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TIMELY REVOCATION HEARINGS FOR CRIMINAL VIOLATIONS OF PAROLE

In recent years heightened consciousness of the rights of prisoners has led to a reevaluation of the parole system and its procedures. One area of consideration has been the constitutional safeguards to which a parolee is entitled before his parole is revoked.¹

If a parolee in the federal system violates a term of his parole, the Board of Parole may issue a parole violator warrant for his retaking.² When the violation is the commission of another criminal offense for which the parolee is convicted and imprisoned, the common practice has been to lodge the warrant as a detainer with the institution in which he is imprisoned.³ A hearing and decision on whether to revoke parole are deferred until the parolee has completed his imprisonment for the second offense, which can be a number of years.⁴ The question arises whether this procedure denies the parolee due process of law by depriving him of a speedy revocation hearing, analogous to the speedy trial guaranteed a defendant by the sixth and fourteenth amendments.⁵ The United States Courts of Appeals for the Fourth,⁶ Fifth,⁷ and Tenth⁸ Circuits have held that deferring the decision on parole revocation does not offend the requirements of due process. However, recent

4. See, e.g., Cook v. United States Att'y Gen., 488 F.2d 667, 669 (5th Cir.), cert. denied, 419 U.S. 846 (1974) (6 years); Moore v. Smith, 412 F.2d 720, 722 (7th Cir. 1969) (almost 3 years); Shelton v. United States Bd. of Parole, 388 F.2d 567, 572 (D.C. Cir. 1967) (per curiam) (2½ years); Hash v. Henderson, 385 F.2d 475, 476 (8th Cir. 1967) (2 years); Smith v. Blackwell, 367 F.2d 539, 540 (5th Cir. 1966) (per curiam) (7 years).
5. The factors considered by the Supreme Court in determining whether an individual has been denied his due process right to a fair parole revocation procedure are similar to those weighed by the Court in speedy trial cases. Compare Morrissey v. Brewer, 408 U.S. 471, 480-84 (1972) (parole revocation procedure), with Barker v. Wingo, 407 U.S. 514, 530-31 (1972) (delayed trial). See also note 108 and text accompanying notes 58-62 infra.
decisions in the Seventh and Eighth Circuits have held that a parolee incarcerated for a subsequent crime is constitutionally entitled to a prompt hearing on parole revocation. This Note will examine whether the practice of delaying a hearing on parole revocation affords a federal parolee the constitutional safeguards to which he is entitled.

I. THE FEDERAL PAROLE REVOCATION STATUTE

The federal parole system is governed by a statute which provides only a skeletal structure for its administration. The statute provides for an eight-member board which reviews and rules on applications for parole submitted by federal prisoners who have observed prison regulations and have served the requisite portions of their sentences. All paroled prisoners are subject to the terms and conditions which the Board of Parole prescribes. If a parolee violates a term of his parole, the Board may issue a warrant for his retaking at any time within the maximum term for which he is sen-

10. Cleveland v. Ciccone, 517 F.2d 1082, 1089 (8th Cir. 1975).
12. State parole boards have also used the detainer to delay revocation hearings when one of their parolees is incarcerated in an institution of another state or in a federal prison. The constitutionality of the state practice has received challenges similar to those discussed herein. E.g., Cooper v. Lockhart, 489 F.2d 308 (8th Cir. 1973); Pavia v. Hogan, 386 F. Supp. 1379 (N.D. Ga. 1974); cf. Wingo v. Ciccone, 507 F.2d 354 (8th Cir. 1974); Grant v. Hogan, 505 F.2d 1220 (3d Cir. 1974); Mattingly v. Ciccone, 503 F.2d 502 (8th Cir. 1974) (per curiam).
16. Id. § 4203(a) (Supp. III, 1973). The Board may at its discretion grant parole if it believes the prisoner will be able to live at liberty without violating the law, and that his release will not be incompatible with the welfare of society. Id.
17. Id. § 4203(a) (Supp. III, 1973). Typical conditions are: prohibitions on the use of liquor and association with "undesirable" people. Usually, parolees must receive permission from their parole officers before marrying, changing employment or living quarters, acquiring or driving a motor vehicle, traveling outside the community, or incurring substantial indebtedness. Parolees must report regularly to their parole officers and are sometimes required to make written reports of their activities. Morrissey v. Brewer, 408 U.S. 471, 478 (1972); Arluke, A Summary of Parole Rules—Thirteen Years Later, 15 Crime & Delinquency 267, 272-73 (1969).
18. 18 U.S.C. § 4205 (1970). The warrant may also be issued by any member of the Board. Id.
When the parolee is retaken into federal custody, the warrant is considered to be "executed." The term remaining in the parolee's original sentence begins to run at that time. After the parolee is returned to custody, he is entitled to an appearance before the Board. However, the statute contains no details about the content of the hearing or when, after return to custody, it must be held.

