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Speedy Trial Act of 1974--Dismissal Sanction for Noncompliance with the Act: Defining the Range of District Courts' Discretion to Dismiss Cases with Prejudice

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SPEEDY TRIAL ACT OF 1974—DISMISSAL SANCTION FOR NONCOMPLIANCE WITH THE ACT: DEFINING THE RANGE OF DISTRICT COURTS' DISCRETION TO DISMISS CASES WITH PREJUDICE

United States v. Taylor, 108 S. Ct. 2413 (1988).

I. INTRODUCTION

In *United States v. Taylor*,[1] the United States Supreme Court for the first time addressed the application of the dismissal sanction of the Speedy Trial Act of 1974.[2] The Court resolved several, but not all, of the ambiguities in the statute that had led lower courts to inconsistently interpret and apply the dismissal sanction since it went into effect in 1980.

The Speedy Trial Act mandates that individuals arrested for criminal offenses be indicted within thirty days,[3] and that such individuals be brought to trial within seventy days after the indictment.[4]

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[1] 108 S. Ct. 2413 (1988).

[2] 18 U.S.C. §§ 3161-3174 (1982). The relevant section, § 3162(a)(2), pertains to dismissal sanctions. It states that:

> [i]f a defendant is not brought to trial within the time limit required . . . 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 [permitted by the Act]. 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 reprosecution 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.

18 U.S.C. § 3162(a)(2) (1982).

[3] § 3161(b) provides, in pertinent part, that "[a]ny information or indictment charging an individual with the commission of an offense shall be filed within thirty days from the date on which such individual was arrested or served with a summons in connection with such charges." 18 U.S.C. § 3161(b) (1982).

[4] 18 U.S.C. § 3161(c)(1) states, in pertinent part, that:

> [i]n 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

If these time restrictions are not complied with, dismissal of the charge is mandatory.[5] The Act allows the court to exercise its discretion in determining whether to dismiss the case with or without prejudice.[6] If the case is dismissed with prejudice, reprosecution is barred. The Act requires that courts be guided in their decisions by "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 reprosecution on the administration of this chapter and on the administration of justice."[7]

In deciding to dismiss the charges in *Taylor* without prejudice, the Supreme Court clarified several inconsistencies in the interpretation of the dismissal sanction in the district and circuit courts. The Court held that: (1) there is no presumption that all dismissals should be with prejudice, or that dismissals without prejudice should be the exception to the rule;[8] (2) simple negligence on the part of the government in failing to comply with the Act does not necessarily warrant consideration absent a "truly neglectful attitude," as when bad faith or a pattern of neglect is present;[9] and (3) although the decision whether to dismiss a case with or without prejudice is in the district court's discretion, it is subject to reversal if it fails to indicate that it sufficiently weighed each factor in the balancing test.[10] The Court also emphasized that any contribution to the delay before trial on the part of the defendant weighs heavily in favor of dismissing the case without prejudice.[11]

This Note explores the interpretations the Court chose to attach to the balancing test factors in light of the legislative history of the Act and the dual goals it was designed to implement: safeguarding society from a perceived increase in crimes committed by defendants free on bail for extended periods, and giving substance to defendants' sixth amendment speedy trial rights by ensuring increased consistent judicial treatment.[12] Although these goals are in a sense contradictory, the Court's ruling in *Taylor* strikes a sensible balance in protecting each of them.

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indictment, or from the date the defendant has appeared before a judicial officer of the court in which such charge is pending.

18 U.S.C. § 3161(c)(1) (1982).

5 18 U.S.C. § 3162(a)(1)-(2) (1982).

6 18 U.S.C. § 3162(a)(2) (1982).

7 18 U.S.C. § 3162(a)(2).

8 *Taylor*, 108 S. Ct. at 2418.

9 *Id.* at 2420.

10 *Id.* at 2423.

11 *Id.* at 2421.

12 *See supra* notes 138-39 and accompanying text.

II. SUMMARY OF THE FACTS

The respondent, Larry Lee Taylor, was indicted by a federal grand jury on July 25, 1984, for conspiracy to distribute cocaine[13] and possession of 400 grams of cocaine with intent to distribute.[14] He was scheduled for trial in the Western District Court of Washington on November 19, 1984.[15] The seventy day period during which the prosecution could have properly brought him to trial under the Act[16] would have expired the following day.[17]

Taylor, however, failed to appear for trial.[18] The court then issued a bench warrant for his arrest.[19] Seventy-eight days later, on February 5, 1985, local police officers arrested Taylor in San Mateo County, California on a petty theft charge.[20]

Several factors contributed to a delay in returning Taylor to Washington to stand trial. On February 7, 1985, two days after his second arrest, he was transferred to federal custody on a writ of *habeas corpus ad testificandum* issued by the Northern District Court of California to secure his testimony as a defense witness in a federal narcotics prosecution in San Francisco.[21] He testified on February 21, and was held for possible recall until the next day, when the case ended in a mistrial.[22]

On February 28, 1985, all California charges against Taylor were dismissed.[23] The United States Marshal Service (USMS) was notified of this on the next day, March 1.[24] The United States' notice informed the USMS that "effective today [respondent] becomes your prisoner."[25]

On March 6, Taylor appeared before a magistrate of the Northern District Court of California in connection with the Washington

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13 Taylor was indicted for this offense under 21 U.S.C. § 846 (1982).

14 Taylor was indicted for this offense under 21 U.S.C. § 841(a)(1), (b)(1)(A) (1982) and 18 U.S.C. § 2 (1982). *See* United States v. Taylor, 821 F.2d 1377, 1378-79 (9th Cir. 1987), *rev'd*, 108 S. Ct. 2413 (1988).

15 *Taylor*, 108 S. Ct. at 2415.

16 *See supra* note 4 and accompanying text.

17 *Taylor*, 108 S. Ct. at 2415.

18 *Id.*

19 *Id.*

20 United States v. Taylor, 821 F.2d 1377, 1379 (9th Cir. 1987), *rev'd*, 108 S. Ct. 2413 (1988).

21 Brief for the United States at 2, United States v. Taylor, 108 S. Ct. 2413 (1988)(No. 87-573).

22 *Id.* at 3.

23 *Taylor*, 821 F.2d at 1379.

24 *Id.*

25 Brief for the United States at 3 (citation omitted).

bench warrant.[26] The magistrate scheduled a second hearing for March 8.[27] On that date, the magistrate granted Taylor's request for a physical examination.[28] At that hearing, defense counsel indicated to the court that he was not in a hurry to have Taylor returned to Washington.[29] Indeed, he requested the court to set a removal hearing for a later date, expressing his desire to "keep [Taylor] here and organize what is gonna happen and talk to [Assistant U.S. Attorney] Wales up in Seattle."[30]

A status conference on the removal proceedings was set for March 18, 1985.[31] At the respondent's request, the court ultimately set the removal hearing for April 3.[32] On that date, Taylor waived his right to a hearing.[33]

The magistrate finally signed an order to transport Taylor to Washington on April 3.[34] The USMS, however, deemed it efficient and economical to wait until it could assemble a number of prisoners bound for Oregon and Washington and transport them at the same time.[35] As a result, Taylor did not leave California until two weeks later, April 17.[36] The next day, April 18, while Taylor was detained in Portland, Oregon, the Northern District Court of California issued a second writ ordering his return to San Francisco to testify at the retrial of the federal narcotics prosecution.[37] He was returned to California from Portland five days later, on April 23.[38]

On April 24, the Western District Court of Washington issued a superseding indictment realleging Taylor's narcotics offenses, including an indictment for failure to appear at trial.[39] After testifying at the federal narcotics retrial, which began on May 7, Taylor was finally returned to Washington on May 17, 1985.[40] This was 180 days after his trial date in Washington, and 102 days after his second arrest in California.

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26 *Id.* at 3-4.
27 *Id.* at 4.
28 *Id.*
29 *Id.*
30 *Id.*
31 *Id.*
32 *Id.*
33 *Id.*
34 *Taylor*, 821 F.2d at 1379.
35 *Id.*
36 *Id.*
37 *Id.*
38 *Id.*
39 *Taylor*, 108 S. Ct. at 2415.
40 Brief for the United States at 5, United States v. Taylor, 108 S. Ct. 2413 (1988) (No. 87-573).

Before Taylor was to be retried, he moved to dismiss the superseding narcotics indictment on the basis of the seventy day time limit of the Speedy Trial Act.[41] The district court granted this motion and dismissed both narcotics counts.[42] Taylor pleaded guilty to the failure to appear count, for which no speedy trial violation was found.[43]

The district court concluded that because only one day had remained on the "speedy trial clock" on November 19, 1984, when Taylor fled Washington, the government had a single day in which to bring him to trial.[44] Pursuant to the Act,[45] the court excluded a number of periods from its calculation of speedy trial time.[46] The first was the seventy-eight day period between the respondent's November 19, 1984 trial date and his second arrest on February 5, 1985.[47] Next, the court excluded the period between February 7 and February 22, 1985, when Taylor was detained both on the California charges and for the purpose of testifying in the first federal narcotics trial.[48] The court also excluded the period between March 6, when Taylor first appeared on the bench warrant, and April 3, when the removal hearing took place.[49] Finally, the court excluded a ten-day period during which the USMS reasonably could have

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41 *Id. See* 18 U.S.C. § 3161(c)(1) (1982).

42 *Taylor*, 108 S. Ct. at 2416.

43 Brief for the United States at 5 and n.3.

44 *Taylor*, 821 F.2d at 1380.

45 18 U.S.C. § 3161(h) provides that:

> The following periods of delay shall be excluded in computing the time within which an information or indictment must be filed, or in computing the time within which the trial of any such offense must commence:
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> (1) Any period of delay resulting from other proceedings concerning the defendant, including but not limited to . . . .
>
> (D) delay resulting from trial with respect to other charges against the defendant;
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> . . . .
>
> (G) delay resulting from any proceeding relating to the transfer of a case or the removal of any defendant from another district under the Federal Rules of Criminal Procedure;
>
> (H) delay resulting from transportation of any defendant from another district, . . . except that any time consumed in excess of ten days from the date an order of removal or an order directing such transportation, and the defendant's arrival at the destination shall be presumed to be unreasonable;
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> . . . .
>
> (3)(A) Any period of delay resulting from the absence or unavailability of the defendant or an essential witness."

18 U.S.C. § 3161(h)(1) & (3) (1982).

46 Brief for the United States at 6-7.

47 *Taylor*, 108 S. Ct. at 2415-16. This period was excludable because Taylor was "absent" under 18 U.S.C. § 3161(h)(3)(A). *See Taylor*, 108 S. Ct. at 2416 and n.3.

48 Brief for the United States at 6. *See* 18 U.S.C. § 3161(h)(1).

49 Brief for the United States at 7. *See* 18 U.S.C. § 3161 (h)(1)(G).

transported Taylor to Washington.[50] The district court evidently assumed that the period after April 24 was excludable because of the superseding indictment.[51]

Ultimately, the court concluded that because fifteen non-excludable days had passed between Taylor's arrest in February and April 24, the seventy day limit imposed by the Act had been exceeded by fourteen days.[52] The Ninth Circuit affirmed this calculation.[53]

The government did not ask the Court to review the lower courts' conclusion that it had violated the Act, which made dismissal of the narcotics charges mandatory.[54] The issue that remained was whether the case should be dismissed with or without prejudice in light of the balancing test.[55]

The district court, characterizing the government's conduct as "lackadaisical," concluded that "justice would be seriously impaired if the court were not to respond sternly" to the violation, and dismissed the case with prejudice to avoid "tacitly condon[ing]" the government's behavior.[56] In a divided opinion, the Ninth Circuit affirmed this decision.[57] The sole question before the Supreme Court was whether the district court had abused its discretion in dismissing Taylor's case with prejudice.[58]

III. Summary of the Opinions

A. The Majority

The majority,[59] in an opinion written by Justice Blackmun, reversed the decision of the Ninth Circuit, and held that the district

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50 Brief for the United States at 7. *See* 18 U.S.C. § 3161(h)(1)(H).

51 *Taylor*, 108 S. Ct. at 2415 n.2; United States v. Taylor, 812 F.2d 1377, 1383 (9th Cir. 1987).

52 *Taylor*, 108 S. Ct. at 2416.

53 *Taylor*, 821 F.2d at 1386.

54 *Taylor*, 108 S. Ct. at 2417. In its brief, the United States indicated that the district court had used a "now-outmoded method of calculating speedy trial time," and that a violation had not in fact occurred. Brief for the United States at 5 n.4. However, because the government neither raised that argument below nor pressed it before the Supreme Court, its merits were not reviewed. *Id.* at 6 n.4; *Taylor*, 108 S. Ct. at 2417 n.6.

