

William
called

Mon. 4:55

This is the speedy trial info -
~~you~~ I have alphabetized it -
Ready for filing - See
you Friday DW

Shu

Section 3 then carries on with the discussion of individual drugs. Drugs selected for inclusion are obviously those that have the greatest currency or popularity in contemporary society. Included are the amphetamines, *cannabis* products, cocaine, heroin, LSD, MDA and all the other drugs that are likely to be encountered in the illicit scene. As indicated in the preface, a few drugs are included in this section for special reasons other than prevalence of use. For example the non-beverage alcohols (isopropyl alcohol and methyl alcohol) are only infrequently abused but they are nevertheless notable for their highly toxic properties (see p. xii).

Section 4 headed "Other Drugs of Interest" includes drugs that are generally of less importance in the over-all context of abuse than those in the preceding section. Consequently these articles are briefer.

Finally, Section 5, "Additional Drug Notes" includes drugs that have only attracted limited attention but may nevertheless require consideration by health and legal professionals on occasion.

The book then concludes with a last section that includes "Trade Names", a glossary of medical/scientific terms, and a glossary of street drug language.

The book apparently originated when the county court judges of York, Province of Ontario, approached the Addiction Research Foundation some time ago with the request that the Foundation create a reference book that would be of use to those on the bench who had to deal with alcohol and drug-related cases. This book is the product of that request, and its undoubted usefulness in the years ahead will make us all appreciative of the county court judges' approach to the Foundation.

Alan D. Gold

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Editorial

TIMELY TRIALS

It is all very well for the Charter to state that a person charged with an offence has a right to be tried within a reasonable time but that principle is not self-explanatory. It is not clear what being "charged with" an offence really means and even if it were clear, within a reasonable time of what? One would suppose that the Charter means that his "trial" should at least commence within some reasonable time after he has been "charged".

There are two different principles involved in the question of trying an accused for an offence committed some time in the past. One is a rule of substantive law going to jurisdiction, based on a limitation period that commences from the time of the commission of the offence. Canada, of course, does not have any general principle of limitation save in the case of summary conviction offences though a few indictable offences do have specific limitation periods, such as some treason offences and some sexual offences. Indeed, it is difficult to see any rationale for a general limitation period.

Another, and quite different principle is a procedural rule that, once things have got under way, it is both fair to the accused and in the interest of the State to get the matter cleared up as expeditiously as possible. One only has to state it in this way to see how vague the principle is. Several different factors may make the "immediate" trial impossible or undesirable and these factors may range from unfair tactics on the part of the police to stalling tactics on the part of the accused; from overcrowded court dockets to unavailable witnesses.

At one extreme, it is possible for the police to delay the laying of an information even though their investigation is complete and there is sufficient evidence to support a charge, for the sole purpose of embarrassing an accused in his defence. At the other extreme, it is possible for defence counsel to drag out proceedings from the initial laying of the charge to final disposition for the sole purpose of making things as difficult as possible for the prosecution. One would hope that the reason for any delay would, in practice, be at neither of these

extremes but would result from honest attempts to balance expedition with fairness and that is precisely what the reasonableness consists of. In any case, I would find it very strange if an accused were responsible for the delays and then could rely on his own conduct as a basis for his own acquittal.

The Charter only condemns an unreasonable delay running from the time a person is charged and whether in this context that means when he is arrested, when the information is laid, when the information is read out to him or where he is called upon to plead, may have to be determined. To attempt, however, to legislate in the Code a more precise and rigid definition of what is meant by "unreasonable" is a mistake.

Now that we have the Charter, there will be a tendency to bring substantive Code provisions into line with the Charter by legislating standards of "reasonableness" or "fairness" with statutory precision by, for example, imposing a time-limit of, say six months from committal for trial to commencement of trial or from the date of the information to the commencement of the preliminary inquiry. One can understand the tendency, but one must make the plea to leave well enough alone. Factors determining whether a person is tried without unreasonable delay are so varied that the most awful mess will arise if specific time periods are imposed that do not and cannot take into account all those variables.

We are not used to the type of legislation embodied in the Charter and, until we get used to it, we may well tend to regard it as a statute rather than as a part of our Constitution. The courts, I am sure, will have no difficulty in adapting to a new situation and will abandon their traditional canons of statutory interpretation when dealing with the Charter. But this will be all for nought if the Legislature, for the best of motives, attempts to second-guess the Charter by legislating in the traditional manner things that are best left to general principles.

It is true, of course, that this will lead to much litigation — indeed, it already has led to much litigation — some of it important, some of it trivial. For many years, the courts may be uncomfortable when trying to apply a statement of general principle, but I have no doubt that they will rise to the task. If Parliament attempts to help the courts in legislating its interpretation of those principles, there is danger that in so doing it is cutting down on both the power and the duty of the courts to apply general principles to each individual fact situation. It is impossible, for example, to assert in the abstract that six months from the date of committal for trial to trial is reasonable or unreasonable — one can only say that it depends on all the circumstances. Yet if some statutory time-limit is imposed, not only would a

trial later than that date be impossible even if, in all the circumstances, it was not an unreasonable delay, but, worse, a trial within the six-month period would tend to be regarded as always reasonable even if, in all the circumstances, it might well be unreasonable.

If Parliament will only wait, there will, in due course, emerge a pattern making legislation both unnecessary and undesirable.

A.W.M.

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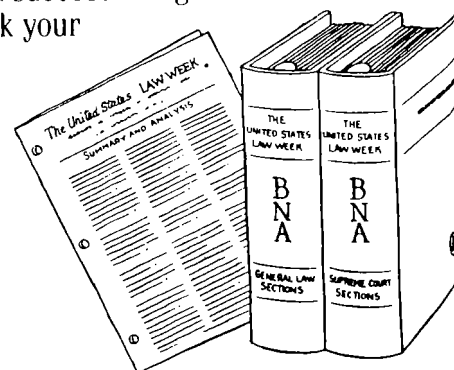
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HOW LONG IS TOO LONG? WHEN PRETRIAL DETENTION VIOLATES DUE PROCESS

FLORALYNN EINESMAN*

From the passage of the Judiciary Act of 1789 to the present . . . federal law has unequivocally provided that a person arrested for a non-capital offense *shall* be admitted to bail. This traditional right to freedom before conviction permits the unhampered preparation of a defense, and serves to prevent the infliction of punishment prior to conviction . . . Unless this right to bail before trial is preserved, the presumption of innocence, secured only after centuries of struggle, would lose its meaning.¹

In 1984, Congress passed the Bail Reform Act (the Act)² which revolutionized the way in which bail was determined in federal criminal cases. For the first time in the history of federal bail legislation, courts are authorized, in noncapital cases, to consider both the defendant's risk of flight, as well as his possible danger to the community, when deciding whether and what amount of bail should be set in a federal criminal case.³ The Act permits the court to incarcerate, *without bail*, a presumptively innocent individual charged with a federal offense when no conditions of release would "reasonably assure" the defendant's appearance at trial or "the safety of any other person and the community."⁴

Seeking to address the serious issues of flight and criminal activity by those released on bail, Congress created new problems when it passed this Act. While authorizing the pretrial detention of a defendant, Congress included no provision in the Act that limits the length of time a defendant could spend in pretrial detention. Congress mistakenly relied on the Speedy Trial Act⁵ to restrict the period of confinement to ninety days.⁶ Because the Speedy Trial Act con-

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1. *Stack v. Boyle*, 342 U.S. 1, 4 (1951) (citations omitted).

2. 18 U.S.C. §§ 3141-3156 (1988 & Supp. II 1990).

3. 18 U.S.C. § 3142(g).

4. 18 U.S.C. § 3142(e).

5. 18 U.S.C. §§ 3161-3174 (1988 & Supp. II 1990).

6. For a discussion of Congress' decision to rely on the Speedy Trial Act to limit the length of pretrial detention, see *infra* notes 95-108 and accompanying text.

tains eighteen exclusions from its time limits, it does not effectively restrict the period of pretrial detention. This error was aggravated when the Supreme Court, reviewing the constitutionality of the Act, failed to address the question of when pretrial confinement exceeds the limits of due process.⁷ Due to the failure of Congress and the Supreme Court to resolve this problem, defendants facing federal criminal charges have been incarcerated without bail for as long as thirty-two months.⁸

After setting forth the background and history of the Act, this Article will address the question of how long an accused may be confined pretrial, without bail, before a violation of substantive due process takes place. Since neither Congress nor the Supreme Court has restricted the length of pretrial detention, the lower courts have devised their own standards to determine when a period of such incarceration crosses the line from permissible regulation to impermissible punishment. After tracing the evolution of these tests, this Article will analyze how they lead to protracted periods of incarceration for presumptively innocent individuals.⁹ This Article will then propose changes to the legislation to ensure that the law comports with due process.

Part I will discuss the history and practice of the Bail Reform Act of 1984. Part II will analyze the case of *United States v. Salerno*,¹⁰ the first and, thus far, only case in which the United States Supreme Court has reviewed the constitutionality of the Act. Although the Supreme Court upheld the constitutionality of the Act against a facial challenge, the Court chose not to resolve the question that this article will address—when does pretrial detention become so protracted so as to violate due process.¹¹ Part III will examine the development of the due process tests used to determine whether the pretrial detention has become punitive. It will conclude that the tests are deficient because they fail to effectively protect the liberty interest of the accused. Part IV will propose changes to the Act in an effort to reconcile the issue of pretrial detention to the Due Process Clause of the United States Constitution.¹²

7. *United States v. Salerno*, 481 U.S. 739, 747 n.4 (1987) ("We intimate no view as to the point at which detention in a particular case might become excessively prolonged, and therefore, punitive, in relation to Congress' regulatory goal.").

8. *United States v. Ojeda Rios*, 846 F.2d 167 (2d Cir. 1988).

9. Even if a criminal defendant is ultimately convicted of the charged offense, he is still entitled to due process under the Fifth Amendment before this adjudication. *Bell v. Wolfish*, 441 U.S. 520, 535 (1979) ("For under the Due Process Clause, a detainee may not be punished prior to an adjudication of guilt in accordance with due process of law."); *United States v. Gallo*, 653 F. Supp. 320, 343 (E.D.N.Y. 1986) ("That a defendant is ultimately found guilty does not, of course, excuse the violation of his constitutional rights prior to conviction.").

10. 481 U.S. 739 (1987).

11. *Salerno*, 481 U.S. at 747 n.4; see *supra* note 7.

12. This Article does not seek to critique the entire Bail Reform Act of 1984

I. THE FEDERAL BAIL REFORM ACT OF 1984

In 1984, through sweeping legislation, Congress dramatically altered the way in which the matter of bail was determined in federal criminal cases.¹³ Congress adopted these changes to reflect its determination that a new bail law should address the problem of criminal activity by those released on bail and to authorize courts to consider the issue of danger to others that a defendant may pose if released on bail.¹⁴ In passing this legislation, Congress noted that these changes marked a "significant departure from the basic philosophy of the Bail Reform Act [of 1966] which is that the sole purpose of bail laws must be to assure the appearance of the defendant at judicial proceedings."¹⁵

A. The Bail Reform Act of 1966

The new legislation revised the Bail Reform Act of 1966,¹⁶ which had been the first major modification of the federal bail system since 1789.¹⁷ President Johnson signed the 1966 Act into law on June 22, 1966.¹⁸ It sought to address the inequities of the Federal Judiciary Act of 1789,¹⁹ which resulted in indigent defendants being held in pretrial custody due to their financial inability to post a

or the decision in *United States v. Salerno*. For a critique of the Bail Reform Act, see Albert W. Alschuler, *Preventive Pretrial Detention and the Failure of Interest-Balancing Approaches to Due Process*, 85 MICH. L. REV. 510 (1986); Kevin F. Arthur, Comment, *Preventive Detention: Liberty in the Balance*, 46 MD. L. REV. 378 (1987); Scott D. Himsell, Comment, *Preventive Detention: A Constitutional But Ineffective Means of Fighting Pretrial Crime*, 77 J. CRIM. L. & CRIMINOLOGY 439 (1986); Shari J. Cohen, Note, *Circumventing Due Process: A Judicial Response to Criminal Recidivism Under the Bail Reform Act*, 15 HASTINGS CONST. L.Q. 319 (1988); and John A. Washington, Note, *Preventive Detention: Dangerous Until Proven Innocent*, 38 CATH. U. L. REV. 271 (1988). For a discussion of the *Salerno* decision, see Michael J. Eason, Note, *Eighth Amendment—Pretrial Detention: What Will Become of the Innocent?* 78 J. CRIM. L. & CRIMINOLOGY, 1048 (1988); John B. Howard, Note, *The Trial of Pretrial Dangerousness: Preventive Detention After United States v. Salerno*, 75 VA. L. REV. 639 (1989); and Marian E. Lupo, Comment, *United States v. Salerno: A Loaded Weapon Ready for the Hand*, 54 BROOK. L. REV. 171 (1988).

13. 18 U.S.C. §§ 3141-3156 (1988 & Supp. II 1990) (current version at 18 U.S.C. §§ 3141-3156 (1988 & Supp. II 1990)).

14. S. REP. NO. 225, 98th Cong., 1st Sess. 3 (1983), reprinted in 1984 U.S.C.A.N. 3182, 3185.

15. *Id.* at 3185-86.

16. Bail Reform Act of 1966, Pub. L. No. 89-465, 80 Stat. 214 (1966) reprinted in 1966 U.S.C.A.N. 241 (codified at 18 U.S.C. §§ 3141-3151 (1982)).

17. Sam J. Ervin, Jr., *The Legislative Role in Bail Reform*, 35 GEO. WASH. L. REV. 429, 431 (1967) [hereinafter *Legislative Role*].

18. *Id.* at 429.

19. See Ervin, *Legislative Role*, *supra* note 17, at 444 n.38.

surety bond.²⁰ Before 1966, the federal courts generally set bail in the amount of a corporate surety bond. This procedure required the defendant to resort to a bail bondsman to gain his release from pretrial custody.²¹ In so doing, the defendant was obliged to pay the bondsman a nonrefundable fee, usually ten percent of the bail set.²² The defendant also was required to post collateral with the bail bondsman in an effort to secure his release.²³ Consequently, many poor defendants, without property and money to post, were unable to secure even a low surety bond. As a result, these defendants were incarcerated before trial on the basis of their indigence rather than their likelihood of flight.²⁴

The Bail Reform Act of 1966 sought to eliminate financial status from bail consideration.²⁵ The Act provided that each defendant was presumptively entitled to release on the preferred method of release—personal recognizance or the execution of an unsecured appearance bond in an amount specified by the court.²⁶ Such methods of release did not oblige the defendant to resort to a bail bondsman or post any property as collateral.²⁷ The Act also enumerated various alternatives that could be ordered in addition to, or instead of, personal recognizance. These included placing the defendant in the custody of a designated person, restricting travel and association, or requiring the execution of an appearance bond with a deposit of up to ten percent of that bond in the registry of the court.²⁸ In the case of a

20. Ervin, *Legislative Role*, *supra* note 17, at 435.

21. *Id.* at 436.

22. *Id.*

23. *Id.*

24. *Id.* at 430.

25. Bail Reform Act of 1966, Pub. L. No. 89-465, 80 Stat. 214 (1966) *reprinted in* 1966 U.S.C.C.A.N. 241 (codified at 18 U.S.C. §§ 1341-13151 (1982)) [hereinafter cited as codified]. Section 2 of Pub. L. No. 89-465 provided:

The purpose of this Act is to revise the practice relating to bail to assure that all persons, regardless of their financial status, shall not needlessly be detained, pending their appearance to answer charges, to testify, or pending appeal, when detention serves neither the ends of justice nor the public interest.

Id. See also H.R. REP. NO. 1541, 89th Cong., 2d Sess. 2 (1966), *reprinted in* 1966 U.S.C.C.A.N. 2293, 2295.

26. *Id.*

27. See 18 U.S.C. § 3146(a) (1982) (current version at 18 U.S.C. § 3142 (1988 & Supp. II 1990)) Section 3146(a) states:

Any person charged with an offense, other than an offense punishable by death, shall, at his appearance before a judicial officer, be ordered released pending trial on his personal recognizance or upon the execution of an unsecured appearance bond in an amount specified by the judicial officer, unless the officer determines, in the exercise of his discretion, that such a release will not reasonably assure the appearance of the person as required. . . .

Id.

28. 18 U.S.C. § 3146(a)(1)-(5) (1982).

substantial risk of flight, the court could still demand that the defendant execute a bail bond with sureties.²⁹

In addition, the 1966 Bail Reform Act listed numerous factors for the courts to consider in setting bail.³⁰ Congress specifically omitted "danger to the community" as a factor that could be considered by the courts in setting bail because Congress considered this factor as inconsistent with the traditional purpose of bail—assuring the defendant's appearance in court.³¹ As a result, Congress also rejected the notion of preventive detention—detaining an accused in order to prevent the accused from continuing criminal activity while awaiting trial.³²

Three years later, in 1969, a new presidential administration called on Congress to reform the federal bail system. In response to the increase in crime, President Nixon issued a directive urging Congress to modify the Bail Reform Act of 1966 to allow for the temporary detention of defendants who presented a clear danger to the community while out on bail.³³ Based on this presidential directive, the United States Department of Justice, headed by Attorney General John Mitchell, proposed an amendment to the Bail Reform Act of 1966.³⁴

This amendment would have authorized the federal courts to hold pretrial detention hearings to determine whether a defendant should be incarcerated for up to sixty days upon a finding that he was charged with a crime of violence and that his release presented a danger to society.³⁵ The Attorney General explained that the acute increase in crime necessitated these changes.³⁶ It was necessary to amend the statute because the Bail Reform Act of 1966 excluded danger to the community as a factor the courts could consider in

29. 18 U.S.C. § 3146(a)(4) (1982).

30. 18 U.S.C. § 3146(b) (1982). This section prescribed that, in determining conditions of release which would reasonably assure the defendant's appearance in court, the judicial officer is to consider: the nature and circumstances of the offense, the weight of the evidence, and the defendant's financial resources, family ties, record of employment, character and mental condition, length of residence in the community, criminal record and his record of appearance or flight in previous cases.

31. Ervin, *Legislative Role*, *supra* note 17, at 447.

32. *Id.* at 443.

33. 27 CONG. Q. WKLY. REP. 238 (Feb. 7, 1969) (cited in John N. Mitchell, *Bail Reform and the Constitutionality of Pretrial Detention*, 55 VA. L. REV. 1223 (1969)).

34. S. 2600, 91st Cong., 1st Sess. (1969) (cited in Mitchell, *supra* note 33, at 1223 n.2).

35. 115 CONG. REC. S2600 (daily ed. July 11, 1969) (cited in Mitchell, *supra* note 33, at 1223 n.2).

36. "[T]he crisis we face from crime in our streets . . . makes it imperative for action to be taken along those lines." Letter from John Mitchell to the Speaker of the House of Representatives (July 11, 1969), *microformed on* CIS No. 70-H301-40 (Congressional Info. Serv.).

setting bail.³⁷ In order to deal with those defendants who posed such a substantial threat to the community that their release was considered dangerous, the statute would have to be modified to allow for the detention of these individuals without bail.³⁸ Attorney General Mitchell proposed limiting the period of pretrial detention to sixty days in order to mitigate the "burden of confinement" and to ensure that such detention did not violate due process.³⁹ The bill to amend the Federal Bail Reform Act of 1966, however, died in committee.⁴⁰

B. The District of Columbia Bail Reform Legislation

Although Congress did not amend the 1966 Act at that time, it did adopt the proposal to reform the bail procedures employed in the District of Columbia.⁴¹ Despite significant opposition,⁴² Congress

37. See *supra* note 31 and accompanying text.

38. Mitchell, *supra* note 33, at 1223.

39. *Id.* at 1239.

40. A bill authorizing preventive detention for federal criminal defendants was introduced in the Senate on July 11, 1969 (S2600, 91st Cong., 1st Sess. (1969); see also 115 CONG. REC. at 19,256 (1969)) and in the House of Representatives (H.R. 12606, 91st Cong., 1st Sess. (1969); see also 115 CONG. REC. 19,352 (1969)). The Senate bill was referred to the Senate Judiciary Subcommittee on Constitutional Rights, which refused to report the bill for further consideration. The subcommittee of the House Judiciary Committee also refused to take any further action on the bill. See Sam J. Ervin, Jr., *Preventive Detention, A Species of Lydford Law*, 52 GEO. WASH. L. REV. 113 (1983) [hereinafter *Preventive Detention*].

41. For a thorough analysis of the District of Columbia bail reform legislation, see Frederick D. Hess, *Pretrial Detention and the 1970 District of Columbia Crime Act—The Next Step in Bail Reform*, 37 BROOK. L. REV. 277 (1971).

42. Senator Sam Ervin described the proposed District of Columbia Bail Reform legislation as "[a] bill to repeal the Fourth, Fifth, Sixth and Eighth Amendments to the Constitution." *Hearings Before Senate Judiciary Committee*, 91st Cong., 2d Sess. (1970) *microformed on* CIS No. S301-10.1 at 2079 (Congressional Info. Serv.). He also characterized the proposed detention hearing as a "sort of a kangaroo court hearing" and as "a merry-go-round," by which "you can keep a man in jail until Gabriel's Horn is silent." *Hearings before the Senate Committee on the Judiciary*, 91st Cong., 2d Sess. (1970), *microformed on* CIS No. S521-28 at 273-276 (Congressional Info. Serv.). Congressman Abner Mikva proclaimed, "Masquerading as a crime-stopper, preventive detention is really a justice-stopper. In allowing the detention of accused persons before being adjudged guilty, this procedure itself perpetrates a 'crime of punishment without trial.'" 115 CONG. REC. at 37,373 (Dec. 5, 1969). Senator Muskie declared that the proposal for pretrial detention:

reflects a concept which runs counter to the presumption of innocence until guilt is proven beyond a reasonable doubt . . . an individual is deprived of his liberty on the mere possibility that he will be dangerous if released on bail and the probability that he is guilty of the crime for which he has been charged. . . . This is too high a price to pay for an 'acceptable legislative compromise.' . . . The law we write for the District should be a model for all the 50 States. Instead, the provisions of this conference report make the people of the District subjects for an experiment in repression.

116 CONG. REC., at 25, 187-90 (daily ed. July 21, 1970).

did finally pass the District of Columbia bail reform legislation on July 29, 1970.⁴³ This bail reform statute served as a prototype for the federal Bail Reform Act of 1984, providing much of the language for the Act.⁴⁴ Although it appears that a provision of the District of Columbia statute limiting pretrial detention to a period of sixty days eased its passage,⁴⁵ when Congress relied on this legislation to revise the federal bail system, it omitted any provision limiting the length of pretrial confinement.⁴⁶

The District of Columbia Bail Reform legislation authorized the courts to consider both danger to the community and risk of flight when setting bail.⁴⁷ If the court found that a person was charged

43. District of Columbia Court Reorganization Act of 1970, Pub. L. No. 91-358, 84 Stat. 473 (1970).

44. Compare 18 U.S.C. §§ 3141-51 (1982) with D.C. CODE ANN. §§ 23-1321 to 1332 (1981).

45. Local District of Columbia editorials written or broadcast in favor of the passage of the bill, stressed the importance of the section of the legislation which limited the duration of pretrial detention to just sixty days:

It is our belief that the 1966 [Bail Reform Act] law should be changed. As matters stand, a federal judge can consider only one thing in passing upon a request for bail in a non-capital case—whether an accused person is likely to show up for his trial or whether he can be expected to flee to avoid trial. This limited discretion, we think, should be enlarged to permit a judge to take into consideration the danger to the community that could be created if a particular suspect were to be released prior to his trial. This is what is known as preventive detention.

Under a bill proposed by the Nixon administration, this additional discretion would be subject to tight restrictions. Preventive detention would apply only in the case of very serious felonies. The period of detention *could not exceed 60 days* . . .

Editorial from THE EVENING STAR, Oct. 22, 1969, *microformed on* CIS No. H301-2.7 (emphasis added). Another editorial comment included the following: "The City Government is properly concerned with protecting the rights of the accused. But, we believe the Administration bill provides adequate safeguards. The suspect would *have to go to trial within 60 days after arrest* . . ." Editorial Broadcast by WMAL/AM/FM/TV, July 13, 1969, *microformed on* CIS No. H301-2.7 (Congressional Info. Serv.) (emphasis added). Another commentary included:

Under the administration's proposal, carefully-designated suspects *may be detained up to 60 days*, but only on an order of the court and only after a full hearing. This is a drastic policy, for its net effect is to impose imprisonment in advance of conviction. But in this particular respect, the right of society to a reasonable degree of safety needs to be reinforced.

A WTOP Editorial, October 22 & 23, 1969, *microformed on* CIS No. H301-2.7 (Congressional Info. Serv.) (emphasis added).

46. For a discussion of Congress' decision to omit any provisions limiting the length of pretrial detention, see *infra* nn. 95-108 and accompanying text.

47. See D.C. CODE ANN. § 23-1321(b) (1989).

In determining which conditions of release, if any, will reasonably assure the appearance of a person as required or the safety of any other person or the community, the judicial officer shall, on the basis of available information, take into account such matters as the nature and circumstances of the offense

with a dangerous crime,⁴⁸ or a crime of violence⁴⁹ or with the obstruction or attempt to obstruct justice,⁵⁰ the court was permitted to hold a detention hearing. At that hearing, the court could order the detention of the defendant if it found by clear and convincing evidence that no conditions of release would reasonably assure the safety of any other person or the community,⁵¹ and by a "substantial probability"⁵² that the defendant committed the offense charged. The legislation required that the trial of a detained defendant be placed on an expedited calendar.⁵³ It limited the pretrial detention to a period of just sixty days, unless the trial was in progress or the defendant had caused the delay in getting the case to trial.⁵⁴

The statute specifically stated that the filing of pretrial motions by the defendant could not be used to extend the sixty-day limitation on pretrial detention.⁵⁵ The language regarding the filing of motions by the defendant was added by the House of Representatives on July 14, 1970, just two weeks before Congress passed the legislation.⁵⁶ This addition was made "in order to make it perfectly clear"⁵⁷

charged, the weight of the evidence against such person, his family ties, employment, financial resources, character and mental conditions, past conduct, length of residence in the community, record of convictions, and any record of appearance at court proceedings, flight to avoid prosecution, or failure to appear at court proceedings.

Id.

48. D.C. CODE ANN. § 23-1322(a)(1) (1989).

49. D.C. CODE ANN. § 23-1322(a)(2) (1989).

50. D.C. CODE ANN. § 23-1322(a)(3) (1989).

51. D.C. CODE ANN. § 23-1322(b)(1)-(2) (1989).

52. D.C. CODE ANN. § 23-1322(b)(2)(C) (1989). In reporting on the proposed legislation that ultimately became the Bail Reform Act of 1984, the Senate Judiciary Committee referred to the "substantial probability" provision as an "overzealous exercise of legislative precaution," which constituted the "principal reason cited by prosecutors for the failure over the last ten years to request pretrial detention hearings" under the District of Columbia Bail Reform statute. Although the Senate committee concluded that the "substantial probability" requirement did provide some additional protection against the possibility of authorizing pretrial detention for defendants who are ultimately acquitted, it decided that "the validity of the charges against the defendant" would be assured because pursuant to Rules 4(a) and 5(a) of the Federal Rules of Criminal Procedure, the court must find by probable cause, that the defendant committed the offense with which he is charged, both at his initial appearance and then later at either a preliminary hearing or through the filing of a grand jury indictment. Thus the bill contained no "substantial probability" requirement. S. REP. NO. 98-147, 98th Cong., 1st Sess. 9, 45 (1983).

53. D.C. CODE ANN. § 23-1322(d)(1) (1989).

54. D.C. CODE ANN. § 23-1322(d)(2)(A) (1989).

55. D.C. CODE ANN. § 23-1322(d)(2)(A) (1989). A person shall be entitled to release "upon the expiration of sixty calendar days, unless the trial is in progress or the trial has been delayed at the request of the person *other than by the filing of timely motions* (excluding motions for continuances)". *Id.* (emphasis added).

56. H.R. CONF. REP. NO. 91-1303, 91st Cong., 2d Sess. 239-40 (1970) *microformed on*, CIS NO. H303-22.

57. *Id.*

that any delay in the trial resulting from the defendant's filing of timely motions, such as a motion to suppress illegally obtained evidence or a motion for discovery, would not be considered a "delay at the request of the defendant."⁵⁸ Twelve years later, on July 21, 1982, the City Council of the District of Columbia amended the provisions of the District of Columbia Code⁵⁹ to permit an extension of pretrial detention from sixty to ninety days upon a showing of "good cause" by the prosecutor, but only for the "additional time required to prepare for the expedited trial" of a detained defendant.⁶⁰

C. *United States v. Edwards*

Eleven years after its passage, the District of Columbia Court of Appeals heard a constitutional challenge of the District of Columbia Bail Reform statute. In *United States v. Edwards*⁶¹ the defendant challenged the bail statute on a number of constitutional bases. He argued that pretrial detention constituted impermissible punishment before an adjudication of guilt in violation of the principle recognized in *Bell v. Wolfish*,⁶² denied him substantive and procedural due process,⁶³ and violated the "Excessive Bail Clause" of the Eighth Amendment.⁶⁴

The Court of Appeals rejected each of these arguments and upheld the constitutionality of the statute.⁶⁵ The defendant contended that pretrial detention violated the Fifth Amendment because it constituted impermissible punishment before an adjudication of guilt.⁶⁶ Addressing the defendant's argument that confinement before trial always constitutes punishment,⁶⁷ the court found it was necessary to determine whether pretrial detention was "penal" or "regulatory"

58. *Id.*

59. District of Columbia Bail Amendment Act of 1982, No. 4-223, 29 D.C. Reg. No. 33, 3479, 3480 (codified at D.C. CODE ANN. § 23-1321 (1989)).

60. D.C. CODE ANN. § 23-1322(d)(4) (1989).

61. 430 A.2d 1321 (D.C. 1981) (en banc), *cert. denied*, 455 U.S. 1022 (1982).

62. *Id.* at 1331. "Under the Due Process Clause, a detainee may not be punished prior to an adjudication of guilt in accordance with Due Process." *Id.* (citing *Bell v. Wolfish*, 441 U.S. 520, 534-35 (1978)).

63. *Id.* at 1333, 1341.

64. *Id.* at 1325-30. Because this Article focuses on the issue of whether and when pretrial detention constitutes impermissible punishment in violation of substantive due process, the arguments regarding the Eighth Amendment as well as the procedural Due Process Clause of the Fifth Amendment will not be addressed here. For a thorough analysis of *United States v. Edwards*, see David J. Rabinowitz, Comment, *Preventive Detention and United States v. Edwards: Burdening The Innocent*, 32 AM. U. L. REV. 191 (1982).

65. See *Edwards*, 430 A.2d at 1324.

66. *Id.* at 1331.

67. *Id.*

in order to decide whether it constituted impermissible punishment or permissible regulation.⁶⁸ Although recognizing that it is sometimes difficult to determine whether a sanction is penal or regulatory,⁶⁹ the court relied on the test set out by the United States Supreme Court in *Kennedy v. Mendoza-Martinez*⁷⁰ and reaffirmed in *Bell v. Wolfish*,⁷¹ to decide the question.⁷²

The District of Columbia Court of Appeals found the characterization of pretrial detention to be a "close question"⁷³ but concluded that pretrial detention was regulatory not penal.⁷⁴ The traditional reasons behind pretrial detention, the prevention of flight and the intimidation of witnesses, did not seek to punish the defendant for past behavior but, rather, sought to prevent any future behavior which would jeopardize the integrity of the judicial process.⁷⁵ The court also found that pretrial detention to prevent the commission of dangerous acts by the detainee was not intended to punish the defendant for prior acts but to "curtail reasonably predictable conduct" in the future.⁷⁶

The court examined the statutory history of the District of Columbia legislation, concluding that Congress intended pretrial detention to protect the safety of the community, not to punish the accused.⁷⁷ The court stated that pretrial detention permitted by the District of Columbia bail statute was not intended to promote any goal of punishment—retribution, deterrence or rehabilitation.⁷⁸ The statute was "closely circumscribed"⁷⁹ so as not to exceed its goal of incapacitating a potentially dangerous defendant before trial. In so concluding, the court of appeals specifically cited section 23-

68. *Id.*

69. *Id.* ("The distinction . . . is often elusive . . .").

70. 372 U.S. 144, 164-69 (1963).

71. 441 U.S. 520 (1979).

72. The District of Columbia Court of Appeals set forth the test as follows: Whether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as punishment, whether it comes into play only on a finding of *scienter*, whether its operation will promote the traditional aims of punishment—retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned . . .

United States v. Edwards, 430 A.2d 1321, 1332 (D.C. 1981) (en banc), *cert. denied*, 455 U.S. 1022 (1982) (quoting *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-69 (1963) (footnotes omitted), quoting *Bell v. Wolfish*, 441 U.S. 520, 537-38 (1979)).

73. *Edwards*, 430 A.2d at 1331.

74. *Id.* at 1332.

75. *Id.*

76. *Id.*

77. *Id.*

78. *Id.* at 1333.

79. *Id.*

1322(d)(2)(A) of the District of Columbia bail statute which required that pretrial detention be limited to sixty days, by which time the detainee's trial must have begun or bail must have been set.⁸⁰ The court viewed this as proof that Congress had carefully restricted pretrial detention to ensure that the defendant was merely incapacitated for a limited period before trial and not punished for an extended period before a finding of guilt.⁸¹

D. The Operation of the Bail Reform Act of 1984

Armed with the District of Columbia legislation authorizing pretrial detention on the ground of danger to the community and the decision in *United States v. Edwards*⁸² upholding the constitutionality of the District of Columbia bail statute, Congress set out to modify the Bail Reform Act of 1966. By this time Congress was determined to address what it perceived to be "the alarming problem of crimes committed by persons on release."⁸³ Congress intended to authorize courts "to make release decisions that give appropriate recognition to the danger a person may pose to others if released."⁸⁴ Consequently, in passing the Bail Reform Act of 1984,⁸⁵ Congress expanded the list of factors a judicial officer could consider in determining whether bail should be set in a particular case to include "the nature and seriousness of the danger to any person or the community that would be posed by the person's release."⁸⁶ Further-

80. *Id.* See also D.C. CODE ANN. § 23-1322(d)(2)(A) (1989).

81. See *Edwards*, 430 A.2d at 1333.

82. *Id.* at 1324.

83. S. REP. NO. 225, 98th Cong., 1st Sess. 3 (1983), reprinted in 1984 U.S.C.C.A.N. 3185.

84. *Id.*

85. 18 U.S.C. §§ 3141-3156 (1988).

86. 18 U.S.C. § 3142(g)(4) (1988). This section requires the judicial officer consider the available information concerning:

- (1) the nature and circumstances of the offense charged;
- (2) the weight of the evidence;
- (3) the history and characteristics of the person including:
 - (a) the defendant's character;
 - (b) his physical and mental condition;
 - (c) his family ties;
 - (d) his employment history;
 - (e) his financial resources;
 - (f) his length of residence in the community;
 - (g) his ties to the community;
 - (h) his past conduct;
 - (i) his history of drug or alcohol abuse;
 - (j) his criminal history;
 - (k) his previous record of appearances at court proceedings;
 - (l) whether at the time of the current offense or arrest, he was on

more, Congress authorized that either the Government⁸⁷ or the court⁸⁸ could move for the pretrial detention of the defendant.

In order to detain a defendant, the statute requires that the court hold a hearing where the judicial officer must determine "whether any condition or combination of conditions . . . will reasonably assure the appearance of such person as required and the safety of any other person and/or the community. . . ."⁸⁹ The Act provides the defendant with certain procedural rights at this detention hearing,⁹⁰ requiring the judicial officer to find by clear and convincing evidence "that no condition or combination of conditions will reasonably assure the safety of any other person and the community."⁹¹ Although the Act does not specifically state the Government's burden of proof regarding risk of flight, several courts have held that the Government need only show risk of flight by a preponderance of the evidence.⁹² Significantly, the Bail Reform Act of 1984 does not contain a major protection of the District of Columbia Bail Reform legislation—that the case of a pretrial detainee be placed on an

probation, parole or other release pending trial, sentencing, appeal or completion of a sentence; and

- (4) the seriousness of the danger the defendant's release would pose to any person or the community.

See *id.*

87. See 18 U.S.C. § 3142(f)(1)-(2) (1988). The Government may move for a detention hearing when the case involves:

- (1) a crime of violence;
- (2) an offense for which the maximum sentence is life imprisonment or death;
- (3) a drug offense carrying a maximum term of imprisonment of 10 years or more;
- (4) any felony committed after the person has been convicted of two or more of the above offenses (state or federal).

See *id.*

88. See 18 U.S.C. § 3142(f)(2) (1988). The Government or the court may request a detention hearing where it believes that a case involves:

- 1) a serious risk of flight; or
- 2) a serious risk that the defendant will or will attempt to obstruct justice or risk that the defendant will or will attempt to threaten, injure or intimidate a prospective witness or juror.

See *id.*

89. 18 U.S.C. § 3142(f) (1988).

90. *Id.* This section provides the defendant the right:

- (1) to be represented by counsel, either retained or appointed;
- (2) to testify;
- (3) to present witnesses on his own behalf;
- (4) to cross-examine witnesses who appear at the hearing; and
- (5) to present information by proffer or otherwise.

See *id.*

91. 18 U.S.C. § 3142(e) (1988).

92. *United States v. Himler*, 797 F.2d 156, 161 (3d Cir. 1986); *United States v. Portes*, 786 F.2d 758, 765 (7th Cir. 1985); *United States v. Medina*, 775 F.2d 1398, 1402 (11th Cir. 1985).

expedited trial calendar,⁹³ with the duration of pretrial detention being limited to a specific period of time.⁹⁴

E. The Legislative History of the Federal Bail Reform Act

The Senate Judiciary Committee rejected the setting of a specific time period beyond which a defendant could not be detained. Rather, it looked to the provisions of the Speedy Trial Act,⁹⁵ to set the necessary time limits:

93. See D.C. CODE ANN. § 23-1322(d) (1989):

The following shall be applicable to persons detained pursuant to this section:

- (1) The case of such person shall be placed on an expedited calendar and, consistent with the sound administration of justice, his trial shall be given priority.
- (2) Such person shall be treated in accordance with section 23-1321 [allowing for pretrial release in other than first degree murder cases]—
 - (A) upon the expiration of sixty calendar days, unless the trial is in progress or the trial has been delayed at the request of the person other than by the filing of timely motions (excluding motions for continuances); or
 - (B) whenever a judicial officer finds that a subsequent event has eliminated the basis for such detention.

Id.

94. See D.C. CODE ANN. § 23-1322(d)(4) (1989). This section states:

Notwithstanding the sixty calendar day provision of paragraph (2)(A), any such person may be detained for an additional period not to exceed thirty days from the date of the expiration of such sixty calendar day period on the basis of a petition submitted by the United States attorney and approved by the judicial officer. Such additional period of detention may be granted only on the basis of good cause shown and shall be granted only for the additional time required to prepare for the expedited trial of such person. For the purposes of determining the maximum period of detention under this section, such a period not to exceed ninety days, the period begins on the date the defendant is first detained after arrest, and includes the days detained pending a detention hearing and the days in confinement on temporary detention under subsection (e) whether or not continuous with full pretrial detention.

Id.

95. See 18 U.S.C. § 3161(c)(1). This section states:

In any case in which a plea of not guilty is entered, the trial of a defendant charged in an information or indictment with the commission of an offense shall commence within seventy days from the filing date (and making public) of the information or indictment, or from the date the defendant has appeared before a judicial officer of the court in which such charge is pending, whichever date last occurs. If a defendant consents in writing to be tried before a magistrate on a complaint, the trial shall commence within seventy days from the date of such consent.

Id. See also 18 U.S.C. § 3164:

(a) The trial or other disposition of cases involving—

- (1) a detained person who is being held in detention solely because he is

18 U.S.C. 3161, (sic) [of the Speedy Trial Act] specifically requires that priority be given to a case in which a defendant is detained, and also requires that his trial must, in any event, occur within 90 days, subject to certain periods of excludable delay. . . . These current limitations are sufficient to assure that a person is not detained pending trial for an extended period of time.⁹⁶

The Senate Judiciary Committee also rejected an amendment to the Speedy Trial Act⁹⁷ that would have reduced the period in which a pretrial detainee must be brought to trial from ninety to sixty days.⁹⁸

awaiting trial, and

(2) a released person who is awaiting trial and has been designated by the attorney for the Government as being of high risk, shall be accorded priority.

(b) The trial of any person described in subsection (a)(1) or (a)(2) of this section shall commence not later than ninety days following the beginning of such continuous detention or designation of high risk by the attorney for the Government. *The periods of delay enumerated in section 3161(h) are excluded in computing the time limitation specified in this section.*

(c) Failure to commence trial of a detainee as specified in subsection (b), through no fault of the accused or his counsel, or failure to commence trial of a designated releasee as specified in subsection (b), through no fault of the attorney for the Government, shall result in the automatic review by the court of the conditions of release. No detainee, as defined in subsection (a) shall be held in custody pending trial after the expiration of such ninety-day period required for the commencement of his trial. A designated releasee, as defined in subsection (a), who is found by the court to have intentionally delayed the trial of his case shall be subject to an order of the court modifying his nonfinancial conditions of release under this title to insure that he shall appear at trial as required.

Id. (emphasis added). For a thorough discussion of the interaction between the Bail Reform Act of 1984 and the Speedy Trial Act of 1974, see Allen Daniel Appelbaum, Note, As Time Goes By: Pretrial Incarceration Under the Bail Reform Act of 1984 and the Speedy Trial Act of 1974, 8 CARDOZO LAW REV. 1055 (1987).

96. See S. REP. NO. 225, 98th Cong., 1st Sess. 22 n.63 (1983), reprinted in 1984 U.S.C.A.N. 3205.

97. 18 U.S.C. §§ 3161-3174 (1988).

98. 130 CONG. REC. S945 (daily ed. Feb. 3, 1984) (Senator Grassley stated, "No evidence has been presented that at any time in our hearings [on the Bail Reform Act] that the 90 day Speedy Trial Act limit has not worked perfectly well to protect against lengthy incarceration.")

In an April 19, 1983 letter from Robert A. McConnell, Assistant Attorney General, Office of Legislative Affairs, United States Department of Justice, to Senator Strom Thurmond, Chairman of the Senate Committee on the Judiciary, Mr. McConnell strongly opposed such an amendment, stating that, "We have no doubt that the proposed amendment is well intentioned and agree that a speedy trial is especially important where a defendant must, for the protection of the integrity of the judicial process or the safety of the community be held pending trial. But the problems posed by the proposed reduction to 60 days of the Speedy Trial Act's present limit on pretrial detention are simply too great to justify its enactment as a *menas* [sic] of furthering this principle." S. REP. NO. 98-147, 98th Cong., 1st Sess. app. at 93 (1983), *microformed* on CIS No. 83-S523-8 (Congressional Info. Serv.).

The Senate debate concerning the Bail Reform Act indicates that several senators believed that the ninety-day time period for bringing a detained defendant's case to trial under the Speedy Trial Act was firm and not likely to expand.⁹⁹ The senators apparently were not interested in, or at least not aware of, the practical reality of the Speedy Trial Act,¹⁰⁰ which permits the exclusion of time from the ninety-day limit on eighteen separate grounds.¹⁰¹ These exclusions include delay resulting from the filing of any interlocutory appeal,¹⁰² the filing of pretrial motions by either side,¹⁰³ or the granting of a continuance based on the judge's findings that the ends of justice served by taking such action outweigh the interest of the public and the defendant in holding a speedy trial.¹⁰⁴ Once the court finds an exclusion of time under any one of these grounds, the Speedy Trial Act stops the clock from running, and the ninety-day period is tolled.¹⁰⁵ This tolling delays the case of a detained defendant from proceeding to trial within the ninety-day period required by the Speedy Trial Act.¹⁰⁶ It results in further, and often protracted, incarceration of a presumptively innocent individual.¹⁰⁷

The lower federal courts quickly recognized that the Speedy Trial Act would not serve to protect defendants against lengthy pretrial incarceration.

[E]xperience under the combined operation of these two statutes [the Speedy Trial Act and the Bail Reform Act] may demonstrate that the realities of preparing for the trial of complex cases having

99. Senator Thurmond told the Senate that "the 90 days is the worst case limit," 130 CONG. REC. S941 (daily ed. Feb. 3, 1984); Senator Laxalt referred to the 90 day limit as the "upper bound," *id.* at S943; and Senator Grassley stated that "no defendant will be detained indefinitely while the processes of justice grind to a halt," *id.* at 945.

100. 18 U.S.C. §§ 3161-3174 (1988).

101. 18 U.S.C. § 3161(h)(1)-(9) (1988). These exclusions caused the Third Circuit to refer to the law as "the rather porous provisions of the Speedy Trial Act." *United States v. Perry*, 788 F.2d 100, 118 (3d Cir.), *cert. denied*, 479 U.S. 864 (1986).

102. 18 U.S.C. § 3161(h)(1)(E) (1988).

103. 18 U.S.C. § 3161(h)(1)(F) (1988).

104. 18 U.S.C. § 3161(h)(8)(A) (1988).

105. The preceding periods of delay "shall be excluded in computing the time within which an information or an indictment must be filed, or in computing the time within which the trial of any such offense must commence . . ." 18 U.S.C. § 3161(h) (1988).

106. 18 U.S.C. § 3164(b) (1988).

107. See e.g., *United States v. Infelise*, 934 F.2d 103, 104 (7th Cir. 1991) ("defendants will have spent two years in jail without having been proved guilty of a crime."); *United States v. Ojeda Rios*, 846 F.2d 167, 168 (2d Cir. 1988) (over thirty-two months); *United States v. Melendez-Carrion*, 790 F.2d 984, 999 (2d Cir. 1986) (over eight months); *United States v. Noriega*, 746 F. Supp. 1548, 1558 (S.D. Fla. 1990) (over one year); and *United States v. Gatto*, 750 F. Supp. 664, 673 (D.N.J. 1990) (over eighteen months).

numerous defendants and multi-count indictments are such that this congressional expectation [of having detained defendants being tried within ninety days] and policy may occasionally be frustrated. . . . Exclusions authorized by 3161(h) for pretrial motions by both sides, scheduling difficulties as well as unforeseeable delays granted in the interests of justice, may combine to so delay a trial that the Speedy Trial Act might not "work perfectly well to protect against lengthy incarceration." In such a case, the length of a defendant's pretrial detention might not survive a proper due process challenge.¹⁰⁸

II. THE ACT'S FACIAL CONSTITUTIONALITY: *UNITED STATES V. SALERNO*

In 1987, for the first and, thus far, only time the United States Supreme Court considered a constitutional challenge to the Act.¹⁰⁹ Anthony Salerno and Vincent Cafaro were arrested on March 21, 1986. Along with thirteen others, they were charged in a twenty-nine count indictment.¹¹⁰ At the arraignment of the defendants, the Government conceded that neither Salerno nor Cafaro posed a risk of flight.¹¹¹ The prosecution argued for pretrial detention, however, based on the defendants' indictment for crimes of violence stemming from their alleged involvement in organized crime.¹¹² The Government contended that no conditions of bail would assure the safety of the community or any other person if either Salerno or Cafaro were released.¹¹³

108. *United States v. Colombo*, 777 F.2d 96, 101 (2d Cir. 1985) (footnotes omitted). See also *Melendez-Carrion*, 790 F.2d at 996 ("it may well be that the Senate did not fully appreciate just how long pretrial detention might last under the exclusions of the Speedy Trial Act"); *United States v. Gallo*, 653 F. Supp. 320, 342 (E.D.N.Y. 1986) ("[E]xtended imprisonment has become the rule rather than the exception whenever pretrial detention is used in complex, multi-count, multi-defendant actions. . . . Excludable time provisions of the Speedy Trial Act often push back the trial for months, and even years, despite the possible detention of defendants. . . .").

109. *United States v. Salerno*, 481 U.S. 739 (1987).

110. The charges were as follows:

one count of conspiracy to violate the Racketeer Influence and Corrupt Organizations Act ("RICO"), in violation of 18 U.S.C. § 1962(d) (1982); one count of participating in a racketeering enterprise, in violation of 18 U.S.C. § 1962(c) (1982); 16 counts of mail fraud, in violation of 18 U.S.C. § 1341 (1982); one count of wire fraud, in violation of 18 U.S.C. § 1343 (1982); eight counts of extortion, in violation of 18 U.S.C. § 1951 (1982); and one count of operating an illegal bookmaking business and one count of operating an illegal numbers business, in violation of 18 U.S.C. § 1955 (1982).

United States v. Salerno, 794 F.2d 64, 66-67 (2d Cir. 1986), *rev'd* 481 U.S. 739 (1987).

111. *United States v. Salerno*, 631 F. Supp. 1364, 1366 (S.D.N.Y.), *vacated* 794 F.2d 64 (2d Cir. 1986), *rev'd* 481 U.S. 739 (1987).

112. *Id.*

113. *Id.*

At the detention hearing, the prosecution proffered the testimony of two Government witnesses who, in the past, had testified in the trials of other organized crime figures.¹¹⁴ It also presented evidence from the search of an apartment where Cafaro lived and Salerno visited, as well as excerpts from wiretaps placed at various locations.¹¹⁵ The evidence proffered by the Government related largely to the defendants' alleged involvement in murder conspiracies and violence connected to their labor, loansharking and gambling enterprises.¹¹⁶

Following the hearing, the district court granted the Government's motion for detention.¹¹⁷ The court found that there was clear and convincing evidence that, due to their alleged involvement in violent crime, the two defendants presented a danger to society.¹¹⁸ The court ordered the defendants detained because it found that no conditions of release could reasonably assure that the defendants would not endanger the safety of the community.¹¹⁹

On appeal, the defendants argued, among other things, that the provision of the Bail Reform Act codified at section 3142(e), Title 18 of the United States Code, violated their rights to due process.¹²⁰ The defendants contended that this provision was unconstitutional because it allowed the court to order them held without bail pending a trial, solely on the ground that if released, they posed a danger to the community.¹²¹ The United States Court of Appeals for the Second Circuit agreed, holding that the "Due Process Clause prohibits pretrial detention on the ground of danger to the community as a regulatory measure, without regard to the duration of the detention."¹²²

The Second Circuit first noted that the only basis for this detention order was the finding that, if released, the defendants would likely continue their criminal business which involved threats and crimes of violence, thus posing a danger to the community.¹²³ The court further found that the pretrial detention of these defendants on this basis was unconstitutional because the deprivation of liberty in order to prevent future crimes violated due process.¹²⁴ The

114. *Id.* at 1367.

115. *Id.*

116. *Id.* at 1367-70.

117. *Id.* at 1375.

118. See *id.* ("When business as usual involves threats, beatings, and murders, the present danger such people pose to the community is self-evident.")

119. *Id.* at 1371, 1375.

120. *United States v. Salerno*, 794 F.2d 64, 71 (2d Cir. 1986), *rev'd* 481 U.S. 739 (1987).

121. *Id.*

122. *Id.* at 71.

123. *Id.*

124. *Id.* at 71-72.

court rejected the Government's contention that 18 U.S.C. § 3142(e) was a rational means of achieving the regulatory goal of protecting the public safety.¹²⁵ Although the court appreciated the objective of protecting the public from harm, it found that this goal could not be accomplished by incarcerating those merely accused and not convicted of crimes.¹²⁶ Citing *United States v. Melendez-Carrion*,¹²⁷ the court rejected the regulatory test advanced by the Government:

The fallacy of using such a test can be readily seen from consideration of preventive detention as applied to persons not arrested for any offense. *It cannot seriously be maintained that under our Constitution the Government could jail people not accused of any crime simply because they were thought likely to commit crimes in the future.* Yet such a police state approach would undoubtedly be a rational means of advancing the compelling state interest in public safety. In a constitutional system where liberty is protected both substantively and procedurally by the limitations of the Due Process Clause, a total deprivation of liberty cannot validly be accomplished [on the sole ground that] doing so is a rational means of regulating to promote even a substantial government interest.¹²⁸

In finding that the incarceration of a presumptively innocent individual to prevent future crimes exceeds the limits of due process, the court concluded that the Fifth Amendment permits the incarceration of individuals only as a punitive measure after they have been convicted of a crime and not as a regulatory measure to control the activities of those merely accused of a crime.¹²⁹ The court rejected the Government's position that the mere filing of criminal charges against individuals for alleged past criminal activity permitted the regulation of their conduct through detention.¹³⁰ Finally, the court found that "[t]he proper remedy for charges of past crimes, assuming they are proven," is the imposition of a penalty after trial and not incarceration before trial.¹³¹

On certiorari, the United States Supreme Court reversed.¹³² For the first time in the history of this country, the Supreme Court upheld the constitutionality of a statute that permitted the pretrial incarceration of adult defendants merely charged with, but not convicted of, noncapital offenses.¹³³ In a six-to-three decision, delivered by Chief Justice Rehnquist, the Court found that the Act is

125. *Id.* at 72-73.

126. *Id.* at 73.

127. 790 F.2d 984 (2d Cir. 1986).

128. *Salerno*, 794 F.2d at 72 (citing *Melendez-Carrion*, 790 F.2d at 1000-01).

129. *See id.* at 73-74.

130. *Id.* at 72-73.

131. *Id.* at 73.

132. *United States v. Salerno*, 481 U.S. 739, 741 (1987).

133. *Id.*

not facially unconstitutional under either the Due Process Clause of the Fifth Amendment¹³⁴ or the Excessive Bail Clause of the Eighth Amendment.¹³⁵

The Court first examined the issue of whether the Act violates substantive due process because it authorizes impermissible punishment before trial in violation of the principle set forth in *Bell v. Wolfish*.¹³⁶ In order to make this determination, the Court examined the legislative history of the Act to ascertain whether Congress intended to punish or merely regulate the conduct of those whose detention was sought by the Government or the court.¹³⁷ It reiterated Congress' position that the Act is a legislative response to "the alarming problem of crimes committed by persons on release."¹³⁸ The Court found that unless Congress expressly intended to punish the detained defendant, the "punitive/regulatory distinction"¹³⁹ turns on whether the restriction serves some valid regulatory purpose and is not excessive in effecting this goal.¹⁴⁰ In examining the legislative history, the Court concluded that Congress intended for pretrial detention of adult defendants to address the problem of continued criminal activity by those released on bail and not to punish dangerous individuals.¹⁴¹

The Court looked to its recent decision in *Schall v. Martin* to decide the issue.¹⁴² In that case the Court upheld the constitutionality of a section of the New York Family Court Act that authorized pretrial detention of an accused juvenile delinquent who posed a "serious risk"¹⁴³ of further criminal activity. The Court held that the detention authorized by the New York statute served a legitimate regulatory function and, therefore, did not violate substantive due process under the Fourteenth Amendment.¹⁴⁴ The Court reasoned that society has a legitimate and compelling interest in protecting

134. *Id.* at 755.

135. *Id.* at 752. Because the focus of this Article is the constitutionality of pretrial detention under the Due Process Clause of the Fifth Amendment, there will be no discussion of the Court's ruling with respect to the Eighth Amendment. For a thorough examination of the Court's decision in *United States v. Salerno* see Donald W. Price, Comment, *Crime and "Regulation": United States v. Salerno*, 48 LA. L. REV. 743 (1988); Howard, *supra* note 12; Eason, *supra* note 12; Lupo, *supra* note 12.

136. *United States v. Salerno*, 481 U.S. at 746 (citing *Bell v. Wolfish*, 441 U.S. 520, 537 (1979)).

137. *Id.* at 747.

138. *Id.* at 742 (citing S. REP. NO. 225, 98th Cong., 1st Sess. 3 (1983)).

139. *Id.* at 747.

140. *Id.* at 747 (citing *Kennedy v. Mendoza-Martinez*, 373 U.S. 144, 168-69 (1963)).

141. *Id.* at 747.

142. 467 U.S. 253 (1984).

143. *Id.* at 255 (citing N.Y. FAM. CT. ACT § 320.5 (McKinney 1983)).

