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RECENT LEGISLATION

Criminal Law—FEDERAL SYSTEM ADOPTS SPECIFIC PARAMETERS FOR THE CONSTITUTIONAL RIGHT TO A SPEEDY TRIAL—*Speedy Trial Act of 1974*.¹

The right of every criminal defendant to a speedy trial is deeply entrenched in our legal heritage² and is specifically included in the Bill of Rights of the United States Constitution.³ However, though the guarantee of a speedy trial is quite explicit, the courts generally have been confused as to the precise extent of this right.⁴ Indeed, the Supreme Court did not expressly recognize the right as fundamental until 1967,⁵ and until 1972 had provided no guidelines for determining whether a defendant had been denied the right to a speedy trial.⁶ The Court at that time refused to set specific time periods within which the accused must be tried, stating "such a result would require this Court to engage in legislative or rulemaking activity" Thus, even with some clarification by the Supreme Court, each court basically was left to use its own discretion, absent specific legislation to the contrary, in determining whether a defendant had been given a speedy trial.

The Speedy Trial Act of 1974 was enacted by Congress specifically to deal with the problem of assuring the defendant and the public a speedy

1. 18 U.S.C.A. §§ 3161-74 (Supp. I, 1975).

2. As Chief Justice Warren noted in *Klopper v. North Carolina*, 386 U.S. 213 (1967), the right to a speedy trial "has its roots at the very foundation of our English law heritage. Its first articulation in modern jurisprudence appears to have been made in Magna Carta (1215) . . . but evidence of recognition of the right to speedy justice in even earlier times is found in the Assize of Clarendon (1166)." 386 U.S. at 223.

3. "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . ." U.S. CONST. amend. VI.

4. For example, in approaching this problem, some courts have held that if a defendant did not demand a speedy trial prior to trial, he waived this right. Other courts expressly rejected this doctrine which became known as the "demand-waiver" rule. See generally 18 N.Y.L.F. 997 (1973).

5. *Klopper v. North Carolina*, 386 U.S. 213, 223 (1967). This holding recognized that the right to a speedy trial extends to defendants in state trials through the fourteenth amendment. *Id.* at 227.

6. In *Barker v. Wingo*, 407 U.S. 514, 528 (1972), the Court rejected the demand-waiver rule as being sufficient by itself to rebut the defendant's claim that he was denied his right to a speedy trial. Instead, the Court held that in determining whether a defendant had been deprived of his right to a speedy trial, his failure to assert his right was only one factor to be considered along with the actual length, the reasons, and the prejudicial effect of the delay. See 18 N.Y.L.F. 997 (1973). For a criticism of the case see Amsterdam, *Speedy Criminal Trial: Rights and Remedies*, 27 STAN. L. REV. 525, 539 (1975).

7. *Barker v. Wingo*, 407 U.S. 514, 523 (1972).

trial,⁸ though this Act is not the first proposed statutory solution.⁹ Congress had earlier approved Rule 48(b) of the Federal Rules of Criminal Procedure which allowed a court to dismiss a case where unnecessary pre-trial delays had occurred.¹⁰ However, this rule still did not establish guidelines for its application, and it gradually became apparent that a more organized approach was needed. In 1972, the Judicial Conference of the United States¹¹ drafted an amendment to Rule 50 of the Federal Rules of Criminal Procedure. Rule 50(b) went further than the case by case approach of Rule 48(b) by ordering each federal judicial district to establish set time limits for bringing a case to trial. The rule was submitted to Congress by the Supreme Court and became law in 1972.¹² Although all but three of the districts had adopted such a plan under Rule 50(b) by 1974,¹³ Congress decided to set the specific time limits itself. Thus, the Speedy Trial Act

8. In drafting the Speedy Trial Act, Congress noted that "the sixth amendment is a right of the community as well as of any particular defendant." S. REP. NO. 1021, 93d Cong., 2d Sess. 15 (1974) [hereinafter cited as S. REP. NO. 1021]. Indeed, a defendant on bail may pose a danger to the community, and the longer he is on bail, the greater the likelihood that he will commit more crimes. H.R. REP. NO. 1508, 93d Cong., 2d Sess. 16 (1974) [hereinafter cited as H.R. REP. NO. 1508]. As a deterrent to crime, Chief Justice Burger noted that "[t]he swift disposition of criminal charges is a major deterrent that has not had sufficient attention in the administration of justice." Address by Chief Justice Burger, American Bar Association Mid-Winter Meeting, Feb. 23, 1975.