55 *Taylor*, 108 S. Ct. at 2415. The Act requires that courts consider: the seriousness of the offense; the facts and circumstances surrounding the dismissal of the case; and the impact of the decision on the administration of the Act and justice in deciding whether to dismiss the case with or without prejudice. 18 U.S.C. § 3162(a)(2) (1982).

56 *Taylor*, 108 S. Ct. at 2416 (citation omitted).

57 *Taylor*, 821 F.2d at 1386.

58 *Taylor*, 108 S. Ct. at 2415.

59 Chief Justice Rehnquist, Justices Blackmun, White, O'Connor and Kennedy made up the majority. Justice White filed a concurring opinion. Justice Scalia filed an opinion concurring in all but part II-A of the decision.

court had abused its discretion in dismissing *Taylor* with prejudice.[60] This ruling was based on the majority's conclusion that the district court had "failed to consider all the factors relevant to the choice of a remedy" for violations of the Act.[61]

The Court first noted that the Speedy Trial Act lists specific factors that courts must consider in determining whether to dismiss a case with or without prejudice.[62] They are, " 'among others, . . . the seriousness of the offense; the facts and circumstances of the case which led to the dismissal; and the impact of a reprosecution on the administration of [the Act] and on the administration of justice.' "[63] In addition to these factors, the pertinent legislative history indicated to the Court that the lack or presence of prejudice caused to the defendant by the delay was a factor that should guide courts in their choice of remedy.[64]

After reviewing the legislative history of the Act, the Court concluded that "Congress did not intend any particular type of dismissal to serve as the presumptive remedy for a Speedy Trial Act violation."[65] Each dismissal decision, concluded the Court, must be made after an objective balancing of the factors listed in the Act.[66]

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60 *Taylor*, 108 S. Ct. at 2423.

61 *Id.*

62 *Id.* at 2419.

63 *Id.* at 2417 (quoting 18 U.S.C. § 3162(a)(2)).

64 *Taylor*, 108 S. Ct. at 2418. The Court noted that Representative Dennis, for example, sought to establish the relevance of prejudice to the defendant through " 'legislative history.' " *Id.* (quoting 120 CONG. REC. 41795 (1974)). The author of the compromise amendment, Representative Cohen, agreed that the factor was relevant. *Id.* (quoting 120 CONG. REC. 41794-95 (1974)). However, he opposed including it in the statutory text because he was concerned that courts would treat a lack of prejudice to the defendant as dispositive. 108 S. Ct. at 2418 (citing 120 CONG. REC. 41795 (1974)). The Court also cited United States v. Kramer, 827 F.2d 1174, 1178 (8th Cir. 1987); United States v. Caparella, 716 F.2d 976, 980 (2d Cir. 1983); and United States v. Bittle, 699 F.2d 1201, 1208 (D.C. Cir. 1983) to support the proposition that the issue of prejudice was relevant.

65 108 S. Ct. at 2418. The dismissal sanction issue was the subject of considerable controversy in Congress. *Id.* Some, for instance, then Representative Mikva, argued that unless the Act uniformly barred reprosecution, it would be largely ineffective because prosecutors would often be free to reinstate the case. A. PARTRIDGE, LEGISLATIVE HISTORY OF TITLE I OF THE SPEEDY TRIAL ACT OF 1974 32 (1980). Others, such as Senator McClellan, feared that dismissing all cases with prejudice would allow criminals to unjustly escape prosecution. *Id.* The Court concluded that the Act as it stands represents a compromise between these competing positions. *Taylor*, 108 S. Ct. at 2418. The Court found support for this position in *Kramer*, 827 F.2d at 1176; United States v. Salgado-Hernandez, 790 F.2d 1265, 1267 (5th Cir.), *cert. denied*, 479 U.S. 964 (1986); United States v. Russo, 741 F.2d 1264, 1266-67 (11th Cir. 1984); and *Caparella*, 716 F.2d at 980. For further discussion of the legislative history of the Speedy Trial Act, *see infra* notes 140-90 and accompanying text.

66 *Taylor*, 108 S. Ct. at 2419.

The Court next confirmed that the proper standard for reviewing lower court decisions pursuant to the dismissal sanction provision of the Act was whether or not the district court's decision constituted an abuse of discretion.[67] While recognizing that the factual findings of a district court are "entitled to substantial deference and will be reversed only for clear error,"[68] the Court stated that discretion is nonetheless " 'not left to a court's inclination, but to its judgment; and its judgment is to be guided by sound legal principles.' "[69] Thus, said the Court, "[w]hether discretion has been abused depends . . . on the bounds of that discretion and the principles that guide its exercise."[70]

The Court explained that in the Speedy Trial Act, Congress expressly instructed that courts be guided in their exercise of discretion by a set of specific factors.[71] Therefore, the majority concluded that district courts must "carefully consider those factors as applied to the particular case and . . . clearly articulate their effect in order to permit meaningful appellate review."[72] The Court believed that the district court, however, had failed to "fully explicate its reasons for dismissing" Taylor's narcotics charges with prejudice.[73] Thus, the Court found it necessary to re-examine the facts of the case and weigh the balancing test factors anew in order to determine whether the district court had properly applied them.[74]

The majority agreed with the district and appellate courts that Taylor's narcotics offenses were "serious,"[75] a determination which weighed in favor of dismissing the case without prejudice. The Court then turned to the second factor, "the circumstances of the case leading to dismissal."[76] The Court noted that the district court had attached great weight to this factor.[77] The Court indicated that the district court had characterized the government's conduct relating to the delay as "lackadaisical" because of its unexcused failure to make "any particular show of concern" and to "respon[d] with dispatch" to the court order to return Taylor to Washington.[78]

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67 *Id.*

68 *Id.* (citing Anderson v. Bessemer City, 470 U.S. 564 (1985)).

69 *Id.* at 2419 (quoting Albemarle Paper Co. v. Moody, 422 U.S. 405, 416 (1975)(citations omitted).

70 *Taylor*, 108 S. Ct. at 2419.

71 *Id.*

72 *Id.*

73 *Id.* at 2420.

74 *Id.*

75 *Id.*

76 *Id.*

77 *Id.* at 2421.

78 *Id.* at 2420.

The majority rejected the district court's interpretation of the facts in *Taylor*, and its conclusion that the government's conduct supported a dismissal of the case with prejudice.[79] Although it agreed that the conduct of the government should be considered in the balancing test, in the Court's view, there was no evidence of a "truly neglectful attitude" on the part of the government.[80] The Court considered it significant that the district court had not found that the government had acted in bad faith toward Taylor, or that there was "any pattern of neglect by the local United States Attorney."[81] The Court stated that such findings "would clearly have altered the balance" in favor of dismissal with prejudice.[82] The Court noted that a large part of the delay in *Taylor*, however, was apparently the result of a simple "misunderstanding" as to whose duty it was to transport Taylor before the California charges were dismissed.[83] In the Court's opinion, as an "isolated unwitting violation," the government's conduct was not significant in terms of the Act's balancing test.[84]

Instead, the majority regarded Taylor's failure to appear at trial as a key factor in its decision to dismiss the case without prejudice.[85] Indeed, stated the Court, "it was respondent, not the prosecution, who prevented the trial from going forward in a timely fashion."[86] The Court determined that the district court and Ninth Circuit majority had erred in failing to take Taylor's "culpable conduct" and responsibility for the delay into account in weighing the balancing test factors.[87]

The Court briefly discussed the possibility, raised in oral argument, that the district court might have given Taylor a harsher sentence than it normally would have on the failure to appear charge in order to "wrap up the 'equities' in a single package."[88] While the district judge gave Taylor a five-year sentence on the failure to appear charge, noted the Court, she had given his original co-defendant a three-year sentence for the same narcotics offenses with which Taylor had been charged.[89] It had been suggested in oral argument

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79 *Id.* at 2420-21, 2423.
80 *Id.* at 2420.
81 *Id.*
82 *Id.* at 2421.
83 *Id.* at n.10 (citing United States v. Taylor, 821 F.2d 1377, 1387 (9th Cir. 1987) (Poole, J., dissenting), *rev'd*, 108 S. Ct. 2413 (1988)).
84 *Taylor*, 108 S. Ct. at 2421.
85 *Id.*
86 *Id.*
87 *Id.*
88 *Id.* at 2420 n.9.
89 *Id.* at 2420.

that the district court may have justified its misapplication of the Act with the rationale that the "errors would balance out in the end."[90]

The Court did not find evidence indicating that the district court had in fact done this.[91] Nevertheless, it condemned the idea that a court, in misapplying the Act as a means of ensuring future governmental compliance, would violate a defendant's rights by imposing a heavy sentence on the basis of still "untested and unsubstantiated" facts related to the narcotics charges.[92]

The Court then considered the fact that the total delay of fourteen days caused by the government's conduct was relatively brief, and that Taylor was not prejudiced by it.[93] In the Court's view, the district court erred in neglecting to take this into account as a factor in the balancing test.[94] Not only was the delay brief, said the Court, but since Taylor was detained on the bench warrant as well as the narcotics charges, there were no "additional restrictions or burdens on his liberty as a result of the . . . violation."[95] Further, concluded the Court, there was no indication that the preparation of Taylor's defense was in any way hindered by the delay.[96]

With respect to the final factor specified in the Act, the impact of the decision on the administration of the Act and justice, the Court agreed with the district court that "dismissal with prejudice always sends a stronger message [to the government] than dismissal without prejudice, and is more likely to induce salutary changes in procedures, reducing pretrial delays."[97] The Court, however, rejected the notion that dismissal with prejudice should serve as the presumptive remedy for violations of the Act.[98] The Court held that the district court had erred in basing its decision principally on its desire to avoid "tacitly condon[ing]" the government's behavior and to send a strong message to encourage it to comply with the Act.[99]

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90 *Id.* at n.9.

91 *Id.* at 2420 and n.9.

92 *Id.* at n.9.

93 *Id.* at 2421-22.

94 *Id.* at 2423.

95 *Id.* at 2422. Because delay is "closely related to the issue of prejudice to the defendant," the Court believed that this factor should figure into the balancing test. *Id.* at 2421. In support of this conclusion, the Court cited Barker v. Wingo, 407 U.S. 514, 537 (1972)(White, J., concurring), *quoting* United States v. Marion, 404 U.S. 307, 320 (1970)(emphasizing that the longer the delay, the more the defendant is likely to be prejudiced by it).

96 *Taylor*, 108 S. Ct. at 2422.

97 *Id.* (citing Brief for the United States at 31).

98 *Id.* at 2418.

99 *Id.* at 2422.

In response to the contention that dismissing cases without prejudice is a mere "toothless sanction," the Court pointed out that the government may find reprosecution too burdensome to pursue or barred by the statute of limitations.[100] The Court also advocated the "liberal use of direct sanctions" that the Act provides to "send a message" when warranted.[101] The Court indicated that "dilatory" counsel may be penalized through fines,[102] suspension from practice,[103] or the reporting of the violation to disciplinary committees.[104] The majority stressed that the goal of deterring the government from violating the Act should not be the determinative factor in a court's decision to dismiss a case with prejudice.[105] Indeed, stated Justice Blackmun, "[i]f the greater deterrent effect of barring reprosecution could alone support a decision to dismiss with prejudice, the consideration of the other factors identified in § 3162(a)(2) would be superfluous, and all violations would warrant barring reprosecution."[106]

The Court concluded that, in the absence of a thorough explanation by the district court as to how it assessed each factor in the balancing test, it could only infer that the district court had dismissed the case with prejudice solely to send a strong message to the government.[107] In the Court's opinion, heavy reliance on this one factor, common to all Speedy Trial Act cases, could not support a decision to dismiss a case with prejudice, and was reversible error.[108]

B. JUSTICE WHITE, CONCURRING

Justice White filed a short concurrence.[109] He agreed with the majority that "when a defendant, through deliberate misconduct, interferes with compliance with the Speedy Trial Act and a violation of

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100 *Id.*

101 *Id.* at n.14.

102 *Id.* § 3162(b)(C) provides that if the government's attorney knowingly and willfully causes an improper delay in trial, he may be fined in an amount not to exceed $250. 18 U.S.C. § 3162(b)(C) (1982).

103 *Taylor*, 108 S. Ct. at 2422 n.14. § 3162(b)(D) provides that such attorney may be denied "the right to practice before the court considering such case for a period of not to exceed ninety days." 18 U.S.C. § 3162(b)(D) (1982).

104 *Taylor*, 108 S. Ct. at 2422 n.14. § 3162(b)(E) provides that the court may discipline such attorney "by filing a report with an appropriate disciplinary committee." Note, however, that this argument is inapplicable in *Taylor*, in which the USMS, not the prosecuting attorney, occasioned the delay. 18 U.S.C. § 3162(b)(E) (1982).

105 *Taylor*, 108 S. Ct. at 2423.

106 *Id.* at 2422.

107 *Id.* at 2423.