When a parolee's violation is a crime for which he has been convicted and imprisoned, the Board has adopted the practice of delaying the parolee's return to its custody until he is released from serving his sentence for the intervening crime. Instead of executing the warrant, the Parole Board lodges it as a detainer with the institution in which the parolee is imprisoned for his second offense. When the term for the second offense has been completed, the prison authorities return the parolee to the custody of the Parole Board for disposition of the violation.

21. Id. § 4205. In the case of a mandatory releasee, the Board's authority to revoke terminates 180 days before the expiration of the maximum term for which the releasee was sentenced. Id. § 4164; see 28 C.F.R. § 2.49 (1975).

22. 18 U.S.C. § 4205 (1970). "Any officer of any Federal penal or correctional institution, or any Federal officer authorized to serve criminal process within the United States, to whom a warrant for the retaking of a parole violator is delivered, shall execute such warrant by taking such prisoner and returning him to the custody of the Attorney General." Id.

23. Id. § 4205: "The unexpired term of imprisonment of any such prisoner shall begin to run from the date he is returned to the custody of the Attorney General under said warrant . . . ." Id. If the Board decides that parole should be revoked, it may require the parolee to serve all or any part of the term for which he was sentenced. Id. § 4207. No credit is granted for the time the prisoner was on parole. Id. § 4205. In the case of a mandatory releasee, the statute provides that "all or any part of his earned good time may be forfeited." Id. § 4165.

24. Id. § 4207: "A prisoner retaken upon a warrant issued by the Board of Parole, shall be given an opportunity to appear before the Board, a member thereof, or an examiner designated by the Board." Id.

25. See id. The Board of Parole's regulations set out the procedure for revocation hearings. The parolee is first granted a preliminary interview by an official designated by the Board. Following receipt of a summary of the preliminary interview, the Board provides the parolee an opportunity to appear before the Board or a member or representative of the Board. The parolee may request a local hearing. Otherwise, he will be given a revocation hearing after he is returned to a federal institution. See 28 C.F.R. § 2.40, at 87-88 (1975). This procedure has been revised and amplified to reflect most of the Supreme Court's dictates in Morrissey v. Brewer, 408 U.S. 471 (1972). Compare id. at 485-87, 489 with 28 C.F.R. § 2.49-.56, 79-82 (1975). However, the revised regulations have not incorporated Morrissey's requirements regarding the timing of the hearings. The Morrissey requirements are discussed at notes 65-67 infra & accompanying text.


When the Board reviews whether parole should be revoked, among the factors it considers are:

1. The institutional adjustment including the efforts of the inmate to improve himself vocationally and educationally.
   (a) Conduct record in confinement.
   (b) The length of the current sentence and the amount of violation time owed.
   (c) Health condition of the individual, both physical and mental.
The Board of Parole adopted the practice of lodging a detainer and delaying execution of the warrant so that the time remaining in the parolee's original sentence would not begin to run until he had completed service of his intervening sentence.27 If the Board regained custody over the parolee sooner, the time remaining in the first sentence would begin to run at the same time the parolee was imprisoned for the second offense.28 As a result, he would serve the two terms concurrently.29

The Supreme Court approved the Parole Board's discretion to delay the parolee's return to custody in Zerbst v. Kidwell.30 The parolees in Zerbst claimed that because they had been incarcerated in a federal prison for crimes committed while on parole, they were already in federal custody when the warrant was issued.31 The parolees thus contended they had served the unexpired portions of their original sentences during their imprisonment for the second offense.32 The Supreme Court disagreed and held that when a parolee commits another criminal offense while on parole, service of the original sentence is interrupted.33 As a result of the new criminal act, the parolee's "imprisonment [is] attributable to his second sentence only, and his rights and status as to his first sentence [are] 'analogous to those of an escaped convict,'"34 outside actual or constructive federal custody.35 The Court stated that it was not reasonable to assume that Congress intended that a model parolee would remain under the control of the Parole Board until expiration of his sentence while a parolee who committed a second offense could reduce his time in the control of the Board to less than the original sentence.36 This would be the result if the Board were deprived of the option to require consecutive sentences.

The Court's approval of Board discretion to delay execution of the warrant led to a comparable delay in holding the revocation hearing. Since the statute requires only that the parolee be given an opportunity to appear before the

| (d) | Attitude of the offender toward his crime. |
| (e) | Family situation. |
| (a) | The gravity of the offense charged in the violation warrant. |
| (b) | The individual's prior criminal history. |
| (c) | The overall adjustment of the individual while he was on parole in the community. |
| (d) | Cooperation with law enforcement or institutional officials. |
| IV. | And any other such factors which the Board feels are pertinent to the case."

