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THE SPEEDY TRIAL ACT— JUSTICE ON THE ASSEMBLY LINE

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In January 1975, Congress enacted the Speedy Trial Act¹ which has established limits upon the time in which persons accused of federal crimes must be indicted, arraigned, and tried and has imposed sanctions for failure to meet such time limits. The wisdom of this legislation is debatable, and the consensus of those connected with the federal criminal justice system has been decidedly unfavorable. Neither the quality of its draftsmanship nor the logistics of its organization has evoked admiration, for many problems are raised and left unanswered, thus necessitating judicial speculation.

The Act and its consequences should be of grave concern to all participants in the federal criminal justice system, but primarily to accused persons. The concern of accused persons is emphasized because the title of the Act is misleading. It is not a mere legislative expression of the sixth amendment right to a speedy trial;² this right is already possessed by defendants in both federal³ and state⁴ courts. The Act goes further—it *requires* a speedy trial whether the defendant wants it or not. This requirement may not always benefit the defendant or

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1. 18 U.S.C. §§ 3161-3174 (Supp. IV, 1974).
2. U.S. CONST. amend. VI.
3. See *Strunk v. United States*, 412 U.S. 434 (1973).
4. See *Smith v. Hooey*, 393 U.S. 374 (1969).

accord with his desires. For example, only upon the occurrence of certain acceptable ("excludable") delays set forth in section 3161(h) of the Act⁵ can a time limit be extended, and (as will be discussed later) under early cases interpreting the Act, even these exclusions may not apply if the defendant is incarcerated.⁶ Thus, the Speedy Trial Act, in addition to expressing a sixth amendment right, appears to manifest the theory, announced and accepted by many penologists, that swift and certain punishment operates as an effective deterrent to criminal behavior.⁷ This philosophy is reflected in the Report of the House Judiciary Committee which states that the purpose of the Act is to reduce crime and the danger of recidivism.⁸

Many states have speedy trial legislation,⁹ and model legislation has also been recommended by the American Bar Association.¹⁰ State legislation differs, however, from the Speedy Trial Act in that the imposed time limits can be waived by the defendant. For example, in California the trial can be set outside of the time limits upon the defendant's request or with his express or implied consent.¹¹ In Iowa and Nevada, however, the waiver is limited to an application by the defendant.¹² Massachusetts takes yet another approach and a delay may be occasioned only if the defendant "requires it."¹³ This does not mean that state courts where such legislation exists must automatically grant a defendant's motion for continuance or set trials outside of the time limits if the defendant requests or consents, but state courts do have a broad discretion in this respect. Thus, when compared with the state statutes, the Speedy Trial Act appears to be unique in turning the time

5. 18 U.S.C. § 3161(h) (Supp. IV, 1974).

6. See *United States v. Tirasso*, 532 F.2d 1298 (9th Cir. 1976) (*construing* 18 U.S.C. § 3164).

7. Antunes and Hunt, *The Deterrent Impact of Criminal Sanctions: Some Implications for Criminal Justice Policy*, 51 J. URBAN L. 145, 158-59 (1973).

8. H.R. REP. NO. 93-1508, 93rd Cong., 2d Sess. 1 (1974). See also S. REP. NO. 93-1021, 93rd Cong., 2d Sess. 6-8 (1974).

9. E.g., ALAS. STAT. § 12.20.050 (1962); ARK. STAT. ANN. §§ 43-1708 to -1711 (1964); CAL. PENAL CODE § 1382 (Deering 1976); ILL. ANN. STAT. ch. 38, § 103-5 (Smith-Hurd Supp. 1976); IOWA CODE ANN. § 795.1 (Supp. 1976); MASS. GEN. LAWS ANN. ch. 277, § 72 (1968); NEV. REV. STAT. § 178.556 (1973); VA. CODE ANN. § 19.1-191 (Supp. 1975); WASH. SUPER. CT. (CRIM.) R. 2.1, 3.3.

10. ABA PROJECT ON STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO SPEEDY TRIAL (1967).

11. CAL. PENAL CODE § 1382 (Deering 1976).

12. IOWA CODE ANN. § 795.1 (Supp. 1976); NEV. REV. STAT. § 178.556 (1973); see VA. CODE ANN. § 19.1-191 (Supp. 1975) (continuance, presumably beyond time limitations, can be granted on defendant's motion).

13. MASS. GEN. LAWS ANN. ch. 277, § 72 (1968) (defendant in custody and under indictment).

limitations against the defendant. Accused persons and defense counsel should be keenly aware of this singular requirement of the Act.¹⁴

Time limitations are not new to federal courts. Rule 50(b) of the Federal Rules of Criminal Procedure requires each district court to prepare a plan for the prompt disposition of criminal cases to include rules regarding time limits within which pretrial procedures, the trial itself, and sentencing must occur.¹⁵ Such plans were in effect in federal courts at the time the Speedy Trial Act was enacted,¹⁶ but the so-called "50(b) plans" are neither as elaborate nor as far reaching as the provisions of the Speedy Trial Act. Similar to state legislation, rule 50(b) plans normally exclude any delay caused or consented to by the defendant¹⁷ and normally recognize congested dockets as justifiable excuse for delay,¹⁸ which is contrary to an express provision of the Speedy Trial Act.¹⁹ Further, they give district courts a wide discretion in imposing the sanction of dismissal—a discretion which the appellate courts have exercised on the side of retaining the case on the docket.²⁰

THE BASIC PROVISIONS OF THE ACT

The Act imposes permanent time limits requiring that an information or indictment be filed within 30 days from the date of the accused's arrest,²¹ that the arraignment of the defendant be held within 10 days from the filing of the information or indictment, and finally that the trial commence within 60 days from arraignment on the information or indictment.²² These permanent time limits become effective on July 1, 1979.²³

14. The Speedy Trial Act does contain a catch-all grant of discretion to order a continuance, but, as will be discussed later, the legislative history indicates that it is to be rarely used. See 18 U.S.C. § 3161(h)(8) (Supp. IV, 1974).

15. FED. R. CRIM. P. 50(b).

16. See *United States v. Clendening*, 526 F.2d 842, 843 n.1, 844 n.3, 848 n.6 (5th Cir. 1976) (relevant portions of the Southern District of Texas 50(b) Plan). For criticism of the effectiveness of 50(b) plans, see S. REP. NO. 93-1021, 93rd Cong., 2d Sess. 17-20 (1974) and H.R. REP. NO. 93-1508, 93rd Cong., 2d Sess. 5-7 (1974).

17. See *United States v. Clendening*, 526 F.2d 842, 844 n.3 (5th Cir. 1976).

18. See *United States v. Rodriguez*, 510 F.2d 1, 3 (5th Cir. 1975); *United States v. Rodriguez*, 497 F.2d 172, 176 (5th Cir. 1974).

19. 18 U.S.C. § 3161(h)(8)(C) (Supp. IV, 1974).

20. See *United States v. Maizumi*, 526 F.2d 848, 851 (5th Cir. 1976); *United States v. Clendening*, 526 F.2d 842, 847 (5th Cir. 1976).

21. 18 U.S.C. § 3161(b) (Supp. IV, 1974).

22. *Id.* § 3161(c).

23. *Id.* §§ 3161(f), (g). These subsections were to begin the phase-in periods from the effective date of this section which was July 1, 1976. This logically led to a three year phase-in ending on June 30, 1979.

To afford the criminal justice system an opportunity to explore its weaknesses and solve its problems, phase-in time limits are provided in three stages.²⁴ While the system is being weaned on the phase-in limits, there are no sanctions provided by the Act until July 1, 1979. It can be expected, however, that many courts, both trial and appellate, will be inclined to strengthen the phase-in time limits by dismissing cases wherein the limits are exceeded without excuse.

