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NOTES

SPEEDY TRIALS: RECENT DEVELOPMENTS CONCERNING A VITAL RIGHT

I. Introduction

Historically, Anglo-American law has jealously guarded the right of an accused to have a speedy trial in a criminal prosecution.¹ Englishmen formally claimed the right in the Magna Charta of 1215.² In the United States, it is extended to defendants in federal cases by the sixth amendment to the Constitution.³ Through incorporation into the fourteenth amendment, the protection is likewise available to defendants in state prosecutions.⁴

Notwithstanding constitutional provisions and Supreme Court decisions, the concept of a speedy trial in the United States has always been ambiguous. Until recent times it has been considered a matter that could only be defined in the context of the special circumstances of individual cases.⁵ The right was said to be "consistent with delays";⁶ thus there has been less than an absolute guarantee that a defendant would be tried within a short time of his arrest or indictment.

Society has several vital interests in securing speedy trials in criminal prosecutions. This Note will discuss those interests and examine two plans which represent attempts to give exact definition to the right. One plan was made effective in 1971 by the Judicial

1. *United States v. Provoe*, 17 F.R.D. 183, 196 (D.C. Md.), *aff'd per curiam*, 350 U.S. 857 (1955).

2. "We will sell to no man, we will not deny or defer to any man either justice or right." *MAGNA CHARTA* ch. 40 (1215).

3. "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . ." U.S. CONST. amend VI.

4. *Klopper v. North Carolina*, 386 U.S. 213, 222-23 (1967).

5. *Barker v. Wingo*, 407 U.S. 514, 521-22 (1972).

6. *Beavers v. Haubert*, 198 U.S. 77, 87 (1905).

7. 2D CIR. R. 1-9 (PROMPT DISPOSITION OF CRIM. CAS.) [hereinafter cited as 2D CIR. R.]. These rules are reprinted in 28 U.S.C.A. (Supp. 1976). Though district courts were mandated to enact their own rules regarding the prompt disposition of criminal cases after the promulgation of Rule 50(b) of the Federal Rules of Criminal Procedure (effective October 1, 1972), several courts in the Second Circuit modeled their plans upon the Second Circuit rules. Outstanding among these courts, were the Southern and Eastern Districts of New York from where many cases discussed in this Note arose. See text accompanying notes 37-104 *infra*.

Council for the Second Circuit of the United States Court of Appeals.⁷ The other, the Speedy Trial Act of 1974,⁸ is the product of congressional action. By 1979, after a five year break-in period, this Act must be given full effect in all federal courts.

II. Societal Interests in Speedy Trials

The right to a speedy trial is commonly thought to be a right of an accused, but it actually benefits society as a whole and not just individual defendants.⁹ In *Barker v. Wingo*,¹⁰ the Supreme Court of the United States declared:¹¹

[T]here is a societal interest in providing a speedy trial which exists separate from, and at times in opposition to, the interests of the accused.

Ideally, a defendant in a criminal case benefits from a speedy trial in several ways. The practice prevents undue and oppressive incarceration prior to trial. It reduces the time that an accused may suffer from personal anxiety and public suspicion. Also, it minimizes the chances that defenses will be prejudiced because of the disappearance of witnesses or the fading of memories over time.¹² On the whole, the right enhances the integrity and fairness of an entire criminal proceeding.¹³

Frequently, however, accused persons may consider the above benefits to be of no real importance to them. Prosecutors often witness situations where defendants prefer delayed rather than speedy trials and only become interested in the right when there is a chance that by invoking it they can have their charges dismissed.¹⁴ There is a great likelihood that defendants who are out on bail and anticipate that they will be found guilty, will wish to avoid custody as long as possible.¹⁵ Aware that convictions are more easily obtained when trials are held shortly after the commission of a crime, a defendant may try to scuttle a successful prosecution through delaying tactics.¹⁶

8. The Speedy Trial Act of 1974, 18 U.S.C.A. §§ 3161-74 (Supp. 1976).

9. FED. R. CRIM. P. 50(b), Notes of Advisory Committee on Rules.

10. 407 U.S. 514 (1972).

11. *Id.* at 519.

12. See *United States v. Ewell*, 383 U.S. 116, 120 (1966).

13. *Dickey v. Florida*, 398 U.S. 30, 43 (1970) (Brennan, J., concurring opinion).

