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*A Guide to the Legislative History  
of the Federal Magistrate Judges System*

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## 1. In General<sup>1</sup>

The United States magistrates system was established by the Federal Magistrates Act of 1968<sup>2</sup> to "reform the first echelon of the Federal judiciary into an effective component of a modern scheme of justice...."<sup>3</sup> While the Act created United States magistrates as a new corps of judicial officers in the United States district courts, it built upon and superseded the 175-year old United States commissioner system. It granted to each magistrate, at a minimum, "all powers and duties conferred or imposed upon United States commissioners" by law or by the Federal Rules of Criminal Procedure.<sup>4</sup> The Act has been amended on several occasions to improve the administration of the magistrates system, to confer greater judicial authority on magistrates, and to change the title of the office to "United States magistrate judge."<sup>5</sup>

## 2. United States Commissioners

### a. Development of the Commissioner System

In the Judiciary Act of 1789, the First Congress specified that bail for a person accused of committing a federal crime should be set either by a judge of the United States or by a state judge or state magistrate.<sup>6</sup> In 1793 the Congress authorized the federal circuit courts to appoint "discreet persons learned in the law" to take bail for the courts in federal criminal cases.<sup>7</sup> In 1812 these persons were also authorized to receive affidavits in criminal cases and were allowed such fees for

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<sup>1</sup> The text of this chapter is adapted in part from Peter G. McCabe, *The Federal Magistrate Act of 1979*, 16 HARV. J. ON LEGIS. 343-401 (1979), and is printed with the permission of the JOURNAL.

<sup>2</sup> [Pub. L. No. 90-578](#), [82 Stat. 1107 \(1968\)](#) (codified as amended at 28 U.S.C.A. §§ 604, 631-639 and 18 U.S.C.A. §§ 3060, 3401-3402 (West Supp. 1991)).

<sup>3</sup> H.R. REP. NO. 1629, 90th Cong., 2d Sess. 11 (1968), *reprinted in* [1968 U.S.C.C.A.N. 4252](#) [hereinafter cited as 1968 HOUSE REPORT].

<sup>4</sup> [28 U.S.C. § 636\(a\)\(1\) \(1988\)](#).

<sup>5</sup> A list of the statutes that have amended the Federal Magistrates Act is set out as Attachment A to this chapter. The text and amendments to [28 U.S.C. § 636](#), the principal jurisdictional section of the Act, is set forth in Attachment B.

<sup>6</sup> Judiciary Act of 1789, ch. 20, § 33, 1 Stat. 91.

<sup>7</sup> Act of March 2, 1793, ch. 22, § 4, 1 Stat. 334.

services as permitted by state law.<sup>8</sup>

These "discreet persons" were referred to by statute as "commissioners" as early as 1817, at which time the Congress further authorized them to take affidavits and bail in civil cases and to exercise all the powers of a federal judge for the taking of depositions.<sup>9</sup> Throughout the nineteenth century the Congress authorized them to perform other miscellaneous duties,<sup>10</sup> and in 1878 it codified the developing law and formally provided for the appointment of "commissioners of the circuit courts" to exercise such powers as may be conferred by law.<sup>11</sup>

In 1896 the Congress replaced the century-old system of circuit court-appointed commissioners with a new system of "United States commissioners," clothed with the same powers and duties as their predecessors, but appointed by the district courts and compensated for their services under a uniform federal fee schedule. The United States commissioners were appointed for four-year terms of office, but they were subject to removal by the district courts at any time.<sup>12</sup>

### **b. Origins of Criminal Trial Authority**

In 1894 a commissioner position was authorized by statute specifically for Yellowstone National Park. In addition to the general duties exercised by other commissioners, the park commissioner was given limited authority to try persons accused of petty offenses committed within the park. The statute authorized appeal from the commissioner's judgment of conviction to the United States District Court for the District of Wyoming. The park commissioner was provided with a fixed salary for his services "in addition to the fees allowed by the law to commissioners of the circuit courts" for the conduct of various proceedings in federal cases.<sup>13</sup> Over the next half-century,

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<sup>8</sup> Act of February 20, 1812, ch. 25, §§ 1, 2, 2 Stat. 679-82.

<sup>9</sup> Act of March 1, 1817, ch. 30, [3 Stat. 350](#).

<sup>10</sup> See [United States v. Maresca, 266 F. 713, 719-20 \(S.D.N.Y. 1920\), cert. denied, 257 U.S. 657 \(1921\)](#); Richard S. Goldsmith, *The Role and Jurisdiction of the United States Commissioner in the Federal Judicial Structure*, 1 LINCOLN L. REV. 89 (1966), reprinted in *Federal Magistrates Act: Hearings on S. 3475 & S. 945 Before the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary*, 89th Cong., 2d Sess. & 90th Cong., 1st Sess. 318, 348 (1966 & 1967) [hereinafter cited as *1966-67 Senate Hearings*].

<sup>11</sup> Act of March 9, 1878, ch. 26, 20 Stat. 27, Title XIII, ch. 6, § 627, 2 Rev. Stat. 109 (1878).

<sup>12</sup> Act of May 28, 1896, ch. 252, §§ 19, 21, 29 Stat. 184.

<sup>13</sup> Act of May 7, 1894, ch. 22, §§ 5, 7, 28 Stat. 74.

several additional "national park commissioner" positions were established by statute with the same basic petty offense trial authority as at Yellowstone, as well as the general authority of other commissioners.<sup>14</sup>

In 1940 the Congress extended general authority to try all petty offenses committed on property under the exclusive or concurrent jurisdiction of the federal government to those United States commissioners who were specifically designated by their appointing district courts to exercise such jurisdiction.<sup>15</sup> A commissioner could not proceed with the trial of a petty offense until first apprising the defendant of the right to elect to be tried before a district judge and obtaining the defendant's written consent to be tried before the commissioner. The statute provided for appeal from the judgment of the commissioner to a district judge, and it authorized the Supreme Court to prescribe rules of procedure for both the trial of petty offense cases and the taking of appeals.<sup>16</sup>

### **c. Judicial Conference Studies of the Commissioner System**

In 1942 the Director of the Administrative Office of the United States Courts conducted a study of the office of United States commissioner for the Judicial Conference of the United States. The Director concluded that the commissioner system needed substantial improvement and recommended that consideration be given to: (1) changing from a fee system of compensation to a salary system; (2) authorizing commissioners to try all federal petty offenses (including those not committed on federal enclaves) and some misdemeanors above the level of petty offenses; (3) adopting a policy that commissioners be members of the bar wherever practicable; (4) furnishing commissioners with space, supplies, and staff; (5) reducing the number of commissioner positions in the district courts; and (6) combining the office of commissioner in some districts with that of other court officials, such as a referee in bankruptcy.<sup>17</sup>

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<sup>14</sup> See, e.g., Act of April 20, 1904, 33 Stat. 188, 189; Act of March 3, 1911, 36 Stat. 1086; Act of August 22, 1914, 38 Stat. 700, 701; Act of June 30, 1916, 39 Stat. 245, 246; Act of August 21, 1916, 39 Stat. 523; Act of June 2, 1920, 41 Stat. 733; Act of April 25, 1928, 45 Stat. 460; Act of March 2, 1929, 45 Stat. 1538.

<sup>15</sup> Act of October 9, 1940, ch. 785, [54 Stat. 1058](#).

<sup>16</sup> *Id.* A detailed review of the petty offense jurisdiction of United States commissioners is found in Goldsmith, *supra* note 10, *reprinted in 1966-67 Senate Hearings, supra* note 10, at 318.

<sup>17</sup> *Reprinted in The U.S. Commissioner System: Hearings Before the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary, 89th Cong., 1st & 2d Sess., pt. 2 at 53, 67 (1965-66) [hereinafter cited as 1965-66 Senate Hearings].* A summary of actions taken by the Judicial Conference regarding the commissioner system between 1922 and 1965 is included in the record of the hearings. *Id.* at 105-113.



A committee of district judges was formed to examine the Director's report, and it proposed legislation to put into effect most of the Director's recommendations.<sup>18</sup> The committee was divided on the issue of expanding the criminal trial jurisdiction of the commissioners. Accordingly, the Judicial Conference appointed a special committee to study the matter further. The special committee subsequently recommended that commissioners be authorized to accept guilty pleas and impose sentence in all federal petty offense cases.<sup>19</sup>

The Judicial Conference approved a "Manual for United States Commissioners" at its September 1943 meeting. Prepared by the Committee on United States Commissioners, it served as a procedural guide for commissioners in the performance of official duties in criminal cases. The manual was revised by the Administrative Office in 1948 to reflect changes in rules and legislation.<sup>20</sup>

In 1946 the Congress enacted a simplified fee schedule for United States commissioners and provided for the payment of certain essential office expenses for them.<sup>21</sup> In 1954 the Congress authorized the Director to pay additional office expenses and clerical expenses of those commissioners who were required to devote full time to their official duties.<sup>22</sup>

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<sup>18</sup> Although favoring in theory the adoption of a salary system for commissioners, the committee concluded that such a salary plan was impracticable and instead endorsed legislation proposing a simplified fee system. In its report in 1943, the committee stated the advantages of a salary system:

This method of compensation would dispose, once and for all, of the criticism that under the present fee system the direction of official decision may be colored by the prospect of a fee. The criticism we think somewhat captions as applied to the commissioners. Nevertheless, for the public repute of the judicial establishment it is a criticism well to heed.

In March 1950 the Judicial Conference reaffirmed the conclusions of the committee in response to pending legislation proposing the creation of a salary system and the elimination of the fee schedules. *Id.* at 108.

<sup>19</sup> *Id.* at 106-07.

<sup>20</sup> *Reprinted in 1966-67 Senate Hearings, supra* note 10, at 390-451.

<sup>21</sup> Act of August 1, 1946, [60 Stat. 752](#); Act of July 10, 1946, [60 Stat. 525](#).

<sup>22</sup> Act of August 13, 1954, [68 Stat. 703](#). See JCUS-SEP 52, pp. 7-8; *1965-66 Senate Hearings, supra* note 17, at 110. The schedule of fees for commissioners was increased to an annual statutory maximum of \$10,000 in 1957. Pub. L. No. 276, 85th Cong., 1st Sess. (1957).

In 1959 Representative Emanuel Celler, Chairman of the Judiciary Committee of the House of Representatives, urged the Judicial Conference to study the commissioner system. The Judicial Conference concurred and assigned the study to its Committee on the Administration of the Criminal Law. The committee first endorsed pending legislation: (a) to expand the commissioners' trial jurisdiction beyond the petty offense level to include misdemeanors for which the maximum prescribed penalty did not exceed one year's imprisonment and/or a fine of \$1,000; and (b) to increase the commissioners' fee schedule. The committee conditioned its approval upon retention of the requirement that the defendant in a misdemeanor or petty offense case be apprised of the right to trial before a district judge and sign a written consent to be tried before the commissioner. The Judicial Conference approved the committee's recommendations at its September 1960 meeting.<sup>23</sup>

The Criminal Law Committee also reviewed two proposals drafted by the Administrative Office for reforming the commissioner system, together with a comprehensive plan for further study of the system. One of the draft proposals dealt exclusively with the conduct of preliminary hearings in criminal cases and envisioned upgrading the hearings substantially. The other proposal contemplated the establishment of a comprehensive new system of full-time and deputy (or part-time) commissioners.<sup>24</sup>

### **3. Legislative Reform**

#### **a. The 1965-66 Hearings on the Commissioner System**

Senator Joseph D. Tydings of Maryland, Chairman of the Senate Judiciary Subcommittee on Improvements in Judicial Machinery, conducted comprehensive, exploratory hearings on the commissioner system in late 1965 and early 1966.<sup>25</sup> The materials that had been prepared by the Criminal Law Committee of the Judicial Conference were entered in the record at the hearings, and many of the committee's suggestions were eventually incorporated in draft legislation.

The hearings were devoted largely to the various defects perceived in the commissioner system. The witnesses generally agreed that the commissioner system needed fundamental reform and focused on the following deficiencies: (1) the lack of a requirement of bar membership for appointment as a commissioner; (2) the freedom of the district courts to appoint and remove commissioners at will; (3) the part-time status of virtually all the commissioners; (4) the lack of guidance given to commissioners in the performance of their duties; (5) the basic impropriety of a fee system for compensating judicial officers; (6) the inadequacy of the existing compensation levels;

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<sup>23</sup> JCUS-SEP 60, p. 41; *1965-66 Senate Hearings*, *supra* note 17, at 112.

<sup>24</sup> *See 1965-66 Senate Hearings*, *supra* note 17, at 52, 113-121.

<sup>25</sup> *Id.*

and (7) the insufficiency of support services provided to the commissioners.<sup>26</sup>

The hearings elicited two conflicting proposals for general overhaul of the commissioner system. The first approach would have eliminated or downgraded the office of commissioner and transferred the duties of the position to district judges. The second would have substantially upgraded the position of commissioner. The first alternative commanded little support and was rejected as both inefficient and impractical. The decision was made by the Senate Subcommittee to follow the latter approach.<sup>27</sup>

One of the major areas of discussion at the hearings was the trial jurisdiction of the United States commissioners. Several proposals were advanced to enlarge the jurisdiction to include more petty offenses and some misdemeanors in order to relieve district judges of the necessity of hearing these minor cases.<sup>28</sup> Considerable time was also devoted at the hearings to a review of preliminary examination proceedings in federal criminal cases. The testimony established that there was little uniformity among district courts in the conduct of such proceedings.<sup>29</sup>

#### **b. Introduction of Draft Legislation to Establish the Federal Magistrates System**

In April 1966 the Senate Subcommittee staff completed an initial draft of a bill to create an upgraded system of judicial officers to replace the commissioners, patterned after the existing statutory arrangements for referees in bankruptcy.<sup>30</sup> The draft was circulated among federal judges,

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<sup>26</sup> *Id.* at 43-44; S. REP. NO. 371, 90th Cong., 1st Sess. 9-11 (1967) [hereinafter cited as 1967 SENATE REPORT]; 1968 HOUSE REPORT, *supra* note 3, at 13-14.

<sup>27</sup> *See* 1966-67 Senate Hearings, *supra* note 10, at 238-39 (statement of Senator Tydings), and at 30-31 (staff memorandum); 1968 HOUSE REPORT, *supra* note 3, at 14; 1967 SENATE REPORT, *supra* note 26, at 11. *See also* remarks of Senator Tydings, reprinted in *Diversity of Citizenship Jurisdiction and Magistrates Reform: Hearings Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Comm. on the Judiciary*, 95th Cong., 1st Sess. 86, 96 (1977) [hereinafter cited as the 1977 House Hearings].

