NOTES & COMMENTS

IF IT AIN'T BROKE, DON'T FIX IT: INDICTMENT DELAYS AND DUE PROCESS

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I. INTRODUCTION

Among the greatest threats to the administration of justice in the American judicial system are arbitrary challenges to deeply

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ingrained practices and precedents of our nation's highest tribunal.[1] The framers of the United States Constitution, in their contemplation that individuals are deemed innocent until proven guilty, proclaimed, "[n]o person shall be . . . deprived of life, liberty, or property, without due process of law."[2] The Due Process Clause encompasses both substantive and procedural rights.[3] An individual's procedural rights are simply the means of enforcing their substantive rights.[4] However, unbeknownst to the drafters of the Fourteenth Amendment at the time of construction, it would be the barrage of defendants grounding their pre-indictment delay challenges in certain procedural due process components that has led numerous courts and commentators to struggle with the constitutionality of pre-indictment delay.[5] Since both ordinary civilians and those individuals formally accused are afforded certain due process protections under the Fifth Amendment,[6] courts should be hesitant to interpret the Fifth Amendment in such a way that it risks compromising society's general desire to prosecute those individuals who were rightfully accused and properly indicted.[7]

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[1] *See* Christine A. Varney, Assistant Att'y Gen., Antitrust Div., U.S. Dept. Just., Procedural Fairness, Address at 13th Annual Competition Conference of the International Bar Association (Sept. 12, 2009) (transcript available at https://www.justice.gov/atr/speech/procedural-fairness); *see also* Warren G. Burger, Chief Justice U.S. Supreme Court, The State of the Judiciary—1970, Address Before the American Bar Association (Aug. 1970), *in* 56 A.B.A. J. 929, 934 (1970).

[2] U.S. CONST. amend. V.

[3] *Fifth Amendment—Rights of Persons*, CONST. ANNOTATED, https://constitution.congress.gov/browse/essay/amdt5-4-1/ALDE_00013721/ (last visited Dec. 30, 2022).

[4] *See* Simona Grossi, *Procedural Due Process*, 13 SETON HALL CIR. REV. 155, 158–59 (2017).

[5] Though courts and scholars around the country have referred to delays at this juncture in criminal proceedings as pre-indictment, pre-accusation, pre-arrest, or other similar terms, the term "pre-indictment delay" will be used throughout this Note. *See* United States v. Doe, 149 F.3d 945, 948 (9th Cir. 1998) (using the terms "pre-accusation delay" and "pre-indictment delay" interchangeably); *see also* United States v. Brown, 498 F.3d 523, 527–28 (6th Cir. 2007) (using the term "pre-arrest delay" but citing to authority which uses the term "pre-indictment delay").

[6] *See* McCarthy v. Arndstein, 266 U.S. 34, 40 (1924) (discussing how the privilege against self-incrimination, a Fifth Amendment protection, is applicable to both ordinary witnesses and "party defendant[s]" alike); *see also* U.S. CONST. amend. V.

[7] *See* Michael J. Cleary, *Pre-Indictment Delay: Establishing a Fairer Approach Based on* United States v. Marion *and* United States v. Lovasco, 78 TEMP. L. REV. 1049, 1058 (2005); Robert Henderson, *The Purpose of Punishment*, *in* ALASKA CRIMINAL LAW, 2022 EDITION (May 5, 2021), https://pressbooks.pub/alaskacriminallaw2022/chapter/1-5-the-purposes-of-punishment/.

As it currently stands, courts apply two different standards when analyzing a due process challenge to a pre-indictment delay: the two-prong approach and the balancing approach.[8] The majority approach among the federal circuits is aptly named the "two-prong" approach.[9] To succeed on a due process claim for a pre-indictment delay under the majority approach, defendants must show both that the government's delay in bringing the indictment (1) caused "actual and substantial prejudice," and (2) the government acted in bad faith in order to gain a "tactical advantage" over the accused.[10] On the other hand, in the few circuits where it is applied, the minority approach is referred to as the "balancing test" or balancing approach.[11] If the defendant can establish actual and substantial prejudice, the balancing approach requires the court to then balance the hardships suffered by the defendant against the reasons provided by the government for the delay.[12] While most courts remain true to what is known as the two-prong test,[13] a minority of courts, and numerous scholarly articles, comments, and notes, urge courts to adopt murky Fifth Amendment standards under the balancing approach.[14] However, what these advocates fail to warn of is that the standards endorsed by the balancing approach would likely create an influx of arbitrary litigation

[8] Cleary, *supra* note 7, at 1051–52.

[9] *Id.*; *see, e.g.*, United States v. Crouch, 84 F.3d 1497, 1511 (5th Cir. 1996).

[10] United States v. Ashford, 924 F.2d 1416, 1419–20 (7th Cir. 1991) (quoting United States v. Chappell, 854 F.2d 190, 195 (7th Cir. 1988); *see also* United States v. Sebetich, 776 F.2d 412, 430 (3d Cir. 1985); *Crouch*, 84 F.3d at 1511.

[11] Cleary, *supra* note 7, at 1052, 1063–64. Throughout the rest of this Note, the minority test will be referred to as "the balancing approach."

[12] United States v. Doe, 149 F.3d 945, 948 (9th Cir. 1998) (holding that defendant "must show the delay, when balanced against the prosecution's reasons for it, offends those fundamental conceptions of justice which lie at the base of our civil and political institutions" (quoting United States v. Sherlock, 962 F.2d 1349, 1353–54 (9th Cir. 1989)); *see also* Howell v. Barker, 904 F.2d 889, 895 (4th Cir. 1990) (employing a balancing approach on a claim of pre-indictment delay).

[13] Eli DuBosar, *Pre-Accusation Delay: An Issue Ripe for Adjudication by the United States Supreme Court*, 40 FLA. STATE U. L. REV. 659, 668–69 (2013).