108 *Id.*

109 *Id.* (White, J., concurring).

the Act then occurs," the case should not be dismissed with prejudice unless the violation of the Act is "much more serious" than in *Taylor*.[110] Justice White thus emphasized the point that a defendant's contribution to the delay should weigh heavily against dismissals with prejudice.[111]

C. JUSTICE SCALIA, CONCURRING IN PART

Justice Scalia agreed with the result reached by the majority, and that the issue of prejudice to the defendant must be taken into account in applying the balancing test. However, he opposed the majority's reliance on legislative history when the statute of the language was, as he thought, clear.[112] He indicated that the majority had reviewed the Act's legislative history to establish that prejudice to the defendant is one of the factors to which the phrase "among others" refers.[113] Justice Scalia believed that this point was "so utterly clear from the text" of the Act that the majority's recourse to legislative history was unjustified.[114]

Justice Scalia reasoned that it is dangerous to rely on statements made during the legislative process when Congress ultimately voted for an unambiguous act.[115] To do so, he said, could distort Congress' clear intent.[116] Justice Scalia recognized that in *Taylor*, the Court would have reached the same result whether the legislative history was considered or not, for the issue of prejudice was not dispositive in the majority's decision.[117] Yet, Justice Scalia argued that the majority had set a faulty precedent.[118] According to Justice

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110 *Id.* (White, J., concurring).

111 *Id.* (White, J., concurring). Justice White, however, did not indicate what type of government conduct would have been sufficiently "serious" to warrant dismissal with prejudice.

112 *Id.* at 2423 (Scalia, J., concurring in part).

113 *Id.* (Scalia, J., concurring in part). *See supra* note 64 and accompanying text for the majority's position.

114 *Taylor*, 108 S. Ct. at 2423 (Scalia, J., concurring in part). Note, however, that the majority did:

> not agree that the statutory text render[ed] it 'so obviou[s]' . . . that the presence or absence of prejudice to the defendant is one of the 'other factors' that a district court is required by the Speedy Trial Act to consider. A brief review of the [House] floor debate . . . demonstrate[d] that at least some Members of Congress were uncertain about, and repeatedly sought clarification of, precisely what they were voting for.

Id. at 2418 n.7 (citation omitted).

115 *Id.* at 2424 (Scalia, J., concurring in part).

116 *Id.* at 2423-24 (Scalia, J., concurring in part).

117 *Id.* at 2424 (Scalia, J., concurring in part).

118 *Id.* (Scalia, J., concurring in part). Justice Scalia drew attention to Representative Dennis, who stated on the House floor, "I have an amendment [specifying prejudice as a factor] here in my hand which could be offered, but if we can make up some legislative

Scalia, resorting to the legislative history when the statutory text is ambiguous could jeopardize the democratic process if done to argue in favor of elements that were in fact intentionally omitted from the language of statutes later securing congressional and presidential approval.[119]

D. THE DISSENT

Justice Stevens, joined by Justices Brennan and Marshall, wrote a lengthy dissent, arguing that the majority's ruling wrongly deprived the district judge of the discretion that the Act had granted to her.[120] The dissent stressed that the Act expressly granted district judges this discretion because they are in a "much better position" than appellate judges to assess the circumstances surrounding cases and to determine how those cases should properly be dismissed.[121] District judges, said Justice Stevens, have a unique

> understanding, not only of what actually happened, but also of the significance of certain events. . . . Moreover, the trial judge is privy to certain information . . . such as her impression of the demeanor and attitude of the parties, her intentions in handling the future course of the proceedings, and her understanding of how the limited issue faced on appeal fits within the larger factual and procedural context.[122]

The dissent strongly disagreed with the majority's failure to attach importance to the fact that the district judge gave Taylor a five-year sentence on the failure to appear charge, while Taylor's original co-defendant was given only a three-year sentence on the narcotics charges.[123] Indeed, Justice Stevens believed that it would have been proper to take the dismissed narcotics charges into account in imposing a harsh sentence on Taylor for his failure to appear.[124] The dissent noted that the statute under which Taylor was sentenced for failure to appear[125] defined two classes of violations: (i) failure to appear to face felony charges, punishable by a maximum of five years imprisonment, and (ii) failure to appear to face misdemeanor charges, punishable by a maximum of one year imprisonment.[126] The dissent reasoned that because the failure to ap-

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history which would do the same thing, I am willing to do it." *Id.* (Scalia, J., concurring in part)(quoting 120 CONG. REC. 41795 (1974)).

119 *Id.* (Scalia, J., concurring in part).

120 *Id.* at 2428 (Stevens, J., dissenting).

121 *Id.* at 2424 (Stevens, J., dissenting).

122 *Id.* at 2424-25 (Stevens, J., dissenting)(footnote omitted).

123 *Id.* at 2425 (Stevens, J., dissenting).

124 *Id.* (Stevens, J., dissenting).

125 18 U.S.C. § 3150 (1982) (repealed).

126 *Taylor*, 108 S. Ct. at 2425 (Stevens, J., dissenting).

pear statute itself differentiated between these two classes of accused persons—although the defendant, when sentenced, has not been convicted of the crime in question and therefore remains under a presumption of innocence with regard to it—it was proper to take the pending charges into account in sentencing.[127]

The dissent also contested the majority's conclusion that the district court had failed to offer any basis on which to characterize the government's conduct as "lackadaisical."[128] The dissent pointed out that the district court had taken note of the USMS' failure to promptly comply with a court order to transport Taylor, a "serious matter."[129] Indeed, said the dissent, the district judge had listed all instances of inexcludable delay and indicated that the government lacked a valid excuse for each of them.[130] In Justice Stevens' opinion, the district court had studied and carefully weighed every factor in the balancing test, and reached a "sensible" conclusion.[131]

Justice Stevens stated that had he been confronted with the case as a district judge, he was not certain how he would have dismissed it.[132] He stated that he would have assumed, however, that if he had "set forth a sensible explanation" for his holding, it would have withstood appellate review.[133] He added that dismissing the case without prejudice would be a "rather meaningless sanction" unless the statute of limitations had run, in which case it would not matter how the case was dismissed.[134] Justice Stevens was concerned that the majority's holding would encourage district courts to consistently dismiss cases without prejudice in order to avoid reversal on appeal.[135] This, he concluded, would run contrary to the spirit of the Act and deprive district courts of the discretion to which the Act properly entitles them.[136]

IV. Analysis

The Speedy Trial Act of 1974 was designed to promote greater efficiency in processing criminal cases in order to achieve two goals. The first was to establish a standard by which the sixth amendment

127 *Id.* at 2425-26 (Stevens, J., dissenting).
128 *Id.* at 2626 (Stevens, J., dissenting).
129 *Id.* (Stevens, J., dissenting).
130 *Id.* at 2427 (Stevens, J., dissenting).
131 *Id.* at 2426 (Stevens, J., dissenting).
132 *Id.* (Stevens, J., dissenting).
133 *Id.* (Stevens, J., dissenting).
134 *Id.* (Stevens, J., dissenting).
135 *Id.* at 2626 (Stevens, J., dissenting).
136 *Id.* at 2426, 2428 (Stevens, J., dissenting).

right to a speedy trial[137] could be more effectively and uniformly implemented than had been possible under either judicially created balancing tests or the Federal Rules of Criminal Procedure.[138] Second, the Act sought to respond to a national concern with increasing crime, which many attributed in part to offenses committed by criminal defendants who spent extended periods of time free on bail while awaiting trial.[139]

The dismissal sanction, which the Supreme Court addressed for the first time in *Taylor*, proved controversial from the start. Indeed, commentators and courts have raised persuasive counterarguments in response to several of the interpretations that the Court adopted for the balancing test factors. Nevertheless, *Taylor* is valuable as a guiding framework for courts applying the dismissal sanction, thus achieving a major purpose of the Act by furthering uniformity among decisions.

Moreover, *Taylor* serves as a signal to courts that the Act seeks to address the public interest in crime control as well as the defendant's sixth amendment rights, and that these factors cannot be neglected when the balancing test factors are interpreted and weighed. The balancing test factors in the Act implicitly respond to the competing interests of protecting the defendant's right to a speedy trial and society's interest in controlling crime. Courts must therefore take both of these purposes into account in deciding whether to dismiss cases with or without prejudice under the Act.

A. BACKGROUND OF THE DISMISSAL SANCTION: LEGISLATIVE HISTORY

The concern for promptly disposing of criminal cases did not begin with the Speedy Trial Act of 1974. For quite some time, congressional bills had sought to clarify defendants' interest in, and right to, a speedy trial.[140] In the late 1960's, however, speedy trial legislation assumed an added dimension. Speedy trial guarantees came to be seen as a means of responding to the growing national

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137 The sixth amendment provides, in pertinent part, that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial." U.S. CONST. amend. VI. The Supreme Court has held this right to be "as fundamental as any of the rights secured by the Sixth Amendment." Klopfer v. North Carolina, 386 U.S. 213, 223 (1967).

138 *See* Steinberg, *Right to a Speedy Trial: The Constitutional Right and Its Applicability to the Speedy Trial Act of 1974*, 66 J. CRIM. L. & CRIMINOLOGY 229, 230 (1975)(citing H.R. REP. No. 1508, 93d Cong., 2d Sess. 11-12, *reprinted in* 1974 U.S. CODE CONG. & ADMIN. NEWS 7404-05).

139 Steinberg, *supra* note 138, at 930 (citing H.R. REP. No. 1508, 93d Cong., 2d Sess. 15-16, *reprinted in* 1974 U.S. CODE CONG. & ADMIN. NEWS 7408-09).

140 A. PARTRIDGE, *supra* note 65, at 11.

problem of increasing crime. Society's interest in speedy trial guarantees was thus recognized.[141]

The "enormous increase in the rate of crime"[142] was believed to have been exascerbated by the Bail Reform Act of 1966,[143] which permitted defendants in non-capital cases to be liberally released before trial without having to post the conventional bail bond.[144] The Court has advanced that "the longer an accused is free awaiting trial, the more tempting becomes his opportunity to jump bail and escape."[145]

The Bail Reform Act was also perceived as a vehicle by which defendants released on bond could "exert[] heavy pressure" on their lawyers to postpone trials as long as possible in the hope that the government's case would be weakened or dropped in the interval.[146] This factor contributed to an enormous backlog in the federal courts.[147]

This problem was also believed to be aggravated by the Criminal Justice Act of 1964.[148] The Act, which guaranteed indigent de-

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141 *Id.*

142 Burger, *The State of the Judiciary—1970*, 56 A.B.A. J. 929, 930 (1970).

143 18 U.S.C. §§ 3141-3156 (1982).

144 Burger, *supra* note 142, at 930. The Supreme Court had also pointed out that "[i]n Washington, D.C., in 1968, 70.1% of the persons arrested for robbery and released prior to trial were re-arrested while on bail." Barker v. Wingo, 407 U.S. 514, 519 n.8 (1972), (citing Mitchell, *Bail Reform and the Constitutionality of Pretrial Detention*, 55 VA. L. REV. 1223, 1236 (1969)(citation omitted)). The legislative history, discussing the benefits of speedy trials to society, referred to a government study on recidivism which concluded, based on data gathered in 1968, that there was "(a) [a]n increased propensity to be re-arrested when released more than 280 days; and (b) an increased propensity of persons classified as dangerous . . . to be re-arrested in the period from 24 to 8 weeks prior to trial." H.R. REP. No. 1508, 93d Cong., 2d Sess. 16, *reprinted in* 1974 U.S. CODE CONG. & ADMIN. NEWS 7408-09. *See also* Note, *The Speedy Trial Act of 1974: Defining the Sixth Amendment Right*, 25 CATH. U.L. REV. 130, 133 n.15. The House Judiciary Committee also noted that by 1974, approximately 75% of all defendants were released pending trial, which "means that persons who are likely to commit additional crimes could without adequate supervision . . . continue to reap the profits of criminal activity at the expense of the public." H.R. REP. No. 1508, 93d Cong., 2d Sess. 15, *reprinted in* 1974 U.S. CODE CONG. & ADMIN. NEWS 7409.

145 *Barker*, 407 U.S. at 520. The Court cited the ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS 321 (1971) for the proposition that such offenses had been increasing in number.

146 Burger, *supra* note 142, at 931. Chief Justice Burger stated that "[d]efendants, whether guilty or innocent, are human: They love freedom and hate punishment . . . We should not be surprised that a defendant on bail exerts a heavy pressure on his court-appointed lawyer to postpone the trial as long as possible so as to remain free." *Id.*

147 In *Barker*, the Court stated that the "large backlog of cases in urban courts . . . enables defendants to negotiate more effectively for pleas of guilty to lesser offenses and otherwise manipulate the system." *Barker*, 407 U.S. at 519 (citing REPORT OF THE PRESIDENT'S COMMISSION ON CRIME IN THE DISTRICT OF COLUMBIA 256 (1966)).