144. *Id.* at 257.

itself from crime and protecting juveniles from their own criminal conduct.¹⁴⁵ Although the Court recognized that juveniles have a substantial interest in their own liberty, this interest is qualified because, unlike adults, juveniles are "always in some form of custody."¹⁴⁶ The Court also found that because the pretrial confinement in *Schall* was restricted to a period of just seventeen days,¹⁴⁷ and the place of incarceration was either an open facility in the community or a secure one which resembled a dormitory,¹⁴⁸ this limited detention was intended to regulate the juvenile's conduct not to punish him.¹⁴⁹

Applying the principles of *Schall* to *Salerno*¹⁵⁰ the Court also examined the features of the Act and decided that they too reflect the regulatory, rather than punitive, objectives of the statute.¹⁵¹ As in *Schall*,¹⁵² the Bail Reform Act of 1984 requires that individuals be detained in a "facility separate, to the extent practicable, from persons awaiting or serving sentences or being held in custody pending appeal."¹⁵³ The Court also found, that because the Act strictly limits the type of cases in which pretrial detention may be imposed, its regulatory purpose was not violated.¹⁵⁴ Lastly, the Court found that because the defendant receives a prompt detention hearing¹⁵⁵ and "the maximum length of pretrial detention is limited by the stringent time limitations of the Speedy Trial Act,"¹⁵⁶ the Act is regulatory.¹⁵⁷

Citing numerous examples, the Court found that under certain circumstances the government's regulatory interest in community safety can outweigh an individual's liberty interest in a particular case.¹⁵⁸ In determining whether the Act is excessive in effecting its

145. *Id.*

146. *Id.* at 265.

147. *Id.* at 270. In relying on *Schall v. Martin*, the Court in *Salerno* neglected to mention that the defendants in the latter case had already spent ten months in custody by the time their case was heard by the Supreme Court. *See id.*

148. *Id.* at 271.

149. *Id.* at 269.

150. 481 U.S. 739 (1987).

151. *Id.* at 747-48.

152. 467 U.S. 253 (1984).

153. *United States v. Salerno*, 481 U.S. at 747 (citing 18 U.S.C. § 3142(i)(2)). In practice, however, this is not always the case. *See, e.g., United States v. Gallo*, 653 F. Supp. 320, 336, 340 (E.D.N.Y. 1986).

154. *Salerno* 481 U.S. at 747, (citing 18 U.S.C. § 3142(f)).

155. *Id.*

156. *Id.* at 757 (citing 18 U.S.C. §§ 3161-64).

157. In practice, the time limits of the Speedy Trial Act have not proven to be so stringent and have not effectively restricted the period of pretrial detention. *See supra* notes 95-108 and accompanying text.

158. For instance, during wartime the Supreme Court has held the government may detain individuals whom the government believes to be dangerous. *See, e.g.,*

regulatory goal, the Court first noted that the government has a legitimate and compelling interest in preventing further crime by an individual who has already been arrested and charged with a criminal offense.¹⁵⁹ The Court found that the Act is not excessive because it narrowly focuses on the critical problem of crime committed by one already charged with an offense in which the government has an overwhelming interest;¹⁶⁰ it implicates only a limited number of individuals who have been charged with very serious violations of the law;¹⁶¹ it requires the government to establish by probable cause that the defendant has committed the charged offense;¹⁶² and through a detention hearing, the prosecution must persuade the court by clear and convincing evidence that "no conditions of release can reasonably assure the safety of the community or any person."¹⁶³

The Court found that even though an individual does have a substantial interest in liberty, under these carefully drawn and limited circumstances, this interest is outweighed by those of the government.¹⁶⁴ The Court concluded that "under these circumstances we cannot categorically state that pretrial detention 'offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental,'"¹⁶⁵ and, therefore, the Court found no violation of substantive due process.¹⁶⁶

With respect to the defendants' procedural due process challenge to the Act, the Court stated that it need only find the Act's procedures "adequate to authorize the pretrial detention of at least some [persons] charged with crimes."¹⁶⁷ The Court found that the procedural requirements of the Act pass that test as well.¹⁶⁸ Noting that "there is nothing inherently unattainable about a prediction of

Ludecke v. Watkins, 335 U.S. 160 (1948) (approved the "unreviewable executive power to detain enemy aliens in time of war"). This interest in protecting the community's interest in safety is not limited, however, to wartime. *See, e.g., Schall v. Martin*, 467 U.S. 253 (1984) (approved a post-arrest regulatory detention of juveniles when they present a continuing danger to the community); *Gerstein v. Pugh*, 420 U.S. 103 (1975) (police may arrest and hold a suspect for a short period of time until a neutral magistrate determines whether probable cause exists); *Carlson v. Landon*, 342 U.S. 524, 537-42 (1952) (no absolute constitutional barrier to the detention of potentially dangerous resident aliens pending deportation proceedings).

159. *United States v. Salerno*, 481 U.S. 739, 749 (citing *DeVeau v. Brausted*, 363 U.S. 144, 155 (1960)).

160. *Salerno*, 481 U.S. at 750.

161. *Id.* (citing 18 U.S.C. § 3142(f)).

162. *Id.* at 750.

163. *Id.*

164. *Id.* at 750-51.

165. *Id.* at 711 (quoting *Snyder v. Massachusetts*, 291 U.S. 97 (1934)).

166. *Id.*

167. *Id.* at 751 (quoting *Schall*, 467 U.S. at 264).

168. *Id.* at 751.

future criminal conduct,"¹⁶⁹ the Court found that the procedural requirements of the Act, including the defendant's right to counsel,¹⁷⁰ the right to testify in one's own behalf,¹⁷¹ the right to present information by proffer and to cross-examine those witnesses who appear at the hearing,¹⁷² and the right to immediate appeal of the decision,¹⁷³ militate in favor of an accurate determination that the defendant presents a danger to the community. Furthermore, the Court decided that the Act did not violate procedural due process¹⁷⁴ because the Act demands that the Government must prove by clear and convincing evidence that the defendant poses a threat to the safety of the community.¹⁷⁵ In addition the court must consider specific statutory factors in determining whether to detain the defendant¹⁷⁶ and must prepare written findings of fact and a statement of reasons supporting its decision.¹⁷⁷

The Supreme Court concluded that in view of "the legitimate and compelling regulatory purpose of the Act and the procedural protection it offers,"¹⁷⁸ the Act was not facially invalid under either the substantive or procedural Due Process Clause of the Fifth Amendment. In a footnote, the Court did comment, however, that "we intimate no view as to the point at which detention in a particular case might become excessively prolonged, and, therefore, punitive in relation to Congress' regulatory goal."¹⁷⁹ The issue, therefore, remained: at what point in time does detention become punitive rather than regulatory?

III. WHEN DOES PRETRIAL DETENTION VIOLATE SUBSTANTIVE DUE PROCESS?

The Fifth Amendment protects against deprivation of liberty without due process of law¹⁸⁰ and prohibits the imposition of punishment before trial.¹⁸¹ Absent extraordinary circumstances, it would violate due process to imprison a person deemed to be a danger to society who was not accused of a crime.¹⁸² Yet the Bail Reform Act

169. *Id.* at 751 (quoting *Schall*, 467 U.S. at 278).

170. *Id.* (citing 18 U.S.C. § 3142(f)).

171. *Id.* (citing 18 U.S.C. § 3142(f)).

172. *Id.* (citing 18 U.S.C. § 3142(f)).

173. *Id.* (citing 18 U.S.C. § 3145(c)).

174. *Id.*

175. *Id.* (citing 18 U.S.C. § 3142(f)).

176. *Id.* at 751-52 (citing 18 U.S.C. § 3142(g)).

177. *Id.* at 752 (citing 18 U.S.C. § 3142(i)).

178. *Id.*

179. *Id.* at 748 n.4.

180. U.S. CONST. Amend. V.

181. *Bell v. Wolfish*, 441 U.S. 520, 535 n.16 (1979).

182. *United States v. Melendez-Carrion*, 790 F.2d 984, 1001 (1986). For such extraordinary circumstances see *supra* note 158 and accompanying text.

of 1984 authorizes the pretrial detention of an accused, who is presumed innocent, based on the finding that the accused presents a danger to society or a risk of flight.¹⁸³ As discussed, the Supreme Court in *United States v. Salerno*¹⁸⁴ upheld this provision of the Act as being regulatory rather than punitive, but left open the question of when such pretrial confinement crosses the line from permissible regulation to impermissible punishment.¹⁸⁵ This section will explain how the factors the courts use to make such a determination are inappropriate and, often, inconsistently applied. It will analyze, for example, why it is unconstitutional to allow the courts to extend the pretrial detention of defendants simply because they file pretrial motions that contribute to the delay in getting their cases to trial. It will conclude that because these tests do not effectively protect the due process rights of detained defendants, there should be a bright-line point at which pretrial detention is determined to be unduly protracted, and therefore, punitive in all cases.

A. The Impact of the Bail Reform Act of 1984

In order to fully appreciate the profound impact of the Act, it is first necessary to examine the number of individuals being detained under the statute.¹⁸⁶ In passing the Bail Reform Act of 1984, Congress seriously underestimated the number of individuals who would be detained pending trial.¹⁸⁷ It is difficult to accurately ascertain the total number of federal defendants detained pretrial because the Administrative Office of the United States Courts does not maintain this statistic. The Office does, however, maintain figures regarding the total number of defendants against whom criminal cases are filed and upon whom the Pretrial Services Agency (PSA) of the

183. 18 U.S.C. § 3142(e).

184. 481 U.S. 739 (1987).

185. *Id.* at 747 n.4.

186. Since the Supreme Court upheld the constitutionality of pretrial detention in the *Salerno* case in May of 1987, only the statistics for the period from July 1, 1987 to June 30, 1988; July 1, 1988 to June 30, 1989; and July 1, 1989 to June 30, 1990 will be included herein.

187. In a May 24, 1983, letter from Alice M. Rivlin, Director of the Congressional Budget Office to Senator Strom Thurmond, Chairman of the Senate Committee on the Judiciary, the Congressional Budget Office (CBO) estimated the cost to the federal government of implementing this law. The CBO assumed that the number of federal defendants would continue at its recent average—about 44,000 per year and that approximately 19 percent of this population would be affected by this bill. REPORT OF THE COMMITTEE ON THE JUDICIARY ON S. 215, S. REP. NO. 147, 98th Cong., 1st Sess. 65-66 (1983). Statistics derived from the annual reports of the Administrative Office of the United States Courts for the years 1987, 1988 and 1990 strongly contradict this estimate. See *infra* notes 205-215 and accompanying text.

federal courts activates a case.¹⁸⁸ The PSA gathers information used by the federal courts to make decisions regarding the detention or the release of defendants charged with federal offenses.¹⁸⁹ The number of criminal filings exceeds the number of PSA cases because the total number of filings may include the names of an individual who is named in more than one criminal filing¹⁹⁰ and because the PSA figure only encompasses those defendants with whom the PSA has had contact in an official capacity.¹⁹¹ Some defendants, for example, choose not to be interviewed by the PSA.¹⁹²

The following table sets forth the total number of criminal filings in federal court, the total number of PSA cases activated, the total number and percentage of PSA cases where detention was sought and ordered, as well as the total number, percentage and reasons for this detention. It demonstrates that the total percentage of the PSA-activated cases in which detention was sought rose approximately five percent in the three-year period between July 1, 1987 through June 30, 1990. It also shows that detention was ordered in three-fourths of the PSA-activated cases where detention was sought, and that the total number of defendants detained in PSA-activated cases increased by over four thousand in the three-year period.

PRETRIAL DETENTION 1987-1990

Dates	Total Crim. Defendants Filed ¹⁸⁸	Pretrial Services Agency (PSA) ¹⁸⁹ cases activated	Number of motions for detention filed by gov't and court in PSA cases	% of PSA activated cases where detention is sought	Total Number of defendants detained in PSA activated cases	% of PSA activated cases where detention ordered
July 1, 1987 to June 30, 1988 ¹⁹⁰	49,658	34,664	10,256	30	7,625	74
July 1, 1988 to June 30, 1989 ¹⁹⁰	51,307	41,562	13,815	33	10,249	74
July 1, 1989 to June 30, 1990 ¹⁹⁰	54,193	46,101	16,204	35	11,945	74

188. 1988-1990 ADMIN. OFFICE OF U.S. COURTS ANNUAL REPORT [hereinafter ANNUAL REPORT].

189. 1988 ANNUAL REPORT 45.

190. 1990 ANNUAL REPORT 29.

191. Interview with Glen Vaughn, Chief Pretrial Services Officer, Southern District of California (April 15, 1992).

192. *Id.*

193. This figure "includes persons proceeding by indictment, information or consent on complaint and persons in fugitive status. It excludes petty, traffic, escapes

REASONS FOR DETENTION

Dates	Flight		Danger to Witness		Danger to Community		Flight and Danger	
	Total PSA Cases	Percent of PSA Cases	Total PSA Cases	Percent of PSA Cases	Total PSA Cases	Percent of PSA Cases	Total PSA Cases	Percent of PSA Cases
July 1, 1987 to June 30, 1988	3,745	49	125	1	956	13	2,799	37
July 1, 1988 to June 30, 1989	4,647	45	139	1	1200	12	4,263	42
July 1, 1989 to June 30, 1990	5,268	44	150	1	1503	13	5,024	42

B. The Evolution of a Due Process Test

The Bail Reform Act of 1984 was passed on October 12, 1984.¹⁹⁸ Almost immediately after the passage of the Act, defendants detained under the new legislation began to argue that not only the fact, but the length, of their pretrial detention constituted punishment before an adjudication of guilt, thereby violating their rights to substantive due process.¹⁹⁹ To address this argument, courts first had to devise a test to determine whether a period of pretrial detention passed from permissible regulation to impermissible punishment.

From the time the courts first began to examine the question of an allowable length of pretrial detention, they have rejected the use

[sic] reopens, removals and complaints dismissed at initial appearance." 1988 ANNUAL REPORT 377 n.1; 1989 ANNUAL REPORT 375 n.1; 1990 ANNUAL REPORT 248 n.1.

194. A PSA case is activated on each criminal defendant who chooses to confer with a pretrial services agent. "This column may include persons counted once as a PSA case, but named in more than one criminal filing." 1988 ANNUAL REPORT 377 n.2; 1989 ANNUAL REPORT 375, n.2; 1990 ANNUAL REPORT 248 n.2.

195. 1988 ANNUAL REPORT at 374, 386 (all information for time period of 1987-1988).

196. 1989 ANNUAL REPORT at 372, 384 (all information for time period 1988-1989).

197. 1990 ANNUAL REPORT at 247, 253 (all information for time period of 1989-1990). The 1990 Annual Report of the Proceedings of the Judicial Conference called the state of pretrial detention a "crisis" and noted that "the average number of defendants in pretrial detention has more than doubled in the past four years." 1990 PROCEEDINGS OF THE JUDICIAL CONF. ANNUAL REPORT 16.

198. See Pub. L. No. 98-473, 98 Stat. 1985 (1984).

199. See, e.g., *United States v. Infelise*, 934 F.2d 103 (7th Cir. 1991); *United States v. Melendez-Carrion*, 820 F.2d 56 (2d Cir. 1987); *United States v. Accetturo*, 783 F.2d 382 (3d Cir. 1986); *United States v. Gotti*, 776 F. Supp. 666 (E.D.N.Y. 1991); *United States v. Gatto*, 750 F. Supp. 664 (D.N.J. 1990); *United States v. Noriega*, 746 F. Supp. 1548 (S.D. Fla. 1990);

of any "per se" test.²⁰⁰ They have all agreed that because "due process is a flexible concept,"²⁰¹ the due process limit on the duration of pretrial detention should be evaluated on a case-by-case basis. The courts have avoided drawing any bright lines that determine "precisely when defendants adjudged to be flight risks or dangers to the community should be released pending trial."²⁰² No court has "expressed a definitive view as to when a period of pretrial detention is so excessive as to impinge on a defendant's due process rights."²⁰³ All courts that have examined this issue, however, have agreed that after the passage of some period of time, pretrial detention may pass from permissible regulation to impermissible punishment.²⁰⁴

The question arose as to what factors should be used to determine if the length of detention had become unduly protracted and, therefore, punitive rather than regulatory. A description of the evolution of the due process tests will demonstrate that, because the courts received no guidance from either Congress or the Supreme Court as to what factors should be considered in making this decision, the courts' approach to this question was inconsistent and arbitrary. This same flawed approach continues to be used today.

In one of the first cases to address the issue of a constitutionally permissible length of pretrial detention, the Chief Judge of the Eastern District of New York, Jack B. Weinstein, upheld the magistrate's decision to release defendant Anthony Colombo on bail after an initial detention order had resulted in Colombo's ninety-day pretrial incarceration.²⁰⁵ In deciding to uphold the magistrate's release order, Judge Weinstein first relied on the statutory factors.²⁰⁶ He

200. See, e.g., *United States v. Berrios-Berrios*, 791 F.2d 246 (2d Cir.) cert. dismissed, 479 U.S. 978 (1986); *United States v. Accetturo*, 783 F.2d 382 (3d Cir. 1986); *United States v. Theron*, 782 F.2d 1510 (10th Cir. 1986); *United States v. Portes*, 786 F.2d 758 (7th Cir. 1985); *United States v. Colombo*, 777 F.2d 96 (2d Cir. 1985); *United States v. LoFranco*, 620 F. Supp. 1324 (N.D.N.Y. 1985), app. dismissed sub nom. *United States v. Cheesman*, 783 F.2d 38 (2d Cir. 1986); *United States v. Hall*, 651 F. Supp. 13 (N.D.N.Y. 1985); *United States v. Hazzard*, 598 F. Supp. 1442, 1451 n.5 (N.D. Ill. 1984).

201. See, e.g., *United States v. Accetturo*, 783 F.2d 382, 388 (3d Cir. 1986).

202. *Id.*

203. *United States v. Infelise*, 1990 WL 77795 at *2 (N.D. Ill. May 15, 1990) (memorandum opinion and order).

204. See, e.g., *United States v. Infelise*, 934 F.2d 103 (7th Cir. 1991); *United States v. Melendez-Carrion*, 820 F.2d 56 (2d Cir. 1987); *United States v. Accetturo*, 783 F.2d 382 (3d Cir. 1986); *United States v. Noriega*, 746 F. Supp. 1548 (S.D. Fla. 1990); *United States v. Gotti*, 776 F. Supp. 666 (E.D.N.Y. 1991).

205. *United States v. Colombo*, 616 F. Supp. 780, 788 (E.D.N.Y.), rev'd 777 F.2d 96 (2d Cir. 1985).

206. *Id.* at 784. The Court is to examine:

(1) nature and circumstances of the offense charged, including whether the

found that the Government had failed to establish by clear and convincing evidence that detention was necessary because, in this case, the court could devise bail conditions which would assure the safety of the public.²⁰⁷

Another significant reason for Judge Weinstein's decision was that the defendant's trial was not likely to begin for another thirteen to twenty-four months.²⁰⁸ The judge reached this conclusion because the indictment contained seventy-one counts, the charges were complex, there were twenty-four other defendants in the case, and many pretrial motions had been filed to which the Government had not yet responded.²⁰⁹ The judge recognized that Congress had excluded the length of pretrial detention in the statutory list of factors the court should use in determining whether to order the pretrial detention of a defendant.²¹⁰ He found, however, that it was necessary to consider this factor because otherwise a defendant, in effect, would "be sentenced to a long term of imprisonment on the theory that he is guilty as charged, without affording him the due process of law available at trial."²¹¹ Consequently, he considered the likely length of pretrial detention in determining whether the defendant should be released or detained.²¹² He found that the anticipated delay in bringing Colombo to trial justified his release on bail.²¹³

Three months later, while the defendant was still being detained, the United States Court of Appeals for the Second Circuit reversed Judge Weinstein's decision.²¹⁴ The court held that the conditions set by the lower court were insufficient to assure that the defendant would not pose a danger to the community.²¹⁵ More importantly, the court concluded that the release of the defendant based on the anticipated length of his pretrial incarceration was premature at that time.²¹⁶ It thereby rejected the predominant factor used by the Chief

offense is a crime of violence or involves a narcotic drug;

(2) weight of the evidence against the person;

(3) the history and characteristics of the person . . . ;

(4) the nature and seriousness of the danger to any person or the community that would be posed by release.

18 U.S.C. § 3142(g) (1988).

207. *Colombo*, 616 F. Supp. at 785.

208. *Id.*

209. *Id.* at 786-87.

210. *Id.* at 784.

211. *Id.* at 786.

212. *Id.*

213. *Id.*

214. *United States v. Colombo*, 777 F.2d 96, 101 (2d Cir. 1985).

215. *Id.* at 99. "The particular danger that Colombo . . . was found to pose—that of an alleged supervisor and director of the 'Colombo Crew'—is hardly alleviated by the type of conditions established by the district court." *Id.* at 100.

216. *Id.*

Judge to determine the issue. Even though the defendant had already been detained for seven months when the appellate court reviewed the matter, the court found that, at this stage, the case did not present the issue of whether the length of the defendant's pretrial detention violated due process.²¹⁷ Because the trial date was not yet set and the court did not know who would cause any further delays or what the reasons for the delays would be, it held it was premature to determine that the defendant must be released to protect his due process rights. The court conceded that the combined operation of the Bail Reform Act and the Speedy Trial Act "might not work perfectly well to protect against lengthy incarceration,"²¹⁸ and in "such a case, the length of a defendant's pretrial detention might not survive a proper due process challenge."²¹⁹ Nonetheless it held that this was not the case because the anticipated delay in trial was merely speculative and Colombo had not moved to expedite his trial or sever his case from that of his codefendants.²²⁰ Consequently, the Court would not find that the defendant's rights to due process had been violated.²²¹

Soon after Judge Weinstein rendered his decision in *Colombo*,²²² the Chief Judge of the United States District Court for the Northern District of New York, Howard Munson, examined the issue of whether a defendant's six-month pretrial detention constituted a violation of his due process rights.²²³ In deciding that this period of detention did violate the defendant's rights to due process, the court used a balancing test, "[w]eighing the defendant's interest in liberty against society's interest in his continued detention."²²⁴ Although the court found that the defendant did pose a risk of flight and potential danger to the community, Judge Munson ruled that the defendant's six-month pretrial incarceration up to that point and the likelihood of future incarceration for at least three additional months before trial outweighed those concerns.²²⁵ Because the court had declared

217. *Id.* at 101.

218. *Id.* at 101. The court of appeals noted that Congress had relied on the Speedy Trial Act, 18 U.S.C. §§ 3161-64 (1988), to limit the period of pretrial incarceration but that in a complex case such as this, excludable time under 18 U.S.C. § 3161(h) such issues as: the filing and consideration of pretrial motions by both sides, the scheduling difficulties of all parties and the delays in the interest of justice, would substantially delay trial and would likely extend trial for detained defendants well beyond the ninety days set forth in section 3164. *Id.*

219. *Id.* at 101.

220. *Id.*

221. *Id.*

222. 616 F. Supp. 780 (E.D.N.Y. 1985).

223. *United States v. LoFranco*, 620 F. Supp. 1324 (N.D.N.Y. 1985), *appeal dismissed sub nom. United States v. Cheesman*, 783 F.2d 38 (2d Cir. 1986).

224. *LoFranco*, 620 F. Supp. at 1326.

225. *Id.*

the case complex under the Speedy Trial Act,²²⁶ this case was exempt from the time requirements under that statute. Consequently, there were no limitations on the amount of time this defendant could spend in custody awaiting his trial. The court, therefore, found that the defendant's rights to due process under the Fifth Amendment had been violated.

Soon after, in January of 1986, defendants in the case of *United States v. Accetturo*²²⁷ argued that the Bail Reform Act of 1984 violated due process because it failed to include any provision directing the courts to consider the probable length of pretrial detention when initially determining whether a defendant should be ordered detained or released.²²⁸ The United States Court of Appeals for the Third Circuit rejected this argument.²²⁹ It ruled that in relying on the Speedy Trial Act²³⁰ to govern the length of pretrial delay, Congress had provided for a "rational scheme for limiting the duration of federal pretrial detention."²³¹ The court found that because, at the time of the initial detention hearing, the probable length of pretrial detention and the responsibility for that delay was speculative, the consideration of probable length of pretrial detention at that time would be inappropriate.²³² It thereby rejected the concern that Judge Weinstein had thought to be so critical.

The court did recognize, however, that pretrial detention could not last indefinitely without resulting in a violation of due process.²³³ Accordingly, the court fashioned a test enumerating the factors that should be used at a hearing to determine whether the length of the defendant's pretrial detention violated due process.²³⁴ Citing no authority and relying on no statutory language or enunciated judicial principles, the Third Circuit ruled that a court should consider the factors relevant in the initial detention hearing "such as the seriousness of the charges, the strength of the government's proof that defendant poses a risk of flight or a danger to the community, and the strength of the government's case on the merits."²³⁵ In addition, the court ruled that such additional factors as "the length of the detention that has in fact occurred, the complexity of the case, and

226. *Id.* at 1325. If a case is "unusual" or "complex" the time limit provisions of the Speedy Trial Act do not apply. See 18 U.S.C. § 3161(h)(8)(B)(ii) (1988).

227. 783 F.2d 382 (3d Cir. 1986).

228. *Id.* at 387.

229. *Id.*

230. 18 U.S.C. §§ 3161-3164 (1988).

231. *Accetturo*, 783 F.2d at 388.

232. *Id.*

233. *Id.* ("[A]t some point due process may require a release from pretrial detention or, at a minimum, a fresh proceeding at which more is required of the government than is mandated by section 3142 [of the Bail Reform Act].").

234. *Id.*

235. *Id.*

whether the strategy of one side or the other has added needlessly to that complexity" should be considered.²³⁶ The Third Circuit did not include in its formulation Judge Weinstein's major concern, the likely length of future detention. Although the defendants in *Accetturo* had already been detained for three months and were not scheduled for trial for an additional two months,²³⁷ the court failed to decide whether their due process rights had been violated by this term of pretrial detention.²³⁸

Several months later, in November of 1986, the United States Court of Appeals for the Second Circuit addressed the constitutional challenge of appellants who argued that their fourteen-month pretrial detention on the grounds of risk of flight violated their rights to due process.²³⁹ The Second Circuit, like the Third Circuit in *Accetturo*,²⁴⁰ recognized that at some point the length of pretrial detention raises a constitutional issue and that each such challenge must be decided on its own facts.²⁴¹ The court devised its own test to decide whether the duration of pretrial detention violated due process. This test considered the length of detention that the defendants had already endured, the nonspeculative length of future detention, the extent of the Government's responsibility for the pretrial delay, and the strength of the evidence of the defendant's risk of flight, or danger to the community when relevant.²⁴² The Second Circuit, unlike the Third Circuit, emphasized that the duration of the detention was a "central focus of our inquiry."²⁴³ At some point in time, irrespective of other circumstances, the sheer length of pretrial detention would violate due process.²⁴⁴

Also unlike the Third Circuit, the Second Circuit Court did not find it necessary to revisit such issues as the seriousness of the charges or the strength of the Government's case on the merits to determine whether the length of the defendant's pretrial incarceration violated

236. *Id.*

237. *Id.* at 387.

238. *Accetturo* is particularly noteworthy on the issue of pretrial detention. Some of the defendants in this case were held in pretrial detention for an extended period of time and after a twenty-one month jury trial, all twenty defendants were acquitted of all charges. See Terrance G. Reed, *The Defense Case for RICO Reform*, 43 VAND. L. REV. 691, 719 (1990).

239. *United States v. Gonzales-Claudio*, 806 F.2d 334, 335 (2d Cir. 1986).

240. 783 F.2d 382 (3d Cir. 1986).

241. *Gonzales-Claudio*, 806 F.2d at 340.

242. *Id.* at 340-41.

243. *Id.* at 340. The court also noted the importance of considering the prosecution's role in the trial delay and the strength of the evidence indicating risk of flight.

244. *Id.* However, the court stated that "in most cases likely to be encountered it is more consonant with due process jurisprudence to consider factors in addition to passage of time." *Id.*

due process. Instead, the court was much more concerned with the status of the case at the time of the due process challenge. It considered how long the pretrial detention of the defendant had already lasted, how much longer it was scheduled to last, to what extent the Government bore responsibility for the pretrial delay, and whether the facts that supported initial pretrial detention on the basis of risk of flight (or danger to the community, when relevant) were constitutionally sufficient to extend the detention.²⁴⁵

The Second Circuit found that the fourteen-month pretrial confinement, with the certainty of at least another twelve months to the end of trial, militated in favor of a violation of due process.²⁴⁶ Added to that was the Government's responsibility for a significant portion of the delay due to its dilatory tactics in providing the defense with discovery such as certified translations of audiotapes and videotapes.²⁴⁷ The court concluded that although the district court was not clearly erroneous in its finding that the defendants posed a risk of flight, in view of the protracted length of the pretrial detention, the facts regarding flight were insufficient to permit continued detention of the defendants.²⁴⁸

At almost exactly the same time, in *United States v. Gallo*,²⁴⁹ Chief Judge Weinstein was again examining the constitutionality of prolonged pretrial detention in a case where defendants had been incarcerated for almost five months on the grounds that they posed a danger to a Government witness.²⁵⁰ The Chief Judge opined that assessing whether or not a defendant's rights to due process had been denied was a "delicate and complex" matter.²⁵¹ He concluded that a decision regarding the release of a defendant should be left to the discretion of the trial court because as the factfinder on the issues of risk of flight and danger to the community, it was in the best position to determine whether release or detention was appropriate.²⁵²

Judge Weinstein found that the statutory factors set forth in the Bail Reform Act of 1984 for an initial determination regarding release or detention of the defendant would have to be reconsidered at the time of a due process challenge by the defendant.²⁵³ In addition, he

245. *Id.*

246. *Id.* at 343. "[T]he Due Process Clause endeavors to set outer limits at which risks to society must be accepted to avoid unconscionable deprivations of the liberty of individuals." *Id.*

247. *Id.* at 342.

248. *Id.* at 343.

249. *United States v. Gallo*, 653 F. Supp 320 (E.D.N.Y. 1986).

250. *Id.*

251. *Id.* at 338.

252. *Id.* at 339-40.

253. *Id.* at 344. Section 3142(g) of the Bail Reform Act requires that the court

agreed with the Third Circuit²⁵⁴ that the court must consider who is responsible for the delay in proceeding to trial and whether the delay is reasonable under the circumstances.²⁵⁵ Maintaining the position he set out in *United States v. Columbo*,²⁵⁶ the Chief Judge reiterated that the length of both pretrial detention to the point of the due process challenge as well as the nonspeculative future detention should be considered in assessing whether a violation of due process had occurred.²⁵⁷

Judge Weinstein went further, however, and stated that the court should consider not only the length but also the hardships caused by the detention.²⁵⁸ The Chief Judge stated that the court must take into account the detrimental effects of lengthy detention on the defendant.²⁵⁹ He noted that protracted incarceration causes financial difficulties for the defendant who is forced into unemployment,²⁶⁰ deterioration of the defendant's morale and demeanor due to isolation from family and friends, interaction with those already convicted of crimes,²⁶¹ and the devolution of the defendant's legal defense due to an inability to assist the attorney full-time in the investigation and preparation of his case.²⁶² The court recognized that the harsh effects of custody must also be considered when deciding whether the detention has passed from regulation to punishment.²⁶³ Up until that time, no court had ever addressed these concerns when deciding this issue. In resolving whether the period of pretrial detention constituted punishment, the courts had considered the amount of time the defendant spent in pretrial custody, but no court had weighed the effects that this incarceration had on the defendant.

The Chief Judge also stated that once the defendant has been detained for a substantial period of time, the court must carefully

consider the following in determining whether to detain or release the defendant: 1) the nature and circumstances of the offense charged, including whether the offense is a crime of violence; 2) the weight of the evidence against the defendants; 3) the history and characteristics of the defendants; and 4) the nature and seriousness of the danger to the witness that would be posed by the person's release. 18 U.S.C. § 3142(g) (1988).

254. See *United States v. Accetturo*, 783 F.2d 382 (3d Cir. 1986).

255. *Gallo*, 653 F. Supp. at 343.

256. 616 F. Supp. 780 (E.D.N.Y. 1985).

257. *Id.* at 344.

258. *Id.* at 336-38.

259. *Id.* at 338.

260. *Id.* at 337.

261. *Id.* at 336. The Bail Reform Act requires that those ordered detained be housed in a place of commitment "separate, to the extent practicable, from persons awaiting or serving sentences or being held in custody pending appeal." 18 U.S.C. § 3142(i)(2)(1988). Many detainees, however, are held in the very same facility as individuals who have already been convicted of crimes and are awaiting or serving their sentences. *Gallo*, 653 F. Supp. at 336, 344.

262. *Id.* at 337.

263. *Id.* at 338.

re-evaluate any alternatives to pretrial incarceration to determine whether any such conditions may be imposed on the defendant that would effectively, but not so restrictively, deal with the threat he poses.²⁶⁴ Even though the statute required courts to impose detention only when no conditions of release would reasonably assure against the risk of flight or danger to the community, no other court included this concern in the calculus that was to be used to determine if pretrial detention had crossed the line from constitutional to unconstitutional.

In this case, the Chief Judge weighed the length of detention, the effects of such detention on the defendants, the nonspeculative length of future detention, the responsibility for the delay, the reasonableness of the delay, the nature of the offense, the weight of the evidence against the defendants, the history and characteristics of the defendants, the nature and seriousness of the danger the defendants presented if released, and options other than incarceration. Judge Weinstein decided that the release of the *Gallo* defendants was constitutionally required.²⁶⁵

The cases that followed failed to adopt the test set forth by Judge Weinstein. Specifically they did not consider the effects of pretrial incarceration on the accused. Instead they relied on the tests set forth in *United States v. Accetturo*²⁶⁶ or *United States v. Gonzales-Claudio*.²⁶⁷

264. *Id.*

265. *Id.* at 345.

266. 783 F.2d 382 (3d Cir. 1986). The test set forth in *Accetturo*, considers the seriousness of the charges, the strength of the Government's proof that the defendant poses a risk of flight or danger to the community, the strength of the Government's case on the merits, the length of the detention which has in fact occurred, the complexity of the case and whether the strategy of one side or the other has added needlessly to that complexity. *Id.* at 388. See, e.g., *United States v. Infelise*, 934 F.2d 103 (7th Cir. 1991); *United States v. Gotti*, 776 F. Supp. 666 (E.D.N.Y. 1991); *United States v. Noriega*, 746 F. Supp. 1548 (S.D. Fla. 1990); *United States v. Gatto*, 750 F. Supp. 664 (D.N.J. 1990); *United States v. Renzulli*, No. 87-258-7, 1987 U.S. Dist. LEXIS 8750, (E.D. Penn. Sept. 28, 1987) (memorandum and order).

267. 806 F.2d 334 (2d Cir. 1986). The test set forth in *Gonzales-Claudio* considers the length of the detention that the defendants have thus far endured, the non-speculative length of future detention, the extent of the Government's responsibility for the pretrial delay and the strength of the evidence of the defendant's risk of flight or danger to the community. *Id.* at 340. See, e.g., *United States v. Quatermaine*, 913 F.2d 910 (11th Cir. 1990); *United States v. Gelfuso*, 838 F.2d 359 (9th Cir. 1988) (streamlining the *Gonzales-Claudio* test to include only the length of the detention and the extent to which the Government was responsible for the delay); *United States v. Ojeda Rios*, 846 F.2d 167 (2d Cir. 1988); *United States v. Melendez-Carrion*, 820 F.2d 56 (2d Cir. 1987); *United States v. Jackson*, 823 F.2d 4 (2d Cir. 1987); *United States v. Whitehorn*, No. 88-0145, 1989 U.S. Dist. LEXIS 6460 (D.C. Cir. June 8, 1989) (memorandum and order); *United States v. Martinez*, 678 F. Supp. 267 (S.D. Fla. 1988).

C. Problems with the Due Process Test

There are serious flaws with the flexible test currently used by the courts to determine whether pretrial detention has crossed the line from permissible regulation to impermissible punishment. These flaws include placing the onus on the defendant to bring the issue of a due process violation to the attention of the court and finding the defendant responsible for extending his detention when he exercises his right to litigate constitutional issues by filing pretrial motions.

The current tests place the onus on the defendant to continuously raise the issue of the denial of due process rights. This burden remains on the defendant until the court either recognizes that the defendant's rights to due process have been violated and releases him from custody or resolves the case. With no guidance from the Bail Reform Act and no indication from the Supreme Court as to when pretrial detention becomes unduly protracted, the defendant must speculate as to when the court will be prepared to grant his motion for release based on a denial of due process rights.²⁶⁸ If such speculation is wrong and the court does not believe that the defendant's term of pretrial incarceration has been long enough, the defendant must continue to file motions seeking release. This process continues until the court orders the defendant released or the case ends.²⁶⁹ The process involves a substantial investment of resources by the defense attorney, who must continuously prepare and file such motions, by the prosecutor, who must continuously respond to these motions, and by the court, which must continuously review, hear, and decide these motions.²⁷⁰

It also extends the length of time of pretrial detention. Every time a defendant files a motion, the period of time from the filing of the motion until its resolution by the court is excluded from the

268. Alschuler, *supra* note 12, at 517 n.30.

269. *Id.* "[T]he effective representation of a detained defendant apparently would require his lawyer to appear before a judge at periodic intervals to ask, 'Now?' After an unspecified number of months during which the judge would reply, 'Not yet,' he would answer, 'Yes, now.'" *Id.* See, e.g., *United States v. Portes*, 786 F.2d 758, 768, n.14 (7th Cir. 1986) (The Seventh Circuit found defendant's four and one-half month detention did not rise to the level of a due process violation, but invited the defendant to "at any time request that the district court reconsider the detention order." The court would "express no opinion as to the length of detention which would be constitutionally impermissible"); *United States v. Infelise*, No. 90-CR-87, 1990 WL 77795 (N.D.Ill. May 15, 1990) (memorandum opinion and order) (the court found the defendants' three month detention did not constitute a violation of due process but recommended "that if at a later date defendants can more definitively show that their pretrial detention is no longer regulatory but instead has become punitive, they should bring a motion for reconsideration.")

270. Eason, *supra* note 12 at 1076.

time requirements of the Speedy Trial Act.²⁷¹ The trial date can, therefore, be scheduled for a date further in the future.²⁷² Although Congress chose to rely on the Speedy Trial Act to guarantee a defendant's limited pretrial incarceration, in practice under that very statute, each time a defendant asks the court to consider whether the length of pretrial detention has become unduly protracted, the detention may grow longer and the trial date may become even more distant.

The current system also creates problems for the defendant who waits a significant period of time before filing such a motion for pretrial release because he believes that he must endure a substantial period of time in pretrial detention before approaching the court for release. When his motion is heard, he learns that the court will grant his request for release, and based on the court's assessment of the factors involved, would likely have granted the request several months earlier.²⁷³ The denial of the defendant's due process rights is irreversible, however, and the only remedy at that point is release from custody on conditions. There is no compensation for the period of time the defendant has spent in pretrial custody past the point of a due process violation.²⁷⁴

271. See 18 U.S.C. § 3161(h)(1)(F) (1988). This section states:

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

(1) Any period of delay resulting from other proceedings concerning the defendant, including, but not limited to—

... (F) delay resulting from an pretrial motion, from the filing of the motion through the conclusion of the hearing on, or other prompt disposition of, such motion.

Id.

272. See, e.g., *United States v. Mendoza*, 663 F. Supp. 1043, 1047-48 (D.N.J. 1987). In *Mendoza* the court noted "[i]f the accused exercises his constitutional rights by filing pre-trial motions, he thus extends his period of pre-trial incarceration. This is so even if he is successful on said motions." *Id.*

273. Alschuler, *supra* note 12, at 516-17 n.30. "Just when the preventive tadpole would become a punitive bullfrog seems to be anyone's guess." *Id.*

274. Interestingly, when a subcommittee of the House Committee on the District of Columbia, held hearings on the bill authorizing pretrial detention in the District of Columbia, Subcommittee Chairman John Dowdy proposed a provision that would compensate a defendant wrongfully detained at the rate of twenty dollars per day. *Bail Reforms, Stop and Search, Pretrial Detention, Crimes of Violence, and Juvenile Code: Hearings on H.R. 14334 Before the Subcomm. of the Comm. on the District of Columbia House of Representatives 91st Cong., 1st Sess. (1969) microformed on CIS No. H301.2 at 73 (Congressional Info. Serv.)* (statement of John Dowdy, Chairman, Subcomm. No. 3). "My Bail Reform Bill [H.R. 12855] has one unique feature that none of the others has, and that is it would provide a \$20 per day allowance to a defendant wrongfully detained. One who is eventually exonerated would be compensated for the time that his liberty was denied him." *Id.* Neither the final version of the

The courts also have expressed different views on the element of length of the detention of the defendant. Although the amount of time the defendant has spent in pretrial custody would seem to be an objective factor, it is often evaluated in a subjective light. While some courts consider a relatively short period of custody before an adjudication of guilt to be onerous,²⁷⁵ other courts view a substantially longer period of detention to be an acceptable consequence of being accused of a serious crime and being found to be a flight risk or danger to the community.²⁷⁶ It is true that when courts make these due process judgments, they view a number of factors in conjunction with each other. If one court begins, however, with the position that pretrial detention of eight or ten months is not particularly onerous, while another court views detention of four months as unduly burdensome, then the final answer to the question of whether the period of pretrial detention has passed from permissible regulation to impermissible punishment will differ significantly from court to court.²⁷⁷

Furthermore, not all courts allocate the same weight to the factor of length of detention. While some courts believe that the length of pretrial detention is the determinative factor in the calculus used to decide whether the defendant's due process rights have been violated,²⁷⁸ other courts see it as only one of several elements they must consider.²⁷⁹ This lack of uniformity results in disparate treatment for individuals charged with federal offenses.²⁸⁰ While defendants are asserting their right to due process under the Fifth Amendment, the

District of Columbia bail reform legislation nor the federal Bail Reform Act of 1984 includes such a provision. Commentators have suggested that such a provision would compel the Government to be accountable for unwarranted detention. See Marc Miller & Martin Guggenheim, *Pretrial Detention and Punishment*, 75 MINN. L. REV. 335, 411 (1990).

275. See, e.g., *United States v. Vastola*, 652 F. Supp. 1446, 1448 (D.N.J. 1987) (the defendants' three and one-half month detention plus the likelihood of extended future detention required immediate release); *United States v. Gallo*, 653 F. Supp. 320 (E.D.N.Y. 1986) (the four and one-half months the defendants spent in pretrial custody along with the probability of much longer incarceration warranted the defendants' immediate release with stringent conditions).

276. See, e.g., *United States v. Quatmaine*, 913 F.2d 910, 918 (11th Cir. 1990) ("the prospect of eight to ten months of pretrial detention, without more, does not mandate the release of a defendant for whom pretrial detention is otherwise appropriate"); *United States v. Tortora*, 922 F.2d 880, 889 (1st Cir. 1990) (defendant's more than six month pretrial detention "has not been so protracted as to support a due process claim"); *United States v. Melendez-Carrion*, 820 F.2d 56, 59-60 (2d Cir. 1987) (defendants' nineteen-month detention was not a per se violation of due process).

277. See *supra* notes 275-76.

278. See, e.g., *United States v. Gallo*, 653 F. Supp. 320 (E.D.N.Y. 1986); *United States v. LoFranco*, 620 F. Supp. 1324 (N.D.N.Y. 1985), *appeal dismissed sub nom. United States v. Cheesman*, 783 F.2d 38 (2d Cir. 1986).

279. See, e.g., *United States v. Melendez-Carrion*, 820 F.2d 56 (2d Cir. 1987); *United States v. Zannino*, 798 F.2d 544, 547-48 (1st Cir. 1986).

280. Eason, *supra* note 12, at 1075.

resolution of their claims seems to depend upon the district or even the judge hearing their motions.²⁸¹ The courts have enormous discretion in making these judgments. Often this discretion results in disparate treatment for those accused of federal offenses in federal courts.²⁸²

Another problem is the way in which courts assess responsibility for the delay in getting the case to trial. Generally, the courts examine the record of the case proceedings and try to ascertain if either the prosecution or the defense has acted in any way to complicate or delay the case. In some cases, courts have found that defendants who file extensive pretrial motions are responsible for prolonging their own detention.²⁸³

Charging a defendant with the responsibility for delaying the trial and extending his detention due to his filing of pretrial motions creates an intolerable dilemma for the defendant. For example, if he files a pretrial motion to suppress evidence or obtain discovery, his pretrial detention is extended, and he may be held responsible for this extension.²⁸⁴ The alternative is to abandon all claims to exclude or obtain evidence in an effort to limit pretrial incarceration. This result forces the defendant to choose between the exercise of two constitutional rights—the litigation of constitutional claims under the Fourth, Fifth and Sixth Amendments versus the Fifth Amendment right not to be punished before an adjudication of guilt by a prolonged period of pretrial incarceration.²⁸⁵ The Supreme Court has

281. See *id.* at 1076.

282. *Id.* at 1075.

283. See, e.g., *United States v. Infelise*, 934 F.2d 103, 105 (7th Cir. 1991) (sixteen-month pretrial incarceration did not violate due process because "the length and depth of their [the defendants'] preparation" can not be used to gain their release from pretrial detention); *United States v. Ojeda Rios*, 846 F.2d 167, 169 (2d Cir. 1988) (thirty-two month pretrial detention could no longer withstand a due process challenge, but that this substantial delay was largely due to the "zealous, perhaps overly zealous, pretrial demands of the defendants"); *United States v. Berrios-Berrios*, 791 F.2d 246, 253 (2d Cir. 1986) (the complexity of the case, "exacerbated by the defendants' many motions," did not render eight-month pretrial detention unconstitutional); *United States v. Gonzales-Claudio*, 806 F.2d 334, 341 (2d Cir. 1986) (court found fourteen-month pretrial detention did violate due process but commented that "defendants cannot litigate pretrial matters to the ultimate degree and then rely on the extra time attributable to their motion practice to claim that the duration of pretrial detention violates due process").

284. See 18 U.S.C. § 3161(h)(1)(F) (1988). Under the Speedy Trial Act, any delay resulting from the filing of a pretrial motion through the conclusion of the hearing on, or other prompt disposition of, such motion is excluded in the computation of time within which the defendant's trial must take place. *Id.* Furthermore, after a hearing on the motions, the court may take the matter under advisement for a period of up to thirty days. See 18 U.S.C. § 3161(h)(1)(J) (1988).

285. See, e.g., *United States v. Mendoza*, 663 F. Supp. 1043, 1047-48 (D.N.J. 1987). The Court stated:

held that it will not tolerate a government action which compels a defendant to choose between the exercise of two constitutional rights.²⁸⁶

If the accused exercises his constitutional rights by filing pre-trial motions, he thus extends his period of pre-trial incarceration. This is so even if he is successful on said motions. On the other hand, if he forgoes those motions, he accelerates his trial date, but thereby relinquishes valuable rights and defenses. The chilling effect is obvious.

Id.

286. See *Simmons v. United States*, 390 U.S. 377, 394 (1968). In *Simmons*, pursuant to the Fourth Amendment, one of the defendants moved to suppress a suitcase that contained incriminating evidence. *Id.* at 381. In support of this motion, the defendant testified on the issue of standing at the pretrial hearing. The motion was ultimately denied and the Government used the defendant's pretrial testimony as evidence against him during its case-in-chief. *Id.* The Supreme Court recognized that this created a "dilemma" for the defendant, because by pursuing a Fourth Amendment motion to suppress evidence and providing the necessary information regarding standing through his own testimony, the defendant was required to incriminate himself in violation of his Fifth Amendment privilege against self-incrimination. *Id.* at 391. The Court acknowledged that by allowing the defendant's pretrial testimony to be used against him on the issue of guilt at trial, the court was forcing the defendant to make a choice between either litigating his Fourth Amendment claims and incriminating himself in violation of his Fifth Amendment privilege, or remaining silent and abandoning his rights under the Fourth Amendment. *Id.* at 393. The Court found it "intolerable that one constitutional right should have to be surrendered in order to assert another." *Id.* at 399. The Supreme Court held that when a defendant testifies in support of his motion to suppress evidence pursuant to the Fourth Amendment, his pretrial testimony can not later be used against him as evidence of guilt during the Government's case-in-chief, in violation of his Fifth Amendment right to remain silent. *Id.*

The principle set forth in *Simmons* was reaffirmed in *United States v. Salvucci*. See *United States v. Salvucci*, 448 U.S. 83 (1980). Other courts have addressed the problem of compelling a defendant to choose between the exercise of two constitutional rights and have found this compulsion to be unacceptable. See, e.g., *United States v. Inmon*, 568 F.2d 326 (3d Cir. 1977) (testimony at pretrial hearing as to whether second indictment charged same offense for which he had already been placed in jeopardy could not be used at trial because doing so would force defendant to choose between the Fifth Amendment privilege against self-incrimination and the Fifth Amendment double jeopardy claim); *United States v. Branker*, 418 F.2d 378 (2d Cir. 1969) (Government was not permitted to use defendant's testimony during a hearing to determine indigence for the purpose of seeking appointed counsel, against him at trial because doing so would compel the defendant to choose between his Sixth Amendment right to counsel and his Fifth Amendment privilege against self-incrimination). But see, *McGautha v. California*, 402 U.S. 212, 213 (1971), *vacated on other grounds*, 408 U.S. 941 (1972). In *McGautha* the Supreme Court distinguished *Simmons* and stated:

The criminal process, like the rest of the legal system is replete with situations requiring the 'making of difficult judgments' as to which course to follow. Although a defendant may have a right, even of constitutional dimensions, to follow which ever course he chooses, the Constitution does not by that token always forbid requiring him to choose. The threshold question is whether compelling the election impairs to an appreciable extent any of the policies behind the rights involved.

Id. at 183 (emphasis added) (citation omitted). See also Peter Westen, *Incredible Dilemmas: Conditioning One Constitutional Right on the Forfeiture of Another*, 66

Significantly, two weeks before the passage of the District of Columbia Bail Reform legislation that served as a prototype for the Bail Reform Act of 1984, Congress specifically added language to that statute to make it clear that the defendant's filing of motions, other than a motion for continuance, would not be used to extend pretrial detention.²⁸⁷ Fourteen years later when Congress passed the federal bail legislation, it included no such language in the Act.²⁸⁸

An additional difficulty emerges when one detained defendant files few or no motions while a codefendant files extensive and complicated motions. Under the Speedy Trial Act, a "reasonable period of delay when the defendant is joined for trial with a codefendant as to whom the time for trial has not run and no motion for severance has been granted" is excludable.²⁸⁹ Consequently, the delay attributable to one defendant for the filing of pretrial motions is attributable to all defendants in the case, even if they have not joined in those motions.²⁹⁰ The only requirement is that the delay be "reasonable."²⁹¹ As a result, a defendant who has not acted in any way to delay trial, who has repeatedly requested a severance from the other codefendants, who has filed few, if any, motions, and who has at all times requested an immediate trial, may still be detained for a substantial period of time.²⁹²

Finally, the courts find no constitutional violation when they conclude that defendants are responsible for prolonging their own

IOWA L. REV. 741 (1981); William R. Stein, Note, *Resolving Tensions Between Constitutional Rights: Use Immunity In Concurrent or Related Proceedings*, 76 COLUM. L. REV. 674 (1976).

287. D.C. CODE ANN. § 23-1322(d)(1) (1989). See also *supra* note 80 and accompanying text.

288. For a discussion regarding the reasons why Congress did not include any such time limitations, see *supra* notes 95-108 and accompanying text.

289. 18 U.S.C. § 3161(h)(7) (1988).

290. *United States v. Piteo*, 726 F.2d 53 (2d Cir. 1984); *United States v. Campbell*, 706 F.2d 1138, 1141 (11th Cir. 1983); *United States v. Novak*, 715 F.2d 810, 815 (3d Cir. 1983) *cert. denied* 465 U.S. 1030 (1983); *United States v. Noriega*, 746 F. Supp. 1548, 1559 (S.D. Fla. 1990).

291. *Noriega*, 746 F. Supp. at 1559.

292. See, e.g., *Noriega*, 746 F. Supp. at 1548. The court found that despite defendant Saldarriaga's twelve-month pretrial detention, the four additional months until the scheduled trial date, his lack of responsibility for the delay, his repeated efforts to sever his case from that of codefendant Noriega, his one-year pretrial incarceration did not violate due process. The court reasoned that the defendant posed a significant flight risk while facing very serious charges, and the Government was not responsible for the delay, even though it repeatedly opposed the defendant's motion for severance. *Id.* at 1561-62. But see *United States v. Theron*, 782 F.2d 1510 (10th Cir. 1986). In *Theron* the court held that after four and one-half months pretrial incarceration, due process demanded that the defendant either be released on bond or be tried within thirty days because he had repeatedly sought an immediate trial, and the delays were attributable to the filing of motions by his codefendants. *Id.* at 1516-17.

pretrial detention by requesting additional time to prepare for trial, irrespective of whether the case encompasses a lengthy pre-indictment investigation, multiple charges or numerous defendants. For example, in *United States v. Infelise*,²⁹³ the United States Court of Appeals for the Seventh Circuit held that defendants' pretrial detention of approximately fifteen months did not violate due process because the defense, not the Government, was responsible for the delay in bringing the case to trial.²⁹⁴

The Seventh Circuit reached this decision despite the fact that this was a complex case in which the Government filed an indictment charging twenty defendants with forty-two separate counts. During the course of its investigation, the Government had amassed approximately 1000 hours of electronic surveillance of the defendants and voluminous betting and loan records. In addition, the Government had applied for and obtained authorization for Title III wiretaps and several search warrants. In preparing their defense, the defendants sought to review all this discovery.²⁹⁵

By holding the defendants entirely responsible for the pretrial delay, the court ignores the role of the Government in any criminal case. The Government controls the investigation. It decides how many charges to file and what those charges should be. It decides how many defendants to charge and whether those charges should be contained in one or several separate indictments. It decides whether and what discovery should be released without the filing of pretrial motions. Moreover, the prosecution can oppose continuances and move for severance of counts or defendants. The Government must, therefore, bear at least some of the responsibility when a complex case does not get to trial expeditiously.²⁹⁶

293. 934 F.2d 103 (7th Cir. 1991).

294. *Id.* at 1104-05. The *Infelise* court stated:

[T]he extent of delay is to some extent within the control of the defendants themselves, and they cannot be allowed to manufacture the grounds for their constitutional argument. . . . The delay appears to be due to the time that the defendants' counsel are taking to prepare their clients' defense. Of course, we do not criticize them for preparing as carefully as possible, but neither do we think that the length or depth of their preparation can obtain the release of defendants whose dangerousness has been amply demonstrated.

Id. See also *United States v. Gelfuso*, 738 F.2d 358, 359 (9th Cir. 1988); *United States v. Jackson*, 823 F.2d 4, 7 (2d Cir. 1987); *United States v. Melendez-Carrion*, 820 F.2d 56, 60 (2d Cir. 1987); *United States v. Gotti*, 776 F. Supp. 666, 671 (E.D.N.Y. 1991).

295. *United States v. Infelise*, No. 90-CR-87, 1990 WL 77795 (N.D. Ill. May 15, 1990) (memorandum opinion and order). On March 4, 1991, defendants filed thirty-three separate pretrial motions. *United States v. Infelise*, No. 90-CR-87, 1991 LEXIS 10220 at *1 (N.D. Ill. July 12, 1991) (memorandum opinion and order). On July 12, 1991, the court rendered its decision on these motions. *Id.* The time period from the filing of the pretrial motions until the rendering of the decision by the district court was all excludable under the Speedy Trial Act. See 18 U.S.C. § 3161(h)(1)(F) (1988).

296. See *United States v. Salerno*, 794 F.2d 64, 79 n.2 (2d Cir. 1986), *reversed*

By finding that even in complex cases the defendants are entirely responsible for the pretrial delay, the courts compel these defendants to choose between either preparing for trial and extending their pretrial detention or foregoing the preparation and reducing their pretrial detention. Again this forces the defendant to choose between constitutional rights—the right to a fair trial and the right not to be punished before trial, both under the Fifth Amendment. If the defendant chooses the right to a fair trial through a thorough preparation that requires some time, then the courts will not find that the extended pretrial detention constitutes a denial of due process. The courts thus force the defendant to endure an extended period of pretrial incarceration because the defendant has sought to thoroughly prepare a defense to obtain a fair trial.²⁹⁷

481 U.S. 739 (1987). As Chief Judge Feinberg noted in his dissent:

Pretrial detention under any circumstances is an extraordinary remedy with serious due process implications. If the Government seeks the benefit of that remedy it must exert itself to accelerate the date for a trial. Quite often, reliance on the usual processes of trial administration will not be enough. If this is so, the Government must take whatever special steps are needed to move the trial date forward. In complex, multi-defendant cases, that may require that the Government seek a severance. In cases involving many hours of taped intercepted material, the Government may have to arrange for swift and reliable transcription, by extraordinary means if necessary, before moving for detention or immediately after obtaining it. *Should the Government be unwilling or unable to shoulder the cost of these procedures, pretrial detention may not be available.*

Id. (emphasis added). See also *United States v. Vastola*, 652 F. Supp. 1446, 1448 (D.N.J. 1987). In *Vastola* the district court ordered the defendants released from pretrial detention because upon initial detention of the defendants, the Government first estimated its evidence to contain approximately 1000 hours of audio tape which defense counsel would need to review before trial, but later agreed that there were actually 3000 to 3800 hours of tape recordings. *Id.* The Government did not facilitate the review of the tapes by providing an index of the contents of those tapes. *Id.* In *United States v. Gatto*, the district court ordered the release of the detained defendants because, after successfully moving for the pretrial detention of the defendants on the ground of dangerousness, fourteen months later the Government first disclosed to defense counsel that it had amassed fifteen years worth of surveillance logs on the detained defendants which the defense would have to review. *United States v. Gatto*, 750 F. Supp. 664, 671 (D.N.J. 1990).

