The Speedy Trial Act of 1974

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The sixth amendment guarantees all criminal defendants in state and federal courts the right to a speedy and public trial. The right exists to prevent oppressive pretrial detention, to limit the possibility that the defense of the accused will be impaired, and to minimize the anxiety, public scorn and suspicion, and potential "chilling effect" of unresolved charges. The Supreme Court has held that the protection of these interests is so important that the only possible remedy for violation of the right is dismissal of the charges.

The sixth amendment does not, however, specify the period of delay after which a prosecution is no longer "speedy," and the Court has held that the constitutional limit depends entirely on the facts of the particular case. Although fixed time limits would facilitate definition and enforcement of the right, the creation of such rules has been held to be a legislative function. In the absence of such

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1 The speedy trial right is "fundamental" and is thus imposed on the states through the due process clause of the fourteenth amendment. Klopfer v. North Carolina, 386 U.S. 213 (1967).


5 Id. at 523.
legislation, therefore, an appeal is generally required to resolve the issue in a particular case.

An even more serious limitation to the constitutional guarantee is that it fails to protect the public interest in speedy trials, which is distinguishable from, and often in conflict with, the interests of the defendant. Many defendants, it seems, do not want a speedy trial; since the Government carries the burden of proof, the passage of time is more likely to weaken the prosecution's case and strengthen the bargaining position of the defendant. Not surprisingly, therefore, delays in state and federal criminal cases frequently exceed even the broad limits imposed under the sixth amendment.

These delays seriously weaken the effectiveness of the criminal justice system. Not only are convictions lost or "bargained down," as memories fade, witnesses disappear or lose interest, and evidence is lost, but more fundamentally there is a weakening of public respect and cooperation with a system which moves so slowly. Furthermore, even if a defendant is eventually convicted, the sentence imposed may be so removed in time from the offense that the deterrent impact and prospects for rehabilitation are attenuated. If the defendant is unable to provide assurances that he will appear for trial, he must be detained at public expense. If he is released, he may commit further crimes before finally being brought to trial, and there is evidence to suggest that the likelihood of recidivism increases substantially if he is released for more than a few months.

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6 Id. at 519. Of course, any delays attributable to the defendant constitute a waiver of his rights under the sixth amendment and are not counted in determining whether a constitutional violation has occurred. Id. at 529.

7 Id. at 519, 521. A 1967 study of delay in Chicago criminal courts suggests that the probability of acquittal or conviction on reduced charges increases with increasing age of the case. Banfield & Anderson, Continuances in the Cook County Criminal Courts, 35 U. CHI. L. REV. 259, 287-90 (1968).

8 In Hedgepeth v. United States, 364 F.2d 684, 686 (D.C. Cir. 1966), it was held that delays exceeding one year would raise a constitutional claim with "prima facie" merit. In 1968, about 25 percent of felony defendants in Cuyahoga County (Cleveland), Ohio took longer than one year from arrest to disposition; 57 percent took more than six months. L. Katz, L. Litwin & R. Bamberger, Justice Is The Crime: Pretrial Delay in Felony Cases app., Table 1 (1972). As of June 30, 1975, 17 percent of all active federal criminal cases without fugitives had been pending for more than one year; 33 percent were over six months old. Administrative Office of the U.S. Courts, 1975 Annual Report of the Director A-70, Table D8B [hereinafter cited as 1975 Annual Report]. Although these statistics do not focus specifically on arrest-to-trial time, they are probably fairly representative of that interval.

9 In October, 1970, the Harris Poll found that 78 percent of the public believes arrested defendants are not brought to trial quickly enough. M. Hindelang, C. Dunn, A. Aumick & L. Sutton, Sourcebook of Criminal Justice Statistics-1974, at 206, Table 2.73 (1975).


11 See studies cited note 267 infra.
While released he may also threaten the witnesses, tamper with evidence, or flee the jurisdiction of the court.\textsuperscript{12}

To protect these important public interests and to clarify the rights of defendants, Congress passed the Speedy Trial Act of 1974.\textsuperscript{13} Although the Act is necessarily limited to federal offenses, it embodies two extremely important and innovative concepts which, if they prove workable in the federal context, may be adaptable to state criminal justice systems.\textsuperscript{14} The first is the concept of an enforceable public right to speedy trial, independent of the defendant's rights and wishes. Accordingly, the time limits established by the Act begin to run automatically upon arrest or summons, without the need for a "demand" for trial by the defendant;\textsuperscript{15} and except for certain enumerated events of excludable delay, the limits may be extended only by court order, in accordance with strict statutory guidelines.\textsuperscript{16}

The second major innovation is the extensive program for research and planning required by the Act.\textsuperscript{17} The effective date of the prescribed time limits and sanctions is delayed for four years,\textsuperscript{18} during which time the courts are to study the problem of delay, recommend changes in the Act or other statutes and procedures, and submit requests for any additional resources needed to achieve speedier trials. The Act also requires the compilation of comprehensive statistics on the criminal justice process in each district, and this data base will be of value to court management and research independent of speedy trial implementation efforts.

The Act is far from a "model" in its present form, however. It contains numerous unresolved policy issues, ambiguities, and draft-\textsuperscript{19}

\textsuperscript{12} As of June 30, 1975, 58 percent of the federal cases over six months old involved one or more fugitive defendants. 1975 Annual Report, supra note 9, at A-70, Table D8B.

\textsuperscript{13} 18 U.S.C. §§ 3161-74 (Supp. IV, 1974) (tit. I); id. §§ 3152-56 (tit. II). All textual citations to statutory material refer to Title 18 of the United States Code. Title I of the Act contains the speedy trial provisions, which apply in all federal districts. Title II provides for the establishment of "pretrial services" agencies in ten "representative" districts to supervise defendants placed on pretrial release, recommend appropriate release conditions, and perform other services designed to maximize the number of defendants released, while minimizing rearrest and failure-to-appear rates. Titles I and II have similar origins and objectives, but their scope and problems of implementation are obviously very different. Due to space limitations, this article focuses on Title I.

\textsuperscript{14} Most states already have some sort of statutory or constitutional speedy trial provision, but none contain either of the two features described in the text. See also text at notes 150, 259 infra.

\textsuperscript{15} See note 56 infra.

\textsuperscript{16} See text at note 150 infra.

\textsuperscript{17} See text at note 259 infra.

\textsuperscript{18} The Act provides for certain interim provisions however. See text at note 47 & pp. 711-20 infra.
ing errors which must be carefully considered and resolved prior to the effective date of the permanent time limits and sanctions. This paper is an attempt to identify, and help to resolve, the major issues and problems.

I. A General Summary of the Act

When the Speedy Trial Act becomes fully effective on July 1, 1979, it will establish a set of three fairly short time limits keyed to the major events in the prosecution of federal criminal cases.

1. If the defendant is arrested on a magistrate's complaint, prior to the filing of an indictment or information in district court, then such filing must take place within 30 days of arrest, subject to certain excludable time periods;
2. the defendant must then be arraigned and enter a plea within 10 days after the indictment;
3. if a plea of not guilty is entered, the trial must commence within 60 days thereafter, subject again to certain exclusions. If a defendant is not arrested or summoned until after indictment (which frequently occurs in "white collar" and other nonviolent federal offenses), then the 10-day arraignment limit begins to run when the defendant first appears before a judicial officer, after which the same 60-day trial limit applies.

Thus, a defendant arrested prior to indictment, who enters an initial plea of not guilty, has an effective time limit of 100 days from arrest or summons to trial; similarly, defendants arrested or summoned after indictment have an overall limit of 70 days. These time limits are somewhat shorter than the limits provided under state speedy trial acts, local federal rules, and the recommendations of both national crime commissions; they are also much shorter

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Section 3163 ("effective dates") provides that the statutory time limits become effective twelve months after July 1, 1975, but sections 3161(f) and (g) further postpone the effective date of the "permanent" time limits until July 1, 1979. Beginning on July 1, 1976, certain "transitional" time limits (without sanctions) are provided. See note 42 infra.

The term "indictment" will hereinafter include the filing of a prosecutor's information, unless otherwise indicated.

18 U.S.C. § 3161(b) (Supp. IV, 1974). If the defendant is served with a summons in lieu of arrest, pursuant to Federal Rule of Criminal Procedure 4, then the 30-day time limit begins to run on the day of service.

See text at note 28 infra.


Id. § 3161(c). Failure to move for dismissal prior to trial or the entry of a plea of guilty or nolo contendere constitutes a waiver of the right to dismissal under the Act. Id. § 3162(a)(2). If the defendant is permitted to withdraw his plea of guilty or nolo contendere, the 60-day trial limit starts to run anew. Id. § 3161(l).

Id. § 3161(e).

See text and notes at notes 82-84 infra.
than average criminal disposition times in many federal districts. 27

In an effort to temper the harshness of these relatively short
time limits, and to provide the courts with some guidance in distin-
guishing between "good" and "bad" delays, Congress provided a
series of exceptions and excludable time periods. The following
specified events of "unavoidable" delay are excludable: other pro-
cedings concerning the defendant; 28 deferred prosecution; 29 absence
or unavailability of the defendant or an essential witness; 30 periods
of mental incompetency, 31 physical inability to stand trial, 32 or
treatment under the Narcotic Addict Rehabilitation Act; 33 delay
between the dropping of charges by the Government and refiling of
the same charges, 34 and a "reasonable period of delay" caused by
slower processing of a codefendant. 35 Additional flexibility is pro-
vided by a provision permitting the exclusion of any continuance
granted after a written finding that "the ends of justice served by
the granting of such continuance outweigh the best interests of the
public and the defendant in a speedy trial." 36

The sanction for violation of the statutory time limits, after
deduction of excludable periods, is dismissal either with or without
prejudice. 37 The dismissal without prejudice alternative thus pro-
vides additional flexibility in the administration of the strict time
limits, and permits refiling and reprosecution subject only to the
applicable statute of limitations. 38 Sanctions for intentional delay
and other forms of misconduct by government or defense attorneys
are also provided. 39 All sanctions become effective on July 1, 1979. 40

To avoid large numbers of unjustified dismissals, due to unfor-
seen crises or the failure of Congress to quickly provide needed additional resources, a district-wide "judicial emergency" exception is provided. Any court which finds that it is unable to comply with the arraignment and trial limits, despite the efficient use of available resources, may apply for a one-year suspension of these limits.41

Prior to the effective date of the permanent time limits and sanctions, the Act provides a set of "transitional" time limits which become increasingly shorter each year prior to July 1, 1979.42 These limits are without sanctions; their purpose is simply to assist the courts in preparing to meet the "permanent" limits. Closely related to this graduated timetable are the elaborate planning procedures established under the Act. In June of 1976 and 1978, each district court is to submit a detailed district plan to the Administrative Office of the United States Courts,43 containing extensive statistical material on the impact and effectiveness of implementation efforts; general background data on the administration of criminal justice in the district; descriptions of the systems and procedures being used to achieve and study implementation; and requests for statutory amendments, rule changes, and appropriations.44 The plans are to be developed by a planning group consisting of the principal court and prosecution officials, representatives of the defense bar, and an outside research consultant.45 Within three months of the filing of the district plans (i.e., by September 30, 1976 and 1978), the Administrative Office is required to make an overall report to Congress, detailing the plans submitted.46

In addition to the permanent and transitional time limits, the Act provides a special "interim" trial limit during the period beginning September 29, 1975, and ending June 30, 1979.47 This 90-day

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41 Id. § 3174. The 60-day trial time limit must be replaced by a longer limit of up to 180 days, but no substitute arraignment limit is specifically provided. See note 206 infra.

42 During the three years prior to July 1, 1979, the indictment limit is 60 days (1976-77), 45 days (1977-78), and 35 days (1978-79). 18 U.S.C. § 3161(f) (Supp. IV, 1974). During this same three-year period, the trial limit is first 180 days, then 120 days, then 80 days. Id. § 3161(g). The arraignment limit remains 10 days on and after July 1, 1976, as provided in section 3163(b).

43 Id. § 3165(e). The plan which is due on June 30, 1976, is to govern the disposition of offenses during the period July 1, 1977, through June 30, 1979, although most courts will probably put their 1976 plan into effect starting on July 1, 1976. The plan which is due on June 30, 1978, is for the period following July 1, 1979, which is the point at which the permanent time limits and sanctions become applicable.

44 Id. § 3166.

45 Id. § 3169(a). An initial $2,500,000 was authorized to compensate these consultants and pay for supporting staff, facilities and other planning group expenses. Id. § 3171.

46 Id. § 3167.

47 Id. § 3164.
limit, which is not keyed to prosecution stages, applies to only two categories of defendants: (1) pretrial detainees and (2) defendants released on bail or recognizance who have been designated as being of "high risk." Special sanctions are provided for each of these two categories: pretrial detainees must be released from custody if, through no fault of their own, trial has not begun within 90 days after the beginning of detention; "high risk" releasees who intentionally cause delay may have their release conditions tightened after 90 days. Given the low pretrial detention rate in most federal districts and certain inherent problems with the "high risk" concept, the interim provisions will apply to a fairly small proportion of defendants.

II. THE LEGISLATIVE HISTORY

The Speedy Trial Act was introduced as S. 3936 by Senator Ervin in 1970, and grew out of his strong opposition to the preventive detention provisions of the 1970 District of Columbia Crime Bill. Ervin maintained that preventive detention was both unconstitutional and unworkable, and that speedy trial legislation was its constitutional alternative. S. 3936 contained three titles. Title I, "Speedy Trials," was the predecessor of Title I of the Speedy Trial Act of 1974 and provided for trial within 60 days of arrest or indictment, whichever came later. Title II, which was subsequently dropped from the legislation, provided additional penalties for any crime committed while on release pending trial, appeal, or sentence. Title III, "Pretrial Services Agencies," was the predecessor of Title II of the Speedy Trial Act of 1974. All three titles were intended to deal with the problem of crime committed by bailed defendants, and the trial limits in Title I were derived from the preventive detention proposals for the District of Columbia. This

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49 See text and notes at notes 248-58 infra.
52 See Ervin, supra note 50.
53 Id. § 315A (up to three years additional imprisonment, consecutive to the sentence imposed for the offense committed while on release).
54 S. 3936 provided a four-step, phased implementation process based on the seriousness of the offense and the defendant's pretrial release status. Id. § 3163. Ninety days after its effective date the Act was to become applicable to defendants in custody charged with the
early focus on bail crime, together with the 1967 report of the President’s Crime Commission\textsuperscript{55} and the American Bar Association’s 1968 “minimum standards” for speedy trial (ABA Standards),\textsuperscript{56} inspired the emphasis on “public” speedy trial rights manifested in the Act and throughout its legislative history.

S. 3936 was reintroduced in the Ninety-Second Congress as S. 895, which duplicated all of S. 3936 except for Title II.\textsuperscript{57} Hearings on S. 895 resulted in an amended version,\textsuperscript{58} which was reintroduced in the Ninety-Third Congress as S. 754.\textsuperscript{59} The final Senate amendments were made in March 1974,\textsuperscript{60} and in July S. 754 was passed and sent to the House. After hearings by the Subcommittee on kinds of dangerous or violent offenses covered by preventive detention proposals; defendants held in preventive detention would thus be assured speedy trial priority. After 120 days, the Act would become applicable to released defendants charged with these more serious offenses; other defendants in custody would be covered after 180 days, and other released defendants would be covered eighteen months after the effective date.

The choice of the 60-day time limit was also derived from preventive detention considerations. That was the period of time during which defendants could be preventively detained, and it was also the period of time after which the risk of crime on bail had been found to increase substantially, according to several empirical studies of the problem. See H.R. REP. No. 1508, 93d Cong., 2d Sess. 14 (1974); S. REP. No. 1021, 93d Cong., 2d Sess. 8 (1974). See also studies cited note 267 infra.

55 President’s Comm’n on Law Enforcement and Administration of Justice, The Challenge of Crime in a Free Society (1967) [hereinafter cited as The Challenge of Crime]. The Commission noted that delay undermines the law’s deterrent effect and, in the case of released defendants, results in lost convictions and potential danger to the public. Id. at 155.

