U.S. Department of Justice
Office of Legal Policy
Federal Justice Research Program

The Impact of the Speedy Trial Act on Investigation and Prosecution of Federal Criminal Cases

June 1985

98295

Abt Associates Inc.
55 Wheeler Street, Cambridge, Massachusetts 02138
Telephone • Area 617-492-7100
TWX: 710-3201382

AAI #85-36

THE IMPACT OF THE SPEEDY TRIAL ACT ON INVESTIGATION AND PROSECUTION OF FEDERAL CRIMINAL CASES

by

Nancy L. Ames
Theodore M. Hammett
Lindsey D. Stellwagen

This report was sponsored by the United States Department of Justice, Office of Legal Policy, Federal Justice Research Program under contract number 3C00102. The views and conclusions contained in this document are those of the authors and should not be interpreted as necessarily representing the official policies, either express or implied, of the U.S. Government.

TABLE OF CONTENTS

TABLE OF CONTENTS

(continued)

LIST OF EXHIBITS

LIST OF EXHIBITS

(continued)

ACKNOWLEDGEMENTS

In addition to the co-authors of this report, I would like to express my appreciation to a number of other staff who helped carry out this study. Kenneth Carlson participated in overall project design and conducted the analysis of FBI data in order to test the impact of the Act on the timing of the charging decision. Jan Chaiken reviewed the draft and suggested a number of changes that helped improve its clarity. Ellie Lee was responsible for setting up the case records data base for our analysis of arrest-initiated cases and for producing descriptive statistics. Beverly Lee and Margaret Levine conducted site visits and contributed to the site reports on which the qualitative findings are based. Monique Sullivan and Elizabeth Shapiro helped proof and edit various drafts of the document. Mary-Ellen Perry was primarily responsible for producing and reproducing this final report.

I would also like to thank our two project consultants--Charles Wellford, Director of the Institute of Criminal Justice and Criminology at the University of Maryland, and George Bridges, Assistant Professor, University of Washington--for their help in designing and carrying out this study. Their careful review of the draft document helped improve the final product considerably.

Special thanks also to Helen Lessin Shaw and Carolyn Boyle of the Federal Justice Research Program for their assistance throughout the project and for ensuring that both the initial design and final report received sound external review. Richard Sonnichsen of the FBI also was extremely helpful in formulating study plans, soliciting cooperation from the local field offices, obtaining access to FBI data, and critiquing our draft final report.

A number of other individuals within the Department of Justice also contributed insightful comments on the draft final report. These included John Beal and Susan Nellor of Main Justice and Bernie Auchter, Cheryl Martorana, and Tom McMorrow of the National Institute of Justice. James McCafferty of the Administrative Office of the U.S. Courts also provided data tapes and statistics that were instrumental to our study findings.

Finally, we would like to express our appreciation to all of the attorneys, agents, judges, clerks and other staff in the study districts for their cooperation during our site visits and their assistance in supplying needed data. Without their help, the study could not have been conducted.

Nancy Ames

Cambridge, Massachusetts

EXECUTIVE SUMMARY

The Speedy Trial Act (Pub. L. 93-619), passed by Congress in 1974, establishes strict time limits for processing all federal criminal cases. One of the most important and innovative concepts of the Act is its recognition of the public's right to have defendants speedily tried. Accordingly, the limits are triggered independently of requests by the defendant.

The Act provided for a four-year phase-in period during which the time limits for case disposition were progressively shortened. Throughout this interval, districts were to plan for implementation and to report on any problems in achieving compliance. At the end of this period, Congress modified the original Act through passage of the Speedy Trial Act Amendments Act of 1979 (Pub. L. 96-43).[1]

The amended Act established two basic time limits:

- arrested defendants must be indicted within 30 days of their arrest; and
- trials of all defendants must commence within 70 days of their indictment.[2]

These time limits are not hard and fast, however. The amended Act specifies events that create excludable time periods to provide necessary flexibility in case processing.[3] In addition, the Act contains a more general exclusion that allows the judge to order a continuance if, in his or her judgment, it would serve the "ends of justice." The Speedy Trial Act provides that cases that exceed the time limits may be dismissed with or without prejudice. While the dismissal sanction was to have become effective on July 1, 1979, the 1979 amendments delayed the effective date until July 1, 1980.

The amendments also called for an impact study of the implementation of the Act upon the offices of the United States attorneys. That study was conducted by Abt Associates Inc. under the sponsorship of the Federal Justice Research Program (FJRP) of the Office for Improvements in the Administration of Justice, U.S. Department of Justice, and the final report was published in the spring of 1980.[4] The Abt Associates' study predicted that compliance with the time limits would be possible in the overwhelming majority of cases, assuming that cases were monitored, that accurate records were kept of "automatic" excludable time periods, and that "ends of justice" continuances were used where necessary and appropriate. The study's predic-

tions have largely come to pass: few cases have been dismissed by the court on speedy trial grounds.[5] At the same time, the 1980 study suggested a number of unintended consequences of the Act on the investigation and prosecution of criminal cases.

PURPOSE OF THIS STUDY

The present study, which was also commissioned by FJRP, was designed to examine the impact of the speedy trial limits on investigative and prosecutorial policies and practices, now that the sanctions are fully in place and districts have had several years' experience under the Act. The central question addressed was: "To what extent, if any, has the Speedy Trial Act affected the ability of federal investigators and prosecutors to process criminal cases effectively?" More specifically, the following issues were explored:

1. To what extent, if any, does the Act result in increased declination or deferral of cases to state and local jurisdictions in order to keep the case load manageable?

2. To what extent, if any, are prosecutors more reluctant to authorize arrests pre-indictment for fear of triggering the 30-day limit?

3. To what extent, if any, are prosecutors forced to present partially developed cases to the grand jury, dismiss cases prior to indictment, or take other measures to comply with the arrest-to-indictment time limit.

4. To what extent, if any, does the Act impede the ability of prosecutors to prepare fully for trial?

5. To what extent, if any, has the Act resulted in a change in plea negotiation practices or other forms of case disposition?

In addition, in the course of completing the study, we also examined the impact of the Act on the courts, defense bar, and overall processing of federal criminal cases.

STUDY METHODS AND LIMITATIONS

The findings reported here were drawn from a variety of data sources using a combination of research methods, including:

- a telephone survey of 17 U.S. attorneys' offices;

- on-site interviews with 90 individuals in six large and medium-sized federal jurisdictions, including:

  --the U.S. attorney or his designee

  --supervisory staff in each of the major units responsible for processing criminal cases in the U.S. attorney's office

  --at least one district court judge, a federal magistrate and staff of the court clerk's office

  --supervisory staff in the local FBI, DEA, ATF, Postal Inspection Service, and Secret Service field offices

  --supervisory staff within the federal defender's program and distinguished members of the private defense bar;

- examination of 546 arrest-initiated cases in the six study jurisdictions (all of the defendants were arrested during the latter part of 1983); and

- analysis of data supplied by the Federal Bureau of Investigation (FBI) on 700 robbery and embezzlement cases drawn from the six study districts.

In addition, a mail survey was conducted in all 94 U.S. attorneys' offices to examine the use of Speedy Trial Act waivers, and published court statistics were utilized to supplement case records data collected on-site.

Since much of the data reported here is drawn from the six study jurisdictions (California Northern, Colorado, Florida Southern, Illinois Northern, New Jersey, and New York Southern), the findings must be interpreted with some caution. Generally, we have found that smaller districts with lighter case loads have an easier time complying with the Act's limits, assuming that the grand jury meets often enough to accommodate the 30-day arrest-to-indictment limit. The findings and conclusions reported here are generalizable primarily to large and medium-sized jurisdictions where the large volume of cases demands efficient case management and sometimes necessitates difficult choices in the way resources are allocated.

AUDIENCE FOR THIS REPORT

The immediate audience for this report is the U.S. Department of Justice, Federal Justice Research Program, as well as the staff of the Executive Office for U.S. Attorneys, other Department of Justice staff, and the staff of the various federal investigative agencies. It is intended to assist them in developing policy guidelines

and providing technical assistance to local field offices. The secondary audience for this report includes members of Congress and the federal judiciary; both should be interested in how the Act is working and whether there is room for improvement in the law or its interpretation. The wider audience includes federal, state and local investigators and prosecutors who must process cases within fixed time limits; state court administrators and chief justices; state and local policy-makers considering speedy trial legislation; and researchers and others interested in the problem of court delay reduction.

ORGANIZATION OF THE REPORT

Chapter 1 provides a detailed legislative history of the Speedy Trial Act, tracing the origins of this study. The next three chapters describe the impact of the Act on the various stages of case investigation and prosecution--from initial screening and charging decisions (Chapter 2), through indictment (Chapter 3), to disposition by plea, dismissal or trial (Chapter 4). Finally, Chapter 5 discusses the overall impact of the Act on case management from case initiation through disposition.

In the remainder of this Executive Summary, we outline the major findings and present our overall conclusions and recommendations. We first describe the ways in which the Act appears to be meeting its intended goals. We then discuss some of the Act's unintended consequences and offer some suggestions for reducing some of the remaining implementation problems.

FINDINGS

Intended Outcomes. Both the qualitative and quantitative data suggest that the Speedy Trial Act is, in large measure, meeting its stated objective: once cases enter the federal criminal justice system, they are disposed of fairly quickly under the Act.

During the arrest-to-indictment interval, U.S. attorneys' offices are able to comply with the Act in the overwhelming majority of cases. According to statistics published by the Administrative Office of the United States Courts (AO), compliance with the 30-day time limit is very high nationwide: 97 percent of the cases complied in the year ending June 30, 1983. In our study sample, the corresponding figure was 94 percent. The overwhelming majority of the defendants in our case records sample were indicted within 30 calendar days of arrest. In a small fraction of cases (6.4%) the charges against the defendant were dismissed by the prosecutor pre-indictment.

In another 9.5 percent of the cases, excludable time was necessary to achieve compliance with the 30-day limit.

Compliance has also been high in the indictment-to-trial period (over 96% nationwide), and there have been few non-compliance dismissals under the Act. At the same time, there has been no reduction in disposition time for the median (typical) criminal case since the Act's inception. On the contrary, the last two years have seen an increase in median disposition time from 3.8 to 4.9 months. It is virtually impossible to know how long such cases would have taken in the absence of speedy trial limits, however. The major problem in assessing the impact of the Act on actual case processing speed is the changing nature of the federal case load. Since the Speedy Trial Act took effect, the number of civil cases has increased sharply and, despite an increase in judicial resources under the Omnibus Judgeship Act of 1978, judicial workload is currently at an all-time high.

Data from Abt Associates' 1980 Speedy Trial Act Impact study suggest that, although there may have been no reduction in processing time for the typical case, the number of cases taking an extremely long time to disposition has declined in recent years. In 1972, 1973 and 1974, ten percent of the cases took over 13 months to process. By 1978 and 1979, the longest ten percent of the cases took only nine months. In a forthcoming compendium of federal justice statistics, Rhodes also found that between 1970 and 1981, case processing time in the slowest federal circuits was reduced by 47 percent. In the early 1970s, the slowest circuits took 7.3 months to process cases, over two times longer than the overall average of three months. By the early 1980s, times in the slow circuits had been reduced to 3.9 months, only slightly above the overall average.[6]

Anecdotal evidence from our current study suggests that judges and prosecutors have reordered case priorities in order to comply with the Act's limits. Furthermore, both U.S. attorneys' offices and the district courts have initiated changes in management procedures designed to produce real improvements in case efficiency.

Most of the U.S. attorneys' offices visited in the course of this study had instituted:

- training and dissemination of materials to new and experienced staff;
- monitoring of cases by means of tickler systems or computerized case tracking systems; and

- increased communication and early interaction between U.S. attorneys' offices and investigative agencies.

A few of the offices had also implemented special case management procedures, such as:

- allocating resources based on case complexity and assigning back-up attorneys to difficult cases in the event of scheduling conflicts;
- creating special grand jury units; and
- reorganizing office staff to place the most experienced attorneys in charge of intake/charging decisions.

Many of the courts visited for this study had used senior and visiting judges to reduce delay and installed case tracking systems to ensure compliance with the Act's provisions. A few had also:

- modified case assignment procedures;
- tightened scheduling of key case events, such as discovery hearings, arraignments, trials, and the end date for plea negotiation; and/or
- modified organizational structures, including creation of teams of judges and clerks to expedite case processing.

Despite the fact that both government and defense attorneys claim the Act has encouraged more plea negotiations, we found little evidence that the Act has altered case disposition patterns over time. On the contrary, published AO statistics reveal that the percentage of federal cases going to trial has remained fairly constant (at about 15%) over the last several years, with a slight increase during the period 1979 to 1981. If speedy trial pressures have affected the nature of plea negotiations, it is difficult to ascertain which party has benefited. Defense attorneys argue that the Act has resulted in "speedy convictions;" prosecutors counter that it has led to "bargain basement justice."

Some critics of the 1979 amendments feared that the more liberal excludable time provisions would undermine the strict time limits set forth in the Act, essentially "gutting" the statute. In fact, the excludable time provisions have been used frequently to gain more time in complex cases or cases involving unusual circumstances. The most recent data available from the AO (for the year ending June 30, 1981) reveal that exclusions were recorded in roughly two out of every five cases.[7] Yet, in most

instances, use of the excludable time provisions does not appear to be abusive. According to the AO data, most exclusions are of very short duration: 44% lasted three weeks or less, and the majority lasted less than one month. The most common exclusions were for filing and consideration of pretrial motions. Continuances in the ends of justice were granted in only 14 percent of the cases disposed, with the typical continuance extending for 60 days.

For the most part, then, compliance appears to be possible without radically changing the nature of case disposition or overreliance on ends of justice continuances. Yet, there is some reason to believe that the Act has also had collateral consequences on the investigation and prosecution of criminal cases that were unintended by Congress.

Unintended Consequences. Anecdotal evidence suggests that the Speedy Trial Act has had some impact on three key aspects of the charging decision: declination/deferral of criminal cases to state and local jurisdictions, arrest policies and practices, and the timing of the indictment decision in cases not initiated by arrest. In some cases, the qualitative data are also supported by statistical evidence. However, it must be noted that these effects appear to be highly variable across jurisdictions and difficult to separate from other contemporaneous changes in the federal criminal justice system. Furthermore, respondents disagree as to whether any such effects have had an adverse impact on public safety and the administration of justice.

The impact of the Act on declination and deferral policies is especially difficult to measure because federal prosecutorial policies have changed dramatically over the last several years. Clearly, changes in filings over time are partly a function of such overall policy decisions. At the same time, a number of respondents observed that the Act's pressures can lead to more stringent standards for case acceptance, and that certain classes of cases may be de-emphasized to keep case loads to a reasonable level. In rare instances, the Act may also play a role in individual declinations--e.g., when a prosecuting attorney has a full trial schedule and feels the need to keep his or her case load manageable.

Respondents in 12 of 19 U.S. attorneys' offices surveyed believe that the Speedy Trial Act <u>has</u> resulted in a more restrictive arrest policy, and AO data for 1982 and 1983 reveal a decline in arrest-initiated cases. During the period from 1977 to 1981, roughly 40 percent of the cases adjudicated in the federal courts were initiated by pre-indictment arrests; in the last two years, the figure has dropped to

approximately 30 percent. Without better data on the type of cases being prosecuted in the federal system, it is impossible to attribute this reduction solely to speedy trial pressures. Nevertheless, both investigative agents and prosecuting attorneys interviewed during our site visits reported that arrests have been discouraged in some cases to avoid triggering speedy trial limits.

Virtually all prosecuting attorneys and agents interviewed agreed that arrests were never discouraged if they were necessary to forestall violence against agents, witnesses or members of the general public. There was less agreement as to whether pre-indictment arrests should be authorized when there is no immediate threat to public safety. Those who support a restrictive arrest policy note that:

- liberal pretrial release policies allow many detained defendants to be released from custody soon after arrest anyway;
- restricting the circumstances under which an arrest can be made by the agent encourages early, close contact between the investigative agency and the U.S. attorney's office in determining the way in which the case will be investigated and developed;
- ethics and fairness dictate delaying the arrest until all the evidence is in hand; and
- postponing an arrest may be essential in developing a larger case.

Those who oppose such a policy argue that:

- alleged offenders are now staying on the street longer, and criminal conduct may continue while the case is being fully developed;
- restricting arrests impedes prosecution, since arrests can be helpful in seizing evidence, obtaining confessions, and gaining the suspect's cooperation in implicating others; and
- failure to arrest breeds disrespect for the law, removes a powerful deterrent, and allows suspects to flee.

Analysis of data supplied by the FBI suggests that the time for case investigation--measured from case opening to referral to the U.S. attorney's office--has increased in recent years. Time required for robbery cases increased about 60 days on average from 1973 to 1982, while the time for embezzlement increased an average of 36 days. These data must be interpreted with some caution, due to the small number of districts represented, and the inability to control for possible changes in case

complexity, among other things. Nevertheless, several of the prosecuting attorneys interviewed noted that the Act does encourage delay in order to ensure that cases are fully prepared prior to grand jury presentation.

Some prosecutors commented that such delays help ensure "high quality" prosecutions, with weak cases falling out before formal charges are filed. Delaying the indictment also helps ensure that trial preparation can be handled effectively once the case is filed in court. Agents (and some other prosecuting attorneys) complained that many cases are overprepared pre-indictment, an unnecessary step in many instances, given the large number of cases that end in guilty pleas. Defense counsel argue that permitting the government unlimited time to prepare cases prior to filing charges places the defense at a relative disadvantage once the 70-day clock begins. Furthermore, such pre-indictment delay raises serious questions about the ultimate effectiveness of the Act in expediting overall case disposition, measured from commission of the offense to adjudication in court.

Generally speaking, prosecutors are more likely to support a lengthy charging process than investigators. Agents' primary interest is in stopping ongoing criminal activity and getting offenders off the street; prosecutors are concerned with obtaining a conviction at trial. In most of the study districts, the net result has been a well-articulated, practical set of arrest and charging policies and procedures, coupled with early and close coordination between investigators and prosecutors. In two study districts, however, the U.S. attorney's arrest and charging policies appear to be extremely restrictive, and supervisory agents in several of the offices interviewed expressed grave concerns. In these jurisdictions, the U.S. attorney's office might consider either re-evaluating local policies and procedures or clarifying the rationale for the existing ones. Where arrests are routinely discouraged and indictments delayed for extended periods of time without sufficient cause, the spirit of the Act is clearly not being served.

As noted above, once a defendant is arrested, most U.S. attorneys' offices are able to respond to speedy trial pressures directly by obtaining an information or indictment within the 30-day limit set by law. In fact, some even "beat" the speedy trial clock by indicting within 10 or 20 days of arrest, the time limit set by the court for a preliminary hearing. While these offices are in full compliance with both the letter and spirit of the Act, some respondents noted that treating the interval as fixed and rushing to indict can pose problems in some cases. For example, in a complex case, indicting the defendant within 30 days may mean leaving out certain targets or

charges. It may also leave insufficient time for negotiating a plea in exchange for cooperation or for arranging pretrial diversion.

One study district uses the excludable time provisions of the Act frequently (44% of arrest-initiated cases) to extend the 30-day limit, especially where plea negotiations are in progress or pretrial diversion is being arranged. Another two districts use them infrequently (less than 10% of the cases), while the remaining three never use them. While exclusions can obviously be overused, limited application of the provisions when necessary may help reduce problems in those cases where the 30-day limit inhibits effective investigation prior to the filing of formal charges.

In rare instances, (3% of sample cases), U.S. attorneys' offices have responded to Speedy Trial Act pressures by dismissing arrest-initiated cases that are in danger of exceeding the 30-day limit and then reopening them after the investigation has been completed. This "dismiss-reopen" strategy has a number of potentially negative consequences: the case may simply be forgotten or the suspect may flee, destroy evidence, create alibis or notify co-conspirators. The U.S. Attorneys' Manual discourages the practice and encourages government attorneys to use all other means to comply with the law before resorting to this strategy.

Another method for meeting the 30-day time limit is to obtain an indictment within the time limit and use superceding indictments, where necessary, to complete the charging process. Once again, such a strategy can be abused, especially if the grand jury is used simply to complete the initial investigation, rather than to seek to add new defendants or new substantive charges. Used appropriately, however, superceding indictments may help correct deficiencies in cases caused by the initial rush to indictment.

Once the defendant is indicted, the major concern for both prosecution and defense is obtaining adequate time for trial preparation within the limits set by the Act. Generally speaking, it appears that the excludable time provisions afford needed flexibility to both parties. However, there are certain problems that continue to be associated with the application of these provisions. Among the major concerns expressed by respondents were these:

- There is widespread variability in the interpretation of the excludable time provisions, particularly in the granting of continuances in the ends of justice. Some judges refuse to grant continuances in all but the most extreme circumstances, whereas others use the applicable provision to postpone trials for apparently trivial reasons.

- The excludable time provisions can be manipulated by the court to help with calendar management. Government and defense counsel can also file unnecessary motions or otherwise manipulate the excludable time provisions to gain more time for trial preparation.

- There is continuing confusion regarding the computation of excludable time, particularly in multiple-defendant cases, partly due to the fact that case law is still emerging. In some instances, this has inadvertantly led to cases exceeding the time limits and subsequent dismissals.

There are also other problems in complying with the indictment-to-trial limit. For example, government attorneys note that the 70-day limit is extremely short in cases that require preparing wiretap transcripts and translations, obtaining information on the identities of foreign nationals, securing bank and telephone records, and conducting forensic analysis. Such problems are especially acute in arrest-initiated cases, where the government has not had time to prepare the case fully before indictment. Another concern expressed by prosecutors is that many judges treat government attorneys as interchangeable and routinely refuse requests for continuances in the event of scheduling conflicts. For their part, defense attorneys often have only 70 days to prepare a complex case that the government has taken months or years to prepare. Where judges refuse to grant continuances, defense counsel argue that the Act's limits do not allow reasonable time necessary to prepare for trial.

A final concern raised during the course of this study involves continuing disagreement over the defendant's right to waive the Speedy Trial Act limits. While the Act contains an implicit waiver of the dismissal sanction, i.e., the defendant may elect not to move for dismissal, there is considerable controversy about the legitimacy of express waivers of the time limits per se. Some courts argue that the Speedy Trial Act is premised on the public's right to a speedy disposition and, therefore, that the defendant is not in a position to waive its limits. Others argue that the defendant has as much right to waive the statutory right to a speedy trial as the Sixth Amendment right. Of the 70 federal jurisdictions responding to our survey on the subject, 46 percent allow express waivers in some cases, while 54 percent do not allow waivers under any circumstances. Such inconsistency in interpretation of the law's basic provisions exascerbates pre-existing differences in case processing across the 94 federal districts.

CONCLUSIONS AND RECOMMENDATIONS

Overall, then, it appears that the Speedy Trial Act has been generally effective in achieving its objectives of bringing accused offenders to swift justice. While the typical case may not move any faster then before, there is reason to believe that fewer cases take very long times to process since the Act's passage. The Act has encouraged U.S. attorneys' offices and the courts to review their case management policies and procedures and to take steps to improve efficiency. At the same time, there is little evidence that the Act has brought about changes in the nature of case disposition.

Yet, there is some evidence that the Act has also had collateral consequences on the investigation and prosecution of criminal cases that were unintended by Congress. The government appears to have responded to the limits, in part, by controlling case intake and by moving as much case preparation as possible outside the mandated intervals. Some tightening of the screening/charging process may be constructive. It prevents weak cases from ever entering the system and helps guarantee that those accepted for prosecution can be handled effectively. Nevertheless, if cases are declined and charging decisions postponed solely for speedy trial reasons, then compliance is being achieved at some loss to the overall administration of justice.

Most of the time prosecutors can comply with the 30-day limit. Occasionally, a case enters the system before the government is fully prepared to prosecute, and the prosecutor may be forced to take measures to toll the clock until the case is ready for prosecution. Such measures include dismissing the case and later reopening it through presentation to the grand jury, or indicting on partial charges.

Both government and defense attorneys have used the excludable delay provisions to extend the time limits once the 70-day clock starts running, and, for the most part, these provisions are being applied appropriately. However, they are subject to manipulation, and, in some jurisdictions, respondents alluded to "gameplaying" by one or both parties. An even more serious concern is the continuing variability in interpretation of these provisions. Too tight a construction may deny the parties adequate time to prepare for trial; too liberal a construction may undermine the Act's basic intent to encourage speedy case disposition. Finally, some confusion remains regarding the computation of excludable time and the permissibility of per se waivers.

By and large, the Act appears to be working, and most participants in the criminal justice system now accept it as a fact of life. While there may be collateral consequences, they appear to be relatively minor. Furthermore, the Act sends an important signal to the courts, the government, the defense and the general public: criminal cases will receive the highest priority in the federal court system since speedy trials are in the public's interest.

To help promote greater uniformity in the application of the excludable time provisions and other provisions of the Act, we would encourage the Judicial Conference to update its guidelines to reflect emerging case law. By including relevant commentary, the Guidelines may help bridge the current differences of opinion among circuits and assist in the formulation of a more consistent and coherent interpretation of the law. Of particular concern is the issue of express waivers; currently, the courts are divided on this topic.

The U.S. Attorneys' Manual was updated in June 1984 and contains a comprehensive discussion of the various speedy trial provisions, along with court decisions that have a direct effect on Departmental Policy. Recent cases are featured regularly in the U.S. Attorneys' Bulletin, which is published bi-monthly. To help eliminate any remaining confusion regarding the Act's limits, the Executive Office for U.S. Attorneys may also want to develop handouts, video- or audiotapes, or other training materials designed to help AUSAs better understand the more complex provisions of the Act. In particular, such training might focus on:

- the use of excludable time provisions in the arrest-to-indictment interval;
- the calculation of the beginning and ending dates in the indictment-to-trial interval; and
- the computation of excludable time in cases involving multiple defendants and superceding indictments.

Agents might also benefit from knowing more about the Act's provisions, particularly those affecting the arrest-to-indictment period. Finally, for those few districts experiencing serious difficulties with compliance, the Executive Office may want to consider on-site training or technical assistance to help offices meet the Act's limits without resorting to questionable practices.

While no single delay-reduction method is appropriate for all offices, the Executive Office may also want to encourage cross-fertilization of proven case man-

agement techniques across U.S. attorneys' offices. Information could be shared at conferences or in cross-site visits. The Executive Office may also want to consider disseminating information on various techniques initiated to respond to speedy trial pressures, such as the use of "second chair" attorneys who can take over a complex case in the event of a scheduling conflict.

Ultimately, implementation of the Speedy Trial Act is the responsibility of local field offices, U.S. attorneys' offices, and individual courts. Each should review its policies and procedures on a regular basis to see that they are in keeping with both the letter and spirit of the law. We would also encourage local offices and courts to review their case management procedures to assure that resources are being allocated efficiently, that cases are being monitored carefully, and that there are no salient problems associated with speedy trial compliance. Reconvening speedy trial planning groups on an annual or semi-annual basis would also help focus system-wide attention on speedy trial matters and might suggest common solutions to locally identified problems. Individual offices or courts might also want to assign a speedy trial coordinator or appoint an in-house committee to examine local implementation problems and suggest needed improvements in case administration. At a minimum, additional training would help assure that staff are familiar with the Act's provisions and that no cases are dismissed due to simple oversight or misunderstanding of the law.

FOOTNOTES

1. Hereinafter referred to as the Speedy Trial Act, or the Act.

2. These intervals may also be triggered and terminated by other events.

3. The original Act also included excludable time periods; these were expanded in the amended version.

4. Nancy L. Ames, et al., The Processing of Federal Criminal Cases under the Speedy Trial Act of 1974 (as Amended 1979) (Cambridge, MA: Abt Associates Inc. 1980).

5. According to statistics provided to Congress by the Justice Department, during Fiscal Year 1981 only 17 cases of 30,000 filed were dismissed for exceeding the time limits. Statement of Kenneth A. Caruso, Special Assistant to the Associate Attorney General, before the Committee on the Judiciary, Subcommittee on Crime, U.S. House of Representatives, October 1981, p.6. See also, George S. Bridges, "The Speedy Trial Act of 1974: Effect on Delays in Criminal Litigation in Federal Courts," Journal of Criminal Law and Criminology, 1982, 73 (1), 50-73.

6. William M. Rhodes, 1979 Compendium of Federal Justice Statistics, forthcoming publication for the Bureau of Justice Statistics.

7. Not every excludable time period reported to the AO is used to extend the time limits in the case. In some courts, excludable time is automatically entered in the case record in the event that the 70-day limit be exceeded at some point in the future.

1.0 INTRODUCTION

This report presents the results of Abt Associates' examination of Speedy Trial Act implementation under the sponsorship of the Federal Justice Research Program of the U.S. Department of Justice. The purpose of the study was to assess the impact of the statutory time limits on the investigation and prosecution of federal criminal cases. The report includes findings from several study components, including: a telephone survey of 17 U.S. attorneys' offices, interviews with criminal justice system actors in six federal jurisdictions, case records analysis in those six districts, a mail survey and examination of published court statistics.

In the remainder of this chapter, we trace more fully the origins of the Speedy Trial Act and the purpose of the present study. We also briefly describe the methodology used to address the policy questions of concern. We conclude this introduction with a brief overview of the study's findings and a guide to the rest of the report.

1.1 Legislative History of the Speedy Trial Act[1]

1.1.1 Initial Passage of the Act, 1970-1974

The Speedy Trial Act of 1974 was the culmination of over a decade of controversy, research and hearings focusing on the issue of court reform and delay reduction. In the face of an archaic and congested court system, a substantial increase in crime in the late 1960s and liberal pretrial release policies following passage of the Bail Reform Act of 1966, a number of groups called for the courts to adopt more efficient management procedures and to process their cases more quickly:

- In 1967, the President's Commission on Law Enforcement and the Administration of Justice argued that long delays in criminal case processing make a mockery of bail decisions, cause cases to be lost by attrition and undermine the law's deterrent effect.[2]

- In 1968, an American Bar Association (ABA) committee proposed standards for expediting criminal trials.[3]

- In 1973, the National Advisory Commission on Criminal Justice Standards and Goals placed high priority on ensuring speed and efficiency in achieving the final determination of a defendant's guilt or innocence.[4]

The efforts of these national groups were instrumental in creating interest in and support for speedy trial legislation and are visible throughout the report's legislative history.[5]

While a number of states had adopted speedy trial legislation before the late sixties and various speedy trial bills had been periodically introduced in Congress, early initiatives were concerned primarily with invoking the defendant's Sixth Amendment right "to a speedy and public trial." What was unique about the federal Speedy Trial Act was its emphasis on protecting not only the defendant's right to a speedy trial, but also the public's interest in bringing the accused to swift justice. In fact, the authors of the legislation acknowledged that many defendants do not want a speedy trial. For those released pretrial, delay not only postpones the defendant's day of reckoning, but in the eyes of many, weakens the prosecutor's case as witnesses move away or lose interest, evidence is lost, and the prosecutor's position generally erodes. Recognizing that the defendant's interest in delay may at times conflict with the public's interest in speedy disposition, the Act did not include a "demand" provision as in most state laws. The federal speedy trial clock runs in all federal criminal cases, regardless of whether the defendant demands a speedy trial.

