Look at the New Second Circuit Rates for the Prompt Disposition of Criminal Cases, A

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I. INTRODUCTION

On July 5, 1971, the Second Circuit rules regarding the prompt disposition of criminal cases became effective. These rules are one response to the slowdown in the administration of criminal justice in the United States that has reached crisis proportions during the past decade. They establish a system of reporting and priorities to help identify the causes of delay and cut court congestion. Under the rules a time limit of 90 days from arrest to trial is established for cases where the defendant is detained in lieu of bail; six months is the established limit for all other cases. Failure to proceed to trial within these time limits, with exceptions for permissible delay, is grounds for dismissal.

The Second Circuit has attempted to create a flexible framework that will encourage the prompt disposition of criminal cases and provide direction in an area that has heretofore been

1. The Second Circuit Rules Regarding the Prompt Disposition of Criminal Cases [hereinafter, Second Circuit Rules] were announced on January 5, 1971, to become effective six months from that date. The rules were announced by an en banc court in United States ex rel. Frizer v. McMann, 437 F.2d 1312 (2d Cir. 1971), a case which the court believed raised important questions regarding the Sixth Amendment right to a speedy criminal trial. On appeal the Attorney General's brief advised the court for the first time that the defendant was serving a sentence on a subsequent indictment during most of the period when it was believed that he had been in jail in lieu of bail. Upon this revelation the court affirmed the order denying the defendant's habeas corpus petition without further consideration of the merits. The court reviewed causes of delay identified in amicus curiae briefs solicited from leading segments of the New York bar and civil liberties organizations as background for announcing the rules.

2. United States ex rel. Frizer v. McMann, 437 F.2d 1312, 1315 (2d Cir. 1971). The Second Circuit cited examples of the chronic delay facing most criminal prosecutions in New York State. For example, as of April 1, 1970 there were 2,899 persons accused of a felony in New York State who had been in jail three months or more pending trial. In a large portion of these cases more than six months had elapsed since arrest. In many New York County and Kings County homicide cases the detention before trial had already exceeded one year. See also Only Radical Reform Can Save the Courts, FORTUNE, Aug. 1970, at 110; Interview with Chief Justice Burger, U.S. NEWS AND WORLD REP., Dec. 14, 1970, at 32, 34, 35; Action to Help Clear the Log Jam in the Courts, U.S. NEWS AND WORLD REP., Jan. 11, 1971, at 65. All cite examples of increasing delay in the disposition of criminal cases.
This note will set out and analyze each of the rules with regard to their potential to overcome the interrelated problems of delay and the derogation of constitutional rights, and will compare them with other proposals which have been advanced in the hope of revealing areas where future progress can be made toward promoting the prompt disposition of criminal cases.

II. THE SECOND CIRCUIT RULES: COMMENTS AND ALTERNATIVES

Rule 1. Priorities in scheduling criminal cases.
Insofar as is practicable:

(a) the trial of criminal cases shall be given preference over civil cases, as provided by Rule 50, Federal Rules of Criminal Procedure; and

(b) the trial of defendants in custody and defendants whose pre-trial liberty is reasonably believed to present unusual risks should be given preference over other criminal cases.

Subdivision (a) of Rule 1 follows the recommendations of the American Bar Association and the President's Commission on Crime in the District of Columbia in granting criminal cases priority over civil cases in recognition of the greater jeopardy faced by a defendant in a criminal action and the detrimental effect of delay on the deterrent role of criminal justice administration. More importantly, subdivision (b) establishes scheduling priorities within the class of criminal cases, changing the long-standing tradition of prosecution control over the scheduling of criminal cases. Heretofore, prosecutors have not been forced to consider either the interest of the accused or of the public in establishing case priorities and, as a result, scheduling convenience and other litigational factors probably play a substantial role in priority decisions.

4. AMERICAN BAR ASSOCIATION PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO SPEEDY TRIAL § 1.1 (Approved Draft 1968) [hereinafter cited as A.B.A. STANDARDS].
5. PRESIDENT'S COMMISSION ON CRIME IN THE DISTRICT OF COLUMBIA 269 (1966) [hereinafter cited as D.C. CRIME COMMISSION]. The recommendation here, however, seems to be only an emergency measure implemented by assigning additional judges to criminal cases rather than a general preference.
6. It is generally agreed that the certain and prompt imposition of the criminal sanction rather than its severity provides the significant deterrent effect upon criminal conduct. See Banfield & Anderson, Continuances in the Cook County Criminal Courts, 35 U.CHI. L. REV. 259, 259-63 (1968).
The interest of the accused is served by the provision in Rule 1 which gives preference to cases where the defendant is held in lieu of bail pending trial over cases where the defendant is free on bail. This preference recognizes the greater prejudice suffered by jailed defendants in terms of alienation from the community and ability to preserve and prepare their defense, and the discrimination which the bail system exerts in favor of wealthy defendants who are allowed to go free on bail pending trial. However, society also has an interest in the priority of cases which is directly related to the danger created by defendants who are free on bail pending trial. Rule 1 recognizes this interest by granting those defendants whose freedom poses a threat to the community trial preference over nonviolent defendants. This priority is based on the reasonable premise that defendants accused of violent crimes are more apt to commit violent crimes while free on bail than defendants accused of non-violent crimes.

One potential problem under Rule 1 is that the preferences established may not always be in harmony. For example, it may be that a choice will be required between a non-violent jailed defendant's prosecution and a violent bailed defendant's prosecution. In such a case a conflict would exist between the priority favored by the public interest and that which is based upon the interest of the accused. Since neither interest can properly be subordinated to the other, such a problem can be resolved only through increased judicial manpower.

