after his conviction).

⁹⁸ *United States v. Howard*, 440 F. Supp. 1106, 1109 (D. Md. 1977).

⁹⁹ See *United States v. Mejias*, 552 F.2d 435 (2d Cir.), *cert. denied*, 434 U.S. 847 (1977); *United States v. Cordova*, 537 F.2d 1073, 1076 (9th Cir. 1976), *cert. denied*, 429 U.S. 960 (1977). *United States v. LaCruz*, 441 F. Supp. 1261, 1267 (S.D.N.Y. 1977).

¹⁰⁰ *United States v. Correia*, 531 F.2d 1095, 1098 (1st Cir. 1976).

¹⁰¹ 412 U.S. 434 (1972).

¹⁰² Prompt disposition of criminal charges.

(a) It is unprofessional conduct for a prosecutor intentionally to use procedural devices for delay for which there is no legitimate basis.

(b) The prosecution function should be so organized and supported with staff and facilities as to enable it to dispose of all criminal charges promptly. The prosecutor should be punctual in attendance in court and in the submission of all motions, briefs and other papers. He should emphasize to all witnesses the importance of punctuality in attendance in court.

(c) It is unprofessional conduct to misrepresent facts or otherwise mislead the court in order to obtain a continuance.

AMERICAN BAR ASSOCIATION, STANDARDS RELATING TO THE PROSECUTION FUNCTION AND THE DEFENSE FUNCTION (Approved Draft 1971).

¹⁰³ 412 U.S. at 437.

lay.¹⁰⁴ Consequently, in looking at the prosecutor's interest in delay, one must keep in mind that often the prosecutor will be arguing for delay caused by events totally outside his control. Often the prosecutor will be arguing for delay due to congested court calendars,¹⁰⁵ recusal of judges,¹⁰⁶ judge's illness¹⁰⁷ or absence from the district,¹⁰⁸ and other such "court business" problems.¹⁰⁹

C. Judicial Interest in Delay

The motives for court-desired delay in criminal cases are much harder to pinpoint and more difficult to characterize. From one standpoint, manpower used to expedite criminal cases is taken away from trying civil cases. Some judges find this unacceptable.¹¹⁰ Other judges feel that criminal cases delayed are criminal cases which are more likely to "plead out."¹¹¹ Finally, some judges find their calendars so full that it makes little difference to them how quickly they progress. Given these factors, many judges will readily accept the wishes of the prosecution and defense to delay trial.¹¹²

The motives for delay (lawyer-oriented, defend-

ant comfort-oriented, and court-oriented) can be realized through many separate tactics, whether the mechanism to achieve delay is the "right to adequately prepared counsel" argument or some other argument. Under the legislative mandate both prosecutors and defense counsel will have a more difficult time manipulating delay to suit their own purposes. As a result there was, and is, continued opposition to the Speedy Trial Act by the practicing bar. The danger looms large that these parties will join together to stipulate to a waiver of the Act.¹¹³ That this fear is real can be seen in the statements of the participants themselves, indicating both a great dislike and significant distrust of the Act.

IV. PARTICIPANTS' DISDAIN OF THE ACT

During the gestation period of the Speedy Trial Act in Congress, it became a common occurrence for each participant in the criminal justice system to blame another component of the system for delay.¹¹⁴ In the words of Representative Conyers, chairman of the House Subcommittee on Crime, "Prosecutors blamed backlogged court dockets and judges blamed prosecutors for filing indiscriminate, multi-count indictments. For their part, prosecutors and defense counsel alike found the dilatory tactics of their adversaries as the principal cause of delay."¹¹⁵ None of the participants were willing to admit to the obvious fact that all of them benefited in their own way from delay. Although the participants were unable to agree on the cause of delay, they did agree on one thing: the Speedy Trial Act was an ill-conceived idea that they thought would have an adverse effect on individual justice.

The Justice Department had long been a foe of proposed speedy trial legislation.¹¹⁶ In the legisla-

¹¹³ "If courts are to exercise effective calendar control and to expedite the cases before them, they must reject consent of the parties as a basis for granting adjournments." THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: THE COURTS, 86 (1967).

¹¹⁴ See, e.g., HOUSE REPORT, *supra* note 1, at 17, 20; SENATE REPORT, *supra* note 1, at 8-9. But see Judge Zirpoli's statement that the judiciary can make the speedy trial guarantee a reality, *House Hearings, supra* note 2, at 375.

¹¹⁵ HOUSE REPORT, *supra* note 1, at 56.

¹¹⁶ For a brief history of speedy trial legislation, including previous opposition by the Justice Department, see Hansen & Reed, *The Speedy Trial Act in Constitutional Perspective*, 47 Miss. L.J. 365, 400-06 (1976). See also *United States v. Salzmann*, 417 F. Supp. 1139, 1147-51 (E.D.N.Y. 1976), *aff'd*, 548 F.2d 395 (2d Cir. 1977).

¹⁰⁴ As the Court noted in *Barker v. Wingo*: "A more neutral reason such as negligence or overcrowded courts should be weighed less heavily but nevertheless should be considered since the ultimate responsibility for such circumstances must rest with the government rather than with the defendant." 407 U.S. at 531. Many cases have dealt with applying the analytical process of *Barker v. Wingo*, including the weighing of "neutral" factors such as crowded docket and understaffed prosecutors' offices. See, e.g., *Strunk v. United States*, 412 U.S. 434 (1972); *United States v. Carini*, 562 F.2d 144, 148-52 (2d Cir. 1977); *United States v. Vispi*, 545 F.2d 328, 333-37 (2d Cir. 1976); *United States v. Simmons*, 536 F.2d 827, 829-35 (9th Cir. 1976), *cert. denied*, 429 U.S. 854 (1977); *United States v. Jones*, 524 F.2d 834, 849-53 (D.C. Cir. 1975); *United States v. Salzmann*, 417 F. Supp. 1139, 1165-71 (E.D.N.Y. 1976), *aff'd*, 548 F.2d 395 (2d Cir. 1977). See also Rudstein, *supra* note 47.

¹⁰⁵ See, e.g., *United States v. Jones*, 524 F.2d 834, 839 (D.C. Cir. 1975).

¹⁰⁶ *United States v. Vispi*, 545 F.2d 328, 336 (2d Cir. 1976).

¹⁰⁷ *United States v. Carini*, 562 F.2d 144, 149 (2d Cir. 1977); *United States v. Lord*, 565 F.2d 831, 840 (2d Cir. 1977).

¹⁰⁸ *United States v. Douglas*, 504 F.2d 213 (D.C. Cir. 1974) (judge attending a professional meeting); *United States v. Didier*, 542 F.2d 1182, 1184 (2d Cir. 1977) (judge holding court outside of his district).

¹⁰⁹ *United States v. Carini*, 562 F.2d 144, 149 (2d Cir. 1977) (summer recesses).

¹¹⁰ See note 130 *infra*.