The roots of the speedy trial legislation can be traced to a bill introduced by Representative Abner J. Mikva in November 1969 entitled the "Pretrial Crime Reduction Act."[6] Title I of the Mikva bill set time limits for case disposition following closely the standards set forth by the ABA. Title II authorized the creation of demonstration pretrial services agencies, more restrictive release conditions for defendants previously convicted of violent crimes, and additional penalties for those committing crimes of violence while on pretrial release. The Mikva bill was intended to be an alternative to the "preventive detention" bills submitted by the Nixon administration in an effort to deal with the problem of crime committed by defendants released on bail. Together, the various provisions of the bill were designed as a comprehensive "approach to the problems of crime by defendants released prior to trial which does not rely on jailing criminal defendants."[7]

In June 1970, Senator Sam J. Ervin Jr., Chairman of the Senate Judiciary Committee's Subcommittee on Constitutional Rights, introduced speedy trial legislation in the Senate. Senator Ervin, who had been the principal sponsor of the Bail Reform Act of 1966, also saw the "Speedy Trial Act" as an alternative to preventive detention. Senator Ervin's bill (S. 3936) was similar to the Mikva bill in many respects, and the two pieces of legislation may be viewed as "two stages in a

single development."[8] Title I of the Act was a speedy trial title; Title II set forth additional penalties for defendants convicted of offenses while on pretrial release; and Title III authorized creation of demonstration pretrial services agencies. The Speedy Trial Act of 1974 was based in large measure on this early draft legislation.

In February of 1971, Senator Ervin reintroduced S. 3936 in the Ninety-Second Congress as S. 895, with deletion of Title II and other minor changes. Because extensive hearings were held on S. 895, this bill is generally referred to as the original speedy trial bill. S. 895 was reintroduced as S. 754 in 1972. A one-day hearing on this bill was held in 1973, and an amended version was introduced to the Senate in the spring of 1974. In July of that year, the bill passed the Senate and was sent to the House, where further hearings were held in the Subcommittee on Crime of the House Judiciary Committee.

On the House side, Representative John Conyers, Jr. of Michigan introduced H.R. 17409 which, with some exceptions, duplicated the Senate bill. This bill, with amendments, was signed into law as the Speedy Trial Act of 1974.

Throughout this formative period, the Speedy Trial Act was opposed by the two major federal agencies responsible for administering federal criminal justice: the U.S. Department of Justice and the Judicial Conference of the United States. Both agencies questioned the brevity and rigidity of the legislatively proposed time limits. In addition, each agency had unique concerns regarding the proposed statute.

The Judicial Conference opposed the Act on the ground that court-imposed solutions to delay reduction were preferable to Congressionally mandated approaches. The judiciary was not opposed to the concept of speedy trial per se. In 1966, the Supreme Court affirmed the importance of the defendant's right to a speedy trial, calling it "an important safeguard to prevent undue and oppressive incarceration prior to trial, to minimize anxiety and concern accompanying public accusation, and to limit the possibilities that long delay will impair the ability of an accused to defend himself."[9]

Yet, in Barker v. Wingo (1973) the Supreme Court held that there was "no constitutional basis" for quantifying the defendant's right to a speedy trial "into a specific number of days or months."[10] Despite a five-year delay in bringing the defendant to trial, the court held that there had been no violation of the defendant's right to speedy trial in this case. Instead, the Court recommended that four factors be employed as a balancing test to determine whether the defendant's rights had been

violated: length of delay, reason for delay, prejudice to the defendant, and the defendant's assertion of his or her rights.

In part, the Court's reluctance to impose sanctions for delay helped prod Congressional action. Yet officials in the federal judiciary did not take kindly to Congressional intervention in what they viewed as their exclusive domain.[11] The initial response of the judiciary was to lobby informally against the legislation, requesting additional funding instead. When this did not deter Congressional action, the judiciary developed court rules as an alternative to the proposed statutory time limits.

The court's approach to delay reduction was embodied in Rule 50(b), which was added to the Federal Rules of Criminal Procedure by the Supreme Court in April 1972.[12] Endorsed by the Judicial Conference of the United States, the new rule required each district to develop a plan for the prompt disposition of criminal cases. The rule also authorized creation of a planning and review process to be handled by local district court judges who would develop and approve their own plan and then submit it to the Judicial Conference for review. Representatives of the judiciary argued that Rule 50(b) should at least be tested before Congress passed statutory time limits for case disposition.

Rule 50(b) did receive a brief test. The Administrative Office of the United States Courts (AO) prepared a model plan that defined certain case processing standards, suggested a system of setting scheduling priorities, and outlined various procedural plans. Yet, beyond these standards, neither the rule nor the AO's model plan established criteria for determining whether a case had been "promptly" disposed or provided any penalties for not meeting the recommended standards. Critics of the Rule 50(b) approach to delay reduction cited two major problems with its implementation. First, most courts undertook no planning process, simply resubmitting the model plan as their own. Second, the few districts that actually proposed their own plans for delay reduction, generally watered down the AO model. Local plans with strong sanctions for non-compliance were typically accompanied by liberal time limits, while those with strict time limits had weak sanctions (or numerous loopholes).[13]

During hearings on the speedy trial legislation, officials of the federal judicial organizations voiced support for continued operation of Rule 50(b), arguing that case backlog had declined and cases were being processed more quickly under the rule. Yet, witnesses presented evidence showing that the decline in backlog was

attributable more to changes in the federal case load than to an increase in court efficiency. Further, Professor Daniel Freed of Yale Law School, among others, argued convincingly that the district plans only served to reinforce what districts were already doing, while giving the appearance of bringing about change. Where districts were already processing cases swiftly or moving to accomplish that objective, the court rule approach was effective but probably unnecessary. Where districts were historically slow, and delay reduction was not singled out as a priority goal, it was not effective.[14]

Representative Peter W. Rodino, Jr., Chairman of the House Judiciary Committee, unconvinced by the judiciary's evidence, argued that the speedy trial legislation was necessary because the courts had failed to "put their own house in order."[15] The major problem with the Rule 50(b) approach, in his view, was that it contained no sanctions to compel the courts to comply with the established time limits. In presenting the House-passed bill to the Senate, Senator Ervin also called for passage of the Speedy Trial Act as a means of spurring the courts to deal with the problems of inefficiency and undue delay:

> The bill is based upon the premise that the courts, undermanned, starved for funds, and utilizing 18th century management techniques, simply cannot cope with burgeoning case loads. The consequence is delay and plea bargaining. The solution is to create initiative within the system to utilize modern management techniques and to provide additional resources to the courts where careful planning so indicates.[16]

Included in the final bill was an extensive phase-in period during which the time limits were to be progressively tightened. During this phase-in period, districts were given the opportunity to plan for full implementation and to provide Congress with feedback on the impact of the legislation on the court system. Toward the end of the phase-in period, in October of 1978, Congress also passed the Omnibus Judgeship Act, Pub. P.L. 95-486. Designed to help the courts comply with the new deadlines and help soften judicial opposition, the Act authorized 117 new judgeships, increasing the number of federal district court judges by 29 percent.

While the federal judiciary expressed strong and consistent opposition to the very concept of speedy trial legislation during this early period, the position of the U.S. Department of Justice was less intransigent. Successive attorneys general expressed differing viewpoints: some totally opposed the legislation and others criticized only certain provisions. Nevertheless, all were against one major feature of the Congressional proposals--mandatory dismissal with prejudice. In the final stages

of legislative enactment, facing the possibility of a presidential pocket veto, Congress conceded to Department of Justice pressure by amending the Act to allow judges the discretion to dismiss cases with or without prejudice. With this final compromise, the bill was enacted as amended and signed into law by President Gerald R. Ford on January 3, 1975.

As stated in the preamble, the purpose of the legislation was "to assist in reducing crime and the danger of recidivism by requiring speedy trials and by strengthening the supervision over persons released pending trial."[17] The public right to a speedy trial was embodied in time limits (to be progressively narrowed over the four-year period) within which arrested persons must be indicted, and all defendants indicted must be arraigned and brought to trial. The final time limits were to be 30, 10, and 60 days, respectively, triggered automatically without any demand for trial by the defendant. The Act specified a number of "excludable delays" that could extend these time limits. It also provided courts with the authority to grant continuances that were found to be "in the ends of justice." Finally, the Act provided for dismissal of charges on motion of the defense, should any time limit be exceeded. The dismissal sanction was to be effective June 30, 1979.

In August 1979, shortly after the sanctions went into effect, but before any dismissals had occurred, Congress amended the Act with passage of the Speedy Trial Act Amendments Act of 1979 (Pub. L. 96-43). The concerns leading up to the 1979 Amendments are discussed below.

1.1.2 The Phase-in Period, 1975-1979

Controversy over the Speedy Trial Act did not end with its passage in 1974. The Act called for extensive research and planning during the four-year phase-in period. The courts were to study the problem of delay, compile comprehensive statistics on case processing, make recommendations for statutory and procedural changes, and submit requests for additional resources required to achieve compliance with the final time limits.

This planning period invited intense scrutiny of the Act's implementation. During this interval, the Act was subjected to a great deal of criticism by various observers interested in assessing the effectiveness of the legislation and concerned over the potential costs it might impose on the administration of justice. Much of the concern stemmed from a report published by the Administrative Office of the U.S. Courts in September 1977.[18] While that report showed a 13.4 percent reduction in the

nation's federal criminal case backlog from the preceding year, it also pointed to a 10 percent increase in civil backlog, the highest level ever. Many observers felt that this increase was directly attributable to the Speedy Trial Act and were concerned that further acceleration of criminal cases would result in even greater delays for civil cases.

The federal judiciary continued to express concern over the speedy trial legislation during this interim period. In general, however, the members of the judiciary came to accept some version of the legislation as a given and concentrated their efforts not on repealing the Act, but on making it more workable. The preamble to a report published by the Ad Hoc Subcommittee on the Speedy Trial Act of the U.S. Judicial Conference highlights this change in judicial attitude:

> The task enjoined upon this Ad Hoc Subcommittee involves recommendations for improvement in the Speedy Trial Act. . . . It is assumed that a repeal of the Speedy Trial Act is unlikely, and that recommendations for repeal or substantial revision would be useless. It is our conclusion, however, that relatively minor adjustments in the Act can produce substantial benefits and enable the Federal judiciary to comply with its strictures without excessive impairment of other judicial functions.[19]

The Subcommittee recommended that the time limits be substantially increased and that the excludable time provisions be subject to clarification and minor modification. The Judicial Conference adopted the Subcommittee's recommendations, which became the basis for legislative proposals submitted to the Ninety-Third Session of Congress in the spring of 1979.

The U.S. Department of Justice was not idle during this interim period either. In 1977, the Subcommittee on Legislation and Special Projects of the Attorney General's Advisory Committee of U.S. Attorneys, led by Earl J. Silbert, then U.S. Attorney for the District of Columbia, solicited the views of all U.S. attorneys. Among the major problems identified were these:

- The 30-day limit for indictment was considered insufficient for investigators and prosecutors to prepare for the grand jury, causing the following undesirable results:

  --indictment of innocent persons who would have been exonerated with a thorough grand jury investigation

  --failure to obtain indictments against dangerous offenders in cases where all available evidence to support a conviction cannot be uncovered in the short time frame; and

--failure to arrest persons who should be brought under the control of the court for fear of triggering the "speedy trial clock."

- The 60-day limit for trial was deemed to be wholly insufficient for the prosecution of high priority cases, including fraud, white collar crime, public corruption, organized crime, income tax cases, and conspiracies, with the following undesirable consequences:

  --increased declinations to avoid failure to comply with the limits; and

  --unwarranted severances in multi-defendant cases.

- Imprecision in the excludable delay provisions, resulted in wasted time litigating the precise meaning of the exclusions.[20]

The Subcommittee also challenged the fairness of the dismissal with prejudice sanction, calling absolute dismissal a "windfall" for the defendant, especially where there has been no actual prejudice to the defendant and the prosecutor is not at fault for the delay. Stating that the time limits are "unrealistic, and simply too short," the Subcommittee recommended that the limits be broadened, the courts be given the authority to grant continuances for "good cause," parties be allowed to stipulate to a waiver of the Act, and additional resources be given to the U.S. attorneys' offices, federal investigative agencies and the courts in order to avoid massive dismissals for noncompliance.

Partly in response to these reported problems, the Department of Justice's Office for Improvements in the Administration of Justice (OIAJ) undertook an internal, empirical study of the implementation of the Speedy Trial Act. Specific issues to be addressed in the study were:

- Whether the time limits would result in a tendency towards a "no arrest" policy by U.S. attorneys.

- Whether the time limits would cause U.S. attorneys to decline a greater number of otherwise prosecutable cases.

- Whether the time limits would allow sufficient time to prepare cases begun by arrest for presentation to the grand jury.

- Whether the time limits would impair the rights of defendants to obtain counsel of their choice or leave insufficient time for defense preparation.

- Whether a greater number of trials would be required because of severances granted to defendants in order to avoid delays that would violate the time limits.

- Whether failure to meet the time limits would result in an intolerable number of dismissals with prejudice.[21]

The most significant findings of the OIAJ Study were these:

- The degree of compliance with the Act in terms of the ultimate time limits was relatively high for the year ending June 30, 1978. During that year, at least four out of five cases were processed within the ultimate time limits required by the Act, despite the fact that such limits were not yet mandatory.

- The most frequent causes of delay were time spent waiting for investigative reports, time spent considering plea offers, and time spent waiting for defense counsel to become available.

- The most significant cost of compliance with the Act was cited as continued and aggravated delay in the disposition of civil cases.

The report also identified a number of collateral consequences of compliance with the Act:

- Many U.S. attorneys had instructed law enforcement agencies to avoid making arrests before indictment whenever possible, notwithstanding the existence of clear, or even abundant, probable cause. One consequence of the deferral or arrests is that persons who might otherwise be detained remain at large and may continue their criminal activity.

- Prosecutors were concerned that the short Interval I time period precluded adequate investigation prior to indictment in some cases that began with an arrest.

- The Act's 10-day limit to arraignment (subsequently deleted in the 1979 Amendments) posed two problems: hastier preparation by the defense prior to arraignment and increased travel requirements by judges, court personnel and counsel to meet the 10-day requirement.

- Interviews with defense counsel suggested that the Act may hamper defendants in the preparation of their case and may interfere with representation by counsel of their choice as well.

The study found no empirical evidence that: 1) the Act had contributed to the substantial decline in the number of federal prosecutions; 2) the Act had led to severance of defendants in multi-defendant cases; or 3) the Act had affected the nature of the plea dispositions. While noting that the AO had projected that there would have been over 5,000 dismissals if the final time limits and the dismissal sanction had been in effect during this period, the report concluded:

> It can be expected that, in response to the threat posed by the dismissal requirement, the work patterns of prosecutors and courts will adapt to the new situation, additional resources will be devoted to meeting the deadlines of the Act and, in consequence, the dismissals will be held to a less drastic level.[22]

In April 1979, Chairman Rodino introduced H.R. 3630, which was submitted by the U.S. Department of Justice to the House Judiciary Committee. Similar legislation was submitted in the Senate as S. 961. The Department's legislative proposals to amend the Act were akin to those of the Judicial Conference. Their central aim was to broaden the time limits to 180 days overall, although they also proposed minor amendments to the excludable delay and judicial emergency provisions.

In support of these legislative proposals, the Department cited the findings of the OIAJ study. In a prepared statement presented to the Senate Judiciary Committee, Assistant Attorney General Philip Heymann asserted:

> In addition to substantial improvement in case processing, . . . our experience in trying to comply with the demands of the Act [has] 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.[23]

Mr. Heymann estimated that 5174 felony cases would have been subject to dismissal had the Act's permanent time limits and the dismissal sanction been in effect during the period under study. Mr. Heymann also cited some of the possible collateral consequences addressed in the OIAJ study.

Yet, Congress remained unconvinced by both the Judicial Conference's and the Justice Department's concerns and criticisms. In fact, Congress drew upon the conclusions of the OIAJ study to support the existing time limits, noting that OIAJ had suggested delaying the dismissal sanction rather than expanding the overall limits from 100 to 180 days.[24] OIAJ believed that this option would allow districts the chance to operate under the 100-day limit from arrest to trial without the threat of sanctions. This, in turn, would permit time to determine what adjustments, if any, were needed in the Act itself or in the resources allotted to the various segments of the criminal justice system to achieve compliance.

In electing to keep the existing time limits, Congress also cited another major study that was completed by the General Accounting Office (GAO) at about the same time.[25] The study, conducted at the request of the Senate Judiciary Committee and published in May of 1979, concluded that there was insufficient experience under

the Act to support the proposed expansion of the time limits. It recommended instead that Congress consider postponing the dismissal sanction for 18 to 24 months, with the provision that the courts "fully identify and document the problems encountered for those cases exceeding the 100-day time frame." The recommendation was predicated on the fact that, even before the permanent time limits went into effect, GAO found compliance in over 90 percent of the cases examined. After studying several hundred cases that had exceeded the time limits, the GAO concluded that many of these cases would also have been in compliance had excludable time been recorded.

In light of these studies, testimony of other witnesses, and "skepticism about the motives of those wishing to broaden the time limits," Congress chose to extend the 1974 statute with only minor modifications.[26] While the 100-day limit to trial was kept intact, Congress did make the following changes:

- merged the 10-day indictment-to-arraignment and the 60-day arraignment-to-trial limits into a single 70-day indictment-to-trial period;
- established a 30-day minimum from the defendant's first appearance through counsel to trial;
- clarified and broadened certain excludable delay provisions, notably those for filing and consideration of pretrial motions and "ends of justice" continuances in both the pre-indictment and post-indictment intervals; and
- amended to the provisions relating to the extension of time limits due to judicial emergency.

Congress also suspended the dismissal sanction for one year, until July 1, 1980.

In addition to these substantive modifications, the Amendments added a number of reporting requirements. Among them was a report to be submitted by the Department of Justice to include:

1. the reasons why, in those cases not in compliance, the excludable time provisions of the act, enumerated in § 3161(h) have not been adequate to accommodate reasonable periods of delay;
2. the nature of the remedial measures which have been employed to improve conditions and practices in the offices of the United States attorneys in districts with low compliance records and the practices and procedures which have been successful in those with high compliance records;
3. the additional resources which would be necessary for the offices of the United States attorneys to achieve compliance with the time limits;

4. suggested statutory and procedural changes which the Department of Justice deems necessary to further improve the administration of justice and meet the objectives of the Act; and

5. the impact of compliance with the time limits upon the litigation of civil cases by the offices of the United States attorneys and the rule changes, statutory amendments, and resources necessary to assure that such litigation is not prejudiced by full compliance with the Act.

In response to the Congressional mandate, OIAJ Commissioned Abt Associates to conduct a Speedy Trial Act Impact Study.[27] In addition to addressing the five topics listed above, it focused on a sixth issue that was implied in § 9(e)(4) of the amended Act: the impact and unintended consequences of compliance with the Act on the administration of criminal justice.

1.1.3 Implementation under Sanctions, 1979-present

The Abt Associates study became the focus of discussions within the Department of Justice and served as the basis of the Department's final report to Congress as required by the 1979 Amendments. Partly on the basis of the study's prediction of high levels of compliance with the final time limits, the Department elected not to submit further proposals for amending the statute. The Judicial Conference also remained silent, and on July 1, 1980, the dismissal sanction went into effect as planned.

Despite the early fears, there were few dismissals, and no major reverberations were observed in the justice system once the sanctions were in place. Where once the Act had been violently opposed by virtually all parties involved, the Act was now taken as something to be dealt with, a fact of life in the daily processing of criminal cases. In some instances, opposition became support. According to those present, for example, Attorney General Benjamin J. Civilletti, upon leaving the Department, hailed the Speedy Trial Act as one of the major accomplishments of his administration. And, in Congressional hearings before the Subcommittee on Crime, Committee on the Judiciary, House of Representatives, on October 6, 1981, a parade of witnesses, including several district court judges, testified that the Act was working well, with few of the problems originally envisioned.

For example, in his prepared statement, the Honorable Robert J. Ward, United States District Judge of the Southern District of New York noted:

> Despite some dire predictions made prior to its enactment, the Speedy Trial Act is to a substantial extent accomplishing the purposes envisioned by the Congress.[28]

The Honorable John Feikens, Chief Judge of the United States District Court for the Eastern District of Michigan, Southern Division commented:

> Due to the lead time that was afforded by this statute, our Judges had ample time to become prepared to carry out the mandates of the Speedy Trial Act.[29]

Judge Feikens did note that implementation must be understood in the context of the change in federal prosecution goals which helped reduce the criminal case load, albeit making it more complex. With an increase in criminal case load, the Judge noted that civil dockets might never be touched and "new challenges" would need to be met.

Finally, Chief Judge Robert F. Peckham of the Northern District of California, Chairman of the Ninth Circuit Speedy Trial Coordinating Committee began his prepared remarks by alluding to the considerable controversy surrounding the 1979 Amendments. Judge Peckham went on to note:

> Since the 1979 hearings, Congress has amended the Act to make it clearer and more workable without changing its basic purpose or direction; the sanctions under the Act have become fully effective, and the courts, the bar, and the clerks have gained familiarity with the Act's provisions. I can now state to this committee that the biggest news about the Speedy Trial Act is that it is no longer controversial.[30]

Speaking on behalf of the Department of Justice, Kenneth A. Caruso, Special Assistant to the Associate Attorney General, also reported that the "Act is achieving its purpose and is doing so without infringing the right of either the defendant or the people of the United States to a fair and speedy trial."[31] The only problems noted were those involving questions of statutory construction, particularly with respect to the excludable delay provisions found in §3161(h)(8). Otherwise, the Department was "well satisfied" with the Act in its present form.

Only one individual expressed strong criticism of the Act and proposed amendments. Robert L. Weinberg, a member of the Washington, D.C. defense bar, called for a reasonable extension of time (120 days as a minimum) for the defendant to prepare for trial as a matter of right.

1.2 Purpose of this Study

While the dire predictions expressed by some have not come to pass, there remain unanswered questions about the efficacy of the Act in achieving its stated objectives and about possible adverse effects on investigation and prosecution of federal criminal cases. Both the original OIAJ study and Abt Associates' 1980 Speedy Trial Act Impact Study pointed to a number of collateral consequences of compliance with the Act's time limits. The purpose of this study was to examine the impact of the Act, now fully implemented, on investigative and prosecutorial policies and practices.

Of specific interest was the potentially adverse impact of the Act on arrest policies and procedures. In a memo dated September 27, 1983, Judge William H. Webster, Director of the Federal Bureau of Investigation, expressed his concern regarding the potentially negative impact of the Act and the heavy cost of compliance:

> For example, delay in authorizing an arrest, or permitting someone under arrest to be released because of an inability to meet the speedy trial requirements may not directly affect the actual prosecution. The by-product, however, of letting known criminals go back on the street or stay on the street because there is not enough time to complete the case for grand jury presentation can be just as, if not more, damaging to society than some courtroom impediment.

More generally, the study was designed to address the following research questions:

1. To what extent, if any, does the Act result in increased declination or deferral of cases to state and local jurisdictions in order to keep the case load manageable?

2. Are charging decisions (arrest or indictment/information) occurring later in the investigative process as a result of the Speedy Trial Act? If so, does this have an adverse effect on public safety?

3. How do prosecutors deal with the 30-day arrest-to-indictment interval? Are suspects released for failure to meet the time limit to indictment? Does the rush to indictment force prosecutors to present partially developed cases to the grand jury?

4. What is the impact of the Speedy Trial Act on trial preparation? Are there problem cases that are likely to exceed the 70-day limit? Do the excludable time provisions provide the necessary flexibility to accommodate complex cases or unavoidable delays?

5. To what extent, if any, has the Speedy Trial Act affected the timing or nature of case disposition, e.g., by plea, trial or dismissal?

In fulfilling the Department's mandate, Abt Associates explored a number of related issues to ascertain whether the Act was indeed having its intended effect, and if not, why not. For example, we asked the courts and the defense bar for their perceptions of the Act's effects on the federal justice system. We also addressed changes in case management resulting from the Act and continued problems in the law or its implementation that impede effective case processing. Finally, we examined the use of the dismissal sanction and express waivers of the sanction by defendants. Based on our findings and conclusions, the report offers recommendations for those responsible for implementing the Act's provisions.

1.3 Study Methodology

The study questions described above were addressed by a variety of different research methods, including telephone and mail surveys, on-site interviews in six federal jurisdictions, case records data collection in those same jurisdictions, and analysis of data supplied by the Federal Bureau of Investigation (FBI) based on a sample of terminated cases supplied by the Administrative Office of the U.S. Courts (AO). Each of the study components is described briefly below.

Telephone Survey of U.S. Attorneys' Offices. During the start-up phase of the project, Abt Associates initiated a number of activities designed to focus the research questions, refine the study design, and obtain preliminary information on the effects of Speedy Trial Act on investigation and prosecution. These included:

- visits to FBI and DEA headquarters and to DOJ's Executive Office for U.S. Attorneys;
- visits to the Boston field offices of the FBI and DEA; and
- a telephone survey of 17 of the 94 U.S. attorneys' offices.[32]

The telephone survey was conducted with the U.S. attorney or his designee, usually the chief of the criminal division. Exhibit 1.1 displays the districts surveyed, according to office size and level of compliance with the Speedy Trial Act limits during the year ending June 30, 1979. Survey results were synthesized into a working paper covering:

- problems faced by districts in complying with the Act;

Exhibit 1.1

SAMPLE FOR THE TELEPHONE SURVEY

(17 of 94 U.S. Attorneys' Offices)

SIZE OF OFFICE	COMPLIANCE WITH THE SPEEDY TRIAL ACT[a]	
	Low	Medium (M) and High (H)
Large	New York Eastern Washington, D.C. Illinois Northern	California Central (M) New Jersey (M)
Medium	Florida Southern Pennsylvania Western Michigan Eastern Massachusetts	California Northern (M) Missouri Eastern (H) South Carolina (H)
Small	Florida Northern Connecticut Utah	Delaware (H) New Mexico (H)

[a]Based on average overall compliance for the year ending June 30, 1979. Districts with high compliance are in the top one-third of all 94 districts in terms of percentage of cases complying with the Act's limits. Low compliance districts represent the bottom third of all 94 districts in percentage of cases complying with the limits. Even districts with "low" compliance met the Act's limits in the vast majority of the cases disposed.

- strategies developed to achieve compliance; and
- the overall impact of the Act on the major stages of case processing.

Findings from the survey are woven into this final report.

On-Site Interviews. Interviews were conducted with criminal justice system actors in six federal jurisdictions, four of which were also included in the telephone survey. The six districts visited represented all four regions of the country and included both large and medium-sized U.S. attorneys' offices. (See Exhibit 1.2.) No districts with small U.S. attorneys' offices were included in the on-site component of the study because none of those surveyed by telephone reported having any problems complying with the Act and because each accounts for a very small share of the total federal criminal case load. The districts visited generally had medium or low compliance as measured by published AO statistics for 1979.

While on site, project staff interviewed the following individuals:

- The U.S. attorney or his designee and supervisory staff in each of the major units responsible for processing criminal cases;
- One or more district court judges, a magistrate, and staff of the court clerk's office;
- Supervisory staff in each of the following law enforcement agencies:

  --FBI
  --DEA
  --ATF
  --Postal Inspection Service
  --Secret Service

- Supervisory staff within the federal defender's program and distinguished members of the private defense bar.

In all, approximately 90 interviews were conducted (15 per site) using semi-structured interview guides.

Data collected through these interviews were synthesized into site reports using a standardized outline. These site reports provide much of the qualitative information on which which this document is based.

Arrest-to-Indictment Case Analysis. In each of the jurisdictions visited, roughly 100 cases were sampled from those arrested in late 1983 in order to determine

Exhibit 1.2

DISTRICTS INCLUDED IN THE ON-SITE STUDY

DISTRICT (CIRCUIT)	NUMBER OF ASSISTANTS[a]	OVERALL COMPLIANCE, 1979[b]
New York Southern (2)	113	Low
New Jersey (3)	52	Medium
Florida Southern (11)	59	Low
Illinois Northern (7)	85	Low
California Northern (9)	43	Medium
Colorado (10)	20	Medium

[a]Average number as of FY 82.

[b]Based on average overall compliance for the year ending June 30, 1979. Districts with high compliance are in the top one-third of all 94 districts in terms of percentage of cases complying with the Act's limits. Low compliance districts represent the bottom third of all 94 districts in percentage of cases complying with the limits. Even districts with "low" compliance met the Act's limits in the vast majority of the cases disposed.

how districts were responding to the 30-day arrest-to-indictment interval.[33] For each defendant sampled, we examined U.S. attorneys' office and/or court records to ascertain:

1. Basic characteristics of the case, including:

   --number of defendants

   --agency(ies) making the arrest

   --the offense charged at arrest

2. Key Speedy Trial Act dates:

   --date of arrest

   --date of disposition (by dismissal, indictment or information)

3. Timing and conditions of release

4. The nature of the disposition.

For cases which exceeded the 30-day limit, a follow-up questionnaire was used to determine the reason for delay, whether excludable time provisions were used to bring the case into compliance and, if not, what ultimately happened to the case. Cases dismissed pre-indictment were also followed up to ascertain the reasons for case dismissal and whether the case had later been reopened by the filing of an indictment. Both the original case records data and the follow-up information were analyzed using simple descriptive statistics.

Analysis of Data Supplied by the Federal Bureau of Investigation. As noted above, there is some fear that the Act has led to increased preparation time on the part of investigators and prosecutors prior to presentation to the grand jury. Such a delay in charging, if it were to occur, would offset the effects of the Act on case processing speed following indictment. This study component was designed to address whether the Act has had an unintended impact on the timing of charging decisions.

To address this issue, Abt Associates examined FBI records for 1,340 defendants in the six study districts. The sample consisted of defendants tried for either bank robbery or bank embezzlement whose cases were terminated in fiscal years 1974, 1980, and 1983. These years were chosen to represent the pre-Act period,

the pre-sanction period, and full implementation of the Speedy Trial Act, respec tively. Cases were drawn from the AO's computer tapes of terminated cases for the years in question.

For each case in our sample we attempted to gather:

1. The date on which the case was opened by the FBI, supplied by each of the local FBI field offices; and

2. The date the matter was referred to the U.S. attorney's office, also supplied by the FBI field offices.

The time between these two dates was used as an estimate of the length of time the case was under investigation. In two districts, the FBI could not supply the dates required on a large proportion of their cases, and these sites were dropped from this component. The final sample consisted of 334 robbery and 366 embezzlement cases.

Mail Survey to 94 U.S. Attorneys' Offices. The final study component involved a mail survey of U.S. attorneys' offices nationwide to ascertain whether or not they permit express waivers of the Act and, if so, under what circumstances.

In addition to these primary study components, Abt Associates also made use of published statistics supplied by the AO in order to answer the various questions of interest. These statistics were drawn from a variety of sources which are noted throughout the report.

1.4 Limitations of the Study Methodology

The findings reported here are based in large measure on case records and interview data from only six of the 94 federal jurisdictions. Furthermore, these jurisdictions are all large or medium-sized districts. In both our 1980 study and in the current study, we found that such jurisdictions generally have more problems dealing with the pressures imposed by the Speedy Trial Act than do smaller jurisdictions. To the extent that small, fast districts were excluded from this study, the report may overstate problems with implementation of the Act.

It would have been desireable to examine the impact of the Speedy Trial Act on case timing and disposition controlling for changes in case load, case complexity, and prosecutorial/judicial resources. Unfortunately, such an analysis was beyond the scope of the present study. Our findings and conclusions regarding Speedy Trial Act effects should be seen as suggestive only. Without additional statistical control, one cannot attribute observed changes to the Act with a high degree of certainty.

1.5 Organization of the Report

Chapter 2 of this report presents data regarding the impact of the Act on various aspects of the charging process (see research questions 1 and 2). In particular, it examines whether the Act has affected declination or deferral policies and practices, the decision to arrest prior to indictment, and the timing of the charging decision generally.

