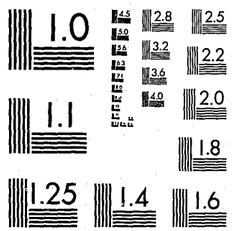

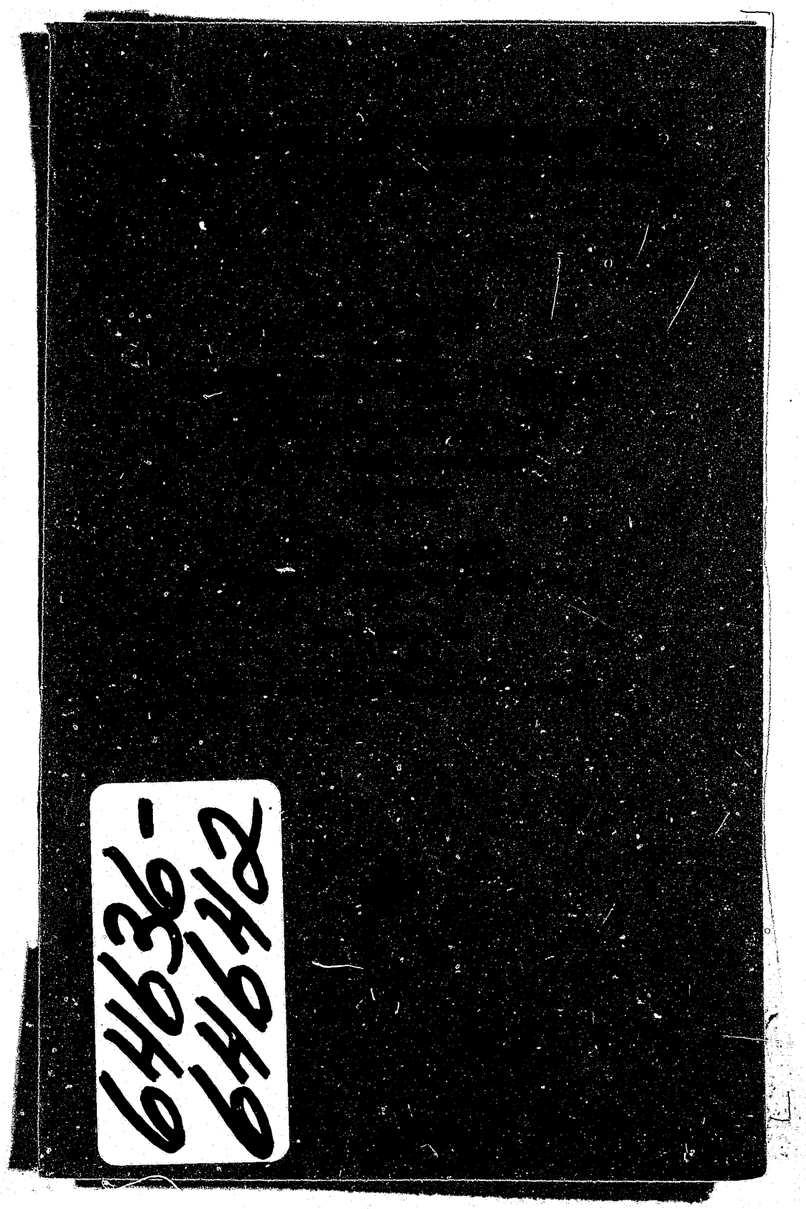

CONTENTS

APPENDIX

PART 1.—ADDITIONAL STATEMENTS AND CORRESPONDENCE

WITNESSES BEFORE THE SUBCOMMITTEE HEARINGS

[1] These materials may be found in the files of the Subcommittee on the Constitution.

[1] These materials may be found in the files of the Subcommittee on the Constitution.

STATE ORGANIZATIONS

CITIZENS STATEMENTS

PART 2.—NEWSPAPER AND NEWSLETTER ARTICLES

PART 3.—REPORTS AND STUDIES

[1] These materials may be found in the files of the Subcommittee on the Constitution.

PART 4.—COURT CASES AND LAW REVIEW ARTICLES

PART 5.—SPEEDY TRIAL ACT LEGISLATION AND AMENDMENTS

[1] These materials may be found in the files of the Subcommittee on the Constitution.
[2] Tentative printing for vol. 47, 1979, not available to the public at the time of this hearing.

64637

PREPARED STATEMENT OF PHILIP HEYMANN

Mr. Chairman and Members of the Committee, It is a great pleasure to appear before you to present the Department of Justice proposals for Amendment of the Speedy Trial Act of 1974. These proposed amendments have been formally introduced as S. 961.