297. See *United States v. Infelise*, No. 90-CR-87, 1990 WL 77795 (N.D. Ill. May 15, 1990) (memorandum opinion and order). In *Infelise*, the defense argued that the pretrial incarceration of the defendants would serve to prolong the period needed to review discovery and prepare for trial because access to those detained was restricted. *Id.* at *2. The court rejected this contention as well. *Id.* at *4. On October 15, 1991, after a period of twenty months of pretrial custody, the court again denied defendants' motion for limited release. See also *United States v. Infelise*, No. 90-CR-87, 1991 LEXIS 17111 (N.D. Ill. October 15, 1991) (memorandum opinion and order). The defendants had sought release for the period of their trial in order to have more time to meet with counsel. *Id.* at *1. They had proposed that they be fitted with electronic ankle bracelets which would monitor their whereabouts twenty-four hours per day.

IV. PROPOSALS FOR CHANGE

The statistics and cases on pretrial detention clearly show that pretrial detention has become a common phenomenon in federal criminal cases²⁹⁸ and that congressional reliance on the Speedy Trial Act²⁹⁹ to limit the length of pretrial detention was misplaced.³⁰⁰ It appears that having a case of a detained defendant proceed to trial within ninety days is the exception rather than the rule. Many defendants have spent protracted periods of time in custody awaiting their trials.³⁰¹ Furthermore, there are significant problems with the way in which the courts now determine whether the period of pretrial detention has become punitive rather than regulatory. To address these problems, the federal Bail Reform Act must be amended.

The most dramatic and uniform solution to the problems set forth in this Article would be to amend the Bail Reform Act to strictly limit the period of pretrial detention.³⁰² Congress should follow the lead of the District of Columbia bail statute and amend the Act to limit pretrial detention to a maximum period of ninety days.³⁰³ This amendment would read as follows:

Although the court was sensitive to the difficulties the defendants faced in trying to confer privately and extensively with their attorneys while incarcerated, the court found that these difficulties did not constitute a violation of the defendants' Sixth Amendment right to effective assistance of counsel. *Id.* As of February 13, 1992, two years after the defendants had been ordered detained, the trial of this case was in progress and the defendants were still detained. *United States v. Infelise*, No. 90-CR-87, 1992 LEXIS 2746 (N.D.Ill. February 13, 1992) (memorandum opinion and order).

See also *United States v. DiGiacomo*, 746 F. Supp. 1176, 1182 (D. Mass. 1990) (regarding defendant's Sixth Amendment right to effective assistance of counsel). In *DiGiacomo* the court noted that the defendants were being incarcerated before trial approximately four hours away from the courthouse and the offices of their attorneys. The court recognized that "[a]t some point a serious question concerning whether the defendants are being denied their right to effective counsel might be generated by problems relating to the place or manner of their pretrial detention." *Id.* However, the court stated that it was "not now presented with this constitutional question." *Id.*

298. See *supra* notes 95-108 and accompanying text.

299. 18 U.S.C. §§ 3161, 3164 (1988).

300. See *supra* notes 95-108 and accompanying text (discussing Congress' decision to rely on the Speedy Trial Act to limit the length of pretrial detention).

301. See, e.g., *United States v. Infelise*, 934 F.2d 103, 104 (7th Cir. 1991); *United States v. Gelfuso*, 838 F.2d 358, 359 (9th Cir. 1988); *United States v. Ojeda Rios*, 846 F.2d 167, 168 (2d Cir. 1988); *United States v. Gotti*, 776 F. Supp. 666, 670 (E.D.N.Y. 1991); *United States v. Noriega*, 746 F. Supp. 1548, 1561 (S.D. Fla. 1990).

302. See, e.g., D.C. CODE ANN. § 23-1322(d)(4) (1989). Others have also advocated a bright-line test to determine whether a period of pretrial detention violates due process. See, e.g., Alschuler, *supra* note 12, at 510; Applbaum, *supra* note 95, at 1090; Eason, *supra* note 12, at 1077; Miller & Guggenheim, *supra* note 274, at 412; Price, *supra* note 135.

303. See, e.g., D.C. CODE ANN. §§ 23-1322(d)(1)-(4) (1989); see also WIS. STAT. ANN. § 969.035(8) (1985). The defendant "shall be released from custody with or without conditions" if the period of detention exceeds sixty days from the date of the pretrial hearing. *Id.*

A defendant shall be entitled to release on conditions pursuant to 18 U.S.C. § 3142 upon the expiration of sixty calendar days, unless the trial is in progress or the trial has been delayed at the request of the defendant, other than by the filing of timely motions. This period of pretrial detention may be extended for a period of up to thirty days, upon a showing of good cause by the prosecutor, but only for the additional time required to prepare for the expedited trial of a detained defendant.³⁰⁴

This amendment would limit pretrial detention to a period of sixty days, with one thirty-day continuance permitted upon the showing of "good cause" by the prosecutor.³⁰⁵ After the expiration of ninety days, the defendant would have to be tried or released on bond, with appropriate conditions.³⁰⁶

This change would permit the Government to seek and obtain the pretrial detention of a defendant who was deemed dangerous and likely to flee. It would, however, strictly curtail the length of time the defendant could be incarcerated pending his trial. It would place the onus on the Government to ensure that the case moved to trial expeditiously.³⁰⁷ It would eliminate the disparate treatment of defendants who are charged with federal crimes and whose pretrial status depends not only on which test the courts use to determine if there was a denial of the defendants' due process rights but the interpretation of that test as well.³⁰⁸ It would eliminate the need for the defendants to speculate as to the appropriate time to move for release from pretrial custody and would obviate the need for the defendants to bring this issue to the courts' attention regularly.³⁰⁹ It would force the Government to have its case well organized before it filed an indictment.³¹⁰ Because in passing the Bail Reform Act Congress envisioned that, in most cases, pretrial detention would not last longer than ninety days,³¹¹ such a provision would serve to ensure that this expectation was realized.

It is true that such an amendment would eliminate the flexibility the courts prefer to exercise in this matter. It would establish a rigid timetable for the trial of detained defendants. It would not permit the courts to decide the issue of due process in each case on its own facts. It would place a significant burden on the Government to

304. See, e.g., D.C. CODE ANN. §§ 23-1322(d)(1)-(4) (1989).

305. See, e.g., D.C. CODE ANN. § 23-1322(d)(4) (1989).

306. *Id.*

307. See *supra* note 296 and accompanying text. See also Eason, *supra* note 12, at 1077.

308. See *supra* notes 275-82 and accompanying text.

309. See *supra* notes 268-69 and accompanying text. See also Eason, *supra* note 12, at 1078.

310. See *supra* note 296 and accompanying text.

311. See *supra* notes 95-108 and accompanying text.

proceed to trial quickly if it sought to maintain the defendant in custody pending trial. When one balances these concerns against the due process rights of the presumptively innocent defendant who has spent ninety days in custody and the fact that Congress envisioned that pretrial detention would not last longer than ninety days,³¹² such an amendment to the Act prevails. It would effectively resolve the problem of protracted periods of detention which defendants currently endure, yet it would still permit pretrial detention for up to ninety days in those cases where it was warranted. It would eliminate, however, both the arbitrary approach that the courts use to decide this issue and the substantial expenditure of resources the current system demands.

If Congress is serious about limiting pretrial detention to ninety days in most cases and if it finds that an amendment as described above is too far-reaching, then, at a minimum, it should adopt a compromise solution. The alternative amendment would read as follows:

A detained defendant shall be entitled to a review hearing upon the expiration of ninety calendar days, unless the trial is in progress or the trial has been delayed at the request of the defendant, other than by the filing of timely motions. At that review hearing the court shall determine whether the pretrial detention of the defendant shall continue for a maximum period of sixty additional calendar days. At this hearing, the presumption shall be in favor of release on conditions pursuant to 18 U.S.C. 3142. The Government shall bear the burden of proving that continued pretrial detention is regulatory and not punitive. In determining whether the extended detention would be regulatory and not punitive, the court shall consider the following factors:

- (1) the stage of the proceedings of this case;
- (2) the date of the trial if one has been set;
- (3) if a trial date has not been set, the reasons why no trial date has been set;
- (4) in view of defendant's pretrial detention of ninety days, any alternatives to pretrial detention that would reasonably assure against the possibility of the defendant's flight or danger to the community which his release on conditions may present.

If after the review hearing, the court determines that pretrial detention is still regulatory and necessary, the court may extend the period of pretrial detention for up to sixty additional calendar days. Upon the expiration of one hundred and fifty calendar days, unless the trial is in progress or the trial has been delayed at the request of the defendant, other than by the filing of timely motions, the court shall hold a hearing to set conditions and to order the defendant released pursuant to 18 U.S.C. § 3142(c).

312. See *supra* notes 95-108 and accompanying text.

Because Congress anticipated that pretrial detention would not last longer than ninety days, it should amend the Act to require that, at a minimum, after ninety calendar days of pretrial detention, the court must hold a hearing to determine whether the detention has become punitive rather than regulatory.³¹³ Where the defendant has already spent ninety days in custody, the presumption at the review hearing should be that detention was punitive. The burden should be on the prosecution to establish that pretrial detention is still regulatory and must continue, rather than on the defendant to prove that it is punitive in violation of due process.³¹⁴

In order to promote consistency, Congress must delineate the factors that the courts are to use at this hearing to determine whether detention should continue. Because at the initial detention hearing the court has already assessed the nature of the charges, the weight of the evidence, the history and characteristics of the defendant, the risk of flight, and the danger to the community that this defendant poses, it would be redundant to re-evaluate all of these factors at the review hearing. At this hearing the court should focus on the major concern in this due process issue: the length of the detention that has already occurred and the likely length of any future detention.³¹⁵ It should also consider the fact that the defendant has already spent ninety days in custody and whether at this point there are any available alternatives³¹⁶ that would "reasonably assure"³¹⁷ against the

313. See, e.g., *United States v. Accetturo*, 783 F.2d 382, 396 (3d Cir. 1986) (Sloviter, J., dissenting).

314. See, e.g., *United States v. Mendoza*, 663 F. Supp. 1043, 1047 (D.N.J. 1987). See also *Miller & Guggenheim*, *supra* note 274, at 412-13.

315. See *United States v. Colombo*, 616 F. Supp. 780, 785-6 (E.D.N.Y.) *rev'd* 777 F.2d 96 (2d Cir. 1985). See also *Applbaum*, *supra* note 95, at 1089; *Hinsell*, *supra* note 12, at 464.

316. A number of courts have begun to devise creative alternatives to pretrial detention. See, e.g., *United States v. Patriarca*, 948 F.2d 789, 793 (1st Cir. 1991). In *Patriarca* the First Circuit upheld the lower court's order to release the defendant with the standard conditions set forth in the statute, as well as the following more innovative conditions: that the defendant remain in his home, twenty-four hours per day (save for medical appointments or meetings with his attorney while wearing an electronic monitoring device; that he meet or communicate only with his attorneys and individuals approved by the court; that he keep a record of any such communications; that at his own expense, he install and maintain 24-hour video camera surveillance of each entry to his home; that he maintain only one telephone and telephone line at his home; that he execute an agreement to forfeit four million dollars, collateralized by property, if the court determines that he has violated a condition of his release; and that he be subjected to unannounced searches by law enforcement officers.

In *United States v. DiGiacomo*, the district court ordered release of the defendants subject to the following conditions: house arrest subject to electronic monitoring; a limitation on meetings or communications with only their attorneys, certain relatives and a small number of close friends, all of which would be monitored by the installation of a pen-register on the defendants' telephones to record the destination of outgoing

defendant's flight or danger to the community if released on conditions pursuant to 18 U.S.C. § 3142.

In order not to penalize the defendant for exercising his right to file motions to litigate legal issues, either proposed amendment must also contain a provision, like the District of Columbia Bail Reform legislation, which specifically prohibits the court from extending the period of pretrial detention due to the filing of motions by the defendant.³¹⁸ The second amendment should also contain a provision

calls, and the possible tracing of incoming calls, in addition to the maintenance of a log by the defendants to record their communications which would be available to the Government for review; a restriction on communication with codefendants, except in the presence of their attorneys; and the posting of their assets which would be subject to forfeiture if they failed to appear as required. *United States v. DiGiacomo*, 746 F. Supp. 1176, 1189-90 (D. Mass. 1990). See also *United States v. O'Brien*, 895 F.2d 810, 811 (1st Cir. 1990); *United States v. Traitz*, 807 F.2d 322, 323-24 (3d Cir. 1986). But for a rejection of such conditions see *United States v. Tortora*, 922 F.2d 880, 882 (1st Cir. 1990); *United States v. Gotti*, 776 F. Supp. 666, 672-73 (E.D.N.Y. 1991); and *United States v. Infelise*, 765 F. Supp. 960, 964 (N.D. Ill. 1991), where the courts refused to permit the use of electronic surveillance equipment and other stringent conditions as an alternative to pretrial detention.

317. See 18 U.S.C. § 3142(f) (1988). Under section 3142(f) of the Bail Reform Act, the Government must prove that no combination of conditions will reasonably assure the appearance of the defendant, the safety of any person, or the safety of the community. *Id.* (emphasis added). As one court recently observed: "Congress did, however, choose to use the term 'danger,' which by its nature is a risk concept. By using this term, Congress did not declare that the community is entitled to assurances of freedom from all harm, and a court cannot detain arrestees on the mere apprehension of danger of harm. Rather, the court's inquiry must focus on whether by conditions of release the community can reasonably be assured of its safety." *United States v. Phillips*, 732 F. Supp. 255, 266 (D. Mass. 1990) (citations omitted). The need for the reasonableness of this assurance is even more acute after the defendant has already spent ninety days in custody awaiting his trial.

318. D.C. CODE ANN. § 23-1322(d)(2)(A) (1989). See also *supra* notes 283-88 and accompanying text. If such a provision is contained in the amendment, there may be a concern that a defendant may file frivolous pretrial motions merely to delay the trial. Once the 90 or 150 days had passed, the defendant would be entitled to release on conditions. Arguably, the defendant would then be able to flee from the jurisdiction or endanger the community. It would, however, constitute unethical behavior for a lawyer to file frivolous motions merely to delay the proceedings. See MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-102(A)(2) (1983). The *Model Code of Professional Responsibility* states that a lawyer shall not "knowingly advance a claim or defense that is unwarranted under existing law." *Id.* Under the *Model Rules of Professional Conduct*, a "lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law. . . ." MODEL RULES OF PROFESSIONAL CONDUCT, Rule 3.1 (1990). In addition, an attorney who files motions merely for dilatory purposes may be monetarily sanctioned by the court for his actions. Pursuant to 28 U.S.C. § 1927, an attorney "who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses and attorneys' fees reasonably incurred

that if, at the ninety-day mark, the court found that pretrial detention was still regulatory and must continue, then another hearing should be held in sixty days, unless the trial had already begun by that point or the defendant had requested the delay. At the second hearing, if the trial had not yet begun after one hundred and fifty days of pretrial custody, then the court would set appropriate conditions and order the release of the defendant.

Such an amendment of the Bail Reform Act would serve many of the same functions as the first recommended amendment. It would not, however, strictly limit pretrial detention to a period of ninety days, and would permit longer detention in those extraordinary cases where it was warranted. Ultimately, however, it would restrict the length of pretrial detention to a period of 150 days,³¹⁹ with a presumption that after ninety days the detention has become punitive rather than regulatory.

By establishing this presumption and shifting the burden to the Government to prove at a review hearing that detention was still regulatory and necessary, Congress would prescribe that periods of pretrial detention of longer than ninety days are to be considered exceptional. It would legislate that such pretrial detention could only be extended when the Government could show that it is not responsible for the delay, the trial is imminent, and there are still no alternatives that could reasonably assure against the risk of flight or possible danger to the community. By statutorily scheduling review hearings, it would also eliminate the need for the defendant to speculate as to whether his pretrial detention was ripe for consideration of a due process violation and would eliminate the need to regularly bring the issue to the court's attention.³²⁰ This amendment would also compel the prosecution to prepare its case promptly and adopt every possible

because of such conduct." 28 U.S.C. § 1927 (1992) (emphasis added).

For example, in *United States v. Blodgett*, the Ninth Circuit held that the lower court had the power to impose a monetary sanction on a criminal defense attorney who filed a frivolous appeal in bad faith, solely for the purposes of delay. *United States v. Blodgett*, 709 F.2d 608, 609 (9th Cir. 1983). The Court remanded the case for a hearing to determine if the appeal in question was, in fact, filed solely to delay the proceedings. *Id.* at 610. The court of appeals also noted that a district court has the "inherent power to impose sanctions on counsel who 'willfully abuse[s] judicial processes'" by taking actions in bad faith, i.e. solely for the purposes of delay. *Id.* at 609 (quoting *Roadway Express Inc. v. Piper*, 447 U.S. 752, 766 (1980)). Of course, 28 U.S.C. § 1927 must be strictly construed "so that the legitimate zeal of an attorney in representing her client is not dampened." *Browning v. Kramer*, 933 F.2d 340 (5th Cir. 1991) (citing *Roadway Express Inc. v. Piper*, 447 U.S. 752 (1980)).

319. See *supra* notes 95-108 and accompanying text. This period is sixty days longer than Congress envisioned pretrial detention would last when passing the Bail Reform Act. *Id.*

320. See *supra* notes 268-69 and accompanying text. See also Eason, *supra* note 12, at 1078.

measure to ensure that a trial takes place expeditiously if it wishes to have the defendant detained before trial.³²¹ Furthermore, it would promote consistency by requiring that all courts use the same factors to decide whether the period of pretrial detention had become punitive rather than regulatory. The factors enumerated would focus on the element of time—the amount of time that the defendant had already spent in custody and the amount of time the defendant would likely continue to be so held.³²² In addition, the court would examine the role the prosecution played in the delay of trial, and in view of the period of detention which had already taken place, whether any other alternatives to pretrial detention were reasonable and available at that time.³²³ These factors also reflect Congress' position that pretrial custody of longer than ninety days is to be considered exceptional. Consequently, the defendant should be released unless the Government can establish that the trial will be held in the near future, that it was not responsible for the delay, and that after the defendant had already spent ninety days in custody, there were still no alternatives that could reasonably assure that this defendant would not flee or would not pose a danger to the community.³²⁴

These proposed changes also take into consideration the fact that prisons are overcrowded and likely to remain so for the future.³²⁵ With the advent of minimum mandatory sentences for numerous federal offenses³²⁶ and life sentences for career offenders,³²⁷ the abolition of parole,³²⁸ and the increased use of pretrial detention,³²⁹ the prison population in this country is exploding. The federal prison population is expected to increase 119 percent from 1987 to 1997.³³⁰ The expense

321. See note 296 and accompanying text. See also, Eason, *supra* note 12 at 1077.

322. See *supra* note 315 and accompanying text.

323. See *supra* notes 316-17 and accompanying text.

324. See Miller & Guggenheim, *supra* note 274, at 412-13. Some commentators have suggested an even stricter time limit—the right to trial for a detained defendant within fourteen to thirty days—and a strong set of escalating protections if the Government seeks to extend the period of pretrial detention. *Id.*

325. MARC MAUER, AMERICANS BEHIND BARS: A COMPARISON OF INTERNATIONAL RATES OF INCARCERATION 3 (1991). According to one study, the "United States has the world's highest known rate of incarceration, with 426 prisoners per 100,000 population. South Africa is second in the world with a rate of 333 per 100,000 and the Soviet Union third with 268 per 100,000 population." *Id.*

326. See, e.g., 21 U.S.C. § 848(a) (1988).

327. UNITED STATES SENTENCING COMMISSION, FEDERAL SENTENCING GUIDELINES MANUAL § 4B1.1 (Nov. 1990) (Career Offender provisions).

328. 18 U.S.C. § 3141 (1988).

329. See *supra* notes 193-97 and accompanying text.

330. UNITED STATES SENTENCING COMMISSION, SUPPLEMENTARY REPORT IN THE INITIAL SENTENCING GUIDELINES AND POLICY STATEMENTS, 71 (June 18, 1987) (cited in MAUER, *supra* note 325, at 8).

of incarcerating these individuals is exorbitant.³³¹ As the following chart indicates,³³² the cost of incarcerating defendants from the time of their arrest to the adjudication³³³ of their cases has risen dramatically. In just a two-year period, the cost has soared approximately one hundred and fifty-seven percent.³³⁴ Over two-thirds of the total expenditure goes to pay for the detention of defendants from the time of their initial hearing to the adjudication of their case.³³⁵

COST OF FEDERAL DETENTION

Date	Pretrial Services Agency (PSA) Cases Closed ³³⁶	Total From Pre-initial Hearing To Post Adjudication		Cost Pre Initial Hearing	Post Initial Hearing to Adjudication	
		Cost	% Increase From Previous Year		Cost	% of Tot.
July 1, 1987 to June 30, 1988 ³³⁷	21,952	\$27,729,277	N/A	\$940,480	\$19,343,704	70%
July 1, 1988 to June 30, 1989 ³³⁸	30,139	\$54,678,322	97%	\$1,939,115	\$37,175,616	68%
July 1, 1989 to June 30, 1990 ³³⁹	38,797	\$90,994,844	60%	\$3,246,812	\$57,642,710	63%

In order to alleviate this substantial economic cost, as well as address the significant social cost of incarcerating presumptively

331. "The total cost of incarcerating the more than one million Americans in prisons and jails is now \$16 billion a year." MAUER, *supra* note 325, at 3 (citing *Justice Expenditure and Employment*, 1988 Bureau of Justice Statistics (July 1990)).

332. These figures are not complete because the Administrative Office of the United States Courts does not maintain statistics on the total cost of incarcerating all defendants in federal facilities. These figures only reflect the cost of incarceration for those cases that the Pretrial Services Agency has maintained files.

333. In this context, adjudication is defined as the determination of guilt or innocence.

334. It appears that Congress also severely underestimated the increased cost of detaining defendants pretrial. In a letter dated May 24, 1983 from Alice M. Rivlin, the Director of the Congressional Budget Office (CBO) to Senator Strom Thurmond, the Chairman of the Senate Committee on the Judiciary, Ms. Rivlin estimated that the increased cost to the federal government for detaining defendants pretrial would be about \$1.1 million in fiscal year 1983, \$4.6 million by fiscal year 1984 and \$5.6 million by fiscal year 1988. Letter from Alice M. Rivlin, Director of the Congressional Budget Office, to Strom Thurmond, Chairman of the Senate Committee on the Judiciary, in *Report of the Committee on the Judiciary, United States Senate on S. 215, S. REP. No. 147, 98th Cong., 1st Sess. 66* (1983).

335. This amount includes the cost of incarcerating those who are either ordered detained by the court or who can not meet the release conditions set by the court.

336. All figures on this table pertain only to Pretrial Services Agency (PSA) cases closed during the time indicated.

337. 1988 ANNUAL REPORT at 47, 398 (all information for time period of 7-1-87 to 6-30-88).

338. 1989 ANNUAL REPORT at 40, 396 (all information for time period of 7-1-88

innocent individuals for protracted periods of time the Bail Reform Act must be modified to include one of the proposed amendments set forth above. These proposed changes would still provide the Government with the option of detaining potentially dangerous or fleeing defendants, but would restrict the length of that detention and would more effectively address the due process rights of those defendants who find themselves detained for protracted periods of time.

CONCLUSION

When Congress passed the Bail Reform Act of 1984, it mistakenly relied on the Speedy Trial Act to limit the duration of pretrial detention. Pursuant to the Bail Reform Act of 1984, large numbers of individuals are being incarcerated pending their trials. Periods of pretrial confinement often exceed the ninety days contemplated by Congress. In some cases, the duration of such detention is even three, four or five times as long as Congress intended when it passed this law. There is no uniformity in the factors the courts use to determine whether the period of pretrial detention exceeds constitutional limits and no consistency in the manner in which the courts apply these factors. In order to eliminate this arbitrariness and conform to Congress' original intent regarding the length of pretrial detention, the Bail Reform Act of 1984 must be revised to include provisions strictly limiting the duration of pretrial confinement to a period of ninety days and requiring that if this limit must be extended for a period of sixty days, then the Government will bear a heavy burden to establish that this extension should be granted. Only in this way will the due process rights of the presumptively innocent defendant be protected while still permitting the use of pretrial detention to safeguard against the potential risk of flight or danger to the community the released defendant may present.

338. 1989 ANNUAL REPORT at 40, 396 (all information for time period of 7-1-88 to 6-30-89).

339. 1990 ANNUAL REPORT at 259 (all information for time period of 7-1-89 to 6-30-90) (The percentages for this time period were computed by this author.).

MARBURY V. MADISON AND SECTION 13 OF THE 1789 JUDICIARY ACT

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INTRODUCTION

*Marbury v. Madison*¹ is considered the cornerstone of American constitutional jurisprudence. It stands as a towering monument for the ringing proposition that it is "emphatically the province and duty"² of the courts to determine the constitutionality of statutes and other governmental actions. Yet the analysis of the case is marred in a number of respects, to such an extent as to raise grave doubts whether the case should be regarded with such reverence. If the reasoning is flawed, is not the result affected?

The case is normally studied to consider how the Court reached the conclusion that it is the supreme arbiter of the constitutionality of legislative and executive actions, even though the Constitution does not expressly confer this power. The issue is clearly a debatable one, although its resolution in *Marbury* appears to be widely accepted in this country today.³

Other issues in the case are more controversial, and remain unsettled. The conflict of interest on the part of Justice Marshall in hearing the case, since he was responsible for the delivery of *Marbury*'s commission as Secretary of State under President Adams before coming to the Supreme Court, is well documented.⁴ While,

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1. 5 U.S. (1 Cranch) 137 (1803).

2. *Id.* at 177.

3. The dormant commerce clause is a striking exception, where the Court will determine the constitutionality of state regulation of commerce subject to reversal of that determination by Congress. See GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW 271-72 (2d ed. 1991) [hereinafter CONSTITUTIONAL LAW]. The Court has also recognized the power of Congress to interpret the Fourteenth Amendment in ways not required by the Constitution. See *Katzenbach v. Morgan*, 384 U.S. 641 (1966).

The Court's virtual abdication of constitutional review in cases of economic regulation is well established. See e.g., *United States v. Carolene Prods. Co.*, 304 U.S. 144 (1938); J. M. Balkin, *The Footnote*, 83 NW. U. L. REV. 275 (1989). A much more disturbing trend is the apparent willingness of the Court to abdicate its role of constitutional review in First Amendment cases involving Congress' spending power, as in *Rust v. Sullivan*, 111 S. Ct. 1759 (1991).

4. See, e.g., William W. Van Alstyne, *A Critical Guide To Marbury v. Madison*, 1969 DUKE L.J. 1 (1969) [hereinafter *A Critical Guide*].

Court Congestion and the Right to Speedy Trial in Massachusetts

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I. INTRODUCTION

For a variety of reasons, some new, some all too familiar, court congestion has become an increasing problem in the trial and disposition of criminal cases in Massachusetts. By now it is widely acknowledged, for example, that Massachusetts "ranks 50th among the states in the proportionate number of trial judges,"¹ an unwelcome distinction indeed. Moreover, as Thomas F. Maffei, past president of the Massachusetts Bar Association, remarked recently, "[w]ith the flood of criminal cases in our courts, the expansion of our courts' jurisdiction in the area

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1. Hennessey, *Twelfth Annual Report to the Bar*, 73 MASS. L. REV. 3, 9 (1988).

of social welfare legislation and with time standards, the system is on the verge of drowning."²

The primary and inevitable product of court congestion is delay. How that delay is perceived and treated, however, varies considerably. Secretly, or not so secretly, delay is viewed as a boon by some defendants and defense counsel, who, because of the nature of the case, are in no hurry to see it proceed to trial. Delay, in their eyes, spells relief. Although a defense objection will often be made on the record to a case being continued, this amounts to little more than a perfunctory gesture at best. In addition to relief, delay fosters the notion that the case will eventually "go away," that witnesses will be harder to locate, memories will fade, and the like.

For other defendants, however, who wish to press their right to speedy trial, delays due to court congestion present a vexing and essentially unanswered question. Simply stated, the question is: Under such circumstances should the twelve-month speedy trial clock, contained in Massachusetts Rule of Criminal Procedure 36(b), be allowed to run, or should it be stopped, thus excluding the period of the delay from the speedy trial computation?³

In the footnotes of two cases decided on the same day in 1983, *Barry v. Commonwealth*⁴ and *Commonwealth v. Farris*,⁵ the Supreme Judicial Court addressed but did not resolve that question. Discussing the *Barry* decision in 1985, Justice Cutter of the Massachusetts Appeals Court reminded his audience that "[t]he effect of court congestion also was left undecided"⁶ and conceded that "Rule 36 apparently has resulted in some confusion in its application."⁷ He then suggested that "a comprehensive review of Rule 36, in the light of actual experience under it, may prove to be desirable at some stage."⁸ Justice Kass, of the same court, in a number of decisions⁹ has made little secret of his own gen-

2. *Will Courts Drown in a Sea of Neglect?* 29 MBA Newsletter No. 8 (May 1989).

3. MASS. R. CRIM. P. 36(b). In the first two years of implementation of Rule 36(b), transitional periods of twenty-four months and eighteen months, respectively, controlled. MASS. R. CRIM. P. 36(b)(1)(A) & 36(b)(1)(B).

4. 390 Mass. 285, 296 n.13, 455 N.E.2d 437, 445 n.13 (1983).

5. 390 Mass. 300, 306 n.6, 455 N.E.2d 433, 437 n.6 (1983).

6. *Commonwealth v. Moore*, 20 Mass. App. Ct. 1, 6 n.8, 477 N.E.2d 1033, 1036 n.8 (1985) (citation omitted).

7. *Id.*

8. *Id.*

9. "Once again we grapple with application of Mass. R. Crim. P. 36." *Commonwealth v. McCants*, 20 Mass. App. Ct. 294, 480 N.E.2d 25 (1985), *further app. rev. denied*, 396 Mass. 1102 (1985), *app. after remand*, 25 Mass. App. Ct. 735 (1988), *further app. rev. denied*, 403 Mass. 1101 (1988). "Although rule 36 . . . is 'designed in some measure to operate mechanically,' . . . its application continues to disclose bugs in the machinery." *Commonwealth v. McDonald*, 21 Mass. App. Ct. 368, 369, 487 N.E.2d 224, 225 (1986) (citations omitted). See also remarks of Chief Justice Liacos in a speech delivered on January 20, 1990, at the midyear meeting of the Massachusetts Bar Association. "Thus, I am indeed a chief justice

eral impatience and disenchantment with Rule 36.

Particularly affected by this problem, currently and in the past, are non-incarcerated defendants awaiting trial for misdemeanors and minor felonies in the district courts of busy counties. Unable or unwilling to reach these cases, even when both sides answer ready for trial, judges in many instances are continuing them *sua sponte*, and with few apologies, to another date. Either "court congestion" or "court overscheduling"¹⁰ is the reason most often stated on the record for the continuance. When the new trial date arrives, usually several months later, the same scenario is often repeated, with attendant mutterings and exasperations from all concerned. "It's going to get worse before it gets better,"¹¹ a prominent district court judge warned recently in open court after a criminal case, ready for trial, had to be continued due to lack of other available judges that day.

The problem, of course, is now exacerbated by the dramatic burgeoning of drug cases and by the proliferation of civil cases remanded from the superior court to the district court; but it is hardly new. In an innovative federal class action suit decided in 1973, *Ad Hoc Committee on Judicial Administration v. Commonwealth of Massachusetts*,¹² a coalition of plaintiffs, including "all defendants in pending criminal proceedings,"¹³ alleged under 42 U.S.C. section 1983 that "Massachusetts' failure to provide 'court facilities, judges, clerical personnel, and other facilities' violate[d] their Sixth and Fourteenth Amendment rights."¹⁴

under seige [sic], presiding over a court system in severe fiscal crises, and perhaps approaching catastrophe." Mass. Lawyers Weekly, Jan. 29, 1990, at 5, col. 1; 18 M.L.W. 857 (Jan. 29, 1990).

10. In the view of a Maryland court official, overscheduling of criminal cases is widespread and deliberate, predicated on the assumption that only a small percentage of such cases will go to trial.

Scheduling dockets into the future is more of an "art" than a "science." It involves the prediction of complex trial events which have no guaranteed certainty and can change from moment to moment. Despite the confusion, certain known factors allow future dockets to be assembled with some degree of rationale. For example, although we may not know specifically which cases will plead out, we nevertheless know that 80-85% will never go to trial. This concept dictates the technique called "overscheduling."

State v. Frazier, 298 Md. 422, 432, 470 A.2d 1269, 1275 (1984) (quoting G. RIGGIN, CIRCUIT COURT FOR BALTIMORE CITY—CRIMINAL COURT OVERVIEW 4 (July 13, 1983)).

Without this overscheduling, the majority opinion in *Frazier* declares, "initial trial dates would have to be set far into the future, judges would be available for great periods of time without cases to try, and few if any cases would be tried within 180 days [the Maryland speedy trial period]." *Id.* at 432, 470 A.2d at 1274.

11. For reasons of discretion, the author declines to identify the source of this quotation, spoken in his presence in open court in early summer 1989.

12. 488 F.2d 1241 (1st Cir. 1973), *cert. denied*, 416 U.S. 986 (1974).

13. *Ad Hoc Comm.*, 488 F.2d at 1242 n.1.

14. *Id.* at 1243.

Judge Levin H. Campbell affirmed the lower court's dismissal of the suit for failure to state a justiciable cause of action, declining as well to cast "a federal district court in the role of receiver for a state judicial branch."¹⁵ He did not, however, ignore the seriousness of the underlying grievance. "Courts in Massachusetts," Judge Campbell stated, "as in many other states, have been overtaken by an explosion of litigation, causing congestion and delays which defy solution even by the most active lawyers and jurists."¹⁶

II. AN OVERVIEW OF COURT CONGESTION

Although readily familiar, the phrase "court congestion" lacks precision. It also functions in part as a euphemism, glossing over the near-chaotic conditions that often reign in some courts. Primarily, court congestion, wherever it occurs, refers to the lack of a judge to hear the case. For example, in *Dufield v. Perrin*,¹⁷ the state of New Hampshire opposed a petition in federal court for a writ of habeas corpus, arguing that responsibility for a two-year delay rested not with the prosecution but was caused rather by a "crowded docket and the presence of only one justice in Merrimack County."¹⁸ Unpersuaded, District Judge Loughlin allowed the petition and ordered New Hampshire officials to release Dufield forthwith. Judge Loughlin observed dryly, "Crowded criminal dockets and the lack of judges, cannot be attributed to petitioner."¹⁹

Alternatively, congestion occurs when a judge is present but there is a backlog of older cases or cases involving defendants in custody which must be given priority.²⁰ Other variants are failure to hold a term of court,²¹ summer recesses,²² the illness of a judge,²³ a judge's attend-

15. *Id.* at 1246.

16. *Id.* at 1243.

17. 470 F. Supp. 687 (D. N.H. 1979).

18. *Id.* at 690.

19. *Id.*

20. See *Commonwealth v. Fontaine*, 8 Mass. App. Ct. 51, 53, 391 N.E.2d 1234, 1236 (1979). "It was agreed at the hearing on the motion that the delay had resulted from court congestion rather than from any deliberate action or design on the part of the prosecution. Priority appears to have been given to cases in which the defendants were incarcerated." *Id.*

21. See *Bishop v. Commonwealth*, 352 Mass. 258, 225 N.E.2d 345 (1967).

22. See *United States v. Carini*, 562 F.2d 144, 149 (2d Cir. 1977).

23. *Id.*

It is clear, furthermore, and the government concedes, that the so-called "institutional" delays here—the lengthy delays occasioned by Judge Burke's illnesses, the court's summer recesses, and the otherwise unexplained inaction of the District Court, caused, no doubt, by an overloaded docket, Judge Elfvin's disqualifications and the vacancy on the District Court bench created by Judge Henderson's death—are properly chargeable against the government . . .

Id. (citations omitted).

ance at a seminar,²⁴ and the like. Among the many synonyms for court congestion to be found in the abundance of speedy trial appellate decisions are "institutional failures"²⁵ and "institutional delay."²⁶

A. Chronic and Nonchronic Court Congestion

Two types of court congestion, chronic and nonchronic, are commonly recognized. The labels, which derive from the Commentary to Standard 12-2.3(b) of the American Bar Association (ABA) Standards for Criminal Justice,²⁷ are to a large degree self-defining. There appears to be no reported Massachusetts decision discussing or distinguishing the two types of court congestion.

Applying the appropriate label, chronic or nonchronic, to the court congestion in any given case is not always an easy task. In a 1984 Maryland case, *State v. Frazier*,²⁸ some sixty-one pages are essentially devoted to that very question, including a long and spirited dissent. Much is at stake in the outcome, however, for the overriding issue is whether the acknowledged delays due to the congestion will be counted or ignored in the computation of the speedy trial time period. As Judge Davidson explained in his dissent in *Frazier*: "Unavailability of a court resulting from 'chronic court congestion,' in and of itself, ordinarily does not constitute good cause [for delay]; whereas unavailability of a court resulting from 'nonchronic court congestion' ordinarily constitutes good cause."²⁹

III. OTHER RIGHTS TO SPEEDY TRIAL

To a considerable degree, the implementation on July 1, 1979, of the Massachusetts Rules of Criminal Procedure may be seen as a response to the lamentable conditions in the courts as acknowledged by Judge Levin H. Campbell in 1973. Criminal defendants, of course, had already possessed the right to speedy trial under article XI of the Massachusetts Declaration of Rights³⁰ and under the sixth and fourteenth

24. See *United States v. Andrews*, 790 F.2d 803, 808 (10th Cir. 1986), *cert. denied*, 481 U.S. 1018 (1987).

25. *Commonwealth v. Lutloff*, 14 Mass. App. Ct. 434, 441, 440 N.E.2d 52, 57 (1982).

26. *United States v. New Buffalo Amusement Corp.*, 600 F.2d 368, 377-78 (2d Cir. 1979).

27. II A.B.A. STANDARDS FOR CRIMINAL JUSTICE Standard 12-2.3(b) (2d ed. 1986).

28. 298 Md. 422, 470 A.2d 1269 (1984).

29. *Id.* at 465, 470 A.2d at 1291 (Davidson, J., dissenting).

30. MASS. CONST. art. XI.

Article XI of the Declaration of Rights of the Constitution of the Commonwealth commands: "Every subject of the commonwealth . . . ought to obtain right and justice freely, . . . completely, and without any denial;

amendments to the United States Constitution.³¹ But this right, especially under the United States Constitution, has been, and continues to be, both vague and unquantified.³² For these reasons, in part, it was predicted in 1982 that "Rule 36 will become the primary judicial vehicle for enforcement of the speedy trial right in Massachusetts in the future."³³

A. The Burden of Proving Prejudice

Defendants alleging violations of speedy trial rights under either the Massachusetts Constitution or the United States Constitution have been required to establish, in addition to other factors, that they have been prejudiced by the delay.³⁴ *Bishop v. Commonwealth*, decided in 1967, is a rare exception to this rule.³⁵ While prejudice is readily ap-

promptly, and without delay * * * This article guarantees to a defendant in a criminal case the right to a speedy trial.

Bishop v. Commonwealth, 352 Mass. 258, 260, 225 N.E.2d 345, 346 (1967) (citations omitted).

The language of article XI appears in the Massachusetts Constitution of 1780 and has been noted with some prominence in federal speedy trial decisions. *See, e.g., Klopfer v. North Carolina*, 386 U.S. 213, 225 n.21 (1967).

31. U.S. CONST. amend. VI & amend. XIV, § 1. "The Sixth Amendment to the Constitution of the United States provides that '[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial.' This right has been applied to the states by virtue of the Fourteenth Amendment." *Commonwealth v. Burhoe*, 3 Mass. App. Ct. 590, 591, 337 N.E.2d 913, 914-15 (1975) (citing *Klopfer v. North Carolina*, 386 U.S. 213 (1967)).

32. Both qualifications hail from *Barker v. Wingo*, 407 U.S. 514 (1972). "[T]he right to speedy trial is a more vague concept than other procedural rights." *Id.* at 521. "We find no constitutional basis for holding that the speedy trial right can be quantified into a specified number of days or months. The States, of course, are free to prescribe a reasonable period consistent with constitutional standards. . . ." *Id.* at 523.

33. *Non-Constitutional Massachusetts Speedy Trial Rights and Remedies*, 29 ANN. SURV. OF MASS. LAW 95 (1982).

34. "[W]e have held generally that a defendant has the burden of showing prejudice to his defense sufficient to warrant dismissal." *Commonwealth v. Beckett*, 373 Mass. 329, 334, 366 N.E.2d 1252, 1256 (1977) (citing *Commonwealth v. Gove*, 366 Mass. 351, 361, 320 N.E.2d 900, 908 (1974)).

35. *Bishop v. Commonwealth*, 352 Mass. 258, 225 N.E.2d 345 (1967). In *Bishop*, the element of prejudice was neither established nor discussed. Although the delay (two years) was not inordinate, the nature of the court congestion was egregious. Convicted in the Brockton District Court of drunkenness and operating a motor vehicle while under the influence of intoxicating liquor, the defendant sought a *de novo* appeal before a jury of six. But as Justice Wilkins, writing the opinion for the court, was quick to emphasize, "[i]n trials before a jury of six have been held in Plymouth County from February, 1965, to at least September 30, 1966, when the statement of agreed facts was filed." *Id.* at 259, 225 N.E.2d at 346. Concluding that two years is plainly "more than a reasonable time," the court ordered the cases dismissed. *Id.* at 260, 225 N.E.2d at 346.

While it must be conceded that *Bishop* arose some five years before the landmark Supreme Court decision of *Barker v. Wingo*, 407 U.S. 514 (1972), the

parent in the case of the incarcerated defendant awaiting trial, it has been exceedingly difficult to prove in Massachusetts for the defendant at liberty, even with a "delay of fifty-five months between indictment and trial."³⁶ Although the Supreme Judicial Court was constrained to declare, in *Commonwealth v. Green*,³⁷ that "[p]rejudice is necessarily inherent in any long delay,"³⁸ it must be remembered that *Green* involved an inordinate delay of fifteen years.

Generally, federal courts have been more charitable on the issue of prejudice.³⁹ They also have been more inclined to recognize a second kind of prejudice, perhaps more damaging than the more familiar prejudice which flows from faded memories, missing witnesses, and the like. The classic expression of this other prejudice was articulated by the Supreme Court in *United States v. Marion*:⁴⁰

Inordinate delay between arrest, indictment, and trial may impair a defendant's ability to present an effective defense. But the major evils protected against by the speedy trial guarantee exist quite apart from actual or possible prejudice to an accused's defense. . . . Arrest is a public act that may seriously interfere with the defendant's liberty, whether he is free on bail or not, and that may disrupt his employment, drain his financial resources, curtail his associations, subject him to public obloquy, and create anxiety in him, his family and his friends.⁴¹

IV. SIMPLIFIED OPERATION OF RULE 36(b)

In marked contrast, a defendant pressing a claim of denial of speedy trial under the Massachusetts Rules of Criminal Procedure is required to show prejudice only if that claim is pursuant to Rule 36(c),⁴² a seldom invoked paragraph which addresses those situations where the

omission of prejudice from consideration in the case may well be inconsequential since *Bishop* was decided not on federal constitutional grounds, but rather pursuant to article XI of the Massachusetts Declaration of Rights.

36. *Commonwealth v. Beckett*, 373 Mass. 329, 331, 366 N.E.2d 1252, 1254 (1977).

37. 353 Mass. 687, 234 N.E.2d 534 (1968).

38. *Id.* at 690, 234 N.E.2d at 536 (citations omitted).

39. As Justice Powell wrote in *Barker v. Wingo*, "even if an accused is not incarcerated prior to trial, he is still disadvantaged by restraints on his liberty and by living under a cloud of anxiety, suspicion, and often hostility." *Barker v. Wingo*, 407 U.S. 514, 533 (1972).

40. 404 U.S. 307 (1971); *see also Commonwealth v. Ludwig*, 370 Mass. 31, 35 (1976) (quoting *United States v. Marion*, 404 U.S. 307, 320 (1971)).

41. *United States v. Marion*, 404 U.S. at 320.

42. MASS. R. CRIM. P. 36(c).

(c) Dismissal for Prejudicial Delay. Notwithstanding the fact that a defendant is not entitled to a dismissal under subdivision (b) of this rule, a defendant shall upon motion be entitled to a dismissal where the judge after an examination and consideration of all attendant circumstances determines that: (1) the conduct of the prosecuting attorney in bringing the defendant to trial has been unreasonably lacking in diligence and (2) this

time requirements of Rule 36(b) have not been met. In addition to prejudice, a defendant seeking relief under Rule 36(c) must also demonstrate that "the conduct of the prosecuting attorney . . . has been unreasonably lacking in diligence."⁴³

Neither requirement is present in the more familiar Rule 36(b), which bears the caption, "Standards of a Speedy Trial." In brief, the Rule provides to all criminal defendants, both incarcerated and at liberty, the *specific* and *quantified* right to be tried within twelve months of their "return day,"⁴⁴ subject to statutory "excluded periods."⁴⁵ Failure to try a defendant in that time establishes a *prima facie* case of a violation of Rule 36(b), with dismissal of the complaint mandatory, unless the Commonwealth can justify the delay.⁴⁶ If no justification is offered, "the defendant is entitled to dismissal of the indictment without a showing of prejudice."⁴⁷ Finally, a dismissal pursuant either to Rule 36(b) or 36(c) "is a bar to any subsequent prosecution for the same offense or any related offense, whether by later complaint in the District Court or indictment in the Superior Court."⁴⁸

Discretion has virtually no place in the operation of the rule, although the "ends of justice" exclusion,⁴⁹ discussed in Part VI,⁵⁰ contradicts this expectation. Justice Liacos has stated, "The rule is designed in some measure to operate mechanically."⁵¹ A mechanical operation of rule 36 allows all parties to calculate with reasonable certainty the date within which the defendant must be tried."⁵²

The description of Rule 36, in the reporters' notes, as "primarily a

conduct on the part of the prosecuting attorney has resulted in prejudice to the defendant.

Id.

43. *Id.*

44. MASS. R. CRIM. P. 2(b)(15). "Return day" is defined in Rule 2(b)(15) as "the day upon which a defendant is ordered by summons to first appear or, if under arrest, does first appear before a court to answer to the charges against him, whichever is earlier." *Id.* The reporters' notes to Rule 2(b)(15) go on to state that the return day "is the date upon which speedy trial rights attach . . . and from which other time limits are measured." *Id.* reporters' notes.

45. Rule 36(b)(2) contains fourteen different categories of "excluded periods," each set forth in a separately numbered or lettered paragraph. MASS. R. CRIM. P. 36(b)(2).

46. *Commonwealth v. Pacifico*, 27 Mass. App. Ct. 254, 255, 537 N.E.2d 593, 594 (1989) (citing *Barry v. Commonwealth*, 390 Mass. 285, 291, 455 N.E.2d 437, 443 (1983)).

47. *Commonwealth v. Look*, 379 Mass. 893, 899 n.2, 402 N.E.2d 470, 476 n.2 (1980), *cert. denied*, 449 U.S. 827 (1980).

48. 30A K. SMITH, MASSACHUSETTS PRACTICE § 2276 (2d. ed. 1983) (footnote omitted). See, e.g., *Commonwealth v. Ludwig*, 370 Mass. 31, 345 N.E.2d 386 (1976); *Commonwealth v. Fields*, 371 Mass. 274, 356 N.E.2d 1211 (1976).

49. MASS. R. CRIM. P. 36(b)(2)(F).

50. See *infra* text accompanying notes 89-103.

51. *Barry v. Commonwealth*, 390 Mass. 285, 292, 455 N.E.2d 437, 443 (1983).

52. *Id.*

management tool, designed to assist the trial courts in administering their dockets,"⁵³ must be viewed with considerable cynicism. While that goal may well have been a principal concern of the drafters, and while appellate courts continue to urge that trial courts have "a duty to control [their] own docket[s] and to ensure that criminal cases are brought to trial within the time prescribed by rule 36,"⁵⁴ the reality is sharply otherwise, at least in the district courts. Almost always it is a criminal defendant, not a court, who forces the rule into play and who demands compliance with it. The pace and sheer volume of criminal cases in the district courts of busy counties serve to deter and distract judges in those courts from even *inquiring* about Rule 36 compliance. Taking affirmative steps to control dockets, unless defendants (or, on occasion, victims) clamor for this, is rarer still.

In terms of actual practice, it is both inaccurate and disingenuous to refer to Rule 36 by its title, "Case Management," or to describe it as "primarily a management tool." Unless the defendant or his or her attorney elects to "manage" the case by insisting that the strictures of Rule 36 be adhered to, in all likelihood there will be no one else to champion, or even mention, the rule in the entire progression of the case from arraignment to disposition.

A. The Importance of Avoiding Waiver

Regardless of whether court congestion has been a minor or major cause of the pre-trial delay, it is essential, for a complete understanding of the operation of Rule 36(b), to grasp how the doctrine of waiver has been engrafted onto the rule by prior case law.⁵⁵ The rationale offered for this interpretation is that since "the opportunity conferred by the rule is not a fundamental constitutional right, or even a right created by statute, the application of 'traditional indicia of waiver of rights' is appropriate."⁵⁶ In more practical terms, "[w]hen a defendant has agreed to a continuance, or has not entered an objection to delay, he will be held to have acquiesced in the delay,"⁵⁷ with the result that the period of the delay is excluded.⁵⁸

Failure to appreciate the drastic consequences of waiver has led to the defeat of innumerable Rule 36(b) claims for relief. In a very recent

53. MASS. R. CRIM. P. 36 reporters' notes.

54. *Barry*, 390 Mass. at 296 n.13, 455 N.E.2d at 445 n.13.

55. For an excellent discussion of the topic of waiver, see Reilly, *Criminal Law and Procedure*, 30 ANN. SURV. OF MASS. LAW 93, 107-13 (1983).

56. *Barry*, 390 Mass. at 296, 455 N.E.2d at 445 (citations omitted).

57. *Id.* at 298, 455 N.E.2d at 446 (citations omitted).

58. For an extended discussion of the problems in calculating "delays attributable to the pendency of pretrial motions" see *Commonwealth v. McDonald*, 21 Mass. App. Ct. 368, 370-74, 487 N.E.2d 224, 226-28 (1986).

case, *Commonwealth v. Dias*,⁵⁹ the Supreme Judicial Court again emphasized that "defense counsel has an obligation to object to delay."⁶⁰ In an extreme case, excludable periods traced to failure to object to delay can all but emasculate and make a mockery of the rule. For example, in *Commonwealth v. McCants*,⁶¹ where the parties stipulated that 1,080 days had elapsed from the defendant's return day to the filing of the motion to dismiss, the court excluded 795 of those days, leaving the Commonwealth well within the period of time to try the defendant.⁶²

Not only is *McCants* memorable for the staggering length of time excluded, but the case holds, even more disturbingly, that the defendant still suffers the consequences of those delays when the delays are agreed to by defense counsel but without the consent of the defendant.⁶³ The undisputed harshness of this result compelled Justice Kass, in a footnote at the conclusion of the first *McCants* opinion, to urge judges to act with circumspection in the future:

Defendants, as here, who are in custody because they cannot make bail stand at greater risk of not knowing how their cases are proceeding. . . . Trial judges will wish to be comparatively grudging with continuances in cases where the defendant is incarcerated. If the defendant is in court when a continuance is requested, it is good practice for the judge to inform the defendant that the period of continuance will not be counted in calculating the time limit for bringing the defendant to trial.⁶⁴

When the continuance is caused by court congestion, the defense attorney's obligation is no different than at any other time. Simply put, an objection must be made on the record to avoid the consequences of waiver of rights and inferred acquiescence in the delay. Such is the lesson of *Commonwealth v. Farris*,⁶⁵ where the clerk-magistrate, after a

59. 405 Mass. 131, 539 N.E.2d 59 (1989). See also *Commonwealth v. Wysocki*, 28 Mass. App. Ct. 45, 546 N.E.2d 177 (1989).

60. *Id.* at 139, 539 N.E.2d at 64 (citing *Barry v. Commonwealth*, 390 Mass. 285, 296 n.13, 455 N.E.2d 437, 445 n.13 (1983)).

61. 20 Mass. App. Ct. 294, 480 N.E.2d 25 (1985), *appeal after remand*, 25 Mass. App. Ct. 735, 522 N.E.2d 15 (1988).

62. *Commonwealth v. McCants*, 25 Mass. App. Ct. 735, 740, 522 N.E.2d 15, 18 (1988).

63. To hold otherwise, Justice Kass reasoned, "would place impractical and unreasonable burdens on the trial court and on the lawyer-client relationship." *McCants*, 20 Mass. App. Ct. at 299, 480 N.E.2d at 28. At the same time, Justice Kass was anything but apologetic about the protracted delays in the case.

The defendant spent more than a year in jail without trial. None of the players in a system of criminal justice which allowed this to happen are entitled to be pleased with themselves. Their responsibility . . . has not been met. Yet that system must proceed on the working assumption that counsel are acting in the best interests of their clients . . .

Id.

64. *Id.* at 301 n.8, 480 N.E.2d at 29 n.8.

65. 390 Mass. 300, 455 N.E.2d 433 (1983).

hearing with the parties, "entered an order which ruled that, on the court's own motion, the case was being continued, in the interests of justice . . . because of 'congestion of the session.'"⁶⁶ Since there was no objection to this continuance (indeed, defense counsel agreed to it), the Supreme Judicial Court declined to "reach the question whether the magistrate had authority under [Rule 36(b)(2)(F)] to find that a continuance should be granted" based on court congestion.⁶⁷

V. BARRY AND THE ABA STANDARDS

Justice Liacos, writing for the court in *Barry v. Commonwealth*,⁶⁸ makes clear "that, while § 2.3(b) of the ABA Standards [Relating to Speedy Trial] recognizes congestion of the trial docket as justification for delay in exceptional circumstances, rule 36 has no such specific exclusion. We need not reach the issue in this case whether court congestion is a permissible basis for a finding under rule 36(b)(2)(F)."⁶⁹

To be sure, the statement that "rule 36 has no such specific exclusion" for congestion appears as dicta in a footnote, with limited, if any, precedential value.⁷⁰ Still, the statement should be accorded considerable weight, especially in light of the great many carefully delineated exclusions that the Rule does contain.⁷¹ Unfortunately, the delays in *Barry*, a murder and armed robbery case, stemmed from many causes, but court congestion was not one of them. Justice Liacos' remarks bear careful scrutiny, however, for in a short space he identifies some of the key ingredients of this debate. *Barry* remains, moreover, a watershed Rule 36 case, with one of the most thorough explications to be found anywhere of the background, purpose, operation, and exclusions of the rule.

A. The Test for "Exceptional Circumstances"

Standard 12-2.3(b) of the ABA Standards for Criminal Justice, the current version of the original 2.3(b) referred to by Justice Liacos, excludes from the computation of the time for trial "the period of delay resulting from congestion of the trial docket when the congestion is attributable to exceptional circumstances."⁷² Unlocking the meaning of "exceptional circumstances" is obviously crucial to an understanding of the

66. *Id.* at 302, 455 N.E.2d at 435. The court based its motion upon Mass. R. CRIM. P. 36(b)(2)(F). *Id.*

67. *Id.* at 306 n.6, 455 N.E.2d at 437 n.6.

68. 390 Mass. 285, 455 N.E.2d 437 (1983).

69. *Id.* at 296 n.13, 455 N.E.2d at 445 n.13 (emphasis added).

70. *Id.*

71. MASS. R. CRIM. P. 36(b)(2). Rule 36(b)(2) sets out time exclusions for such delays as physical examination of the defendant, absence of an essential witness, and joining of a codefendant.