388 F.2d at 579.

27. See Cleveland v. Ciccone, 517 F.2d 1082, 1086 (8th Cir. 1975).
28. Id.; see notes 22-23 supra and accompanying text.
29. Cleveland v. Ciccone, 517 F.2d 1082, 1086 (8th Cir. 1975).
30. 304 U.S. 359, 361-63 (1938).
31. Id. at 360.
32. Id.
33. Id. at 362.
34. Id. at 361, quoting Anderson v. Corall, 263 U.S. 193, 196 (1923).
35. 304 U.S. at 361; Doherty v. United States, 280 F.2d 35, 37-38 (9th Cir. 1960); see United States ex rel. Nicholson v. Dillard, 102 F.2d 94, 96 (4th Cir. 1939).
36. 304 U.S. at 363.
Board after he is retaken upon the warrant—but set no time within which the warrant must be executed—timing of the hearing was considered to be within the informed discretion of the Board. Challenges to the delayed hearings were rejected by the courts on the basis of *Zerbst*. To hold an earlier hearing, would require taking the violator into custody and this would trigger automatic concurrent sentences, contrary to the Supreme Court’s interpretation of congressional intent that the parolee be subject to some sanction for his violation.

Until recently, the courts considered the Parole Board’s discretion nearly absolute and gave great deference to its decisions. They recognized Congress’ implicit intention in the parole statute that the revocation hearing be fair and that it be held within a reasonable time, but they viewed the hearing as only a narrow inquiry intended to provide a factual basis for the Board’s exercise of discretion. So long as the parolee was not prejudiced in his ability to “explain away the accusation,” the courts considered that delay until completion of an intervening prison sentence was reasonable. Only if the delay was so great that it indicated an abuse of the Parole Board’s discretion and deprived the parolee entirely of the protection Congress had provided, would relief be granted.

37. 18 U.S.C. § 4207; see note 24 supra and accompanying text.
38. See note 25 supra and accompanying text.
39. The rationale was that the parole statute “bristle[s] with discretion given the Board . . . .” *Hiatt v. Compagna*, 178 F.2d 42, 45 (5th Cir. 1949), aff’d by an equally divided Court, 340 U.S. 880 (1950) (per curiam); see note 41 infra and accompanying text.
41. See, e.g., *Shelton v. United States Bd. of Parole*, 388 F.2d 567, 576 (D.C. Cir. 1967) (per curiam); *Hiatt v. Compagna*, 178 F.2d 42, 45 (5th Cir. 1949), aff’d by an equally divided Court, 340 U.S. 880 (1950) (per curiam).
This focus on the statute and underlying congressional intent resulted from the belief that parole was an act of grace—a privilege, not a right—subject to whatever conditions Congress might impose. A parolee was not entitled to any constitutional safeguards, because under the traditional view of due process, a governmental benefit characterized as a privilege was not afforded constitutional protection.

In the 1960s, the Supreme Court abandoned the right-privilege distinction. It held that due process was required whenever an individual would suffer a "grievous loss" through governmental action. The nature of the process required was established by balancing the interests of the individual against those of the government.

II. PAROLE REVOCATION AND DUE PROCESS

In Morrissey v. Brewer, the Supreme Court considered the procedural requirements for parole revocation without the constraints of the right-privilege distinction. Morrissey involved two state parolees whose paroles had been revoked without a hearing. Under the right-privilege approach, any procedural requirements would have had to be premised on the dictates and implications of the parole statute. However, in its due process analysis, the Court examined the interests of the parolee and the government. When the government seeks to revoke parole, the parolee has an interest in his continued liberty and although this liberty, which is subject to the restrictions of parole is not the equivalent of that of a free man, it is still of great

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53. 408 U.S. 471 (1972).

54. Id. at 481.

55. Id. at 473.

56. See text accompanying notes 48-49 supra.

57. 408 U.S. at 480-83.

58. Id. at 481-82.
value. Parole enables a person to lead a life very different from that of a prisoner in confinement. The parolee may work, live with his family, and enjoy the free associations of normal life, subject only to the conditions of his parole. The Court concluded that the termination of this liberty is a grievous loss and calls for at least some informal orderly process.59

Although the government has a strong interest in rehabilitation of the parolee,60 if he demonstrates by his violation that his continued liberty is a threat to society, the government must be able to revoke parole and return a violator to prison without the burden of a new adversary criminal trial.61 The government therefore has an interest in having the Parole Board retain the flexibility and discretion it needs to function effectively.62

In balancing these interests, the Court in *Morrissey* concluded that the government has no interest in revoking parole without at least the rudiments of due process.63 Among the safeguards to which a parolee is entitled before revocation is a two-stage hearing.64 The first stage is a preliminary hearing to determine whether there are reasonable grounds to believe he has violated parole. It should be held as promptly as possible after arrest, while the information is fresh and sources are available.65 The second stage, a hearing to determine whether there has, in fact, been a violation and, if so, the action to be taken, must be held "within a reasonable time"66 after the parolee is taken into custody."67