14. Address by Whitney North Seymour, Jr., ABA Convention, Aug. 15, 1972, reprinted in 118 CONG. REC. 30404 (1972).

15. *Id.*

16. See *Barker v. Wingo*, 407 U.S. 514, 519 (1972).

A defendant in a criminal case can achieve definite advantages through delay. Once trial starts, stale cases are more easily challenged by defense attorneys on cross examination.¹⁷ Juries are often disenchanted with offenses that have occurred in the remote past.¹⁸ If prosecution witnesses become unavailable over long periods of time or prosecutorial ardor should wane, the guilty benefit at society's expense.¹⁹

Aside from affecting the probabilities of obtaining a conviction, the speedy trial right has significant impacts upon the quality of judicial action and the possibilities of future criminal conduct. The tendency to postpone trials adds to court congestion and the backlog of cases. To dispose of such backlog, plea bargaining is frequently utilized.²⁰ In the interest of expediting matters accused persons receive lighter sentences than those they actually may have deserved. A second impact of delay is to weaken the deterrent effect that the criminal justice system should have on would-be criminals.²¹

Finally, the speedy trial right is intricately related to the needs of a well ordered society in several other respects.²² Guilty persons released on bail for too long tend to commit other crimes or flee the jurisdiction of the courts altogether.²³ Defendants who are not bailed must spend "dead" time in local jails exposed to conditions destructive of human character.²⁴ For those who are eventually found innocent, their potential to be contributing members of society through any kind of employment is lost during pre-trial incarceration.²⁵ On the other hand, the possibility of rehabilitating those who are eventually found guilty is diminished since correction procedures cannot be started until after trial.²⁶ These non-productive conditions are achieved at a great financial expense to society.²⁷ The

17. Note, *The Right to a Speedy Trial*, 57 COLUM. L. REV. 846 (1957).

18. See *id.*

19. *Ponzi v. Fessenden*, 258 U.S. 254, 264 (1922).

20. *Barker v. Wingo*, 407 U.S. 514, 519 (1972).

21. Burger, *The State of the Judiciary—1970*, 56 A.B.A.J. 929, 932 (1970).

22. Note, *supra* note 17.

23. *Barker v. Wingo*, 407 U.S. 514, 520 (1972).

24. *Hearings on Federal Bail Procedures before the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary*, 88th Cong., 2d Sess., 46 (1964) (testimony of James V. Bennett, Director, Bureau of Prisons).

25. *Barker v. Wingo*, 407 U.S. 514, 521 (1972).

26. See *id.* at 520.

27. *Id.*

enactment of plans for the prompt disposition of criminal cases was aimed, in part, at their elimination.

III. The Second Circuit Plan

In the late 1960s and early 1970s, influential groups and individual persons gave serious consideration to the problem of delayed criminal trials.²⁸ Various recommendations were forthcoming and many of these pointed out a need for imposing definite time limits upon courts and prosecutors for the completion of various stages in criminal proceedings. Despite these proposals, the Supreme Court refused to hold that the sixth amendment required that a defendant in a criminal case be offered for trial within a specified time.²⁹ Instead, it adopted a less precise "balancing test"³⁰ to determine what constituted a speedy trial. The Court explained this action by referring to its hesitancy to engage in what it considered to be legislative activity.³¹

The Judicial Council for the Second Circuit of the United States Court of Appeals did not share the reluctance of the Supreme Court. In 1971, pursuant to its statutory power,³² it enacted a set of speedy trial rules which more precisely delineated the right to a speedy trial.³³ As the first attempt to impose time limits in criminal trials, the rules did not immediately end all mystery surrounding the speedy trial right.³⁴ Judicial reaction to and interpretation of the rules was required. The issues most frequently litigated concerned the meanings of Rules 4, 5, and 6.³⁵

28. See, e.g., ABA PROJECT ON STANDARDS FOR CRIMINAL JUSTICE, *Standards Relating to Speedy Trial* (1967); PRESIDENT'S COMM. ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, *THE CHALLENGE OF CRIME IN A FREE SOCIETY* (1967); Burger, *The State of the Judiciary—1970*, 56 A.B.A.J. 929 (1970); Address by President Nixon to the National Conference on the Judiciary, March, 1971.

29. *Barker v. Wingo*, 407 U. S. 514, 523 (1972).

30. *Id.* at 530. The four factors that must be balanced are: (1) the length of delay; (2) the reason for delay; (3) the defendant's assertion of his sixth amendment right; (4) the existence of prejudice to the defendant resulting from the delay.

31. *Id.* at 523.

32. 28 U.S.C. § 332(d) (1970).

33. 2D CIR. R. 1-9.

34. After the promulgation of the Second Circuit's rules, the test announced by the Supreme Court in *Barker*, see note 30 *supra*, still applied whenever a defendant specifically claimed a violation of his sixth amendment right. Also, the Second Circuit's rules were not binding on state courts within the circuit. For a discussion of New York State law concerning the speedy trial right, see *People v. Johnson*, 38 N.Y.2d 271 (1975).

35. Many cases, which this Note discusses, arose in the Eastern and Southern Districts

A. Rule 4

Rule 4 of the Second Circuit's plan was directed toward the problem of prosecutorial delay. Sometimes referred to as the "ready rule"³⁶ it mandated that the government be prepared for trial:³⁷

[W]ithin six months from the date of the arrest, service of summons, detention, or the filing of a complaint or of a formal charge upon which the defendant is to be tried (other than a sealed indictment), whichever is earliest.