Rule 2. The United States Attorney of each district shall file every two weeks with the chief judge of the circuit, and the chief judge of his district, a report of all persons held in jail prior to trial, the period of detention, and the reason for such detention.

7. Delay may impair the ability of the accused to present a defense due to the loss or destruction of documents, death or disappearance of witnesses or inability of witnesses to recall the facts surrounding the crime. See Tynan v. United States, 376 F.2d 761 (D.C. Cir. 1957); United States v. Dillon, 183 F. Supp. 541 (S.D.N.Y. 1960); United States v. Chase, 135 F. Supp. 230, 233 (N.D. Ill. 1955).

8. See President's Commission on Law Enforcement and Administration of Justice, Task Force Report: The Courts 89 (1967) [hereinafter cited as Task Force Report], which suggests a similar set of priorities, based on the type of crime charged, designed to assure speedy disposition of cases involving particularly dangerous activities. The report also notes that in Philadelphia priorities have been established which assure that defendants charged with violent crimes come to trial within 30 days. Id.

9. 116 Cong. Rec. 7291, 7293 (daily ed. May 18, 1970), contains remarks by Senator Ervin on a study of pre-trial crime by the National Bureau of Standards conducted in Washington, D.C. in 1969. During the four week period studied, 17% of the felony offenders released prior to trial were rearrested; 7% were rearrested for felonies.
detention or delay in the disposition of charges pending against
them. As to all other criminal cases the United States Attorney
shall make a similar report monthly regarding each case in
which the trial has not commenced within six months of the
date of arrest, service of summons, detention, or the filing of the
charge for which the defendant is to be tried, whichever is earli-
est.

To enable improvements to be made in the administration of
the criminal justice system the sources and causes of delay must
be identified. This can best be accomplished by a reporting
system which monitors the progress of a criminal prosecution
throughout the system with particular focus upon the critical
variables, such as the stage of prosecution, time in the system to
the present stage and total time in the system. Such a monitor-
ing system would help to isolate those stages of the prosecution
which are chronic sources of delay. The reporting system should
also require that reasons for, and the sources of delay be recorded
in order to allow a further evaluation of the causes of the delay,
to help isolate abusive delay tactics and to aid the court in moni-
toring its case load to assure the optimum use of judicial man-
power.10

Rule 2 represents a "bare-bones" reporting system aimed only
at identifying problem cases rather than monitoring the case load
of the court. While jailed defendants are more prejudiced by
delay than bailed defendants, the public interest is the same
for each class of defendants. Since most criminal defendants are
not incarcerated pending trial the reporting system adopted by
the Second Circuit will not begin any surveillance of a majority
of the cases before the court until approximately six months has elapsed—a period which the rules recognize as unacceptable.11

10. See D.C. CRIME COMMISSION, supra note 5, at 268, citing the in-
efficiency of current calendaring techniques which sometimes result in a
judge being available for a case but having no case ready due to late
filing of motions or other exigencies. These problems could be avoided
by a system that would monitor the entire caseload of the court and pre-
pare for contingencies. See also TASK FORCE REPORT, supra note 8, at 88,
89.

11. In contrast, the A.B.A. STANDARDS, supra note 4, at § 1.2, require
periodic reports in all cases where the prosecution has not requested trial
within the prescribed time following charging, and the TASK FORCE RE-
PORT, supra note 8, at 89, recommends a more comprehensive system of
reporting to monitor the progress of the case through the entire system
and includes the establishment of special calendars for cases lagging be-
hind schedule. Both of these alternative standards reject leaving control
of criminal case disposition solely in the hands of the prosecution, recog-
nizing that this may give the prosecution an unfair advantage over the
defendant. See also Note, Calendar Practice in Criminal Courts—Control
by Court or Prosecutor?, 48 COLUM. L. REV. 613, 620 (1948), where the
Rule 3. In cases where a defendant is detained, the government must be ready for trial within ninety days from the date of detention. If the government is not ready for trial within such time, the defendant shall be released upon bond or his own recognizance or upon such other conditions as the district court may determine, unless there is a showing of exceptional circumstances justifying the continued detention of the defendant, and then the detention shall continue only for so long as is necessary. This shall not apply to any defendant who is serving a term of imprisonment for another offense, nor to any defendant who, subsequent to release under this rule, has been charged with another crime or has violated the conditions of his release.

Rule 4. In all cases the government must be ready for trial within 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. If the government is not ready for trial within such time, or within the periods as extended by the district court for good cause, then, upon application of the defendant or upon motion of the district court, after opportunity for argument, the charge shall be dismissed.

In establishing a time-to-trial period expressed in months or days running from a specified event, the Second Circuit followed the American Bar Association recommendations\textsuperscript{12} and avoided previous statutory approaches relating the time-to-trial to terms of court.\textsuperscript{13} The Second Circuit's approach adopts the traditional view that arrest is the point at which the defendant's jeopardy attaches, and consequently no provision is made to accommodate pre-arrest delay in the time-to-trial standard. One rationale for this is that the statute of limitations is the sole prescription against pre-arrest delay.\textsuperscript{14} Another is that since a time-to-trial standard must, of necessity, be measured from some specified point is made that the prosecutor may be motivated to move in indictment to trial on the calendar of a judge whose remarks at arraignment or at the time of fixing bail demonstrated that he had little sympathy for the defendant. In such a situation the accused has no countervailing power to suggest an alternative, other than to challenge the judge for disqualifying prejudice, and can do nothing to offset the advantage gained by the prosecution.

\textsuperscript{12} A.B.A. STANDARDS, supra note 4, at § 2.1.