72. II A.B.A. STANDARDS FOR CRIMINAL JUSTICE Standard 12-2.3(b) (2d ed. Supp. 1986).

standard. Although no definition is supplied, a reading of the commentary that accompanies 12-2.3(b) leaves little doubt that the authors of the standard intended "exceptional circumstances" to be interpreted and applied restrictively.⁷³

At the outset, the commentary states bluntly that "delay arising out of the chronic congestion of the trial docket should not be excused."⁷⁴ It further rejects the view that docket congestion may routinely be considered in the balancing of the four factors set forth in the landmark decision of *Barker v. Wingo*⁷⁵ to determine if a violation of the sixth amendment right to speedy trial has occurred. The commentary then lists four reasons why chronic court congestion should not be tolerated:

(1) the defendant can be prejudiced by delay, whatever the source; (2) such delays are contrary to the public interest in the prompt disposition of criminal cases; (3) if congestion excuses long delays, there is insufficient inducement for the state to remedy congestion; and (4) the calendar problems that arise out of trying to make maximum use of existing facilities do not ordinarily require time beyond that otherwise allowed.⁷⁶

On the other hand, the commentary urges tolerance for delays caused by *nonchronic* court congestion, the litmus test for which is "exceptional circumstances." The closest the commentary comes to defining this nebulous expression is to speak of "certain unique, nonrecurring events."⁷⁷ The single illustration provided, however, makes clear that "exceptional circumstances," properly interpreted and applied, could never be confused with the common, i.e., *chronic* congestion that plagues so many courts. "Thus, when a large scale riot or other mass public disorder has occurred, some leeway for additional time is required to ensure that the many resulting cases will receive adequate attention from the prosecutor's office, defense counsel (possibly a single defender office), and the judiciary."⁷⁸

73. *Id.*

74. *Id.*

75. 407 U.S. 514 (1972). As Justice Greaney stated in *Lutloff*:

The seminal United States Supreme Court case on the right to a speedy trial is, of course, *Barker v. Wingo*, 407 U.S. 514 (1972). In that case, the Supreme Court formulated the now familiar four factors to be considered in determining whether a defendant has been deprived of his constitutional right to a speedy trial: (1) the length of the delay, (2) the reason for the delay, (3) the defendant's assertion of the right, and (4) prejudice to the defendant resulting from the delay.

Commonwealth v. Lutloff, 14 Mass. App. Ct. 434, 438-39, 440 N.E.2d 52, 55 (1982).

76. II A.B.A. STANDARDS FOR CRIMINAL JUSTICE Standard 12-2.3(b) (2d ed. Supp. 1986).

77. *Id.*

78. *Id.*

B. Treatment of Court Congestion Outside Massachusetts

Since the promulgation of the ABA Standards, the phrase "exceptional circumstances," or a variant of it,⁷⁹ has found its way into the rules of criminal procedure or speedy trial decisions of several jurisdictions. Arkansas, for example, initially tracks the language of Standard 12-2.3(b) by excluding "[t]he period of delay resulting from congestion of the trial docket when the delay is attributable to exceptional circumstances."⁸⁰ But the Arkansas rule goes on to require that "[w]hen such a delay results, the court shall state the exceptional circumstances in its order continuing the case."⁸¹

Florida's rule of criminal procedure covering speedy trial rights is comprehensive and is a model of draftsmanship for other states to emulate, particularly for states like Massachusetts where applicable rules are silent on the subject of court congestion. Regarding exceptional circumstances, the Florida rule states unequivocally that "[e]xceptional circumstances shall not include general congestion of the court's docket, lack of diligent preparation or failure to obtain available witnesses, or other avoidable or foreseeable delays."⁸² Instead, exceptional circumstances mandating extension of time periods "are those which as a matter of substantial justice to the accused or the State or both require an order by the court."⁸³ Not content to leave the matter there, the rule continues with six detailed examples of situations that constitute bona fide exceptional circumstances, none of which stem from court congestion.⁸⁴

Court congestion is commonly perceived as a local and temporary problem. Accordingly, it is not surprising that, despite the ABA Standards, there exists no uniform rule, policy, or procedure among the states to deal with it. In this sense, court congestion is incongruous with the relatively standardized procedures in criminal law such as interstate rendition or appointment of counsel for indigent defendants. Indeed, among the various states the treatment of court congestion in the context of speedy trial rights is broad. Detailing the range and vari-

79. See, e.g., ARIZ. R. CRIM. P. 8.4(c). The Arizona rule substitutes "extraordinary" for "exceptional," excluding "[d]elays necessitated by congestion of the trial calendar, but only when the congestion is attributable to extraordinary circumstances, in which case the presiding judge shall promptly apply to the Chief Justice of the Arizona Supreme Court for suspension of any of the Rules of Criminal Procedure." *Id.*

80. ARK. R. CRIM. P. 28.3(b).

81. *Id.*

82. FLA. R. CRIM. P. 3.191(f).

83. *Id.*

84. *Id.* Such exceptional circumstances include unexpected illness, an unusual or complex case, evidence unavailable until a later date, unanticipated developments, accommodation of co-defendant or interruption of proceedings by the accused. *Id.* at 3.191(f)(1)-(6).

ety of that treatment is beyond the scope of this article. Briefly, however, for purposes of clarifying Massachusetts Rule 36(b) and offering guidance for any proposals to amend it, the range extends from states such as Michigan and Wisconsin, which explicitly provide, respectively, that "[d]ocket congestion is not good cause for delay"⁸⁵ and "[n]o continuance . . . may be granted because of general congestion of the court's calendar,"⁸⁶ to Kansas, which allows one continuance due to court congestion but only for a maximum of thirty days;⁸⁷ to Indiana, which has an elaborate and rather liberal rule allowing such continuances.⁸⁸

VI. THE "ENDS OF JUSTICE" EXCLUSION

Given the absence, as noted by Justice Liacos, of any specific statutory exclusion for delays caused by court congestion, a Massachusetts judge inclined to grant a continuance based on that reason would be forced to rely on the language of Rule 36(b)(2)(F).⁸⁹ In brief, this exclusion allows a judge to stop the running of the twelve-month speedy trial clock and order a continuance of the case if the judge concludes that the "ends of justice served by taking such action outweighed the best interests of the public and the defendant in a speedy trial."⁹⁰ Either the judge, the defendant, defense counsel, or the prosecutor may be the party moving for the continuance. Reasons must be set forth in the record supporting the judge's decision, although in practice this requirement is seldom complied with. If a reason is provided at all,

85. MICH. R. CT. 6.109(B)(5).

86. WIS. R. CRIM. P. 971.10(3)(c).

87. KAN. STAT. ANN. § 22.3402(3)(d) (1988).

88. IND. R. CRIM. P. 4. "Any continuance granted due to a congested calendar or emergency shall be reduced to an order, which order shall also set the case for trial within a reasonable time." *Id.* at 4(A), (B)(1), (C). "[A] trial court may take note of congestion or an emergency without the necessity of a motion, and upon so finding may order a continuance." *Id.*

89. MASS. R. CRIM. P. 36(b)(2)(F).

(2) *Excluded Periods.* The following periods shall be excluded in computing the time within which the trial of any offense must commence . . .

(F) Any period of delay resulting from a continuance granted by a judge on his own motion or at the request of the defendant or his counsel or at the request of the prosecutor, if the judge granted the continuance on the basis of his findings that the ends of justice served by taking such action outweighed the best interests of the public and the defendant in a speedy trial. No period of delay resulting from a continuance granted by the court in accordance with this paragraph shall be excludable under this subdivision unless the judge sets forth in the record of the case, either orally or in writing, his reasons for finding that the ends of justice served by the granting of the continuance outweigh the best interests of the public and the defendant in a speedy trial.

Id.

90. *Id.*

often it is no more illuminating than "court congestion" or "court overscheduling." Moreover, the appeals court has held that there is "no necessity for the trial judge to make the statement of reasons called for by rule 36(b)(2)(F) where there [is] no defense objection to a continuance."⁹¹

With only minor stylistic differences, the language of Rule 36(b)(2)(F) tracks an otherwise identical provision in the Federal Speedy Trial Act of 1974.⁹² However, the similarity ends there, for a subsequent paragraph in the Speedy Trial Act declares that "[n]o continuance . . . shall be granted because of general congestion of the court's calendar . . ."⁹³ This provision has been interpreted to mean what it says.⁹⁴

The role of exclusion 36(b)(2)(F) and its compatibility in the overall scheme of Rule 36 are far from clear. In essence, the exclusion is a catchall provision, apparently intended to serve as a safety net in the event that some miscellaneous pretrial delay or delays evade the trap of the other, more specific statutory exclusions. Justice Liacos, toward the conclusion of *Barry*, advances two "salutary purposes" for the provision. "First, it provides a means through which the parties can protect themselves against the rigors of the rule. . . . Second, the provision is designed to ensure that courts meet their obligations to the public to try criminal defendants swiftly."⁹⁵

Neither of these contentions stands up well to analysis of actual practice under Rule 36. The neglect by the courts, particularly the district courts, of any systematic kind of docket control is well known, despite the periodic reporting requirement of Rule 36(f).⁹⁶ Conspicuously, too, exclusion 36(b)(2)(F) is utterly silent as to whether

91. *Commonwealth v. Stevenson*, 22 Mass. App. Ct. 963, 964, 494 N.E.2d 1040, 1042 (1986) (citing *Commonwealth v. Dominigue*, 18 Mass. App. Ct. 987, 988-89, 470 N.E.2d 799, 801 (1984)), *further appellate review denied*, 393 Mass. 1105 (1985). The rescript opinion in *Dominique* nonetheless states that "it would have been preferable had the several judges who allowed the continuances made the statement of reasons called for in Mass. R. Crim. P. 36(b)(2)(F) . . ." 18 Mass. App. Ct. at 988, 470 N.E.2d at 801.

92. 18 U.S.C. §§ 3161-3174 (Supp. 1988).

93. *Id.* at § 3161(h)(8)(C).

94. *See, e.g., United States v. Andrews*, 790 F.2d 803, 808 (10th Cir. 1986), *cert. denied*, 481 U.S. 1018 (1987); *United States v. Smith*, 588 F. Supp. 1403, 1404 (D. Haw. 1984).

95. *Barry v. Commonwealth*, 390 Mass. 285, 297-98, 455 N.E.2d 437, 446 (1983) (citations omitted). "The granting of continuances, . . . can frustrate the public interest as much as other causes of delay. The provision of rule 36(b)(2)(F), therefore, seeks to encourage the exercise of oversight by the court over the progress of criminal prosecutions." *Id.* at 298, 455 N.E.2d at 446.

96. This last provision ("Case Status Reports") of Rule 36 requires the clerk in each district court and superior court to give periodic notice to the respective Administrative Justice "of all cases which have been pending in that court for six months or longer." MASS. R. CRIM. P. 36(f). More specifically, "[s]uch notice shall

more than one such continuance may be ordered and, if so, how long in the aggregate these continuances may extend.⁹⁷ In addition, notwithstanding the "salutary purposes" discerned by Justice Liacos, the language of 36(b)(2)(F) is excessively general and vague, an evil to be eschewed in any rule or statute which affects penal interest. The same description applies as well to the ostensible mission and function of 36(b)(2)(F), the "ends of justice." While it may be argued that the imprecise language of the exclusion could not be made otherwise, given the uncertainty of what can cause or contribute to pretrial delays, the exclusion seems decidedly at odds with Justice Liacos's own interpretation that Rule 36 "is designed in some measure to operate mechanically."⁹⁸

Exclusion 36(b)(2)(F) is contrary to that expectation. It confers substantial, almost unfettered, discretion on a judge considering a motion for a continuance or a motion to dismiss, discretion which in effect vitiates Rule 36. For the defendant who for tactical reasons welcomes and acquiesces in requests for continuances, a judge's discretion to circumvent the time period of the rule is a harmless exercise of power. By contrast, other defendants, perhaps a majority, are anxious and entitled to rely on "the rigors of the rule," to ensure strict compliance with the speedy trial guarantee.

Although it is not clear what Justice Liacos meant when he referred to exclusion 36(b)(2)(F) providing two "salutary purposes," it is a fair surmise that he was alarmed at the spectre of dismissal on purely technical grounds. *Barry*, after all, was a murder and armed robbery case, and a "dismissal is a remedy which infringes drastically on the public interest in bringing guilty persons to trial."⁹⁹ But, as Justice Greaney emphasized in *Commonwealth v. Lutoff*,¹⁰⁰ a case in which protracted pretrial delays were caused primarily by court congestion, "the proper remedy lies in correcting the failures of the system, rather than in abridging a defendant's constitutional right."¹⁰¹ Moreover, as the recent case of *Commonwealth v. Campbell*¹⁰² makes clear, even a first-degree murder case can and should be dismissed if an explicit violation of Rule 36(b) has been established.¹⁰³

include the number of the case, the name of the defendant, the offense charged, the name of defense counsel, if any, and the name of the prosecutor." *Id.*

97. Contrast the procedure in Kansas, which allows only one continuance for court congestion and for a maximum of thirty days. See *supra* note 87 and accompanying text.

98. *Barry*, 390 Mass. at 292, 455 N.E.2d at 443. "A mechanical operation of rule 36 allows all parties to calculate with reasonable certainty the date within which the defendant must be tried." *Id.*

99. *Id.* at 297, 455 N.E.2d at 446 (citation omitted).

100. 14 Mass. App. Ct. 434, 440 N.E.2d 52 (1982).

101. *Id.* at 446, 440 N.E.2d at 60.

102. 401 Mass. 698, 519 N.E.2d 269 (1988).

103. *Id.* at 698-99, 519 N.E.2d at 272.

VII. PRIOR MASSACHUSETTS CASE LAW

Lending facial support, but little more than that, to the proposition that the "ends of justice" exclusion is broad enough to embrace delays due to court congestion are the reporters' notes to Rule 36(b)(2)(F).¹⁰⁴ The final paragraph of these notes lists, along with scant discussion, nine Massachusetts appellate opinions,¹⁰⁵ all decided before the adoption of Rule 36, in which court congestion contributed to pretrial delay.

The threshold question of whether cases decided prior to the adoption of Rule 36 may be resorted to as an aid in interpretation of the new rule was addressed by Justice Liacos in both the text and footnotes of the *Barry* decision. Prior case law, he maintained, is applicable to the issue of waiver of rights, but to no other issues: "We note that the prior case law is encompassed in the rule *only to the extent* that the defendant is not entitled to dismissal if he acquiesces in, is responsible for, or benefits from, the delay. *The rule clearly intended to change other aspects of the prior case law.*"¹⁰⁶

Assuming, then, that a defendant does *not* acquiesce in, is *not* responsible for, and does *not* benefit from a delay due to court congestion, what guidance, if any, does the prior case law provide for the proper interpretation of Rule 36(b) which is silent on the subject? A review of the nine cases listed in the reporters' notes sheds meager light on this question. Although relief for alleged speedy trial violations was denied in all nine cases, an analysis of the backgrounds, arguments, and precedents relied on in those cases strongly suggests that they are only marginally, if at all, relevant to the present-day concerns of Rule 36(b).

The nine cases do not represent a broad spectrum or continuum of Massachusetts decisional law. Most significantly, with the lone exception of *Commonwealth v. Rego*,¹⁰⁷ which was decided in 1971, they date from the very narrow period of 1974-1978. Thus, eight of the nine cases follow in the large and influential footsteps left in 1972 by *Barker v. Wingo*,¹⁰⁸ the pre-eminent Supreme Court decision which established

104. MASS. R. CRIM. P. 36 reporters' notes.

105. *Commonwealth v. Beckett*, 373 Mass. 329, 366 N.E.2d 1252 (1977); *Commonwealth v. Gove*, 366 Mass. 351, 320 N.E.2d 900 (1974); *Commonwealth v. Rego*, 360 Mass. 385, 274 N.E.2d 795 (1971); *Commonwealth v. Mattson*, 6 Mass. App. Ct. 893, 377 N.E.2d 433 (1978), *further appellate review*, 377 Mass. 638, 387 N.E.2d 546 (1979); *Commonwealth v. Jones*, 6 Mass. App. Ct. 750, 383 N.E.2d 527 (1978); *Commonwealth v. Carrillo*, 5 Mass. App. Ct. 812, 361 N.E.2d 415 (1977); *Commonwealth v. Campbell*, 5 Mass. App. Ct. 571, 366 N.E.2d 44 (1977); *Commonwealth v. Ambers*, 4 Mass. App. Ct. 647, 357 N.E.2d 323 (1976); *Commonwealth v. Burhoe*, 3 Mass. App. Ct. 590, 337 N.E.2d 913 (1975).

106. *Barry v. Commonwealth*, 390 Mass. 285, 298 n.17, 455 N.E.2d 437, 447 n.17 (1983) (emphasis added).

107. 360 Mass. 385, 274 N.E.2d 795 (1971).

108. 407 U.S. 514 (1972).

the standard for determining alleged violations of the federal constitutional right to a speedy trial. Six of the eight cases cite *Barker*, and most of these discuss and apply the test of *Barker* at length.

In *Barker*, "[f]our factors, '[l]ength of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant' must interact in a 'difficult and sensitive balancing process.'" ¹⁰⁹ However, as earlier outlined in Parts III and IV, Rule 36(b), far from being an offspring or a derivative of the *Barker* decision, is a new and fundamentally different right. There is no "difficult and sensitive balancing process" resorted to, and prejudice to the defendant, the fourth factor in the *Barker* equation, is wholly inapplicable.

On the subject of delays due to court congestion, Justice Powell, who wrote the *Barker* opinion, had relatively little to say. "A more neutral reason such as negligence or overcrowded courts should be weighed less heavily [than prosecutorial inaction or deliberate attempts to delay a trial]," he remarked, "but nonetheless should be considered since the ultimate responsibility for such circumstances must rest with the government rather than with the defendant."¹¹⁰

What, however, does it mean to weigh such delays "less heavily"? Since Justice Powell declined to quantify the sixth amendment right to speedy trial "into a specified number of days or months,"¹¹¹ his ambivalence on this issue may seem logical and consistent. The twelve-month clock of Rule 36(b), however, demands more precision. Delays due to court congestion, duly objected to by the defendant, must be either included or excluded in the computation of the time for trial. There is, in short, no provision in the Rule to weigh certain delays "less heavily" than others.

A. Massachusetts General Laws Chapter 277, Section 72A

In addition to suffering excessive dependence on *Barker*, five of the nine cases listed in the reporters' notes to Rule 36(b)(2)(F) were decided pursuant to the language and policy of a now repealed statute, chapter 277, section 72A of the Massachusetts General Laws.¹¹² Often termed a "'warrant removal' or detainer removal statute,"¹¹³ the former section 72A required penal authorities to notify "a prisoner of any untried indictment, information or complaint pending against him, after which he may file an application for speedy trial and 'shall, within six months after such application is received by the court, be brought

109. *Commonwealth v. Gove*, 366 Mass. 351, 361, 320 N.E.2d 900, 908 (1974) (quoting *Barker v. Wingo*, 407 U.S. 514, 530, 533 (1972)).

110. *Barker*, 407 U.S. at 531.

111. *Id.* at 523.

112. MASS. GEN. L. ch. 277, § 72A (1972), repealed by St. 1979, ch. 344, § 42 (1979).

113. *Gove*, 366 Mass. at 356, 320 N.E.2d at 904.

into court for trial or other disposition of any such indictment, information or complaint, unless the court shall otherwise order.'" ¹¹⁴

It would be a serious error, however, to view this repealed statute as a meaningful predecessor of Rule 36(b).¹¹⁵ Beyond the obvious difference that section 72A applied only to "an untried charge against a prisoner 'serving a term of imprisonment,'" ¹¹⁶ and because the six months provided for trial or other disposition was only half the period presently allowed by Rule 36(b), the statute was never intended to "be seen as a broad-gauge legislative attempt to help solve the problems underlying the concept of 'speedy trial.'" ¹¹⁷ Rather, it established "a ready method for inmates to accelerate action on possible further impediments to their freedom."¹¹⁸

A more glaring distinction between procedure under the former section 72A and Rule 36(b) concerns the consequences of the expiration of the statutory period for speedy trial. As discussed in Part IV, dismissal of a criminal complaint is mandatory, once a prima facie case of a violation of Rule 36(b) has been made, unless the Commonwealth can justify the delay. Practice under section 72A lacked this requirement. In two cases interpreting the statute,¹¹⁹ the appeals court held that "where delay was neither attributable to the defendant nor for his benefit, a six months' delay after application for a prompt trial under this statute requires automatic dismissal of the indictment."¹²⁰ The Supreme Judicial Court, called upon to review the propriety of only one of those dismissals,¹²¹ affirmed the dismissal of the indictment but cautioned that "we think the statute does not mandate a per se rule of dismissal after the statutory period has expired."¹²² Mindful of the Supreme Judicial Court's ruling in *Alexander*, the appeals court later held that

114. *Commonwealth v. Ambers*, 4 Mass. App. Ct. 647, 649, 357 N.E.2d 323, 325 (1976) (quoting MASS. GEN. L. ch. 277, § 72(A)).

115. Some of the concerns and policies of the former § 72A, however, may be seen in the language of Rule 36(d), which is captioned "Special Procedures: Persons Serving Term of Imprisonment."

116. *Commonwealth v. Jones*, 6 Mass. App. Ct. 750, 752, 383 N.E.2d 527, 529 (1978).

117. *Commonwealth v. Gove*, 366 Mass. 351, 355, 320 N.E.2d 900, 903 (1974) (citing *Commonwealth v. Stewart*, 361 Mass. 857, 858 (1972)). See also *Commonwealth v. Lauria*, 359 Mass. 168, 171, 268 N.E.2d 363, 365 (1971) (section 72A establishes trial priority for defendants who are already in custody).

118. *Gove*, 366 Mass. at 355, 320 N.E.2d at 903.

119. *Commonwealth v. Alexander*, 4 Mass. App. Ct. 212, 344 N.E.2d 221 (1976); *Commonwealth v. Gove*, 1 Mass. App. Ct. 614, 304 N.E.2d 589 (1973).

120. *Commonwealth v. Alexander*, 371 Mass. 726, 728, 359 N.E.2d 306, 308 (1977).

121. The Commonwealth appealed the decision of the appeals court in both *Gove* and *Alexander*, but only in the latter case was a challenge made to the correctness of a dismissal after the six month period allowed by § 72A had run.

122. *Alexander*, 371 Mass. at 728, 359 N.E.2d at 308.

[d]elay beyond the six months' period of section 72A is not chargeable against the Commonwealth where the delay results from court congestion and where there is no evidence of oppressive or purposefully dilatory conduct by the prosecution; and it is a fair inference that these delays were inherent in the general problems of the administration of justice in a congested county.¹²³

B. *The Legacy of Beckett*

*Commonwealth v. Beckett*¹²⁴ is the first of the nine cases listed in the last paragraph of the reporters' notes to Rule 36(b)(2)(F), and it is possibly the best known Massachusetts appellate opinion on the subject of court congestion. In June 1971, the defendant and her husband were indicted on a charge of conspiracy to commit larceny by false pretenses.¹²⁵ The trial did not go forward until January 1976, some fifty-five months later.¹²⁶

On appeal of the defendant's conviction, the Supreme Judicial Court followed *Barker v. Wingo*.¹²⁷ "A delay of fifty-five months between indictment and trial is substantial," Justice Wilkins acknowledged, "and requires serious consideration whether the defendant was denied a speedy trial in violation of her constitutional rights."¹²⁸ Although some of the delay was caused by the defendant,¹²⁹ "the principal reason for the delay was court congestion."¹³⁰ Conceding that the prosecution did not intentionally frustrate or hinder the defendant's right to a speedy trial, Justice Wilkins emphasized that "court congestion is not the responsibility of the defendant and must be weighed

123. *Commonwealth v. Mattson*, 6 Mass. App. Ct. 893, 893, 377 N.E.2d 433, 434 (1978) (citations omitted). The defendant's trial was delayed because of court congestion which was caused by the absence of criminal sessions in the Superior Court of Plymouth County. *Id.*

124. 373 Mass. 329, 366 N.E.2d 1252 (1977).

125. *Id.* at 331, 366 N.E.2d at 1254. "The charge was based on a claim that the defendant and her husband . . . conspired to commit larceny by false pretenses by misrepresenting to the Department of Public Welfare that her husband did not live with [her]" so that the family would qualify for AFDC aid. *Id.*

126. *Id.* "This delay is longer than the delay in any other case in which [the court] has held that a defendant's constitutional rights to a speedy trial was not infringed." *Id.* (citing *Commonwealth v. Gilbert*, 366 Mass. 18, 314 N.E.2d 111 (1974); *Commonwealth v. Horne*, 362 Mass. 738, 291 N.E.2d 629 (1973); *Commonwealth v. Burhoe*, 3 Mass. App. Ct. 590, 337 N.E.2d 913 (1975)).

127. 407 U.S. 514, 530-33 (1972). "The approach [the Court accepts] is a balancing test, in which the conduct of both the prosecution and the defendant are weighed." *Id.* at 530. There are four factors that are weighed: (1) length of delay, (2) reason for delay, (3) extent to which the defendant asserted a right to a speedy trial, and (4) extent of prejudice to defendant because of the delay. *Beckett*, 373 Mass. at 332, 366 N.E.2d at 1254-55.

128. *Beckett*, 373 Mass. at 331, 366 N.E.2d at 1254.

129. *Id.* at 333, 366 N.E.2d at 1255. "Some of the delay apparently was caused by the unavailability of counsel, or a change of counsel, for her husband . . ."

130. *Id.* at 332, 366 N.E.2d at 1255.

against the Commonwealth in assessing the reasons for the delay."¹³¹ In addition, he responded sympathetically to the defendant's argument that "the presiding justices have not assigned importance to [her] case."¹³² While judicial indifference is "a natural consequence of congested dockets [it] also must be weighed against the Commonwealth."¹³³

Unfortunately, Justice Wilkins was never called upon in *Beckett* to define or quantify the precise weight to be given to delays caused by court congestion. Like Justice Powell's ruling in *Barker v. Wingo*, Justice Wilkins merely concluded that the weight "is not so heavy as a deliberate prosecutorial attempt to delay a trial."¹³⁴ His analysis of court congestion ends there, as it must, because the defendant failed to establish evidence to support the third and fourth factors under the *Barker* test: the assertion of her right to a speedy trial and prejudice to the defendant. Regardless of the length or reason for the delay, the defendant was not entitled to relief because she had not shown an attempt to assert her right to a speedy trial, nor had the defendant shown that she was prejudiced by the delay.¹³⁵

Although Justice Wilkins neither questions nor challenges the fairness of the *Barker v. Wingo* balancing test, it is a safe inference that he was troubled not only by the result in *Beckett* but also by the major source of the delay. His words of admonition seem addressed to the criminal justice system at large: "We add that we will not tolerate court congestion as an adequate ground for denying a reasonably prompt trial to a defendant who actively pursues his constitutional right to such a trial."¹³⁶

It is tempting, perhaps inevitable, to speculate what the outcome would have been if Rule 36(b) were in effect at the time of the *Beckett* decision and the defendant had pursued that right instead of the more difficult federal constitutional claim. An instinctive answer is that a dismissal would have been assured, particularly since the element of prejudice to the defendant would have been irrelevant. The correct answer, however, is just the opposite. Given the same facts, a motion to dismiss pursuant to Rule 36(b) would have been denied almost as readily as the sixth amendment claim. Routinely overlooked in *Beckett* is that, despite the pattern of egregious court congestion, the defendant

131. *Id.* "But the weight to be given to such a cause for delay is not so heavy as a deliberate prosecutorial attempt to delay a trial." *Id.*

132. *Id.* at 332-33, 366 N.E.2d at 1255.

133. *Id.* at 333, 366 N.E.2d at 1255.

134. *Id.* at 332, 366 N.E.2d at 1255.

135. *Id.* at 335, 366 N.E.2d at 1256. "Considering the lack of prejudice to the defendant and her failure to assert her right to a speedy trial . . . in spite of the inordinate delay, the defendant was not denied her constitutional rights . . ." *Id.* at 335, 366 N.E.2d at 1256.

136. *Id.* at 335, 366 N.E.2d at 1256.

"did not object at any time to the numerous continuances which were granted."¹³⁷ Accordingly, as *Commonwealth v. Farris*¹³⁸ demonstrates, the twelve-month clock under these circumstances would have been stopped. Just as acquiescence to delay was fatal to the defendant's claims for relief in *Barker v. Wingo*,¹³⁹ so too the defendant in *Beckett* would have fared no better had she been able to rely on Rule 36(b).

Nothing, however, in the holding or the dicta of *Beckett* suggests that the Supreme Judicial Court in 1977 condoned or was oblivious to the evils of court congestion. On the contrary, the legacy of *Beckett* is not that court congestion is inevitable and should be tolerated, but rather that defense counsel, if they wish to invoke for their clients the protection of Rule 36(b), must be ever vigilant to object to delay, however caused.

VIII. CONCLUSION

Although the labels "chronic" and "nonchronic" may provoke debate, few would deny the prevalence of court congestion in the criminal courts of Massachusetts, particularly in the district courts of busy counties. Given the current plight of the judicial and criminal justice systems, the situation could hardly be otherwise. Unlike many jurisdictions, however, which have made provision for the treatment of delay resulting from court congestion in their rules of criminal procedure, Massachusetts Rule of Criminal Procedure 36 is silent on the subject, containing no specific exclusion or inclusion for such delays. Moreover, Massachusetts case law in this area is sparse and of limited value, with the majority of these cases decided before the adoption of Rule 36, when significantly different standards controlled. More recent cases, chiefly *Barry* and *Farris*, address the topic of court congestion, but only in footnotes and only as an ancillary issue at best.

Dismissal of a criminal case because of delays due to court congestion has been described, in a 1987 opinion of the Indiana Supreme Court, as "an extremely unpleasant but compelling responsibility."¹⁴⁰ Because, by definition, prosecutorial misconduct is not implicated in delays due to court congestion, the appropriateness of the remedy

137. *Id.* at 333, 366 N.E.2d at 1255.

138. 390 Mass. 300, 455 N.E.2d 433 (1983) (defendant, by not objecting to delay, was held to have acquiesced in the delay).

139. 407 U.S. 514 (1972). "Although the Court rejects petitioner's speedy trial claim and affirms denial of his petition for habeas corpus, it is apparent that had *Barker* not so clearly acquiesced in the major delays involved in this case, the result would have been otherwise." *Id.* at 536-37 (White, J., concurring).

140. *Huffman v. State*, 502 N.E.2d 906, 908 (Ind. 1987). This dismissal was ordered, not because of a violation of the state or federal constitutional right to speedy trial, but because of noncompliance with the applicable Indiana rule of criminal procedure, the counterpart to Mass. R. Crim. P. 36. *See* IND. R. CRIM. P. 4(C).

when such delays occur often provokes wrenching debate. This is especially true when the crime is serious and the likelihood of conviction would be strong if the defendant actually stood trial. The silence of Rule 36 regarding the treatment of court congestion suggests that there is no clear answer to this dilemma. There are, however, guidelines.

In *Strunk v. United States*,¹⁴¹ decided in the year following *Barker v. Wingo*, the Supreme Court recognized, in passing, that "[u]nintentional delays caused by overcrowded court dockets or understaffed prosecutors are among the factors to be weighed less heavily than intentional delay, calculated to hamper the defense . . ."¹⁴² Nonetheless, the Court continued, these unintentional delays should "be considered since the ultimate responsibility for such circumstances must rest with the government rather than the defendant."¹⁴³ The real issue confronting the Supreme Court in *Strunk*, however, was the appropriateness of a remedy, an issue created when the Court of Appeals for the Seventh Circuit declined to take the "extreme" step of ordering a dismissal even though that court readily agreed that the defendant's right to a speedy trial had been violated.¹⁴⁴ Chief Justice Burger was direct and forceful in his resolution of the matter. "[S]uch severe remedies [as dismissal]," he wrote, "are not unique in the application of constitutional standards. In light of the policies which underlie the right to a speedy trial, dismissal must remain, as *Barker* noted, 'the only possible remedy.'"¹⁴⁵

In this context, it is worth repeating the analogous remarks of Justice Greaney that "the proper remedy lies in correcting the failures of the system, rather than in abridging a defendant's constitutional right."¹⁴⁶ Of course, no amount of court congestion can transform Rule 36(b) into a constitutional right. That necessary concession, however, is wide of the mark. Whether by accident or design, Rule 36(b) in the ten years of its existence has eclipsed and supplanted the formerly exclusive roles of article XI and the sixth amendment. In replacing them, Rule 36(b) has become the primary vehicle in Massachusetts to press a claim of the denial of the fundamental right to a speedy trial.

In view of the enhanced status that Rule 36(b) enjoys and the great demands placed upon it, it is both misguided and illusory to continue to refer to the rule as "primarily a management tool" and little more. It is also a defect of serious magnitude that the rule does not specifically address the issue of treatment of delays due to court congestion,

141. 412 U.S. 434 (1973).

142. *Id.* at 436.

143. *Id.* (quoting *Barker v. Wingo*, 407 U.S. 514, 531 (1972)).

144. *Id.*

145. *Id.* at 439-40 (quoting *Barker v. Wingo*, 407 U.S. 514, 522 (1972)).

146. *Commonwealth v. Lutoff*, 14 Mass. App. Ct. 434, 446, 440 N.E.2d 52, 60 (1982).

when such delays are a persistent and pervasive problem. A proposal amending Rule 36 to correct these deficiencies is long overdue. Criminal defendants, both incarcerated and at liberty, are entitled to the greater certitude and predictability that these revisions would bring. So too must help come to our beleaguered courts.

The Tremors of the Times*

Jerome H. Heckman**

I. INTRODUCTION

You have probably heard it said that every story ever written follows one of seven plots. Something similar could be said about the issues the plastics industry has faced over the years and in all likelihood, the ones it will encounter in the years to come. While the names change, the issues—and the solutions to those issues—have an underlying similarity. There are, however, important permutations that should not be overlooked or underplayed.

Typically, an industry problem is an alleged health or safety concern sparked in varying degrees by scientific uncertainty, political opportunism, and the desire of competitors to keep plastics out of a market. Invariably, the challenge to the industry is to fashion a responsible solution that protects or expands the market for plastic products. Invariably, the solution demands communicating the facts to the proper officials and sometimes the public. Invariably, where a genuine problem exists, an appropriate self-policing effort is needed.

Sometimes communicating the facts effectively requires going to court to fight misinformation, as the plastics industry did in 1972 when it succeeded in having a New York City tax on plastic packaging de-

* This paper was prepared for presentation at the Society of the Plastics Industry, Inc.'s (SPI) 45th New England Fall Conference on September 17-19, 1989 at the Newport Marriott in Newport, Rhode Island.

The Society of the Plastics Industry, Inc. is a member-run association dedicated to promoting and protecting continuing growth for the plastics industry in the United States. SPI represents more than 2,000 member companies from all segments of the industry including processors, resin and adjuvant suppliers, plastics distributors, machinery builders, and moldmakers.

Incorporated in 1937, SPI is headquartered at 1275 K Street, N.W., Suite 400, Washington, D.C. 20005. SPI has four regional offices: Eastern Office, 1275 K Street, N.W., Suite 400, Washington, D.C. 20005; Midwestern Office, 240 East Devon Avenue, Suite 301, Des Plaines, IL 60018; New England Office, Stetson Place, 541 Main Street, Weymouth, MA 02190; Western Office, Saddleback Square, Suite 124, 12440 Firestone Boulevard, Norwalk, CA 90650; plus a New York Office, 355 Lexington Avenue, New York, NY 10017. THE SOCIETY OF THE PLASTICS INDUSTRY, INC., FACTS & FIGURES OF THE U.S. PLASTICS INDUSTRY iii (Sept. 1988).

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ON THE COVER

Jim Branton of San Antonio and Jerry Secrest of Temple (listed alphabetically) are the candidates for 1993-94 president-elect of the State Bar of Texas. Ballots will be mailed April 15 and must be postmarked by April 30. Cover design by Alfredo Diaz.

Speedy Trial

The Federal Rule and Its Exceptions

By Judge Louis Guirola Jr.

To give effect to the constitutional right of the accused to a speedy trial, Congress crafted a trial clock. The designers of the Speedy Trial Act realized that their clock, like any other, would need a mechanism for occasional adjustments. The Speedy Trial Act was designed to provide the defendant with a speedy resolution of his or her criminal entanglement while allowing the flexibility needed to handle the unavoidable delays of more complex criminal prosecutions.

The Speedy Trial Act of 1974

The Sixth Amendment to the United States Constitution guarantees the accused the fundamental right to a speedy trial. This constitutional protection is designed to minimize the possibility of lengthy incarceration prior to trial, to reduce the impairment of liberty imposed on an accused while released on bail, and to shorten the disruption of life caused by arrest and the presence of unresolved criminal charges.¹ In determining whether a defendant's constitutional right to a speedy trial has been violated the courts consider the following factors: (1) the length of delay; (2) the reasons for the delay; (3) the timeliness and vigor of the defendant's assertion of his speedy trial rights; and (4) the degree of prejudice to the defendant. The constitutional right to speedy trial is supplemented by a statutory right to speedy trial.

In 1974, Congress passed the Federal Speedy Trial Act.² The act consists of a statutory blueprint for the expeditious resolution of criminal cases. Generally, the statute limits the time in which an information or indictment may be filed against an accused after arrest, specifies the time within which the defendant's trial must commence, allows a period of time for the defendant to prepare for trial, provides for periods of delay which may be excluded from the computation of time within which

the defendant's trial must commence, and provides sanctions for failure to comply with the time limitations.

From Arrest To Information or Indictment

In the federal criminal system, an accused is initially charged by a complaint containing an affidavit that recites the probable cause which demonstrates that an offense has been committed and that the defendant committed it.³ The Speedy Trial Act provides that an indictment or information must be filed within 30 days from the date of arrest. This time limit is extended to 60 days when no grand jury has been in session during the initial 30-day period.⁴ It should be noted that to trigger the act there must be a "federal" arrest. Federal participation in a state arrest is not sufficient.⁵ Likewise a federal detainer on a state prisoner is not enough.⁶ In addition, the arrest must be followed by formal charges. An arrest followed by release of the defendant without formal charges will not set the speedy trial clock in motion. Consequently, a case in which a defendant is arrested, released without formal charges, and indicted more than 30 days later would be in compliance with the act.⁷

From Time of Indictment to Trial

Generally, an accused must be brought to trial within 70 days from the filing date and making public of the indictment or information, or from the date the defendant appears before a judicial officer in the charging district, whichever occurs last.⁸ In the case of a defendant who has been arrested and charged by complaint, the indictment date would control. In the case of a defendant who has not been formally charged except by indictment, the date of the first appearance before the judicial officer would control. For the Speedy Trial Act to apply, an appearance before a judicial officer must be in the charging district.⁹

In the event of a dismissal occasioned by the defendant and a subsequent re-indictment and prosecution on the same charge, the 70-day clock begins to run anew.¹⁰ However, a dismissal by the prosecution stops the speedy trial clock only during the period in which no indictment is pending, and begins again upon the filing of the second indictment.¹¹ In the event of a mistrial or an order for new trial, the second trial must begin within 70 days of the order granting mistrial or mandate for new trial.¹²

Defense Preparation Period

Unless waived in writing by the defendant, the act provides a 30-day period to allow the defendant adequate time to prepare for trial.¹³ The 30-day period begins on the date that the defendant first appears with counsel. In the event of a superseding indictment, the defendant is not entitled to an additional 30-day preparation period unless the charge is materially altered or new defendants are added.¹⁴

Excluded Periods of Delay

Certain periods of delay are excluded when computing the time within which the trial of an accused must commence under the Speedy Trial Act.¹⁵ Any such delay will stop the speedy trial clock.

The exclusions are numerous. They include: (a) delay from examinations to determine the mental or physical capacity of the defendant; (b) delay from examination of defendants addicted to drugs; (c) delay resulting from deferral of prosecution of drug addicts during treatment; (d) delay due to the trial of the defendant on other charges; (e) delay due to an interlocutory appeal; (f) delay resulting from the filing of pretrial motions; (g) delay resulting from transfer or removal of the defendant from another district; (h) delay resulting from transportation of a defendant from another district or to and from places of examination or hospitalization;

(i) delay while the court considers a plea agreement; (j) delay (not to exceed 30 days) while the court considers proceedings taken under advisement;¹⁶ (k) delay resulting from deferred prosecution while the defendant demonstrates good behavior; (l) delay due to the unavailability of the defendant or an essential witness; (m) delay due to defendant's mental or physical inability to stand trial; (n) delay during treatment of a drug addicted defendant; (o) delay caused by re-indictment after dismissal of original charge; (p) delay resulting from joinder with codefendant whose time for trial has not run; (q) delay resulting from a continuance; and (r) delay (not to exceed one year) due to request for evidence in a foreign country.¹⁷

Most appellate cases dealing with the

application of excluded time involve issues of pretrial motion delay, multiple defendants, and continuances.

Pretrial Motions

Pursuant to Title 18 U.S.C. § 3161(h)(1)(F), delay resulting from any pretrial motion, from the filing of the motion through the conclusion of the hearing or other prompt disposition of such motion, is excluded from speedy trial calculations. Such delay need not be "reasonable" and may stop the speedy trial clock indefinitely.¹⁸ This section applies with equal force to motions or requests made by the prosecution.¹⁹

Multiple Defendant Cases

Under Title 18 U.S.C. §3161(h)(7), a rea-

sonable period of delay is excluded from the speedy trial computation when the defendant is joined for trial with a codefendant as to whom the time for trial has not run and no motion for severance has been granted. In essence, defendants who are joined for trial generally fall within the speedy trial computation of the last defendant to appear.²⁰ For example, if one jointly indicted defendant is arrested and appears before a judicial officer in the charging district and his codefendant is apprehended and appears two weeks later, the last defendant's appearance date controls. In addition, the pretrial motion of one defendant stops the speedy trial clock as to all codefendants.²¹

Continuances

Title 18 U.S.C. §3161(h)(8) permits the exclusion of periods of delay which are the result of the granting of a continuance when the court determines that the ends of justice served by the granting of a continuance outweigh the best interests of the public and the defendant in a speedy trial. However, delay due to a continuance is not automatically excluded. For a continuance delay to stop the speedy trial clock, the court must find that the ends of justice served by granting the continuance outweigh the best interests of the public and the defendant in a speedy trial.²² The act sets out the factors which may justify an "ends of justice" continuance.²³ The court must articulate at least one of the statutory factors to stop speedy trial.²⁴ The court's finding must be made at the time the continuance is granted. *Nunc pro tunc* findings are not sufficient.²⁵ Delay occasioned by a continuance may not be excluded if such continuance is granted due to the general congestion of the docket, lack of diligent preparation, or failure to obtain an available witness on the part of the prosecution.²⁶

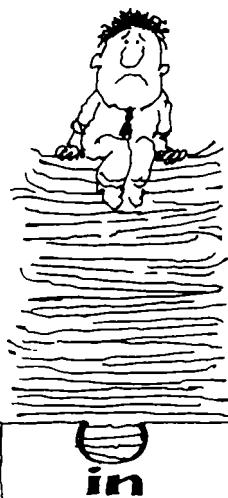
The Fifth Circuit has held that the provisions of the act may not be waived.²⁷ This holding may at first seem inconsistent with other cases in which a criminal defendant has been permitted to waive statutory and constitutional rights. However, the Speedy Trial Act is intended to protect both the defendant from unreasonable delay and to benefit the public by ensuring that criminal matters are resolved expeditiously. It may not be unilaterally waived.

In matters of administration of the Speedy Trial Act, lower court findings of fact are reviewed under the clearly erroneous standard, while conclusions of law are reviewed de novo.²⁸

Sanctions for Failure to Comply

The sanctions for failure to comply with the provisions of the Speedy Trial Act are found in Title 18 U.S.C. §3162(a)(1)²⁹ and

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Title 18 U.S.C. §3162(a)(2).³⁰ Failure to comply with the provisions of the Speedy Trial Act usually mandates dismissal of the charge, although a defendant who induces the court to misapply the provisions of the act may not thereafter rely upon the error to seek dismissal.³¹

Dismissals may be with or without prejudice.³² The act provides certain factors which the court must consider prior to dismissal with or without prejudice.³³ Dismissals with prejudice are rare.³⁴ In *U.S. v. Taylor*,³⁵ the U.S. Supreme Court held that the trial court abused its discretion when it failed to examine each statutory factor and explain the factors relied upon in arriving at a decision to dismiss a case with prejudice.

In addition to dismissal, sanctions against an offending attorney may be imposed for knowingly allowing a case to be set for trial without disclosing to the court the fact that a necessary witness would be unavailable, filing a frivolous motion for purposes of delay, making a false statement for the purpose of obtaining a continuance, or any willful failure to comply with the provisions of the act.³⁶

Conclusion

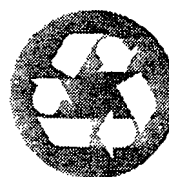
Because of its many exceptions, the Speedy Trial Act requires close scrutiny by defense and prosecution. Few complicated multiple defendant cases will be disposed of within 70 days of indictment. However, there is no reason why single defendant cases with few novelties could not be resolved within the time limits provided.

The Speedy Trial Act provides adequate flexibility in individual cases while protecting the interests of the public and the accused in the speedy administration of justice.

1. *Barker v. Wingo*, 92 S.Ct. 2182 (1972).
2. *Speedy Trial Act of 1974*, Pub.L.No. 93-619, 88 Stat. 2076, 93rd Cong., S. 754 (1975).
3. Fed. R. Crim. P. 3.
4. 18 U.S.C. §3161(b)(1988). Any information or indictment charging an individual with the commission of an offense shall be filed within 30 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 30-day period, the period of time for filing of the indictment shall be extended an additional 30 days.
5. *U.S. v. Charles*, 883 F.2d 355 (5th Cir. 1989).
6. *U.S. v. Hausman*, 894 F.2d 686 (5th Cir. 1990); *U.S. v. Johnson*, 815 F.2d 309 (5th Cir. 1987).
7. *U.S. v. Walker*, 856 F.2d 26 (5th Cir. 1985).
8. 18 U.S.C. 3161(c)(1)(1988). In any case in which a plea of not guilty is entered, the trial of a defendant charged in an information or indictment with the commission of an offense shall commence within 70 days from

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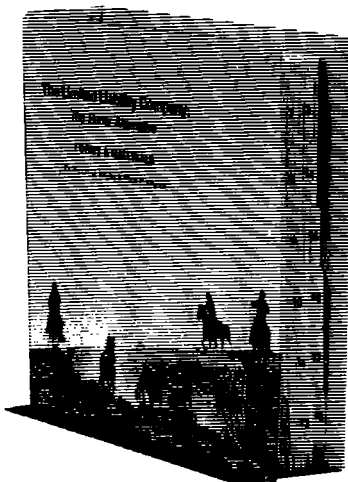
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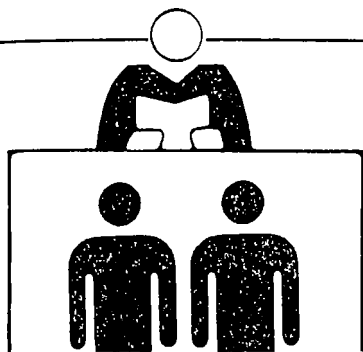
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the filing date (and making public) of the information or indictment, or from the date the defendant has appeared before a judicial officer of the court in which such charge is pending, whichever date last occurs. If a defendant consents in writing to be tried before a magistrate on a complaint, the trial shall commence within 70 days from the date of such consent.

9. *U.S. v. Helms*, 897 F.2d 1293 (5th Cir. 1990); *U.S. v. Wilson*, 720 F.2d 608 (9th Cir. 1983).
10. 18 U.S.C. §3161(d)(1)(1988); *U.S. v. Magana-Olvera*, 917 F.2d 401 (9th Cir. 1990); *U.S. v. Page*, 854 F.2d 293 (8th Cir. 1988).
11. 18 U.S.C. §3161(h)(6)(1988); *U.S. v. Roman*, 822 F.2d 261 (2nd Cir. 1987).
12. 18 U.S.C. §3161(e)(1988).
13. *Id.* at §3161(2). Unless the defendant consents in writing to the contrary, the trial shall not commence less than 30 days from the date on which the defendant first appears through counsel or expressly waives counsel and elects to proceed pro se.
14. *U.S. v. Rojas-Contreras*, 106 S.Ct. 555 (1985); *U.S. v. Bigler*, 810 F.2d 1317 (5th Cir. 1987).
15. 18 U.S.C. §§3161(h)(1)-(9)(1988).
16. *Id.* at §§3161(h)(1)(A)-(J).
17. *Id.* at §§3161(h)(2)-(9).
18. *Henderson v. U.S.*, 106 S.Ct. 1871 (1986); *U.S. v. Kingston*, 875 F.2d 1091 (5th Cir. 1989).
19. *U.S. v. Walker*, No. 91-8423 (5th Cir. April 24, 1992)(motion by prosecution to continue hearings on defense motions); *see also U.S. v. Santovo*, 890 F.2d 726 (5th Cir. 1989)(Speedy Trial Act was stopped by the government's written demand for notice of alibi until the defendant filed a written response).
20. *U.S. v. Welch*, 810 F.2d 485 (5th Cir. 1987); *U.S. v. Helms*, 897 F.2d 1293 (5th Cir. 1990); *U.S. v. Darby*, 744 F.2d 1508 (11th Cir. 1984)(when the clock stops for one defendant, generally it stops for all defendants); *see also U.S. v. Noriega*, 746 F.Supp. 1548 (S.D.Fla. 1990)(under the Speedy Trial Act, delay attributable to one defendant is excludable not only as to him but also to his codefendant, subject to requirement that delay be reasonable).
21. *U.S. v. Campbell*, 706 F.2d 1138 (11th Cir. 1983).
22. 18 U.S.C. §3161(h)(8)(A)(1988).
23. *Id.* at §§3161(h)(8)(B)(i)-(iv).
24. *U.S. v. Ortega-Mena*, 949 F.2d 156 (5th Cir. 1991).
25. *U.S. v. Tanner*, 941 F.2d 574 (7th Cir. 1991); *U.S. v. Richmond*, 735 F.2d 208 (6th Cir. 1984).
26. 18 U.S.C. §3161(h)(8)(C)(1988).
27. *U.S. v. Willis*, 958 F.2d 60 (5th Cir. 1992).
28. 949 F.2d 156 (5th Cir. 1991).
29. 18 U.S.C. §3162(a)(1)(1988). If, in the case of any individual against whom a complaint is filed charging such individual with an offense, no indictment or information is filed within the time limit required by §3161(b) as extended by §3161(h) of this chapter, such charge against that individual contained in such complaint shall be dismissed or otherwise dropped. In determining whether to dismiss the case with or without prejudice, the court shall consider, among others, each of the following factors: the seriousness of the offense; the facts and circumstances of the case which led to the dismissal; and the impact of a re-prosecution on the administration of this chapter and on the administration of justice.
30. *Id.* at §3162(a)(2). If a defendant is not brought to trial within the time limit required by §3161(c)(1) as extended by §3161(h), the information or indictment shall be dismissed on motion of the defendant. The defendant shall have the burden of proof of supporting such motion, but the government shall have the burden of going forward with the evidence in connection with any exclusion of time under subparagraph 3161(h)(3). In determining whether to dismiss the case with or without prejudice, the court shall consider, among others, each of the following factors: the seriousness of the offense; the facts and circumstances of the case which led to the dismissal; and the impact of a re-prosecution on the administration of this chapter and on the administration of justice. Failure 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.
31. *U.S. v. Eakes*, 783 F.2d 499 (5th Cir. 1986); *see also U.S. v. Willis*, 958 F.2d 60, 64 (5th Cir. 1992): In short, we hold that dismissal of an indictment is inappropriate when a defendant requests a continuance under an erroneous interpretation or application of one of the Act's provisions and the district court simply errs in its application of the Act to the defendant's request. In those cases, as in *Eakes*, we will look to the circumstances surrounding the continuance and ask whether the district court could have granted a §3161(h)(8) continuance. Dismissal will be appropriate where the district court grants a continuance based solely upon the defendant's "waiver" without identifying an applicable exception or performing an ends of justice analysis under §3161(h)(8).
32. *U.S. v. Giawa*, 831 F.2d 538 (5th Cir. 1987).
33. 18 U.S.C. §3161(a)(2)(1988).
34. For cases holding dismissal with prejudice was proper, *see U.S. Angelini*, 553 F.Supp. 367 (D.C. Mass. 1982); *U.S. v. Russo*, 741 F.2d 1264 (11th Cir. 1984); *U.S. v. White*, 864 F.2d 660 (9th Cir. 1989).
35. 108 S.Ct. 2413 (1988).
36. 18 U.S.C. §3162(b)(1988).



Louis Guirola, Jr. is a U.S. Magistrate in the Western District of Texas. He is a 1979 graduate of the University of Mississippi Law School. Guirola was formerly the lead assistant U.S. attorney for the Organized Crime and Drug Enforcement Task Force in the Eastern District of Texas.



Practicum

Special section for the courtroom expert

Court Rules Have Limits

How New Jersey's Speedy Trial Program Is Meeting with Success

The New Jersey Statewide Speedy Criminal Trial Program, begun in 1981, has cut almost in half the median time from complaint to disposition, from twelve months down to seven. By itself seven months is not an accomplishment to draw much attention, but it is a significant improvement. The program continues, and we expect to see further reduction in processing time.

The New Jersey program faced several basic questions at its start:

- Can Speedy Trial be accomplished without significant new resources?
- Can it succeed in the face of a sizable existing backlog?
- Can the judiciary get the cooperation of the other major actors in criminal case processing, especially the prosecutors and public defenders, without using ultimate sanctions such as "try or dismiss" or "try or release" rules? The answers to these three questions set the tone of New Jersey's Speedy Trial program.

Can Speedy Trial go forward without major new investments in more prosecutors, public defenders,

By Robert D. Lipscher



Robert D. Lipscher
is the administrative
director of the courts,
State of New Jersey

judges, and other support personnel? In New Jersey, the decision came early not to seek new resources without first testing the limits of the existing resources. With better communication among the participants and some adjustments in procedures, together with very strong statewide leadership and commitment, the hope had been that the system's productivity could grow. Only when present resources are stretched to their capacity would new resources be sought.

How could the program deal with the existing backlog? There would never be a time to start a program such as this one on a clean slate. In the New Jersey effort, the focus has been on applying strict time goals to new cases while working on a gradual, multi-year reduction of the backlog. The program's flexible approach to backlog reduction, at the same time that it challenges the system to meet time goals for new cases, has made it possible to undertake both efforts simultaneously.

Finally, how should the judiciary secure the cooperation of the prosecutors and public defenders? We have found that open lines of communication, and the development of a process that involves prosecutors and public defenders in policy decisions at both state and local levels, have built cooperation and established consensus on major program goals. At the state level, a Speedy Trial Coordinating Committee chaired by the chief justice has included the attorney general and public defender, and local planning committees include the assignment judge, prosecutor, and regional public defender. The way has not always been easy, but the major goal of case expedition is beneficial to both prosecution and defense—defense because the defendants suffer from delay in terms of pretrial detention, uncertainty, and insecurity. With a broad-based effort, the New Jersey Speedy Trial program has to a great degree won their participation.

This approach has increased credibility with others in the justice system and—because it involved judges, prosecutors, public defenders, sheriffs, private attorneys, and others in every county in the state—brought about the release of previously untapped energy and initiative. An approach based exclusively on threats of sanctions and one which flowed only from a small group of rulemakers as opposed to this broad-based effort might have had a much different effect and a different outcome. It might have hardened the lines of communication we sought to use, or it might have stifled local creativity and problem-solving capacity. The time may come for heavier reliance on sanctions in the future but only after all these other avenues have been thoroughly explored.

The New Jersey System. The criminal case process in New Jersey is multi-leveled, complex, and delay-prone. The trial court of general jurisdiction, the superior court, has jurisdiction over all serious criminal offenses, but the cases come to superior court indictment only after municipal court processing and grand jury action. Municipal courts, of which there are 529 in the state, take complaints, hold initial appearances, set bail, and optionally conduct probable cause hearings. Public defenders seldom appear at the municipal court level but enter the case thereafter. The county prosecutor's office screens the cases and decides whether to press for indictment or to downgrade the charge back to the municipal court jurisdiction. Following presentment to the grand jury and indictment, the superior court receives the case, holds arraignments, and determines pretrial diversion appeals. As can be seen, the process involves several major steps, many potential detours, and considerable opportunities for delay.

The rule-making authority in New Jersey is broad. The supreme court has rule-making power "governing the administration of all courts in the state and, subject to the law, the practice and procedure in all such courts" (Constitution, Article VI, Section 2). In addition, the Constitution makes the chief justice the "administrative head of all the courts in the State" (Article VI, Section 7). These two provisions enable the chief justice and the supreme court to exercise rule-making power whenever necessary.