56 ABA Project on Minimum Standards for Criminal Justice, Standards Relating to Speedy Trial (Approved Draft, 1968) [hereinafter cited as ABA Standards]. Standard 1.3 attempts to limit the granting of continuances, and the commentary states that “the need for prompt disposition of criminal cases transcends the desires of the immediate participants in the proceedings.” Standard 2.2 provides that the time for trial shall commence to run without demand by the defendant, and the commentary notes that the demand requirement is inconsistent with the public interest in prompt disposition of criminal cases. “[T]he trial of a criminal case should not be unreasonably delayed merely because the defendant does not think that it is in his best interest to seek prompt disposition of the charge.”


58 Hearings on S. 895 Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary, 92d Cong., 1st Sess. (1971) [hereinafter cited as 1971 Senate Hearings]. The amended version was reported to the Judiciary Committee in 1972. S. REP. No. 1021, 93d Cong., 2d Sess. 4-5 (1974). Significant changes included addition of the interim provisions of section 3164; removal of the original blanket exemption for certain complex cases (antitrust, securities, and tax violations); and addition of special sanctions against government and defense attorneys.

59 S. 754, 93d Cong., 1st Sess. (1973); see Hearings on S. 754 Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary, 93d Cong., 1st Sess. (1973) [hereinafter cited as 1973 Senate Hearings].

60 S. REP. No. 1021, 93d Cong., 2d Sess. 2-3 (1974). The original sanction of dismissal with prejudice was replaced with a provision permitting re prosecution under “exceptional circumstances.” Other important changes included further expansion of the planning process and addition of the three statutory guidelines which judges must consider in deciding whether to grant an excludable, “ends of justice” continuance.
Crime of the House Judiciary Committee, Representative Conyers of Michigan introduced H.R. 17409, which substantially duplicated S. 754 with some major exceptions. When the bill was presented before the House, the sponsors of the bill agreed to a change in the dismissal with prejudice sanction which would give the trial judge an option to dismiss either with or without prejudice. The bill was thereupon approved by the House, and Senate confirmation soon followed.

During most of its legislative history, the Act was opposed by the two major agencies responsible for the administration of federal criminal justice. The Justice Department’s major objections, which related to the dismissal with prejudice sanction, were eventually withdrawn. The Judicial Conference of the United States opposed the Act on the grounds that rule 50(b) and other judicially-

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63 The exceptions are as follows: (1) H.R. 17409 contained the judicial emergency provision found in the final version of the Act; (2) The sanction of dismissal with prejudice, removed by the Senate amendments to S. 754, was restored; (3) The separate 10-day limit applicable to the period between indictment and arraignment was added, thus increasing the overall time from indictment to trial under the permanent time limits to 70 days. See H.R. Rep. No. 1508, 93d Cong., 2d Sess. 9-10 (1974).


65 Id. at S 22,489-89.

66 See 1973 Senate Hearings, supra note 59, at 109-16 (statement of Deputy Att’y Gen. Joseph Sneed). Two years earlier, however, then-Attorney General Rehnquist had stated that the Department did not “categorically oppose” the mandatory dismissal provisions. 1971 Senate Hearings, supra note 58, at 96.


68 The Committee on Rules of Practice and Procedure of the Judicial Conference of the United States had been working on its own proposals for speedy trial, in the form of proposed amendments to rule 45 of the Federal Rules of Criminal Procedure. In March of 1971, the Committee released two alternate drafts. 1971 Senate Hearings, supra note 58, at 317-34. Alternate No. 1 was subsequently adopted with little change as rule 50(b). Fed. R. Crim. P. 50(b). Effective October 1, 1972, rule 50(b) provided that each district must adopt a plan for the prompt disposition of criminal cases. Such plans were to include separate limits for the pretrial, trial, and sentencing stages, as well as special provisions for the trial of defendants in custody and dangerous released defendants. Unlike the Speedy Trial Act, however, the plans allowed each court to determine the length of its own limits and the sanctions, if any, to be imposed. Alternate No. 2 was not adopted as part of the Federal Rules, but it apparently formed the basis for the “model” district plan promulgated by the Judicial Conference in August of 1972. Admin. Office of U.S. Courts, Model Plan for the U.S. District Courts for Achieving Prompt Disposition of Criminal Cases, Aug. 19, 1972, reprinted in 1972 Senate Hearings, supra note 59, at 217 [hereinafter cited as 1972 Model Plan]; Cohn, Rule 50(b): Response of the District Courts, July 5, 1973 (report prepared for the Criminal Justice System Workshop at Yale Law School), reprinted in 1973 Senate Hearings, supra note 59, at 220.
administered remedies\textsuperscript{69} were sufficient.\textsuperscript{70} This opposition was apparently never withdrawn and remains a matter of some concern since the degree of flexibility inherent in the statutory scheme\textsuperscript{71} presupposes a level of judicial support which may be lacking.

III. THE MAJOR PROBLEMS OF POLICY AND INTERPRETATION

Despite its lengthy legislative history, the Speedy Trial Act contains a large number of ambiguities and unresolved policy issues. In addition to the usual problems created by last-minute revisions and compromises, there are major difficulties in defining excludable time periods, interim provisions, and allowable sanctions. The more fundamental difficulty is whether the structure and length of the permanent time limits represent a realistic and efficient solution to the problem of pretrial delays. Moreover, the Act's elaborate planning procedures may not provide alternative solutions as quickly as Congress hoped.

The discussion which follows attempts to identify the more serious issues—those which go to the heart of the statutory scheme—and to suggest some workable solutions which are consistent with the apparent legislative intent.\textsuperscript{72} This intent is to be

\textsuperscript{69} At about the time of the Judicial Conference proposals, the Circuit Council of the Second Circuit Court of Appeals had promulgated its own set of detailed and ambitious rules regarding prompt disposition of criminal cases. Second Circuit Rules Regarding Prompt Disposition of Criminal Cases, 8 Crim. L. Rptr. 2251 (1971). These rules provided that detained defendants must be released if the Government was not ready for trial within 90 days of detention, and all defendants not tried within six months of arrest were to have their charges dismissed. Many of the same exceptions and exclusions found in the Senate bills and the ABA Standards were made applicable to each of these time limits.


\textsuperscript{71} See pp. 689-711 infra.

\textsuperscript{72} Some of the issues to be discussed have already been addressed. See Comm. on Administration of the Criminal Law of the Judicial Conference, Guidelines to the Administration of the Speedy Trial Act of 1974, Aug. 8, 1975, revised, Aug. 4, 1976 [hereinafter cited as Judicial Conference Guidelines]. The Judicial Conference and the Administrative Office of the U.S. Courts have subsequently issued a series of numbered "advisories" and "directives" relating to the Act. Although the Judicial Conference Committee is composed entirely of federal judges, the Guidelines were presented as "tentative advisory interpretations" of the Act and are not to be regarded as "binding interpretations." Id. The Guidelines do help to explain, however, certain statutory problems which are not resolved in the legislative history, and they also indicate the approach federal judges are likely to follow. Another useful interpretative source, which generally follows the Guidelines' interpretations, is the "model" statement of time limits prepared for inclusion in the 1976 district plans required by the Act. See Administrative Office of U.S. Courts, Model Statement of Time Limits and Procedures for Achieving Prompt Disposition of Criminal Cases, Feb. 18, 1976 (Speedy Trial Advisory No. 11) [hereinafter cited as 1976 Model Statement]. See also Administrative Office of U.S.
gleaned from the House and Senate reports,\textsuperscript{23} the lengthy published hearings, correspondence, and other materials considered by Congress,\textsuperscript{24} and the final House debates.\textsuperscript{25}

A. The Structure and Length of the Time Limits

The most difficult policy issues raised by the Act concern the structure and length of its permanent time limits. The Act provides separate, relatively short limits for each principal stage of prosecution, and it remains to be seen whether the greater incentives created by such a scheme outweigh the administrative problems. It may be that a single, somewhat longer time limit (with fewer excludable time periods) could achieve substantially the same objectives more efficiently, or that separate time limits should be established for each district court, or for different classes of offense or methods of disposition. Even if the three-stage approach is retained, certain ambiguities relating to the arraignment limit should be resolved by statutory amendment.

1. Separate Time Limits: Pro and Con. During most of the legislative history, the statutory scheme consisted of a single 60-day time limit from arrest or indictment (whichever was later) to trial.\textsuperscript{76} The 30-day arrest-to-indictment limit was added in March of 1974, apparently in response to research results which showed significant delays in the preindictment period.\textsuperscript{77} The 10-day arraignment limit

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\textsuperscript{23} See notes 58, 63 supra.

\textsuperscript{24} See notes 58-59, 61 supra.


\textsuperscript{77} A study by the Federal Judicial Center found that in 1970 "the average delay between arrest and indictment in the busier federal courts was over 100 days." S. Rep. No. 1021, 93d
was added by the House in October of 1974, for reasons which are not clear.\textsuperscript{78}

The final three-stage approach has certain inherent advantages. First, not all defendants pass through each stage of procedure. Some are arrested and subsequently discharged, without being indicted; others are not arrested or issued a summons until after an indictment or information has been filed; and some defendants plead guilty at their initial arraignment, so that they never appear in the “awaiting trial” status. In each of these cases, the statute provides a shorter overall time limit than would be the case if a single arrest-to-trial time limit were used. Another advantage of multiple limits is that participants in the later stages of plea and trial are not disadvantaged by excessive delays in the preindictment stage, nor is extra time gained simply because the earlier stages were brief.

On the other hand, the allowable time which is “lost” by rapid processing of early stages may be needed later on to permit adequate trial preparation.\textsuperscript{79} One consequence of this problem will be a general tendency to “take the limit” at each stage, whether or not extra

\textsuperscript{78} According to the House Report, the separate arraignment limit was added, at the suggestion of the Justice Department, so that the trial limit would begin at “a logical point in the proceedings.” The Department had argued that “it would be a waste of judicial resources to require the courts to schedule trials at the time of the filing of an indictment, due to the possibility that the defendant may choose to plead either guilty or nolo contendere, thus making trial unnecessary.” H.R. Rep. No. 1508, 93d Cong., 2d Sess. 30-31 (1974). This reasoning is not entirely satisfactory, since the old version did not require the court to set a trial date prior to arraignment, but only “at the earliest practicable time.” S. 3936, 91st Cong., 2d Sess. § 3161(a) (1970). A better reason for setting separate arraignment and trial limits is to encourage promptness at the outset of the case by means of a short-term and a longer-term deadline, instead of a single long-term limit.

\textsuperscript{79} Although certain forms of delay may be specific to different stages of procedure, it seems likely that delays related to trial preparation and plea negotiations can take place at any time after arrest. Whether these delays take place prior to indictment or after may be largely fortuitous, and it is likely that many cases which move quickly from arrest to indictment or from indictment to arraignment may move relatively slowly thereafter, while the parties “catch up” on their trial preparations. One study found a negative correlation between indictment-to-arraignment and arraignment-to-trial intervals. 1976 District Plan for the Northern District of Illinois, app. A, June 11, 1976 (on file in the Office of the Clerk of the Court) [hereinafter cited as 1976 Northern Illinois Plan]. The study also indicated that a significantly smaller percentage of defendants meet all applicable time limits than meet the combined totals of 100 or 70 days. Id. at 27-28. These findings suggest that some cases which fail to meet a particular time limit nevertheless meet the overall limit, because excessive delays at one stage are balanced by speedier processing at other stages.
time is actually needed, and this could have the effect of slowing down some cases. Since the timing of indictment and arraignment is largely under the control of the U.S. Attorney, these events can be manipulated in order to maximize the time available for preparation of the case. There might even be a tendency to arrest more defendants on magistrates' complaints, if the need for an arrest is strong, in order to gain the additional 30 days afforded by the arrest-to-indictment limit. Another consequence of the multi-stage limit is that postindictment arrest cases receive less overall time for trial preparation than preindictment arrests, even though postindictment arrests typically involve white-collar and other complex charges which require lengthy periods of trial preparation or plea negotiation or both. Although the U.S. Attorney may be able to achieve 30 days worth of trial preparation by the time an indictment or information is filed, the defense attorney certainly would not. Congress may therefore want to provide a longer trial limit for postindictment arrests.

The separate 10-day arraignment limit is particularly problematic. Its purpose of course is to discourage delay at the outset of the case; the sooner the defendant and his counsel appear in court and receive a specific schedule for discovery and pretrial motions, the sooner the court will be able to set a realistic trial date. Indeed, the expeditiousness of these early proceedings could well determine the whole tempo and style of the litigation; thus, as a matter of principle, arraignments should be held as soon as possible. The difficulty with this rationale, however, is that the entry of a plea of not guilty bears no necessary relationship to the disposition of later pretrial matters. The enforcement of a strict 10-day arraignment limit could result in nothing more than the entry of "pro forma" not guilty pleas. It would also complicate the entry of initial guilty pleas, for such a plea generally requires more time to prepare than does an initial plea of not guilty.\footnote{Id. at Table 8.} In the past courts were free to delay the arraignment in order to allow for this preparation. Under the Act, however, a not guilty plea must be entered within 10 days even if the defendant intends to plead guilty; the result is an extra, unnecessary court appearance.

The separate arraignment limit is also very troublesome to enforce. On the one hand, it seems unduly harsh to require dismissal of the case—even dismissal without prejudice—simply because the defendant was not arraigned until the eleventh day; to avoid this
result, courts would almost certainly resort to very liberal use of the excludable time provisions. On the other hand, if no sanction is provided to enforce the arraignment limit, it is not likely to be respected. As it turns out, an apparent mistake in draftsmanship may have effectively eliminated the separate arraignment limit in favor of a single, 70-day postindictment limit. Even if this was not the actual intent of Congress, the Act should be amended to make this result explicit.

2. The Length of the Statutory Time Limits. Whether or not the three-stage delimitation is retained, there is some question whether the overall length of the time limits is appropriate for all cases in all districts. To begin with, the time limits are shorter than comparable time limits prescribed by most state statutes, the federal rules, and the recommendations of the President’s Crime Commission. The limits are also much shorter than existing disposition times in federal criminal cases. A Federal Judicial Center study of all defendants terminated in 1974 showed, for example, that only two of the ninety-four districts were able to dispose of more than 90 percent of their defendants within 70 days. Of course,

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81 See text at note 112 infra.
82 This comparison is all the more significant in view of the fact that state statutes generally permit the defendant routinely to waive the speedy trial limit. See, e.g., ILL. REV. STAT. ch. 38, § 103-5 (1973) (120 days from the beginning of custody, or 160 days from the date trial was demanded, if defendant is not in custody). See also note 152 infra.
83 The 1972 Model Plan, which was adopted by most districts pursuant to Federal Rule of Criminal Procedure 50(b), provides a time limit of 180 days from plea of not guilty to trial in noncustody cases; for custody cases, the limit is 90 days. See note 68 supra.
84 The Crime Commission recommended that courts establish standards for the completion of various stages of criminal cases, and that “the period from arrest to trial of felony cases be not more than 4 months.” The Challenge of Crime, supra note 55, at 155. The applicability of this limit to federal cases has been questioned: “While this seems to be an appropriate standard for common-law felonies, it may be unrealistic in the type of white-collar criminal cases with which the federal courts are frequently occupied. Particularly is this so in view of the continually expanding scope of pretrial proceedings.” 8A J. Moore, Federal Practice ¶ 48.03[1], at 48-22 (2 ed. rev. 1975).
85 The National Advisory Commission on Criminal Justice Standards and Goals adopted a somewhat different approach. National Advisory Comm’n on Criminal Justice Standards and Goals, Report on Courts, Jan. 23, 1973. The Report on Courts, in Standard 4.1, states that the time from arrest to trial in a felony case “generally should not be longer than 60 days.” The standard for misdemeanors is 30 days. The commentary to these standards notes the contrast with the recommendations of the Crime Commission, but argues that the shorter standards “are realistic if it is recognized that they relate only to the norm or average and do not impose outside limits.”
87 Id. The two districts were Middle Alabama and the Canal Zone. The study also showed that one-fourth of the defendants took more than 160 days from indictment to dismissal, entry of a guilty plea, or commencement of trial, and almost one-half took more than 70 days. Nationwide figures on arrest-to-indictment intervals are not yet available, but the elaborate
these figures do not necessarily imply that the statutory limits are unrealistic, given the substantial resources and incentives which the Act is specifically designed to provide. But whether the limits are realistic remains to be seen, for there is certainly no inherent wisdom to the precise limits chosen. The 60-day trial limit, for example, was based largely on studies of pretrial recidivism which failed to address the crucial issue of the amount of time needed to dispose of criminal cases. Although Congress received testimony on this issue, it failed to analyze the problem carefully. As for the 30-day indictment limit, this standard was based on a survey of fifteen districts, and Congress decided without enlisting supportive evidence that the average arrest-to-indictment interval achieved by the three fastest districts should serve as the maximum allowable limit for all cases in all districts.

