That Can of Worms: The Speedy Trial Act

by Alex Kozinski

The Speedy Trial Act, now going into force in the federal court system for criminal proceedings, is supposed to reduce "crime and the danger of recidivism," but its provisions raise so many questions and problems that the effect may be just the opposite. The problems with the act are just beginning. As the act's time limits shorten, its effects will lengthen.

THE AVOWED PURPOSE of the Speedy Trial Act of 1974 (18 U.S.C. §§ 3161–3174) is "to assist in reducing crime and the danger of recidivism by requiring speedy trials and by strengthening the supervision over persons released pending trial."

The statute caused serious problems for prosecutors, defense attorneys, and the judiciary in the administration of federal criminal trials almost immediately after its first-phase implementation September 29, 1975. On that date plans for implementation of the "interim time limits" of the act were adopted by every federal judicial district. These time limits require trials of certain defendants to commence within ninety days of arrest. Sara Jane Moore, who fell into this category, was then being charged in the Northern District of California with the attempted assassination of President Ford. She objected to the trial date of December 15, 1975, which had been set to comply with the ninety-day requirement, claiming that this would not permit her adequate time to assist in preparing her defense, since she had spent much of the time since her arrest in psychiatric examinations and competency hearings. She petitioned the Ninth Circuit for a writ of mandamus to forestall the scheduled trial.

Meanwhile, pretrial proceedings in the Patricia Hearst case were under way in the same judicial district. Her attorneys indicated that they would take the position that the act required commencement of trial within ninety days of arrest, thereby putting the United States attorney in the awkward situation of perhaps having to argue inconsistent interpretations of the statute in the same court. The question was resolved when the court of appeals denied Moore's petition but indicated that trial in that case was not required within ninety days (525 F. 2d 328).

These uncertainties as to the proper interpretation of the act have arisen only in the preliminary phase of what will be a four-year program of ever-tightening time limitations for disposition of criminal cases. Thus the act has the potential of drastically changing current operating procedures for the federal courts and the lawyers practicing in them. The act also raises sufficient questions of statutory interpretation and constitutional law that it promises to be a fruitful area for litigation. This article is designed to give practitioners a brief outlook on how the statute is likely to affect them in the next several years.

The basic scheme of the act is to divide the time between arrest (or service of summons) and the commencement of trial into three periods, providing restrictions within which each segment must be completed. These periods are: (1) from arrest to the filing of the indictment or information; (2) from the filing of the indictment or information to arraignment; and (3) from arraignment to trial. Ultimately, thirty days will be allotted to the first period, ten to the second, and sixty to the third.

These "permanent limits," however, are not to take effect until July 1, 1979. In the meantime, three sets of transitional limits, imposed in yearly succession commencing July 1 of this year, will implement a program of increasingly stringent limitations. The time from arrest to trial shrinks from 250 days for the first set of transitional limits during 1976–77 to 100 days after July 1, 1979, when the permanent limits take effect. The chart on page 863 sets forth the timetable for the three sets of transitional limits as well as the permanent limits.

Sanctions Imposed Discriminately

There is an important qualitative difference between the transitional time limits and the permanent limits. The act provides no sanctions for noncompliance with the transitional limits but imposes severe sanctions for failure to meet the permanent limits. Congress apparently recognized the necessity for a period of adjustment and experimentation and must have assumed that all concerned would strive to comply with the time limits during the transitional process even in the absence of sanctions.

Section 3162 sets forth the possible sanctions for noncompliance with the permanent limits. These include discretionary dismissal of the complaint in the case of a belated filing of an indictment or information, discretionary dismissal of the indictment or information if the trial is delayed more than sixty days after arraignment, and monetary and other disciplinary sanctions against attorneys in certain cases.

While this scheme is not complex in broad outline, it is fraught with difficulties in implementation. There are

numerous problems of statutory interpretation, and in parts the act is badly drafted. Complicating factors, moreover, threaten to compound the difficulties of courts and lawyers in dealing with the statute. One is the existence of a superseding set of time limits applicable only to certain classes of defendants. These "interim limits," which constitute the first phase of the act, went into effect on September 29, 1975, and apply to defendants who are in custody solely because they are awaiting trial and to defendants who have been released pending trial but have been designated by the attorney for the government as "high risks" of failing to appear for trial. Under the interim limits, defendants in custody must be brought to trial within ninety days of their incarceration. High-risk defendants on bail must be brought to trial within ninety days of their designation as high risk.

The interim limits are to remain in effect until June 30, 1979, expiring at the same time as the final set of transitional limits. Unlike the transitional limits, however, the interim limits carry sanctions. Incarcerated defendants not brought to trial within the prescribed period must be released from custody for the balance of the proceedings, while high-risk defendants in certain cases may suffer modification of the nonfinancial conditions of their release. These interim limits caused the difficulty in the Sara Jane Moore case

Another complicating factor in the scheme is the fact that the requirements of the act must be implemented by separate compliance plans for each federal district. When the act went into effect, each district court already had a plan calling for expedited procedures in criminal cases under Rule 50(b) of the Federal Rules of Criminal Procedure. These plans were hastily modified before last September 29 to include the interim limits of Section 3164. The original Rule 50(b) plans in most districts, as well as the 1975 revisions, closely followed a model prepared by the Federal Judicial Center's Committee on the Administration of the Criminal Law. While there were some variations among the districts, there was substantial consistency in the Rule 50(b) procedures of the various federal district courts.