\textsuperscript{13} State statutory provisions defining the time-to-trial in relation to terms of court relate back to circuit riding days. They are difficult for defendant and counsel to understand and frequently result in a lack of uniformity within a single jurisdiction as to time allowed. See note 16 infra for a listing of state statutory time-to-trial requirements. See also A.L.I. CODE OF CRIMINAL PROCEDURE, comments to § 292 (Offl Draft, 1930) [hereinafter cited as A.L.I. CODE].

\textsuperscript{14} See United States v. Mackey, 239 F. Supp. 733 (D.D.C.), aff'd, 351 F.2d 794 (D.C. Cir. 1965); Nickens v. United States, 323 F.2d 808, 809 (D.C. Cir. 1963). \textit{But see} Nickens v. United States, 323 F.2d 808, 810 nn. 1 & 2 (D.C. Cir. 1963) (concurring opinion); Mann v. United States, 304
specific event, it is difficult to incorporate pre-arrest delay into the standard because the power to arrest accrues only when the arresting agency has "probable cause" to believe that the accused has committed a crime, a point which depends on the circumstances of each case. However, as recognized in a number of cases, pre-arrest delay, which is the clear responsibility of the government and is arranged solely for its advantage, should be considered in determining the prejudice that the defendant has suffered.

Pre-arrest delay should also be considered in determining the sanction to be imposed, providing a standard for deciding whether or not dismissal on the merits is appropriate. Decisions interpreting the Sixth Amendment right to a speedy criminal trial have indicated that the mere lapse of time is not in itself an accurate gauge of that right and that therefore no particular time-to-trial standard is required. The President's Commission on Law Enforcement has recommended a period of not more than four months and the Commission's Task Force Report establishes a series of standards representing the various stages of prosecution, aggregating in just under 11 weeks from arrest to trial.

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16. The scope of the Sixth Amendment right to a speedy criminal trial has been left largely undefined in the decisions of the United States Supreme Court. However, in United States v. Ewell, 383 U.S. 116, 120 (1966), the court made it clear that mere lapse of time does not in and of itself constitute a violation of the constitutional right. See also Beauers v. Haubert, 198 U.S. 77 (1905). Certain delays are consistent with the right to a speedy criminal trial, a finding that that right is violated seems to depend on the facts of the individual case. See generally Note, The Right to a Speedy Criminal Trial, 57 Colum. L. Rev. 846 (1957).


17. President's Commission on Law Enforcement and Administration of Justice, The Challenge of Crime in a Free Society 155 (1968) [hereinafter cited as President's Commission on Law Enforcement].

18. Task Force Report, supra note 8, at 84-88. The total time-to-
In contrast, the present Federal Rules of Criminal Procedure contain no specific time-to-trial limitation. The only substantive requirement regarding the progress of the administration of criminal justice after the arrest of the defendant is found in Rule 5. Subdivision (a) of that rule provides that the accused must be brought before a commissioner (or magistrate as he is now called) without "unnecessary delay," but "unnecessary delay" is difficult to identify outside the confines of a particular case.

The Omnibus Crime Control and Safe Streets Act of 1968 was Congress’ response to the uncertainties created by the "unnecessary delay" standard. This act provided that voluntary confessions would not be inadmissible solely because of delay if the accused was brought before a magistrate within six hours after arrest. However, after the defendant has been brought before a magistrate and the decision to hold for prosecution is made, there is no further provision in the Federal Rules of Criminal Procedure specifying the period within which the accused must be brought to trial.

Rule 48(b) of the Federal Rules of Criminal Procedure is the statutory codification of the inherent power of the court to dismiss a case for want of prosecution; it is also the only procedural vehicle provided for the enforcement of the Sixth Amendment’s right to a speedy criminal trial. Under Rule 48(b), “unnecessary delay” may be the basis for dismissal of the indictment or

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22. 18 U.S.C. § 3501(c) (1971). The constitutionality of this provision has yet to be tested in the courts. Its constitutionality is supported by the reasoning that the “McNabb-Mallory” rule was not the product of constitutional interpretation but rather a result of the Court’s supervisory power in the implementation of Rule 5 of the Federal Rules of Criminal Procedure requiring that the accused be brought before a magistrate without unnecessary delay. See C. Wright, supra note 20, at § 72 nn. 42 & 43 (1969).
complaint. Thus while “unnecessary delay” is the standard under both Rule 5 and Rule 48(b), each rule is aimed at a different abuse.

The “unnecessary delay” requirement of Rule 5 is designed to minimize the period before the accused is brought before an impartial magistrate for a determination of whether the “probable cause” standard for arrest has been met and to assure that the accused is appraised of his rights and set bail. This provision fails to recognize that “unnecessary delay” may occur at two different times after the initial appearance, each of which is critical to the defendant. The first is delay in arraigning the defendant. Before arraignment the accused is not aware of the details of the charge against him, which ignorance limits his opportunity to preserve his defense. The prosecution’s countervailing interests require that some time be allowed for an appraisal of the grounds for the arrest, but since the standard for charging is simply “probable cause” this evaluation should not be permitted to extend beyond the time required for a thoughtful review of the arrest file.

The time between arraignment and trial is a second distinct period after the initial appearance. Several factors may dictate that the standard for “unnecessary delay” be longer here than at other stages. For example, the defendant is usually aware of the exact charge against him at this stage and may act to preserve his defense and be set free on bail or personal recognizance. The prejudice suffered by the accused as a result of delay during this period is real and takes the form of anxiety created by the pending charge, alienation from his community and the dimming of witnesses’ memories. On the other hand, this is also the period of trial preparation requiring a large amount of time.