Thus, even if significant improvements in previous disposition times are achieved, it is quite likely that many cases will still take more than 70 or 100 days from arrest to trial or plea. Consequently, many courts will find it necessary to make frequent use of the various statutory exclusions and exceptions, to avoid undue pressure on the parties or large numbers of dismissals with prejudice. As will be demonstrated in the discussion which follows, the language of these provisions is flexible enough to accommodate almost any form of delay. The combination of this flexibility with the short statutory

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research and planning procedures required under sections 3165 through 3171 of the Act should insure that this and other statistical data pertaining to speedy trial will soon be available for all defendants in all federal districts. See text at note 259 infra. A 1973 survey of fifteen districts revealed an average arrest-to-indictment interval of 50.9 days, and only three districts had an average of less than 40 days. 1973 Senate Hearings, supra note 59, at 217. In earlier Federal Judicial Center studies, none of the districts examined had an average arrest-to-indictment interval of less than 40 days. See note 77 supra.

Testimony and correspondence were received from a large number of federal prosecutors, defense attorneys, and judges regarding the feasibility of the proposed trial limit, but Congress appears to have given greater weight to the more optimistic views expressed. For example, the Senate Report refers to a speech by Whitney North Seymour, former U.S. Attorney for the Southern District of New York, indicating that his office was “ready for trial” within 60 days of arrest in “the overwhelming bulk of cases.” S. Rep. No. 1021, 93d Cong., 2d Sess. 8 (1974); see 1973 Senate Hearings, supra note 59, at 174-76 (transcript of speech). A subsequent letter from Mr. Seymour states, however, that it is “totally unrealistic” to believe that all federal cases can be brought to trial within 60 days. Id. at 190-91. Figures contained in his letter indicate that in 1972, less than 40 percent of defendants in the Southern District were tried or pled guilty within 60 days. See Administrative Office of U.S. Courts, Speedy Trial Advisory No. 4, Dec. 5, 1975 (presenting similar data for 1974).


Pp. 689-711 infra.
limits has one major advantage: it provides the maximum potential incentive to expedite all cases—even those which move fairly quickly—while giving the courts the power to tailor the effective, "net" time limits to the particular circumstances of the cases which take longer.

Flexibility is obviously a mixed blessing. It is entirely possible that liberal construction of the statutory exceptions could achieve technical "compliance" with little or no change in previous disposition times. In fact, excessive use of some of these provisions could even result in greater delays.\[^1\] In any case, the frequent application of these exceptions would involve considerable expenditures of court and attorney resources which ought to be spent in disposing of cases on the merits. Thus, from the standpoint of efficiency, as well as effectiveness, it may prove desirable to limit the application and use of certain exceptions, and this in turn would require either lengthening the current limits, or adopting separate limits for different kinds of cases.

A second reason for lengthening the time limits is to reduce the need for frequent case reassignment. Under the so-called individual calendar system,\[^2\] the processing of cases is sometimes delayed due to illness, vacations, or extended trials. To the extent that such delays are not covered by one of the statutory exceptions, the oldest criminal cases on a given docket must be transferred to another judge to permit compliance with the Act. Such transfers, however, inevitably involve certain disruptions, inefficiencies, and the possibility of inconsistent rulings. Perhaps most important, widespread transfer of cases would ultimately weaken the valuable incentive for rapid processing of cases which the individual calendar system provides. Since cases are assigned randomly under this system, all judges receive comparable workloads over time, and this fosters a healthy spirit of competition and pride in the volume of work accomplished by each judge. The widespread transfer of cases, by disrupting the comparability of workloads, tends to remove this incentive. Thus, if experience with the Act shows that many reassignments are required, even after initial backlogs have been re-

\[^1\] See text and notes at notes 126-36 infra.

\[^2\] Under this system, which is now used by most federal courts, a single judge normally handles all aspects of a case from filing to disposition. Unlike the so-called master calendar system used in some jurisdictions, it only rarely involves reassignment. See Campbell, Judicial Responsibility for Calendar Control, 28 F.R.D. 63 (1961). For a discussion of this system and the problems caused by the Act, see 1976 Northern Illinois Plan, supra note 79, at 33-39.
duced and additional resources provided, then Congress should consider lengthening the statutory time limits in some or all cases.

The advantage of adopting separate limits for different kinds of cases is that this preserves the incentive to expedite those cases which really can be tried within 70 or 100 days. For example, bank embezzlement and postal theft cases typically move much faster than those involving fraud or extortion charges; if experience with the Act shows that such differences remain, despite efforts to expedite all cases, then it might make sense to adjust the statutory time limits accordingly. The difficulty with this approach, however, is that it fails to account for the tremendous variations within offense categories, no matter how narrowly defined. A major cause of this variation is the effect of method of disposition: commencement of trial generally takes longer than the process of negotiating a change of plea, and such "later" guilty pleas take longer than initial pleas. Thus, trials in embezzlement cases may take considerably longer than pleas in fraud and extortion cases.

The most precise tailoring of fixed time limits to individual case necessities would therefore involve limits based on both the type of offense and the method of disposition. For example, postal theft cases could be given a certain period of time for entry of a guilty plea, after which no guilty plea would be acceptable, and the case would have to go to trial within a longer time limit. However, such a statutory "plea cutoff" could result in substantially fewer guilty

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83 Congress anticipated that such an approach might be desirable. As part of the planning process established under the Act, each district plan must include data on "the identity of cases which, because of their special characteristics, deserve separate or different time limits as a matter of statutory classifications." 18 U.S.C. § 3166(b)(7) (Supp. IV, 1974). There are actually several distinct reasons why it might be important to establish separate time limits for different offenses. First, as suggested in the text, some offenses may characteristically require more or less than the average amount of time for preparation, even after statutory exclusions are deducted. Second, there may be some cases which, like the detention and high risk categories under the interim provisions, require shorter (or longer) time limits due to relative differences in the value of speedy trial in such cases. Finally, the value of successful prosecution, relative to the value of speedy trial, may require longer limits in some cases, to minimize the incidence of dismissals under the Act.

84 See 1976 Northern Illinois Plan, supra note 79, at Table 10. In 1974 the average indictment-to-trial (or plea) intervals, by offense, ranged from 50 days (postal offenses) to 178 days (extortion, racketeering, and threats).

85 For a discussion of the problems inherent in expediting cases and estimating future compliance rates prior to the effective date of the statutory sanctions, see pp. 720-22 infra.

86 See 1975 ANNUAL REPORT, supra note 8, Table D6. In another study the average time from filing to trial or guilty plea was 50 days for initial pleas of guilty; 119 days for later pleas of guilty; and 180 days for trials. See 1976 Northern Illinois Plan, supra note 79, at Table 8. The differences due to method of disposition appear to be greater than the differences due to offense. Id. at Tables 10, 10a.
pleas, which would compound court congestion problems and result in unnecessary trials. A simpler alternative would be to have a single set of time limits for all offenses in a given district, adjusting the limits to take account of the average complexity and typical methods of disposition found in each district. This would be the easiest system for a court to administer, but preliminary determination of the exact formula to be applied would be difficult, and problems would be created in cases where prosecution is transferred between districts. Moreover, the variation in disposition times within districts is substantial,\(^9\) and if the limits were set low enough to expedite the faster cases, it would be necessary to make frequent use of statutory exceptions to account for the slower ones.

None of these alternatives can be fully evaluated until the courts have had more experience with the Act, but the best scheme would probably be a single set of somewhat longer limits, applicable to all cases in all districts. Although this tends to sacrifice incentive in the faster cases, there are certain inherent administrative pressures, at least in courts using the individual calendar system, which tend to encourage prompt disposition of "easy" cases.\(^8\) A somewhat longer set of limits would still have the beneficial effect of lowering average disposition times, while eliminating the most extreme "stragglers." These more modest achievements are definitely attainable, at relatively little additional cost. Ultimately, Congress must decide whether further reductions in disposition time are worth the administrative costs and inefficiencies: the difference between three years and three months is significant and well worth the price; the difference between three months and two months (assuming the latter is attainable) may not be.

3. Interpreting the Arraignment Limit. In the event that the present three-stage structure of time limits is retained, it will be necessary to resolve certain ambiguities in the language relating to the 10-day arraignment limit. When this limit was added in the last few months before passage, a number of related sections which had been keyed to the previous indictment-to-trial time limit were apparently not conformed to the final version, and a potential loophole was created by the language which defines when the arraignment limit commences to run.

The first sentence of section 3161(c) provides as follows:


\(^8\) See text and note at note 92 supra. In addition to the competitive spirit fostered by the individual calendar system, judges like to keep their pending caseload down to a manageable size.
The arraignment of a defendant charged in an information or indictment with the commission of an offense shall be held within 10 days from the filing date (and the making public) of the information or indictment, or from the date a defendant has been ordered held to answer and has appeared before a judicial officer of the court in which such charge is pending, whichever date last occurs.

The reference to publication of the charge serves to delay the start of the arraignment limit in the case of a sealed indictment; the second half of the quoted sentence also serves to delay the starting date in those cases where the defendant has not previously appeared before a magistrate in the charging district, e.g., where the prosecution begins with the filing of an information or an indictment.

The reference to appearance in court means that the first time limit applicable to a defendant arrested after indictment does not begin to run immediately upon arrest.\(^9\) In the case of a defendant arrested in another district, the entire period of transportation or unsupervised travel to the charging district is exempted,\(^10\) as well as any period after arrival but prior to the initial appearance. Similarly, defendants arrested within the district are not subject to any time limit until their first appearance before the judge,\(^11\) which is often at the arraignment itself. Since arraignments are usually scheduled by the U.S. Attorney in cooperation with defense counsel, the Act permits the parties to gain extra time by agreeing to delay the defendant's first "appearance."

The House Report clearly indicates that no such loophole was intended.\(^12\) To effectuate this intent the Act should be amended to provide that, where the defendant is found within the district, the arraignment limit begins to run upon arrest (or service with a summons).\(^13\)

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\(^9\) On the other hand, the 30-day indictment limit begins to run upon arrest or service with a summons. 18 U.S.C. § 3161(b) (Supp. IV, 1974).

\(^10\) Federal Rule of Criminal Procedure 40 requires that a defendant arrested outside the charging district be taken before a magistrate "without unnecessary delay" for a "removal" hearing. After that point, however, there are no limits on the timing of his prosecution.

\(^11\) When a defendant is arrested pursuant to a magistrate's complaint, he must be brought before the nearest available federal magistrate "without unnecessary delay." Fed. R. Crim. P. 5. In contrast, the initial court appearance of a defendant arrested pursuant to an indictment or information is not regulated by the Federal Rules. See Fed. R. Crim. P. 9. The 1972 Model Plan under rule 50(b) requires arraignment within 30 days of indictment or arrest, whichever is later (20 days, if the defendant is in custody), but there are no sanctions to enforce this standard. See note 68 supra.

\(^12\) "This provision is not intended to give the attorney for the Government the discretion to extend the time for arraignment beyond 10 days where the defendant's presence could have been obtained by the exercise of prosecutorial initiative." H.R. Rep. No. 1508, 93d Cong., 2d Sess. 14 (1974).
Of course, the Government could still gain time by delaying the arrest itself, since there does not appear to be any statute or rule requiring prompt issuance of an arrest warrant or summons after the filing of charges. The result is a substantial loophole, unregulated by either the Act or the statute of limitations. If lengthy delays are found to occur at this stage, it may be necessary to set some sort of limit by statute or local rule.

In the case of arrests outside the district, a different rule may be required. Even if Congress wanted merely to control delays occurring after arrival in the charging district, it would have been better to have the arraignment limit begin at that point. However, the House Report recognizes that considerable delays take place prior to arrival, particularly in the case of prisoners in custody, and the Report goes on to state that the inconvenience or expense of promptly transporting such prisoners does not justify delaying the arraignment. Nevertheless, the language of the Act permits such delays to go unregulated, resulting in a major loophole and considerable hardships to defendants in custody.

To resolve these problems and effectuate the legislative intent, the Act may have to be amended to provide a limited period of time for transportation or travel to the charging district. For example, the

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163 If additional time is needed to permit the newly-arrested defendant to secure counsel, this could be handled by means of an exclusion or by simply providing that the arraignment limit for postindictment arrests will be 20 days, rather than 10.

164 Federal Rule of Criminal Procedure 9(a) provides that a warrant or summons shall issue “upon the request of the attorney for the government,” although the court may also order the issuance of a summons. Cf. Fed. R. Crim. P. 4 (warrant or summons “shall issue” upon filing of a complaint).

165 The filing of formal charges within five years of the offense satisfies the general federal statute of limitations, 18 U.S.C. § 3282 (1970), and even if such charges are later dropped after the five-year period has expired, the Government is granted an additional six months to refile. Id. § 3288.

166 “[P]risoners aren’t moved immediately when ready because the marshals try to make their trips worthwhile by combining the movement of several prisoners. So it may take several weeks to get a prisoner from Florida to Colorado . . . .” H.R. Rep. No. 1508, 93d Cong., 2d Sess. 31 (1974) (testimony of U.S. Atty Trecce, D. Colo.).

167 See note 106 supra. The prisoner transportation system operated by the U.S. Marshal’s Service frequently results in a series of short trips from one local jail to another. (There are only three federally-operated jails in the country.) These trips may or may not take the most direct route to the charging district—that depends on how many prisoners are going in a given direction on a given day—and conditions in the local jails are generally poor. See Goldfarb, JAILS: THE ULTIMATE GHETTO (1975); LAW ENFORCEMENT ASSISTANCE ADMIN., NATIONAL JAIL CENSUS—1970 (1971). Moreover, due to the unpredictability of daily movements within the prisoner transportation network, communication with friends, family, defense counsel, or business partners is difficult or impossible. Such prisoners are unlikely to obtain a bond reduction hearing until they arrive in the charging district, and the result may be several weeks of unnecessary detention.
Act could provide that the arraignment limit will begin to run 10 days after arrest outside the charging district, and that additional time may only be provided in exceptional circumstances. Alternatively, a longer limit could be established, not subject to any exception. Prior to such amendments, the frequency and duration of postindictment removals should be monitored closely to determine the most efficient and realistic approach to the problem.

Another category of defendants are those who are transferred from other authorities, rather than being arrested or served with a summons. If the transfer is made outside the district, the prisoner must be transported back to the charging district, and the delays discussed above are likely to occur. Thus, the Act should be keyed to the date of transfer, rather than the date of first appearance in court.

In the case of defendants who are serving a term of imprisonment, however, Congress apparently intended to permit inclusion of time prior to either transfer or initial appearance. Section 3161(j) requires the government promptly to request transfer or file a detainer as soon as charges are filed, but since neither the indictment nor arraignment "clock" would be running, this duty may be difficult to enforce. To deal with this problem, the House Report suggests that

if the attorney for the Government is responsible for unreasonable delay either in causing a detainer to be filed with the custodial official or seeking to obtain the prisoner's presence for trial in lieu of filing a detainer or upon receipt of a certificate of demand for trial, any such period of delay should be counted in ascertaining whether the time for trial has run in connection with the defendant's demand for dismissal under Section 3161(a)(2).110

Such a rule111 has no basis in the language of the Act, and an amend-

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109 Transfer of a prisoner prior to expiration of his sentence is normally accomplished by means of a writ of habeas corpus ad prosequendum. A detainer is simply a request for custody of the defendant upon his release or upon expiration of his sentence. The Act gives the Government the choice of filing a writ or a detainer, and if the latter alternative is chosen, the defendant may then demand immediate trial (i.e., prior to expiration of his sentence). 18 U.S.C. § 3161(j)(2) (Supp. IV, 1974). If he does demand trial, the Government must "promptly" seek to obtain his presence by means of a writ. Id. § 3161(j)(3). See text at note 138 infra.