[14] *See Howell*, 904 F.2d at 895 (explaining that *Lovasco* did not establish a "black-letter test" for pre-indictment delay); *see also* United States v. Moran, 759 F.2d 777 (9th Cir. 1985); Danielle M. Rang, Student Article, *The Waiting Game: How Preindictment Delay Threatens Due Process and Fair Trials*, 66 S.D. L. REV. 143, 166–77 (2021); Cleary, *supra* note 7, at 1053; DuBosar, *supra* note 13, at 665–71; *see generally* Phyllis Goldfarb, *When Judges Abandon Analogy: The Problem of Delay in Commencing Criminal Prosecutions*, 31 WM. & MARY L. REV. 607, 618–20 (1990) (explaining how the Supreme Court has not readdressed the balancing approach test and lower courts have "fashioned a range of standards").

of both substantive and procedural due process issues. While this Note focuses on due process challenges to pre-indictment delays within the federal court system, state courts also disagree about the correct evaluation of a pre-indictment delay challenge under the Fourteenth Amendment.[15] That being said, it is of significance to note that there seems to be a consensus that the bright line two-prong approach is the more favorable form of analysis to such challenges as twenty-nine of the states that have addressed such challenges apply this standard.[16]

This Note examines the law of pre-indictment delay and the federal case law that has shaped the application of the doctrine throughout federal and state court systems. In contrast to previous scholarly articles that have addressed this topic in an attempt to cure an alleged circuit split,[17] this Note takes aim at the leading arguments put forward in support of the adoption of the balancing approach to the pre-indictment delay analysis over the more widely used two-prong approach. Part II of this Note discusses the leading United States Supreme Court cases addressing due process challenges based on pre-indictment delays and describes the different interpretations that the federal courts of appeals have employed. Part III first recounts the leading arguments that commentators and courts have made in support of the balancing approach. Part III then addresses those arguments and explains their shortcomings. This Note concludes with a brief summarization of both approaches taken by courts in analyzing challenges to a pre-indictment delay and expresses why the majority approach strikes the correct balance under the Fifth Amendment's Due Process Clause.

II. THE BEGINNINGS: *MARION* AND *LOVASCO*

The Sixth Amendment grants all persons accused of a crime the right to a speedy trial.[18] In a typical Sixth Amendment challenge, a court must address whether a delay, after charges are brought but before a defendant's trial begins, is too long.[19] In *United States v.*

[15] *See* DuBosar, *supra* note 13, at 671–85.

[16] *See id.* at 672–73 nn.104–32.

[17] *See* articles cited *supra* note 14.

[18] U.S. CONST. amend. VI.

[19] *See id.* ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . . ."); Barker v. Wingo, 407 U.S. 514, 530 (1972) (explaining that the

Marion, however, the Court addressed whether an individual has the right to a *speedy indictment* and at what stages of the criminal process the Sixth Amendment is to govern.[20]

In 1970, William Marion and his business partner were indicted for engaging in fraudulent business practices.[21] In response, the defendants filed a motion to dismiss for lack of speedy prosecution, arguing that the indictment was unduly prejudicial because, although their alleged criminal acts took place between 1965 and 1967, the government did not file charges against them until 1970.[22] In particular, the defendants argued that when the indictment was eventually brought, the delay was "an unreasonably oppressive and unjustifiable time after the alleged offenses," and that the delay deprived them of their "rights to due process of law and to a speedy trial under the Fifth and Sixth Amendments to the Constitution of the United States."[23] They further asserted that "the indictment required memory of many specific acts and conversations occurring several years before, and . . . that the delay was due to the negligence or indifference of the United States Attorney in investigating the case and presenting it to a grand jury."[24] According to the United States Attorney, however, the delay was a result of understaffing and direct orders to investigate and prosecute more pressing cases.[25] The United States District Court for the District of Columbia agreed with the defendants' contentions that the three-year delay between their criminal acts and the charged indictment was unreasonable under the Sixth Amendment and dismissed the indictment.[26] Nonetheless, on direct appeal, the Supreme Court reversed the judgment of the district court, holding that the speedy trial provision does not apply until a defendant in some way is officially accused, and that Marion and his business partner had not been officially accused until they were formally indicted.[27]

approach set forth for analyzing speedy trial claims "is a balancing test, in which the conduct of both the prosecution and the defendant are weighed").

[20] *See* 404 U.S. 307, 308–09, 313 (1971) (emphasis added).

[21] *Id.* at 308–09.

[22] *Id.* at 309.

[23] *Id.* at 309–10.

[24] *Id.* at 310.

[25] *Id.* at 334–35 (Douglas, J., concurring).

[26] *Id.* at 310 (majority opinion).

[27] *Id.* at 313, 325.

In *Marion*, the defendants presented no evidence of actual prejudice on the part of the government in bringing their delayed indictment claim.[28] Instead, they supported their Fifth Amendment violation claim by asserting that dismissal was still appropriate because the prejudice they suffered was "inherent" in the three-year delay between the occurrence of the alleged criminal acts and the time the indictment was handed down.[29] The *Marion* Court ultimately disagreed, but it recognized that "the Fifth Amendment would require dismissal of the indictment if it were shown at trial that the pre-indictment delay . . . caused substantial prejudice to appellees' rights to a fair trial and that the delay was an intentional device to gain tactical advantage over the accused."[30] Thus, the Court made clear that dismissal is in fact warranted when the government intentionally causes a delay "to gain tactical advantage over [a defendant]" and that delay causes "substantial prejudice" to the defendant's "rights to a fair trial".[31] Unfortunately, after setting the stage for what is now known as the two-prong approach, the Court left murky the pool of jurisprudence for which lower courts were left to wade through and explicate the finer details of its new standard: "[W]e need not, and could not now, determine when and in what circumstances actual prejudice resulting from pre-accusation delays requires the dismissal of the prosecution."[32]

Despite its somewhat generalized conclusion, the Court recognized that a pre-indictment delay is distinctly different from a delay implicating the speedy trial guarantee and, by implication, differentiating the analysis that is conducted therein.[33] The singular most important distinction is whether, at the time when an indictment is brought, the government delayed the commencement of trial proceedings or whether the government delayed initially bringing the charges in the first place.[34] Thus, with this recognition, the Court unequivocally denied extending both the protections afforded under the Speedy Trial Clause and the balancing analysis that goes along with it to

[28] *Id.* at 325.

[29] *Id.* at 308, 325–26.

[30] *Id.* at 324.

[31] *Id. See also* United States v. Gouveia, 467 U.S. 180, 192 (1984) (noting that "the Fifth Amendment requires the dismissal of an indictment . . . if the defendant can prove that the Government's delay in bringing the indictment was a deliberate device to gain an advantage over him").

[32] *Marion*, 404 U.S. at 324.

[33] *See id.* at 313.

[34] *See id.*

their review of pre-indictment delay challenges.[35] The Court noted that the language of the Sixth Amendment suggests that the framers did not intend to extend speedy trial protections to individuals not yet subject to criminal prosecution, and precedent does not support such an expansive construction.[36] "On its face, the protection of the [Sixth] Amendment is activated only when a criminal prosecution has begun and extends only to those persons who have been 'accused' in the course of that prosecution."[37] Prior to arrest, an individual does not bear the loss of freedom or other disadvantages associated with criminal prosecution.[38] Furthermore, although the Court conceded that pre-indictment delays may in fact impair a defendant's ability to secure evidence and construct a defense, the risk of such a hurdle does not automatically justify redefining the government's ability to prosecute offenses.[39] The Court found statutes of limitations properly bar prosecution after a set period of time, and the legislature, in crafting such statutes, has already balanced the government's interests against the potential prejudice to criminal defendants.[40] Thus, it was unnecessary to invoke the Sixth Amendment or its balancing approaches since necessary statutes of limitations were already legislatively enacted to protect defendants' interests by blocking any indictments that are not brought for the alleged crime in a timely manner.[41]

Strictly speaking, the *Marion* Court did not define what type of prejudice would justify dismissing an indictment, nor did it determine whether a showing of negligence in the government's investigatory actions during the delay could satisfy the second prong of the pre-indictment delay review.[42] Rather, the *Marion* Court simply explained that the Sixth Amendment's Speedy Trial Clause does not attach until a defendant is formally accused of a crime and that the Fifth Amendment does not protect against pre-indictment delays in the absence of actual prejudice and intentional government action.[43] The

[35] *See id.* at 313–15.