<sup>28</sup> *See* 1966-67 Senate Hearings, *supra* note 10, at 208; 1965-66 Senate Hearings, *supra* note 17, at 10, 16, 17, 20, 63-67, 116-17.

<sup>29</sup> *See* 1965-66 Senate Hearings, *supra* note 17, at 13-14; 1966-67 Senate Hearings, *supra* note 10, at 208; 1967 SENATE REPORT, *supra* note 26, at 33-35.

<sup>30</sup> Referees Salary and Expense Act of 1946, [60 Stat. 323](#). *See also* Staff Memorandum, *Statutory Provisions Regarding Referees in Bankruptcy*, in *1966-67 Senate Hearings*, *supra* note 10, at 279-81.

United States commissioners, attorneys, law professors, and other interested parties.<sup>31</sup> Following consideration of the various comments and suggestions received, Senators Tydings and Scott introduced a modified bill in the 89th Congress in June 1966. The revised bill, S. 3475, carried the endorsement of the Judicial Conference and the American Bar Association, and it was supported by the Department of Justice and the National Association of United States Commissioners.<sup>32</sup>

The legislation was predicated on the fundamental assumptions that the commissioner system should be upgraded and that new functions should be added to relieve district judges of their growing caseload burdens.<sup>33</sup> It provided for the establishment of a wholly new system of full-time and deputy (or part-time) "United States magistrates" in place of the commissioners. The title "United States magistrate" was chosen to emphasize the judicial nature of the new officer and to denote a clear break with the commissioner system:

The feeling was that there are altogether too many Federal officials who are known as "commissioners" of one sort or another; that the name "commissioner" does not in any way make clear the judicial nature of the office; and that it would be best to break away from the old commissioner system in name as well as substance. The name of "United States Magistrate" was selected as the only acceptable alternative, despite its unfavorable connotation in some state judicial systems. The new system envisioned by the bill will soon make a reputation for itself; if, as it is hoped, the reputation is a good one, any unfavorable connotations presently attached to the name of "magistrate" will quickly disappear.<sup>34</sup>

### **(1) Proposed Office and Compensation**

The bill required the Director of the Administrative Office to conduct surveys of local conditions in the district courts and recommend the number, type and locations of magistrate positions needed in each court. The Judicial Conference was authorized to establish magistrate positions for each court, based upon the recommendations of the district court, the pertinent circuit council, and the Director:

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<sup>31</sup> See 1966-67 Senate Hearings, *supra* note 10, at 2.

<sup>32</sup> See 1967 SENATE REPORT, *supra* note 26, at 9.

<sup>33</sup> 1966-67 Senate Hearings, *supra* note 10, at 239.

<sup>34</sup> *Id.* at 14 (subcommittee staff memorandum); *see also id.* at 239 (remarks of Senator Tydings).

We feel that statutory determination of the number and location of magistrates lacks the flexibility necessary to adapt to changing conditions and reflect experience with what in many ways will be a new system. On the other hand, a change from a fee system to a salary basis of compensation requires some central control over the number of salaried positions to be created. The Judicial Conference, through the process of consultation borrowed from the [bankruptcy] referee statute, seems the agency best suited to provide this control.<sup>35</sup>

The fee system of compensation was abolished in the bill and replaced by a salary system of compensation similar to that provided for referees in bankruptcy. The salary for each full-time and deputy magistrate position was to be set by the Judicial Conference, based on the anticipated workload at a particular location. The maximum salary for a full-time magistrate was set at \$22,500, the same as a full-time referee, and the salaries of deputy magistrates were to range from \$300 per annum to \$11,000 per annum. Full-time magistrates and deputy magistrates were placed under the civil service retirement system.

In keeping with the decision to upgrade the office, the bill established statutory qualifications for appointment to the position of United States magistrate. All magistrates were required to be attorneys, and no magistrate could continue to serve after having attained the age of seventy. The bill, however, included a "grandfather" clause whereby commissioners serving upon the effective date of the Act could be appointed to the office of magistrate, even if they failed to meet the qualification requirements. With the approval of the Director a part-time referee in bankruptcy or a clerk of court or deputy clerk could serve concurrently as a part-time magistrate.

The bill provided that magistrates continue to be appointed by the district courts:

It was felt that, since the magistrates in a sense serve the district courts and should have the confidence of the district judges if they are to relieve the judges of some of their burden, it would be best to allow the judges to continue to appoint them. The district courts would be better qualified than any more centralized body, such as the circuit councils, the Judicial Conference, or the Administrative Office, to select the best available local attorney for the position. Appointment by the President and confirmation by the Senate which was briefly considered but not seriously advocated by any witness, would be suitable only if we wished to set up a lower tier of Article III Federal judges, a measure which seems unwarranted at the present time.<sup>36</sup>

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<sup>35</sup> *Id.* at 12 (subcommittee staff memorandum).

<sup>36</sup> *Id.* See also 1967 SENATE REPORT, *supra* note 26, at 11-12. "Your committee believes that the enlightened self-interest of district court judges will

The term of office for both full-time and deputy magistrates was set at eight years. Removal of a magistrate during a term of office could be made only for cause and would be determined by majority vote of the judges of the district court.

## **(2) Administrative Proposals**

Full-time magistrates were required to devote their time exclusively to their offices and were prohibited from practicing law or from engaging in any other business that would impair the proper performance of their official duties. Deputy magistrates were made subject to the criminal conflict-of-interest provisions of title 18, United States Code. They were allowed to practice law but could not serve as counsel in criminal cases in the federal courts. Subject to these restrictions, deputy magistrates could engage in any business not inconsistent with the proper discharge of their official duties.

The bill authorized the Director to provide payment for clerical and secretarial assistance for full-time magistrates and to furnish them with necessary office space, furniture, and facilities. Deputy magistrates were to be reimbursed by the Director for actual and necessary secretarial and office expenses incurred by them in the performance of their duties, with the exception of the cost of procuring office space. All magistrates were to receive an official seal, necessary dockets and forms, and the current edition of the United States Code.

The bill delineated the duties of the Director of the Administrative Office with respect to magistrates. In addition to conducting surveys as to the number, type, and location of magistrate positions, the Director was required to gather and evaluate statistics and report to the Congress on the work performed by magistrates. He was given supervision over administrative matters relating to the offices of magistrates and responsibility for conducting periodic training seminars for magistrates. The Director was further required to prepare and distribute a legal manual for magistrates. In order to carry out these various functions the bill required the Director to establish a separate division within the Administrative Office to oversee the magistrates system.

## **(3) Preference for Full-time Judicial Officers**

The bill enunciated a strong preference for a system of full-time magistrates. "Deputy" magistrates were to be considered only at those locations where there was a need to provide prompt access to a federal judicial officer in criminal cases and a full-time magistrate position would not be feasible. In remarks accompanying the introduction of the bill, Senator Tydings noted:

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prompt them to appoint only highly qualified individuals whose legal capabilities will have a direct and measurable effect upon the judges' own workloads, rather than individuals whose only claim to appointment is party loyalty or personal friendship with one or more of the appointing judges." *Id.* at 12.

There is ... one service performed by the old commissioner system that a network of full-time magistrates cannot replace. This is having available in remote areas of the country a Federal judicial officer before whom an arrested person can be brought promptly for presentment and the setting of bail. In addition, there may be some judicial districts in which the caseload does not justify the appointment of even one full-time magistrate. For these reasons, our bill, while establishing a preference for full-time positions where such are required, also creates the office of part-time U.S. magistrate....<sup>37</sup>

Stating that "sound policy and experience underlie this predilection for full-time positions," the Senate Judiciary Committee's report noted several reasons in support of the preference for full-time judicial officers: (1) the higher rate of compensation and the longer term of office of full-time magistrates will attract high-caliber attorneys; (2) full-time magistrates will more readily develop expertise in exercising their official responsibilities; and (3) full-time magistrates with offices and courtrooms in U.S. courthouses will be readily available to judges, law enforcement officials and arrested persons.<sup>38</sup> The committee emphasized, however, that the creation of part-time magistrate positions, especially in remote or rural areas without a significant caseload to support creation of a full-time position, was considered "essential to the accomplishment of the ends to which the Federal Magistrates Act is in part addressed: such convenient access to the U.S. magistrate as will afford law enforcement officers expeditious issuance of lawful process and arrested persons their constitutional right to initial appearance before a committing officer without reasonable delay, even in remote areas."<sup>39</sup>

#### **(4) Proposed Jurisdiction**

The bill specified the judicial authority of magistrates in proposed section 636 of title 28, United States Code. Full-time and "deputy" magistrates were authorized to perform all the existing duties of the United States commissioners and such other duties as might be assigned to them under any other statute or by the Federal Rules of Criminal Procedure.

The bill authorized all full-time magistrates, and those part-time magistrates specially designated by the courts, to try persons accused of "minor offenses," i.e., violations of federal criminal laws for which the maximum penalty did not exceed one year's imprisonment and/or a fine of \$1,000. Before proceeding to try a case, a magistrate was required to inform the defendant of the right to trial before a district judge and to obtain the defendant's waiver of this right and consent to

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<sup>37</sup> 1966-67 *Senate Hearings*, *supra* note 10, at 239 (remarks of Senator Joseph D. Tydings on the Senate floor, February 8, 1967).

<sup>38</sup> 1967 SENATE REPORT, *supra* note 26, at 20.

<sup>39</sup> *Id.*

be tried before the magistrate. Magistrates were authorized to apply the federal probation laws and to order presentence reports from the probation service, with the approval of the district court. The bill also authorized magistrates to sentence persons under the federal youth offender and juvenile delinquency statutes. The bill specified that proceedings in minor offense cases be taken down by a court reporter or recorded on suitable sound recording equipment and that a copy of the record be made available without charge to indigent defendants for purposes of appeal.

In order to assist trial judges in expediting their civil and criminal caseloads, the bill authorized the district courts to assign to full-time magistrates such additional duties as were "not inconsistent with the Constitution and laws of the United States." The bill then listed the following specific examples of duties that might be assigned to magistrates by the courts:

- (1) service as a special master in an appropriate civil action;
- (2) supervision of the conduct of any pretrial discovery proceeding in a civil or criminal action; and
- (3) preliminary consideration of applications for post-trial relief made by individuals convicted of criminal offenses.

The bill gave magistrates the power to punish as contempt of court certain acts committed in their presence.

#### **(5) Preliminary Examinations**

Finally, the bill attempted to clarify the law regarding the conduct of preliminary examinations in criminal cases by providing that, unless an intervening indictment or information were filed, the preliminary examination would have to be held within ten days of the initial appearance if the defendant were held in custody, or within 20 days if the defendant were released pending the hearing. The bill provided that the defendant could waive the preliminary examination or consent to a continuance, after having an opportunity to consult with counsel. Failure to hold the preliminary examination within the prescribed time limits would result in the unconditional release of a defendant. These proceedings were required to be taken down by a court reporter or recording machine, and a copy of the record was to be furnished without charge to an indigent defendant.

#### **c. Modifications in the Legislation**

##### **(1) 1966 Senate Hearings**

The Subcommittee on Improvements in Judicial Machinery of the Senate Judiciary Committee held four days of hearings on S. 3475 in July and August 1966 and took testimony from a wide range of interested parties.<sup>40</sup> In general, the witnesses supported the concept of upgrading the quality of justice at the commissioner level and approved the draft legislation. Several witnesses

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<sup>40</sup> 1966-67 Senate Hearings, *supra* note 10.



noted with particular approval the expanded use of magistrates in civil cases and applauded the flexibility that would allow each district court to determine how a magistrate could best serve the court in light of its own specific caseload and particular geographic situation.<sup>41</sup>

Some witnesses, while approving of the bill, expressed objections or reservations as to particular provisions of S. 3475. For instance, objection was made to the "grandfather" clause on the ground that any person who failed to meet the basic statutory requirements should not be permitted to serve as a magistrate, regardless of prior service to the district court as a commissioner. Others suggested deleting the specific list of "additional duties" that courts could assign to magistrates, retaining only a broad authorization for judges to delegate duties to magistrates. Several witnesses objected, on both philosophical and constitutional grounds, to providing magistrates with contempt power, preferring a system of certification of any contempt for action by a district judge. Others, however, argued that the power of contempt was essential, particularly in light of the expanded criminal jurisdiction of the magistrates.<sup>42</sup>

The Department of Justice voiced objection to the bill's provision for expansion of the petty offense trial jurisdiction, stating that many of these cases should be tried in the state courts and that injection of magistrates into more federal criminal cases would delay the ultimate decisions in these cases. In addition, the Department asserted that the bill's provisions posed a constitutional problem of subject-matter jurisdiction that could not be cured by a defendant's consent to be tried by a non-Article III judicial officer.<sup>43</sup> Most witnesses, though, stated that the defendant's consent would cure any potential problems regarding the expansion of the magistrates' criminal jurisdiction. Moreover, many pointed out that defendants in minor offense cases would generally prefer to have their cases disposed of promptly without the formality and publicity that would attach to a proceeding before a district judge.

## (2) Judicial Conference Comments

The Judicial Conference Committee on the Administration of the Criminal Law reviewed the proposed legislation in detail and offered several recommendations for changes, which were

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<sup>41</sup> *Id.* at 47 (Senator Ervin), 49 (Senator Brewster), 52 (Judge Northrop), 54 (Judge Niles), 92, 94-95 (Judge Hoffman), and 179 (Mr. Homet).

<sup>42</sup> For a statement in favor of contempt authority for magistrates, *see 1966-67 Senate Hearings, supra* note 10, at 195 (Judge Smith). For statements against contempt authority, *see 1966-67 Senate Hearings, supra* note 10, at 142 (Professor Dash), 179-80, and 188 (Mr. Homet).

<sup>43</sup> *1966-67 Senate Hearings, supra* note 10, at 109, 129. *See also* 1967 SENATE REPORT, *supra* note 26, at 36. The Department of Justice subsequently concluded that the jurisdiction was indeed constitutional. *See* footnote 56, *infra*, and corresponding text.

approved by the Conference at its September 1966 session.<sup>44</sup> As proposed by the Criminal Law Committee, the Judicial Conference supported the upgrading of the commissioner system and applauded Senator Tydings' reform efforts. Most of the recommendations offered by the Criminal Law Committee were later incorporated into a revised draft bill, S. 945, that Senator Tydings introduced in the 90th Congress in February 1967.<sup>45</sup>

As suggested by the Criminal Law Committee, the term "deputy magistrate" was dropped in the revised bill, since several district courts would not have a full-time magistrate to whom a part-time magistrate would be a "deputy." The revised version adopted the simple distinction of "full-time" and "part-time" magistrates. The minimum statutory salary for a part-time magistrate was reduced from \$300 per annum to \$100 per annum; the requirement that a separate division in the Administrative Office be established to administer the magistrates system was eliminated from the statute; and the responsibility for procuring office space for magistrates was transferred from the Director of the Administrative Office to the General Services Administration.