Also, the process of rule-making in New Jersey is straightforward. Once the court has determined the need for a certain rule through a hearing or a report with recommendations or on its own action, it may develop and promulgate the rule for review (traditionally at an annual judicial conference) and adoption.

During the 1970s New Jersey had flirted with Speedy Trial but did not commit itself to a program. Expectations of large additional costs combined with shrinking public resources stilled the initiative. Inaction, of course, contributed further to case backlogs as delays mounted. By 1980, the backlog stood at an all-time high. The median time from indictment to trial was more than nine months, plus almost three months more from arrest to indictment for a total of over a year. Nearly 30,000 defendants had indictments pending against them, and in addition over half that number were awaiting indictment.

Given these circumstances, there were those who wondered how New Jersey could deal with the next year's caseload successfully within existing resources, let alone consider Speedy Trial. Yet Chief Justice

Criminal case delay had systemic origins that could not be overcome by rules alone

Robert N. Wilentz, then in his first year as chief justice, made the reduction of criminal delay his first program priority at the start of 1980.

There are similarities between New Jersey's speedy trial program and the federal program enacted by Congress in 1974 (P.L. 93-619). Both programs included local planning efforts and set forth a phased schedule of time goals. Significant differences are worth noting, however. New Jersey's program was shaped by the Judiciary and not the legislative branch, and the time goals are intended to apply only to non-exceptional cases; cases exceeding the goals need not be dismissed. Also, New Jersey's program has the strong leadership of the chief justice and other judicial leaders. The leadership, combined with the flexibility of the program goals, has increased New Jersey's success.

Demonstration Projects. The first step, once the supreme court commitment had been made, was to demonstrate that criminal case processing time could be reduced. The demonstration projects proved that expeditious case processing lay in the hands of those who could exercise internal initiative and was not wholly dependent upon legislation or outside resources. The theory was that if initial results could be shown in pilot projects basically through improved management techniques, the pessimists would lose their most telling argument—that the system's built-in delays were insurmountable without additional resources or legislative mandate. Demonstration projects, mounted in Passaic and Union counties by February 1980, brought forth early and very favorable results by June.

Some very basic and generally known (but then unused) management ideas were tested and proven viable in these pilot projects. These management techniques included early judicial controls, strong case management and monitoring of the progress of cases by the judges, early review and screening of criminal cases, adherence to scheduling orders with time goals that are flexible according to the complexity of each case, and assurance that at the completion of one event, the next is scheduled.

The success of the pilot programs shifted the initiative. Those who thought that Speedy Trial was impossible were forced to question why others could not also do as well as the demonstration sites. The conclusion was inescapable that if the attitude and the energies of the criminal justice personnel could be directed to delay reduction, remarkable results could be achieved—without more money, implementing legislation, or indeed even rule changes.

Consensus Building. At the same time that the de-

monstration projects were being carried out, planning began for the annual Judicial Conference, a statewide gathering of judges, attorneys, government officials, and others which by tradition had been used for the discussion of rule changes, rather than program development. In 1980, however, the conference was dedicated exclusively to Speedy Trial, a statement of its great importance, since never before had a Judicial Conference been devoted exclusively to one subject.

To prepare for the conference, statewide planning committees of prosecutors, public defenders, judges, academics, and members of the private bar met to prepare recommendations for the program. At the conference, almost 500 persons—county officials, prosecutors, key legislators, public defenders, judges, and other opinion leaders—considered the prospects for the Speedy Trial program. They reviewed the positive results of the demonstration projects, received the program recommendations of the planning groups, and listened to the urging of national experts who exhorted New Jersey to meet the challenge before it. All of the material led convincingly to the conclusion that New Jersey could and should embark on a statewide Speedy Trial program. An unspoken but very real consensus of the Judicial Conference became the springboard for the actual Speedy Trial program.

Local Planning. To translate this general consensus into an action program on a statewide basis probably was the most crucial step in the story of New Jersey's Speedy Trial program. Traditionally in New Jersey, and probably in other states as well, the next step might have been simply to promulgate a set of rules establishing time frames for Speedy Trial in the hope that the program somehow would be self-executing. Perhaps the court could have "ordered" Speedy Trial into effect through rule promulgation with sanctions, at least on paper, but experience gave no confidence that results could be achieved without hands-on management.

We had enough indication that criminal case delays in New Jersey had systemic origins that could not be overcome by rules alone. It required day-to-day management attention and cooperation from every element of the system to conquer. Changing attitudes would be as important as changing rules. It was psychologically important, therefore, that the program not be rammed down anyone's throat but rather be developed with consultation.

In order to accomplish this, the main focus of the next stage was planning at the county level rather than statewide rules. The local planning procedures called

(Please turn to page 55)

efficiency and management goals over considerations of fairness.¹¹

Unreviewable power, casual contact, and interest in outcome (or in aggregate outcomes) have not traditionally been associated with the "due process" decision-making model. These features do not evoke images of reasoned adjudication, images that form the very basis of both our faith in the judicial process and our enormous grant of power to judges. The literature of managerial judges refers only occasionally to the values of due process: the accuracy of decision making, the adequacy of reasoning, and the quality of adjudication. Instead, commentators and training sessions for trial judges emphasize speed, court control, and quantity. Federal trial judges boast of the number of cases terminated, the number of arguments held, the number of motions decided. The accumulation of such data may cause—or reflect—a subtle shift in the values that shape the judiciary's comprehension of its own mission.

Case processing is no longer viewed as a means to an end; instead, it appears to have become the desired goal. Quantity has become all important; quality is occasionally mentioned and then ignored. Some commentators regard deliberation and the writing of opinions as an obstacle to efficiency. Proponents of management may be forgetting the quintessential judicial obligations of conducting a reasoned inquiry, articulating the reasons for decision, and subjecting those reasons to appellate review—characteristics that have long defined judging and distinguished it from other tasks.

CONCLUSION

I argue for reflection before we plunge headlong into judicial management. I do not mean to suggest that adjudication must be frozen into earlier forms or that more efficient decisionmaking is an unworthy aim. Rather, as we reorient the judicial system to accommodate contemporary demands, I believe that we should preserve the core of adjudication.

To help judges remain impartial, we should design rules to limit the flow of untested information to them. To ensure that judges have the patience for deliberation, we should refrain from giving them too many distracting new responsibilities. To hold judges accountable for the quality—not merely the quantity—of their actions, we should require them to act in public and to state reasons for their decisions. In sum, we should not simply embrace the new management ethic; we must think carefully about what role judges

should take and then craft rules to enable judges to act accordingly.

1. The focus of this discussion is on the changing role of federal judges. Many of the comments, however, are also pertinent to judicial management in state courts.

2. The United States Supreme Court promulgated amendments to Rule 16 and to other federal rules and those amendments became effective in August of 1983. See Federal Rules of Civil Procedure, 97 F.R.D. 165 (April 1983). [Hereinafter referred to as "Amendments."]

3. See P. EBENER, COURT EFFORTS TO REDUCE PRETRIAL DELAY (1981).

4. See, e.g., Peckham, *The Federal Judge as a Case Manager: The New Role in Guiding a Case from Filing to Disposition*, 69 CALIF. L. REV. 770 (1981); Brazil, *Improving Judicial Controls Over the Pretrial Development of Civil Actions: Rules for Case Management and Sanctions*, 1981 A.B.F. RES. J. 875.

5. ADMINISTRATIVE OFFICE OF UNITED STATES, 1980 ANNUAL REPORT OF DIRECTOR 81.

6. See, e.g., J. ADLER, W. FELSTINER, D. HENSLEY & M. PETERSON, THE PACE OF LITIGATION: CONFERENCE PROCEEDINGS (1982).

7. Compare Church, *Civil Case Delay in State Trial Courts*, 4 JUST. SYS. J. 166, 181 (1978) with Grossman, Kritzer, Bumiller, & McDougal, *Measuring the Pace of Civil Litigation in Federal and State Trial Courts*, 65 JUDICATURE 86 (1981). One social scientist stated: "[w]riting on court delay is voluminous, but much of it might simply be termed inspirational." Lusk, *Building a Theory of Case Processing Time*, 62 JUDICATURE 115, 117 (1978).

8. See, e.g., Flanders, *Case Management in Federal Courts: Some Controversies and Some Results*, 4 JUST. SYS. J. 147, 161 (1978) (Study of six federal district courts revealed that the court "with the strongest and most vigorous settlement role has the fewest civil terminations per judgeships per year."). But see Kritzer, *The Judge's Role in Pretrial Case Processing: Assessing the Need for Change*, 66 JUDICATURE 28, 35-36 (1982) (noting some evidence to suggest settlement activities speed case dispositions); Church, *The "Old and the New" Conventional Wisdom of Court Delay*, 7 JUST. SYS. J. 395, 399-405 (1982) (rudimentary empirical studies indicate that case management systems contribute to speedier case processing).

9. See, e.g., the Advisory Committee Note to F.R. Civ. P. 16, in which the Advisory Committee claims:

"Empirical studies reveal that when a trial judge intervenes personally at an early stage to assume judicial control over a case and to schedule dates for completion by the parties of the principal pretrial steps, the case is disposed of by settlement or trial more efficiently and with less cost and delay than when the parties are left to their own devices."—Amendments, *supra* note 2, at 20.

10. The one study cited by the Advisory Committee for the proposition that early judicial management "works" was conducted by Flanders et al., *CASE MANAGEMENT AND COURT MANAGEMENT IN THE UNITED STATES DISTRICT COURTS* (Federal Judicial Center, 1977). That study did not investigate the costs either to courts or to litigants of different processing methods or the impact of management on the outcome of cases. As a consequence, the Flanders study can tell us little about whether judicial management saves or wastes dollars.

11. See, e.g., *Beary v. City of Rye*, 601 F.2d 62 (2d Cir. 1979) (reversal of trial judge's dismissal of lawsuit after denying plaintiff's request for a brief continuance); *McCargo v. Hedrick*, 545 F.2d 393 (4th Cir. 1976) (magistrate insistence on deadlines unduly burdened litigants).

Lipsher

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for a group of judges, prosecutors, defenders, and others to work together on a systematic examination of their procedures and informal understandings to

achieve statewide Speedy Trial goals. The structure of these local planning procedures was consistent throughout the state. Within a prescribed framework, there was substantial opportunity for local groups to develop their own solutions so that they did not feel straitjacketed.

Local problem-solving and innovation were key characteristics of the endeavor. The time frame goals were set by consensus. They show a phased effort to reduce time from arrest to disposition to 135 days in cases where the defendant is not held in jail, and to 90 days where the defendant is jailed. The time goals applied to all but exceptional cases; clearly exceptional cases are not subject to the same goals as the great majority, and as an informal yardstick the expectation has been that as many as 20 percent of all criminal cases will exceed the stated goals. Those cases were subjected to individual treatment by the court as appropriate, including scheduling orders, status conferences, and special hearings or briefs.

These time-frames were not applicable to the existing backlog of cases. In considering how to launch the program, the supreme court decided that the time goals should apply only to new cases; the backlog was to be eliminated gradually over a period of three years.

Rule Changes. The framework the supreme court provided for county-level planning consisted of two important rule changes: mandatory in-court arraignment and predisposition conferences. These needed rules gave judges additional control over the criminal process at its beginning and prior to trial. The importance of these rules lies mainly in their use as management tools. By requiring an appearance at a formal arraignment, the superior court judge can insure that early case processing steps have been taken: identification of defense counsel, applications to diversion programs, exchange of discovery, identification of possible fugitive problems, and the scheduling of future events (*R. 3:9-1*, as amended). Later, in the time prior to trial, a mandatory pretrial conference provides a forum for plea-negotiations in advance of trial, thus making trial scheduling more certain (*R. 3:13-1*, as amended).

These were the only rule changes of the Speedy Trial program. Obviously, they were case management techniques, not traditional Speedy Trial rules. By themselves, they might have created even more delay, because they call for additional court events and add greater complexity to the system. However, by using the events as mechanisms for case management and oversight, and by combining them with a comprehensive review of informal procedures and accommodations of the case processing system, they have contributed a great deal to Speedy Trial. Most important, they could not have made a major difference without the total program.

Participatory Management. The real Speedy Trial program was filled in at the local level within the framework of these two new rules. While each planning group evolved its own style, the one overarching element common to all was the use of participatory management. While judges chaired the county committees, they could not command results but had to work out solutions with and through the other members. This participatory style was often strange to judges trained in a different milieu and accustomed to

command, not consensus. It was strange also for natural courtroom adversaries, because prideful lions and stalking tigers were asked to come together to agree on system changes. As a result, the local planning group process had difficult moments—so much so that the Chief Justice and other state judicial leaders would not have been unreasonable to have had second thoughts about the process. Fortunately, they did not.

Ultimately, the process righted itself and led first to the identification and solution of problems that could not have been achieved in any other way. Second, it led to the stitching together of the first approximation of a criminal justice *system* which New Jersey has seen, involving public defenders, prosecutors, sheriffs, police, private bar, and others.

During the last quarter of 1980, the county groups prepared and submitted their own Speedy Trial plans to the supreme court for approval. The plans were undramatic and common-sensical—but very necessary. They demonstrated the capacity for innovation which had lain untapped throughout the state. There is no opportunity here to detail the specific innovations, and they probably have only local significance. But more than the product, it was the process that released hidden energy and problem-solving ability. Participatory management permitted those who knew most about their problems to have a go at identifying and solving them.

At the end of this process, we found that to begin solving most problems did not require more money, more manpower, or new rules—just common sense, cooperation, and commitment.

The First Year. The year of 1980 showed truly remarkable progress. From the public announcement in January of the intention to pursue Speedy Trial, the judiciary moved quickly to statewide committee study and demonstration projects. Next was the Judicial Conference, the program framework, and the decision to embrace local planning. Then the detailed local efforts produced action plans by the end of the year. January 1, 1981, marked the official beginning of the state's Speedy Trial program.

The program centered, of course, in the counties. The local plans were implemented, assisted by statewide technical assistance from the Administrative Office of the Courts. Within the counties, procedures for transfer of documents, scheduling of events, assignment of counsel, and the rest were set in motion without a great deal of fanfare.

It is important to note that serious problems persisted. Many such problems arose from turf battles, from the fear of the prosecutors that the court's need to manage cases would interfere with their traditional prerogatives, and from the concern of the public defenders that their cooperation could lead to a conflict with their criminal defense duties. Obviously these are major institutional matters, but the groups have found enough common ground to proceed toward the shared goal of expeditious justice.

By the end of the first year, New Jersey had sub-

stantially met the Phase One goals. Median time of trial had dropped dramatically, from almost twelve months to only seven months for all cases (1981 Speedy Trial cases and prespeedy trial cases). Concerning adherence to the time span goals of Phase One, the best available data show that more than 70 percent of Speedy Trial dispositions met the goals, about double the percentage of dispositions that met those same goals during the previous year. With this demonstration of progress, the legislature provided a \$500,000 appropriation to be channeled through the Speedy Trial Coordinating Committee to reduce the existing backlog of criminal cases. These funds were committed to four counties with the most serious backlog problems.

The Prospects. The first year results were gratifying. But the problems that remain are, if anything, as difficult as those first encountered. Solutions bring on new problems. It became clear, for example, that the trial court's internal structure was inadequate to deal with the rapid pace demanded of it. We are now moving rapidly to restructure the entire criminal court support staff to eliminate existing overlaps and delay points in pretrial court processing. Central intake units are being formed in each county, and procedures are being developed to apply a universal intake format throughout the state. Criminal presiding judges with enhanced

authority are being appointed and trained. Case managers are being appointed to assist them. Computerization is moving quickly ahead to allow improved case tracking and management review. And new procedures are being considered to promote early case disposition—again, without coercion or inflexible mandates.

New Jersey is now at the halfway point in its Speedy Trial Program. We have seen good results since 1980, and the criminal case processing system is substantially different in all counties from what it was then. Yet achievement of the overall time goals continues to require strong leadership, massive effort, coordination, improved management and continued cooperation. The mid-1983 figures for median age of Speedy Trial cases, from arrest to disposition, is 168 days for cases resulting in a plea, and 240 days for cases going to trial.

We have made real advances thus far in the program. By forcing ourselves and the rest of the criminal justice system to make improvements without new resources, we have established greater cooperation among the various offices, released previously untapped energy, and developed local initiative. Most important, we have brought to the system a greater credibility and a greater accountability to the public than it had before. With all of these benefits, we remain determined to meet all Speedy Trial goals. 

Myers

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easy to administer uniformly, not all judges are willing to comply. Some are arbitrary, and some are unwilling to follow the guidelines.

Because most of the 35 to 50 judges *pro tempore* have as much or more trial experience than many of the regular judges, attorneys often prefer to try cases before a *pro tem* judge. The *pro tem* judge only has one case to worry about, and is more willing to start early and work late than the regular judges (who are often concerned that staff work only seven and one-half hours a day). However, the *pro tem* participants frequently have to hunt for an unused courtroom, moving from courtroom to courtroom daily (or more than once per day), and usually have to hunt for a court reporter and clerk. Much time can be wasted, but generally the benefits outweigh the delays encountered.

RECOMMENDATIONS

Some recommendations for improving this system include:

1. A master calendar clerk or computerized system should be instituted to ensure that no lawyer would be assigned a trial date in conflict with another of his or her trials. Perhaps conferences between court and counsel before trial dates are selected would be suffi-

cient to resolve trial conflicts.

2. Discovery, especially in the smaller case, seems to be abused because of the fear of not being prepared. Defense counsel, especially, appear to be deposing excessively. Perhaps a discovery schedule and limitation on the number of depositions is in order, with additional discovery permitted at the trial judge's discretion for good cause.

3. When *pro tem* judges are used, more effort needs to be given to obtaining—well in advance—the courtroom, the clerk, and the court reporter. Too much time seems to be wasted during the day of trial in “running around” or waiting for the logistical arrangements to be made. Although the presiding judge's office does its best, better advance planning might avoid much delay.

In conclusion, most Maricopa County trial lawyers believe our delay reduction system is beneficial to litigants, counsel, and the court system. As with any major court system in America today, ours is not without problems. Certainly, use of *pro tem* judges and adequate support staff adds expense to the court's budget. However, earlier trial dates and the substantial likelihood that the trial will commence as initially set undoubtedly reduce overall court system expenses, because cases will not be in the system as long. Cases settle sooner because of the pressure of an early trial or are tried within 12 to 18 months of filing. Most importantly, the rapid trial dates and short life of most cases benefit clients—and therefore their attorneys. 

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FOUR FACES OF STATE CONSTITUTIONAL SEPARATION OF POWERS: CHALLENGES TO SPEEDY TRIAL AND SPEEDY DISPOSITION PROVISIONS

Neil C. McCabe*

INTRODUCTION

In recent years, separation of powers has become a major theoretical battleground embroiling the three branches of the federal government. The federal courts have decided questions about the constitutionality of such provisions as the Federal Speedy Trial Act ("FSTA"),¹ the federal sentencing guidelines,² the one-house congressional override of administrative agency action³ (otherwise known as the legislative veto⁴), the Balanced Budget Act,⁵ and the independent counsel (special prosecutor) provision.⁶

Less noticed has been a similar struggle at the state level, which predated the burst of activity in the federal courts. For example, before the United States Supreme Court considered the congressional veto, state courts⁷ and state attorneys general⁸ had addressed the question of the constitutionality of the state

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1. See *United States v. Brainer*, 691 F.2d 691, 695 (4th Cir. 1982) (Speedy Trial Act constitutional); 18 U.S.C. §§ 3161-3174 (1982 & Supp. IV 1986).

2. See *Mistretta v. United States*, 57 U.S.L.W. 4102, 4107-16 (U.S. Jan. 18, 1989) (federal sentencing guidelines constitutional); UNITED STATES SENTENCING COMMISSION GUIDELINES MANUAL (June 15, 1988).

3. See *Immigration and Naturalization Serv. v. Chadha*, 462 U.S. 919, 959 (1983) (one-house Congressional override contained within Immigration and Nationality Act held unconstitutional). But see *Leiserson, Separation of Powers: A New Approach*, 22 GONZ. L. REV. 423, 477 (1987-88) *Chadha* "says that separation of powers has been violated but makes the decision turn on the constitutional procedures for valid legislative action by Congress, which is not a separation of powers issue at all."

4. Schwartz, *The Legislative Veto and the Constitution—A Reexamination*, 46 GEO. WASH. L. REV. 351, 351 n.3 (1978) (identifying first use of term).

5. See *Bowsher v. Synar*, 478 U.S. 714, 736 (1988) (Court held powers vested in Comptroller General under Balanced Budget Act violated command of Constitution). See also 2 U.S.C. §§ 901-907, 921-922 (Supp. IV 1986) (Balanced Budget Act).

6. See *Morrison v. Olson*, 108 S. Ct. 2597, 2622 (1988) (authority of independent counsel held constitutional). See also 28 U.S.C. §§ 591-598 (1982 and Supp. IV 1986) (independent counsel provision).

7. See *State v. A.L.I.V.E. Voluntary*, 606 P.2d 769, 777-79 (Alaska 1980) (statute providing for legislative veto held to violate state constitution); *Opinion of the Justices*, 121 N.H. 552, 558-59, 431 A.2d 783, 787 (1981) (legislative veto of rule-making authority of administrative agencies not *per se* unconstitutional); *General Assembly v. Byrne*, 90 N.J. 376, 388, 448 A.2d 438, 444 (N.J. 1982) (legislative veto unconstitutional); *State ex rel. Barker v. Manchin*, 279 S.E.2d 622, 634-35 (W. Va. 1981) (court held legislative veto violated separation of powers).

8. Schwartz, *supra* note 4, at 367 (two state attorneys general found legislative vetoes unconsti-

legislative veto.⁹

This article will focus on four aspects of a perceived conflict between state constitutional separation of powers principles and statutes or court rules providing for the speedy trial or speedy disposition of cases. The general development of state separation theory will be discussed,¹⁰ and decisions regarding the constitutionality of the FSTA will be examined to provide a basis for the analysis of state court opinions, some of which expressly rely on the FSTA cases.¹¹

The remainder of the article will investigate cases involving state speedy trial and speedy disposition acts or rules. Part A of that section will examine whether statutes mandating speedy decision making by the courts impermissibly encroach on the judicial power.¹² Part B will analyze the argument that a court's creation of a speedy trial rule unconstitutionally invades the legislative or executive realms.¹³ Part C will examine the claim that a speedy trial statute is an invalid legislative infringement on the power of the courts.¹⁴ Finally, Part D will assess the contention that a speedy trial provision is an unconstitutional intrusion on the prosecutor's power.¹⁵

I. THE BACKGROUND: HISTORY OF STATE SEPARATION OF POWERS

The state court cases in this area demonstrate an apparent conflict between notions of inherent and exclusive powers of the courts and prosecutors, on the one hand, and the theory of the plenary power of legislatures, on the other. "The view is frequently expressed that state legislatures have inherently all power not denied to them by state and national constitutions."¹⁶ That theory stems from the early history of state constitution making. Before the United

tional) (citing 42 Op. Att'y Gen. 350 (Wis. 1954); Letter from Michigan Att'y Gen. Frank G. Millard to Hon. Adrian de Boom (Dec. 17, 1953)).

9. See Levinson, *The Decline of the Legislative Veto: Federal/State Comparisons and Interactions*, 17 *Publius* 115, 124-27 (1987) (discussing cases).

10. See *infra* notes 16-74 and accompanying text for a discussion of the general development of state separation theory.

11. See *infra* notes 75-169 and accompanying text for a discussion of cases examining the constitutionality of FSTA.

12. See *infra* notes 170-216 and accompanying text for a discussion of state speedy disposition statutes.

13. See *infra* notes 217-39 and accompanying text for a discussion of court rules mandating speedy trials.

14. See *infra* notes 240-54 and accompanying text for a discussion of whether speedy trial acts impermissibly infringe on the power of the courts.

15. See *infra* notes 255-99 and accompanying text for a discussion of the effects speedy trial statutes have on the prosecutor's power.

16. Dodd, *The Function of a State Constitution*, 30 *POL. SCI. Q.* 201, 201 (1915). See also G. TARR & M. PORTER, *STATE SUPREME COURTS IN STATE AND NATION* 50 (1988) ("According to traditional legal theory, the state government inherently possesses all governmental power not ceded to the national government, and thus a state constitution does not grant governmental power but merely structures and limits it"); Williams, *State Constitutional Law Processes*, 24 *WM. & MARY L. REV.* 169, 178 (1983) ("State constitutions are usually contrasted with their federal counterpart by characterizing the former as limits on governmental power rather than grants of power. When the Union was formed, the states retained almost plenary governmental power exercised primarily by their legislatures.")

States Constitution was written, the original states, given their experience with King George III and the "bitter rivalry between governors and assemblies"¹⁷ in most but not all colonies,¹⁸ "reduced the governor to a cipher and vested most power in the legislature."¹⁹

All of the early state constitutions regarded separation of powers as "an article of faith"²⁰ and incorporated the theory in some form.²¹ Scholars have asserted, however, that those documents treated the separation principle as a "shibboleth"²² or a "slogan; it meant that power was to be separated from the executive and given to legislatures."²³ According to that view, the framers of the early state constitutions embraced a paradox:²⁴ they professed the principle of separation of powers but did not practice it.²⁵

17. A. KELLY & W. HARBISON, *THE AMERICAN CONSTITUTION: ITS ORIGIN AND DEVELOPMENT* 91 (5th ed. 1976).

18. Kay, *The Rule-Making Authority and Separation of Powers in Connecticut*, 8 *CONN. L. REV.* 1, 7 (1975). The article states: "Connecticut was one of two colonies in which the legislature, representing the interests of the colonists, was not in continued confrontation with a governor representing the colonial proprietors or the English crown." *Id.* (footnote omitted).

19. J.W. COWARD, *KENTUCKY IN THE NEW REPUBLIC: THE PROCESS OF CONSTITUTION MAKING* 2 (1979). Most of the state constitutions prior to 1787 took the anti-Federalist position. See Erler, *The Constitution and the Separation of Powers*, in *THE FRAMING AND RATIFICATION OF THE CONSTITUTION* 158 (1987) (states' failures to meaningfully separate powers concerned framers).

20. Howard, *"For the Common Benefit": Constitutional History in Virginia as a Casebook for the Modern Constitution-Maker*, 54 *VA. L. REV.* 816, 826 (1968) (by time of American Revolution, separation of powers became article of faith with Americans).

21. W.P. ADAMS, *THE FIRST AMERICAN CONSTITUTIONS: REPUBLICAN IDEOLOGY AND THE MAKING OF THE STATE CONSTITUTIONS IN THE REVOLUTIONARY ERA* 266 (1973) (separation of powers common to early state constitutions). Cf. Taylor, *Legislative Vetoes and the Massachusetts Separation of Powers Doctrine*, 13 *SUFFOLK U.L. REV.* 1, 5-6 (1979) (proposed Massachusetts constitution of 1778 rejected in part because it did not provide for separation of powers).

22. Blumoff, *Separation of Powers and the Origins of the Appointment Clause*, 37 *SYRACUSE L. REV.* 1037, 1045 (1987) (by 1776, separation of powers was shibboleth). See also Leiserson, *supra* note 3, at 423 ("separation of powers is to the Constitution what the Trinity is to Christianity"). Cf. Wright, *The Modern Separation of Powers: Would James Madison Have Untied Ulysses?* 18 *COLUM. L. REV.* 69, 72 (1987-88) (separation of powers not "totem").

23. Levi, *Some Aspects of Separation of Powers*, 76 *COLUM. L. REV.* 371, 374 (1976) (early separation of powers provisions used as means of controlling executive).

24. A similar paradox has been noted in recent proposals to change the federal constitution: If one makes a list of the most frequently proposed alterations in our constitutional arrangements, the odds are high that these proposals will call for a reduction in the separation of powers. . . . It is as if almost everybody were expressing devotion to the Constitution in general but not to the central principle on which it rests.

Wilson, *Does the Separation of Powers Still Work?* 86 *PUB. INTEREST* 36, 37 (1987).

25. See F. GREEN, *CONSTITUTIONAL DEVELOPMENT IN THE SOUTH ATLANTIC STATES, 1776-1860*, 83-84 (1971):

[T]he principle of separation of powers was violated in practice by legislative exercise of judic[i]al and executive functions; by the election of the executive councils by and from the legislatures; by the appointment of judicial and executive officers by the legislature; by the presidency and vote of the vice-executive in the upper house; and by the exercise of judicial functions by the governor and his council.

See also Blumoff, *supra* note 22, at 1051-52 ("Separation dogma loomed larger in the rhetoric of those early state constitutions than in the reality of state politics. . . . [F]unctional separation of powers as we have come to know it was more apparent than real"); Howard, *supra* note 20, at 827

Many states wrote explicit separation guarantees into their constitutions, but the meaning of the concept of separation was so subject to differing interpretations that those provisions were widely misunderstood. Some states (e.g., Massachusetts) had strong separation language competing with equally clear commandments in the constitution authorizing invasions of one branch's power by another branch. Other states had separation provisions in their constitutions which were ignored in practice.²⁶

Even though six of the original states included express separation of powers provisions in their early state constitutions,²⁷ the state constitutions did not control the legislative power. "In all but two states the constitution was written by the legislature and could be altered or abolished by that body if it so chose."²⁸

One commentator thus observed that "Americans in 1776 gave only a verbal recognition to the concept of separation of powers in their Revolutionary constitutions, since they were apparently not concerned with a real division of departmental functions."²⁹ That view, however, may have stemmed from an unfavorable comparison of the early state constitutions with the later federal charter and from confusion between the principle of separation of powers and the notion of coequal branches of government. It is true that "functional separation of powers as we have come to know it . . . was more apparent than real," and that "neophyte constitution-makers combined separation tenets with legislative supremacy."³⁰ The difference in allocation of power, however, merely reflected a divergence in the nature of state and federal governments and variation in views on the nature of legislative power vis-à-vis the other branches. The early state constitutions expressed a belief in an "extreme version of separation of powers"³¹ but not in the later myth of three coequal branches, which devel-

(proposals for Virginia Constitution of 1776 embodied doctrine of separation of powers, but all, including Jefferson's, "created a weak governor, elected by the Legislature and hardly coordinate with it in power or dignity"); A. KELLY & W. HARBISON, *supra* note 17, at 92 (contrast between legislative ascendancy and separation of powers provisions).

26. D. BRAVEMAN & W. BANKS, *CONSTITUTIONAL LAW: STRUCTURE AND RIGHTS IN OUR FEDERAL SYSTEM* 36 (1987). The quotation from Braveman contains more than one erroneous notion. If the constitution gives a "clear commandment" to one branch, the exercise of authority thus conferred cannot be considered an "invasion" of the power of another branch. Furthermore, the fact that a constitutional provision is "ignored in practice" gives no clue to its intended meaning, as shown by the way in which men who voted for adoption of the first amendment to the United States Constitution also supported the obviously unconstitutional Sedition Act of 1798, 1 Stat. 596 (1798) (act expired by its terms in 1801). See *New York Times Co. v. Sullivan*, 376 U.S. 254, 276 (1964) (although Sedition Act never tested by Court, attack on its validity has carried day in "court of history"). See generally L. LEVY, *LEGACY OF SUPPRESSION: FREEDOM OF SPEECH AND PRESS IN EARLY AMERICAN HISTORY* (1960) (struggle over Sedition Act).

27. Cox, *State Judicial Power: A Separation of Powers Perspective*, 34 OKLA. L. REV. 207, 211 (1981).

28. Belz, *Constitutionalism and the American Founding*, in *THE FRAMING AND RATIFICATION OF THE CONSTITUTION* 333 (1987).

29. G. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787*, at 153-54 (1969) (footnote omitted).

30. Blumoff, *supra* note 32, at 1052.

31. Belz, *supra* note 28, at 338.

oped around the federal constitutional scheme.

The fact that, under a state constitution, the legislature might exercise a power that under a later federal or state constitution would be regarded as judicial or executive in nature, does not mean that the earliest state documents paid only lip service to the notion of separation of powers. If a constitution gives a power to the legislature, then by definition the power is legislative in nature.³² Furthermore, coequality of branches (which, despite the catechism of high school civics books, neither the state governments nor the federal government has ever truly exemplified) is not essential to a system of separated powers. The legislature may be more powerful than, yet "separate and distinct"³³ from, the other branches. Because most students of the federal constitution are accustomed to speaking of separation of powers and coequal branches in the same breath, the combination of separation provisions and the "ascendancy of legislature over executive,"³⁴ found in the early state constitutional systems, looks like a paradox, to be sure. The paradox, however, is an apparent contradiction, not a real one.³⁵

The views of the state framers were to change as they gained greater experience with the excesses and vices of state legislatures,³⁶ experience many of these same framers brought to the drafting of the federal Constitution,³⁷ employing a

32. Accord Burns & Markman, *Understanding Separation of Powers*, 7 PACE L. REV. 575, 582 (1987) (president's veto is exercise of executive power, not sharing of legislative power).

33. See, e.g., ARIZ. CONST. art. III ("three separate departments . . . shall be separate and distinct"); ARK. CONST. art. IV, § 2 ("No person or coalition of persons, being one of the departments, shall exercise any power belonging to either of the others, . . ."); CONN. CONST. art. II (three distinct departments); GA. CONST. art. I, § II, para. III ("The legislative, judicial, and executive powers shall forever remain separate and distinct . . ."); KY. CONST. § 27 (three distinct departments); MD. CONST. art. VIII ("The Legislative, Executive and Judicial powers of Government right to be forever separate and distinct from each other . . ."); MISS. CONST. art. I, § 1 (three distinct departments); MO. CONST. art. I, § 1 (same); N.C. CONST. art. I, § 6 ("The legislative, executive, and supreme judicial powers of the State government shall be forever separate and distinct from each other . . ."); OKLA. CONST. art. IV, § 1 ("The Legislative, Executive, and Judicial departments of government shall be separate and distinct . . ."); TEX. CONST. art. II, § 1 (three distinct departments); VT. CONST. ch. II, § 5 ("The Legislative, Executive, and Judiciary departments shall be separate and distinct . . ."); VT. CONST. art. III, § 1 ("The legislative, executive, and judicial departments shall be separate and distinct, . . ."); W. VA. CONST. art. V, § 1 (same).

34. A. KELLY & W. HARBISON, *supra* note 17, at 92.

35. See RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 1406 (2d ed. 1987), which defines the word paradox as "a statement or proposition that seems self-contradictory or absurd but in reality expresses a possible truth."

36. For examples of these excesses and vices, see Friedman, *State Constitutions in Historical Perspective*, 496 ANNALS 33, 37-39 (1988).

37. See Williams, "Experience Must Be Our Only Guide:" *The State Constitutional Experience of the Framers of the Federal Constitution*, 15 HASTINGS CONST. L.Q. 403, 405-06 (1988) (giving names); Webster, *Comparative Study of the State Constitutions of the American Revolution*, 9 ANNALS 380, 417 (1897). The author writes: "From one-third to one-half of the members of the federal convention had been members of the conventions which framed the several state constitutions, and a very large number of the members of the various ratifying conventions had also had a part in the formation of the respective state constitutions." *Id.* See also C.E. STEVENS, *SOURCES OF THE CONSTITUTION OF THE UNITED STATES CONSIDERED IN RELATION TO COLONIAL AND ENGLISH HISTORY* 249 (1927). Stevens states that the "constitutional movement which transformed individ-

different arrangement of powers adapted from the practice of various states.³⁸ Their outlook on separation of powers, however, never came to mirror the one reflected in the federal document, nor should it have. The theory of separation of powers as it appeared in many state constitutions before 1787 was entirely different from the British system,³⁹ and the federal Framers did not copy either the British model or any one state's arrangement.⁴⁰ While the federal Framers did reject a proposed amendment that would have included an express separation of powers provision in the Bill of Rights, it is doubtful that they did so because they all agreed which powers belonged to which branch.⁴¹ "Separation meant different things to different theorists at different times, and it is clear that a few very divergent theories concerning separation were influential to our [federal] Framers."⁴²

In the decade after the American colonies achieved independence, the largest question being debated by the framers of state constitutions was the proper scope of authority to be accorded the legislative and executive branches and the relationship of those branches to each other.⁴³ In the nineteenth century, the people developed a "deep distrust" of their legislatures,⁴⁴ which began to be seen as a threat to personal liberties. State constitutions thus were rewritten to limit the power of all branches of state government or to "institutionalize" separation of powers for the first time.⁴⁵ Still later constitutions addressed problems that were developing in other regions of the nation,⁴⁶ by seeking such goals as "a

ual colonies into States" related to the national constitution in two ways: "[I]t prepared the members of the Philadelphia Convention for their task, and at the same time supplied them with much digested material for the work of construction." *Id.*

38. Webster, *supra* note 37, at 416. The federal constitution was "very largely the product of a wise selection of the best and most generally observed usages of the various states." *Id.* But cf. Williamson, *supra* note 37, at 424-26 (negative influences of state constitutions on federal framers).

39. Rossum, *The Courts and the Judicial Power*, in *THE FRAMING AND RATIFICATION OF THE CONSTITUTION*, 226-29 (1987) (differences between British and American separation of powers theories).

40. Kurland, *The Rise and Fall of the "Doctrine" of Separation of Powers*, 85 MICH. L. REV. 592, 594-97 (1986) ("separation of powers as adopted by Constitution had no true precedents in either fact or theory").

41. Dry, *The Case Against Ratification: Anti-Federalist Constitutional Thought*, in *THE FRAMING AND RATIFICATION OF THE CONSTITUTION* 288-89 (1987) (contents of bill of rights reflects struggle between federalists and anti-federalists); Rutland, *Framing and Ratifying the First Ten Amendments*, in *THE FRAMING AND RATIFICATION OF THE CONSTITUTION* 310, 315 (1987) (current bill of rights determined through debate and compromise). But cf. Leiserson, *supra* note 3, at 449 n.100 (debates at federal convention not informative about role of judiciary because delegates took for granted meaning of judicial power).

42. D. BRAVEMAN & W. BANKS, *supra* note 26, at 33.

43. Williams, *Evolving State Legislative and Executive Power In the Founding Decade*, 496 ANNALS 43, 44 (1988).

44. A. KELLY & W. HARBISON, *supra* note 17, at 90.

45. Kay, *supra* note 18, at 6 (growing sentiment for institutionalizing separation of powers one of various forces that led to convening of Connecticut state constitutional convention in August 1818).

46. See, e.g., J. MAUER, *Southern State Constitutions in the 1870's: A Case Study of Texas* (1983) (shift to restrictive constitution making can be traced to 1840s but spread rapidly after adoption of Illinois Constitution of 1870).

reduction, as much as possible, of all outside control of the state by 'big business' and its pawns; an expansion of individual rights; and a restriction of the power of state government."⁴⁷ Each new state had its own historical reasons for limiting the authority of the legislature, sometimes severely.⁴⁸ Within a century of the adoption of the federal Constitution, the states held two hundred constitutional conventions,⁴⁹ with a common result being the "hamstringing"⁵⁰ of the state legislatures. By 1900, state governments had changed radically from the days of "legislative omnipotence."⁵¹ In light of such historical developments, state courts have rejected invocations of legislative plenary power as bases for the resolution of challenges to speedy disposition and speedy trial provisions.⁵²

Whether or to what extent state judiciaries have inherent powers is a more difficult question to address historically than is the legislative plenary power issue. Although "English unwillingness to liberate colonial judges from royal and proprietary prerogative . . . gave impetus to the coming implantation of separation theory in the soon to be drafted state constitutions,"⁵³ the judicial branch did not figure prominently in the debate over separation of powers in early state constitutions.⁵⁴ In those documents, the courts were placed directly under the legislature; in colonial times, they had been under the executive.⁵⁵ The Framers of the federal Constitution, learning from the mistakes of the earlier state documents, removed the courts from the legislative branch's control, and later state

47. Boughey, *An Introduction to North Dakota Constitutional Law: Content and Methods of Interpretation*, 63 N.D.L. REV. 157, 242 (1987). See also Friedman, *supra* note 36, at 38 (popular perception of big-business corruption of legislatures).

48. See, e.g., Snyder & Ireland, *The Separation of Governmental Powers Under the Constitution of Kentucky: A Legal and Historical Analysis of L.R.C. v. Brown*, 73 KY. L.J. 165, 206 n.209 (1984-85) (historical reasons why powers of legislature were severely limited by present state constitution, adopting separation of powers provision written by Thomas Jefferson).

49. Eaton, *Recent State Constitutions*, 6 HARV. L. REV. 53, 53 (1892). See also May, *Constitutional Amendment and Revision Revisited*, 17 PUBLIUS 153, 155 (1987) (more than 230 constitutional conventions held since 1776).

50. J. FORDHAM, *THE STATE LEGISLATIVE INSTITUTION* 26 (1959) (reality of state constitutional order is that legislatures are hamstrung by numerous limitations on power). See also Williams, *supra* note 16, at 201 (transition from early state constitutions granting unfettered legislative power to more recent constitutions restricting legislative power reflects one of most important themes in state constitutional law).

51. C. THATCH, *THE CREATION OF THE PRESIDENCY, 1775-1789*, at 34, 41 (1923).

52. See, e.g., Meshell v. State, 739 S.W.2d 246, 274 (Tex. Crim. App. 1987) (Miller, J., dissenting) (legislature's power to enact laws is plenary); *id.* at 260 n.5 (Clinton, J., dissenting) (legislature's power to enact such laws as it finds necessary to effectuate constitutional provisions so elementary that constitutional provision giving legislature such power was repealed as being obsolete, superfluous, and unnecessary) (citing TEX. CONST. art. III, § 42 (1876, repealed 1969)); *In re Grady*, 118 Wis. 2d 762, 788-94, 348 N.W.2d 559, 572-73 (1984) (Abrahamson, J., concurring) (complaining that majority ignored plenary power of legislature).

53. Blumoff, *supra* note 32, at 1048-49.

54. *Id.* n.181 (citing J. GOEBEL, JR., *HISTORY OF THE SUPREME COURT OF THE UNITED STATES: ANTECEDENTS AND BEGINNINGS TO 1801*, at 97 (1971)). See Williams, *supra* note 37, at 420 (judiciary almost forgotten during early revolutionary period).

55. Lutz, *The First American Constitutions*, in *THE FRAMING AND RATIFICATION OF THE CONSTITUTION* 75 (1987).

constitutional framers did the same.⁵⁶ Just as had occurred federally with *Marbury v. Madison*,⁵⁷ however, conflicts erupted in some states over the proper role of the judiciary,⁵⁸ and especially over its rule-making power.⁵⁹ Those conflicts continue today in the cases involving attacks on speedy trial and speedy disposition provisions.

The impossibility of precisely defining the boundaries separating the three branches of government was recognized even before the federal Constitution was written. Discussing the interpretation of the early state constitutions, Madison observed that

[e]xperience has instructed us, that no skill in the science of government has yet been able to discriminate and define, with sufficient certainty, its three great provinces—the legislative, executive, and judiciary; or even the privileges and powers of the different legislative branches. Questions daily occur in the course of practice which prove the obscurity which reigns in these subjects, and which puzzle the greatest adepts in political science.⁶⁰

Since Madison's time, courts and commentators have provided some guidance about what is inherently a judicial power.⁶¹ Nonetheless, the student of state separation of powers today can discern little basis, apart from the text and structure of an individual state's constitution,⁶² for regarding a particular judicial (or prosecutorial) power as exclusive.⁶³ As in the federal Constitution, the theory of separation of powers in state constitutions "is not one that is capable of precise legal definition and it does not yield clear solutions to intragovernmental disputes."⁶⁴

The rule-making issue and other conflicts between the branches of state government have led some courts to hold that explicit provisions for separation of powers, which are found in a majority of state constitutions,⁶⁵ "envision a

56. *Id.* at 80-81.

57. 5 U.S. (1 Cranch) 137 (1803).

58. See, e.g., Note, *Oklahoma's Legislative Veto: Combat Casualty in Separation of Powers War?* 12 OKLA. CITY U.L. REV. 129, 129 (1987) (early definitive decisions in state focused on power of judiciary).

59. See, e.g., Browde & Occhialino, *Separation of Powers and the Judicial Rule-Making Power in New Mexico: The Need for Prudential Constraints*, 15 N.M.L. REV. 407 (1985) (thorough review of conflict between legislature and judiciary over rule-making power).

60. THE FEDERALIST NO. 37, at 286 (J. Madison) (J. Hamilton ed. 1904).

61. Cox, *supra* note 27, at 221-29 (history of attempts to define inherent judicial power).

62. See, e.g., *State v. Moore*, 57 TEX. 307 (1882): "It must be presumed that the constitution, in selecting the depositories of a given power, unless it is otherwise expressed, intended that the depository should exercise an exclusive power." *Id.* at 314.

63. Cf. Kurland, *supra* note 40, at 602 (early members of federal government decided questions of power allocation among three branches not by asking whether power was legislative, executive, or judicial but by asking where it was allocated in the basic document); Meshell v. State, 739 S.W.2d 246, 270 (Miller, J., dissenting) (cases relied on by majority do not address issues by reference to separation of powers, but rather resolve disputes by referring to some specific power enumerated in Constitution). See generally Browde & Occhialino, *supra* note 59 (history and criticism of judicial exclusivity doctrine).

64. J. NOWAK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW 136 (2d ed. 1983).

65. Cox, *supra* note 27, at 212.

more rigid compartmentalization of the three departments of government than does the [merely implicit⁶⁶ principle in the] federal constitution."⁶⁷ That finding seems to comport with the wording of state constitutions mandating that the departments of government shall remain "forever separate and distinct."⁶⁸ It is also in harmony with the history of state separation of powers theory.

The principle of separation of powers has "evolved along parallel but distinctly different paths on the state and federal levels."⁶⁹ The main differences, which make reliance on supposedly analogous federal cases problematic,⁷⁰ are that (1) the states have express, and often strongly worded, separation of powers provisions,⁷¹ while the federal principle is implicit;⁷² (2) the distribution of power at the state level differs from that at the federal;⁷³ and (3) the state bias against legislatures is much greater than at the national level.⁷⁴ The "parallel but different" character of state/federal separation of powers theory is exemplified by the federal and state court opinions dealing with speedy trial and speedy disposition provisions. The federal cases will be discussed first, because they contained the earliest thorough exploration of the constitutional problems posed by speedy trial acts. The federal decisions provided the backdrop against which much of the state litigation was played out.

II. THE FEDERAL SPEEDY TRIAL ACT

The idea that the FSTA⁷⁵ might amount to an unconstitutional infringement by Congress on the federal judicial power found expression in 1976 in an

66. But see Burns & Markman, *supra* note 32, at 579 (in federal Constitution powers expressly separated in wording conferring legislative, executive, and judicial powers in separate articles).

67. Stern, *The Political Question Doctrine in State Courts*, 35 S.C. L. REV. 405, 411 (1984) (citing *State v. Hunter*, 447 A.2d 797, 799 (Me. 1982) (separation of governmental powers mandated by Maine Constitution much more rigorous than same principle as applied to federal government). See also Malone Meekins, 650 P.2d 351, 357 (Alaska 1982) (declining to assume responsibility for ruling on validity of election of legislative officers); *State ex rel. Barker v. Manchin*, 279 S.E.2d 622, 630 (W. Va. 1981)) (separation of powers must be strictly construed); Powers, *Separation of Powers: The Unconstitutionality of the Arkansas Legislative Council*, 36 ARK. L. REV. 124, 131 (1982) (explicit Arkansas provision has been held to require stronger separation between departments than implicit separation of powers doctrine would) (citing *Oates v. Rogers*, 201 Ark. 335, 345-47, 144 S.W.2d 457, 462-63 (1940)).

68. See, e.g., Orth, "Forever Separate and Distinct": *Separation of Powers in North Carolina*, 62 N.C. L. REV. 1 (1983) (examination of decisional law of North Carolina and other states).

69. Comment, *Treatment of the Separation of Powers Doctrine in Kansas*, 29 U. KAN. L. REV. 243, 243 (1981).

70. Fisher & Devins, *How Successfully Can the States' Item Veto Be Transferred to the President?* 75 GEO. L.J. 159, 162 (1986) ("state analogy" suffers from serious deficiencies).

71. See, e.g., *supra* note 33 for state constitutional provisions requiring the branches of government to be not only "separate" but also "distinct."

72. Cf. Banks, *Efficiency in Government: Separation of Powers Reconsidered*, 35 SYRACUSE L. REV. 715, 715 (1984) (lack of explicit textual reference to separation rule in federal Constitution itself, coupled with other factors, has produced considerable confusion concerning meaning and relevance of separation principle).

73. Fisher & Devins, *supra* note 70, at 162.

74. *Id.*

75. 18 U.S.C. §§ 3161-3174 (1982 & Supp. IV 1986).

opinion by Tom C. Clark, former United States Supreme Court Justice, sitting on the United States Court of Appeals for the Second Circuit after his retirement from the high court. In that case, *United States v. Martinez*,⁷⁶ the trial court had denied a motion, made pursuant to the FSTA,⁷⁷ for the release of the defendants from incarceration during trial. The appellate court found at least two grounds for affirmance: "The first is a constitutional one which we will not elaborate further than to note that there is a question under the doctrine of separation of powers that the Congress can exercise judicial authority to the extent indulged here."⁷⁸ The court further remarked in a footnote that, even if one assumes Congress has the power to enact rules of procedure, "[s]ome of the language of the [FSTA] is so sweeping that it might well be construed as more than procedural."⁷⁹ Deciding the case on the second, statutory, ground, however, the court reserved the constitutional issue for another day.⁸⁰

The question of the FSTA's constitutional validity surfaced a year later in a federal district court in the Fourth Circuit, in *United States v. Howard*.⁸¹ The court declared the FSTA to be "an unconstitutional legislative encroachment on the judiciary."⁸² As in *Martinez*, the defendants in *Howard* unsuccessfully invoked the FSTA in seeking release from custody during trial.⁸³ The trial court found statutory reasons for denying the motion but nevertheless held the FSTA to be unconstitutional.⁸⁴ Judge Young grounded his decision on several bases: (1) Justice Clark's dictum in *Martinez*,⁸⁵ (2) the *Federalist* papers,⁸⁶ (3) interpretations of the inherent powers of state courts by such courts⁸⁷ and commentators,⁸⁸ (4) the legislative history of the FSTA,⁸⁹ (5) Judge Young's own

76. 538 F.2d 921 (2d Cir. 1976), *cert. denied*, 434 U.S. 847 (1977).

77. *Id.* at 922. The defendants claimed that they were entitled to release under 18 U.S.C. § 3164 because the trial court had not started the trial before the expiration of ninety days after the beginning of their detention. *Id.*

78. *Id.* at 923 (footnote omitted).

79. *Id.* at 923 n.4.

80. *Id.* at 923. The Second Circuit held that "both Section 3164 [of the FSTA] and Rule 4 of the Southern District of New York Plan for Achieving Prompt Disposition of Criminal Cases (Interim) clearly require the exclusion of the time consumed in pre-trial matters." *Id.* at 923. The delay, attributed to the fault of the accused or his counsel, was not to be counted in the calculation of the FSTA time limits. Therefore, the FSTA was not violated, and there was no need to reach the separation of powers issue. *Id.* at 924.

81. 440 F. Supp. 1106 (D. Md. 1977), *aff'd on other grounds*, 590 F.2d 564 (4th Cir. 1979).

82. 440 F. Supp. at 1109.

83. *Id.* at 1107. The defendants relied on 18 U.S.C. § 3164. *Id.* The defendants in *Howard* also relied on the local court rules for the District of Maryland, which specified a time period but mandated release of a defendant only when the FSTA was violated. *Id.* at 1114. They then moved for dismissal of the indictment, which was denied. *Id.* at 1114.

84. *Id.* at 1108-09.

85. *Id.* at 1111 (citing *Martinez*, 538 F.2d at 923 (questioning extent to which Congress exercised judicial authority in passing FSTA)).

86. *Id.* at 1109 (citing THE FEDERALIST NOS. 47-51 (J. Madison & A. Hamilton)).

87. *Id.* at 1111. The court cited decisions from the courts of Oklahoma, Nevada, Arkansas, Indiana, New York, Ohio, and Pennsylvania. *Id.*

88. *Id.* at 1110 (quoting Levin & Amsterdam, *Legislative Control Over Judicial Rule-Making: A Problem in Constitutional Revision*, 107 U. PA. L. REV. 1, 30 (1958) (certain spheres of activity so

interpretation of *Barker v. Wingo*,⁹⁰ and (6) his experience with the "disruption" of criminal and civil dockets caused by the FSTA.⁹¹ The court of appeals affirmed the trial court's holding without reaching the constitutional issue.⁹²

Four years after *Howard*, Judge Young again held the FSTA unconstitutional, in *United States v. Brainer*.⁹³ In *Brainer*, the defendant moved for dismissal of the indictment on the ground that he had not been brought to trial within the time prescribed by the FSTA.⁹⁴ The sanction Brainer sought—dismissal of the indictment—was mandatory when the FSTA time limits had been violated.⁹⁵

The government agreed that the FSTA requirements had not been met but argued that the act was "an unconstitutional legislative encroachment on the Judiciary and violate[d] the principle of separation of powers."⁹⁶ The stage was set for a decision based not on statutory or other subsidiary grounds, but squarely on the constitutional issue.

In *Brainer*, Judge Young borrowed heavily from his *Howard* opinion. He again relied on the *Federalist* papers, though he buttressed his analysis with citation to the debates at the Federal Convention.⁹⁷ The judge admitted that the theory of separation of powers "was never intended, nor has it proven to be, complete,"⁹⁸ but maintained that the concept "contemplates a zone of judicial power which must be free from interference by either the Legislative or Execu-

fundamental and necessary to a court that to divest court of command within those spheres makes phrase "judicial power" meaningless)).

89. *Id.* at 1111-13 (citing various congressional reports).

90. *Id.* at 1111-12 (citing *Barker v. Wingo*, 407 U.S. 514 (1972)). In *Barker*, the Court declined to announce a precise time limit under the sixth amendment speedy trial provision, but the Court observed that the states were free to prescribe exact standards. 407 U.S. at 523. In *Howard* Judge Young saw *Barker* as not inconsistent with the view that the FSTA was unconstitutional. 440 F. Supp. at 1112.

91. *Howard*, 440 F. Supp. at 1112-13.

92. *United States v. Howard*, 590 F.2d 564, 568 n.4 (4th Cir. 1979), *cert. denied*, 440 U.S. 976 (1979). The case involved more than one defendant, and the pertinent one was not party to the appeal. 590 F.2d at 568 n.4.

93. 515 F. Supp. 627 (D. Md. 1981), *rev'd*, 691 F.2d 691 (4th Cir. 1982).

94. 515 F. Supp. at 629. Section 3161(c)(1) of the FSTA required the trial to begin within seventy days of the date the accused first appeared before a judicial officer. 18 U.S.C. § 3161(c)(1) (1980). Brainer had been indicted in mid-1980, but he remained a fugitive and was not apprehended until January 1981. 515 F. Supp. at 639. Upon arrest he was taken before a magistrate, at which time bail was set. *Id.* The FSTA clock began running at that point. The court was unable to try Brainer within the statutory seventy days, due to a crowded docket. *Id.* at 630. Therefore, the court dismissed the indictment on June 4, 1981. *Id.* at 640.

95. 515 F. Supp. at 629. Section 3162(a)(2) provides: "If a defendant is not brought to trial within the time limit required by section 3161(c) . . . the information or indictment shall be dismissed on motion of the defendant." 18 U.S.C. § 3162(a)(2) (1980).

96. *Brainer*, 515 F. Supp. at 629.

97. *Id.* at 630 (citing THE FEDERALIST NOS. 47-51 (J. Madison & A. Hamilton) (examining theory of separation of powers)).

98. *Id.*

tive Branches."⁹⁹ Drawing on the analysis of Professors Levin and Amsterdam, who spoke of an "area of minimum functional integrity of the courts,"¹⁰⁰ Judge Young characterized the core idea of separation of powers as "institutional independence," "administrative autonomy," and a "zone of judicial autonomy."¹⁰¹

Judge Young treated the decision regarding when a trial is to begin as a docket control matter. He spoke of such matters as being "purely judicial functions" and "exclusively judicial concerns."¹⁰² In that vein, he denied the validity of congressional attempts to exercise "control over the administration of the judicial function."¹⁰³

Again, as in his *Howard* decision, Judge Young supported his assertion that a zone of "inherent power" exists in the judiciary by citing state court decisions and commentaries. He did so because "the states have historically encountered more instances of actual attempts by the Legislature to intrude upon the Judiciary."¹⁰⁴ The judge pointed to state court opinions invalidating legislative requirements that the judiciary act on civil matters,¹⁰⁵ as well as criminal cases,¹⁰⁶

99. *Id.* at 630-31.