While it is clear that the language of Rule 48(b) also contemplates delay, both prior to and subsequent to the arraignment, the fact that no specific standard has been established for either has resulted in the federal courts considering the entire period of delay in determining if “unnecessary delay” has occurred.24


24. See authorities cited in note 23 supra. See also Sanchez v.
A more precise standard applicable to both Rule 5 and Rule 48(b) would provide a uniform guideline to encourage disposition of cases within its framework. State statutes dealing with the disposition of criminal cases have generally provided an overall period related to the terms of court. This is an improvement over the open-ended "unnecessary delay" standard but also falls short of providing a framework encouraging prompt disposition.

Any procedural framework which is developed should reflect the underlying nature of the criminal proceeding as well as its impact on the parties. The processing of the accused falls roughly into three phases—arrest to initial appearance, initial appearance to arraignment and arraignment to trial—which the procedural framework should recognize. A standard should be provided against which the progress of the prosecution can be measured for each phase. This time period should attempt to accommodate the prejudices suffered by the accused with the problems of prosecution at each stage in the proceedings. Ideally, such an approach would make explicit the pattern that has developed under statutory and judicial interpretation of the "unnecessary delay" standard of Rule 5 of the Federal Rules, and add substance to the "unnecessary delay" standard of Rule 48(b).

The time period selected should also reflect the objectives sought to be furthered as well as the litigational logistics which the court faces. If the underlying right of the accused to a speedy criminal trial is most important, some maximum time-to-trial period must be established upon which the shortage of judicial and prosecution manpower can have no effect. The adoption of the shortest period of time consistent with an effective prosecution would favor the defendant's rights and would force re-evalu-


25. Delay attributable to court congestion and lack of judicial and prosecution manpower is not strictly within the rule of cases like *Pollard v. United States*, 352 U.S. 354 (1957), and *United States v. Provoo*, 124 F. Supp. 185 (D.Md.), *aff'd*, 350 U.S. 857 (1955) (*mem. dec.*). Those cases dealt with prosecution delay which was "deliberate, purposeful and oppressive" and obviously designed to achieve a tactical advantage over the defendant. The court had no stake in the outcome. However, such a distinction is untenable since the source of the delay does not affect the prejudice that results to the defendant. This was recognized in *Marshall v. United States*, 337 F.2d 119, 122 (D.C. Cir. 1964), where considerable delay was attributable to avoidable actions of the district court. The circuit court dismissed the indictment noting that though the delay was not purposeful, much of it was avoidable and the resultant delay was vexatious and oppressive.
ation if the standard chosen proved to be too short. A relatively longer standard would not force re-evaluation and might allow the prosecution to give the appearance of optimum performance merely by being sufficiently loose to accommodate existing inadequacies.26

The question of what sanction should be imposed when the time-to-trial limitation is exceeded is of crucial importance. The sanction imposed should reflect the objective of preserving the prosecution of the criminal case while recognizing the greater prejudice suffered by detained defendants. The provision for release on bail or personal recognizance where the shorter 90 day time-to-trial period is exceeded adopts the approach of matching the sanction to the objective. If the overall six month time-to-trial limitation is exceeded, the Second Circuit's Rule 4 provides for dismissal. Such a dismissal would not be with prejudice according to the Second Circuit's comments accompanying the rules.27 The traditional view agrees with that position. That view does not equate a statutory time-to-trial provision with the constitutional right to a speedy trial. The latter is generally considered a bar to future prosecution of the same charge.28 The American Bar Association takes the position that absolute and complete discharge is the only effective remedy for delay.29 The rationale behind this position is that if the prosecution is free to prosecute again, subject only to the statute of limitations, the right to a speedy trial is almost meaningless.30 An intermediate position is proposed by the American Law Institute, whose Code requires the approval of the court before an action once dismissed

26. The A.B.A. STANDARDS, supra note 4, at § 4.2, recognize the establishment of a shorter time-to-trial period for detained defendants. The A.L.I. CODE, supra note 13, at § 292, on the other hand, adopts the same time-to-trial standard for all defendants but provides that in the case of detained defendants the sanction for exceeding the standard is release on bail or personal recognizance rather than dismissal.

27. See Statement of the Circuit Council (1971) accompanying the Second Circuit Rules, supra note 1, at 8.

28. The limited authority available indicates that a violation of this constitutional right is a bar to subsequent prosecution. See State v. Artz, 154 Minn. 290, 191 N.W. 605 (1923); Smith v. State, 168 Tenn. 265, 77 S.W.2d 450 (1935). To the extent that delay in granting a speedy trial is viewed as a denial of due process, further prosecution would clearly be barred. See United States v. Provoo, 124 F. Supp. 188 (D.Md.), aff'd, 350 U.S. 857 (1955).

29. A.B.A. STANDARDS, supra note 4, comments to § 4.1, at 40, 41.

30. Prosecutors who are free to commence another charge later have not been deterred from undue delay. See, e.g., Brummit v. Higgins, 89 Okla. Crim. 183, 157 P.2d 922 (1945).
because of delay can be reinstituted. As far as the states are concerned, few have been willing to adopt so severe a penalty as dismissal with prejudice. Other sanctions for delay have been suggested, such as punishing prosecution officials or awarding monetary damages.

To be effective the sanction must accommodate the underlying policy considerations that motivate prompt disposition of criminal cases while being potent enough to deter dilatory tactics. While non-prejudicial dismissal is hardly a potent deterrent to delay in prosecution, effective administration of criminal justice demands that the accused criminal not be set free by the imposition of an arbitrary standard of disposition. In accommodating these considerations the following underlying features of the individual prosecution should be considered: the difference in prejudice as between jailed and bailed defendants, the danger to the community as between felony and misdemeanor defendants and the source and period of delay. These features could be integrated into an escalating system of sanctions that would accommodate the differences in individual prosecutions. The difference in prejudice suffered by jailed defendants over bailed defendants is recognized in the provision in Rule 3 for release on personal recognizance if the prosecution does not proceed to trial of a detained defendant within 90 days. That rule could be supplemented with the following: (a) the difference in danger to the community between felony as opposed to misdemeanor defendants could be handled by providing that dismissal for failure to bring a case to trial within the specified time limits would be a complete bar to future prosecution for a misdemeanor while providing for non-prejudicial dismissal in felony cases; (b) the difference in the source of delay could be reflected by providing that where delay is attributable to the pros-

31. The A.L.I. Code, supra note 13, at § 294, states: "[A]n order for the dismissal of the prosecution . . . is not a bar to another prosecution of the defendant for the same offense; but no such prosecution shall be instituted without the order of the court in which the cause was pending."