9. The first such statute appears to be the Habeas Corpus Act of 1679, 31 Car. 2, c. 2, which was enacted in England and later adopted in form by several states in America. It was based on the number of *terms* of court between arrest and trial. In 1970, the A.B.A. released the ABA PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO SPEEDY TRIAL (1970) [hereinafter cited as ABA STANDARDS] which emphasized in section 2.1 that the standard of measurement should be based on the number of *days* from arrest to trial. See generally Note, *Speedy Trial Schemes and Criminal Justice Delay*, 57 CORNELL L. REV. 794, 803 (1972). In Virginia, the legislature recently enacted such a statute based on the number of days between the initial determination of probable cause by the judge and the trial. VA. CODE ANN. § 19.2-243 (Repl. Vol. 1975).

10. FED. R. CRIM. P. 48(b).

11. The Judicial Conference is generally recognized as "the supreme policy-making body of the federal judiciary . . ." H.R. REP. NO. 1508, *supra* note 8, at 79.

12. FED. R. CRIM. P. 50(b). This rule became law under the Rules Enabling Act, 18 U.S.C. § 3771 (1970), which allows the Supreme Court to submit rules to Congress which become law within ninety days after they are reported.

13. Rule 50(b) was criticized primarily for being too flexible. Since each district could establish its own time limits, disparities among the districts resulted. For example, in the Southern District of Georgia a defendant had to be tried within 45 days after arraignment; in the Middle District of Georgia, the Government had 90 days to bring a defendant to trial, while in the Northern District of that state a defendant was entitled to a trial within 180 days after arraignment. H.R. REP. NO. 1508, *supra* note 8, at 13. Rule 50(b) is still in effect, however, and does cover some aspects of the criminal process that are not covered by the Speedy Trial Act. For instance, Rule 50(b) says that each district must set a time limit for when sentencing must take place after a defendant is found guilty.

was drafted which placed all of the districts under one uniform time schedule for pre-trial procedures.¹⁴

Under the provisions of this Act, Congress has set forth a four year plan to implement the mandatory time limits for criminal trials with the eventual goal to be a maximum time span of one hundred days from arrest to trial by July 1, 1979.¹⁵ In the first year, the only time limit placed on the courts is that each defendant who is detained solely for the purpose of awaiting trial, or who is released but is designated as a high risk¹⁶ by the Government, must be brought to trial within ninety days.¹⁷ Otherwise, any person who is detained *must be released* pending trial, while a high risk releasee must have the conditions of his release reviewed.¹⁸ This interim plan is to remain in effect until July 1, 1979.¹⁹ In the three years from July

14. Since this Act pertains only to the federal system, the only limitation on state prosecutions is the broad language of the sixth amendment, absent specific state legislation to the contrary.

15. 18 U.S.C.A. §§ 3161(b)-(c) (Supp. I, 1975) provide:

(b) Any information or indictment charging an individual with the commission of an offense shall be filed within thirty days from the date on which such individual was arrested or served with a summons in connection with such charges. If an individual has been charged with a felony in a district in which no grand jury has been in session during such thirty-day period, the period of time for filing of the indictment shall be extended an additional thirty days.

(c) The arraignment of a defendant charged in an information or indictment with the commission of an offense shall be held within ten days from the filing date (and 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. Thereafter, where a plea of not guilty is entered, the trial of the defendant shall commence within sixty days from arraignment on the information or indictment at such place, within the district, as fixed by the appropriate judicial officer.

16. The Administrative Office of the United States Courts has defined a high risk defendant as:

(a) one whose chances of appearing at his trial or other court proceedings have been judicially determined to be poor; or

(b) one reasonably designated by the United States Attorney as posing a danger to himself or any other person, or to the community.