100. *Id.* at 632 (citing Levin & Amsterdam, *supra* note 88, at 32 (referring to areas so crucial to efficient operation of courts as to be beyond power of legislature)).

101. *Id.* at 631-33.

102. *Id.* at 631-32.

103. *Id.* Judge Young cited James Madison for the idea that no one branch of government "ought to possess, directly or indirectly, an overruling influence over the others in the administration of their respective powers." *Id.* (quoting THE FEDERALIST NO. 48, at 382 (J. Madison) (J. Hamilton ed. 1904)). Judge Young regarded the FSTA as a congressional attempt to exercise the kind of "overruling influence" warned against by Madison. *Id.* at 632.

Although the state and federal opinions discussed in this article often refer to the *Federalist* papers, sometimes for opposing propositions, the reader should be aware of the fallacy of believing that the federal Framers' "public words and actions at the time of ratification and in the early years of the Republic constitute some catalogue of what the document must have meant to them. . . . The point of the criticism is that the wise Framers of the 'Golden Age,' like politicians of every age, had specific policy concerns which were sometimes best addressed by making politically inspired claims about constitutional requirements or prohibitions." Carter, *From Sick Chicken to Synar: The Evolution and Subsequent De-Evolution of the Separation of Powers*, 1987 B.Y.U. L. REV. 719, 740 n.92 (citing THE RESPONSES OF THE PRESIDENTS TO CHARGES OF MISCONDUCT xiv (C. Woodward ed. 1974)).

104. *Brainer*, 515 F. Supp. at 632.

105. *Id.* at 632-33 (citing *Sands v. Albert Pike Motor Hotel*, 245 Ark. 755, 762, 434 S.W.2d 288, 291-92 (1968) (state statute which required court to enter order in worker's compensation case was unconstitutional exercise of judicial function by legislative branch of government); *Kostas v. Johnson*, 224 Ind. 540, 550, 69 N.E.2d 592, 596 (1946) (state statute which deprived court of jurisdiction for failure to determine issue under advisement an unconstitutional legislative interference with judicial functions); *Lindauer v. Allen*, 85 Nev. 430, 435, 456 P.2d 851, 854 (1969) (legislature that charged time for mandatory dismissal contravened separation of powers provision in state constitution); *Riglander v. Star Constr. Co.*, 98 App. Div. 101, 105, 90 N.Y.S. 772, 774-75, *aff'd*, 181 N.Y. 531, 73 N.E. 1131 (1905) (mandatory law regulating preference in civil actions unconstitutional infringement upon judicial discretion); *Atchinson, Topeka & Santa Fe Ry. Co. v. Long*, 122 Okla. 86, 89, 251 P. 486, 489 (1926) (referendum state statute that required court to commence trial within ten days after defendant's pleading usurped judicial power contrary to state constitution)).

106. *Id.* at 633 (citing *Schario v. State*, 105 Ohio St. 535, 539, 138 N.E. 63, 64 (1922) (act of general assembly that prescribed time for exercise of judicial function unconstitutional and void)). Judge Young cited cases dealing with the power of the courts to protect court administration in the

within a specified period of time.

Judge Young then cited federal authorities, including Justice Cardozo, to the effect that the courts possess certain inherent powers, including the right to control the judicial docket.¹⁰⁷ None of those cases, however, directly addressed the issue in *Brainer*. Recognizing that the United States Supreme Court rarely had been faced with congressional intrusions upon the judicial power,¹⁰⁸ Judge Young pointed to the 1871 case *United States v. Klein*¹⁰⁹ as the one most on point. The judge assumed, for the purpose of the analysis, that Congress is constitutionally authorized to abolish the lower federal courts.¹¹⁰ Nevertheless, he interpreted *Klein* to mean that, as long as such courts remain in existence, Congress "cannot unduly interfere with purely judicial functions," such as internal administration, including docket control.¹¹¹

Missing entirely from *Howard* but present in *Brainer* was reference to the Supreme Court's more recent separation of powers analysis, in such cases as *United States v. Nixon*¹¹² and *Nixon v. Administrator of General Services*.¹¹³ In the first case, Nixon had resisted a subpoena for tape recordings and documents relating to conversations in the President's oval office; in the second case, Nixon had challenged the transfer of presidential tapes and papers to the respondent for eventual public access. From those cases, Judge Young discerned the following balancing test: "The Court's approach . . . requires consideration of the extent to which a branch is prevented from accomplishing its constitutionally

face of insufficient funds or inadequate quarters supplied by legislatures or county supervisors. *Id.* He also referred to cases involving the "inherent power of the Judiciary to regulate the practice of law," because he saw the zone of judicial independence recognized in such cases as extending to other areas, like court administration and docket control. *Id.*

107. *Id.* at 633-34 (citing *Landis v. North American Co.*, 299 U.S. 248, 254 (1936) (inherent judicial power to control docket); *United States v. Correia*, 531 F.2d 1095, 1098 (1st Cir. 1976) (same); *United States v. Inman*, 483 F.2d 738, 740 (4th Cir. 1976) (same)).

108. *Id.* at 634.

109. *Id.* at 631 (citing *United States v. Klein*, 80 U.S. (13 Wall.) 128, 146 (1871) (Congress prohibited from prescribing rules of decision to judicial department of government)). In *Klein*, the Radical Republican Congress had attempted to dictate an "arbitrary rule of decision" to govern the outcome of cases in which residents of the southern states were filing claims for compensation for property taken by the federal army during the Civil War. 80 U.S. at 146. By legislation, Congress provided that if the claimant had accepted the general pardon granted by President Johnson in 1868, the pardon was to be taken as proof that the claimant had aided rebellion against the United States. *Id.* at 129. Upon such proof, the courts were required by Congress to dismiss the claim for lack of jurisdiction. *Id.* The Supreme Court held that the legislation unconstitutionally intruded on both the judicial and the executive spheres. *Id.* at 147. See generally L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* §§ 3-5, at 50 (2d ed. 1988) (Congress may not force its interpretation of law upon federal courts).

110. *Brainer*, 515 F. Supp. at 631 (citing Hart, *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1371 (1953) (discussing theory that Congress can divest federal courts of jurisdiction to adjudicate federal constitutional rights)).

111. *Id.* at 631. In *Howard*, Judge Young had cited *Klein* only in passing. 440 F. Supp. at 110. In *Brainer*, he placed more emphasis on the century-old case. 515 F. Supp. at 631.

112. 418 U.S. 683 (1974).

113. 433 U.S. 425 (1977). The Fourth Circuit later was to criticize Judge Young's application of the *Nixon* cases. See *Brainer*, 691 F.2d at 698.

assigned functions. When the potential for disruption is present, the Court then requires a balancing of the interest[s] involved."¹¹⁴

Proceeding to the final step of the *Nixon* analysis, Judge Young regarded the FSTA as flawed by "a major constitutional shortcoming" in that it infringed on the "independence and flexibility" of the judiciary without adequately taking into account all of the interests involved.¹¹⁵ According to Judge Young, the FSTA addressed the interest of the defendant and society in speedy trials but ignored other societal interests, such as the effectiveness and efficiency of the federal criminal justice system.¹¹⁶

114. *Brainer*, 515 F. Supp. at 630 (citing *Nixon v. Adm'r*, 433 U.S. at 442-43 (separation of powers doctrine interpreted to fulfill need for proper balance between coordinate branches of government). In thus stating the test, Judge Young paraphrased and abbreviated the Supreme Court's analysis. 515 F. Supp. at 630. In *Nixon v. Adm'r*, from which Judge Young drew the test, the Court actually reasoned as follows:

[I]n determining whether the Act disrupts the proper balance between the coordinate branches, the proper inquiry focuses on the extent to which it prevents the [other] [b]ranch from accomplishing its constitutionally assigned functions. . . . Only where the potential for disruption is present must we then determine whether that impact is justified by an overwhelming need to promote objectives within the constitutional authority of Congress.

433 U.S. at 443 (citing *United States v. Nixon*, 418 U.S. 683, 703-07, 711-12 (absolute executive privilege under Article II of the Constitution conflicts with function of courts provided by constitution)). Judge Young's analysis contained only two steps: (1) evaluating the potential for disruption and (2) balancing the various branches' interests. 515 F. Supp. at 630. The Court's approach in the *Nixon* cases, however, involved three parts: (1) the potential for disruption, (2) the constitutional authority of Congress, and (3) the balancing test. *Nixon v. Adm'r*, 433 U.S. at 443; *United States v. Nixon*, 418 U.S. at 711-12. If there is no potential for disruption of the other branch's ability to carry out its constitutionally assigned functions, the analysis stops there, with a holding of the validity of the act in question. If potential for disruption is present, but no relevant grant of congressional power can be found, the analysis stops at that point, with a holding against the constitutionality of the act. Only if both the potential for disruption and the constitutional authority of Congress are found does the reviewing court need to engage in a balancing of interests. Judge Young, by omitting the second step in the *Nixon* approach, actually made it easier on Congress, by not requiring a showing that speedy trials are "objectives within the constitutional authority of Congress." *Id.* (citing *United States v. Nixon*, 418 U.S. at 711-12). Apparently he skipped the second step because he believed that Congress "certainly possesses authority under our constitutional scheme to take action designed to protect the interests embodied by the Sixth Amendment right to a speedy trial." *Brainer*, 515 F. Supp. at 639.

115. *Brainer*, 515 F. Supp. at 637.

116. *Id.* Judge Young spoke of the FSTA as resulting in misused resources, inadequately prepared cases, dismissals of indictments against guilty persons, forced severances in complicated cases, and excessive costs in dollars—all causing severe disruption, a decrease in the quality of justice, and a heavy burden on federal district courts. *Id.* at 637-40.

Judge Young was not the only federal judge to complain of the effects of the FSTA on the court's calendar. See *Hibbs v. Yashar*, 522 F. Supp. 247, 253 n.7 (D.R.I. 1981) ("The [FSTA's] effect on the calendar of this court has been unprecedented. This effect is largely attributable to the arbitrary time limitations imposed on the judiciary by the Act's terms."). Such effects were anticipated by some while the Act was being considered by Congress. See Statement of Joseph T. Sneed, former Deputy Attorney General, Dept. of Justice, later U.S. Circuit Judge, Ninth Circuit, Hearing on S. 754, before Subcommittee on Constitutional Rights of Committee on Judiciary, Senate, 93rd CONG., 1st SESS., 112 (1973).

Regarding civil cases, Judge Young identified the ability of the federal courts to function effectively and efficiently there as a separate societal interest that had been ignored by Congress in passing

After discussing the disruption generally caused by the FSTA, Judge Young criticized Congress's reliance on a 1972 United States Supreme Court case, *Barker v. Wingo*.¹¹⁷ In *Barker*, the Supreme Court set out general guidelines for the lower courts to use in deciding whether the sixth amendment right to a speedy trial had been violated.¹¹⁸ The Court declined to impose exact time limits, because "such a result would require this Court to engage in legislative or rule-making activity, rather than in the adjudicative process to which we should confine ourselves."¹¹⁹ According to Judge Young, that quotation received much attention during the congressional hearings on the proposed FSTA,¹²⁰ and Congress interpreted that language as an invitation from the Court to Congress to pass a sweeping speedy trial provision with specific time limits.¹²¹ Only when taken out of context, Judge Young reasoned, could the quotation be regarded as such an invitation to Congress.¹²²

Barker arose in the state courts of Kentucky, not in the federal system. When the United States Supreme Court agreed to hear the case, the issue was whether the Court would set speedy trial time periods for state courts to follow as a matter of sixth amendment law. The Court declined to do so but invited the state legislatures to "prescribe reasonable periods."¹²³ Apparently the Court meant that a state legislature, relying on authority existing under the state con-

the FSTA. *Brainer*, 515 F. Supp. at 638. With the flexibility of the federal courts reduced by the FSTA, he saw district judges as being hampered in the administration of the civil docket. *Id.* (citing Testimony of Hon. Robert Peckham, U.S. District Judge, Southern District of New York, Hearings on S. 961 and S. 1028, before Committee on Judiciary, Senate, 96th CONG., 1st SESS., 130 (1979)). Judge Young found that the FSTA, "with its myopic concern for rigid time limits in criminal cases, hinders the ability of the courts to focus sufficient resources on the adjudication of . . . important civil matters." *Id.*

117. 407 U.S. 514 (1972).

118. *Id.* at 530. Four factors to be considered are (1) length of delay, (2) reason for delay, (3) defendant's assertion of the right, and (4) prejudice resulting to defendant. *Id.* at 530-33. The four factors, which are to be employed in a balancing test, are not exclusive of others that might be relevant in a given case. *Id.* at 533.

119. *Id.* at 523.

120. *Brainer*, 515 F. Supp. at 638 (citing H.R. REP. NO. 93-1508, 93rd CONG., 2D SESS. 1 (1974) reprinted in 1974 U.S. CODE CONG. & ADMIN. NEWS 7401, 7405 (quoting *Barker*); Statement of Congressman Cohen, Hearings on S. 754, H.R. 7873, H.R. 658, H.R. 773, & H.R. 4807, before Subcommittee on Crime of the Committee on the Judiciary, House, 93rd CONG., 2d SESS. at 214, 358 (1974) (referring to wording of *Barker*)).

121. *Id.* See H.R. REP. NO. 1508, 93rd CONG., 2D SESS. 5 (1974), reprinted in 1974 U.S. CODE CONG. & ADMIN. NEWS 7405 (Committee noted *Barker* Court's refusal to engage in rule-making activity).

122. *Brainer*, 515 F. Supp. at 539.

123. 407 U.S. at 523. The remainder of the paragraph following the sentence relied on by Congress clearly shows that the Supreme Court was inviting state legislatures, not Congress, to experiment with speedy trial statutes:

We do not establish procedural rules for the States, except when mandated by the Constitution. We find no constitutional basis for holding that the speedy trial right can be quantified into a specified number of days or months. The States, of course, are free to prescribe a reasonable period consistent with constitutional standards, but our approach must be less precise.

Id.

stitution, could pass a speedy trial act if it did not operate to deprive a person of his sixth amendment right, as defined in guidelines set out by the Court in the *Barker* opinion and elsewhere.¹²⁴ As Judge Young noted, the *Barker* language relied on by Congress in passing the FSTA was nothing more than a "general comment on the role of an adjudicating court" and did not invite a congressional attempt to reduce the flexibility of the federal courts in their internal administrative functioning.¹²⁵ Judge Young regarded such legislative interference as an unconstitutional disruption of the judicial function of determining guilt or innocence (or presiding over a jury's determination of the issue), as well as an infringement on the courts' inherent power to control their internal administration and their dockets in both criminal and civil cases.¹²⁶

On appeal,¹²⁷ the Fourth Circuit, in upholding the FSTA's constitutionality, perceived Judge Young's opinion to be composed of two distinct arguments: (1) The FSTA usurps the federal courts' adjudicative role by determining the "actual substantive outcome of individual criminal cases," and (2) the Act intrudes too far into the realm of judicial administration.¹²⁸ In writing for the court, Judge Winter recognized that the district court had gone too far in asserting that the FSTA "attempts to determine the actual substantive outcome of individual criminal cases."¹²⁹ Judge Young apparently made that unfortunate statement in an attempt to harmonize his reasoning with the holding of the *Klein* opinion, which regarded as unconstitutional statutes that "prescribe rules of decision to the judicial department of the government in cases pending before

124. *Id.* at 530-33. Of course, when state legislatures create precise speedy trial time limits to govern trials in state courts, no federal separation of powers problems can result. As we will see later in this article, state constitutional separation of powers provisions could be implicated, but that would not create a federal question for the United States Supreme Court to review. *Michigan v. Long*, 463 U.S. 1032, 1037-40 (1983) (plain statement in state court opinion that decision is based on state law precludes review by United States Supreme Court). *Cf. Dreyer v. Illinois*, 187 U.S. 71, 77-78 (1902) (federalism bars due process attack on state separation of executive and judicial powers). *But cf. Note, Justice Without Favor: Due Process and Separation of Executive and Judicial Powers in State Government*, 94 YALE L.J. 1675 (1985) (challenging *Dreyer* rule).

125. *Brainer*, 515 F. Supp. at 639. The *Barker* opinion stressed that there is "no constitutional basis" for the notion that the sixth amendment speedy trial right "can be quantified into a specified number of days or months." *Barker*, 407 U.S. at 523.

126. *Brainer*, 515 F. Supp. at 636, 639-40.

127. *United States v. Brainer*, 691 F.2d 691 (4th Cir. 1982). On appeal the government switched its position and joined *Brainer* in supporting the FSTA's constitutionality. *Id.* at 692. The Court of Appeals appointed an amicus curiae to argue in favor of the district court's opinion. *Id.* at 692 n.5. The circuit court held that it had jurisdiction, despite the government's change in position, and upheld the constitutionality of the FSTA. *Id.* at 693, 699.

One of the amicus curiae was Eugene Gressman, now the William Rand Kenan, Jr., Professor Emeritus at the School of Law, University of North Carolina, Chapel Hill, N.C. As a judge in the 1982 J. Braxton Craven, Jr. Memorial Moot Court Competition, held at Chapel Hill (in which this author competed), Professor Gressman provided the initial impetus to this article.

128. *United States v. Brainer*, 691 F.2d 691, 694-95 (4th Cir. 1982) (quoting *Brainer*, 515 F. Supp. at 636).

129. *Id.* at 695 (citing *Brainer*, 515 F. Supp. at 636).

it."¹³⁰ *Klein*, however, involved a statute that arbitrarily dictated the outcome of a case on the merits, unlike the statute in *Brainer*.

The court of appeals seized on the weakest link in Judge Young's reasoning. By focusing on a single sentence about "substantive outcome," Judge Winter easily rebutted the trial judge's first argument merely by invoking the standard procedural/substantive dichotomy. According to Judge Winter, the FSTA disposes of cases on a procedural basis, much like a statute of limitations.¹³¹ The Act does not dictate the substantive outcome of a particular case; that is, it does not decide the guilt or innocence of the accused. Although Judge Winter saw the FSTA as most closely analogous to a statute of limitations, he also saw "no difference" between the FSTA and other congressional regulations of federal court evidence and procedure, and "statutes prescribing who may sue and where and for what,"¹³² which are well accepted.¹³³

The appellate opinion did not address whether the FSTA violated the theory of separation of powers by interfering with the judicial function of deciding cases already committed to resolution by the courts.¹³⁴ The court apparently misunderstood the first issue to be whether the FSTA, rather than merely prescribing procedures for the courts to follow, actually determined the substantive outcome of *Brainer*'s case.¹³⁵ Proceeding to review Judge Young's second point,

130. *United States v. Klein*, 80 U.S. (13 Wall.) 128, 146-47 (1871) (congressional attempt to limit jurisdiction upon finding of disloyalty violated separation of powers).

131. *Brainer*, 691 F.2d at 696. Allowing a statute of limitations to prevent cases from being brought to a trial court in the first place, however, does not interfere with the court in its role of deciding cases. It is one thing for Congress to tell the courts which cases should not be filed; it is quite another to order the courts to dismiss cases properly committed to them. Note, *The Federal Speedy Trial Act: A Study in Separation of Powers*, 22 WASHBURN L.J. 299, 316 n.176 (1983) (distinction between deadline before case submitted to judicial process and on operating after that point).

132. *Brainer*, 691 F.2d at 695-96 (referring specifically to Federal Rules of Civil Procedure, Federal Rules of Criminal Procedure, Federal Rules of Appellate Procedure, and Federal Rules of Evidence).

133. Actually, the validity of legislative control over court procedure has been questioned at both the federal and state levels. See Wigmore, *All Legislative Rules for Judiciary Procedure Are Void Constitutionally*, 23 ILL. L. REV. 276, 277 (1928) (under state and federal constitutions, all judicial power except certain parts of jurisdiction and place of criminal trial is in judiciary). Like the FSTA, the evidence and procedure rules govern "cases pending." The latter rules, however, do not create docket nightmares that interfere with the judicial function of deciding cases. If the evidence or procedure rules were shown to cause such problems, they might be subject to the same constitutional attack as the FSTA. The very fact that, because the evidence and procedure rules do not severely hamper the courts and, therefore, are "requirements of unquestioned validity," *Brainer*, 691 F.2d at 696, means that such rules are not analogous to the FSTA. For that reason, citation to them does not support the circuit court's rationale.

134. *Brainer*, 691 F.2d at 695-99. Actually, as shown by the way in which the circuit court divided its opinion with subheadings, the court did not even regard that issue as one involving a claimed separation of powers violation. The circuit court prefaced its discussion of Judge Young's first point with the heading, "Claimed Determination of Outcome." *Id.* at 695. The circuit court entitled the discussion of the Judge Young's second ground of decision, involving the inherent power of a trial court to administer its own docket, "Claimed Violation of Separation of Powers." *Id.* at 696.

135. Judge Young's objection to the FSTA, however, was not limited to *Brainer*'s case in par-

that the FSTA intrudes too far into the internal administration of the federal courts, the court first noted that the trial court had relied on state court decisions.¹³⁶ Making no attempt to dispute the inherent power of state courts, the court recognized as a question of first impression "[w]hether or to what extent the federal courts possess a power of self-administration which invokes the separation of powers doctrine. . . ."¹³⁷ Raising the possibility that federal courts have the power to make procedural rules only in the absence of congressional action, the court admitted that procedure and internal administration may be two different things, with inherent power in the federal judiciary over the latter.¹³⁸ The circuit court assumed for the purpose of its analysis that "federal courts possess some measure of administrative independence" so that interference by Congress would violate the separation of powers requirement "at some extreme point."¹³⁹ The fact that a power is inherent, however, does not mean that any degree of intrusion, however slight, constitutes a separation of powers violation.¹⁴⁰ In other words, "inherent" does not mean "exclusive."

Judge Winter criticized Judge Young's opinion for purporting to follow the *Nixon* test for separation of powers but in reality merely attacking the propriety of the FSTA.¹⁴¹ Ironically, Judge Winter's opinion was even less faithful to the *Nixon* cases than was Judge Young's.¹⁴² This opinion set up a requirement that the congressional interference must be actual and "extreme" in order to create a separation of powers concern, which was not part of the *Nixon* analysis.¹⁴³ Nevertheless, the court proceeded to examine the extent to which the FSTA repre-

ticular or to criminal cases in general, as shown by the fact that the next paragraph in his opinion made the same point about civil cases. *Brainer*, 515 F. Supp. at 636. He observed that the duties of Article III courts also include the trying of civil cases and found that the FSTA interferes with that constitutionally assigned function by "severely hamper[ing] trial courts in their attempts to prepare civil cases for trial, find the time to try them, and assure that well-founded decisions are reached." *Id.*

136. 691 F.2d at 696.

137. *Id.*

138. *Id.* at 697. See, e.g., *Morrison v. Olson*, 108 S. Ct. 2597, 2611 (1988) (federal courts possess inherent authority to initiate contempt proceedings for disobedience to orders, and authority necessarily includes ability to appoint private attorney to prosecute contempt) (citing *Young v. United States ex rel. Vuitton Et Fils S.A.*, 107 S. Ct. 2124 (1987) (long-settled character of authority of courts to appoint private attorney)).

139. 691 F.2d at 697.

140. *Id.* at 697 n.10 (citing *Michaelson v. United States*, 266 U.S. 42, 65-66 (1924) (inherent contempt power of courts not immune from some regulation by Congress)).

141. *Id.* at 698. In questioning the propriety of the FSTA, Judge Young was not alone. Former Chief Justice Burger and others on the Judicial Council also had done so. See Burger, *What the Justices Are Saying*, 62 A.B.A. J. 992, 993 (1976) (passage of FSTA did not make sense because opposed by Judicial Council and no commensurate legislation to increase number of judges).

142. As discussed earlier, the trial court's opinion in *Brainer* did not merely question the wisdom of the FSTA. Judge Young applied *Nixon* in shortened form, skipping only the second step, because he conceded that Congress had some constitutional authority to formulate rules for the federal courts to follow in matters of procedure and evidence. *Brainer*, 515 F. Supp. at 634. See *supra* notes 120-26 and accompanying text for a discussion of *Brainer*.

143. *Brainer*, 691 F.2d at 697-99. The Fourth Circuit repeatedly used the word "extreme" as part of the test. *Id.*

sents such an extreme. In doing so, the court misconstrued the *Nixon* test. Paraphrasing *Nixon v. Administrator of General Services*, the *Brainer* court reasoned that for a separation of powers problem to arise, the congressional enactment in question must prevent the judiciary from "accomplishing its constitutionally assigned functions" and held that the FSTA could not fairly be cast "in such extreme terms."¹⁴⁴

Judge Winter's interpretation of the *Nixon* test, however, led his analysis astray. The *Nixon* cases do not hold that, before a separation of powers issue can arise, a statute must actually prevent another branch of the government from performing its constitutional role. The threshold issue, and the wording omitted by Judge Winter, is the *extent to which* the statute interferes with another branch's ability to carry out its constitutionally assigned function and whether the statute establishes the "potential for disruption" of the other branch's ability to perform its proper role.¹⁴⁵ Actual and complete disruption is not the initial requirement.¹⁴⁶

In explaining why it did not perceive a separation of powers violation in *Brainer* the court pointed to four purported aspects of the FSTA as ameliorating any disruption of the "zone of judicial self-administration,"¹⁴⁷ such as docket control: (1) the FSTA provides that the trial court may dismiss an indictment "without prejudice;"¹⁴⁸ (2) the FSTA excludes from the time computation specified unavoidable delays;¹⁴⁹ (3) the FSTA arguably provides (in the face of explicit language to the contrary) for a continuance in the interests of justice because of scheduling conflicts,¹⁵⁰ and (4) the Act allows the judicial council of

144. *Id.*

145. *Nixon v. Adm'r*, 433 U.S. 425, 443 (1977).

146. *Id.* The difference between potential and actual interference is a nuance, to be sure, but an important one, especially in light of the circuit court's admission, later in its opinion, that the FSTA had the potential to disrupt the judiciary's function. *Brainer*, 691 F.2d at 699. Even at that point, however, the court emphasized that it would find a separation of powers violation only "in an extreme case," and the court believed that "that possibility would appear to be remote." *Id.*

147. *Id.* at 698. The court did not examine the actual extent to which the FSTA disrupted the judicial function of deciding or presiding over cases, because, as shown earlier, the court did not regard that issue as one involving serious separation of powers questions. *Id.*

148. *Id.* (citing 18 U.S.C. § 3162(a)(2)). See generally Steinburg, *Dismissal With or Without Prejudice Under the Speedy Trial Act: A Proposed Interpretation*, 68 J. CRIM. L. & CRIMINOLOGY 1 (1977). The circuit opinion, however, in no way made it clear how dismissal and refile of indictments is itself anything but a disruption of the trial court's docket.

149. *Brainer*, 691 F.2d at 698 (citing 18 U.S.C. § 3161(h)). Once again, however, that provision is at best irrelevant to the inquiry in *Brainer*, and the opinion did not try to show otherwise. Perhaps that was because Judge Young expressly had found that "there were no periods of delay" that could be excluded under the FSTA in order to comply with the time limit. *Brainer*, 515 F. Supp. 630.

150. *Brainer*, 691 F.2d at 698. The court expressed that idea in the face of explicit FSTA provisions stating that the trial court cannot order a continuance because of "general congestion of the court's calendar," 18 U.S.C. § 3161(h)(8)(C) even if the trial court finds that the "ends of justice served by [such a continuance] outweigh the best interest[s] of the public and the defendant." 18 U.S.C. § 3161(h)(8)(A). The circuit's reasoning was that the FSTA banned reliance on "general" congestion of the trial court's docket, not on "specific" congestion, which might have been the problem in *Brainer's* case. 691 F.2d at 698. Understandably, the circuit opinion cited no authority for

a circuit to suspend the prescribed time limits if a district, "due to the status of its court calendars," cannot meet the FSTA deadlines.¹⁵¹ At least two problems arise from reliance on this last provision. First, such a gross calendar logjam for an entire district would go a long way toward establishing the "extreme case" that the court of appeals required before a separation of powers violation could be found. It seems that Congress could envision the extreme case, even if the court regarded it as "remote." Second, in light of *Immigration and Naturalization Service v. Chadha*¹⁵² and *Bowsher v. Synar*,¹⁵³ the veto or suspension of the FSTA by a judicial circuit, subject to congressional oversight,¹⁵⁴ now appears itself to be of doubtful constitutionality.¹⁵⁵

To buttress its holding, the court observed that the district court might have been able to squeeze Brainer's case into its schedule after all.¹⁵⁶ According to the appellate opinion, the record also failed to establish that the trial court could not have transferred Brainer's case to another court within the district, so that the trial could have taken place within the time limits set by the FSTA.¹⁵⁷

In the final analysis, neither opinion is particularly persuasive. Judge Young's opinion is weakest when he attempts to analogize to *Klein*'s ban on a statutory rule of decision determining the substantive outcome of a pending case. The circuit court's reasoning is deficient when it attempts to show that the FSTA has built-in "safety valves"¹⁵⁸ designed to allow flexibility. At best, the alternative and safety-valve provisions are irrelevant to Brainer's case; at worst, they are subject to constitutional attack in themselves.

Moreover, neither court effectively employed the *Nixon* analysis. Judge Young attacked the FSTA on the basis that Congress, in passing the Act, did not take into account the interests of both the public and the judiciary in the judicial system's ability to operate effectively and efficiently in both criminal and civil cases. In making that point, the trial court referred to the legislative record at length. Congress, however, is not required to take any particular interest into

that position, and the cases suggest that the law is to the contrary. See, e.g., *United States v. Andrews*, 790 F.2d 803, 808 (10th Cir. 1986) (delay caused by heavy criminal docket, several legal holidays, and judge's seminar attendance was attributable to "general congestion" of court's calendar), *cert. denied*, 481 U.S. 1018 (1987); *United States v. Crane*, 776 F.2d 600, 605 (6th Cir. 1985) (judge's unavailability caused by his presiding over other case attributable to "general congestion" of court's calendar); *United States v. Nance*, 666 F.2d 353, 357 (9th Cir.) (general congestion), *cert. denied*, 456 U.S. 918 (1982); *United States v. New Buffalo Amusement Corp.*, 600 F.2d 368, 376 (2d Cir. 1979) (general congestion); *United States v. Didier*, 542 F.2d 1182, 1186 (2d Cir. 1976) (general congestion).

151. 691 F.2d at 698 (citing 18 U.S.C. § 3174).

152. 462 U.S. 919 (1983).

153. 478 U.S. 714 (1986).

154. See 18 U.S.C. § 3174(d)(2) (1982).

155. Note, *supra* note 131, at 310-11.

156. *Brainer*, 691 F.2d at 699.

157. *Id.* It would seem, however, that requiring a trial court to transfer a case from its docket is just as much an interference with internal administration as dismissal of an indictment for failure to meet a time limit. Whether the device is dismissal or transfer, the autonomy of a trial court to control its own docket is hampered by forcing the judge to relinquish control of the case.

158. See *Brainer*, 691 F.2d at 699.

account.¹⁵⁹ The balancing-of-interests approach is a method of judicial review, not a constitutional requirement for the legislative process. Congress need not make a record of the interests it considered in passing legislation, in order to withstand a separation of powers attack. Judge Young would have been better advised to concentrate on marshaling evidence for the arguments that (1) the FSTA places a heavy burden on the judiciary and severely disrupts the administration of justice¹⁶⁰ and (2) the interests of the judiciary, the public, and individual litigants in an independent judiciary and effective and efficient administration of justice outweigh the interests of the Congress, the public, and the defendant in speedy trials.

The Fourth Circuit never engaged in the balancing of interests suggested by *Nixon*, because it did not accept Judge Young's assertions that the FSTA severely affected the courts in their internal administration.¹⁶¹ The court demanded proof of actual and extreme disruption of judicial functions, not merely the "potential for disruption" required by the *Nixon* Court. The circuit's approach, tying the analysis closely to the record, or lack of it, pretermitted the balancing step of the analysis, with the result that we cannot know the relative weight the circuit would have assigned to the interests involved.

In the end, the Fourth Circuit held that the FSTA was not unconstitutional on its face or as applied in Brainer's case. The court left open the "remote" possibility, however, that, given a record showing an "extreme case," in which the judiciary actually was prevented from carrying out its assigned functions, the FSTA could be struck down.¹⁶² Nevertheless, we are not likely to see another

159. Cf. *Meshell v. State*, 739 S.W.2d 246, 273 (Tex. Crim. App. 1987) (Miller, J., concurring) (whether state speedy trial act employs *Barker* factors irrelevant to question of act's validity under state constitution).

160. As shown by nationwide statistics compiled in the *Annual Report of the Director of the Administrative Office of the United States Courts (Report)*, relatively few dismissals have resulted under the FSTA in recent years. 1987 *Report* 122 (20 dismissals in 1987); 1986 *Report* 121 (14 dismissals in 1986; 12 in 1985); 1984 *Report* 185 (19 dismissals in 1984; 16 in 1983); 1982 *Report* 148 (21 dismissals in 1982; 19 in 1981). A reported high level of compliance with the FSTA may be the result of nothing more than the availability of loopholes, especially in the form of time periods that are excludable from the computation of deadlines. Probably as a result of excludable time periods and "ends of justice" continuances, the processing of criminal cases was not significantly speeded by the FSTA, according to a five-year study. Bridges, *The Speedy Trial Act of 1974: Effects on Delays in Federal Criminal Litigation*, 73 *CRIMINOLOGY* 50, 71-72 (1982).

161. *Brainer*, 691 F.2d at 699. Apparently the circuit court was either not aware that the announced purpose of the FSTA was to cause the court system to be "shaken by the scruff of its neck" or believed that the FSTA had not accomplished that objective. Prepared Statement of the Assistant Attorney General (now Chief Justice of the United States Supreme Court) William H. Rehnquist, 1971 Senate Hearings 107, reported in A. PARTRIDGE, *LEGISLATIVE HISTORY OF TITLE I OF THE SPEEDY TRIAL ACT OF 1974* 17 (1980).

162. *Brainer*, 691 F.2d at 699. In other words, if a trial judge could show that none of the FSTA safety valves or other alternatives to dismissal of the indictment were available, or that forcing the available alternatives upon the judge in itself was an unwarranted intrusion upon the judicial power, the FSTA would be unconstitutional as applied in that case. Cf. *State v. Pachay*, 64 Ohio St. 2d 218, 223, 416 N.E.2d 589, 592 (1980) (shortening of time limits, repealing of exceptions, or increasing of case load could result in state speedy trial act invalidity). See *infra* note 252 and accompanying text for a discussion of *Pachay*.

test of the FSTA's constitutionality, unless the government changes its position again and attacks the Act. A defendant will have difficulty persuading a court to reach the issue.¹⁶³

The greatest problem with the Fourth Circuit's analysis of *Nixon v. Administrator of General Services* is that *Nixon* did not establish an all-purpose separation of powers test. Since its decision in that case, the Supreme Court has applied the *Nixon* formulation in one other separation of powers case involving *Nixon* himself and claims of encroachment on the executive power.¹⁶⁴ However, in *Chadha*¹⁶⁵ and *Bowsher v. Synar*,¹⁶⁶ cases involving clashes between executive and legislative power, the majority made no mention of *Nixon*. In the recent case of *Morrison v. Olson*,¹⁶⁷ the Court referred to the *Nixon* wording only as an afterthought.¹⁶⁸

The Court has not favored the *Nixon* test for determining the constitutionality of a statute allegedly invading the judicial realm. Instead, the Court has rejected any particular formula in favor of a general balancing of the interests of the respective branches. In a clash between Congress and the courts, for example, the Supreme Court has balanced legislative interests, such as convenience and efficiency, against the judiciary's interest in judicial independence.¹⁶⁹ Because the Fourth Circuit in *Brainer* did not balance the interests involved, its method of analysis is not in harmony with the one developed later by the Supreme Court. Although the FSTA cases have been cited in the state decisions discussed below, the state courts have applied neither the *Nixon* analysis nor the later general balancing test to separation of powers issues. Instead, they have attempted to forge independent paths through the separation of powers thicket.

III. STATE STATUTES AND RULES MANDATING THE SPEEDY DISPOSITION AND TRIAL OF CASES

A. State Speedy Disposition Statutes

The trial judge in *Brainer* analogized to state court opinions that invali-

163. See, e.g., *United States v. Buonos*, 730 F.2d 468, 471-72 (7th Cir. 1984) (separation of powers argument need not be addressed because, if successful in attacking dismissal/reindictment provision of FSTA, defendant would be left with reliance on sixth amendment speedy trial principles, which were not violated by dismissal/reindictment procedure).

164. See *Nixon v. Fitzgerald*, 457 U.S. 731, 753-54 (1982) (jurisdiction can be exercised over President, but must be balanced with separation of powers doctrine).

165. 462 U.S. 919 (1983). For discussion and criticism of the analysis in the *Chadha* opinion, see *Leiserson*, *supra* note 3, at 475-81; *L. TRIBE*, *supra* note 109, at 214-18.

166. 478 U.S. 714 (1986). For discussion and criticism of the analysis in *Bowsher v. Synar*, see *Carter*, *supra* note 103, at 797-98.

167. 108 S. Ct. 2597 (1988).

168. *Id.* at 2621.

169. See, e.g., *Commodity Futures Trading Comm'n v. Schor*, 106 S. Ct. 3245 (1986) (applying balancing test in case concerning claim of intrusion on judicial power). See also *Mistretta v. United States*, 57 U.S.L.W. 4102, 4108 (U.S. Jan. 18, 1989) (citing *Nixon* cases for claims of intrusion on executive power, but *Schor* for "cases specifically involving the Judicial Branch"). The *Mistretta* Court seemed to prefer the *Schor* balancing test for cases dealing with the judiciary. See *id.* The Court also addressed the *Nixon* analysis because the petitioner urged that standard. *Id.* at 4115.

dated legislation requiring courts to decide cases or otherwise to act within specified time periods.¹⁷⁰ Since then, three state supreme courts—Oregon, Montana, and Wisconsin—have decided major "speedy disposition" cases, and each has referred to *Brainer*. Each of those cases, however, dealt with statutes mandating not speedy commencement of trials but speedy decisions by courts. In *State ex rel. Emerald People's Utility District v. Joseph*,¹⁷¹ the Oregon Supreme Court upheld, against a state constitutional separation of powers challenge,¹⁷² a statute requiring an appellate court to hear and determine a case within three months from the time the appeal was taken. The appellate court had ignored the statute, regarding it as an act that violated the state constitution's separation of powers provision.¹⁷³

The state supreme court enunciated the separation of powers test as whether "legislative action unduly burdens or unduly interferes with the judicial department in the exercise of its judicial functions."¹⁷⁴ Recognizing that the highest courts in other jurisdictions, with "constitutional provisions regarding the separation of powers similar to those of Oregon,"¹⁷⁵ had invalidated similar statutes, the Oregon court nevertheless found no violation of its state constitution, because the statute on its face did not unduly burden or unduly interfere with the judiciary. The court defined "undue" in such a way that no separation of powers violation would be found unless the legislative act made it impossible for the courts to carry out their constitutionally assigned functions.¹⁷⁶ The supreme court noted that it was possible for the lower appellate court to have a case briefed, submitted, and decided in the time remaining between the delivery of the supreme court's opinion and the statutory deadline.¹⁷⁷ Even so, the

170. *Brainer*, 515 F. Supp. at 632-33.

171. 292 Or. 357, 640 P.2d 1011 (1982).

172. Article II, § 1 of the Oregon Constitution reads as follows:

The powers of the Government shall be divided into three separate [sic] departments, the Legislative, the Executive, including the administrative, and the Judicial; and no person charged with official duties under one of these departments, shall exercise any of the functions of another, except as in this Constitution expressly provided.

173. *Joseph*, 290 Or. at 359, 640 P.2d at 1012.

174. *Id.* at 359, 640 P.2d at 1013 (quoting *Ramstead v. Morgan*, 219 Or. 383, 399, 347 P.2d 594, 601 (1959) (legislation affecting judicial power upheld)).

175. *Id.* at 360, 640 P.2d at 1013 (citing *State ex rel. Kostas v. Johnson*, 224 Ind. 540, 547, 69 N.E.2d 592, 595 (1946) (three departments of government independent and, unless otherwise provided for, no department can be controlled or embarrassed by another department); *Schario v. State*, 105 Ohio St. 535, 538, 138 N.E. 63, 64 (1922) (legislature cannot tell judiciary when it can hear or determine any case within its lawful jurisdiction); *Atchinson, T. & S.F. Ry. Co. v. Long*, 122 Okla. 86, 92, 251 P. 486, 492 (1926) (legislative branch may not usurp constitutionally mandated powers of judicial branch)).

176. *Id.* at 362, 640 P.2d at 1014. According to the majority, "unduly" should be taken to mean "that it is impossible in the individual case, within the statutory deadline, for counsel to complete proper briefing or other documentation adequate for a responsible judicial decision, and for the court to arrive at a reasoned decision consistent with the judicial responsibility imposed by Art VII [of the Oregon Constitution]." *Id.* The court declined to "infer in the abstract" whether or not the act interfered with the judiciary in its constitutional function. *Id.*

177. *Id.* at 363, 640 P.2d at 1014. The Oregon Court thus employed the same "undue interference" wording that the *Brainer* trial court had drawn from state decisions. See *Brainer*, 515 F. Supp.

supreme court declined to order the lower court to comply with the statute, because the deadline would fall only six days from the supreme court's decision, and such an order "might well interfere unduly with the court's well-considered and responsible decision of the cases involved here."¹⁷⁸

Justice Peterson, concurring, noted that "virtually every court which has considered this problem holds that such legislative action is prohibited"¹⁷⁹ and apparently would have adopted a stricter test, invalidating any legislative intrusion into areas that are purely judicial functions.¹⁸⁰ He seemed to envision an area of exclusive judicial power into which the legislature could not intrude at all without violating the state constitution's separation of powers provision. Along with Levin and Amsterdam, Justice Peterson regarded the generation of policy about when and how cases should be heard and decided as "a realm of proceedings which are so vital to the efficient functioning of a court as to be beyond legislative power."¹⁸¹ In articulating that principle, his opinion presaged decisions in Montana and Wisconsin, to be discussed later in this article.¹⁸² He also reasoned that the mere fact that it was possible for the lower appellate court to hear and decide a case within the prescribed time period was "largely irrelevant"¹⁸³ to the question of the statute's constitutionality: "[E]ven though the Court of Appeals could possibly hear and determine the appeal in this case within the statutorily prescribed time, the intrusion by the legislative branch into affairs which are peculiarly the responsibility of the judicial department violates the separation of powers clauses of the Oregon Constitution."¹⁸⁴ Justice Peterson's line of reasoning paralleled Judge Young's in *Brainer*, in mak-

at 636. But the *Joseph* court employed the extreme requirement of actual and complete disruption of another branch's function—impossibility—which the *Brainer* appellate court later imposed before a violation of separation of powers could be found. See *Brainer*, 691 F.2d at 698. The *Joseph* decision, issued during the time between the district and circuit opinions in *Brainer*, noted the former in the appendix. *Joseph*, 292 Or. at 371, 640 P.2d at 1019.

178. 292 Or. at 363, 640 P.2d at 1014. The "undue interference" wording here appears to echo the separation of powers test the court was applying to the legislation in question. Presumably, however, the Oregon Supreme Court shied away from the possibility of undue interference with the lower court's decision-making process as a matter of prudence and did not purport to apply separation of powers principles between itself and another court in the same branch of state government.

179. *Id.* at 368, 640 P.2d at 1017 (Peterson, J., concurring). The appendix to the opinion collected prior cases from other jurisdictions, many of which appeared in Judge Young's *Brainer* opinion. *Id.* at 371-72, 640 P.2d at 1019. The concurring judge recognized two state court opinions upholding the validity of speedy trial acts, and noted that they stood in contradistinction to the trial court's decision in *Brainer*, but he regarded them as distinguishable in that they "turn upon the constitutional guarantee of a speedy trial." *Id.* at 368 n.6, 640 P.2d at 1017 n.6 (citing *State v. Warren*, 224 Kan. 454, 456, 580 P.2d 1336, 1338 (1978) (state has obligation to ensure that defendant enjoys speedy trial and legislature may enact statute to codify obligation); *State v. Pachay*, 64 Ohio St. 2d 218, 223, 416 N.E.2d 589, 592 (1980) (speedy trial statute is rational way to enforce constitutional speedy trial requirement)). What constitutional difference that distinction makes he did not say.

180. *Joseph*, 292 Or. at 366, 640 P.2d at 1018 (Peterson, J., concurring).

181. *Id.* at 370, 640 P.2d at 1018 (quoting Levin & Amsterdam, *supra* note 88, at 31-32).

182. See *infra* notes 186-214 and accompanying text for this discussion.

183. *Joseph*, 292 Or. at 366, 640 P.2d at 1016 (Peterson, J., concurring).

184. *Id.* (emphasis in original).

ing the point that the effect of the time limit in one case could spill over to undermine the effective and efficient administration of justice in other cases.¹⁸⁵

One year after the Oregon decision, the Montana Supreme Court struck down a similar scheme in *Coate v. Omholt*.¹⁸⁶ Two Montana statutes placed time limits on district and supreme court cases and imposed sanctions on judges for failure to comply. The penalties included withholding a judge's salary. A district court declared the statutes unconstitutional, and the supreme court agreed.¹⁸⁷ Addressing the time limits as an issue separate from the withholding of pay, the court concluded that, based on the separation of powers clause of the state constitution,¹⁸⁸ "the question of when cases shall be decided and the manner in which they shall be decided is a matter solely for the judicial branch of the government."¹⁸⁹ The court regarded the authority to determine when a judicial decision is made to be an inherent and exclusive power of the judiciary, not one shared with the legislature.¹⁹⁰

Noting Judge Young's opinions in *Howard* and *Brainer*,¹⁹¹ and the fact that the decision of the Oregon Court in *Joseph* stood as the lone exception to the otherwise "virtual unanimity" among state courts,¹⁹² the Montana court held

185. Compare *id.* at 370-71, 640 P.2d at 1018 (Peterson, J., concurring) ("Permitting the legislature to tell [the judiciary] when and how to hear and determine cases will impermissibly affect judicial functions—the manner in which cases are prepared, argued, considered and determined") with *Brainer*, 515 F. Supp. at 638 (FSTA "severely hamper[s] trial courts in their attempt to prepare civil cases for trial, find the time to try them, and assure that well-founded decisions are reached").

186. 203 Mont. 488, 622 P.2d 591 (1983).

187. The district court held that the pay forfeiture provisions of the statutes violated two provisions of the Montana Constitution: Article VII, § 7(1), barring diminution of judicial salaries during a term of office, and Article II, § 31, prohibiting the impairment of contracts. *Omholt*, 203 Mont. at 493, 662 P.2d at 593. The supreme court agreed. *Id.* at 497, 662 P.2d at 597.

188. MONT. CONST., art. III, § 1 provides:

The power of the government of this state is divided into three distinct branches—legislative, executive, and judicial. No person or persons charged with the exercise of power properly belonging to one branch shall exercise any power properly belonging to either of the others, except as in this constitution expressly directed or permitted.

189. *Omholt*, 203 Mont. at 492, 662 P.2d at 593. The court also held that, even if the two statutes did not violate state constitutional provisions regarding separation of powers, diminution of judicial salaries, and impairment of contracts, the statutes would be invalidated for another reason. The legislature simply lacked authority to enact the statutes, because, although Article VII, § 2(3) of the Montana Constitution confers on the legislature a veto power over procedural rules promulgated by the courts, it does not empower the legislature to generate such rules. *Id.* at 505, 662 P.2d at 600.

190. *Id.* at 492, 662 P.2d at 593.

191. *Id.* at 496, 662 P.2d at 596. The Montana court did not note the Fourth Circuit opinion in *Brainer*.

192. *Id.* at 494-96, 662 P.2d at 594-96 (citing *Sands v. Albert Pike Motor Hotel*, 245 Ark. 755, 762, 434 S.W.2d 288, 291-92 (1968) (state statute requiring court to enter order was unconstitutional exercise of judicial power); *Vaughan v. Harp*, 49 Ark. 160, 163, 4 S.W. 751, 753 (1887) (legislature does not have authority to compel judiciary to write out records for every decision); *Houston v. Williams*, 13 Cal. 24, 28 (1859) (unconstitutional to require state supreme court to produce written opinion in every case); *State ex rel. Kostas v. Johnson*, 224 Ind. 540, 547, 69 N.E.2d 592, 595 (1946) (three departments of government independent); *State v. Merialdo*, 70 Nev. 322, 328-29, 268 P.2d 922, 926 (1954) (statute requiring trial judges to submit affidavits that they have no cases pending before receiving salary unconstitutional); *Waite v. Burgess*, 69 Nev. 230, 233, 245 P.2d 994, 996

that the power to determine when a case would be decided is in "the essential nature of a constitutional court," a matter "that the courts alone determine," and not one over which "the courts and the legislature have concurrent rule-making power."¹⁹³ In positing not only inherent but also exclusive authority in the judiciary, the Montana court went further than Judge Young had gone in *Brainer* and expressly held what Justice Peterson in Oregon had only implied in the *Joseph* case: the area of internal administration of the courts is one in which any intrusion by the legislature is invalid. With that rule, no balancing test is used; no weighing of competing interests is done.

Relying on the Montana Supreme Court's opinion in *Omholz*,¹⁹⁴ the Wisconsin Supreme Court took the same approach the following year, in *In re Grady*.¹⁹⁵ Like *Omholz*, *Grady* involved a separation of powers challenge to a statute imposing time limits on judicial decisions and monetary penalties for noncompliance.¹⁹⁶ The court's per curiam opinion expressly rejected the Fourth Circuit's argument in *Brainer*¹⁹⁷ that the legislature shared power with the judiciary to set such time periods:

[T]he separation of powers doctrine does not render every power conferred upon one branch of government a power which may be shared by another branch and as to which the undue burden or substantial interference standard is applicable. There are zones of authority constitutionally established for each branch of government upon which any other branch of government is prohibited from intruding. As to these areas of authority, the unreasonable burden or substantial interference test does not apply; any exercise of authority is unconstitutional.¹⁹⁸

The argument was made that the legislature has the authority to enact laws to advance public confidence in the judicial system,¹⁹⁹ but the *Grady* court perceived the issue to be whether establishing time limits within which judges are to decide cases lay in "an area of exclusive judicial authority."²⁰⁰ The court was "not concerned with the reasonableness or substantiality of legislative interfer-

(1952) (legislation intended to require judicial action within fixed period of time unconstitutional); *Schario v. State*, 105 Ohio St. 535, 538, 138 N.E. 63, 64 (1922) (legislature cannot tell judiciary when it can hear case within its lawful jurisdiction)).

193. *Id.* at 494, 662 P.2d at 594. The Montana court, like most courts discussing such issues, relied heavily on *Levin & Amsterdam*, *supra* note 88.

194. 203 Mont. 488, 662 P.2d 591 (1983).

195. 118 Wis. 2d 762, 348 N.W.2d 559 (1984).

196. *Id.* at 768 n.3, 348 N.W.2d at 562 n.3. Unlike most state constitutions, Wisconsin's does not contain an express separation of powers provision, but, like the federal constitution, it implicitly provides for separation of powers by vesting three different departments with the legislative, executive, and judicial powers, respectively. *State v. Holmes*, 106 Wis. 2d 31, 42, 315 N.W.2d 703, 708 (1982).

197. 691 F.2d 691 (1982).

198. *Grady*, 348 N.W.2d at 566 (emphasis by the court) (citing *Thoe v. Chicago M. & St. P.R. Co.*, 181 Wis. 456, 465, 195 N.W. 407 (1923) (statute prohibiting directed verdict held invalid as intrusion on judicial power)).

199. *Grady*, 118 Wis. at 777-78, 348 N.W.2d at 567.

200. *Id.* at 776, 348 N.W.2d at 566.

ence; the sole question was whether the statute at issue was a legislative regulation of an area reserved exclusively to the judiciary."²⁰¹

The *Grady* court saw the Fourth Circuit's opinion in *Brainer* as acknowledging that "not all governmental power is 'shared power'" and as turning on the finding that trial rights were an area of proper congressional action.²⁰² According to the Wisconsin Supreme Court, however, the generation of time limits for judicial decisions, unlike trial rights, involves the efficiency and effectiveness of the court system,²⁰³ matters of internal court administration. "The legislature does not have the power to promulgate rules of court administration. . . . The setting and enforcement of time periods for judges to decide cases lies within an area of authority exclusively reposed in the judicial branch of government."²⁰⁴ Furthermore, the *Grady* court saw the statute in question as being worse than an intrusion upon exclusive judicial power over court administration. The court condemned it as "an attempt to coerce judges in their exercise of the essential case-deciding function of the judiciary."²⁰⁵

In a concurring opinion, Justice Abrahamson wrote separately to express her disagreement with the majority holding that the statute violated the state constitution's separation of powers provision. Justice Abrahamson also exposed a gap in the majority's reasoning:

While the majority opinion discusses the existence of areas of shared power in which both the legislative and judicial branches may act, it does not examine whether each branch has power to regulate the time in which decisions are rendered. In a quantum leap and with no explanation, it moves from recognizing that some areas of authority are exclusively reposed in the judicial branch to asserting that [the statute] falls within such an area.²⁰⁶

Justice Abrahamson correctly observed that merely applying the label "administrative" to certain issues concerning the efficiency and effectiveness of the court system does not explain why those matters are within the court's exclusive authority.²⁰⁷ Beginning what was to become a recurrent theme of hers,²⁰⁸ Justice

201. *Id.*

202. *Id.* at 781, 348 N.W.2d at 569.

203. *Id.* at 782, 348 N.W.2d at 569. The Wisconsin court apparently believed that the protection of trial rights was a proper subject of legislation but that the public interest in effective and efficient court systems was not a matter within the legislature's authority. *See id.* at 781-82, 348 N.W.2d at 569. The Fourth Circuit, however, seemed to think that Congress had the power to pass statutes designed to advance or protect the public interest in the efficiency and effectiveness of the judicial system. *See Brainer*, 691 F.2d at 698.

204. *Grady*, 118 Wis. at 782-83, 348 N.W.2d at 569.

205. *Id.* at 782, 348 N.W.2d at 569. The mention of interference with the "case-deciding function" recalls to mind the opinion of Judge Young in *United States v. Brainer*, 515 F. Supp. 627, 636 (D. Md. 1981), and that of Judge Peterson in *State ex rel. Emerald People's Util. Dist. v. Joseph*, 292 Or. 357, 640 P.2d 1011, 1018 (1982) (Peterson, J., concurring).

206. *Grady*, 118 Wis. at 795, 348 N.W.2d at 575 (Abrahamson, J., concurring).

207. *Id.* at 799, 348 N.W.2d at 576-77 (Abrahamson, J., concurring). *Cf. Carter*, *supra* note 105, at 721 (U.S. Supreme Court opinions generally seem justifications for results reached, rather than explanations of analytical pathways that led Justices to conclusions).

208. *See, e.g., Abrahamson, Criminal Law and State Constitutions: The Emergence of State*

Abrahamson called for state constitutional law decisions to be made on historically sound, principled bases.²⁰⁹

She pointed out that the majority, in holding that the legislature does not have the power to promulgate rules for the efficient and effective functioning of the court system, was forgetting that the legislature has plenary power to act for the general welfare.²¹⁰ Finding nothing in the state or federal constitution or federal law proscribing the legislature from so acting, Justice Abrahamson concluded that "the regulation lies within the zone of authority shared by the legislature and the judiciary,"²¹¹ because the statute was in "[t]he overlap of . . . the court's power to adopt measures necessary for the due administration of justice and the legislature's power to protect the public welfare by promoting the efficient and impartial administration of justice."²¹²

Justice Abrahamson further argued that, even if the regulation fell within the judiciary's exclusive power, the court should have chosen not to strike it down,²¹³ because the statute did not interfere with the court in its exercise of that power. Apparently conceding part of her point, the majority recognized the desirability of a reasonable time limit for judicial decisionmaking. Ironically, while declaring the statute to be unconstitutional, the court adopted as an appendix to the *Grady* opinion a similar rule with the same time period but without the monetary sanction.²¹⁴

The speedy disposition cases analyzed here, while containing some of the clearest assertions of the exclusivity of judicial power, were not the first of their kind. As the opinions show, the question of the constitutionality of the legislature's attempt to dictate the actions of the judiciary was litigated as far back as the previous century.²¹⁵ The FSTA cases and the state speedy disposition cases are important not only in themselves, but also because they prompted attacks on

Constitutional Law, 63 TEX. L. REV. 1141, 1179-80 (1985) (highlighting need for well-reasoned, not result-oriented, decision making).