As you are well aware, this is a critical juncture in the life of this important piece of legislation. After a four-year period of phasing in progressively narrower interim time limits within which the various stages of a federal criminal prosecution must occur, the final time limits will go into effect in less than 60 days, on July 1, 1979.

These final time limits are: (1) thirty days from arrest to the filing of a charge with the court; (2) ten days from filing to arraignment on the charge; and (3) sixty days from arraignment to trial. These time limits can be extended by excluding certain periods of delay as specified in the Act. When the Act becomes fully effective this July, the sanction for exceeding the statutory time limits, after deducting excludable periods, will be mandatory dismissal of the action with or without prejudice to reprosecution at the discretion of the court.

The Department's legislative proposals amend the Act in a manner consistent with the intent of Congress to safeguard the speedy trial rights of criminal defendants by expanding the Act's final time limits to require that a defendant be charged within 60 days of arrest, and that trial begin within 120 days of the filing of the charge. This latter interval includes the period from filing of the charge to arraignment that is now separately treated in the Act. The penalty of dismissal will continue to apply, as under the current law, to cases that exceed these time limits. It is an important part of this new scheme to note that defendants detained pending trial and those designated "high risk" by the prosecutor will not be subject to these somewhat longer time limits. These special cases will continue to be subject to the shorter time limits.

Before I discuss the merits of these proposed amendments, I would like to clearly state that the Department supports the Act's major objectives.

We support the interest expressed by the drafters of the Act in assuring the sixth amendment rights of all criminal defendants including preventing oppressive pretrial detention, limiting the possibility that the defense of the accused will be impaired, and minimizing the anxiety, public scorn, and suspicion created by unresolved charges.

We support the Act's recognition of the societal interest in providing a speedy trial to prevent further criminal activity by those charged while awaiting trial.

We support the Act's efforts to minimize the unfairness and expense to the defendant and the community of keeping an individual in jail for lengthy periods of time pending trial.

Finally, we strongly support the need to balance the above interests against the necessity of permitting adequate trial preparation for defense counsel as well as for the prosecutor.

It is this last interest that most concerns the Department under the current law. Our experiences in trying to comply with the Act's decreasing time limits and the available data clearly indicate that as currently written the structure and length of the final permanent time limits do no represent a realistic and efficient solution for properly achieving this essential balance.

Since its enactment, the Department has made considerable, good faith efforts to comply with the time limits mandated by the Act. While these efforts have resulted in substantial success, they have also clearly demonstrated the limits of our ability to comply with the current 100-day time limits and the costs that we will have to accept if we are forced to so comply.

Examination of case processing by the United States Attorneys' Offices shows a steady decline in the time it takes to bring cases to trial. While comparable figures are not easily obtained, this can be clearly seen by reviewing the data available through the reports of the Administrative Office of the United States Courts (AOUSC) and a recent study by the Department's own Office for the Improvements in the Administration of Justice (OIAJ). From such a review, we can see that in the past 5 years there has been a 32 percent reduction in pending criminal cases while only a 15 percent reduction in criminal filings. This reduction in pending criminal cases certainly suggests more rapid handling of criminal matters.

More specifically we know that the overall length of time to dispose of cases ending in guilty pleas has decreased in the past 5 years from an average of 90 days to an average of 78 days. (Neither figure takes into account periods of excludable time.)

Finally we know from the OIAJ study that overall compliance by the United States Attorneys' Offices, measured under the 100-day time limits, is 83 percent, a substantial increase over the figures cited in earlier studies and during the original 1974 hearings of the Speedy Trial Act. It should be noted that this decrease in processing time was occurring at a time when the emphasis was on developing more complex cases in the priority areas of white-collar crime, narcotics, and organized crime. Viewed in this light, the United States Attorneys' success in decreasing case-processing time should certainly be considered substantial.

Further, in support of these efforts, the Department has issued instructions and guidance on complying with the Act in the United States Attorneys' Manual and the United States Attorneys' Bulletin; it has held briefings for new United States Attorneys and Assistant United States Attorneys; the United States Attorneys have taken an active part in the planning groups in every judicial district; we have actively cooperated with the judicial committee appointed by Judge Rubin to study the Act; two senior attorneys have been made available to answer telephone inquiries from attorneys in the field; and officials of the Department have been designated to serve on Bar Association committees concerned with Speedy Trial problems. In addition, the Attorney General is in the process of issuing instructions to the investigative agencies regarding expediting the preparation of laboratory analyses and case reports particularly when an arrest has been made or an indictment or information has been filed. This is being done as a result of the OIAJ study which cited this problem as a major source of delay.