148 18 U.S.C. § 3006A (1982).

fendants an attorney at public expense and removed their monetary concerns, was thought to discourage defendants from disposing of their cases as quickly as they could by avoiding continuances and pleading guilty.[149]

Despite the increase in crime and the corresponding backlog in the federal courts, it was acknowledged that the "revolution in criminal justice" had secured gains for defendants that were important to preserve.[150] Speedy trial legislation arose as a means of decreasing the number of criminal defendants who were free on bail and alleviating congestion in the federal courts in a manner that would not contradict the goals of the Bail Reform and Criminal Justice Acts.[151]

At the same time, there was a concern that defendants' rights to a speedy trial under the sixth amendment were inadequately protected under the extant standards.[152] Before 1972 and the decision in *Barker v. Wingo*,[153] the Supreme Court had never attempted to establish uniform standards for the implementation of the sixth amendment speedy trial guarantee.[154]

The *Barker* Court recognized that "[t]he right to a speedy trial is generically different from any of the other rights enshrined in the Constitution for the protection of the accused," because in addition to the defendant's interest in being treated fairly, "there is a societal interest in providing a speedy trial which exists separate from, and at times in opposition to, the interests of the accused."[155] With both these interests in mind, the Court adopted a balancing test to determine whether a defendant had been deprived of his sixth amendment right.[156] The Court identified four factors that must be

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149 Burger, *supra* note 142, at 930-31. According to Chief Justice Burger, "[a]s recently as 1950, three or four judges were able to handle all serious criminal cases [in Washington, D.C.]. By 1968, twelve judges out of fifteen in active service were assigned to the criminal calendar and could barely keep up." *Id.* at 931. He also stated:

> [w]e should not be surprised at delay when more and more defendants demand their undoubted constitutional right to a trial by jury because we have provided them with lawyers and other needs at public expense; nor should we be surprised that most convicted persons seek a new trial when the appeal costs them nothing and when failure to take the appeal will cost them freedom.

Id.

150 *Id.* at 931.

151 *See generally* A. PATRIDGE, *supra* note 65, at 13.

152 H.R. REP. No. 1508, 93d Cong., 2d Sess. 11-12, *reprinted in* 1974 U.S. CODE CONG. & ADMIN. NEWS 7404-05.

153 407 U.S. 514 (1972)(setting forth a balancing test for the determination of whether a defendant's sixth amendment speedy trial rights had been violated).

154 *See* Steinberg, *supra* note 138, at 230 & n.21.

155 *Barker*, 407 U.S. at 519.

156 *Id.* at 530.

considered: "[l]ength of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant."[157] Although the Court was aware of requests for more explicit standards, it found "no constitutional basis for holding that the speedy trial right can be quantified into a specified number of days or months."[158] Moreover, quantifying the speedy trial right would have required the Court to engage in "legislative or rulemaking activity," which, the Court said, was beyond its authority.[159]

The Federal Rules of Criminal Procedure went no further in satisfying proponents of more definite speedy trial standards.[160] Rule 50(b) provides that "each district court shall conduct a continuing study of the administration of criminal justice . . . and shall prepare plans for the prompt disposition of criminal cases."[161] Advocates of more specific standards believed, however, that "plans submitted under the rule had failed to provide a uniform definition of speedy trial and had only encouraged perpetuation of the status quo."[162] Rule 48(b) provides that "[i]f there is unnecessary delay in presenting the charge to a grand jury or in filing an information . . . or . . . in bringing a defendant to trial, the court may dismiss the indictment, information or complaint."[163] Since courts had interpreted this rule in an "erratic way," it similarly provided little definitive guidance.[164] Indeed, "in passing the Speedy Trial Act, Congress specifically determined that neither the previous decisions of the Supreme Court nor the implementation of rule 50(b) of the Federal Rules of Criminal Procedure had provided the courts with adequate guidance on the speedy trial question."[165]

The concern with the need to address both growing crime and inadequate sixth amendment protections for criminal defendants was shared by the American Bar Association, which developed the Standards Related to Speedy Trial.[166] The standards sought to en-

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157 *Id.*

158 *Id.* at 523.

159 *Id.*

160 For discussions of the inadequacies of the Federal Rules of Criminal Procedure and the *Barker* balancing test as a means of furthering speedy trials, see Note, *supra* note 144, at 141-44 and Note, *Criminal Law—Federal System Adopts Specific Parameters for the Constitutional Right to a Speedy Trial—Speedy Trial Act of 1974*, 10 U. RICH. L. REV. 449, 450 (1976) [hereinafter *Specific Parameters*].

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

162 Note, *supra* note 144, at 141-42.

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

164 Note, *supra* note 144, at 143.

165 Steinberg, *supra* note 138, at 230 (citing H.R. REP. No. 1508, 93d Cong., 2d Sess. 11, *reprinted in* 1974 U.S. CODE CONG. & ADMIN. NEWS 7404-05).

166 A.B.A. STANDARDS RELATING TO SPEEDY TRIAL (Approved Draft, 1968).

sure: (1) the defendant's personal interest in a speedy trial, including the preservation of the means of presenting his or her defense, avoiding long periods of incarceration before trial or conditional release, and long periods of "anxiety and public suspicion arising out of the accusation"; and (2) the public's interest in "proving the charge" and avoiding "an extended period of pretrial freedom by the defendant during which time he may flee, commit other crimes, or intimidate witnesses."[167] The standards provided only for dismissals with prejudice.[168]

The first congressional bill advocating the speedy trial as a response to increasing crime was the Pretrial Crime Reduction Act, introduced by Representative Abner Mikva in November, 1969.[169] This bill, based in large part on the American Bar Association Standards, similarly provided exclusively for dismissals with prejudice.[170] It also provided for a sixty day period during which defendants charged with violent crimes could be brought to trial, and a 120 day period for those charged with other offenses.[171] Its principal aim was to " 'avoid[] the repugnant, and probably unconstitutional, alternative of preventive detention' " that the Nixon administration favored as a means of reducing the number of crimes committed by defendants released on bail.[172] A number of bills had previously been introduced which would have permitted such detention in the case of defendants charged with "dangerous" crimes.[173]

A "Speedy Trial Act" bill was introduced into the Senate in June, 1970, by Senator Sam Ervin, Jr., a key sponsor of the Bail Reform Act of 1966 and an opponent of preventive detention.[174] Senator Ervin's bill, like Representative Mikva's, was offered as an alternative to preventive detention, and stressed both crime reduction and sixth amendment rights. Senator Ervin's original bill provided for dismissals with prejudice except in cases where the delay was due to the fault of the defendant or defense counsel.[175]

Neither the Mikva nor the original Ervin bill survived, but the

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167 *Id.* at Commentary to § 1.1, *reprinted in* A. PARTRIDGE, SUPRA note 65, at 12.

168 A.B.A. STANDARDS RELATING TO SPEEDY TRIAL § 4.1.

169 115 CONG. REC. 34334-36 (1969).

170 *See id.* at 34336.

171 *See id.*

172 *See id.* at 34335. The *Barker* court also voiced its opposition to pretrial detention, stating that it "contributes to the overcrowding and generally deplorable state of [local jails]"; jeopardizes the chances of successful rehabilitation; may lead to violent rioting; and is very costly. *Barker*, 407 U.S. at 520-21.

173 A. PARTRIDGE, *supra* note 65, at 13.

174 S. 895, 92d Cong., 1st Sess., 117 CONG. REC. 3405-09 (1971).

175 *See* 117 CONG. REC. at 3409.

Ervin bill was reintroduced in 1973.[176] The 1972 Senate subcommittee bill omitted the reference to "fault" and barred the reprosecution of any offenses "based on the same conduct or arising from the same criminal episode" as the dismissed offense.[177] This sanction met harsh criticism from both members of Congress and the Department of Justice.[178]

By 1974, the Senate had agreed to compromise; its committee bill that year provided for dismissal without prejudice.[179] Prosecution, however, could "only be reinstituted if the court . . . finds . . . compelling evidence that the delay was caused by exceptional circumstances which the government and the court could not have foreseen or avoided."[180] Senator Ervin himself admitted that even within the Senate, opposition to the provision allowing only dismissals with prejudice was so intense that it would have made passage of the bill impossible.[181] The 1974 House subcommittee bill, however, provided only for dismissal with prejudice.[182]

The Department of Justice reiterated its dissatisfaction, and finally indicated that it would support the bill if it provided the district court with the discretion to dismiss cases either with or without prejudice.[183] Congress ultimately acknowledged that the President would likely use a pocket veto to prevent the bill's passage unless Congress compromised with the Department of Justice.[184] Representative Cohen thus hurriedly introduced a bill incorporating the current version of the dismissal sanction.[185] This compromise bill, amended on the floor of the House, passed both houses of Congress[186] and was signed into law by President Ford on January 3,

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176 S. 754, 93 Cong., 1st Sess., 119 CONG. REC. 3263-68 (1973).

177 *Id.* at 3265.

178 In the Department's view, the

> mandatory dismissal of criminal cases can only serve to injure the public by releasing persons charged with crime. . . . This injures the public not only because the person may pose a danger to the public welfare, but also because it undermines the public's confidence in the criminal justice system to see persons charged with crime released without trial.

Letter from Elliot L. Richardson to Sen. Sam J. Ervin, Jr. (Oct. 11, 1973), *reprinted in* Hansen & Reed, *The Speedy Trial Act of 1974 in Constitutional Perspective*, 47 MISS. L.J. 365, 415 (1976)(footnote omitted).

179 S. 754, 93d Cong., 2d Sess., 120 CONG. REC. 24668 (1974).

180 *Id.*

181 *See* Hansen & Reed, *supra* note 178, at 415.

182 H.R. 17409, 93d Cong., 2d Sess., 120 CONG. REC. 41783 (1974).

183 Letter from Attorney General William B. Saxbe to Rep. Peter W. Rodino, Jr. (Dec. 13, 1974), *reprinted in* 120 CONG. REC. 41619-20 (1974). *See* A. PARTRIDGE, *supra* note 65, at 16-18.

184 A. PARTRIDGE, *supra* note 65, at 17-18.

185 H.R. 17409, 93d Cong., 2d Sess., 120 CONG. REC. 41793-94 (1974).

186 *See* United States v. Taylor, 108 S. Ct. 2413, 2418 (1988).

1975.[187] The dismissal sanction ultimately went into effect on July 1, 1980.[188]

Because the current version of the dismissal sanction, which includes the balancing test factors, was hurriedly amended and passed, it had "no antecedents in earlier versions of the bill, and no substantial guidance [was] to be found in the history made on the House floor."[189] It is not surprising, therefore, that courts interpreted the balancing test factors with little or no more consistency than they had under the *Barker* doctrine or the Federal Rules of Criminal Procedure.[190] *Taylor*, by providing a framework in which cases arising under the dismissal sanction might be more uniformly decided by the courts, furthers a primary goal of the Act.

B. THE BALANCING TEST FACTORS

Before *Taylor*, some controversy had existed among the district courts and circuit courts of appeals as to how to interpret the balancing test factors identified, whether explicitly or implicitly, in the dismissal sanction.[191] Commentators have repeatedly termed the dismissal sanction "unclear"[192] and "ambiguous."[193] To some extent, the degree to which courts had given adequate consideration to the dual aims of the Act, crime control and the effective implementation of the sixth amendment speedy trial right, determined their interpretation of the balancing test factors. This section will explore the various interpretations courts have given to the balanc-

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187 A. PARTRIDGE, *supra* note 65, at 18.

188 18 U.S.C. § 3163(c) (1982).

189 A. PARTRIDGE, *supra* note 65, at 33.

190 This is not to imply that the Speedy Trial Act precludes review under a strict sixth amendment analysis pursuant to the *Barker* balancing test. § 3173 of the Act explicitly states that "[n]o provision of this chapter shall be interpreted as a bar to any claim of denial of speedy trial as required by amendment VI of the Constitution." 18 U.S.C. § 3173 (1982). For example, if a defendant can prove that he was severely prejudiced by a delay shorter than the time limits specified in the Act, he could conceivably assert a successful claim based on the sixth amendment. *See* 120 CONG. REC. 41777 (1974) (exchange between Rep. Wiggins and Rep. Cohen), *reprinted in* A. PARTRIDGE, *supra* note 65, at 258. Because outcomes under the *Barker* analysis and the Speedy Trial Act may vary, commentators have urged defense counsel to seek dismissal under both theories. *See* Russ & Mandelkern, *The Speedy Trial Act of 1974: A Trap for the Unwary Practitioner*, 2 NAT'L J. CRIM. DEF. 1, 32 (1976).

191 *See supra* note 7 and accompanying text.