32. Ten states treat dismissal for failure to meet statutory time-to-trial requirements as a bar to another prosecution for the same offense. See A.L.I. Code, supra note 13, comments to § 294.

33. The laws of the state of Utah provide for punishment of prosecuting officials for unnecessary delay. Utah Code Ann. § 77-17-1 (1953). This does little to redress the harm done to the accused. Monetary damages would provide some measure of redress, and this is an available remedy in at least one state and under international law. See Mass. Ann. Laws ch. 277, § 73 (1955); W. Bishop, International Law 487-92 (1st ed. 1955).
execution it would have the burden of showing that no prejudice resulted to the defendant, while providing for revocation of bail for defendants not in custody if they are responsible for the delay.

The sanction of complete discharge and bar to further prosecution undoubtedly is the most effective way of protecting the defendant's right to a speedy trial. However, this drastic remedy is appropriate only if it is also the best way to protect the public interest. The public interest requires that criminal cases be promptly disposed of both as a deterrent to criminal acts and to protect the integrity of the criminal justice system. In the past neither dismissal nor discharge and bar has been viewed as a realistic means of preventing delay since the lack of procedural standards has created a climate in which only the most flagrant abuse gives rise to any sanction for undue delay. While the possibility of discharge and bar may create an incentive for prosecutors to move expeditiously to trial, it would also provide an incentive for the defendant to employ dilatory tactics in the hope of complete discharge of his offense. Until experience under a system aimed at encouraging prompt disposition shows that only complete discharge and bar effectively deters undue prosecution delay, such a drastic sanction seems inappropriate.

Rule 5. In computing the time within which the government should be ready for trial, the following periods should be excluded:

(a) A reasonable period of delay resulting from other proceedings concerning the defendant, including but not limited to proceedings for the determination of competency and the period during which he is incompetent to stand trial, pretrial motions, interlocutory appeals, trial of other charges, and the period during which such matters are sub judice.

(b) The period of delay resulting from a continuance granted by the district court at the request of, or with the consent of, the defendant or his counsel. The district court shall grant such a continuance only if it is satisfied that postponement is in the interest of justice, taking into account the public interest in the prompt disposition of criminal charges. A defendant without counsel should not be deemed to have consented to a continuance unless he has been advised by the court of his rights under these rules and the effect of his consent.

34. While the passage of the statutory time-to-trial period is considered conclusive in determining undue delay, the statutory period is subject to exemptions for good cause which have been liberally granted. To establish a violation of the constitutional right to a speedy trial, one is generally required to show prejudice and this is rarely found where delays are less than one ear. See, e.g., United States v. Kaye, 251 F.2d 87 (2d Cir.), cert. denied, 356 U.S. 919 (1958).
(c) The period of delay resulting from a continuance granted at the request of a prosecuting attorney if:

(i) the continuance is granted because of the unavailability 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; or

(ii) the continuance is granted to allow the prosecuting attorney additional time to prepare the government's case and additional time is justified by the exceptional circumstances of the case.

(d) The period of delay resulting from the absence or unavailability of the defendant. A defendant should be considered absent whenever his location is unknown and in addition he is attempting to avoid apprehension or prosecution or his location cannot be determined by due diligence. A defendant should be considered unavailable whenever his location is known but his presence for trial cannot be obtained by due diligence.

(e) 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 there is good cause for not granting a severance. In all other cases the defendant should be granted a severance so that he may be tried within the time limits applicable to his case.

(f) The period of delay resulting from detention of the defendant in another jurisdiction provided the prosecuting attorney has been diligent and has made reasonable efforts to obtain the presence of the defendant for trial.

(g) The period during which the defendant is without counsel for reasons other than the failure of the court to provide counsel for an indigent defendant or the insistence of the defendant on proceeding without counsel.

(h) Other periods of delay occasioned by exceptional circumstances.

Rule 5 establishes specific causes of delay that are excluded from the time-to-trial computation. These exclusions may be grouped into the following categories: (a) defendant caused or consented to delay arising from the inability of the defendant to stand trial, or because he has consented to or requested a continuance; (b) prosecution caused delay arising from unavailability of evidence material to the prosecution's case or exceptional circumstances justifying additional time in preparing the government's case; (c) other periods of delay occasioned by exceptional circumstances.

In computing the permissible time-to-trial, allowances must be made for both unavoidable prosecution delay and delay for which a defendant is responsible. The exclusion of delay for which a defendant is responsible or delay that he has agreed to,
fails to recognize the public interest in the prompt disposition of criminal cases. On the other hand, certain prosecution delays are necessary to ensure the integrity of the prosecution. To encourage prompt disposition and yet accommodate the valid interests of both sides, specific standards for acceptable delay are needed. One major cause of delay is the granting of continuances, which has become a tactical weapon for both the defense and prosecution. However, since only a court may grant a continuance, the abusive use of the continuance is subject to court control to a greater extent than other causes of delay. Adopting continuance standards and recording the reason for granting the continuance would aid in controlling such abuse.