110 H.R. REP. No. 1508, 93d Cong., 2d Sess. 36 (1974). The reference to subsection 3161(a)(2) is probably a typographical error, since no such section existed at the time of the House Report. The context suggests that section 3162(a)(2), dealing with dismissal for failure to meet the time limit for commencement of trial, was probably intended.

111 For a similar rule, see ABA STANDARDS, supra note 56, Standard 3.2.
The reference to the time limit for "trial," and the use of the singular in referring to section 3161(c) would mean, taken literally, that there is no sanction for failure to hold the arraignment within 10 days. The House Report does not discuss this question directly, but the "general description" of the bill indicates that the sanction of dismissal "applies to both the period between arrest and indictment and between indictment and trial." This suggests that the indictment-to-arraignment period was not intended to be exempt from sanctions.

In order to effectuate this apparent intent, one of two interpretations must be adopted. Either the sanctions apply directly to the arraignment limit, or else 10 days are to be added on to the 60-day trial limit, so that all defendants must be brought to trial or plead guilty within 70 days of indictment or initial appearance in the district. The latter approach, which treats the two postindictment limits as a single "trial" limit for purposes of sanctions, is probably preferable because it avoids the harshness of dismissing the case simply because the defendant was not arraigned within the relatively short 10-day limit. The former approach involves reading more into the literal terms of section 3162 and would probably result in either more dismissals or excessive use of exclusions, but it does serve to emphasize the importance of prompt arraignments, and it gives some independent meaning to the arraignment limit. Failure to adopt either of these interpretations permits a substantial "time out" period at the outset of every prosecution; if the 10-day arraignment limit is merely a voluntary guideline, without sanctions, arraignments could be delayed indefinitely. It seems highly unlikely that Congress intended such a result.

A similar problem involves the application of section 3161 exclusion provisions during the indictment-to-arraignment period. Section 3161(h) provides that these exclusions apply "in computing..."

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112 (Emphasis added.)


114 If "unreasonable" pretransfer delays are counted, in the case of imprisoned defendants, violation of the 10-day limit would be inevitable. See text and notes at notes 109-11 supra.
the time within which an information or an indictment must be filed, or in computing the time within which the trial of any such offense must commence.” Thus, unless the reference to “trial” is construed broadly enough to include both of the postindictment time limits, the exclusions do not apply to the arraignment limit. Of course, if there is no sanction for violation of the 10-day arraignment limit, then there is no real need to calculate excludable time. But if sanctions are applicable, either directly or by means of an overall 70-day indictment-to-trial limit, then the statutory language should be amended to permit the use of exclusions. For example, if a defendant became a fugitive during this period, it would be absurd to expect to hold the arraignment within either 10 days or 70 days. Although the House Report does not address this problem directly, the various descriptions of section 3161(h) imply that the exclusions would apply to the arraignment limit;\(^\text{115}\) since this is the most reasonable approach, the failure to point out a different interpretation probably means that the problem was a result of a last-minute drafting error.\(^\text{116}\)

B. Statutory Exceptions: The Search for Controlled Flexibility

Congress recognized that it could not realistically expect the indictment, arraignment, and trial of all defendants within a single set of relatively short, nonwaiveable time limits, and therefore combined these limits with a large number of statutory exclusions and escape clauses.

These provisions can be viewed as operating at four levels. (1) The narrowest exceptions are the provisions for excludable time contained in sections 3161(h)(1) through (7), dealing with “other proceedings concerning the defendant,” deferred prosecution, unavailable parties, codefendant delays, and other specified events of excusable delay. (2) A much broader exception is contained in sec-

\(^{115}\) For example, the House Report indicates that the exclusion for “proceedings relating to transfer from other districts” includes “proceedings with respect to transfer for plea and sentence” under rule 20 of the Federal Rules. Such proceedings would normally take place prior to the entry of the initial plea. H.R. Rep. No. 1508, 93d Cong., 2d Sess. 21 (1974).

\(^{116}\) Another apparent oversight relates to the treatment of defendants who are permitted to withdraw their guilty plea. Section 3161(i) provides that upon withdrawal of a guilty plea to any of the charges “the defendant shall be deemed indicted with respect to all charges . . . within the meaning of § 3161, on the day the order permitting withdrawal of the plea becomes final.” Taken literally, this would provide a 10-day arraignment limit, followed by the 60-day trial limit, even though the defendant has already been arraigned. Thus, such a defendant should probably be deemed indicted and arraigned as of the date of the withdrawal, so that his trial must commence within 60 (not 70) days thereafter. See 1976 Model Statement, supra note 72, § 5(e).
tion 3161(h)(8), which permits the court to exclude periods of delay resulting from continuances granted to serve the "ends of justice." Although several statutory guidelines are provided for the granting of such continuances, this provision clearly gives the court considerable discretion.\footnote{See text at note 146 infra.} (3) If the statutory time limits are violated, the statutory dismissal sanction permits dismissal without prejudice.\footnote{18 U.S.C. § 3162(a) (Supp. IV, 1974).} (4) If all of the foregoing exceptions are insufficient to permit a court to substantially comply with the statutory time limits, the "judicial emergency" provisions permit the chief judge to apply for a district-wide suspension of the arraignment and trial time limits.\footnote{Id. § 3174.}

The attempt to combine the strict time limits with the necessary flexibility is full of paradoxes. On the one hand, Congress seemed to be saying that the courts had shown insufficient commitment to the goal of speedy trial and must, therefore, be forced to address this objective by means of statutory time limits. On the other hand, the diversity of individual cases and special circumstances requires a degree of flexibility in direct proportion to the strictness of the time limits, and this same flexibility gives the courts complete control over the extent to which prosecutions will actually be expedited. A second paradox relates to the "cost" of statutory flexibility: the more exceptions and exclusions permitted, the more administrative, judicial, and attorney time must be consumed in construing and applying these provisions. The time required to administer the statutory exceptions might therefore equal or exceed any savings in disposition time to be achieved by application of the statutory time limits.

Furthermore, the attempt to define periods of excludable delay presupposes that there are certain kinds of delay which are justified and others which are not. This approach seems plausible enough, since certain kinds of delay—such as where the defendant is a fugitive or incompetent to stand trial—should plainly be excluded from even the most generous statutory time limit. Other kinds of delay, however, are less easily appraised, and a legislature is not likely to agree on which delaying activities are "worthy" of exclusion or on statutory language specifying when such delays are excusable. In the case of plea bargaining delays, for example, it is quite possible that such out-of-court activities actually tend to expedite the disposition of cases by avoiding lengthy and expensive trials, but how
much time ought to be allocated to this process? The answer obviously depends on the facts of the particular case.

The following discussion examines each of the four levels of flexibility incorporated in the Act. Although some of these provisions could operate both effectively and efficiently if judiciously construed, the Act in general appears to be overly complex. A more workable compromise between firmness and flexibility could be reached by allowing fewer exceptions, combined with somewhat longer statutory time limits.

1. **Specific Categories of Excludable Delay.** Sections 3161(h)(1) through (7) list the fairly specific events and proceedings which are to be excluded from the calculation of elapsed time.\(^{120}\) Many of the exclusions are straightforward and easy to apply, such as those involving delays caused by deferred prosecution,\(^{121}\) by incompetency to stand trial,\(^{122}\) by commitment for drug treatment,\(^{123}\) or by interlocutory appeals.\(^{124}\) Such delays are readily defined by court orders or administrative procedures which occur independently of the Act; thus there is relatively little risk that events will be manipulated to maximize excludable time and defeat the purposes of the Act.

Some of the other enumerated exclusions in section 3161 are both more difficult to define and much more likely to be invoked and abused.\(^{125}\) Particular problems may be caused by the exclusions relating to (1) pretrial motions, (2) proceedings "under advisement," (3) unavailability of the defendant or an essential witness, and (4) superseding charges.

a. **Pretrial Motions.** Section 3161(h)(1) permits the exclusion of "any period of delay resulting from other proceedings concerning the defendant, including but not limited to . . . delay resulting

\(^{120}\) Most of these provisions were included in the earliest drafts of the legislation, and they were apparently derived from the ABA Standards. For a discussion of the legislative history, see pp. 673-76 supra. Similar provisions are found in some state speedy trial statutes. See, e.g., N.Y. CODE CRIM. PRO. § 30.30(4) (McKinney 1971). But since most of these statutes also provide that any defense continuance tolls the statute, such detailed exceptions are rarely at issue. See text at note 150 infra. The statutes also tend to have somewhat longer time limits. See generally text and note at note 82 supra.


\(^{122}\) Id. § 3161(h)(4).

\(^{123}\) Id. § 3161(h)(5).

\(^{124}\) Id. § 3161(h)(1)(D).

\(^{125}\) In the Northern District of Illinois, for example, the three most common exclusions entered during the first three months of 1976 were pretrial motions (56 percent of all exclusions); "under advisement" proceedings (26 percent); and unavoidable defendant/witness unavailability (19 percent). 1976 Northern Illinois Plan, supra note 79, at Table 2.
from hearings on pretrial motions . . .”\textsuperscript{126}

The language of this provision is ambiguous. The narrowest interpretation would exclude only the days actually consumed by the hearing itself; the broadest would permit exclusion of the entire period from filing to disposition of the motion (or the point at which it was taken “under advisement,” thus triggering the application of a separate exclusion provision).\textsuperscript{127} The broad interpretation is suggested by the comprehensive term “proceedings” and by the reference to delay “resulting from” hearings. On the other hand, such an interpretation would make the word “hearings” superfluous.

The legislative history, while not conclusive, suggests that Congress intended a narrow interpretation. The principal sponsor of the bill in the House, Representative Conyers, apparently believed that the exclusion was limited to “actual hearings on pretrial motions.”\textsuperscript{128} The Senate Report does not discuss the scope of this exception directly, but it does indicate that the analogous provision applicable to Narcotic Addict Rehabilitation Act\textsuperscript{129} “proceedings” permits exclusion only of “time actually consumed in hearings on the issue of addiction.”\textsuperscript{130}

A narrow interpretation is also supported by strong policy considerations. If the entire period from filing to hearing is excluded (or from filing to receipt of all briefs, where no hearing is held), then the Act would provide no incentive to limit either extensions of time to file briefs or postponements of the hearing date. Such extensions

\textsuperscript{126} This provision is identical to Standard 2.3 of the ABA Standards and remained virtually unchanged throughout the legislative history. ABA Standards, supra note 56. (There was one temporary change. See note 130 infra.)

\textsuperscript{127} A similar ambiguity affects several other excludable events defined in section 3161(h)(1): competency hearings, trials of other charges, and transfers from other districts. These provisions will not be considered separately because they apply much less frequently than the pretrial motions exclusion, but many of the same arguments in favor of narrow construction are applicable.


At one point the bill contained a provision expressly limiting all of the section 3161(h)(1) exclusions to “such court days as are actually consumed.” S. 754, 93d Cong., 1st Sess. § 3161(e)(1)(B) (1973). The subcommittee added this language for the sole purpose of prohibiting exclusion of posthearing “under advisement” time; the language was removed when the full committee subsequently added subsection 3161(h)(1)(G), which expressly permits such exclusions. See S. Rep. No. 1021, 93d Cong., 2d Sess. 36 (1974). Thus, prehearing delays were never at issue, and the removal of this language does not imply an intent to permit exclusion of such delays. Moreover, the legislative history indicates that, prior to these changes, the pretrial motions exclusion was viewed as including, at most, “the period consumed by the hearing” plus “under advisement” time. Id.
and postponements are probably a major cause of pretrial delay.\textsuperscript{131} Moreover, an automatic exclusion of all delays relating to pretrial motions without regard to duration or justification would seem inconsistent with the strict provisions governing the granting of "excludable" continuances.\textsuperscript{132} A broad rule would actually tend to encourage delays in the disposition of pretrial motions, since judges would not be required to give any reasons for extending a briefing schedule or postponing a hearing. Judges might also be tempted to permit filing of belated or frivolous motions, because each such event would provide substantial additional "breathing room." The narrower the exclusion, the more incentive judges will have to require early filing and briefing of all pretrial motions.\textsuperscript{133}

Unfortunately, an exclusion that is limited to one or two "actual hearings days" is hardly worth the effort, and an intermediate approach would be the hardest to define. (How much delay necessarily "results" from a pretrial motion?) The simplest answer is to eliminate the exclusion entirely and deal with the problem either by means of the excludable continuance provisions or with somewhat longer time limits. The latter alternative seems preferable, particularly if experience with the Act reveals a tendency to overuse the continuance provisions.

b. Proceedings Under Advisement. Subsection 3161(h)(1) (G) permits the exclusion of "delay reasonably attributable to any period, not to exceed 30 days, during which any proceeding concerning the defendant is actually under advisement." This provision was added by the Senate Judiciary Committee so that such exclusions would not have to be made under the "ends of justice" continuance provision;\textsuperscript{134} the 30-day limitation was later added by the House.\textsuperscript{135} The Senate Report indicates that this new exclusion provision was intended to be fairly narrow.

\textsuperscript{131} The 1970 Federal Judicial Center study revealed that, in the 12 districts studied, about 94 percent of the delays between indictment and trial or entry of a guilty plea occurred prior to disposition of the last "substantive motion." 1971 Senate Hearings, supra note 58, at 544. Even if delays between indictment and the filing of the first pretrial motion were subtracted, it is likely that the disposition of such motions would still have accounted for more than half the pretrial delay in these districts.

\textsuperscript{132} 18 U.S.C. § 3161(h)(8) (Supp. IV, 1974); see text at note 146 infra.

\textsuperscript{133} For a discussion of the importance of preventing "[s]uccessive pretrial motions . . . filed on a 'one-at-a-time basis,'" see S. Rep. No. 1021, 93d Cong., 2d Sess. 10 (1974).

\textsuperscript{134} Id. at 36.

\textsuperscript{135} H.R. Rep. No. 1508, 93d Cong., 2d Sess. 32 (1974). The 30-day limitation does not prevent the court from excluding additional time pursuant to section 3161(h)(8), provided the required "ends of justice" finding is set forth in the record. Id. at 33.
It was not the intent of the Committee in adopting this amendment to give a blanket exception to matters under advisement for the time excluded must be "reasonably attributable" and the matter must be "actually under advisement." Therefore the judge must be actually considering the question, for example, conducting the research on a novel legal question.\textsuperscript{136}

Of course, the judge himself will determine whether the period of delay meets this definition, and there is nothing to prevent judges from routinely taking all motions "under advisement" for the maximum period of 30 days. Thus, since Congress intended to limit the frequency and duration of such delays, it probably should have relied instead on the "ends of justice" continuance provision, which at least requires the judge to justify the reasons for delay in each case. Conceivably, the "under advisement" exclusion as presently formulated could be so widely invoked that overall ("gross") disposition times in some cases would actually increase.

\textbf{c. Unavailability of Defendant or Essential Witness.}\ Section 3161(h)(3) permits exclusion of

\begin{itemize}
\item[(A)] Any period of delay resulting from the absence or unavailability of the defendant or an essential witness.
\item[(B)] For purposes of subparagraph (A) of this paragraph, a defendant or an essential witness shall be considered absent when his whereabouts are unknown and, in addition, he is attempting to avoid apprehension or prosecution or his whereabouts cannot be determined by due diligence. For purposes of such subparagraph, a defendant or an essential witness shall be considered unavailable when his whereabouts are known but his presence for trial cannot be obtained by due diligence or he resists appearing at or being returned for trial.\textsuperscript{137}
\end{itemize}

The necessity of excluding periods of defendant or witness una-


\textsuperscript{137} The wording of this provision is almost identical to Standard 2.3(e) of the ABA \textit{Standards}, supra note 56, except that the latter does not extend to "essential" witnesses. The \textit{Senate Report} defines this term as follows:

By an "essential witness" the Committee means a witness so essential to the proceeding that continuation without the witness would either be impossible or would likely result in a miscarriage of justice. For example, a chemist who has identified narcotics in the defendant's possession would be an "essential witness" within the meaning of this subsection.

