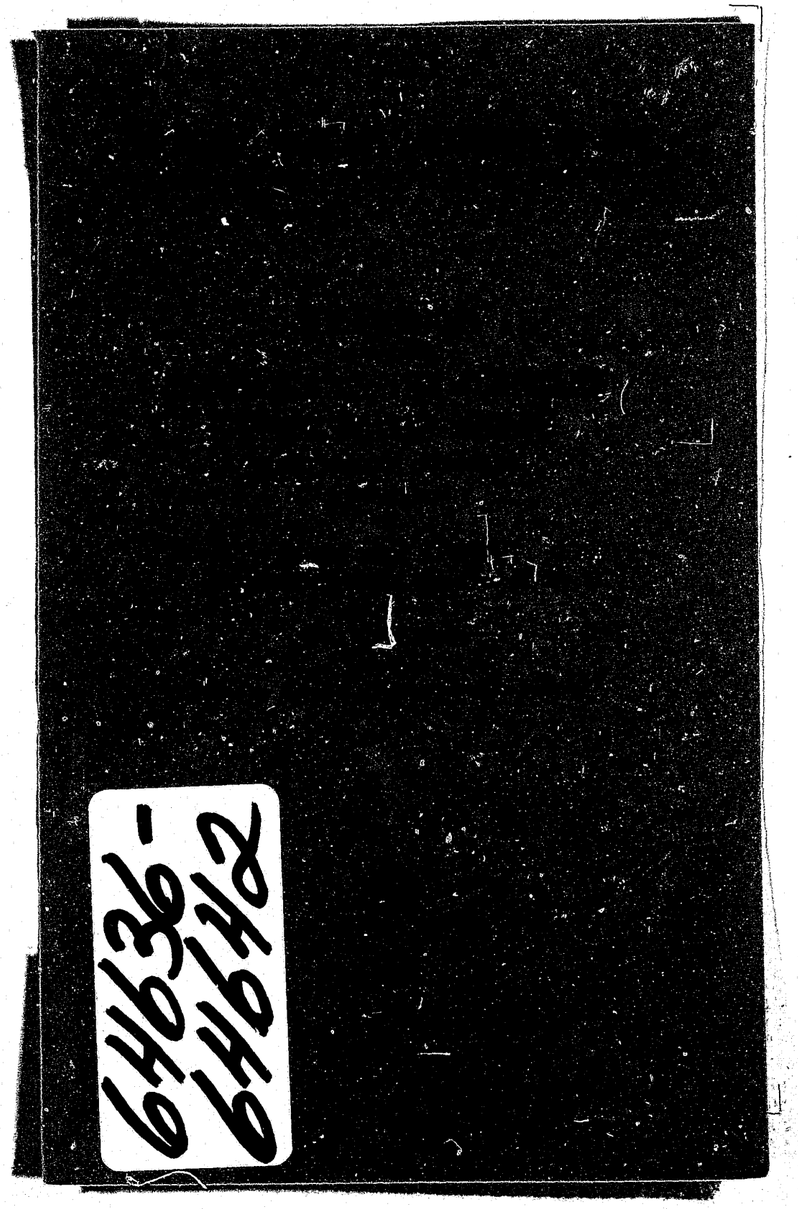

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[1] These materials may be found in the files of the Subcommittee on the Constitution.
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PREPARED STATEMENT OF PROF. DANIEL J. FREED

64638

THE SPEEDY TRIAL ACT AT THE CROSSROADS

Nearly four and one-half years after enactment, the Speedy Trial Act is approaching the eve of its activation. Beginning July 1, unless suspended, amended or repealed, the act will impose its ultimate limits, and be able to invoke its arsenal of sanctions. It will simultaneously allow extensions of time through many escape clauses.

The formal limits will be trial within 100 days after arrest, or 70 days after indictment. If delay is inexcusable, the sanctions may be dismissal of a dilatory prosecution with or without prejudice, or pressured trial for a dilatory defendant,

or disciplinary action against delay-minded attorneys. If delay is warranted, on the other hand, numerous escape valves will extend or suspend the limits and avoid the sanctions.