[36] *See id.* at 314–15 ("The framers could hardly have selected less appropriate language if they had intended the speedy trial provision to protect against pre-accusation delay.").

[37] *Id.* at 313.

[38] *See id.* at 321.

[39] *Id.* at 331.

[40] *Id.* at 322–23.

[41] *Id.* at 323.

[42] *See id.* at 324–26.

[43] *See id.* at 320–24.

Court went on to suggest that a governmental delay should be considered on a case-by-case basis and, in defined circumstances, that certain delays caused by the government in bringing an indictment will justify its dismissal—like when the government intentionally delays indicting an individual to gain some strategic advantage over them.[44]

Nearly six years after *Marion* was decided, the Supreme Court faced another due process challenge based on a pre-indictment delay in *United States v. Lovasco*.[45] While addressing the question of what constitutes dismissible prejudice, the Court built upon its *Marion* assertion that proof of prejudice is a necessary showing in a pre-indictment delay analysis, but it alone is insufficient for establishing a successful due process challenge.[46] In delivering the majority opinion, the Court upheld one of the key holdings in *Marion*—that a pre-indictment delay is cause for dismissal only if it violates a statute of limitations or due process.[47] As such, due process does not automatically bar the bringing of an indictment if a plaintiff suffers only some prejudice from a pre-indictment delay without an accompanying intentional act by the government to gain a tactical advantage over the accused.[48]

In relevant part, the defendant in *Lovasco* challenged an indictment handed down by the government for possession of stolen firearms.[49] The defendant contended that because the alleged criminal conduct took place approximately eighteen months before any charges were brought, the governmental delay prevented him from presenting a proper defense due to lost testimony from a number of key witnesses.[50] Supporters of the balancing approach and other observers of the progression of this case through the lower courts may have believed the posterity of *Marion* was being given rightful meaning following the Eighth Circuit Court of Appeals' affirmation of the lower court's dismissal of the indictment.[51] The Eighth Circuit found the government's eighteen-month delay was "unnecessary[] and unreasonable" without the additional finding that there was some intentional

[44] *See id.* at 324–25.

[45] 431 U.S. 783 (1977).

[46] *Id.* at 790.

[47] *See id.* at 789.

[48] *See id.* at 789–90.

[49] *Id.* at 784.

[50] *Id.* at 784–86.

[51] *Id.* at 786–87; *see* United States v. Lovasco, 532 F.2d 59 (8th Cir. 1976).

and tactical delay on the part of the government.[52] Nevertheless, as a matter of course, the Supreme Court reinstated the indictment while further developing its previous opinion in *Marion*, expounding in more detail on the requirements for a successful pre-indictment delay claim.[53]

In essence, the Court in *Lovasco* concluded that proof of a defendant's prejudice is part of a due process claim, but that it alone is insufficient to establish a due process violation.[54] Consequently, the Court created a new two-part line of reasoning so as to account for the government's reason for the delay, instructing that "the due process inquiry must consider the reasons for the delay as well as the prejudice to the accused."[55] Although the Court ultimately applied what would soon be known as the strict two-prong approach,[56] the minority circuits and those who support the balancing approach continue to reference the above-quoted language when arguing that the more reasonable readings of the *Marion* and *Lovasco* holdings called for weighing the prejudice to the accused against the government's justifications for the delay.[57] However, despite their strained interpretation, when this language is read in context with the Court's full opinion, the preferable interpretation of this language should be that courts must look to the governmental action to see if there were any intentional acts to gain a tactical advantage.[58]

While the Court elaborated that, though a defendant's "proof of actual prejudice makes a due process claim concrete and ripe for adjudication," it does not "make[] the claim automatically valid."[59] Thus, per *Lovasco*, to dismiss an indictment for violating a defendant's Fifth Amendment due process rights, courts must first consider the evidence presented by the defendant purporting to show that the defendant

[52] *See Lovasco*, 532 F.2d at 61.

[53] *See Lovasco*, 431 U.S. at 790–92, 796–97.

[54] *Id.* at 790.

[55] *Id.*

[56] Sarah R. Grimsdale, Note, *The Better Way to Stop Delay: Analyzing Speedy Sentencing Claims in the Wake of* Betterman v. Montana, 72 VAND. L. REV. 1031, 1034 (2019).

[57] *See, e.g.*, Cleary, *supra* note 7, at 1070–71; State v. Stock, 361 N.W.2d 280, 283 (S.D. 1985); State v. Calderon, 684 P.2d 1293, 1296 (Wash. 1984)) ("The defendant must show that he was prejudiced by the delay and, in making its due process inquiry, the court must consider the reasons for the delay as well as the prejudice to the accused."); Howell v. Barker, 904 F.2d 889, 894–95 (4th Cir. 1990).

[58] *Lovasco*, 431 U.S. at 784–97.

[59] *Id.* at 789.

suffered actual prejudice from the government's delay.[60] Once a defendant proffers sufficient evidence to show that they suffered actual prejudice from the government's delay, the question becomes, what actions taken by the government will amount to an intentional tactical delay, such as to justify a dismissal of the indictment?[61] The Court in *Lovasco* expanded upon its earlier discussions of the second prong of the two-prong analysis by distinguishing an "investigative delay" occasioned by the government from a "delay undertaken . . . solely 'to gain a tactical advantage over the accused.'"[62] In recognizing this point, the Court further emphasized that "the Due Process Clause does not require" prosecutors to be penalized for their choice of "subordinat[ing] the goal of 'orderly expedition'" of their investigative processes for that of "'mere speed.'"[63] Simply put, the government's ensuing prosecution following an "investigative delay" will not violate the Due Process Clause, regardless of whether that delay caused some prejudice to the defendant.[64] Despite such delays, the government, as rationalized in *Lovasco*, is under no duty to bring an indictment as soon as possible, even when the "[g]overnment has assembled sufficient evidence to prove guilt beyond a reasonable doubt."[65]

In an oft-quoted mantra, the Court in *Lovasco* reasoned that a bad-faith standard for due process challenges to a pre-indictment delay is appropriate because courts should not be able to "abort criminal prosecutions simply because they disagree with a prosecutor's judgment."[66] Instead, courts should only find a defendant successfully raised a pre-indictment delay challenge when the delay "violates those 'fundamental conceptions of justice which lie at the base of our civil and political institutions,' and which define 'the community's sense of

[60] *Id.* at 790.