Continuances impose both monetary and social costs upon the criminal justice system; monetary costs resulting from the time lost by witnesses and police officers on wasted trips to the courthouse, and social costs incurred when lagging prosecutions compromise the deterrence objective. Continuance delay arising at the litigant's request should be distinguished from delays occasioned by calendar congestion. For example, the President's Commission on Crime in the District of Columbia reported that one third of the continuance delay from 1950 through 1965 was due to court congestion and assignment problems. These delays can be eliminated by improved court management.

35. In addition to reducing the deterrent effect of the criminal justice system which results when punishment closely follows crime, delays have a further harmful impact in their effect on community attitudes regarding the administration of criminal justice. The economic burden and inconvenience suffered by witnesses and jurors who are forced to return to the court time after time because of delays and adjournments only to have the case settled by a guilty plea only aggravates the feeling that the law is an exercise in futility. See The Task Force Report, supra note 8, at 90-91.

36. See Banfield & Anderson, supra note 6, at 265-66; D.C. Crime Commission, supra note 5, at 264.

37. See Banfield & Anderson, supra note 6, at 293. The authors suggest that continuance records could be surveyed on a regular basis and attorneys who employ abusive practices should be subject to discipline by the bar. Such records would not, however, provide a basis for denying continuances to a suspect attorney when such a denial would create a risk of prejudice to the defendant.

The A.B.A. Standards, supra note 4, at § 1.3, fail to provide any guidance for granting continuances other than the broad "good cause" standard, and the recognition that in granting continuances the public interest in prompt disposition should be recognized. The Task Force Report, supra note 8, at 86, also acknowledges that mere acquiescence of the parties to trial delay is an insufficient basis for granting a continuance.

38. The costs of continuances are elaborated in Banfield & Anderson, supra note 6, at 260-63.

techniques and the addition of more judges. Continuances requested by the litigants pose a more difficult problem since some technique is necessary to separate justifiable “fair hearing” continuances from continuance abuse. The first step in isolating unjustifiable delay is to provide a record of continuances in each case, stating the reason that the continuance was granted and the party requesting the delay. Even this rudimentary system would be an improvement over procedures in most courts at the present time, and would provide a means of identifying continuance offenders.

Rule 5(c) exempts two classes of prosecution continuances from the time-to-trial period. Continuances granted because of the unavailability of material evidence are excluded if the prosecution has exercised due diligence and there are reasonable grounds for believing that the evidence will be available in a reasonable time. Such a provision does little, however, to reduce continuance abuse if it does not include some specific outer time limit for obtaining the needed evidence, such as, that additional time granted shall not exceed 90 days. Such a requirement would recognize that the prosecution must be required to make a “hard” evaluation of the merits of the case within a time limit that reflects the defendant’s rights and the public interest in the prompt disposition of criminal cases.

Delay caused by or consented to by the defendant is also excepted under Rule 5. Two of these defense-oriented delays re-

40. Traditional court management has centered around three documents: (1) the case file, where all original pleadings, warrants and motions, etc., are filed and present a historical record of the case; (2) the docket, where a loose leaf record is used to record each important event in the processing of the case; and (3) the calendar, which is a list of all cases pending before the court at a particular stage. In a court with a small case load, a judge can, by reference to the calendar and docket, determine the overall court load and whether any cases are falling behind in prosecution. When case loads increase, however, the judge cannot keep track of the cases and monitor the docket efficiently with this crude system. See Task Force Report, supra note 8, at 88-89.

41. Banfield & Anderson, supra note 6, at 276-77. The informality of continuance practices in the Cook County courts has encouraged abuse. Although authority is conferred upon them by statute, judges rarely require affidavits to accompany continuance requests, nor do they require motions to be in writing; often the reason for the continuance is not recorded.

42. Id. at 293. Despite the fact that attorneys may be able to disguise their reasons for asking for a continuance, those requesting a large number of continuances under suspect circumstances could be cautioned and, if necessary, ultimately disciplined by the local Bar for abusive practices.
quire clarification. Rule 5(b) appears to recognize consent of the defendant as grounds for exempting delay from the time-to-trial limitation. Such a standard fails to recognize the public interest in prompt disposition and should not be an independent basis for exempting delay. Those exceptional instances when defense consent should be sufficient to result in exempted delay can be better handled within the "other exceptional circumstances" standard of Rule 5(h). Rule 5(g) excepts the period of delay during which the defendant is without counsel for reasons other than the failure of the court to provide counsel or the defendant's insistence on proceeding without counsel. However, once a defendant enters the criminal justice system, any period during which he is without counsel would arguably be attributable either to the defendant or to the court and, as such, hardly provides a basis for justifiable delay in disposing of the prosecution.

Rule 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.

While giving each of these retrial eventualities the same effect as a new trial, the advantage of administrative simplicity, the same time-to-trial standard applied in the original trial need not be applicable to the retrial of a case. If prompt disposition of criminal cases is the objective, some further restriction in the time-to-trial standard would be appropriate in order to reflect the fact that in most cases substantially less preparation is required on retrial than for the original preparation.

Rule 7. If the United States Attorney knows that a person charged with a criminal offense is serving a term of imprisonment in a federal, state or other institution or that of another jurisdiction, it is his duty promptly:

(a) to undertake to obtain the presence of the prisoner for plea and trial; or

(b) when the government is unable to obtain the presence of the defendant, to cause a detainer to be filed with the official having custody of the prisoner and request him to advise the prisoner of the detainer and to inform the prisoner of his rights under these rules.