Upon the recommendation of the Criminal Law Committee, part-time magistrates were required under the revised bill to take the same oath of office as full-time magistrates. The revised bill deleted a specific reference to the general criminal provisions on conflicts of interests by federal officers and established instead a procedure for the Judicial Conference to prescribe ethical standards for part-time magistrates.<sup>46</sup> The revised bill also incorporated the Committee's recommendation that the district courts be authorized to assign "additional duties" under section 636(b) to part-time magistrates as well as to full-time magistrates. The new draft allowed the district courts, with the approval of the Judicial Conference, to appoint a non-attorney as a part-time magistrate if an attorney was not available at a given location.

The Criminal Law Committee further proposed that part-time magistrates be appointed to serve at the discretion of the district court, rather than for a set eight-year term. Such an appointment, the Committee stated, would provide the courts with the flexibility they needed to meet changing conditions. The revised bill did not incorporate this suggestion, but it reduced the term of

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<sup>44</sup> JCUS-SEP 66, p. 54. The Criminal Law Committee's report on S. 3475 is set forth at pages 241j-244 of the *1966-67 Senate Hearings*, *supra* note 10.

<sup>45</sup> A second report by the Criminal Law Committee, endorsing S. 945, was approved by the Judicial Conference in March 1967. JCUS-MAR 67, p. 38, *reprinted at 1966-67 Senate Hearings*, *supra* note 10, at 244-45..

<sup>46</sup> In adopting the Criminal Law Committee's recommendation that the outside employment activities of part-time magistrates be regulated by the Judicial Conference, the Senate report noted that the scope of such activities could be better clarified under Judicial Conference regulations. These regulations "will enable the development of a practical set of rules that can be easily changed as experience dictates." 1967 SENATE REPORT, *supra* note 26, at 18-19.

office for part-time magistrates from eight years to four years. The revised bill also rejected the Criminal Law Committee's recommendation that the statutory expression favoring a system of full-time magistrates be moderated.<sup>47</sup>

The Criminal Law Committee expressed reservations on four aspects of the expanded jurisdiction of United States magistrates. First, it asserted that subsection 636(b), authorizing the delegation of "additional duties" to magistrates, was so broad and general in scope as to make the statute vulnerable to possible constitutional attack. The chairman of the Criminal Law Committee later met with Senator Tydings and congressional staff and mutually agreed to modifications in the language of the jurisdictional provisions.<sup>48</sup>

Second, the Criminal Law Committee expressed serious doubts as to the provision giving magistrates power to punish for contempt. The revised bill, therefore, eliminated the authorization for magistrates to exercise contempt powers and substituted a procedure whereby magistrates would certify contemptuous conduct committed in their presence for hearing and disposition by a judge of the district court. The Senate report stated:

Your committee is satisfied that the procedure for handling alleged contempts specified in this section is adequate both to insure proper respect for the office of U.S. magistrate and its process, and to protect the rights of alleged contemnors. The procedure prescribed by the section is also appropriate because the magistrate, in exercising his jurisdiction and power under the act, is in fact exercising the jurisdiction and powers of the district court as an officer of that court. It is therefore fitting that failure to accord the magistrate or his process due respect be treated as a contempt of the district court, and that such court hear evidence, adjudicate, and punish acts that are contemptuous of the court by virtue of being contemptuous of one of its officers.<sup>49</sup>

Third, the Criminal Law Committee expressed concern about constitutional objections that could be raised to the proposed expansion of the criminal trial jurisdiction to include misdemeanors above the level of petty offense. Therefore, it recommended that the jurisdiction of magistrates remain limited to petty offense cases, although without restriction as to where an offense were committed. It also recommended that a general study be undertaken of the federal criminal laws with a view towards reducing the penalty provisions of misdemeanor statutes, where appropriate, to the level of petty offenses. The Senate Subcommittee, and later the full Senate Judiciary Committee,

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<sup>47</sup> The preference for full-time judicial officers is discussed generally at § 16(m)(2), *infra*.

<sup>48</sup> See JCUS-SEP 66, p. 54.

<sup>49</sup> 1967 SENATE REPORT, *supra* note 26, at 27-28.

concluded unanimously that the "heavy weight" of authority supported the constitutionality of the expanded minor offense trial jurisdiction.<sup>50</sup> Senator Tydings' revised draft bill, therefore, did not incorporate the suggestions of the Criminal Law Committee in this regard. The Criminal Law Committee ultimately recommended approval of the expanded minor offense jurisdiction in its report on the revised draft bill, S. 945.<sup>51</sup>

Fourth, at the suggestion of the Criminal Law Committee, the revised bill deleted provisions empowering magistrates to try defendants under the provisions of the juvenile delinquency and youth offender statutes. The Senate Judiciary Committee made the changes in recognition of the "delicate and extraordinary" nature of proceedings under those statutes that could culminate in the confinement of juveniles or youth offenders by a magistrate for a period considerably beyond the proposed one-year limit on a magistrate's general sentencing authority.<sup>52</sup>

#### **d. Approval of the Federal Magistrates Act of 1968**

##### **(1) Senate Consideration**

A final version of the magistrate legislation, reflecting changes in S. 3475 suggested by the Criminal Law Committee and by witnesses at the 1966 hearings, was introduced by Senator Tydings at the opening of the new Congress in February 1967. The Subcommittee on Improvements in Judicial Machinery conducted an additional one-day hearing on the bill in May 1967.<sup>53</sup>

The Senate Judiciary Committee approved S. 945 on June 28, 1967, making a number of additional changes in the bill. It amended the definition of a "minor offense" to specifically exclude from the magistrates' criminal trial jurisdiction certain "political" offenses of a sensitive nature; provided greater discretion to the district courts in designating magistrates to try minor offenses and to condition the terms of the designation; amended the trial jurisdiction provision to prescribe more fully the information that a magistrate must provide to a defendant before obtaining consent to trial; added a new subsection to specify that a defendant convicted by a magistrate has the right of appeal to a judge of the district court; and added an exemption to the requirement for mandatory retirement at age 70 to allow for continued service of a magistrate beyond that age if the judges of the appointing court unanimously agree.

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<sup>50</sup> *Id.* at 30-32. See Staff Memorandum, *The Constitutionality of Trial of Minor Offenses by U.S. Magistrates*, reprinted at 1966-67 Senate Hearings, *supra* note 10, at 246-56.

<sup>51</sup> 1966-67 Senate Hearings, *supra* note 10, at 245.

<sup>52</sup> 1967 SENATE REPORT, *supra* note 26, at 32; 1966-67 Senate Hearings, *supra* note 10, at 242-43.

<sup>53</sup> 1966-67 Senate Hearings, *supra* note 10, starting at 237.

The Senate Judiciary Committee report summarized the purposes of the bill as "both to update and make more effective a system that has not been altered basically for over a century, and to cull from the ever-growing workload of the U.S. district courts matters that are more desirably performed by a lower tier of judicial officers."<sup>54</sup> The bill was brought to the Senate floor and passed unanimously on June 29, 1967, without debate.

## (2) House Consideration

In the House of Representatives, Subcommittee No. 4 of the Judiciary Committee held hearings on S. 945 on March 7 and 13, 1968.<sup>55</sup> Since the Senate hearings had produced voluminous evidence as to the merits of the legislation, the hearings in the House were confined largely to suggestions for technical improvements in S. 945.

One of the more difficult questions raised during the Senate hearings had been the proposed expansion of the criminal trial jurisdiction to include offenses punishable by up to one year's imprisonment and/or a fine of \$1,000. In a letter entered into the record at the commencement of the House hearings, the Deputy Attorney General noted that the expanded trial jurisdiction constituted "the heart of the bill." He stated that the Department of Justice had resolved its earlier doubts and was now convinced that the legislation was constitutional.<sup>56</sup>

The constitutional questions relating to the expanded trial jurisdiction of magistrates were given particular attention by the House Judiciary Subcommittee. The members concurred in the analyses of the Senate and concluded that the new jurisdiction was constitutional, emphasizing that "the magistrate is an officer of the U.S. district court, is appointed by the article III judges of the court and subject at all times to the directions and control of the judges."<sup>57</sup> The Subcommittee also clarified several references in the bill regarding conflict-of-interest provisions and the removal of a magistrate for cause.

The House Subcommittee added a provision guaranteeing job security to magistrates who might be called to active military service. Several congressmen urged adoption of an amendment to permit the transfer of a magistrate to another district, or the appointment of "temporary magistrates," in emergency situations. The legislation, though, was not amended to include

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<sup>54</sup> 1967 SENATE REPORT, *supra* note 26, at 9.

<sup>55</sup> *Federal Magistrates Act: Hearings on S. 945 et al Before Subcomm. No. 4 of the House Comm. on the Judiciary*, 90th Cong., 1st Sess. (1968).

<sup>56</sup> *Id.* at 61-63.

<sup>57</sup> 1968 HOUSE REPORT, *supra* note 3, at 21. See Staff Memorandum, *The Constitutionality of Trial of Minor Offenses by U.S. Magistrates*, at 1966-67 Senate Hearings, *supra* note 10, at 246-56.

provisions to this effect.

The House Committee on the Judiciary issued its report on S. 945 on July 3, 1968.<sup>58</sup> The changes recommended by the committee were generally minor in nature, such as transferring responsibility for the training of magistrates from the Director of the Administrative Office to the newly-created Federal Judicial Center. The House Judiciary Committee, in approving the legislation, concluded that the new federal magistrates system would be capable of "increasing the overall efficiency of the Federal judiciary, while at the same time providing a higher standard of justice at the point where many individuals first come into contact with the courts."<sup>59</sup>

The report of the House Judiciary Committee also contained the first legislative dissent from the Federal Magistrates Act. Representative Cahill of New Jersey expressed the view that the proposal was unconstitutional and "represent[ed] an unprecedented attempt to thrust the Federal judiciary into politics." He stated that the Constitution did not specifically authorize a magistrate system, but did guarantee federal judges lifetime tenure and salary protection. He further noted that the Constitution vested the power to appoint officers of the United States in the President, with the advice and consent of the Senate.<sup>60</sup>

The House of Representatives passed the bill on September 26, 1968, by a vote of 172 to 21. The Senate took up the amended version on October 3, and without further debate it unanimously agreed to the revisions in the bill made by the House of Representatives. On October 17, 1968, President Johnson signed the Federal Magistrates Act into law.<sup>61</sup>

#### **e. Jurisdictional Provisions of the 1968 Act**

As enacted, the jurisdictional section of the Federal Magistrates Act provided United States magistrates with authority to perform three basic categories of judicial duties: (a) all the powers and duties formerly exercised by the United States commissioners; (b) the trial and disposition of "minor" criminal offenses; and (c) "such additional duties as are not inconsistent with the Constitution and laws of the United States."

##### **(1) Commissioner-type Powers and Duties**

In establishing the office of United States magistrate, the Federal Magistrates Act built upon and superseded the 175 year old United States commissioner system. The Senate Judiciary

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<sup>58</sup> 1968 HOUSE REPORT, *supra* note 3.

<sup>59</sup> *Id.* at 14.

<sup>60</sup> *Id.* at 44-47.

<sup>61</sup> [Pub. L. No. 90-578, 82 Stat. 1107 \(1968\)](#).

Committee did not wish to discard the old system entirely:

Although the present U.S. commissioner system is in many ways defective, your committee believes it is neither practical nor desirable simply to abolish the commissioner system and transfer the functions now performed by that office to the U.S. district court judges, who are already overburdened by their present duties and not geographically situated to service the needs of remote areas of the country.<sup>62</sup>

The Federal Magistrates Act therefore included [28 U.S.C. § 636\(a\)](#), authorizing magistrates to exercise all powers and duties conferred or imposed upon commissioners by law or by the Federal Rules of Criminal Procedure. These duties are discussed in detail in the [Inventory of United States Magistrate Judges Duties](#).<sup>63</sup>

## (2) Criminal Trial Duties

Since 1940 U.S. commissioners had been authorized to try petty offense cases arising solely from federal enclaves. The Federal Magistrates Act amended [28 U.S.C. § 636\(a\)](#) and [18 U.S.C. § 3401](#) to provide magistrates with more extensive trial authority. Magistrates could try certain "minor offenses" without regard to where the offense was alleged to have been committed.

The term "minor offenses," as defined by amended section 3401(f), included certain misdemeanors punishable by imprisonment not exceeding one year, or a fine not exceeding \$1,000, or both. The magistrate's authority, however, was contingent upon: (1) the magistrate's special designation by the district court to try minor offenses; (2) the defendant's written consent to be tried before the magistrate; and (3) the defendant's specific waiver of the right to trial before a district judge and of any right to trial by jury.

The constitutionality of the criminal trial provisions of the Federal Magistrates Act was studied and discussed in great detail by both the Senate and House committees.<sup>64</sup> However, a severability provision [Title V of the Act] was added to the bill "in the unlikely event that a constitutional challenge to the [expanded minor offense] jurisdiction is sustained."<sup>65</sup>

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<sup>62</sup> 1967 SENATE REPORT, *supra* note 26, at 11.

<sup>63</sup> [http://jnet.ao.dcn/Judges/Magistrate\\_Judges/Authority/Inventory.html](http://jnet.ao.dcn/Judges/Magistrate_Judges/Authority/Inventory.html)

<sup>64</sup> *See supra* notes 50, 55 and 56 and accompanying text.

<sup>65</sup> 1967 SENATE REPORT, *supra* note 26, at 8.

### (3) Additional Duties

In enacting the Federal Magistrates Act in 1968, Congress intended to upgrade the system of judicial officers below the level of the district judge. In addition to the powers previously conferred upon U.S. commissioners, the Act created [28 U.S.C. § 636\(b\)](#) to permit courts to assign to magistrates "such additional duties as are not inconsistent with the Constitution and laws of the United States," including:

- (1) service as a special master in an appropriate civil action, pursuant to the Federal Rules of Civil Procedure;<sup>66</sup>
- (2) assistance to a district judge in the conduct of pretrial or discovery proceedings in civil or criminal actions; and
- (3) preliminary review of applications for posttrial relief made by individuals convicted of criminal offenses, and submission of a report and recommendations to facilitate the decision of the district judge having jurisdiction over the case as to whether there should be a hearing.<sup>67</sup>

The legislative history of the bill emphasized that the "additional duties" that could be delegated by district judges to United States magistrates under 28 U.S.C. § 636(b) were not limited to the specific functions listed in that subsection of the statute. "The mention of these three categories is intended to illustrate the general character of duties assignable to magistrates under the act, rather than to constitute an exclusive specification of duties so assignable."<sup>68</sup>

The Senate committee report discussed at length the flexibility with which courts could delegate additional duties to magistrates:

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<sup>66</sup> The requirement that a special master serve pursuant to the conditions imposed by [Fed. R. Crim. P. 53](#) was added as a clarification in response to comments made by the Criminal Law Committee. This requirement was meant to "protect against any abdication of the decisionmaking responsibility that is properly that of the district courts." 1967 SENATE REPORT, *supra* note 26, at 25. See also Staff Memorandum, *Restrictions on the Use of Special Masters*, reprinted in *1966-67 Senate Hearings*, *supra* note 10, at 281-83.