[61] *See id.* at 790–92.

[62] *Id.* at 795 (quoting United States v. Marion, 404 U.S. 307, 324 (1971).

[63] *Id.* at 795–96 (quoting Smith v. United States, 360 U.S. 1, 10 (1959)).

[64] *Id.* at 796; *see also* United States v. Sowa, 34 F.3d 447, 451 (7th Cir. 1994) ("[E]ven if a defendant proves prejudice, due process is not violated if the government's delay is due to further investigation to solidify its case."); United States v. Seale, 600 F.3d 473, 479–80 (5th Cir. 2010) (holding that the prosecution of a defendant following an investigative delay does not constitute a deprivation of due process even if the defendant is somewhat prejudiced by the delay).

[65] *Lovasco*, 431 U.S. at 792. *See* Janis Merle Caplan, *Better Never than Late: Pre-Arrest Delay as a Violation of Due Process*, 1978 DUKE L. J. 1041, 1046–47 (1978).

[66] *Id.* at 790.

fair play and decency.'"[67] As discussed further below, oftentimes, statutes of limitations are already in place to act as a procedural safeguard against those delays that do not meet the newly articulated bad faith standard.[68]

The *Lovasco*[69] Court's refinements to the standard outlined in *Marion*[70] were almost enough to make the contours of the standard indisputable. However, the Court's brief addition at the end of the *Lovasco* opinion, in which the Court stated that it "could not determine in the abstract the circumstances in which pre-accusation delay would require dismissing prosecutions," left the door open for further confusion and a source of invigoration for those supporters of the balancing approach, which a minority of the federal appellate courts have adopted.[71]

The Court was unable to squarely revisit the topic of the proper approach to pre-indictment delay challenges again until its brief affirmation of the two-prong approach in the case of *United States v. Gouveia*,[72] seven years after *Lovasco*. In *Gouveia*, the Court upheld the two-prong test after concluding that, when a defendant asserts a pre-indictment delay challenge, the Constitution demands "the dismissal of an indictment, even if it is brought within the statute of limitations, if the defendant can prove that the Government's delay in bringing the indictment was a deliberate device to gain an advantage over him and that it caused him actual prejudice in presenting his defense."[73] Following the holdings of *Marion*,[74] *Lovasco*,[75] and *Gouveia*,[76] the Court has not squarely revisited these cases collectively in the context of pre-indictment delays, though at least one justice has indicated in the past his desire for the Court to resolve any lingering confusion regarding the applicable test.[77] In his dissent from the

[67] *Id.* (first quoting Mooney v. Holohan, 294 U.S. 103, 112 (1935); and then quoting Rochin v. California, 342 U.S. 165, 173 (1952)).

[68] *See infra* note 114 and accompanying text.

[69] 431 U.S. at 788–96.

[70] 404 U.S. 307, 320–26 (1971).

[71] *Lovasco*, 431 U.S. at 796.

[72] 467 U.S. 180 (1984).

[73] *Id.* at 192.

[74] *Marion*, 404 U.S. at 325–26.

[75] *Lovasco*, 431 U.S. at 796–97.

[76] *Gouveia*, 467 U.S. at 192–93.

[77] Hoo v. United States, 484 U.S. 1035, 1035–36 (1988) (White, J., dissenting).

majority's denial of certiorari in *Hoo v. United States*, Justice White stated: "The continuing conflict among the Circuits on this important question of constitutional law requires resolution by this Court; I would grant certiorari."[78]

As it stands today, the two-prong approach, as put forth by *Marion*, *Lovasco*, and the majority of other circuit courts, requires a showing that the pre-indictment delay caused the defendant actual prejudice and that the government acted in bad faith in bringing about the delay.[79] As to the first prong, notwithstanding the possibility of differing standards among the circuits regarding what constitutes actual prejudice to a defendant, it is undisputed that federal courts require the suffered prejudice to be clear and not overtly speculative.[80] And in order for a defendant to meet this bad faith standard, coupled with actual prejudice, they must show that the "[g]overnment's delay in bringing the indictment was a deliberate device to gain an advantage over him."[81] In essence, such conduct that amounts to bad faith includes actions that contravene "'fundamental conceptions of justice which lie at the base of our civil and political institutions,' and which define 'the community's sense of fair play and decency.'"[82]

[78] *Id.* at 1036.

[79] *Marion*, 404 U.S. at 324–25; *Lovasco*, 431 U.S. at 788–90.

[80] *See* United States v. Crouch, 84 F.3d 1497, 1499–1500 (5th Cir. 1996); United States v. Bartlett, 794 F.2d 1285, 1290 (8th Cir. 1986) ("In sum, the defendant must demonstrate that the prejudice *actually* impaired his ability to meaningfully present a defense."). Several circuits have demonstrated that a showing of actual substantial prejudice "will not be presumed because of a lengthy delay" but instead a showing of "actual prejudice and not merely 'the real possibility of prejudice [that is] inherent in any extended delay'" is required. Stoner v. Graddick, 751 F.2d 1535, 1544 (11th Cir. 1985) (quoting United States v. McGough, 510 F.2d 598, 604 (5th Cir. 1975)).

[81] *Gouveia*, 467 U.S. at 192.

[82] *Lovasco*, 431 U.S. at 790 (first quoting Mooney v. Holohan, 294 U.S. 103, 112 (1935); and then quoting Rochin v. California, 342 U.S. 165, 173 (1952)). Over the years, different circuits have further elaborated upon the outer contours of what constitutes "bad faith" on the part of the government. For example, the Fifth Circuit has found that the government does not act in bad faith, even if a lengthy amount of time has passed, unless the government intentionally delays an indictment as a strategic choice. United States v. Seale, 600 F.3d 473, 479–80 (5th Cir. 2010). The Seventh Circuit has also found that the government does not act in bad faith for investigative delays, including when investigations are deferred because of administrative constraints. *See* United States v. Sowa, 34 F.3d 447, 451–52 (7th Cir. 1994).