On and after July 1, 1979, the Act requires, for failure to meet the specified time limits, dismissal of the complaint or charge if the indictment or information is late²⁵ or dismissal of the indictment if the trial is late.²⁶ At this point Congress hedged a bit by giving courts discretion to determine whether to dismiss with or without prejudice after considering "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 re-prosecution on the administration of this chapter and on the administration of justice."²⁷ The American Bar Association took a contrary position and stated that the only effective remedy would be an absolute and complete discharge if the time limits were not met.²⁸

Remember, however, that the objective of the Speedy Trial Act, unlike the model of the American Bar Association, is to create "a requirement for" rather than a "right to" a speedy trial. With this in

24. *Id.* §§ 3161(f), (g). The interim time limits are depicted in the table below:

INTERIM TIME LIMITS UNDER SPEEDY TRIAL ACT

Stage of Proceedings	Stage I	Stage II	Stage III
	July 1, 1976 to June 30, 1977	July 1, 1977 to June 30, 1978	July 1, 1978 to June 30, 1979
Arrest to indictment	60 days	45 days	35 days
Indictment to arraignment	10 days	10 days	10 days
Arraignment to trial	180 days	120 days	80 days

SOURCE: Derived from 18 U.S.C. §§ 3161(f), (g) (Supp. IV, 1974).

25. *Id.* § 3162(a)(1).

26. *Id.* § 3162(a)(2).

27. *Id.* §§ 3162(a)(1), (2).

28. ABA PROJECT ON STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO SPEEDY TRIAL 40-41 (1967) which states:

The position taken here is that the only effective remedy for denial of speedy trial is absolute and complete discharge. If, following undue delay in going to trial, the prosecution is free to commence prosecution again for the same offense, subject only to the running of the statute of limitations, the right to speedy trial is largely meaningless. Prosecutors who are free to commence another prosecution later have not been deterred from undue delay.

mind, the logic of one's trying again if one does not at first succeed can be understood.

If a case does not proceed to trial within the designated time, a motion by the defendant prior to trial is required to invoke the sanction of dismissal, and "[f]ailure of the defendant to move for dismissal prior to trial or entry of a plea of guilty or nolo contendere shall constitute a waiver of the right to dismissal under this section."²⁹ Thus, a defendant whose time is exceeded cannot wait until jeopardy has attached and then move for dismissal under the Act.

In computing the time limits the Act provides for the exclusion of a number of periods of delay.³⁰ These can be divided into three general categories: (1) delay occasioned primarily for the benefit of and at the request of the defendant; (2) delay occasioned primarily for the benefit of and at the request of the prosecution; and (3) delay occasioned for the benefit of and at the request of either or both parties. Excludable time that logically falls into the first category are those delays resulting from an examination of the defendant and a hearing regarding his mental or physical state, and an examination for drug addiction pursuant to 28 U.S.C. § 2902 (1970).³¹ Deferred prosecution, allowing the defendant an opportunity to demonstrate his good conduct, is another category of defendant delay.³² Finally, delay can result from the defendant being "mentally incompetent or physically unable to stand trial,"³³ or the defendant being treated as a narcotics addict under 28 U.S.C. § 2902 (1970).³⁴

The only excludable period of delay solely benefiting the prosecution is any delay resulting from transfer proceedings when the defendant is in another district.³⁵

The third category, which can benefit either or both parties, includes delays caused by trials on other charges, hearings on pretrial motions, or those delays arising from interlocutory appeals.³⁶ A delay, not to exceed 30 days, during which the court has a motion or other relevant matter under advisement is also excludable.³⁷ Delays resulting from the

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

30. *Id.* § 3161(h).

31. *Id.* §§ 3161(h)(1)(A), (B).

32. *Id.* § 3161(h)(1)(G)(2).

33. *Id.* § 3161(h)(1)(G)(3)(B)(4).

34. *Id.* § 3161(h)(1)(G)(3)(B)(5).

35. *Id.* § 3161(h)(1)(F).

36. *See id.* §§ 3161(h)(1)(C)-(E).

37. *Id.* § 3161(h)(1)(G).

unavailability of the defendant or an essential witness³⁸ or a delay caused when a codefendant's time for trial has not run³⁹ are also grounds that would benefit both parties.

Another excludable period occurs when an information or indictment is dismissed by the government and thereafter another charge is filed involving the same transaction.⁴⁰ At first glance such an exclusion would seem to benefit only the government, but it is better categorized as benefiting either or both parties because normally the situation occurs when the defendant has agreed to plead guilty to a lesser offense. The statutory provision is extremely difficult to understand, but interpretation of it is aided by referring to the Report of the Senate Judiciary Committee, which states that "only the period of time during which the prosecution has actually been halted is excluded from the 60-day time limit. . . ."⁴¹

In section 3161(h)(8)(A), a catch-all provision allows a district judge to grant a continuance upon his own motion or the motion of either party, if he finds "the ends of justice served by taking such action [that] outweigh[s] the best interest of the public and the defendant in a speedy trial."⁴² This section specifically prohibits, however, a continu-

38. *Id.* § 3161(h)(3)(A).

39. *Id.* § 3161(h)(7).

40. *Id.* § 3161(h)(6) which provides:

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, [exclude] any period of delay from the date the charge was dismissed to the date the time limitation would commence to run as to the subsequent charge had there been no previous charge.

41. See S. REP. No. 93-1021, 93rd Cong., 2d Sess. 38 (1974) where the committee discussed reindictment after dismissal:

Subparagraph 3161(h)(6) provides for the case where the Government decides for one reason or another to dismiss charges on its own motion and to then recommence prosecution. Under this provision only the period of time during which the prosecution has actually been halted is excluded from the 60-day time limits. Therefore, under 3161(h)(6) when the Government dismisses charges only the time between when the Government dismisses charges to when it reindicts is excluded from the 60-day time limits. For example, if the Government decides 50 days after indictment to dismiss charges against the defendant then waits six months and reindicts the defendant for the same offense the Government only has 10 days in which to be ready for trial.

42. 18 U.S.C. § 3161(h)(8)(A) (Supp. IV, 1974). The court must set forth in the record the reasons supporting such finding and must consider "among others," the following somewhat vague factors:

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

(ii) Whether the case taken as a whole is so unusual and so complex, due to the number of defendants or the nature of the prosecution or otherwise, that it is

ance because of a congested court calendar or the lack of diligent preparation or the failure to obtain available witnesses by the government.⁴³

An important section of the Act concerns detainees who are being held solely because they are awaiting trial and released persons who are awaiting trial and have been designated as "high risks" by the United States Attorney.⁴⁴ During the period of time from September 29, 1975 until July 1, 1979, when the permanent limits go into effect, the trial of such defendants must be commenced within 90 days from the beginning of continuous detention or the designation of high risk.⁴⁵ The Act further provides that no detainee shall be held in custody pending trial after the expiration of the 90-day period required for the commencement of his trial.⁴⁶ The high risk defendant who intentionally delays his case, however, may have the nonfinancial conditions of his release modified.⁴⁷ After July 1, 1979, the permanent time limits specified in the Act will apply to all defendants, including those in detention or designated as high risk defendants, and section 3164 will thereafter have no application.⁴⁸

A few miscellaneous provisions complete the mechanical scheme of the Act. With respect to the 30-day period between arrest and indictment for a felony offense, the Act authorizes an additional 30-day extension in a district where the grand jury has not been in session during the 30-day period.⁴⁹ This provision grants relief only in isolated circumstances and probably would never be applicable in any of the four districts in Texas because a grand jury is in session somewhere in the district almost continuously. The effect of this provision during the phase-in periods is unclear. Whether it applies at all and, if so, whether the base period is either 30 days or extends during the period specified during that particular 12-month phase-in period is not specified in the

unreasonable to expect adequate preparation within the periods of time established by this section.