¹¹¹ Levin, *supra* note 53, at 114.

¹¹² *Id.* at 114-16.

tive events which immediately preceded the passage of the Speedy Trial Act of 1974, Justice Department opposition heightened.¹¹⁷ For instance, Attorney General Saxbe outlined six major areas in which the Justice Department was opposed to the pending legislation. He claimed that rule 50(b) plans were sufficiently effective, that mandatory dismissal was not in society's interest, that no additional resources had been provided, that complicated cases required longer time to prepare than the provisions allowed, that the rate of guilty pleas would be adversely affected and that the legislation would result in more hearings and more appeals which would further clog court calendars.¹¹⁸ Even after changes were made in response to some of these objections, the Justice Department continued to express its displeasure with the bill.¹¹⁹ Justice Department opposition even prompted Representative Conyers to comment upon Attorney General Saxbe's criticisms of the Act by saying that: "It mystifies me that the Department persists in these arguments, especially since they have been in full partner in some forty-two months of refinement, and have seen all but a few of over two dozen of their suggested changes included in what is now before the Committee."¹²⁰

Strong opposition to passage of the Speedy Trial Act also came from the judiciary. Director Kirks of the Administrative Office of the United States Courts not only contended that such legislation should await further study of the effect of the rule 50(b) plans,¹²¹ but also complained that the planning process of the Act and the pre-trial services program were inappropriate.¹²² As Kirks noted, "[t]he Conference has felt rather strongly that the goal of achieving a speedy trial for every defendant charged with crime in the district courts could be achieved within the court structure without the need for legislation."¹²³

¹¹⁷ See, HOUSE REPORT, *supra* note 1, at 13, 17, 54, 58, 78; *House Hearings, supra* note 2, at 196-222 (statements and testimony of W. Vincent Rakestraw, Assistant Attorney General, Office of Legislative Affairs; H. M. Ray, United States Attorney, Northern District of Mississippi; James L. Treece, United States Attorney, District of Colorado; Earl Silbert, United States Attorney for the District of Columbia; Mac Redwine, Legislative Counsel, Office of Legislative Affairs).

¹¹⁸ HOUSE REPORT, *supra* note 1, at 55.

¹¹⁹ *Id.* at 55-58.

¹²⁰ *Id.* at 58.

¹²¹ *Id.* at 50-54. See also *House Hearings, supra* note 2, at 176-96.

¹²² HOUSE REPORT, *supra* note 1, at 50-54.

¹²³ *House Hearings, supra* note 2, at 176.

Furthermore, individual district court judges appeared before Congress to make their objections known.¹²⁴

The defense bar was represented in the House hearings by three practitioners. Their testimony implies that they viewed the pending legislation as assisting their defense of clients because much of testimony centered on the issue of dismissal with prejudice, a matter of much concern to defense counsel.¹²⁵

Subsequent to the passage of the Speedy Trial Act, evidence exists that the participants' distrust has not abated. For instance, some federal judges have continued to express their displeasure with the Act.¹²⁶ Furthermore, some judges have ignored its existence,¹²⁷ while others have referred to it in opinion as "oppressive and onerous."¹²⁸ Still others

¹²⁴ Judge John Feikens, United States District Court for the District of Eastern Michigan commented:

Now what I fear, Mr. Chairman and members of the subcommittee, is this: That if we have to put all of our attention on criminal cases, we will not reach our civil docket. I am in danger right now of that. And I point out in my statement—and I think you ought to consider this—that there are very important cases on the civil docket that we have to try—the prisoners' rights petitions, the civil rights cases, the habeas corpus applications, the civil rights cases in which the United States is a party, and the onslaught of cases that we are getting under title 7 in private civil rights cases. . . .

In other words, what I am saying to you, Mr. Chairman, is this: Whether we talk about the speedy trial bill or whether we talk about plans under rule 50(b) of the Federal Rules of Criminal Procedure, in courts like the Eastern District of Michigan we already have problems. And if you say to us "Now put these criminal cases front and center to the exclusion of the civil cases," we can do that, but the civil litigants are going to suffer.

House Hearings, supra note 2, at 241.

Judge Alfred Arraj, United States District Court for the District of Colorado, was quoted by United States Attorney Treece as saying that he had such a backlog of criminal cases that he could not get to the civil cases. Therefore, Judge Arraj was going to dismiss criminal cases. *Id.* at 215. See also the statements of Judge Alphonso Zirpoli, United States District Court for the District of Northern California, *Id.* at 365-84.

¹²⁵ See *Id.* at 223-38, 248-59, 335-48.

¹²⁶ See, e.g., *United States v. Bullock*, 551 F.2d 1377, 1382 (5th Cir. 1977).

¹²⁷ See *United States v. Carpenter*, 542 F.2d 1132, 1134 n.1 (9th Cir. 1976). See also Misner, *supra* note 14, at 15-25.

¹²⁸ Wood, *Federal Prisoner Petitions in the Proceedings of the Seminar for Newly Appointed United States District Judges*, 75 F.R.D. 89, 340 (1976).

have sought its repeal¹²⁹ or sought major alterations in order to return to the Rule 50(b) situation.¹³⁰ Some judges have even flouted the intent of the Act by "empanelling juries and then continuing the trial for weeks, or even months."¹³¹ Two judges have gone so far as to find that the Act is so onerous and such a constraint on the judiciary, that it violates the separation of powers clause.¹³² Finally, others have vented their frustration by predicting, not without some justification, that the consequential effects of the legislation will have devastating effects upon all judicial business.¹³³

¹²⁹ REPORT OF THE AD HOC SUBCOMMITTEE ON THE SPEEDY TRIAL ACT (Administrative Office of the United States Court, undated, chaired by Judge Carl B. Rubin) [hereinafter cited as AD HOC REPORT]. App. B, Summary of Responses on Speedy Trial Act (8th, 9th and 10th Circuits), 8; App. A, Analysis of Sixth Circuit Responses, 2-3. The AD HOC REPORT was the product of a meeting in Washington, D.C. on June 27, 1977, sponsored by the Administrative Office and the Federal Judicial Center. Representatives from the twelve district courts which had already moved to the 1979 standards were present, as well as a cross section of other interested individuals including public defenders, United States attorneys, United States magistrates, circuit reporters, members of the criminal defense bar, and staff counsel from subcommittees of the Senate Judiciary Committee and the House Judiciary Committee. To obtain a broad-base of information, requests for information were submitted to the chief judges of all the districts. In addition, Earl J. Silbert, United States attorney for the District of Columbia, solicited views of all United States attorneys on the problems created by the Act.

¹³⁰ See AD HOC REPORT, *supra* note 129, App. A, D.C. Circuit, 4; Second Circuit, 1. Another way to limit the Act severely is to expand the judicial emergency provisions of 18 U.S.C. § 3174 (Supp. IV 1974). See AD HOC REPORT, App. A, D.C. Circuit, 1, Second Circuit, 1; Third Circuit, 4; Fourth Circuit, 2.