<sup>67</sup> The legislative history explained that a qualified, experienced magistrate would likely acquire an expertise reviewing prisoner petitions for district judges. "It is hoped that assignment of this function to magistrates will afford some degree of relief to district judges and their law clerks, who are presently burdened with burgeoning numbers of habeas corpus petitions and applications..." 1967 SENATE REPORT, *supra* note 26, at 26.

<sup>68</sup> 1968 HOUSE REPORT, *supra* note 3, at 19; 1967 SENATE REPORT, *supra* note 26, at 25.



It seems unwise to your committee to require that the district courts give magistrates duties other than those traditionally performed by commissioners. It is hoped, however, that in their discretion the district courts will find it useful to lighten their own burden in this way.

If district judges are willing to experiment with the assignment to magistrates of other functions in aid of the business of the courts, your committee believes that there will be increased time available to judges for the careful and unhurried performance of their vital and traditional adjudicatory duties, and a consequent benefit to both efficiency and the quality of justice in the Federal courts. Your committee wishes to emphasize that this provision of the act permitting assignments to magistrates cannot be read in derogation of the fundamental responsibility of judges to decide the cases before them; instead it contemplates assignments to magistrates under circumstances where the ultimate decision of the case is reserved to the judge, except in those instances where action can properly be taken by a nonarticle III judge. The duties assignable to magistrates under section 636(b) are intended to supplement, rather than supplant, the duties imposed upon these officers in other provisions of the act. It is not anticipated that magistrates will be assigned additional duties under section 636(b) to such a degree that interference with their specific statutory functions will result....<sup>69</sup>

The additional duties provision of section 636(b), however, restricted the exercise of such authority to "any full-time United States magistrate, or, where there is no full-time magistrate reasonably available, any part-time magistrate specially designated by the court...." The 1967 Senate report briefly discusses the restrictions imposed on part-time magistrates: "It is anticipated that this provision will be used by the district courts mainly to make assignments to full-time magistrates, but the act also permits the assignment of additional duties to any part-time magistrate when there is no full-time U.S. magistrate reasonably available."<sup>70</sup>

The provision also included a requirement that additional duties be assigned to magistrates only pursuant to local rules adopted by a majority of the district court judges:

No individual judge may give a magistrate additional duties that are not authorized by these rules. Involving the entire court in the process by which responsibilities under subsection 636(b) are assigned not only guards against the possibility that a magistrate may be given additional duties that unduly interfere with the performance of his regular responsibilities, but also reduces the possibility that a magistrate will be given conflicting assignments by

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<sup>69</sup> 1967 SENATE REPORT, *supra* note 26, at 26.

<sup>70</sup> *Id.* at 24.

different judges of the court. Furthermore, providing that assignments are to be governed by rule of court protects against potential abuses of the assignment power by individual judges who, in misguided attempts to expedite the business before them, might unwittingly delegate to magistrates responsibilities that are more properly discharged by the judge.<sup>71</sup>

#### **4. Implementation of the Magistrates System**

##### **a. Establishment of Magistrate Positions**

The Federal Magistrates Act empowered the Judicial Conference to provide for changes in the number, locations, and salaries of full-time and part-time magistrates. The Senate report states as follows:

Your committee declares its hope that the Conference will establish and maintain a system of U.S. magistrates that is flexible enough to continually meet the demands of a dynamic society. The dissolution of a particular magistracy, its consolidation with another, a change of location, the creation of a new position, or the adjustment of a magistrate's salary -- each of these actions ought to follow promptly the recognition that the change is desirable. Congressional action on each and every minor change would be time consuming and inappropriate. The authority to promulgate such changes in a system the quantitative incidents of which it established belongs to the Judicial Conference of the United States, both as a logical extension of its authority to establish the number, location, and salaries of magistrates, and as a necessary expedient in insuring prompt response to manifest needs.<sup>72</sup>

Changes could be made with or without a prior survey by the Director of the Administrative Office.

The magistrates system was quickly established in five pilot districts and the first United States magistrate took office on May 1, 1969. Nationwide surveys were then conducted by the Administrative Office to determine the needs of each district court for magistrate services. Following consideration of the surveys, the Judicial Conference in 1970 authorized the district courts to fill 542 positions: 82 full-time magistrate positions, 449 part-time magistrate positions, and 11 "combination" positions - in which part-time referees in bankruptcy or clerks or deputy clerks of court serve concurrently as part-time magistrates.<sup>73</sup>

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<sup>71</sup> *Id.* at 24-25.

<sup>72</sup> 1967 SENATE REPORT, *supra* note 26, at 21.

<sup>73</sup> JCUS-OCT 70, pp. 67-70.

The 542 magistrate positions authorized by the Judicial Conference replaced more than 700 United States commissioner and "national park commissioner" positions. After the appropriation of funds by the Congress, appointments to the United States magistrate positions across the country began to be made by the courts in late 1970. By July 1, 1971, the United States magistrates system had replaced the commissioner system in all the district courts.

#### **b. Administration and Oversight**

The Judicial Conference and the Administrative Office of the United States Courts began implementing the new legislation shortly after its enactment. The Conference established a committee of judges to oversee the development of the magistrates system, and the Director of the Administrative Office established the Magistrates Division to administer the program.<sup>74</sup>

Administrative regulations governing the daily operation of the magistrates system were approved; jurisdictional guidelines and model local rules for the delegation of duties to magistrates were distributed to the courts; and various educational programs were presented to acquaint judges with the potential uses of magistrates. Rules of procedure to govern the trial of minor offenses before magistrates were approved by the Supreme Court on May 19, 1969.<sup>75</sup>

At its March 1969 session the Judicial Conference adopted the first six conflict-of-interest rules to define the conduct of part-time magistrates.<sup>76</sup> The rules preclude a part-time magistrate and his or her partners and associates from appearing in any case in which the magistrate has been involved in connection with official court duties. The rules also preclude part-time magistrates from appearing as counsel in any criminal action in any court of the United States, and their partners and associates from appearing in any criminal case in the district in which the part-time magistrate serves.

The Judicial Conference adopted a seventh rule on the floor of its meeting in October 1969.<sup>77</sup> Rule 7 prohibits a part-time magistrate who is assigned additional duties pursuant to [28 U.S.C.](#)

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<sup>74</sup> The committee was originally called the Committee to Implement the Federal Magistrates System. Its name was changed by the Judicial Conference in 1972 to the Committee on the Administration of the Federal Magistrates System. On June 4, 1991, the Executive Committee of the Judicial Conference changed the name to the Committee on the Administration of the Magistrate Judges System in order to reflect the legislative change in title to magistrate judge.

<sup>75</sup> 395 U.S. 989 (1969).

<sup>76</sup> JCUS-MAR 69, pp. 32-33. The Conflict-of-Interest Rules for Part-Time Magistrate Judges, as amended, are located in Vol. II, Ch. III of the *Guide to Judiciary Policies and Procedures*.

<sup>77</sup> *Id.* at 79.

[§ 636\(b\)](#) from appearing as counsel in any case, civil or criminal, in the district court for which he or she is appointed. Excepted from the prohibition are part-time magistrates whose additional assignments are limited to the review of prisoner petitions or service as a special master in a specified case.<sup>78</sup>

The Judicial Conference did not comment upon its intent in enacting rule 7 of the conflict-of-interest rules until its meeting in March 1977:

The rule was adopted in recognition of expressed concerns that it would be inappropriate to assign substantial "additional duties" to a lawyer practicing before the court which he serves. The Conference considered the possible appearance of favoritism, as well as the potential discomfort that a private attorney might feel, when opposing counsel in one case is the same individual who will prepare an important ruling or conduct a pretrial conference in another case in which the attorney has an interest.

Technically, any duty which could not be performed by a United States Commissioner or is not listed in [28 U.S.C. §636\(a\)](#) may be denominated an "additional duty," and thus fall within the scope of Conflict-of-Interest Rule 7.<sup>79</sup>

The Conference at that time agreed to expand the rule 7 exceptions to the prohibition on the performance of additional duties by part-time magistrates to include the receipt of indictments returned by grand juries and the conduct of arraignments.<sup>80</sup>

Rule 8 of the conflict-of-interest rules was adopted by the Judicial Conference in October 1972.<sup>81</sup> This rule prevents part-time magistrates from using their office to promote their private law practice, and from including their official title on the letterhead for their private practices.

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<sup>78</sup> Since rule 7 was adopted on the floor of the Judicial Conference without definitive recommendations by the Magistrates Committee, no reports exist to provide insight into why prisoner matters were excepted from the general prohibitions of the rule. In July 1978, the Magistrates Committee reviewed rule 7 and determined that the exception should not be expanded to allow part-time magistrates who practice law in federal court to conduct evidentiary hearings in prisoner cases.

<sup>79</sup> JCUS-MAR 77, p. 27.

<sup>80</sup> *Id.* at 28.

<sup>81</sup> JCUS-OCT 72, pp. 67-68.

Both Congress and the Judicial Conference have expressed continuing concern over the appearance of impropriety resulting from the performance of judicial functions by part-time judicial officers who continue to maintain a private law practice. This concern is reflected in the Conference's on-going implementation through the survey process of the preference for a system of primarily full-time magistrates; *see* § 16 (m)(2), *infra*.

## 5. The 1972 Amendments

### a. Salary

The 1968 Act authorized the Judicial Conference to set the salaries of full-time and part-time magistrates at the same rates as those authorized for referees in bankruptcy. Through drafting oversight, however, the legislation neglected to provide a mechanism for the Judicial Conference to make periodic adjustments in magistrates' salaries.<sup>82</sup> Accordingly, the salaries of magistrates were "capped" by law at a fixed maximum of \$22,500 for a full-time magistrate and \$11,000 for a part-time magistrate, while the compensation of referees in bankruptcy and other federal officers and employees increased periodically.<sup>83</sup>

In 1971 legislation was introduced at the request of the Judicial Conference to correct the oversight in the 1968 Act and restore parity between magistrates and referees in bankruptcy.<sup>84</sup> The bill was approved by the House Judiciary Committee on May 2, 1972. On the floor of the House, however, an amendment was added to limit the maximum salary of a full-time magistrate to 75 percent of a district judge's salary. As amended, the legislation passed the House of Representatives on May 1, 1972.

The Senate Judiciary Committee approved the bill on August 16, 1972, with a further amendment fixing the maximum salary for a part-time magistrate at \$15,000. The Committee

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<sup>82</sup> *See* H.R. REP. NO. 1037, 92d Cong., 2d Sess. 2 (1972).

<sup>83</sup> Under the Federal Salary Act of 1967 as amended, a Citizens' Commission on Public Service and Compensation is formed every four years to make recommendations to the President on the appropriate level of compensation for the Vice President and for positions in the Executive Branch from Cabinet offices through Level V of the Executive pay scale, for members of Congress, and for Supreme Court justices, judges, and other members of the judiciary except bankruptcy judges. [2 U.S.C.A. § 351](#) *et seq.* (West 1992). The Commission makes its recommendations to the President, who in turn submits recommendations to Congress at the beginning of the calendar year. Congress amended the Salary Act in 1978 to give the Commission jurisdiction to make recommendations as to the salaries of magistrates, effective October 1, 1979.

<sup>84</sup> [H.R. 7375](#), 92d Cong., 1st Sess. (1971).

imposed the ceiling on part-time salaries in order to encourage the Judicial Conference to create more full-time magistrate positions. Stressing the "expressed Congressional intent to create and maintain a system of as many full-time magistrates as possible," it urged the Judicial Conference to establish more full-time magistrate positions and decrease the number of part-time positions.<sup>85</sup> Although the Committee acknowledged that in most areas it was "better economics" for an individual to remain a part-time magistrate and a part-time lawyer, it stated that the possible conflict-of-interest problems inherent in the office of part-time judicial officers should be avoided.<sup>86</sup>

The House concurred in the Senate amendments, and the legislation was signed into law on September 21, 1972.<sup>87</sup>

#### **b. Inter-district Assignments of Magistrates**

The Federal Magistrates Act of 1968 made no provision for the temporary assignment of magistrates from one district to another to meet emergency situations and caseload backlogs. An amendment to [28 U.S.C. § 636](#) was introduced in the 92d Congress to provide that "in an emergency and upon the concurrence of the chief judges of the districts involved," a magistrate may be temporarily assigned to perform duties in a district other than the district of the magistrate's appointment.<sup>88</sup>

The measure received the support of the Administrative Office and the Department of Justice, and was approved by the Judicial Conference in October 1971.<sup>89</sup> The bill was signed into law on

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<sup>85</sup> S. REP. NO. 1065, 92d Cong., 2d Sess. 4 (1972), *reprinted in* [1972 U.S.C.C.A.N. 3350](#), 3353; *Magistrate System: Hearing on H.R. 7375 Before the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary*, 92d Cong., 2d Sess. 2, 16-20, 24-27, 33, 45-49 (1972). In 1977 and 1979, the Senate Subcommittee reiterated the view that the Judicial Conference should do more to create additional full-time magistrate positions. S. REP. NO. 344, 95th Cong., 1st Sess. 7-8 (1977) [hereinafter cited as 1977 SENATE REPORT]; S. REP. NO. 74, 96th Cong., 1st Sess. 7-9 (1979), *reprinted in* [1979 U.S.C.C.A.N. 1469](#), 1476-77 [hereinafter cited as 1979 SENATE REPORT]. The Judicial Conference has on several occasions taken actions to follow the Congressional mandate; *see generally* § 16(m)(2), *infra*.

<sup>86</sup> S. REP. NO. 1065, 92d Cong., 2d Sess. 4 (1972).

<sup>87</sup> [Pub. L. No. 92-428](#), [86 Stat. 721 \(1972\)](#), codified as amended at [28 U.S.C. § 634\(a\) \(1988\)](#).