To satisfy its obligation under the rule, the government had to "communicate its readiness for trial to the court in some fashion"³⁸ No presumption of readiness would be raised from the fact that the government had sought an indictment since the sufficiency of evidence to warrant the indictment could be less than what was necessary for trial.³⁹ In *United States v. Pierro*,⁴⁰ the court recommended that filing a written notice with the clerk of the court would be the best advisable procedure to follow.⁴¹ Moreover, the 180 day limitation on filing a notice was considered analogous to a statute of limitations and thus was strictly enforced. Therefore, an unwarranted delay of even one day beyond the period would not be considered *de minimis*.⁴²

Proper compliance with the rule allowed filing of notice only after a defendant had pleaded innocent so that issue could be joined. This meant that an indictment had to be procured well enough in advance to allow the defendant to plead and still permit the government time to meet its deadline.⁴³ The sanction which the government faced under the rule for failure to do so was dismissal of all charges against the defendant.⁴⁴

Two significant cases had treated the problem of whether the government could re-indict a defendant upon identical charges if a

of New York. See text accompanying notes 37-104 *infra*. These districts based their own speedy trial rules upon the Second Circuit rules after the promulgation of Rule 50(b) of the Federal Rules of Criminal Procedure in 1972.

36. S. REP. No. 1021, 93d Cong., 2d Sess. 22 (1974).

37. 2D CIR. R. 4.

38. *United States v. Pierro*, 478 F.2d 386, 389 (2d Cir. 1973).

39. *United States v. Scafo*, 480 F.2d 1312, 1318 (2d Cir.), *cert. denied*, 414 U.S. 1012 (1973).

40. 478 F.2d 386 (2d Cir. 1973).

41. *Id.* at 389.

42. *United States v. McDonough*, 504 F.2d 67, 68-69 (2d Cir. 1974).

43. *United States v. Bowman*, 493 F.2d 594, 596-97 (2d Cir. 1974); *United States v. Valot*, 481 F.2d 22, 24-25 (2d Cir. 1973).

44. 2D CIR. R. 4.

prior indictment was dismissed for violation of Rule 4. In *Hilbert v. Dooling*,⁴⁵ the petitioner was arrested on August 5, 1971 for possession of illegal drugs. On February 3, 1972—just two days before the six month period prescribed by the rule expired—he was indicted. One month later the government filed its notice of readiness for trial. The petitioner's motion to dismiss the charges was granted.⁴⁶

On May 30, 1972 a grand jury then handed down a superseding indictment charging the same offense. The district court denied a new defense motion to dismiss the second indictment. The petitioner sought a mandamus from the court of appeals and it was granted.⁴⁷

In ordering the district court to dismiss the second indictment the appellate court said that to let it stand would render the rules a "dead letter."⁴⁸ It interpreted the use of such words as "must," "shall," and "charge" contained in Rule 4 as requiring the dismissal to be with prejudice.⁴⁹

In accord with the decision in *Hilbert*, the court in *United States v. Bosques*⁵⁰ dismissed a charge and forbade re-indictment when the government failed to give its timely notice required by the rule.

B. Rule 5

To insure fairness to the government, Rule 5 provided that the running of the clock could be tolled for a variety of reasons.⁵¹ Delays caused by the defendant or in the defendant's behalf were not computed within the time limit that the government had to be ready for trial. If, for example, a defendant was unavailable for trial,⁵² or without counsel,⁵³ or joined with a co-defendant as to whom the time for trial had not run,⁵⁴ periods of delay were tolerated.

Prosecutions could also be delayed if a societal interest, greater than those interests protected by the speedy trial right, was being served:⁵⁵

45. 476 F.2d 355 (2d Cir.), cert. denied, 414 U.S. 878 (1973).

46. *Id.* at 356.

47. *Id.* at 357.

48. *Id.* at 358.

49. *Id.*

50. 364 F. Supp. 131, 134 (D. Conn. 1973).

51. 2D CIR. R. 5.

52. 2D CIR. R. 5(b).

53. 2D CIR. R. 5(g).

54. 2D CIR. R. 5(e).

55. *United States v. Pierro*, 478 F.2d 386, 389 (2d Cir. 1973).

The Second Circuit Rules Regarding Prompt Disposition of Criminal Cases were not intended to straightjacket the administration of criminal justice in the federal courts, nor were they designed to place obstacles in the path of legitimate law enforcement efforts

Thus, in *United States v. Rollins*,⁵⁶ the government was allowed to delay a defendant's trial until it finished an investigation of the police officer who arrested him. The court excused the prosecutor's unpreparedness by stating that the public interest in fighting police corruption outweighed the benefits of a speedy trial.⁵⁷ Protecting an undercover policeman's identity was likewise considered a sufficient reason to postpone a trial.⁵⁸

Under Rule 5(h) the clock could also be tolled during periods of delay "occasioned by exceptional circumstances."⁵⁹ The meaning of this clause was at first a matter of considerable controversy. Viewed liberally the clause could have allowed the government to escape the restrictions of Rule 4. The courts in their decisions, however, opted for a strict construction.