¹³¹ AD HOC REPORT, App. C, 4.

¹³² For the most in-depth discussion, see *United States v. Howard*, 440 F. Supp. 1106 (D. Md. 1977). In *United States v. Martinez*, 538 F.2d 921, 923 (2d Cir. 1976), Mr. Justice Clark, sitting by designation, noted in passing that he viewed the Act as being constitutionally suspect.

¹³³ It is feared that the Speedy Trial Act will have a number of adverse effects. The most prominent fear is that the Act will totally disrupt the civil calendar. This point was made by Chief Justice Burger in Proceedings of the 37th Annual Judicial Conference of the District of Columbia Circuit Court, 73 F.R.D. 147, 245 (1976). See also *United States v. Frazier*, 547 F.2d 272, 274 (5th Cir. 1977); Lasher, *The Court Crunch: The View From the Bench*, 76 F.R.D. 245, 249 (1977); AD HOC REPORT, *supra* note 129, at 6-7. Other effects will be that district judges will be so involved with criminal cases, magistrates will be forced to handle more civil matters. See, e.g., *Loral Corp. v. McDonnell Douglas Corp.*, 558 F.2d 1130 (2d Cir. 1977). See also the remarks made by Attorney General

However, other judges have found the Act to be a necessary element to remedy "excessive and inexcusable delay in bringing a defendant to trial."¹³⁴ Some have intimated a basic disagreement with the wisdom of passing the Act, but believe it is their duty to enforce it whether they think it is "good law, bad law, or law which is partly good and partly bad."¹³⁵ This attitude is best expressed by United States District Court Judge McGarr, who has stated that:

It [the Speedy Trial Act] has provoked more violent and emotional rhetoric than any other act that's affected the judiciary and nobody has been more violent or emotional than I have. I have written letters to Congressmen and everyone else about it. I think it's improvident, and I think it's ill considered. It's wrecking our dockets. It's going to force us into total moratoria on civil cases while we force to trial defendants who don't want to go to trial anyway

Congress is congratulating itself that it has done a worthwhile thing, and incidentally, very happy that they have shown once again to the judiciary whose the boss in this government. But it cannot be ignored. A lot of people are devoting a lot of time to it. We've got to comply with it.¹³⁶

The wisdom of the Act has not escaped the pointed criticism of appellate courts as well.¹³⁷

Bell, Proceedings of the 38th Annual Judicial Conference of the District of Columbia Circuit Court, 77 F.R.D. 251, 308 (1977). There is also concern that the Act will cause prosecutors to forego some re-trials, *Marting v. United States*, 411 F. Supp. 1352, 1360 (D.N.J. 1976); and not to proceed with some "minor" crimes, *United States v. Bennett*, 563 F.2d 879, 884 (8th Cir. 1977). There seems to be some trend to blame all judicial administrative problems on the Speedy Trial Act. See, e.g., *Acha v. Beame*, 438 F. Supp. 70, 80 (S.D.N.Y. 1977), in which the court commented that because of the Speedy Trial Act and its effect upon the workload, factual disputes in a discriminatory hiring practices case must be turned over to a special master.

¹³⁴ *United States v. Vispi*, 545 F.2d 328, 330 (2d Cir. 1976).

¹³⁵ *United States v. Koch*, 438 F. Supp. 307, 310 (S.D.N.Y. 1977).

¹³⁶ McGarr, *Anatomy of a Criminal Case*, 75 F.R.D. 269, 285 (1976).

¹³⁷ See, Burger, *Year-End Report*, 12 ARIZ. B.J. 16 (1977). In *United States v. Tirasso*, 532 F.2d 1298 (9th Cir. 1976), Judge Kennedy commented that: "It is discouraging that our highly refined and complex system of criminal justice is suddenly faced with implementing a statute that is so unartfully drawn as this one. But this is the law, and we are bound to give it effect." 532 F.2d at 1301.

Criticism of the Act by defense counsel and prosecutors filters through court decisions. Defense counsel are beginning to learn that "it is obvious that the Speedy Trial Act of 1974 was not written with the rights of defendants in mind."¹³⁸ It was also not written with the schedule conflicts or the delay tactics of counsel in mind, whether legitimate or not.¹³⁹ Consequently, when asked what legislative action should be taken to make the Act more amenable to defense counsel, the general recommendation is to repeal it. Some defense counsel now refer to the Act as the "Speedy Convictions Act."¹⁴⁰

Prosecutors have come to the same basic conclusions regarding the Act as have defense counsel. United States attorneys, in response to a questionnaire circulated by the United States attorney for the District of Columbia, expressed grave reservations about the Act. Their complaints centered on the effect of the narrow time frames of the Act and upon multi-defendant cases. At the heart of the complaints was the fact that prosecutors were losing control over their calendars. Some United States attorneys suggested that the Act should be amended to allow parties to stipulate to a waiver of the Act and thus return greater power to the litigating parties.¹⁴¹

Resistant attitudes of the participants have been buttressed by the available data concerning court experience during the phase-in, planning stage. As the House Report commented:

The primary purpose of the planning process is to monitor the ability of the courts to meet the time limits of the bill and to supply the Congress with information concerning the effects on criminal justice administration of the time limits and sanctions, including the effects on the prosecution, the defense, the courts and the correctional process, and the need for additional rule changes and statutes which would operate to make speedy trial a reality.¹⁴²

Despite this, many courts have virtually ignored the Act during the trial period and thus have been unable to experiment with procedures to make it effective.¹⁴³ Moreover, neither the prosecution nor

the defense have objected to the courts' failure to operate under the Act.¹⁴⁴ There is a certain Kafkaesque irony in all this because the participants in the criminal justice system have all predicted that great calamities will flow from the Act, and by refusing to use the planning provisions of the Act they may have made their predictions a self-fulfilling prophecy.

V. A MECHANISM OF SUBTERFUGE

One clear mechanism to translate the motives for delay into actual delay is for the defendant to seek a period of excludable delay by arguing that the defendant's sixth amendment right to counsel (either his "right" to counsel of his choice or his right to adequately prepared counsel) will be jeopardized if he is immediately forced to trial. Such a delay, the argument goes, is excludable under the Speedy Trial Act's "ends of justice" provision. What can easily happen as a result is that the prosecutor will not oppose this motion because he has his own motives for delay. The court must guard, with great vigilance, the independent societal reasons for quick adjudication of criminal cases, irrespective of its own beliefs as to the wisdom of the Speedy Trial Act.¹⁴⁵

A. Right to Particular Counsel

The sixth amendment right to counsel has been seen as a "cornerstone of our national system of ordered liberty."¹⁴⁶ However, the right to counsel does not confer upon a defendant the absolute right to a particular counsel.¹⁴⁷ Instead, federal case law is abundantly clear that "the right of an accused to choose his own counsel cannot be insisted upon in a manner that will obstruct reasonable and orderly court procedure."¹⁴⁸

Once past this rhetoric, the appellate courts give little guidance as to the factors to be weighed in a balancing test. The standard raised on appeal is

¹⁴⁴ *Id.*

¹⁴⁵ See notes 132-33 *supra*.