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

Id. §§ 3161(h)(8)(B)(i)-(iii).

43. *Id.* § 3161(h)(8)(C).

44. *Id.* §§ 3164(a)(1), (2).

45. *Id.* § 3164(b).

46. *Id.* § 3164(c).

47. *Id.* § 3164(c).

48. *Id.* § 3164(a).

49. *Id.* § 3161(b).

Act. It would be logical to argue that during a particular phase-in period—for example, from July 1, 1976 through June 30, 1977, when the limit from arrest to indictment is 60 days⁵⁰—that the extension does apply, and that if a grand jury is not in session during the 60 days (rather than 30 days), the time will be extended for 30 days.

Subsection (d) of section 3161 addresses the situation wherein any indictment or information or part thereof is dismissed on motion of the defendant or any charge contained in a complaint is dismissed or otherwise dropped. If thereafter a complaint is filed against the defendant charging him with the same offense or one arising out of the same transaction, the time limits begin anew.⁵¹

Section 3161(c), which establishes the 10-day time limit between filing the indictment or information and arraignment, provides as an alternative beginning date: "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"⁵² This covers the situation wherein a defendant is indicted before arrest.

Section 3161(e) provides that when the trial judge declares a mistrial or orders a new trial, the resulting retrial shall commence within 60 days from the date the action occasioning the retrial becomes final.⁵³ This is also true in connection with a retrial necessitated by a successful appeal or collateral attack, except that the court retrying the case may extend the period not to exceed 180 days from the action occasioning the retrial if unavailability of witnesses or other factors resulting from passage of time shall make the trial within 60 days impractical.⁵⁴ These time periods are presumably subject to the delay exclusions delineated in section 3161(h) since they both fall under the same general section dealing with time limits and exclusions.

Section 3161(i) provides in effect that if a defendant withdraws a plea of guilty or nolo contendere, the 60-day time limit for his trial begins running on the day the order permitting withdrawal of the plea becomes final.⁵⁵

50. *Id.* § 3161(b).

51. *Id.* § 3161(d). This situation is to be contrasted with that covered in section 3161(h)(6), where the information or indictment is dismissed upon motion of the government.

52. *Id.* § 3161(c).

53. *Id.* § 3161(e).

54. *Id.* § 3161(e).

55. *Id.* § 3161(i).

Section 3161(j) attempts to cover the situation where a defendant is serving a term in a penitentiary for another crime. The provision is awkwardly worded and leaves open a number of interpretive problems, but generally it requires the United States Attorney to file a detainer on such a defendant, whereupon the person having custody of the defendant must promptly advise the defendant of the charge against him and of his right to demand a trial. If such trial is demanded, the United States Attorney "shall promptly seek to obtain the presence of the prisoner for trial."⁵⁶ The Act does not say what happens if the defendant does not demand a trial, although it does say that if the United States Attorney knows that a person charged with an offense is imprisoned he shall promptly seek to obtain the prisoner for trial.⁵⁷ Presumably, if such undertaking is successful, which in most cases it would be if the defendant is in a federal penitentiary or in a state penitentiary with either a reciprocal agreement or which is subject to federal court jurisdiction, the trial would proceed. The provision does not state how or when the time limits operate in such a situation, although presumably the initial arrest would not occur until the defendant is somehow in federal custody.

The Act authorizes the district court to punish by fine any counsel who knowingly or willfully causes or attempts to cause an unjustified delay at any point in the proceedings.⁵⁸

The final provision of the Act provides a safety valve in case of "judicial emergency," which is a situation in which a district court cannot comply with the time limits set forth in section 3161(c) due to the status of its court calendars.⁵⁹ In such a situation, upon proper application the judicial council of the circuit may allow a period of 180 days to elapse from arraignment to trial.⁶⁰ Such time limit suspensions are allowed for only a one-year period and must be reported to and ultimately approved by Congress.⁶¹

Very little space need be devoted to the planning process provided by the Act. A planning group is established for each district consisting at a minimum of the Chief Judge, a United States magistrate (if any is designated by the Chief Judge), the United States Attorney, the Clerk of

56. *Id.* § 3161(j).

57. *Id.* § 3161(j)(1)(A).

58. *Id.* § 3162(b).

59. *Id.* § 3174(a).

60. *Id.* § 3174(b).

61. *Id.* § 3174(c).

the district court, the Federal Public Defender (if there is one), a private attorney experienced in the defense of criminal cases in the district, the Chief United States Probation Officer for the district, and a "person skilled in criminal justice research who shall act as reporter for the group."⁶² On or before June 30, 1976 and again on or before June 30, 1978,⁶³ the planning group is required to prepare and submit a plan to be reviewed by a panel composed of the members of the judicial council of the circuit and either the Chief Judge of the district court whose plan is being reviewed or such other active judge that the Chief Judge designates.⁶⁴ The plans are to consist of elaborate statistical outlines, statements of problems, and recommendations for compliance.⁶⁵ In a brilliant burst of legislative precision, the Act describes the planning process as follows: "The process shall seek to avoid underenforcement, overenforcement, and discriminatory enforcement of the law, prejudice to the prompt disposition of civil litigation, and undue pressure as well as undue delay in the trial of criminal cases."⁶⁶

PROBLEMS OF CONSTRUCTION

Ninety-Day Release Limitations of Detainees

The language and structure of the Act raise a number of problems which are not specifically resolved. The problem that has caused the most consternation to date is the question of whether instances of excludable delay⁶⁷ are applicable in computing the 90 days in which a detained defendant must be tried under section 3164.⁶⁸ The Act is not helpful in resolving this question. If anything, by its silence it indicates that no excludable delays apply to the 90-day time limit. But such a result, without modification, is unthinkable as well as unconstitutional. Only rarely will the prosecution or the court allow the 90 days to pass without gearing its machinery to see that the defendant is tried. Faced with the option of a premature trial or the release of an unbailable defendant, the system will always choose the trial. What then will the result be if the defendant is mentally incompetent or physically unable to stand trial or if a witness essential to the defendant is unavailable or if

62. *Id.* § 3168(a).

63. *Id.* § 3165(e).

64. *Id.* § 3165(c).

65. *See id.* § 3166.

66. *Id.* § 3165(b).

67. *See id.* §§ 3161(h)(1)-(8).

68. *Id.* § 3164.

any of the other conditions exist which would normally be expected to be raised by a defendant in seeking a delay? The Act seems to provide that such defendant must either be brought to trial within 90 days or released and that no excludable delays are recognized. Under this construction, regardless of the exceptional circumstances, the defendant will be tried within 90 days because the court will not want the defendant released. If this is the intent of the Act, then it is clearly unconstitutional, affording neither due process nor equal protection.⁶⁹ There can be no rational justification for rushing a detained defendant to trial, regardless of the circumstances, while allowing a defendant who is out on bail the benefit of normal delaying circumstances.

The Ninth Circuit has faced the problem twice. In *Moore v. United States District Court*,⁷⁰ the 90-day time limit could not be met because of delays incurred while the defendant was detained for a study of her mental competency. The court of appeals allowed the district judge to exclude both the period of study and the time consumed by court hearings on the defendant's competency "upon a finding that the demands of due process so require."⁷¹ The court skirted the applicability of section 3161(h) to detained defendants by reasoning that a defendant who is detained for the purposes of a mental examination or for a court hearing on such mental competency is not a person under section 3164(a)(1) who is detained solely because he is awaiting trial.⁷²

Later in *United States v. Tirasso*,⁷³ the issue was not so easily avoided. The government had allowed the 90 days to expire because the defendants had to be transferred from New York to Arizona in order to fully try all charges against them, and additional time was needed to gather evidence of a criminal conspiracy whose dimensions proved to be of massive proportions.⁷⁴ The defendants filed motions under section 3164 for their release, asserting that section 3164 did not provide for *any* delays and that since they had not been brought to trial within 90 days, they should be released.⁷⁵ The court agreed with the defendants and ordered them released even though the court knew that they would probably flee across the Mexican border.⁷⁶ Although the court de-

69. U.S. CONST. amends. V and XIV.

70. 525 F.2d 328 (9th Cir. 1975).