192 La Fave and Israel stated that the " 'with or without prejudice' provision, the result of an amendment on the floor of the House, is not only anticlimatic [sic] [in view of the years of effort that went into developing a uniform, definitive remedy] but also very unclear." W. LA FAVE & J. ISRAEL, CRIMINAL PROCEDURE § 18.3, at 694 (1985) (quoting 18 U.S.C. § 3162(a)(2) (1982)).

193 Note, *Specific Parameters*, *supra* note 160, at 457 n.53.

ing test factors and address the arguments advanced in favor of each.

1. The Seriousness of the Offense

The seriousness of the offense committed has in and of itself not proved to be a controversial factor among courts applying the dismissal sanction of the Act. The courts are in general agreement as to which offenses should be termed "serious" for purposes of the Act.[194] The Supreme Court in *Taylor* agreed with the district court and Ninth Circuit that Taylor's alleged offenses, conspiracy to possess cocaine and possession of cocaine with intent to distribute, were "serious" crimes.[195] Courts have uniformly termed narcotics offenses "serious" in discussing this factor.[196] In almost all cases involving narcotics, courts have held the gravity of the offense to be a significant factor leading them to determine that the case should be dismissed without prejudice.[197]

Although not articulated by the Supreme Court in *Taylor*, which examined this factor on its own merits, many courts have weighed the seriousness of the defendant's offense against that of the Speedy

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194 *See infra* notes 196-97 and accompanying text.

195 United States v. Taylor, 108 S. Ct. 2413, 2420 (1988).

196 *See* United States v. May, 819 F.2d 531, 534 (5th Cir. 1987)(five counts of possession with intent to distribute controlled substances); United States v. Stayton, 791 F.2d 17, 21 (2d Cir. 1986)(trafficking in 200 kg. of phenylacetone to be used in methamphetamine manufacture); United States v. Simmons, 786 F.2d 479, 485 (2d Cir. 1986)(several counts involving a "relatively small quantity" of substances); United States v. Phillips, 775 F.2d 1454, 1456 (11th Cir. 1985)(several offenses involving marijuana importation); United States v. Brown, 770 F.2d 241, 244 (1st Cir. 1985), *cert. denied*, 474 U.S. 1064 (1986)(distribution and conspiracy to distribute four ounces of cocaine with a wholesale value of $10,000); United States v. Russo, 741 F.2d 1264, 1267 (11th Cir. 1984)(several offenses involving methaqualone); United States v. Carreon, 626 F.2d 528, 533 (7th Cir. 1980)(one count of conspiracy to distribute heroin and seven counts of heroin distribution); United States v. Veillette, 654 F.Supp. 1260, 1263 (D. Me. 1987)(possession of 280 grams of cocaine with intent to distribute); United States v. Green, 582 F. Supp. 265, 267 (D. Colo. 1984)(one count of distribution of a schedule II drug); United States v. Angelini, 553 F. Supp. 367, 370 (D.Mass.), *vacated and remanded*, 678 F.2d 380 (1st Cir. 1982)(possession and distribution of methaqualone was "serious," but the factor was "neutral" because the government's proof was predicated only on fragments of seven Quaalude tablets valued at approximately $4).

197 *But see Stayton*, 791 F.2d at 21 (the court held that a delay of 23 months between voir dire and the swearing of the jury outweighed the seriousness of the offense); *Russo*, 741 F.2d at 1267-68 (a delay of several months in bringing the defendant to trial outweighed the seriousness of the offense); United States v. Iaquinta, 515 F. Supp. 708, 710 (N.D.W. Va. 1981), *rev'd on other grounds*, 674 F.2d 260 (4th Cir. 1982) (Neither mentioning the Act's crime reduction rationale nor explaining the balancing test factors, the court dismissed the case with prejudice, stating that the Act was "designed to implement and enforce the Sixth Amendment right to a speedy trial and to ensure uniformity of the same throughout the nation.").

Trial Act violation.[198] When a court has deemed a crime "not serious," cases have consistently resulted in dismissals with prejudice.[199]

It is noteworthy that the Court did not articulate a standard that a number of courts have used to assess the seriousness of the offense: that the length of the sentence for an offense is a valid indication of its gravity.[200] One commentator has cautioned against such practices, stating that "inconsistency on the legislature's part between length of the sentence and severity of the crime has been aptly demonstrated."[201] The Court, in holding that a narcotics offense was serious, implicitly rejected another standard for measuring the gravity of the offense: whether it was "violent."[202] Indeed, "non-violent crimes, particularly those that have massive social im-

198 *See, e.g., May*, 819 F.2d at 534 (dismissal without prejudice); *Russo*, 741 F.2d at 1267 (dismissal with prejudice); *Carreon*, 626 F.2d at 533 (dismissal without prejudice).

199 Other cases involving "serious" offenses include: United States v. Fountain, 840 F.2d 509, 512 (7th Cir.), *cert. denied*, 109 S. Ct. 533 (1988) (being an accomplice to murder); United States v. Kramer, 827 F.2d 1174, 1176-77 (8th Cir. 1987) (bank record fraud amounting to almost one million dollars); United States v. Peeples, 811 F.2d 849, 851 (5th Cir. 1987)(attempt to defraud an investor of more than $500,000); United States v. Salgado-Hernandez, 790 F.2d 1265, 1267-68 (5th Cir), *cert. denied*, 479 U.S. 964 (1986) (transporting illegal aliens); United States v. Janik, 723 F.2d 537, 546 (7th Cir. 1983)(possession of unregistered guns); United States v. Hawthorne, 705 F.2d 258, 260 (7th Cir. 1983)(possession of stolen government checks); *Veillette*, 654 F. Supp. at 1262 (possession of unregistered firearm silencer); *Green*, 582 F. Supp. at 265 (illegally selling food stamps worth $2,500).

Offenses that courts have not deemed sufficiently serious for purposes of the Act include: mail theft of a ring, United States v. Caparella, 716 F.2d 976, 980 (2d Cir. 1983); mail theft of a check, United States v. Jervey, 630 F. Supp. 695, 698 (S.D.N.Y. 1986); and credit card fraud amounting to $1,000, United States v. Koch, 438 F. Supp. 307, 310 (S.D.N.Y.), *aff'd*, 563 F.2d 49 (2d Cir.), *cert. denied*, 736 U.S. 946, *aff'd*, 598 F.2d 610 (2d Cir. 1977). *See also* United States v. Bilotta, 645 F. Supp. 369 (E.D.N.Y. 1986), *aff'd*, 835 F.2d 1430 (2d Cir. 1987), in which the court stated that if conspiracy to export military and espionage equipment to Libya and the U.S.S.R. was in fact "serious," the government would not have waited 18 months to indict the defendant. *Id.* at 373. What the court likely meant was that it did not consider the offense as serious as the government's violation of the Act, a standard used by many courts in assessing the seriousness of the offense. *See supra* note 198 for courts articulating this standard.

200 *See, e.g., Salgado-Hernandez*, 790 F.2d at 1268 (in which the Court stated that "as an objective measure, possible imprisonment for fifty-five years is some indication that the offense is serious.").

201 Steinberg, *Dismissal With or Without Prejudice Under the Speedy Trial Act: A Proposed Interpretation*, 68 J. CRIM. L. & CRIMINOLOGY 1, 9 n.79 (1977)(referring to a former California statute that set the sentence for second indecent exposure conviction at one year to life).

202 *Taylor*, 108 S. Ct. at 2420. *See Caparella*, 716 F.2d at 980 ("absent exascerbating circumstances such as violence," postal theft was not a serious crime); *Jervey*, 630 F. Supp. at 698 (citing *Caparella* in a case involving postal theft). Nine years earlier, however, the same judge that decided *Jervey* had stated that if the defendant had been "the Heroin Tycoon of the East Bronx," he might have dismissed the case without prejudice. *Koch*, 438 F. Supp. at 310. This indicates that these courts would perhaps have been

plications, also may be considered serious in nature," for example, a corporate executive "criminally polluting public waters."[203]

2. The Facts and Circumstances Leading to the Dismissal

The second factor guiding courts in their application of the dismissal sanction is the facts and circumstances leading to the dismissal.[204] This factor relates to the role played by the government and, where applicable, the defendant in causing the delay resulting in the violation of the Act. The courts have differed significantly in interpreting this factor, especially in their judgments as to what types of government conduct should be factored into the balancing test.

a. The Nature of the Government's Violation of the Act

The *Taylor* majority stated that "a truly neglectful attitude on the part of the government reasonably could be factored against it" in the balancing test.[205] Such an attitude might have been demonstrated by a "pattern of neglect by the local United States Attorney" or by evidence of "bad faith."[206] As the *Taylor* case demonstrates, however, "bad faith" is in many respects a subjective standard that courts can interpret differently. Justice Stevens, for example, stated that the "characterization of such a violation as 'lackadaisical' appears understated," implying that he believed the USMS to have acted in bad faith.[207] In contrast, the majority held that a mere "isolated unwitting violation" such as that in *Taylor* was insufficient to tip the balance in favor of dismissal with prejudice.[208]

Whether "unwitting" violations should be weighed against the government in determining how to dismiss cases under the Act has been controversial among the courts. Some courts have held that negligence or inadvertence on the part of the government should indeed be factored into the balancing test. One court, for example,

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more careful about their choice of terminology if serious but non-violent narcotics offenses had in fact been at issue.

203 Steinberg, *supra* note 201, at 9.

204 18 U.S.C. § 3162(a)(2) (1982).

205 *Taylor*, 108 S. Ct. at 2420.

206 *Id.*

207 *Id.* at 2426 (Stevens, J., dissenting). Although the dissent stated that "the important issue is . . . whether the Service acted carelessly or without regard for respondent's interest in seeing justice administered swiftly," it believed that this was a factual determination that only the district court was in a position to make. *Id.* Acting without thinking about the defendant's interests, however, is not in bad faith in the same way that consciously or maliciously trying to prejudice him to further some motive would be. The dissent appears to adopt the former sense of bad faith, and the majority the latter. *See id.* at 2420-21; *id.* at 2426 (Stevens, J., dissenting).

208 *Id.* at 2421.

held that although the government's failure to file a timely indictment "did not spring from any evil motive . . . when a defense motion . . . is late, the government is quick to point [that] out. . . . Meeting established time limitations is important and lack of attention or dilatoriness in observing them should not be encouraged by courts viewing such neglect tolerantly."[209]

Another court rejected the government's argument that "its recalcitrance was neither intentional, nor designed to secure any tactical advantage."[210] The government claimed that it had misunderstood the implications of the new Act, and had not realized that it had violated it when it delayed several months in bringing the defendant to trial.[211] The court argued that "the mere lack of improper motive is not a sufficient excuse," and that "[s]ome affirmative justification must be demonstrated to warrant a dismissal without prejudice" where the seriousness of the crime was balanced by the idea that dismissals without prejudice "frustrat[e] the Act's mandate of swift prosecution."[212] The court stated, however, that "mere negligence or inadvertence" would not necessarily call for dismissal without prejudice if, for example, the crime was very serious and the unexcused delay minimal.[213]

Other courts have argued the reverse, reasoning that because unintentional, inadvertent acts resulting in violations are not deterrable, the sanction of dismissal with prejudice would serve no useful purpose.[214] This view, however, contradicts much of the traditional rationale behind imposing liability for negligence: that holding per-

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209 United States v. Caparella, 716 F.2d 976, 980 (2d Cir. 1983).

210 United States v. Russo, 741 F.2d 1264, 1267 (11th Cir. 1984).

211 *Id.*

212 *Id.*

213 *Id. See also* United States v. Salgado-Hernandez, 790 F.2d, 1265, 1268 (5th Cir.), *cert. denied*, 479 U.S. 964 (1986)(stating in dicta that oversight cannot "always excuse a failure to meet the Act's deadlines," as where the government frequently fails to comply or has failed to comply "more than once with respect to the same defendant."); United States v. Graham, 538 F.2d 260, 266 (9th Cir. 1976)(stating in dicta that under the Act, "the government should be aware that negligent conduct in bringing an accused to trial will not be tolerated.").

214 *See* United States v. Hawthorne, 705 F.2d 258, 261 (7th Cir. 1983)(because a clerical miscalculation, resulting in a violation, was unintentional and not designed to gain a "tactical advantage," it should not factor in the balancing test); United States v. Bittle, 699 F.2d 1201, 1208 (D.C. Cir. 1983)("the government's exceeding the time limit was unintentional" and "unlikely to recur."); United States v. Carreon, 626 F.2d 528, 533 (7th Cir. 1980)(finding no evidence that the government's failure to file a timely petition for hearing was intentional and likely to recur); United States v. Green, 582 F. Supp. 265, 267 (D. Colo. 1984)(in which it did "not appear that the delay was intentional or willful," but was simply "the result of inattention.").

sons liable for careless behavior encourages them to take greater care.