In several cases a factual situation had arisen where the government was not ready for trial due to internal disorders in the offices of the United States Attorneys. In *United States v. Pollak*,⁶⁰ the court suggested that an "extraordinary situation in the office of the prosecutor" could justify reasonable delay.⁶¹ Later cases eventually decided that understaffed conditions⁶² and turnovers in personnel⁶³ did not qualify as exceptional conditions. Rule 5(h) was then said to cover only unusual occasions that the drafters of the rules could not envision or could not have been aware of.⁶⁴

C. Rule 6

Even if no Rule 5 allowance of delay applied and Rule 4 had been complied with to the fullest, a defendant was not actually guaranteed trial within six months of arrest or indictment under the Sec-

56. 487 F.2d 409 (2d Cir. 1973).

57. *Id.* at 414.

58. *United States v. Cuomo*, 479 F.2d 688, 694 (2d Cir.), *cert. denied*, 414 U.S. 1002 (1973).

59. 2D CIR. R. 5(h).

60. 474 F.2d 828 (2d Cir. 1973).

61. *Id.* at 830.

62. *United States v. Bowman*, 493 F.2d 594, 597 (2d Cir. 1974).

63. *United States v. Favaloro*, 493 F.2d 623, 625 (2d Cir. 1974).

64. *Id.* at 625.

ond Circuit plan.⁶⁵ The responsibility for scheduling cases rested with the courts which remained in control of their own trial calendars. The rules merely commanded that priority be given to the scheduling of criminal cases "[i]nsofar as is practicable."⁶⁶ Cases that considered the problem of court congestion resulting in delays suggested that congestion was an excusable event⁶⁷ and beyond the compass of the rules to punish.⁶⁸

Rule 6, dealing with all appellate court ordered initial trials and retrials, eventually provided a solution for part of the problem.⁶⁹ Several decisions interpreting the rule, as carried over into Southern and Eastern District Court plans,⁷⁰ suggested that delay traced to the courts could result in a dismissal of all charges against a defendant. In *United States v. Drummond*⁷¹ the appellant had been convicted of conspiring to sell heroin but the conviction was set aside due to prosecutorial misconduct.⁷² A new trial order was handed down on July 5, 1973 but it did not issue until September 14, 1973.⁷³ At that time, the judge assigned to hear the new trial began another difficult criminal case that precluded him from scheduling the appellant's case. In April, 1974, a motion to dismiss was denied.⁷⁴

In May the case was reassigned to a different judge and trial began on July 11, 1974.⁷⁵ The appellant was again convicted. A new appeal, based on the alleged violation of Rule 6 of the Eastern District's plan,⁷⁶ was unsuccessful and the conviction was affirmed.⁷⁷ The court of appeals pointed out that Rule 6 had nothing to do with

65. *Hilbert v. Dooling*, 476 F.2d 355, 357 (2d Cir.), *cert. denied*, 414 U.S. 878 (1973).

66. 2D CIR. R. 1.

67. *See United States v. Counts*, 471 F.2d 422, 427 (2d Cir.), *cert. denied*, 411 U.S. 935 (1973).

68. *See United States v. Infanti*, 474 F.2d 522, 528 (2d Cir. 1973).

69. 2D CIR. R. 6. If the defendant is to be retried following a mistrial, an order for a new trial, or an appeal or collateral attack, the time shall run from the date when the order occasioning the retrial becomes final. *Id.*

70. E.D.N.Y. (Crim.) R. 6, N.Y. COURT RULES: STATE AND FEDERAL (McKinney 1975); S.D.N.Y. (Crim.) R. 6, N.Y. COURT RULES: STATE AND FEDERAL (McKinney 1975).

71. 511 F.2d 1049 (2d Cir. 1975).

72. *United States v. Drummond*, 481 F.2d 62, 64 (2d Cir. 1973).

73. 511 F.2d at 1051.

74. *Id.*

75. *Id.*

76. The only major distinction between the Eastern District court version and the older Rule 6 rested in the fact that appellate court orders had to be obeyed within 90 days instead of six months.