59. *Id.*
63. 408 U.S. at 484.
64. *Id.* at 485-90.
65. *Id.* at 485. The inquiry is to be conducted at or reasonably near the place of the alleged violation. *Id.* Due process requires that the determination of probable cause be made by someone not directly involved in the case. A parole officer could make the evaluation, so long as he was not the same officer who had recommended that parole be terminated. *Id.* at 485-86. But see *id.* at 499-500 (Douglas, J., dissenting in part). The parolee should receive prior notice of the hearing, its purpose, and the violation alleged. At the hearing, the parolee may speak on his own behalf and, absent a need for confidentiality, cross-examine witnesses. The hearing officer is responsible for preparing a report on the hearing and determining whether there is probable cause to detain the parolee further. *Id.* at 486-87.
66. The Court suggested that a delay of two months would not appear to be unreasonable. *Id.* at 488. See also notes 105-24 infra and accompanying text.
67. 408 U.S. at 488. Minimum requirements of due process at the revocation hearing include: "(a) written notice of the claimed violations of parole; (b) disclosure to the parolee of evidence against him; (c) opportunity to be heard in person and to present witnesses and documentary evidence; (d) the right to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation); (e) a 'neutral and detached' hearing body such as a traditional parole board, members of which need not be judicial officers or lawyers; and (f) a written statement by the factfinders as to the evidence relied on and reasons for revoking parole." *Id.* at 489. The Court did not decide whether the parolee is entitled to the assistance of counsel at the hearing. *Id.* A year after *Morrissey*, the Court held, in *Gagnon v. Scarpelli*, 411 U.S. 778 (1973), that
Despite the *Morrissey* holding, the Parole Board has continued to delay revocation hearings when the violator is serving a sentence for an intervening crime. The rationale has been that when the violation is a crime—which it was not in *Morrissey*—the interests of the government and the parolee strike a different balance which obviates the need for prompt hearings. However, an examination of these interests suggests that when the violation is a crime, the balance is similar to that found in *Morrissey* and thus the practice of delaying the hearing until completion of the intervening sentence denies the parolee due process of law.

### III. Weighing the Interests in Prompt Hearings

From the government's point of view, a prompt hearing can have the detrimental effects of forcing a revocation decision before an adequate record can be established along with the likelihood that it would result in an automatic concurrent sentence. When a hearing on parole revocation is delayed until completion of the intervening sentence, the Parole Board can acquire more information on which to base its decision. Since a parolee's record may look least sympathetic immediately subsequent to a criminal conviction, mandating a prompt decision might lead the Board to err on the safe side by revoking parole more often than is necessary. If the Board were obliged to hold prompt hearings, it could not consider such factors as the individual's good behavior during his intervening prison sentence, thus making it more difficult to render the decision which best serves the government's dual interests of protecting society and rehabilitating the prisoner.

An even greater disadvantage to the government of prompt revocation hearings would result from the wording of the parole statute which triggers automatic concurrent sentences as soon as the parole violator's warrant is executed. Although the government is not required to provide indigents with counsel in all cases, it is obliged to do so when cross-examination of witnesses or explanation of complex documentary evidence is required to present the parolee's version of disputed facts. A right to counsel is presumed when the parolee makes "a timely and colorable claim (i) that he has not committed the alleged violation of the conditions upon which he is at liberty; or (ii) that, even if the violation is a matter of public record or is uncontested, there are substantial reasons which justified or mitigated the violation and make revocation inappropriate, and that the reasons are complex or otherwise difficult to develop or present." Whether the parolee appears to be able to speak effectively for himself should also be considered.

68. See, e.g., United States ex rel. Hahn v. Revis, 520 F.2d 632 (7th Cir. 1975); Cleveland v. Ciccone, 517 F.2d 1082 (8th Cir. 1975).
71. See id.
privilege the Parole Board of the authority to demand that the parolee serve consecutive sentences.\textsuperscript{74} The parolee would be subject to no sanction for violating parole, thereby seriously undercutting the disciplinary power of the Parole Board.\textsuperscript{75} Faced with these consequences, the Board might be more reluctant to grant parole, contrary to the humane goal of releasing deserving prisoners from incarceration through the parole system.\textsuperscript{76}

On the other hand, a delayed hearing has detrimental effects on the parolee. Although the parole violator has no automatic right to a concurrent sentence, in certain cases a concurrent sentence would be appropriate. Deferring the revocation decision until the intervening sentence has been completed denies the parolee the opportunity to serve the time left in his original sentence, at least in part, concurrently with the sentence for the second conviction.\textsuperscript{77} It is possible for the Parole Board to achieve the same length of imprisonment as would have resulted from a concurrent sentence by deducting the time served for the second offense from the term remaining in the parolee's original sentence.\textsuperscript{78} However, a concurrent sentence is still preferable for a prisoner because it avoids the need for a detainer and its punitive consequences.\textsuperscript{79} So long as the time remaining in the parolee's original sentence is not longer than his term of imprisonment for the intervening crime, a concurrent sentence has the additional advantage for the parolee of eliminating the necessity of depriving him of his liberty after completion of the intervening sentence pending the Board's action.\textsuperscript{80}

