

IN THE SUPREME COURT OF THE UNITED STATES

3 JACOB ZEDNER,

4 Petitioner : (Signature)

5 v. : No. 05-5992

6 UNITED STATES.

8 Washington, D.C.

9 Tuesday, April 18, 2006

10 The above-entitled matter came on for oral
11 argument before the Supreme Court of the United States
12 at 11:00 a.m.

13 APPEARANCES:

14 EDWARD S. ZAS, ESQ., New York, New York; on behalf of
15 the Petitioner.

16 DARYL JOSEFFER, ESO., Assistant to the Solicitor

17 General, Department of Justice, Washington, D.C.;
18 on behalf of the Respondent.

19

20

21

22

23

24

25

1 C O N T E N T S

2	ORAL ARGUMENT OF	PAGE
3	EDWARD S. ZAS, ESQ.	

4	On behalf of the Petitioner	3
---	-----------------------------	---

5	DARYL JOSEFFER, ESQ.	
---	----------------------	--

6	On behalf of the Respondent	25
---	-----------------------------	----

7	REBUTTAL ARGUMENT OF	
---	----------------------	--

8	EDWARD S. ZAS, ESQ.	
---	---------------------	--

9	On behalf of the Petitioner	57
---	-----------------------------	----

10		
----	--	--

11		
----	--	--

12		
----	--	--

13		
----	--	--

14		
----	--	--

15		
----	--	--

16		
----	--	--

17		
----	--	--

18		
----	--	--

19		
----	--	--

20		
----	--	--

21		
----	--	--

22		
----	--	--

23		
----	--	--

24		
----	--	--

25		
----	--	--

1

P R O C E E D I N G S

2

(11:00 a.m.)

3

⁴ next in Zedner v. United States.

5 Mr. Zas.

6 ORAL ARGUMENT OF EDWARD S. ZAS

7 ON BEHALF OF THE PETITIONER

8 MR. ZAS: Mr. Chief Justice, and may it
9 please the Court:

10 The Speedy Trial Act protects the public, as
11 well as the personal interests of defendants, by
12 mandating the prompt disposition of Federal criminal
13 prosecutions. In this case, the Government and the
14 district court failed to comply with the clear
15 requirements of the act.

As relevant here, the act provides that the trial of a defendant who pleads not guilty and who is released on bail shall commence within 70 days after the indictment. The act, however, is not as inflexible as it sounds. The act permits numerous categories of delay to be excluded from the 70-day limit.

22 The act also provides an enforcement
23 mechanism. If more than 70 nonexcludable days elapse
24 between the indictment and the trial, the indictment
25 shall be dismissed.

1 This case concerns two periods of delay, that
2 each exceed the 70-day time limit, and I'd like to
3 focus initially on the longer period of delay.

4 This is the delay that took place between
5 2000 and 2001, after a competency proceeding was taken
6 under advisement. Just to put this delay in context, a
7 competency hearing was held on July 10, 2000. The
8 judge solicited post-hearing briefs. The matter was
9 taken under advisement on August 23rd, and in our
10 papers, we asked the judge to find Petitioner competent
11 and to set the matter for trial as soon as possible.
12 We noted that at that point the case was already more
13 than 4 years old. We offered to waive a jury and
14 proceed to a bench trial immediately.

15 And at that point, the case sat idle for the
16 next 195 days. Now, the act excludes only the first 30
17 days of that period. That's section 3161(h)(1)(J). For
18 reasons that have never been explained, the court sat
19 on the proceeding.

20 When 7 months went by, we filed a motion.

21 JUSTICE GINSBURG: What about, Mr. Zas, that
22 the court thought it was home free on the Speedy Trial
23 Act? After all, it had gotten a waiver for all time.
24 Isn't that why the 165 days?

25 MR. ZAS: That may be, Justice Ginsburg, but

1 -- but as of our filing after the competency
2 proceeding, we asked for a trial as soon as possible.
3 So putting aside whether the waiver had any validity at
4 all, which I'll get to shortly, the waiver had no
5 effect when we came in and asked for a trial.
6 Otherwise, defendants would have no right to a speedy
7 trial and --

8 JUSTICE BREYER: Yes, but on -- on that one,
9 the -- the Second Circuit said that he was incompetent,
10 and you could have excluded the time on (4) because (4)
11 allows you to exclude time when he's incompetent. And
12 if, in fact, the district judge is sitting there
13 thinking he's incompetent, then the failure is simply a
14 failure to write down his reason why it's excluded. I
15 guess there's uncertainty here as to what reason
16 was the district judge excluded that time, and it's a
17 little bit hypothetical for the reason that Justice
18 Ginsburg mentioned.

19 But if you were to lose on the first point,
20 then I guess on this point, the thing to do would be to
21 send it back and determine whether, in fact, the judge
22 intended to exclude on the ground of competency, in
23 which case his failure was simply a failure to note
24 down his reason, which is not required by the act.

25 MR. ZAS: Well, Justice Breyer, I have

1 several responses for that.

2 The court only made a finding that Mr. Zedner
3 was incompetent on March 21, 2001. Prior to that time,
4 the competency issue was under advisement. It couldn't
5 be that Mr. Zedner's incompetency, if it existed before
6 the finding, is what prevented the court from declaring
7 him incompetent.

8 JUSTICE KENNEDY: You're not quite through
9 your answer yet, but is there also a requirement that
10 the competency determination be made within 30 days?
11 Or am I -- am I in error on that point?

12 MR. ZAS: Your Honor is -- is exactly right.
13 Any proceeding under section 3161(h)(1)(J) is excluded
14 but only for 30 days once it's taken under advisement.

15 JUSTICE BREYER: I'm sorry. My act must read
16 differently. My act says in (4), any period of delay
17 resulting from the fact that the defendant is mentally
18 incompetent. It doesn't say anything about 30 days.

19 JUSTICE KENNEDY: But that -- but that's
20 different, I take it, from the judge's delay in making
21 the finding of competency.

22 MR. ZAS: That's right, Your Honor. Yes.

23 On -- Justice Breyer, on your reading, a -- a
24 court could sit indefinitely with the competency
25 proceeding under advisement.

1 JUSTICE BREYER: Yes, that's why, see, I
2 guess on this point, we'd have to send it back because
3 if, in fact, the judge had determined in his mind
4 within the 30-day period that the person was incompetent
5 or he was incompetent in fact, then that could have been
6 his reason.

I'm not sure what to do about this point in
any case, and I understand that you think he wasn't
incompetent, or at least it hadn't been so found. The
Second Circuit seemed to think he was incompetent
because that was their basis. So I guess if he was,
it's excluded, and if he wasn't, it isn't excluded.
And I don't know. The Second Circuit said he was. So
maybe you should have another chance to argue this
before the Second Circuit.

16 MR. ZAS: Your Honor, I'm -- I'm just trying
17 to envision what that remand would look like. If the
18 Court were -- if the -- if the case were to go back to
19 the Second Circuit and then go back to the district
20 court for a finding that this delay resulted from Mr.
21 Zedner's incompetency, that finding would be clearly
22 erroneous. There is no -- there is no basis --

23 JUSTICE SCALIA: The delay -- the delay was
24 not because we can't try this man because he's
25 incompetent, and until he's rendered competent, we --

1 we have to stay proceedings. That wasn't the basis at
2 all. It was just I haven't made up my mind yet.

3 MR. ZAS: That's right, Your Honor, and the
4 act --

5 JUSTICE SCALIA: Which is what is
6 specifically precluded by the requirement that -- that
7 you act within 30 days, and -- and all the rest of the
8 time, the clock is running.

9 MR. ZAS: That's correct, Your Honor.

10 JUSTICE KENNEDY: And I take it the trial --
11 the Speedy Trial Act doesn't say if the judge is
12 thinking about something, it requires him to make an
13 order.

14 MR. ZAS: No, Your Honor. It -- it says that
15 the court has decide the matter within 30 days or the
16 clock will start running.

17 Now, the court, in a particularly difficult
18 or novel question, could -- could enter an order of
19 ends of justice exclusion and exclude perhaps an
20 additional period of time.

21 JUSTICE KENNEDY: Well, I was going to ask
22 you about that. Or could he vacate submission because
23 he wants new evidence or something? Could you vacate
24 submission of the -- of the first competency hearing in
25 order to take new evidence?