Taylor is problematic in that the "lackadaisical" conduct of the USMS, while not stemming from an evil motive, was indeed intentional and hence deterrable. The Court, however, by terming the violation "unwitting," placed it in the same category as unconscious clerical errors resulting in delays, a type of error that courts have often excluded from the balancing test.[215] Although it did not intend to disadvantage Taylor by postponing his departure from California, the USMS indeed sought to benefit, in terms of cost-efficiency, from the delay.[216]

While the proper balancing of all the factors warrants dismissing *Taylor* without prejudice, it arguably defeats a central purpose of the Act to give no consideration at all to intentional violations, which the Act aims to prevent. Perhaps the better view is that violations committed in good faith should be factored into the test, but given less weight than bad faith violations. This could make a difference in the outcome of cases on the margin, for example, in which the offense involved is less serious than Taylor's.

Taylor leaves unanswered the question of how to address situations in which the court itself, and not the prosecuting attorney, is the cause of the delay.[217] The language of the statute does not delineate the range of violations that should be considered in balancing the factors, and courts are divided on the issue. Some courts have reasoned that because court oversights are not the target of the Act, they are not relevant.[218] Other courts, in contrast, have drawn

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215 *Taylor*, 108 S. Ct. at 2421.

216 *Id.* at 2416. In United States v. Jervey, 630 F. Supp. 698 (S.D.N.Y. 1986), the court took a different approach. The court found that the government had made a good faith attempt to transport the defendant prisoner in a timely manner, but nevertheless failed to do so within the Act's time limits. *Id.* at 695. Judge Brieant

> recognize[d] the reality of federal prisoner transportation. Under existing conditions, three weeks for this trip [was] neither unusual nor unexpected. The prison bus, which usually takes a circuitous route like that of a tramp steamer, need not run through the night. . . . Congress did not intend that prisoners and their custodians travel on the regularly scheduled airlines as a customary means of travel.

Id. at 697. No matter how unfeasible compliance with the Act may have been, however, Judge Brieant held that under the Act, "[s]uch ordinary institutionalized delay [was] not an excuse," and dismissed the case with prejudice. *Id.* at 697-98. Nonetheless, he urged Congress to either amend the "silly" § 3161(h)(1)(H), which excludes from speedy trial time only ten days for the transportation of prisoners, or appropriate funds sufficient to ensure expeditious travel. *Id.* at 698.

217 18 U.S.C. § 3174(a)(b) (1982) permits that the running of the "speedy trial clock" to be suspended in the case of overcrowded court dockets, provided the chief district judge properly petitions the judicial council of the circuit.

218 *See* United States v. Kramer, 827 F.2d 1174, 1178 (8th Cir. 1987)(not weighing the delay caused by unavailability of trial judge); United States v. Phillips, 775 F.2d 1454,

no distinction between the roles of the court and the prosecutor in causing the delay.[219] These courts have reasoned that the effect on the defendant is the same regardless of the cause of the violation.

Taylor drew no distinction between the USMS and the prosecuting attorneys when it stated that if the USMS had acted in bad faith or had been responsible for repeated violations, the balance "would clearly have [been] altered."[220] Because the USMS is even less subject to the prosecutor's control than are court personnel, *Taylor*, by implication, appears to support the view that delays resulting from negligence in the court system should factor into the balancing test if they are frequent or in bad faith. One commentator has agreed that delays caused by the court's "deliberate or negligent misconduct" are "impermissible" and should weigh in favor of dismissal with prejudice.[221]

b. The Role of the Defense in Contributing to the Violation

Taylor was largely responsible for the events culminating in the Speedy Trial Act violation. Although the dismissal was predicated on the fact that a sufficient number of non-excludable days had elapsed after Taylor was located and the speedy trial clock began to run, it is also true that if not for his initial flight from Washington, the government would have tried him within the limits imposed by the Act. Judge Poole, dissenting in the Ninth Circuit, noted the "iron[y] that the statutory scheme which would have assured [Taylor's] orderly trial in November 1984, is resorted to, five months later, as the reason for 'springing' him to freedom and conferring

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1456 (11th Cir. 1985)(government "twice filed reports alerting the trial court of the speedy trial deadline, [but] [t]he case was simply not reached on the trial docket, a matter within the primary responsibility of the court."); United States v. Veillette, 654 F.Supp. 1260, 1264 (D. Me. 1987) (negligence on the part of trial court personnel *would* be a factor, but delay caused by the Clerk of the Supreme Court or court of appeals, or the Solicitor General's office, was not). *Kramer* and *Phillips* are difficult to reconcile with 18 U.S.C. § 3174 (a)(b) (1982), which specifies the procedures that district judges must follow when court dockets are overcrowded. If the court is negligent in failing to abide by these procedures, but this negligence is not weighed in the balancing test, the defendant alone is burdened, and the intent of the Act is grossly contradicted.

219 *See* United States v. Stayton, 791 F.2d 17, 20 (2d Cir. 1986)(reasoning that " 'the Act controls the conduct of the parties and the court itself during criminal pre-trial proceedings. Not only must the court police the behavior of the prosecutor and the defense counsel, it must also police itself' " (quoting United States v. Pringle, 751 F.2d 419, 429 (1st Cir. 1984)); United States v. Angelini, 553 F. Supp. 367, 370 (D. Mass.), *vacated and remanded*, 678 F.2d 380 (1st Cir. 1982)(stating that "even if the lapse were solely the responsibility of the court, violation of the Act and defendant's rights would be no less clear").

220 *Taylor*, 108 S. Ct. at 2421.

221 Steinberg, *supra* note 201, at 9.

upon him complete absolution from further prosecution."[222] Justice White evidently deemed Taylor's conduct the most important factor leading him to concur separately in the majority's decision to dismiss the case without prejudice.[223]

One commentator has agreed that "it seems unnecessary to ignore completely the defendant's responsibility for the delay, particularly where such delay is intentional and without any justification."[224] Representative Cohen's remarks during the final House debates demonstrate an intent to "prevent defendants from taking advantage of their own 'deliberate stalling' to seek dismissal under the Act."[225] Under this reasoning, the district court, Ninth Circuit, and the dissent in *Taylor* were mistaken in not taking Taylor's behavior into account.[226]

Taylor is the first reported case decided under the Act to involve a fugitive defendant whose actions affirmatively contributed to a violation of the Act's time limits.[227] The more typical situation involves a defendant or defense counsel who simply fails to take steps to avoid the delay.[228] This is a virtual prerequisite for asserting a successful sixth amendment speedy trial claim.[229] The *Barker* Court stressed its "reluctan[ce] . . . to rule that a defendant was denied this

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222 United States v. Taylor, 821 F.2d 1377, 1387 (9th Cir. 1987)(Poole, J., dissenting), *rev'd*, 108 S.Ct. 2413 (1988).

223 *Taylor*, 108 S. Ct. at 2423 (White, J., concurring).

224 Frase, *The Speedy Trial Act of 1974*, 43 U. CHI. L. REV. 667, 707 (1976).

225 Frase, *supra* note 224, at 707, *citing* 120 CONG. REC. 41777 (1974) (remarks of Rep. Cohen).

226 Even the Ninth Circuit was aware of the problem of defendants becoming fugitives shortly before the running of the speedy trial clock. United States v. Taylor, 821 F.2d at 1381. The court went so far as to conclude that "the trial court may certainly take into account the defendant's culpable absence in deciding whether any resulting dismissal for violation of the [Act] should be with or without prejudice." *Id.* at 1383. Nonetheless, for unexplained reasons, the court did not apply this reasoning to the case before it.

227 One such case arising under FED. R. CRIM. P. 48(b) resulted in dismissal with prejudice. The defendant in that case had escaped from jail and was charged with this offense, but remained a prisoner for more than one year without being arraigned. United States v. McLemore, 447 F. Supp. 1229, 1232 (E.D. Mich. 1978).

228 *See* United States v. Janik, 723 F.2d 537, 546 (7th Cir. 1983)("defendant never manifested any desire to see the proceeding moved along any faster"); United States v. Carreon, 626 F.2d 528, 534 (7th Cir. 1980)(defendant failed to assert his right to a speedy trial); United States v. Veillette, 654 F. Supp. 1260, 1264 (D. Me. 1987)(the court weighed against the defendant the fact that he had requested continuances giving rise to excludable delays and may have had notice of the Supreme Court's denial of a *certiorari* petition that restarted the speedy trial clock, where a hearing had been set for the time such decision issued).

229 Barker v. Wingo, 407 U.S. 514, 531-32 (1972). The Court "emphasize[d] that failure to assert the right will make it difficult for a defendant to prove that [he] was denied a speedy trial". *Id.* at 532.

constitutional right on a record that strongly indicates . . . that [he] did not want a speedy trial."[230]

It may well further the purposes of the Act to weigh deliberate attempts by the defendant to stall. When one considers the third factor of the balancing test, the impact of the decision on the administration of the Act and on justice,[231] it is clear that justice would be adversely affected if the defendant who is largely responsible for engineering the delay is not penalized for his or her actions. However, the defendant's mere failure to expedite the case, which might well be to his or her disadvantage or stem from mere ignorance, should not be weighed as heavily as affirmative moves for unjustifiable delay. As the *Barker* Court noted, the "ultimate responsibility" for government or court negligence resulting in delays "must rest with the government," not the defendant.[232] Indeed, *Barker*'s ruling "place[d] the primary burden on the courts and the prosecutors to assure that cases are brought to trial."[233]

3. The Impact of the Decision on the Administration of the Act and Justice

The third factor that courts must consider in applying the dismissal sanction is the impact of the decision on the administration of the Act and on justice.[234] Courts' and commentators' discussions of this factor have focused on the general policy question of determining which remedy best responds to the aims of the Act. The arguments of the courts refusing to recognize a presumption in favor of dismissals without prejudice are self-evident, as they are motivated by obvious concerns regarding crime control.[235] The arguments supporting a presumption in favor of dismissals with prejudice, which the Supreme Court rejected in *Taylor*, are more complex.

Those who support a presumption in favor of dismissals with prejudice generally focus on the interests of the defendant. Commentators have reasoned that "[s]ince the Supreme Court has held that the only remedy for a violation of the sixth amendment right is dismissal *with prejudice*, Congress [in the Speedy Trial Act] has failed to give adequate protection to the defendant whose right to a

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230 *Id.* at 536.

231 18 U.S.C. § 3162(a)(2) (1982).

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

233 *Id.* at 529.

234 18 U.S.C. § 3162(a)(2) (1982).

235 For example, courts have weighed the "public interest in speedy trials" under this factor, focusing on justice and the policy of the Act from the viewpoint of society. United States v. Veillette, 654 F. Supp. 1260, 1265 (D. Me. 1987).

speedy trial . . . has been violated."[236] It is more difficult, however, to obtain dismissal under a sixth amendment theory than under the Speedy Trial Act. The *Barker* test, for example, requires the defendant to show actual prejudice and to have asserted his right to a speedy trial.[237] The Act is more lenient in allowing dismissals, even dismissals with prejudice, when these factors have not been satisfied. As long as the time limits imposed by the Act have been exceeded, it is mandatory for the case to be dismissed upon the motion of the defendant. In the cases decided under the Act, defendants have not generally attempted to prevail on sixth amendment theories in the alternative,[238] which perhaps indicates a lack of confidence in their ability to satisfy the *Barker* test.

Other commentators have decried the dismissal sanction as a "serious flaw," because "[n]ot only will the defendant be subjected to further depletion of his financial resources and curtailment of his liberty, the process of subsequent reindictment and retrial will perpetuate the delay condemned by the Act."[239] If the charge is dismissed without prejudice, the defendant may be rearrested or reindicted and "the time periods of the Act would begin over again without any compensation for the delay that had already occurred."[240] Dismissals without prejudice may in fact prove more prejudicial to the defendant than a delay in trial, for "[r]eindictment may necessitate retaining new counsel and duplication of legal and investigative efforts, all at increased monetary and psychological cost to the defendant."[241]

It has also been argued that permitting cases to be dismissed and reopened not only defeats the purpose of the Act by creating further delay, but provides no incentive for government attorneys to indict and try cases within the time limits.[242] Moreover, "the need to reindict large numbers of defendants would significantly add to the workload and expense of the grand jury system," a concern that

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236 Russ & Mandelkern, *supra* note 190, at 27. *See* Strunk v. United States, 412 U.S. 434, 440 (1973).

237 *Barker*, 407 U.S. at 530.

238 *See, e.g.*, United States v. Taylor, 108 S. Ct. 2413 (1988).

239 Hansen & Reed, *supra* note 178, at 416.

240 Russ & Mandelkern, *supra* note 190, at 27. This concern has motivated some courts to state that violations of the Act should be weighed heavily against the government if they occur "more than once with respect to the same defendant." United States v. Salgado-Hernandez, 790 F.2d 1265, 1268 (5th Cir.), *cert. denied*, 479 U.S. 964 (1986).