71. *Id.* at 329.

72. *Id.* at 329.

73. 532 F.2d 1298 (9th Cir. 1976).

74. *Id.* at 1299.

75. *Id.* at 1299.

76. *Id.* at 1300.

scribed the Act as "inartfully drawn,"⁷⁷ it nevertheless interpreted it as being unambiguous and held that the reason for the delay is irrelevant so long as it is not caused by the defendant or his counsel.⁷⁸

The recent Second Circuit Court of Appeals case of *United States v. Martinez*⁷⁹ dealt with a situation where the court found that the delay was caused not by the government as in *Tirasso* but by the defendant or his counsel. The court on this basis refused to release the accused.⁸⁰ Justice Clark, sitting by designation, mentioned in passing that the result was required on a constitutional ground.⁸¹ The Second Circuit did not hold, as had the lower court,⁸² that the exclusions of section 3161(h) are applicable to section 3164, but stated that section 3164 sufficiently authorized its actions.⁸³

Under these cases it appears that section 3161(h) excludable delays do not apply to the 90-day period for detained persons unless due process requires the delay, as in *Moore*, or delay is occasioned by the accused or his counsel, as in *Martinez*.⁸⁴ Although the statute is not as clear as the court states, this is a reasonable interpretation of what the Ninth Circuit correctly describes as "inartfully drawn" legislation. Admittedly it puts a strain on the prosecution and the courts, but the constitutional objections mentioned above are eliminated by this construction. Time will be excluded to satisfy due process when the

77. *Id.* at 1301.

78. *Id.* at 1299 where the court stated:

The language of section 3164 is straightforward. We find no ambiguity in its interpretation. Subsection (b) provides that the trial of persons held in custody *solely because they are awaiting trial* must commence within ninety days following the beginning of such continuous detention. Subsection (c) provides that the failure to commence trial within the ninety day period, where such failure is not occasioned by the fault of the accused or his counsel, must result in an automatic review by the court of the conditions of release, and further that 'no detainee . . . shall be held in custody pending trial after the expiration of such ninety-day period' Under the clear language of the statute the reason for delay is irrelevant, so long as it is not occasioned by the accused or his counsel.

(emphasis added).

79. — F.2d — (2d Cir.), *aff'g sub nom.* *United States v. Mejias*, — F. Supp. — (S.D.N.Y. 1976).

80. *Id.* at — (delay caused by defense counsel's failure to timely file motions).

81. *Id.* at —.

82. *See United States v. Mejias*, — F. Supp. —, — (S.D.N.Y.), *aff'd sub nom.* *United States v. Martinez*, — F.2d — (2d Cir. 1976). The court in *Mejias* held that the applicability of section 3161(h) exclusions to section 3164 was far from explicit, but, nevertheless, it was Congress' intent that the exclusions apply to the interim limits of section 3164 as well. *Id.* at —. *But see United States v. Orman*, Criminal No. 76-CR-5 (D. Colo., July 12, 1976) (exclusions held not to apply to interim time limits).

83. *United States v. Martinez*, — F.2d —, — (2d Cir. 1976).

84. *See also United States v. Soliah*, — F. Supp. —, — (E.D. Cal. 1976) (court held section 3161(h) exclusions do not apply to defendant detained solely for the purpose of awaiting trial).

defendant is either physically or mentally incompetent to stand trial or an essential defense witness is unavailable to testify. Time also will be excluded when any delay is caused by the defendant or his counsel. Congress should clarify this situation;⁸⁵ but, in the event it does not, the problem will disappear on July 1, 1979, when the permanent time limits of sections 3161(b) and (c), along with the excludable delays in section 3161(h), will apply to all defendants—detained and undetained alike.

Another question with reference to detained and high risk defendants subject to section 3164 is whether, in addition to the 90-day limitation, the “phase-in periods” in sections 3161(f) and (g) apply to the proceedings. For instance, from July 1, 1977, through June 30, 1978, must a *detained* defendant be indicted within 45 days from arrest, arraigned within 10 days from indictment, and tried within 120 days from arraignment? The 90-day limitation of section 3164 does not require dismissal of the case but merely requires the release of the defendant or a review of his status.⁸⁶ Suppose, for example, that a defendant is arrested and jailed without bond on January 1, 1978 and is not tried before April 1, 1978. He must be released under section 3164, but once released must he then be tried within 120 days of his arraignment? The question may seem academic since sanctions do not apply officially until July 1, 1979; in reality, however, it has practical ramifications in view of the likelihood that many judges will impose sanctions during the “phase-in periods” so as to give them meaning. The Act does not specifically resolve the problem. Section 3161 applies to “[a]ny information or indictment charging an individual with the commission of an offense”⁸⁷ and to any defendant,⁸⁸ which indicates application to detained as well as to undetained defendants. Presumably, if section 3161 does apply to all defendants, then the excludable delay provisions of section 3161(h) would apply without restriction to the defendants’ trial date after they have been released and also to the consideration of whether they have been timely indicted or arraigned. As a result, the 90-day and the phase-in time limits run concurrently.

85. The Justice Department is proposing legislation to Congress which will have the effect of excluding the delays enumerated in section 3161(h) from section 3164(b) computations. Letter from the Attorney General to the President of the Senate, June 21, 1976.

86. See 18 U.S.C. § 3164(c) (Supp. IV, 1974).

87. *Id.* § 3161(b).

88. *Id.* § 3161(c).

Ten-Day Limitation From Indictment to Arraignment

The provision establishing a 10-day limitation from indictment to arraignment⁸⁹ raises further problems of construction. First, the excludable delays of article 3161(h) apply only in computing the time within which an information or an indictment must be filed, or the trial of such offense initiated.⁹⁰ Does this mean that no excludable delays apply to this 10-day period and that the provision is violated even if the defendant's physical or mental condition prevents his appearance at arraignment, or even if he jumps bail and is thus unavailable? Common sense requires that the exclusions be applied to the 10-day period, but there are limits on how far a court may go in writing common sense into the Act, which makes no reference to the application of exclusions to the 10-day period.

Another problem related to the 10-day period is that the sanctions imposed in section 3162 apply only when there is a failure to file an indictment or information within the time limit imposed by section 3161(d) and when a defendant is not brought to trial within the time limit imposed by section 3161(c).⁹¹ Apparently, there are no statutory sanctions for failing to arraign the defendant within 10 days of indictment. It is difficult to understand why Congress imposed the 10-day limitation without sanctions. The courts are faced with the option of ignoring the limit and simply holding arraignments within a reasonable time or of supplying omitted sanctions by judicial legislation.

Both of these problems result from the circumstance that the idea of imposing the 10-day period was added to the Act by a late amendment,⁹² and other portions of the bill were not redrafted to accommodate the addition. Since the idea of establishing a time limit between indictment and arraignment serves no useful purpose to any party or to the public, Congress should eliminate entirely the 10-day period or at least express its intent through clarifying amendments.

Dismissal of the Detainee's Case Under Section 3164

Apart from *Moore*, *Tirasso*, and *Martinez*, the language in section 3164 regarding the consequences of exceeding the 90-day trial time for

89. *Id.* § 3161(c).

90. *Id.* § 3161(h).

91. *See id.* § 3162(a).