S. Rep. No. 1021, 93d Cong., 2d Sess. 37 (1974). This standard is very similar to the provisions of section 3161(h)(8), which allows "excludable" continuances to be granted to serve the "ends of justice," except that exclusions based on unavailable witnesses do not require a statement of reasons.
vailability seems clear enough, but the language of this exclusion, like the pretrial motions provision, is troublesome and ambiguous. Narrowly construed, the exclusion can be said to apply only to continuances of court proceedings made necessary by the nonappearance of the defendant or witness. A broader construction would also exclude any period during which the prosecution or defense counsel is unable to contact the defendant or witness for purposes of discovery or plea negotiation. Although such out-of-court "unavailability" can often lead to subsequent trial delays, even if these persons appear for all the required court proceedings, the reference in subsection 3161(h)(3)(B) to "presence for trial" suggests that unavailability is grounds for an exclusion only to the extent that the delay results from nonappearance. This narrow interpretation is also favored by the special difficulty of determining factually, as to out-of-court events, precisely when a defendant or witness is "attempting to avoid apprehension or prosecution" or when his "whereabouts cannot be determined by due diligence." Thus the narrow interpretation should probably be adopted, but court appearances should be scheduled with sufficient frequency to insure prompt detection of out-of-court unavailability.

In some circumstances the language of this exclusion could conflict with the separate provision applicable to defendants serving a term of imprisonment for other offenses, section 3161(j). Although section 3161(j) would generally apply prior to the defendant's initial appearance (hence, prior to the point at which the time limits and exclusions become applicable), both provisions could apply simultaneously if a defendant were released on bond and subsequently began serving a term of imprisonment on unrelated charges. At that point, subsection 3161(h)(3)(B) would require "due diligence" to obtain the defendant's immediate presence for trial, whereas section 3161(j) permits the government to file a detainer and, if no demand for trial is received, wait out the prisoner's sentence.138

Section 3161(j) was taken directly from the ABA Standards,139 but neither the commentary to these standards nor the legislative history of the Act explain why the trial of defendants in prison should be postponed by nonaction of the prosecutor and the defendant. Both the ABA Standards and the Act are premised on the notion of a public right to speedy trials, independent of the wishes of the parties,140 but since there is no additional cost associated with

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140 See note 56 supra.
such correctional custody, nor any of the risks associated with pretrial release, a limited exception to the public right concept may be appropriate. If so, then the stricter rule implicit in section 3161(h)(3) should be considered subordinate to the “demand” rule of section 3161(j).

d. Superseding Charges. Section 3161 of the Act contains several provisions dealing with situations in which a complaint, indictment, or information has been dismissed, and subsequently the same offense is charged in a new document. Section 3161(d) provides that the time limits for indictment, arraignment, and trial begin to run anew when the original charge is dismissed upon motion of the defendant, or if the original charge was a complaint and it is dismissed by either party or on the court’s own motion.141

If, however, an information or indictment is dismissed upon motion of the Government, the time limits applicable to any refiled charges apparently do not begin to run anew. Section 3161(h)(6) permits an exclusion under the following circumstances:

If the information or indictment is dismissed upon motion of the attorney for the Government and thereafter a charge is filed against the defendant for the same offense, or any offense required to be joined with that offense, any period of delay from the date that the charge was dismissed to the date the time limitation would commence to run as to the subsequent charge had there been no previous charge [is excludable].

If the period between the dismissal of the first charge and the filing of the second is excludable, this implies that the “clock” is still running.142

Since the filing of superseding charges is entirely within the control of the Government, such a rule makes sense: the Government should not be permitted to obtain additional time simply by filing slightly different charges against the same defendant for the same criminal episode. Yet section 3161(d) clearly permits the Government to do just that with respect to charges in a complaint.143

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141 Section 3161(d) is obviously limited to dismissals without prejudice. If the charge is dismissed with prejudice, pursuant to section 3162(a) or for other reasons, it cannot be refiled.


143 The distinction between preindictment and postindictment dismissals appears to derive from the ABA Standards. ABA STANDARDS, supra note 56, Standards 2.2(a), 2.3(f). The commentary to Standard 2.2(a) justifies this distinction as follows:

Were it otherwise, the time for trial would begin running because of the action of the police and magistrate, even though the prosecutor later concluded he had insufficient evidence to file a charge and caused the outright release of the defendant.
Moreover, it would seem to allow the Government to file a new complaint before dismissing the old one, in which case the defendant would not have to be released from custody or from his bail obligations at any time. Clearly such a paper shuffle would violate the spirit if not the letter of the law, and if experience with the Act reveals a tendency for dismissed and refiled complaints to increase, section 3161(d) should be amended to conform to the "tacking" approach applicable to superseding indictments.

Whether or not the "tacking" rule is extended to superseding complaints, the wisdom of automatically excluding all of the time between dismissal and refiling of charges is also questionable. The public interest in speedy trials clearly favors prompt refiling of charges, and lengthy delays are particularly damaging to the defense. Although the defendant does not suffer the concrete disadvantages of pending charges, he must still deal with the problems of lost witnesses, stale evidence, and unresolved accusations. Moreover, any continuing preparations or investigations by the Government are not likely to be matched by equal efforts on behalf of the defendant, and the Government can control the timing of refiling to maximize this advantage. This is always a problem at the outset of a prosecution, and section 3161(h)(6) seems to give the Government a second chance to gain the upper hand in trial preparation.144

On the other hand, when charges are dismissed it is reasonable to expect that grand jury delays, further investigations, or problems of unavailable evidence might necessitate some delay in refiling. Such events are generally excludable under other provisions of the Act, however,145 so it may be possible to eliminate the automatic exclusion provided in section 3161(h)(6). This would give the Government less of an incentive to "stop the clock" and would prevent

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144 The "ends of justice" continuance provisions can be used to give the defendant extra time for preparation, but the result is obviously further delay of an already stale case.
145 E.g., 18 U.S.C. § 3161(b) (Supp. IV, 1974) (if no grand jury is in session, the indictment limit may be extended for up to 30 days); id. § 3161(h)(3) (unavailability of the defendant or an essential witness); id. § 3161(h)(8) (continuances granted to serve the "ends of justice," including unavoidable delays in grand jury proceedings).
exclusion of delays which the Act does not specifically recognize as excusable.

2. **Excludable Continuances.** If none of the specific exclusions provided in sections 3161(h)(1) through (7) is applicable, section 3161(h)(8) permits the court to grant an excludable continuance on its own motion, or at the request of either party. Such a continuance is excludable only if the judge finds that "the ends of justice served by taking such action outweigh the best interests of the public and the defendant in a speedy trial." This seemingly indeterminate standard is substantially confined by certain statutory guidelines, and the judge is required to set forth his reasons for granting the continuance in the record of the case, either orally or in writing.

The Senate viewed this provision as "the heart of the speedy trial scheme" created by the Act, because it allows the necessary flexibility to make compliance with the strict time limits a "realistic goal." Yet section 3161(h)(8) is of central importance for another reason as well: the strict standards governing the granting of such excludable continuances represent a clear expression of Congress's determination to enforce the public right to speedy trials. The court is expressly required to consider this right along with the rights of the defendant; accordingly, the defendant's consent or waiver of his rights is not a sufficient basis for an extension of the statutory time limits, nor may such extensions be obtained "by agreement" if they do not meet the strict standards of section 3161(h)(8).

Such strict control of defense continuances is virtually unprecedented in prior speedy trial statutes and rules. Most state statutes provide that any delay on defendant's motion or "application" automatically tolls the time limits, and few standards are provided to govern the granting of such continuances. Other statutes exclude defense continuances but, like the Act, contain standards which

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146 See text at note 155 infra.
147 S. Rep. No. 1021, 93d Cong., 2d Sess. 39 (1974). The option of dismissal without prejudice and the judicial emergency provisions, both of which were subsequently added by the House, allow additional flexibility. See text at notes 175, 200 infra.
149 However, the right to dismissal may be waived by failure to make a timely motion. See note 24 supra. See also text at note 195 infra (suggesting that certain forms of intentional defense delay might bar dismissal with prejudice under section 3162(a)).
150 See, e.g., Ind. R. Crim. P. 4.
recognize the public interest in speedy trials and restrict the granting of such continuances.\textsuperscript{152} The enforcement of such standards, however, is generally left entirely to the judge; unlike the Act, no reviewable record of his reasoning is required.\textsuperscript{153} The standard of review under the Act is unclear, but even if a narrow "abuse of discretion" standard is followed,\textsuperscript{154} the need to articulate the exercise of this discretion should serve to encourage adherence to the statutory formula.

The Act sets out three factors which the court must consider, "among others,"\textsuperscript{155} in deciding whether to grant an excludable continuance. First, the court must consider

\textsuperscript{152} See, e.g., ILL. REV. STAT. ch. 38, § 103-5(f) (1973) ("delay occasioned by the defendant" tolls the statutory time limits); id. § 114-4 (court may require any motion for a continuance filed more than 30 days after arraignment to be supported by affidavit; the statute specifies the situations in which such a motion may be granted, but provides that the court may also grant the motion if it finds that "the interests of justice so require"; these provisions are designed to protect both "the rights of the defendant and the state to a speedy, fair and impartial trial"). See also N.Y. CODE CRIM. PROC. § 30.30(4)(b) (McKinney 1971) (excludable continuance may be granted if postponement is "in the interest of justice, taking into account the public interest in the prompt disposition of criminal charges"). The Illinois standards are contained in a separate statutory provision governing all continuances in criminal cases, whereas the New York Statute, like the Act, places the standards within the speedy trial exclusion provisions. The latter arrangement implies that nonexcludable continuances may be granted without regard to the standards; that is, the standards only set the conditions for excludability.

In addition to the structure of the Act, there are strong policy reasons why section 3161(h)(8) should not be interpreted to prohibit nonexcludable continuances. There are bound to be situations in which a case must be put over for a few days due to temporary scheduling problems or other difficulties, and judges should not be required to make a separate finding in each and every case. Even if such extensions would not be justified under the strict "ends of justice" standard, they do not jeopardize the effectiveness of the statute if they are not excluded. Moreover, if all continuances must meet the standards of section 3161(h)(8), courts would be under considerable pressure to expand and dilute these standards. Thus, the availability of nonexcludable continuances promotes effectiveness as well as efficiency in the administration of the Act.

\textsuperscript{153} The state of Arizona briefly experimented with such a procedure, but then abandoned the effort. Rule 8.5 of the 1973 Rules of Criminal Procedure issued by the Arizona Supreme Court (effective Sept. 1, 1973) provided that continuances would be granted only upon a written order, "specifically enumerating" the reasons therefor. Rule 8.5 further provided that, after two continuances, any further continuances could be granted only by the presiding judge of the court. In Schultz v. Peterson, 111 Ariz. 421, 531 P.2d 1128 (1975), it was held that failure to make the required written finding made a prosecution continuance nonexcludable, so that the defendant was entitled to dismissal (even though his counsel had agreed not to contest the continuance). Perhaps in reaction to the Schultz case, the requirements of written justification and control by the presiding judge were eliminated on May 7, 1975 (effective August 1, 1975).

\textsuperscript{154} The standard of review is not mentioned in the legislative history. For a discussion of the common law "abuse of discretion" standard, see C. WRIGHT, FEDERAL PRACTICE AND PROCEDURE § 832, at 333-40 (1969). See also S. REP. No. 1021, 93d Cong., 2d Sess. 41 (1974) (denial of an excludable continuance not subject to interlocutory appeal).

\textsuperscript{155} The reference to such "other" factors obviously indicates that the statutory guidelines
[w]hether the failure to grant such a continuance in the proceeding would be likely to make a continuation of such proceeding impossible, or result in a miscarriage of justice.\textsuperscript{156}

The \textit{Senate Report} suggests that any of the following circumstances would be sufficient to warrant the granting of an excludable continuance under the above standard:

where the judge trying the case, the attorney for the Government, defense counsel, the defendant or an essential witness is ill or unable to continue, or the defense counsel has been permitted by the court to resign from the case, or the court has removed counsel from the case.\textsuperscript{157}

The "miscarriage of justice" standard also authorizes the courts to subordinate the demands of speedy trial if necessary to secure important rights of the defendant. The \textit{House Report} suggests, for example, that an excludable continuance could be granted to preserve the defendant's right to due process and effective representation by counsel;\textsuperscript{158} trial postponement based on pretrial publicity should also be justified under this provision.\textsuperscript{159}

The second factor which the court must consider in determining whether to grant an excludable continuance is

[w]hether the case taken as a whole is so unusual and so complex due to the number of defendants or the nature of the prosecution or otherwise, that it is unreasonable to expect adequate preparation within the periods of time established by this section.\textsuperscript{160}

This provision focuses on delays related to the nature of the case itself, and recognizes that some cases simply take longer than other cases to reach trial. The number of defendants (or perhaps more


\textsuperscript{158} H.R. Rep. No. 1508, 93d Cong., 2d Sess. 33-34 (1974). The \textit{Report} attempts to distinguish between delays caused solely by the defendants' counsel, and delays in which the defendant "participated actively." Application of this rule lessens but does not avoid the potential conflicts between the \textit{Speedy Trial Act} and the due process clause. Presumably, the trial date or other court proceeding could be scheduled so unreasonably early in the case that, even if a defendant "participated" in the failure to proceed on that date, it would be fundamentally unfair to deny him a continuance.

\textsuperscript{159} See Judicial Conference Guidelines, \textit{supra} note 72, at 20.

precisely, the number of defense counsel) is undoubtedly a measurable determinant of disposition time, and statistical research may be able to provide the courts with fairly precise guidelines regarding the number of defendants (or counsel) beyond which extra time is usually needed.

The more general standard of "complexity" is harder to define and measure. At one extreme, this standard could be construed so broadly that any case which was more "complex" than the average case would be eligible for an exclusion. Such an interpretation, however, would tend to affirm the status quo, which is clearly not what Congress intended. A narrower interpretation is implied in the Senate Report, which states that exclusion is appropriate in "protracted" prosecutions such as antitrust and "complicated organized crime conspiracy cases." The Report also suggests that such complexity could be measured by means of the case weighting system used by the Administrative Office of U.S. Courts.

It would be very appropriate to grant continuances under Section 3161(h)(8) for a bribery case which has a weighted case-load index of 5.90 [the second highest value assigned], while in the typical auto theft case where the index is only .63 a continuance based on complexity would not be appropriate.

The third factor which the statute permits the court to consider is

[w]hether delay after Grand Jury proceedings have commenced, in a case where arrest precedes indictment, is caused by the unusual complexity of the factual determination to be made by the Grand Jury or by events beyond the control of the court or the Government.

This provision applies only during the arrest-to-indictment interval, and is to be narrowly construed. The Senate Report indicates that the exclusion

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161 See 1976 Northern Illinois Plan, supra note 79, app. A. A statistically significant correlation was found between number of defendants and "gross" indictment-to-trial times in 1974.

162 About half of all defendants are already tried or plead guilty within 70 days of indictment. See note 86 supra.


165 Id. at 40.

is not designed to cover every situation where Grand Jury proceedings are delayed—only where the delay was caused when an unusual amount of new or complex evidence is elicited in those proceedings.\textsuperscript{167}

In addition to these three factors, the Act grants the courts a certain residual discretion to determine what the “ends of justice” require in a given case.\textsuperscript{168} Although this power was intended to be “rarely used,”\textsuperscript{169} there are several common situations which would justify an exclusion but which are not covered by any of the section 3161(h)(8) guidelines or by a specific exclusion provision. Thus, if Congress wishes to discourage the exercise of the residual “ends of justice” exclusion, it may be necessary to specify additional guidelines or specific exclusions.