ADMINISTRATIVE OFFICE, MEMORANDUM TO: ALL FEDERAL JUDGES, UNITED STATES MAGISTRATES, UNITED STATES PROBATION OFFICERS, CIRCUIT EXECUTIVES, PUBLIC DEFENDERS, CLERKS OF THE COURT, AND DEPUTY CLERKS IN CHARGE OF DIVISIONAL OFFICES, at 28 (Aug. 8, 1975) [hereinafter cited as A.O. MEMORANDUM]. Though this definition is not binding on the districts, it is included in the model plan drawn up by the A.O. and probably will be incorporated into most district plans.

17. 18 U.S.C.A. § 3164(b) (Supp. I, 1975).

18. *Id.* § 3164(c).

19. There is a slight ambiguity on this point. Section 3164(a) says this interim plan is to last until sections 3161(b) and (c) go into effect. Though these sections are technically effective on July 1, 1976, as a practical matter they do not take effect until July 1, 1979, because

1, 1976, to July 1, 1979, additional time limits are also placed on the various stages of pre-trial procedure with the limits for each successive year nearing the final goal.²⁰ Hopefully, this time schedule will allow the courts to adjust gradually to the final provisions of the Act.²¹

The deadlines for bringing an accused defendant to trial are subject to certain provisions which allow an extension of these time limits.²² Besides specific types of pre-trial situations where delays would be excusable, such as sanity hearings, hearings for pre-trial motions and interlocutory appeals,²³ courts also have some leeway in granting continuances which would toll the time restrictions where the "ends of justice" would be served.²⁴ If

of sections 3161(f) and (g). Thus, it appears that section 3164 would remain in effect until that time. *Accord*, A.O. MEMORANDUM, *supra* note 16, at 27.

20. 18 U.S.C.A. §§ 3161(f)-(g) (Supp. I, 1975) provide:

(f) Notwithstanding the provisions of subsection (b) of this section, for the first twelve-calendar-month period following the effective date of this section as set forth in section 3163(a) of this chapter the time limit imposed with respect to the period between arrest and indictment by subsection (b) of this section shall be sixty days, for the second such twelve-month period such time limit shall be forty-five days and for the third such period such time limit shall be thirty-five days.

(g) Notwithstanding the provisions of subsection (c) of this section, for the first twelve-calendar-month period following the effective date of this section as set forth in section 3163(b) of this chapter, the time limit with respect to the period between arraignment and trial imposed by subsection (c) of this section shall be one hundred and eighty days, for the second such twelve-month period such time limit shall be one hundred and twenty days, and for the third such period such time limit with respect to the period between arraignment and trial shall be eighty days.

21. As of June 30, 1975, there were over 2,600 defendants still waiting to be brought to trial twelve months after arrest. ADMINISTRATIVE OFFICE, ANNUAL REPORT OF THE DIRECTOR XI-116 (1975).

22. 18 U.S.C.A. § 3161(h) (Supp. I, 1975). There is some question as to whether this provision applies to the initial interim plan. *See* notes 16-20 *supra*, and accompanying text. The Administrative Office is of the opinion it does *not*, which would mean all detained defendants must be brought to trial within ninety days *regardless of extensions* in the pre-trial period or else be released pending trial. A.O. MEMORANDUM, *supra* note 16, at 29. Though this opinion is not necessarily correct or binding on the districts, since it is included in the A.O.'s model plan, it will probably be adopted by most districts.

23. 18 U.S.C.A. § 3161(h)(1) (Supp. I, 1975).

24. *Id.* § 3161(h)(8). Subsection (B) of this section sets forth several guidelines which a judge may consider in deciding to grant such a continuance, such as the complexity of the case or prejudice to the defendant. It would seem that this section would provide for an extension where excessive publicity has made it impossible to have a fair trial immediately. *See Sheppard v. Maxwell*, 384 U.S. 333 (1966). On the other hand, subsection (C) clearly prohibits granting a continuance because of congestion of a court's docket. For a discussion of cases allowing continuances for this reason see Note, *Speedy Trial Schemes and Criminal Justice Delay*, 57 CORNELL L. REV. 794, 798 (1972). Likewise, if the Government is simply not ready for trial and no justifiable excuse is offered, the case must be dismissed. However, if the defendant is unprepared through the fault of his lawyer, a continuance should certainly

the courts find it hard to meet the time limits of the statute, this discretionary power is certain to be invoked and undoubtedly will be more narrowly construed as the cases are litigated.²⁵ If a defendant is not brought to trial within the requisite time period, the court must dismiss the case either with or without prejudice²⁶ upon a motion by the defendant.²⁷ The court can also levy fines against any attorney in the case under certain circumstances.²⁸ However, none of these sanctions will go into effect until July 1, 1979.²⁹