The great furor over the pressure of the Speedy Trial Act, and the dire results that some opponents have forecast, has often obliterated attention to the provisions for "excludable time" and for continuances in the interests of justice. Instead of enacting a rigid flat time rule accompanied by a mandatory sentence of dismissal, Congress devised a flexible instrument that, when read in good faith, functions more like an accordion. Extensions have been available since the act was passed, but the majority of courts and lawyers—in the great majority of Speedy Trial Act cases—have not yet taken them seriously. In addition, the judicial emergency provision permitting individual districts to suspend the time limits for 1 year goes into effect on July 1.

The 52 months since President Ford signed the bill into law have witnessed both encouraging and distressing experiences. Substantial problems with the act have come to light in many districts, while important progress has been recorded in others. A number of impediments and difficulties have been overcome. Many others remain. The act has a number of flaws, many of which are beginning to be remedied by thoughtful judicial interpretation. Some of them will eventually warrant amendment. At the moment, the act is just beginning to be seen as prescribing requirements of law, rather than voluntary arrangements, and to promote the kind of efficient criminal process, effective criminal sanction, and fair attention to individual justice which Congress had in view.

As your hearings open today you are faced with powerful recommendations to stretch the final time limits before they begin, and to relax the discipline of the act across the board. The question to be answered is whether the Congress should retreat from or hold firm to the act's on-time enforcement. It is clear that if a poll of lawyers and judges were to decide the issue, retreat would be the order of the day. But the same would also have been true in 1974, when a popularity contest—if pertinent to the judgment of Congress—might have stifled the act before it was born. The question therefore ought not be whether the act had, or has, constituent support in the legal profession, but whether the independent judgment which the 93d Congress exercised should be upheld or found deficient today.

The question is not easy to resolve. I shall try in this statement[1] to put the matter in some perspective. My bottom line will be that some statutory amendments are desirable but not urgent, and that a richer sense of how well this act works and of what kind of changes are needed will emerge from the serious business of compliance which begins in two months.

BACKGROUND: WHERE DID THE LIMITS COME FROM?

Twelve years ago, in 1967, the National Crime Commission proposed a model timetable for criminal cases: it urged that arrest to trial in felony cases not exceed four months. A year later, in 1968, the American Bar Association promulgated a set of standards for speedy trial, including the principle that cases not tried within the time limits established by rule or statute be dismissed with prejudice. In August 1970, in his first state of the judiciary address to the American Bar Association, Chief Justice Burger stated:

"If ever the law is to have genuine deterrent effect on the criminal conduct giving us immediate concern, we must make some drastic changes. The most simple and obvious remedy is to give the courts the manpower and tools—including the prosecutors and defense lawyers—to try criminal cases within 60 days after indictment. * * * I predict it would sharply reduce the crime rate."

[1] My prior statements may be found in "Speedy Trial—1971," pp. 132–150 (hearings before the Senate Judiciary Committee, Subcommittee on Constitutional Rights 1971), "Speedy Trial—1973," pp. 154–62 (hearings before the Senate Judiciary Committee, Subcommittee on Constitutional Rights 1973) and "Speedy Trial Act of 1974," pp. 259–273 (hearings before the House Judiciary Committee, Subcommittee on Crime 1974).

Since passage of the act, I have continued pertinent studies in a variety of settings including: workshops at Yale Law School on "The Speedy Trial Act of 1974" (spring 1977, fall 1977, spring 1978), conducted under the auspicies of the Daniel and Florence Guggenheim program in criminal justice; and participation in a meeting of the ad hoc subcommittee on the Speedy Trial Act of the Judicial Conference of the United States (June 1977), in meetings of two ABA ad hoc committees on speedy trial (1977, 1979), and in the work of the committee of judges and lawyers in the second circuit, under the chairmanship of Judge Robert J. Ward (SDNY), which prepared the circuit's guidelines under the Speedy Trial Act (1978–79).

Three years later, in 1973, the National Advisory Commission on Criminal Justice Standards and Goals recommended in standard 4.1 that: "The period from arrest to the beginning of trial of a felony prosecution should not be longer than 60 days."

Although speedy trial bills had been proposed as far back as the 88th Congress, it was not until 1974 that a statute was agreed upon. In the 1970 and 1971 bills printed in the first Senate hearings, the time limit was 60 days from arrest or indictment to trial. The focus of the early proposals was street crime and symbolic of a lesser concern for white collar crime, antitrust, tax and securities cases were excluded. Later versions disclosed the policy decision to cover all Federal offenses, with lengthened limits, and substantially expanded provisions for excludable delay and continuances.