For example, an exclusion seems appropriate when a judge becomes bogged down in a lengthy trial on another matter. Given the unpredictability of settlement processes and plea bargaining, as well as the difficulty in forecasting the exact length of trials, such temporary conflicts in court scheduling are often unavoidable. It would be inefficient and unfair to the litigants in the case on trial to require that a recess be held to permit trial of criminal cases approaching the statutory time limits. Moreover, if the case on trial is a criminal case, it too may be approaching the statutory deadline; and if it is a civil trial, consideration must be given to Congress’s desire that the Speedy Trial Act not cause “prejudice to the prompt disposition of civil litigation.”\textsuperscript{170}

That leaves two alternatives: either reassign the criminal cases which are not on trial, or enter an excludable continuance in each of those cases. If the scheduling conflict could not have been avoided, then the situation is similar to a case in which the original judge becomes “ill or unable to continue.”\textsuperscript{171} In both cases, it is more efficient to tolerate a slight delay than to require reassignment (which may cause some delay anyway); large numbers of such reassignments would also seriously impair the effectiveness of the individual calendar system.\textsuperscript{172} There is some question, however, whether

\textsuperscript{167} S. Rep. No. 1021, 93d Cong., 2d Sess. 41 (1974). The Report goes on to suggest that the exclusion would not be appropriate in cases where the arrest was premature. Id.

\textsuperscript{168} See note 155 supra.


\textsuperscript{170} See 18 U.S.C. § 3165(b) (Supp. IV, 1974).

\textsuperscript{171} See text at note 157 supra. Subsection 3161(h)(8)(C) which prohibits the granting of an excludable continuance based on “general congestion of the court’s calendar,” should not be a bar to exclusions based on such temporary scheduling conflicts. See text at note 174 infra.

\textsuperscript{172} See text at note 92 supra.
the granting of an excludable continuance in such a case could be based on the "impossibility" or "miscarriage of justice" standard. Either rationale seems rather contrived; to avoid diluting the statutory language it seems preferable to add a specific provision permitting such exclusions.

A similar problem arises when the subject case involves a legal question that is pending decision by the court of appeals or the Supreme Court. The Judicial Conference Guidelines suggest that if the legal question would be dispositive of the subject case, an excludable continuance is justified under section 3161(h)(8).

Here again, continuation of the case would not be "impossible," nor would it necessarily result in a "miscarriage of justice," but it would certainly involve the inefficiency of litigating the same issue in two courts simultaneously. Thus, a decision to await the outcome of the case on appeal would have to be based on more general "ends of justice" considerations.

The "ends of justice" standard is qualified by the provisions of subsection 3161(h)(8)(C), specifying that an excludable continuance may not be granted where delay results from general congestion of the court's calendar, or lack of diligent preparation or failure to obtain available witnesses on the part of the attorney for the Government.

Such "general congestion" would presumably be grounds for a request to invoke the "judicial emergency" provisions. As for the apparent distinction between prosecutor and defense "diligence," one justification might be that an unprepared prosecutor has the option of dropping the case, whereas an unprepared defendant must carry on. If the defendant himself "participated" in the delay, however, he can apparently be forced to go to trial unprepared. This distinction between client and attorney stalling is not possible in the case of prosecution delays, so it is necessary to adopt either a strict or an indulgent approach; Congress chose the former.

One other major source of delay in federal courts, which is not mentioned anywhere in the Act or the legislative history, is the traditional summer "recess." Since the Act attempts to define all

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In the final House debates, Representative Conyers stated that conflicts caused by the trial of long and complicated cases are generally foreseeable, and that courts must anticipate these problems and attempt to reassign other cases approaching the statutory limits. 120 Cong. Rec. H 12,570 (daily ed., Dec. 20, 1974). Unfortunately, the result would seem to be a major decrease in court efficiency, in return for a fairly minor increase in disposition time.

173 Judicial Conference Guidelines, supra note 72, at 21.

174 See note 158 supra.
forms of delay which are excusable (hence, excludable), the failure
to mention this practice presumably means that it is not a basis for
an exclusion. To some extent the Government can avoid this prob-
lem by limiting the number of prosecutions commenced in the
months immediately prior to the recess. But some defendants must
be arrested immediately in order to terminate their illegal activity,
and judges may be compelled to reduce or stagger their vacations
to accommodate these arrests, as well as cases left over from earlier
months.

3. The Dismissal Sanction. In addition to the excludable time
provision, the Act provides further flexibility through the applica-
tion of the dismissal sanction. If the statutory time limits are ex-
ceeded, after the deduction of excludable time, the court is author-
ized to dismiss the charge either with or without prejudice, and
although the Act contains certain guidelines for this determina-
tion,175 the amount of discretion given to the courts appears to be
at least as great as that implicit in the “ends of justice” continuance
provisions.

The dismissal sanction was a source of controversy and compro-
mise throughout the legislative history. Many state speedy trial acts
do not provide for dismissal with prejudice,176 and neither rule 48 nor
rule 50(b) of the Federal Rules of Criminal Procedure requires dis-
missal with prejudice, absent a sixth amendment violation.177 How-

175 See text at note 183 infra.
176 See, e.g., S.D. Code § 23-34-6 (1967). See generally Annot., 50 A.L.R.2d 943 (1956);
ABA Standards, supra note 56, commentary to Standard 4.1.
177 Rule 48(b) provides as follows:
If there is unnecessary delay in presenting the charge to a grand jury or in filing an
information against a defendant who has been held to answer to the district court, or if
there is unnecessary delay in bringing a defendant to trial, the court may dismiss the
indictment, information or complaint.
The Advisory Committee note to subdivision (b) indicates that this rule is a “restatement of
the inherent power of the court to dismiss a case for want of prosecution,” although the rule
also implements the right of an accused to a speedy trial under the sixth amendment. Viola-
tion of the constitutional right apparently requires dismissal with prejudice. Strunk v. United
States, 412 U.S. 434 (1973); Barker v. Wingo, 407 U.S. 514, 522 (1972); Mann v. United
States, 304 F.2d 394, 398 (D.C. Cir. 1962) (dictum). However, a dismissal solely for want of
prosecution may be either with or without prejudice. See Mann v. United States, supra
(without prejudice); United States v. Furey, 514 F.2d 1098, 1103 (2d Cir. 1975) (with preju-
dice). Prior to the Furey case, it was unclear whether federal courts were empowered to
dismiss with prejudice in the absence of a constitutional violation. Previous cases, such as
Mann, had only upheld the validity of dismissal without prejudice, and the two cases relied
upon by the court in Furey did not expressly approve dismissal with prejudice for non-
constitutional violations. See White v. United States, 377 F.2d 948 (D.C. Cir. 1967); District
Rule 50(b) requires each district court to prepare a “plan for achieving prompt disposi-
tion of criminal cases,” but the rule itself does not specify the sanctions which may be
never, the ABA Standards recommended that violation of the applicable time limits should lead to absolute discharge, on the theory that this is the only effective remedy, \textsuperscript{178} and the initial drafts of the Act adopted this approach.\textsuperscript{179} Early in 1974, the Senate Judiciary Committee amended the dismissal sanction, to permit reprosecution if there were “compelling evidence that the delay was caused by exceptional circumstances which the government and the court could not have foreseen or avoided.”\textsuperscript{180} The House Judiciary Committee disagreed with this change, and reinstated the requirement that all violations must lead to dismissal with prejudice.\textsuperscript{181} However, the Department of Justice, and several members of the Committee, strongly opposed that requirement,\textsuperscript{182} and when the bill came up for debate on the House floor an amendment was offered, and agreed to by the bill’s sponsors, giving the judge discretion to dismiss with or without prejudice.\textsuperscript{183}

How this discretion is to be exercised is very unclear, however. Section 3162(a)(1) simply states that the complaint, indictment, or information “shall be dismissed,” and that

\[\text{In determining whether to dismiss the case with or without prejudice, the court shall consider, among others, each of the following factors: the seriousness of the offense; the facts and circumstances of the case which led to the dismissal; and the impact of a reprosecution on the administration of this chapter and on the administration of justice.}\]

The reference to other factors makes it clear that the three statutory factors do not constitute an exhaustive list. In particular, the final House debates indicate that the degree of prejudice to the defendant is also a relevant consideration, though not a determinative one.\textsuperscript{184}

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\textsuperscript{178} See ABA Standards, supra note 56, Standard 4.1 & commentary at 40.
\textsuperscript{179} S. 3936, 91st Cong., 2d Sess. § 3162 (1970); S. 895, 92d Cong., 2d Sess. § 3162 (1971).
\textsuperscript{180} S. 754, 93d Cong., 2d Sess. § 3162(b) (1974).
\textsuperscript{183} 120 Cong. Rec. H 12,570-72 (daily ed., Dec. 20, 1974).
\textsuperscript{184} See note 190 infra.
Unlike the excludable continuance provisions, section 3162 contains no statement of the "general rule" within which all such factors must operate, although the legislative history suggests at one point that a balancing test similar to the one provided in section 3161(h)(8) is to be used.\(^8\) It seems anomalous that the important dismissal decision is subject to fewer restrictions than the granting of continuances, and the Act should probably be amended to specify that the same standards apply. Thus, courts would be required to determine whether the "ends of justice" served by dismissing without prejudice outweigh the best interests of the public and the defendant in a speedy trial. Courts might also be required to state on the record the reasons for such a finding, as they are under section 3161(h)(8).

There is some similarity between the standards for dismissal under the Act and under the sixth amendment, and the House Report suggests that the drafters of the statutory dismissal provisions intended to adopt this prior law.\(^8\) In *Barker v. Wingo*\(^7\) the Supreme Court listed four factors which should be considered in deciding a sixth amendment claim: (1) the length of the delay; (2) the reasons for the delay; (3) the extent to which the defendant asserted his right to speedy trial; and (4) the degree of prejudice to the defendant's rights.\(^8\) The first factor was said to depend on the nature of the case, including perhaps the seriousness of the offense,\(^9\) and the second factor—reasons for the delay—seems very similar to the "facts and circumstances" rule of the Act. The "degree of prejudice" is also a relevant factor under both constitutional and statutory principles.\(^9\)

However, the legislative history subsequent to the issuance of


\(^{155}\) In discussing the powers of the federal courts under Federal Rule of Criminal Procedure 48(b), the House Report indicated that the proposed amendment would "continue current law." H.R. Rep. No. 1508, 93d Cong., 2d Sess. 81-82 (1974). Prior to United States v. Furey, 514 F.2d 1098 (2d Cir. 1975), however, rule 48 only appeared to justify dismissal with prejudice when there had been a constitutional violation. See note 177 supra.

\(^{156}\) 407 U.S. 514 (1972).

\(^{157}\) Id. at 530 (1972).

\(^{158}\) As an example of the different time limits appropriate in different cases, the Court stated that "the delay that can be tolerated for an ordinary street crime is considerably less than for a serious, complex conspiracy charge." 407 U.S. at 531. Apparently both complexity and seriousness are relevant factors.

\(^{159}\) None of the four factors enunciated in *Barker v. Wingo* was intended to constitute either a necessary or a sufficient condition for dismissal. 407 U.S. at 533. The operation of the statutory standards is less clear, but the House debates indicate that the "prejudice" factor is neither a necessary nor a sufficient consideration. See 120 Cong. Rec. H 12,571-72 (daily ed., Dec. 20, 1974).
the *House Report* plainly indicates that the statutory provisions were designed to permit dismissal with prejudice under circumstances where this sanction would not be required by the sixth amendment, and the important "public interest" rationale behind the Act would also seem to require this result. Under sixth amendment standards, any delay "attributable" to the defendant is automatically excluded in determining the right to dismissal, but the application of such a broad rule to the statutory dismissal sanction would tend to nullify the strict limitations on the granting of excludable continuances.

On the other hand, it seems unnecessary to ignore completely the defendant's responsibility for delay, particularly where such delay is intentional and without any justification. An earlier version of the Act made the sanction of dismissal conditional on the absence of defendant or defense counsel "fault," and the final House debates clearly indicate an intent to prevent defendants from taking advantage of their own "deliberate stalling" to seek dismissal under the Act. The debates suggested that the problem could be handled either by means of the separate sanctions against attorneys for "willful" delay or through the use of excludable time, but neither approach is completely satisfactory. The attorney sanctions do not deal with the problem of misconduct by the defendant himself, and, even if he is blameless, a dismissal with prejudice would tend to reward his counsel's misconduct. The entry of an exclusion equal to the period of such "deliberate delay" makes more sense, unless such period has already been excluded (e.g., if defense counsel obtained an excludable continuance on the basis of false

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191 In a letter dated Dec. 9, 1974, from Attorney General Saxbe to Rep. Madden, Chairman of the House Rules Committee, the proposed amendment was said to permit dismissal with prejudice either for denial of sixth amendment rights or where the judge "believes circumstances warrant a dismissal." 120 CONG. REC. H 12,519 (daily ed., Dec. 20, 1974). A letter from the Attorney General to Rep. Rodino, dated Dec. 13, 1974, makes the same point. 120 CONG. REC. S 22,489 (daily ed., Dec. 20, 1974).


193 See text at note 149 *supra*.


196 *Id.* (remarks of Rep. Conyers). Section 3162(b) of the Act permits the court to impose fines and other penalties on any government or defense attorney who (1) knowingly allows the case to be set for trial without disclosing the fact that a necessary witness would be unavailable for trial; (2) files a motion solely for the purpose of delay which he knows is totally frivolous and without merit; (3) makes a statement for the purpose of obtaining a continuance which he knows to be false and which is material to the granting of a continuance; or (4) otherwise willfully fails to proceed to trial without justification consistent with Section 3161 of this chapter . . .

representations). In that situation, some sort of dismissal may be required, but it seems reasonable to deny dismissal with prejudice unless the degree of government "fault" is equally great. Thus, although the "facts and circumstances" factor should relate primarily to the justification offered by the Government or the court for failure to meet the statutory limits, there may be situations in which consideration of defense "fault" would also be appropriate.

The number of dismissals without prejudice must be kept within limits, however. Section 3162 requires the court to consider "the impact of a reprosecution on the administration of justice," and this provision suggests two reasons for minimizing such dismissals. First, widespread dismissals without prejudice would weaken the deterrent impact of the Act and decrease its effectiveness in protecting public and private speedy trial rights. Moreover, the need to reindict large numbers of defendants would significantly add to the workload and expense of the grand jury system. Thus, dismissals without prejudice should be the exception, not the rule.

To summarize, the dismissal decision should be the product of a balancing test similar to that employed under the "ends of justice" continuance provisions. Dismissal with prejudice is permitted under circumstances which would not require dismissal under the sixth amendment, and the number of dismissals without prejudice should be limited. Seriousness of the offense is a factor which weighs against dismissal with prejudice, while the extent of prejudice to the defendant, government "fault," and defense "fault" are other factors which weigh in the balance.

4. The Judicial Emergency Provision. In the event that the exclusions and exceptions discussed above do not permit a district to comply with the permanent time limits, section 3174 permits the chief judge to apply for a temporary suspension of the arraignment and trial time limits contained in section 3161(c). This provision was added by the House of Representatives, at the request of the Department of Justice and the Administrative Office of U.S.

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198 A similar "comparative fault" standard is provided under section 3164 (interim limits). See text at note 253 infra.

199 This was one of the major reasons why the House Judiciary Committee decided to reinstate the mandatory dismissal with prejudice sanction. See H.R. Rep. No. 1508, 93d Cong., 2d Sess. 37 (1974).