There is little doubt that this Act will have a profound impact on the federal court system. The primary question remaining is whether the Act will impair or facilitate the administration of justice in criminal proceedings. The basic aims of the Act are certainly commendable. Indeed, both the courts and criminal defendants are in need of relief from the congestion that exists today within the court system. However, the Speedy Trial Act does impose strict limitations which could cause many new problems in the federal system.³⁰ The main fear of the critics of the Act is that some

be granted in the interest of justice under this section. The defense lawyer should be discharged and a new one sought. H.R. REP. NO. 1508, *supra* note 8, at 33-34.

25. As former Attorney General Saxbe noted, this situation "will result in numerous hearings and appeals, thus further clogging the courts." H.R. REP. NO. 1508, *supra* note 8, at 55.

26. There is some confusion as to when a defendant's case has actually been prejudiced to the extent that the Government should be barred from re-prosecuting. In *Barker v. Wingo*, 407 U.S. 514 (1972), the Supreme Court stated:

Prejudice, of course, should be assessed in the light of the interests of defendants which the speedy trial right was designed to protect. This Court has identified three such interests: (i) to prevent oppressive pretrial incarceration; (ii) to minimize anxiety and concern of the accused; and (iii) to limit the possibility that the defense will be impaired. Of these, the most serious is the last, because the inability of a defendant adequately to prepare his case skews the fairness of the entire system. *Id.* at 532.

Thus, each court will have to decide if prejudice has attached on a case by case basis.

27. 18 U.S.C.A. § 3162(a) (Supp. I, 1975). Under subsection (1), if the indictment is not brought within the requisite time, the charges are automatically dropped. Otherwise, under subsection (2), the defendant must *request* that the case be dismissed if he is not brought to trial after indictment within the time period or he is considered to have waived his right to dismissal.

28. *Id.* § 3162(b).

29. *Id.* § 3163(c).

30. Perhaps one of the greatest changes that will result from this Act will be in pre-trial tactics. Defendants may now refuse to plea bargain in hopes that the time limits will expire before they are brought to trial. On the other hand, there may be more plea bargaining with defendants having more leverage with the prosecutor than before the Act, particularly in the more congested courts. As to cases brought to trial, prosecutors may be forced to bring fewer charges against a defendant; border line cases will probably be dropped. Certainly federal prosecutors will defer more cases to state prosecutors wherever possible, and petty offenses may be prosecuted with less vigor. Former Attorney General Saxbe argued that "the time limits will discourage U.S. Attorneys from bringing complicated cases—white collar criminals

criminal defendants will go free without ever having a trial to determine their guilt or innocence. The basis for this fear is twofold: (1) the time limits are overly strict, particularly in view of the limited court personnel available at the present time,³¹ and (2) the sanctions are too absolute.³²

In evaluating the reasonableness of the time limits set by the Act, the members of the House Judiciary Committee who opposed the bill pointed out that the two main branches of Government affected by the bill, the federal judiciary and the Department of Justice, strongly objected to its provisions.³³ There was a general consensus that the federal criminal justice system should be subject to specific limits on the pre-trial period.³⁴ However, the opponents of the bill felt the one hundred day period was too idealistic and should be relaxed somewhat.³⁵ Indeed, the Department of Justice asked each of the ninety-four United States Attorneys how they felt about the bill, and of the ninety-two who responded, all were unanimously opposed to its passage.³⁶ One factor that certainly weighed heavily in this opposition was the fact that the bill contained no provisions for additional prosecutors, not to mention judgeships or public defenders.³⁷ However, even if resources are provided to remedy this situation, the question remains whether a defense lawyer can effectively represent his client under these stringent time limits.³⁸ As a result of this situation it would seem only logical that there would be a significant increase in the demand for lawyers. Otherwise, lawyers may be less diligent in their handling of criminal cases.