¹⁴⁶ *United States v. Poulack*, 556 F.2d 83, 86 (1st Cir.), *cert. denied*, 434 U.S. 986 (1977) (citing *Powell v. Alabama*, 287 U.S. 335 (1932)).

¹⁴⁷ See, e.g., *United States v. Poulack*, 556 F.2d 83 (1st Cir. 1977), and cases cited therein. See also *United States v. Taylor*, 569 F.2d 448 (7th Cir.), *cert. denied*, 435 U.S. 952 (1978); *United States v. Gray*, 565 F.2d 881 (5th Cir. 1978); *In re Rappaport*, 558 F.2d 87 (2d Cir. 1977); *United States v. Robinson*, 553 F.2d 429 (5th Cir. 1977), *cert. denied*, 434 U.S. 1016 (1978).

¹⁴⁸ 556 F.2d at 86. *But see Drumgo v. Superior Court*, 8 Cal. 3d 390, 394, 506 P.2d 1007, 1011 (1973) (Mosk, J., dissenting).

¹³⁸ *United States v. Rothman*, 567 F.2d 744, 747 (7th Cir. 1977). It is also clear that some counsel are ignorant of the Act. See *United States v. Strand*, 566 F.2d 530, 532 (5th Cir. 1978).

¹³⁹ See AD HOC REPORT, *supra* note 129, App. B, Ninth Circuit, 2.

¹⁴⁰ *Id.* at 6.

¹⁴¹ AD HOC REPORT, *supra* note 129, App. C.

¹⁴² HOUSE REPORT, *supra* note 1, at 23.

¹⁴³ Misner, *supra* note 14, at 15-25.

seen as the question of whether the trial court abused its discretion in granting or denying the motion for continuance for the purpose of allowing the defendant to be represented by counsel of his own choice.¹⁴⁹

In the balancing test, some factors have been given short shrift by the courts. For example, a claim that the defendant is entitled to a change of counsel because under the federal public defender system both the federal defender and the United States attorney are employed by the federal government, unconstitutionally contravenes the spirit of a true adversary system has been of no assistance to the defendant.¹⁵⁰ Moreover, a defendant has no right to be represented by unlicensed counsel¹⁵¹ and no absolute right to be represented by out-of-state counsel.¹⁵²

In the area of speedy trial, the right to the counsel of one's choice most often arises in the context of a defendant seeking a change of counsel. In the reported cases, attention is entered upon the defendant's motives for change, as well as the effect that such a change would have upon court management issues. If the change of counsel is seen as a defense ploy to gain a delay, the request is often viewed with suspicion.¹⁵³ If the defendant is presently represented by adequate counsel, and a change of counsel would cause a delay that would affect the efficient management of the court,¹⁵⁴ affect witness availability,¹⁵⁵ or the speedy trial of co-defendants,¹⁵⁶ the request can be denied, even when the defendant is willing "to waive any and all constitutional and statutory right to a speedy trial and to remain in detention."¹⁵⁷ Again, it must be emphasized that the reported case law may not represent the practice at the trial level since the granting of a motion to change counsel would lie unappealed. Although for the most part the reported decisions are not very helpful in establishing

a framework for subjugating defendant's desire to be represented by a particular counsel to speedy trial considerations, in a few instances courts have given clear insights into the problem. For example, in *United States v. Deplet*,¹⁵⁸ the court appointed new counsel upon consideration of the uncertainty of the legal aid lawyer's calendar because of trial conflicts, the congested court calendar and the societal interests in speedy trials as codified in the Speedy Trial Act. The court clearly appointed new counsel in that case to further the court's ability to deal swiftly with its calendar.¹⁵⁹

B. Right to Prepared Counsel

The second major way in which delay may be sought is through a defense claim that it needs additional time in which to prepare for trial. The attractiveness of the argument to allow more time for the defense to prepare must be understood not only in the context of the motives for delay by the defense, the court, and the prosecutor but also in its procedural context. The time limits of the Speedy Trial Act do not begin to run until after an arrest has been made or an indictment handed down. Consequently, there will be instances where the prosecution will have had months or years to investigate and prepare before the time limits begin to run. The reported decisions in the area deal basically with the denial of the continuance and therefore may not accurately depict what actually occurs at the trial level.

The case law is most often conclusory and merely limited to findings that the record does not support a claim that the trial court's inherent ability to control its own docket was abused.¹⁶⁰ Although one may isolate cases which recite, for example, that defendant's counsel had six weeks to prepare for what the court found to be a rather simple case,¹⁶¹

¹⁵⁸ 432 F. Supp. 622 (S.D.N.Y. 1977).

¹⁵⁹ *Id.* at 623-24.

¹⁶⁰ *See, e.g.,* *United States v. Correia*, 531 F.2d 1095, 1098-99 (1st Cir. 1976).

¹⁶¹ *United States v. Rothman*, 567 F.2d 744, 747 (7th Cir. 1977). *See also* *United States v. Powers*, 572 F.2d 146, 153 (8th Cir. 1978) (19 days to prepare); *United States v. Taylor*, 562 F.2d 1345, 1363 (2d Cir.), *cert. denied*, 432 U.S. 909 (1977) (9 days to prepare); *United States v. Anderson*, 561 F.2d 1301, 1303 (9th Cir.), *cert. denied*, 434 U.S. 943 (1977) (2 months to prepare); *United States v. Olivas*, 558 F.2d 1366, 1371-78 (10th Cir.), *cert. denied*, 434 U.S. 866 (1977) (33 days to prepare); *United States v. Savage*, 430 F. Supp. 1024 (M.D.Pa.) (10 days to prepare), *aff'd*, 566 F.2d 1170 (3d Cir. 1977); *Pope v. State*, 140 Ga. App. 549, 550, 231 S.E.2d 549, 550-51 (1976) (1 week to prepare); *Russell v. State* 559 S.W.2d 7, 9-10 (Ark. 1978) (20 days to prepare).

¹⁴⁹ *See* sources cited in note 148 *supra*.

¹⁵⁰ *See* *United States v. Robinson*, 553 F.2d 429 (5th Cir. 1977), *cert. denied*, 434 U.S. 1016 (1978).

¹⁵¹ *United States v. Taylor*, 569 F.2d 448 (7th Cir. 1978).

¹⁵² *See In re Rappaport*, 558 F.2d 87 (2d Cir. 1977).

¹⁵³ *See* *United States v. Jones*, 524 F.2d 834 (D.C. Cir. 1975). *But see* *United States v. Gray*, 565 F.2d 881 (5th Cir.), *cert. denied*, 435 U.S. 955 (1978).

¹⁵⁴ *Carey v. Rundle*, 409 F.2d 1210, 1214 (3d Cir.), *cert. denied*, 397 U.S. 946 (1969).