1 MR. ZAS: Absolutely, Your Honor. And that
2 matter would -- would be back to a -- a situation in
3 which there's examinations or hearings or argument or
4 post-hearing brief, and -- and the judge can take as
5 long as the judge wants there. But once the court has
6 the matter under advisement, the court only has 30
7 days.

8 JUSTICE BREYER: So your view is that we
9 should say that the Second Circuit's statement that the
10 defendant could not have been tried because, at that
11 time, he was incompetent, that we should simply say
12 that's false, that the Second Circuit is wrong to say
13 that.

14 MR. ZAS: Well, not quite, Your Honor. The
15 question -- the question is did more than 70
16 nonexcludable days elapse during this period or not.
17 Once the finding was made in March, that's when Mr.
18 Zedner was incompetent. No further findings were
19 necessary -- were necessary, and the time is then
20 automatically excluded. The time prior counts toward
21 the 70-day period whether or not he was in some
22 metaphysical sense incompetent before then.

23 The question is not whether he could have
24 been tried or not in that period. The question is did
25 more than 70 days elapse. And if the judge had decided

1 this matter sooner, Mr. Zedner would have been --
2 received the treatment he ultimately got much sooner,
3 and the trial would have occurred much sooner. That's
4 the purpose of the Speedy Trial Act.

5 Now, the Government has abandoned the Second
6 Circuit's holding to the effect that harmless error
7 analysis applies to a violation of the 70-day limit.
8 That's a wise position for the Government take -- to
9 take, given this Court's holding in Bozeman which
10 interpreted essentially the same language. The Court
11 there held that where the statute says the indictment
12 shall be dismissed, there's no room for harmless error
13 analysis. That's the remedy that Congress chose. So
14 in this case on the -- on the -- this period of delay
15 we're talking about, more than 70 days elapsed, and the
16 remedy must be dismissal.

17 JUSTICE KENNEDY: Now, we've been talking
18 about the competency period. I take it the first
19 period was one of just repeated requests for
20 extensions. That's January '97 until May '97.

21 MR. ZAS: That's correct.

22 JUSTICE KENNEDY: And that's this -- that's
23 the first of the two periods that's involved here.

24 MR. ZAS: That's correct. This was -- this
25 was a -- an adjournment that was requested by Mr.

1 Zedner's first lawyer for the stated purpose of
2 investigating whether the United States Bond,
3 supposedly issued by the Ministry of Finance of USA,
4 was genuine. The court, having already obtained a
5 purported waiver of a speedy trial for all time,
6 granted the continuance, but made no order of
7 excludable delay, as it had done previously, made no --

8 JUSTICE KENNEDY: I don't know if it makes
9 any difference to the case. Do you -- do you think the
10 court could have made findings that would have been
11 justified? I mean, it takes a while to find an expert
12 to say that a bond is genuine when it spells United
13 with O, but --

14 (Laughter.)

15 MR. ZAS: It could take for all time, Your
16 Honor.

17 I think it would be a very close question as
18 to whether that could survive appellate review. That
19 may well be an abuse of discretion to find, after
20 having let the matter -- delayed the matter already 10
21 months, to grant another 3 months for that purpose.

22 JUSTICE KENNEDY: Are there -- are there
23 cases in which the judge's findings -- let's assume
24 that he made the findings -- are set aside for abuse of
25 discretion on -- on review for a violation of the

1 Speedy Trial Act?

2 MR. ZAS: That is the standard that the courts
3 of appeals have generally applied. I can't recall a
4 case where the court actually reversed an ends of
5 justice finding. There may well be one based on a
6 legal error where it was some obvious ground that --
7 that is not a basis for an adjournment such as --

8 JUSTICE GINSBURG: Who -- who could complain?
9 Because in -- in all of these instances, it was the
10 defendant who sought the enlarged time. In fact, even
11 though the judge had given -- gotten this all-purpose
12 waiver, he didn't give defense counsel as much time as
13 defense counsel asked for to -- to investigate the
14 genuineness of the bond.

15 MR. ZAS: Well, Justice Ginsburg, you're
16 right. Certainly the Petitioner and his counsel at the
17 time requested this adjournment. They did get the full
18 adjournment they requested, but the judge said that
19 that would be the last adjournment and that the matter
20 would be set for trial then.

21 But whether that time is excludable or not is
22 answered by the statute. The ends of justice provision
23 recognizes that defendants or prosecutors and judges on
24 their own motion would seek or grant continuances, but
25 that's not enough under the statute. The statute is --

1 although it's flexible, is rigorous. The court must
2 make a finding that the ends of justice outweigh the
3 public's and the defendant's interest in a speedy
4 trial.

5 JUSTICE SCALIA: And you think it's -- it's
6 not harmless error if they didn't make the finding but
7 -- but could have?

8 MR. ZAS: That's right, Your Honor. It's not
9 harmless for the same reason the later period is not
10 harmless because the statute says that if the defendant
11 is not brought to trial within the time limits, the
12 indictment shall be dismissed. And it makes very clear
13 that in the absence of an ends of justice finding, the
14 time is not excludable.

15 JUSTICE SOUTER: No, but isn't -- isn't the
16 difference that in the latter period, the court took no
17 action, and there is a mandate on the court to act?
18 With respect to this earlier period, the court did act.

19 Incidentally, it did exactly what the defendant wanted
20 it to do, but it acted so that the only -- the only
21 reason for arguing error here is, in effect, a clerical
22 reason. He didn't say the magic words or make the
23 magic conclusion. If, in fact, that's because he
24 couldn't have made it, no question. You -- you got a
25 violation of the statute. But if he could have made it

1 and -- and simply didn't say the magic words, you're in
2 a very different position here from what you are in --
3 in the case of -- of the failure to act on the -- on
4 the competency issue.

5 MR. ZAS: Justice Souter, I would -- I would
6 not characterize this as a clerical error. Congress
7 considered this provision the heart of -- of a scheme.

8 This was where --

9 JUSTICE SOUTER: Well, let's put it this way.
10 It's a failure to speak rather than a failure to act.
11 In -- in the latter case, no action. In this case,
12 action, in fact, action as more -- it's as requested.
13 But a failure to speak contemporaneously with the
14 action, that's different.

15 MR. ZAS: Well, I would disagree, again with
16 the characterization that it's just a failure to speak.
17 The act requires a careful weighing of the public's
18 interest, the ends of justice, the defendant's
19 interest. So it's not just a matter of speaking. This
20 is --

21 JUSTICE SOUTER: Well, we don't -- we don't
22 know. I mean, on the face of the record, we don't know
23 whether he weighed or whether he didn't weigh. In the
24 second case, we know that he didn't act, and -- and
25 action is what he's got to -- to accomplish. But

1 whether he weighed or not, we don't know. He just
2 didn't say whether he weighed.

3 MR. ZAS: That's right, and the court also
4 didn't make the finding --

5 JUSTICE SOUTER: Right.

6 MR. ZAS: -- or state the reasons that the
7 statute specifically requires. And the question for
8 the Court is what flows from that failure. And the
9 answer is given in the sanctions provision. It says
10 that if more than 70 nonexcluded days elapse, the
11 indictment shall be dismissed.

12 Now, that provision itself builds in
13 flexibility to take into account exactly what Your
14 Honor is talking about. A judge may dismiss without
15 prejudice to re-prosecution depending on various
16 factors, including whether it was just an oversight, a
17 failure to recite words. So that's where --

18 JUSTICE SOUTER: No. I -- I --

19 MR. ZAS: -- that's where this -- this
20 distinction that you're drawing can be taken into
21 account.

22 JUSTICE SOUTER: But it's -- it requires --
23 in order for us to conclude that that's the only way it
24 can be taken account -- into account, we -- we'd have
25 to conclude that -- that rule 52 was, in effect,

1 partially repealed and made inapplicable implicitly
2 here without any reference to it. And that's -- that
3 kind of, let's say, implicit modification of -- of one
4 of the rules is, as a matter of normal interpretation,
5 disfavored.

6 MR. ZAS: Well, Your Honor, I think that the
7 principle -- well-accepted principle that the more
8 specific provision will govern over the general governs
9 here. So the remedy provision, the sanctions provision
10 here says that the indictment shall be dismissed
11 whether it's 71 days that elapsed or 200 days or 5
12 years.

13 JUSTICE SOUTER: But there's always some
14 sanction for error, and the point of the harmless error
15 rule is to determine whether that specific sanction
16 should be applied.