92. *See* S. REP. NO. 93-1021, 93rd Cong., 2d Sess. 31-32 (1974) where any discussion of the 10-day period is conspicuously absent. H.R. REP. NO. 93-1508, 93rd Cong., 2d Sess. 21-22 (1974) discusses a later amendment adding the 10-day period at the request of the Justice Department.

detained defendants is far from clear. The provision contains two sentences which seem to conflict. First, subsection (c) of section 3164 begins by stating that an "automatic review" by the court of the conditions of the release will result when the court fails to try the detainee within 90 days and this failure was not the fault of the accused, his counsel, or the United States Attorney.⁹³ Although some latitude is given the court with this provision, the next sentence provides that "[n]o detainee, as defined in subsection (a), shall be held in custody pending trial after the expiration of such ninety-day period required for commencement of his trial"⁹⁴ This latter provision seems mandatory. The Ninth Circuit, in *Tirasso*, read these two sentences together to mean that if the time is exceeded without fault of the accused he must be released; but if the delay is "occasioned by the accused," the time can be extended without releasing the defendant.⁹⁵ This is a reasonable result, but it is not supported by statutory language.

Transfer Delay and Arraignment Interpretation

Another unresolved problem concerns the provision for excluding delays resulting from other proceedings concerning the defendant, such as proceedings relating to transfer from other districts under the Federal Rules of Criminal Procedure.⁹⁶ How is this time computed if a defendant is arrested in Florida, for instance, and then transferred to the State of Washington? Is only the one day devoted to the transfer proceedings excluded, or may the four or five days travel time between Florida and Washington be considered? Moreover, what happens if the marshal in Florida waits several days before transferring the defendant to Washington? None of this time can be considered as proceedings, but might it be considered as resulting from proceedings? Unfortunately, the Act does not provide the guidance necessary to answer these questions.

Another problem concerns the congressional meaning of arraignment in the Act's requirement that a defendant be arraigned 10 days after his indictment.⁹⁷ Rule 10 of the Federal Rules of Criminal Procedure, titled "Arraignment," provides that "[a]rraignment shall be conducted in open court and shall consist of reading the indictment or information

93. See 18 U.S.C. § 3164(c) (Supp. IV, 1974).

94. *Id.* § 3164(c).

95. *United States v. Tirasso*, 532 F.2d 1298, 1299-1300 (9th Cir. 1976).

96. See 18 U.S.C. § 3161(h)(1)(F) (Supp. IV, 1974).

97. *Id.* § 3161(c).

to the defendant or stating to him the substance of the charge and calling on him to plead thereto. He shall be given a copy of the indictment or information before he is called upon to plead."⁹⁸

Rule 11 then defines the pleas that a defendant may make at the time of his arraignment.⁹⁹ Did Congress intend to confine arraignment to the simple procedure described in rule 10, or did it intend to include the plea procedure outlined in rule 11? It makes a difference because a magistrate may arraign a defendant short of accepting a plea, but only a district judge may accept a plea of guilty or nolo contendere.¹⁰⁰ Without citing specific authority other than the entire tenor of the Act, it is probable that Congress intended to include rule 11's plea procedure in the term "arraignment" and therefore contemplated an appearance before a district judge.

Computation of Limitation Periods

The Act is not clear as to how to compute a defendant's time if he is arrested, indicted, or tried near the beginning of a new phase-in period. For example, if a defendant were arrested on June 28, 1977, must he be indicted within 60 days (the period required from July 1, 1976, through June 30, 1977) or within 45 days (the period required from July 1, 1977, through June 30, 1978)?¹⁰¹ Section 3163 provides that the time limit between arrest and indictment applies to "all individuals who are arrested or served with a summons on or after the date of expiration of the twelve-calendar-month period following July 1, 1975"¹⁰² Thus, it is thought that the date of arrest controls which "phase-in period" applies. Accordingly, in the above situation, the time period would be 60 days since the defendant was arrested during the earlier time period.

Similarly, the controlling event with reference to selecting the time period from arraignment to trial is determined by the date of filing of the indictment since section 3163 refers to such incident in determining the effective date.¹⁰³ This is confusing because the date is actually computed from arraignment. Such confusion is undoubtedly caused by the late addition of the 10-day period to the Act and the failure to redraft other provisions of the Act to harmonize with it.

98. FED. R. CRIM. P. 10.

99. See FED. R. CRIM. P. 11.

100. See 28 U.S.C. § 636 (1970); FED. R. CRIM. P. 5.

101. 18 U.S.C. § 3161(f) (Supp. IV, 1974).

102. *Id.* § 3163(a)(1).

103. *Id.* § 3163(b).

For that matter, section 3163 when considered alone is misleading as to the effective date of the permanent time limits. It states that the permanent time limits provided in subsections (b) and (c) of section 3161 are effective on July 1, 1976, without mentioning the phase-in time periods.¹⁰⁴ Without question, however, since sections 3161(f) and (g) modify sections 3161(b) and (c) with the phase-in time periods, these must be read into section 3163.

Under section 3161(c), which establishes the 60-day period from arraignment to trial, the question may arise as to when the trial begins—at the beginning of voir dire, the swearing of the jury, the swearing of the first witness, or at some earlier or later event? Traditionally, apart from the question of when jeopardy attaches, a trial is understood to begin with voir dire of the jury,¹⁰⁵ and it is probable that this event was intended as the beginning of trial under the Act. If the trial is before a judge, it begins on the day it is called. Therefore, it is conceivable that a judge can comply with the Act by selecting several juries or by calling several non-jury cases on one day, within the prescribed limits, and then taking up further proceedings at a leisurely pace, without regard to the limits. For example, a defendant whose jury is selected on the 58th day but whose further proceedings begin a week later, could reasonably argue that, although it is not expressed, the Act implies a requirement that the trial proceed without delay after selecting the jury and that, accordingly, the described procedure violates the Act. On the other hand, such a procedure, if not carried to extremes, is perfectly reasonable and customary and might be held to be in compliance with the Act. The most that can be said here is that any judge who follows this practice is taking a risk of dismissal on appeal.

Another problem in the computation of excludable delays arises when the defendant is examined for his mental competency, physical incapacity, or narcotic addiction.¹⁰⁶ Is the criteria used to compute the period of delay the actual time spent with an examining doctor or may time spent in travel to and from the hospital or clinic, time spent in orientation, adjustment, observation, postexamination recovery, and other predictable consequential delays be excluded as well? This will have to be determined on a case by case basis, but the interpretation given this subsection by the Senate report is somewhat restrictive. It stipulates that

104. *See id.* § 3163(c).

105. *Hopt v. Utah*, 110 U.S. 574, 578 (1884); *United States v. Miller*, 463 F.2d 600, 603 (1st Cir.), *cert. denied*, 409 U.S. 956 (1972).

106. *See* 18 U.S.C. §§ 3161(h)(1)(A), (B) (Supp. IV, 1974).

only a reasonable amount of time *actually* consumed while the defendant is under physical or mental examination is excludable.¹⁰⁷ It further provides that any time spent at the hospital after the examination is completed or any delays at the hospital while awaiting the examination are not to be excluded.¹⁰⁸

Finally, some confusion may develop as to the breadth of section 3161(h)(8), which gives a judge discretion in granting a continuance based on findings "that the ends of justice served by taking such action outweigh the best interests of the public and the defendant in a speedy trial."¹⁰⁹ The factors set out in sections 3161(h)(8)(B)(i)—(iii) are not exclusive as their criteria is prefaced with the language "among others."¹¹⁰ The only requirement for a finding of a particular factor is that the judge have some reasonable basis for his findings (other than a congested docket) and that he place his reasons in the record.¹¹¹ Concerning the judge's function, the Senate report emphasizes that this provision is the "heart of the speedy trial scheme" because it furnishes the flexibility to make the time limits realistic goals.¹¹² But, despite the phrase "among others," the report indicates that Congress intended for the courts to be restricted to the three broad factors expressed in the Act in virtually every case.¹¹³

In viewing these three broad factors of sections 3161(h)(8)(B)(i)—(iii),¹¹⁴ the House report construed the failure to grant a continuance that would result in a "miscarriage of justice" under subsection (i) to include a situation where the defendant's counsel is at fault in causing the delay.¹¹⁵ There are three other instances when relief should be

107. See S. REP. NO. 93-1021, 93rd Cong., 2d Sess. 36 (1974).

108. *Id.*

109. 18 U.S.C. § 3161(h)(8)(A) (Supp. IV, 1974).