The Speedy Trial Act of 1974 embodied many of the above principles and others. It incorporated many compromises. It adopted 100 net days from arrest to trial as an ultimate goal, but it did so with numerous qualifications and exceptions. It authorized dismissal with or without prejudice as two possible sanctions for noncompliance, but only upon careful weighing by the court of the seriousness of the crime, the circumstances leading to dismissal, and the impact of reprosecution on the administration of justice. The act postponed these limits and sanctions for 4 years pending (*a*) a gradual introduction of long and then progressively shorter time limits, (*b*) establishment of a planning process in each Federal district, and (*c*) an extended period of experimentation, data gathering, and assessment.

There were many who believed the act was unnecessary or too tough. They staunchly opposed its enactment, and have in recent years urged its repeal. There were others who believed that the Act was essential but too weak. They thought that the long postponement of an effective date was a mistake, that the 17 subsections of exclusions and continuances riddled the statute with loopholes which invited delay, and that the watered-down sanctions produced a statute without teeth.

To some extent both sets of critics were right. Even in the transitional years, some judges have applied the statute with rigidity and harshness. Others have paid little attention to it, or have permitted defendants simply to waive the limits.

Whether the 1974 act will ultimately prove too tough or too weak, excessively rigid or unduly flabby, remains to be seen. As it nears its ultimate limit and its first use of sanctions, prediction of what will happen must emerge from weighing dire forecasts and hostile attitudes, on one hand, and substantial compliance and readiness on the other. I would like to offer a few guideposts for members of the committee to consider when listening to witnesses and weighing the evidence in these hearings.

TRANSITION

It is important to keep in mind that this committee is being asked to assess a statute in the midst of transition. You are viewing a changing situation, not a stable picture. The process of transition is as difficult in the lives of institutions as in the lives of men and women. Trying to modify long-accepted norms does not come easily. Particularly when change is towards more rapid dispatch of business, there may be a significant loss of freedom for a life tenure judge or a career lawyer who are no longer able to plan calendars and try cases as they see fit. An omnipresent sense of pressure may pervade the courtroom and the lawyer's office. It is not an atmosphere which evokes praise for the Congress that changed the old pace of litigation.

But the pain of transition also brings benefits. The early years have seen this act generate an enormous impetus to get moving. Lawyers and judges, trained to respect rules, are inevitably enhancing their will and ability to comply as the effective date nears. The Justice Department's OIAJ report said it well:

"It can be expected that, in response to the threat posed by the dismissal requirement, the work patterns of prosecutors and courts will adapt to the new situation, additional resources will be devoted to meeting the deadlines of the act * * *"

The opportunity to plan during the transition for a quicker timetable has already led many to develop and exchange innovative ideas and techniques. Conventional practice has been reexamined and revised in many places. Further reexamination cannot fail to materialize if the steady pressure of the act is not released.

Decades from now, when viewed in the perspective of history, the painful transition period for the Speedy Trial Act will seem very short. Viewed narrowly just from today, it may feel long, hard and ominous. The entire period was designed to prepare the system for the provisions which take effect in July. Until then, successes and setbacks alike will be but prologue.

If the act is materially altered at the last minute, we will never know how well it might have worked or what changes emerged clearly from trying it out. The remarkable discrepancies in Speedy Trial Act administration across the Federal system make it evident that the transitional experience with its nonbinding limits (1975–79) shows both the best and the worst features of a voluntary system. That system will bear little resemblance to the kind of widespread reasonable interpretation and conscientious compliance with binding limits that can be expected from Federal judges, U.S. attorneys and defense counsel.

Let me offer just a few examples.

1. Short limits.—"The general consensus seems to be that the time strictures of 1979 are simply too short" (report of the Judicial Conference of the United States, ad hoc subcommittee on the Speedy Trial Act, 1977).

This finding underlies the basic recommendation on which the Judicial Conference voted in 1977 to double the arrest-indictment limit (30 to 60 days), double the indictment-arraignment limit (10 to 20 days), and increase the arraignment-trial limit from 60 to 100 days. The text of that Judicial Conference subcommittee report largely reads time limits as if they were straight calendar days. Exclusions, other than § 3161h(8), were seen as conducive to "motions, appeals and delays." The subcommittee thought it preferable to have a statute with longer limits and "judicious use of (h)(8)." Under this format "the necessity for many of the exceptions may disappear."