209. *Grady*, 118 Wis. at 792, 348 N.W.2d at 572 (Abrahamson, J., concurring). See also *State v. Jewett*, 146 Vt. 221, 224, 500 A.2d 233, 235 (1985) (decisions must be principled, not result-oriented); Whitten & Robertson, *Post-Custody, Pre-Indictment Problems for Fundamental Fairness and Access to Counsel: Mississippi's Opportunity*, 13 VT. L. REV. 247, 247-48 (1988) (state constitutional law a response to arbitrary, result-oriented decisions of federal constitutional jurisprudence).

210. *Accord Meshell v. State*, 739 S.W.2d 246, 260 n.5, 274 (Tex. Crim. App. 1987) (Clinton and Miller, J.J., respectively, dissenting) (legislature has plenary power).

211. *Grady*, 118 Wis. 2d at 792, 348 N.W.2d at 572 (Abrahamson, J., concurring).

212. *Id.* at 795, 348 N.W.2d at 575 (Abrahamson, J., concurring).

213. *Id.* at 800, 348 N.W.2d at 577-78 (Abrahamson, J., concurring). *Accord Browde & Occhialino*, *supra* note 59, at 474 (court should not override procedural statutes not necessary to protect essential judicial functions or when court rule is better than inefficient statutory procedure). *But cf.* Carter, *supra* note 103, at 748 ("It is unclear what constitutional warrant the courts have for permitting the Congress free aggrandizement of its own authority in the guise of exercising its judgment on what institutional arrangements new problems require"); Note, *Eroding the Separation of Powers: Congressional Encroachment on Federal Judicial Power*, 53 BROOKLYN L. REV. 669, 690-91 (1987) (acquiescence by one branch in intrusion by another is inconsistent with system of checks and balances).

214. *Grady*, 118 Wis. at 786-87, 348 N.W.2d at 571.

215. See, e.g., *Houston v. Williams*, 13 Cal. 24, 25 (1859) (invalidating statute requiring California Supreme Court to render written opinion with reasons).

the constitutionality of state speedy trial acts and rules.²¹⁶ Some of the same arguments advanced in the state and federal cases discussed above reappeared in the state speedy trial cases.

B. Court Rules Mandating Speedy Trials

Even before state speedy trial statutes were being attacked as legislative intrusions on judicial power, speedy trial rules promulgated by the courts were challenged as judicial incursions into the domain of the legislature or the executive. In such cases, the usual contention was that the courts, in promulgating rules setting speedy trial time limits, were creating a substantive right to a speedy trial, which was a power residing in the legislature. Nevertheless, the universal ruling in those cases was that such rules merely prescribed procedures by which the constitutional or statutory right to a speedy trial was obtained in a judicial proceeding.

In *State ex rel. Uzelac v. Lake Criminal Court*,²¹⁷ decided in 1965, the Indiana Supreme Court held that a time limit set by the court was within the court's constitutional authority, even though the legislature had attempted to fix different time limits based on terms of court.²¹⁸ The Arkansas Supreme Court took a similar position in 1981, upholding a court rule that permitted a delay longer than that allowed by a former statutory limit.²¹⁹ During the 1970s, the Florida Supreme Court decided a pair of cases establishing the court's authority to promulgate speedy trial rules. First, in 1973 the court reversed a trial court ruling that had held the speedy trial rule unconstitutional.²²⁰ Two years later, the court reiterated and explained its earlier holding as based on the difference between substantive and procedural law: "Therein this Court declared that the questioned rule merely provides the procedures through which the constitutional right to a speedy trial is enforced in this state and is a proper exercise of this Court's constitutional power to promulgate rules of practice and procedure."²²¹

During the 1980s, the attacks on speedy trial rules broadened to include the contention that the rules infringed on the power of the executive, as well as the

216. See, e.g., *State v. Pachay*, 64 Ohio St. 2d 218, 219, 416 N.E.2d 589, 589-90 (1980) (question of constitutionality of state speedy trial act prompted by holdings in previous cases where attempts by general assembly to dictate judicial action within specified time struck down or ignored as legislative invasions of judicial power).

217. 247 Ind. 87, 212 N.E.2d 21 (1965).

218. *Id.* at 91, 212 N.E.2d at 23.

219. *Cassell v. State*, 273 Ark. 59, 69-70, 616 S.W.2d 485, 490-91 (1981). The court held that, like a speedy trial statute or a statute of limitations, the court rule was procedural, even though it had a substantive effect. *Id.* The Fourth Circuit took a similar approach in *Brainer*, 691 F.2d at 695-96 (speedy trial act only proscribes rules of practice and procedure).

220. *State ex rel. Maines v. Baker*, 254 So. 2d 207 (Fla. 1971) (court has constitutional power to promulgate rules governing practice and procedure).

221. *State v. Lott*, 286 So. 2d 565, 566 (Fla. 1973), *cert. denied*, 417 U.S. 913 (1974). *But cf.* *Fulk v. State*, 417 So. 2d 1121, 1125 (Fla. Dist. Ct. App. 1982) (Coward, J., concurring) (just as legislature/judiciary boundaries breached in creation of rule, executive/judiciary boundaries breached in scope of rule).

legislature. In *State v. Edwards*,²²² the Washington Supreme Court faced both challenges. The state's first contention was that the court's speedy trial rule created a "substantive 'statute of limitations'" that infringed on the legislative function. The court held that it had the inherent authority, independent of any statutory grant of power, to make rules of practice and procedure.²²³ It then invoked the familiar substantive/procedural distinction and held that the speedy trial rule was "clearly within the power and necessary to the operation of the courts."²²⁴ The court also responded to the state's argument that the rule, which included a mandatory provision for dismissal with prejudice upon failure to comply, interfered with the prosecutor's constitutionally granted discretion in charging persons with crimes. Observing that the rule did not begin to operate upon the prosecutor until he or she had exercised the discretion to arrest or charge a person, the court concluded that the rule did not violate the state's right to prosecute.²²⁵

Four years later, the Alaska Supreme Court, in *State v. Williams*,²²⁶ relied heavily on the Washington Supreme Court's decision in *Edwards*. The contention in *Williams* was the standard one, that the court's rule violated separation of powers principles,²²⁷ intruding on the legislative power by creating a substantive right to a speedy trial. While recognizing that "the line between substance and procedure is an elusive one,"²²⁸ the Alaska court, like the Washington court in *Edwards*, nevertheless invoked the substance/procedure dichotomy.²²⁹ The state alleged that the court's speedy trial rule usurped the legislature's authority by affording the accused protections greater than those provided by the federal and state constitutions.²³⁰ The court concluded, however, "that any additional protections which [the rule] arguably confers upon criminal defendants are justified by the fact that these are incidental to the efficient implementation of the

222. 94 Wash. 2d 208, 616 P.2d 620 (1980).

223. *Id.* at 213, 616 P.2d at 623.

224. *Id.*

225. *Id.* at 213, 616 P.2d at 623. As will be shown later, the Texas Court of Criminal Appeals was to reach the opposite conclusion regarding a statute mandating that the prosecution be ready for trial within specific time limits. See *Meshell v. State*, 739 S.W.2d 246, 257 (Tex. Crim. App. 1987) (act guaranteeing dismissal with prejudice when County Attorney delayed, deprived County Attorney of prosecutorial discretion).

226. 681 P.2d 313 (Alaska 1984).

227. *Id.* at 315. Like the Federal Constitution, and unlike most state charters, the Alaska Constitution had no express separation of powers provision. *Id.* at 315 n.2. The court reiterated earlier holdings that the principle of separation of powers is implicit in the Alaska Constitution. *Id.* Unlike the Washington Constitution, the Alaska Constitution expressly vests procedural rule-making power in the state supreme court, so the Alaska court did not have to rely on the notion of inherent power. *Id.* at 315 (Alaska constitution vests power to make and promulgate rules governing practice and procedure in supreme court of Alaska) (quoting *Thomas v. State*, 566 P.2d 630, 637 (Alaska 1977)).

228. 681 P.2d at 316 n.4 (quoting *Smiloff v. State*, 579 P.2d 28, 33 n.19 (Alaska 1978)).

229. *Id.* at 315.

230. *Id.* at 316. The Fourth Circuit, in *Brainer*, rejected a similar notion that Congress could not accord an accused "more protection than the [federal] Constitution requires." 691 F.2d 691, 698 (4th Cir. 1982).

constitutional right to a speedy trial,"²³¹ which the court discerned as one of the two purposes to be served by the rule. In reaching that ruling, the *Williams* court borrowed the reasoning of the Indiana Court in the *Lake Criminal Court* case,²³² mentioned earlier.²³³ The *Williams* court also employed the Washington court's reasoning in *State v. Edwards*²³⁴ to counter the argument that the rule established a substantive statute of limitations, an infringement on the power of the legislature.²³⁵

The rule's other purpose, according to the *Williams* court, was to advance the societal interest in speedy prosecution. The court saw that goal as "a matter of calendaring, a function generally considered to be within the judiciary's domain."²³⁶ After reviewing cases from eleven jurisdictions, including some of the opinions discussed herein,²³⁷ the court concluded that its speedy trial rule was a valid exercise of its constitutionally granted authority over rules of practice and procedure and did not infringe on the powers of the executive or legislative branches.²³⁸

Taken as a whole, the state decisions dealing with court rules mandating speedy trials, turning as they did on the obscure distinction between substantive law and procedural rules (as did the *Brainer* appellate opinion, in part)²³⁹ provided little guidance for the resolution of the question of the constitutionality of speedy trial legislation. The cases were resolved through a definitional approach that displayed only superficial analysis. Once it was determined that the courts had the authority to promulgate procedural rules and the rule was pronounced procedural, not substantive, the result followed automatically. Perhaps because the cases lacked significant analysis, they played little or no part in the decisions regarding state speedy trial acts, despite the surface similarity of issues.

231. 681 P.2d at 317 (footnote omitted).

232. 247 Ind. 87, 212 N.E.2d 21 (1965).

233. See *supra* note 217 and accompanying text for a discussion of the *Lake Criminal Court* case.

234. 94 Wash. 2d 208, 616 P.2d 620 (1980).

235. 681 P.2d at 318-19. The reliance of the Alaska and Washington state governments, in attacking the rule, on a purported resemblance between the court-created speedy trial rules and statutes of limitations, is ironic in light of the Fourth Circuit's use of the same analogy to uphold the FSTA in *Brainer*, 691 F.2d at 696.

236. 681 P.2d at 317-18.

237. *Id.* at 319 n.19 (citing *Cassell v. State*, 273 Ark. 59, 70, 616 S.W.2d 485, 491 (1981) (court can supersede speedy trial statute by procedural rule permitting longer delay); *State v. Lott*, 286 So. 2d 565, 566 (Fla. 1973) (same); *State ex rel. Maines v. Baker*, 254 So. 2d 207, 208 (Fla. 1971) (same); *State ex rel. Uzelac v. Lake Criminal Court*, 247 Ind. 87, 91, 212 N.E.2d 21, 23 (1965) (same); *State v. Edwards*, 94 Wash. 2d 208, 213, 616 P.2d 620, 623 (1980) (same)). The Alaska court also analogized to *State v. Estencion*, 63 Haw. 264, 268, 625 P.2d 1040, 1043 (1981) (court's speedy trial rule valid and distinct from constitutional right to speedy trial). See *Williams*, 681 P.2d at 317 n.12 (purpose of Hawaii rule to increase efficiency of criminal process).

238. 681 P.2d at 318.

239. *United States v. Brainer*, 691 F.2d 691, 695-96 (4th Cir. 1982). See *supra* notes 131-33 and accompanying text for a discussion of the *Brainer* court's substantive/procedural distinction. But see *Mistretta v. United States*, 57 U.S.L.W. 4102, 4110 (U.S. Jan. 18, 1989) (separation of powers analysis does not turn on whether activity is substantive or procedural).

C. Speedy Trial Acts and the Courts

A year after Judge Young ruled on the constitutionality of the FSTA in *United States v. Howard*,²⁴⁰ the Kansas Supreme Court, in *State v. Warren*,²⁴¹ dismissed the contention that its state speedy trial act constituted a legislative encroachment on the judiciary, in violation of state separation of powers principles. Without engaging in any analysis, the *Warren* court stated that it found the *Howard* opinion unpersuasive, noting that no other state or federal court had followed it.²⁴²

Taking the issue (and the *Howard* opinion) more seriously, while ignoring the Kansas Supreme Court's *Warren* opinion, the Ohio Supreme Court, in *State v. Pachay*,²⁴³ examined the question of whether the state speedy trial statutes violated the state constitution by encroaching on judicial power. As early as 1977, the Ohio court had begun to suggest that the state speedy trial statutes could be viewed as an invasion of judicial autonomy.²⁴⁴ In the later case of *State v. Pachay*,²⁴⁵ the court stayed its hand and declined to invalidate the act as a usurpation of judicial power.²⁴⁶

The court recognized a line of its own cases striking down or ignoring legislative attempts to dictate judicial action within a specified time.²⁴⁷ It also admitted that "[c]logent arguments" had been made in *United States v. Martinez*,²⁴⁸ *United States v. Howard*,²⁴⁹ and elsewhere against the validity of the FSTA and other such acts.²⁵⁰ As the Fourth Circuit later would do in *Brainer*, however, the *Pachay* court failed to find persuasive evidence in the record to establish that the statutes usurped judicial power. Even so, the court, invoking the spirit of judicial exclusivity, hinted that the procedural area in question might be "solely

240. 440 F. Supp. 1106 (D. Md. 1977).

241. 224 Kan. 454, 580 P.2d 1336 (1978).

242. *Id.* at 457, 580 P.2d at 1339. The *Warren* court did not mention the fact that no other court could have followed *Howard* because no other court had addressed that issue yet.

243. 64 Ohio St. 2d 218, 416 N.E.2d 589 (1980). The Ohio Constitution contains no separation of powers provision. In *Pachay*, the Ohio court interpreted article IV, § 1, which vested judicial power in the courts. *Id.* at 219 n.2, 416 N.E.2d at 589 n.2.

244. See *State v. Ladd*, 56 Ohio St. 2d 197, 201, 383 N.E.2d 579, 582 (1978) (court will not apply such statutes when judicial autonomy will be derogated by enforcement), *cert. denied*, 441 U.S. 926 (1979); *State v. Singer*, 50 Ohio St. 2d 103, 105-06, 362 N.E.2d 1216, 1218 (1977) (legislative time limit upheld as rational, although different from court rule). *State v. Ladd*, 56 Ohio St. 2d 197, 383 N.E.2d 579 (1978) (court will not apply such statutes when judicial autonomy would be derogated by enforcement).

245. 64 Ohio St. 2d 218, 416 N.E.2d 589 (1980).

246. *Id.* at 222, 416 N.E.2d at 592.

247. *Id.* at 220-21, 416 N.E.2d at 590.

248. 538 F.2d 921, 923 & n.4 (2d Cir. 1976) (sweeping language of act may be more than procedural).

249. 440 F. Supp. 1106, 1109 (D. Md. 1977) (speedy trial act an unconstitutional legislative encroachment on judiciary).

250. *Pachay*, 64 Ohio St. 2d at 221, 416 N.E.2d at 591. See also *State v. Pugh*, 53 Ohio St. 2d 153, 156, 372 N.E.2d 1351, 1352 (1978) (Herbert, J., concurring) (questioning constitutionality of state speedy trial time limits).

within the domain of the judiciary."²⁵¹ The *Pachay* court also put the legislature on notice that the issue would be reexamined if the burdens on the trial courts were to increase because of (1) legislative shortening of the time periods, (2) legislative elimination of existing exceptions to the application of those limits, or (3) an increase in the number of cases.²⁵² The *Pachay* decision thus cannot be taken as a general ruling on the constitutionality of the Ohio speedy trial statutes.²⁵³

To date, no state supreme court has held that a speedy trial statute constitutes a legislative infringement on the power of the courts²⁵⁴ in violation of state constitutional separation of powers principles. The Kansas court, which upheld a statute against such a challenge, left nothing to examine because it provided no analysis. The Ohio Court, while showing evidence of research into analogous cases from its own and other jurisdictions, in the end left the question open and gave little indication of the test it would apply in the future.

D. The Effect of a Speedy Trial Statute on Prosecutors

The final case to be examined in this exploration of state constitutional separation of powers challenges to speedy trial and speedy disposition statutes and rules is the most recent one, and is the only case involving a successful attack on a state speedy trial statute. In 1987, after struggling for nearly ten years to interpret the state's speedy trial statute, the Texas Court of Criminal Appeals,²⁵⁵ in *Meshell v. State*,²⁵⁶ held that the statute violated an express separation of powers provision in the state constitution,²⁵⁷ by encroaching impermissibly on the prosecutorial discretion of the county attorney.²⁵⁸ Curiously, that encroachment constituted an infringement on the judicial branch, not the executive, be-

251. *Pachay*, 64 Ohio St. 2d at 222, 416 N.E.2d at 591.

252. *Id.* at 223, 416 N.E.2d at 592.

253. See *State v. Hatcher*, 2 Ohio Misc. 2d 8, 9, 436 N.E.2d 557, 558 (1982) where the court stated:

... *Pachay* did not rule generally on the constitutionality of the speedy trial statutes, but rather simply elected to enforce them at that time in that particular case. The Court held with the facts before it that the statutes represented a rational effort to enforce the constitutional guarantee of a speedy trial.

Id.

254. But see *State v. Meshell*, 739 S.W.2d 246, 252-54 (Tex. Crim. App. 1987) (statute invades judiciary by infringing not on courts but on prosecutor, member of judicial branch).

255. Texas (like Oklahoma) has two courts of last resort. The court of criminal appeals handles criminal cases; the supreme court decides civil cases. Tex. R. App. P., Secs. 15 & 9, respectively.

256. 739 S.W.2d 246 (Tex. Crim. App. 1987).

257. *Id.* at 257. The Texas Constitution devotes an entire article to the separation of powers: The powers of the Government of the State of Texas shall be divided into three distinct departments, each of which shall be confided to a separate body of magistracy, to wit: Those which are Legislative to one; those which are Executive to another, and those which are Judicial to another; and no person, or collection of persons, being of one, of these departments, shall exercise any power properly attached to either of the others, except in the instances herein expressly permitted.

TEX. CONST. art. II, § 1.

258. 739 S.W.2d at 257. The court noted that "the usurpation of power will not receive sanction by reason of a long and unprotested continuation." *Id.* at 252 n.8 (citing *Immigration & Natu-*

cause the Texas Constitution places the office of county attorney within the judicial department.²⁵⁹ Although some of the duties of the county attorney appear executive in nature,²⁶⁰ *Meshell* involved a conflict between the legislative and judicial branches.²⁶¹

The constitutionality of the state statute was questioned soon after it was adopted. In 1979, Judge Clinton²⁶² suggested that the statute could be viewed as violating the state constitution's separation of powers provision because it "deprives prosecuting attorneys of their right to exercise judgment and discretion in performing their exclusive prosecutorial functions."²⁶³ Judge Clinton also suggested that the speedy trial statute encroached on the authority of the courts to control their dockets,²⁶⁴ the claim that had been made in *United States v. Howard*²⁶⁵ two years earlier. No claim based on docket control was made in *Meshell*, and the majority focused instead on legislative interference with the prosecutor's discretion in preparing for trial.²⁶⁶ That concentration was dictated by the fact that the statute itself "focused upon prosecutorial readiness for trial rather than actual commencement of trial."²⁶⁷

The statute required that the state be ready for trial within 120 days after commencement of a felony criminal action.²⁶⁸ Otherwise, the trial court would have to dismiss the indictment with prejudice.²⁶⁹ In *Meshell*'s case, the criminal

ralization Serv. v. Chadha, 462 U.S. 919, 944 (1983) (provision providing Congressional veto declared unconstitutional)).

259. *Id.* at 253 (citing TEX. CONST. art. V, § 21 (controlling legislative creation of prosecutor's office)). Texas is not alone in placing the prosecutor's office in the judicial article of the state constitution. See, e.g., Fulk v. State, 417 So. 2d 1121, 1126 n.2 (Fla. App. 1982) (Coward, J., concurring) (constitutional provision for state attorneys and public defenders provided by FLA. CONST. art. V, §§ 17-18, denoted as judiciary article).

260. *Meshell*, 739 S.W.2d at 253 n.9.

261. *Id.* at 253. One member of the court expressed doubt that the county attorney had standing to speak for the judiciary. *Id.* at 269 (Teague, J., dissenting).

262. Members of the Texas Court of Criminal Appeals carry the official title of "Judge," not "Justice." Rule 201(a), TEX. R. APP. P. Any comments in this article regarding the opinions of Judge Clinton should be read in light of the fact that the author was a briefing attorney (law clerk) for Judge Clinton during the 1982-83 term.

263. *Ordunez v. Beam*, 579 S.W.2d 911, 915 (Tex. Crim. App. 1979) (Clinton, J., concurring).

264. *Id.*

265. 440 F. Supp. 1106 (D. Md. 1977).

266. 739 S.W.2d at 254-57. Presumably, because the prosecutor is a member of the same branch of government as the courts, a judicially created rule requiring the prosecutor to be ready for trial within a specified time could not be held to violate the separation of powers provision of the state constitution, at least not on the basis that the rule was an infringement on prosecutorial discretion.

267. *Id.* at 255-56 n.15.

268. The statute provides: "A court shall grant a motion to set aside an indictment . . . if the state is not ready for trial within . . . 120 days of the commencement of a criminal action if the defendant is accused of a felony. . . ." TEX. CODE CRIM. PROC. ANN. Art. 32A.02, § 1(1) (Vernon 1983).

269. *Meshell*, 739 S.W.2d at 250. In this respect, the Texas act differs from the FSTA, which allows dismissal without prejudice to the government's ability to seek another indictment for the same offense. See *supra* note 148 and accompanying text for the FSTA provision permitting dismissal without prejudice.

action commenced when he was indicted, but for more than twelve months the state failed to arrest or try him.²⁷⁰ The trial court agreed with *Meshell* that the state had failed to comply with the statute, but, without stating its reason, the court held the statute unconstitutional.²⁷¹ In an unpublished opinion, the appellate court summarily rejected the contention that the statute violated separation of powers principles but held it unconstitutional on other grounds.²⁷² Despite problems with the procedural posture of the case, the court of criminal appeals decided to address the separation of powers issue.²⁷³

As noted above, the government argued that in passing the speedy trial statute, the legislature had intruded on the judiciary by restricting the prosecutorial discretion of the county attorney, a member of the judicial branch.²⁷⁴ Although the legislature had treated some counties differently by establishing the office of district attorney or criminal district attorney,²⁷⁵ in the jurisdiction in question only the county attorney had the constitutional "duty to represent"²⁷⁶ the state in criminal cases. As a member of the judicial branch, the county attorney was entitled to the protection of the separation of powers precept contained in the state constitution. Previously, the legislature had been unable to remove or limit the duties of county attorneys unless an express provision of the constitution authorized it to do so.²⁷⁷

The court of criminal appeals regarded prosecutorial discretion in the preparation of the government's case for trial as an "obvious corollary" to a county

270. 739 S.W.2d at 249. Although an arrest warrant had issued, it stated the wrong home address. Unaware of the warrant or indictment, *Meshell* continued to reside at his usual address until he was arrested. *Id.*

271. *Id.*

272. *Id.* at 251. The court of appeals held that, when the bill proposing the act was before the legislature, the caption or introduction to the bill failed to provide the legislature with sufficient notice of its contents, in violation of Article III, § 35 of the Texas Constitution. *Id.* Meanwhile, however, Section 35 had been amended to prevent the courts from invalidating legislation on that basis and leaving such questions in the hands of the legislature alone. *Id.* The issue thus became moot. *Id.*

273. *Id.* at 248 n.3. The high court's justifications for reaching that question, despite procedural obstacles, were criticized by Judge Clinton at one point as "utterly fatuous" and elsewhere as "a masterly bit of disingenuousness." *Id.* at 259, 260 n.3 (Clinton, J., dissenting). Another dissenter agreed that Judge Clinton was "technically correct" in objecting to the exercise of discretionary review over the separation of powers issue but believed that to refrain from reaching the question would amount to "judicial wheel-spinning." *Id.* at 261 n.1 (Teague, J., dissenting).

274. *Id.* at 253. But cf. *People v. Guenther*, 740 P.2d 971, 977 (Colo. 1987) (statute authorizing court to order pretrial dismissal of criminal charges does not impermissibly encroach on executive prosecutorial function in violation of state constitution).

275. *Meshell*, 739 S.W.2d at 253 n.10 (citing 1 THE CONSTITUTION OF THE STATE OF TEXAS: AN ANNOTATED AND COMPARATIVE ANALYSIS 463-467 (G. Braden ed. 1977) (explaining manner in which Texas Constitution controls legislative creation of prosecutor's office)).

276. TEX. CONST. art. V, § 21 (county attorney shall represent state). But see *Meshell*, 739 S.W.2d at 271 (Miller, J., dissenting) (doubting that stated "duty to represent" is actually "power" protected from infringement by other departments because of separation of powers clause).

277. See *Hill County v. Sheppard*, 142 Tex. 358, 364, 178 S.W.2d 261, 264 (1944) (unconstitutional for legislature to place criminal duties of county attorney in office of criminal district attorney).

attorney's constitutional duty to prosecute criminal cases.²⁷⁸ Thus, without express constitutional authorization, the legislature could not restrict the county attorney's ability to prepare for trial.²⁷⁹ The Court rejected the argument that the legislature's constitutionally granted power to make rules for the courts operated as express authority to infringe on the prosecutor's discretion in preparing for trial.²⁸⁰ The rule-making authority presupposed the existence of a substantive right of the defendant for which the legislature was merely to provide procedures. The legislature was not given "unlimited power to infringe upon the substantive power of the Judicial department under the guise of establishing 'rules of court,' thus rendering the separation of powers doctrine meaningless."²⁸¹

The right for which the statute was meant to provide procedural guidelines was the constitutional right to a speedy trial.²⁸² The flaw in the plan was that the Act did not provide for the speedy commencement of trial but merely directed the prosecutor to be ready for trial within a certain time period. "[T]he Act is directed at speeding the *prosecutor's preparation and ultimate readiness for trial*."²⁸³ The federal and state constitutional provisions, the court noted in contrast, were "directed at assuring a *speedy commencement of trial*."²⁸⁴

Furthermore, the statute did not take into account that well-established constitutional speedy trial doctrine regarded as major factors to be considered in determining whether the right to a speedy trial had been abridged: (1) the reason for the delay; (2) the defendant's assertion of his or her right; and (3) prejudice to the defendant.²⁸⁵ Under the Texas speedy trial statute, it made little

278. *Meshell*, 739 S.W.2d at 254. *But see id.* at 272 (Miller, J., dissenting) (express wording of constitution and cases relied on by majority speak of power to represent state, not prosecutorial discretion in preparation of cases for trial).

279. *Id.* at 254-56. *But see id.* at 272. (Miller, J., dissenting): "[S]imply because a power is specified in the Constitution, and is therefore subject to protection . . . does not imply that any incident to that power is also accorded the same protection. . . . Absent an articulable power, the enumerated powers doctrine . . . and the separation of powers clause . . . are irrelevant." *Id.* (Miller, J., dissenting).

280. *Id.* at 255. The Texas Constitution "clearly intends that the Legislature have ultimate control over establishment of procedural rules of court." *Id.* (quoting TEX. CONST. art. V, § 25 ("The Supreme Court shall have power to make and establish rules of procedure *not inconsistent with the laws of the State* for the government of said court and the other courts of this State to expedite the dispatch of business therein") (emphasis added)).

281. *Id.* The court noted that "the Legislature could establish a new right under its general plenary power if that right did not infringe upon another department's separate power." *Id.* at 255 n.13.

282. *Id.* at 255. For background to the statute, see Clinton, *Speedy Trial—Texas Style*, 33 BAYLOR L. REV. 707, 743-46 (1981) (act has not induced pace of speedy trial which serves public policy of Act); Cohen, *Senate Bill 1043 and the Right to a Speedy Trial in Texas*, 7 AMER. J. CRIM. L. 23, 24 (1979) (liberal provisions for extending intervals likely to result in litigation to determine meaning of provisions).

283. *Meshell*, 739 S.W.2d at 255 (emphasis by the court). A caption to an amendment described the provision as "[a]n Act relating to the time limits for the state to be ready for trial. . . ." *Id.* at 255 n.15 (emphasis by the court).

284. *Id.* at 256 (emphasis by the court).

285. See *Barker v. Wingo*, 407 U.S. 514, 530 (1972) (deprivation of right to speedy trial deter-

difference what reason the state had for the delay, and it made no difference whether the defendant had been prejudiced by the delay or had requested a speedy trial before seeking dismissal.²⁸⁶ The legislature's failure to incorporate those factors, combined with its focus on the prosecutor's readiness for trial rather than the commencement of trial, caused the court to conclude that the statute infringed on the prosecutor's discretion, while failing to ensure a defendant a speedy trial.²⁸⁷ The dissenters regarded the effectiveness or efficiency of the statute,²⁸⁸ as well as the factors discussed above, to be irrelevant, and they saw no practical difficulties being imposed on prosecutors by the act.²⁸⁹ Finding no other express provision of the state constitution authorizing the statute, however, the majority held that the legislature had "exceeded its authority to protect appellant's substantive right to a speedy trial through procedural legislation."²⁹⁰

Although the *Meshell* opinion is open to criticism,²⁹¹ it is significant in several respects.²⁹² It was the first decision to hold a state speedy trial act unconstitutional. The *Meshell* majority did so in a way that provided an example of truly independent state constitutional analysis: without reference to federal separation of powers decisions, to federal cases dealing with the constitutionality of the FSTA, or even to the decisions from other jurisdictions concerning speedy trial or speedy disposition provisions,²⁹³ despite the similarity of the Texas separation of powers provision to those of other states.²⁹⁴ Unlike most of the deci-

mined by *ad hoc* balancing test). A fourth factor, the length of delay, is taken into account by the statute. The federal and Texas constitutions provide the same speedy trial right. *Meshell*, 739 S.W.2d at 255 n.14.

286. *Id.* at 256. See TEX. CODE CRIM. PROC. ANN. art. 32A.02, § 3 (Vernon Supp. 1988).

287. *Meshell*, 739 S.W.2d at 256. *But see id.* at 275 (Miller, J., dissenting) (whether statute accords defendant speedy trial in most efficient way is irrelevant).

288. *Meshell*, 739 S.W.2d at 263 (Teague, J., dissenting) (Speedy Trial Act governed by statutory interpretation and legislative history, while Supreme Court's analysis in *Barker v. Wingo*, applies only to assertion by defendant of federal constitutional speedy trial right); *Meshell*, 739 S.W.2d at 274 (Miller, J., dissenting) (whether Speedy Trial Act adequately addresses four factors set out in *Barker* wholly irrelevant to determination of viability of Act vis-à-vis separation of powers clause).

289. *Id.* at 739 (Teague, J., dissenting) (Act is so easy for prosecutor to comply with that failure to do so "closely resembles an attorney losing an uncontested divorce case. It can be done, but it is awfully hard. . . .").

290. *Meshell*, 739 S.W.2d at 257.

291. Because the dissenting opinions cited herein did such a thorough job of it, this article will not elaborate on the possible shortcomings of the majority opinion.

292. See *Rose v. State*, 752 S.W.2d 529, 538 (Tex. Crim. App. 1988) (opinion on reh'g) (Miller, J., concurring) (*Meshell* must be most important separation of powers opinion in recent times).

293. One dissenter, however, discussed federal separation of powers decisions in general: *United States v. Brainer*, 691 F.2d 691, 698 (4th Cir. 1982) (FSTA not unconstitutional encroachment on judiciary); and a similar act in Ohio considered in *State v. Pachay*, 64 Ohio St. 2d 218, 222, 416 N.E.2d 589, 591 (1980) (speedy trial provisions are rational effort to enforce constitutional right to speedy trial). *Meshell*, 739 S.W.2d at 264-68 (Teague, J., dissenting).

294. See *supra* notes 33, 172, 188 for examples of state separation of powers provisions similar to that of Texas. See also *supra* note 257 for the Texas provision. States often have borrowed from one another constitutional provisions and legal reasoning in a form of "horizontal federalism." Tarr & Porter, *Introduction: State Constitutionalism and State Constitutional Law*, 17 *PUBLIUS* 1, 9 nn.17-18 (1987). For other discussions and examples of horizontal federalism, see Elazer, *The Principles and Traditions Underlying State Constitutions*, 12 *PUBLIUS* 11, 18-22 (1982) (suggests six constitu-

sions from other jurisdictions, the *Meshell* majority and dissenting opinions displayed the results of extensive debate about the text, structure, and function of the state constitution and the statute in question.²⁹⁵ Perhaps most significant, as a sweeping victory for the state, which also promises to clear many cases from the appellate dockets,²⁹⁶ the *Meshell* opinion demonstrated that far-reaching²⁹⁷ and activist²⁹⁸ state constitutional decision making was not the province of only liberal or defense-oriented judges.²⁹⁹

CONCLUSION

As noted in some of the opinions discussed above, vigorous scholarly debate over the question of inherent judicial control over rule making has spanned several decades.³⁰⁰ Although some form of inherent judicial power is a widely,

tional patterns among states based, *inter alia*, on regional differences); Lutz, *The Purposes of American State Constitutions*, 12 *PUBLIUS* 27, 43 (1982) (written constitutions express existing political cultures and reflect respective values); McCabe, *State Constitutions and the "Open Fields" Doctrine: A Historical-Definitional Analysis of the Scope of Protection Against Warrantless Searches of "Possessions"*, 13 *VT. L. REV.* 179, 191 (1988) (some states copied from other state constitutions rather than from federal fourth amendment); Sturm, *Development of American State Constitutions*, 12 *PUBLIUS* 57, 74 (1982) (survey of current development of state constitutions).

295. The majority and dissenting opinions fill more than thirty pages in the reporter. A single footnote in one of the dissenting options covers four full pages. See *Meshell*, 739 S.W.2d at 276-80 n.2 (Miller, J., dissenting).

296. On a single day, May 25, 1988, the Texas Court of Criminal Appeals disposed of eight speedy trial cases, merely by citing *Meshell*. Some of the cases had been pending for three or four years. See *Ballenger v. State* (No. 632-84); *Beddoe v. State*, 752 S.W.2d 564, 565 (Tex. Crim. App. 1988) (No. 589-84); *Garcia v. State*, 751 S.W.2d 507, 508 (Tex. Crim. App. 1988) (No. 1118-85); *Hoffman v. State*, 751 S.W.2d 512, 512 (Tex. Crim. App. 1988) (No. 448-85); *Massey v. State*, 751 S.W.2d 505, 506 (Tex. Crim. App. 1988) (No. 1111-86); *Orn v. State*, 753 S.W.2d 394, 395 (Tex. Crim. App. 1988) (No. 466-87); *Stevenson v. State*, 751 S.W.2d 508, 509 (Tex. Crim. App. 1988) (No. 928-85); *Wright v. State*, 751 S.W.2d 506, 507 (Tex. Crim. App. 1988) (No. 1217-85). The last two digits of the case number denote the year in which the high court received the petition for discretionary review.

297. See *Meshell*, 739 S.W.2d at 262 (Teague, J., dissenting): ("[T]he majority opinion is a mere step away from holding that the prosecuting attorneys of the State, which presently number at least 1,085 . . . can never be subject to any procedural laws promulgated by the Legislature of this State"); *id.* at 275 (Miller, J., dissenting) ("[W]hat act of the legislature regulating the prosecution is ever safe from our attack?") *Id.*

298. See *id.* at 258 (Clinton, J., dissenting) (majority of court demonstrates will and determination to cast aside carefully drawn rules for orderly procedure to reach result that law and procedural circumstances have previously put beyond its reach); *id.* at 269 (Teague, J., dissenting) (referring to "aggressive and assertive majority team").

299. See Miller, *Separation of Powers: An Ancient Doctrine Under Modern Challenge*, 28 *ADMIN. L. REV.* 299, 324-25 (1976) (separation of powers is profoundly conservative device to block innovations). But cf. Maltz, *False Prophet—Justice Brennan and the Theory of State Constitutional Law*, 15 *HASTINGS CONST. L.Q.* 429, 433 (1988) (overwhelmingly liberal impact of state court activism). For an idea of the Texas Court of Criminal Appeals' activism (from a court about evenly divided between liberal and conservative judges), see *Rose v. State*, 752 S.W.2d 529, 536-37 (Tex. Crim. App. 1987) (parole law jury instruction violates separation of powers and due course of law); *Long v. State*, 742 S.W.2d 302, 319 (Tex. Crim. App. 1987) (admission of videotape of child witness violates right of confrontation and due course of law).

300. See Kaplan & Greene, *The Legislature's Relation to Judicial Rule-Making: An Appraisal*

though not universally,³⁰¹ accepted concept,³⁰² some observers have argued that control of court administration is the only truly inherent power of the judiciary.³⁰³ Virtually every state now allows judicial control over the rules of practice and procedure, but the source of that authority is often a statute by which the legislature has expressly delegated the power.³⁰⁴ Alternatively, rule-making authority is now explicitly granted to the courts in many state constitutions,³⁰⁵ though often with legislative oversight.³⁰⁶ Constitutional authorization for legislative and judicial sharing of control over rules of procedure, however, does not settle the question of whether the legislature can dictate the internal administration of the courts or impede the discretion of the prosecutor.³⁰⁷

Because state constitutions expressly vest the judicial power in the judiciary,³⁰⁸ some commentators have suggested that the real questions involve not whether a power is inherent, but whether it is judicial in nature and exclusively so.³⁰⁹ Unfortunately, the typical state court opinion leaps from the premise that some judicial power is exclusive to the conclusion that the power in question is

of *Winberry v. Salisbury*, 65 *HARV. L. REV.* 234, 239 (conflict between N.J. legislature and supreme court) (1951); Levin & Amsterdam, *supra* note 88, at 30 (some powers of courts must be free from legislative control); Pound, *Procedure Under Rules of Court in New Jersey*, 66 *HARV. L. REV.* 28, 37-40 (1952) (judicially established rules of procedure bring speed and efficiency to administration of justice); Pound, *The Rulemaking Power of the Courts*, 12 *A.B.A. J.* 599, 601-02 (1926) (procedure of courts belong to courts, not legislature); see generally Wigmore, *supra* note 133 (claiming all legislative rules for judicial procedure are unconstitutional).

301. See Dodd, *supra* note 16, at 201 (political philosophy of 1776 did not recognize existence of inherent governmental power); Burns & Markman, *supra* note 32, at 581 (denying existence of inherent powers in branches of federal government).

302. In *re Clerk of Court's Compensation v. Lyon County Comm'rs*, 308 *Minn.* 172, 177, 241 *N.W.2d* 781, 784 (1976) (doctrine of inherent judicial power is established law in virtually all American jurisdictions).

303. Cox, *supra* note 27, at 229.

304. Kay, *supra* note 18, at 28.

305. See Levin & Amsterdam, *supra* note 88, at 5 (recent history of constitutional drafting in this country reflected consistent concern with rule making by judiciary, with new constitutions expressly granting power to courts).

306. Williams, *supra* note 10, at 208-09 (citing for examples and further discussion A. KORBAKES & C. GRAU, *JUDICIAL RULEMAKING IN THE STATE COURTS—A COMPENDIUM* (1978); Joiner & Miller, *Rules of Practice and Procedure: A Study of Judicial Rule Making*, 55 *MICH. L. REV.* 623, 639-42 (1957); Kay, *supra* note 18, at 28; Means, *The Power to Regulate Practice and Procedure in Florida Courts*, 32 *U. FLA. L. REV.* 442, 458 (1980)).

307. Coate v. Omholt, 203 *Mont.* 488, 497-98, 667 *P.2d* 591, 596 (1983) (legislative power to regulate procedure does not include control of court dockets); *In re Grady*, 118 *Wis.* 2d 762, 782, 348 *N.W.2d* 557, 569 (1984) (efficient and effective administration of court is matter within exclusive authority of judiciary); *State v. Meshell*, 739 S.W.2d 246, 257 (Tex. Crim. App. 1987) (authority of legislature to regulate procedure is not authority to encroach on power of prosecutor in trial preparation).

308. See, e.g. KY. CONST. § 27: "The powers of the government . . . shall be divided into three distinct departments, and each of them be confined to a separate body of magistracy, to wit: Those which are legislative to one; those which are executive to another; and those which are judicial to another . . ."

309. See Williams, *supra* note 16, at 211 ("State constitutions . . . place the judicial power in the judiciary; consequently, rather than debating whether a court's power is inherent, the inquiry should focus on whether the claimed power is properly a judicial function").

(or is not) exclusive.³¹⁰ In the ordinary case, however, it does not matter whether the power in question is inherently or exclusively judicial, as long as the legislature demonstrates that it is exercising some other authority of its own.³¹¹

If the power in question is judicial, and the legislature cannot demonstrate that it has independent authority of its own, then any legislative exercise of that power should be regarded as a violation of separation of powers principles. The undue interference test should not apply.³¹² If the power at issue is judicial, but the legislature is not actually exercising that power³¹³ and merely is using its own constitutional authority to affect how the court exercises judicial power, the inquiry should be whether the legislation unduly interferes with the judicial branch's power.³¹⁴

In every challenge to a speedy trial statute, the legislature can point to its authority to implement the constitutional right to a speedy trial as a power source independent of both the judiciary's authority over rule making and the prosecutor's authority over case preparation.³¹⁵ The legislature is authorized to effectuate the constitutional right by creating a statutory right to a speedy trial. In speedy trial statute cases, therefore, the question of inherent or exclusive power of the courts or prosecutors becomes irrelevant. Because the legislature has its own power source independent of the authority of the other branches, the only question is whether the speedy trial act unduly interferes with the other branches in the exercise of their power.

Similarly, unless the state constitution indicates otherwise, the legislature has general policymaking authority to pass statutes designed to protect or advance the interests of the public and litigants in an effective and efficient system of justice, including the speedy disposition of cases.³¹⁶ No state has a provision expressly limiting the legislature in this regard. To the contrary, most states

310. See, e.g., *Grady*, 118 Wis. 2d at 795, 348 N.W.2d at 575 (Abrahamson, J., dissenting) (in areas of shared powers, majority does not examine whether each branch has power to regulate time in which decisions are rendered).

311. *But cf. Morrison v. Olson*, 108 S. Ct. at 2627-31 (Scalia, J., dissenting) (emphasizing importance of exclusivity).

312. See *Grady*, 118 Wis. 2d at 776, 348 N.W.2d at 566 (areas of authority exclusive to judicial branch are free from intrusion by other branches of government).

313. Some state constitutions contain express wording, not only calling for separation of powers, but also forbidding a member of one branch of government from exercising the powers of another branch. See, e.g., OR. CONST. art. II, § 1, *supra* note 172; MONT. CONST. art. III, § 1, *supra* note 188; TEX. CONST. art. II, § 1, *supra* note 257. The argument can be made that such provisions prohibit only the actual exercise of one branch's power by another branch, not actions by one branch that affect other branches.

314. See *State ex rel. Emerald People's Util. Dist. v. Joseph*, 292 Or. 357, 362, 640 P.2d 1011, 1013 (1982) (statute imposing three month time limit for appeals court to hear and determine cases did not unduly interfere with exercise of judicial functions). A similar approach could be taken to shared powers. If the power is not exclusive but is shared by the legislature and another branch, the question should be whether the statute unduly interferes with the proper exercise of authority shared with the other branch.

315. See, e.g., *Meshell v. State*, 739 S.W.2d at 255 (recognizing, *inter alia*, legislature's authority to effectuate right to speedy trial).

316. See, e.g., *supra* notes 199, 210-11 and accompanying text for a discussion of the legislative ability to establish new rights.

have legislative/judicial sharing of rule-making power.³¹⁷ Therefore, when the legislature enacts a statute directing internal administrative procedures for the courts, it is exercising either independent legislative policymaking power or shared legislative/judicial rule-making authority, not exclusive judicial power. For that reason, it does not matter whether the power that the courts are concerned with protecting is inherently or exclusively judicial, because, again, the legislature is exercising power of its own.

The action of the legislature may still be unconstitutional, however, if it unduly interferes with the judiciary's power. Even interference with the judiciary's exercise of shared authority can be a separation of powers violation, should that interference become too substantial or extensive.³¹⁸ As long as the legislature is exercising authority of its own, the standard of undue interference should be applied to a claim of legislative interference, whether or not the judicial power at issue is exclusive or inherent.

For example, in *Meshell* the power to prepare the state's criminal cases for trial was viewed as the exclusive province of the prosecutor, a judicial officer. Had a legislative committee undertaken to prepare a criminal case for trial, it would have been exercising an exclusive prosecutorial power, thus violating the separation of powers provision.³¹⁹ The legislature in *Meshell*, however, was not exercising a prosecutorial power. The Texas legislature undoubtedly has the constitutional authority to effectuate the state constitutional right to a speedy trial.³²⁰ It merely passed a statute that, while creating a statutory right in order to implement the constitutional speedy trial right, affected the prosecutor in the exercise of case preparation. Because the statute did not amount to an exercise of prosecutorial power, but had an effect on that power, it should be evaluated on an undue interference standard.³²¹ "Undue interference" or "undue burden" should not be defined to include only a result that completely prevents a branch from carrying out its constitutionally assigned function,³²² or makes it impossible for the other branch to perform its constitutional role.³²³ Rather, the standard should be broadly read to invalidate any threat to the independence of another branch that is not justified by a constitutionally assigned power and an overriding need of the acting branch to protect or advance constitutionally

317. See *supra* notes 302-03 and accompanying text for a discussion of authority shared by legislature and judiciary.

318. See *In re Grady*, 118 Wis. 2d 762, 776, 348 N.W.2d 559, 574 (Abrahamson, J., concurring) (in area of shared authority, legislation constitutional unless unduly burdens or substantially interferes with judicial branch).

319. See *Meshell v. State*, 739 S.W. 246, 277-78 n.2 (Tex. Crim. App. 1987) (Miller, J., dissenting) (separation of powers violation might occur if legislative investigating committee undertook to dismiss prosecution, rather than creating conditions under which court must dismiss indictment after legislative grant of statutory transactional immunity).

320. See *supra* notes 52, 281 (plenary power of Texas legislature).

321. Compare *Meshell*, 739 S.W.2d at 267 (Teague, J., dissenting) (advocating undue interference standard) with *Morrison v. Olson*, 108 S. Ct. at 2620 (using "undue interference" wording but not as well-defined test).

322. *Brainer*, 691 F.2d at 698.

323. *Joseph*, 292 Or. at 362, 640 P.2d at 1014.

rooted interests.³²⁴

The approach proposed here draws from the state cases the undue interference language and from the federal cases elements of the *Nixon* analysis and the later general balancing test. It takes the middle ground between those who would seek rigid compartmentalization and those who would find no separation of powers violation until one branch completely disrupted another branch's ability to function. The rigid compartmentalization theory undermines the efficiency of government and undervalues the availability of checks and balances.³²⁵ The other extreme looks only for the completed coup and underestimates the incremental effect of interbranch intrusions. As Justice Frankfurter warned, "The accretion of dangerous power does not come in a day. It does come, however slowly, from the generative force of unchecked disregard of the restrictions that fence in even the most disinterested assertion of authority."³²⁶

The theory of separation of powers, "variously decried as vaguely foolish or praised as truly fundamental,"³²⁷ continues to be a source of contention among the branches of both the state and federal governments. At both levels of government, it remains true that "there is no fruitful rule or test which governs decisions relating to separation of powers."³²⁸ No commentator seriously believes that the courts are even attempting "to follow a consistent set of interpretive rules."³²⁹ The lack of "analytical coherence"³³⁰ in the opinions has led

324. Arguably, only interests with roots in the federal or state constitution should figure in the balance. Whether or to what extent, in the face of separation principles, the federal Constitution embodies an interest in governmental efficiency, which the United States Supreme Court has thrown into the balance before, has been a much debated topic. See *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 863 (1986) (Brennan, J., dissenting) (legislative interest in efficiency should not be weighed against judicial independence). Compare *United States v. Brown*, 381 U.S. 437, 443 (1965) (separation of powers obviously not instituted with idea that it would promote governmental efficiency) and *Myers v. United States*, 272 U.S. 52, 293 (1926) (Brandeis, J., dissenting) (doctrine of separation of powers adopted by Convention of 1787 not to promote efficiency, but to preclude exercise of arbitrary power) with Banks, *Efficiency in Government: Separation of Powers Reconsidered*, 35 SYRACUSE L. REV. 715, 717 (1984) (record reveals that efficiency tells half or more of tale leading to separated powers in Constitution) and Miller, *An Inquiry into the Relevance of the Intention of the Founding Fathers, with Special Emphasis Upon the Doctrine of Separation of Powers*, 27 ARK. L. REV. 583, 587 (1973) ("powers separated in 1787 as much to promote efficiency as anything else). Some state courts have recognized that separation of powers advances efficiency in government. See, e.g., *Redmond v. Ray*, 268 N.W.2d 849, 858 (Iowa 1978) (efficient functioning of government depends on adherence by each branch to delicate balance that must be maintained under separation of powers precept); *Galloway v. Truesdell*, 83 Nev. 13, 22, 422 P.2d 237, 244 (1967) (separation of powers necessary to most efficient functioning of governmental system).

325. See Gallant, *Judicial Rule-Making Absent Legislative Review: The Limits of Separation of Powers*, 38 OKLA. L. REV. 447, 481 (1985) (separation of powers makes sense only when combined with checks and balances); Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573, 578 (1984) (in most cases rigid compartmentalization of governmental functions should be abandoned in favor of analysis in terms of separation of functions and checks and balances).

326. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 594 (1952) (Frankfurter, J., concurring).

327. L. TRIBE, *CONSTITUTIONAL CHOICES* 67 (1985) (footnotes omitted).

328. J. NOWAK, R. ROTUNDA & J. YOUNG, *supra* note 64, at 137.

329. Carter, *supra* note 103, at 781 n.248.

some commentators to suggest radical solutions, such as regarding almost all separation of powers issues as "political questions," to be resolved through the checks and balances available to the executive and legislative branches.³³¹ Declaring an issue to be a political question, however, and thereby allowing the courts to refrain from deciding it, would be little more than "the judicial equivalent of throwing up one's hands in despair."³³²

In the final analysis, it may be said of state constitutional separation of powers theory, as is true of federal, that two centuries "of partisan debate and scholarly speculation [yield] no net result but only [supply] more or less apt quotations from respected sources on each side of any question."³³³ Without the benefit of coherent or consistent guidance by the federal courts,³³⁴ lacking a history of truly independent analysis,³³⁵ and faced with different constitutional frameworks, the state courts must struggle to develop separation of powers theories that rest on principled bases.³³⁶ The state decisions regarding speedy trial and speedy disposition statutes and rules provide useful starting points for such an endeavor.

330. *Id.* at 721.

331. See generally J. CHOPER, *JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS* (1980). Choper regards legislative encroachment on individual rights or on the power of the judiciary as proper reasons for judicial intervention. *Id.* at 60-128, 380-415.

332. Carter, *supra* note 103, at 806.

333. *Youngstown Sheet & Tube*, 343 U.S. at 634-35 (Jackson, J., concurring).

334. Cf. Williams, *Methodology Problems in Enforcing State Constitutional Rights*, 3 GA. ST. U.L. REV. 143, 168 n.115 (1986-87) (in area of inherent power of judiciary over internal court administration "there is no analogous federal doctrine to complicate matters").

335. See McCabe, *supra* note 294, at 217 (even when purporting to engage in independent analysis, state courts often seem unwilling or unable to analyze independently).

336. See Abrahamson, *supra* note 208 (calling for principled decision-making). One reason why some opinions interpreting state constitutions have been poorly reasoned may be that most practitioners, because they lack experience in formulating state constitutional arguments, have given the courts little aid. See Utter & Pitler, *Presenting a State Constitutional Argument: Comment on Theory and Technique*, 20 IND. L. REV. 635, 638 (1987) (failure of litigators to make state constitutional claims). The federal decisions also have been criticized as unprincipled:

Chadha must remain something of a mystery. Neither the near unanimity with which the Court decided *Chadha*, nor the breathtaking sweep of the Court's holding, are easily explained by anything in the Constitution's text, history, or structure; by the force of the Court's own logic; or by the thrust of any analysis thus far advanced, at least to my knowledge, in the decision's defense.

L. TRIBE, *supra* note 327, at 76.

Appendix 4 (cont'd)

	All Civil Cases		Tort Cases		Contract Cases		Trial List Cases		Jury Trial Cases		Percent of All Civil Cases Over 1 Year 2 Years		Civil Backlog Index	
	Median	90th Per.	Median	90th Per.	Median	90th Per.	Median	90th Per.	Median	90th Per.	1 Year	2 Years		
Disposition Time Goals	-.2869 (33) P = .053	-.4133 (33) P = .008	-.1646 (33) P = .180	-.3483 (33) P = .023	-.2298 (33) P = .099	-.3689 (33) P = .017	-.3783 (21) P = .045	-.6540** (21) P = .001	-.2058 (25) P = .162		-.3848 (33) P = .014	-.3906 (33) P = .012	-.4989** (24) P = .007	
% Jury Trials on 1st Sched Trial Date	.	.	.	.	.	.	.	.	-.5728**		.	.	.	.
Civil Backlog Index	.6814** (24) P = .000	.7881** (24) P = .000	.5083** (24) P = .006	.7406** (24) P = .000	.6122** (24) P = .001	.7917** (24) P = .000	.6705** (11) P = .012	.8087** (11) P = .001	-.0755 (16) P = .390		.6158** (24) P = .001	.7335** (24) P = .000	1.0000 (24) P = .000	

* Fewer than 12 courts.

** $r \geq .50$, $p \leq .05$.

The Impact of Speedy Trial Laws in Connecticut and North Carolina*

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Research to date has reached differing conclusions concerning whether speedy trial laws reduce delay in criminal cases. The present research uses a pooled time series-cross section design to estimate the impact of speedy trial laws in Connecticut and North Carolina. The findings do not lessen the prior state of uncertainty: there is no evidence that the Connecticut law reduced delay, but there is strong evidence that the North Carolina law did. Numerous replications with different measures of delay produced consistent results. The greater impact in North Carolina may be due to the fact that its time limit is less than half that in Connecticut. But there are many other reasons why the laws might reduce delay in one state but not another, and the research is only precursory. As is often the case when evaluating court reforms, the current state of knowledge does not permit us to determine why particular reforms are or are not effective.

During the past three decades, most states and the federal government enacted speedy trial laws that ostensibly require courts to bring defendants to trial within a specified period, usually some four to six months. At present 29 states have speedy trial statutes or court rules (Appendix A). The time limits vary greatly in strictness, especially due to differences in tolling provisions, which stop the clock for specified reasons, such as the defendant's failure to appear (see Fort, 1978; Poulos and Coleman 1976).

Although the actual goals lawmakers had in mind are not always clear,¹ the avowed purpose of the speedy trial laws is to reduce delay (to protect defendants

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¹ As a general rule, the actual purposes of reforms are hard to ascertain because they may not be explicitly stated and because different actors may have different motives (Casper and Brereton, 1984). For a good summary of the likely purposes behind the speedy trial legislation see Comment, 1972:369-371.

or the public), and the speedy trial laws are typically evaluated with reference to that goal. Commentators and researchers initially greeted the laws with considerable skepticism. Feeley (1983) considered them among the "reforms that failed," largely because of provisions for tolling time limits. Three studies of state laws support Feeley's contention. Church et al. (1978: 47-49) found no relationship between the extent of delay in ten metropolitan courts and the length of the speedy trial limit. A similar study of 18 courts by Mahoney (1988:63) found that speedy trial laws are not "clearly correlated" with case processing times, but no correlation data were given. A student note found no relationship between delay (as measured by the ratio of dispositions to filings) and the structure of speedy trial laws in seven states (Comment 1972). These studies, however, are not persuasive because cross-section comparisons are not a good design for studying causation (e.g., Liberson 1985: 179-183), and the sample sizes are much too small to rule out relationships, even substantial relationships.

The 1974 federal speedy trial law, like the state laws, was viewed skeptically largely because of the tolling provisions (e.g., Ames et al., 1980). Using median processing time statistics, Bridges (1982) argued that delay changed little from 1971 to 1981, but a single time series of eleven years is not sufficient for proper analysis.² Garner (1987: 235), in addition, faulted Bridges for not considering other delay measures that suggest the federal law may have an impact.