110. See *id.* § 3161(h)(8)(B).

111. *Id.* §§ 3161(h)(8)(A), (C).

112. S. REP. NO. 93-1021, 93rd Cong., 2d Sess. 39-41 (1974).

113. *Id.* at 39 where it is stated that "continuances under 3161(h)(8) should be given only in unusual cases [such as] . . . many protracted and complicated Federal prosecutions, that is antitrust cases, and complicated organized crime conspiracy cases . . ."

114. See 18 U.S.C. §§ 3161(h)(8)(B)(i)-(iii) (Supp. IV, 1974).

115. H.R. REP. NO. 93-1508, 93rd Cong., 2d Sess. 25-26 (1974) where it states:

Although the Committee cannot foresee any excuses for institutional delay which would justify granting a continuance, it does believe that the lack of diligent preparation or failure to obtain available witnesses on the part of the defendant or his attorney could result in a miscarriage of justice and, therefore, exempts these reasons from prohibiting a defendant or his counsel from seeking a continuance. For example, when a defendant's counsel, either intentionally or by lack of diligence fails to properly prepare his client's case, either he or the defendant might seek a continuance on the ground that forcing the defendant to go to trial on the date scheduled would deny the defendant the benefits of a prepared counsel. The court in this situation would determine whether the defendant participated actively in the

available under section 3161(h)(8): (1) counsel for defendant is legitimately engaged in other litigation and effective substitute counsel cannot be provided; (2) the Supreme Court or a court of appeals has before it an issue that would be dispositive of the pending case; and (3) complex cases are specifically mentioned in section 3161(h)(8) as justifying delay in indicting a defendant¹¹⁶ and in proceeding to trial.¹¹⁷

There are other ambiguities and omissions in the Act, both patent and latent, known and unknown, but the purpose of this article is to address only what appear to be the most troublesome areas.

PROBLEMS OF COMPLIANCE AND SOME SUGGESTIONS

General Problems

Even if the Act were clear in all respects and no construction problems existed, the overall problem of compliance with the Act without incurring disproportionate expense and neglecting other judicial duties remains. The most obvious problem is one of manpower, from the level of marshal to that of district judge.

The marshal must keep accurate records of dates of arrest and subsequently transfer them promptly to the clerk and to the United States Attorney. He must be prepared to deliver transferred prisoners from one jurisdiction to another, not just promptly, but immediately, which requires a deputy with no other essential duties to be available at any given time. In some districts new procedures will be adopted which will require him to begin transferring defendants from one division to another for grand jury proceedings and for arraignment. There are few marshal's offices presently staffed to perform these new duties without additional assistance.

The magistrate's job will also increase in workload and complexity. Accurate records concerning arrests and appearances must be compiled and transferred promptly and accurately to the district clerk. Magistrates will have increased participation in arraignment proceedings and in scheduling such proceedings, and thus must become familiar with the

delay or whether his counsel alone was responsible for it. If the defendant did not cause the delay, he should not be penalized by being forced to go to trial with an unprepared counsel. In this case, he should be permitted enough time to seek a new counsel and to properly prepare his case for trial.

116. 18 U.S.C. § 3161(h)(8)(B)(iii) (Supp. IV, 1974).

117. See *id.* § 3161(h)(8)(B)(ii). For a discussion of the type of case contemplated see *Estes, Pre-Trial Conferences in Criminal Cases*, 23 F.R.D. 560 (1959); *Kaufman, Pre-Trial in Criminal Cases*, 23 F.R.D. 551 (1959).

arraignment and trial schedules of district judges. As a result, more and better paid magistrates will be needed in many districts.

Staggering duties are imposed upon the district clerk. This office is the clearing house for the submission, compilation, and transmission of all records and statistics required in both the planning process and reporting procedures under the Speedy Trial Act.¹¹⁸ The clerk is responsible for computing excludable delays authorized under section 3161(h) and for noting them on the docket. This additional duty alone adds substantially to the clerk's present workload and will require the employment of deputies qualified to interpret and exercise legal judgment under the Act. Moreover, the clerk will be responsible for maintaining a central docket which will accurately reflect the status of all pending cases so that he may inform the United States Attorney and the court when a time limit is about to expire as to any particular defendant. With all of these duties imposed upon the office, district clerks will not only need additional manpower, but additional manpower with special para-legal qualifications as well.

The additional burdens imposed upon United States Attorneys are obvious—more grand juries, more court appearances, and more deadlines. In addition to the clerk, most United States Attorneys will be required to maintain a central docket which will accurately reflect the status of all pending cases with reference to speedy trial deadlines. United States Attorneys will undoubtedly need additional clerical and para-legal assistance and probably more lawyers, or at least increased travel time for those they have.

The Act will have a profound effect upon both judges and defense attorneys. The workload and strain upon the judges will necessarily increase, thus necessitating additional judicial manpower in most districts. Defense attorneys will find their dockets more strained, their discovery and preparation less leisurely, and their motions for continuance less leniently considered. Frivolous motions of all types will be dealt with severely and "want of due process" will become a constant battle cry.

The increased workload caused by the Act will be felt to a greater extent in districts of larger area and population. While the Act may present no significant problems in smaller districts such as the Eastern District of Mississippi or the single district in Montana, such would not be the case, for example, in the Western District of Texas which

118. See 18 U.S.C. § 3170 (Supp. IV, 1974).

stretches for 632 miles and has six separate divisions or the Southern District of Texas which stretches for more than 348 miles and includes Houston with its population of more than one million.

The 30-Day Period

Compliance with the 30-day limit from arrest to indictment involves two general steps: first, immediate notification to the United States Attorney by the marshal, arresting law enforcement officer, or magistrate when an accused is arrested; and second, the United States Attorney arranges for a grand jury to be in session and prepares to present the case to the grand jury.

Concerning the first, the problem arises as to who should accomplish the notification. In the past, it was the responsibility of the arresting officer. At present, no reason exists for a change so long as the notification is accurate and prompt. Magistrates have been provided with a form to submit to the district clerk noting when a person is arrested and brought before the magistrate. For additional protection, a copy of this form should be sent to the United States Attorney. The notification problem is magnified when an accused is arrested outside the jurisdiction where he is charged. An arresting marshal in Oregon would not customarily notify the United States Attorney in Florida, where the accused has been charged, when such an arrest is made. He does, however, notify the marshal in Florida, and this notification can be transferred to the United States Attorney and to the clerk in Florida.

Once notified, the United States Attorney, together with the court, must arrange to have a grand jury impaneled in time to act on the charge within 30 days of the arrest. This does not present a grave problem in large urban areas where grand juries are in session almost continuously. If the United States Attorney is notified promptly of the arrest and is able to make diligent preparation for presentation of the charge to the grand jury, the scheduling of a grand jury every 28 days should be sufficient to comply with the Speedy Trial Act.