Finally, in the spring of 1978, the Department commissioned an in-depth study by a team of lawyers and statisticians of the problems being confronted under the Act. I would ask that a copy of that report to the Attorney General from the Office for Improvements in the Administration of Justice (OIAJ), be made a part of the record of this hearing. It has previously been made available to your staff and in draft to the General Accounting Office (GAO) team studying the effect of the Act. James McMullin, previously with OIAJ, is here with me today to answer any questions you might have regarding this study.

However, in addition to substantial improvement in case processing, our experience in trying to comply with the demands of the Act have also clearly demonstrated the limits of our ability to comply with the Act's final time limits and the costs of such compliance if the Act is not amended.

The limits are most dramatically seen in terms of the dismissal potential of cases on the criminal docket. Of course without the dismissal sanction in effect,

it is not possible to be sure how the system will respond. However, the OIAJ study does present a "worst-case" picture indicating how many cases are not now meeting the 100-day limits at each stage (and thus must be brought into compliance) and what type of cases they are.

The study estimates that, if the Speedy Trial Act's permanent time limits and dismissal sanction had been in effect in the year ending June 30, 1978, the courts would have been required to dismiss approximately 5,174 felony cases, or 17 percent of the criminal cases to which the provisions of the Act apply that were terminated during that period. On the basis of the distribution of different types of felony offenses in the OIAJ study sample, it appears that cases involving burglary, larceny and stolen property would be dismissed most frequently (23.4 percent), followed by fraud and embezzlement offenses (17.5 percent), forgery and counterfeiting offenses (13.9 percent), drug-related offenses (13.7 percent), weapons and firearms offenses (13.6 percent), miscellaneous other offenses (11.2 percent), violent personal offenses (6.2 percent), and unlawful flight to avoid prosecution (.5 percent). While it is likely that the system will not allow 5,000 of this type case to be dismissed, this "worst case" figure graphically illustrates that the dismissal risks are very high.

As I will discuss briefly later, the costs of complying with the 100-day limit will be felt in other ways also. Cases will go to the grand jury or to trial inadequately prepared, or the system will develop ways to get more time to prepare cases, such as imprudently modifying plea bargaining practices, increasing the number of declinations, or where possible, postponing arrests to avoid "starting the clock" on the arrest-to-arraignment period.

The Department believes that the risks are too high, the potential costs too great, to allow the permanent time limits and the dismissal sanction to go into effect on July 1.

Moreover, our experience with the Act and with the practicalities of working in the Federal justice system strongly support the specific changes we have proposed. From what we now know about the limits and costs of compliance with the 100-day limits, it is clear that these proposed amendments more effectively and efficiently accommodate the objectives of the Act with the need to permit time for both sides to adequately prepare their cases. Cases will be processed within quantified limits fixed by the Congress rather than on a discretionary basis determined by the desires of the parties in the individual trial. There will be an overall court and prosecutor and defense bar effort to bring systems concepts to the management of litigation dockets. At the same time, both sides will be assured adequate time to prepare for trial, and will not be forced because of scheduling problems to substitute unprepared or hastily prepared counsel at the last minute, or forego employment of counsel of choice. Pretrial detention and pretrial crime will be minimized, and the number of dismissals and the attendant waste of resources invested will be reduced.

Let me now describe more specifically the amendments we have proposed.

Of central importance is the Department's proposal in section 6 of its bill to make a permanent part of the Act the special interim provision of section 3164 which requires trial within ninety days from the beginning of continuous pretrial detention period of those detained awaiting trial and also of defendants designated "high risk" by the attorney for the government. Maintaining stricter time limits for these two classes of defendants insures that two of the most important objectives of the Act will be met: lengthy pretrial incarceration will be prevented and the opportunity of persons on bail to commit further crimes will be minimized.

Excluding these two classes of defendants substantially deals with the hardest cases. To give you some idea of the size of at least one of these groups: In 1978 37.8 percent (15,631) of all defendants disposed of (41,404) were detained for some period of time. Of these 46.6 percent were detained for 10 days or less. I don't have information on the number of cases designated "high risk."

In addressing the other objectives of the Act and the remaining cases not covered by these two exclusions, and upon consideration of the fact that the current limits were established with the recognition that they were ambitious and might possibly need adjustment, the Department has proposed an increase in the allowable time limits which it believes preserves the Act so as to achieve the same objectives desired by the drafters but more efficiently and realistically.

