CONSTITUTIONAL LAW—SPEEDY TRIAL—WHAT HATH CONGRESS WROUGHT?

On June 17, 1969, after having been accepted as a conscientious objector for civilian work in lieu of military service, Nathaniel Dyson failed to report as directed to the Delaware State Hospital in Farnhurst, Delaware. On May 14, 1970, he was indicted under the Selective Service Act[1] in the United States Court for the District of Delaware for violation of 50 U.S.C. App. § 462 (1970).[2] Pursuant to Rule 21(b), Federal Rules of Criminal Procedure, the case was transferred to the Middle District of Georgia, on June 4, 1970. Trial was not held until April 3, 1972.[3] At trial, a motion by defendant having been made and denied for dismissal for want of speedy trial, Dyson was convicted and sentenced to two years' imprisonment. In *United States v. Dyson*,[4] the Fifth Circuit held that Dyson had a right to a trial speedier than that granted by the sixth amendment of the Constitution—in effect, a "speedier than speedy" trial—by virtue of the language of the Selective Service Act.[5] The case was remanded solely to give the government a chance to prove its delay in bringing Dyson to trial was justified, otherwise the conviction was to be set aside.[6]

The *Dyson* case was the first under the Selective Service Act which held that a speedy trial right exists beyond the right granted in the sixth amendment.[7] Inasmuch as this newly found right exists in conjunction with the sixth amendment right, a consideration of the sixth amendment standard becomes highly relevant since no congressional action can in any way restrict the sixth amendment right.[8] In its 1971-72 term, the

1. 50 U.S.C. APP. § 451 *et seq.* (1970).

2. "[A]ny person . . . who in any manner shall knowingly fail or neglect or refuse to perform any duty required of him under or in the execution of this title . . . shall, upon conviction . . . be punished by imprisonment for not more than five years or a fine of not more than $10,000. . . ."

3. It appears that during a period of wholesale administrative reorganization in the United States Attorney's Office for the Middle District of Georgia, Dyson's file was inadvertently misfiled and overlooked.

4. 469 F.2d 735 (5th Cir. 1972).

5. *Id.* at 738.

6. *Id.* at 742. On remand, inasmuch as there was no satisfactory explanation in view of the court's decision, the indictment against Dyson was dismissed in an unreported order by Chief Judge J. Robert Elliott.

7. The following cases represent in inverse order the historical route the speedy trial right has taken in the Supreme Court. Dickey v. Florida, 398 U.S. 30 (1970); Smith v. Hooey, 393 U.S. 374 (1969); Klopfer v. North Carolina, 386 U.S. 213 (1967); United States v. Ewell, 383 U.S. 116 (1966); Smith v. United States, 360 U.S. 1 (1959); Pollard v. United States, 352 U.S. 354 (1957); and Beavers v. Haubert, 198 U.S. 77 (1905).

8. 469 F.2d at 738.

Supreme Court for the first time lent its weight to a test to be used in applying this constitutional right. The Court in *Barker v. Wingo*[9] set forth a balancing test by which the rights of the individual and the rights of public justice were to be reconciled.[10] After first rejecting both the so-called "demand-waiver"[11] rule and requests for a Court-imposed specific time limit within which a defendant would have to be brought to trial[12] as criteria which would not satisfy the desired balancing objective,[13] the *Barker* Court announced four factors to be considered in applying the balancing test. They are: (1) the length of the delay; (2) reasons for the delay; (3) defendant's responsibility to assert his rights; and (4) prejudice to the defendant.[14] The Court was careful to note that none of these factors was controlling by itself in any one factual situation,[15] but did emphasize that by failing to assert his rights it would be very difficult for a defendant to prove that he was denied a speedy trial.[16] It was within this constitutional framework that the Fifth Circuit decided that Dyson's statutory right to a speedier than speedy trial had been denied.

Basing its decision on the wording of 50 U.S.C. App. §§ 462 (a), (c),[17]

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9. 407 U.S. 514 (1972).

10. The need for such balancing was noted early:

> The right of a speedy trial is necessarily relative. It is consistent with delays and depends upon circumstances. It secures rights to a defendant. It does not preclude the rights of public justice. Beavers v. Haubert, 198 U.S. at 87.

11. 407 U.S. at 525. This doctrine deems a defendant to have waived any consideration of his right to speedy trial for any period prior to which he has not demanded a trial. This rule was recognized as inconsistent with the Court's classic definition of waiver as "an intentional relinquishment or abandonment of a known right or privilege." Johnson v. Zerbst, 304 U.S. 485 (1938). Nor should the Court "presume acquiescence in the loss of fundamental rights." Ohio Bell Tel. Co. v. Public Util. Comm'n, 301 U.S. 292 (1937).