241 Russ & Mandelkern, *supra* note 190, at 27-28.

242 *Id.* at 27. On the other hand, if a defendant knows that his or her case could be dismissed without prejudice, there would be an incentive to avoid deliberately stalling and perpetuating delay, a significant concern of the Act's sponsors, and to play his or her part in seeing that the proceeding moves on schedule.

at one point prompted the House Judiciary Committee to restore the mandatory dismissal with prejudice sanction.[243]

A minority of courts have joined these commentators in criticizing the concept of dismissal without prejudice as an ineffective sanction. One court cited the legislative history of the 1979 Amendments to the Act, which postponed the effective date of the dismissal sanction until 1980, for the proposition that "[w]hile the act does permit dismissal without prejudice, extensive use of this procedure could undermine the effectiveness of the act and prejudice defendants, and the committee intends and expects that use of the dismissal without prejudice will be the exception and not the rule."[244] The court believed that "[a]ny other position would render the Act self-contradictory. A defendant would find it more advantageous if an indictment were not dismissed . . . than if the indictment were dismissed without prejudice, thus granting the government a reprieve of the full statutory time limit, should it decide to reindict."[245]

The courts, however, have largely rejected this reasoning. The majority of courts are in general agreement with *Taylor* and reason that because the Act was the result of compromise with the Department of Justice, neither remedy is preferred.[246] The *Taylor* majority pointed out that dismissal with prejudice is not a "toothless sanction."[247] The statute of limitations might bar reprosecution,[248] or the government might opt against reprosecution because of the burdens involved.[249] Another court has added that the grand jury may

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243 Frase, *supra* note 224, at 708 (citing H.R. REP. No. 1508, 93d Cong., 2d Sess. 37, *reprinted in* 1974 U.S. CODE CONG. & ADMIN. NEWS 7430).

244 United States v. Angelini, 553 F. Supp. 367, 370 (D.Mass.), *vacated and remanded*, 678 F.2d 380 (1st Cir. 1982)(citing H.R. REP. No. 390, 96th Cong., 1st Sess. 8-9, *reprinted in* 1979 U.S. CODE CONG. & ADMIN. NEWS 812-13). Importantly, the 1979 House Reports, while fully recognizing that crime control was a major force motivating the Act, focused exclusively on procedural modifications. In this context, it becomes apparent that the statement quoted in *Angelini* presupposes an optimal procedural system. As the product of intensive examination of the substantive issues, the 1974 history is clearly authoritative on the presumption issue.

245 *Angelini*, 553 F. Supp. at 370 (footnote omitted). *See also* United States v. Iaquinta, 515 F. Supp. 708, 712 (N.D.W. Va. 1981), *rev'd on other grounds*, 674 F.2d 260 (4th Cir. 1982)(erroneously tracing the legislative history no further than the A.B.A. Standards).

246 *See, e.g.*, United States v. Russo, 741 F.2d 1264, 1266-67 (11th Cir. 1984); United States v. Caparella, 716 F.2d 976, 979 (2d Cir. 1983).

247 United States v. Taylor, 108 S. Ct. 2413, 2422 (1988).

248 *See* United States v. Veillette, 654 F. Supp. 1260, 1264-65 (D. Me. 1987)(one charge barred after dismissal).

249 *Taylor*, 108 S. Ct. at 2422. In contrast, Hansen & Reed, *supra* note 178, at 416, contend that society's interest in safeguards against many cases being dismissed with prejudice is sufficiently taken into account by the § 3161(h) provisions excluding certain periods of delay from the speedy trial clock.

refuse to reindict, the defendant may be acquitted at trial, and the ultimate sentence may be shorter than the one he or she would have originally received.[250]

The Court in *Taylor* admitted that dismissal with prejudice is the sanction more likely to induce future compliance with the Act.[251] It nevertheless rejected the reasoning set forth in a set of cases dismissed with prejudice largely in order to uphold the Act's effectiveness.[252] After *Taylor*, courts will have to take special care to explain the basis of their decisions to dismiss cases with prejudice by carefully weighing the balancing test factors in order to avoid reversal. Otherwise it may be countered that their decisions simply aimed to provide a "meaningful" remedy for the violation.

It should be noted that it might be inaccurate to state that neither remedy is presumptively preferred. At least for serious crimes, there appears to be a presumption in favor of dismissals without prejudice, which defendants can overcome only by a showing that the government's violation of the Act was severe.

4. *Actual Prejudice to the Defendant*

The *Taylor* court, after reviewing the legislative history of the Act, held that the issue of prejudice to the defendant, caused by the delay, was intended by Congress to be one of the "other" factors that courts must consider in deciding on a remedy for a violation of the Speedy Trial Act.[253] The Court believed that the drafters avoided explicit mention of this issue in the statutory text "for fear that district courts would treat a lack of prejudice to the defendant as dispositive."[254]

Justice Scalia opposed the majority's reliance on legislative his-

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250 United States v. Brown, 770 F.2d 241, 243 (1st Cir. 1985), *cert. denied*, 474 U.S. 1064 (1986).

251 *Taylor*, 108 S. Ct. at 2422.

252 *See* United States v. Jervey, 630 F. Supp. 695, 698 (S.D.N.Y. 1986)(it would be a meaningless "charade" to simply dismiss the case without prejudice); United States v. Koch, 438 F. Supp. 307, 310 (S.D.N.Y. 1977)(it would be "empty form" to dismiss without prejudice and allow the prosecutor to "file a new indictment a half hour later."). Judge Brieant, who decided both cases, however, had found that the crimes involved were not serious. *But see* United States v. Janik, 723 F.2d 537, 546 (7th Cir. 1983)(district court had dismissed a serious case with prejudice because the defendant might be worse off if reindicted; Seventh Circuit reversed and remanded, despite considerable skepticism about the merits of the dismissal sanction, because to do otherwise would be to ignore the intent of the statute). *See also* United States v. Fountain, 840 F.2d 509, 513 (7th Cir.), *cert. denied*, 109 S. Ct. 533 (1988)(although court was "dismayed" at the conduct of United States Attorney's office, this was held an insufficient basis on which to dismiss the case without prejudice).

253 108 S. Ct. at 2418.

254 *Id.* (citing 120 CONG. REC. 41795 (remarks of Representative Cohen)).

tory to establish this point, stating that it was "so utterly clear from the text" of the Act that recourse to the history was unjustified.[255] There is some merit to Justice Scalia's point that when the text of a statute is plain, resorting to isolated statements from the legislative history might distort Congress' ultimate intent.[256] Provided that statements from the legislative history are carefully viewed (and reviewed) in context, however, there is little reason to fear that the Act's intent could be thwarted.[257]

In this case, moreover, it is debatable whether the language and intent of the Act are as obvious as Justice Scalia believed them to be. Clearly, the majority believed otherwise.[258] For one thing, it is difficult to understand what the phrase "among othe[r]"[259] factors should include without having a grasp of the background of the Act and the purposes it aims to achieve. The legislative history is the obvious place to turn for such guidance.

The statutory text, for example, nowhere explicitly states that the Act was designed in part to implement the defendant's sixth amendment speedy trial right. Only with this knowledge does it become apparent that if a defendant is prejudiced, he or she should stand a better chance of success in obtaining a dismissal with prejudice; for if an Act seeks to implement a constitutional requirement, its provisions cannot fall short of it.[260] When a defendant is actually prejudiced by the delay, therefore, this factor should be weighed in favor of dismissal with prejudice.

Courts remain, however, confronted with the issue of whether the *lack* of prejudice should weigh *against* the defendant. Before *Taylor*, courts did not uniformly agree on this issue.[261] It is conceivable that courts could either (i) view the prejudice issue as weighing both in favor of dismissal with prejudice if the defendant was prejudiced and against it if he or she was not; or (ii) view only the presence of prejudice as significant in terms of the balancing test, the lack of prejudice being irrelevant. The latter view appears to

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255 108 S. Ct. at 2423 (Scalia, J., concurring in part). *See supra* notes 112-119 and accompanying text.

256 108 S. Ct. at 2423-24.

257 *But see* United States v. Angelini, 553 F. Supp. 367 (D. Mass), *vacated and remanded*, 678 F.2d 380 (1st Cir. 1982) in which, improperly, only part of the legislative history was used to illustrate a proposition.

258 *Taylor*, 108 S. Ct. at 2418 n.7.

259 18 U.S.C. § 3162(a)(2) (1982).

260 Under sixth amendment actions, actual prejudice to the defendant is a factor weighing in favor of dismissal. Barker v. Wingo, 407 U.S. 514, 532-33 (1972).

261 *See infra* notes 262-71 and accompanying text.

have been the understanding of the lower courts in *Taylor*. This reasoning has been set forth more explicitly:

> While courts have stated that a showing of prejudice to the defendant may be properly considered in finding that a dismissal should be with prejudice, to interpret the defendant's failure to demonstrate prejudice as mandating a dismissal without prejudice overemphasizes the probative value of this factor. The defendant's burden under the Act is only to present proof supporting the motion for dismissal itself.[262]

The majority in *Taylor*, in contrast, spoke both of the "presence or absence of prejudice to the defendant."[263] While the majority acknowledged Representative Cohen's concern that the lack of prejudice should not be dispositive, it indicated that it should be taken into account in decisions regarding the dismissal sanction.[264]

Courts considering the issue of prejudice to the defendant have examined whether the defense was impaired,[265] and the "closely related" issue of the length of delay.[266] The Court in *Taylor* expressly held that a brief delay such as the respondent's, amounting to fourteen days in all, should weigh in favor of dismissal without prejudice.[267] Although no standard exists for determining whether a delay is long or short (the Act, in a sense, presupposes that any delay beyond its limits is long), a period of several months appears to be roughly at the dividing line.[268]

Courts have also considered whether the defendant was free or incarcerated during the delay.[269] The Supreme Court agreed that this was an important consideration, noting that since Taylor was

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262 United States v. Kramer, 827 F.2d 1174, 1179-80 (8th Cir. 1987) (Lay, C.J., dissenting)(citations omitted).

263 *Taylor*, 108 S. Ct. at 2418 n.7.

264 *Id.* at 2418.

265 *See* United States v. Bilotta, 645 F. Supp. 369, 373 (E.D.N.Y. 1986), *aff'd*, 835 F.2d 1430 (2d Cir. 1987)(dismissed with prejudice because during the delay, tensions between the United States and Libya had intensified so much that the defendant, accused of conspiring to sell military equipment to that country, stood a diminished chance of having a fair trial).

266 *Taylor*, 108 S. Ct. at 2421.

267 *Id.* at 2422.

268 *See* United States v. Stayton, 791 F.2d 19, 22 (2d Cir. 1986)(delay of 23 months was an "enormity"); United States v. Brown, 770 F.2d 241, 245 (1st Cir. 1985), *cert. denied*, 474 U.S. 1064 (1986)(35-day delay "not exorbitant"); United States v. Russo, 741 F.2d 1264, 1267 (11th Cir. 1984)(delay of more than 70 days was an "extensive postponement" [that] "certainly militate[d] toward" dismissal with prejudice); United States v. Janik, 723 F.2d 537, 546 (7th Cir. 1983)(delay of two years would ordinarily present a "strong case" for dismissal with prejudice); United States v. Carreon, 626 F.2d 528, 534 (7th Cir. 1980)(delay of one year "significant" but "not extreme").

269 *See, e.g.*, United States v. Melguizo, 824 F.2d 370, 372 (5th Cir. 1987)(defendant was free on bond for all but two weeks of a "short" several month delay); United States v. May, 819 F.2d 531, 534 (5th Cir. 1987)(defendant was free on bail).

already being held on the bench warrant, no "additional restrictions or burdens on his liberty" ensued.[270] Prior to *Taylor*, this had not been a uniform position: some courts had deemed the question of whether the defendant was free or imprisoned irrelevant.[271] This view finds support in the idea that delay, by its very nature, is prejudicial. Trial preparation can be generally hampered, as by the death and fading memories of witnesses.[272] Moreover, "prolonged delay may subject an accused to an emotional stress . . . from uncertainties in the prospect of facing public trial."[273] Now, however, courts will have to view actual prejudice to the defendant more objectively.

5. Factors That Should Not Be Considered In The Balancing Test

The *Taylor* majority, in sharp disagreement with the dissent, believed that it would have been improper for the district court to dismiss the case with prejudice in order to send a strong message to the government to comply with the Act in the future, while giving Taylor a harsh sentence on the failure to appear charge to "wrap up the 'equities' in a single package."[274] Taylor received a five-year sentence on the failure to appear charge, while his original co-defendant had received only a three-year sentence on the narcotics charges.[275] This issue had not arisen in previous cases interpreting the dismissal sanction.