17 MR. ZAS: Yes, but there's not always a -- an
18 express command from Congress as to what the remedy
19 should be. Once Congress says the indictment shall be
20 dismissed, there's no room for a court to say that the
21 indictment shall not be dismissed unless there's some
22 harm shown. So this specific provision trumps the more
23 general provisions of rule 52(a).

24 JUSTICE BREYER: I'd like to know how -- how
25 do we know that the judge didn't set forth orally his

1 reasons for finding that the ends of justice outweigh
2 the interest, et cetera? Is that in the record what he
3 actually said?

4 MR. ZAS: Well, you only --

5 JUSTICE BREYER: Because I don't know that
6 you'd have to use the exact words, the ends of justice
7 served. You know, you don't have to -- I'd like to
8 read what he actually said, and where -- where is that?

9 It's not on page 192, which is somebody's opinion.

10 But rather, if I want to read the words, where do I
11 look?

12 MR. ZAS: Your Honor, this -- the only place
13 you will find the words here are the transcript of the
14 status conference on January 31, 1997. That's the
15 joint appendix beginning at page 80, and you will not
16 find a finding regarding the ends of justice. You will
17 not find mention of the -- the public interest or any
18 of the other balancing factors in the act --

19 JUSTICE SCALIA: He didn't think he needed
20 it. He had a perpetual waiver.

21 MR. ZAS: That's correct. This judge stopped
22 complying with the act on November 8th, 1996 because
23 the court ruled that the waiver for all time was valid.
24 That was a -- an injudicious finding, to say the
25 least. 5 minutes worth of legal research would have

1 shown that all the courts of appeals at the time had
2 already held that the waivers were invalid.

3 So the court didn't do a balancing, didn't
4 think it was doing a balancing. The court has a
5 colloquy in which it appropriately expressed skepticism
6 about the need for this delay, and the court does, in
7 effect, what Congress was concerned about. It indulged
8 defense counsel and said, well, if you don't care
9 enough, I don't care enough. Take 3 more months.
10 That's basically what happened.

11 JUSTICE SCALIA: Mr. Zas, are you going to
12 talk about estoppel?

13 MR. ZAS: Yes, Your Honor. The -- the
14 Government, for the first time, here in this Court has
15 unveiled a new doctrine that hadn't been in the case
16 before. It's no longer relying on either the waiver
17 for all time or the sort of mini-waiver for the -- the
18 January delay. But it argues that Petitioner is
19 estopped from challenging the 90-day delay in 1997.

20 There are several problems with the
21 Government's argument, but the most obvious one is that
22 the only conduct that the Government cites to trigger
23 the estoppel is the waiver.

24 JUSTICE SOUTER: Well, isn't there something
25 more than a waiver here? I mean, waiver is a very

1 broad term. I mean, it would cover a situation, for
2 example, in which the Government asked for time and the
3 defendant said, okay, I waive. In -- in this case,
4 there's -- there's an affirmative act on the part of
5 the defendant. He's not merely waiving. He is
6 affirmatively asking for action on the part of the
7 court, and subject I guess to cutting down the period
8 somewhat, he got what he asked for. This is something
9 more than waiver. This is, in fact, a -- a grant of
10 specific relief requested by him, and he now wants to
11 turn the tables based on receiving exactly what he
12 asked for. That's more than waiver.

13 MR. ZAS: Well, Your Honor, I can't disagree
14 with what you've said, but -- but the --

15 JUSTICE SCALIA: Well, I can. Did he ask for
16 a perpetual waiver? I thought the way the colloquy
17 went, the judge said, no, you know, I can't give you a
18 waiver unless you'll -- unless you'll make it a
19 perpetual waiver. And then he said, okay, I'll make it
20 a perpetual waiver. Wasn't -- wasn't the -- the
21 initiative for the perpetual waiver from -- from the
22 court?

23 MR. ZAS: That's right, Your Honor.

24 JUSTICE SOUTER: And hasn't my brother
25 cleverly changed my hypothetical? Because I was --

1 (Laughter.)

2 JUSTICE SOUTER: -- I was not talking about
3 the perpetual waiver. I was talking about the waiver
4 for whatever number of days he actually took in -- in
5 that case, which was what? 90 days?

6 MR. ZAS: Yes.

7 JUSTICE SOUTER: Yes.

8 MR. ZAS: I think -- I think there are two
9 different waivers that --

10 JUSTICE SCALIA: Okay.

11 MR. ZAS: -- that are before the Court.

12 So, Justice Souter, your question is about
13 not the waiver for all time, but the more limited
14 action in requesting and obtaining the continuance.

15 Now, ordinarily without a statute like this,
16 the defendant getting what he wants would amount to a
17 waiver and the defendant could complain. For example,
18 an evidentiary ruling. If -- if the defendant wants to
19 allow -- he doesn't object to evidence coming in,
20 that's it. He can't later argue that it should not
21 have come in.

22 The problem here is that the statute -- the
23 Congress knew that this kind of thing would happen.
24 Defendants would want delay. Defendants would be quite
25 happy to put off their trial for as long as they could.

1 JUSTICE GINSBURG: As long as they're not in
2 jail pending trial.

3 MR. ZAS: That's right. That's right. If
4 they're out in the community, Congress wanted those
5 people to be tried. And so the ends of justice
6 provision specifically says that a request for a
7 continuance granted by the court is not enough to
8 exclude time. There has to be both a finding and a
9 statement of reasons in the record to support the
10 finding before the time will be excluded.

11 Justice Breyer --

12 JUSTICE BREYER: Maybe you could say then
13 that it's the Government that has the right. If it's
14 the Government that has the right, then Government
15 should have objected.

16 I mean, the problem, of course, is obvious,
17 that it's a little hard on the district judges that
18 people come in and both sides tell them what you have
19 to have here is a waiver. Are you sure you won't raise
20 this against me later? I'm positive. I swear. You
21 mean you absolutely swear a thousand times that no
22 matter what I do and have delay, you will never raise
23 this as an error and it's fine? Yes. Okay? So he
24 says, okay, fine, done. You win. Then he raises it as
25 an error. That's rather -- called sandbagging the

1 judge.

2 And obviously, one would look to -- or I
3 would look to ways to avoid that, but you're telling me
4 I can't avoid it, and that's what Congress wanted and
5 so be it. Is that right?

6 MR. ZAS: Well, it's -- it's partially
7 correct, Your Honor.

8 JUSTICE BREYER: How is it not correct?
9 That's what I'm --

10 MR. ZAS: Well, it's not correct because I
11 would -- I would disagree with the characterization, if
12 that's what Your Honor is doing, of -- of anything that
13 happened here as being sandbagging.

14 JUSTICE BREYER: I'm not talking about here.
15 I'm saying that in your -- if I adopt your position in
16 this case, I would have to have the same position, I
17 would think, in the most egregious cases. Wouldn't I?
18 Because the only reason I'd adopt it here is because
19 Congress wanted it no matter what.

20 MR. ZAS: Yes.

21 JUSTICE BREYER: Is that right?

22 MR. ZAS: Yes, that -- that is --

23 JUSTICE BREYER: Okay. Then you're -- then
24 am I right in characterizing?

25 MR. ZAS: Well, that -- that is what the --

1 that is what the statute says. But Your Honor
2 shouldn't -- shouldn't tarry too long about the
3 consequences because if this Court holds, as we ask the
4 Court to hold, that waivers are no good -- waivers have
5 to be treated essentially as a request for a
6 continuance -- this problem goes away.

7 JUSTICE BREYER: Maybe. I mean, judges are
8 very busy. Not all the prosecutors get the word. It's
9 very hard to ask district judges to raise something on
10 their own in the face of lawyers who are telling them
11 the opposite. So you say, oh, they'll all know. I've
12 noticed there are a lot of opinions we write that they
13 don't know about --

14 (Laughter.)

15 JUSTICE BREYER: -- until, say, the lawyers
16 point them out.

1 JUSTICE GINSBURG: This -- this was a judge
2 who apparently was doing this as a -- a matter of
3 standard practice. He had a form that he whipped out.

4 It must be a very old form. It looked like it was
5 typed on a regular typewriter.

6 MR. ZAS: That -- that's right, Your Honor.
7 This form was -- was preprinted or pretyped.

8 JUSTICE SCALIA: And Gothic print, right?
9 JUSTICE SOUTER: It could have come from my
10 chambers.

11 (Laughter.)