The Congress could have opted for much longer limits and hardly any extensions of time. That system would tend to treat all cases as if they were fungible. The alternative system, which Congress selected, was to recognize vast differences in the kinds and complexity of Federal criminal cases, and to provide for individual exclusions and continuances appropriate to the preparatory stages of each case.

Two findings emerge from data collected by the Administrative Office of the United States courts to suggest that the path Congress preferred will work.

(*i*) *60 day districts.* As of 2 years ago, 20 out of 94 Federal districts chose to process criminal cases on the 1979 limits. AO data for 1977–78 shows that 18 of these districts completed more than 80 percent of their criminal cases within the 60 day arraignment-trial limit; and that 11 of these completed between 95 and 100 percent of their cases on the 1979 schedule.[2] These data do not include the successful record of the 60 day pilot group of judges in the Southern District of New York which, according to the Judicial Conference subcommittee report, "proved that it is possible to meet the strictures." It is noteworthy that the AO found 81 percent of all cases in the country were already in compliance, as of 1 year ago, with the 60 day limit, even though 74 of the 94 districts were then operating on longer limits of up to 120 days.

(*ii*) *Recording exclusions.* As previously indicated, the act was written to provide lawyers and judges with significant leeway to exclude time from the computation of the statutory limits. Considering the widespread nature of complaints that the act affords inadequate time, there has been astonishing underuse of the excludable time provisions. The AO report in September 1978 found that no time whatever had been recorded as excluded in 76.4 percent of all Federal cases in 1977–78. The Justice Department's Office for Improvements in the Administration of Justice found "repeated and marked inconsistencies in the way in which some of the exclusions are being interpreted and applied by the courts."

It found some districts in which pretrial motions accounted for more than half of the exclusions, and other districts in which motions "produced not one instance of excluded processing time." It found one district in which 80 percent of the examined cases experienced at least one excluded incident, and another in which "the figure was only 4 percent." On a national scale it found that § 3161(h)(8)

[2] These data take on added significance in light of an observation by the Judicial Conference subcommittee 1 year earlier: "* * * not all responses have equal weight. There are 20 districts that have adopted the most stringent standards that will be applicable in 1979. Clearly, their experiences would be far more significant than those of districts which, while operating under present limitations, have not yet reached the most strict standards."

"ends of justice" continuances accounted for one-third of all exclusions. In "one sample district it accounted for two-thirds of excluded incidents and, in another sample district, almost none."

OIAJ's conclusion was that "after the act becomes fully effective * * * it seems likely that more uniform and more realistic applications of the exclusions will occur." One judge told OIAJ that greater use of the excludable time provisions will be made "when it counts."

A reasonable inference from these data is that the furor over short limits is misdirected. It is a product not of the act of Congress but of an intentional failure to act by some who apply the statute. The only fair way to appraise the act's time limits is to assess them on the basis of their use as written. Amendments to extend the limits are at best premature if they are derived from voluntary decisions to postpone compliance with § 3161(h).

2. Vague exclusions.—"Unfortunately, because many of the exclusions in the act are so vague, no one knows for sure when the time limits have expired. This has caused and will continue to cause a great deal of wasted time litigating the precise meaning of the exclusions" (Letter from U.S. Attorney Earl E. Silbert, Chairman, Subcommittee on Legislation, and Court Rules of the Attorney General's Advisory Committee of United States Attorneys, June 29, 1977).

The vagueness of some exclusions plainly does not explain the recording of none. But as of 2 years ago, the above comments reflected a widely-held view about the meaning, as opposed to the recording, of some of § 3161(h)'s exclusions. In the intervening period, a highly significant contribution to the interpretation of these provisions has been made by the second circuit. On January 16, 1979 the Judicial Council of the Circuit approved and issued a 43 page set of guidelines under the Speedy Trial Act "for the guidance of bench and bar and for eventual inclusion in the speedy trial plan of each district court."

The guidelines emerged from a broad consultative process. They were drafted by a committee of judges, U.S. attorneys and defense lawyers (both CJA and retained) under the chairmanship of Judge Robert J. Ward (S.D.N.Y.). They were published in draft for comment at 584 F.2d 1 in November 1978. They were the subject of written comments, as well as public hearings in New York City in December. Bar associations, defender programs and individual attorneys contributed most of the responses, and their suggestions were generously reflected in Ward committee revisions prior to action by the second circuit.