77. 511 F.2d at 1055.

the issue of prosecutorial readiness.⁷⁸ It noted the long interval of time in issuing the retrial order and the delay in reassigning the case as the reasons for the violation of the rule.⁷⁹ The court excused the violation but warned that judicial negligence would not be tolerated in the future. It admonished that “[b]oth the United States Attorney and the judge to whom a retrial is assigned should closely monitor its progress.”⁸⁰

*United States v. Roemer*⁸¹ was decided on April 8, 1975. Appellant had been indicted on February 25, 1970 but the government delayed trial in an attempt to extradite a co-conspirator. The district court considered this delay unreasonable and dismissed the indictment.⁸² The government then was granted a writ of mandamus ordering the court to reinstate the indictment.⁸³ The district court postponed the trial when the Supreme Court was asked to review the mandamus order.⁸⁴ Certiorari was eventually denied,⁸⁵ but this fact was not promptly brought to the attention of the trial judge.⁸⁶ A delay of several months resulted and the actual trial did not begin until October 29, 1974.⁸⁷

When the appellant contested his conviction on the grounds that Rule 6 of the Southern District's plan had been violated,⁸⁸ the court of appeals affirmed the lower court decision.⁸⁹ In its opinion, the court reviewed the purpose and effect of the speedy trial rules. It stated that the rules were “‘not established primarily to safeguard defendants' rights . . . [but instead] to serve public interest in the prompt adjudication of criminal cases.’”⁹⁰ The court then found that negligence in the office of the trial judge was a cause of pro-

78. *Id.* at 1051-52.

79. *Id.* at 1054.

80. *Id.*

81. 514 F.2d 1377 (2d Cir. 1975).

82. *Id.* at 1379.

83. *United States v. Lasker*, 481 F.2d 229 (2d Cir. 1973), *cert. denied*, 415 U.S. 975 (1974).

84. 514 F.2d at 1379.

85. *Lasker v. United States*, 415 U.S. 975 (1974).

86. 514 F.2d at 1379.

87. *Id.* at 1380.

88. The only major distinction between the Southern District court version and the older Rule 6 rested in the fact that appellate court orders had to be obeyed within 90 days instead of six months.

89. 514 F.2d at 1384.

90. *Id.* at 1381, quoting *United States v. Flores*, 501 F.2d 1356, 1360 n.4 (2d Cir. 1974).

longed delay.⁹¹ It felt that to punish this negligence by reversing the appellant's conviction would disserve the public interest more than ignoring the oversight.⁹² The court, however, viewed the situation with "serious concern at the sluggishness with which justice was finally achieved"⁹³ It warned courts and prosecutors alike that the failure to "flag the time requirements in all criminal cases" would not be treated lightly in the future.⁹⁴

Together, the *Drummond* and *Roemer* cases influenced the recent decision in *United States v. Didier*.⁹⁵ There, a Southern District court judge refused relief to a defendant when the government failed to prosecute its case within 90 days after the declaration of a mistrial as mandated by Rule 6 of the district's plan.⁹⁶ The court excused the government's failure by saying that it was due to confusion over the meaning of Rule 6. Since the rule was unclear until the courts explained it in *Drummond* and *Roemer*, the delay in bringing the defendant to trial would not be counted against the government.⁹⁷

Also consistent with the warnings issued in *Drummond* and *Roemer*, is a recent case dismissed by a district court when delay in bringing a retrial was traced to the conduct of the court itself.⁹⁸ In this instance the defendant was arrested on May 21, 1973. He was convicted on March 8, 1974,⁹⁹ but the conviction was reversed and a new trial was ordered.¹⁰⁰

The mandamus for retrial was filed on December 16, 1974. Defendant's trial should have taken place no later than March 17, 1975 if Rule 6 was to be properly observed,¹⁰¹ but the judge who heard the first trial waited until May 1975 to initiate the reassignment of the

91. 514 F.2d at 1381.

92. *Id.*

93. *Id.* at 1382.

94. *Id.*

95. 401 F. Supp. 4 (S.D.N.Y. 1975).

96. *Id.* at 8.

97. *Id.*

98. *United States v. Yagid*, Crim. No. 73-471 (S.D.N.Y. July 7, 1975), *aff'd*, No. 75-1288 (2d Cir., Jan. 5, 1976).

99. *Id.* at 1.

100. *United States v. Badalamente*, 507 F.2d 12, 18 (2d Cir. 1974), *cert. denied*, 421 U.S. 911 (1975).

101. *United States v. Yagid*, Crim. No. 73-471 (S.D.N.Y. July 7, 1975), *aff'd*, No. 75-1288 (2d Cir., Jan. 5, 1976).

case.¹⁰² The reassignment became a matter of record on June 4, 1975 and in July the defendant moved for a dismissal.¹⁰³ The court granted this motion stating that it could not "imagine a situation more clearly in violation" of the Rule.¹⁰⁴

In light of the overall history of the rules, the Second Circuit plan was not the perfect solution to the problem of delayed criminal trials. Rule 4 was aimed at eliminating prosecutorial delay. Even then, it allowed the government six months to be ready for trial. As a result, defendants were often not speedily tried. Rule 5 was necessary to protect the interests of justice in particular cases, but it primarily operated to legitimize delay. Rule 6 was the single potentially effective rule against court created delay, but it dealt solely with the narrow subject of court of appeal ordered trials and retrials.

IV. The Speedy Trial Act of 1974

Ever since the 88th Congress, speedy trial legislation of some sort had been under consideration by Congress.¹⁰⁵ In mid-1970 a bill was introduced into the Senate which, over the course of four years, evolved into the Speedy Trial Act of 1974.¹⁰⁶ The initial phases of this act were given effect on July 1, 1975.¹⁰⁷ It is scheduled to be fully operational in the federal courts by July, 1979.