Chapter 3 explores prosecutors' responses to the 30-day arrest-to-indictment clock (research question 3). First, compliance with the limits is examined. Then, a number of strategies for achieving compliance are described, some of which appear to be more in keeping with the spirit of the Act than others.

Chapter 4 is concerned with the indictment-to-trial period (research questions 4 and 5). The chapter examines the impact of the Act on case processing speed and the use of the excludable time provisions to achieve needed flexibility. It discusses the impact of the Act on trial preparation and the nature of case disposition. It also addresses the use of sanctions and the availability of express waivers of the dismissal sanction should the limits be exceeded.

Finally, Chapter 5 describes some of the changes in case management that have been instituted to meet the speedy trial deadlines. Attention is given to changes in case management procedures in both the U.S. attorneys' offices and the courts.

FOOTNOTES TO CHAPTER 1

1. For a complete discussion of the legislative history of the Speedy Trial Act of 1974, see Federal Judicial Center, A. Partridge, Legislative History of Title I of the Speedy Trial Act of 1974 (Washington, D.C.: Government Printing Office, 1980). Richard S. Frase, The Speedy Trial Act of 1974, 43 University of Chicago L. Rev. (Summer 1976). See also, Malcolm F. Feeley, Court Reform on Trial: Why Simple Solutions Fail, a Twentieth Century Fund Report (New York: Basic Books, 1983), pp. 156-182.

2. President's Commission on Law Enforcement and Administration of Justice, The Challenge of Crime in a Free Society (Washington, D.C.: Government Printing Office, 1967).

3. American Bar Association Project on Minimum Standards for Criminal Justice, Standards Relating to Speedy Trial (Chicago: American Bar Association, 1968).

4. National Advisory Commission on Criminal Justice Standards and Goals, Courts (Washington, D.C.: Government Printing Office, 1973).

5. At about this time, a number of other forces also came together to encourage Congressional action. For example, a study by the Federal Judicial Center on delay in federal criminal cases found that pretrial delay was a serious problem, with busier courts averaging over 100 days between arrest and indictment and 250 days between indictment and trial. S. Rep. No. 1021, 93rd Cong., 2d Sess. 7 (1974). The National Bureau of Standards also published a study in 1970 indicating that for defendants released pretrial, the likelihood of recidivism decreases significantly if they are tried within 60 days of arrest. See U.S. Department of Commerce, Compilation and Use of Criminal Court Data in Relation to Pretrial Release of Defendants: Pilot Study, 1970 (Washington, D.C.: National Bureau of Standards Technical Note 535). Both Attorney General William H. Renquist and Chief Justice Warren Burger cited court delay as a crisis in the federal courts in major speeches on the administration of justice.

6. In preparing this and a companion piece of legislation dealing with correctional services, Representative Mikva drew heavily on a bill drafted in the closing days of the Johnson Administration, entitled the "Crime Reduction Act."

7. 115 Cong. Rec. 34334 (1969).

8. Federal Judicial Center, Legislative History of Title I of the Speedy Trial Act of 1974, p. 14.

9. United States v. Ewell, 283 U.S. 116, at 120 (1966).

10. Barker v. Wingo, 407 U.S. 516, at 523 (1973).

FOOTNOTES TO CHAPTER 1

(continued)

11. As Feeley points out, federal rulemaking authority is legislatively authorized under the Court Reorganization Act of 1925. Many of the rules adopted by the federal courts are also properly within the purview of Congress, although over time judges have come to consider this rulemaking authority as an exclusive right. See Feeley, Court Reform on Trial, p. 158.

12. 406 U.S. 979, 999-1000.

13. The relative ineffectiveness of rule 50(b) was documented by Andrew H. Cohn of the Yale Law School in a 1974 Study. Speedy Trial: Hearings on S.754 Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary, 93rd Cong., 1st Sess. 220 (1973).

14. Speedy Trial Act of 1974: Hearings on S. 754, H.R. 7873, H.R. 207, H.R. 658, H.R. 687, H.R. 773, H.R. 4807 Before the House Comm. on the Judiciary, 93rd Cong., 2d. Sess., at 261 (Statement of Daniel J. Freed).

15. Id. at 385 (Statement of Sen. Peter W. Rodino Jr.).

16. 120 Cong. Rec. 41618 (1974).

17. Preamble, Pub.L. 93-619.

18. Administrative Office of the United States Courts, Second Report on the Implementation of Title I and II of the Speedy Trial Act of 1974, (September, 1977).

19. Office for Improvements in the Administration of Justice. Report of the Ad Hoc Subcommittee on the Speedy Trial Act of the United States Judicial Conference, in Delays in the Processing of Criminal Cases Under the Speedy Trial Act of 1974 (March 1, 1979).

20. Letter from Earl J. Silbert to Judge Carl B. Rubin (June 29, 1979).

21. Office for Improvements in the Administration of Justice, Delays in the Processing of Criminal Cases under the Speedy Trial Act of 1974, 5-6 (March 1, 1979)

22. Id. at 34.

23. Assistant Attorney General Philip B. Heymann, Testimony in The Speedy Trial Act Amendments of 1979: Hearings on S. 961 and S. 1028. Before the Senate Committee on the Judiciary, 96th Cong., 1st Sess. (1979).

24. Speedy Trial Act Amendments Act of 1979, H.R. Rep. No. 390 to accompany S. 961, 96th Cong., 1st Sess., (1979), hereinafter referred to as the House Report.

FOOTNOTES TO CHAPTER 1

(continued)

25. Comptroller General of the United States, Speedy Trial Act--Its Impact on the Judicial System Still Unknown (Washington, D.C.: General Accounting Office, May 2, 1979).

26. For a detailed discussion of the amendments and the rationale for these changes, see the House Report.

27. The background and findings of that study may be found in Nancy L. Ames et al., The Processing of Federal Criminal Cases under the Speedy Trial Act of 1974 (as amended 1979) (Cambridge, MA: Abt Associates Inc., 1980).

28. The Speedy Trial Act of 1979 Title I: Hearings Before the Sub Comm. on Crime of the House Comm. on the Judiciary, 97th Cong. 1st Sess. (1981) (statement of Hon. Robert J. Ward, U.S. District Court Judge for the Southern District of New York).

29. Id. (statement of Hon. John Feikens, Chief Judge of the United States District Court for the Eastern District of Michigan, Southern Division).

30. Id. (statement of Chief Judge Robert F. Peckham, United States District Court Chief Judge for the Northern District of California).

31. Id. (statement of Kenneth A. Caruso, Special Assistant to the Associate Attorney General).

32. The Boston interview was conducted in person.

33. Cases included those initiated by arrest on or before December 31, 1983. Up to 100 of the most recent cases were selected for examination in each site. Where a case involved more than one defendant, one was chosen at random for inclusion in the study.

2.0 INFLUENCE OF THE SPEEDY TRIAL ACT ON CHARGING DECISIONS

Past studies, including Abt Associates' 1980 Speedy Trial Act Impact Study, have found anecdotal evidence that the Speedy Trial Act may have had unintended consequences on the nature and timing of the charging decisions in federal criminal cases. Observers have voiced concerns that:

- Fewer cases are accepted for prosecution, so that assistant U.S. attorneys (AUSAs) can keep their case loads manageable enough to meet the tight timelines imposed by the Act.
- Arrests may be substantially delayed to avoid triggering the 30-day time limit before the prosecution is ready to indict.
- Indictments may be delayed so that the prosecution has completed trial preparation before starting the 70-day limit to trial.

Were such unintended effects directly and solely attributable to the speedy trial time limits, they would seriously undermine the Act's stated objectives. Declining prosecution to help meet overall deadlines would not serve the public's interest in speedy disposition. Delaying arrest or indictment would not remove defendants from the street more quickly, nor result in faster overall processing of criminal cases. As one judge interviewed during our 1980 study commented, such stratagems just mean that "the bow knot is tied later." In other words, total time from the commission of the offense to adjudication is not reduced; rather, the time from offense to indictment is increased, and the time from indictment to trial is correspondingly reduced.

This chapter explores the effects of the Speedy Trial Act on declination/deferral policies (Section 2.1), arrest policies (Section 2.2), and the timing of indictments (Section 2.3). Data are drawn from statistics published by the Administrative Office of the United States Courts (AO), telephone and on-site interviews with individuals in 19 jurisdictions, and an analysis of case level data supplied by the Federal Bureau of Investigation (FBI).

2.1 Declination/Deferral Policies

The effects of the Speedy Trial Act on declination and deferral policies in the United States attorneys' offices are difficult to assess with precision because the imposition of the Act's time limits coincided with a broad reconsideration and reordering of the priorities of federal criminal prosecution. These changes in Department of Justice (DOJ) policy are discussed below.

2.1.1 Changing Justice Department Priorities

Exhibit 2.1 shows that criminal case load in the United States District Courts has changed substantially in the last decade. During 1977-1980, at the same time the Speedy Trial Act was being phased in, criminal filings declined 32 percent. Some attributed the decline to the Speedy Trial Act, but this was probably not the underlying cause. While the Act may have played some role in setting overall case load parameters and in case-by-case screening decisions, the reduction in case load during the 1977-1980 period may be largely attributed to changing DOJ priorities under the Carter administration.

Exhibit 2.2 summarizes the changing mix of federal criminal prosecutions in the period 1978-1983. For 1978-1980, the exhibit shows a decline in the number of filings across all major crime categories except fraud and immigration. These reductions were in keeping with the policy decisions made at the highest levels of the Justice Department. In 1977, Attorney General Benjamin V. Civilletti announced that the Department would concentrate its limited resources on the investigation and prosecution of white collar crimes, major narcotics conspiracies, political corruption and organized crime operations. U.S. attorneys' offices were directed to refer certain high-volume cases, such as one-car Dyer Act violations, bank robberies, one-gun weapons violations, small drug cases and small-quantity check forgery and counterfeiting prosecutions to state or local authorities. These cases had long been staples of federal agents' and prosecutors' work.[1]

This change in policy and its accompanying declination guidelines reflected the Department's intention to develop a "quality case load" composed of fewer, but more significant prosecutions. In the drug area, for example, the emphasis shifted from simple "buy-bust" street cases to major drug trafficking organizations.

By the late 1970s, these Department priorities were being reconsidered. In response to rising crime rates, citizens and public officials began to question the wisdom of sharply reduced federal prosecutions, particularly in the areas of violent crime and street crime. There was increasing concern that many concurrent jurisdiction cases were not being prosecuted at all. Congress directed the Justice Department to study the declination policies being followed by the U.S. attorneys' offices to determine whether they were overly stringent. The Department's report, released in 1979, confirmed that written declination guidelines were being widely used to screen out high-volume offense categories that could be deferred to state or local levels. This study also showed that there was a tremendous amount of cross-district

Exhibit 2.1

TOTAL CRIMINAL FILINGS IN UNITED STATES DISTRICT COURTS 1976-1983

YEAR	TOTAL CRIMINAL FILINGS
1976	41,020
1977	41,589
1978	34,625
1979	31,536
1980	27,968
1981	30,355
1982	31,623
1983	34,681

Source: Administrative Office of U.S. Courts, Annual Reports of the Director.

Exhibit 2.2

ALL CRIMINAL FILINGS, BY NATURE OF OFFENSE (TRANSFERS EXCLUDED)

12-MONTH PERIODS ENDED JUNE 30

OFFENSE CATEGORIES	1978		1979		1980		1981		1982		1983	
	n	%	n	%	n	%	n	%	n	%	n	%
A. Immigration	1,734	5.0	1,869	5.9	1,821	6.5	1,929	6.4	1,803	5.7	1,898	5.5
B. Embezzlement	1,944	5.6	1,625	5.2	1,578	5.6	1,836	6.0	2,072	6.6	2,104	6.1
C. Auto Theft	810	2.3	399	1.3	381	1.4	305	1.0	369	1.2	347	1.0
D. Weapons/Firearms	3,058	8.8	1,209	3.8	931	3.3	1,306	4.3	1,779	5.6	1,707	4.9
E. Escape	1,076	3.1	1,095	3.5	832	3.0	919	[illegible].0	819	2.6	897	2.6
F. Burglary/Larceny	4,202	12.1	3,618	11.5	3,184	11.4	3,155	10.4	3,030	9.6	3,566	10.3
G-H. Drugs	3,746	10.8	3,277	10.4	3,130	11.2	3,697	12.2	4,193	13.3	5,024	14.5
I. Forgery/Counterfeiting	3,818	11.0	2,877	9.1	2,124	7.6	1,810	6.0	2,128	6.7	2,322	6.7
J. Fraud	4,637	13.4	5,005	15.9	4,632	16.6	4,744	15.6	4,709	14.9	5,557	16.0
K. Homicide/Robbery/Assault	2,103	6.1	1,838	5.8	1,947	7.0	2,160	7.1	2,157	6.8	2,032	5.9
L. Other	7,497	21.7	8,724	27.7	7,408	26.5	8,494	28.0	8,564	27.1	9,227	26.6
TOTAL	**34,625**	**99.9**	**31,536**	**100.1**	**27,968**	**100.1**	**30,355**	**100.0**	**31,623**	**100.1**	**34,681**	**100.1**

Sources: Administrative Office of the U.S. Courts. For 1978-1982, Annual Report of the Director, (1982). For 1983, Annual Report of the Director, (1983).

variation in specific declination guidelines.[2] Another study, released in 1982, revealed that many concurrent jurisdiction cases were, in fact, never prosecuted.[3]

Under the Reagan administration, federal policy has once again shifted toward the more traditional federal prosecutorial priorities. Accordingly, the Justice Department has directed U.S. attorneys to get back into the business of prosecuting bank robbers, individual drug violators, and more violent offenders. Exhibit 2.1 shows that, while federal prosecutors have not returned to the days in which auto theft and liquor cases dominated their case loads, there have been increases in filings in most major criminal areas since 1980. By 1983, total filings had returned to their 1978 levels, although they were still below the high levels observed in earlier years. In several districts visited in this study, respondents observed that declination guidelines had been liberalized in the past few years.

2.1.2 The Effects of the Speedy Trial Act

While the overall increase in criminal filings since 1980 seems to undermine any general argument that the Speedy Trial Act has caused more conservative and restrictive case screening decisions, there is reason to believe that the Act does play some role in case screening. Respondents in about one-half (9 of 19) of the districts surveyed by telephone interview or site visit reported that the Act had had some effect on declination and deferral policies. One very experienced Assistant U.S. Attorney (AUSA) summed up the prevailing viewpoint in this manner:

> The Speedy Trial Act, general prosecutorial priorities and limitations on available resources necessitate tradeoffs in case load mix along a continuum from many simple and fast cases to a few complex and slow cases. First and foremost, case selection decisions are based on the seriousness of the offense, the strength of the evidence and the nature of the offender. However, the Speedy Trial Act can play a subsidiary role in selection decisions.

According to some respondents, the Act sometimes has had a positive effect by forcing a more systematic approach to case screening and subsequent case load management. Since the Act exerts strong pressure to manage cases efficiently once they are accepted for prosecution, these respondents noted that prosecutors can no longer take the screening decision lightly. In the past, weaker cases might be accepted for prosecution in the hope that the defendant would plead guilty. Cases involving less serious offenses or weaker evidence might simply drift to the bottom of the pile. Under the Act, prosecutors cannot afford to accept marginal cases, since

this might impede their timely handling of more serious cases. They must follow a more disciplined and carefully managed intake process. Respondents made the following observations:

- When the Act first went in, the government looked at everything as a felony and nothing could be deferred or reduced to a misdemeanor. Now, we have learned to prioritize and have come to see some cases as less serious than others. It's a more sensible policy. (AUSA)

- The assistants no longer file a case if they think they will lose it on trial. They used to throw it against the wall to see if it would stick, and I don't see that as much anymore. (Defense Attorney)

- Our case screening has improved. Our motto is: "You indict it, you try it." (AUSA)

Although these respondents viewed this change as a positive one, some commented that justice is not necessarily served if only the most serious offenses, or cases where conviction is almost certain, are selected for prosecution. A number of the investigative agents interviewed in the course of this study (12 out of 30) expressed concern that the Act had had an adverse impact on their ability to get cases prosecuted. This concern was voiced most frequently by supervisory agents within the Postal Inspection Service and the Secret Service.

In several districts, Postal Inspectors complained of their inability to get many of their cases accepted by the U.S. attorneys' offices and attributed these problems to the Speedy Trial Act. In particular, they felt that internal crimes cases (e.g., theft of mail by postal employees) typically receive little attention from AUSAs. Many are declined outright, and those that are accepted for prosecution are often downgraded to misdemeanors or never actively pursued. Postal Inspectors in several districts stated that AUSAs were also reluctant to accept external crimes cases. Mail fraud cases usually receive more consideration, although Postal Inspectors in one district reported that they often forego presenting even large mail fraud cases to the U.S. attorney's office because of its heavy volume of drug cases.

Secret Service agents in two districts expressed frustration at the U.S. attorney's office's reluctance to accept small counterfeiting or check forgery cases. These declination policies, which the agents attributed directly to Speedy Trial Act concerns, reportedly make it difficult to "move up the ladder" in potentially large conspiracy cases.

Of course, this is a long-standing complaint of the Postal Inspection and Secret Service Agencies. The cases these agencies bring tend to be relatively small in dollar value and not complex, and U.S. attorneys have issued blanket declinations for years in many districts on Postal Inspection Service and Secret Service check cases. Few respondents in the other agencies surveyed in this study (FBI, DEA and ATF) expressed a similar concern.

In sum, there do not appear to be any wholesale effects that uniformly cut across districts, but some respondents do point to effects on specific cases and case types. This suggests that certain categories of cases are deemed expendable. The types of cases may vary among districts according to local policies and/or the particular crime problems in the district. When time pressures are particularly acute, offices may drop these marginal cases to ensure that the remaining case load is processed within the speedy trial limits. In this connection, it is important to reemphasize the difficulty of disentangling the effects of two separate but parallel developments: the imposition of speedy trial limits and the reordering of DOJ case priorities.

2.2 Arrest Policies and Practices

One of the principal mandates of this study was to determine whether the Speedy Trial Act had had an unintended effect on arrest policies and practices. The 30-day arrest-to-indictment interval is a relatively short time period, with few, if any, "automatic" exclusions that can be invoked to gain more time. Thus, investigators and prosecutors are under intense pressure to indict quickly once an arrest is made. Furthermore, facing a 70-day limit to trial, prosecutors often want more evidence than is simply needed for an indictment before presenting a case to the grand jury: many believe that they must be ready for trial before seeking an indictment.

In light of such pressures, it is reasonable to ask whether U.S. attorneys' offices discourage or delay pre-indictment arrests so as to avoid triggering the speedy trial limits. A related question is whether, by allowing alleged offenders to remain on the street for longer periods, the Act has had an unintended negative effect on public safety.

2.2.1 Pattern of Pre-Indictment Arrests

During the time Congress was originally considering passage of the Speedy Trial Act and again while amendments were being debated, one of the most serious

criticisms leveled at the Act was that it would cause arrests to be discouraged or delayed to avoid triggering the 30-day clock. Indeed, a study conducted by the Department of Justice in 1979 found evidence in several districts that arrests were being discouraged for speedy trial reasons.[4] Furthermore, during hearings on the 1979 Amendments, the Department cited preliminary AO data showing a sharp decline in the rate of arrests from the year ending June 30, 1977 to June 30, 1978.

Precise national data on the number of arrest-initiated cases handled by U.S. attorneys' offices are not available. However, reasonable surrogate data on the number of cases initiated by arrest can be obtained by examining the number of cases terminating Interval I, the arrest-to-indictment period. Exhibit 2.3 shows that the number of arrest-initiated cases remained fairly stable from fiscal years 1977 to 1981. In 1982, however, there was a substantial decline in the number of arrests, and this drop was only partially reversed in 1983.

The ratio of cases terminating Interval I to those terminating Interval II--indictment to trial--can also be used as a surrogate for the percentage of total cases initiated by arrest in the U.S. district courts. Exhibit 2.3 shows that in the last two years the percentage of arrest-initiated cases has declined from earlier levels. With the exception of 1978, the arrest rate has traditionally hovered around 40 percent; in 1982 and 1983, it dropped to 30 percent.

These national figures lend some support to the view that U.S. attorneys' office arrest policies have become more restrictive in recent years. At the same time, limiting our inquiry to national indicators would be highly misleading, since they mask apparently significant differences in arrest practices across federal districts. Exhibit 2.4 shows that in Florida Southern and New York Southern, the percentages of arrest-initiated cases were twice the national average. On the other hand, in Illinois Northern and Colorado, the percentages were below the national figure. Nor can such variations be easily explained by differences in case mix.

There is apparently a great deal of diversity among jurisdictions in the types of cases initiated by arrest and the agencies making the arrests. For example, our six study districts revealed the following pattern (see Exhibit 2.5):

- In Florida Southern, 73 percent of the arrest-initiated cases involved drugs. The DEA and Customs Service, which both handle the drug offenses in this jurisdiction, were responsible for making over three-fourths (76%) of the arrests in this district.

Exhibit 2.3

RATIO OF INTERVAL I TO INTERVAL II DEFENDANTS

	NUMBER OF DEFENDANTS TERMINATED:		
FISCAL YEAR	INTERVAL I[a] (1)	INTERVAL II (2)	(1)/(2)
1977	13,876	35,797	38.8%
1978	14,164	40,113	35.3%
1979	14,404	37,674	38.2%
1980	13,193	32,019	41.2%
1981	14,773	35,358	41.8%
1982	10,661	35,969	29.6%
1983	12,619	41,044	30.7%

Sources: Administrative Office of the U.S. Courts. For 1977-79, Sixth Annual Speedy Trial Act Implementation Report, (1980). For 1980-82, Annual Report of the Director (1982). For 1983, Annual Report of the Director (1983).

[a]This number may underestimate the percentage of defendants whose cases were initiated by arrest, since some unknown fraction of cases terminating in Interval I is dismissed prior to indictment.

Exhibit 2.4

RATIO OF INTERVAL I TO INTERVAL II DEFENDANTS FOR STUDY DISTRICTS, FISCAL YEAR 1983

DISTRICT	NUMBER OF DEFENDANTS TERMINATED: Interval I (1)	Interval II (2)	(1)/(2)
New York Southern	678	1,136	59.7%
New Jersey	327	743	44.0%
Illinois Northern	222	1,000	22.2%
California Northern	270	705	38.3%
Colorado	86	360	23.9%
Florida Southern	1,267	1,929	65.7%

Source: Administrative Office of the U.S. Courts. Annual Report of the Director, (1983).

Exhibit 2.5

TYPES OF CASES IN THE ARREST SAMPLES FOR THE SIX STUDY DISTRICTS[a]

CASE TYPE	Illinois Northern (n = 92)	Florida Southern (n = 102)	New York Southern (n = 78)	New Jersey (n = 100)	Colorado (n = 100)	California Northern (n = 69)
Drugs	34.8%	72.5%	16.7%	17.0%	13.0%	26.1%
Counterfeiting/Forgery	5.4	3.9	11.5	8.0	7.0	10.1
Assault	0.0	2.9	5.1	4.0	1.0	1.4
Embezzlement/Theft	22.8	0.0	23.1	12.0	12.0	4.3
Fraud/False Statement	2.2	5.9	1.3	31.0	5.0	1.4
Postal Theft	16.3	1.0	21.8	6.0	4.0	0.0
Robbery/Burglary	8.7	1.0	3.8	8.0	11.0	43.5
Interstate Transportation of Stolen Goods	0.0	0.0	2.6	9.0	4.0	0.0
Weapons	1.1	3.9	0.0	5.0	4.0	0.0
Immigration	6.5	2.9	0.0	0.0	28.0	1.4
Other	2.2	5.9	14.1	8.0	11.0	11.6
TOTAL	**100.0**	**100.0**	**100.0**	**100.0**	**100.0**	**100.0**

Source: Abt Associates Inc. arrest sample data.

[a]Case type was missing in five cases.

- Drugs and embezzlement/theft cases made up over one-half of the Illinois Northern arrests. In this district, the Postal Inspection Service was responsible for one-half of the arrests, many of which involved use of the U.S. mails to transport drugs.

- Immigration cases made up 28 percent of the Colorado arrests. In this site, the INS and the FBI together accounted for over one-half (56%) of the total arrests.

- In California Northern, 44 percent of the arrest-initiated cases involved robbery or burglary. The FBI was responsible for roughly 58 percent of all arrests in this district.

- In New Jersey, fraud and false statements accounted for 31 percent of the cases initiated by arrest, but no single agency or agencies were responsible for making the arrests.

- In New York Southern there was no clear pattern in the types of arrests or the arresting agency.

These cross-district variations seem to suggest that U.S. attorneys' offices and federal investigative agencies are pursuing different arrest policies in different districts. The question for this study is how much of this apparent difference results from different responses to Speedy Trial Act pressures.

2.2.2 The Effects of the Speedy Trial Act on Arrest Policies and Practices

The Speedy Trial Act does seem to influence arrest policies, although the effect varies across districts. Twelve of 19 districts, surveyed by telephone and on site visits conducted during this study, reported that the Speedy Trial Act had led to more restrictive arrest policies. Three of the remaining seven districts reported having long-standing restrictions on arrest unrelated to the Act, and four reported having no restrictions on arrest. In fact, in one of these districts--Florida Southern--agents are actively encouraged by the U.S. attorney's office to make arrests in order to seize evidence and prevent flight of foreign nationals.

Whether or not they report that the Speedy Trial Act has affected their arrest policies, most U.S. attorneys' offices either require or encourage agents to request authorization from an AUSA before making an arrest. This is to ensure that the case merits prosecution and that there is sufficient evidence to support the arrest, to alert the office and prepare the AUSAs, and to prevent an avoidable arrest from disrupting an ongoing investigation of a larger nature. However, the extent to which such policies are implemented varies widely, as does the stringency of screening criteria utilized.

Although New York Southern has a high percentage of arrest-initiated cases, respondents in that district still noted a decline in discretionary arrests which they attributed, at least in part, to Speedy Trial Act pressures. As one senior attorney noted:

> The Act has clearly affected our prosecutions. It has affected both the number and the timing of case initiations. Before we could make an arrest and hope for a plea. Now we have to be prepared to go to trial before we make an arrest.

This respondent did point out that once a case was initiated, the Act exerts strong pressure to keep it moving efficiently. On balance, he believed that the tradeoff was a useful one.

Respondents in both Colorado and California Northern also reported a decline in probable cause arrests due to the Speedy Trial Act. One AUSA in the California Northern office went so far as to observe: "Under the Act, we need to build cases patiently and avoid pre-indictment arrests if at all possible."

Respondents in Illinois Northern reported the most dramatic effect of the Speedy Trial Act on arrest policies. This is reflected in the district's low percentage of arrest-initiated cases (22% in 1983). Supervisory staff in virtually all of the investigative agencies in this district complained that the U.S. attorney's office had instituted what amounted to a "no arrest" policy in response to the Speedy Trial Act. This reportedly means that very few pre-indictment arrests are approved, and agents are told to develop their cases for presentation to the grand jury and direct indictment. The U.S. attorney's office disclaims such a wholesale policy, noting that arrests are made wherever there is a threat of physical harm. Yet, AUSAs did admit to discouraging pre-indictment arrests in certain cases where there is no immediate threat to the public's physical safety--e.g., gambling operations and certain types of fraud.

Several districts reported that in response to increasingly restrictive arrest policies, strategies have been developed to obtain as much as possible of the investigative benefit usually associated with arrest, without actually making an arrest. One district's strategy is to execute a search warrant to seize evidence and illicit assets without arresting the suspect. Organized criminal activity can thereby be disrupted by initiating civil forfeiture proceedings without starting the thirty-day clock. This strategy may give the defendant time to destroy the rest of the evidence or to flee the district, but assistants note that most of the defendants involved have

strong ties to the community, and thus are not apt to go into hiding or become a threat to public safety.

Other strategies devised for "on-view" or probable cause arrest situations involve so-called "magistrates' waivers" or "unarrests." Both of these allow evidence to be seized and criminal activity to be interrupted, without formal arrest of the suspect. The suspect is simply released with no complaint being filed or is allowed to waive first appearance before a magistrate. In such situations, the suspect continues to be under threat of direct indictment while negotiations may proceed toward securing a guilty plea and/or cooperation in implicating other targets of the investigation.

2.2.3 The Effects of Arrest Policy and Practices on Public Safety

There is an inherent tension between investigative agents and prosecutors concerning the timing of arrests and the amount of investigation necessary to support a prosecution. This tension preceded the imposition of the Speedy Trial Act and may account for some of the criticisms that agents level at the Act. In general, assistant U.S. attorneys interviewed during this study tended to emphasize the appropriateness and benefits of a restrictive arrest policy (whether prompted by the Speedy Trial Act or by other considerations), while agents stressed the negative effects of such a policy.

The AUSAs' positive views regarding the more restrictive arrest policy reflect a number of basic assumptions. First, AUSAs are convinced that an arrest will be made whenever there is a clear and present danger to public safety. Virtually all AUSAs (and agents) interviewed agreed that arrests were never discouraged if they were necessary to forestall violence against agents, witnesses or members of the general public. Indeed, the chief of the criminal division in one district stated that:

> The suggestion that a 'necessary' arrest would ever be discouraged or delayed simply to avoid triggering the speedy trial clock is ludicrous.

AUSAs in most districts also believe that arrests will be authorized without hesitation in other "appropriate" circumstances, including non-physical victimization, danger of flight, or the possibility of destruction of evidence. As will be discussed below, however, prosecutors and investigative agents may disagree as to what constitutes an appropriate circumstance.

Second, AUSAs are quick to point out that liberal pretrial release policies mitigate the importance of arrest as a means of detaining the defendant prior to trial. In their view, little is gained by arresting the alleged offender if he or she will be released on bond in a very short time. In fact, as Exhibit 2.6 shows, less than half the defendants in our arrest sample were released pre-indictment. In two sites, Illinois Northern and California Northern, only a small fraction of the defendants were released before an indictment was returned.[5] On the one hand, these data suggest that judges appear to be setting fairly restrictive conditions of release and not permitting wholesale release of detained defendants. On the other hand, they may simply reflect careful screening and selectivity on the part of the various U.S. attorneys' offices. For example, an experienced supervisory assistant in Illinois Northern noted that arrests are not authorized unless there is reason to believe the judge will detain the alleged offender pretrial.

Under the Bail Reform Act of 1984, judicial officers may not impose a financial condition that results in the pretrial detention of a person (18 U.S.C. 1342 (c)). Given this provision of the Bail Reform Act, it is likely that fewer defendants will be detained pretrial, and AUSAs may be correct that earlier arrests will not result in earlier detention of defendants.

Third, AUSAs note that restrictive arrest policies force earlier and closer contact between agents and prosecutors during the development of investigations and require agents to prepare their cases more thoroughly before requesting an arrest authorization. In the words of two supervisory AUSAs:

- The Speedy Trial Act has caused us to work together earlier on cases to determine strategy.

- In the past, the agencies would leave us in the lurch--they'd make the arrest, and we'd be without fingerprints, reports, checks, and so on. Now we try to put off the agents until the proof is in hand. This not only protects us, but also forces the agents to move faster.