12 MR. ZAS: And as we point out in the reply
13 brief, the judge had taken a strong legal position 20
14 years earlier that the requirements of the act could be
15 waived.

16 JUSTICE KENNEDY: I was going to ask what is
17 the date of the Speedy Trial Act? 1975?

18 MR. ZAS: I think President Ford signed it on
19 January 3rd, 1975.

20 JUSTICE KENNEDY: And it was widely
21 publicized among the judiciary then.

22 MR. ZAS: Yes, yes. Yes, and you know, this
23 is not a new statute. Judges are used to -- to
24 complying with it. Prosecutors are used to doing it.
25 Frankly, I've never seen a waiver for all time before.

1 It's not the kind of thing that will happen and it
2 should never happen again.

3 CHIEF JUSTICE ROBERTS: Can you make an ends
4 of justice finding for all time? Could he start at the
5 beginning, any continuance I grant is granted after my
6 weighing the different factors set forth in the statute
7 and it's in the ends of justice?

8 MR. ZAS: I don't think so, Your Honor. In
9 fact, there -- there is a circuit split on -- on
10 whether you can -- whether a court can grant an open-
11 ended continuance. I think Your -- Your Honor's ends
12 of justice continuance would amount to a waiver or a
13 suspension of the act.

14 Thank you very much.

15 CHIEF JUSTICE ROBERTS: Thank you, counsel.

16 Mr. Joseffer.

17 ORAL ARGUMENT OF DARYL JOSEFFER

18 ON BEHALF OF THE RESPONDENT

19 MR. JOSEFFER: Mr. Chief Justice, and may it
20 please the Court:

21 On the first of the time periods, it might
22 help if I could start by laying out three basic
23 principles.

24 The first is that a defendant may not opt out
25 of the act by waiver.

1 The second is that a -- a defendant is,
2 nonetheless, precluded from challenging the grant of a
3 continuance that he requested if the continuance
4 satisfies the substantive ends of justice standards of
5 the act and the defendant's waiver or other litigation
6 conduct induced the court to commit the procedural
7 error of not recording an ends of justice finding in
8 the record.

9 And the third related point, although it's
10 not presented here, is that the courts of appeals have
11 recognized that if a defendant requests an ends of
12 justice continuance and the court in a procedurally
13 regular manner grants the ends of justice continuance,
14 the defendant cannot later be heard to contend that
15 there was -- the ends of justice were not really
16 satisfied even though he had told the court that they
17 were.

18 We think the reasons for those three rules
19 stems from the reason that defendants cannot opt out of
20 the act in the first place. Although the act does not
21 contain an express anti-waiver or anti-estoppel
22 provision, it does manifest an intent to bind
23 defendants to its requirements in order to protect the
24 public interest in a speedy trial. If a defendant
25 could opt out of the act altogether and thereby obtain

1 delays that are not authorized by the act, that would
2 thwart the public interest in a speedy trial.

3 JUSTICE KENNEDY: But -- but as we've
4 indicated, the -- the judge was the one that opted out
5 of the act by this regular practice of requiring the
6 perpetual waiver, or whatever we call it.

7 MR. JOSEFFER: I guess there -- there are
8 couple things there. One is that we are not -- we --
9 we are not here relying on the waiver for all time.
10 Our point, instead, here is that when defendant
11 requested the continuance at issue here, it was the
12 defendant that said, Your Honor, I -- I need a
13 continuance and I waive my rights so you should give me
14 the continuance and then also said he needed additional
15 preparation time.

16 The court then -- and this -- this is at J.A.
17 from about page 81 to 85. The court then said, well,
18 why do you need the time? And the court discussed with
19 him for a while why he really needed additional
20 preparation time, reminded counsel that,
21 notwithstanding the waiver, this was a criminal case
22 and criminal cases do need to be tried, and ended up
23 balancing the defendant's desire for preparation
24 against the need for a speedy trial by granting a much
25 shorter continuance than requested. And that is

1 actually an entirely appropriate ends of justice
2 balancing, ends of justice reasoning.

3 JUSTICE BREYER: It's pretty hard to read
4 those pages as if they were anything other than what
5 they seemed to be on their face, that he didn't worry
6 about the Speedy Trial Act because he thought that it
7 had been waived.

8 MR. JOSEFFER: I think you're absolutely
9 right that the court was not, at that point, thinking
10 in terms of applying the Speedy Trial Act.

11 JUSTICE BREYER: Well, then why isn't that
12 the end of that, that the -- if you agree that the
13 defendant can't waive it, well, the reason that he got
14 the continuance is because he waived it, otherwise
15 there would have been something else done and -- or at
16 least might have been.

17 MR. JOSEFFER: Right. No. Our -- I mean, we
18 think there are two related points. One is that a
19 genuine opt-out of the waiver and a general opt-out of
20 the act, an attempt to obtain time that's not
21 excludable under the act is not permissible because
22 that would thwart the public interest in a speedy
23 trial.

24 But where the error is a purely procedural
25 one, a failing to record findings in the record

1 regarding a continuance that is permitted under the
2 substantive standards of the act, then holding the
3 defendant to the waiver, under a theory of either
4 waiver or estoppel -- in our view doesn't matter
5 which --

6 JUSTICE GINSBURG: How can we say it's purely
7 procedural with respect to the first time? I mean, the
8 reason that was given is I have to -- I need this time
9 to find out if these really peculiar looking bonds are
10 genuine.

11 Now, the -- the Second Circuit said -- and I
12 don't understand why they said this -- this is a
13 complex case so that continuance is warranted. Was
14 this a complex case?

15 MR. JOSEFFER: Complex defendants can make
16 for complex cases.

17 (Laughter.)

18 MR. JOSEFFER: And this is, I think, the
19 ultimate example of that.

20 But in addition, it's important to remember
21 that at the end of this 90-day period that was granted,
22 defense counsel withdrew on the ground that his client
23 was still insisting that he present the frivolous
24 defense that -- that the bonds were genuine. And
25 before withdrawing and telling the court that, the --

1 the defense counsel had a very serious duty to his
2 client and the court to continue to investigate what
3 his client was saying was the defense and to continue
4 to try to work with his client and try to come up with
5 a plausible defense strategy. Now, it didn't work and
6 counsel had to withdraw, but I don't think he can be
7 faulted for trying.

8 JUSTICE KENNEDY: Did the Government at any
9 point tell the -- tell the court, Your Honor, we think
10 the act requires you to make a specific finding and we
11 request you do that?

12 MR. JOSEFFER: No. The Government -- I mean,
13 on the one hand, the Government did not seek these
14 delays, did not encourage the waiver, did not rely on
15 the waiver at the -- at the relevant times. However,
16 at the time -- I mean --

17 JUSTICE KENNEDY: Because, I mean, you're --
18 you're coming in and saying, oh, well, he waived, but
19 certainly the Government could -- could have asked the
20 -- asked the district court to make the necessary
21 findings.

22 MR. JOSEFFER: Right, and at the time of --
23 of this -- this was about 10 years ago now -- the
24 Second Circuit recently held that waiver is not
25 ordinarily appropriate, but sometimes is. And so

1 everyone in the bar, I mean, has been acting under some
2 -- some confusion, we think, that -- that frankly, to
3 some extent, persists to this day.

4 We think that the best way to clarify matters
5 going forward is -- is a combination of the two things
6 I mentioned earlier, to say, first, defendants cannot
7 opt out of the act by waiver, to just try to discourage
8 waivers. But to say that mistakes will happen and that
9 when a -- a continuance -- when a court grants a
10 specific continuance that is authorized under the
11 substantive standards of the act, that at that point in
12 time, the defendant's waiver or other conduct that
13 induces a court not to make the findings prevents the
14 defendant from trying to seize on a purely procedural
15 violation on appeal because at that point -- remember,
16 the -- the reason for -- for a -- a partial anti-waiver
17 rule here is not that there's a specific anti-waiver or
18 anti-estoppel provision in the act. It's that Congress
19 has, on the whole, manifested an intent to protect the
20 public interest in a speedy trial. But if the time is
21 excludable under the substantive standards of the act,
22 a purely procedural error does not diminish the
23 public's interest in a speedy trial because the --
24 JUSTICE SCALIA: What -- what are you
25 hypothesizing? That the court actually made this

1 finding in its mind but just didn't express it? Or are
2 you hypothesizing that the court could have made it but
3 didn't make it, never even went through the mental
4 process?