¹⁵⁵ *United States v. Gray*, 565 F.2d 881 (5th Cir. 1978).

¹⁵⁶ *United States v. Poulack*, 556 F.2d 83 (1st Cir.), *cert. denied*, 434 U.S. 986 (1977).

¹⁵⁷ *Id.* at 84.

the reference to the time available to defense counsel is usually followed by rhetoric to the effect that:

The parties agree that a ruling denying a motion for a continuance is not subject to review unless there is a clear showing of an abuse of discretion or that a manifest injustice would result. . . . It has likewise long been recognized that there are no mechanical tests to be applied and that "[t]he answer must be found in the circumstances [of] each case, particularly in the reasons presented to the trial judge."¹⁶²

The Supreme Court has adopted this analysis as well. In fact, it is only when the facts of the given case are so egregious as to be shocking that the Supreme Court has stepped in. For example, in *Avery v. Alabama*,¹⁶³ the defendant was forced to trial two days after his arrest and the appointment of counsel. However, even in this seemingly outrageous situation, the Court continued its historical hands-off policy and upheld the conviction. The Court took the classic approach that appellate courts have since used in viewing continuance requests and their relation to adequate representation by counsel:

Since the Constitution nowhere specifies any period which must intervene between the required appointment of counsel and trial, the fact, standing alone, that a continuance has been denied, does not constitute a denial of the constitutional right to assistance of counsel. In the course of trial, after due appointment of competent counsel, many procedural questions necessarily arise which must be decided by the trial judge in the light of facts then presented and conditions then existing. Disposition of a request for continuance is of this nature and is made in the discretion of the trial judge, the exercise of which will ordinarily not be reviewed.

But the denial of opportunity for appointed counsel to confer, to consult with the accused and to prepare his defense, could convert the appointment of counsel into a sham and nothing more than a formal compliance with the Constitution's requirement that an accused be given the assistance of counsel. The Constitution's guarantee of assistance of counsel cannot be satisfied by mere formal appointment.¹⁶⁴

The difficulty in applying the past case law to the perceived possibility of defense and prosecution jointly undermining the Speedy Trial Act is that

the past case law has been basically unconcerned with the common practice of continuances stipulated to by both the defense and prosecution.¹⁶⁵ In the words of the Seventh Circuit, commenting upon the Speedy Trial Act, "the necessary expeditious disposal of criminal cases requires the most effective use of the time permitted for trial preparation without reliance upon the routine continuances that may have been customary in the past."¹⁶⁶ What must be done is for the trial courts to take the broad guidelines as suggested by the case law,¹⁶⁷ by the standards of the American Bar Association,¹⁶⁸ and by commentators,¹⁶⁹ and flesh out those guidelines with the facts of a particular case whenever a continuance is sought. Not only would such a process present a meaningful record on appeal, but also it would help guard against defense-prosecution complicity in undermining the Speedy Trial Act.

VI. THE PROCESS OF ADEQUATE DOCUMENTATION

The correctness of the decision to grant or deny a motion for continuance turns upon the facts of the given case. However, the Speedy Trial-Act demands more. In order to guarantee that societal interests in speedy resolution of criminal matters do not receive short shrift, courts can no longer grant continuance merely because the participants agree. The Act is structured to account for all the

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The judges almost never forcefully interfere with the attorneys' pursuit of their goals, even though they are aware that they often are associated with delay. For instance, the judges' routine granting of continuances, especially without a time-consuming formal explanation, allows the attorney to use them to his own ends. . . . Nor did criminal division judges require reasons for continuances: some judges in this court were willing to permit as many continuances as the defense and prosecution were willing to arrange.

Levin, *supra* note 53, at 114.

¹⁶⁶ *United States v. Rothman*, 567 F.2d 744, 749 (7th Cir. 1977).

¹⁶⁷ The individual cases discussed in this article may be of some assistance as similar factual situations recur. The difficulty is that often the reputed cases do not contain sufficient information on all relevant factors. For a more detailed court synopsis of delay cases, see *United States v. Salzman*, 417 F. Supp. 1139 (E.D.N.Y. 1976), *aff'd*, 548 F.2d 395 (2d Cir. 1977).

¹⁶⁸ AMERICAN BAR ASSOCIATION, STANDARDS RELATING TO SPEEDY TRIAL (Approved Draft, 1968) § 1.3.

¹⁶⁹ NATIONAL ADVISORY COMMISSION ON CRIMINAL JUSTICE STANDARDS AND GOALS, COURTS, STANDARD 4.12; PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: THE COURT, 84-90.

¹⁶² *United States v. Rothman*, 567 F.2d 744, 747 (7th Cir. 1977).

¹⁶³ 308 U.S. 444 (1939).

¹⁶⁴ *Id.* at 446.

time between arrest and indictment.¹⁷⁰ Thus, in practice, parties may not stipulate to continuances,¹⁷¹ nor waive the applicability of the Act's provisions.¹⁷² The Act requires that the court balance, on the record, the competing interests of court management and participants' desires.¹⁷³ The documentation process recommended is a simple one that will not contribute to the problem of delay. The process, however, does require that lawyers be prepared to justify their requests for additional time and that judges will be unswerving in their resolve not to honour undocumented requests for delay.

The procedure needed to make the goals of the Act attainable can best be illustrated by analyzing the ends of justice exclusion as it applies to the right-to-counsel delay mechanism. Two subject matters need to be discussed: the degree of specificity required to justify a continuance and the balancing technique to be used in weighing the competing interests.

In terms of the defendant's desire to be represented by a particular counsel and his right to be represented by adequately prepared counsel, those continuances which in the past have been granted in a routine, uncritical way must now be justified under 18 U.S.C. § 3161(h)(8).¹⁷⁴ The statute requires reasons for finding that "the ends of justice served by the granting of such continuance outweigh the best interests of the public and the defendant in a speedy trial."¹⁷⁵ The statute lists

three non-exclusive factors which are to be considered when making the determination regarding the "ends of justice":

(i) Whether the failure to grant such a continuance in the proceeding would be likely to make a continuance of such proceeding impossible, or result in a miscarriage of justice.

(ii) Whether the case taken as a whole is so unusual and so complex, due to the number of defendants or the nature of the prosecution or otherwise, that it is unreasonable to expect adequate preparation within the periods of time established by this section.

(iii) Whether delay after the grand jury proceedings have commenced, in case where arrest precedes indictment, is caused by the unusual complexity of the factual determination to be made by the grand jury or by events beyond the control of the court or the Government.¹⁷⁶

The provision concludes with the statement that no continuance is available "because of general congestion of the courts' calendar, or lack of diligent preparation or failure to obtain available witnesses on the part of the attorney for the Government."¹⁷⁷

It would appear that the legislative intent in establishing the "ends of justice" exclusion was that:

In order to avoid the pitfalls of unnecessary rigidity on the one hand, and a loop-hole which would nullify the intent of the legislation on the other, a balancing test is established in order to enable the judge to determine when the 'ends of justice' require an extraordinary suspension of the time limits.¹⁷⁸

But, to guarantee that the Act is not made a sham at the trial level and to give the appellate court an adequate record on appeal, specific findings supporting the three listed factors must be required.