200 The judicial emergency provisions were added contemporaneously with the 10-day arraignment limit and thus do not contain the apparent last minute drafting errors discussed earlier. See text at notes 112-16 supra. Section 3174 refers consistently to "the time limits set forth in § 3161(c)," so it seems clear that both the arraignment and trial limits contained in that section may be suspended. However, the two limits are treated differently in the event of a suspension. See text and note at note 206 infra.
Courts, to prevent "unjustifiable dismissals" caused by factors beyond the control of the court.\textsuperscript{201} In particular, the concern was that if Congress failed to appropriate the necessary additional resources fast enough, or if unforeseen circumstances arose, then "wholesale dismissals" would result.\textsuperscript{202} Although the House indicated that the number of other safeguards contained in the Act would make such a contingency unlikely, it felt that the matter should not be left to chance.\textsuperscript{203}

The \textit{House Report} makes clear, however, that this provision should not be invoked "as a matter of course,"\textsuperscript{204} and both the statutory language and the legislative history substantially restrict the scope of the suspension and the circumstances under which it may be invoked. Only the arraignment and trial time limits may be suspended,\textsuperscript{205} and in place of the permanent 60-day arraignment-to-trial limit, a longer limit not exceeding 180 days must be substituted.\textsuperscript{206} This "suspension" may not exceed a period of one year, and does not apply to indictments or informations which were filed prior to the effective date of the suspension.\textsuperscript{207}

The procedure for requesting and obtaining suspension is itself designed to limit and control the use of this provision. The chief judge must first seek the recommendations of the Speedy Trial Act Planning Group, and must then submit his request to the judicial council of the circuit.\textsuperscript{208} The circuit council, if it finds that a suspension is justified, then makes application to the Judicial Conference

\begin{footnotes}
\footnote{201}{H.R. Rep. No. 1508, 93d Cong., 2d Sess. 9, 42-44 (1974).}
\footnote{202}{\textit{Id.} See also 120 Cong. Rec. H 12,552 (daily ed., Dec. 20, 1974).}
\footnote{203}{H.R. Rep. No. 1508, 93d Cong., 2d Sess. 42 (1974).}
\footnote{204}{\textit{Id.} at 44.}
\footnote{205}{Section 3174(b) specifically provides that "the time limits from arrest-to-indictment, set forth in \textsection 3161(b), shall not be reduced," and further specifies that "the time limits for the trial of cases of detained persons who are being detained solely because they are awaiting trial shall not be affected by the provisions of this section." The first limitation may be unwise. \textit{See} text at note 218 infra.}
\footnote{206}{18 U.S.C. \textsection 3174(b) (Supp. IV, 1974). The Act does not place similar restrictions on extensions of the arraignment limit. Given the brevity of this limit, Congress may have felt that the degree of extension granted for arraignments should be handled on a case-by-case basis. However, if the need to encourage prompt arraignments is to be taken seriously, and a major "loophole" avoided, some upper limit seems desirable. The 180-day maximum set for suspensions of the trial limit corresponds to the trial limit permitted for bailed defendants under the 1972 \textit{Model Plan}, so adoption of the 30-day arraignment limit in that plan might be appropriate. \textit{See} notes 83, 101 supra.}
\footnote{207}{H.R. Rep. No. 1508, 93d Cong., 2d Sess. 43 (1974).}
\footnote{208}{18 U.S.C. \textsection 3174(a) (Supp. IV, 1974). The \textit{House Report} states that such recommendations "should be in writing and must set forth compelling reasons why a suspension should either be requested or not requested . . . The chief judge should also seek the recommendations of the judges of his district." H.R. Rep. No. 1508, 93d Cong., 2d Sess. 42-43 (1974).}
\end{footnotes}
of the United States, which makes a further determination of necessity. The Judicial Conference may then grant a suspension for up to one year, unless the request is for a further suspension within six months of a prior suspension. In the latter case, the request for a further suspension must be reported to Congress, and if Congress approves or fails to act within six months, the further suspension may be ordered.

Throughout this procedural sequence, the standards for defining a "judicial emergency" are fairly strict. The court's inability to comply with the arraignment and trial time limits must be due to "the status of its court calendars," which presumably does not encompass problems caused by shortages of prosecutors, defense counsel, or other noncourt resources. The court and the circuit council must also find that "existing resources are being efficiently utilized," and that "the availability of visiting judges from within and without the circuit," as well as other remedial actions, will not "reasonably" alleviate the court's problem.

One question left open by these standards is how many untried cases or defendants constitute a noncompliance "emergency"; a related question is whether the measuring of such noncompliance should include dismissals without prejudice. The concern over "wholesale" dismissals suggests that the noncompliance rate would have to be substantial; but the disruptive effects of large numbers of dismissals without prejudice suggests that including such dismissals in the calculation of the noncompliance rate is desirable. Of

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209 Section 3174(b) merely requires the Judicial Conference to find "that such calendar congestion cannot be reasonably alleviated," but this standard probably incorporates the more specific standards provided to guide the determination of the chief judge and the circuit council. See text at notes 211-22 infra.

210 18 U.S.C. § 3174(c) (Supp. IV, 1974). Since a second suspension will not go into effect until at least six months after the application to Congress, the second suspension should be requested during the pendency of the first; otherwise a gap would result, during which new indictments and informations would be subject to the permanent arraignment and trial time limits. See H.R. Rep. No. 1508, 93d Cong., 2d Sess. 44 (1974).


212 Id. The Act does not expressly require the circuit council to consider this factor, but the standards for review include an evaluation of the "capabilities of the district," which suggests that the council may review the chief judge's determination of efficiency.

213 18 U.S.C. §§ 3174(a), (b) (Supp. IV, 1974).

214 See text and note at note 202 supra.

215 See text and note at note 199 supra. The possibility that dismissals without prejudice would "backlog calendars with reindictments" was one of the reasons advanced for adding the judicial emergency provisions. See H.R. Rep. No. 1508, 93d Cong., 2d Sess. 42 (1974). Although the House thought it had resolved that particular problem by eliminating the alternative of dismissal without prejudice, the problem returned when the dismissal without prejudice alternative was reinstated on the floor of the House.
course, a rule that excluded dismissals without prejudice would have the advantage of discouraging excessive use of that sanction alternative.\textsuperscript{216}

Another problem of interpretation relates to the degree of "impossibility" required to justify a suspension of the time limits. Many courts, it seems, can substantially comply with the Speedy Trial Act in criminal cases by simply abandoning or sharply reducing their disposition of civil cases. Given the congressional mandate to avoid "prejudice to the prompt disposition of civil litigation,"\textsuperscript{217} such a drastic approach should not be required before the noncompliance standard may be satisfied. Similarly, courts should not liberally construe the "ends of justice" and other exclusion provisions simply to avoid the need to invoke the judicial emergency provision. Congress intended to speed up criminal cases, even if this required additional resources, and the judicial emergency provision was intended to permit strict construction of the Act, while allowing for possible delays or mistakes in the appropriations and planning processes.

It is not apparent why Congress failed to provide an emergency provision for the arrest-to-indictment time limit. The result of this oversight may be either unjustified dismissals or overuse of the few exclusions and exemptions applicable to the preindictment period. For example, prosecutors may be encouraged to take maximum advantage of the nontacking rule for dismissed complaints\textsuperscript{218} in order to gain additional time for the filing of an information or indictment. An additional 30 days is also available in felony cases if no grand jury was in session during the first 30-day period after arrest,\textsuperscript{219} and this rule could encourage intentional delays of grand jury convening in order to obtain an additional 30 days for a particular block of defendants. Such problems of compliance with the indictment limit should be monitored closely to determine whether the coverage of the judicial emergency provisions should be extended.

C. Section 3164: The Interim Limits

The most difficult section of the Act to interpret is also, unfortunately, the one which goes into effect soonest. Section 3164 provides that, between September 29, 1975, and June 30, 1979, all

\textsuperscript{216} See text at note 199 supra.
\textsuperscript{217} 18 U.S.C. § 3165(b) (Supp. IV, 1974).
\textsuperscript{218} See text and note at note 143 supra.
\textsuperscript{219} 18 U.S.C. § 3161(b) (Supp. IV, 1974).
defendants held in pretrial detention must be brought to trial within 90 days or be released from custody, unless the delay was attributable to the "fault of the accused or his counsel." Released defendants who are designated as "high risk" must also be tried within 90 days, measured from the date of designation, but there are no sanctions against the Government to enforce this limitation. Instead, such defendants may have their "nonfinancial" release conditions tightened after 90 days if they have "intentionally delayed the trial" and the Government is not at "fault." However, none of these terms is adequately defined in the Act or its legislative history, and there is also a need to clarify the relationship between section 3164 and other important provisions of the Act, in particular the exclusion provisions.

1. Applicability of the Section 3161 Exclusions. In United States v. Tirasso, the Ninth Circuit held that the detailed exclusion provisions in section 3161(h) do not apply to the calculation of elapsed time under section 3164, and that defendants must be released from custody after 90 days, regardless of the reasons for delay by the Government. The two defendants in Tirasso were foreign nationals accused of smuggling twenty kilograms of cocaine as part of a conspiracy which involved twenty other defendants in ten states, Puerto Rico, and four foreign countries. Counsel for the defendants conceded that the delays by the government were reasonable, given the scope of the alleged conspiracy and the need to transfer the proceedings from New York to Arizona, and it was also apparently conceded that the defendants, if released, would be likely to flee across the Mexican border, so that their release from custody would be tantamount to dismissal. The court was acutely aware of these criticisms of the result reached, but stated that the language of section 3164 is "straight-forward and unambiguous": since section 3164 itself contains no provision for excludable time, the court concluded that none could be ordered, at least in the

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220 Id. § 3164(c).
221 Id.
223 Id. The court did not consider whether the district court could require the defendants to post a bond or agree to restrictions on their pretrial movements. See text at note 245 infra.
224 This was also the interpretation adopted in the Judicial Conference Guidelines, supra note 72, at 29. As noted earlier, however, these Guidelines are not binding on any judge, and it should also be recognized that such preliminary advisories would, by their nature, tend to reflect conservative or literal interpretations of the Act.
An earlier decision by the Ninth Circuit also declined to apply the exclusion provisions to the interim limits. See Moore v. United States Dist. Ct., 525 F.2d 328 (9th Cir. 1975).
absence of any “fault” on the part of the defendant.\footnote{225}

The result in \emph{Tirasso} was not only undesirable but unnecessary. Both the language of the Act and its legislative history justify application of the exclusion provisions of section 3161(h) during the interim period. In \emph{United States v. Mejias}\footnote{226} the court found three persuasive reasons for applying the section 3161(h) exclusions to section 3164. First, section 3164 was designed to provide “minimal speedy trial requirements . . . pending the full effectiveness of Sections 3161 and 3162.”\footnote{227} As the court observed, it is unlikely that Congress intended such “minimal” requirements to operate more harshly than the permanent provisions. Secondly, the legislative history does not indicate any intent to prohibit the application of excludable time during the interim period; and the exclusion provisions were provided “in recognition of the impossibility of providing rigid time limits for the trial of criminal cases.”\footnote{228} Flexible time limits are not only a practical necessity; they also serve to ensure that “the rights of the individual to a complete and full hearing are not trampled in the headlong rush for the disposition of a trial.”\footnote{229}

The origins of section 3164 provide a third basis for permitting exclusions under that section. As the \emph{Mejias} court pointed out, section 3164 was based in part upon the Second Circuit Rules,\footnote{230} and the interim plans to be adopted pursuant to section 3164 were expected to be similar to those rules.\footnote{231} However, the Second Circuit Rules permitted most of the exclusions contained in section 3161 of

\footnotesize{Although the issue was not directly decided in that case, the court suggested that the only way to avoid the strict 90-day limit on government delays would be to exclude periods during which the defendant was not “awaiting trial” within the meaning of subsection 3164(a)(1). In particular, the court felt that the periods during which the defendant was undergoing competency examination or hearings on competency should not be counted. Such an approach has obvious limitations, however, since many forms of unavoidable prosecution delay would not be excludable. Moreover, the failure of the court in \emph{Tirasso} to apply this approach to the delays caused by transfer of the defendants to Arizona casts some doubt on its scope and continuing validity. \textit{See also United States v. Soliah, No. 75-523 (E.D. Cal., Jan. 14, 1976)} (holding, \textit{inter alia}, that section 3164 is not subject to excludable time because it makes no express reference to the section 3161(h) provisions).

\footnote{225} For a discussion of the fault standard, see text at note 238 infra.

\footnote{226} \textit{No. 76 Cr. 164 (S.D.N.Y., May 24, 1976), aff'd on other grounds sub nom. United States v. Padilla-Martinez, No. 76-1236 (2d Cir., June 4, 1976).} (The text of both opinions is contained in Administrative Office of U.S. Courts, Speedy Trial Advisory No. 14, June 24, 1976.) The Second Circuit adopted a narrower basis for denying release of the defendants, based on the “fault” exception, and expressed no opinion as to the applicability of the section 3161(h) exclusions to section 3164. \textit{See text and note at note 238 infra}.

\footnote{227} \textit{See S. Rep. No. 1021, 93d Cong., 2d Sess. 45 (1974).}

\footnote{228} \textit{See H.R. Rep. No. 1508, 93d Cong., 2d Sess. 21 (1974).}

\footnote{229} \textit{Id.} at 15.

\footnote{230} \textit{S. Rep. No. 1021, 93d Cong., 2d Sess. 5 (1974).}

\footnote{231} \textit{Id.} at 45.
the Act, and Congress was well aware of this fact. A related point is that section 3164 apparently replaced an earlier "interim" provision which also permitted exclusion of time. Of course, it is possible that Congress intended to adopt a stricter version in section 3164, but if so, it is odd that such an important difference was not noted in the Senate Report, which carefully describes the major revisions and changes made at each stage of the legislative history.

Thus, it seems reasonable to assume that Congress intended the exclusion provisions of section 3161(h) to apply to the interim time limits in section 3164, and the language of the statute is certainly broad enough to permit this interpretation. Subsection 3161(h) provides that:

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

The location of this provision in section 3161 suggests that it is limited to the permanent and transitional time limits contained in that section, but the italicized language could be construed to cover the interim "trial" limits as well. As the Mejias court observed, the Act "must be read in such a way as to render it a sensible and workable whole," and the result reached in Mejias certainly makes more sense than the narrow, technical approach adopted in the Tirasso case. It is to be hoped that other federal courts will

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232 Id. at 17.

233 These earlier provisions were closely tied to preventive detention proposals. See note 54 supra. When it became clear that a nationwide preventive detention bill would not be passed, there was no longer any need for the Act to provide accelerated coverage of detained and released defendants charged with the more serious offenses subject to preventive detention. However, in light of the delayed effective date of the Act, it was felt that some sort of interim provision should still be provided for defendants in custody and dangerous released defendants. See 1971 Senate Hearings, supra note 58, at 140 (testimony of Professor Daniel J. Freed).


235 (Emphasis added.)

236 United States v. Mejias, No. 76 Cr. 164 (S.D.N.Y., May 24, 1976). See also United States v. Masko, No. 76 Cr. 15 (W.D. Wis., June 24, 1976), reprinted in Administrative Office of U.S. Courts, Speedy Trial Advisory No. 15, July 19, 1976. Masko holds that section 3164 must be viewed as an "integral part of the grand scheme of the Act," not as an "independent enactment"; hence, that section should be construed to embody "by implication" the provisions of section 3161(h).

237 Failure to read section 3164 in the context of the entire Act could lead to further difficulties not raised in the Tirasso and Mejias cases. For example, section 3164, unlike section 3161, is not specifically limited to defendants charged with an "offense," as defined in section 3172(2). The latter section excludes military and petty offenses, and it is highly
follow the reasoning in the Mejias case, but in any case section 3164 should be amended to provide specifically for application of the exclusion provisions.

2. Detainee “Fault.” Section 3164(c) provides that a detainee will be released from custody only if the failure to meet the interim time limit was “through no fault of the accused or his counsel.” Relying on this provision, the Second Circuit affirmed the result in the Mejias case, without approving or rejecting the applicability of the section 3161(h) exclusions. On the basis of the facts recited in the court of appeals’ decision, it appears that the defendants were guilty of at least knowing, if not intentional, delay. The local rules of the Southern District of New York require pretrial motions to be filed within 10 days of arraignment, and the trial judge had extended this limit for an additional 30 days. Nevertheless, the defendants filed eight pretrial motions subsequent to the extended deadline, and the hearings on these motions lasted for 5 days. The court of appeals found that the defendants’ “fault in delaying the filing and hence the decision on their motions . . . and their prolonging of the hearing on the motions was a specific cause of the delay in commencing the trial after the 90th day.”

unlikely that Congress intended the interim limits to apply to defendants who would not be covered under the permanent limits. Similarly, section 3164 does not contain any provision dealing with superseding charges, yet if the “tacking” rule implicit in section 3161 is not applied to the interim limits, the latter could be completely avoided by the simple expedient of filing revised charges. Congress could not have intended such a result, so it must have assumed that defendants covered by the interim provisions would also be covered by the general principles of section 3161.

238 United States v. Padilla-Martinez, No. 76-1236 (2d Cir. June 4, 1976). The opinion, by retired Supreme Court Justice Clark, also makes an obscure reference to constitutional issues which required affirmance of the refusal to release the defendants. Justice Clark declined to elaborate this constitutional objection “further than to note that there is question under the doctrine of separation of powers that the Congress can exercise judicial authority to the extent indulged here.” Id. In a footnote, the opinion states that “[s]ome of the language of the Act is so sweeping that it might well be construed as more than procedural, assuming that Congress has the power to enact the latter.” Id. at n.4. The three cases cited in the footnote deal with judicial powers to control admission to practice and budgeting for judicial operations, and the Martinez opinion does not indicate which judicial functions the Speedy Trial Act may have impaired.