III. THE TWO-PRONG TEST IS THE PROPER APPROACH AFTER A PRE-INDICTMENT DELAY CLAIM

As discussed above, before finding a due process violation as a result of the government's delay in bringing an indictment while still within the statute of limitations period, the majority of circuit courts, and the Supreme Court in *Marion*, *Lovasco*, and *Gouveia*, have applied the two-prong test requiring the defendant to prove: (1) actual prejudice as a result of the delay, and (2) that the government intentionally brought about the delay to gain a tactical advantage over the accused.[83] As it stands today, three circuit courts firmly apply the alternative balancing approach—an evaluation that instructs the court to consider the alleged prejudice to the accused, and then weigh it against the government's proffered justification for the delay.[84] If the presiding court then determines that the prejudice suffered by the accused—meaning a defendant's ability to adequately defend himself at trial—outweighs the government's justification for why the delay was brought, then the court may agree with the defendant's pre-indictment delay challenge and dismiss the charges.[85] Notably, the Fifth Circuit was previously among those circuits that applied the balancing approach, but it later transitioned its pre-indictment delay analysis to the two-prong approach after more detailed consideration.[86]

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[83] Of our nation's federal appellate courts, the First, Second, Third, Sixth, Eighth, Tenth, and Eleventh Circuits have either firmly adopted the two-prong approach or have indicated that this was the correct application to a pre-indictment delay challenge. United States v. Acevedo, 842 F.2d 502, 504 (1st Cir. 1988); United States v. Ray, 578 F.3d 184, 199–200 (2d Cir. 2009); United States v. Sebetich, 776 F.2d 412, 429–30 (3d Cir. 1985); United States v. Lively, 852 F.3d 549, 564 (6th Cir. 2017); United States v. Brown, 959 F.2d 63, 66 (6th Cir. 1992); United States v. Sprouts, 282 F.3d 1037, 1041 (8th Cir. 2002); United States v. Woodard, 817 F. App'x 626, 628 (10th Cir. 2020); United States v. Barragan, 752 F. App'x 799, 800 (11th Cir. 2018); United States v. Foxman, 87 F.3d 1220, 1222 (11th Cir. 1996).

[84] *See, e.g.*, United States v. Doe, 149 F.3d 945, 948 (9th Cir. 1998). In the three federal circuits that still recognize it, the balancing approach stands on uncertain grounds. The Fourth, Seventh, and Ninth Circuits have opted to apply the balancing approach instead of the two-prong approach expressed by the Court in *Marion* and *Lovasco*. Jones v. Angelone, 94 F.3d 900, 905 (4th Cir. 1996) (acknowledging that every other circuit but the Ninth had adopted the two-prong test but recognized that it could not now overrule its prior court precedent without an en banc proceeding); United States v. Moran, 759 F.2d 777, 782 (9th Cir. 1985); United States v. Hagler, 700 F.3d 1091, 1099 (7th Cir. 2012).

[85] Cleary, *supra* note 7, at 1073.

[86] *Compare* United States v. Townley, 665 F.2d 579, 582 (5th Cir. 1982) (establishing originally that should the defendant prove actual prejudice, then the court must "engage 'in a sensitive balancing of the government's need for an investigative delay . . . against the prejudice asserted by the defendant'" (quoting United States v. Brand, 556 F.2d 1312,

A. Establishing Bad Faith Is Demanding, but It is Not an Impossible Hurdle

A majority of the circuits have interpreted both *Marion* and *Lovasco* to mean that the pre-indictment delay inquiry entails a strict two-pronged test in which a criminal defendant must show (1) the prosecution's delay caused some actual prejudice to their defense; and (2) the delay was the result of a bad-faith prosecutorial motive.[87] In turning to the defendant's burden of establishing bad faith on the part of the government, the minority view contends it is at this point that the two-prong analysis creates an impossible burden for defendants to overcome, especially those who may lack the resources to obtain essential information in order to counter the government's proffered justifications for the delay.[88] Accordingly, proponents of the minority view argue that when a court reviews pre-indictment delay challenges, it should find that the bad faith requirement is an impractical standard and, instead, adhere to those foundational procedural due process protections by employing the balancing approach.[89] Accordingly, the balancing approach relieves the defendant of their burden of showing bad faith by requiring the courts to weigh a defendant's actual prejudice against the government's justification for the delay.[90]

First, in response to this argument, although these procedures are established to protect those rights entitled to citizens under the Constitution,[91] if the second prong were any easier to prove or if the standard were any less stringent, there would be a flood of challenges raised by every defendant who feels that they have suffered some prejudice as a result of the government delaying the bringing of their indictment. Simply because a certain standard may be difficult

1317 n.7 (5th Cir. 1977)), *with* United States v. Crouch, 84 F.3d 1497, 1512 (5th Cir. 1996) (clarifying that the balancing approach ignores that prejudice is inherent and improperly places interests on each side of the scale that "are wholly different from each other and have no possible common denominator that would allow determination of which 'weighs' the most").

[87] *See* cases cited *supra* note 83.

[88] *See* Cleary, *supra* note 7, at 1072–73; *see also* Rang, *supra* note 14, at 163, 165–66; United States v. Rogers, 118 F.3d 466, 477 n.10 (6th Cir. 1997); Howell v. Barker, 904 F.2d 889, 895 (4th Cir. 1990).

[89] *See, e.g.*, United States v. Vongphakdy, 2021 U.S. Dist. LEXIS 248169, at *8 (W.D.N.C. Dec. 30, 2021); *see also* Cleary, *supra* note 7, at 1073.

[90] *Vongphakdy*, 2021 U.S. Dist. LEXIS 248169, at *8; *see* Cleary, *supra* note 7, at 1073.

[91] *See* Cleary, *supra* note 7, at 1053.

to meet does not necessarily mean that it should be changed to make it easier to prove.[92] Similarly, the due process guarantee "applie[s] to *deliberate* decisions of government officials to deprive a person of life, liberty, or property."[93] As a result, "the Due Process Clause . . . is *not* implicated by the lack of due care of an official causing *unintended* injury to life, liberty or property."[94] Thus, the majority two-prong analysis aligns with due process principles not only as a matter of technicality but also as a matter of policy.[95]

Additionally, a lesser standard might necessarily impede the proper administration of justice,[96] forcing the government to choose between thoroughly investigating an alleged crime or rushing to bring an indictment before its case has been fully established. The Supreme Court has emphasized that "[t]he public is concerned with the effective prosecution of criminal cases, both to restrain those guilty of crime and to deter those contemplating it."[97] The Court has also recognized that because the government employs prosecutors to carry the burden and responsibility of representing their constituents in the court of law,[98] "[t]he decision to file criminal charges, with the awesome consequences it entails, requires consideration of a wide range of factors in addition to the strength of the Government's case, to determine whether prosecution would be in the public interest."[99] Consequently, if one is to follow the holdings of *Marion* and *Lovasco*, in that the government has the ability to delay the bringing of an indictment until it has enough evidence to prove guilt, then it should conceivably follow that the government may also reasonably delay the bringing of an indictment if, as the result of administrative and staffing constraints, it has not yet compiled the requisite evidence to prove guilt beyond a reasonable doubt.[100] Thus, in affording the government such great discretion, the Court has refused to charge the government

[92] *Id.* at 1062–63.