The degree of specificity required of the trial court can be gleaned from the legislative history. In the Senate Report, for example, the "Watergate case" is discussed in terms of the "ends of justice" exclusion. As the report states, "Although a case like the alleged conspiracy involving the so-called 'Watergate case' might normally be subject to a continuance under this provision because of its complexity, society's interest in a speedy trial in

¹⁷⁰ See *United States v. Hillegas*, 443 F. Supp. 221, 225 (S.D.N.Y. 1977); *United States v. La Cruz*, 441 F. Supp. 1261, 1264 (S.D.N.Y. 1977).

¹⁷¹ See *United States v. Rothman*, 567 F.2d 744, 749 (7th Cir. 1977).

¹⁷²

Underlying the government position is the premise that the public, the defendant and the prosecutor all have the same interest in prompt disposition, and thus the public interest is adequately represented when the defendant and the prosecutor agree to a waiver. But if such were the case, there would have been no need to enact the Plan. The court in promulgating the Plan—and Congress in enacting the Speedy Trial Act—has determined that the immediate participants cannot be relied upon to further the public interest in prompt disposition . . . It would be antithetical to this entire design if the parties were permitted to free themselves from the constraints imposed by the Plan through the simple expedient of the willing defendant signing a waiver. *United States v. Beberfeld*, 408 F. Supp. 1119, 1122-23 (S.D.N.Y. 1976).

¹⁷³ 18 U.S.C. § 3161(h)(8) (Supp. IV 1974).

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

¹⁷⁶ 18 U.S.C. § 3161(h)(8)(B) (Supp. IV 1974).

¹⁷⁷ 18 U.S.C. § 3161(h)(8)(C) (Supp. 1974).

¹⁷⁸ SENATE REPORT, *supra* note 1, at 21.

light of the then upcoming election might have outweighed that consideration."¹⁷⁹

In discussing the applicability of the three listed factors, the Senate Report detailed what factual situations would fall within the categories. One example given in the Senate Report is that when determining whether to give counsel more time to prepare, the court should look to the probable length of trial based upon a weighted caseload formula developed by the Federal Judicial Center to determine the actual amount of time spent on different kinds of cases.¹⁸⁰ Although Congress rejected a blanket exception for complicated federal prosecution, experience with certain types of cases will put the court on notice of the potential need for further time.¹⁸¹ In contrast to the old case law which virtually guaranteed disparity from case to case, the Speedy Trial Act creates a process which requires specific reasons for delay at the trial level which will eventually result in a body of common law continuances giving guidance to the district courts on how to strike the balance among the competing interests in the speedy trial area.¹⁸²

Other types of factors regarding the need for additional time can be identified. If the need for a continuance is arguably urgent, it should be recognized early in the process.¹⁸³ This is not to suggest, however, that "surprises" will not occur in criminal cases.¹⁸⁴

¹⁷⁹ *Id.* at 40.

¹⁸⁰ *Id.* For a discussion of the weighted caseload formula see ADMINISTRATIVE OFFICE OF THE U.S. COURTS, THE ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS 1971, at 167.

¹⁸¹ SENATE REPORT, *supra* note 1, at 30.

¹⁸² *See, e.g.*, Plan for the United States District Court for the District of Arizona for Achieving Prompt Disposition of Criminal Cases § 4a, which requires the clerk to maintain a separate file for all orders authorizing ends of justice exclusions.

¹⁸³ *See* United States v. Rothman, 567 F.2d 744, 749 (7th Cir. 1977).

¹⁸⁴ The GUIDELINES of the Administrative Office, *supra* note 25, discuss additional factors.

The other instance involves the "complex" case. Complexity in criminal cases results *inter alia* from complex issues, multiple parties or extensive documentary evidence. Cases fitting into this pattern frequently include antitrust, mail fraud, conspiracy and net worth income tax cases, among others, which cases may require a whole series of pretrial conferences, as well as other protracted proceedings. *See*: "Pre-Trial Procedures in Big Criminal Cases", Judicial Conference Handbook of Recommended Procedures for the Trial of Protracted Cases, pp. 47-50; Judge Irving R. Kaufman, "Problems in

In the right to adequately prepared counsel when the claim is made in a broad statement that the case is complex and further time to prepare is needed, the court should require the defense counsel to show specifically what is yet to be done and how long it will take to accomplish. Possible motives for delay should be scrutinized. In the change of counsel situation, the court should inquire as to what differences exist between counsel and defendant that make the change necessary. Only upon a record of this specificity can realistic review and precedential use of the case be made.

In order to accomplish the need for rather detailed justifications for continuances under the "ends of justice" exclusion, the local criminal rules may need to be modified in a number of ways. Whenever possible, motions for continuances under this provision should be in writing and should be accompanied by a proposed set of findings of fact.¹⁸⁵ Where appropriate, motions for continuances should contain an affidavit of counsel referring to the facts which underlie the need for additional time. The onus should be placed upon counsel in the "ends of justice" cases just as the burden is placed upon counsel in the other facets of the criminal trial. Secondly, procedures must be established so that upon motion of either the defense or the prosecution, determinations regarding excludable time may be made by a judge other than the trial judge, or a judge *ex parte* and *in camera* when questions of confidentiality arise.¹⁸⁶ Finally, to assure that a judge can make informed decisions about the effect of delay upon the administration of the calendar within the district, the clerk must

Protracted Criminal Cases", 23 F.R.D. 551; Judge Joe E. Estes, "Pre-Trial Conferences in Criminal Cases", 23 F.R.D. 560. After an indictment is filed, the court can determine from the nature of the case whether it is "unusual or complex" within the meaning of Section 3161(h)(8)(B)(ii).

Finally, it should be noted that cases may be held in abeyance awaiting a decision of the court of appeals or Supreme Court which would be dispositive of the case. Section 3161(h)(8) would be applicable.

¹⁸⁵ *See* United States District Court for the District of Arizona, Rule 91. *See also* NATIONAL ADVISORY COMMISSION ON CRIMINAL JUSTICE STANDARDS AND GOALS, COURTS 97 (1973).

¹⁸⁶ In the analagous situation of allowing counsel to withdraw for an alleged conflict of interest, a similar process was suggested by Judge (now Justice) Stevens. *United States v. Jeffers*, 520 F.2d 1256, 1265 (7th Cir. 1975). *See* Lowenthal, *Joint Representation in Criminal Cases: A Critical Appraisal*, 65 VA. L. REV. 939 (1978).

have in a usable format the data required under 18 U.S.C. §§ 3166 and 3170.¹⁸⁷

¹⁸⁷ 18 U.S.C. §§ 3166, 3170 (Supp. IV 1974).
§ 3166. District plans—contents.