5 MR. JOSEFFER: We think that, legally
6 speaking, all that matters is that the court could
7 have, and that once --

8 JUSTICE SCALIA: Could have made it. So --
9 so we're going to -- why can't life be simple? We're
10 going to have to have trials all the time as to
11 whether, in this hypothetical situation, this finding
12 could have been made. I mean, you know, this creates
13 subsidiary litigation that we really don't need.

14 MR. JOSEFFER: In -- in some instances, it
15 may add to an additional degree of complexity, although
16 I'll say that whatever that might be, it's still less
17 than the complexity of retrying the case. And also, I
18 think more often than not, on the face of the record --
19 I mean, these -- these determinations can be made.

20 Here, for example -- I mean, if -- if a court
21 grants a continuance for any reason, it's going to ask
22 the reasons why. Here, the court questioned counsel as
23 to whether he really needed more time, explained his
24 basic reasoning for doing so. And so when -- when it's
25 apparent on the record that a continuance could have

1 been granted, that's certainly a much less complex inquiry
2 than trying the case.

3 JUSTICE BREYER: Suppose you ask the judge.
4 You say, Judge, 2 months ago the defendant came to you
5 and said, I waive the Speedy Trial Act. Now the
6 defendant says, Judge, I now would like a month's
7 continuance. The judge says, I'll give it to you. The
8 opposing counsel says why. He says, because he waived
9 it.

10 Now, you're telling me that, one, he cannot
11 waive it, but two, even though the judge said I did it
12 because he waived it, that still itself is okay. We go
13 ahead and let him exclude it because the judge might
14 have done something differently. Is that what you're
15 saying?

16 MR. JOSEFFER: Well, either -- you would need
17 more on the record there because if the record was
18 limited to what you just said, I don't think there
19 would be a basis for --

20 JUSTICE BREYER: But it's possible you could
21 argue, looking at the record, that the judge should
22 have tried it -- should have excluded it on a
23 different basis. He should have excluded it on the
24 basis of the interests of justice, et cetera required.

25 So what the judge said, just to make it

1 clear, is I'm not even thinking about this different
2 basis, though I might. I'm doing it just because he
3 waived it. And now you're telling me, I take it, he
4 can't waive it, but nonetheless, the error is harmless
5 because he waived it, or something like that.

6 MR. JOSEFFER: At this -- at this point we're
7 not at the harmlessness point yet. This would be --

8 JUSTICE BREYER: It's not harmless. You're
9 saying it's a procedural error.

10 MR. JOSEFFER: Right, and --

11 JUSTICE BREYER: So we don't say the judge is
12 right because he waived it. We're saying he's right
13 because the judge made a procedural error. I'm having
14 a hard time following that.

15 MR. JOSEFFER: Well, anytime you're talking
16 about a waiver or estoppel theory, the premise is that
17 there -- there may well have been underlying error, and
18 the question is whether the defendant is precluded.

19 And here, there's no question there was an underlying
20 error because the findings were not required -- were
21 not reported in the act.

22 But the act does -- again, does not contain
23 an express anti-waiver provision, and the speedy trial
24 interests, which are the reason for reading, to some
25 extent, an anti-waiver provision, are -- are not

1 diminished when the court could have properly excluded
2 the time from the act. And to the contrary, speedy trial
3 interests would be harmed in that manner for three
4 reasons.

5 First, it gives defendants every reason to
6 delay in hopes of manufacturing a speedy trial
7 violation.

8 Second, waiver and estoppel are generally
9 important to the efficient and orderly conduct of
10 litigation, and if you take those -- that out, what you
11 will get is less efficient litigation and more delays,
12 which Congress recognized when, as part of the Speedy
13 Trial Act, it required the courts to develop management
14 plans for the efficient handling of cases.

15 JUSTICE SCALIA: But, you know, Congress
16 could have -- could have written it the way -- the way
17 you're proposing it. Congress could have said, you
18 know, when there -- when -- when there is good cause
19 for the continuance, the clock won't run. It didn't
20 say that. It -- it said the judge has to make a
21 finding. I mean, don't we have to give that some
22 effect?

23 You're saying it really doesn't matter
24 whether he makes the finding or not. So long as there
25 was good cause so that a finding could have been made,

1 that will be enough.

2 MR. JOSEFFER: No. Our -- our view is that,
3 I mean, like anytime the waiver or estoppel is at
4 issue, one could say that that's being read into the
5 statute, but the point, as this Court has explained in
6 Hillen and -- and Mezzanatto, is that those are
7 background principles of law that presumptively apply.

8 Our view is this: a court should make the
9 finding, but a -- a defendant may not challenge the
10 finding if a few conditions are satisfied. First, the
11 defendant was the one requesting the continuance and
12 benefiting from it. Second, the finding could have
13 been made on the record in the case, and third, the
14 defendant is responsible in some way for inducing the
15 court not to make the finding. It could be by a waiver
16 or it could be the defendant's -- or it could be the
17 court saying, I've decided it's appropriate to make an
18 ends of justice finding. Now, let me record this in
19 the record, and defense counsel saying, Your Honor,
20 please don't bother. It's late. We've got four more
21 things to do. We don't need the findings. In that
22 circumstance as well, it's not a waiver, but defense
23 counsel would have -- the defendant at that point
24 should not be heard to complain about the absence of a
25 finding that should ultimately --

1 JUSTICE KENNEDY: Well, it seems to me the
2 Government is equally remiss for not pointing out the
3 obligations of the court under the act.

4 But let me ask you this. Probably you can
5 respond to that as well if you like. What are the
6 problems with reindicting -- I mean, how -- how is the
7 Government hurt if it can reindict? I recognize that
8 it's costly to the system, et cetera. But is there
9 any real prejudice there?

10 MR. JOSEFFER: Well, I mean, there are two
11 concerns. One is, as you said, the -- the cost of
12 having to do a brand new jury trial after you've
13 already done a fair one. The second is that -- I mean,
14 in this case, the trial was 3 years ago.

15 JUSTICE KENNEDY: Well, of course, I'm -- I'm
16 supposing that after this rule, there would be no trial
17 because there would be -- if -- if you don't prevail,
18 there wouldn't be a trial.

19 MR. JOSEFFER: Oh, I -- well, if dismissal
20 was required in this case, I think dismissal would be
21 without prejudice as opposed to with prejudice and
22 therefore --

23 JUSTICE KENNEDY: And I'm asking are there --
24 are there severe costs with that when there's been no
25 trial?

1 MR. JOSEFFER: If there had not already been
2 -- oh.

3 JUSTICE KENNEDY: There's -- there's no
4 trial.

5 MR. JOSEFFER: This is pretrial.

6 JUSTICE KENNEDY: The -- the action is
7 dismissed for a Speedy Trial Act violation because the
8 position of the Petitioner here is accepted by this
9 Court and the Government just reindicts.

10 MR. JOSEFFER: Oh, there's already been a
11 trial.

12 JUSTICE KENNEDY: I'm hypothesizing that
13 there hasn't been.

14 MR. JOSEFFER: Okay.

15 JUSTICE KENNEDY: The case is dismissed.

16 MR. JOSEFFER: I see. It's dismissed before
17 trial.

18 JUSTICE KENNEDY: And there is a
19 reindictment.

20 MR. JOSEFFER: Right. I understand.

21 JUSTICE KENNEDY: How costly is that to the
22 system other than getting the grand jury together?

23 MR. JOSEFFER: Sorry. I understand. Yes, if
24 -- if pretrial --if the district court dismisses, then
25 the Government ordinarily could reindict for -- if the

1 court dismisses without prejudice, the Government
2 ordinarily could reindict very quickly, and the cost to
3 the system would not be great.

4 The real cost to the system comes in when the
5 district court does not dismiss and holds the trial
6 because then the trial has been held and then by the
7 time you get back down to the trial court -- I mean, in
8 this case, it'll probably be 4 years. And at that
9 point, sometimes you can do a retrial, but sometimes
10 memories fade, witnesses are lost, other sources of
11 proof are lost. And as a result, you end up with --
12 with fairly -- you can end up with very severe
13 consequences in situations where the first trial is
14 held.

15 JUSTICE GINSBURG: In this -- is there a
16 statute of limitations problem in -- in these cases if
17 their dismissal is without prejudice?

18 MR. JOSEFFER: No. There's a -- the Judicial
19 Code contains a -- a provision that generally contains
20 a 6-month grace period for limitations following
21 dismissal by a court. So we would have -- I mean, by
22 now the limitations period would have run, but we would
23 have 6 months to -- to reindict.