Section 2 of our bill amends 18 U.S.C. 3161(b) to enlarge the time allowed for the filing of an indictment or information following the arrest of a defendant,

or the service upon him of a summons based upon a complaint from thirty to sixty days. This provision would not apply to defendants detained pending trial or to those designated high risk.

In making this proposed change, we have asked ourselves what is the amount of time required to properly handle a case begun by arrest? Why do we need more than thirty days?

Roughly 30 percent of all cases are initiated by arrest. While arrests may occasionally be postponed, sometimes arrests are required; for example, a defendant is caught in the act, or an arrest is necessary to prevent further crimes or the defendant's flight from the jurisdiction, or the destruction of evidence or contraband. Where the arrest is unavoidable, the United States Attorneys are having difficulty completing their investigation within the 30-day limit. This is not only because of limited staff, but more importantly because 30 days is simply an inadequate period of time to do a professional follow-up investigation. These cases are not usually fully prepared at the time of arrest, and often a great deal must be done to properly and fairly investigate and prepare the case for indictment. However, it should be understood, this period is used not merely to prepare for indictment but also for seriously considering whether to indict or not. Thus not only will cases be inadequately prepared, but some persons may be indicted who might have been exonerated by a more thorough grand jury or police investigation.

Listing all the tasks that must be completed by the prosecutor during this stage to make indictment decisions and to prepare grand jury presentations, and which are not subject to the Act's excludable time provisions, makes thirty days appear a very short time indeed. This is even more apparent when viewed in light of the fact that each Assistant United States Attorney handled an average of 123 cases in 1978.

Time is needed to collect and review investigative reports and other evidence. In some of the less urban states, FBI and other investigative agents are housed all around the district. Collecting reports held by these agents can take many days. Once these reports are collected and reviewed, time is needed for investigators to follow out leads, for prosecutors to conduct a thorough exploration of the case in the grand jury, and for chemists and other experts to complete their scientific analyses. The OIAJ study cited problems in obtaining laboratory reports analyzing such things as handwriting samples, fingerprints, or other physical evidence as a major source of delay. These laboratory reports often routinely take four to six weeks to get back.

Sometimes the arrested defendant has been involved in a chain of related offenses such as passing counterfeit money, forging government checks, or dealing in stolen property. Tracing the various items or documents, and interviewing the potential witnesses all takes time.

At other times the arrested person is a minor figure, such as a drug courier, or only one of a group of car thieves or bank robbers, and while the case against him may be clear, pursuing leads, enlisting his cooperation, etc., all require more time than is currently allowed.

Investigating these situations may involve traveling to other judicial districts all across the country especially in complex white-collar crime, or multi-defendant cases.

There may be a need to obtain records from the telephone company or credit card charge receipts. Moreover, under the recently enacted Financial Privacy Act, there is an automatic minimum ten-day period before the government can gain access to financial records, during which time the accountholder may move to quash the process. These can easily take several weeks to obtain, and then there is the need to carefully review these records, follow up on any further leads that this review might suggest, and finally to prepare these materials for presentation to the grand jury.

Following leads may involve securing search warrants to locate evidence or contraband, securing a handwriting order from the court, or it may require using the grand jury to subpoena witnesses to testify in an effort to secure sufficient evidence to finally bring a supportable indictment.

In addition to the need for time to pursue this careful step-by-step process of identifying and following each lead, other tasks impinge on the prosecutor's time. He must schedule grand jury time to present his case within the prescribed time limits. Often this is a problem in districts where grand juries are not in session daily. In some districts, for example, the grand jury only meets for a

few days each month, and convening them more frequently will present some serious scheduling problems.

The prosecutor may enter into plea negotiations with the defendant at this time. The time spent in negotiating and considering plea offers was also cited by the OIAJ study as a major source of delay.

Given all that needs to be done within this period to properly screen and prepare cases for presentation to the grand jury, sixty days is clearly reasonable and at the same time protects the interests of the defendant and the public.

Of course the next question we should address is what happens if the 30-day limit is maintained and the sanctions allowed to go into effect? Again the experiences of the last few years suggest that forcing compliance within the 30-day limits will not come without certain costs.

The most obvious cost is the risk of dismissal of some large number of cases. While we can't be sure how much better the system will perform once the dismissal sanction is in effect, the OIAJ study estimates non-compliance with 30-day limits in 17.5 percent of the 9,169 cases begun by arrest for the year ending in June 1978. Of course under the actual permanent time limits and with the dismissal sanction in effect, performance will improve, but with non-compliance in some districts estimated to be as high as 50 percent to 65 percent, some dismissals must be expected.