Some states refuse to apply their speedy trial provisions to an accused incarcerated on another charge. The rationale for

43. Some states have refused to apply statutory time-to-trial provisions to an accused imprisoned for another crime within their own state. See Wedmore v. State, 235 Ind. 341, 133 N.E.2d 842 (1956); Shafer v. State, 43 Ohio App. 493, 183 N.E. 774 (1932). Where the defendant is imprisoned in another jurisdiction, the failure to apply time-to-trial provi-
this practice is that the state cannot proceed to trial without the presence of the accused and that the accused cannot complain of the delay for which he is primarily responsible. The position, of course, ignores the public interest in prompt disposition. The effect of such a rule is even more directly prejudicial to the accused since he is unable to preserve his defense, being unaware of the charges against him. Even if the defendant is aware of the charges, where a detainer has been filed, the detainer itself may become a source of prejudice since many state parole boards refuse to consider prisoners for parole who have detainers filed against them. This prejudice is further increased when a detainer is filed against the prisoner and he is not made aware of that fact by prison authorities. Rule 7 remedies many of these problems by requiring that an effort be made to obtain the accused for trial and that a detainer be filed when the effort is unsuccessful. The further provision for notice to the defendant of the detainer and his rights under these rules helps to eliminate the additional prejudice suffered by a defendant who is heretofore unaware of the charges.

The question of when the imprisoned accused's rights accrue is not directly answered in Rule 7. The 90 day time-to-trial limitation for detained defendants in Rule 3 specifically excludes a defendant who is serving a term of imprisonment for another offense. Rule 4 states that the six month time-to-trial limitation shall run from the date of arrest, summons, detention or filing a formal charge whichever is earliest. Where a prisoner is already incarcerated for another offense presumably the detainer would be filed along with the formal charges. The six month limitation would then run from the filing of the formal charges, subject to the exclusion of Rule 5(c) for the period when the defendant is unavailable because his presence for trial cannot be obtained by due diligence.

sions is generally based on an inability to obtain jurisdiction over the accused without the consent of the other jurisdiction. See, e.g., Nolan v. United States, 163 F.2d 768 (8th Cir. 1947); United States v. Jackson, 134 F. Supp. 872 (E.D.Ky. 1955).

44. See Note, supra note 16, at 850-51, for a discussion of exceptions to the Sixth Amendment right to a speedy criminal trial.


46. These provisions adopt the substance of the A.B.A. STANDARDS, supra note 4, at § 3.1, with regard to persons serving a term of imprisonment.

47. This provision produces the same result recommended by the
Under the provisions of Rule 7 and the related time-to-trial provisions of Rule 4 the defendant can apply for dismissal of the proceedings if he has not been brought to trial within six months. The burden should then be on the prosecution to show that the delay is not due to any lack of diligence in obtaining the defendant's presence for trial, since the prosecution would have access to the information regarding the cause of the delay. This has not been the usual allocation of the burden of proof where the accused has charged an unreasonable delay and some clarification would be desirable. Rule 7 also requires the prosecution to undertake to obtain the presence of the prisoner for trial. This implies an affirmative duty on the part of the U.S. Attorney to demand the release of the prisoner for trial rather than adopting a passive posture like that of the Uniform Mandatory Disposition of Detainers Act and the Interstate Agreement on Detainers, which do not require the prosecutor to act unless the defendant has demanded trial. The conclusion that affirmative action is required by the prosecution to obtain the presence of the accused for trial is confirmed by the provision of Rule 8 that a demand by the defendant is not a necessary prerequisite for invoking the rights conferred under the rules.

Rule 8. A demand by a defendant is not necessary for the purpose of invoking the rights conferred by these rules. However, failure of a defendant to move for discharge prior to plea of guilty or trial shall constitute waiver of such rights. The preceding sentence shall not apply to a defendant without counsel unless he has notice of these rules.

Rule 8 adopts the substance of the American Bar Association recommendations in rejecting the idea that unless the defendant

American Bar Association—time commences to run when the defendant's presence is obtained for trial—and is an improvement in that if the prosecution fails to use due diligence in obtaining the defendant for trial the resultant period of delay will accrue against the six month limitation. A.B.A. Standards, supra note 4, at § 3.1.

This provision may be contrasted with the Uniform Mandatory Disposition of Detainers Act § 3, and the Interstate Agreement on Detainers, Article III. Kansas, Massachusetts and Missouri have adopted the Uniform Act. The National Conference on Uniform State Law, Handbook, 384 (1964). As of April 1967, the Council of State Governments had been notified that 19 states had adopted the Interstate Agreement: California, Connecticut, Hawaii, Iowa, Maryland, Massachusetts, Michigan, Minnesota, Montana, Nebraska, New Hampshire, New Jersey, New York, North Carolina, Pennsylvania, South Carolina, Utah, Vermont and Washington.

49. Supra note 47.
50. Supra note 49.
51. See Rule 8 infra.
demands a speedy trial he has waived his right to one. The view that such a demand is necessary to preserve the right to a speedy trial is premised on the rationale that the right to a speedy trial is a personal right and may be waived by action that is inconsistent with that right. The failure of the accused to demand a speedy trial is then said to constitute the inconsistent action that results in waiver. However, silence is an unreliable indication of intent, and is particularly inappropriate as the basis for denial of important individual rights. A better explanation of the so-called "demand doctrine" is the underlying feeling that a potentially guilty defendant should not go free simply because the prosecutor failed to act.

While Rule 8 rejects the "demand doctrine," an accused criminal must nonetheless assert the violation of this right before trial or plea of guilty or the right is waived. Under this provision the accused could assert the violation of this right for the first time either at arraignment or at the pre-trial motion stage. Rule 4's provision that a violation of the six month time-to-trial limitation is grounds for dismissal upon application of the defendant or motion of the court suggests that even where a defendant has failed to demand discharge prior to trial there is an independent duty on the part of the court to move to dismiss the case where the time-to-trial limitation has been violated. However, since it would probably be improper for the court to dismiss without prejudice over the defendant's objection that he would prefer trial now, the power of the court to act on its own motion should be limited by requiring notice to the defendant. Nonetheless, action by the court on its own motion is appropriate and essential to the protection of the public interest in the prompt disposition of criminal cases. A strong statement acknowledging the courts duty to act affirmatively to enforce the public interest in prompt disposition puts the prosecution on notice that it cannot engage in dilatory tactics with the acquiescence of the defendant.