<sup>88</sup> [H.R. 9180](#), 92d Cong., 1st Sess. (1971).

<sup>89</sup> S. REP. NO. 617, 92d Cong., 2d Sess. 2 (1972).

March 1, 1972.<sup>90</sup>

In March 1998, upon a recommendation of the Magistrate Judges Committee, which was based on in part on input from the circuit judicial councils, the Judicial Conference approved written standards and procedures for inter-district assignments under the title, Judicial Conference Guidelines for Intracircuit and Intercircuit Assignments of United States Magistrate Judges.

## 6. Jurisdictional Uncertainty

The "additional duties" subsection of the 1968 Act proved to be inadequately drawn, resulting in conflicting opinions among the courts of appeals as to the specific types of judicial proceedings that district judges could appropriately delegate to United States magistrates under 28 U.S.C. § 636(b).

Several circuit court decisions invalidated references of a wide range of duties to magistrates under 28 U.S.C. § 636(b).<sup>91</sup> The appellate court decisions invalidating references to magistrates were based on purely statutory, rather than constitutional, grounds. Nevertheless, several decisions expressed concern as a matter of policy over the potential abdication of judicial responsibilities by district judges in delegating decision-making to magistrates.

Other decisions of the courts of appeals upheld an equally wide variety of references to magistrates under the pertinent statute.<sup>92</sup> Special master references to magistrates were approved in individual cases in accordance with the strictures of the Federal Rules of Civil Procedure. Several courts of appeals also spoke approvingly of the assistance that magistrates had provided to the district courts in expediting litigation.

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<sup>90</sup> [Pub. L. No. 92-239](#), §§ 1, 2, [86 Stat. 47 \(1972\)](#), codified as amended at [28 U.S.C. § 636\(f\) \(1988\)](#).

<sup>91</sup> [TPO, Inc. v. McMillen](#), 460 F.2d 348 (7th Cir. 1972) (motion to dismiss); [Wedding v. Wingo](#), 483 F.2d 1131 (6th Cir. 1973), *aff'd*, 418 U.S. 461 (1974) (habeas corpus evidentiary hearing); [Ingram v. Richardson](#), 471 F.2d 1268 (6th Cir. 1972) (recommended disposition in determination of social security benefits).

<sup>92</sup> [Campbell v. United States District Court](#), 501 F.2d 196 (9th Cir.), *cert. denied*, 419 U.S. 879 (1974) (motion to suppress); [Givens v. W.T. Grant Co.](#), 457 F.2d 612 (2d Cir.), *vacated on other grounds*, 409 U.S. 56 (1972) (motion to dismiss); [Remington Arms Co. v. United States](#), 461 F.2d 1268 (2d Cir. 1972) (motion for summary judgment); and [Noorlander v. Ciccone](#), 489 F.2d 642 (8th Cir. 1973) (habeas corpus evidentiary hearing).

Despite the appellate court differences, most district courts progressively expanded the responsibilities of magistrates,<sup>93</sup> particularly the conduct of pretrial proceedings in civil and criminal cases and the review of prisoner petitions.<sup>94</sup> In several districts the judges delegated to magistrates the function of presiding over evidentiary hearings in habeas corpus cases.

In June 1974, the Supreme Court acted for the first time on a jurisdictional issue affecting magistrates and resolved the intercircuit conflict that had developed regarding the authority of magistrates in habeas corpus cases.<sup>95</sup> In *Wingo v. Wedding*,<sup>96</sup> the Court held by a vote of 7 to 2 that under the Habeas Corpus Act<sup>97</sup> and subsection 636(b)(3) of the Federal Magistrates Act, a district judge lacked authority to designate a magistrate to conduct an evidentiary hearing in a habeas corpus action.

In January 1976 the Supreme Court resolved another intercircuit conflict<sup>98</sup> and ruled unanimously that a preliminary review and submission by a magistrate of a report and recommended disposition in a social security appeal was a reference falling "well within the range of duties Congress empowered the district courts to assign" to magistrates.<sup>99</sup>

## 7. Impetus for Redrafting the Jurisdictional Provisions of the Federal Magistrates Act

The Supreme Court decision in *Wingo v. Wedding* proved to be the principal catalyst for legislative reformulation of the "additional duties" jurisdiction of magistrates. Chief Justice Burger pointed the way in his vigorous dissent in the case, in which he expressly invited the Congress to enact new legislation:

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<sup>93</sup> S. REP. NO. 625, 94th Cong., 2d Sess. 3 (1976) [hereinafter cited as 1976 SENATE REPORT]. See also [1974] DIR. AD. OFF. U.S. CTS. ANN. REP. 149-51.

<sup>94</sup> [1974] DIR. AD. OFF. U.S. CTS. ANN. REP. 146.

<sup>95</sup> Compare [Noorlander v. Ciccone](#), 489 F.2d 642 (8th Cir. 1973), with [Wedding v. Wingo](#), 483 F.2d 1131 (6th Cir. 1973), *aff'd*, 418 U.S. 461 (1974) and [Rainha v. Cassidy](#), 454 F.2d 207 (1st Cir. 1972).

<sup>96</sup> [418 U.S. 461 \(1974\)](#).

<sup>97</sup> [28 U.S.C. § 2241-2255 \(1988\)](#).

<sup>98</sup> Compare [Yascavage v. Weinberger](#), 379 F. Supp. 1297 (M.D. Pa. 1974), with [Ingram v. Richardson](#), 471 F.2d 1268 (6th Cir. 1972).

<sup>99</sup> [Mathews v. Weber](#), 423 U.S. 261, 270 (1976).



In any event, now that the Court has construed the Magistrates Act contrary to a clear legislative intent, it is for the Congress to act to restate its intentions if its declared objectives are to be carried out.<sup>100</sup>

The Supreme Court decision in *Wingo v. Wedding* and the continuing conflict in the decisional law interpreting the jurisdictional provisions of the 1968 Act, however, were not the only factors leading to eventual amendment of the statute. Several other events also provided an impetus for clarification and expansion of the jurisdiction of magistrates.

**General Accounting Office Report.** In September 1974 the Comptroller General submitted a report to the Congress on the operation of the federal magistrates system in which he recommended, in part: (1) that the Judicial Conference take the lead in encouraging district judges to make greater use of magistrates under the existing law; (2) that the Congress further define the "additional duties" jurisdiction of magistrates; and (3) that the Congress expand the criminal trial jurisdiction of magistrates to include more misdemeanors.<sup>101</sup>

**English Visit.** In early 1974 a delegation of district judges and magistrates visited England to study the operation of masters in the English judicial system. In the Queen's Bench Division of the High Court of Justice masters handle all preliminary matters and dispose of the great majority of civil cases filed in the court, without the need for action by a judge.<sup>102</sup> The delegation published a report in September 1974 praising the effectiveness of the English procedures and expressing confidence that the federal district courts could duplicate the successful English experience through the greater use of United States magistrates.<sup>103</sup>

**Growing Caseloads.** In addition to normal, across-the-board increases in judicial business, several laws creating new federal causes of action were passed by the Congress, giving greater access to the federal trial courts.<sup>104</sup> The continuing press of business appeared to require the reference of

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<sup>100</sup> [Wingo v. Wedding, 418 U.S. 461, 487 \(1974\)](#) (Burger, C.J., dissenting).

<sup>101</sup> Report to the Congress by the Comptroller General of the U.S., *The U.S. Magistrates: How Their Services Have Assisted Administration of Several District Courts: More Improvements Needed*, 19 (1974) (No. B-133322).

<sup>102</sup> See Silberman, *Masters and Magistrates, Part 1: The English Model*, 50 N.Y.U. L. REV. 1070, 1079-1104 (1975).

<sup>103</sup> Kirks, Metzner, King, Hatchett, Schreiber & Sensenich, *Report of the Committee to Study the Role of Masters in the English Judicial System* (Federal Judicial Center 1974).

<sup>104</sup> See, e.g., Freedom of Information Act (1967), as amended at [5 U.S.C. § 552 \(1988\)](#); Occupational Health and Safety Act (1970), as amended [29 U.S.C.A. §§ 651 et seq](#) (West Supp. 1991); Equal Employment Opportunity Act [Title

additional work to magistrates if the courts were to be able to cope with their growing and increasingly complex caseloads.

***Speedy Trial Act.*** The implementation of the Speedy Trial Act<sup>105</sup> in January 1975, which imposed strict deadlines and requirements for the conduct of proceedings in federal criminal cases, heightened existing docket pressures and necessitated adjustments in district court procedures and scheduling. The Magistrates Committee was well aware of the impact of the Act when it proposed draft language to amend the Federal Magistrates Act to the Conference:

It is mandatory that the district courts make greater use of their magistrates if the guidelines of the bill are to be achieved without further drastically increasing the size of the judiciary.<sup>106</sup>

## **8. The Jurisdictional Amendments of 1976**

### **a. Senate Consideration**

In March 1975 the Judicial Conference proposed draft legislation to clarify and expand the jurisdiction of magistrates by replacing section 636(b) of the 1968 Act with a completely new jurisdictional provision authorizing a judge, *inter alia*, to designate a magistrate to handle "any pretrial matter" pending in the district court.<sup>107</sup> On March 21, 1975, Senator Quentin Burdick

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VII] (1972), as amended at [42 U.S.C. § 2000e \(1988\)](#); Consumer Credit Protection Act (1968), as amended at [15 U.S.C.A. § 1601](#) et seq. (West Supp. 1991); Fair Credit Reporting Act (1970), as amended at [15 U.S.C.A. §§ 1681a et seq](#) (West Supp. 1991);; and the Consumer Product Safety Act (1972), as amended at [15 U.S.C.A. §§ 2051 et seq](#) (West Supp. 1991).

<sup>105</sup> [Pub. L. No. 93-619](#), Title 1, § 101, [88 Stat. 2076 \(1975\)](#), codified as amended at [18 U.S.C.A. §§ 3161 et seq](#) (West Supp. 1991).

<sup>106</sup> *Reprinted in Jurisdiction of United States Magistrates: Hearings on S. 1283 Before the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary, 94th Cong., 1st Sess. 4 (1975) [hereinafter cited as 1975 Senate Hearings].*

<sup>107</sup> JCUS-MAR 75, pp. 31-32. The Conference also approved a draft bill to eliminate the requirement that a defendant in a petty offense case execute a written waiver of his right to be tried by a district judge and consent to be tried before a magistrate. The Conference noted that H.R. 14535, 93d Congress, which it had previously approved, had been resubmitted in the 94th Congress. The bill would have expanded the trial jurisdiction of magistrates to include misdemeanors punishable by fines of up to \$5,000, exempted petty offense cases from the application of the federal juvenile delinquency statute,

introduced the legislation for the Conference as S. 1283.<sup>108</sup>

The Judicial Conference's proposed legislation was brief and general in nature.<sup>109</sup> The proposal intended to give magistrates a major role in expediting civil and criminal litigation at the pretrial stage, thereby freeing district judges "to try cases and hear important matters such as preliminary injunctions."<sup>110</sup> The staff of the Senate Judiciary Subcommittee on Improvements in Judicial Machinery proposed amendments to make the bill more specific both as to magistrates' jurisdiction and as to court procedures. The chief counsel for the Subcommittee then conferred with the Chairman of the Magistrates Committee of the Judicial Conference, with representatives of the Administrative Office, and with several magistrates and made refinements in the legislation.<sup>111</sup> Senator Burdick thereupon introduced an amended version of S. 1283 on June 17, 1975.

Brief hearings on the legislation were conducted before the Senate Subcommittee on July 16, 1975,<sup>112</sup> and additional refinements were made in the bill at the request of the Chairman of the Magistrates Committee. On February 3, 1976, S. 1283 was approved by the Judiciary Committee of the Senate.<sup>113</sup>

The bill dealt only with the "additional duties" authority of magistrates under 28 U.S.C. § 636(b), and it focused on the assistance that magistrates may provide to district judges in the conduct of pretrial proceedings.

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authorized magistrates specifically to place a defendant on probation prior to trial or plea, authorized the payment of transcript costs for indigents in certain civil proceedings conducted by magistrates, eliminated the requirement that changes approved by the Conference in magistrate positions not take effect for 60 days after they are promulgated, and clarified the law as to combination bankruptcy judge-magistrate positions. Several of these proposals were adopted, in whole or in part, in the Federal Magistrate Act of 1979. *See* §§ 11 and 12, *infra*.

<sup>108</sup> The legislation was introduced in the House of Representatives as H.R. 5575. In addition, Representative Railsback introduced the bill as part of H.R. 6150, an omnibus measure affecting the courts.

<sup>109</sup> The text of the Judicial Conference's draft bill and supporting statement are reprinted in *1975 Senate Hearings, supra* note 106, at 33.

<sup>110</sup> *Id.* at 34.

<sup>111</sup> 121 CONG. REC. 19,232 (1975).

<sup>112</sup> *1975 Senate Hearings, supra* note 106.

<sup>113</sup> 1976 SENATE REPORT, *supra* note 93.

The purpose of the bill is to amend section 636(b), title 28, United States Code, in order to clarify and further define the additional duties which may be assigned to a United States Magistrate in the discretion of a judge of the district court. These additional duties generally relate to the hearing of motions in both criminal and civil cases, including both preliminary procedural motions and certain dispositive motions. The bill provides for different procedures depending upon whether the proceeding involves a matter preliminary to trial or a motion which is dispositive of the action. In either case the order or the recommendation of the magistrate is subject to final review by a judge of the court.<sup>114</sup>

It did not affect the authority of magistrates, under [28 U.S.C. § 636\(a\)](#), to try criminal misdemeanor cases or to conduct initial proceedings in criminal cases. The bill was designed to supersede the Supreme Court's decision in *Wingo v. Wedding*, and it overruled several decisions of the courts of appeals that had invalidated various references of pretrial matters to magistrates under the jurisdictional provisions of the 1968 Act.<sup>115</sup>

The bill passed the Senate on February 5, 1976.

#### **b. House Consideration**

In the House of Representatives, S. 1283 was approved by the Judiciary Committee on September 17, 1976, with amendments designed to: (1) clarify the scope of review to be applied by a district judge to a magistrate's recommendations or determinations; and (2) incorporate the provisions of the proposed legislation into the newly enacted federal rules governing habeas corpus cases and proceedings under [28 U.S.C. § 2255](#).<sup>116</sup>

The House of Representatives passed the bill, as amended by its Judiciary Committee, on October 1, 1976, and the Senate concurred in the House amendments. The bill was signed into law on October 21, 1976.<sup>117</sup>

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<sup>114</sup> *Id.* at 1; H.R. REP. NO. 1609, 94th Cong., 2d Sess. 5-6 (1976), reprinted in [1976 U.S.C.C.A.N. 6162](#) [hereinafter cited as 1976 HOUSE REPORT].