[93] Daniels v. Williams, 474 U.S. 327, 331 (1986).

[94] Davidson v. Cannon, 474 U.S. 344, 347 (1986) (emphasis added).

[95] *See* Cleary, *supra* note 7, at 1062–63.

[96] *See* United States v. Lovasco, 431 U.S. 783, 790–95 (1977).

[97] Dickey v. Florida, 398 U.S. 30, 42 (1970) (Brennan, J., concurring).

[98] *Public Prosecutors as the 'Gate-Keepers' of Criminal Justice*, UNITED NATIONS OFF. ON DRUGS & CRIME (Feb. 2020), https://www.unodc.org/e4j/en/crime-prevention-criminal-justice/module-14/key-issues/2—general-issues—public-prosecutors-as-the-gate-keepers-of-criminal-justice.html.

[99] *Lovasco*, 431 U.S. at 794.

[100] S*ee id.* at 790–96; Caplan, *supra* note 65, at 1046–47.

with bringing an indictment the moment probable cause can be established or proof beyond a reasonable doubt demonstrated.[101] This is not to say that all governmental delay is not prejudicial; instead, it only means that when the government's actions involve bad faith do such delays rise to a level of prejudice as to contravene the Due Process Clause.[102] Accordingly, "[r]ather than deviating from elementary standards of 'fair play and decency,' a prosecutor abides by them if he refuses to seek indictments until he is completely satisfied that he should prosecute and will be able promptly to establish guilt beyond a reasonable doubt."[103]

Similarly, the balancing approach affords defendants yet another avenue to challenge their indictments,[104] inevitably leading courts to be "engaged in lengthy hearings in every case to determine whether or not the prosecuting authorities had proceeded diligently or otherwise."[105] Prosecutors and their offices are already stretched thin due to a lack of adequate resources.[106] However, supporters of the balancing approach do not address the additional burden that would befall these offices if they had to account for the possibility of a court scrutinizing each action for potential prejudice that a defendant may have suffered throughout the investigative process.[107] It is simply unrealistic for prosecutors and their offices to undertake the additional burden of analyzing whether each legitimate delay in the prosecutorial process is justifiable compared to unknown pre-indictment delay due process claims that an accused individual may bring after their indictment. The additional time and effort it would take for prosecutors to keep track of every criminal's alleged movement, defense witnesses, or other possible evidence that the defense might be able to produce would prove vain and further strain a prosecutorial office's already limited resources.[108]

[101] *See Lovasco*, 431 U.S. at 790–96; Caplan, *supra* note 65, at 1046–47.

[102] *See id.*

[103] United States v. Burks, 316 F. Supp. 3d 1036, 1042 (M.D. Tenn. 2018) (quoting *Lovasco*, 431 U.S. at 795).

[104] *See* United States v. Crouch, 84 F.3d 1497, 1512–13 (5th Cir. 1996).

[105] *Id.* at 1506 (quoting United States v. Marion, 404 U.S. 307, 321 n.13 (1971)).

[106] Adam M. Gershowitz & Laura R. Killinger, *The State (Never) Rests: How Excessive Prosecutorial Caseloads Harm Criminal Defendants*, 105 NW. U. L. REV. 261, 279 (2011).

[107] *See, e.g.*, Cleary, *supra* note 7, at 1070–76.

[108] *See* Gershowitz & Killinger, *supra* note 106, at 279.

B. Statutes of Limitations Properly Mitigate Delay-Related Concerns

Supporters of the balancing approach contend that the Supreme Court has acknowledged statutes of limitations only go so far in protecting a defendant's due process rights.[109] For example, the balancing approach adherents point to the Court's declaration in *Lovasco*, which acknowledged that "the Due Process Clause has a limited role to play in protecting against oppressive delay."[110] They also cite to *Marion*, in which the Court stated that statutes of limitations should "encourage law enforcement to investigate suspected criminal activity promptly."[111] Although balancing approach supporters may admit that statutes of limitations aid in some due process protections, they believe that statutes of limitations do not go far enough because they do not protect against stale charges when exculpatory evidence is destroyed by the passage of time, nor do proponents believe they serve as a sufficient mechanism in the protection against prosecutorial prejudice.[112]

Though it is easy to sympathize with the adverse effects defendants may suffer,[113] the fact of the matter is that the government, in bringing an indictment, cannot be held liable for everything that occurs between the time of the crime and the bringing of the indictment that may result in some inadvertent delay. This is especially true when the government is within their legal right of the statute of limitations for a specific law. The statute of limitations is a defendant's "primary guarantee against bringing overly stale criminal charges."[114] "Such statutes represent legislative assessments of relative interests of the State and the defendant in administering and receiving justice . . . ."[115] Federal statutes of limitations are set by the legislative

[109] *E.g.*, Rang, *supra* note 14, at 145.

[110] *Lovasco*, 431 U.S. at 789.

[111] *See e.g.*, Cleary, *supra* note 7, at 1075; United States v. Marion, 404 U.S. 307, 324 (1971).

[112] *See* Rang, *supra* note 14, at 164.

[113] *See* Erik Aucion, *Empathy Leads to Death: Why Empathy is an Adversary of Capital Defendants*, 58 SANTA CLARA L. REV. 99, 126 (2018).

[114] *Marion*, 404 U.S. at 322 (quoting United States v. Ewell, 383 U.S. 116, 122 (1966)); *see* Betterman v. Montana, 578 U.S. 437, 441 (2016) (citing United States v. Lovasco, 431 U.S. 783, 789 (1977)); Stoner v. Graddick, 751 F.2d 1535, 1541 (11th Cir. 1985).

[115] *Marion*, 404 U.S. at 322; *see* Chase Sec. Corp. v. Donaldson, 325 U.S. 304, 314 (1945) ("[Statutes of limitations] have come into law not through the judicial process but through legislation. They represent a public policy about the privilege to litigate.").

branch, which, after careful consideration through research and understanding public interest, enacts such time periods as to bring about some level of reliability and protection for ordinary individuals.[116] Such statutes are not only intended to "protect individuals from having to defend themselves against charges when the basic facts may have become obscured by the passage of time,"[117] or when "witnesses have died or disappeared,"[118] but they also "have the salutary effect of encouraging law enforcement officials promptly to investigate suspected criminal activity."[119] More specifically, on the issue of pre-indictment delay, the Supreme Court has stated that "statutes of limitations, which provide predictable, legislatively enacted limits on prosecutorial delay, provide 'the primary guarantee, against bringing overly stale criminal charges.'"[120] "They are practical and pragmatic devices," whose "operation does not discriminate between the just and the unjust claim, or the voidable and unavoidable delay."[121] As a result of such detailed and careful consideration on the part of the legislature, "[w]hen the statute of limitations is constitutional, the Constitution places a very heavy burden on a defendant to show that pre-indictment delay has offended due process."[122]

In recognition of the argument that those individuals who have been accused of crimes could suffer harm to their ability to defend themselves as a result of any sort of delay in bringing an indictment, both federal and state legislatures have purposefully crafted statutes of limitations to protect those accused from being held to answer for their crimes indefinitely.[123] Consequently, "[w]here the possibility of prejudice derives from pre-indictment delay, the defendant in a criminal case must first resort to the applicable statute of limitations," and "[o]nly where the applicable statutes of limitations has failed to offer relief for pre-indictment delay" are such due process claims ripe for adjudication.[124] Accordingly, statutes of limitations and the two-prong

[116] *See Chase Sec. Corp.*, 325 U.S. at 314.