102. *Id.* at 6.

103. *Id.* at 7.

104. *Id.* at 9.

105. S. REP. No. 1021, 93d Cong., 2d Sess. 3 (1974).

106. The Speedy Trial Act of 1974, Pub. L. No. 93-619, 88 Stat. 2076 (codified at 18 U.S.C.A. §§ 3161-74 (Supp. 1976)). S. 3936 was introduced in the record session of the 91st Congress. Title II of S. 3936 received unfavorable comments and was severed from the bill. S. 895 introduced in the first session of the 92d Congress was virtually identical to the part of S. 3936 which remained. See *Hearings on S. 895 before the Subcomm. on Constitutional Rights of the Sen. Comm. on the Judiciary*, 92d Cong. 1st Sess. 2 (1971). S. 754 was the successor of S. 3936 and S. 895. It was passed into law as the Speedy Trial Act of 1974.

107. In compliance with the first mandated procedures of the Act, district courts had to develop interim plans within 90 days of July 1, 1975, which would contain certain basic provisions. For example, "high risk" defendants and those incarcerated while awaiting trial had to be tried within 90 days following their designation as being "high risk" or the beginning of continuous detention. 18 U.S.C.A. § 3164 (Supp. 1976). This is a stricter requirement than anything contained either in the Second Circuit plan or the district court versions of speedy trial rules that were based upon it. See 2D CIR. R. 1(b), 3; E.D.N.Y. (Crim.) R. 1(b), 3 N.Y. COURT RULES STATE AND FEDERAL (McKinney 1975); S.D.N.Y. (Crim.) R. 1(b), 3, N.Y. COURT RULES STATE AND FEDERAL (McKinney 1975). Also, the time limits provided in 18 U.S.C.A. § 3161(e) were meant to be immediately applicable. See *Comm. on the Administration of the Criminal Law of the Judicial Conference, Guidelines to the Administration of the Speedy Trial Act of 1974*, at 10 (1975).

In passing the Act, Congress desired to define standards for what constitutes a speedy trial.¹⁰⁸ Experiences with previous attempts to do the same had not proved satisfactory. The *Barker v. Wingo* test,¹⁰⁹ enunciated in 1972 by the Supreme Court, was said to provide no real guidance to either defendants, courts, or prosecutors. It was found to be a neutral test at best which reinforced the legitimacy of delay.¹¹⁰

Many district court plans passed in 1973 pursuant to Rule 50(b) of the Federal Rules of Criminal Procedure, simply did not provide for speedy trials.¹¹¹ Moreover, no uniform statement of a defendant's rights had resulted from these plans. Each district court was allowed to inaugurate a policy of its own choosing and this led to discrepancies within many states as well as the nation. For example, if a defendant committed a crime in the Southern District of Georgia, he would be entitled to a trial within 45 days of his arraignment. In the Middle District, however, there was a 90 day period, and in the Northern District, his trial need commence only within 180 days of arraignment.¹¹²

The legislators likewise concluded that the Second Circuit plan did not efficiently deal with all the problems of delayed trials.¹¹³ They recognized its value as an initial attempt to cure the situation but they desired a more complete set of guidelines that would mandate even more speedier trials. Thus, the most basic changes incorporated into the new law related to the actual time periods within which trials had to be held.

Rule 4 established a "ready rule" which compelled the prosecutors to notify the court of their readiness for trial within six months of a defendant's arrest.¹¹⁴ While there was no precise deadline for obtaining an indictment or filing an information, this had to be done well enough in advance to allow the defendant to plead and still permit the government time to meet its deadline. Trial was not actually guaranteed to take place shortly thereafter. Unlike Rule 4,

108. H.R. REP. NO. 1508, 93d Cong., 2d Sess. 1 (1974).

109. *Barker v. Wingo*, 407 U.S. 514, 530 (1972). For statement of the test, see note 30 *supra*.

110. H. R. REP. NO. 1508, 93d Cong., 2d Sess. 11 (1974).

111. *Id.* at 13.

112. *Id.*

113. 119 CONG. REC. 3264 (1973) (remarks Senator Ervin).

114. 2D CIR. R. 4.

the Speedy Trial Act of 1974 distinguishes three stages in a criminal prosecution and mandates that each stage be reached within certain specific periods. The courts as well as the prosecutors are bound by these limitations.¹¹⁵

A. Filing of Information or Indictment

Section 3161(b) provides:¹¹⁶

Any information or indictment charging an individual with the commission of an offense shall be filed within thirty days from the date on which such individual was arrested or served with a summons in connection with such charges.

This section sharply reduces the time that was allotted under the Second Circuit's Rule 4, making it necessary to call a grand jury and have it return an indictment within thirty days.