<sup>115</sup> [Wingo v. Wedding, 418 U.S. 461 \(1974\)](#). See 1976 SENATE REPORT, *supra* note 93, at 3-4; 1976 HOUSE REPORT, *supra* note 114, at 5-6. See also § 6, *supra*.

<sup>116</sup> 1976 HOUSE REPORT, *supra* note 114, at 1-4.

<sup>117</sup> [Pub. L No. 94-577, 90 Stat. 2729 \(1976\)](#).

### c. Provisions of the 1976 Amendments

Congress determined that the 1976 amendments to the Federal Magistrates Act "will further improve the judicial system by clearly defining the additional duties which a judge of the district court may assign to a magistrate in the exercise of the discretionary power to so assign as contained in Section 636(b)...."<sup>118</sup> The 1976 amendments to the Act completely revised section 636(b), in effect deleting the language permitting the exercise of additional duties by part-time magistrates only when no full-time magistrates were available.<sup>119</sup>

Congress' goal in enacting the 1976 amendments was to expand the general authority of magistrates to handle additional duties. The Senate Judiciary Committee wrote:

Rather than constituting "an abdication of the judicial function", it seems to the committee that the use of a magistrate under the provisions of [§ 636(b)], as amended, will further the congressional intent that the magistrate assist the district judge in a variety of pretrial and preliminary matters thereby facilitating the ultimate and final exercise of the adjudicatory function at the trial of the case.<sup>120</sup>

The Senate report noted that without the assistance furnished by magistrate judges in handling additional duties for the court, district judges would have to devote a "substantial" portion of their time to various procedural matters rather than to trying cases.<sup>121</sup>

***Authority of District Judges.*** The legislation authorized individual judges of the district courts to delegate judicial duties to magistrates under four separate lines of authority set forth in [28 U.S.C. § 636\(b\)](#).

The bill revises in its entirety section 636(b) under which magistrates could be assigned certain additional duties in the discretion of the court. This discretionary power to assign additional duties to a magistrate is continued but the discretion is vested in a judge of the district court rather than in a

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<sup>118</sup> 1976 SENATE REPORT, *supra* note 93, at 6.

<sup>119</sup> *See supra* note 70 and accompanying text. The 1976 Senate and House reports do not discuss the effect of this revision upon the referral of additional duties to part-time magistrates.

<sup>120</sup> 1976 SENATE REPORT, *supra* note 93, at 5. *Accord*, 1976 HOUSE REPORT, *supra* note 114, at 7.

<sup>121</sup> 1976 SENATE REPORT, *supra* note 93, at 6. *Accord*, 1976 HOUSE REPORT, *supra* note 114, at 7.

majority of all the judges of the court. Of course the scope of any permissible additional duties to be assigned can still be agreed upon by a majority of the judges, but the bill will permit exercise of the actual power of assignment to a single judge. Since assignments are frequently made in individual cases, or on an ad hoc basis, it seems preferable to vest the power in a single judge who can execute any required order of assignment or reference.<sup>122</sup>

In addition, the legislation provided for the promulgation of local rules effectuating its provisions. The committee reports also discussed the constitutionality of the exercise of authority by non-Article III judicial officers.<sup>123</sup>

The initial sentence of the revised additional duties section begins: "Notwithstanding any provision of law to the contrary--."

This language is intended to overcome any problem which may be caused by the fact that scattered throughout the code are statutes which refer to "the judge" or "the court." It is not feasible for the Congress to change each of those terms to read "the judge or a magistrate." It is, therefore, intended that the permissible assignment of additional duties to a magistrate shall be governed by the revised section 636(b), "notwithstanding any provision of law" referring to "judge" or "court."<sup>124</sup>

This language applied to both dispositive and nondispositive matters referred under subparagraphs (A) and (B) of § 636(b)(1).

***Nondispositive Pretrial Matters.*** The legislation authorized a judge to designate a magistrate to "hear and determine" with finality any pretrial matter in a civil or criminal case, except for eight enumerated classes of motions which were viewed as "dispositive," or effectively dispositive of

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<sup>122</sup> 1976 SENATE REPORT, *supra* note 93, at 7. *Accord*, 1976 HOUSE REPORT, *supra* note 114, at 9. The original provision enacted in 1968 required additional duties to be referred to magistrates pursuant to rules adopted by a majority of the district court judges; *see generally* note 70 and accompanying text.

<sup>123</sup> 1976 SENATE REPORT, *supra* note 93, at 6. *Accord*, 1976 HOUSE REPORT, *supra* note 114, at 8.

<sup>124</sup> 1976 SENATE REPORT, *supra* note 93, at 7. *Accord*, 1976 HOUSE REPORT, *supra* note 114, at 9.

litigation.<sup>125</sup> The Senate Judiciary Committee defined the scope of the phrase "any pretrial matter" to include "a great variety of preliminary motions and matters which can arise in the preliminary processing of either a criminal or a civil case."<sup>126</sup>

A magistrate's order would be subject to review by a district judge under the "clearly erroneous or contrary to law" standard. The use of the phrase "[a] judge may reconsider" any order entered by a magistrate on a nondispositive pretrial matter was intended to convey the Congressional intent that such matters need not be heard a second time by a district judge:

However, if a party requests reconsideration based upon a showing that the magistrate's order is clearly erroneous or contrary to law then the judge must reconsider the matter. Of course, the judge has the inherent power to rehear or reconsider a matter sua sponte.<sup>127</sup>

The legislative history emphasized that a magistrate's order under subparagraph (A) of the revised section was final, subject only to the ultimate right of review by a district court judge.

***Dispositive Motions and Prisoner Matters.*** Subparagraph (B) of the revised section authorized a judge to designate a magistrate to conduct hearings on prisoner petitions or on any of the eight categories of excepted dispositive motions and file recommended findings of fact and a recommended disposition with the judge:

The authority of the magistrate under subparagraph (B) is clearly more than authority to make a "preliminary review". It is the authority to conduct hearings and where necessary to receive evidence relevant to the issues involved in these matters. Therefore, passage of S. 1283, as amended, will supply the congressional intent found wanting by the Supreme Court in

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<sup>125</sup> Motions for injunctive relief, for judgment on the pleadings, for summary judgment, to dismiss or quash an indictment or information made by the defendant, to suppress evidence in a criminal case, to dismiss or to permit maintenance of a class action, to dismiss for failure to state a claim upon which relief can be granted, and to involuntarily dismiss an action for failure to comply with an order of the court.

<sup>126</sup> 1976 SENATE REPORT, *supra* note 93, at 7. *Accord*, 1976 HOUSE REPORT, *supra* note 114, at 9. *See generally* § 3.03(b), *infra*, and cases listed therein. Some courts have occasionally referred postjudgment duties under § 636(b)(1)(A); *see infra* § 3(c).

<sup>127</sup> 1976 SENATE REPORT, *supra* note 93, at 8. *Accord*, 1976 HOUSE REPORT, *supra* note 114, at 10.

*Wingo v. Wedding*....<sup>128</sup>

The revised section would also permit a judge to refer to a magistrate "for consideration and study" social security cases challenging a determination of entitlement to benefits.

The expanded authority of magistrates to hold evidentiary hearings in prisoner cases and to submit findings of fact and conclusions of law to a district judge received the support of many witnesses during 17 days of hearing on the judicial system. The House report stated:

The vast majority of the chief judges who testified stated that the magistrates were of assistance to the court in handling certain preliminary matters in both civil and criminal cases, and were of greatest assistance in handling petitions for the issuance of a writ of habeas corpus made by both state and federal prisoners in an effort to obtain a collateral review of the original conviction. A few of the district courts which had not made extensive use of the services of the magistrates were encouraged to do so as a means of freeing time of district court judges to preside at trials of other cases.<sup>129</sup>

The bill before the Senate Judiciary Committee did not include the "de novo determination" standard of review ultimately contained in subparagraph (C) of the legislation signed into law.<sup>130</sup> However, the report did discuss the sentence providing that a district judge "may accept, reject or modify," in whole or in part, a magistrate's findings and recommendations.

The judge is given the widest discretion to "accept, reject or modify" the findings and recommendation proposed by the magistrate, including the power to remand with instructions. Thus, it will be seen that under subparagraph (B) and (C) the ultimate adjudicatory power over dispositive motions, habeas corpus, prisoner petitions and the like is exercised by a judge of the court after receiving assistance from and the recommendation of the magistrate.<sup>131</sup>

***De Novo Determination.*** The House amendments clarified the intent of the Congress that a district judge must make a "de novo determination" of a magistrate's recommendations on case-dispositive motions. In other words, "the district judge in making the ultimate determination of

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<sup>128</sup> 1976 SENATE REPORT, *supra* note 93, at 9. *Accord*, 1976 HOUSE REPORT, *supra* note 114, at 11.

<sup>129</sup> 1976 HOUSE REPORT, *supra* note 114, at 4.

<sup>130</sup> 1976 SENATE REPORT, *supra* note 93, at 10.

<sup>131</sup> *Id. Accord*, 1976 HOUSE REPORT, *supra* note 114, at 11.



the matter, would have to give fresh consideration to those issues to which specific objection has been made by a party."<sup>132</sup> The House Judiciary Committee emphasized, however, that the use of the words "de novo determination" in the legislation was not intended to require the judge to actually conduct a new hearing on contested issues.

Normally, the judge, on application will consider the record which has been developed before the magistrate and make his own determination on the basis of that record, without being bound to adopt the findings and conclusions of the magistrate. In some specific instances, however, it may be necessary for the judge to modify or reject the findings of the magistrate, to take additional evidence, recall witnesses, or recommit the matter to the magistrate for further proceedings.<sup>133</sup>

In its report to the Senate Judiciary Committee, the Judicial Conference discussed the de novo review provision of the proposed amendments to the Federal Magistrates Act.

The argument may be made that the de novo review provisions will only create another layer in the judicial process. Experience to date in the nondispositive civil pretrial area of rulings by magistrates clearly shows that appeals are seldom taken by losing litigants.<sup>134</sup>

The Judicial Conference report noted that the de novo review provision was added to avoid any objection that only Article III judges could ultimately determine dispositive issues, "although there is respectable authority that finds congressional power sufficient to avoid any constitutional objection."<sup>135</sup>

***Special Masters and Trial by Consent.*** The legislation authorized a judge to appoint a magistrate as a special master in any civil case upon the consent of the litigants. The legislation also carried forward the provision of the 1968 Act authorizing a magistrate to be appointed as a special master under [Fed. R. Civ. P. 53](#), where "some exceptional condition" exists. The legislation also added a provision authorizing a judge to appoint a magistrate to serve as a special master in any civil

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<sup>132</sup> 1976 HOUSE REPORT, *supra* note 114, at 3.

<sup>133</sup> The approach of the House Committee, as well as that in general of the Senate, was adopted from the decision of the United States Court of Appeals for the Ninth Circuit in [Campbell v. United States District Court, 501 F.2d 196 \(9th Cir.\), cert. denied, 419 U.S. 879 \(1974\)](#).

<sup>134</sup> 1975 Senate Hearings, *supra* note 106, at 35.

<sup>135</sup> *Id.*

case, with the parties' consent, without regard to the provisions of Rule 53.<sup>136</sup> The Senate Judiciary Committee report and the House Judiciary Committee report expressed the view that experience in the use of magistrates as special masters should serve to occasion a reappraisal of the restrictions imposed in *LaBuy v. Howes Leather Co.*<sup>137</sup>

***Additional Duties.*** Magistrates would be authorized, as under the 1968 Act, to perform any "additional duties as are not inconsistent with the Constitution and laws of the United States." The Senate Judiciary Committee's report emphasized the expansive nature of this "catch-all" provision:

A similar provision is contained in the existing legislation. This subsection enables the district courts to continue innovative experimentations in the use of this judicial officer. At the same time, placing this authorization in an entirely separate subsection emphasizes that it is not restricted in any way by any other specific grant of authority to magistrates.

Under this subsection, the district courts would remain free to experiment in the assignment of other duties to magistrates which may not necessarily be included in the broad category of "pretrial matters". This subsection would permit, for example, a magistrate to review default judgments, order the exoneration or forfeiture of bonds in criminal cases, and accept returns of jury verdicts where the trial judge is unavailable. This subsection would also enable the court to delegate some of the more administrative functions to a magistrate, such as the appointment of attorneys in criminal cases and assistance in the preparation of plans to achieve prompt disposition of cases in the court.

If district judges are willing to experiment with the assignment to magistrates of other functions in aid of the business of the courts, there will be increased time available to judges for the careful and unhurried performance of their vital and traditional adjudicatory duties, and a consequent benefit to both

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<sup>136</sup> At its March 1995 session, the Judicial Conference opposed Sec. 301(e) of H.R. 667, the House version of the Prison Litigation Reform Act (PLRA), [Pub. L. No. 104-134, 110 Stat. 1321 \(1996\)](#), which would have restricted service as a special master in a conditions of confinement case to a magistrate judge only, and would have limited the authority of a special master in such a case to making findings on complicated factual issues only. [1995] Judicial Conference of the U.S. Rep. 28-29. These provisions were not included in the "special master" provision of the PLRA, [18 U.S.C. § 3626](#), as enacted.

<sup>137</sup> [352 U.S. 249 \(1957\)](#). See 1976 SENATE REPORT, *supra* note 93, at 10. Accord, 1976 HOUSE REPORT, *supra* note 114, at 12.

efficiency and the quality of justice in the Federal courts.<sup>138</sup>

**Local Rules.** Subsection 636(b)(4) provided that the district courts establish local rules to govern the performance of the above duties by magistrates. The bill carried this requirement over from the existing statute:

It ensures that a magistrate will not be so burdened by assignments from one judge that he cannot assist the other judges in the district. Further, by requiring the promulgation of such local rules of the court, the statute provides the local bar at least some advance notice of the potential assignment of a case to a magistrate.<sup>139</sup>

The Judiciary Committee noted that the local rules could also provide procedures for review of a magistrate's order or recommendation under either subparagraph (A) or (B).

**Constitutionality.** The Senate Judiciary Committee believed that the revisions of the Federal Magistrates Act embodied in S. 1283 would "further the congressional intent that the magistrate assist the district judge in a variety of pretrial and preliminary matters," and that the utilization of magistrates pursuant to the bill would not constitute "an abdication of the judicial function."<sup>140</sup> The Committee also commented at length on Article III considerations generally.