(a) Each plan shall include a description of the time limits, procedural techniques, innovations, systems and other methods, including the development of reliable methods for gathering and monitoring information and statistics, by which the district court, the United States attorney, the Federal public defender, if any, and private attorneys experienced in the defense of criminal cases, have expedited or intend to expedite the trial to other disposition of criminal cases, consistent with the time limits and other objectives of this chapter.

(b) Each plan shall include information concerning the implementation of the time limits and other objectives of this chapter, including:

(1) the incidence of, and reasons for, requests or allowances of extensions of time beyond statutory or district standards;

(2) the incidence of, and reasons for, periods of delay under section 3161(h) of this title;

(3) the incidence of, and reasons for, the invocation of sanctions for noncompliance with time standards, or the failure to invoke such sanction, and the nature of the sanction, if any, invoked for noncompliance;

(4) the new timetable set, or requested to be set, for an extension;

(5) the effect on criminal justice administration of the prevailing time limits and sanctions, including the effects on the prosecution, the defense, the courts, the correctional process, costs, transfers and appeals;

(6) the incidence and length of, reasons for, and remedies for detention prior to trial, and information required by the provisions of the Federal Rules of Criminal Procedure relating to the supervision of detention pending trial;

(7) the identity of cases which, because of their special characteristics, deserve separate or different time limits as a matter of statutory classifications; and

(8) the incidence of, and reasons for, each thirty-day extension under section 3161(b) with respect to an indictment in that district.

(c) Each district plan required by section 3165 shall include information and statistics concerning the administration of criminal justice within the district, including, but not limited to:

(1) the time span between arrest and indictment, indictment and trial, and conviction and sentencing;

(2) the number of matters presented to the United States Attorney for prosecution, and the numbers of such matters prosecuted and not prosecuted;

(3) the number of matters transferred to other districts or to States for prosecution;

(4) the number of cases disposed of by trial and plea;

In the limited experience to date with the "ends of justice" exclusion, every indication is that the courts have not been very specific in justifying continuances. For example, in the United States District Court for Arizona, whenever an interest of justice exclusion is found by the Court, the courtroom deputy clerk merely checks a form indicating under which of the three listed factors the judge

(5) the rates of nolle prosequi, dismissal, acquittal, conviction, diversion, or other disposition; and

(6) the extent of preadjudication detention and release, by numbers of defendants and days in custody or at liberty prior to disposition.

(d) Each plan shall further specify the rule changes, statutory amendments, and appropriations needed to effectuate further improvements in the administration of justice in the district which cannot be accomplished without such amendments or funds.

(e) Each plan shall include recommendations to the Administrative Office of the United States Courts for reporting forms, procedures, and time requirements. The Director of the Administrative Office of the United States Courts, with the approval of the Judicial Conference of the United States, shall prescribe such forms and procedures and time requirements consistent with section 3170 after consideration of the recommendations contained in the district plan and the need to reflect both unique local conditions and uniform national reporting standards.

§ 3170. Speedy trial data.

(a) To facilitate the planning process and the implementation of the time limits and objectives of this chapter, the clerk of each district court shall assemble the information and compile the statistics required by sections 3166(b) and (c) of this title. The clerk of each district court shall assemble such information and compile such statistics on such forms and under such regulations as the Administrative Office of the United States Courts shall prescribe with the approval of the Judicial Conference and after consultation with the Attorney General.

(b) The clerk of each district court is authorized to obtain the information required by sections 3166(b) and (c) from all relevant sources including the United States Attorney, Federal Public Defender, private defense counsel appearing in criminal cases in the district, United States district court judges, and the chief Federal Probation Officer for the district. This subsection shall not be construed to require the release of any confidential or privileged information.

(c) The information and statistics compiled by the clerk pursuant to this section shall be made available to the district court, the planning group, the circuit council, and the Administrative Office of the United States Courts.

has determined the case falls.¹⁸⁸ No factual basis appears. In fact, it appears that in most district courts continuances are routinely being made as if the Speedy Trial Act had never been passed.¹⁸⁹

The district court decision in *United States v. Tussell*,¹⁹⁰ is an example of an inadequate finding in regard to the "ends of justice" exclusion. In that case the inadequate finding was not the result of the district judge's being unconcerned with the Act or unwilling to state his reasons on the record. Rather, the record simply did not go far enough. This multi-defendant case contained motions by defendants to suppress allegedly illegally obtained evidence. In excluding certain time periods, the court said:

Eight of the defendants have trial deadlines of July 18, 1977, and one of the two remaining defendants has a deadline of July 20. Consideration of the suppression motions will require a hearing, which will commence on Thursday, July 28, 1977, at 10:00 A.M. The period of time beginning with these deadlines and ending in July 27, the day before the hearing, will be excluded in accordance with 18 U.S.C.A. § 3161(h)(8). The number of defendants involved in this matter, along with a proliferation of joint and individual pretrial motions, has complicated management of this case. When a case is made especially complex by the "number of defendants, or the nature of the prosecution, or otherwise," Congress has provided for additional periods of excludable time. See *id.* § 3161(h)(8), and will order periods of exclusion up until the day of the hearing, and additional periods if thereafter necessary and appropriate.¹⁹¹

The court had before it facts which should have led to the conclusion that judicial time could best be spent considering defendant's motions together as they apparently involved similar or identical facts and the prospective delay would have been relatively short. Specific reference to the facts of the crowded docket as supplied by the clerk under section 3166,¹⁹² as well as how judicial time would better be spent, should have been made. The Court should have referred to section 3161(h)(8)(A) and made the balance of the above facts to conclude that "the ends of justice served by taking such action outweigh the best interest of the public and the defendant in a speedy trial."

¹⁸⁸ The form used by the United States District Court for the District of Arizona is available upon request from the author.

¹⁸⁹ See Misner, *supra* note 14, at 21-22.

¹⁹⁰ 445 F. Supp. 1 (M.D. Pa. 1977).

¹⁹¹ *Id.* at 1-2.

¹⁹² 18 U.S.C. § 3166 (Supp. IV 1974).

Instead, the court incorrectly moved into subsection (B) and attempted to use one of the non-inclusive factors to justify what was already justifiable. The trial court took out of context the statement "number of defendants, or the nature of the prosecution, or otherwise"¹⁹³ and applied it to the continuance to consolidate motions for a hearing when the subsection only applies to the question of whether a continuance should be granted for further preparation.