That can't be expected of second phase Speedy Trial Act plans, which go into effect in virtually all districts on July 1, 1976. These plans are designed to implement the first set of transitional time limits in addition to the interim limits. It is expected that differences in the caseload and geography of the various districts will make uniform procedures inadvisable. The act by Section 3168(b) provides for the establishment of individual planning groups in each district. These groups are given broad authority to "address [themselves] to the need for reforms in the criminal justice system, including but not limited to changes in the grand jury system, the finality of criminal judgments, habeas corpus and collateral attacks, pretrial diversion, pretrial detention, excessive reach of Federal criminal law, simplification and improvement of pretrial and sentencing procedures, and appellate delay."

The Federal Judicial Center contemplates that not only will there be substantial variations among districts in the procedures adopted but also that some districts may move ahead of the statutory schedule by imposing

Limits under Speedy Trial Act

	First Set of Transitional Limits, July 1, 1976, to June 30, 1977	Second Set of Transitional Limits, July 1, 1977, to June 30, 1978	Third Set of Transitional Limits, July 1, 1978, to June 30, 1979	Permanent Limits, July 1, 1979, and after
Arrest to indictment or information	60 days	45 days	35 days	30 days
Indictment or information to arraignment	10 days	10 days	10 days	10 days
Arraignment to trial	180 days	120 days	80 days	60 days

NOTE 1—An additional set of time limits is applicable to in-custody and "high-risk" defendants during the period commencing September 29, 1975, and ending July 1, 1979. These limits are described in the text.

NOTE 2—Arraignment includes the taking of a plea. See S. REP. 1021, Ninety-third Congress, second session (1974).

NOTE 3—The time limits in a district may be shorter than indicated if so provided in that district's implementation plan.

stricter limits for the transitional periods than required by the act. District planning groups are in the process of drawing up plans that will be adopted and approved by July 1, 1976. Lawyers should study carefully the plan in their district because some plans may well contain substantial deviations from the general practice.

Perhaps the most serious complicating factor in the Speedy Trial Act is a series of exclusions, listed in Section 3161(h), from the computation of elapsed time. According to the most reasonable view, these exclusions are applicable to the transitional and permanent time limits but not to the interim limits. While this conclusion is not inescapable, the positioning of the interim limits in a separate section of the act (Section 3164), while the exceptions are placed in the same section as the transitional and permanent limits (Section 3161), is a strong indication that this is the case. Most of the district court plans implementing the interim limits have been drafted on this assumption, so the exclusions were made expressly inapplicable to the interim limits.

In what appears to be the first appellate decision on this point, *United States* v. *Tirasso*, 44 U.S.L.W. 2478, the Ninth Circuit in March granted an emergency motion ordering the release of two alleged importers of narcotics who had been held in custody in excess of ninety days. The opinion, written by Judge Anthony M. Kennedy, only thinly disguised the court's displeasure with the "inartfully drawn" statute. The court, however, felt bound to release the defendants, despite the fact that the delay was reasonable and there was a strong possibility that they, as foreign nationals, would flee to Mexico. Subsequently one defendant pleaded guilty to a greatly reduced charge; the other fled the country before trial.

Section 3161(h) excludes from the time computation periods of delay resulting from hearings in pretrial motions, the unavailability of witnesses, interlocutory appeals, and the incapacity, unavailability, or examination of the defendant. Each of these exclusions is likely to cause problems of interpretation, including, no doubt, determination of how much delay is reasonably attributable to each. The period of delay may greatly exceed the time actually consumed by a hearing or examination. In fact, the impact of the Speedy Trial Act on current practices in federal criminal litigation may well depend on how strictly the courts interpret Section 3161(h).

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Perhaps the most important exclusion in that respect is that provided by Subsection 8 of Section 3161(h). It authorizes certain special continuances to be granted by a court when it specifically finds on the record that "the ends of justice served by taking such action outweigh the best interest of the public and the defendant in a speedy trial." While the subsection lists a number of factors for the court to consider in making its determination, as well as two factors that it may not consider, discretion as to the granting of these continuances is left primarily with the trial judge.

A serious problem in the exercise of that discretion will be the extent to which the wishes and convenience of the defendant, the defense counsel, and the prosecuting attorney should be considered. Unlike some state speedy trial statutes, which generally can be waived by the defendant, the federal act is not designed primarily to safeguard the rights of the accused. Clearly the consent of the defendant or of both sides is not intended to be determinative on whether trial should be delayed. On the other hand, failure to grant defense motions for a continuance may cause serious conflicts with the defendant's rights. Courts will be called upon to make delicate decisions balancing these rights against the purposes of the act.

Assessing whether a case is sufficiently complicated for the interest of justice to require delay for the preparation of an adequate defense presents a relatively straightforward problem. More subtle inquiries will be required to determine the legitimacy of defense motions to delay the trial for tactical reasons. A defense strategy to delay trial in order to permit, for instance, dissipation of the effects of harmful pretrial publicity may be a proper basis for a continuance under this subsection. But a defense strategy of delay to prolong the period an accused can stay free on bail is assuredly inimical to the purposes of the act.

Another problem will be determining whether a continuance is proper under this subsection if the delay is caused by the defense counsel's prior commitments to other clients, which would prevent his giving full and immediate attention to the defendant's case. For an attorney who must serve a number of clients accused of crimes in the federal system, delay of some proceedings as to one or more of his clients may be crucial if he is to give each a proper defense. The refusal of a continuance in these circumstances may result in inadequate representation for some defendants. Or some defendants may be represented by attorneys other than their first choice. Refusals by district courts to grant continuances for attorneys representing a number of clients would limit severely the number of federal criminal defendants one lawyer could represent at any one time.

Given these considerations—the most obvious aspects of what is an obtuse and complicated statute—it remains to be seen whether the depletion of judicial resources required to implement the Speedy Trial Act will not have an effect on the disposition of criminal trials quite opposite to that contemplated by its framers. ▲