24 CHIEF JUSTICE ROBERTS: Counsel --

25 JUSTICE SOUTER: Mr. --

1 CHIEF JUSTICE ROBERTS: -- the -- the
2 argument you're making is really one of invited error,
3 and I'm not sure it even applies on these facts. I
4 mean, the -- the defense lawyer didn't, as you
5 hypothesized in one of your answers, say something to
6 the effect of don't worry, you don't need to make any
7 findings of the ends of justice or anything like that.

8 He just said I'm waiving my speedy trial rights, and
9 that may mean he's not going to argue, you know, that
10 the ends of justice don't justify it or whatever. He's
11 just saying I don't have any objection. Maybe he
12 assumed that the judge would go on and say, okay, I'm
13 making the findings required by subsection 8(a).

14 MR. JOSEFFER: Well, I think that when a --
15 when a litigant expressly waives his rights under an
16 act, that the very natural effect of that is to make
17 the court think he does not have to follow that act and
18 that would include the findings requirement.

19 JUSTICE GINSBURG: Well, in this case, the
20 judge told the defendant I've got a solution to this.
21 Here's my form.

22 MR. JOSEFFER: No. It was the -- I mean, in
23 context, there were two -- at the earlier status
24 conference that does not relate to this hearing, but at
25 the earlier status, it was defendant who said, Your

1 Honor, I want a continuance and I want to waive my
2 rights. In response to defendant's invocation of a
3 waiver, the court said, well, if you're going to waive,
4 you have to waive for all time, because the court was
5 concerned the defendant would selectively waive until
6 it was inconvenient for the court to try the case. We
7 don't defend the court's response to that, but the
8 point is that even then it was the defendant who raised
9 waiver first.

10 And then at this status conference regarding
11 this particular continuance, it was -- defendant was
12 the only one talking about waiver. Defendant said --
13 defendant initially raised it and said I -- I waive my
14 rights, then came back to it again. I waive my rights,
15 just give me the continuance. And the court said -- I
16 mean, the court did say that, well, if you've already
17 waived, you don't have to again. But he then said
18 that, notwithstanding the waiver, he couldn't give the
19 defendant an open-ended amount of time because this is
20 a criminal trial. So it was defendant who was -- who
21 was pressing this at all times.

22 JUSTICE ALITO: Do you have any idea how
23 often this -- this sort of situation comes up where
24 there's an alleged violation of the act and then a
25 denial by the district court of a pretrial motion to

1 dismiss?

2 MR. JOSEFFER: I think that happens with some
3 regularity. There's quite a lot of court of appeals
4 case law in which defendants are protesting speedy
5 trial violations. I mean, actually quite a lot.

6 JUSTICE SOUTER: You -- you made an argument
7 a moment ago which included the point that he asked for
8 this particular relief and represented what he needed
9 to do if he got the relief, the continuance. You --
10 you came right up within a step of -- of making a
11 judicial estoppel claim, although you did not use those
12 terms. I have two questions.

13 Did the Government raise at least the -- the
14 theory of judicial estoppel in the litigation before it
15 reached this point?

16 And the second question is, even if the
17 Government did not raise that term, asked for -- for
18 estoppel to be applied in those terms, did the
19 Government make the same argument that you have just
20 made which emphasizes the fact that he asked for it and
21 he represented the reasons for -- for needing it?

22 MR. JOSEFFER: Yes. In the -- in the court
23 of -- the answer your first question, in the court of
24 appeals -- we referred to our argument as one of waiver
25 rather than estoppel, in part because that's what the

1 Second Circuit had in -- in the past referred to it as
2 being. And yes, in substance, we were -- we -- we
3 raised -- I mean, we were raising a similar waiver
4 argument below as the one that we are now.

5 We don't think it matters greatly whether one
6 calls it waiver or estoppel, except that we do think
7 that estoppel is the -- is the -- the preferable way of
8 looking at because we're -- as -- as has been pointed
9 out, we're talking here not just about a waiver, but
10 also about a situation where a defendant requests
11 relief --

12 JUSTICE SOUTER: Yes. The difference between
13 acquiescence and -- and potentially sandbagging.

14 MR. JOSEFFER: Yes. I mean, here the -- the
15 defendant is affirmatively requesting relief on the
16 basis of one -- one position and is now seeking
17 dismissal based on the fact that his first position was
18 accepted and received that relief. And that's a
19 situation in which judicial estoppel is -- is, frankly,
20 tailor-made for, and I think the fact that judicial
21 estoppel prevents that very situation helps to
22 underscore the -- that if -- if Congress really wanted
23 to --

24 JUSTICE SCALIA: Except -- except where
25 there's a public policy against what you want to estop

1 him into doing. I mean, it seems to me for the same
2 reason that you don't allow a waiver, you shouldn't
3 allow an estoppel. There's a public policy against it.

4 The -- the Congress wanted these things tried
5 promptly, and -- and whether he merely waives or -- or
6 goes further and affirmatively causes the court to do
7 something which it shouldn't have done, you're just as
8 much violating the policy it seems to me.

9 MR. JOSEFFER: Well, I think the -- I mean, I
10 -- I agree that -- I mean, whether it's waiver or it's
11 estoppel, if Congress manifests an affirmative intent
12 to displace those doctrines, they don't apply. And it
13 doesn't matter which -- which one you're under.

14 But the -- the affirmative intent that
15 Congress manifested here, notwithstanding -- I mean,
16 remember, there's no express anti-waiver or anti-
17 estoppel provision, but the affirmative intent is to
18 protect the public's interest in a speedy trial. And
19 that -- that intent is entirely protected when a delay
20 could be -- is permitted by the substantive standards
21 of the act, and the only error is a procedural one that
22 the defendant helped to induce the court to commit.
23 And I mentioned -- in that circumstance, there's not
24 only no delay that was not contemplated by Congress.

25 But as I mentioned before there are three

1 reasons that permitting a defendant to seek dismissal
2 in that circumstance would actually harm speedy trial
3 rights. First, the incentive for defendants to delay.
4 Second, the inefficiency, and the third is that,
5 remember, one of the main reasons, if not the main
6 reason, that Congress wanted speedy trials was that it
7 was concerned that defendants out on bail were
8 committing crimes. And Congress' concern with crime
9 prevention is not served in the least by letting a
10 defendant seek dismissal of an indictment based on a
11 purely procedural error that he helped to cause.

12 JUSTICE SCALIA: If -- if what you say is
13 true, I don't know why it makes any difference that the
14 defendant led the court into it. If you -- if you
15 believe that this is just a procedural nicety that was
16 not complied with, why shouldn't you do the same thing
17 when -- when the court fails to make the finding but
18 could have made the finding whether or not the
19 defendant was the one that led him into it?

20 MR. JOSEFFER: Well, the question then would
21 be harmless error analysis. I mean, we agree the
22 statute requires the finding to be made. It was not
23 made. Therefore, there was an error. And it's the
24 defendant inducing the court to --

25 JUSTICE KENNEDY: It's harmless error because

1 he -- the evidence of guilt was substantial? What --
2 how does the harmless error work?

3 MR. JOSEFFER: No. If -- if one moved beyond
4 the inducement and into harmless error, the question
5 would be -- would be that there here the -- the error
6 -- I think as I mentioned before, the error here would
7 be the failure -- would -- would be the clerical one,
8 the error to record findings in the act.

9 And I think -- and we would agree that the
10 act -- pointing to the second question now. But the
11 act does expressly say that if a defendant is not tried
12 within 70 relevant days, the indictment shall be
13 dismissed. And that suggests that harmless error
14 analysis would not be appropriate to the question
15 whether 71 or 81 days of delay is appropriate because
16 Congress said 70 is 70.

17 But when the error is not that, but the error
18 is failing to record something in the record, that's a
19 distinct type of error that's not covered by the
20 mandatory dismissal provision. And it could be considered
21 harmless, especially in circumstances where the record
22 reflects --

23 CHIEF JUSTICE ROBERTS: Why do you -- why do
24 you put that in a separate category? It's kind of
25 unusual for Congress to put that type of a requirement

1 in the statute. They could have normally -- I suspect
2 they normally would write it. You know, you -- you --
3 they're excludable only if the court finds in the
4 interest of justice. But they went further and they
5 said if the court sets forth orally or in writing in
6 the record of the case. I mean, they set it forth as a
7 separate requirement. I don't know that we can give it
8 sort of a second-class status.