[T]he committee believes that it should comment upon the contention that Article III of the Constitution imposes a limitation upon the judicial functions which this bill vests in a magistrate. In the federal court system, the primary court of general jurisdiction has always been the district court and, as such, it is an "inferior court" ordained and established by the Congress under Article III. But this is not to say that the Congress may not create other inferior courts. For example, it is believed that it would be competent for the Congress to create below the district courts a court of limited jurisdiction which would be roughly the equivalent of a municipal court in some of the state systems. Multi-tiered court systems developed simply in recognition of the fact that certain cases and judicial functions are of differing importance so as to justify different treatment by the court system. While the U.S. District Court has long been a single tiered court as far as original jurisdiction

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<sup>138</sup> 1976 SENATE REPORT, *supra* note 93, at 10-11. *Accord*, 1976 HOUSE REPORT, *supra* note 114, at 12.

<sup>139</sup> 1976 SENATE REPORT, *supra* note 93, at 11. *Accord*, 1976 HOUSE REPORT, *supra* note 114, at 13.

<sup>140</sup> 1976 SENATE REPORT, *supra* note 93, at 5. *Accord*, 1976 HOUSE REPORT, *supra* note 114, at 7.

is concerned, the Congress has nevertheless recognized that it is not feasible for every judicial act, at every stage of the proceeding, to be performed by "a judge of the court".<sup>141</sup>

## 9. Other Statutory Amendments

### a. Salaries of Magistrates and Positions for the Virgin Islands

Concurrently, with its consideration of the 1976 jurisdictional amendments, the Senate enacted legislation (S. 2923) to remove the provision of the 1972 salary amendments that had limited the salary of a full-time magistrate to 75 percent of the salary of a district judge and the salary of a part-time magistrate to a maximum of \$15,000 per annum.<sup>142</sup> The stated purpose of the legislation was "to provide that full-time U.S. magistrates shall receive the same compensation as full-time referees in bankruptcy and to adjust the salaries of part-time magistrates."<sup>143</sup> It authorized the Judicial Conference to set the salary of a full-time magistrate at any amount up to that of a full-time referee in bankruptcy and the salary of a part-time magistrate at any rate up to one-half the salary of a full-time magistrate.<sup>144</sup> The bill passed the Senate on February 5, 1976.

The House of Representatives amended S. 2923 to add a change in [28 U.S.C. § 631\(a\)](#) to extend the operation of the federal magistrates system to the district court of the Virgin Islands. The statute authorized the Judicial Conference to establish magistrate positions in the Virgin Islands on the same basis as in the 92 United States district courts.

The bill passed the House as amended on September 29th, and the Senate concurred in the House amendment on September 30th. The bill became law on October 17, 1976.

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<sup>141</sup> 1976 SENATE REPORT, *supra* note 93, at 6. *Accord*, 1976 HOUSE REPORT, *supra* note 114, at 8.

<sup>142</sup> [Pub. L No. 94-520](#), [90 Stat. 2458 \(1976\)](#).

<sup>143</sup> S. REP. NO. 624, 94th Cong., 2d Sess. 1 (1976); H.R. REP. NO. 1607, 94th Cong., 2d Sess. 1 (1976).

<sup>144</sup> This provision, codified at [28 U.S.C. § 634\(a\)](#), is still in effect. On April 1, 1984, however, the linkage with referees in bankruptcy was dissolved; *see* note 148, *infra*, and accompanying text. The provision was amended again in 1988 to allow the Judicial Conference to set the salaries of magistrates at an annual rate equal to 92% of a district judge's salary, which is the salary of a bankruptcy judge; *see* § 16(h)(1), *infra*.

## **b. International Prisoner Transfers**

In 1977 the Congress enacted legislation to implement treaties for the transfer of convicted criminal offenders to serve the remainder of their commitment in the countries of which they are citizens or nationals.<sup>145</sup> Prior to such a transfer, proceedings must be conducted in the transferring country to verify that the offender has consented knowingly and voluntarily to the transfer. The legislation amended the Federal Magistrates Act to authorize United States magistrates to appoint counsel and perform the necessary verification function in the United States and, when assigned by a judge, to perform these functions in other countries.<sup>146</sup>

The legislation also provided that under certain circumstances an offender transferred to the United States may be returned to the country from which he or she had been transferred.<sup>147</sup> In such cases a magistrate may be authorized to conduct the proceedings required for such action.

## **c. Bankruptcy Reform Act of 1978**

In 1978 the Congress enacted omnibus legislation amending the substantive law of bankruptcy and establishing a new federal bankruptcy court system.<sup>148</sup> The legislation amended the Federal Magistrates Act in two significant respects. First, it eliminated the authority of the Judicial Conference to establish or continue combination bankruptcy judge-magistrate positions, effective April 1, 1984.<sup>149</sup> Second, it dissolved the linkage between the salaries of magistrates and bankruptcy judges, effective April 1, 1984, and it expressly placed magistrates' maximum salaries under the quadrennial pay adjustment mechanism established by law for other high-level government officials.<sup>150</sup> In addition, section 238 of the Bankruptcy Reform Act amended [28 U.S.C. § 1334\(c\)](#) to

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<sup>145</sup> [Pub. L. No. 95-144](#), [91 Stat. 1212](#) (codified as amended at 10 U.S.C. § 955 (1988); 18 U.S.C.A. §§ 4105-15 (West Supp. 1991); 28 U.S.C. § 636(g) (1988)).

<sup>146</sup> [28 U.S.C. § 636\(g\) \(1988\)](#).

<sup>147</sup> [18 U.S.C.A. § 4114 \(West Supp. 1991\)](#).

<sup>148</sup> [Pub. L. No. 95-598](#), 95th Cong., 2d Sess. (1978) (codified as amended as Title 11 United States Code (1988) and [28 U.S.C.A. §§ 151 et seq](#) (West Supp. 1991)).

<sup>149</sup> *Id.*, § 231, amending [28 U.S.C. § 631\(c\)](#) to strike out references in the Federal Magistrates Act to referees in bankruptcy.

<sup>150</sup> *Id.*, § 232, amending [28 U.S.C. § 634\(a\)](#) to set a maximum rate for a full-time magistrate at \$48,500, subject to adjustment under section 225 of the Federal Salary Act of 1967 and [28 U.S.C. § 461](#). Section 634(a) has since been amended; see § 16(h)(1), *infra*.

prohibit district courts from referring bankruptcy appeals to magistrates or special masters.

In 1982 the Supreme Court invalidated the jurisdiction of the bankruptcy court over certain claims arising entirely under state law.<sup>151</sup> This decision ultimately resulted in additional legislation by Congress in 1984. *See* § 2.16(d), *infra*.

## 10. Conduct of Civil Trials by Magistrates

The 1976 amendments to the Federal Magistrates Act clarified the pretrial role of magistrates and broadened the range of cases in which a magistrate could be appointed as a special master. They did not, however, deal specifically with the trial of civil cases by magistrates or their case-dispositive authority.

Even before enactment of the 1976 jurisdictional revisions, however, magistrates had been assigned by several district courts to try the issues of civil cases upon the consent of the litigants.<sup>152</sup> Such civil trial delegations were made under the long-standing tradition, untouched by the 1968 Act, that parties may freely consent to refer cases for decision in the first instance to non-Article III officers.<sup>153</sup>

Although the "additional duties" language of [28 U.S.C. § 636\(b\)](#) was relied upon by some courts for authority to refer a civil case to a magistrate for trial on consent, the Congress had not specified procedures for the ultimate adjudication of a case by a magistrate, for the entry of a final judgment, or for appellate review following trial. To fill the void, some courts incorporated by reference the appellate procedures and scope of judicial review set forth in rule 53(e) of the Federal Rules of Civil Procedure, governing special masters. The United States Court of Appeals for the First Circuit, for example, stated that:

[I]n the present state of the law we would be reluctant to approve even a clearly worded consensual reference to a magistrate which purports to finally bind the parties to his rulings of law. Until Congress, on reviewing the experience under the Federal Magistrates Act, fashions a review procedure for consensual reference for final (or semi-final) determination of all issues of law and fact, it might be better to rely on the formulation contained in Rule

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<sup>151</sup> [Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50 \(1982\)](#).

<sup>152</sup> *1975 Senate Hearings, supra* note 106, at 19, 28.

<sup>153</sup> The civil trial delegations were therefore made under the former section 636(b) of the 1968 Act, which permits assignment of "such additional duties as are not inconsistent with the Constitution and laws of the United States," or as special master references under [FED. R. CIV. P. 53](#).

53(e)(4).<sup>154</sup>

Even where the provisions of rule 53 were not made specifically applicable by decisional law, the courts of appeals ruled uniformly that a district judge must personally order the entry of judgment in any civil case tried before a magistrate.<sup>155</sup>

## 11. The Proposed Magistrate Act of 1977

### a. Administration Proposal

As one of his initial acts as Attorney General, Griffin B. Bell established within the Department of Justice an Office for Improvements in the Administration of Justice. The first major legislative proposal developed by the new unit was the "Magistrate Act of 1977," designed to provide litigants in the federal courts with more efficient and inexpensive justice and to reduce the burdens of district judges by transferring certain categories of civil and criminal cases to magistrates for trial and disposition.

A draft bill was prepared in March 1977 and circulated to a cross-section of the legal community for comment. It provided for: (1) increasing the magistrates' criminal trial jurisdiction to include all federal misdemeanors; (2) eliminating the requirement that a defendant in a petty offense case consent to trial by a magistrate; (3) giving magistrates case-dispositive jurisdiction over certain categories of civil cases, including social security and black lung benefit litigation, penalty and forfeiture actions, and Federal Tort Claims cases with claims for relief not exceeding \$10,000; and (4) requiring the Judicial Conference to promulgate regulations governing the selection of magistrates in order to upgrade the quality of the magistrates system.

Opposition by the Department of Health, Education and Welfare and by the Legal Services Corporation resulted in a White House request for further consideration of the legislation before submission to the Congress. The objections were apparently directed for the most part at provisions in the bill that would have removed certain specified categories of cases, especially social welfare cases, from district judges and relegated them for trial and ultimate disposition by United States

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<sup>154</sup> [DeCosta v. Columbia Broadcasting Sys., 520 F.2d 499, 508 \(1st Cir. 1975\), cert. denied, 423 U.S. 1073 \(1976\)](#). See also *Magistrate Act of 1977: Hearings on S. 1612 and S. 1613 Before the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary*, 95th Cong., 1st Sess. 9-10 (1977) [hereinafter cited as *1977 Senate Hearings*].

<sup>155</sup> [Horton v. State St. Bank & Trust Co.](#), 590 F.2d 403 (1st Cir. 1979); [Small v. Olympic Prefabricators, Inc.](#), 588 F.2d 287 (9th Cir. 1978); [Taylor v. Oxford](#), 575 F.2d 152 (7th Cir. 1978); [Sick v. City of Buffalo](#), 574 F.2d 689 (2d Cir. 1978).

magistrates exclusively.<sup>156</sup>

In response to these objections, the Department of Justice deleted from the revised draft the provision for mandatory diversion of specified categories of civil cases to magistrates. Instead, the proposed case-dispositive jurisdiction of magistrates was to be limited to those cases in which the parties expressly consented to trial before a magistrate.

In transmitting the bill to the Congress in May 1977, the Attorney General summarized its basic purposes as improving access to the federal courts for the less advantaged and providing more flexible use of scarce judicial resources:

The proposed Magistrate Act of 1977 recognizes the growing interest in the use of magistrates to improve access to the courts for all groups, especially, the less advantaged. The latter lack the resources to cope with the vagaries of adjudication delay and expense. If their civil cases are forced out of court as a result, they lose all their procedural safeguards. This outcome may be becoming more pronounced as the requirements of the criminal Speedy Trial Act increases its demands on the federal courts. The imaginative supply of magistrate services can help the system cope and prevent inattention to a mounting queue of civil cases pushed to the back of the docket by the Speedy Trial Act.

The bill would allow the increased and more flexible use of fully competent magistrate judicial officers with more limited tenure and salary requirements to improve access to justice on a district-by-district basis. Magistrates would be selectively placed to accommodate litigation peaks in particular districts at particular times. These surges in litigation have characterized, for example, the social security black lung disability cases. All this would be accomplished without resort to the process of congressional confirmation.<sup>157</sup>

## **b. Congressional Action**

### **(1) Senate Consideration**

The revised Administration bill was introduced in the Senate as S. 1613 on May 26, 1977, by Senators Dennis DeConcini and Robert Byrd. A companion bill was introduced in the House of

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<sup>156</sup> See 35 CONG. Q. WKLY. 833-34 (daily ed. April 30, 1977).

<sup>157</sup> Proposed Magistrate Act of 1977, 123 CONG. REC. S8767 (daily ed. May 26, 1977).



Representatives by Congressman Peter Rodino.<sup>158</sup> At the request of the Judicial Conference, Senator DeConcini also introduced S. 1612, a separate bill to expand the "minor offense" jurisdiction of magistrates, to eliminate the requirement that a defendant in a petty offense case consent to trial by a magistrate, and to make the federal juvenile delinquency statute inapplicable in petty offense cases.<sup>159</sup>

In June 1977 comprehensive hearings on the legislation were conducted by the Senate Judiciary Subcommittee on Improvements in Judicial Machinery, chaired by Senator DeConcini.<sup>160</sup> Most of the witnesses supported increasing the civil and criminal jurisdiction of magistrates.<sup>161</sup> A difference of opinion surfaced at the hearings, however, regarding the alternate appeal routes to be taken from a civil case tried by a magistrate. As introduced on behalf of the Department of Justice, S. 1613 prescribed that any appeal from a magistrate be taken exclusively to a judge of the district court.<sup>162</sup> Further appeal to the court of appeals would be discretionary only and confined to questions of law. A majority of the witnesses, however, objected to the Department's proposal and favored taking appeals of civil cases tried by magistrates directly to the courts of appeals.<sup>163</sup>

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<sup>158</sup> H.R. 7493 (introduced May 26, 1977).

<sup>159</sup> *See 1977 House Hearings, supra* note 27, at 2, 29-35

<sup>160</sup> *1977 Senate Hearings, supra* note 154.

<sup>161</sup> *See* H.R. REP. NO. 1364, 95th Cong., 2d Sess. 9 (1978) [hereinafter cited as 1978 HOUSE REPORT].

<sup>162</sup> The Department of Justice favored review by a district judge because it reduced: (1) the cost of litigating an appeal through elimination of the costly printing of briefs, (2) travel costs to the nearest seat of the court of appeals, and (3) the costs of reproducing the record of the trial for the appellate court. Consideration of the appeal by a single judge, rather than a panel of three judges, also would better conserve judicial resources. Appeal to a district judge, moreover, was seen as helping to relieve a severe workload crisis in the courts of appeals. *See 1977 Senate Hearings, supra* note 152, at 153, 155-56 (testimony of Attorney General Bell); 105-06 (testimony of Professor Leo Levin); *1977 House Hearings, supra* note 27, at 183-84 (statement of Assistant Attorney General Meador).