Several studies, on the other hand, give partial evidence that speedy trial laws can reduce delay. Grau and Sheskin (1982a, 1982b) conducted individual case time series regressions, with a sample of 2,267 cases filed in 1967-1977 in three Ohio courts. They found that processing times were substantially less for cases filed in the years after the 1974 speedy trial law went into effect in two of the courts (but not the third), even after controlling for numerous features of the cases such as pretrial custody status. However, it was hard to separate the impact of speedy trial law from the continued implementation of an earlier delay reduction program, the 1971 Rules of Superintendence.

Flemming, Nardulli, and Eisenstein (1987) studied 7,475 cases in nine courts, three each in Illinois (which has a 120 day speedy trial rule), Pennsylvania (180 day rule), and Michigan (180 day rule). The authors found no relationship between processing time and the length of the time limits, after controlling for features of

the cases. They concluded, nevertheless, that speedy trial laws have an impact because cases subject to laws with less "bite"³ have longer processing times. This research, however, is essentially a cross section-study of three states. The greater delay in states with weaker laws could be caused by numerous other differences between the three states not accounted for by other variables in the analysis.

Garner used nationwide data for federal courts over 150 months to explore the impact of the federal speedy trial law on three delay measures. He found a significant reduction in mean and median times, but not in the time for the 90th percentile case (Garner, 1987: 240-242).

Finally, several descriptive studies of the Philadelphia Court of Common Pleas found that case scheduling is constantly dictated by the need to comply with the state's strict speedy trial limits (Church et al., 1978: 42-43; Marvell, 1982; Schulhofer, 1984), but these studies provide no evidence concerning actual impact on case processing time.

Thus, the research to date does not present a clear picture of the impact of speedy trial laws. The varying results may be due to methodological differences; for example, all studies finding no relationship have very inadequate sample sizes. The best designed studies, especially Garner (1987) and Grau and Sheskin (1982a, 1982b), do find impacts.

The present research seeks to shed more light on the issue through a study of all felony courts in two states, Connecticut and North Carolina. The following paragraphs describe these courts and the speedy trial laws, and later sections describe the research methodology and the results.

Connecticut

Connecticut established a unified court system on July 1, 1978, placing almost all criminal matters in the superior court. Major felony cases are tried primarily in the judicial districts, which are divisions of the superior court comparable to general jurisdiction trial courts. Misdemeanors and some lesser felonies are tried in the geographical area locations, divisions comparable to limited jurisdiction courts. In court years 1979 to 1981 all class A to class C felony cases (punishable by sentences of more than five years) were tried in the judicial districts, while class

² The common recommendation is that a single time series should have at least 50 time periods (see Cook and Campbell, 1979: 228).

³ For example, the Michigan law is classified as having the least bite because exceeding the time limit results only in pretrial release, not dismissal of the case. Since the Michigan law is not a true speedy trial law (see Appendix A), Flemming and his colleagues are mainly studying the difference between states with and without speedy trial laws.

D felonies and other crimes were tried in the geographical areas. Starting in 1982, some class B and C felonies were filed in the geographical areas, greatly reducing the criminal caseloads in the judicial districts in some parts of the state. As of 1987, the state was divided into 12 districts for felony cases, and judges were assigned to the different locations for six month rotations. As part of a major delay reduction effort starting in 1982, the court increased the assignment of judges to felony cases.

The original Connecticut speedy trial law, effective on July 1, 1983, required that defendants be tried within 18 months after arrest or information, whichever occurred later. For defendants in pretrial custody, the limit was 12 months. These times were lowered to 12 and eight months respectively for defendants charged after June 30, 1985. The defendant waives speedy trial rights if a motion is not filed before the start of trial. The dismissal is with prejudice, that is, the prosecutor cannot bring the same charges again.

The major excludable periods are: 1) delay resulting from other proceedings, including mental health proceedings, trials on other charges, and appeals; 2) delay resulting from unavailability of the defendant or essential prosecution witnesses; 3) delay due to defendant's inability to stand trial; 4) delay due to continuances granted at the request of the defendant; 5) delay due to continuances requested by the prosecution because of unavailability of material evidence, or because the prosecution needs additional time to prepare the case and "additional time is justified because of the exceptional circumstances of the case."

North Carolina

The North Carolina Superior Court, the state's general jurisdiction court, hears all felony cases, and felony preliminary is conducted in the district court. As of 1987, the superior court was divided into 34 districts, and judges are rotated between districts for periods of one week to six months.

The North Carolina Speedy Trial Act was passed in 1977, effective for cases initiated on or after October 1, 1978, and it set a 120 day limit for trial in felony cases. The starting event is the latest of the arrest, service of process, indictment, or waiver of indictment. The defendant waives speedy trial rights by not requesting dismissal. The trial judge has discretion to dismiss with or without prejudice.

The 120 day limit is tolled for numerous events, including: 1) other proceedings concerning the defendant, such as mental examinations and hearings on pretrial motions, 2) prosecutorial deferral, 3) absence of the defendant or essential witnesses, 4) incapacity of the defendant, 5) a continuance for which the judge finds (in writing) that the ends of justice served by granting the continuance outweigh the interests of the defendant and the public in a speedy trial, and 6) when the court holds court sessions so infrequently that the limit cannot be met (an amendment effective October 1, 1983, stated that the county is conclusively presumed to fall in this category if the court holds less than eight criminal or mixed sessions a year). In the latter case, a defendant may request a prompt trial before a superior court judge elsewhere in the district or by a district court judge.

The North Carolina Administrative Office of the Courts collects data on the number of speedy trial law dismissals. In 1987 there were 25 such dismissals, or 0.1 percent of all dispositions.

Research Design

This study uses a pooled time series-cross section design, which combines data from several jurisdictions over several years. It is a common econometric procedure, less often used in other social sciences in spite of frequent recommendations (e.g., Lempert, 1966; Cook and Campbell, 1979: 214-227; Berk et al., 1979). The major benefits of the pooled design over a single time series are the larger sample size and the ability to enter better control variables.

We use the standard fixed effect regression model (Pindyck and Rubinfeld, 1981; Hsiao, 1986).⁴ Separate dummy variables are created for each court (that is, the variable for a particular court is one for that court and zero for all other courts) to control for factors unique to individual courts. In addition, the preferred practice is to include year dummies if significant (Pindyck and Rubinfeld, 1981: 256-257), although some researchers leave them out (e.g., Berk et al. 1979). In the present analysis the year dummies are not entered because they would be perfectly colinear with the dummy variables representing speedy trial laws, such that one could not distinguish the impact of the speedy trial laws and year effects.

⁴ For more detail concerning the statistical techniques used see the full report of this research in Marvell, Lusk, and Moody (1988) and the similar procedures used in Marvell (1990).

Variables

The analysis uses data from court districts, ten in Connecticut and 34 in North Carolina.⁵ We have data for nine years in Connecticut (1979-87) and nine to twelve years (ending 1987), depending on the particular delay measure, in North Carolina. Hence, the number of observations (number of years times number of courts) is 90 for Connecticut and at least 300 for North Carolina.

The key variables are speedy trial laws and delay, and several control variables are also entered. All statistics are for felony cases only. The North Carolina data were obtained from The Administrative Office of the Courts (1977-1988). Approximately half the Connecticut data came from The Connecticut Judicial Department (1981-1987), and the rest came from unpublished tables supplied by the Office of Chief Court Administrator.

Speedy trial. The Connecticut speedy trial law is represented by a dummy variable for the original law, effective July 1, 1983, and a second dummy variable for the amendment reducing time limits on July 1, 1985. These variables are scored one for the years in which the law is in effect and zero for earlier years. Since the court statistics are for the July 1st fiscal year, the speedy trial dummies are scored beginning in 1984 and 1986, respectively.

Because the North Carolina law only affected indictments made from October 1978, its direct effect on court statistics did not appear until the next year. To complicate matters, the court statistics were compiled on an annual basis through 1978 and on a fiscal year basis for 1979 and thereafter. Because of this change, figures for 1978 and 1979 overlap; both contain data for the second half of 1978. The speedy trial variable, therefore, is scored zero through 1978, 0.5 for 1979, and one for 1980 and later years. The law is coded the same for each district, even though it is not applicable to counties that hold few court sessions. These counties, however, represent only a small portion of the caseload for nearly all districts.

Delay. There are numerous ways to measure delay, and we use as many measures as possible to test the fragility of the findings. A good delay variable should directly measure whether the court can expeditiously deal with its caseload. This suggests some measure of the status of the docket, either the size of the

backlog or the amount of time taken to process cases. Both are difficult concepts, and space limitations permit only a short summary here.

Measures of backlog are based on cases pending. Ideally, the measure should contain only cases available for court processing, excluding "inactive cases" in which defendants are unavailable, usually because they cannot be located. Backlog, of course, is relative; a given volume of pending cases represents a more serious problem in a small court than a large one, and pending figures must be adjusted to account for court size.⁶ The first of the many delay measures we use is the backlog index, pending cases at the end of the year divided by dispositions that year. This is a common measure of delay, and it approximates the time required for the court to dispose of its pending caseload (DonVito, 1972: 63-64; Church et al., 1978: 25-28; see also similar measures used by Clark and Merryman, 1976). The second, related measure is the raw number of pending cases, divided by the population of the court district. The third is the time pending. For Connecticut this is measured by the percent of felony cases pending over six months, the median age of felony cases pending, and the number of defendants (per capita) in jail for more than six months. For North Carolina, the measures of time pending are the mean and median time, the percent pending over four months, and the percent pending over six months.

Measures of processing time, available only in North Carolina, are the mean and median time to disposition, percent disposed over four months, and the percent disposed over six months. It should be emphasized that the "before period" for half the North Carolina delay measures is very short because they did not have data available before fiscal year 1979 (Table 2), such that the speedy trial variable in these five analyses consists of 0.5 in 1979 and one in later years.

Control Variables. Because the pooled design gives us a large sample size, we can enter many control variables without serious loss of degrees of freedom. The most important are the court dummies, which control for overall differences between courts. As noted earlier, year dummies could not be included in the same analysis as variables for the speedy trial laws, which operated statewide. In an analysis without the speedy trial variables, the year dummies were not significant in Connecticut, but they were for most analyses in North Carolina, where their coefficients were consistent with the results in Table 2 in that they declined after the speedy trial law went into effect. As a partial substitute for year effects in North Carolina we include a time trend variable (see Garner, 1987: 241).

⁵ Districts split in both states during the period of the research. In Connecticut, the data for two districts that split were combined after the splits. In North Carolina, data for four districts that split were not used before the splits.

⁶ In the present study, per judge figures are not helpful because the number of judges assigned to a court and the number assigned to criminal cases are very flexible.

Additional control variables are several other factors that might affect criminal case delay: the number of trials, felony filings, and civil filings. Also, in Connecticut we entered the proportion of felony cases filed in lower court division (which differed considerably among districts), part of a 1982 delay reduction initiative described earlier. In North Carolina, we entered the number of assistant district attorneys, the number of judges in the court division, and a dummy representing the state's presumptive sentencing statute (which went into effect in the 1982 court year).

Table 1.
Impact of the Connecticut Speedy Trial Law, 1979-87
(Delay is the dependent variable, and speedy
trial laws are among the independent variables)

Delay measure	T Ratios	
	FY 1984 Law	FY 1986 Change
Backlog index	1.35	-.05
Backlog index, based on active pending	.61	-.15
Backlog index, based on cases pending trial	.66	-.51
Pending per capita	.46	.69
Active pending per capita	-.26	.37
Percent pending over 6 months	-1.29	2.34*
Median age of pending	-.19	-.31
Defendants in jail for more than 6 months	-.61	-.41

Probability levels: * = .05. The remaining T Ratios are above the .15 level.

Results

The results with respect to the speedy trial laws are summarized in Tables 1 and 2. Each line represents a separate equation, and the tables give regression results

only for the speedy trial variables.⁷ The analyses produced extreme differences between the states and substantial consistency within them. There is no sign that the Connecticut law reduced delay (Table 1), although the results for the fiscal year 1986 change, based on only two years of "afterwards data" are less persuasive than the results for the fiscal year 1984 change. Only one coefficient was significant to the .05 level, and the result is in the "wrong" direction (this does not suggest that the Connecticut speedy trial law is associated with more delay, however, because with so many analyses, the odds are that one T Ratio would be significant simply by chance).

In contrast, the evidence is strong that speedy trial laws reduced delay in North Carolina (Table 2). All ten delay measures produced results in that direction, nine significant to the .05 level and eight to the .01 level. The results are more persuasive for the delay measures that have longer "before periods" such as the number of pending cases and the backlog index, but the results are similar for the delay measures that start later. The magnitude of the impact is substantial, as is best seen by the elasticity,⁸ which represents the proportion that delay is reduced after the law. The elasticities vary between .23 and .50, suggesting that the speedy trial law reduced delay by roughly 23 to 50 percent.

The results in North Carolina are subject to the qualifications discussed above concerning the impact of year effects. That is, we only know that some statewide occurrence at the end of 1979 acted to reduce delay, and the supposition is that this was the speedy trial law. Extensive study of the state laws and court rules, as well as interviews with court officials (see Marvell, Luskin, and Moody, 1988), uncovered no other factor that might account for the impact except for a general climate of delay reduction of which the speedy trial law was the key ingredient.

⁷ Space limitations prevent us from presenting the complete results concerning the control variables (which are available in Marvell, Luskin, and Moody, 1988). In general, the variables were not significant, or only slightly significant in one or two analyses, except for the following: The court dummies were always highly significant. The year counter in the North Carolina analysis was significant in the four regressions with time-to-disposition measures as dependent variables. The number of criminal filings are usually highly significant, but for technical reasons pertaining to the delay measures and probably not because higher caseloads affect delay. For example, when a spurt of filings temporarily increases the number of pending cases, there is a temporary jump in the backlog index and a temporary drop in the portion of cases pending over six months. Finally, the transfer of cases in Connecticut reduced delay significantly.

⁸ The elasticity is the coefficient associated with the speedy trial law dummy variable divided by the mean of the dependent variable.

Table 2.
Impact of the North Carolina Speedy Trial Law
(Delay is the dependent variable, and speedy
trial laws are among the independent variables)

Delay Measure (and year first available)	FY 1979 Speedy Trial Law		
	Coefficient	Elasticity	T Ratio
Backlog index (1977)	-8.4	-.23	-2.69**
Pending per capita (1976)	-78.8	-.34	-5.62***
Mean time to disposition (1979)	-46.9	-.39	-3.53***
Median time to disposition (1979)	-33.1	-.40	-3.44***
Mean age of pending [#] (1979)	-71.0	-.47	-3.43***
Median age of pending [#] (1979)	-19.4	-.23	-1.28
Percent disposed over 4 mo. (1979)	-12.2	-.40	-2.69**
Percent disposed over 6 mo. (1977)	-5.9	-.33	-2.75**
Percent pending over 4 mo. (1978)	-13.4	-.39	-2.43**
Percent pending over 6 mo. (1977)	-10.9	-.50	-4.52***

The years in parentheses are the first year for data in the analysis, and the last year was 1987.

[#] The year dummies were not significant and the year counter was not entered. Probability levels: * = .05; ** = .01; *** = .001. The remaining T Ratios are above the .15 level.

Discussion

This study, as well as the prior research, strongly indicates that speedy trial laws can help reduce delay and that the impact differs from jurisdiction to jurisdiction. The next logical step would be to determine what accounts for the different impacts, but as a general rule empirical research can seldom determine why reforms work in some places but not others, because answers need sizeable samples of evaluations. Here we have evaluated only two state laws, and even if we combine all the evaluations conducted to date, analysis is not feasible given the

large number of factors that may determine whether the laws work.⁹ These include many features of the laws, such as the length of the time limits and the events that toll the running of the time. Also important is the setting into which the laws are placed (see, e.g., Boyum 1979; Church et al. 1978). The degree of consensus among judges and court officials concerning whether delay reduction is a prime goal and the extent to which the defense and the prosecution actually desire quicker trials and, thus, take advantage of the laws contribute to the laws' effectiveness.

One can speculate loosely about why the North Carolina law may have been more successful than the Connecticut law. A prime candidate is the difference in time limits: the 120 day limit in North Carolina is much shorter than the one year limit in Connecticut (eight months for defendants in custody). Such a conclusion would differ from the findings by Flemming, Nardulli, and Eisenstein (1987) and Church et al. (1978) that time limit length makes no difference, although the time limit differences here are unusually extreme. The different results might also be explained by the factors that toll the running of the time limits. The North Carolina court officers who monitor the speedy trial act, it should be noted, believed that the law itself is largely ineffective because of its liberal tolling provisions, but that it might reduce delay through persuasion. Its enactment was accompanied by a general delay reduction climate. Also, district attorneys, who generally control the criminal docket, may use the law as an excuse to refuse requests for continuances, and the speedy trial law may stimulate prosecutors to make sure enough judges are assigned to criminal cases. However, such explanations are surely incomplete; for example, the Connecticut speedy trial law was also accompanied by a general court delay reduction effort.

In sum, this research and the prior studies of speedy trial laws are only very preliminary steps towards understanding what makes speedy trial laws work. It is possible that extensive future research will provide some answers. At the state level, the number of observations, the number of different states with new laws, will always remain too small for standard statistical techniques. Perhaps separate evaluations of speedy trial laws in a hundred or so local courts could provide useful information, but many important factors, such as the tolling provisions, are

⁹ Marvell (1990:563-564) recently made a similar point with respect to estimating the impact of no-fault laws on divorce rates: there are so many possible reasons why the laws may affect rates that cross-section comparisons cannot discern the differing impacts.

statewide, and conducting such a large number of evaluations is probably beyond the limits of feasible social science research.

A promising technique that may permit answers with relatively small samples of states or courts is the application of Boolean algebra, which is sometimes used in cross-section studies of nations, where sample size is a frequent problem (Ragin 1987). This procedure, for example, might be used to determine whether a particular factor or a pattern of factors is necessary (or sufficient) in order for speedy trial laws to reduce delay. If future research continues to evaluate individual no-fault laws, eventually there will be enough adequate evaluations, perhaps two dozen is a good lower limit, to apply the Boolean approach. Unfortunately, however, the courts cannot expect timely information about why a particular reform works in one place, but not in another.

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Appendix A State Speedy Trial Laws

This appendix presents material concerning the 29 states with speedy trial laws that specify a definite time period within which the felony defendant must be brought to trial or else the case is dismissed, unless the time limit is tolled. We exclude less strict laws, including those that 1) pertain to misdemeanors rather than felonies (e.g., Montana), 2) require that the defendant be brought to trial within a specific number of court terms (e.g., in West Virginia), 3) require that the defendant be released from pretrial custody if time limits are not met (e.g., Rhode Island), 4) give the trial judge discretion concerning whether the case is to be dismissed (e.g., Nevada), or 5) pertain only to defendants incarcerated following conviction for another crime (e.g., Michigan).

The material in Table 3 was found by research in the state statutes and court rules, and it was checked against surveys in Poulos and Coleman (1976), Fort (1978), Misner (1983), Clifford and Roper (1986), and Boland and Sones (1986).

Table 3.
Speedy Trial Laws

State	Law ¹	Effective date	Time Limits period ²	begin point
Alaska	Rule 45	pre-72	120 days	charge/arrest
Arizona	Rule 8.2	9-1-73	120/150 days	arrest ⁶
Arkansas	Rule 28	7-1-80	12 months ^{3,5}	charge
California	Penal 1382	pre-72	60 days	indictment
Colorado	18-1-405 ⁴	pre-72	6 months	plea
Connecticut	Rule 956	7-1-83	8/12 mo. ⁵	information
Florida	Rule 3.191	pre-72	175 days	custody
Hawaii	Rule 48	1-1-77	6 months	charge/arrest
Idaho	19-3501	7-1-80	6 months ³	indictment
Illinois	38:103-5	pre-72	120/160 days	custody ⁶
Indiana	Rule 4	pre-72	12 months	charge/arrest
Iowa	Rule 27	pre-72	90 days ⁵	indictment
Kansas	22-3402	pre-72	90/180 days ³	arraignment
Louisiana	Crim. 701	9-11-81	120/180 days ³	arraignment
Maryland	27-591	6-25-79 ⁷	180 days	arraignment
Massachusetts	Rule 36	7-1-79	12 months	return date
Mississippi	99-17-1	7-1-76	270 days	arraignment
Missouri	217.460	9-1-78	180 days	certificate
Nebraska	29-1207	pre-72	6 months	indictment
New Mexico	Rule 5-604	7-1-72	6 months	arraignment

Table 3. (cont'd)

State	Law ¹	Effective date	Time Limits period ²	begin point
New York	Crim. 30.30	4-28-72	6 months	complaint
North Carolina	15A-701	10-1-78	120 days	arrest
Ohio	2945.71	1-1-74	270 days	arrest
Pennsylvania	Rule 1100	7-1-73	180 days ⁵	complaint
South Dakota	23A-44-5.1	7-1-85	180 days	1st appearance
Texas	Cr. 32A.02	7-1-78	180 days	commencement
Virginia	19.2-243	pre-72	6/9 months	probable cause
Washington	Rule 3.3 ⁸	pre-72	60/90 days ⁵	arraignment
Wisconsin	Rule 971.10	pre-72	90 days	trial demand

1. The law citations are either to the rule of criminal procedure or to statutory sections.
2. When two periods are given, the first is for defendants in pre-trial custody and the second is for those not in custody.
3. The speedy trial law superseded an earlier, less strict law. The former laws specified that the defendant must be brought to trial within a specified number of court that in Louisiana the law had a limit of two years from filing to trial.
4. Also, Rule 48(b).
5. The laws have been amended to change the times: in Arkansas the times were nine months if in jail and three terms if not to October 1, 1987; in Connecticut the times were 12 and 18 months from July 1, 1983, to June 30, 1985; in Iowa the time was 60 days until January 1, 1978; in Pennsylvania the time was 270 days until July 1, 1974; in Washington the time was 60 days for all defendants before November 17, 1978.
6. In Arizona the time runs from initial appearance for persons in custody, and in Illinois the time runs from when the defendant demands trial for persons not in custody.
7. Date of *State v. Hicks* 285 Md. 310, 403 A2d. 356 (1979) which held that violation of Section 591 results in dismissal.
8. Was Section 10.46.010.

CRIMINAL PROCEDURE — The Right to a Speedy Trial—Has the Wyoming Supreme Court Correctly Applied the Balancing Test? *Harvey v. State*, 774 P.2d 87 (Wyo. 1989).

On the evening of January 5, 1986, Jetty Lee Harvey, Everett W. Phillips¹ and David Swazo abducted a 38 - year old woman from a sidewalk in Rock Springs, Wyoming, forced her into Phillips' crew cab pickup, and drove away. Thereafter, the vehicle proceeded to the outskirts of the city and Swazo sexually assaulted the victim while Harvey and Phillips looked on encouraging him.² Fortunately for the victim, an individual in a nearby vehicle witnessed the abduction and reported it to the police. The police immediately responded to the call, intercepted Phillips' pickup, and arrested both Harvey and Swazo on the spot.³ The police did not arrest Phillips because the victim did not initially implicate him in the crime.⁴ On January 9, 1986, following further investigation, the police arrested Phillips.⁵

Following Harvey's arrest, on January 5, 1986, approximately eighteen months elapsed before he was brought to trial. On February 5, 1986, the prosecution filed an information in district court charging Harvey with kidnapping and sexual assault.⁶ On February 18, 1986, Harvey filed a motion for discovery and a motion to dismiss. After that date, the record was silent for a period of nearly ten months as to any further proceedings.⁷

Finally, December 5, 1986, the record indicates that the court sent a letter notifying the parties that the individual cases of Harvey, Phillips and Swazo⁸ would be consolidated for trial. This trial was set for January 6, 1987. On December 9, 1986, the State obtained a continuance of the trial.⁹

On January 16, 1987, Harvey retained counsel and submitted a *pro forma* motion to the district court to dismiss for lack of a speedy trial.¹⁰

1. For the purposes of this casenote the discussion will focus on *Harvey v. State*, 774 P.2d 87 (Wyo. 1989), with reference to *Phillips v. State*, 774 P.2d 118 (Wyo. 1989), made in the footnotes.

2. *Harvey*, 774 P.2d at 90.

3. *Id.*

4. *Phillips*, 774 P.2d at 120.

5. Phillips was arrested on January 9, 1986. His trial commenced on July 21, 1987. *Phillips*, 774 P.2d at 120-21. Harvey's trial also began on July 21, 1987. *Harvey*, 774 P.2d at 91.

6. *Harvey*, 774 P.2d at 90. There were 531 days between the filing of the information and the trial. *Id.* at 93. The total delay in Phillips' case was also approximately eighteen months, but the time from information to trial was only 372 days. The information in Phillips' case was filed on July 14, 1986. *Phillips*, 774 P.2d at 122.

7. *Harvey*, 774 P.2d at 90.

8. Swazo subsequently entered a guilty plea and had been sentenced to the Wyoming State Penitentiary. *Id.* at 91.

9. *Id.* at 90. The court found no record of the continuance, but the State acknowledged obtaining the continuance in its brief. Without the State's concession there would be no explanation of why the trial was not held on January 6, 1986. *Id.*

10. *Id.* at 91. For unknown reasons this motion was never filed, but the State conceded in its brief that the motion was submitted on that date. *Id.*

On April 27, 1987, he filed another motion with an accompanying certificate stating that the January 16th motion had been submitted.¹¹ Harvey did not request a hearing on either of these motions, and after sixty days the motions were deemed automatically denied.¹² On July 20, 1987, one day prior to trial, Harvey joined in Phillips' motion to dismiss for lack of speedy trial.¹³

On July 21, 1987, trial was finally held, 562 days after the arrest. Harvey was convicted of kidnapping and first-degree sexual assault.¹⁴ Harvey appealed the conviction to the Wyoming Supreme Court which determined that the dispositive issue in the case was whether, under the circumstances, Harvey had been denied his right to a speedy trial.¹⁵

The Wyoming Supreme Court concluded that a delay of eighteen months between Harvey's arrest and the time he was brought to trial violated his right to a speedy trial.¹⁶ The court reversed the conviction and dismissed Harvey's information.¹⁷

This casenote focuses on the Wyoming Supreme Court's application of the *Barker* balancing test to the facts in *Harvey*, and specifically, it examines whether the Wyoming Supreme Court gave undue weight to certain factors in the balancing formula; thus leading the court to an erroneous result.

BACKGROUND

The right to a speedy trial is one of the fundamental rights secured by the sixth amendment of the Constitution of the United States.¹⁸ The United States Supreme Court has applied the right to a speedy trial to the states through the fourteenth amendment.¹⁹ The Wyoming Constitution also provides defendants with the right to a speedy trial.²⁰ In addition, under Rule 204 of the Uniform Rules for the District Courts of the State of Wyoming, the prosecution has 120 days from the filing

11. *Id.* On July 6, 1987, Phillips made a motion to dismiss for speedy trial, fifteen days before the trial began. *Phillips*, 774 P.2d at 121.

12. UNIF. R. DIST. CRTS. WYO. 301.

13. *Harvey*, 774 P.2d at 91.

14. *Id.* Phillips was also convicted of the same charges. *Phillips*, 774 P.2d at 119.

15. *Harvey*, 774 P.2d at 89. For purposes of the appeal, Phillips was the companion case to *Harvey*. *Phillips*, 774 P.2d at 119.

16. *Harvey*, 774 P.2d at 97.

17. *Id.* (citing *Strunk v. United States*, 412 U.S. 434 (1973)). The Wyoming Supreme Court also dismissed Phillips' information and overturned his conviction. Phillips' case was much closer than Harvey's because Phillips was responsible for some of the delay, and he was not diligent in asserting his right to a speedy trial. *Phillips*, 774 P.2d at 125.

18. U.S. CONST. amend. VI, provides:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

19. *Klopfer v. North Carolina*, 386 U.S. 213, 223 (1967).

20. WYO. CONST. art. I, § 10.

of an information or indictment to bring a defendant to trial.²¹ However, Wyoming courts have used this rule in an advisory nature, and have not interpreted it as a mandatory rule.²²

The United States Supreme Court attempted for the first time to decide what constitutes a speedy trial in *Barker v. Wingo*.²³ The *Barker* Court developed a four part balancing test to determine whether the defendant's right to a speedy trial was violated.²⁴ Under the balancing test four factors were assessed: length of the delay, the reason for the delay, whether the defendant asserted his right to a speedy trial, and whether the delay prejudiced the defendant.²⁵

In *Barker*, Willie Barker and Silas Manning were arrested in July of 1958 for the brutal murder of an elderly couple. The State of Kentucky had a stronger case against Manning, and felt that Barker could

21. Rule 204 provides:

- a) It is the responsibility of court and counsel to insure to each person charged with crime a speedy trial.
- b) A criminal charge shall be brought to trial within 120 days following the filing of information or indictment.
- c) The following periods shall be excluded in computing the time for trial:
 - 1) All proceedings related to the mental illness or deficiency of the defendant.
 - 2) Proceedings on another charge.
 - 3) Delay granted by the court pursuant to Section (d).
 - 4) The time between the dismissal and the refiling of the same charge.
 - 5) Delay occasioned by defendant's change of counsel or application therefor.
- d) Continuances may be granted as follows:
 - 1) On motion of defendant supported by affidavit of defendant and defendant's counsel.
 - 2) On motion of the prosecuting attorney or the court if:
 - i) the defendant expressly consents; or
 - ii) the state's evidence is unavailable and the prosecution has exercised due diligence; or
 - iii) Required in the due administration of justice and the defendant will not be substantially prejudiced.
- e) Upon receiving notice of possible delay the defendant shall show in writing how the delay may prejudice his defense.
- f) If the defendant is unavailable for any proceeding at which his presence is required, the time period shall begin anew upon defendant's being available.

UNIF. R. DIST. CRTS. WYO. 204.

22. *Robinson v. State*, 627 P.2d 168, 172 (Wyo. 1981). *Robinson* discusses Rule 22 which was the precursor to Rule 204.

23. 407 U.S. 514 (1972).

24. The Court rejected two approaches that had been used in the past. The first was that the Constitution require a defendant to be offered a trial within a specific number of days or months. This would require the Court to engage in legislative or rulemaking activity, rather than the adjudicative process to which they should confine their efforts. *Barker*, 407 U.S. at 523. The demand-waiver rule was also rejected. The demand-waiver doctrine states that a defendant waives his right to a speedy trial for the period of time that he has not demanded a trial. *Id.* at 524-25. The Court felt this would place defense counsel in an awkward position to demand an early trial. *Id.* at 527-28.

25. *Id.* at 530. The balancing test is essentially an ad hoc approach to determine if the right has been violated.

not be convicted unless Manning testified against him.²⁶ The State proceeded to prosecute Manning and obtained a series of sixteen continuances of Barker's trial. After nearly four and a half years, and six trials, Manning was finally convicted in December of 1962.²⁷ During this time, Barker was incarcerated for ten months and had made two *pro forma* motions to dismiss for violation of speedy trial.²⁸ Following Manning's conviction, the State moved to set Barker's trial for March 19, 1963. However, because of illness to a primary witness, the trial was again continued. In October of 1963, Barker's trial finally commenced.²⁹ Over five and a half years had elapsed between Barker's arrest and trial.

The Court found that the five and a half year lapse between Barker's arrest and trial was extraordinary and that it was mostly attributable to the prosecution.³⁰ However, the Court concluded that the delay did not violate Barker's right to a speedy trial because it was outweighed by two counterbalancing factors: 1) the prejudice to Barker caused by the delay was minimal because there was no claim that the delay had impaired his defense; and 2) that Barker had not vigorously asserted his right to a speedy trial.³¹

Under the balancing test, length of delay is essentially a "triggering mechanism". Until a delay exists which is "presumptively prejudicial"³², there is no necessity to inquire into the other three factors.³³ The Court reasoned that the speedy trial right is so imprecise, a court must consider the individual facts of each case in deciding whether the length of delay will trigger further analysis.³⁴ If the length of the delay is sufficient, then the other factors must be considered.

The second factor, is the reason for the delay, or "the reason the government assigns to justify the delay."³⁵ The weight assigned to this

26. *Id.* at 516.

27. *Id.* at 516-17.

28. *Barker*, 407 U.S. at 517.

29. *Id.* at 517-18.

30. *Id.* at 533-34.

31. *Id.* at 534.

32. W. LAFAYE & J. ISRAEL, CRIMINAL PROCEDURE § 18.2 at 688 (1985). LaFave and Israel attempted to shed light on what presumptively prejudicial is, by stating: The reference to "delay which is presumptively prejudicial" is somewhat confusing, but viewing the case in its entirety it seems fair to say that this phrase does *not* mean a period of time so long that it may actually be presumed the defense at trial would be impaired. Nor does it mean that once a sufficient time has been shown the prosecution has the burden of establishing that in fact there was no prejudice. The Court apparently meant that a claim of denial of speedy trial may be heard after the passage of a period of time which is, *prima facie*, unreasonable in the circumstances.

Id.

33. *Barker*, 407 U.S. at 530.

34. *Id.* The Court exemplified this by stating that, "[T]he delay that can be tolerated for an ordinary street crime is considerably less than for a serious, complex conspiracy charge." *Id.* at 531.

35. *Id.*

factor will vary depending on the reason for the delay. A deliberate attempt to delay the trial will weigh heavily against the government; a more neutral reason, such as negligence or overcrowded courts, will weigh less heavily but should still be considered; and a valid reason will serve to justify the delay.³⁶

The third factor is the assertion by the defendant of his right to a speedy trial. This factor is entitled to strong evidentiary weight in deciding if a right has been violated.³⁷ Courts should weigh the frequency and force of the objections as opposed to attaching significant weight to a purely *pro forma* objection.³⁸ Significant weight will not be given simply by making a *pro forma* motion for a speedy trial. The defendant must diligently assert his right or it will be difficult for him to prove he was denied a speedy trial.³⁹

The fourth factor is the prejudice to the defendant caused by the delay. Prejudice to the defendant is broken down into three categories: 1) oppressive pretrial incarceration; 2) anxiety and concern of the accused; and 3) the possibility that the defense will be impaired as a result of the delay.⁴⁰ Of these, the extent to which the defense will be impaired is the most important, "because the inability of a defendant adequately to prepare his case skews the fairness of the entire system."⁴¹

None of the four factors are necessary to establish that a violation has occurred. They are related factors to be considered along with other relevant circumstances.⁴² An affirmative demonstration of prejudice is not necessary to prove a denial of the right to a speedy trial.⁴³ The *Barker* Court outlined this test to aid lower courts in determining whether a speedy trial violation exists, not to establish a rigid test.

The Wyoming Supreme Court has consistently applied the *Barker* test: The length of delay is a triggering mechanism;⁴⁴ allocating the appropriate weight to the various classifications of reason for delay;⁴⁵ inquiring into whether the defendant vigorously pressed his right to a speedy trial;⁴⁶ and taking into account any evidence regarding the

36. *Id.*

37. *Id.* at 531-32. Although the Court rejected the demand-waiver rule they were not willing to go so far as to say that the defendant has no responsibility in asserting the right. *Id.* at 528.

38. *Id.* at 529.

39. *Id.* at 532.

40. *Id.*

41. *Id.* If witnesses die or disappear, or if loss of memory prevents witnesses from accurately recalling past events, this will result in prejudice to the defendant brought about by the delay. *Id.*

42. *Id.* at 533. "In sum, these factors have no talismanic qualities; courts must still engage in a difficult and sensitive balancing process. But, because we are dealing with a fundamental right of the accused, this process must be carried out with full recognition that the accused's interest in a speedy trial is specifically affirmed in the Constitution." *Id.*

43. *Moore v. Arizona*, 414 U.S. 25, 26 (1973).

44. *Phillips v. State*, 597 P.2d 456, 460 (Wyo. 1979).

45. *Caton v. State*, 709 P.2d 1260, 1265 (Wyo. 1985).

46. *Robinson*, 627 P.2d at 171.

three types of prejudice⁴⁷ to determine if there was actual prejudice.⁴⁸ In addition, the court has used Rule 204 of the Uniform Rules for the District Courts as a factor in the balancing test.⁴⁹ Only once, prior to the instant case has the court found the balance tipped in favor of the defendant, warranting a dismissal.⁵⁰

The Wyoming Supreme Court adopted the four part balancing test from *Barker* in *Cosco v. State*.⁵¹ The *Cosco* court held that a nineteen month delay was not a deprivation of the right to a speedy trial where the delay did not prejudice the defendant.⁵² In *Cosco*, the delays which did occur were mostly for the benefit of or caused by the defendant and there was no indication of unreasonable delay attributable to the prosecution.⁵³

The Wyoming Supreme Court has decided a long line of cases since *Cosco* without finding a speedy trial violation under the *Barker* balancing test.⁵⁴ In *Cherniwchan*, the court found that the speedy trial rights were infringed, but decided that when all things were considered the stringent remedy of dismissal was not called for.⁵⁵

Relying on *Barker*, the *Cherniwchan* court determined the length of delay of 107 days was unconscionable and the county and court were to blame. However, the court noted that the defendants did not assert their rights to a speedy trial during the delay, and that left the court to decide if there was prejudice sufficient to warrant dismissal.⁵⁶ Although the defendants had been wronged, the wrongs did not prejudice their ability to defend.⁵⁷ The court found there was no violation because the defendants failed to show that the delay had prejudiced their ability to defend.⁵⁸ Although the court found no violation, they did issue a stern warning admonishing law enforcement officials in Wyoming. "[T]his must not happen again, and all persons—whether

47. Oppressive pretrial incarceration; any unusual pretrial anxieties; or any impairment of the defense. *Heinrich v. State*, 638 P.2d 641, 645 (Wyo. 1981).

48. *Grable v. State*, 649 P.2d 663, 671 (Wyo. 1982).

49. *Harvey*, 774 P.2d at 93 (citing *Caton v. State*, 709 P.2d 1260 (Wyo. 1985); *Cook v. State*, 631 P.2d 5 (Wyo. 1981); *Robinson v. State*, 627 P.2d 168 (Wyo. 1981)). In *Cook*, the Wyoming Supreme Court rejected a strict reading of Rule 204, holding that a strict reading of the time limitations conflicts with the balancing test from *Barker*. The time limitation of the rule limits the flexibility and thus the balancing test is preferred. *Cook*, 631 P.2d at 10 (citing *Robinson v. State*, 627 P.2d 168 (Wyo. 1981)).

50. *Stuebgen v. State*, 548 P.2d 870, 875 (Wyo. 1976).

51. 503 P.2d 1403, 1405 (Wyo. 1972).

52. *Id.* at 1406.

53. *Id.*

54. See, e.g., *Sodergren v. State*, 715 P.2d 170 (Wyo. 1986); *Caton v. State*, 709 P.2d 1260 (Wyo. 1985); *Grable v. State*, 649 P.2d 663 (Wyo. 1982); *Robinson v. State*, 627 P.2d 168 (Wyo. 1981); *Cook v. State*, 631 P.2d 5 (Wyo. 1981); *Heinrich v. State*, 638 P.2d 641 (Wyo. 1981); *Estrada v. State*, 611 P.2d 850 (Wyo. 1980); *Phillips v. State*, 597 P.2d 456 (Wyo. 1979); *Cherniwchan v. State*, 594 P.2d 464 (Wyo. 1979); *Hurst v. State*, 563 P.2d 232 (Wyo. 1977).

55. *Cherniwchan*, 594 P.2d at 470.

56. *Id.* at 469.

57. *Id.*

58. *Id.* at 470.

they be prisoners or whomsoever will be given their Rule-5 and speedy-trial rights, failing which the supervisory authority of this court will be brought into play to address such negligent conduct."⁵⁹

In *Estrada v. State*, the court again applied the *Barker* test to reach the conclusion that there was no sixth amendment violation of a speedy trial.⁶⁰ Eleven months elapsed between the filing of the complaint and Estrada's trial. The court found the delay was sufficient to trigger further inquiry into the other factors.⁶¹ Although the delay was partly attributed to extradition procedures, necessary to bring Estrada from Kansas to Wyoming to face charges, the court determined that there was no sinister motive in any unnecessary delay in bringing Estrada into Wyoming.⁶² Estrada also failed to show any evidence to support his claim of prejudice.⁶³ The court again found that without evidence of prejudice or bad faith causing the delay, the defendant's speedy trial right had not been violated.⁶⁴

In fact, only one Wyoming case prior to *Harvey* has found a violation of the right to a speedy trial under the *Barker* balancing test.⁶⁵ In *Stuebgen v. State*, there was an eighteen month delay between arrest and trial. The court found that the State could not show good cause for the delay or that the delay was necessary. The delay also resulted in prejudice to the defendants' employment and education. The court found the failure to show good cause, and the prejudice were sufficient to establish a speedy trial violation.⁶⁶

PRINCIPAL CASE

Justice Macy, writing for the majority stated that, "It was perhaps inevitable, . . . that this Court would eventually be confronted with a case wherein the result in *Stuebgen* and the warning in *Cherniwchan* would not have been heeded."⁶⁷ In a 3-2 decision the Wyoming Supreme Court determined that the State had violated Jetty Lee Harvey's right to a speedy trial.⁶⁸ The court arrived at this conclusion by applying the *Barker* balancing test: the length of the delay; the reason for the delay; the assertion of his right to a speedy trial; and the

59. *Id.*

60. *Estrada v. State*, 611 P.2d 850, 855 (Wyo. 1980).

61. The Wyoming Supreme Court stated that the *Barker* facts were different, but they cited *Barker* to illustrate the point that even very lengthy delays are not *per se* violative of the constitution. *Id.* at 853.

62. *Id.* at 854. The Wyoming Supreme Court quoted the pertinent language from *Barker*: "'Neutral' unnecessary delay 'should be weighted less heavily but nevertheless should be considered since the ultimate responsibility for such circumstances must rest with the government rather than with the defendant.'" *Id.*

63. *Id.* at 855.

64. *Id.*

65. *Stuebgen v. State*, 548 P.2d 870 (Wyo. 1976).

66. *Id.* at 875.

67. *Harvey*, 774 P.2d at 90.

68. *Id.* at 97.

prejudice resulting from the delay.⁶⁹ Balancing all four factors led the court to the conclusion that a speedy trial violation had occurred.⁷⁰

The court determined that a delay of eighteen months from arrest to trial raised a presumption of prejudice that weighed heavily in the defendant's favor.⁷¹ The court also used Wyoming District Court Rule 204 as a touchstone in the analysis, and concluded that a delay four times greater than the period prescribed by the rule was sufficient to trigger further analysis into the other three factors.⁷²

Likewise, the Court found that the State had failed to meet the burden of showing that the delays were reasonable or necessary.⁷³ Therefore, the court attributed the entire reason for the delay to the State. However, the court made no finding regarding whether the delay was neutral as opposed to deliberate, nor did it find anything in the record indicating sinister motive on behalf of the State.⁷⁴ Nevertheless, the court found the reason for the delay weighed substantially in favor of Harvey.⁷⁵

Next, the court concluded that Harvey had adequately asserted his right to a speedy trial and that this weighed in his favor.⁷⁶ Even though Harvey did not vigorously press his two motions to dismiss, the court stated that Harvey had no duty to bring himself to trial.⁷⁷

Finally, the court found that the prejudice factor also weighed in Harvey's favor.⁷⁸ Despite the fact that there was no lengthy pretrial incarceration, no prejudice in the ability to defend, or any actual anxiety suffered, the court felt the eighteen month delay was sufficient to presume prejudice. Relying on Justice Brennan's concurrence in *Dickey v. Florida*, the court reasoned that prejudice should be presumed in the case of excessive delay.⁷⁹

The majority's presumption of prejudice led Justice Thomas to dissent. He argued that there was not any actual prejudice to Harvey.⁸⁰ There was no evidence that Harvey suffered from anxiety or any other aspect of prejudice; the effects were simply presumed.⁸¹ Even if Harvey had shown he was anxious, Justice Thomas concluded no speedy

69. *Id.* at 92-97.

70. *Id.* at 97.

71. *Id.* at 94.

72. *Id.* (citing *Caton*, 709 P.2d at 1265).

73. *Id.* at 95 (citing *Estrada*, 611 P.2d at 854; *Stuebgen*, 548 P.2d at 875).

74. *Id.* The court concluded that there had been no good faith effort to bring Harvey to trial as quickly as possible. *Id.*

75. *Id.*

76. *Id.* at 96.

77. *Id.* (citing *Barker*, 407 U.S. at 527; *Dickey v. Florida*, 398 U.S. 30, 38 (1970)).

78. *Harvey*, 774 P.2d at 97.

79. *Id.* at 96 (citing *Dickey*, 398 U.S. at 39 (1970) (Brennan, J., concurring)). The Wyoming Supreme Court adopted the language from Brennan's concurrence in *Dickey*, in *Cherniuchan*, 594 P.2d at 469, and *Caton*, 709 P.2d at 1266.

80. *Harvey*, 774 P.2d at 114 (Thomas, J., dissenting).

81. *Id.*

trial violation occurred because, "he doubted that a cloud of suspicion is very troublesome to the guilty"⁸²

Justice Golden, also dissented asserting that the majority had achieved an inspired application of the doctrine of *stare decisis*.⁸³ By comparing the facts from *Barker* with those in *Harvey*, Justice Golden concluded that the majority had reached an absurd result.⁸⁴ He felt that if the majority were deciding a Willie Barker-like case today, they would reverse his conviction.⁸⁵

Justice Golden also felt the majority was trying to send a message to the district judge with the opinion.⁸⁶ Justice Golden feared the majority had lost sight of the issue before the court; whether substantive analysis would be given to the factors in *Barker*.⁸⁷

ANALYSIS

To analyze the *Harvey* decision, it is necessary to look carefully at the way in which the Wyoming Supreme Court applied the four factors from *Barker*.⁸⁸ The Wyoming Supreme Court was blinded by their determination to realize their warning from *Cherniuchan*, and misapplied the *Barker* balancing test. The four factors must be considered together and balanced in relation to all relevant circumstances.⁸⁹

Length of Delay

Initially, the courts should consider the length of delay mainly as a triggering mechanism.⁹⁰ "Until there is some delay which is presumptively prejudicial there is no necessity for inquiry into the other factors that go into the balance."⁹¹ In cases where the length of delays

82. *Id.*

83. *Id.* at 117 (Golden, J., dissenting). Justice Golden's dissent in *Harvey* is consistent with his stance in *Phillips*. *Phillips*, 774 P.2d at 126 (Golden, J., dissenting).

84. *Harvey*, 774 P.2d at 117. Making the comparison, Justice Golden stated:

Of course, Mr. Harvey's and Mr. Phillips' facts of consequence were not quite the same as Willie Barker's. Willie Barker's trial was delayed nearly five years, Mr. Harvey's and Mr. Phillips' only eighteen months. Willie Barker suffered nearly ten months' pretrial incarceration; Mr. Harvey and Mr. Phillips suffered none. Willie Barker made several *pro forma* pretrial speedy trial assertions, as did Mr. Harvey; Mr. Phillips made none. Mr. Barker's conviction was affirmed and he is now serving his life sentence. Mr. Harvey's and Mr. Phillips' convictions were reversed and they are now roaming the streets of Wyoming as free men.

Id.

85. *Id.*

86. *Id.*

87. *Id.* at 118.

88. Unless noted, this analysis applies equally to the situation in *Phillips*.

89. *Harvey*, 774 P.2d at 92 (citing *Moore v. Arizona*, 414 U.S. 25 (1973); *Heinrich v. State*, 638 P.2d 641 (Wyo. 1981)).

90. *Barker*, 407 U.S. at 530.

91. *Id.*

have been factually similar to the delay in *Harvey*,⁹² the court has used the length of delay merely as a touchstone to prompt further investigation.

However, in *Harvey*, the Wyoming Supreme Court gave substantial weight to the defendant simply because of the length of delay.⁹³ This is inconsistent with prior decisions.⁹⁴ The *Barker* Court characterized the five and a half year delay as extraordinary, but refused to give the delay factor substantial weight and did not indicate whether the length of delay weighed in Barker's favor.⁹⁵ The delay in Barker was considerably longer than the delay in *Harvey*. If the United States Supreme Court did not give substantial weight to a five and a half year delay, it is illogical that a delay one-third as long should weigh heavily in *Harvey*'s favor.

Reason for the Delay

Secondly, courts must examine the reason or cause for the delay.⁹⁶ "[I]t is recognized that neutral or innocent unnecessary delay should be weighed less heavily against the State than deliberate unnecessary delay . . ."⁹⁷ Mere negligence in bringing the defendant to trial is considered a neutral delay and weighs less heavily than a deliberate attempt to delay the trial.⁹⁸

In *Harvey*, the Wyoming Supreme Court afforded substantial weight to the reason for the delay because the State could not justify the delay, and because no good faith effort was made to bring *Harvey* to trial.⁹⁹ However, the court found no evidence that the delay was attributable to any sinister motive on behalf of the State in bringing *Harvey* to trial.¹⁰⁰ Finding no good faith effort, nor any sinister motive, would imply that the reason for the delay was simple negligence on the part of the State. Since negligence is considered a neutral delay, receiving less weight, substantial weight should not be attributed to the reason for the delay. Certainly this factor should weigh in favor of *Harvey*, but giving this factor substantial weight is too liberal.

The first two factors of the *Barker* test tip the balance in favor of *Harvey*, but not by the considerable weight allocated by the majority. The situation in *Barker*, was considerably more egregious than the case

92. *Grable*, 649 P.2d at 670; *Heinrich*, 638 P.2d at 644. The delays were 419 and 453 days respectively, and there was no discussion by the court of the delay weighing heavily in favor of the defendant. The delay only triggered further analysis, and would be taken into account in applying the balancing test.

93. *Harvey*, 774 P.2d at 94.

94. *Grable*, 649 P.2d at 670; *Heinrich*, 638 P.2d at 644.

95. *Barker*, 407 U.S. at 533.

96. *Id.* at 531.

97. *Harvey*, 774 P.2d at 95 (citing *Caton*, 709 P.2d at 1265; *Estrada v. State*, 611 P.2d 850 (Wyo. 1980); *Barker v. Wingo*, 407 U.S. 514 (1980)).

98. *Barker*, 407 U.S. at 531.

99. *Harvey*, 774 P.2d at 95.

100. *Id.*

at hand. The delay was five and a half years, of which nearly all was attributable to the State. Yet, in *Barker*, the weight given to the length and reason for delay was counterbalanced by the other two factors.¹⁰¹

Defendant's Assertion of His Right

Thirdly, courts inquire into the defendant's responsibility to assert his right to a speedy trial.¹⁰² The majority in *Harvey* glosses over the distinction between a *pro forma* objection and one that is diligently asserted. The majority correctly distinguished between a counseled failure to object versus an uncounseled failure to object.¹⁰³ However, this distinction focuses on the timing of the objection as opposed to the nature of the objection itself. Even though *Harvey* asserted his right shortly after he retained counsel, the motion was merely *pro forma*.¹⁰⁴ In *Barker*, the Court weighed the frequency and force of the objections instead of attaching significant weight to purely *pro forma* objections.¹⁰⁵

The Wyoming Supreme court afforded weight to *Harvey*'s two *pro forma* motions to dismiss on speedy trial grounds.¹⁰⁶ The *Barker* Court gave no weight to Barker's three *pro forma* motions, holding that Barker's failure to vigorously assert his right weighed heavily against him.¹⁰⁷ Since *Harvey*'s motions were *pro forma* the majority erred in affording any weight to them.

The United States Supreme Court has indicated that they would be hard pressed to find a speedy trial violation when the facts indicate that the defendant did not want a speedy trial.¹⁰⁸ Two *pro forma* motions that were never diligently asserted certainly implies that no speedy trial was wanted.

Prejudice to Defendant

Finally, the court must consider the prejudice that the defendant suffers as a result of the delay.¹⁰⁹ The Wyoming Supreme Court found this factor weighed in *Harvey*'s favor because they presumed *Harvey* was prejudiced by the lengthy delay.¹¹⁰ No evidence was presented to

101. *Barker*, 407 U.S. at 534.

102. *Id.* at 531.

103. *Harvey*, 774 P.2d at 96. The court gave credence to the fact that shortly after *Harvey* retained private counsel he promptly asserted his right to a speedy trial. This distinction between counseled and uncounseled objection was first recognized in *Estrada*, 611 P.2d at 854-55.

104. *Harvey*, 774 P.2d at 117 (Golden, J., dissenting).

105. *Barker*, 407 U.S. at 529.

106. *Harvey*, 774 P.2d at 96. In *Phillips* there was no assertion of right until fifteen days prior to trial. The majority determined that failing to assert the right did not weigh for or against *Phillips*. *Phillips*, 774 P.2d at 121, 124.

107. *Barker*, 407 U.S. at 534-36.

108. *Id.* at 536.

109. *Id.* at 532.

110. *Harvey*, 774 P.2d at 97.

indicate that Harvey had suffered any actual prejudice from the delay.¹¹¹ The court deemed the eighteen month delay sufficiently long to find a presumption of prejudice with respect to pretrial anxiety and related concerns.¹¹²

In *Barker*, the United States Supreme Court did not articulate a presumption of prejudice when discussing the fourth factor in the balance.¹¹³ The *Barker* Court gave virtually no weight to any anxiety that Willie Barker may have experienced during his five and a half year delay.¹¹⁴

The *Harvey* court relied on the language of Justice Brennan's concurring opinion in *Dickey*¹¹⁵ to justify a finding of presumed anxiety prejudice. Brennan's discussion was not binding precedent for future speedy trial cases, it was offered as an academic comment that the Court should begin to consider the basic questions presented by various speedy trial scenarios.¹¹⁶ Certainly, if the Supreme Court had intended for Justice Brennan's language to be binding they could have adopted it in *Barker* and presumed anxiety prejudice to Willie Barker.¹¹⁷ But they did not. Therefore, the Wyoming Supreme Court incorrectly provided weight in favor of Harvey under the prejudice factor.

The *Barker* Court found no prejudice that would favor the defendant in that case since the Court described the factor of prejudice as a counterbalance that outweighed length, and reason for delay.¹¹⁸ Never before had the Wyoming Supreme Court presumed any sort of prejudice in the long line of speedy trial cases it had decided. The Wyoming Supreme Court has also given very little weight to the idea of anxiety prejudice. They have recognized that the defendant may be anxious during the delay but no more severely than is usually experienced by an accused.¹¹⁹

In a case where length of delay and reason for delay were much greater, the United States Supreme Court found these deficiencies could be outweighed. In a case where the length of delay was much shorter and the reason for the delay was neutral, the Wyoming Supreme Court concluded that a presumption of prejudice and *pro forma* assertions of right, resulted in a speedy trial violation.

111. It is not necessary that prejudice be affirmatively shown in order to prove a violation of the constitutional right to a speedy trial, *Moore*, 414 U.S. at 26, and *Heinrich*, 638 P.2d at 644, but it is an important factor to consider.

112. *Harvey*, 774 P.2d at 97.

113. *Barker*, 407 U.S. at 532.

114. Although the *Barker* Court did find minimal anxiety prejudice to Barker, it did not affect his ability to defend. *Id.*

115. *Dickey*, 398 U.S. at 39 (Brennan, J., concurring).

116. *Phillips*, 774 P.2d at 129 (Golden, J., dissenting).

117. "More telling is Justice Brennan's vote in *Barker*, where he joined Justice White's concurrence . . . but, when push came to shove, concurred in affirming Barker's conviction." *Id.* at 129-30.

118. *Barker*, 407 U.S. at 534.

119. *Sodergren*, 715 P.2d at 178; *Grable*, 649 P.2d at 671.

Certainly the possibility for prejudice was much greater in *Barker* where there was a five and a half year delay and he was incarcerated for ten months, than in Harvey's case where the delay was approximately eighteen months and there was no incarceration. The *Barker* Court found minimal anxiety prejudice to Barker, none of which weighed in his favor in the balance. In *Harvey*, prejudice was presumed from a year and a half delay and weighed in favor of Harvey. This appears to be contradictory to the finding from *Barker*. Certainly Willie Barker was prejudiced more by a five year delay than Harvey by an eighteen month delay. If the length and reason for delay were overcome by the other two factors in *Barker*, then a shorter, neutral delay should be counterbalanced by the lack of prejudice and failure to vigorously assert the speedy trial right in *Harvey*.¹²⁰

CONCLUSION

If the Wyoming Supreme Court had properly applied the balancing test, and followed the precedent from the United States Supreme Court they would have affirmed Harvey's conviction. In a case that is far less extreme than the landmark United States Supreme Court decision which established speedy trial precedent the Wyoming Supreme Court reached an opposite result. Whatever force was driving the Wyoming Supreme Court and whatever message it was trying to send was done by compromising a long history of precedent, and the rights of an innocent victim.

CHRISTOPHER J. WALSH

120. Since Harvey's case was a closer decision than that of Phillips, based on the facts, the logical conclusion is that Phillips was also erroneously decided.