A problem arises in smaller divisions where the caseload simply does not justify impaneling a grand jury regularly every month, or even on an ad hoc basis within 28 to 30 days after a person is arrested. The expense, the lack of judicial and prosecutorial manpower, and the logistics of such a practice render it infeasible. A partial solution is to establish consolidated grand juries consisting of the smaller divisions and the nearest urban division so that individuals charged and arrested

in the smaller division can be indicted in the larger division. For instance, in the Southern District of Texas a recommendation was made by the Speedy Trial Planning Group that cases arising in Galveston be presentable to a grand jury in Houston and that those in Victoria be presentable to a grand jury in Corpus Christi. This proposal comes close to solving the problem because grand juries are (or soon will be) in session at least every 28 days both in Houston and in Corpus Christi; thus, if a person is arrested and charged in Galveston or Victoria and no grand jury is scheduled in the place of arrest during the succeeding 28 days, the accused person's case can be presented to a Houston or a Corpus Christi grand jury, as the case may be.

This solution has not always been well received. A similar suggestion was made in the Western District of Texas that grand juries in Del Rio, a relatively small division both in population and caseload, be consolidated with those from San Antonio, a metropolitan area with continuous grand juries. When this recommendation was made public, the outbreak of provincial fury emanating from Del Rio was of such magnitude that the issue has yet to be resolved.

A major obstacle delaying United States Attorneys' preparation of cases for presentation to grand juries is the slowness of law enforcement agencies in submitting reports. Preparation for grand jury presentation need not be as detailed or as extensive as preparation for trial, but some facts must be available to the prosecution. When law enforcement agencies are late in submitting their reports, United States Attorneys remain empty-handed as the 30-day deadline approaches. The lateness results from a shortage of agents and secretaries and can be resolved only by providing additional help to the agencies in need.

A few United States Attorneys plan in some cases to eliminate the 30-day deadline problem by pursuing a practice of deliberately suspending arrest until after indictment, except as to defendants whose liberty presents a danger to themselves or to others. Such a practice will relieve the strain on the prosecution and will give government prosecutors sufficient time to prepare both for presentation of cases to grand juries and for trial. On the other hand, it will increase the burden on the accused who, in many instances, will first learn of the charge against him when he is arrested and then has only 10 days to answer the charges at his arraignment and only 60 days after the arraignment to prepare a defense. Such a practice, if deliberately and systematically pursued solely to circumvent the 30-day time limit under the Act and to give the prosecution a preparation advantage over the accused, seems inconsis-

ent with the Act's express policy of extending "fairness to accused persons."¹¹⁹ Furthermore, when a defendant can show that a deliberate delay between the filing of the charge and his arrest substantially prejudiced him in preparing his defense, the practice may run afoul of the due process clause.¹²⁰

The 10-Day Period

The 10-day limitation from indictment to arraignment¹²¹ is the most troublesome of all and ironically is the one limitation that is not phased in between July 1, 1976 and June 30, 1979.¹²² Compliance in urban divisions can be accomplished by regularity—by establishing a time each week when arraignments will be held and never varying from this time except in extreme circumstances. Compliance in smaller divisions presents the same problems as with the 30-day limitation. It is virtually impossible, as well as unduly expensive, to require a district judge to be available in a small division to arraign one or two persons within 10 days after they are indicted. This problem can also be resolved by consolidation: by providing that a person charged in a small division such as Del Rio, Texas, can be arraigned in a large division such as San Antonio, Texas, if no federal judge is regularly available in the small division within 10 days of the accused's indictment. Undoubtedly, this practice will be accepted in some areas and will cause a furor in others.

A mechanical process is practiced in some areas that affords prompt notice of arraignment date to an accused who is out on bail. Immediately preceding a grand jury session, the United States Attorney furnishes the clerk, on a confidential basis, a list of the names of the accused to be submitted to the grand jury for indictment. The clerk types notices of arraignment for each accused person and prepares the same for mailing, while the grand jury is in session. The notices to those who are not indicted are disposed of, while those who are indicted receive the notice several days sooner than if the clerk had waited to prepare the notices until after the grand jury had adjourned. This procedure is even more helpful in the event a defendant is indicted in one jurisdiction and is out on bond, at his residence or otherwise, in

119. *Id.* § 3165(b).

120. *E.g.*, *Godfrey v. United States*, 358 F.2d 850, 852 (D.C. Cir. 1966); *Ross v. United States*, 349 F.2d 210, 215 (D.C. Cir. 1965).

121. 18 U.S.C. § 3161(c) (Supp. IV, 1974).

122. *See generally id.* §§ 3161(f), (g), for the provision holding that the phase-in periods apply only to the times from arrest to indictment and from arraignment to trial.

another jurisdiction. If such a defendant's notice is not mailed until several days after he is indicted, he may not receive it until a few days before the arraignment date, which obviously causes hardship.¹²³ As for defendants who are not out on bond or who are not arrested until after indictment, the magistrate should have a schedule of arraignment dates for the particular court in which the case is set and should advise such defendants as to the date of arraignment when they are brought before him.

The time may come when magistrates will be entirely responsible for arraignments. At present, a magistrate has authority to conduct all aspects of the arraignment proceeding with the exception of taking a plea of guilty or *nolo contendere*.¹²⁴ This deficiency could be alleviated by instructing all defendants to plead "not guilty" to a magistrate, thus completing the arraignment contemplated by the Speedy Trial Act. Those who eventually want to plead "guilty" can so advise the magistrate, whereupon a rearraignment will be scheduled before a district judge. A more straightforward solution, however, would be to statutorily authorize magistrates to take pleas of guilty. Until magistrates actually begin the practice of arraigning defendants and accepting temporary pleas of not guilty, they should be sufficiently familiar with the district court's docket to advise the defendant when his case will be set for pretrial and trial. The Act requires that "the appropriate judicial officer, at the earliest practicable time, shall, after consultation with the counsel for the defendant and the attorney for the Government, set the case for trial on a day certain"¹²⁵ The time of arraignment is accepted by a consensus as the earliest practicable time; thus, if magistrates participate in arraignments they will be the appropriate judicial officer to set the case for trial, although it is foreseeable that some district judges will insist upon retaining direct control over their trial dockets and may design a different procedure for trial settings.

One unfortunate consequence of the 10-day limitation is the pall it casts over discovery procedures in federal criminal trials, particularly the so-called "omnibus" procedure, which has eliminated considerable delay in federal criminal cases.¹²⁶ The omnibus procedure is normally initiat-

123. The suggestion has been made that defendants who are released by magistrates after arrest and who reside a considerable distance from the jurisdiction be required as a condition of their bond to provide a telephone number where prompt notification of arraignment date can be communicated. This suggestion has merit, but additional written notification to such defendants is recommended.

124. 28 U.S.C. § 636 (1970); FED. R. CRIM. P. 5.

125. 18 U.S.C. § 3161(a) (Supp. IV, 1974).

126. FED. R. CRIM. P. 17.1. See also Comment, *The Omnibus Proceeding: Clarifi-*

ed immediately after indictment, and an important, often final, step is completed at the time of arraignment, but its effective operation requires more than 10 days. The time required for omnibus can be adjusted but not satisfactorily. If omnibus is initiated before indictment—for example, at the time of the initial appearance before a magistrate—sufficient time will be available to complete the procedure. It is unlikely, however, that the United States Attorney will have full facts to submit to discovery, nor will he be inclined to allow full discovery before indictment. If time is made available after arraignment, not only will an additional pretrial hearing be required, but also more pleas of not guilty will be made at arraignment, many of which will later be changed, thus requiring rearraignments and more judicial time. Under the present practice, in many instances the pretrial hearing and arraignment are conducted simultaneously.

The best solution to the 10-day limitation problem is to delete the requirement. It was not included in the original legislation which computed the time from indictment to trial;¹²⁷ furthermore, such a period is not contemplated in any state legislation or in the American Bar Association model legislation.¹²⁸ The House report indicates that the 10-day period was written into the Act at the suggestion of the Justice Department on the theory that the time of arraignment rather than indictment is a more logical time from which to compute the time for trial.¹²⁹ Whatever logic supports this view is completely overridden by the disproportionate burden it places on the judicial system and the resulting expense to the taxpayer. The time of indictment is a definite date, and courts can be counted upon to arraign defendants within a reasonable time thereafter. At the very least, if arraignment is to be retained as a significant time, the period should be increased to 20 days, leaving 50 days thereafter for trial.