The court of appeals may have overlooked an even narrower basis for affirming the trial court’s opinion, namely, that the commencement of trial prior to the decision on appeal made the issue of release moot. Id. Section 3164 only applies to defendants “awaiting trial,” and the release sanction bars continued custody “pending trial.” This language suggests that defendants may be reincarcerated once trial has begun, but neither the trial court nor the court of appeals considered this possibility. As for the conditions of release, either prior to or during trial, see text at note 245 infra.

239 S.D.N.Y.R. CRIM. P. 8(b).

Under the circumstances, the reasoning adopted by the court of appeals appears to be a sensible application of the fault standard. However, this exception is not a suitable substitute for the exclusion provisions discussed above, and it is submitted that the Second Circuit would have done better to adopt the reasoning advanced by the trial court. For one thing, as the Tirasso case demonstrates, there are numerous kinds of unavoidable prosecution delay which are not attributable to the defendant at all, and it seems unlikely that Congress intended to penalize the Government for delays which the Act recognizes are beyond its control (e.g., unavailability of an essential witness). Moreover, if the fault exception is to serve as a substitute for the exclusion provisions, then the standard of fault is likely to be construed very broadly, and the result will be a failure to protect the public interest in speedy trial during the interim period. The public interest in speedy trial of detained defendants may be somewhat less than in the case of released defendants, but there is no indication that the interim detainee provisions were passed solely for the benefit of these defendants. Thus, the degree of defendant fault required to bar release should be set high enough to ensure that waiver of the 90-day limit does not become a routine matter.

Another difficulty with the Second Circuit opinion is that it fails to specify the precise consequences of a finding of defendant fault. The court stated that the Act and the local speedy trial plan “require the exclusion of the time consumed in pretrial matters.” The reference to “exclusion” of time suggests that defendant fault is neither a permanent bar to release, nor a basis for starting the 90-day time limit running anew, but since the trial in the Mejias case began two weeks after the expiration of the 90-day limit, any of these three rationales would have been sufficient to bar release of the defendants. If the standard of “fault” is kept fairly narrow, as proposed above, then it seems appropriate to start the 90-day time limit over again, perhaps by analogy to the treatment of defendants dismissed without prejudice under the permanent sanction provi-

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24 For example, the problems of pretrial recidivism, obstruction of justice, and flight to avoid prosecution are not at issue in the case of detained defendants. However, the cost of extensive pretrial detention is certainly a matter of public concern, and the general problems of stale prosecution evidence, missing witnesses, loss of deterrent impact, and interference with rehabilitative efforts jeopardize the public interest whether or not the defendant is in custody. See text at note 8 supra. The provisions of section 3164 dealing with released defendants designated as being of “high risk” are obviously intended to serve public interests. See text at note 248 infra.


23 Id.
The "exclusion" of the period of delay for which the defendant was to blame might provide only a few more days for the Government to bring the defendant to trial, and it also appears to be an inadequate penalty for willful delay. On the other hand, permanent forfeiture of the right to release seems too severe a consequence even for the most aggravated defense delays, since it could also result in permanent loss of the public right to a speedy trial.

3. Conditions of Release from Custody. In the event that the 90-day period (however calculated) has expired and the defendant was not at fault, he may no longer be "held in custody." The statute is silent, however, regarding the conditions which may be attached to the defendant's release. May he be required to post bond or other collateral, and can he be reincarcerated if he violates conditions of residency, travel, court attendance, etc.? Defendants may argue that their right to release is absolute, and that the court may neither put conditions on the terms of their release, nor permit them ever to be held in pretrial custody again on the same charge.

As usual, the legislative history fails to address this problem, but it seems unlikely that Congress intended to create such a strict remedy. The Second Circuit Rules, which Congress considered to be the model for section 3164, specifically permitted bond and other release conditions, as well as reincarceration.

[T]he defendant shall be released upon bond or his own recognizance or upon such other conditions as the district court may determine . . . . This shall not apply to . . . any defendant who, subsequent to release under this rule . . . has violated the conditions of his release.

A similar construction should be adopted under section 3164, although an amendment of the statutory language may be necessary to avoid litigation on the issue. Such an amendment should specify that the court may conduct an investigation into the defendant's financial condition, to determine what bail amount, if any, he can reasonably be required to post. Any conditions on travel, residence, association, and supervision which would be valid under the Bail 

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214 Where the charges are dismissed without prejudice, pursuant to section 3162, the provisions of section 3161(d) become applicable. Dismissal of the indictment upon motion of the defendant starts the time limits running anew. See text at note 141 supra.

245 18 U.S.C. 3164(c) (Supp. IV, 1974).

2 As for detention during the trial, see note 238 supra.

22 2D. CIR. R. 3. The ABA Standards provide that defendants should be released on their own recognizance, subject only to the penalties for failure to appear. ABA STANDARDS, supra note 56 (Standard 4.2). The provision of the ABA Standards is not mentioned in the Senate Report however.
Act should be permissible, provided such conditions are no more restrictive than are necessary to insure the defendant's presence at trial.\textsuperscript{248}

4. "High Risk" Releasees. The provisions governing released defendants who have been designated "high risk" contain some of the same ambiguities discussed above, as well as other problems, both statutory and constitutional. The most basic problem involves the nature of the "risk" to be avoided. The origins of the Act in the preventive detention controversy suggest that the Senate intended to include risks of further crime or obstruction of justice, as well as nonappearance in court,\textsuperscript{249} but it is clear that the House Judiciary Committee intended a narrower definition.

[T]he Committee . . . believes that the words "high risk" should be construed to mean a high risk that the defendant will not appear for trial.\textsuperscript{250}

It is arguable that the latter statement, which was made shortly before passage of the Act, is a more reliable indicator of congressional intent, but the final views of the Senate are unknown.\textsuperscript{251} In the event that danger to the community is held to be a relevant consideration, it will be especially important to take steps to insure that the defendant's "fair trial" rights are protected.\textsuperscript{252}

a. Fault Standards in High Risk Cases. If a "high risk" defendant is not tried within 90 days of designation, his release conditions may be revised, provided that (1) the defendant is found to have "intentionally delayed the trial of his case," and (2) the Government was not at "fault" for the delay.\textsuperscript{253} Although the meaning of government "fault" is nowhere defined in the Act or the legislative history, it seems reasonable to restrict this term to the kinds of "intentional" delay for which "high risk" defendants will be held responsible. Otherwise, the courts would be applying a double stan-

\textsuperscript{248} See text and note at note 257 infra.

\textsuperscript{249} See text at note 49 supra. In the 1971 Senate Hearings, which led to the drafting of section 3164, "high risk" defendants were described as "dangerous," which suggests that "preventive detention" issues were still very much alive at that point. See 1971 Senate Hearings, supra note 58, at 140 (testimony of Prof. Daniel J. Freed).


\textsuperscript{251} The drafters of the 1975 Model Plan and the 1976 Model Statement apparently believed that risk of further crime was a relevant consideration. See 1975 Model Plan, supra note 72, § 10; 1976 Model Statement, supra note 72, § 6(b) (a "high risk" defendant is one designated as "posing a danger to himself, or any other person, or to the community").

\textsuperscript{252} See 1976 Model Statement, supra note 72, § 6(d)(3) (a "high risk" designation may be sealed "for such period as may be necessary to protect the defendant's right to a fair trial").

\textsuperscript{253} 18 U.S.C. § 3164(c) (Supp. IV, 1974).
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standard, releasing defendants who cause intentional delay on the basis of less culpable government delays.

If the Government is found to be at fault, or if the defendant did not cause intentional delay, then sanctions may not be invoked against the defendant, but the statute does not indicate whether this bar is temporary or permanent. The approach suggested previously—"recycling" the 90-day clock—seems appropriate in cases where the defendant is blameless, but if both parties have caused intentional delay, it may be more appropriate to keep the original "clock" running and hold the defendant responsible for further stalling committed any time after the first 90 days (provided the Government is not also at fault).

b. "Modification" of Release Conditions. Assuming there has been a finding of intentional defense delay and the Government was not at fault, the court is authorized to "modify" the defendant's nonfinancial release conditions "to insure that he shall appear at trial as required." The reference to nonfinancial conditions apparently rules out raising the amount of bond and, by implication, prevents outright revocation of bail, so presumably all the court can do is impose tighter restrictions on the defendant's travel, residence, associations, and supervision. However, this narrowing of the sanction does not avoid constitutional difficulties. The Supreme Court has held that bail set at a figure higher than an amount "reasonably calculated" to assure appearance at trial is "excessive" within the meaning of the eighth amendment, and this suggests that nonfinancial release conditions which are unrelated to appearance might also be suspect.

To avoid all of these problems, U.S. Attorneys will probably forgo the use of "high risk" designations, particularly since the supposed benefits of this procedure can generally be achieved informally. Potential "high risk" defendants can be detained on high

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234 See text and note at note 244 supra.
236 In contrast, the 1972 Model Plan permitted revocation of any released defendant's bail if he were found to be "responsible" for the failure to commence trial within 180 days of indictment, and there was no "good cause" for the delay. 1972 Model Plan, supra note 68, § 5.
237 Stack v. Boyle, 342 U.S. 1 (1951). Even if the eighth amendment is inapplicable to nonfinancial conditions of release, it is arguable that the need to assure appearance at trial is the only government interest justifying restrictions on the pretrial liberty of the accused. If so, the due process clause prohibits any restrictions not rationally related to that interest. See generally Note, Constitutional Limitations on the Conditions of Pretrial Detention, 79 YALE L.J. 941, 949 (1970).
238 As of July 1, 1976, no instances of "high risk" designation had come to the attention of the author.
bonds, and those who secure release can usually be tried quickly, with the cooperation of the court. Thus, from a policy standpoint, "intentional" defense delay is actually only a problem in the large number of "low risk" cases, where courts and prosecutors lack the incentives or resources to require promptness on the part of the defendant. In short, the interim "high risk" provisions are awkward, unnecessary, and worthy of neglect or repeal.

D. The Planning Process

The Speedy Trial Act includes an extensive research and planning component, which finds no counterpart in previous state speedy trial acts or state and federal court rules. Congress considered these provisions to be even more important than the operative sections of the statute, for they provide the vital link between strict statutory time limits and the appropriations process through which any additional resources needed to implement these limits would be provided. The required research into the causes of pretrial delay was also intended to better inform Congress of the nature of the problem and the best way to focus and refine the statute to achieve its goals. Independent of the speedy trial problem, the detailed offender-based statistics contemplated by the planning provisions should produce, for the first time, comprehensive statistics on all levels of the federal criminal justice process, which will facilitate system-wide research and planning, as well as improved judicial administration.

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259 Rule 50(b) requires each district court to conduct "a continuing study of the administration of criminal justice," but the rule makes no provision for the hiring of staff to conduct such a study, and no particular issues are required to be covered. The 1972 Model Plan to implement the rule is simply a statement of time limits and procedures, not an analysis of the problem of delay and methods for resolving it. See note 68 supra. Neither rule 50(b) nor the Model Plan permits courts to request the additional resources necessary to achieve the time limits set forth.


262 "The individual offender is the unit of count as he proceeds through the various processing stages of the criminal justice system, and this provides the means of linking various segments to one another." C. Pope, Offender-Based Transaction Statistics 12 (1975). Such statistics are essential for any analysis of the lengths of time required for various stages of procedure, and they also permit analysis of the interaction of events taking place at different times or at different levels of the process (e.g., pretrial release status vs. disposition).

263 Prior to the Act, retrievable data on federal defendants was limited to the basic offense
Although the statute does not specify how such data collection and analysis are to be carried out, the sheer magnitude of the task clearly indicates that computerized systems are required. Some of the larger federal courts and U.S. Attorneys' offices have been working on sophisticated computer-based management systems for several years, and the Act should serve to accelerate the development and dissemination of this technology. Congress reasonably believed that the use of these systems would be of substantial assistance to courts in complying with the strict statutory time limits. Certainly the instantaneous retrieval of data on a particular case or set of cases would permit the courts to detect crises and bottlenecks more easily. Sophisticated analysis may also reveal patterns of delay attributable to certain individuals or types of cases. However, the utility of computers may be limited. They are not likely to help, for example, in defining the crucial distinction between "delay" and legitimate trial preparation or plea negotiation; nor are they likely to pinpoint or resolve the underlying "causes" of delay, for these are probably as myriad and complex as the cases themselves.

The anticipation of future implementation problems and resource needs is also problematic. The basic limitation of the planning process is that it attempts to predict disposition rates and times after the effective date of the statutory sanctions on the basis of current experience without these sanctions, which is like trying to predict the outcome of a tennis match on the basis of the warm-
up. Judges and other participants are likely to work much harder after 1979 than during the interim, but how much harder they can work and how effective their efforts will be is unpredictable. Judges are also likely to make much greater use of excludable time provisions after 1979, whereas data for the first few months of 1976 suggests that, if anything, judges have been underutilizing these provisions in the presanction period. Thus, Congress will probably not know until after 1979 just how broadly the exclusion provisions will be interpreted, and it will certainly not know until then how often the dismissal without prejudice option will be used.

Notwithstanding the volume of data and analysis required under the planning provisions, one of the most important questions related to the Speedy Trial Act will not be investigated—namely, the incidence of further crime, failures to appear, and obstruction of justice among released defendants awaiting trial. Except for the ten pilot districts which will operate Pretrial Services Agencies under Title II of the Act, Congress will receive no data on the incidence of these problems or the extent to which speedier trials serve to mitigate them. Thus some of the major reasons for creating a "public right" to speedy trial will not be examined in most districts.

CONCLUSION

The attempt to enforce the public and private interests in prompt disposition of criminal charges is a worthy goal, but Con-

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265 During the first three months of 1976, only 27 percent of the defendants disposed of in the Northern District of Illinois had any excludable time entered; most of the exclusions related to the pretrial motions and "under advisement" provisions, but it did not appear that maximum use was made of either, and the "ends of justice" continuance provisions were almost never used. See 1976 Northern Illinois Plan, supra note 79, Table 2; note 125 supra.

267 Past studies of pretrial recidivism involved defendants charged with state or local rather than federal offenses, so the results are probably not representative of either the rate or the timing of pretrial recidivism in most federal districts. See U.S. Dep't of Commerce, Compilation and Use of Criminal Court Data in Relation to Pretrial Release of Defendants: Pilot Study, 1970 (Nat'l Bureau of Standards Technical Note 535); Preventive Detention: An Empirical Analysis, 6 HARV. CIV. RIGTS-CIV. LIB. L. REV. 289 (1971).


269 The data available in the ten pilot districts will, of course, permit at least a limited assessment of these important issues. Section 3155 of Title II of the Act requires the Director of the Administrative Office to report annually to Congress on the "accomplishments" of these agencies, with particular attention to their effectiveness in (1) reducing crimes committed by bailed defendants, (2) reducing the volume and cost of "unnecessary pretrial detention," and (3) "improving the operation" of the Bail Act. The third topic presumably refers to the failure-to-appear rate.
gress may have set its sights somewhat higher than the realities of federal criminal justice administration will tolerate. Both the length and the structure of the permanent time limits established under the Act need to be reconsidered; the ready alternative—extensive use of excludable time—appears to be both a waste of resources and an invitation to emasculation of the Act. Lengthening of the time limits, by contrast, would permit elimination of the more troublesome exceptions and stricter interpretation of those that remain. Other provisions of the statute also need to be amended in order to eliminate potential loopholes or conform to the necessities of court administration; and numerous ambiguities and drafting problems must be resolved. With the exception of the interim provisions, which need to be clarified as soon as possible, all of these changes should wait until the courts have gained further experience with the Act, and have compiled more reliable data on disposition times and patterns. However, a final decision on the scheme and timetable to be followed should be made well in advance of July 1, 1979, so the courts can be assured that the necessary resources and statutory amendments will be forthcoming in time to avoid major disruption of court functions.