A fourth advantage cited by respondents is that a more restrictive arrest policy protects the defendant. Some AUSAs commented that ethics and fairness dictate limiting arrests to cases where there is sufficient evidence in hand to obtain a conviction. Of course, this is a higher standard than that which law enforcement officials must meet to justify a probable cause arrest. AUSAs' observations on this point included the following:

Exhibit 2.6

NUMBER AND PERCENTAGE OF DEFENDANTS IN THE ARREST SAMPLE WHO WERE RELEASED PRE-INDICTMENT

DISTRICT	(1) NUMBER OF DEFENDANTS[a]	(2) NUMBER OF DEFENDANTS RELEASED PRE-INDICTMENT[b]	(3) PERCENTAGE OF DEFENDANTS RELEASED PRE-INDICTMENT
California Northern	69	7	10.0
Colorado	100	48	48.0
Florida Southern	94	40	42.6
Illinois Northern	49[c]	14	28.6
New Jersey	100	45	45.0
New York Southern	81	35	43.2

Source: Abt Associates Inc. arrest sample data.

[a]This number represents the total number of defendants in our arrest sample for whom release data were available.

[b]This number includes defendants released on personal recognizance and those who posted bond sometime between the date of arrest and indictment.

[c]A large number of defendants were missing this information in Illinois Northern.

- Normally we do not arrest someone unless we have enough to convict them as well. A political corruption arrest will ruin the defendant's reputation, so we had better be sure about it if we arrest him.

- Rather than arrest pre-indictment, we prefer to do more investigation up front and fully use the grand jury subpoena power before indicting. This isn't just for speedy trial reasons--the prosecutor has an obligation to make the case before an indictment, because an indictment can wreak havoc on a person's career, and it would be highly punitive to indict without adequate investigation.

Finally, as the following comments indicate, prosecutors believe that discouraging or delaying arrests may be essential to develop a larger case:

- Arrest cuts off certain investigative options like wiretaps. But, as soon as we have the evidence, we go in for the arrest, regardless of the Speedy Trial Act consequences, and get the guy off the street. It's a question of balancing fairness to defendants and the public safety.

- We are paid to make a judgment on whether the public is better served by pulling someone off the street immediately or holding off and getting a larger case with greater impact. We aren't always right, but someone has to make the decision, and we do the best we can.

- On balance, it's better for the public if we hold off, get the whole pie and immobilize an entire ring than if we go in and get some offenders off the street sooner.

In sum, many AUSAs believe that the restrictive arrest policy helps to prevent unfair and inappropriate arrests and to produce a "quality case load," without adversely affecting public safety.

On the other hand, some respondents believe that overly restrictive arrest policies can have harmful effects on prosecutorial efficiency, on public safety and on case development. For example, some agents believe that exclusive reliance on the grand jury to initiate charges removes the pressure to move forward in certain cases.

While most of the AUSAs interviewed noted that arrests were made whenever there was an immediate threat of violence, some AUSAs and investigative agents in the sites visited expressed concerns about less immediate effects of delayed arrests on public safety. Such concerns were voiced in six of the twelve districts where respondents to our telephone survey reported that more restrictive arrest policies had resulted from the Speedy Trial Act. Comments from agents interviewed during our site visits included the following:

- Without the arrest, public safety is a real problem. Narcotics trafficking breeds a lot of violence and the traffickers are staying on the street a lot longer now. The crime chain generated by the narcotics trade is being allowed to linger now that we do not arrest.

- We've had trouble getting warrants to protect our agents. Instead of getting an arrest warrant, we're now serving subpoenas; a subpoena doesn't offer the agent much clout with the subject--it's hard to pull any weight in a troubled neighborhood with a subpoena.

- Failure to arrest breeds disrespect for the law, allows suspects to flee and sometimes jeopardizes agent safety.

Moreover, restricting arrests curtails one of the law enforcement officer's most valuable tools. Arrests can be helpful in seizing evidence, obtaining confessions, gaining cooperation in implicating other actors in a criminal enterprise, preventing development of alibis, preventing disbursement of assets and fully identifying suspects. In the words of the investigative agents interviewed in our study sites:

- The decline in arrests has caused us some problems. Arrests can elicit confessions and give us a chance to interview the defendant. Arrests can also have a deterrent effect. Under the Act, things are more businesslike but not necessarily more effective.

- The AUSAs do not want any probable cause arrests and prefer that you walk away from everyone. Pre-indictment arrest is the most important law enforcement tool there is. During the emotion of an arrest, one can get statements, admissions, and confessions. The defendant is forced to face the situation and may cooperate. Moreover, when the case gets old by the time of the indictment, witnesses may be lost or it may be hard to refresh their memories. Even the average case has 5-7 witnesses.

- The buy-bust is virtually no longer an option with the no arrest approach. Buy-bust is a valid investigational technique which often leads to witnesses cooperating. No arrests means wasting time on simple investigations by using round-about methods.

- Most cases are proactive and there is no problem, but with property crimes we have lost the benefit of arrest. The trauma of arrest can produce evidence and cut down the time to develop an alibi.

In sum, pre-indictment arrests have been discouraged in a number of jurisdictions partly in response to Speedy Trial Act pressures. There is disagreement, however, as to the desirability of the more restrictive policy. Agents prefer to act

sooner; prosecutors typically want to wait until all the evidence is in hand. In most of the jurisdictions surveyed, this natural tension between law enforcement and prosecution appears to be relatively mild, ground rules have been set, and most of the actors seem reasonably well pleased with the current approach. In the one or two sites where disagreements are strong, a clearer understanding of overall prosecutorial policy and increased coordination between the investigative agencies and the U.S. attorney's office might help reduce tensions and bring about a more balanced approach.

2.3 The Effect of the Speedy Trial Act on the Timing of the Charging Decision

2.3.1 Delayed Arrest/Indictments

The above discussion centered on whether the Act had unintentionally resulted in a more restrictive policy regarding pre-indictment arrests. A related question is whether the Act has delayed the charging decision so that more evidence is required before an arrest is made or an indictment returned. In other words, has the government responded to the limits by moving as much case preparation as possible outside (i.e. before) the controlled intervals?

Many AUSAs interviewed during this study believe that the Speedy Trial Act has had little to do with the timing of the arrest or indictment decision. Rather, they contend that such timing is based entirely on investigative considerations. These respondents refer to long-standing policies that cases are to be built patiently until the evidence is complete, making maximum use of grand jury subpoena power and court-ordered wiretaps--tools which are usually lost as soon as an arrest is made.

A number of other respondents reported that the Speedy Trial Act had led to more investigation time prior to charging the defendant and triggering the Act's limits. Comments included the following:

- The Act hasn't accomplished its goal of speedier prosecution because it just takes longer to bring an indictment--the overall effect is zero sum. (U.S. District Court Judge)

- Given the Speedy Trial Act, we have to begin cases by indictment. In many cases, we need the subpoena power of the grand jury to gather financial information. If we were to go ahead and indict with a few outstanding issues, we would risk a defense claim to the court that we had plenty of time up front and shouldn't be allowed any extra time. We may be overworking simple arrest cases, but if two out of ten cases do go to trial and one of those is underinvestigated, it is the AUSA

who will look bad in the eyes of the court. (Assistant U.S. Attorney)

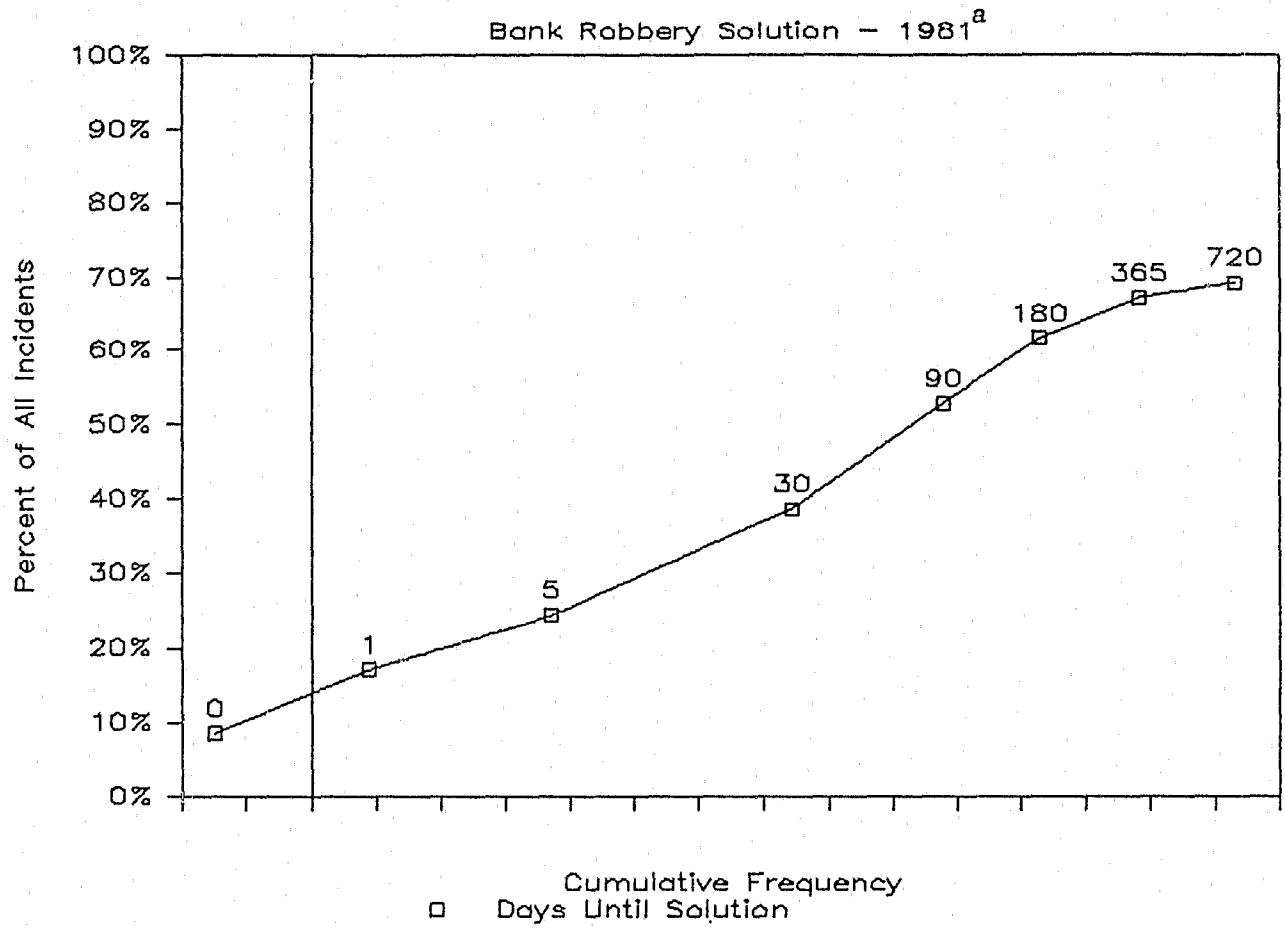
- Since the AUSAs now want to proceed by indictment, a long time is elapsing between the end of the investigation and the indictment. This causes problems in relocating defendants and witnesses and informants. Sometimes it takes years to get to trial. For example, one case took four years to get to trial. By the time of sentencing, the defendant, who was no longer dealing [drugs], received probation. (DEA agent)

In order to test the hypothesis that the Act had resulted in protracting the time used by the Federal Bureau of Investigation (or other investigative agencies) for case development, we examined FBI records for 1,340 defendants. Our assumption was that if the Act had had an impact on the length of time it took to develop a case, then the time from case opening to referral to the prosecutor would have grown longer from 1974 to 1983, from passage of the Act to full implementation.

In order to circumvent the problem of changing character of federal prosecutions over the last several years, we concentrated our analyses on only the crimes of bank robbery and bank embezzlement. These crime were chosen for two reasons. First, these are relatively high incidence crimes, guaranteeing a reasonably large sample size. Second, they represent a fairly interesting contrast in case development procedures. Bank robbery is a violent offense, where the investigation can nearly always be assumed to begin within a few hours of the offense. As Exhibit 2.7 shows, about a quarter of the offenses are solved on the day that they occur, and over half are solved within the month of occurrence. Moreover, once a crime is solved, an arrest is likely to follow, since offenders are usually considered dangerous and likely to flee. In contrast, bank embezzlement is primarily an investigative offense, which is often detected long after it has occurred, and where the case depends on assembling and interpreting appropriate documentary evidence rather than finding a suspect.

Our hypothesis was that if the Speedy Trial Act was influencing investigation, it should affect the two offense types differentially. We hypothesized that the arrest interval should be relatively unimportant in embezzlement cases, because arrests are generally unnecessary, while in bank robbery cases a limit on the arrest-to-indictment interval might encourage a delay in arrest, which might in turn be reflected in longer periods of investigation by the FBI.

Exhibit 2.7



Source: Uniform Crime Reporting Program, Crime Indicators System: Fourth Semiannual Briefing on Crime, Federal Bureau of Investigation (October, 1983).

[a]Data refer to robberies committed in 1981 and solved as of September, 1983.

While selecting only two types of crime for analysis helps control for the changing federal case mix, it is still possible that the character of bank robberies or embezzlements themselves has changed over the decade. Exhibit 2.8 shows that the number of incidents of bank robbery increased over the decade from 1973 to 1982, but that the proportion of solved cases has fallen with increasing numbers. It is possible that this may indicate an increase in the difficulty of investigation, that might produce delays unrelated to the Speedy Trial Act. Nor were we able to identify any intermediate dates in the investigative process, such as when a suspect was identified or located, that might affect the length of the investigative period independent of speedy trial considerations.

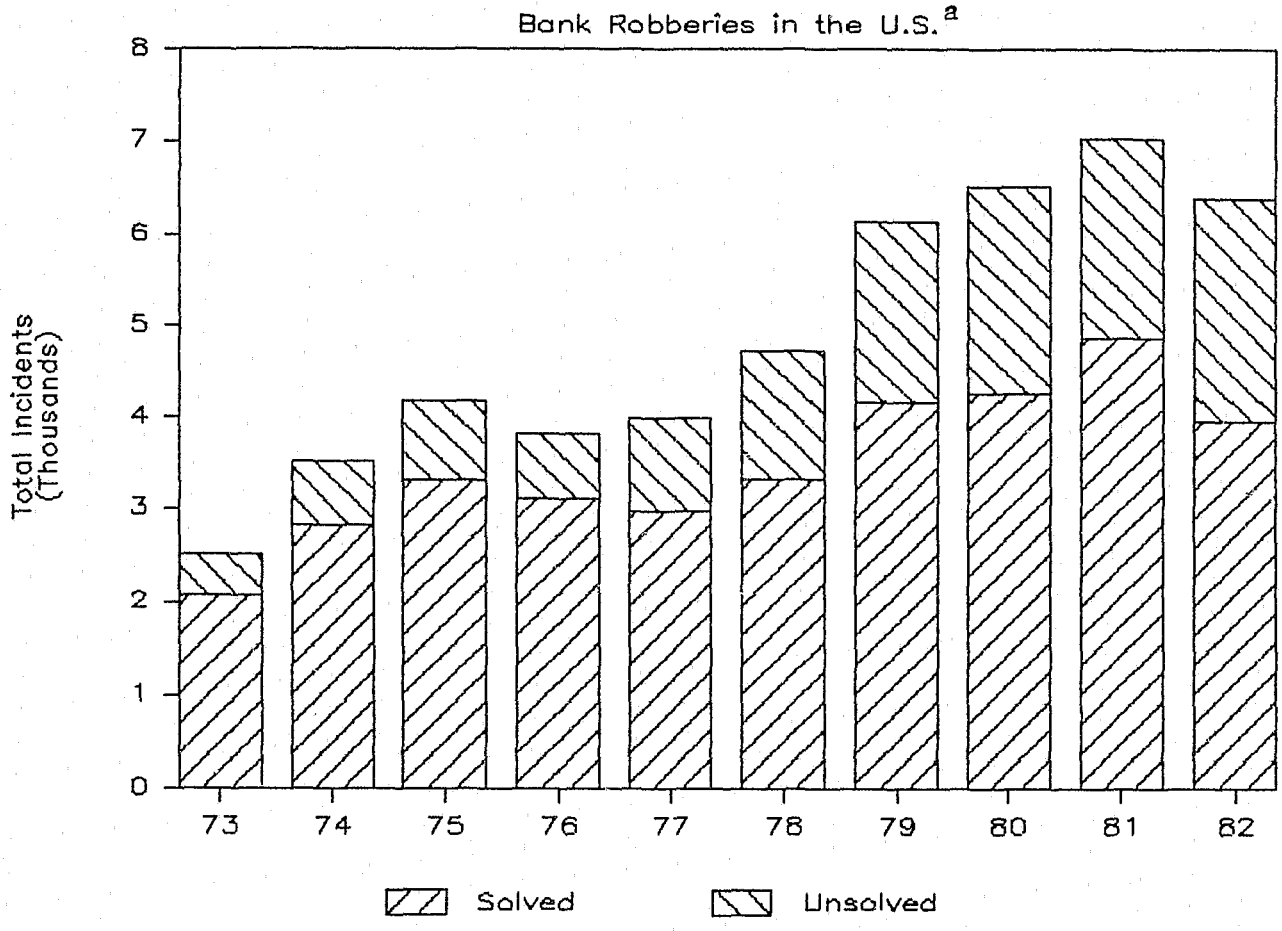
The data for the study consisted of court and FBI records for every defendant in the six study districts tried for either bank robbery or bank embezzlement whose trials were in the years ending June 30, 1974, 1980, and 1983. (On the average, the cases were initiated in the calendar year before the date of termination. For simplicity, the exhibits below refer to the approximate date on which cases commenced.) To avoid bias from cases still pending at the time the file was constructed, we eliminated the handful of defendants whose cases lasted more than 24 months.

Exhibit 2.9 shows the total number of defendants in each of these districts. FBI records in two of these districts were extremely spotty. Defendants sometimes could not be identified, or were under so many investigations that it was impossible to tell which one corresponded to a particular trial. In many cases, one or both of the key investigative dates were missing, and some of the dates reported to us by the FBI appeared to be logically inconsistent. In all, about one-third of the cases could not be analyzed because of missing or logically inconsistent data.

Exhibit 2.10 shows the fraction of cases remaining in each district after missing and unusable data had been eliminated. Fewer than half the cases in Colorado and the Southern District of New York could be used. These two districts were eliminated from all subsequent analyses because of the risk that the remaining cases in these sites might be unrepresentative of the total. This left 334 robbery defendants and 366 embezzlement defendants with complete data from the remaining four districts.

Exhibit 2.11 shows the average time required to investigate robbery and embezzlement cases in each district. Times increased for both robbery and embezzlement, but the increase for robbery was about 60 days on the average (1973 to 1982), while the time for embezzlement increased an average of 36 days.

Exhibit 2.8



Source: Uniform Crime Reporting Program, Crime Indicators System: Fourth Semiannual Briefing on Crime, Federal Bureau of Investigation (October, 1983).

[a]Data refer to robberies committed in 1981 and solved as of September, 1983.

Exhibit 2.9

TOTAL NUMBER OF DEFENDANTS BY DISTRICT AND YEAR

DISTRICT	1973	1979	1982	TOTAL
New York Southern	125	103	109	337
New Jersey	78	46	55	179
Florida Southern	42	24	20	86
Illinois Northern	168	40	74	282
California Northern	125	56	171	352
Colorado	34	25	45	104
TOTAL	**572**	**294**	**474**	**1,340**

Exhibit 2.10

PERCENTAGE OF DEFENDANTS WITH USABLE DATA
BY DISTRICT AND YEAR

DISTRICT	1973	1979	1982	TOTAL
New York Southern	26%	47%	52%	42%
New Jersey	94%	91%	91%	92%
Florida Southern	74%	100%	70%	80%
Illinois Northern	45%	85%	77%	59%
California Northern	88%	93%	80%	85%
Colorado	9%	40%	58%	38%
TOTAL	**57%**	**71%**	**72%**	**65%**

Exhibit 2.11

AVERAGE MONTHS OF INVESTIGATION BY DISTRICT AND YEAR

DISTRICT	1973	1979	1982	AVERAGE
ROBBERY				
New Jersey	1.23	0.71	4.32	1.80
Florida Southern	0.15	1.38	1.00	0.71
Illinois Northern	0.73	1.00	3.00	1.59
California Northern	1.32	1.97	2.87	1.91
TOTAL	**1.12**	**1.35**	**3.10**	**1.72**
EMBEZZLEMENT				
New Jersey	1.86	2.11	3.18	2.48
Florida Southern	2.67	1.13	---	1.61
Illinois Northern	0.74	2.24	1.84	1.39
California Northern	3.00	5.40	3.61	3.72
TOTAL	**1.79**	**2.81**	**2.98**	**2.15**

The timing of the changes is also interesting. Most of the change in time to investigate embezzlement occurred prior to 1979--that is, before sanctions were imposed for noncompliance with Speedy Trial limits. Most of the change in the time to investigate robbery, on the other hand, was concentrated in the years following 1979, when our hypothesis suggested that speedy trial effects were most likely. Neither pattern is perfectly consistent across all four sites, however.

Examination of the FBI data also reveal that in 1973, 84 percent of the robbery investigations which resulted in prosecutions were concluded within one month after they began. By 1979, that figure had dropped to 71 percent, and in 1982 it was 57 percent. Analogous figures for the embezzlement investigations are 73.5 percent, 56 percent, and 55 percent, respectively.[6] Thus, for both crimes, practically all the observed difference in average times for investigation was due to the fraction of cases referred promptly to the U.S. attorney. If a case was not closed by the second month after opening, it took about as long to complete in 1973 as it did in 1982, for both robbery and embezzlement. This finding suggests that in simpler, more easily developed cases, more time is now being spent on readying the case for referral to the prosecutor. In cases that were normally taking a long time to investigate and prepare for possible prosecution, little has changed since the Act's inception.

These data lend statistical support to the anecdotal evidence suggesting that the Act has delayed the charging process. Nevertheless, they should be interpreted with caution. First, the number of sites represented in the analysis is quite small. Second, as noted above, the analysis could not control for possible changes in case complexity or delays in the detective process that may have affected investigative time independently of speedy trial considerations.

2.3.2 The Effects of Delaying Indictments

There was considerable variation in respondents' opinions of the effects of delayed indictments. Once again, AUSAs tended to stress the positive aspects while investigative agents were generally more negative. Not surprisingly, many of the same benefits ascribed to delayed indictments had also been mentioned with regard to discouraging pre-indictment arrests.

The investigative benefits cited included earlier and closer coordination with agents and the maintenance of grand jury subpoena powers and court-ordered wiretaps for as long as possible. Lengthier and more careful investigations were also alleged to produce a generally higher-quality case load. Unfair or frivolous indictments tend to

be more rare: the weak cases simply fall out and the strong cases survive. Finally, more thorough pre-indictment investigation yields substantial prosecutorial benefits in the period after indictment. It permits the prosecutor to anticipate and prepare more thoroughly to counter defense strategies; it tends to reduce the time between indictment and trial in many cases; and, in the view of some AUSAs, it produces more guilty pleas.

The most serious arguments made against delayed charging are that it counters the intent of the Act, encourages over-preparation of cases, and is unfair to the defense. Clearly, if the decision to charge the defendant is delayed due to the Speedy Trial Act, its goal of reducing pretrial rescidivism by getting the defendant off the street sooner is being thwarted. From the defendant's standpoint, delay may not be a problem, since he or she is not bearing the burden of criminal charges. The public's interest in a speedy trial, however, is undermined if delay is simply transferred from the post-charging interval to the time between the commission of the offense and the filing of formal charges. The overpreparation concern was voiced by both AUSAs and agents. They argue that the Act encourages such a degree of caution and conservatism that the government must be prepared for trial even in those cases in which the defendant is likely to plead guilty.

The small number of defense attorneys interviewed (11 in all) were almost unanimously of the opinion that the government's tendency to prepare the case fully pre-indictment placed them at a severe disadvantage. They argued that the government's case may be made over several years of intense investigation, but once the indictment is returned, the defense has only seventy days (plus any excluded time allowed by the court) to prepare for trial. The problem is particularly serious in complex cases. The defense is usually able to obtain some additional time for trial preparation, but defense attorneys argue that this is still rarely enough time to overcome the government's initial advantage. A number of AUSAs acknowledged that delayed indictments may be prejudicial to the defense. As yet, however, there are no realistic suggestions for dealing with this problem.

Other negative comments concerning delayed indictments came generally from investigative agents. Several mentioned that the longer an investigation continues, the more chance it will be disclosed. Lengthy delays in indictments can also result in deterioration of evidence. As with the question of the authorization of pre-indictment arrests, agents' complaints stem in part from differing views on the pace of investigations and the timing of key events between investigators and prosecutors.

2.4 Summary and Conclusions

Anecdotal evidence suggests that the Speedy Trial Act has had effects on three key aspects of the charging decision: declination/deferral, arrest policy, and the timing of charging decisions. In several cases, the interview data are also supported by analysis of AO and/or study data. Nevertheless, the Act's effects are sometimes hard to disentangle from those of other parallel but separate developments.

The impact of the Act on declination/deferral policy is particularly hard to assess since federal prosecutorial priorities have changed greatly over the last decade. Clearly, changes in filings are partly a function of such overall policy decisions. At the same time, a number of respondents observed that the Act's pressures can lead to more stringent standards for case acceptance and that certain classes of cases may be de-emphasized to keep case loads manageable. In rare instances, the Act may also play a role in individual declinations--e.g., when an AUSA has a full trial schedule and feels the need to keep his or her case load adequately spaced out.

AO data suggest a decline in the percentage of cases initiated by arrest in the last two years, and respondents in a majority of the U.S. attorneys' offices surveyed believed that the Act had resulted in a more restrictive policy regarding arrests. Yet, there does not seem to be serious concern in most of the study districts that discouraging or delaying arrests has adversely affected the public's safety. A minority of respondents argued that the Act was having such an effect, but the vast majority noted that necessary arrests have been and will continue to be made--that is, in situations of both real or potential violence. There is less agreement about whether arrests are as likely to be made in non-life-threatening situations--for example, when there is a danger that evidence will be destroyed, that a suspect will flee, or that non-violent victimization will continue. Many respondents commented that stricter arrest policies permit criminal conduct to continue while cases are being fully developed. A number of investigators argued that overly restrictive arrest policies can also impede case development in some instances.

Our interviews and statistical analysis both suggest that greater time is being spent on pre-indictment investigation since the Act became effective, although it is hard to disentangle the effects of the Act from changes in case complexity or other factors in the investigative process. AUSAs note some important investigative, prosecutorial and other benefits of delayed indictments; agents (and some other AUSAs) complain of the tendency to over-prepare cases; and defense counsel argue

that permitting the government unlimited time to prepare cases before the clock starts, puts the defense at an unfair disadvantage in the indictment-to-trial period. If prosecutors were delaying charging decisions solely to comply with the Speedy Trial Act limits, this would raise a serious question about the efficacy of the Act in achieving swift justice. Simply tying the "bow knot" later may alter timing of key case events, but it does not substantively reduce the overall time from commission of the offense to case disposition.

FOOTNOTES TO CHAPTER 2

1. See Jack Hausner et al., The Investigation and Prosecution of Concurrent Jurisdiction Offenses, FJRP-82/001 (Washington, U.S. Department of Justice, Office of Legal Policy, Federal Justice Research Program, January 1982), Chapter II.

2. U.S. Department of Justice, United States Attorney's Written Guidelines for the Declination of Alleged Violations of Federal Criminal Laws: A Report to the United States Congress (Washington, November 1979).

3. Hausner, et al., supra.

4. U.S. Department of Justice, Office for Improvements in the Administration of Justice, Delays in the Processing of Criminal Cases Under the Speedy Trial Act of 1974 (Washington, D.C.: March 1, 1979), pp. 22-23.

5. It should be noted that information on release status was missing in about one-half of the Northern Illinois sample cases.

6. A non-parametric statistical test (the Kruskal-Wallace one-way Analysis of Variance) indicated that the differences in investigation times for both robbery and embezzlement were too large to be attributed to simple random fluctuations in the data. Effects as large as that for robbery could occur randomly less than once in a thousand tests. The embezzlement effect had less than a one percent chance of occurring randomly.

3.0 THE ARREST-TO-INDICTMENT INTERVAL: OUTCOMES AND STRATEGIES

This chapter examines what happens to cases once an arrest is made. In Section 3.1, we examine how successful agents and AUSAs are in achieving compliance with the 30-day time limit. In Section 3.2 we describe a number of different strategies used to achieve compliance. We also discuss whether these strategies have a deleterious effect on the administration of justice. Finally, Section 3.3 briefly addresses what happens when cases do not comply with the 30-day limit. The discussion is based on interview responses in 19 federal districts and analysis of samples of arrest-initiated cases in the six districts visited.

It should be noted at the outset that one major strategy for dealing with the 30-day interval is to avoid it entirely by not making an arrest and, instead, initiating the case as a "grand jury original." Another is to delay arrest until the case is more fully prepared, thus minimizing the difficulties encountered in complying with the 30-day time limit. These approaches have already been discussed in Chapter 2.

3.1 Overall Patterns of Compliance

Statistics compiled by the Administrative Office of United States Courts (AO) show that compliance with the Interval I limit is extremely high nationwide: in fiscal year 1983, 97 percent of cases terminated the arrest-to-indictment interval within the limit.[1] Analysis of our samples of arrest-initiated cases (which totalled 546 cases) shows clearly that compliance with the 30-day time limit is also very high in the six jurisdictions under study. Exhibit 3.1 summarizes the compliance patterns and strategies in these districts. It shows that 94 percent of the cases examined were in compliance with the arrest-to-indictment limit. Compliance rates were 90 percent or more in five of the six districts; in the remaining district, Illinois Northern, 88 percent of the cases were in compliance.

More than three-fourths of the sampled arrest cases (78%) complied on the basis of gross time from arrest to indictment or information: that is, the defendants were charged within 30 calendar days of arrest. Another nine percent were brought into compliance through the use of excludable time, and six percent were dismissed before the time limit expired.

One reason for the high degree of compliance during the arrest-to-indictment interval may be the close working relationships that have been established between U.S. attorneys' offices and investigative agencies in most jurisdictions. A number of

Exhibit 3.1

SUMMARY OF STUDY DISTRICTS' COMPLIANCE PATTERNS IN THE ARREST-TO-INDICTMENT INTERVAL

	California Northern		Colorado		Florida Southern		Illinois Northern		New Jersey		New York Southern		TOTAL	
	n	%	n	%	n	%	n	%	n	%	n	%	n	%
COMPLIANT CASES														
Indictment returned[a] or pretrial diversion arranged within 30 calendar days	67	97.1	88	88.0	95	93.1	66	71.0	70	70.0	40	48.8	426	78.0
Dismissed within 30 calendar days	—	—	—	—	—	—	16	17.2	14	14.0	5	6.1	35	6.4
Indicted or dismissed within 30 net days (using excludable time)	—	—	7	7.0	—	—	—	—	9	9.0	36	43.9	52	9.5
Sub-total: Compliant Cases	67	97.1	95	95.0	95	93.1	82	88.2	93	93.0	81	98.8	513	94.0
NON-COMPLIANT CASES														
30+ net days elapsed: Indictment returned[a] or pretrial diversion arranged	2	2.8	5[b]	5.0	5[c]	4.9	4	4.3	6	6.0	1	1.2	23	4.2
30+ net days elapsed: Investigation continuing	—	—	—	—	1	1.0	—	—	—	—	—	—	1	0.2
30+ days elapsed: Dismissal	—	—	—	—	1[c]	1.0	5	5.4	1	1.0	—	—	7	1.3
30+ net days elapsed: Status unknown	—	—	—	—	—	—	2	2.1	—	—	—	—	2	0.3
Subtotal: Non-Compliant Cases	2	2.8	5	5.0	7	6.9	11	11.8	7	7.0	1	1.2	33	6.0
TOTAL CASES	**69**	**99.9**	**100**	**100.0**	**102**	**100.0**	**93**	**100.0**	**100**	**100.0**	**82**	**100.0**	**546**	**100.0**

Source: Abt Associates Inc. arrest sample data.