The majority's conclusion, however, is sound. It would have indeed constituted "unbridled discretion"[276] to assume what the outcome would have been if the respondent had been fairly tried. The dissent correctly noted that the failure to appear statute authorizes sentencing according to the severity of the offense with which

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270 *Taylor*, 108 S. Ct. at 2422.

271 *See, e.g.*, *Russo*, 741 F.2d at 1267.

272 It may be questioned, however, whether the Act, or even the sixth amendment itself, serves to adequately protect defendants against this harm. As the Supreme Court has noted:

> [o]n its face, the protection of the Amendment is activated only when a criminal prosecution has begun . . . . These provisions would seem to afford no protection to those not yet accused, nor would they seem to require the Government to discover, investigate, and accuse any person within any particular period of time.

United States v. Marion, 404 U.S. 307, 313 (1971). The Court noted that courts of appeals deciding cases involving only pre-indictment delay have never reversed a conviction or dismissed an indictment, and declined to do so itself. *Id.* at 315. The defendant's only safeguard against such delay is the applicable statute of limitations. *Id.* at 315 n.8.

273 Strunk v. United States, 412 U.S. 434, 439 (1973).

274 *Taylor*, 108 S. Ct. at 2420 and n.9. There was no evidence, however, that the district judge had in fact done this.

275 *See supra* notes 123-127 and accompanying text.

276 *Taylor*, 108 S. Ct. at 2420 n.9.

the defendant is charged.[277] Defendants in these cases have been found guilty of failing to appear and, like Taylor, should be sentenced for it. Yet, the length of the sentence should correspond to the severity of the underlying offense, or to the circumstances of the failure to appear, and not to the judge's guess as to the defendant's guilt regarding the underlying offense. The dissent set dangerous precedent when it stated its willingness "to consider the strong possibility of conviction" only because no "even moderately complicated issues" were involved.[278]

Another factor that courts should not consider in determining how to dismiss cases under the Act concerns the ability of the prosecution to reinstate its case after dismissal, which was not at issue in *Taylor*. Dismissing cases without prejudice in order to allow the prosecution to promptly reinstate its case would provide "little incentive for the government to comply when it first arrested or indicted an accused."[279] Moreover, such a practice could prove highly prejudicial to the defendant, defeating the purposes of the Act.

C. STANDARD OF REVIEW

The principal contention of the dissent was its sharp disagreement with the majority's conclusion that the district judge had abused her discretion in dismissing *Taylor* with prejudice.[280] Indeed, the conflict over the amount of deference that reviewing courts should give to the findings of trial judges is prevalent throughout the law.

Commentators have recognized the danger that discretionary rulings, such as those made pursuant to the dismissal sanction, may be inconsistent, arbitrary and "different in different men."[281] A lack of faith in the idea that a "sole judge on the lowest rung of the judicial ladder [can be] given unreviewable power" has led to a mistrust in deferring to trial court discretion.[282] Appellate review has thus been promoted as a safeguard against the possibility of abuse of discretion,[283] especially in cases such as *Taylor*, where the "appellate court has as much before it as the trial judge did" in terms of facts.[284]

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277 *Id.* at 2425 (Stevens, J., dissenting).

278 *Id.* at 2420 n.9.

279 Steinberg, *supra* note 201, at 13-14.

280 *Taylor*, 108 S. Ct. at 2424-27 (Stevens, J., dissenting).

281 Burrows, *Statutes and Judicial Discretion*, 7 N.Z.U. L. REV. 1, 11 (1976).

282 Rosenberg, *Judicial Discretion of the Trial Court, Viewed from Above*, 22 SYRACUSE L. REV. 635, 660 (1971).

283 Burrows, *supra* note 281, at 11.

284 Rosenberg, *Appellate Review of Trial Court Discretion*, 79 F.R.D. 173, 184 (1975).

Indeed, the most persuasive argument advanced in favor of deferring to trial judges' discretion is that the trial judge often has a "feel of the case"[285] because of "the superiority of his nether position."[286] This is the principal idea advanced by the dissent in *Taylor*.[287]

It is clear that this argument is most suitable when *factual* findings are at issue.[288] In *Taylor*, however, it does not appear that the district court had access to any facts that were not also available to the Supreme Court. Both sides submitted lengthy briefs. Moreover, none of the factual findings were disputed by either side. In *Taylor*, only the interpretation and legal effects of the stipulated facts were in question. *Taylor*, therefore, was precisely the sort of case that was appropriate for appellate review. The majority concluded that the district court had made not an erroneous determination of fact, but legal errors.[289] It has long been established that the rule precluding review of discretionary holdings does not apply where errors of *law*, or mixed questions of fact and law as in *Taylor*, are at issue.[290]

In *Taylor*, the Court determined that the district court had given insufficient weight to a relevant consideration, Taylor's fault in causing the delay, and too much weight to irrelevant considerations, such as the "unwitting" violation of the USMS.[291] Moreover, it believed that the district court, by employing dismissal with prejudice as a vehicle to teach the government a lesson, had adopted a principle that was inconsistent with the policy of the Act.[292] Indeed, one commentator has specifically stated that when a "statute conferring . . . discretion lays down . . . principles on which it is to be exercised, a judge who fails to apply those principles is wrong. So is one who applies a principle which is inconsistent with the policy or provisions

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285 Id. (quoting Noonan v. Cunard Steamship Co., 375 F.2d 69, 71 (2d Cir. 1967)(Friendly, J.)).

286 Rosenberg, *supra* note 282, at 663.

287 *Taylor*, 108 S. Ct. at 2424-25 (Stevens, J., dissenting).

288 The primary case used in support of it is Atchison, Topeka & Santa Fe Ry. v. Barrett, 246 F.2d 846 (9th Cir. 1957). The case involved a trial judge's determination that the plaintiff's "twitching" of the head, sustained after an accident at work, was genuine. *Id.* at 849. The trial judge's discretion was "based on facts or circumstances that are critical to the decision and that the record imperfectly convey[ed]." *See* Rosenberg, *supra* note 282, at 664.

289 *Taylor*, 108 S. Ct. at 2419-20 ("A judgment that must be arrived at by considering and applying statutory criteria . . . constitutes the application of law to fact and requires the reviewing court to undertake more substantive scrutiny to ensure that [it] is supported in terms of the factors identified in the statute.").

290 *See* Bogardus v. Comm'r of Internal Revenue, 302 U.S. 34, 39 (1937).

291 *Taylor*, 108 S. Ct. at 2423.

292 *Id.*

of the statute."[293] Moreover, "the court's discretion will be upset if it is apparent that no weight, or insufficient weight, has been given to relevant considerations, or if weight has been given to irrelevant considerations."[294]

As one commentator has persuasively explained, the dismissal sanction's balancing test should be treated as a question of law, justifying appellate review of the exercise of judicial discretion.[295] With respect to both the seriousness of the offense and the facts and circumstances leading to the dismissal, the reviewing court has the same information before it as the trial court; it has only to assess the facts in terms of the Act, which is a question of law.[296] The final factor, the impact of the decision on the administration of the Act and justice, obviously involves an interpretative issue as well.[297]

What makes *Taylor* especially problematic is that there is disagreement as to how to interpret the balancing test factors, and which factors are "relevant" for purposes of the Act. For example, the question of whether sanctions should be used as a method of encouraging future compliance is a factor that may or may not be relevant depending on one's understanding of the policies underlying the Act, that is, whether the defendant's or society's interests are considered most important. When, as here, the relevant considerations are open to debate, the abuse of discretion issue becomes considerably more complex.

The majority contended that the trial court failed to sufficiently "explicate its reasons for dismissing [*Taylor*] with prejudice."[298]

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293 Burrows, *supra* note 281, at 12.

294 *Id.* at 13.

295 *See* Steinberg, *supra* note 201, at 4.

296 *Id.* It might be argued that the majority improperly strayed into the range of factual findings when it stated that it saw no basis for the district court to have concluded that the USMS' conduct was "lackadaisical," and that its "unwitting violation" was not in bad faith. *See Taylor*, 108 S. Ct. at 2420-21, 2423. To the district court, bad faith appears to have meant a conscious disregard for the time limits imposed by the Act, while the Supreme Court seemed to use the term to refer to a malicious motive. Yet, the question of how a purposeful 14-day delay designed not to harm the defendant but to achieve efficiency, which was a stipulated fact, should weigh against the other balancing test factors clearly calls for legal judgment.

297 Steinberg, *supra* note 201, at 4. Thus,

> the crucial inquiries are whether the appellate court is situated in as good a position as the lower court to resolve the issues raised and whether the trial court's findings concern the effect or impact of certain events rather than disputed facts and witness credibility. Since both of these questions must be answered in the affirmative, the appellate court is "free from . . . the 'clearly erroneous' rule," and may therefore draw its own conclusions.

Id. (citing Kiwi Coders Corp. v. Acro Tool and Die Works, 250 F.2d 562, 568 (7th Cir. 1957)(citation omitted)).

298 *Taylor*, 108 S. Ct. at 2420.

One commentator has observed that it is essential for trial judges to fully explain the basis of their discretionary decisions to permit meaningful evaluation on appeal.[299] This reasoning clearly applies to certain cases that have arisen under the statute, in which trial courts have simply stated that they weighed the factors and, providing no explanation at all, dismissed the case one way or the other.[300]

In *Taylor*, however, the trial judge indeed set forth an explanation, based on which the Supreme Court felt confident to deduce the ultimate rationale on which she had dismissed the case with prejudice. It is difficult to imagine what more the trial judge could have said if she indeed believed that although the crime was serious, the government's conduct was inexcusable and dismissal with prejudice was the best way to avoid recurrences of it. The Court may have validly believed that this constituted an abuse of discretion. Yet its dwelling on the district court's inadequate explanation appears unwarranted, and unnecessary to reach its conclusion.

One court has taken the position that "[t]he Act's multi-factored standard for deciding whether dismissals shall be with or without prejudice invites an exercise of judicial discretion and thereby implies a limited scope of review."[301] Thus, after a reviewing court sets forth the proper interpretations and weight to be accorded to the balancing test factors, it should remand the case to the district court.[302] It may be argued, however, that under this approach, the reviewing court in essence dictates the result the district court must reach, denying it actual discretion.

The dissent pointed out that *Taylor* will most likely encourage district courts to avoid reversal by adopting a consistent practice of dismissing cases without prejudice.[303] This fear appears unfounded: appellate courts have indeed reversed cases in favor of dismissal with prejudice on the basis of abuse of discretion. In fact, the majority seemed to take special care to avoid criticizing the decisions of any other courts. It even cited with approval, for particular propositions, cases which were dismissed with prejudice.[304] The

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299 Rosenberg, *supra* note 282, at 665-66.

300 *See* United States v. Iaquinta, 515 F. Supp. 708 (N.D.W. Va. 1981), *rev'd on other grounds*, 674 F.2d 260 (4th Cir. 1982). In *Iaquinta*, the court's entire explanation of its decision went as follows: "Here, defendants have timely moved to dismiss the indictments for violation of 3161(b). After considering the factors enumerated in the statute, the Court must conclude that there has been a violation of the Act and that the mandated sanction is dismissal with prejudice." *Id.* at 712.

301 United States v. Janik, 723 F.2d 537, 547 (7th Cir. 1983).

302 *See id.*

303 *Taylor*, 108 S. Ct. at 2426 (Stevens, J., dissenting).

304 United States v. Russo, 741 F.2d 1264 (11th Cir. 1984)(reversing a district court

Court also explicitly stated that its decision might well have been different had the USMS repeatedly violated the Act or acted in bad faith, as it defined it, towards Taylor.[305] Moreover, the facts in *Taylor* do not easily lend themselves to strict precedential adherence: cases in which defendants largely contributed to the delayed trial are rare, and future cases will usually be distinguishable on the facts. Thus, although *Taylor* may have narrowed the range of appropriate contexts for dismissals with prejudice, considerable flexibility remains available to courts, provided they adhere to the policies underlying the Act.

V. CONCLUSION

Taylor narrowed the range of cases which can properly be dismissed with prejudice under the dismissal sanction of the Speedy Trial Act. The Court clarified ambiguities in the Act that had divided the lower courts, potentially resulting in unequal treatment for different defendants. The increased uniformity that will develop among decisions arising under the Act satisfies one of its major motivations.

Taylor also serves as a reminder to courts that although they may disagree with the methods the Act employs to fulfill its aims, they are not authorized to misapply the dismissal sanction to achieve more efficient results. *Taylor* is faithful to both aims underlying the Act in that it interprets the dismissal sanction's balancing test factors so as to respond to society's as well as the defendant's interests in a speedy trial.

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decision to dismiss a case involving narcotics offenses without prejudice); United States v. Caparella, 716 F.2d 976 (2d Cir. 1983)(reversing a district court's decision to dismiss a case involving mail theft without prejudice).

[305] *Taylor*, 108 S. Ct. at 2420-21.