Delay in holding the parole revocation hearing may have other disadvantages for the parolee. Since violation does not necessarily result in revocation,\textsuperscript{81} one of the primary functions of the revocation hearing is to afford the

\textsuperscript{74} See Zerbst v. Kidwell, 304 U.S. 359, 363 (1938); text accompanying note 36 supra.
\textsuperscript{75} Zerbst v. Kidwell, 304 U.S. 359, 363 (1938).
\textsuperscript{76} Id. However, such a reaction would be detrimental to the interests of the government as well as to those of the parolee since it would result in both overcrowded prisons and increased cost to the government in caring for additional prisoners in custody. See Morrissey v. Brewer, 403 U.S. 471, 477 (1972); Cooper v. Lockhart, 489 F.2d 308, 317 (8th Cir. 1973).
\textsuperscript{78} See 18 U.S.C. § 4207 (1970). The "prisoner may be required to serve all or any part of the remainder of the term for which he was sentenced." Id.
\textsuperscript{79} See Cooper v. Lockhart, 489 F.2d 308, 316 (8th Cir. 1973); notes 85-89 infra and accompanying text.
\textsuperscript{80} See text accompanying note 93 infra.
\textsuperscript{81} United States ex rel. Obler v. Kenton, 262 F. Supp. 205, 208-09 (D. Conn. 1967). A Wisconsin empirical study disclosed that violation of probation or parole resulted in revocation in only 34.5% of the cases. S. Hunt, The Revocation Decision: A Study of Probation and Parole Agents' Discretion 10 (1964) (unpublished thesis on file at the University of Wisconsin library), cited in Gagnon v. Scarpelli, 411 U.S. 778, 784 n.8 (1973). Another source estimated that 35-45% of all parolees are subjected to revocation and return to prison. President's Commission on Law
violator the opportunity to present evidence in mitigation of the violation.  

A long delay before holding a revocation hearing is likely to result in the loss of such evidence, defeating the possibility of ever conducting a fair proceeding.  

A detainer also impedes the rehabilitation of a prisoner. In the opinion of a former Director of the Federal Bureau of Prisons:

[I]t is in their effect upon the prisoner and our attempts to rehabilitate him that detainers are most corrosive. The strain of having to serve a sentence with the uncertain prospect of being taken into . . . custody . . . at the conclusion interferes with the prisoner's ability to take maximum advantage of his institutional opportunities. His anxiety and depression may leave him with little inclination toward self-improvement.

In addition, a prisoner subject to a detainer will commonly be denied prison privileges such as eligibility for participation in vocational, educational, and other less-than-maximum security programs. Moreover, a detainer may substantially diminish the prisoner's prospects for parole on the intervening

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83. Disappearance of witnesses and evidence, impairment of memory, and loss of perspective on events are all possible consequences of a delayed hearing. Smith v. Hooey, 393 U.S. 374, 379-80 (1969). Loss of memory is not always reflected in the record because the forgotten can seldom be demonstrated. Barker v. Wingo, 407 U.S. 514, 532 (1972). In addition, when a person is incarcerated, his ability to confer with potential witnesses and keep track of their whereabouts is severely hindered. Smith v. Hooey, supra at 379-80.

84. See Cooper v. Lockhart, 489 F.2d 308, 313 (8th Cir. 1973).


87. Cooper v. Lockhart, 489 F.2d 308, 313 (8th Cir. 1973). The generally recognized punitive effects of a detainer include the following restrictions: "the inmate is (1) deprived of an opportunity to obtain a sentence to run concurrently with the sentence being served at the time the detainer is filed; (2) classified as a maximum or close custody risk; (3) ineligible for initial assignments to less than maximum security prisons (i. e., honor farms or forestry camp work); (4) ineligible for trustee status; (5) not allowed to live in preferred living quarters such as dormitories; (6) ineligible for study-release programs or work-release programs; (7) ineligible to be transferred to preferred medium or minimum custody institutions within the correctional system, which includes the removal of any possibility of transfer to an institution more appropriate for youthful offenders; (8) not entitled to preferred prison jobs which carry higher wages and entitle them to additional good time credits against their sentence; (9) inhibited by the denial of possibility of parole or any commutation of his sentence; (10) caused anxiety and thus hindered in the overall rehabilitation process since he cannot take maximum advantage of his institutional opportunities." Id. at 314 n.10.
sentence. These severe consequences seem particularly unjust in view of the fact that at the eventual hearing the violation will frequently be deemed not serious enough to warrant revocation.