[a]Includes information filed and consent to trial before magistrate cases.

[b]Includes two cases in which AUSAs reported that defendant waived the speedy trial time limit.

[c]Includes one case in which the AUSA reported that the defendant waived the speedy trial time limit.

respondents commented that these relationships had improved since imposition of the Speedy Trial Act limits. Of course, closer coordination may also have been required by changing federal priorities. Complex white collar, organized crime, and drug-related cases typically demand early collaboration between agents and prosecutors in determining overall case strategy, tight scheduling of case development activities, and prosecutorial control over the arrest decision. Whatever the reason, such coordination greatly facilitates compliance with Interval I.

While the overall level of compliance is uniformly high, Exhibit 3.1 also reveals important cross-district differences in patterns of compliance. California Northern, Florida Southern, and Colorado achieved their high levels of compliance primarily by indicting arrested defendants within 30 calendar days. By contrast, substantial percentages of the compliant cases in Illinois Northern and New Jersey were pre-indictment dismissals. Finally, in New York Southern, about one-half of the compliant cases met the time limit through use of excludable time. These cross-district differences in compliance patterns will be discussed in detail below.

Of the 546 cases in the total arrest sample, only 33 (6%) appear to be non-compliant with the 30-day time limit. We attempted through follow-up questionnaires to obtain information on the reasons that particular cases exceeded the time limit. As shown in Exhibit 3.1, seven of these cases (21%) were dismissed after the expiration of the time limit. In view of the fact that during fiscal year 1983 only 21 defendants nationwide had their cases dismissed for exceeding the Speedy Trial Act time limits[2], it is unlikely that few, if any, of our sampled arrest cases were dismissed on defense motion. Most were simply dismissed by the government.

Another 23 cases (70%) terminated Interval I through filing of charges or arrangement of pretrial diversion after the 30-day limit had expired, and one was still under continuing investigation at the time of our data collection. The most common explanation for exceeding the time limit was that plea negotiations were in progress. In very few cases was non-compliance attributed to delays in receiving investigative or laboratory reports or to unavailability of grand jury time. As will be discussed below, while all of these cases technically fail to comply with the Act's limits, there is little incentive for the defense to request a dismissal on speedy trial grounds during the pre-indictment interval.

Exhibit 3.2 shows gross (calendar) time in the arrest-to-indictment interval by crime category. As can be seen, study districts were able to obtain indictments within 30 calendar days of arrest in over 90 percent of the narcotics, robbery/burg-

Exhibit 3.2

NUMBER AND PERCENTAGE OF ARREST SAMPLE CASES INDICTED[a] WITHIN 30 CALENDAR DAYS OF ARREST, BY CRIME CATEGORY

CRIME CATEGORY	California Northern		Colorado		Florida Southern		Illinois Northern		New Jersey		New York Southern		TOTAL	
	n	%	n	%	n	%	n	%	n	%	n	%	n	%
Narcotics	18	100.0	11	84.6	72	97.3	26	81.3	14	82.4	11	84.6	152	91.0
Counterfeiting/Forgery	6	85.7	7	100.0	4	100.0	3	60.0	2	25.0	3	33.3	25	62.5
Assault	1	100.0	1	100.0	3	100.0	--	--	3	75.0	2	50.0	10	76.9
Embezzlement/Theft	2	66.7	8	66.7	--	--	15	71.4	3	75.0	7	38.9	35	60.3
Fraud/False Statement	1	100.0	5	100.0	6	100.0	--	--	20	64.5	1	100.0	33	71.7
Postal	--	--	3	75.0	1	100.0	9	60.0	5	83.3	6	35.3	24	55.8
Robbery/Burglary	30	100.0	11	100.0	1	100.0	7	87.5	8	100.0	2	66.7	59	96.7
Interstate Transportation of Stolen Goods	--	--	4	100.0	--	--	--	--	3	33.3	--	--	7	46.7
Weapons	--	--	4	100.0	3	75.0	1	100.0	4	80.0	--	--	12	85.7
Immigration	1	100.0	28	100.0	3	100.0	4	66.7	--	--	--	--	36	94.7
Other	8	100.0	6	54.5	2	33.3	--	--	6	75.0	6	54.5	28	60.9
TOTAL	67	97.1	88	88.0	95	93.1	65[b]	69.9	68[c]	68.0	38[c]	46.3	421	77.1

Source: Abt Associates Inc. arrest sample data.

[a]Includes information filed and consent to trial before magistrate cases.

[b]In one case, crime category was missing.

[c]In two cases, crime category was missing.

lary, and immigration cases. At the other end of the spectrum, less than 50 percent of the cases alleging interstate transportation of stolen goods, and slightly over one-half of the postal cases were indicted within 30 days. In part, these differences may reflect the relative priorities assigned to offenses. However, what is perhaps more striking than the differences by case type is the wide variation among districts in the primary strategies used to achieve compliance.

3.2 Strategies to Achieve Compliance with the Thirty-Day Time Limit

The major strategies adopted by study districts in the arrest-to-indictment interval fall into four basic categories, as follows:

- Two strategies--beating the preliminary hearing deadline and beating the 30-day clock--are simple approaches that treat the interval as fixed and require quick response in arrest-initiated cases.
- One strategy--using exclusions to achieve compliance--takes advantage of the flexibility built into the Act; and
- Another strategy--the "dismiss-reopen" approach--essentially circumvents the 30-day clock, and may have negative consequences for the administration of justice.
- Finally, the use of superceding indictments may be a legitimate means of achieving compliance if it is not abused.

We describe each in turn below.

3.2.1 Indict Within the Time Limit to Preliminary Hearing

In three study districts--Florida Southern, New Jersey, and California Northern--the U.S. attorney's office policy is to indict before the expiration of the time limit to preliminary hearing, if at all possible. According to the Federal Rules of Criminal Procedure, that limit is ten days for jailed defendants, and 20 days for defendants who have been released from custody. Indeed, Exhibit 3.3 shows that in Florida Southern, 96 percent of the indictments were returned within 20 calendar days of arrest. In New Jersey and California Northern, the vast majority of indictments were also returned within 20 calendar days of arrest. The important point is that in these districts the Speedy Trial Act limit for the arrest-to-indictment interval is largely irrelevant.

Prosecutors wish to avoid preliminary hearings because they afford early discovery to the defense and may expose government witnesses and agents to

Exhibit 3.3

SUMMARY OF COMPLIANT CASES IN THE STUDY DISTRICTS

CRIME CATEGORY	California Northern		Colorado		Florida Southern		Illinois Northern		New Jersey		New York Southern		TOTAL	
	n	%	n	%	n	%	n	%	n	%	n	%	n	%
Indictment Returned:[a]														
0-10 calendar days	36	53.7	29	30.5	45	47.4	3	3.7	51	54.8	11	13.6	175	34.1
11-20 calendar days	29	43.3	36	37.9	46	48.4	3	3.7	9	9.7	11	13.6	134	26.1
21-30 calendar days	2	3.0	23	24.2	4	4.2	60	73.2	10	10.8	18	22.2	116	22.6
Dismissed within 30 calendar days	--	--	--	--	--	--	16	19.5	14	15.1	5	6.2	36	7.0
Indicted within 30 net days (using excludable time)	--	--	7	7.4	--	--	--	--	9	9.7	36	44.4	52	10.1
TOTAL COMPLIANT CASES	**67**	**100.0**	**95**	**100.0**	**95**	**100.0**	**82**	**100.1**	**93**	**100.1**	**81**	**100.0**	**513**	**99.9**

Source: Abt Associates Inc. arrest sample data.

[a]Includes information filed and consent to trial before magistrate cases.

intimidation and physical danger. Avoiding the preliminary hearing is considered particularly important when a premature arrest has occurred in a complex investigation involving informants and undercover work.

Interestingly, this desire to "beat" the preliminary hearing deadline imposes even more serious constraints on prosecutors than does the Speedy Trial Act time limit. Of course, the pressure is reduced in districts where waivers of the preliminary hearing are routine. Particularly in districts where preliminary hearings are limited in scope, defendants are often willing to waive them in the hope that they can negotiate a plea to reduced charges.

3.2.2 Indict Within the Thirty-Day Speedy Trial Time Limit

As shown in Exhibit 3.3, three of the study districts--Illinois Northern, New York Southern, and Colorado--tend to obtain more of their indictments later in the 30-day interval. In effect, the policy in these U.S. attorneys' offices seems to be simply to meet the speedy trial deadline. In Illinois Northern and Colorado, the emphasis is on obtaining indictments within 30 calendar days, that is, treating the arrest-to-indictment interval as fixed and making little or no use of excludable time provisions to extend it. (In Illinois Northern, 91 percent of the cases terminating Interval I by indictment within 30 calendar days did so in the last 10 days.) In New York Southern, by contrast, exclusions are very commonly used to achieve compliance with the 30-day deadline.

Complying with the 30-day deadline may be particularly difficult when a premature or unexpected arrest occurs in a complex investigation. In such instances, which are rare, there may be inadequate time to prepare the whole case before having to present evidence to the grand jury. Respondents in several districts noted that in premature arrest situations they simply get the best possible indictment within 30 days. If this means leaving out certain targets or charges, it may be possible to complete the case later by using superceding indictments, as discussed below.

3.2.3 Use of Excludable Time Provisions

Only one of our study districts, New York Southern, makes frequent use of the excludable time provisions of the Act to gain more time in the arrest-to-indictment interval. Respondents in this jurisdiction note that the use of excludable time is a preferred strategy for complying with the 30-day limit. Indeed, Exhibit 3.3 shows that 44 percent of the cases in New York Southern were brought into compliance through the use of exclusions.

The pattern in this district is to request continuances from the magistrate so that plea negotiations or deferred prosecution agreements can be finalized. It is not unusual for a case to be continued for two, three or four months in this way. These continuances, which are normally requested by the prosecutor with the consent of the defense, are routinely granted by magistrates in this district. As one magistrate noted:

> I grant ends-of-justice continuances rather routinely if I think that the parties can work things out. If the defendants consent to an adjournment, and there is a chance to downgrade the offense or reach an agreement, then I'm all for it.

Occasionally, the continuances are granted ex parte on the request of the government. In these cases, the affidavit is sealed, and only the order for continuance appears in the record of the case. Such continuances may be requested in order to protect government witnesses or to keep other facts of the case secret so as not to jeopardize a continuing investigation.

In contrast, no exclusions were noted in the arrest sample cases in Illinois Northern, Florida Southern, or California Northern. In New Jersey and Colorado, less than 10 percent of the sampled cases were brought into compliance through exclusions, although there are indications that these districts are beginning to make greater use of the excludable time provisions. In both of these jurisdictions, the excludable time provisions were used to gain more time for plea negotiations and for negotiations with cooperating witnesses. One AUSA in New Jersey has developed a standard motion for continuance for use in such situations.

Apparently, in most cases prosecutors can comply with the 30-day time limit, even if it means going to the grand jury with less than a complete case or with only a portion of the evidence fully prepared. However, sometimes it is impossible or undesirable to indict within 30 calendar days, and prosecutors must find alternative methods to comply with the time limits specified in the Act. The excludable time provisions were intended to provide that flexibility.

Interview responses suggest that one major reason for the infrequent use of the excludable time provisions in Interval I is the fear of a possible defense appeal. This is because some AUSAs consider the excludable delay provisions applicable to Interval I ambiguous and untested. In Abt Associates' 1980 Speedy Trial Act Impact Study we found that many AUSAs were unfamiliar with the applicability of the excludable time provisions to the arrest-to-indictment interval.[3] There appears to be

a continuing need for information and training on the judicious use of exclusions in this interval.

The U.S. Attorneys' Manual does encourage use of Section 3161(h)(8)(B)(iii) to extend the time limit if, "because of the timing of arrest or because the facts of the case are unusual or complex, it is unreasonable to expect the grand jury to return an indictment within 30 days."[4] The manual also cites relevant case law, and goes on to state that:

> An [h(8)] continuance may be appropriate where an arrested defendant cooperates, where investigative or laboratory reports cannot be completed, or where the full scope of the criminal scheme cannot be determined within 30 days. See United States v. Hope, 714 F.2d 1084 (11th Cir. 1983).[5]

We would suggest that all new AUSAs receive orientation on this subject and that experienced attorneys receive ongoing training in the use of these provisions.

Another fear expressed by AUSAs is that the need to substantiate a request for continuance might provide the defense with early discovery of important aspects of the government's case. This would be especially true if the continuance is needed to investigate other possible targets or to build a larger case against the defendant. Yet, as the experience in New York Southern indicates, it may be possible under certain circumstances to request an ex parte continuance.

Finally, a number of AUSAs commented that treating the interval as fixed helps to keep the pressure on investigative agents to complete their investigations and produce their reports in a timely fashion. According to this view, if agents begin to see the time limit as flexible, they might tend to relax their efforts.

While the use of excludable time provisions may be helpful in achieving compliance with the Speedy Trial Act limits, there is also the danger that such continuances will be overused. Relying too heavily on h(8) continuances to obtain additional time can defeat the entire purpose of the Act. Clearly, a balancing test must be employed, so that the use of exclusions is limited to those cases in which additional time truly serves the interests of justice.

3.2.4 The "Dismiss-Reopen" Strategy

Another strategy for dealing with the 30-day clock is to dismiss the complaint when a case appears in danger of exceeding the time limit, continue the investigation while no charges are pending and no speedy trial clock is running, and then reopen the case as a "grand jury original" at a later date. While there is considerable disagreement among AUSAs on its desirability, and many view it as a last resort, this "dismiss-reopen" strategy appears to be used, at least on rare occasion, in twelve of the 19 districts surveyed during our study.

Analysis of arrest sample data for the six districts suggests that the strategy is used in roughly three percent of the arrest-initiated cases. It is most widely used in New Jersey and Illinois Northern, although even in these districts it is relatively uncommon.

Fifteen percent of the defendants in our New Jersey arrest sample had their cases dismissed. As shown in Exhibit 3.4, 60 percent of these dismissed cases had either been re-opened or were still under investigation at the time of our follow-up survey.

Illinois Northern, the study district that seems to have the most difficulty complying with the 30-day time limit, had the largest percentage of sample cases dismissed pre-indictment among the study districts (23%). Over one-half of these dismissed cases (52%) were either re-opened or were under continuing investigation at the time of our follow-up survey. This pattern is consistent with interview responses that the U.S. attorney's office in this district uses the dismiss-reopen strategy when necessary to protect cases that are in apparent danger of exceeding the 30-day limit.[6]

Our respondents were virtually unanimous in their opinion that the dismiss-reopen strategy should not be used for jailed defendants. On the other hand, there was divergent opinion as to the advisability of using it in cases where the defendant was released pending trial. Some AUSAs commented that when the defendant had already been released, the risk of removing formal charges was sometimes acceptable in return for maintaining the security of a larger investigation, avoiding a potentially damaging preliminary hearing, gaining valuable time for additional investigation, or continuing use of grand jury subpoena power. These may be particularly important considerations when an arrest is precipitated prematurely in an ongoing investigation in order to protect an agent, preserve "buy money," or for some other reason.

Exhibit 3.4

PRE-INDICTMENT DISMISSALS IN ARREST SAMPLES FROM NEW JERSEY AND ILLINOIS NORTHERN

STATUS FROM FOLLOW-UP SURVEY	DISTRICT					
	New Jersey		Illinois Northern		TOTAL	
	n	%	n	%	n	%
Reopened	6	40.0	9	42.9	15	41.7
Investigation Continuing	3	20.0	2	9.5	5	13.9
Closed	5	33.3	4	19.0	9	25.0
Unknown	1	6.7	6	28.6	7	19.4
TOTAL	**15**	**100.0**	**21**	**100.0**	**36**	**100.0**

Source: Abt Associates Inc. arrest sample data.

A case from Illinois Northern provides a good example of a situation in which the dismiss-reopen strategy was considered necessary to protect a larger investigation. An individual was arrested in connection with an undercover store-front "sting" operation. Had the government proceeded to indict this individual within the prescribed 30 days, AUSAs believed that the entire operation would have been prematurely disclosed, thus seriously jeopardizing the prosecution of many additional defendants. Thus, the complaint was dismissed, and the individual arrested was ultimately indicted after the "sting" operation had ended.

Many AUSAs and agents are opposed to the dismiss-reopen strategy under any set of circumstances, citing primarily the danger of flight and the erosion of incentives to confess or cooperate.

A case reported by Secret Service agents in one of the six study districts illustrates the concern about dismissals eroding incentives to cooperate. The case began with the arrest of an individual by local police for passing counterfeit notes. During the next two months, three additional individuals were arrested, and a case was developed against a fifth person. After several more months had passed, the U.S. attorney's office authorized the arrest of the fifth suspect. This individual indicated that he had information that would help in the prosecution of the others, but he asked for certain guarantees from the U.S. attorney's office. Three weeks later, the complaint against this suspect was dismissed. In the view of the Secret Service agents, this dismissal was a direct result of speedy trial pressures. With the charges dismissed, the suspect was under no further obligation to cooperate. This individual was indicted about three months later, but by this time the information he provided had lost its investigative value. The agents believe that if the case had been forcefully pursued within the available time frame, a number of actors in the counterfeiting ring could have been successfully prosecuted.

Critics of the dismiss-reopen strategy also cite the following concerns:

- Defendants released from the threat of pending charges are better able to establish an alibi, destroy vital evidence, intimidate witnesses, or otherwise undermine the government's case.

- According to some agents, who are particularly incensed about the practice, in many instances the "reopen" part of the strategy is simply forgotten by the U.S. attorney's office, and the cases are never pursued.

- Once a complaint has been dismissed, it is difficult to convince the court to issue an arrest warrant if the case is reopened.
- An apparently inexplicable dismissal of a case soon after arrest can expose the agent to suit for false arrest.

Overall, it appears that the dismiss-reopen strategy may have serious negative consequences. Furthermore, a number of respondents noted that it was of dubious propriety, and others believe that it is clearly outside the spirit of the statute.

The U.S. Attorneys' Manual recognizes this view:

> The Speedy Trial Act does not apply to the period between the dismissal of a complaint (provided the 30-day first interval has not been exceeded) and the subsequent return of an indictment against the same individual for the same offense . . . . However, in some districts, judges have expressed disapproval of the use of dismissal and subsequent indictment as a means of avoiding the 30-day first interval time limit. The practice is seen as not being consistent with the spirit of the Speedy Trial Act. It is Departmental policy to comply with the intentions of the Speedy Trial Act as fully as possible. For this reason, and to avoid possible conflict with judges, it is advisable to invoke exclusions when possible where additional time is needed during the first interval . . . . The dismissal-indictment procedure should be employed only where other recourse is not reasonably available.[7]

Clearly, most districts follow this policy. In districts that use this procedure with some frequency, alternative means for complying with the 30-day limit should be explored. Generally, early, close coordination between the U.S. attorney's office and the investigative agency can help minimize premature arrests. Improved case management procedures, use of the excludable time provisions, and/or use of superceding indictments (discussed below) may be required to handle cases initiated by necessary arrest.

3.2.5 Use of Superceding Indictments

In some districts, there has reportedly been an increase in the number of superceding indictments since the imposition of Speedy Trial Act time limits. While it is impossible to establish the causal connection, there are a number of possible explanations. First, if the prosecutor must rush to indict within 30 days, the initial indictment might contain technical errors that must be addressed through later superceding indictments. Second, superceding indictments could be required where the time limit forces a presentation to the grand jury before the entire scope of the

case is known. For example, an indictment could be obtained within the statutory time limit, but it might cover only some of the charges or targets of the investigation. Superceding indictments would then be necessary to complete the charging process once the full facts of the case were understood. In the meantime, the often-critically important investigative powers of the grand jury could be retained for the case.

A respondent in the New Jersey U.S. Attorney's Office commented that superceding indictments are filed in "almost all significant cases." In fact, superceding indictments are often required to add charges or defendants in complex conspiracy cases. For example, all charges under the Racketeer-Influenced Corrupt Organizations (RICO) and Continuing Criminal Enterprise (CCE) statutes require approval from the Criminal Division in Washington. In an arrest-initiated case, it is almost impossible to obtain this approval within the speedy trial time limit. Thus, normal procedure is to indict on incomplete charges and add the RICO or CCE charges later by means of superceding indictments.

The superceding indictment strategy is also used to gain more time in plea negotiations or negotiations with cooperating witnesses. In other words, the potential cooperating witness can be indicted within the time limit, and negotiations can then proceed under the pressure of pending charges. Additional defendants can be added, as necessary, to the original indictment. Pending charges may also inhibit flight, thus addressing one of the principal weaknesses cited by critics of the dismiss-reopen strategy.

Respondents noted that to maintain the pressure to cooperate and to reduce the likelihood that the defendant will flee, it is important that there be no gap between the dismissal of the original indictment and the filing of the superceding indictment. In addition, AUSAs emphasize that this strategy be used only if there is a reasonable possibility of adding new defendants or substantially new charges. It is an abuse of process to use grand jury investigative powers to enhance trial preparation for the original charges in the absence of a reasonable possibility that new charges will be added. On the other hand, if such a possibility exists, continued grand jury investigation and the use of superceding indictments appear to constitute a reasonable and appropriate strategy for obtaining necessary arrest-to-indictment flexibility in complex multiple-defendant cases.

3.3 Non-Compliance with the Thirty-Day Limit

In several districts, we found that a small number of cases were simply allowed to exceed the 30-day limit without any action being taken to bring them into compliance. Despite the statutory time limit, we found that neither the court nor the defense attorneys involved were likely to invoke the dismissal sanctions of the Act. In the words of one respondent, "No one wants to rock the boat."

Defense attorneys do not want to cause trouble for a judge or magistrate before whom they must appear every day. Besides, defense attorneys assume that if the case is dismissed for exceeding the speedy trial time limit, the dismissal will be without prejudice, and the government can simply indict the defendant when the case is fully prepared. Indeed, by ignoring the 30-day clock, defense attorneys buy additional time for their own preparation. In addition, defense attorneys hope that the case may be dropped, that charges will be downgraded, or that some other favorable result will occur prior to indictment. Absent a guaranteed dismissal with prejudice, they believe little is gained by forcing the prosecutor's hand.

The court is unlikely to take action on its own initiative when the 30-day limit expires. In the first place, few judges or magistrates monitor this interval closely, under the assumption that it is the responsibility of the U.S. attorney's office to keep track of cases in Interval I. In the second place, judges are reluctant to take sua sponte action, even where the limit is found to be exceeded because the statute requires defense counsel to invoke the sanction. The result is a modus vivendi, in which all parties "look the other way" when the 30-day limit expires.

3.4 Summary and Conclusions

This study confirms the conclusion that districts are complying with the 30-day arrest-to-indictment time limit in the overwhelming majority of cases. However, the strategies used to achieve compliance differ strikingly across federal districts.

Three of the study districts essentially treat the 30-day limit as irrelevant and obtain the vast majority of indictments within 10 or 20 days, so as to avoid preliminary hearings. Extensive preliminary hearings may afford early discovery of the government's case to the defense and may expose government agents and witnesses to intimidation and danger. For these districts, the speedy trial act limit plays little, if any, role in the arrest-to-indictment interval. Another study district simply has a stated policy of obtaining indictments within the 30-day period. This is accomplished in all but a small fraction of its cases.

One study district makes extensive use of excludable time to bring cases into compliance with the 30-day limit. In this district, repeated "ends of justice" continuances are used to obtain more time for plea negotiations and arrangement of pretrial diversion plans. However, in most of the study districts, exclusions are rarely used in the arrest-to-indictment interval. In part this is because cases can be brought into compliance without resorting to the excludable time provisions. In part, it is because the AUSAs believe that the use of continuances in this interval may provide the defense with grounds for appeal and because AUSAs are unfamiliar with the applicability of the provisions of the Act in Interval I. Our 1980 Speedy Trial Act Impact Study found that most AUSAs treated the interval as fixed; the present study finds that this is still the case.

Another approach to the 30-day time limit is to dismiss the complaint if it appears that the clock may run out, and then re-open the case as a "grand jury original" when the investigation is complete. This dismiss-reopen strategy is never used when the defendant is in custody; indeed, it was used in less than three percent of all cases in the study sample. Nevertheless, it seems to be used as a strategy of last resort in the majority of the districts surveyed, and in some districts it was used more frequently. Some AUSAs find the strategy useful in obtaining more time for an investigation or in maintaining the security of a larger investigation after a premature or unexpected arrest. However, many believe that this strategy circumvents the spirit of the Speedy Trial Act and threatens investigations by eroding incentives for defendants to cooperate and by providing them with the opportunity to flee.

An alternative to the dismiss-reopen strategy may be the judicious use of superceding indictments. In cases where the arrest of a suspect leads to the identification of additional suspects or substantially new charges, an initial indictment covering part of the case may be obtained within the time limit. Superceding indictments may then be used to amend the original charges and add defendants when the investigation is completed. This strategy is commonly used in a number of the study districts. Unlike the dismiss-reopen strategy, the filing of a superceding indictment does not necessarily result in more time. Nevertheless, it is possible to obtain additional time under §3161(h)(7) or §3161(h)(g) of the Act if new charges or defendants are added.

The primary recommendation to emerge from our study of arrest-to-indictment strategies is that, in districts where compliance with the 30-day interval appears problemmatic, AUSAs and agents receive better training on the use of

exclusions in this interval. It would appear that the Act affords--either explicitly or implicitly--sufficient flexibility to cover most arrest-to-indictment problems. In particular, there is a specific provision allowing "ends of justice" continuances in Interval I to obtain more time for complex grand jury investigations. Judicious use of such continuances might help gain more time where such time is needed to develop the case. If prosecutors took advantage of the flexibility provided in the Act, it might no longer be necessary to resort to the dismiss-reopen strategy.

At the same time, since overuse of such continuances could undermine the Act's limits and remove pressure to process cases swiftly, a balancing test must be employed. Where 30 days is not sufficient for even routine arrest-initiated cases, prosecutors should review office management, working relations with local investigative agencies, and grand jury procedures to see whether there are ways to meet the Act's limits without resorting to excludable time.

FOOTNOTES TO CHAPTER 3

1. Administrative Office of United States Court, Annual Report of the Director 1983 (Washington, D.C., 1984).

2. Id.

3. Nancy Ames, et al., The Processing of Federal Criminal Cases Under the Speedy Trial Act of 1974 (as amended 1979) (Cambridge, MA: Abt Associates Inc., 1980), pp. 37, 39-42.

4. U.S. Attorneys' Manual, Title 9, Chapter 17, 6 (June 1984).

5. Id., pp. 6-7.

6. Our case records sample included cases arrested in the latter part of 1983. Our interviews were conducted the following spring. According to the U.S. Attorneys' office, the relatively frequent use of the dismiss-reopen strategy in this site triggered a more restrictive arrest policy during late 1983, early 1984. Such a "no arrest" policy was noted by several respondents as discussed in Chapter 2. It is possible that the number of cases dismissed and later reopened has declined as a result of this more restrictive arrest policy, but our study data do not allow us to examine that possibility.

7. Id., p. 7.

4.0 INDICTMENT-TO-TRIAL ISSUES

The Speedy Trial Act establishes a 70-day limit from indictment to trial. This interval begins with the filing and publication of an indictment or information or the defendant's first appearance before a judicial officer of the court where the charge is pending, whichever is later.[1] It also specifies that trial cannot begin less than 30 days from the defendant's first appearance through counsel, unless the defendant consents in writing to the contrary.

Clearly, a major goal of the original legislation was to shorten the length of time it takes to dispose of federal criminal cases. In choosing the time limits for case processing, Congress was faced with two distinct choices. On the one hand, the statute could set a broad time frame that would be sufficient to process most cases. On the other hand, it could provide for a narrow time span with liberal exceptions to accommodate complex cases or unusual circumstances.

Congress chose the latter approach, setting time limits that were shorter than comparable time limits set by most state statutes, the 1972 Model Plan published by the Administrative Office of the U.S. Courts (AO), and the recommendations of the President's 1967 Commission. The limits were also shorter than the prevailing times to disposition in the majority of federal cases. Much of the early opposition to the Act from both the Department of Justice and the federal judiciary centered on the perceived unreasonableness of these tight time limits, given the nature of the federal case load and historical patterns of case disposition.

Since July 1, 1980 when the sanctions were first imposed, the number of dismissals under the Speedy Trial Act has proven to be quite small (less than 1/10 of 1 percent). Thus, it is clear that districts have found ways of achieving compliance with these narrow limits. An important question, however, is whether compliance with the Act is achieved by means of a real reduction in the time to disposition of criminal cases or through application of the various excludable time provisions allowed by the statute. That is, has the law prompted more effective case management by the U.S. district courts and U.S. attorneys' offices, or has it simply allowed districts to continue long-standing traditions of case processing. A related issue is whether the Act has collateral consequences on trial preparation by the prosecution or defense counsel, or on the method of case disposition, e.g., by trial, plea, or dismissal. Finally, one may ask whether the dismissal sanction is being used to enforce compliance, and if not, why not?

In sections 4.1 and 4.2 below we explore the impact of the Act on case processing time during the indictment-to-trial period and the extent to which the excludable time provisions are used to extend the Act's limits. In sections 4.3 and 4.4, we examine whether the Act has had any effect on trial preparation or has altered the nature of case disposition. Finally, in sections 4.5 and 4.6, we discuss the use of the dismissal sanction and the use of express waivers by the defense as a means of negating the Act's limits. In Chapter 5, we examine the impact of the Act on case management practices.

4.1 Case Processing Time in Interval II

According to statistics published by the AO, the median case disposition time for criminal cases has remained relatively stable over the last decade, ranging between 3.0 and 3.9 months. (See Exhibit 4.1.) The figure does show a slight increase in median time just prior to passage of the Speedy Trial Act in 1974, but generally speaking there is no discernible pattern from 1970 to 1981. However, a sizeable increase in processing time occurred in the last two reporting periods--1982 and 1983 --from 3.8 to 4.9 months.

It is important to note that the AO statistics provide only an estimate of case processing speed, and do not always coincide with Interval II under the Act, since time recorded by the AO runs from indictment/information to dismissal, acquittal, or sentencing. Even so, it appears that the typical case has not proceeded appreciably faster under the Act and may have proceeded more slowly in recent years.

What would have happened to the length of criminal cases in the absence of the Speedy Trial Act is unclear. In the first place, processing time depends on a variety of factors, including the character of the overall case load, as well as the nature of the specific case being processed. The overall case load determines the queue through which the case must pass to obtain court time. The nature of the case itself may also affect the timing of case disposition, independent of the court's docket. For example, cases involving multiple defendants and complex evidentiary issues are bound to take more time than simple, single defendant cases.

During the period of Speedy Trial Act implementation, a number of changes took place in both the size and nature of the federal case load. For example:

- As discussed in section 2.1.1, the number of criminal filings dropped sharply from 1977 to 1980 and then began to rise again under the Reagan administration.

Exhibit 4.1

MEDIAN TIME FROM FILING TO DISPOSITION IN FEDERAL CRIMINAL CASES

Year Ending June 30	Median Time to Disposition[a]
1970	3.2
1971	3.0
1972	3.4
1973	3.9
1974	3.8
1975	3.6
1976	3.4
1977	3.7
1978	3.2
1979	3.7
1980	3.7
1981	3.8
1982	4.9
1983	4.9

Sources: Administrative Office of the U.S. Courts. For 1970-75, Management Statistics for the U.S. Courts (1975). For 1976-79, id. (1979). For 1980-83, id. (1983).