[117] Toussie v. United States, 397 U.S. 112, 114–15 (1970).

[118] *Chase Sec. Corp.*, 325 U.S. at 314.

[119] *Toussie*, 397 U.S. at 115; *see* Jeffrey R. Boles, *Easing the Tension Between Statutes of Limitations and the Continuing Offense Doctrine*, 7 NW. J. L. & SOC. POL'Y 219, 231 (2012).

[120] United States v. Lovasco, 431 U.S. 783, 789 (1977) (quoting *Marion*, 404 U.S. at 322).

[121] *Chase Sec. Corp.*, 325 U.S. at 314.

[122] Stoner v. Graddick, 751 F.2d 1535, 1540 (11th Cir. 1985).

[123] *Toussie*, 397 U.S. at 114.

[124] *Stoner*, 751 F.2d at 1541.

test complement each other.[125] The two-prong test accounts for those instances in which the statutes of limitations cannot offer relief—when the government acts in bad faith in causing a pre-indictment delay.[126]

Through the application of the two-prong test over the balancing approach, courts have allowed those predetermined assessments of the legislatures to provide protections to defendants without encumbering the government's natural progression in bringing charges.[127] As statutes of limitations are "created by the people of a state through their [elected officials]"[128] and carefully crafted by both federal and state legislatures, courts should respect these safeguards, follow the direction of *Marion* and *Lovasco*, and only set aside such provisions when they have failed to offer an accused individual proper relief from pre-indictment delays.[129]

C. Although the Supreme Court Regularly Employs Balancing Tests in Other Contexts, a Balancing Approach is not Appropriate for Pre-Indictment Delays

Finally, balancing approach supporters assert that since balancing tests exist throughout other areas of the law, most notably in Sixth Amendment and other due process violation inquiries, than such an approach is therefore easily applicable to a pre-indictment delay inquiry.[130] For example, in 1972, the Supreme Court adopted a balancing test in *Barker v. Wingo*, a case in which a defendant alleged that his right to a speedy trial had been violated.[131] Supporters of the balancing approach argue that because a Sixth Amendment speedy trial claim and pre-indictment delay challenge both center on the

[125] *See* United States v. Crooks, 766 F.2d 7, 11 (1st Cir.), *cert denied*, 474 U.S. 996 (1985) ("An indictment brought within an applicable statute of limitations period is, constitutionally speaking, late only if the delay significantly prejudices the defendant and the government 'intentionally delayed' the indictment 'to gain an unfair tactical advantage or for other bad faith motives.'").

[126] *See* Boles, supra note 119, at 225–26.

[127] *See* Caplan, *supra* note 65, at 1047 & nn. 45–46 (1978) (explaining that statutes of limitations provide sufficient due process safeguards for defendants by granting prosecutors sufficient time to properly investigate and bring criminal charges).

[128] *Stoner*, 751 F.2d at 1540.

[129] *Id.* at 1540; *see also* United States v. Castellano, 610 F. Supp. 1359, 1385 (S.D.N.Y. 1985).

[130] *See* Cleary, *supra* note 7, at 1075–76.

[131] 407 U.S. 514, 518, 529–30 (1972).

government's facilitation of delays in the prosecutorial process, a standard similar to the speedy trial balancing analysis should also be applied to pre-indictment delay challenges.[132] In *Barker*, the Court found "[t]he right to a speedy trial is a more vague concept than other procedural rights. It is[] . . . impossible to determine with precision when the right has been denied."[133] As a result, "any inquiry into a speedy trial claim necessitates a functional analysis of the right in the particular context of the case: 'The right to a speedy trial is necessarily relative. It is consistent with delays and depends upon [changing] circumstances.'"[134] Thus, the Court accepted "a balancing test, in which the conduct of both the prosecution and the defendant are weighed. . . . [Such a test] compels courts to approach speedy trial cases on an *ad hoc* basis."[135] However, in reality, courts should not be so quick to jump to the conclusion that such a test can automatically be applied to other areas of the law.

Though balancing approaches may be used in other areas of law, the application of the two-prong approach avoids the risk of infusing subjective notions of fairness into the due process analysis, which the *Lovasco* Court wanted to avoid.[136] First, the Supreme Court's decision in *Marion* unequivocally found that issues of pre-indictment delay do not implicate the Sixth Amendment's speedy trial provisions, as those "guarantees are applicable only after a person has been accused of a crime."[137] Second, those situations in which a flexible balancing approach is applied, like challenges to speedy trial violations and delays in bringing forfeiture proceedings,[138] are inherently

[132] Cleary, *supra* note 7, at 1074.

[133] *Barker*, 407 U.S. at 521.

[134] *Id.* at 522 (quoting Beavers v. Haubert, 198 U.S. 77, 87 (1905)).

[135] *Id.* at 530.

[136] United States v. Lovasco, 431 U.S. 783, 790 (1977). As stated by J. Marshall:

> [T]he Due Process Clause does not permit courts to abort criminal prosecutions simply because they disagree with a prosecutor's judgment as to when to seek an indictment. Judges are not free, in defining "due process," to impose on law enforcement officials our "personal and private notions" of fairness and to "disregard the limits that bind judges in their judicial function."

Id. (quoting Rochin v. California, 342 U.S. 165, 170 (1952)).

[137] United States v. Marion, 404 U.S. 307, 316–17 (1971).

[138] The Supreme Court has adopted a similar balancing test, as seen in the right to a speedy trial, to determine whether a delay in bringing forfeiture proceedings is unconstitutional. *See* United States v. Eight Thousand Eight Hundred & Fifty Dollars ($8,850) in

different from a pre-indictment delay challenge. For example, in the context of speedy trial violations, defendants challenging such delays are afforded slim protections other than those applicable state and federal speedy trial rules.[139] On the other hand, defendants subjected to a pre-indictment delay are afforded those due process protections offered by applicable statute of limitations, which no longer apply once there is an indictment because a defendant's speedy trial rights then become the applicable protection.[140] Thus, because these two contrasting due process protections—a defendant's speedy trial and pre-indictment delay rights—were designed to safeguard defendants' rights at different, incomparable points in the prosecutorial process,[141] the forms used to analyze such violations should not automatically be interchangeable.