9 MR. JOSEFFER: Well, I -- I agree that --
10 that section (h) (8) is different from the incompetency
11 exclusion, for example, which I'll turn to in a minute,
12 in that it does tie the -- the findings to the
13 excludability. And that makes the -- the harmless error
14 argument that we have on that issue, obviously, more
15 difficult than on the -- the incompetency issue.

16 But it's still -- I think it ultimately comes
17 down to how you -- how you view the error. Is the
18 error not trying someone within 70 days, or is the
19 error not recording a finding in the record? And if --
20 if you focus on -- on the findings aspect --

21 CHIEF JUSTICE ROBERTS: Or say the error is
22 not complying with the act.

23 MR. JOSEFFER: Right, and then -- but the --
24 but the -- I mean, ordinarily that -- just not
25 complying with the act generally is harmless, and the

1 question would be is -- is that -- because, remember,
2 the -- the only thing that's subject to mandatory
3 dismissal is not trying someone within 70 relevant
4 days.

5 JUSTICE SCALIA: Yes, within 70 relevant days
6 counted as the statute requires them to be counted,
7 which includes the requirement of this finding set
8 forth in the record before you can stop the clock
9 running for -- you know, for some period. I don't
10 think that that's -- I don't think that's very
11 complicated.

12 MR. JOSEFFER: Right. And then, I mean, if
13 that's the way it's viewed, then on the first time
14 period, the (h) (8), then we would stand on our -- stand
15 on either of the -- the waiver and estoppel argument or
16 also on the possibility that another middle ground
17 would be if what we're missing is a finding in the
18 record, the other option would be to remand for the
19 court to clarify the record.

20 JUSTICE GINSBURG: Which court?

21 CHIEF JUSTICE ROBERTS: Oh, no, that --
22 pardon?

23 JUSTICE GINSBURG: The -- is that -- is there
24 any reason to believe that the judge, of course, would
25 clarify it and say the ends of justice, if we took your

1 remand solution.

2 MR. JOSEFFER: Right. And obviously,
3 ordinarily courts would not be doing that. It's a very
4 inefficient thing to do in the ordinary course. But
5 here, where the transcript does reflect the court
6 actually considered, on the one hand, the defendant's
7 need for additional time and, on the other hand, the
8 interest in trying -- trying criminal cases sooner
9 rather than later and balanced them by granting a lesser

10 --

11 JUSTICE GINSBURG: Well --

12 MR. JOSEFFER: It does seem more reasonable.

13 But --

14 JUSTICE GINSBURG: It seems to me that in
15 this case, that -- that all-purpose waiver that the
16 judge, and not for the first time, proposed is -- is what
17 caused all this. And -- and my question that I had is
18 knowing that this was the judge's practice -- and
19 indeed, he had written about it -- did the U.S.
20 Attorney's Office try to do something to say, look, the
21 act doesn't permit that kind of thing?

22 MR. JOSEFFER: At -- at the time, I mean,
23 there was -- there was -- especially this was 10 years
24 ago. There was, in some sense still is, quite a lot of
25 confusion in the bar on these issues because there's no

1 express anti-waiver provision. There's an end, and as
2 I said, the -- the Second Circuit in Gambino had held
3 waiver is not ordinarily appropriate, but had not said
4 it was never appropriate. So there was some confusion.

5 But what -- what the Government never did was
6 to encourage a waiver or to encourage any of these
7 delays either.

8 Now, in this -- I blurred to some extent in the
9 second question presented and talking about the -- the
10 remand and the harmlessness.

11 On the second question presented, the first
12 question is whether the incompetency exclusion applies
13 in the first place. In our view, it's a very simple
14 exclusion. If -- if delay results from the defendant's
15 incompetency, the time is excluded, and if the
16 defendant is incompetent, delay results from that
17 because a person cannot be tried when he is
18 incompetent. Because we have a finding here the
19 defendant was incompetent during the relevant period of
20 time, the exclusion applies.

21 JUSTICE SCALIA: But it was not known at the
22 time that he was incompetent. And -- and therefore,
23 that could not have been the reason that he was not
24 being tried. The reason he was not being tried was
25 that the -- that there was pending before the judge the

1 inquiry into whether he was competent.

2 MR. JOSEFFER: Well, the -- the act has a
3 lengthy series of these resulting from exclusions, and
4 with the exception of (h) (8), which is unusual in terms
5 of the ends of justice finding, these operate
6 automatically as this Court said in Henderson. It's --
7 it's an objective standard. If -- if the defendant
8 could not have been tried then, then the delay
9 resulted, at least as a concurrent cause, from that.

10 And there's -- and it's -- it's very
11 important to understand too that in the context of
12 especially the -- the exclusion for when pretrial
13 motions are pending, the courts of appeals have
14 unanimously held that a more complicated causation
15 analysis not only is not required but would throw a
16 wrench into the practical application of the act
17 because what happens, for example, is someone files a
18 pretrial motion and the parties assume that the -- the
19 clock is turned off then for at least some time. But a
20 defendant later argues that, well, the same delay would
21 have resulted anyway because, say, the judge was on
22 vacation or the judge was planning on recusing himself
23 and reassigning the case. And at that point, the
24 courts have recognized that you don't look to try to
25 figure out which of several potential causes is -- is

1 the relevant one. They're all potential objective
2 concurrent causes, and any other approach make it very
3 difficult to administer the act.

4 JUSTICE SCALIA: You really don't know the
5 answer of whether the clock is running until the
6 finding is made. If the -- if the judge finds that --
7 that he's not incompetent, well, too bad. You know,
8 the Speedy Trial Act requires dismissal. On the other
9 hand, if the judge finds that he is incompetent to be
10 tried, there hasn't been a violation of the act. I
11 mean, it's a very strange situation.

12 And it also, as -- as the -- the other side
13 points out, it -- it puts considerable pressure on the
14 judge when -- when he is in violation of the Speedy Trial
15 Act, to find that the individual is incompetent
16 because, otherwise, there has to be a dismissal.

17 MR. JOSEFFER: I -- I don't think it's
18 appropriate to presume that an Article III judge would
19 have a defendant imprisoned and committed if he was not
20 actually incompetent.

21 But you are right that the incompetency
22 exclusion is -- is, along with the unavailability of
23 the defendant or witness exclusions, are somewhat
24 unusual in that you could discover, after the fact,
25 that they applied. But the reason is that if -- if you

1 had tried to try him sooner, you would have discovered
2 the same thing. He actually was incompetent. The
3 witness actually was unavailable. And from a Speedy
4 Trial Act perspective, it makes no sense to say the
5 speedy trial clock ran because you didn't try a
6 defendant when he was legally unable to be tried.

7 JUSTICE GINSBURG: Are you -- are you relying
8 to any extent on something that I think you brought up?
9 He also could not have been tried because the
10 prosecutor was having a difficult pregnancy and she was
11 on extended leave, which was occurring in this period?

12 MR. JOSEFFER: We haven't relied on that
13 because that would have been the -- that -- that's an
14 appropriate basis for an ends of justice continuance,
15 but no continuance was ever sought or granted for the
16 relevant period. So we -- although that is true that
17 an ends of justice continuance might have been granted
18 for that reason, there was no continuance of any kind
19 granted during that period. So we're relying solely on
20 the plain language of the incompetency exclusion.

21 If you think about it --

22 CHIEF JUSTICE ROBERTS: Even if we agree with
23 you on the incompetency exclusion, we still have to
24 reach the waiver for all time question. Correct? You
25 don't argue that the incompetency goes back that far,

1 do you?

2 MR. JOSEFFER: No. We -- we -- no. With
3 respect to the first time period, we're relying on the
4 specific waiver that was tendered in connection with
5 that actual continuance.

6 CHIEF JUSTICE ROBERTS: You're not suggesting
7 he was incompetent during that period as well.

8 MR. JOSEFFER: Oh, that defendant was
9 incompetent the whole time?

10 CHIEF JUSTICE ROBERTS: Yes.

11 MR. JOSEFFER: No. There was -- actually
12 earlier on in the case, there was -- there were three
13 competency hearings. The first one, he was held
14 competent, and that -- that was earlier on in the
15 proceedings.