Throughout the nation, the enactment of this statute may require changes in several current practices. Local districts will no longer be afforded the luxury of calling a grand jury only when there is enough business to put before it. Problems may arise in some districts when a person is arrested on or near the last meeting of a particular grand jury session. These can easily be averted if a successor grand jury is sworn in before its predecessor is discharged. If a prosecutor should present a complex case to a grand jury and need more time to complete it than is allotted under this section, a reasonable additional time will be permitted.¹¹⁷

B. Arraignment and Trial

Section 3161(c) provides:¹¹⁸

The arraignment of a defendant charged in an information or indictment with the commission of an offense shall be held within ten days from the filing date Thereafter, where a plea of not guilty is entered, the trial of the defendant shall commence within sixty days from the arraignment on the information or indictment

This section contains two important safeguards. It establishes the general rule that an arraignment of the defendant will be held

115. See 119 CONG. REC. 3264 (1973) (remarks of Senator Ervin).

116. 18 U.S.C.A. § 3161(b) (Supp. 1976).

117. Comm. on the Administration of the Criminal Law of the Judicial Conference, Guidelines to the Administration of the Speedy Trial Act of 1974, at 4-5 (1975).

118. 18 U.S.C.A. § 3161(c) (Supp. 1976).

within a short time of the filing of an indictment or information. It also requires that a person be tried within 60 days thereafter. Unlike the Second Circuit's plan, the courts will be held strictly accountable for scheduling trials within this period.¹¹⁹ Moreover, the periods set out in the new law are more definitive than any contained in the earlier plan.

As was the case with the Second Circuit rules, certain defined circumstances will toll the running of the trial clock under the new law. Section 3161(h)¹²⁰ contains provisions that in some instances closely resemble those of Rule 5.¹²¹

Specifically, both section 3161(h)(1)¹²² and Rule 5(a)¹²³ excuse delay while other proceedings concerning the defendant are in progress. The new law as well as the old rule mention competency hearings,¹²⁴ determinations of interlocutory appeals¹²⁵ and pre-trial motions¹²⁶ as common examples of such proceedings.

Rules 5(b)¹²⁷ and 5(c)¹²⁸ addressed themselves to the subject of court ordered continuances. The Speedy Trial Act sets out additional factors that a court should consider before deciding whether or not to grant a continuance.¹²⁹ These include: whether the failure to grant the continuance would make continuation of the proceeding impossible, or would result in a miscarriage of justice;¹³⁰ and whether the case is complex.¹³¹ No continuance can be granted simply because of the existence of court congestion.¹³²

Section 3161(h)(3)(A)¹³³ follows Rule 5(d)¹³⁴ which excluded from consideration any periods of time during which a defendant was

119. See 119 CONG. REC. 3264 (1973) (remarks of Senator Ervin).

120. 18 U.S.C.A. § 3161(h) (Supp. 1976).

121. 2D CIR. R. 5.

122. 18 U.S.C.A. § 3161(h)(1) (Supp. 1976).

123. 2D CIR. R. 5(a).

124. 18 U.S.C.A. § 3161(h)(1)(A) (Supp. 1976).

125. *Id.* § 3161(h)(1)(D).

126. *Id.* § 3161(h)(1)(E).

127. 2D CIR. R. 5(b).

128. 2D CIR. R. 5(c).

129. 18 U.S.C.A. § 3161(h)(8) (Supp. 1976).

130. *Id.* § 3161(h)(8)(B)(i).

131. *Id.* § 3161(h)(8)(B)(ii).

132. *Id.* § 3161(h)(8)(C).

133. *Id.* § 3161(h)(3)(A).

134. 2D CIR. R. 5(d).

unavailable for trial. Under section 3161(h)(3)(B), a defendant is absent for trial:

[W]hen his whereabouts are unknown and, in addition, he is attempting to avoid apprehension or prosecution or his whereabouts cannot be determined by due diligence. For purposes of such subparagraph, a defendant . . . shall be considered unavailable whenever his whereabouts are known but his presence for trial cannot be obtained by due diligence or he resists appearing at or being returned for trial.

Delay resulting from the absence of an essential witness is also excluded from consideration under section 3161(h)(3)(A).¹³⁶ While the Second Circuit Rules did not specifically excuse delay when witnesses were unavailable, one court stated that Rule 5(c)(ii) covered the situation adequately.¹³⁷ That Rule allowed a continuance to be granted when the government needed "additional time to prepare" and "exceptional circumstances" were present. Also, Rule 5(c)(i) allowed continuances due to the:¹³⁸

[U]navailability of evidence material to the government's case, when the prosecuting attorney has exercised due diligence to obtain such evidence and there are reasonable grounds to believe that such evidence will become available within a reasonable period

Rule 5(e) stated that delay would be permitted during a reasonable period "when the defendant is joined for trial with a codefendant as to whom the time for trial has not run and there is good cause for not granting a severance."¹⁴⁰ Section 3161(h)(7) substantially follows this language.¹⁴¹ In the new law there is no explicit equivalent to Rule 5(h), which excluded "[o]ther periods of delay occasioned by exceptional circumstances."¹⁴²

The section of the new law which is most nearly similar to Rule 6 of the Second Circuit's plan is section 3161(e). First, this section allows 60 days for a trial to begin after the declaration of a mistrial or an order for a new trial by a trial judge. It then mandates that a

135. 18 U.S.C.A. § 3161(h)(3)(B) (Supp. 1976).