The 60-Day Period

The 60-day period from arraignment to trial presents the least concern of all.¹³⁰ Although there will be instances of difficulty, in most cases a defendant who has been timely indicted and arraigned can be

ation of Discovery in the Federal Courts and Other Benefits, 6 ST. MARY'S L.J. 386 (1974).

127. S. REP. NO. 93-1021, 93rd Cong., 2d Sess. 31-33 (1974).

128. E.g., ALAS. STAT. § 12.20.050 (1962); CAL. PENAL CODE § 1382 (Deering 1976); IOWA CODE ANN. § 795.1 (Supp. 1976); ABA PROJECT ON STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO SPEEDY TRIAL (1967).

129. H.R. REP. NO. 93-1508, 93rd Cong., 2d Sess. 21-22 (1974).

130. 18 U.S.C. § 3161(c) (Supp. IV, 1974).

tried within the 60-day limit. One reason for this is that few defendants who are indicted and arraigned are ever tried because most plead guilty or are dismissed. Another reason is that except in complex cases, which can be continued,¹³¹ the 60-day interval is realistic and leaves sufficient time to prepare for trial. Even in the small divisions, the 60-day period makes it possible for a district judge to be available for trial before the deadline without undue expense and personal hardship. Furthermore, although a district judge must plan to be available for pending trials in these divisions, such trials are rarely held because, on most occasions, once it becomes known that a judge had definite plans to proceed to trial in a smaller division, pleas of not guilty will be changed to guilty and a trial will no longer be necessary. For example, in 1975, in the Western District of Texas, only one criminal trial was held in the Waco Division, one in the Midland Division, one in the Pecos Division, and six in the Del Rio Division.¹³²

The following propositions would, if adopted, aid compliance with the 60-day limitation period:

(1) Cases should be set for trial at the time of arraignment and such settings should be adhered to except in imperative circumstances.

(2) Courts should be more flexible about their individual docket practice. This is not to suggest that the individual docket practice be abandoned, for it undoubtedly contributes to the orderly disposition of cases, but the Chief Judge or some other administrative officer should be aware of the status of each judge's individual docket, and if one judge's docket is overburdened, it should be definitely understood that some of his cases can be allocated to other judges.

The adherence to individual dockets should also be modified in connection with arraignment procedures. In some areas, particularly urban areas with larger dockets, it would simplify compliance with the Act for one judge to handle all arraignments during a particular week. Such a practice should be seriously considered in order to promote judicial efficiency.

(3) Districts or divisions with overcrowded or congested calendars should make extensive use of visiting judges from less busy areas to assist in disposing of cases in compliance with the Act.

(4) An automatic procedure should be established to control the

131. *Id.* § 3161(h)(8)(B)(ii).

132. Interview with Hon. John Clark, U.S. Attorney for the Western District of Texas, in San Antonio, Texas, Jan. 21, 1976.

eventuality of a particular judge becoming unable to take care of his docket. Under present practice such a judge's cases are often held in abeyance awaiting resolution of his difficulties. In the future, the Chief Judge or some other administrative officer should immediately allocate the indisposed judge's cases among other judges for timely resolution.

(5) Finally, as previously discussed, both the clerk and the United States Attorney should maintain a central docket reflecting each defendant's Speedy Trial Act status at all times.

Collateral Problems

There are additional problems and suggestions collateral to the Act. The first of these is the treatment of civil cases. The Act contemplates that its implementation shall be without "prejudice to the prompt disposition of civil litigation."¹³³ There is good reason to believe, however, that the tendency will be otherwise. Priority is rightfully given to the trial of criminal cases and the speedy trial syndrome may render this priority exclusive. This can be prevented only by reserving substantial and regular times for the disposition of civil cases and rigorously observing these reservations. Advance planning can achieve compliance with the Speedy Trial Act without a resultant neglect of civil cases.

A glaring weakness in the Act is the fact that its provisions are left dangling at the time of jury selection. This leaves unlimited time to complete the trial and to sentence a guilty defendant. Worse still, no limitations are placed upon the disposition of cases on appeal. Even accepting the wisdom of the Speedy Trial Act, what is the benefit to be gained by massive and expensive revisions of the judicial system at the trial level just to try the defendant within 100 days from his arrest, if he thereafter languishes in jail or roams the streets subject to recidivism for months, or even years, pending appeal?

A final topic concerns the docket congestion caused by assigning to federal courts the task of controlling drug abuse. Obviously, several additional articles or even books could be devoted to the subject of drug abuse and only its relation to the Speedy Trial Act will be mentioned here. In most federal districts, particularly those along the Mexican border, district courts devote most of their time to narcotics violations. In the Southern District of Texas, in the fiscal year ending June 30, 1975, the courts disposed of 1,472 criminal defendants of which 910

133. 18 U.S.C. § 3165(b) (Supp. IV, 1974).

(62 percent) were charged with narcotics violations. During this same period, in the Western District of Texas, the number of criminal defendants was 1,247, and of these, 448 (36 percent) were charged with narcotics violations.¹³⁴ Obviously, if control of drug abuse were taken out of the hands of federal courts, the perplexities of the Speedy Trial Act would be significantly reduced in these two representative districts.¹³⁵

CONCLUSION

Earlier, the wisdom of the Speedy Trial Act and of the idea of placing time limits on the disposition of criminal cases was questioned. If, as Congress contemplates, the Speedy Trial Act results in prompt disposition of criminal cases without sacrificing standards of fairness and due process, the interests of both defendants and the public will be served. On the other hand, if, as is feared by many, the idea of deadlines and sanctions accelerates what often appears to be an already hasty flight to judgment,¹³⁶ then the passage of the Act is unfortunate.

One thing is certain: Defendants and defense counsel will be sadly mistaken if they allow the title of the Act and imposition of sanctions to lull them into the belief that the Act will result in further loopholes towards freedom. In only rare instances of oversight will the participants in the federal system of criminal justice allow the imposed time limits to be exceeded. Instead, the gears of justice will be tightened, the Act will be complied with diligently, and many defendants, listening to the imposition of their sentence or staring through prison bars, will wonder where the time went and how things might have turned out if only their counsel had been given more time to prepare their cases.

134. These figures were furnished by the Administrative Office of the United States Courts. The disparity between the percentage of narcotics cases in the two districts, both of which contain major points of entry from Mexico, is probably because the United States Attorney for the Western District of Texas has, of necessity, discontinued accepting for prosecution cases that do not involve large quantities of narcotics.

135. This conclusion is urged because a government report indicates that drug abuse is on the increase, the corollary of which is that the efforts of the federal judiciary to control narcotics have not been successful. HEW, NATIONAL INSTITUTE ON DRUG ABUSE, HEROIN INDICATORS TREND REPORT No. 76-315, at 5 (1976). All that can be suggested here is that Congress should investigate other methods of dealing with drug abuse. If its investigation can turn up more effective methods than the present one, and the federal judiciary can be relieved of the burden, then two problems, the abuse of narcotics and the lack of prompt disposition of criminal trials, would be eased in one instance. The present system, despite its defects, may prove to be the best, but the search for improvement is worth some congressional time.

136. See, e.g., *United States v. Uptain*, 531 F.2d 1281 (5th Cir. 1976); *United States v. Diharce-Estrada*, 526 F.2d 637 (5th Cir. 1976); *United States v. Gordy*, 526 F.2d 631 (5th Cir. 1976).