And what are the costs of bringing about high levels of compliance so as to avoid large numbers of dismissals? One cost we are seeing already in some districts (cited in the OIAJ study) is prosecutors not taking all the proper steps in investigating each case and bringing cases to the grand jury without complete preparation. Some AUSAs have used "holding" indictments and followed up thereafter with superseding indictments. Others have only been able to include a limited number of violations in the indictment since the complete investigation could not be concluded in 30 days.

Another way we can expect prosecutors to adjust to the stricter limits is by adjusting the ssytem to make the cases fit. The OIAJ study cites examples of this adjustment taking place already. It found that "many United Staes Attorneys have instructed law enforcement agencies in their districts to avoid making arrests before indictment whenever possible, notwithstanding the existence of clear, or even abundant, probable cause. The reason is obvious: whereas an arrest 'starts the clock,' an investigation not interrupted by an arrest may continue without artificial limitation until completed. Apparently, the practice of deferring arrests is not uncommon. AOUSC data show that for the twelve months ending on June 30, 1978. as compared to the previous year, the number of defendants . . . whose arrests preceded formal charge . . . decreased by more than half from 18,849 to 9,169.

One consequence of the deferral of arrests is that persons who might otherwise be detailed remain at large and may continue their criminal activity. Another result is that, in the absence of an arrest, no preliminary hearing to establish probable cause is required. This leads to complaints of defense attorneys entering a case at arraignment that they have insufficient time within which to learn about the case, consult with the client regarding the advisability of a guilty plea, or prepare appropriate pretrial motions.

While the evidence is unclear, the increase in declinations has been suggested as related to speedy trial concerns. The primary cause is probably the recent policy directive of the Attorney General with respect to federal prosecutorial priorities, but speedy trial time limits to the extent they impact at all on declination policy will act to increase the number of declinations. At the same time the Act will increase the pressure on the system to bargain cases out of the system.

The situation in the smaller districts with regard to the Act's provisions requiring prompt indictment has necessitated the holding of many more grand jury sessions than were heretofore customary, causing great inconvenience to the jurors who often must travel considerable distances to centrally located courthouses at great expense to the government. On the other hand, some U.S. Attorneys complain that their assistants waste much time travelling to grand juries—now held more frequently—in the several far-flung divisions of their districts.

U.S. Attorneys in rural districts with widely spaced divisions complain of instances where defendants, forced to travel hundreds of miles from their home for arraignment, are often effectively denied cousel of their choice.

Section 3 of the Department's bill will merge the ten-day interval now provided by 18 U.S.C. 3161(c) for arraignment after filing of an indictment or information

with the sixty-day arraignment-to-trial interval, and enlarge the consolidated interval to 120 days. The section also provides that a trial cannot be scheduled sooner than thirty days after filing of an information or indictment, without the consent of the defendant. The enlarged time limits do not apply to defendants detained pending trial or to those designated "high risk."

Again we should examine what amount of time is required to properly prepare a case for trial after the indictment has been brought and, why we are recommending doing away with the separate indictment-to-arraignment interval. In any case, you will ask, why isn't 70 days for this combined period sufficient?

While the Department does not dispute the principle that arraignment should take place as soon after the indictment is brought or the information is filed as is possible, treatment of this period as a separately timed interval has created problems unforseen at the time of its enactment, not the least of which is the harshness of requiring dismissal of the case imply because the arraignment took place on the eleventh day.

The problems seem to be the greatest in large geographic districts. In order to meet the 10-day limit, intolerable burdens of travel and expense have been placed on judges and court personnel, members of the bar, the United States Attorneys' staffs and defendants who have shuttled back and forth in order to meet the 10-day limit. People have had to travel as much as 350 miles a day for a 15 minute pro forma hearing. Counsel have in several cases resigned from the case after arraignment when trial was set in another place. The disruption of schedules and the expense have been unacceptable, with the deadlines still impossible to comply with in some instances.

Moreover, because of the short period of time allotted, defense attorneys do not have an adequate time to evaluate the case prior to the arraignment and therefore pro forma "not guilty" please are entered. Many defendants appear at 10-day arraignments without counsel because the time to obtain counsel is too short. In these cases additional court appearances are often necessary to change a plea or after counsel is obtained further complicating scheduling problems.

Merging the indictment-to-arraignment interval with the arraignment-to-trial interval allows for the flexibility necessary to avoid some of these problems without adding to the prospects for delay. If more time were needed for a defendant to obtain counsel of his choice to appear at arrangement, it would be available. Judges, court personnel, and lawyers would not need to travel hundreds of miles to meet awkward arraignment dates because of the Act's strict limits. Yet the pretrial period as a whole would not have to be enlarged.