[a]For all criminal defendants terminated during the year whether by trial or other disposition, this figure shows the time interval in months for the (median) middle case. For convicted defendants, the interval covers all time through sentencing.

- With changes in the absolute numbers of cases processed came changes in the nature of the cases prosecuted. Generally speaking, these changes moved away from more routine, simple cases and toward more complex cases, involving more serious offenses.

- The number of civil cases filed in the U.S. district courts increased steadily from 1970 to the present. In fact, the number of civil cases filed has nearly tripled since 1970 and more than doubled since 1975. (See Exhibit 4.2.)

- The increase in case load was partially offset by an increase in judicial resources under the Omnibus Judgeship Act of 1978. In the last few years, however, the judicial workload has been steadily increasing and reached an all-time high in 1983. (See Exhibit 4.3.)[2]

The net result is that both the length of the queue facing a criminal case and the nature of the criminal cases processed have changed substantially in the years following the Act's passage. Such changes make it difficult to ascertain how long the typical criminal case would have taken without speedy trial limits and the concomitant priority given to criminal cases.

There is some evidence that, at least for the very longest cases, the Act may have had some impact. Abt Associates' 1980 Speedy Trial Act Impact Study examined changes in criminal processing time from 1972 through 1979. Exhibit 4.4 shows how the distribution of time from filing to adjudication changed during that time period.[3]

The Act sets an upper limit on the time which may be taken, rather than mandating goals for the average time for all cases. The figure clearly indicates that there was a reduction in length of time taken to complete the slowest cases following the passage of the Act. In 1972, 1973 and 1974, ten percent of the cases took over 13 months to process. By 1978 and 1979, the ten percent of cases that took the longest, took only nine months. Similarly, where one-quarter of the cases took over seven months in 1972-1974, the comparable figure was five months in 1977-1979.

At the same time, the median number of months (three) and lower quartile point (one month) were virtually unchanged throughout the period, suggesting that for the typical case and the cases that have traditionally moved quickly, the Act has had little or no effect. It is even possible that there was an increase in the time required to process the fastest tenth of the cases in 1979. Such an effect would be entirely consistent with the structure of the Speedy Trial Act. To achieve compliance, United States attorneys may divert attention away from cases safely within the limits to

Exhibit 4.2

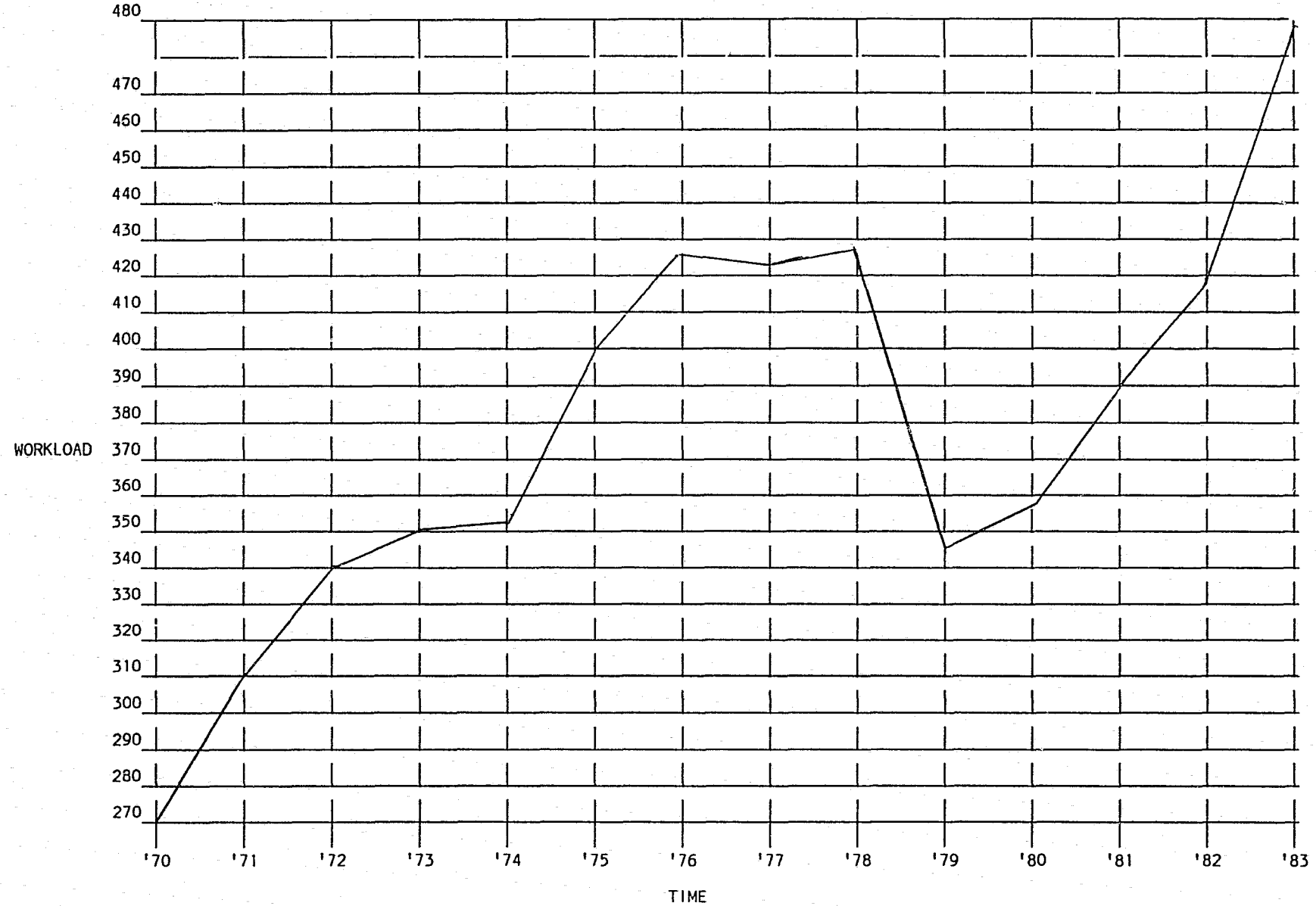
CIVIL CASES FILED DURING THE TWELVE-MONTH PERIODS ENDING JUNE 30, 1970 THROUGH 1983

YEAR	NUMBER OF CASES FILED
1970	87,321
1971	93,396
1972	96,173
1973	98,560
1974	103,530
1975	117,320
1976	130,597
1977	130,567
1978	138,770
1979	154,666
1980	168,789
1981	180,576
1982	206,193
1983	241,842

Sources: Administrative Office the U.S. Courts. For 1970-74, Annual Report of the Director (1981). For 1975-82, id. (1982). For 1983, id. (1983).

Exhibit 4.3

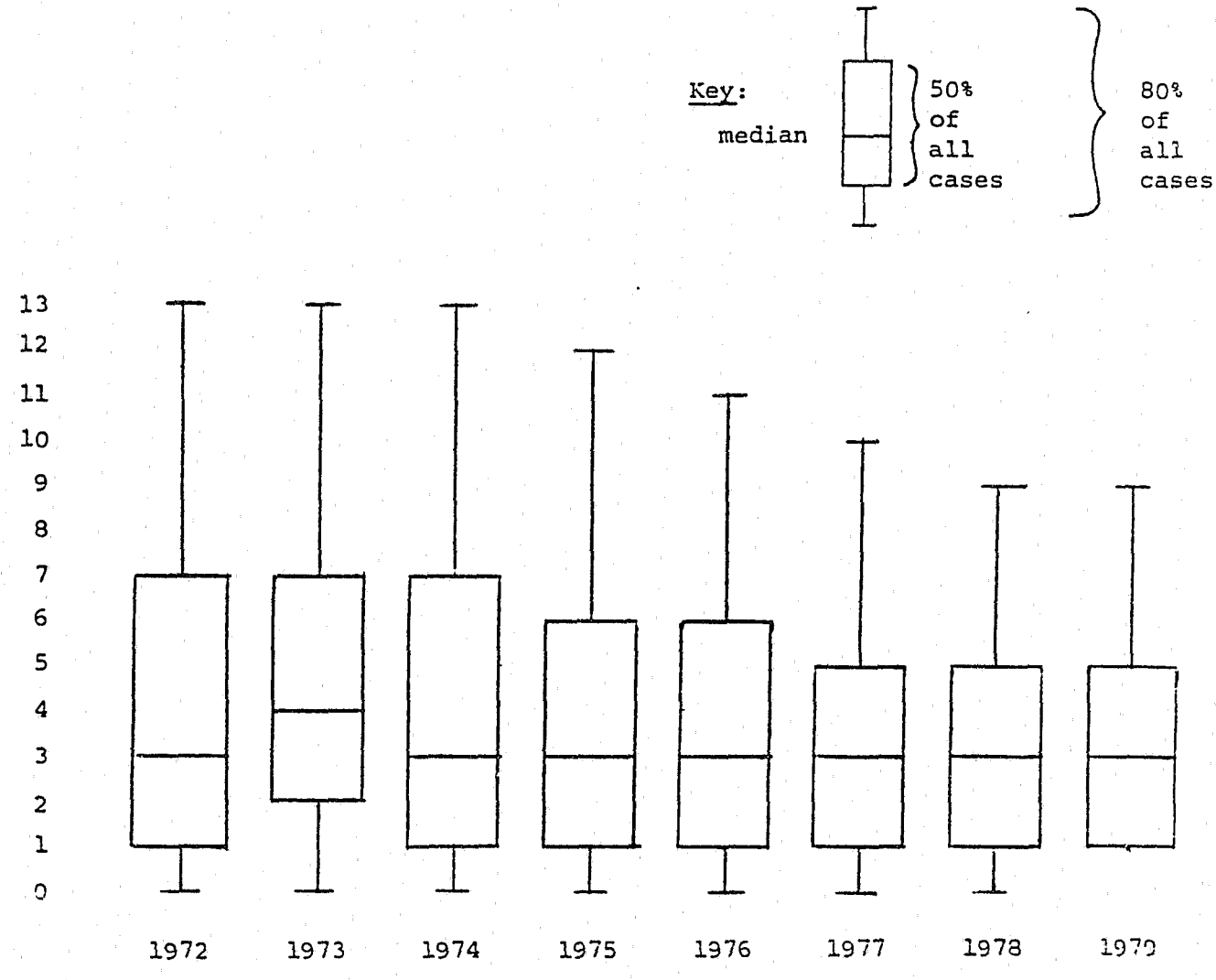
JUDICIAL WORKLOAD DURING THE PERIOD 1970-1983



Sources: Administrative Office of the U.S. Courts. For 1978-1983, Federal Court Management Statistics (1983). For 1975-1977, Federal Court Management Statistics (1979). For 1970-1975, Federal Court Management Statistics (1975).

Exhibit 4.4

MONTHS FROM FILING TO DISPOSITION
CRIMINAL CASES
1972 - 1979



accelerate termination of those just above the limits. Moreover, courts may now schedule all cases uniformly to meet the 70-day time limit, whereas before they might have scheduled the simplest cases quickly to keep their dockets clear.

Rhodes, in a forthcoming compendium of federal justice statistics, also found that between 1970 and 1981, case processing time in the slowest federal circuits was reduced by 47 percent. In the early 1970s, the slowest circuits took 7.3 months to process cases, over two times longer than the overall average of three months. By the early 1980s, times in the slow circuits had been reduced to 3.9 months, only slightly above the overall average.[4]

Interview data from the six districts visited during this study suggest that the Act does exert pressure on the courts and the government to process criminal cases swiftly. A number of respondents commented favorably on the Act's pressure to keep cases moving:

- In general, the trial dates in criminal cases are realistic, and criminal cases are moving faster as a result of the Act. . . . While the Speedy Trial Act does sometimes present problems for managing the civil case load, I'm able to handle it. (U.S. District Court Judge)

- The impact of the Act has been generally favorable. I find that most people work best with deadlines, and the Speedy Trial Act forces the government to get its act together. When the government delays too long between indictment and the trial, witnesses die or become unavailable and it's more difficult to win convictions. (Assistant U.S. Attorney)

- For the simple cases, 70 days is comfortable and the pressure is good. Those cases would take forever without the Act. (Assistant U.S. Attorney)

- We really like the Act. The charging decision may take a bit longer, but once our cases are accepted for prosecution, they move quickly. The overall time is down, and we're getting people off the street faster. (FBI Agent)

Even a number of respondents who were opposed to the Act based their criticism on the fact that it places the court under strong pressure to give higher priority to the criminal calendar:

- The Act works, but it is just a legislated schedule. It's a nuisance and an artificial straightjacket. I disagree with the Act's inflexibility in prioritizing criminal cases over civil. The impact of civil cases is often much more important than that of criminal. For example, a shareholder suit against a proposed

dividend would need to be handled very quickly and would have broad-reaching impact. (U.S. District Court Judge)

- The Act has produced disastrous delays in the civil calendar... and is insufficiently flexible in providing time to prepare an adequate defense in complex criminal cases. The only positive effect has been to prod lazy judges to work harder. (U.S. District Court Judge)

This is not to say that the Act cannot be circumvented or that it is not subject to legal maneuvers to extend deadlines. Overall, however, we found that the Act is an important force in the federal justice system. All parties are cognizant of the limits, and their behavior is very much influenced by the speedy trial clock. As one U.S. attorney stated:

> The defense has a built-in interest in delay, since cases weaken as time passes and witnesses' memories fade. The court also has an interest in delay, since judges must manage a very busy calendar. While the government should desire speedy prosecution, the necessity of juggling cases may result in unintended delays. The Act serves as a positive force, exerting strong pressure on us to manage cases efficiently.

4.2 Use of the Excludable Time Provisions in Interval II

As discussed above, Congress provided for certain periods of time to be excluded from the mandated time limits in order to accommodate unavoidable delays. Two basic categories of excludable time were included in the 1974 Act. The first comprised "automatic" exclusions: delays resulting from other proceedings concerning the defendant, as well as delays due to the absence or unavailability of the defendant or an essential witness and other specified events. The second type of exclusion allowed judges a degree of flexibility in granting continuances, as long as they enter in the record of the case their reasons for believing that a continuance is in the "ends of justice" and that the need for it outweighs the interests of the public and the defendant in a speedy trial.[5]

In the Speedy Trial Act Amendments Act of 1979 (Pub. L. 96-43) Congress clarified and expanded the excludable time provisions. Impetus for these amendments was provided when the Department of Justice and the Judicial Conference of the United States, concerned over the feasibility of existing limits, proposed amendments to increase the time limits of the Act. Others testified that the Act was workable if judges, clerks and attorneys would take advantage of its flexibility.[6]

Exclusions for pretrial motions were expanded to cover the entire period from filing through disposition, provided that the judge did not keep the motion under advisement in excess of 30 days. Congress also broadened the exclusion for examinations and hearings as to the defendant's mental or physical condition and added several other "proceedings concerning the defendant" to the list qualifying for exclusions. The amendments also broadened the language as to the granting of continuances in unusual or complex cases to cover delay in all phases of an unusual or complex case including the preparation for pretrial proceedings. Finally, a new subsection was added to §3161(h)(8) to allow continuances in cases not deemed unusual or complex, but in which failure to grant a continuance would deny the defendant adequate time to obtain counsel, unreasonably deny the defendant or the government continuity of counsel, or deny either party reasonable time necessary for effective preparation of the case, due diligence having been exercised.[7] This subsection was intended to address many of the remaining problems cited by prosecutors and defense counsel in balancing the interests of justice with the public right to a speedy trial.[8]

Following passage of the amendments, the Judicial Conference revised its implementing guidelines. Reflecting the changes in the Act, these guidelines considerably broadened the interpretation of the excludable time provisions. However, the guidelines acknowledge continued uncertainty as to the meaning of certain parts of the Act.[9]

Since passage of the 1979 amendments, each Circuit has also developed its own guidelines and/or case law regarding application of the excludable time provisions. Some, like the Second Circuit, have taken a fairly liberal view of the excludable time provisions. Testifying on behalf of the Second Circuit Approach before the Senate Judiciary Committee in the 1979 hearings, Judge Robert J. Ward supported greater use of the automatic exclusions as well as a liberal construction of the "ends of justice" exclusion.[10] By full and proper use of the automatic exclusions, he believed, abuse of the ends of justice continuance could be prevented. Other circuits have taken a more restrictive view.

Below we present some statistics on the extent to which the excludable time provisions are being utilized nationwide. We then discuss some of the problems which continue to affect application of these exclusions in the 70-day indictment-to-trial interval.

4.2.1 Statistics on Excludable Time

While recent data on the use of excludable time provisions under the Act are not available, statistics for 1979 through 1981 reveal that they are used frequently. As shown in Exhibit 4.5, one or more exclusions were reported in nearly two out of every five cases in the first full year under sanctions. On average, each defendant whose case was extended had between one and two exclusions reported.

Although the number of exclusions reported was fairly high, the exclusions themselves were relatively short in duration. For the year ending June 30, 1981, the typical exclusion was less than one month long. Twenty-eight percent of the exclusions lasted from one to ten days, and only ten percent of the exclusions were for 121 days or more. The "ends of justice" provision was used relatively sparingly; during 1981, only 14 percent of the cases processed were extended through use of this provision.

Exhibit 4.6 provides additional detail on the reasons cited for delay, based upon the 1981 published AO statistics. As can be seen, over three-fourths of the exclusions fell into three basic categories: motions (from filing to hearing or other prompt disposition), motions actually under advisement, and ends of justice continuances. The remainder were scattered across the other categories set forth under 18 U.S.C. 3161(h)(1-7) . Some interesting facts to be gleaned from Exhibit 4.6 are these:

- Roughly two out of five exclusions involve hearings on or other prompt disposition of motions. Generally speaking, these tend to be very short periods of delay, with 32 percent being ten days or less in duration.

- "Other" exclusions are also likely to be brief; 37 percent of these exclusions lasted less than ten days. Of these, 59 percent involved miscellaneous proceedings concerning the defendant, such as hearings on parole or probation revocation, deportation or extradition.

- Motions are most likely to be held under advisement from 22 to 42 days, with 30 days the maximum allowed by statute.[11] Less than 10 percent of motions under advisement exceed this interval.

- Roughly three-quarters of the continuances granted in the ends of justice are less than 85 days in length, with the typical continuance being granted for approximately 60 days. Twenty-two percent of the continuances granted are for three weeks or less, while 16 percent are for more than four months.

Exhibit 4.5

USE OF EXCLUDABLE TIME

		Year Ending June 30		
		1979	1980	1981[a]
1.	Percentage of cases with Excludable Time	28%	36%	39%
2.	Average number of exclusions per case	1.4	1.5	1.6
3.	Median length of time per exclusion	12 days	25 days	27 days
4.	Percentage of exclusions 121 days or more	10%	10%	10%
5.	Percentage of exclusions 10 days or less	43%	31%	28%
6.	Percentage of cases with "ends of justice" continuances (assumes only one per case)	9%	11%	14%

Sources: Administrative Office of the U.S. Courts. For 1981, Annual Report of the Director, Table 59, at 296 (1981). For 1979 and 1980, Fifth and Sixth Reports of the Impelementation of Title I of the Speedy Trial Act of 1974 (February and September 1980, respectively).

[a]Over 94% of these exclusions occurred in Interval II.

Exhibit 4.6

EXCLUDABLE TIME BY TYPE AND DURATION[a]

EXCLUDABLE TIME PROVISION	DURATION IN DAYS 0-10	11-21	22-42	43-84	85-120	121+	TOTAL
Motions (from filing to hearing or other prompt disposition) §3161(h)(1)(F)	2838 (32%) (46%)	1794 (20%) (51%)	2038 (23%) (40%)	1348 (15%) (35%)	489 (5%) (37%)	453 (5%) (22%)	8960 (100%) (41%)
Motions under Advisement §3161(h)(1)(J)	876 (31%) (14%)	635 (23%) (18%)	1044 (37%) (21%)	183 (6%) (5%)	41 (1%) (3%)	39 (1%) (2%)	2818 (99%) (13%)
Ends of Justice Continuance §3161(h)(8)	553 (11%) (9%)	560 (11%) (16%)	1121 (23%) (22%)	1403 (29%) (37%)	465 (10%) (35%)	776 (16%) (37%)	4878 (100%) (22%)
"Other" exclusions under §3161(h)	1949[b] (37%) (31%)	497 (9%) (14%)	866 (16%) (17%)	864 (16%) (23%)	316 (6%) (24%)	832[c] (16%) (40%)	5324 (100%) (24%)
TOTAL	6216 (28%) (100%)	3486 (16%) (99%)	5069 (23%) (100%)	3798 (17%) (100%)	1311 (06%) (99%)	2100 (10%) (101%)	21,980 (100%) (100%)

Source: Administrative Office of the U.S. Courts. For 1981, Annual Report of the Director, at 296 (1981).

[a]The first row of percentages indicates the row percentage, e.g., 2838 equals 32% of 8960, the total for row 1. The second row of percentages indicates the column percentage, e.g., 2838 equals 46% of 6216, the total for column 1.

[b]Fifty-nine percent of these exclusions involve miscellaneous proceedings such as hearings on parole or probation revocation, deportation or extradition.

[c]Seventy percent of these exclusions involve an interlocutory appeal, deferred prosecution or the unavailability of the defendant or essential witness.

- Only 10 percent of all exclusions exceed 120 days. Of these, 37 percent involve continuances under §3161(h)(8), and 40 percent involve miscellaneous "other" exclusions. Seventy percent of the latter include interlocutory appeals, deferred prosecution or the unavailability of the defendant or an essential witness.

Based on these statistics, it would appear that the excludable time provisions are being used frequently, albeit not excessively. While "automatic" exclusions are common, they tend to be relatively short in the vast majority of instances. Moreover, "ends of justice" continuances are used in only a small proportion of cases, with the length of the continuance generally within reasonable bounds. Nevertheless, respondents noted a number of problems with use of the excludable time provisions, as discussed below.

4.2.2 Problems with Interpretation and Use of the Excludable Time Provisions

In our 1980 Speedy Trial Act Impact Study, we found numerous problems surrounding application of the excludable time provisions of the Act.[12] Many of these problems apparently still exist after several years of implementation experience. Our recent site visits revealed widespread variability in the interpretation of these provisions, manipulation of various exclusions to circumvent the Act's limits and continued confusion surrounding the computation of excludable time. The most serious problems involve implementation of the exclusions dealing with motions and continuances granted in the ends of justice.

Motions

Two of the "automatic" exclusions listed in §3161(h) of the Speedy Trial Act cover periods of delay due to pretrial motions:

1) §3161(h)(1)(F) allows time to be excluded for "delay resulting from any pretrial motion, from the filing of the motion through the conclusion of the hearing on, or other prompt disposition of, such motion."

2) §3161(h)(1)(J) allows time to be excluded for "delay reasonable attributable to any period, not to exceed thirty days, during which any proceeding concerning the defendant is actually under advisement by the court."

The frequent use of these exclusions raises a number of questions and concerns.

The first exclusion was expanded in the 1979 amendments. The earlier section, 18 U.S.C. §3161(h)(1)(E), covered only the time during which hearings on

pretrial motions were held. When Congress expanded the provision, it realized the potential for excessive and abusive use of the pretrial motion exclusion. The Senate Report states that the term "or other prompt disposition" applies to situations where no hearing is held, and is not intended to permit circumvention of the 30-day "under advisement" provision of §3161(h)(1)(J). It further warns that "if basic standards for prompt consideration of pretrial motions are not developed, this . . . provision could become a loophole which could undermine the whole Act."[13]

The Judicial Conference Guidelines state that, where no hearing is to be held, the exclusion should begin on the date the motion is filed or made orally and end once the court has received everything it expects from the parties before making a decision. Thereafter, any time before a decision is reached is excludable as a motion under advisement subject to the 30-day maximum.[14]

Some circuits have addressed the situation where long periods of time elapse between the filing and hearing of a motion and have limited the length of time to that which is "reasonably necessary" to process the motion. For example, in U.S. v Cobb, the Second Circuit ruled:

> Underlying the exclusions of the Act is an assumption that in the usual situation the time requirements of a pretrial motion will directly affect when a case can reasonably be ready to go to trial. Yet frequently with suppression motions, and occasionally with other motions, a final determination is deliberately, and for sound reasons, postponed until immediately before or even during trial, ... Long postponements of hearing dates, unless reasonably necessary, would not qualify as excludable time, nor would unnecessarily long extensions of time for submission of papers.[15]

Yet, in those circuits where no such limit has been placed on the length of the exclusion, the scheduling of the hearing on a motion can constitute a real loophole. To nullify the Act, a judge need only schedule the hearing immediately before or during trial, and then consider time between the filing of the motion and the date of the hearing to be excludable. While most courts in our study districts scheduled pretrial hearings early on in the case, lengthy delays were not uncommon in one district. There, respondents noted the potential for abuse.

The statutory language of §3161(h)(1)(J) is extremely clear. The time period during which proceedings concerning the defendant may be held under advisement is limited to 30 days. Yet this provision, which was intended to limit the court's time for decision making, can also be used to extend the speedy trial limits. A number of

respondents in the study districts believed that judges utilized the exclusion to manage their calendars more effectively. According to some judges and other observers, the court is sometimes tempted to reserve its decision on even simple motions until the full 30-day period has expired. In one or two districts, respondents went so far as to say that some judges actually invited pretrial motions in order to gain more time.

Judges are not the only ones who have seized upon the excludable time provisions governing pretrial motions to extend the Act's limits. While each party accuses the other of manipulating the Act through the filing of "frivolous" motions, it is clear that such actions are taken by both parties to some degree. In some U.S. attorneys' offices, respondents feel that the exclusions governing pretrial motions are the only ones available to them, since requests for "ends of justice" continuances are frowned upon both within the office and by the court. Defense counsel too are well aware that the filing of motions may result in additional time without the necessity of requesting a continuance. At times, the government may even indirectly encourage defense motions, e.g., by limiting initial discovery. Despite these cross-accusations, however, attorneys have not been sanctioned for filing frivolous motions or otherwise delaying trial without justification under §3162(D).

The filing of unnecessary motions by the government or defense counsel to stop the speedy trial clock may be likened to a football player's stepping out of bounds in the final minutes of play to gain more time. Such actions do not advance the ball; rather, their purpose is to allow the contenders additional time to plan their strategy. While such maneuvers are clearly within the legal limits of the statute, they are not in keeping with the spirit of the Act. A number of respondents commented that such manipulation of the system results in disrespect for both the law and the courts. Furthermore, the use of pretrial motions to gain more time obscures the real reason for seeking an extension--i.e., to allow adequate time for trial preparation. According to these respondents, use of §3161(h)(8) would be more appropriate in such instances. Other respondents denied that the filing of "shotgun" motions constituted an abuse. One judge, for example, pointed out that defense attorneys are obligated under the code of ethics to exert every lawful effort to present an effective defense, including filing pretrial motions to gain more preparation time.

Ends of Justice Continuances

Perhaps the most controversial provision in the Speedy Trial Act is that allowing judges to grant "ends of justice" continuances. From the beginning, some

commentators argued strongly that such a provision represented a necessary safety valve, especially where the complexity of the case or special circumstances surrounding its processing required additional time to disposition. Others expressed concern that the ends of justice provision could be used as a "catch-all" clause to secure delay under even the most ordinary circumstances.

In order to help standardize the application of the provision, Congress delineated a number of circumstances that would qualify under §3161(h)(8), including:

- when failure to grant a continuance in the proceeding would be likely to make a continuation of the proceeding impossible or result in a miscarriage of justice;
- when a case is so unusual or complex--due to the number of defendants, the nature of the prosecution, or the existence of novel questions of fact or law--that it is unreasonable to expect adequate preparation within the constraints established by the Act; and
- when failure to grant a continuance would deny the defendant reasonable time to obtain counsel, would unreasonably deny the defendant or the [G]overnment continuity of counsel, or would deny counsel reasonable time necessary for effective preparation.

At the same time, the Act specifically prohibited use of §3161(h)(8) to grant a continuance solely because of general court congestion, lack of diligent preparation or failure to obtain available witnesses on the part of the attorney for the government.

Despite the attempt to standardize the conditions surrounding application of §3161(h)(8), a great deal of variability remains across districts and individual judges. In some jurisdictions and individual courtrooms, ends of justice continuances are rarely granted to either party. In other jurisdictions and courts, judges may look more favorably on a defense request for an (h)(8) continuance, than upon a prosecutor's request. In still others, either party may receive a continuance upon request.

The federal court in Denver, Colorado represents one end of the continuum. In this jurisdiction, cases are typically set for trial within 60 days of indictment, and there is little, if any, use of excludable time. A discovery hearing is scheduled for 10 days after arraignment. This Omnibus Hearing, which was established in response to the Act, is intended to expedite discovery and the filing of pretrial motions which are due ten days after the hearing. Immediately following the discovery hearing, the AUSA and the defense attorney adjourn to the judge's chambers, where the trial date is set. Extensions desired by either party must be requested at this time. Excludable

time arising from pretrial motions and other proceedings concerning the defendant is not used to extend the trial date, unless the court needs more time. If the case is complex, the defense may ask for a continuance, or what the district calls a waiver, at this time. Such continuances are rare, however. Exhibit 4.7 depicts the processing of one large case in this district. The case, which involved 13 defendants, was disposed in 66 calendar days.

In other jurisdictions and individual courtrooms, pretrial motions and ends of justice continuances are both routinely used to stop the clock. In one study district, judges use "boilerplate" forms to grant continuances, although court policy ordinarily limits the extension to 30 days. One government attorney summed up the variability among judges this way:

> Some judges will grant a continuance if the defense attorney sniffs. Others will not permit a continuance under any circumstances.

In many cases, continuances are clearly in the interests of justice as defined by the Act. In some unknown proportion of cases, however, there may be other reasons for the court's granting additional time. Sometimes scheduling a large, complex case far in advance can help the court "clear the docket" in order to catch up with smaller criminal cases or civil backlog. Continuances may also reflect judges' desire to solidify working relationships with the attorneys practicing before them and thereby encourage pleas. Since many judges come from the ranks of the defense bar, there is also strong empathy for their plight and the need for additional time for effective case preparation.

Given the strong incentives to delay case processing, it is perhaps surprising that the actual percentage of continuances granted is so low. What is troublesome is not so much the overall frequency of such extensions but the variability with which they are allowed. In essence, application of the ends of justice provision reflects the attitudes and "role orientations" of the judges.[16] Implementation of the federal Speedy Trial Act, much like implementation of state speedy trial laws and rules and other delay reduction efforts, appears to be tempered by local norms and practices--what has been termed "local legal culture."[17]

In addition to variability in the application of the ends of justice provision, the present study revealed one more area of concern regarding §3161(h)(8). Subsection (B)(iv) of this section clearly states that the judge may grant a continuance if failure to do so "would unreasonably deny the defendant or the government continuity of

Exhibit 4.7

SAMPLE CASE DISPLAYING EXPEDITED CASE PROCESSING

MAGISTRATE:	1.	1/19/83	Complaint filed and warrants issued.
	2.	1/21/83	Defendants arrested in Wyoming.
	3.	1/28/83	Indictments filed. (Court records begin) Initial Appearance (bond set, counsel appointed, arraignment set)
	4.	2/83	Arraigned STA min. and max. limits announced Discovery set for 10 days hence Ch. J. Finesilver drawn as the trial judge
	5.	2/14/83	Discovery Conference Held Motions ordered due 2/24 Motion filed to extend time to file motions
DISTRICT COURT:			Motions due 3/10 TRIAL SET FOR 3/28/83 Pleas due 3/23 Hearing on motions set 3/21 and 3/22 Government to provide discovery 2/23-3/1
	6.	2/25/83	Superceding indictment filed adding conspiracy counts (originally 2 counts, 2 more counts added) and adding 4 defendants.
	7.		Motion to reduce bond referred to the Magistrate
	8.		Arraignment on superceding indictment (note: no change in the STA limits as the original was not dismissed, SIs in Denver rarely affect STA)
	9.	3/11/83	Motions are all filed and 11 days of excludable time is marked in the court records. Government responses are filed.
	10.	3/22/83	Motions hearing held. Motions taken under advisement (exclusion is NOT marked in court records).
	11.	3/24/83	Court order on motions.
	12.		Case is transferred to another trial judge.
	13.	3/28/83	Trial begins. Trial lasts for five days.
	14.	5/6/83	Sentencing
	15.		Case is currently on appeal.

counsel." Yet, study respondents reported that few judges will grant a continuance in the event of scheduling conflicts among government attorneys. Government attorneys complained that the court viewed them as "fungible" and refused to delay trial in order to maintain continuity of counsel. Judges confirmed attorneys' reports. Many believed that government attorneys were, in fact, replaceable, or that scheduling conflicts were not, in themselves, sufficient cause for delay, particularly since the government started the clock.