The most serious disadvantage to the parolee which can result from a delayed revocation hearing is unnecessary imprisonment. One of the reasons Morrissey required timely hearings was that the parolee was being deprived of his liberty and reincarcerated before it was proved that he actually violated parole or that the violation was severe enough to warrant revocation. It is true that no equivalent loss of liberty results immediately from Parole Board action when the parolee's violation leads to a criminal conviction and imprisonment. However, when the parolee is officially returned to Parole Board custody after serving the sentence for the intervening crime, he is deprived of his freedom for a further period until there is a disposition of the parole violation. Because the Board has the entire period of the intervening sentence in which to hold the hearing—and since, in most cases, the Board is likely to decide against revocation, and further imprisonment, when it does hold the hearing—any further period of incarceration seems an unnecessary deprivation.

The Board of Parole regulations do provide that a prisoner shall be advised that he may request that the violator warrant against him be withdrawn or

88. United States ex rel. Hahn v. Revis, 520 F.2d 632, 634 (7th Cir. 1975). According to the current regulations of the U.S. Board of Parole, the presence of a detainer does not itself justify the denial of parole. Ordinarily, however, the Board will grant parole only if the status of the detainer has been investigated, and the Board concludes the prisoner is a good parole risk. 28 C.F.R. §§ 2.33(c), (e) (1975).

89. See Cooper v. Lockhart, 489 F.2d 308, 316 n.12 (8th Cir. 1973) ("[A]uthorities are in agreement that less than one-half of all detainers which are filed are ever exercised and many of these are filed with no intention of ever trying to enforce them."); note 81 supra.

90. See Morrissey v. Brewer, 408 U.S. 471, 482 (1972); text accompanying note 80 supra.

91. 408 U.S. at 485-87. Justice Douglas believed that "[i]f a violation of a condition of parole is involved, rather than the commission of a new offense, there should not be an arrest of the parolee and his return to the prison . . . ." until he has been afforded a hearing. Id. at 497 (Douglas, J., dissenting in part). This also raises the question whether a parolee, arrested for a non-criminal violation, is entitled to bail. See Gaddy v. Michael, 519 F.2d 669, 676 n.19 (4th Cir. 1975); Comment, Post-Conviction Criminal Rights: Parole and Probation Revocation and Bail, 8 Creighton L. Rev. 682, 686-88 (1975). The right has generally been denied. Id.

92. See Cooper v. Lockhart, 489 F.2d 308, 314 (8th Cir. 1973); Shelton v. United States Bd. of Parole, 388 F.2d 567, 574 n.11 (D.C. Cir. 1967) (per curiam). According to the Fourth Circuit, Morrissey and its holding can be distinguished on this ground from the situation when the parolee has committed a criminal violation. Gaddy v. Michael, 519 F.2d 669, 675-76 (4th Cir. 1975). The court in Gaddy saw the question answered in Morrissey as whether a state could constitutionally "deny a parolee any 'procedural safeguards [whatsoever] with regard to the loss of liberty that accompanied an arrest for parole violations' and, if it might not, what were the basic requirements for such procedures." Id. at 676.

93. See, e.g., Gaddy v. Michael, 519 F.2d 669, 671-72 (4th Cir., 1975) (revocation hearing not held until 3 months after completion of intervening sentence); Cook v. United States At'ty Gen., 488 F.2d 667, 669 (5th Cir.), cert. denied, 419 U.S. 846 (1974) (4 months); Small v. Britton, 500 F.2d 299, 300 (10th Cir. 1974) (2 months).
executed, so that his original sentence will run concurrently with the new sentence. The Board's internal rules indicate the "[t]he violator may petition prior to the expiration of his new sentence that his parole or mandatory release be revoked and that he be permitted to serve some part of his violator time concurrently with his new sentence." While such a request may result in a dispositional review, at which the Board may decide to withdraw the detainer, this procedure is not a satisfactory substitute for a timely revocation hearing because it conditions review on the parolee's request for a revocation and will be granted only when "'further information [is] deemed necessary'" by the Board.

Morrissey made it clear that the parolee cannot relitigate in the revocation hearing issues which had been determined against him in other forums. Thus, it would seem that a timely criminal conviction fulfills the purpose of establishing probable cause to revoke, so the first stage of the Morrissey hearing could be dispensed with in such cases. On the other hand, it is just as important that the second stage, the parole revocation hearing, be held within a reasonable time. The prejudice to the government in having a prompt hearing—an abbreviated record on which to render a decision and loss of the discretion to require consecutive sentences—is serious. However, this must be balanced against the prejudice to which the parolee is subjected by a delayed hearing—the loss of the possibility of a concurrent sentence, the difficulty in preserving any mitigating evidence, and the hampering of the rehabilitative aspects of the prison sentence.

The Seventh Circuit has suggested that concurrent sentences could be avoided by holding the revocation hearing before execution of the warrant.