Though opponents of the Act do represent a vital segment of our criminal justice system, Congress has provided several safeguards within the

will go uncharged and only violent criminals will be prosecuted." H.R. REP. No. 1508, *supra* note 8, at 55. Another criticism is that civil cases involving the Government may be delayed even longer while prosecutors try to meet the deadlines of the Act.

31. "If we are not given the tools to meet the demands of the Speedy Trial Act . . . the federal courts may be confronted with a crisis . . ." Address by Chief Justice Burger, *supra* note 8.

32. See note 50 *infra* and accompanying text.

33. H.R. REP. No. 1508, *supra* note 8, at 79.

34. *Id.*

35. A series of amendments was introduced that would have extended the time limit from arrest to trial to 160 days. *Id.* at 82.

36. *Id.* at 54 (Letter from William Saxbe to Peter Rodino, Nov. 15, 1974).

37. See note 30 *supra*. The Senate took this matter into consideration, but it decided not to appropriate any additional funds at this time. Instead, the Senate felt that each district court should establish a planning committee to evaluate its needs under the new law before any funds should be allotted for additional court personnel. S. REP. No. 1021, *supra* note 8, at 22-23. It should be noted that the Administrative Office was appropriated 2.5 million dollars to implement the initial phases of the Act. 18 U.S.C.A. § 3171 (Supp. I, 1975).

38. See generally H.R. REP. No. 1508, *supra* note 8, at 83.

Act which should alleviate most of the problems mentioned above. First, the graduated time schedule will allow the courts, prosecutors and defense lawyers to adjust slowly to the requirements of the Act.³⁹ Second, the provisions allowing exclusions of certain time periods in computing the time limits are broad enough to give some flexibility to the courts.⁴⁰ Third, the Act directs the Administrative Office of the United States Courts to keep Congress informed periodically of the Act's success and to make any recommendations for needed changes in the law, including requests for more appropriations if essential to the successful implementation of the Act.⁴¹ Fourth, the Act allows the Judicial Conference of the United States to declare a "judicial emergency" in any district where the court's calendar is too congested to allow the court to meet the specified time limits.⁴² If these safeguards fail to prevent a case from exceeding the designated time limits, then perhaps the case justifiably should be dismissed for failure to give the defendant a speedy trial.

In considering whether the sanctions are too absolute, it should be noted that the Supreme Court has held that once there has been a determination that the defendant has been denied a speedy trial, the only remedy is to dismiss the charges.⁴³ Framing appropriate sanctions for violation of the Speedy Trial Act stimulated lengthy debates in both houses of Congress with some sentiment for the Supreme Court's rule of dismissing the case with prejudice.⁴⁴ The Senate modified this position somewhat by proposing that the Government be barred from reprosecution unless the court dismissed a case without prejudice *and* the Government showed "exceptional circumstances" for why the charges should be brought again.⁴⁵ The House

39. 18 U.S.C.A. §§ 3161(f), (g) (Supp. I, 1975). For the text of these sections see note 20 *supra*.

40. 18 U.S.C.A. §§ 3161(h), (h)(1), (h)(8) (Supp. I, 1975); see notes 22-24 *supra*.

41. 18 U.S.C.A. § 3167 (Supp. I, 1975).

42. *Id.* § 3174. Notwithstanding section 3161(h)(8)(c), which specifically states that the congestion of a court's calendar is not a sufficient justification to grant a continuance in the interest of justice, this section sets forth a procedure whereby the time limits may be relaxed for a district court which is regularly unable to conform to the guidelines of the Act. This procedure has been carefully planned so that a court would not qualify as a "judicial emergency" unless there was a significant backlog in the caseload of that district. Once a "judicial emergency" is declared, the time limits from arraignment to trial may be increased up to one hundred and eighty days for a period of one year, renewable under certain circumstances.

43. *Strunk v. United States*, 412 U.S. 434 (1973). The Court refused to comment on whether the lower court's finding that the defendant had been denied a speedy trial was correct. It only addressed itself to the remedy once such a finding had been made.

44. Originally, the bill was introduced so that once a case was dismissed it could not be reprosecuted. S. REP. No. 1021, *supra* note 8, at 2. See H.R. REP. No. 1508, *supra* note 8, at 57.