12. 407 U.S. at 522-23. The Court was quick to point out that such a time limit is not unconstitutional and is within the purview of the local jurisdictions. *See* Note, *The Impact of Speedy Trial Provisions: A Tentative Appraisal*, 8 COLUM. J. OF L. AND SOC. PROBLEMS 356 (1972). *See also* FED. R. CRIM. P. 50(b).

13. For in-depth discussions of this area and the law as it stood prior to *Barker*, *see* Godbold, *Speedy Trial—Major Surgery for a National Ill*, 24 ALA. L. REV. 265 (1972); Note, *The Lagging Right To a Speedy Trial*, 51 VA. L. REV. 1587 (1965); and Note, *The Right to a Speedy Criminal Trial*, 57 COLUM. L. REV. 846 (1957).

14. 407 U.S. at 530-33. The Fifth Circuit had previously adopted a similar test. *See* United States v. Auerbach, 420 F.2d 921 (5th Cir.), *cert. denied*, 399 U.S. 905 (1969).

15. 407 U.S. at 533.

16. *Id.* at 532.

17. 50 U.S.C. APP. § 462(a) (1970):

> . . . Precedence shall be given by courts to the trial of cases arising under this title, and such cases shall be advanced on the docket for immediate hearing. . . .

50 U.S.C. APP. § 462(c) (1970):

> The Department of Justice shall proceed as expeditiously as possible with a prosecution under this section, or with an appeal, upon the request of the Director of Selective

the Fifth Circuit held that this statutory language was a congressional attempt to grant a separate, personal right to a speedy trial.[18] This trial must be held within time limits more stringent than the limit imposed by the sixth amendment.[19] The court further said that it was plain that in enacting this legislation "Congress concluded that the Sixth Amendment speedy trial standard was not sufficient,"[20] thus rejecting the government's claim that the legislative history of the Selective Service Act showed these provisions of the law to be nothing more than a statement of purpose in an attempt to restore public confidence in the effectiveness and justice of the Selective Service System.[21] The court then rejected any claim that the statutory language was not intended to grant any individual rights by stating that the statutory right as much as the constitutional right was to be considered so personal to the accused that it would be unthinkable to say a defendant could not claim a public right under the statute.[22]

Searching for the outer limits in applying this new-found statutory standard for speedy trials, the *Dyson* court resorted to an analysis of the facts of the case under the standards set forth in *Barker v. Wingo*.[23] The court intertwined the first two factors by saying in effect that even absent any improper governmental motive, lack of an explanation for the twenty-two month delay coupled with the simple nature of the task of the government in preparing a prosecution made the delay excessive.[24] The court also held that the factor of prejudice to the defendant is prima facie present where there is a lengthy unexplained delay.[25] The burden is on the government to show lack of prejudice but the government failed to carry its burden in this case.[26] Finally, as to the last factor in *Barker*, while failure to demand trial might normally be held against a defendant under this balancing test, the court here refused to do so since it doubted that Dyson was ever aware of his speedy trial right.[27] In its conclusion the court held that the record indicated Dyson had not been

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Service System or shall advise the House of Representatives and the Senate in writing the reasons for its failure to do so.

18. 469 F.2d at 738.
19. *Id.*
20. *Id.*
21. Brief for Appellee at 3-4.
22. 469 F.2d at 738.
23. *Id.* at 739.
24. *Id.* at 740.
25. *Id.* at 741.
26. *Id. See* Murray v. Wainwright, 450 F.2d 465 (5th Cir. 1971).
27. 469 F.2d at 741. Dyson was not appointed counsel until four days prior to trial. *See* United States v. Burnett, No. 72-2591 (5th Cir. March 23, 1973).

granted his rights under the minimum statutory mandate of 50 U.S.C. App. § 462 (1970).[28] The court reasoned that this minimum statutory mandate was in reality bottomed on the maximum allowable delay inherent in the sixth amendment itself,[29] but the court specifically refused to base its decision on the sixth amendment.[30]

Several things stand out about this decision. First, the court has taken what on its face appears to be a simple speedy trial case requiring for decision a balancing of the factors set forth in *Barker* and, by a process of abstract reasoning, has placed its decision on the less than firm language of the Selective Service Act.[31] The ill effect of this reasoning can be seen by the fact that the case has already been misinterpreted by another panel of this same court.[32] Secondly, the court cites 50 U.S.C. App. § 462 (a),(c) (1970) as applicable here with most prominence being given to section 462(a),[33] which places its burden on courts to advance cases arising under the title for speedy disposition. There is no mention anywhere in the records of this case of any claim of failure of the district court to properly deal with this case once it was placed on the court's docket. Therefore section 462(a) could not apply to this case where prosecutorial failure is the only error charged. The legislative history of the remaining applicable section, 462(c), shows a legislative intent identical to that which the government urged on this court,[34] but which the court either specifically rejected or plainly ignored.