The provision of Rule 8 that waiver does not apply to a defendant without counsel unless he has notice of the rules tends to equate such notice with the assistance of counsel. However,

52. A.B.A. Standards, supra note 4, at § 2.2.
53. See Note, supra note 14, at 1601-02, and cases cited therein at n. 76.
55. A similar duty is implied in the dismissal provisions of the A.L.I. Code, supra note 13, at § 293.
since a defendant may be made aware of the rules without being aware of their significance to his case, notice is hardly a substitute for the assistance of counsel. Even in those cases where the defendant has rejected the assistance of counsel, notice of the rules is hardly enough to discharge the court’s duty to ascertain that the defendant is making an intelligent waiver. The waiver provision should be clarified to make explicit the court’s duty to satisfy itself that the accused not only has notice of the rules but understands his rights under them.

Rule 9. The district courts may implement these rules in any manner not inconsistent therewith.

While Rule 9 leaves the method of implementation of the rules to the district courts the comments accompanying the rules recommend that a record-keeping procedure be established reflecting any delays and the reasons for excluding certain periods of time. Those courts not having a system of assigning criminal cases to judges are requested to establish a system for keeping a constant check on pending cases. These comments reflect two basic elements in the effective implementation of any system designed to encourage the prompt disposition of cases. First, complete records are essential to identifying the sources of delay in the system. Second, monitoring the progress of the case through the system provides the necessary feedback to permit remedial action to be taken when disposition of a case begins to lag behind. Presently, in some multi-judge courts, the judges “specialize”; one judge hears motions, another tries cases and another handles sentencing. In such courts a case may be handled by a different judge at each stage in its disposition.

While this technique has the advantage of increasing each judge’s efficiency through specialization, it prevents the effective monitoring of a case’s progress through the system. The result may lead to overall delay caused by calendar inefficiency, which leaves one judge with a crowded calendar while another at a different stage of the system waits for cases to reach him. In such a system the individual judge becomes aware of the case for the first time as it appears on his calendar for disposition at a particular stage. Assigning a case to a particular judge for all purposes has the advantage of allowing the judge to view the case as it progresses through the entire system. However, in crowded urban courts heavy caseloads make it impossible for a judge to develop this perspective under traditional calendar tech-

56. See text accompanying notes 10 & 11 supra.
57. TASK FORCE REPORT, supra note 8, at 88-89.
niques. What is needed then is a system that allows the judge to view the case in relationship to the entire caseload of the court, available manpower and the status of the case as measured against the standards for disposition. Modern data processing techniques make such a system manageable.58

III. CONCLUSION

The Second Circuit rules regarding the prompt disposition of criminal cases represent a first step in providing needed procedural standards for encouraging prompt disposition. However, the rules will do little to alleviate court congestion unless they are viewed as a mandate for action by others. At the district court level implementation of the rules should include a reporting system to record reasons for delay at each stage of a given proceeding. The broad standards for disposition established under Rules 3 and 4 should be viewed as a framework within which more definitive standards for delay at each stage of the proceeding would be developed.59 Refinement of the overall standards into a series of standards at each stage of the proceeding will make it possible to monitor the progress of the case meaningfully by distinguishing cases that are justifiably delayed from those where delay is being used as a tactic to wear down an opponent. Such implementation would not be inconsistent with the standards established by the Second Circuit and would provide valuable experience needed in developing a uniform standard for the disposition of criminal cases.

The data generated on the causes of delay at various stages of disposition should be the focus of ongoing study and evaluation. The Second Circuit's comments accompanying the rules

58. The Task Force Report analyzes alternative data processing procedures for providing effective calendar information and needed feedback to isolate causes of delay. Task Force Report, supra note 8, at Appendix E. While it is recognized that electronic computers would be efficient only for those large courts whose case volumes could justify the expense, computer time sharing with other government agencies should make the advantages of such a system available to increasing numbers of courts.

59. Currently a proposed amendment to Rule 45 of the Federal Rules of Criminal Procedure includes a series of time limits within which procedures prior to trial must take place. Under the proposed amendment, the following time limits would apply unless local rules prescribe alternative time limits: arraignment in 30 days, (15 days if defendant is in custody); trial in 180 days (90 days if defendant is in custody). See Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, Alternative Drafts of Proposed Amendments to Rule 45 (March, 1971).
suggest that it will require periodic reports from the district courts as to progress made in improving the disposition of criminal cases under the rules.\textsuperscript{60} This evaluation should be supplemented by independent analysis and evaluation on a continuing basis.\textsuperscript{61}

\textsuperscript{60} Second Circuit Rules, supra note 1, at 9.

\textsuperscript{61} Perhaps the Institute of Judicial Administration could undertake such a project with a view toward recommending changes in the rules and their implementation as patterns and causes of delay are identified. The institute was founded in 1952 to provide for systematic and continuous study of court operation which would lead to needed court reforms. Since its founding, it has participated in or prepared many special studies of court administration including: Delay and Congestion in the Superior Court of Maricopa County, Arizona (1955); Internal Operating Procedures of Appellate Courts (1961); Minimum Standards of Criminal Justice-Speedy Trial (1965); The Criminal Courts of Delaware (1969). The expertise gained from these studies should be brought directly to bear on the problem of providing procedures to encourage the prompt disposition of criminal cases.