The stated purpose of the guidelines is "to interpret the Speedy Trial Act * * * in a manner that avoids both undue pressure and undue delay in the fair disposition of criminal cases."

They specifically take account of "legitimate needs of the parties for counsel of their choice, reasonable notice of trial and reasonable time to prepare for trial."

I urge this committee to give close study to this important development. The guidelines spell out interpretations of the act designed to increase both the amount of time reasonably available to courts and lawyers, and the clarity of the statute. If widely adapted to local needs, they should go far to ease the pressure of the act and reduce the likelihood of time-consuming appeals over the meaning of § 3161(h).

Neither the Judicial Conference nor the Department of Justice took these guidelines into account in their 1977 and 1978 studies. It is highly unlikely that the amendments they have proposed in today's hearings would be needed in a system which interprets § 3161 as the second circuit has suggested, and which records § 3161(h) exclusions faithfully.

3. Arbitrary application.—A troublesome complaint from defense lawyers has been that judges have forced them to trial before expiration of the statutory limit. While few cases can be scheduled on the last day permitted by law, setting a case far in advance of the limit can significantly interfere with adequate preparation. The Judicial Conference and Justice Department urge a statutory amendment to give defendants a minimum of 30 days to prepare. The second circuit would accomplish the same result by its guidelines.

The problem of arbitrary action is not fairly attributable to a statute, nor avoidable by legislation. In an excellent study of the Speedy Trial Act in three districts (Connecticut, New Jersey, and eastern New York), the Fordham Law Review found that half of the judges it interviewed construed § 3161(h)(8) narrowly. Their explanations "ranged from hostility toward the Act to unfamiliarity with its provisions. One judge, whose antipathy was obvious, reasoned

that 'the best way to get rid of a bad law is to enforce it strictly.'" Project, "The Speedy Trial Act: An Empirical Study," 47 Ford. L. Rev. 713 (1979).

In a similar vein were comments by a judge from the southern district of New York quoted disapprovingly by the second circuit in the *Sam Ford* case: "The 60-day rule is fact. It will get you nowhere to argue against the 60-day rule. I didn't make it. I'm stuck with it and so are you and all of us."

Once it becomes clear that the Speedy Trial Act cannot be repealed by making it unpopular, an attitude of reasonableness will hopefully come about. This goal will be bolstered by guidelines like those of the second circuit.

4. Judgeships.—A major objective of the Speedy Trial Act was to plan for a more efficient criminal justice system, with adequate resources and without prejudice to the civil calendar. For most of the transition period these goals remained elusive. A long congressional delay in the omnibus judgeship legislation meant that a new time burden had been imposed on an understaffed court system.

In late 1978 the bill was finally enacted and 113 new Federal district court judgeships were created. Once these positions are filled, there will be a 30-percent increase in the number of trial judges. During the same period, according to the Justice Department's OIAJ report, the criminal backlog has been substantially reduced. An increase of 7.5 percent in civil terminations was also noted, but the civil backlog rose because civil filings have increased appreciably.

These developments suggest that 1979–80 should witness better results from the combination of a vastly increased judiciary and a substantially reduced criminal backlog. The system will at last have the ability and stimulus to dispose of criminal cases on a current basis, with reasonable interpretations and faithful recording of the necessary exclusions, and simultaneously begin addressing the civil calendar.

The Speedy Trial Act has evoked more than its fair share of criticism. It has passed through a difficult transition period with encouraging signs that it can work reasonably well if carefully interpreted. The most significant need at the moment is to ensure that planning groups do not fade into oblivion, that careful monitoring of experience with the 1979 limits and sanctions is carried on, and that interchange of innovation to help lagging districts is encouraged.

The process of weighing amendments should be deferred until the act has been put into effect, and assessed, in the manner Congress wrote it.

Senator BIDEN. Our next group will appear as a panel. John Cleary, executive director of Federal Defenders of San Diego, Inc., and legislative chairman of the Defender Committee of the National Legal Aid and Defender Association; David Isbell, partner of Covington & Burling, representing the American Civil Liberties Union in Washington; and Salvatore R. Martoche, representing the National Association of Criminal Defense Lawyers, Buffalo, N.Y.

END