The Department proposal to enlarge the time for this combined interval from 70 days to 120 is based largely on the experiences of United States Attorneys that the current limits are wholly insufficient for many of the more complex cases, such as those involving fraud, white-collar crime, public corruption, organized crime, income tax cases, conspiracies. These are the cases on which United States Attorneys are currently concentrating their prosecutorial resources. The number of these cases has increased to the point where they are hardly the exception in the federal courts. Yet the sixty-day time limit, perhaps adequate for the simple narcotic sale case, is as fully applicable to these complicated cases as it is to the simple cases. The only relief is under Section 3161(h)(8). A number of judges, however, restrict this section to the extraordinary cases. Consequently the current sixty-day limit is completely inadequate for what has become the nonexceptional case.

A recent fraud case handled jointly by Criminal Division and USA personnel illustrates a number of the tasks and problems that are of necessity dealt with in these complex cases in the federal system.

On October 5, a 17-count indictment charging two defendants with mail fraud, securities fraud, and false statements to the government was filed. At the arraignment on October 13, the defendants and the government were given 20 days in which to file motion. The defense filed 15 motions. Oral argument was set for December 15.

In the interim, the government had to index and copy the 480 exhibits (1300 pages) it intended to introduce, and index 38 boxes of documents that were the background material for certain summaries to be offered at the trial. On December 1, the government filed a 92-page response to the defense motions, to which the defense replied on December 11, in addition to filing two new motions. At the oral argument the government was ordered to file all its exhibits within three days together with the indices and with exhibit lists, and the defense was given similiar

directions. On December 20 the government filed, in addition to other motions, 48 jury instructions and a trial memorandum.

Meanwhile, the FBI collected and analyzed numerous handwriting samples, and prepared five pages of stipulations on bank records. An accounting expert analyzed the flow of items between 12 bank accounts while a computer summary of 600 second trust mortgage notes was created. 53 subpoeans for non-document witnesses and 12 custodians of bank records were prepared and served in 10 states.

During this period a plea was taken from a defendant in a related case, and immunity discussions were held. A consensual monitoring of a government witness who had been impropertly contacted was arraigned, and *Brady* and *Jencks* material was culled, copied, and readied for turnover.

The judge had wanted to try the case in December but could not because defense counsel had a schedule conflict. Neither could he set it as he wished for the second of January because of the number of witnesses coming from out of state. It commenced on the 8th, and ran eight days. Two attorneys, one from the Department and one Assistant U.S. Attorney, a paralegal, and an attorney-investigator from the SEC devoted most of their time to this case, from the beginning of October, right through the Thanksgiving and Christmas holidays.

Perhaps most significant is that the work described above, although unavoidable, did not go to the kind of effort we generally consider trial preparation: the reinterview and testimony preparation of the witnesses for the case-in-chief and the readying of cross-examination. The proliferation of pretrial motions, the increase in discovery, the collateral questions that must be aired before trial, and the growing complexity of the criminal case make it more and more difficult to meet the strict deadlines imposed by the Act.

In addition to the pre-trial activities illustrated by this case, there is often a need to arrange for additional investigation where, for example, an alibi defense or a claim of insanity is being offered. Identifying *Brady* material can often require presenting it to the court for *in camera* inspection to determine whether it is to be considered exculpatory. Extensive travel to interview witnesses or examine records or other evidence is especially likely in multi-district cases.

Special emphasis should be made of the fact that the problems created by these strict time limits apply at least equally to defense counsel as they do to prosecutors. In fact more often in these more complex cases, defense counsel needs are greater than ours because we have at a minimum prepared the case for presentation to the grant jury. In many of the more complex cases, especially in the white-collar crime area, we have spent considerably more time investigating the case. Sometimes the pre-indictment investigation can take years during which time the prosecutor has accumulated masses of documents on which he has spent a great deal of time and energy in review.

Equally serious problems arise for defense counsel in trying to rapidly become familiar with very esoteric federal laws or specific standard business practices and operating procedures. Often there is a need to become expert in the details of the particular regulations of a federal agency.

Defense counsel also has the particular problems, raised most often in multi-defendant cases, of potential conflicts in representation and difficulties in coordinating among the lawyers on the defense team. Each of these special problems is supported by the OIAJ study.

It is in recognition of the special problems often faced by defense counsel that the Department has included a provision in its bill requiring a minimum of 30 days for defense preparation. This insures the defendant of some minimum preparation time even in the simplest case.

Given these needs and the fact that both prosecutors and defense counsel must accomplish all this while handling dozens of other cases and matters, a combined 120 day indictment-to-trial interval is reasonable and at the same time protects the interests of the defendant and the public.