In light of the language of the Act, some respondents viewed this application of the law as unfair and one-sided. They argued that replacing an attorney who has spent several weeks or months preparing for trial denies the government continuity of counsel. Fully familiarizing a new attorney with the case may not only jeopardize the outcome, but also add to the costs of adjudication, since an unprepared attorney can waste valuable court time.

One of the study districts has adopted a "second chair" approach to handling complex cases in an effort to avoid such scheduling problems. An AUSA is assigned to provide backup in complex cases so that he or she will be ready to take over in the event that the assistant assigned to the case is unavailable for trial. (See chapter 5 for a more detailed discussion of case management procedures in this office.)

4.3 Effects of the Speedy Trial Act on Trial Preparation

According to many of the AUSAs we interviewed, the government is always "ready for trial" when the case reaches the grand jury. At least, that is the goal in every U.S. attorney's office and, in most instances, that goal is met even if pre-indictment arrests must be avoided or indictments delayed to do so. Prosecutors can face serious problems, however, when unexpected or premature arrests occur before all the evidence is gathered. Such time pressure in Interval I may cause "spill-over" problems in the indictment-to-trial period, which can be exacerbated when an apparently small case expands as it undergoes further investigation. Particular problem areas include:

- Preparing transcripts/translations of wiretapped conversations or reviewing videotapes for discovery and/or trial. Transcription is an extremely time-consuming process, particularly if translations are necessary. Hours may also be required for reviewing video-tapes, labelling segments and extracting portions for use at trial. Resources often must be diverted to such cases even though other deadlines are also pressing.

counsel." Yet, study respondents reported that few judges will grant a continuance in the event of scheduling conflicts among government attorneys. Government attorneys complained that the court viewed them as "fungible" and refused to delay trial in order to maintain continuity of counsel. Judges confirmed attorneys' reports. Many believed that government attorneys were, in fact, replaceable, or that scheduling conflicts were not, in themselves, sufficient cause for delay, particularly since the government started the clock.

In light of the language of the Act, some respondents viewed this application of the law as unfair and one-sided. They argued that replacing an attorney who has spent several weeks or months preparing for trial denies the government continuity of counsel. Fully familiarizing a new attorney with the case may not only jeopardize the outcome, but also add to the costs of adjudication, since an unprepared attorney can waste valuable court time.

One of the study districts has adopted a "second chair" approach to handling complex cases in an effort to avoid such scheduling problems. An AUSA is assigned to provide backup in complex cases so that he or she will be ready to take over in the event that the assistant assigned to the case is unavailable for trial. (See chapter 5 for a more detailed discussion of case management procedures in this office.)

4.3 Effects of the Speedy Trial Act on Trial Preparation

According to many of the AUSAs we interviewed, the government is always "ready for trial" when the case reaches the grand jury. At least, that is the goal in every U.S. attorney's office and, in most instances, that goal is met even if pre-indictment arrests must be avoided or indictments delayed to do so. Prosecutors can face serious problems, however, when unexpected or premature arrests occur before all the evidence is gathered. Such time pressure in Interval I may cause "spill-over" problems in the indictment-to-trial period, which can be exacerbated when an apparently small case expands as it undergoes further investigation. Particular problem areas include:

- Preparing transcripts/translations of wiretapped conversations or reviewing videotapes for discovery and/or trial. Transcription is an extremely time-consuming process, particularly if translations are necessary. Hours may also be required for reviewing video-tapes, labelling segments and extracting portions for use at trial. Resources often must be diverted to such cases even though other deadlines are also pressing.

- Obtaining information on identities of foreign nationals. Interpol checks can take from six months to one year. Immigration and Naturalization Service (INS) files also take time to obtain, as does information from other countries.

- Securing bank and telephone records. Provisions of the Financial Privacy Act and other laws increase the time required to obtain these records.

- Obtaining cancelled checks from record centers. Obtaining such checks can cause delay in "field-originated" Secret Service check cases--i.e., cases in which field agents are acting on information regarding the passing of a forged check. This problem does not affect "headquarters-originated" cases (the majority) in which the check is already in hand.

- Conducting forensic analysis of handwriting, fingerprints, drug content, etc. Obtaining forensic analyses can be a lengthy process, particularly since all of the FBI analyses are handled in the central laboratory located in Washington, D.C. If the laboratory faces a major crisis such as the Tylenol or Girl Scout Cookie contamination scare, resources can be diverted and many criminal cases will be delayed.

Many of these activities are common in cases involving multiple defendants and complex evidentiary issues. In these instances, speedy trial deadlines may be extended due to hearings on or consideration of motions. Extensions may also be granted under §3161(h)(8)(B)(ii), which permits continuances in the interests of justice for "unusual or complex" cases. Under these circumstances, there may be sufficient time for both parties to prepare for trial.

Yet, prosecutors complain that all too often they must depend on defense counsel to request a continuance because they are reluctant to admit that the government needs more time. Moreover, prosecutors cannot count on excludable time being generated a priori, since it is calculated after the fact based on the incidence of certain events. These conditions make calendar management within the U.S. attorney's office problematic.

Defense attorneys voice even louder criticism about the Speedy Trial Act, arguing that the 70-day limit poses a serious threat to effective trial preparation and thus jeopardizes the quality of representation. Almost without exception, defense counsel criticized the 70-day limit as far too tight to prepare all but the simplest cases, especially in light of the government's control over the timing of the indictment, often extensive pre-indictment preparation, and control of the discovery process.

While the excludable time provisions may ease the situation somewhat, defense counsel also note that narrow construction of the ends of justice provision by some judges can pose undue hardships. In some instances, judges may set the trial date for 31 days from arraignment, giving defense counsel only a month to prepare a case which the government has had months to prepare. This has caused some defense counsel to label the Act the "Speedy Conviction Act."

Since the Act's exclusions run even when the defendant is in custody, some defense counsel feel that this places them in a difficult position. While they need to file necessary motions to strengthen the defense's legal position, such motions trigger excludable time, and the defendant may remain in custody for a longer period as a result. Alternatively, failure to file the motion may result in a weaker legal defense. One defense attorney has even adopted a ploy to avoid stopping the clock if his defendant is in custody. Rather than file a motion and toll the time limit, he will write a letter raising an issue to the AUSA with a copy to the judge. The letter will specify clearly that it is not to be construed as a motion.

4.4 Effects of the Speedy Trial Act on Case Disposition

During the decade since enactment of the Speedy Trial Act, observers within and outside the government have debated whether the time limits affect plea negotiations. Testifying before the Subcommittee on Constitutional Rights of the Senate Judiciary Committee in 1971, Professor Daniel J. Freed argued that "the greatest cost of delay lies in compelling the reduction of charges through plea bargaining, thereby impairing society's ability to establish guilt."[18] The fixed time limits of the Act were designed, in part, to prevent erosion of the government's case over time and the resulting pressure to negotiate reduced charges.

A 1979 Department of Justice Study found no evidence that the Speedy Trial Act had reduced the alleged pressure on the government to negotiate.[19] Indeed, the report suggested that there was some support for the opposite view. Prosecutors in the districts surveyed reported that the Act had increased pressure on the government to reduce the criminal case backlog by disposing of more cases through plea bargains. To do so, prosecutors were forced to make plea offers more attractive.

Abt Associates' 1980 Speedy Trial Act Impact Study also found no statistical evidence that plea negotiation practices had changed under the Act.[20] Once again, however, some respondents in that study expressed concern that pressure to meet

speedy trial deadlines would lead prosecutors to offer and judges to accept more plea negotiations, with more lenient terms for the defendant.

Interviews conducted during the course of the present study revealed mixed perceptions of the impact of the Act on plea negotiations. Many felt that the Act had had no effect on plea negotiations, except perhaps to force the defendant to plead earlier. According to these respondents, the plea decision is more likely to be influenced by the seriousness of the offense and likely penalties, the strength of the evidence against the defendant, the willingness of the prosecutor to "deal," whether the judge has a reputation for imposing stiff sentences, and local norms and procedures governing the plea negotiation process. One AUSA spoke for this group when he commented:

> In a very rare instance, the defense may get a better deal because of speedy trial pressures. I am aware of one such case in the last 18 months.

A small number of respondents reported that the Act has led to an increase in the number of pleas. Some alleged that the increase favored the prosecution, while others argued that it benefited the defense. One federal defender asserted that the Act "coerces pleas" because the defense lacks the time to prepare for trial. Since they cannot try all of their cases, federal defenders will expedite their case load by negotiating pleas in weaker ones. Government attorneys also claim that the Speedy Trial Act imposes pressure to negotiate pleas. One respondent asserted that judges use speedy trial deadlines to force AUSAs to accept last minute pleas to charges less serious than those contained in earlier offers. In his view, the Speedy Trial Act has produced "bargain basement justice."

Only a few respondents claimed that the Act had reduced the number of pleas, the outcome Daniel Freed and others had predicted. One public defender felt that the Act did not allow sufficient time for him to develop a rapport with his client. Absent such rapport, he was reluctant to suggest that the client plead. One government attorney felt that there was insufficient time to arrange for the defendant to plead in exchange for his or her cooperation.

Examination of case disposition patterns for the last several years reveals a fairly constant profile. (See Exhibit 4.8.) Historically, approximately two-thirds of the defendants whose cases are disposed in federal court have pled guilty or nolo contendere. Fifteen to 19 percent of the defendants have had their charges dismissed, and the remaining 14 to 19 percent have gone to trial. The percentage of those

Exhibit 4.8

METHOD OF CASE DISPOSITION

		Year Ending June 30						
		1977	1978	1979	1980	1981	1982	1983
1.	Total number terminated defendants[a]	53,189	45,922	41,175	36,560	38,127	40,466	43,329
2.	Percentage pleading guilty or nolo	66%	68%	66%	63%	64%	68%	70%
3.	Percentage dismissed	19%	17%	17%	18%	17%	17%	15%
4.	Percentage going to trial	15%	15%	17%	19%	19%	15%	14%
5.	Percentage convicted through plea or trial	78%	79%	80%	78%	78%	80%	82%

Sources: Administrative Office of the U.S. Courts. For 1977-79 Fifth Report on Speedy Trial Act Implementation. (Feb. 1980).

For 1980, Sixth Report on Speedy Trial Act Implementation, at 30 (Sept. 1980).

For 1981, Annual Report of the Director, (1981).

For 1982, Annual Report of the Director, (1982).

For 1983, Annual Report of the Director, (1983).

[a]Includes cases dismissed.

convicted through plea or trial has remained a fairly constant 78 to 82 percent. Thus, while there have been slight variations over time, there is little evidence that the Act has resulted in speedy convictions or bargain basement justice as some defense and government attorneys claim.

4.5 Sanctions

Another controversy surrounding passage of the Speedy Trial Act of 1974 concerned the type of sanction to be imposed for failure to meet the statutory time limits. The ABA Standards Relating to Speedy Trial had recommended mandatory dismissal with prejudice in the event of non-compliance, and a number of observers believed that such a sanction was essential in order to "put teeth" into the time limits. The U.S. Department of Justice, however, expressed grave reservations about such a sanction. The Department's opposition was based primarily on the fear that cases would be lost under such a provision even though the prosecutor bore no responsibility for the delay. Furthermore, given the defendant's interest in delay, the Act could possibly be manipulated by the defense bar with the prosecutor (and the public) paying the penalty.[21]

The final wording of the statute represented a compromise by Congress, taking into account the Department's concerns. While Congress mandated dismissal as a sanction for non-compliance, the type of dismissal was left optional. The Act gave the judge discretion to dismiss cases with or without prejudice, the latter affording the government the option to reinstate charges. In determining whether to dismiss with or without prejudice, the judge is to consider, among other things: 1) the seriousness of the offense, 2) the facts and circumstances of the case which led to the dismissal; and 3) the impact of a reprosecution on the administration of justice. The Act also included penalties for willful and unjustified delay caused by the defendant or the attorney for the government.[22]

While this compromise wording ended the immediate controversy regarding the nature of the sanctions, it became an issue once again in 1979 as the final deadline for full implementation of the Act drew near. In the hearings preceding enactment of the 1979 amendments, both the Department of Justice and representatives of the judiciary expressed concern that massive numbers of cases would be dismissed if the final time limits were made effective and the sanctions were immediately imposed.

In fact, despite the dire predictions expressed by some, the dismissal sanction has rarely been invoked. Beginning in September 1980, clerks of the U.S. district

courts were asked to provide reports on defendants whose charges were dismissed pursuant to 18 U.S.C. §3162(a). In the first 10 months during which records were kept, there were only 19 dismissals. Nine of these were without prejudice, five were with prejudice, and in the remaining five cases the nature of the dismissal was not indicated. For the years ending June 30, 1982 and June 30, 1983 there were 21 dismissals each. About half of these were with with prejudice. In almost every instance, the case was dismissed for failure to meet the indictment-to-trial limit. There have been only a handful of Interval I dismissals by the court since the sanctions went into effect.[23]

According to those interviewed in the course of the present project, the rare dismissal results from one of two basic problems:

1) inaccurate recordkeeping by the court or the U.S. attorney's office, i.e. simple mathematical error; or

2) inadequate tracking, with the case simply being overlooked.

The first reason for non-compliance is generally attributable to the fact that there is still some uncertainty as to the meaning of various Speedy Trial Act provisions. As discussed in Chapter 5 of this report, there is still some confusion within both the court and the U.S. attorneys' offices regarding the calculation of the beginning and ending dates of Interval II, computation of excludable time and calculation of the time limits in cases involving multiple defendants and/or superceding indictments. In part, this confusion stems from the fact that case law is still emerging and some interpretation questions remain unanswered. In part, it also results from inadequate training of clerks and AUSAs, some of whom have only a rudimentary understanding of the law.

An example of this confusion on a basic calculation is illustrated in U.S. v. Carrasquillo,[24] where the defendant was arrested and made her initial appearance before the magistrate, then was indicted and arraigned. The trial court used the arraignment date as Day 1. On appeal, the Third Circuit Court of Appeals pointed out:

> If a preindictment initial appearance were not considered to be an "appearance before a judicial officer of the court in which such change is pending," then the date of an indictment could never be the date that "last occurs" under Section 3161(c)(1). . . . this would make the choice of dates provided in Section 3161(c)(1) superfluous. . . .[25]

It is probable that more calculation errors occur than are indicated by dismissal motions.

Dismissals due to simple oversight have occurred on occasion. The District Court in Massachusetts recognized this in a case resulting in a speedy trial dismissal:

> What followed can adequately be described only as "musical judges", as the case was apparently bumped back and forth, assigned from Judge #1 to Judge #2, then to Judge #3 and then to us, Judge #4. . . . Had defendant not filed its motion to dismiss, the case still might be lost in a procedural twilight zone, neither continued or rescheduled for trial. . . . [The procedural mishap] was caused by the negligent administration of the system and negligent administration is the bane of any system.[26]

In most United States attorneys' offices, the individual assistant is responsible for monitoring his or her own case load. An inexperienced or overworked attorney may certainly make errors. A number of respondents in one very busy district commented that the defense bar lies in wait for just such instances, hoping that failure to meet the limits will result in dismissal. Although the court typically keeps accurate track of its case load, its case management systems are not infallible. Moreover, in the view of some judges, monitoring of speedy trial limits is primarily a U.S. attorney's office function; it is the AUSA's responsibility to ensure that trial is scheduled within the statutory time frame.

A few respondents in the current study noted a judicial tactic used to forestall a motion to dismiss: the court will begin voir dire to toll the Speedy Trial clock, and then delay the actual trial. In U.S. v. Gonzalez[27] the Eleventh Circuit Court of Appeals found the trial court's recess reasonable, noted it was aware of the problem and warned other district courts about gameplaying with the voir dire:

> We caution that our decision not be viewed as a license to evade the Act's spirit by commencing voir dire within the prescribed time limits and then taking a prolonged recess before the jury is sworn and testimony is begun. The district courts must adhere to both the letter and the spirit of the Act, and we will not hesitate to find a trial has not actually "commenced" within the requisite time if we perceive an intent to merely pay the Act lip service.[28]

What is surprising is not that dismissals occur, but that they occur so infrequently. There appear to be three basic reasons for the small number of dismissals:

1) Most cases comply with the Speedy Trial Act limits, either because they are disposed within the gross time limits set by the

Act or within the net time limits taking account of excludable time.[29]

2) In some cases the court will look back over the record of the case to find additional excludable time in the form of automatic exclusions.

3) There is no strong incentive for defense attorneys to move for dismissal under the Act. Defense attorneys may waive dismissal either by failing to file a motion or, in some jurisdictions, by expressly waiving the sanction. (See section 4.6.)

The third point deserves some explanation.

In the Interval I period, requests for dismissal by the defense are very rare. Even though a number of cases in our sample had exceeded the 30-day limit, none had resulted in a motion for dismissal. On the government's side, the attorneys we interviewed did not see any reason to dismiss such cases voluntarily unless the defendant moved for dismissal on speedy trial grounds. For their part, defense attorneys noted that pushing for dismissal of the complaint would not necessarily halt prosecution of the defendant. In the first place, the court might simply dismiss without prejudice. In the second place, such a move on the defense's part might trigger a voluntary dismissal of the complaint on the part of the prosecutor, followed by the filing of an indictment on the same charges. The defense would rather hope that the government's failure to move forward quickly represents dwindling interest in the case and, possibly, the dismissal of all charges, deferred prosecution, or the opportunity to plead to a misdemeanor in magistrate's court. Moving the case into the district court via the indictment process virtually guarantees a tougher battle.

In Interval II, motions to dismiss are also quite rare, even in the small number of cases that actually exceed the time limit. As with Interval I, many defense attorneys believe that dismissal will be without prejudice, and that the government will simply reindict the defendant and start the process all over again. Some defense attorneys noted that a motion to dismiss is likely to anger the prosecutor and thus only serve to make the case more difficult to defend the second time around. Motions to dismiss are only considered useful, therefore, if a case is running up against the statute of limitations or if the defendant is in jail. In the former instance, reprosecution is impossible; in the latter, dismissal will at least result in release from jail.

A similar reason for the defense bar's reluctance to move for dismissal is concern over alienating the court. One of the defense attorneys interviewed admitted

that he had had cases that exceeded the 70 net day time limit to trial, but that instead of moving for dismissal he had requested retroactive excludable delay. After all, he said, "We have to appear before these judges in case after case. We are as anxious as anyone to avoid rocking the boat."

In fact, as the statistics cited above show, cases are as likely to be dismissed with prejudice as without prejudice. Currently there is no clear trend in the case law. For example, in U.S. v. Angelini,[30] the District Court in Massachusetts held that there is a presumption of dismissal with prejudice within the Act's provisions. The court relied on the legislative history of the 1979 amendments in making its finding:

> The legislative history noted that '(w)hile the act does permit dismissal without prejudice, extensive use of this procedure could undermine the effectiveness of the act and prejudice defendants, and the committee intends and expects that use of dismissal without prejudice will be the exception and not the rule.' . . . the court concludes that there must be a presumption that an indictment shall be dismissed with prejudice. Any other position would render the Act self-contradictory.[31]

The Second Circuit explicitly disagreed with the court in Angelini, holding that there was no legislative presumption in favor of dismissal with prejudice:

> It would ill behoove a court to engraft a presumption on statutory language plain on its face that does not include it. Instead, we prefer to follow the thrust of the compromise reached in Congress and leave the discretion decision on whether dismissal is with or without prejudice to the courts.[32]

According to our respondents, the Seventh Circuit has been loathe to dismiss cases generally, and to dismiss with prejudice in particular. The decisions in this Circuit do evince a conservative approach. In U.S. v. Carreon,[33] the defendant pled guilty and was incarcerated but later successfully argued that his plea of guilty was involuntary and had the judgment vacated. Just over one year elapsed between the time the reversal was issued and when the defendant moved for dismissal on the government's subsequent reopening of the case. The Circuit Court upheld the speedy trial dismissal without prejudice finding the defendant's drug crime was serious and the impact of reprosecution was slight. The court attributed most of the delay to court error and further stated:

> The defendant claimed no prejudice due to the delay, the government did not intentionally seek delay, and the unusual circumstances of the case would be unlikely to recur, thus causing the sanctioning of similar delays in the future.[34]

Ultimately, compliance with the time limits seems to be more a function of the threat of dismissal than of its actual imposition. While the government obviously faces a severe penalty for non-compliance, the dismissal sanction also places the courts under pressure. Motions for dismissal are often litigated in circuit court, where poor calendar management and/or computation errors are likely to be frowned upon. Moreover, there is often a public outcry when serious charges are dismissed due to a technicality. While it would appear to be in the defendant's interest to move for dismissal in each and every instance of non-compliance, defense attorneys "often go along to get along." Since many believe that the "teeth" in the sanction--dismissal with prejudice--will not be used, and since delay can often be helpful to the defense, defense attorneys are often more anxious to buy needed time than to exercise the dismissal option. This attitude on the part of the defense also helps to explain the frequent use of waivers of the Act, as discussed below.

4.6 Waivers

18 U.S.C. §3161(a)(2) provides that failure of the defendant to move for dismissal prior to trial or to entry of a plea of guilty or nolo contendere constitutes a waiver of that right. As discussed above, many defense counsel have opted to waive the sanction by failing to move for dismissal before the time limits expire. Whether a defendant may also execute a valid express waiver of the right to move for dismissal in the future is unclear.

The Third Circuit has clearly stated that a defendant cannot "waive the public's right to a speedy trial unless he complies with the requirements carefully set forth in Section §3161(h)."[35] The Court reached this decision by referring to the legislative history, and in particular to the Senate Committee report which includes the following language:

> The Committee wishes to state, in the strongest possible terms, that any construction which holds that any of the provisions of the Speedy Trial Act is waivable by the defendant, other than his statutorily-conferred right to move for dismissal . . . is contrary to legislative intent and subversive of its primary objective: protection of the societal interest in speedy disposition of criminal cases by preventing undue delay in bringing such cases to trial.[36]

The basic argument underlying this position is that the rights conferred by the Speedy Trial Act include a public right to speedy disposition which the defendant is not in a position to waive.

Other courts have taken a differing view. Some believe that, despite the public interest in holding trials within the statutory limits, the right to move for dismissal if the limits are exceeded is primarily the defendant's. In this view, the defendant should be able to waive the right expressly as well as by procedural default, as in the case of statutes of limitations.[37]

Still other courts have approved the use of waivers with certain provisos. For example, the Eleventh Circuit appears to have approved of waivers used to obtain a continuance for a specified period to time, but not beyond that:

> Waivers of Speedy Trial Act protections should be specifically tailored to a address only the time periods or reasons for delay actually being waived.[38]

In an attempt to ascertain the extent to which waivers of the Act are being used, Abt Associates sent a survey to all 94 U.S. attorneys' offices. The results of the survey appear in Exhibit 4.9. As can be seen, there is substantial variability among districts within most circuits. Of the districts reporting, roughly 46 percent permit some form of express waiver.

As shown in Exhibit 4.10, districts which prohibit waivers usually base their determination on the statute or its legislative history. In contrast, districts allowing waivers typically rely on local court rule or policy. One complication evident from the survey is that the caselaw and legislative history cited as authorizing waivers often relate directly to the §3161(h)(8) exclusion. Thus, a few of our respondents may have stated that they used "waivers," when in fact they meant §3161(h)(8) continuances. These respondents have recorded §3161(h)(8) as a "statutory provision" authorizing waivers.

In other districts, motions and orders for continuances often contain written defendant waivers of the Speedy Trial Act provisions. From the copies of motions and orders returned with the survey, this appears to be a fairly common approach. In part, this practice may have been adopted because the legal community is accustomed to using such waivers for Sixth Amendment speedy trial rights and statutes of limitations. They may, therefore, feel that the Act also requires an explicit waiver. On the other hand, waivers may be used as insurance where the reason for a §3161(h)(8) continuance is dubious.

Finally, some districts appear to be using "true waivers." These waivers are used to toll the Act's limits entirely, not just for the period during which a

Exhibit 4.9

USE OF WAIVERS BY DISTRICT

CIRCUIT	NO WAIVERS PERMITTED	WAIVERS PERMITTED	NO RESPONSE	TOTAL U.S. ATTORNEYS OFFICES
D.C.	--	1	--	1
First	3	0	2	5
Second	3	2	1	6
Third	2	0	4	6
Fourth	2	5	2	9
Fifth	4	3	3	10
Sixth	2	4	3	9
Seventh	2	2	3	7
Eighth	5	2	3	10
Ninth	9	3	2	14
Tenth	3	4	1	8
Eleventh	3	6	0	9
TOTAL	38 (40%)	32 (34%)	24 (26%)	94 (100%)

Source: Mail Survey of 94 U.S. attorneys' offices conducted by Abt Associates during the course of this study.

Exhibit 4.10

BASES FOR PROHIBITING OR PERMITTING WAIVERS

	WAIVERS PROHIBITED	WAIVERS PERMITTED
Interpretation of Statute and its Legislative History	57%	33%
U.S. Attorney's Office Policy	15%	11%
Court Rule/Policy	26%	47%
Case Law	2%	3%
Constitutional Right	0%	6%
TOTAL	100%	100%

Source: Mail survey of 94 U.S. attorneys' offices conducted by Abt Associates during the course of this study.

continuance is granted. The waiver forms typically state that the defendant understands the provisions of §3161 et. seq., is willing to and does waive those rights, and waives the right to seek a dismissal if the time limits are exceeded. The reasons cited by respondents for requesting waivers included: court session closed on or near the 70-day limit, court request, court scheduling problems, and court requires waivers before allowing the defense any continuance.

While the use of waivers appears to be allowed in a substantial number of districts, the percentage of cases in which waivers are exercised is relatively small. Most of the respondents reported that waivers were used in 11 to 20 percent of the cases in the jurisdiction, and a large proportion of these involved "ends of justice" continuances as well.

The United States Attorney's Manual makes clear that there is a substantial risk that attempted defense waivers of the Speedy Trial Act will be held invalid.[39] It also makes clear that the liberalized automatic exclusions included in the amended Act, coupled with the discretionary "ends of justice" provision should be sufficient to allow both parties adequate time, thus rendering mechanisms of questionable validity unnecessary. We would go further to state that where the waiver accompanies valid excludable time, the spirit of the Act is not violated; however, to the extent that waivers are used to create excludable time and/or to avoid the dismissal sanction, the effect is to undermine the Act.

4.7 Summary and Conclusions

Overall, there is little evidence that the Speedy Trial Act has had a significant positive impact on the disposition time of the typical criminal case. In fact, in the last two years, there has been an increase in the median case processing time for criminal cases. Yet, it is impossible to say how long criminal cases would have taken without the stringent limits set forth in the statute. In the decade since passage of the law, both the criminal and civil case load have changed dramatically, and in recent years judicial workload has reached an all-time high. There is some statistical evidence suggesting that the Act has had a positive impact on very long cases--there are fewer cases taking an extremely long time in the system. There is also anecdotal evidence that judges and prosecutors have rearranged case priorities to comply with the Act's limits.

Few cases have been dismissed for non-compliance with the Act, partly because of the use of excludable time to extend the Act's limits, partly because of

waivers by defense counsel, and partly because of real changes in court management and prosecutorial practices designed to reduce delay. There is little evidence to suggest that the Act has altered the nature of case disposition patterns--e.g., by trial, plea or dismissal.

This does not mean that there are no problems in the indictment-to-trial interval. Respondents noted the following concerns:

- There is widespread variability in the interpretation of the excludable time provisions, particularly in the granting of §3161(h)(8) continuances in the "ends of justice." Some judges refuse to grant needed time for case preparation; others grant continuances for seemingly weak reasons.

- There is some manipulation of the excludable time provisions by both the court and the parties to extend the speedy trial deadline.

- There is continued confusion surrounding the computation of excludable time, particularly in multiple defendant cases.

- Certain kinds of cases can be extremely time-consuming, yet not all of the trial preparation activities are covered by excludable time provisions. This can pose problems for prosecutors, especially when cases are not fully prepared pre-indictment.

- Government attorneys may be denied continuances in the event of scheduling conflicts. Many judges treat them as interchangeable and routinely refuse requests for postponements.

- The 70-day time limit can also pose a serious hardship on defense counsel, especially since the government has often had far more time to prepare for trial prior to indictment. In some jurisdictions, defense counsel may be given less than 70 days to prepare a complex case that the government has had months or years to develop.

- The use of express waivers of the dismissal sanction is of questionable validity and poses a substantial risk to those relying on such waivers to expand the Act's limits.

In the following chapter we describe some of the management changes that have been initiated to meet the Speedy Trial Act limits. We also recommend additional steps that may be taken to facilitate compliance and alleviate some of the problems noted here.

FOOTNOTES TO CHAPTER 4

1. 18 U.S.C. §3161(c)(1).

2. The Federal Judicial Center has conducted a number of studies in an attempt to measure judicial workload. Each has involved a time study designed to record all of the time judges spend on a given case type over a period of several months. The weights derived from such studies are developed by comparing the percentage of time spent on a given case type with the percentage of such cases terminated during the period under observation. That is, if judges spend two percent of their time on cases representing only one percent of their entire case load, those cases may be said to take twice as long as the average case and are assigned a weight of two. By multiplying the number of cases filed in each category by the appropriate weight, one can measure the total workload of the court. While there are numerous problems with interpretation of these measures, the weighted filings are apt to give a better picture of overall court workload than raw case filings. Furthermore, recent trends in judicial workload (since 1979) are reasonably reliable since they are based on a uniform methodology.

3. The Abt Associates' figures are slightly shorter than those published by the AO, since our numbers estimate the duration of Interval II and exclude the time from conviction to sentencing.

4. William M. Rhodes, 1979 Compendium of Federal Justice Statistics, forthcoming publication for the Bureau of Justice Statistics.

5. 18 U.S.C. §3161(h)(8).

6. Amending the Speedy Trial Act of 1974: Hearings on S.961 and S.1028 Before the Senate Committee on the Judiciary, 96th Cong., 1st Sess., at 72-92, 135-145, 147-148 (1979) (Statements of Professor Daniel J. Freed and Judge Robert J. Ward).

7. 18 U.S.C. §3161(h)(8)(B)(iv).

8. For a full discussion of these changes in the Speedy Trial Act of 1979, H.R. Rep. 96-390, 96th Cong., 1st Sess. 12 (1979).

9. See, for example, the discussion of "other proceedings concerning the defendant" in Judicial Conference of the United States, Committee on the Administration of the Criminal Law, "Guidelines to the Administration of the Speedy Trial Act of 1974, As Amended," at 25, (December 1979 revision).