The process of giving specific reasons need not be an onerous task. It does, however, require that the continuance be justified on the record. For example, in the fraud and racketeering trial of Governor Marvin Mandel, the district court justified a delay under the "ends of justice" with the following:

The Court has been advised by counsel that as many as four members of the Maryland Legislature can be expected to be called as witnesses for both the Government and the defense on any given day of the trial. These officials were elected by the citizens of Maryland to serve them in government. The Court is of the opinion that the legislators cannot adequately serve the citizenship unless the Governor is present at the legislative session to confer with them from time to time. In addition, a trial date which would require legislators to be absent from the present session may serve to disrupt the legislative process.¹⁹⁴

Additionally, the court addressed a second reason for the delay:

Several of the defendants contend that much of the publicity surrounding the first trial will dissipate if the trial is delayed for a reasonable time. The Court has examined many of the newspaper clippings and television and radio transcripts submitted by defendant Mandel. An April 13 trial date will result in a four month period between the date the mistrial was declared and the date of the retrial. In the opinion of the Court, it is likely that much of the publicity surrounding the first trial will dissipate during this time.¹⁹⁵

This second reason is much more difficult to justify factually than the first. It may very well be true that a four-month delay would dissipate much of the pre-trial publicity. It is hoped as the pre-trial publicity issue arises in cases over time that better insights might be gained into the area. For example, issues concerning the use of opinion polls and the differing effects of publicity in large versus

¹⁹³ 18 U.S.C. § 3161(h)(8)(B) (Supp. IV 1974).

¹⁹⁴ *United States v. Mandel*, 431 F. Supp. 90, 93 (D. Md. 1977).

¹⁹⁵ *Id.*

small communities can be developed. However, in *Mandel*, the court should have commented on the effect that the delay would have had upon the court's calendar and on the possibility of a change of venue¹⁹⁶ to avoid both the delay and the problem of pre-trial publicity.¹⁹⁷

It is impossible to cover all situations in which the "ends of justice" exclusion might arise. In anticipating the July 1, 1979, effective date of the Act, one can set up broad guidelines as to how the balancing process may work and then anticipate that, over the course of time, the framework will be filled in through the ongoing process of litigation.

There are certain types of delay that fall outside the "ends of justice" exclusion. The Act states that no continuance "shall be granted because of general congestion of the court's calendar, or lack of diligent preparation or failure to obtain available witnesses on the part of the attorney for the Government."¹⁹⁸ These do not apply to the right-to-counsel situations. Toward this end of the spectrum of acceptable reasons for delay, however, one would expect to find delay motivated by a concern for defendant's comfort. Moving toward more acceptable reasons for delay, one finds health problems of defense counsel and schedule conflicts of defense counsel as justifying short delays, but delays longer than two weeks should be granted only when the case is so complex or the lawyer-client relationship so unique that substitution of other counsel would be inappropriate. If continuance is sought for additional preparation time, detailed facts about what is yet unprepared and why preparation will take the time sought by the defendant should be required.¹⁹⁹ Information as to the time that the prosecution requires to prepare its case may be influential here, as well as court records concerning the billable time of private counsel for representation pursuant to the Criminal Justice Act.²⁰⁰

¹⁹⁶ The court in *Mandel* did discuss the venue issue, but not in its possible relationship with the Speedy Trial Act. *Id.* at 98.

¹⁹⁷ In his concurring opinion in *Nebraska Press Association v. Stuart*, 427 U.S. 539 (1975), Mr. Justice Brennan anticipated the publicity problem. "However, even short continuances can be effective in attenuating the impact of publicity, especially as other news crowds past events off the front pages. And somewhat substantial delays designed to ensure fair proceedings need not transgress the speedy trial guarantee. See *Groppi v. Wisconsin*, 400 U.S. 505, 510 (1971); cf. 18 U.S.C. § 3616(h)(8) (1970 ed., Supp. IV)" *Id.* at 602 n.28 (Brennan, J., concurring).

¹⁹⁸ 18 U.S.C. § 3161(h)(8)(C) (Supp. IV 1974).

¹⁹⁹ See text accompanying note 184 *supra*.

²⁰⁰ 18 U.S.C. § 3006 (Supp. 1978).

Merely because a case is, for example, a tax conspiracy case, is not in and of itself sufficient to justify a continuance.

The final topic area requiring discussion in the balancing of societal interests and defendant's interest in speedy trial, is the situation in which defense counsel is dilatory, yet the defendant himself has not participated in the delay. In this area it is suggested that the court be guided by the House Report:

Although the Committee cannot foresee any excuses for institutional delay which would justify granting a continuance, it does believe that the lack of diligent preparation or failure to obtain available witnesses on the part of the defendant or his attorney could result in a miscarriage of justice and, therefore, exempts these reasons from prohibiting a defendant or his counsel from seeking a continuance. For example, when a defendant's counsel, either intentionally or by lack of diligence fails to properly prepare his client's case, either he or the defendant might seek a continuance on the ground that forcing the defendant to go to trial on the date scheduled would deny the defendant the benefits of a prepared counsel. The court in this situation would determine whether the defendant participated actively in the delay or whether his counsel alone was responsible for it. If the defendant did not cause the delay, he should not be penalized by being forced to go to trial with an unprepared counsel. In this case, he should be permitted enough time to seek a new counsel and to properly prepare his case for trial. In the event that the defendant actively participated in the delay, then no miscarriage of justice has occurred and the court should deny the defendant's or his counsel's request for a continuance and require the trial to commence on the scheduled date. This is consistent with the well-reasoned view that a defendant should not profit doubly from delay he is responsible for.²⁰¹

Although a strong, aggressive policy of continuance-justification is absolutely necessary, one cannot punish the defendant by taking away his day in court because of the misguided antics of his counsel. In these situations, other sanctions of the Act may be appropriate.²⁰²

CONCLUSION

The Speedy Trial Act is a proper legislative response to the real problem of delay in the administration of criminal justice. To remedy this problem, it was Congress' judgment that societal interests in quick resolution of criminal charges were

²⁰¹ HOUSE REPORT, *supra* note 1, at 33.

²⁰² See, e.g., 18 U.S.C. § 3162(b) (Supp. IV 1974).

inadequately addressed by the participants of the system. The inadequate protection stems basically from the fact that all participants in the system have separate, but identifiable reasons for delay. In order to further their individual delay interests, it is very possible that the prosecutor and defense counsel may attempt to stipulate to waivers of the Act's time provisions and the common practice of stipulated continuances may be perpetuated. If the practice of stipulated continuances is allowed to exist after the July 1, 1979, full implementation date of the Speedy Trial Act, the Act will be rendered virtually useless.

To avoid this result and to implement the mandated legislative solution to the delay problem in criminal cases, courts *must* require that all requests

for delay be adequately documented and that all excludable time decisions under the broad "ends of justice" provision be factually supported. If defense counsel seeks an "ends of justice" exclusion based upon either a claimed need for more preparation time or upon a claim that the defendant's choice of retained counsel is unavailable within the time required by the Act for trial, the trial judge must investigate the factual basis for the request.

As the Speedy Trial Act goes into full effect, the judiciary must require specificity in granting continuances and cease the time-honored practice of allowing counsel to stipulate to delay. Without such a commitment from the courts, the goals of the Speedy Trial Act will not be reached and justice will again be delayed and denied.