16 The finding of incompetency in the record
17 here is the defendant found the defendant incompetent
18 at the end of the relevant period based entirely on
19 evidence and argument presented at the beginning of the
20 relevant period. So when the -- when the court held
21 that the defendant must be incompetent based on that
22 evidence, he was saying the defendant -- necessarily
23 was saying the defendant must have been incompetent
24 during the entire relevant period based on the evidence
25 from the beginning of the period.

1 JUSTICE SOUTER: Am -- am I correct that the
2 -- the particular provision that you think is relevant
3 here is -- is (h) (1) (A) on page 4 of the -- the
4 appendix in the blue brief?

5 MR. JOSEFFER: No. I'm sorry. It is (h) (4).
6 (h) (1) (A) deals with proceedings regarding the
7 defendant's incompetency.

8 JUSTICE SOUTER: I've -- I've got it. Okay.

9 MR. JOSEFFER: And that applies whether the
10 defendant is competent or not. We're relying on (h) (4)
11 which applies when the defendant was incompetent.

12 JUSTICE SOUTER: What -- what do you make of
13 the language, any period of delay resulting from the
14 fact that the defendant is mentally incompetent? I
15 mean, the claim here is that -- that the -- that the
16 delay did not result from that fact, but simply from
17 the failure of -- of the judge to make that
18 determination so that what you're really doing is
19 making a harmless error analysis.

20 MR. JOSEFFER: Well, I'm happy to move to
21 that as well, but before that, I mean, it is -- there
22 can be concurrent causes and there can be objective
23 concurrent causes. And the defendant could not have
24 been tried during the relevant time period, and
25 therefore, objectively speaking, that was -- I mean, if

1 the -- if the court had tried to try him --

2 JUSTICE SOUTER: Okay, but isn't that a --

3 MR. JOSEFFER: -- during the relevant time
4 period, he couldn't.

5 JUSTICE SOUTER: -- isn't that a harmless
6 error analysis rather than a -- a subsection (4)
7 analysis?

8 MR. JOSEFFER: Well, I think Congress --
9 you're right that it's based in part on the principle
10 that, look, of course, he couldn't have been tried
11 then. But, no, Congress also made that relevant
12 whether there's a violation at all. Just to simplify
13 things, let's take that off the table. If the
14 defendant is incompetent, there certainly couldn't be a
15 constitutional Speedy Trial violation. Let's just
16 take it off the table for -- for the act purposes as
17 well. The argument has been made that --

18 JUSTICE SOUTER: But -- but I guess my only
19 point is that (4) does not say any period during which
20 the defendant is mentally incompetent. It says any
21 period of delay resulting from the fact that he was
22 mentally incompetent, and this did not result from that
23 fact until at the end of the period the judge says, oh,
24 I find him incompetent, so that any period after that
25 would be the result of the fact that he was

1 incompetent. But the -- the delay up to that point was
2 attributable solely to the judge's failure to make a
3 determination.

4 MR. JOSEFFER: If I could answer the
5 question.

6 CHIEF JUSTICE ROBERTS: If it was a question,
7 yes.

8 MR. JOSEFFER: The -- the fact --
9 (Laughter.)

10 JUSTICE SOUTER: It was -- it was cleverly
11 disguised, but it really was a question.

12 (Laughter.)

13 MR. JOSEFFER: I -- I -- I'll try to give a
14 cleverly disguised answer.

15 JUSTICE SCALIA: Isn't -- isn't that so?
16 (Laughter.)

17 MR. JOSEFFER: The -- the fact existed all
18 along. I mean, the -- the fact doesn't come into
19 existence once it's found. The finding reflects the
20 fact that the fact of an incompetency had existed
21 during the entire relevant period.

22 CHIEF JUSTICE ROBERTS: Thank you, counsel.

23 Mr. Zas, you have 4 minutes remaining.

24 REBUTTAL ARGUMENT OF EDWARD S. ZAS
25 ON BEHALF OF THE PETITIONER

1 MR. ZAS: Mr. Chief Justice, I'd like to pick
2 up on questions that both you and Justice Scalia asked
3 regarding the -- the language of the statute.

4 One of the Court's bedrock principles is that
5 judges are not free to rewrite the statute that
6 Congress has enacted. This statute and the whole
7 statutory scheme here speaks very clearly and very
8 precisely, and it would be unwise, even if permitted,
9 for the Court to start tinkering with it because the
10 whole system will start to unravel if the -- if the
11 requirement of express findings and reasons turns into
12 a could have/would have/should have contest, in which
13 case trial judges will take the act less seriously
14 knowing that the court of appeals could make the
15 findings for them. And it will make the court of
16 appeals' job harder because they'll be guessing after
17 the fact what discretionary decision the trial judge
18 would have made.

19 This statute -- the ends of justice provision
20 is very clear. The Government has cited no ambiguity,
21 and it controls. Because the findings were not made,
22 whether they could have been made or should have been
23 made or would have been made, they weren't made, and
24 therefore, the time ran and dismissal is required.

25 Now, the Government proceeds under the false

1 assumption that but for the waiver, the judge would
2 have granted this continuance on January 31, 1997.
3 There's absolutely no support for that in the record.
4 Even before this occasion, on November 8th, 1996, which
5 was the prior court appearance, the court said you're
6 not getting another adjournment unless you waive for
7 all time. So there's no reason to think that at this
8 later date the court was about to say, well, forget the
9 waiver, okay, I'll give you 3 months. It's -- it's the
10 waiver that is providing the basis for the exclusion.
11 The judge, if pushed, would have said, no, we're going
12 to trial soon. No waiver, no more time. So it's a
13 false assumption.

14 I'd like to turn to the second period again.
15 The Government again assumes that when the judge found
16 Mr. Zedner incompetent in March of 2001, that that is a
17 retroactive determination that he was incompetent from
18 July, August, September, October, November, et cetera.

19 And as the Court is aware --

20 CHIEF JUSTICE ROBERTS: It goes back some way
21 because he's looking at reports from those earlier
22 times. It's not only effective as of the date he makes
23 the finding.

24 MR. ZAS: Well, the -- the finding is
25 effective from that point forward. That has to be the

1 case because, as Justice Scalia pointed out, it's
2 important for the parties to know, as matters are
3 unfolding, what the speedy trial clock is. That way
4 the Government knows to push the cases that are
5 approaching the 70-day limit to trial. People can't
6 know that answer if everyone is waiting to find out
7 what the outcome of a pending motion is. And the
8 defendant, in fact, couldn't move for dismissal under
9 the act until the -- the judge said after 1 or 2 years,
10 I find the defendant incompetent.

11 JUSTICE ALITO: What do you mean --

12 JUSTICE SCALIA: I guess you can be -- I'm
13 sorry, go ahead.

14 JUSTICE ALITO: If the judge, when he finally
15 found the defendant competent, had said expressly, and
16 I -- I made this determination in my mind shortly after
17 the hearing and the -- the briefs that were submitted
18 at that time, but now I'm putting it on the record,
19 that wouldn't be sufficient?

20 MR. ZAS: No, Your Honor. If the judge had
21 said, I knew this all along back when I heard the
22 evidence that this defendant was incompetent, that
23 would be an even more egregious violation. The court
24 is not supposed to sit and just let the defendant sit
25 out on the streets for month after month after month

1 when -- when the defendant is incompetent. The court
2 is supposed to make a -- a prompt finding.

3 JUSTICE ALITO: Where does the act say that,
4 that there has to be a finding at the time?

5 MR. ZAS: Well, the court said -- the act
6 says it in -- in section (h)(1)(J). That's the -- the
7 -- in the appendix to the blue brief on page 5. The
8 act excludes time while the proceeding is -- is going
9 on for examinations and hearings, et cetera, but at the
10 end, it excludes only delay reasonably attributable to
11 any period not to exceed 30 days during which any
12 proceeding concerning the defendant is actually under
13 advisement by the court. So -- so if the --

14 JUSTICE ALITO: No. But there's no
15 provision, is there, that says that the finding under
16 (b) (4), that there has to even be a finding under
17 (b) (4), much less when the finding has to be made?

18 MR. ZAS: If I may answer the question, Your
19 Honor.

Well, the only finding that the court has to make under (b) (4) is that the defendant is incompetent. That automatically will exclude the time going forward until the defendant is restored to competency.

24 CHIEF JUSTICE ROBERTS: Thank you, counsel.
25 The case is submitted.

(Whereupon, at 12:02 p.m., the case in the
above-entitled matter was submitted.)

3

4

5

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24