As with the arrest-to-indictment time limits, if Congress maintains the stricter limits of the current law, compliance will come only with certain costs.

The dismissal risks for this time period are also high. While the system will undoubtedly perform better once the dismissal sanction is actually in effect, noncompliance levels are sufficiently high now that some dismissals must be expected. The OIAJ study estimates that 18.6% (5469) of the 29,400 cases arraigned were not tried within 60 days of arraignment and would have to be brought into com-

pliance to avoid dismissal. The highest single-district non-compliance rates were estimated to be over 50%

As was the case with the arrest-to-indictment period, one major cost of bringing these cases into compliance with the 60-day time limits to avoid dismissal will certainly be a decline in the quality of the preparation capable of being done on cases going to trial. Often defense counsel's first contact with the case is at or shortly after arraignment. As indicated in the above example, the short time limits force the court to set early dates for the filing and hearing of motions and for the trial. Counsel must fully familiarize himself with the case, complete any relevant legal research, prepare his motions, meet with witness and arrange for example as needed in very short periods of time. Excludable time, especially under the discretionary h(8) rule cannot be counted on.

The prosecutor also faces a difficult problem in preparing for trial b cause of the short time frame. While most cases will end in a plea rather than go to trial, full preparation of these cases by the prosecution where they can be identified is not a very efficient use of prosecutorial time or resources. However because the time limits are so short, plea consideration regularly take place close to the trial date. This results in a situation where most cases don't plea out until close to the trial is about to begin. Prosecutors, unable to take a chance on which cases will end in a plea are forced to fully, but often unnecessarily, prepare every case. Such "over-preparation" forces each assistant United States Attorney to devote much attention to each of his cases because he can't predict which ones will plea out. As can be imagined, such a situation spreads the Assistant's resources very thinly and inevitably results in less preparation than is desirable in the few cases that actually do go to trial.

Scheduling conflicts for prosecutors are inevitable, and judges, faced with the strict time limits, have refused to grant a continuance where the Assistant assigned the case is in trial before another judge. This has forced the government to reassign the prosecution of the case to another Assistant. This is done even though the new Assistant assigned to the case, unlike the first Assistant, has no familiarity with or knowledge of the case. The result is an unjustified duplication of work and often a lack of preparation of the reassigned case.

The OIAJ report indicates that pressure on prosecutors to dispose of more cases by plea bargains will increase because of the Act. This is a problem in that this pressure will potentially lead to plea offers more attractive to the defendant as an inducement to disposing of the case.

The OIAJ report and other sources also indicate that in multi-defendant cases the Act has increasingly caused some courts to sever defendants, so that the defendant whose case is moving slowly does not hold up the trial of his co-defendants. Section 3161(h)(7) allows "A reasonable period of delay when the defendant is joined for trial with a codefendant as to whom the time for trial has not run." Judges faced with the pressure of the time limits and the general uncertainty of the exclusions, however, have granted severances to avoid speedy trial problems, notwithstanding this exclusion. For example, severances have been granted where one defendant had numerous pretrial motions pending; severance has been granted where one defendant underwent a mental examination; severence has been granted where an interlocutory appeal was taken from a suppression motion affecting only one defendant. Thus, the Act, rather than speeding up the process in all respects, may cause more cases and more trials with greater inconvenience to the witnesses and cost to the taxpaying public, in addition to consuming needlessly court and attorney resources.

Some U.S. Attorney report that the assignment of "firm" trial dates to individual cases has not proved successful either. For any one of a number of reasons, the dates have had to be passed, and the cases rescheduled. The rescheduling is difficult because all available time for a considerable period is ostensibly spoken for. If the limitations prohibit extended delay in the case in question, a number of other cases must be "bumped" to make room for it, creating Speedy Trial Act problems where they may not have previously existed.

In order to meet the deadlines, certain expedients have been adopted. For example, a 60-day time limit, including any excludable delay, does not mean that most cases will be set for trial 50 to 60 days after arraignment. Rather, in recognition of problems with the court's calendar the prior obligations of the trial participants, and the uncertainties inherent in scheduling busy people into a crowded calendar demand that trials often be set only 20 to 40 days after arraignment.

These short time limits reduce scheduling flexibility and, therefore, increase the frequency of case reassignment among judges and AUSA's. If the judge assigned to a case cannot preside over the trial as scheduled because of illness, vacation, or another extended trial and the case is approaching the time limits, another judge will have to be assigned to the case. Further adjustments can be seen as in districts where lengthy trials are commenced and interrupted so that others may be timely commenced. In several districts, cases were routinely recessed after the impaneling of the jury. In short, none of the several calendar systems provides an adequate response to the Act's time provisions.