Additionally, the balancing approach, as applied in those other due process considerations, is an impracticable standard to implement under challenges of pre-indictment delay because "there are no recognized general standards or principles to aid" in a court's determination of whether the government's justification for the delay outweighs the prejudice suffered by the defendant.[142] One jurisdiction, after initially aligning with the balancing approach, instead adopted the two-prong test upon further consideration of the court's ability to weigh the factors on either side of the balancing equation.[143] The Fifth Circuit, in the post-*Lovasco* era, initially held in favor of a balancing approach in *United States v. Townley*.[144] However, the Fifth Circuit reevaluated the standard in *United States v. Crouch*, overruled *Townley*, and squarely adopted the two-prong inquiry.[145] The Fifth Circuit explained briefly the pragmatic difficulties of the balancing approach: "[W]hat this test seeks to do is to compare the incomparable. The items to be placed on either side of the balance . . . are wholly different from each other and have no possible common denominator

U.S. Currency, 461 U.S. 555 (1983). Post-seizure delay in filing forfeiture proceedings "mirrors the concern of undue delay encompassed in the right to a speedy trial." *Id.* at 564.

139 *See* Betterman v. Montana, 578 U.S. 437, 447–48 (2016).

140 *Id.* at 441.

141 *See id.* at 441, 448–49.

142 United States v. Crouch, 84 F.3d 1497, 1512 (5th Cir. 1996) (Politz, C.J., dissenting).

143 *Id.* at 1499–1500, 1523.

144 665 F.2d 579, 581–82 (5th Cir. 1982).

145 *See Crouch*, 84 F.3d at 1512–13, 1523.

that would allow determination of which 'weighs' the most."[146] With this approach, courts are faced with the impractical duty of comparing and contrasting two unrelated topics—the adequacy of government procedures and "prosecutorial and investigative staffing," against any prejudice suffered by a defendant.[147]

Consistent with *Lovasco*, a subjective balancing approach to a pre-indictment delay analysis is ill-equipped to be more widely applied—as supporters of this approach advocate for—considering that there are currently no guidelines or "conversion table[s]" to aid courts in determining when a pre-indictment delay becomes too prejudicial.[148] As the Fifth Circuit aptly stated: "Inevitably, then, a 'length of the Chancellor's foot' sort of resolution will ensue and judges will necessarily define due process in each such weighing by their own '"personal and private notions" of fairness,' contrary to the admonition of *Lovasco*."[149] In short, the balancing approach is ultimately an arbitrary sliding-scale analysis which facilitates inconsistent decision-making.[150] The denominators on both sides of the equation are simply "incommensurate," such that "[i]t is more like judging whether a particular line is longer than a particular rock is heavy."[151] For example, due to a lack of guidance in applying the balancing approach for a pre-indictment delay challenge, a court may ultimately "find a due process violation where the government acted in good faith and did not deliberately seek to prejudice the party ultimately accused.[152]

Reiterating the Fifth Circuit in *Crouch*: "[W]hat this test seeks to do is compare the incomparable."[153] Due to the vast amount of case law that has chosen to apply the strict two-prong approach over the balancing approach, there is "virtually no body of precedent or historic

[146] *Id.* at 1512.

[147] *See Crouch*, 84 F.3d at 1512.

[148] *Id.*; United States v. Lovasco, 431 U.S. 783, 790 (1977) ("Judges are not free, in defining 'due process,' to impose on law enforcement officials our 'personal and private notions' of fairness and to 'disregard the limits that bind judges in their judicial function.'" (quoting Rochin v. California, 342 U.S. 165, 170 (1952)).

[149] *Crouch*, 84 F.3d at 1512.

[150] *See id.*

[151] Bendix Autolite Corp. v. Midwesco Enters., Inc., 486 U.S. 888, 897 (1988) (Scalia, J., concurring) (explaining the difficulties of applying a balancing approach in the context of Negative Commerce Clause cases).

[152] *Id.* at 1513.

[153] *Id.* at 1512.

practice [for a court] to look to for guidance"—nor are there any recognized comparable "standards or principles to aid" a court in determining a pre-indictment delay challenge under the balancing approach.[154]

IV. CONCLUSION

Consistent with the Supreme Court's decisions in the seminal cases of *Marion*[155] and *Lovasco*,[156] the application of the two-prong analysis in pre-indictment delay challenges reflects the sounder approach. It was in these early cases in which the Court first recognized that a due process violation may occur in the time period following the occurrence of an alleged criminal act if the government delayed the bringing of an indictment with the intent to "gain tactical advantage over the accused."[157] Though scholarly articles and Fourth and Ninth Circuit Court opinions on the topic present meaningful and well-reasoned arguments for adopting the balancing approach, ultimately, these scholars, judges, and attorneys urge the endorsement of suspect Fifth Amendment standards that would present greater procedural and ethical concerns, leading to an influx of litigation based on procedural due process issues.[158]

There should be no question that the majority of circuit courts have interpreted the decisions of *Marion* and *Lovasco* to mean that before a court can find that a pre-indictment delay violated an individual's due process rights, the defendant first must show actual prejudice arising from the pre-indictment delay and, second, that the government's actions in bringing about the delay were deliberate so as to gain a strategic advantage over the defendant.[159] The application of the majority two-prong approach not only establishes a consistent and fair approach for all pre-indictment delay challenges, but it also ensures that the government is not excessively burdened in the decision-making process in when it decides to indict individuals.[160] In this recognition, through its constituents, both federal and state

[154] *Id.*

[155] United States v. Marion, 404 U.S. 307, 324–26 (1971).

[156] *See* United States v. Lovasco, 431 U.S. 783, 795–97 (1977).

[157] *Marion*, 404 U.S. at 324.

[158] *See supra* note 14 and accompanying text.

[159] *See* cases cited *supra* note 83.

[160] *See Lovasco*, 431 U.S. at 794–96.

legislatures have purposefully crafted statutes of limitations that comply with the Due Process Clause that both protect defendants from being held to answer for their actions indefinitely and afford the government the ability to properly prosecute criminal acts without rushing to bring indictments.[161] While both ordinary civilians and those individuals formally accused are afforded certain due process protections under the Fifth Amendment,[162] those protections should not extend so far as to compromise society's general desire to prosecute those individuals who were rightfully accused and properly indicted. For the reasons stated herein, courts should continue to affirm a long-standing principle of the Supreme Court and apply the bright line two-prong test in the assessment of pre-indictment delay challenges, as this test strikes the right balance under the Fifth Amendment's Due Process Clause of United States Constitution.

[161] *Marion*, 404 U.S. at 322–23.

[162] *See* U.S. CONST. amend. V.