94. 28 C.F.R. § 2.53(a) (1975).
95. Cleveland v. Ciccone, 517 F.2d 1082, 1088 (8th Cir. 1975).
96. Id.; 28 C.F.R. § 2.53 (1975). The regulations permit the parolee to be represented by counsel and to call witnesses, provided he pays the cost. He must also be given timely notice of the interview and its procedure. The Board may choose among the following actions after the interview: (1) let the detainer stand; (2) withdraw the detainer and, if the expiration date has passed, close the case; (3) withdraw the detainer permitting the federal sentence time to run uninterruptedly from the time of his original release on parole; (4) execute the warrant, permitting the sentence to run from that point in time. 28 C.F.R. § 2.53 (1974).
97. Fitzgerald v. Sigler, 372 F. Supp. 889, 898 (D.D.C. 1974); see Sutherland v. District of Columbia Bd. of Parole, 366 F. Supp. 270, 272 (D.D.C. 1973). However, at least one court has held that a parolee convicted of a criminal offense retains the right to the preliminary as well as the ultimate revocation hearing defined in Morrissey, even if the former is confined to establishing the fact of a parole violation. In re La Croix, 32 Cal. App. 3d 319, 108 Cal. Rptr. 93 (3d Dist. 1973), opinion vacated, 12 Cal. 3d 146, 524 P.2d 816, 115 Cal. Rptr. 344 (1974), cert. denied, 420 U.S. 973 (1975). The court reasoned that the parolee was entitled to the opportunity to use the preliminary hearing to show that he was not the defendant convicted, that the crime for which he was convicted was not the one specified in the parole violator warrant, or that the charge of alleged conviction was inaccurate in respects other than those conclusively determined by virtue of the criminal prosecution. Id. On appeal, the California Supreme Court approved this reasoning, but held that the prisoner was not entitled to habeas relief because he failed to show prejudice as a result of the denial. In re La Croix, 12 Cal. 3d 146, 524 P.2d 816, 115 Cal. Rptr. 344 (1974), cert. denied, 420 U.S. 973 (1975).
98. See notes 77-89 supra and accompanying text.
The court believed that the Parole Board's practice of holding selective dispositional interviews indicates that the present regulations do not foreclose consideration of the revocation issue prior to execution of the warrant. However, these interviews may be held only if the prisoner initiates a request for disposition of his warrant. It would seem that if the Board were compelled to hold a hearing during the intervening sentence, it would be forced to regain custody over the parolee, thus triggering the running of the time remaining in his original sentence.

However, the chief interests of both the government and the individual might best be accommodated by simply redrafting the revocation statute. Congress clearly intended that the Parole Board have great discretion in revoking parole, including the option of requiring the parolee to serve all of the time remaining in his original sentence. Since the unfortunate consequences of the current wording were almost certainly inadvertent, redrafting the statute to avoid automatic concurrent sentences should meet little opposition. In the balance, therefore, mandating revocation hearings within a reasonable time of the violation appears to be the most equitable resolution of the conflicting interests.

IV. REASONABLE TIME FOR REVOCATION HEARINGS

Once it is established that the due process requirement of a parole revocation hearing within a reasonable time of the violation does not permit delay until an intervening sentence is served, the question remains what period short of the expiration of the intervening sentence will satisfy the reasonable time requirement. One solution would be for the courts to specify some period after which the violator warrant would have to be withdrawn if no hearing had been held. However, in *Barker v. Wingo*, the Supreme Court rejected that approach as a means of measuring whether a defendant's constitutional right to a speedy trial had been abused. The Court acknowledged that a specific time limit would simplify the courts' task, but it declined to prescribe such a limit on the ground that it was more appropriately a legislative rather than a judicial function.

Instead, the Court in *Barker* indicated that in each case there should be a weighing of the interests of the government and the individual similar to

100. Id. at 637.
101. 28 C.F.R. § 2.53(a) (1975).
102. See notes 27-29 supra and accompanying text.
103. See 18 U.S.C. § 4207 (1970): "The Board may . . . at any time in its discretion, revoke the order of parole and terminate such parole or modify the terms and conditions thereof.
   " . . . [The] prisoner may be required to serve all or any part of the remainder of the term for which he was sentenced."
104. See Cleveland v. Ciccone, 517 F.2d 1082, 1087 (8th Cir. 1975).
106. Id. at 523.
107. Id.
108. 407 U.S. at 530. On the one hand, the Court considered the injuries to the accused, such as loss of liberty, interference with preparation for trial, and anxiety, which result from delay. Id. at 523-33. On the other, recognition was given to the government's justifications for the delay.
that used in the due process cases. In its weighing process, the Court noted that the individual's assertion or waiver of the right to a speedy trial could affect the balance. The Court rejected the view that the accused has a right to a speedy trial only if he demands it, but indicated that absence of a demand may imply that the accused has chosen delay as a defense tactic and thus waived his right to a speedy trial. This factor is also relevant in determining the timeliness of a revocation hearing, since there are situations in which it may be advantageous for a parolee to delay his hearing. For example, if he has committed a serious crime, the parolee may wish to establish a good record in prison before his case is considered by the Parole Board.