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28. 469 F.2d at 741.

29. *Id.* at 738.

30. *Id.* at 741.

31. While it is recognized that as a general rule a court will prefer to base a decision on a statute in order to avoid a constitutional issue, such is not the case here. Inasmuch as the court has applied the *Barker* standards as setting the maximum delay possible under the statute, and that said maximum was violated, the court should not be unwilling to let the decision rest on the Constitution.

32. In United States v. Anderson, No. 72-2134 (5th Cir. January 8, 1973), this court cited *Dyson* seemingly as a case setting forth a constitutional test for speedy trial.

33. 469 F.2d at 737.

34. The legislative history is found at 1 U.S. Code Cong. & Ad. News 1310 (1967):

> [This act] [r]equires that the Department of Justice institute, as expeditiously as possible, prosecution and judicial proceedings involving violations of the Draft Act in instances in which a specific request for such action has been made by the Director of Selective Service and in the absence of such action by the Attorney General, he be required to submit a complete report to Congress.

See also id. at 1349:

> The provisions of this subsection would require the Department of Justice to institute as expeditiously as possible prosecution and judicial proceedings of violations of the Draft Act in instances in which a specific request for such action has been made by the Director of Selective Service or in the absence of such prosecution by the Attorney General, a complete report in writing to the House of Representatives and Senate. The committee has been provided with numerous examples in which violations of the Draft

Aside from the legislative history, a fair reading of section 462(c) will show that expeditious handling of a prosecution or appeal under the section is dependent on a request by the Director of Selective Service to the Justice Department and that failure of the Justice Department to comply with the request shall be reported to the Congress in writing. The court again apparently ignored the fact that the record disclosed no request by the Director of Selective Service for such an expedited handling. A showing of such a request would appear to be necessary to a finding of such a right under this statute. Assuming *arguendo*, that a finding of a personal right to a speedier than speedy trial is inherent in such language, it is difficult to believe that such a personal right was intended by Congress when it is so easily extinguishable by the simple expedient of a letter to Congress. Such a speedy trial right as the court claimed to find in this statute would seem to be tenuous at best and surely should not carry the label of "personal."

Finally, consideration should be given to the wisdom of the holding in *Dyson* in view of the overall problems which it produces. First, it seems probable that whatever standard was used—statutory or constitutional—on the facts of this case as set forth in the record, Nathaniel Dyson's indictment would have been dismissed.[35] Secondly, the operation of the Selective Service System is in limbo and future enforcement of the law under which Nathaniel Dyson was charged seems remote at best. Thus, the practical effect of the decision on Nathaniel Dyson does not seem to rest on whether the case was decided on statutory or constitutional grounds.

In the long run, the case may assume more serious proportions than would seem probable on its face. Other statutes, notably in the field of civil rights, have congressional mandates similar to that of the Selective Service Act.[36] If the *Dyson* case is found to be of precedential value in

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Act have occurred and the Department of Justice has declined to prosecute despite the requests of the Director of Selective Service. The committee strongly feels that the adequate and speedy enforcement of the Draft Act is essential to ensure the continued public confidence in the law and to preclude a possible public impression that public officials condone violation of its provisions.

35. The Solicitor General disagreed with the court's view of § 462 but declined filing a petition for writ of certiorari in the case based on the facts in the record. UNITED STATES ATTORNEYS BULLETIN, Vol. 21, Jan. 19, 1973, at 20.

36. *See, e.g.*, the following provision of the Voting Rights Act of 1965, 42 U.S.C. § 1971(g) (1970):

> It shall be the duty of the judge designated pursuant to this section to assign the case for hearing at the earliest practicable date and to cause the case to be in every way expedited.

To the same effect is 42 U.S.C. § 1973h(c) (1970).

interpreting these statutes, the case could take on added significance. Absent some strong legislative intent in the language of any of the statutes here mentioned, it would seem to be an improper use of judicial fiat to create a new right to a trial speedier than sixth amendment speedy. Such a judicial act could serve to upset the balance the Supreme Court has sought in this area between the rights of the defendant and the interest of the public in ensuring enforcement of its criminal laws. In *Dyson* the Fifth Circuit appeared to be trying to upset this sensitive balance.

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See also the Civil Rights Act's counterpart, 42 U.S.C. § 1992 (1970), to the Selective Service Act's § 462(c):

> Whenever the President has reason to believe that offenses have been, or are likely to be committed against the provisions of [other sections of this title] . . . , it shall be lawful for him, in his discretion, to direct the judge, marshal, and United States attorney of such district to attend at such place within the district, and for such time as he may designate, for the purpose of the more speedy arrest and trial of persons so charged, and it shall be the duty of every judge or other officer, when any such requisition is received by him to attend at the place and for the time therein designated.