10. See testimony of Judge Robert J. Ward, Senate Committee Hearings to Amend the Speedy Trial Act of 1974, supra.

11. It is impossible to tell how many of these cases, if any, exceed the 30-day limit, since the reporting interval of 22 to 42 days includes the 30-day maximum within its span.

FOOTNOTES TO CHAPTER 4

(continued)

12. Nancy L. Ames et al., The Processing of Federal Cases under the Speedy Trial Act of 1974 (as amended 1979), Chapter 3 (Cambridge, MA: Abt Associates Inc., 1980).

13. S. Rep. No. 96-212, 96th Cong., 1st Sess. 34 (1979).

14. Judicial Conference Guidelines, pp. 32-33.

15. U.S. v. Cobb, 697 F. 2d 38, at 44 (2d. Cir. 1982).

16. This phrase was coined by Keith Boyum, A Perspective on Civil Delay in Trial Courts, Just. Syst. J. 5, 170-186 (Winter 1979). Dr. Boyum found that new approaches were less effective in reducing delays than the attitudes of the chief judges. Those who valued delay reduction and saw themselves as "administrators" achieved results whether or not they adopted new techniques or rules, whereas those who did not made few changes.

17. The term "local legal culture" was first used by Church et al., Justice Delayed the Pace of Litigation in Urban Trial Courts (Williamsburg, Va: National Center for State Courts, 1978) to help explain variations in case processing speed which could not be explained by other measurable variables such as case load. Since then, numerous researchers have used the term to help describe otherwise unaccounted for variation in behavior across jurisdictions.

18. Proposals to Enforce the Sixth Amendment Right to Speedy Trial: Hearings on S.895 Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary, 92d Cong., 1st Sess. 7 (1971).

19. U.S. Dept. of Justice, Office for Improvements in the Administration of Justice, Delays in the Processing of Criminal Cases Under the Speedy Trial Act of 1974, March 1, 1979.

20. Nancy L. Ames et al., supra.

21. Proposal to Enforce the Sixth Amendment Right to Speedy Trial: Hearings on S.895 Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary, 92d Cong., 1st Sess. 7, at 96 (1971) (Statement of William H. Rehnquist, then Assistant Attorney General).

22. As of 1982, this sanction had never been applied, according to the AO.

23. During this interval, it is much more likely for the prosecuting attorney to dismiss the case if it is in danger of exceeding the limits.

24. U.S. v. Carrasquillo, 667 F. 2d 382 (3d Cir. 1981).

25. Id. at 384.

FOOTNOTES TO CHAPTER 4

(continued)

26. U.S. v. Angelini, 553 F. Supp. 367, at 368, 369, 370 (1982).

27. U.S. v. Gonzalez, 671 F. 2d 441 (11th Cir. 1982).

28. Id. at 444.

29. This is not to say that compliance is achieved easily or without costs. As discussed elsewhere in this report, prosecutors have developed a number of strategies for ensuring that the cases accepted for prosecution are processed within the time limits of the Act.

30. 553 F. Supp. 367 (D.C. Mass. 1982).

31. Id. at 370.

32. U.S. v. Caparella, 716 F. 2d 976, at 980 (2d Cir. 1983).

33. U.S. v. Carreon, 626 F. 2d 528 (7th Cir. 1980).

34. Id. at 533.

35. U.S. v. Carrasquillo, 667 F.2d 383, at 390 (3d Cir. 1981).

36. S. Rep. No. 212, 96th Cong., 1st Sess. 28-29 (1979).

37. See United States v. Wild, F. 2d 418 (D.C. Cir. 1977), cert. denied, 431 U.S. 916 (1977).

38. U.S. v. DeLongchamps, 679 F. 2d 217, at 219, Note 2 (1982).

39. U.S. Attorneys' Manual, Title 9, Chapter 17, p. 33 (June 1984).

5.0 CHANGES IN ORGANIZATION AND MANAGEMENT PRACTICES DESIGNED TO ACHIEVE COMPLIANCE

As discussed in the preceding chapters, compliance with the Act has been achieved in part by limiting the number of cases being processed and controlling their entry into the system and in part by extending the deadlines in complex cases or under unusual circumstances. Compliance has also been achieved through changes in organization and management practices designed to make the various parts of the criminal justice system more efficient. In this section, we explore some of the changes that have been initiated to improve case processing, drawing upon the responses of those interviewed in our six site-visited districts. We also highlight certain problem areas that are of continuing concern.

It should be pointed out that all of the U.S. attorneys' offices and district courts underwent an extensive planning and phase-in period beginning with of the Act in 1974. Thus, many changes were initiated in the mid to late 1970s and have long since been institutionalized.[1] For this reason, study respondents may have under-reported the various structural and procedural changes brought about by the Speedy Trial Act. With this caveat, we discuss some of the management shifts that respondents attributed to speedy trial pressures. Our discussion is organized into two parts: 1) changes in investigative agencies and U.S. attorneys' offices (Section 5.1); and 2) changes in the courts (Section 5.2).

5.1 Investigative Agencies/U.S. Attorney's Offices

The government bears the major burden for ensuring that the Act's time limits are met. Since the U.S. attorney's office controls grand jury scheduling, the government has nearly total control of the 30-day limit from arrest to indictment. Investigative agencies also bear responsibility during this interval for ensuring that their reports are prepared in time for presentation to the grand jury. During Interval II, monitoring of the 70-day limit is shared with the court. Since the dismissal sanction for non-compliance penalizes the prosecutor, however, it is incumbent on U.S. attorneys' offices to see that the 70-day limit is met.

In virtually all districts, ultimate responsibility for case tracking rests with the individual assistant U.S. attorney (AUSA) handling the case. Offices provide a variety of support systems, however, to aid the AUSAs and investigative staff. These include:

- training and dissemination;
- tickler systems and other monitoring devices; and
- assistance with case scheduling and management.

Training and Dissemination

A number of investigative agencies reported that their agents were given training and/or written information regarding the Speedy Trial Act. All of those interviewed were aware of the general requirements of the Act, and these had been incorporated in local management policies and procedures. Since the prosecutor controls the timing of the indictment and is ultimately responsible for trial preparation, investigative agents need not have detailed familiarity with the Act in performing their responsibilities under the law. A solid understanding of the provisions governing the 30-day period is helpful, however.

Every U.S. attorney's office disseminates some information on the provisions of the Speedy Trial Act to its attorneys. In most cases, this consists of distribution of materials published by the U.S. Department of Justice, particularly Title 9 of the United States Attorneys' Manual. Each office also has available copies of the Judicial Conference Guidelines and Circuit Guidelines where they have been promulgated. Some offices have also developed local handouts or guidelines discussing key provisions, setting forth relevant examples and presenting a summary of notable case law.

We also found that some offices include the Speedy Trial Act in their orientation for new attorneys, discuss speedy trial issues and recent case law at regularly scheduled staff meetings, and/or routinely circulate important new developments from other districts and "circuit clips" to AUSAs handling criminal cases. In one district visited for our study, the orientation lecture is mandatory, and the presentation is tape-recorded for subsequent review. Attorneys in the appellate division of the U.S. attorney's office are also available for technical assistance in most districts. They, in turn, may request assistance from the appellate staff in the Executive Office for U.S. Attorneys.

Despite these training and dissemination activities, however, confusion continues to surround application of the excludable time provisions. While all assistants are familiar with the general time limits and the most commonly used exclud

able time provisions, many are unaware of the more intricate or less frequently utilized provisions of the Act. Questions remain regarding:

- calculation of time limits to trial in superceding indictment cases;
- the effect of joinder and severance on speedy trial limits;
- the use of exclusions in Interval I; and
- the use of Sec. 3161(h)(8) continuances to assure continuity of the government attorney.

Chapter 9 of Title 9 of the U.S. Attorneys' Manual provides an excellent discussion of the various provisions of the Speedy Trial Act, including each of the major problem areas noted above. The manual cites recent case law and references the Judicial Conference Guidelines and other commentary where appropriate.

In addition to making the manual required reading for all AUSAs handling criminal cases, the Executive Office may wish to consider publishing one or more handouts dealing with issues of continuing confusion to the attorneys. For example, the U.S. Attorney's Manual points out the disparity between the judicial Conference Guidelines and court practice in calculating time in multiple defendant cases. Our respondents reported a good deal of confusion on this point as well. A handout on this issue could be extremely useful. Exhibit 5.1 provides a diagrammatic example of how alternative interpretations for §3161(h)(7) might be presented.

In addition to disseminating such materials, we would recommend that training on the Speedy Trial Act be encouraged in all offices as a key component of orientation for new AUSAs, that inservice training be conducted regularly as new developments occur, and that the Executive Office continue to disseminate relevant case law. A videotape or other training package might be especially helpful to assure that offices in which there are recurring problems are fully apprised of the speedy trial requirements.

Monitoring

According to some of the investigative agents interviewed, speedy trial pressures can disrupt routine operations and may require reallocation of personnel to meet the "30 days to indictment gun." As one respondent noted, "Thirty days is not a long time when you're dealing with a seven-year investigation spanning from New York to Bangkok."

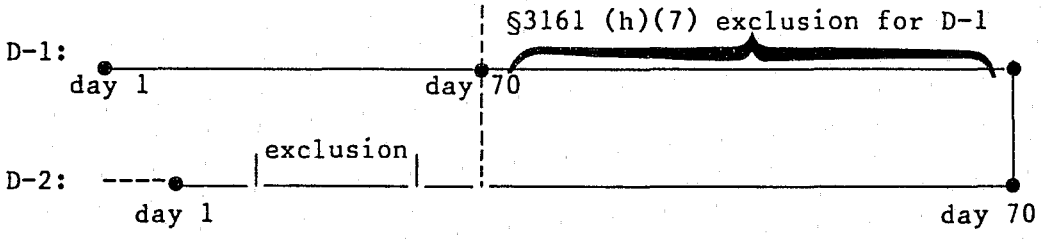
Exhibit 5.1

EXAMPLE OF ALTERNATIVE INTERPRETATIONS FOR §3161(h)(7)

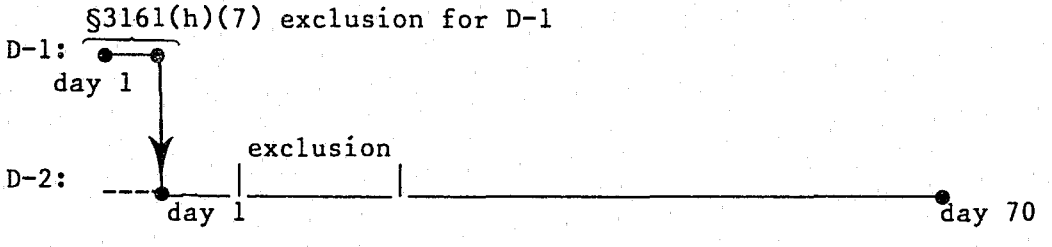
One of the automatic exclusions that has caused interpretational problems is § 3161 (h)(7), which excludes:

> A reasonable period of delay when the defendant is joined for trial with a codefendant as to whom the time for trial has not run and no motion for severance has been granted.

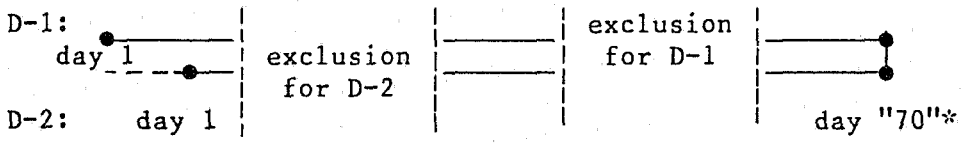
The Judicial Conference Guidelines treat this provision as a single exclusion. It begins for Defendant-1 on Day 70 (the last day his trial should otherwise have begun) and ends on Defendant-2's Day 70 (subject to reasonableness).



Some districts follow a rule to set all codefendants' time limits at the outset of the trial. This is usually couched in terms of codefendants "adopting the clock of the last arraigned defendant."



Another interpretation is to stop the clock for all codefendants for exclusions of any single codefendant. The rule that delay caused by one defendant is excludable as to his codefendants has been adopted by the Eleventh Circuit. U.S. v. Varella, 692 F.2d 1352 (11th Dir. 1982). U.S. v. Davis, 679 F. 2d 845 (11th Cir. 1982). U.S. v. Stafford, 697 F.2d 1368 (11th Cir. 1983).



*One problem here arises from the fact that D-2's clock starts after D-1's clock. In the 11th Circuit, the government has argued that the time should be excluded as to D-1 under §3161 (h)(7), but the Court of Appeals has not yet reached this question. U.S. v. Stafford, 697 F.2d 1368 (11th Cir. 1983).

Exhibit 5.2

U.S. ATTORNEY'S OFFICE CASE TRACKING FORM

	DATE	NUMBER OF DAYS EXCLUDED	MINUTE ORDER RECEIVED	DATE TRIAL MUST COMMENCE
Date of Arrest [30 days to indict]				
Date Complaint Dismissed				
Date of Indictment [70 days to trial if prior arrest]				
Date of Arraignment [70 days to trial if no prior arrest]				
Date Indictment Dismissed and Who Made Motion				
Date New Indictment Returned				
Excludable Time *				
1. Examination of Defendant 3161 (h) (1) (A-C)				
2. Other Trials Involving Defendant 3161 (h) (1) (D)				
3. Interlocutory Appeals 3161 (h) (1) (E)				
4. Pretrial Motions 3161 (h) (1) (F)				
5. Proceedings Under Advisement 3161 (h) (1) (J)				
6. Transportation of Defendant 3161 (h) (1) (H)				
7. Consideration of Proposed Plea Agreements 3161 (h) (1) (I)				
8. PTD With Court Approval 3161 (h) (2)				
9. Absence or Unavailability of Defendant or Government Witness 3161 (h) (3)				
10. Defendant Incompetent 3161 (h) (4)				
11. Joinder of Defendants 3161 (h) (7)				
12. Ends of Justice 3161 (h) (8)				

*In multiple defendant cases, assume that the defendant with the least amount of excludable time is date trial must commence and make motion under 3161 (h) (8) to have excludable time of other defendants apply to defendant with least excludable time.

Office requires all AUSAs to rate their cases at semi-monthly or monthly intervals. The four ratings are based on case complexity and level of attention required. The ratings help supervisors to assign and reassign cases if necessary. In certain complex cases, "second chair" AUSAs are assigned to follow the case and be prepared to assist or take over if the primary attorney experiences a schedule conflict or some other problem arises that jeopardizes Speedy Trial Act compliance. Actual case reassignments are rare, in part because the system foreshadows potential problems and helps prevent them. Such a system might be very helpful in other busy offices, especially where the court is reluctant to grant continuances in the event of a government scheduling conflict.

Other Changes in Case Management

There are other ways in which the government has responded to the Act's time pressures. In many districts, the number of grand juries impanelled has increased. In others, additional grand jury sessions have been scheduled or special grand juries have been used on an as-needed basis to meet the 30-day deadline.

In California Northern, one AUSA has developed a "fast-track" system for processing bank embezzlement cases through magistrate's court. The system depends on a set of standard forms developed by the AUSA that facilitate preparation and processing of a number of embezzlement cases at the same time.

In several districts, the Act has forced U.S. attorneys' offices and investigative agencies to work more closely together. The Act has encouraged clearer guidelines on case acceptance/declination and arrest policies and procedures. Prosecutors are now more apt to get involved at an earlier stage in case investigation and to exercise tighter control over the pre-indictment case development process.

Whereas this change in investigative-prosecutorial relationships was welcomed in most jurisdictions, it was not endorsed by all. Traditionally, there is a certain degree of tension between these two sectors of the criminal justice community. Each has a somewhat different mission and different operating standards. It appears that in districts where there was a solid working relationship before the Act, the statute encouraged even closer coordination. In districts where the tension has been historically high, the Act may have exacerbated long-standing antagonisms. In such instances, an interagency planning group may be necessary to develop mutually satisfactory approaches to case development and prosecution.

Finally, some offices and investigative agencies have adopted different organizational structures partly in response to the Speedy Trial Act:

- Overall coordination of investigative (and prosecutorial) resources: One FBI office has modified its historical approach to case management in which the individual agent was solely responsible for trial preparation. By placing a supervisor in charge of overall coordination, the agency can shift resources as necessary in response to speedy trial deadlines. The California Northern system described above is based on the same principle.

- Creation of special grand jury units. Some offices have set up special grand jury units to work with jurors and serve as a liaison between the judge and the grand jury. By having AUSAs specialize in this function, offices hope to expedite the grand jury process. Limiting the number of attorneys presenting cases can also avoid scheduling conflicts and thereby maximize grand jury utilization.

- Use of experienced attorneys to handle intake functions. Given the demands imposed by the speedy trial clock, it is essential that only the most important and "best" cases are accepted for prosecution. Furthermore, assignment to various units within the U.S. attorney's office must be handled with due consideration to the nature of the case and the workload of the unit(s) involved. Some offices have assigned their most experienced attorneys to this function in the hope of controlling the screening and allocation process before the time limits ever begin.

5.2 Courts

Perhaps the single biggest impact of the Speedy Trial Act on the court system was its redirection of court priorities and resources. Whereas before the Act all cases competed equally for a place on the court docket, the statute demanded a change in the court's traditional queuing system. Criminal cases must now be disposed within the established time frames, and civil cases must be scheduled around the criminal docket. Specifically, the court has adopted a number of new structures and procedures in response to the speedy trial deadlines. We discuss each below under the following headers:

- changes in court organization and resource allocation;
- changes in court scheduling and pretrial procedures;
- introduction of automated case tracking systems; and
- changes in court management procedures.

Court Organization and Resource Allocation

As with the structural changes in U.S. attorneys' offices, it is difficult to ascertain the extent to which the Speedy Trial Act has affected court organizational patterns. Clearly, a number of forces have combined to influence such patterns, including changing theories about efficient court management, the Federal Magistrate Act of 1979 (Pub. L. 96-82), changes in the management orientation of the chief judge and general responses to changing case loads. Bearing this in mind, we did find some organizational changes that were either developed in response to the Act or serve to facilitate compliance with it.

In one district, the Act changed the way cases were assigned among the judges in order to give criminal cases higher priority. Under the former master calendar system, judges were asked to hold open every sixth week to handle pretrial matters in criminal cases. Rotating judges in this manner meant that one judge would rule on motions and a different judge would try the case. Now each judge handles his or her criminal case load from beginning to end. The new system allows judges to allocate a larger share of their time to the criminal docket when necessary to meet speedy trial deadlines. It also enables the judge to keep track of the case from indictment through disposition in order to monitor speedy trial compliance.

Another jurisdiction in our study has adopted a rather novel approach to assignment of criminal cases. Under this system, all cases in which an information or indictment is filed first go to a "Part I assignment judge" for arraignment. At that time, the Part I judge is responsible for accepting the defendant's plea and reviewing bail decisions upon the request of either party. Each acting judge takes a two week rotation on the Part I calendar. In addition to presiding at arraignments, this duty involves impanelling the grand jury, swearing in lawyers, disposing of miscellaneous pretrial motions and reviewing appeals if continuance motions are denied. If the defendant pleads not guilty at arraignment, the case is randomly assigned to a judge for trial. Separate "wheels" are used to assign cases at this point depending on the anticipated length of the trial. Thus, judges are equally likely to get cases with an anticipated trial length of 5 days or less, six to ten days, or more than ten days.

The court believes that this system results in a fair case assignment process. Judges who tend to have a high plea rate are apt to receive their fair share of trials post-arraignment. Moreover, no single judge's calendar is likely to be crowded with extended criminal proceedings, because cases are assigned on the basis of estimated trial length. The court also believes that the system results in earlier

pleas, since defendants may elect to take advantage of sentencing by a lenient Part I judge rather than risk being sentenced by a "hanging" judge after arraignment. Statistics are now being compiled by the court to test this hypothesis. Although the Part I approach is not a direct response to the Speedy Trial Act, those interviewed believe it does enhance court efficiency and may, therefore, be useful in achieving compliance.

One other approach that has been used in this district to streamline court management is the creation of "judge units" to enhance communication between the clerks and the judges. Each unit consists of a criminal and civil docket clerk and their supervisor. Each is assigned to an individual judge to increase coordination and encourage "ownership" of the judge's case load. Judges and their deputies have developed a close working relationship with the clerks assigned to them. The unit approach allows the team to develop its own case management procedures, to resolve problems unique to the unit, and to keep a close handle on the cases assigned to the unit. This approach facilitates recording of excludable time based on judges' minute orders, cross-checking of court and clerks' records and early warning when someone in the unit notices an upcoming deadline.

In addition to changes in court structure and assignment patterns, the Act has also brought about changes in resource allocation. As noted in our initial report, magistrates have been called upon to play an increasing role in criminal case processing, especially since passage of the Federal Magistrate Act granting them increased authority. In addition, senior and visiting judges are used in busy districts to help reduce the case load of the acting judges.

Change in Court Scheduling & Pretrial Procedures

Since passage of the Speedy Trial Act in 1974, a number of changes in procedure have been initiated, many of which have since become part of the court's basic modus operandi. In our initial study, we found that many districts had expedited case processing by establishing and enforcing local time limits for filing and responding to pretrial motions. Other procedures identified in our initial study included: expanded and/or automatic discovery; setting arraignments automatically upon filing of the indictment or information, and setting the trial date at a specially designated pretrial conference or other pretrial hearing. By having both parties present at the time trial is set, the court hopes to avoid attorney scheduling conflicts.

Of course, not all such conflicts can be avoided and scheduling remains a serious problem in some districts. In some instances, the problem arises when the court is forced to make a last minute change in the calendar. For example, in one jurisdiction, AUSAs reported that judges commonly schedule more than one trial per day on the assumption that one or more of the cases will be disposed by plea before the date arrives. While this usually is the case, scheduling problems arise when one of the defendants does not plead.

According to one chief judge, the U.S. attorney's office can also cause scheduling problems if it does not coordinate with the court prior to obtaining indictments. In one extremely complex case, two related indictments involving two overlapping (but not identical) sets of of defendants were filed on the same day. Many of the same defense attorneys were involved in both cases each of which was expected to involve a lengthy trial. While these cases were assigned to two different judges, the attorneys obviously were bound to have scheduling conflicts. In the chief judge's view, prior communication would have helped alert the court and led to better overall coordination.

Some districts have also established time limits by which defendants must accept pleas, and others are considering establishing such limits. According to one local rule, a letter goes out to defense attorneys stating that, unless a plea is taken two weeks or more before trial, the defendant must plead to the whole indictment. The rule is intended to discourage the defense from waiting until the eve before trial to indicate a willingness to negotiate.

In one of the six study districts, a variety of management changes were initiated in order to shorten the indictment-to-trial interval. In the first place, a discovery (omnibus) hearing was added by local rule. Designed to expedite the discovery process and minimize the number of pretrial discovery motions, the hearing is set for ten days following arraignment. The government is required to provide the broadest possible discovery at that time. Pretrial motions are due ten days after the hearing, which also serves as the occasion for setting the trial date. As discussed in Chapter 4, liberal discovery, coupled with tight pretrial deadlines and a strict policy regarding continuances, assures that most cases in this district are disposed well within the 70-day limit set by law.

Automated Case Management Systems

Perhaps the single most important tool available to the courts in monitoring speedy trial deadlines is a computerized management information system. All six of the districts visited during this study had a centralized, computer-based case tracking system. The largest courts have a full docket and reporting system, known as Courtran, for recording court transactions. The medium-sized jurisdictions have a less comprehensive system which is specifically designed to monitor speedy trial time limits--the Speedy Trial Act Automatic Reporting System (STARS).

In every district visited, the computerized system is used to generate one or more status reports on the judges' dockets. Such reports are typically produced on a weekly, bi-monthly or monthly basis. The key elements most important for speedy trial compliance are: name of the defendant, custody status, time elapsed since arraignment, excludable time thus far, and number of days left to trial. These items are used by judges, courtroom deputies and clerks to identify cases nearing the speedy trial limit. Additional reports may list defendants convicted but not sentenced, defendants with a magistrate's complaint but no indictment, or defendants awaiting trial more than a specified number of days. Such reports help move the court docket and are also useful for external reporting purposes.

Most respondents relied on their computerized system to assist in tracking criminal cases from indictment or information through commencement of trial. Some of those interviewed were quite satisfied with their system's capabilities and felt it was being effectively utilized. In one district, however, the court clerk's office pointed out a number of problems with over-reliance on the STARS system in monitoring compliance:

- The system is based on a single defendant. If time is excludable due to codefendants' motions or other proceedings, it is not necessarily recorded.
- The entries are only as good as the judge's minute orders. If not on the record, entries will not necessarily be made.
- Certain entries are judgment calls. Clerks cannot be asked to interpret the Act and to keep up with relevant case law.

While a number of respondents in this district shared these criticisms, each offered a different remedy. The chief judge believes that no automated systems can ever be fail-safe. To avoid exceeding speedy trial limits, he believes that three sets of records should be kept independently: STARS, the judge's own records maintained

by a courtroom deputy, and those maintained by the U.S. attorney's office. The clerk would like to see better coordination both within the court and between the court as a whole and the U.S. attorney's office. In addition, he believes that the clerks need to be better informed about relevant case law, especially recent circuit decisions. By establishing uniform criteria for the application of excludable time in conformity with court rulings, problems stemming from interpretation issues can be reduced. Finally, another respondent would like to see all excludable time determined a priori by the judge and noted on the record. For example, if a motion were to be taken under advisement for a specified number of days, the judge would indicate the number on the record. This would eliminate any guess work by those entering the data in the computer and would provide all parties with up front and consistent information on the deadline to trial.

The U.S. Attorneys' Manual recommends that a judicial order be required before a clerk enters an exclusion in the case docket.[2] Such a practice would give all parties better information regarding elapsed time in the case and days remaining on the speedy trial clock. It also forestalls the possibility that the judge will subsequently disallow an exclusion that the court clerk or AUSA had considered allowable. Such a disallowance could cause the speedy trial limit for the case to be exceeded and result in a dismissal. The manual also notes that procedures may need to be developed with local district courts in order to obtain judicial rulings on exclusions during the 30-day arrest-to-indictment interval. Developing such procedures may be the first step in gaining more flexibility in Interval I.

In general, our site visits suggest that where there is communication between the court and the clerk's office fewer problems are reported. In one district where there are reportedly few interpretation problems or inconsistencies in counting, a major effort was made to indoctrinate the clerk's office staff early during the transition process. Furthermore, the reporting process was simplified. Instead of seven or eight reports, the chief judge requested only one containing the most important pieces of information. The defendant-based report was phased-in over time, with each of the various units being trained in its use successively. We also noted fewer problems in those clerks' offices where one or more supervisory staff have taken a lead role in designing and monitoring data entry. The provisions of the Act are sufficiently complex that experienced, well trained staff must take charge of the tracking system, interacting with the judges, when necessary, to resolve difficult interpretation questions.

Other Court Management Procedures

As discussed in Chapter 4, research on court delay reduction suggests that the role orientation of the chief judge accounts for much of the variation in case processing speed among state and local jurisdictions. Our observations confirm the fact that, even under the Act, cases apparently move more quickly in districts where speed and efficiency are high priorities. In such districts, courts are more likely to:

- promulgate local rules that attempt to hasten case processing time;
- adopt more stringent policies regarding use of continuances and speedy trial waivers;
- spend considerable time in planning for delay reduction and in monitoring the court's docket;
- encourage the clerk's office to take an active role in developing monitoring systems and in notifying the judges when problems occur;
- coordinate with both government and defense counsel so that trials are scheduled smoothly and delaying tactics are minimized.

Ultimately, leadership is needed in two key areas. First, the chief judge must make it clear to his or her colleagues on the bench that delay and inefficiency will not be tolerated. Second, the court must send the message to both government and defense counsel that compliance with the Speedy Trial Act is a high priority.

5.3 Summary and Conclusions

While no statute or court rule could ever eliminate the very real differences in operations among local jurisdictions, the Speedy Trial Act has apparently stimulated changes in the way U.S. attorneys' offices and the courts process criminal cases and reduced disparities in case processing time. Both the government and the court system have been forced to take steps to achieve compliance, although some districts have been more aggressive than others in their efforts to reduce delay.

Among the changes instituted in various U.S. attorneys' offices were these:

- training and dissemination of materials to new and experienced staff;
- monitoring of cases by means of tickler systems and computerized case tracking systems;

- allocating resources based on case complexity and assigning back-up attorneys to difficult cases in the event of scheduling conflicts;

- increasing communication and early interaction between the U.S. attorney's office and investigative staff; and

- creating special grand jury units and reorganizing other office resources to ensure smooth handling of intake/charging decisions.

Given continued misunderstandings about certain key provisions of the Act, we would recommend additional training for AUSAs handling criminal cases and periodic updates to ensure familiarity with emerging case law. While such training is primarily the responsibility of local attorneys' offices, the Executive Office for U.S. Attorneys might assist local training efforts by providing handouts, video- or audiotapes, or other materials designed to assist attorneys in complying with the statute. At a minimum, the U.S. Attorneys' Manual should be supplemented frequently with recent court decisions.

While most AUSAs keep accurate track of the speedy trial limits, occasionally cases exceed the limits through simple human error. Having a centralized tracking system in all large and medium-sized districts would help assure that no case is dismissed due to attorney oversight. Where AUSAs have sole responsibility for tracking their cases, requiring that a status report be completed every 20 days or so would help keep cases from "slipping through the cracks."

Most districts have developed effective working relationships between the U.S. attorneys' offices and the investigative agencies serving them. Where there are problems or misunderstandings, it would be helpful for representatives of the investigative agency(ies) to meet with U.S. attorneys' office staff to discuss issues of common concern. For example, some investigators expressed criticism of the U.S. attorney's office declination and/or arrest policies. AUSAs, in turn, occasionally expressed frustration with agency responsiveness. Such a discussion could help lead to a better understanding of each office's position and might suggest alternative policies or procedures for handling certain cases or situations. Organizing an ongoing committee or planning group would further enhance such communication and coordination.

A particular concern to prosecutors in several jurisdictions studied was the court's unwillingness to grant continuances in the event of government scheduling

conflicts. The use of a "second chair" attorney in complex cases may be a useful practice for other offices to adopt in order to cover such situations.

Like the U.S. attorneys' offices, the courts have responded to the Speedy Trial Act with changes in organization, policy and procedure. The biggest change has been the high priority given to criminal cases. Courts have also done the following:

- modified case assignment procedures;
- altered the use of judicial resources, including magistrates, senior and visiting judges;
- tightened scheduling of key case events, such as discovery hearings, arraignments, trials, and the end date for plea negotiation;
- installed case tracking systems to ensure compliance with the Act's provisions; and
- modified organizational structure, including the way in which judges and clerks work together.

Although fast courts will likely remain fast courts, and vice versa, there are some additional steps that courts may take to ensure compliance and minimize delay. For example, many continuances are the result of scheduling conflicts, some of which could be avoided. In addition, problems with the excludable delay provisions and other areas of uncertainty in the law could be handled, in part, by:

- developing rules or guidelines governing particular problem areas;
- requiring a court order for each period of excludable delay; and
- promoting increased communication between judges and clerks, and between the court and the U.S. attorney's office.

Reinstitution of speedy trial planning committees would also help assure that all parties have the opportunity to discuss the causes of delay and to suggest strategies for effective implementation of the law.

FOOTNOTES TO CHAPTER 5

1. For a discussion of these changes, see Nancy L. Ames, et al., The Processing of Federal Criminal Cases under the Speedy Trial Act of 1974 (as Amended 1979) (Cambridge, MA: Abt Associates Inc., 1980).

2. U.S. Attorneys' Manual, Title 9, Chapter 9, 14 (June 1984).