In addition to these proposed changes in the allowable time limits, the Department's bill will also effect the following improvements in the Act:

Section 3 will also provide that trial before a magistrate upon a complaint must be commenced within one hundred twenty days of the filing of the defendant's consent to be tried by a magistrate. The current Act does not provide limits for magistrates' trials of complaints. The amendment will impose the same limitation as in those cases in which an indictment or information has been filed.

Secton 4 will provide time limitations for trial upon indictments ordered reinstated by an appellate court overruling a district court's dismissal. The treatment is equivalent to that currently provided in section 3161(e) for the analogous case of retrial necessitated by appellate proceedings, which take into consideration the special problems frequently occasioned by the length of time it takes to complete appellate proceedings and the consequent difficulties encountered in preparing for trial. The amendment also makes it clear that the excludable delay provisions of section 3161(h) are applicable as well as the sanctions of section 3162.

Section 5 will provide for exclusion of the time reasonably necessary for the processing of cases where the mental competency or physical capacity of the accused, or his eligibility for treatment under the Narcotic Addiction Rehabilitation Act. 28 U.S.C. 2902, is drawn in question. The current provisions of section 3161(h)(1)(A) and (B) are easily susceptible of being interpreted in an unreasonably restrictive fashion, requiring unnecessary resort to section 3161(h)(8), and resulting in possible errors or injustices, and unnecessary litigation.

Section 5 will also provide for the exclusion of all time reasonably necessary for and routinely required to make, respond to, contest and decide pretrial motions, thus avoiding unnecessary resort to and litigation under and about the exercise of authority under section 3161(h)(3).

Section 6, in addition to providing for priority of disposition for persons either detained awaiting trial or designated by the United States Attorney as being of high risk, will also resolve the conflict between the circuits in the interpretation of the current interim provision by expressly stating that the delays excludable from computations under Sections 3161(b) and (c) enumerated in Section 3161(h) are excludable in the computation under this Section as well. The Act does not explicitly state that the Section 3161(h) exclusions apply to the Section 3164 limitations. On the other hand, it does not affirm the contrary. In *United States* v. *Tirasso*, 532 F. 2d 1298 (C.A. 9, 1976) the court of appeals held the exclusions inapplicable, while the contrary view was reached in *United States* v. *Corley*, 548 F. 2d 1043 (C.A.D.C. 1976), as well as in *United States* v. *Mejias*, 417 F. Supp. 579 (S.D.N.Y. 1976) aff'd on other grounds sub nom. *United States* v. *Martinez*, 538 F. 2d 921 (C.A. 2, 1976), and *United States* v. *Masko*, 415 F. Supp. 1317 (W.D. Wis. 1976). The bill adopts the more rational *Corley* interpretation, since it can hardly have been the intention of Congress to force the release of an alleged felon upon the expiration of 90 days from arrest, where much of the 90 days was consumed by commitment or a competency examination, removal hearings or pretrial motions or appeals. Amendment of the Act to make the interim period clearly subject to the exclusions of Section 3161(h) has been recommended by 26 of the district speedy trial planning groups, by the Judicial Conference of the United States and by the Director of the Administrative Office of the United States Courts. Section 7 will amend the analysis at the beginning of the chapter to conform to the modifications wrought by Section 6.

Section 8 will provide an effective method for dealing with judicial emergencies, in addition to the cumbersome procedures now provided by Section 3174, by vesting executive authority in the chief judge of the district. The proposal is identical with that of the Judicial Conference Committee on the Administration of Criminal Law.

In conclusion I urge you to report favorably to the Senate on the bill the Department has offered. The enlargement of the time limits will assure you that most federal cases will be tried promptly without injury to public justice or the rights of the defendants. Recidivistic crime will be reduced and unwarranted dismissals kept to a minimum. The Department's bill is in large measure consistent with the proposals of the Judicial Conference and the recommendations of the district planning groups.

Mr. Chairman, this concludes my prepared remarks, and I shall be pleased to try to answer any questions you may have.

Senator BIDEN. We will recess until 2:30 in room S–126 because the Senate will be in session and there probably will be voting. We will be off the floor of the U.S. Senate, S–126.

[Whereupon, at 12 noon the committee adjourned, to reconvene at 2:30 p.m. on the same day.]

AFTER RECESS

Senator THURMOND. The committee will come to order.

Judge Harvey, we will start now, so that you can be heard, and not keep you waiting any longer. Your statement will be read by all the other members.

You may proceed.

END