45. See S. REP. No. 1021, *supra* note 8, at 3.

Judiciary Committee chose to amend the bill so that all cases would be dismissed with prejudice regardless of the circumstances if the case was not timely processed.⁴⁶ One reason for this change was that in light of the Supreme Court's rule, the committee felt that any other sanction might be unconstitutional.⁴⁷ More importantly, the committee wanted to avoid any possible confusion that could arise over the Government's right to re prosecute a case.⁴⁸ Despite these apprehensions, the bill was again amended to its present form so that a case could be dismissed with or without prejudice at the court's discretion.⁴⁹

Since the Act's provisions only set self-imposed time limits on bringing a defendant to trial and are not meant to define the constitutional right to a speedy trial, the compromise solution would seem to be constitutional. As to cases dismissed without prejudice and re prosecuted, there will certainly be further litigation challenging the trial court's finding of harmless delay. Though the sanction finally chosen was not as strict as the others proposed, critics of the Act still feel the sanction is too severe since defendants may be set free without facing a trial on the merits of the case. Of course, any time a defendant may be set free because of the application of some procedural rule there will be a certain amount of opposition to the rule. Opponents of the Act also objected to this sanction because of the complications involved in re prosecuting a case even when a case is dismissed without prejudice.⁵⁰ As a practical matter, very few cases dismissed without prejudice are ever re prosecuted, though this practice could change in view of the potential number of cases that may be dismissed under this Act. Whenever a case is re prosecuted, the whole proceeding must start from the beginning at the grand jury level. Likewise, whenever a case is re prosecuted the defendant will almost certainly appeal the trial court's finding that his case had not been prejudiced by the delay. Thus, as opponents of the Act have pointed out, there could be further congestion of the appellate process.⁵¹ The sanction finally chosen was a policy decision on the part of Congress, and though that decision may be criticized, Congress wisely postponed imposition of the sanction until July 1, 1979.⁵² If courts

46. See H.R. REP. No. 1508, *supra* note 8, at 23; *accord*, ABA STANDARDS, *supra* note 9, at § 4.1.

47. See H.R. REP. No. 1508, *supra* note 8, at 57.

48. *Id.* at 38.

49. 18 U.S.C.A. § 3162 (Supp. I, 1975).

50. See H.R. REP. No. 1508, *supra* note 8, at 80-81. To remedy this defect, several members of the House attempted to amend the Act so that whenever the time limits expired due to the prosecutor's fault, the Government would still be given one last chance to prepare its case before the court dismissed it. *Id.* at 82.

51. See note 25 *supra*.

52. 18 U.S.C.A. § 3163(c) (Supp. I, 1975).

have trouble conforming to the time limits in the interim period, Congress certainly has ample time to amend the Act, and it will undoubtedly do so if it appears that a large number of defendants will be released otherwise.

Whether the Act will be successful is difficult to determine at this time. The Act has several ambiguities that will have to be clarified by the courts on a case by case basis.⁵³ But perhaps the main reason why the success of the Act is difficult to predict is that there will undoubtedly be a number of shifts in pre-trial tactics which will affect the processing of criminal defendants.⁵⁴ Despite these deficiencies, Congress must be commended for taking firm action in an area that has been in dire need of such legislation for a long time. No matter what changes do occur, the Speedy Trial Act will hopefully be enforced in the spirit of the late Chief Justice Warren's view of the right to speedy trial that "the essential ingredient is orderly expedition and not mere speed."⁵⁵

J.H.H.

53. The two greatest ambiguities revolve around the terms "in the interest of justice" concerning extensions and the sanction "dismissal with or without prejudice." These problems will have to be clarified as the cases arise. *See generally* notes 24 & 26 *supra*.

54. *See* note 30 *supra*. It should be noted that section 3168 of the Act requires the planning group in each district to study possible reforms of criminal procedure such as revision of the grand jury system, habeas corpus procedure, and other aspects of our criminal justice system. As a result, there may be major changes forthcoming in our system of criminal justice, many of which would be determined by the impact of the Speedy Trial Act.

55. *United States v. Ewell*, 383 U.S. 116, 120 (1966), *quoting from* *Smith v. United States*, 360 U.S. 1, 10 (1959).