Another relevant factor, not present in the criminal context and thus not mentioned in Barker, is the possibility that a revocation hearing could prejudice the parolee's rights at his criminal trial. If a revocation hearing were required within such time of the violation that it would precede the criminal trial, the parolee could not participate in the hearing without jeopardizing his right to be silent at trial. Fairness to the parolee may require that "the determination of guilt or innocence [be left] to the courts [rather] than to an informal Board hearing." Thus, it may be necessary to postpone the revocation hearing until termination of the parolee's criminal trial. As long as the criminal trial complies with the speedy trial requirements of the sixth and fourteenth amendments, however, holding the revocation hearing promptly after completion of the parolee's trial should meet the requirements of due process.

Although the Supreme Court refused in Barker to set any specific time limit, the standard of three months may provide a point of departure for establishing the reasonable time limit for the revocation hearing. When the Speedy Trial Act of 1974—Congress' response to the Supreme Court's

Valid reasons, such as a missing witness or the complexity of a case, would justify an appropriate delay. In the context of a revocation hearing, the interests of the individual are quite similar to those set forth in Barker. Compare id. at 531, with text accompanying notes supra. The governmental interest in delay for a missing witness might also apply to a revocation hearing. By contrast, however, revocation hearings do not vary so widely in complexity that the government could argue that it needed an unusually long time to prepare for an extremely complex case. The Barker opinion indicated that excuses such as negligence or a backlogged judiciary should be considered, but given less weight than the above justifications. The better view, which would be applicable to parole revocation hearings as well, would seem to give these arguments little weight against the individual's claim to his constitutional rights. See id. at 537-38 (White, J., concurring).

110. 407 U.S. at 528.
111. Id. at 521, 528, 531-32. The Court emphasized that a defendant's failure to assert the right to a speedy trial will make it difficult for him to prove he was denied his right. Id. at 532.
112. See Gaddy v. Michael, 519 F.2d 669, 675 (4th Cir. 1975).
113. Id. at 676 n.21.
115. 407 U.S. at 523.
suggestion in *Barker* that determination of specific limits was a task for the legislature\textsuperscript{117}—becomes fully effective in 1979,\textsuperscript{118} it will require that a defendant in the federal system be brought to trial within 100 days of his arrest.\textsuperscript{119} The computation of this period includes any delays attributable to the accused.\textsuperscript{120} However, it does not include periods during which the accused is detained for other crimes.\textsuperscript{121} In such cases, the Act adopted the procedure of the Interstate Agreement on Detainers\textsuperscript{122} which requires that the prosecution promptly either seek to obtain the accused's presence for trial or file with the custodial authorities a detainer and a request that the accused be informed of his right to demand a speedy trial. The custodial authorities must promptly convey that information to the accused and, if he chooses to exercise his right, they must make the accused available for trial.\textsuperscript{123} A three-month period has also been suggested by the First and Seventh Circuits as the maximum delay that will be tolerated between execution of a parole violator warrant and the holding of a revocation hearing.\textsuperscript{124}

V. CONCLUSION

Implementation of procedures for a prompt parole revocation hearing need not cause great administrative inconvenience or expense. Even when the federal parolee's violation of parole is a state offense which results in his incarceration in a state prison, arrangements similar to those provided in the Interstate Agreement on Detainers could be made.\textsuperscript{125} The Supreme Court has emphasized that the hearing procedure prescribed in *Morrissey* was to be an informal one in which substitutes for live testimony—including affidavits, depositions, and documentary evidence—could be used when appropriate.\textsuperscript{126}

\textsuperscript{117} 407 U.S. at 523.
\textsuperscript{119} Id. §§ 3161(b)-(c).
\textsuperscript{120} Id. §§ 3161(b)(3)(A)-(B).
\textsuperscript{121} See id. § 3161(h).
\textsuperscript{123} 18 U.S.C.A. § 3161(j). Congress believed the danger to incarcerated defendants was so great that § 3162(b)(4) of the Act provides that personal sanctions may be taken against a prosecutor who unreasonably delays initiation of these procedures. The punishment imposed may be a fine up to $250. Id. § 3162(b)(4)(C).
\textsuperscript{125} See Gagnon v. Scarpelli, 411 U.S. 778, 782-83 n.5 (1973); text accompanying notes 121-123 supra.
\textsuperscript{126} Cooper v. Lockhart, 489 F.2d 308, 317 (8th Cir. 1973). The Court in *Morrissey* left open
The Court encouraged development of "creative solutions to the practical difficulties of the Morrissey requirements." Thus, the federal and state governments should be able to devise other procedures which would meet the requirements of Morrissey while imposing no great burden on either party.

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the possibility of the states' holding both the preliminary and the final hearing near the place of violation. Gagnon v. Scarpelli, 411 U.S. 778, 782-83 n.5 (1973).