136. 18 U.S.C.A. § 3161(h)(3)(A) (Supp. 1976).

137. *United States v. Cuomo*, 479 F.2d 688, 694 (2d Cir.), *cert. denied*, 414 U.S. 1002 (1973).

138. 2D CIR. R. 5(c)(ii).

139. 2D CIR. R. 5(c)(i).

140. 2D CIR. R. 5(e).

141. 18 U.S.C.A. § 3161(h)(7) (Supp. 1976).

142. 2D CIR. R. 5(h).

trial following an appeal or a collateral attack must commence within 60 days from the date the action occasioning the retrial becomes final.¹⁴³ Rule 6 had allowed a six month retrial period in all cases.¹⁴⁴ Now, only if witnesses should become unavailable or a 60 day retrial becomes impractical for some "other factors," may a court allow six months at the utmost to pass before the retrial is started.¹⁴⁵ The "other factors" would apparently be those mentioned in section 3161(h).¹⁴⁶

If the time limits of the new law are exceeded and the delay is not excusable, section 3162 provides for sanctions.¹⁴⁷ Dismissal of a charge was the only penalty a court could impose under the Second Circuit's rules.¹⁴⁸ The new law gives judges certain options. A court can dismiss a case with or without prejudice. In making its decision, it must consider: (1) the seriousness of the offense; (2) the facts and circumstances of the case which led to dismissal; and (3) the impact of a re prosecution on the administration of justice.¹⁴⁹

Sanctions may also be imposed against attorneys who knowingly or willfully fail to proceed expeditiously to trial or engage in unjustifiable delaying tactics.¹⁵⁰ The attorney may be fined¹⁵¹ or reported to an appropriate disciplinary committee.¹⁵² If he is appointed by the court his compensation may be reduced.¹⁵³ Prosecutors as well as defense attorneys are subject to these penalties when applicable.

The new law appears to be an improvement over previous plans. In many ways it follows the pattern of the Second Circuit plan and yet it is more refined than that early attempt to define the speedy trial right. It mandates shorter and more specific time periods in which certain stages in criminal prosecutions must be completed. It makes allowances for circumstances that require special regulation. It sets out more exacting guidelines for judges to follow in their

143. 18 U.S.C.A. § 3161(e) (Supp. 1976).

144. 2D CIR. R. 6.

145. 18 U.S.C.A. § 3161(e) (Supp. 1976).

146. Comm. on the Administration of the Criminal Law of the Judicial Conference, *Guidelines to the Administration of the Speedy Trial Act of 1974*, at 9 (1975).

147. 18 U.S.C.A. § 3162 (Supp. 1976).

148. 2D CIR. R. 4.

149. 18 U.S.C.A. §§ 3162(a)(1), (2) (Supp. 1976).

150. *Id.* § 3162(b).

151. *Id.* § 3162(b)(4)(B), (C).

152. *Id.* § 3162(b)(4)(E).

153. *Id.* § 3162(b)(4)(A).

deliberations concerning the prompt disposition of criminal cases. The new law addresses itself to prosecutors, courts and even defense attorneys.

V. Conclusion

The speedy trial right is an important concept in American law and in view of its past treatment by the courts, it necessarily should be protected by special legislation. Thus far, judicially inspired plans have not coped successfully with the problem of delayed trials. Perhaps they never would be able to do so in the future since this would require a great amount of self-policing activity. At any rate, the proper role of the courts is not a legislative one and it is fitting that Congress participate in effecting constitutional protections.

The Speedy Trial Act of 1974 represents a well studied attempt to safeguard the vitality of the sixth amendment right. In spite of this, and even though the Act will not be fully effective until 1979, definite problems attend its implementation. Initially, planning groups may face difficulties in changing court practices and substituting interim plans. In the final analysis, a commitment to the concept will be required of all courts and attorneys. Only where such a commitment exists may the time limitations involved in the new law be viewed as not impracticable.

Experience under the Southern District rules shows that the rate of disposition of cases can increase when speedy trials are had.¹⁵⁴ Not only do the innocent benefit, but the rate of convictions and guilty pleas increases as well.¹⁵⁵ If the purpose of the speedy trial right is to benefit society, and justice delayed is justice denied, the Speedy Trial Act of 1974 should indeed be welcome.

Stephen F. Chepiga

154. S. REP. NO. 1021, 93d Cong., 2d Sess. 32 (1974).

155. *Id.*