<sup>163</sup> The witnesses were generally of the view that a direct appeal to the court of appeals was necessary because the parties would not consent to trial by a magistrate if they were denied their right to automatic and full review by the circuit court. They also asserted that direct appeal would have the advantage of providing a single procedure for the trial and appeal of all civil cases in the district court and would avoid adding an extra layer of litigation and expense to the judicial process. *See 1977 Senate Hearings, supra* note 152, at 75-76

Following the hearings, the Administration and Judicial Conference bills were merged and modified by the Subcommittee, which reconciled the conflicting views regarding appellate procedures by providing in the bill for alternative appeal routes in civil cases. As modified, S. 1613 specified that an appeal from a magistrate's judgment in a civil case would ordinarily be taken to a district judge. The parties, however, by mutual consent could agree to have a final judgment of the district court entered on the magistrate's order, with an appeal taken from the district court directly to the court of appeals.

## **(2) Provisions of the Senate Bill**

The bill was reported favorably by the full Judiciary Committee of the Senate on July 14, 1977,<sup>164</sup> and it passed the Senate unanimously by voice vote on July 22, 1977. As approved by the Senate, the principal provisions of the legislation were as follows:

- (a) *Civil Trial Jurisdiction.* The bill authorized a full-time United States magistrate to try any civil case, with or without a jury, and order the entry of judgment upon consent of the litigants.
- (b) *Criminal Trial Jurisdiction.* The jurisdiction of magistrates under 18 U.S.C. § 3401 was expanded from "minor offenses" to all misdemeanors. Magistrates were authorized to try such cases with a jury and to use the sentencing provisions of the Youth Corrections Act, with limitations. In addition, the federal juvenile delinquency statute was made inapplicable to petty offense cases generally.
- (c) *Selection of Magistrates.* The bill required the Judicial Conference to promulgate standards for the qualifications of magistrates and procedures for their selection. Each individual selected as a full-time magistrate would have to be certified as competent by the judicial council of the appropriate circuit.

The 1977 Senate committee report approved a bill that included provisions for the exercise of civil consent authority by full-time magistrates only. The report stated:

In approving this bill, the committee has restricted the conduct of civil trials by consent to those magistrates who serve as full-time magistrates or in combination positions on a full-time basis. The committee believes that the appearance of impropriety is too great to allow such duties to be performed

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(testimony of Judge Metzner); 95 (Magistrate Juda); 97 (Walter Evans); 130-31 (Thomas Ehrlich); 183 (Professor Silberman); 208-211 (Dennis Sweeney); 196 (John Frank); 222 (Arthur Burnett); 229 (Judge Ross). District judges, moreover, were seen as being unlikely to refer cases to a magistrate for trial if they would ultimately have to review them personally. *Id.*, at 96 (Judge Skopil); 115, 126 (Judge Sear).

<sup>164</sup> 1977 SENATE REPORT, *supra* note 85.

by an individual who also maintains an active law practice. In recognition of the need to conduct arraignments and trials in misdemeanor cases at remote locations, the committee has not imposed a similar restriction on the criminal trial jurisdiction. It is left to the Judicial Conference to exercise its responsibility under [28 U.S.C. § 632\(b\)](#) to restrict either the jurisdiction or the private practice of part-time magistrates to insure that the appearance of impropriety, as well as the potential for actual conflict-of-interest, is avoided, while the further development of full-time positions is being accomplished.<sup>165</sup>

The corresponding House report concurred. "The full-time magistrate requirement will insure the highest possible quality of civil adjudication and eliminate the possibility that a part-time magistrate, who may practice law in State courts, might favor counsel in Federal court with whom the magistrate has State court dealings."<sup>166</sup>

The Senate report restated the Congressional preference for full-time judicial officers. The report noted prior statements by Congress expressing its preference for such a system, and recorded the progress made by the Judicial Conference since implementation of the magistrates system in 1971. "While the progress achieved to date is commendable, the committee notes that more should be done to meet the congressional intention, expressed in the original Federal Magistrates Act, and reaffirmed in 1972, that the magistrates system should be a system of full-time judicial officers, to the extent feasible."<sup>167</sup>

### **(3) House Consideration**

In September 1977 the House Judiciary Subcommittee on Courts, Civil Liberties, and the Administration of Justice, chaired by Representative Robert W. Kastenmeier of Wisconsin, conducted four days of hearings concurrently on the magistrate legislation and on several proposals to reduce or eliminate diversity jurisdiction in the federal courts.<sup>168</sup> In November 1977 the Subcommittee in mark-up session approved amendments to S. 1613 requiring that civil trials be conducted only by full-time magistrates, preventing the assignment of specific categories of cases to magistrates for trial, providing for freely-given "blind consent" by the parties to the trial of civil cases by magistrates, and providing for an appeal of right to a judge of the district court.<sup>169</sup>

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<sup>165</sup> *Id.* at 7.

<sup>166</sup> 1978 HOUSE REPORT, *supra* note 161, at 13.

<sup>167</sup> 1977 SENATE REPORT, *supra* note 85, at 8. This statement is part of a broader discussion of part-time magistrates and why the bill restricted the exercise of civil consent trial authority to full-time magistrates; *see id.* at 7-8.

<sup>168</sup> 1977 House Hearings, *supra* note 27.

<sup>169</sup> 1978 HOUSE REPORT, *supra* note 161, at 9.

In January and February 1978, the House Subcommittee approved several more amendments, including proposals of the American Civil Liberties Union that detailed procedures and local merit nominating panels be established for the selection of magistrates and that the requirement be retained that a person charged with a petty offense consent in writing to trial before a magistrate. Also added by the Subcommittee were amendments to require court reporters at certain proceedings before magistrates and to eliminate the provision of the Senate bill that would have excepted petty offense cases from the operation of the juvenile delinquency statute.<sup>170</sup>

On February 9, 1978, the Subcommittee approved the legislation. On June 6, 1978, the full House Judiciary Committee approved the bill by a vote of 23 to 7, with further amendments. Dissenting views were voiced to the effect that the legislation was both unnecessary and unconstitutional.<sup>171</sup> The Judiciary Committee, however, rejected these views and stated that it had inquired "with great care into any possible constitutional objections" to the expansion of magistrates' civil and criminal jurisdiction.

Ten years ago, when Congress passed the Magistrates Act of 1968, there were three separate lines of authority which indicated that the trial and final adjudication (including the entry of judgment) of minor offense cases by U.S. magistrates, with the consent of the parties, was constitutional. The pertinent case law and commentary at that time indicated that any one of the lines of authority, *standing alone*, would be sufficient. The presence of all three created a solid constitutional foundation for creation of the Federal magistrates system.

First, the magistrate is an adjunct of the United States District Court, appointed by the court and subject to the court's direction and control. When the magistrate tries a case, jurisdiction remains in the district court and is

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<sup>170</sup> *Id.* See *infra* § 16(c).

<sup>171</sup> *Id.* at 35-42. Representatives Drinan and Kindness stated that "[o]ur quarrel with this measure is that it extends a system which should not be in existence at all." They argued that legislative proposals to increase the number of Article III judges, combined with the elimination of diversity jurisdiction, would obviate the need for this bill. They also questioned the constitutionality of a "system which authorizes inferior officers to exercise the full judicial power which the Constitution demands be exercised" only by Article III judges. *Id.* at 36. Representative Seiberling also questioned the constitutionality of the bill, equating authorizing a magistrate to exercise the power of a district judge with authorizing a White House aide to sign or veto bills. *Id.* at 40. Representative Holtzman argued that the legislation would create a "dual system of justice" in which some litigants are coerced into consenting to trial by a magistrate in a so-called "poor people's court." *Id.* at 42.

simply exercised through the medium of the magistrate.

Second, both parties must consent to trial before a magistrate and must consent to entry of final judgment by the magistrate for the district court.

Third, in all instances an appeal from a magistrate's decision lies in an Article III court. [footnote omitted].

It is the committee's view that these three pillars are still present today and that they provide firm support for the proposed legislation which not only respects them, but reinforces them in several ways. Since no court has found the present statutory scheme to be constitutionally defective, and several have spoken approvingly, [footnote omitted] the committee is confident that the proposed legislation passes constitutional muster.<sup>172</sup>

The legislation passed the House of Representatives by a vote of 323 to 49 on October 4, 1978. Attached to the bill, however, was a controversial floor amendment that would have eliminated diversity jurisdiction in the federal courts.

#### **(4) Congressional Conference Consideration**

A conference committee was convened during the last week of the 95th Congress, but it could not reach agreement on the diversity amendment. The conference committee thereupon adjourned without reaching the merits of the magistrate provisions, and the legislation expired with the adjournment of the 95th Congress.

### **12. The Federal Magistrate Act of 1979**

#### **a. Congressional Action**

##### **(1) Introduction of Legislation**

On January 18, 1979, Representative Kastenmeier introduced H.R. 1046 in the 96th Congress. The bill was identical to the version of the magistrate legislation that had passed the House of Representatives in 1978, with the exception that the controversial diversity jurisdiction amendment was not included.

One week later, Senator DeConcini introduced S. 237, a revised version of the legislation that differed from the bill that had passed the Senate in 1977 in that: (1) it retained the requirement that a defendant in a petty offense case consent in writing to trial by a magistrate; (2) it narrowed the proposed expansion of magistrates' jurisdiction under the juvenile delinquency law; and (3) it required

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<sup>172</sup> *Id.* at 11.

the Judicial Conference to issue regulations on the selection of magistrates, making explicit provision for public notice of vacancies in all magistrate positions and the appointment of citizen panels for the selection of full-time magistrates.

The stated purpose of the proposed legislation was to amend the Federal Magistrates Act "in order to further clarify and expand the jurisdiction of United States magistrates and improve access to the Federal courts for the less-advantaged."<sup>173</sup> The House Judiciary Committee noted that "the magistrate system now plays an integral and important role in the Federal judicial system."<sup>174</sup> The proposed legislation, therefore, "is, in effect, a logical extension of the congressional will expressed in the 1968 Act and the 1976 amendments. It derives its strength from the increasing use and acceptance of magistrates by judges, practitioners and litigants in the Federal judicial system. And it recognizes that magistrates have already made a significant contribution to aiding the Federal courts to meet their delegated responsibilities and that these judicial officers should continue to play a supportive and flexible role in the Federal judicial system."<sup>175</sup>

## (2) Senate Consideration

S. 237 was considered at hearings before the Senate Subcommittee on Improvements in Judicial Machinery on March 30, 1979, together with proposed bills affecting both diversity jurisdiction and arbitration.<sup>176</sup> The Senate Judiciary Committee approved the bill on April 24, 1979, with amendments that: (1) authorized magistrates to accept guilty pleas in felony cases;<sup>177</sup> and (2)

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<sup>173</sup> 1979 SENATE REPORT, *supra* note 85, at 1. *Accord*, H.R. REP. NO. 287, 96th Cong., 1st Sess. 1 (1979) [hereinafter 1979 HOUSE REPORT].

<sup>174</sup> 1979 HOUSE REPORT, *supra* note 173, at 5.

<sup>175</sup> *Id.*

<sup>176</sup> *The Federal Magistrates Act of 1979: Hearing on S. 237 Before the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary*, 96th Cong., 1st Sess. (1979).

<sup>177</sup> This provision was deleted from the legislation by the conference committee of the House and Senate. Instead, the conferees agreed to send a letter to the Chief Justice requesting that the proper committees of the Judicial Conference study the issue of having magistrates accept guilty pleas in felony cases with the consent of the defendant. *See* S. CONF. REP. NO. 322, 96th Cong., 1<sup>st</sup> Sess. 10 (1979) and [H.R. CONF. REP. NO. 444](#), 96th Cong., 1st Sess. 10 (1979), *reprinted in* [1979 U.S.C.C.A.N. 1487](#), 1491 [hereinafter cited as 1979 CONFERENCE REPORT].

The Judicial Conference subsequently decided that magistrates should not be authorized to accept guilty pleas in felony cases. Report to the Congress by the

altered the procedure for alternate appeal routes by making appeals to the court of appeals the preferred procedure, and appeals to a district judge the alternate procedure.<sup>178</sup>

The Senate Judiciary Committee report explained that S. 237 would expand the authority of magistrates to actually conduct trials and enter judgments in both civil and criminal cases. The utilization of magistrates in this fashion would "improve access to the courts for all groups, especially the less-advantaged," who lack the resources to cope with judicial delay and expense.<sup>179</sup>

Proposed section 636(c) of the bill explicitly permitted magistrates to issue final decisions in any civil case upon the consent of the parties. The new section would thus "codify and replace" the practice in several districts of referring consensual cases to magistrates for trial under sections 636(b)(2) or 636(b)(3) of title 28.<sup>180</sup>

The Senate version of the bill extended the grant of authority to try civil cases with consent to include certain part-time magistrate judges. The Senate report stated that "the committee, as a general rule, has restricted the conduct of civil trials by consent to those magistrates who serve as full-time judicial officers. However, the Committee also recognizes that in rural areas of the country where only part-time magistrates are available, the decision as to whether that magistrate shall be the trier of fact should be left to the parties."<sup>181</sup>

The Committee did not adopt a proposal to designate specific categories of cases for trial under proposed section 636(c). "No limitation is placed on the type of case which may be referred to a magistrate under this section." The Committee stated that there was "inadequate experience" at that point to include certain categories of cases and exclude others.<sup>182</sup>

S. 237 did not include an earlier proposal to remove the requirement that a criminal defendant in a petty offense case consent in writing to trial before a magistrate. The Committee stated:

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Judicial Conference of the U.S., *The Federal Magistrates System*, 52-53 (December 1981). "Because of the sensitivity and critical nature of the guilty plea procedure and its close interrelationship with the sentencing function, it is recommended that no change be made in the current law that reserves the function to judges." *Id.* at 53.

<sup>178</sup> 1979 SENATE REPORT, *supra* note 85, at 5, 13.

<sup>179</sup> *Id.* at 4.

<sup>180</sup> *Id.* See generally § 10, *supra*.

<sup>181</sup> 1979 SENATE REPORT, *supra* note 85, at 7.

<sup>182</sup> *Id.* at 4-5.

The requirement that each of these defendants sign a written form to be tried before a magistrate lengthens the time needed to hear each case and produces a growing volume of unnecessary paperwork. However, the Committee feels further empirical evidence of how the magistrates system works is necessary before it considers removing the written consent requirement. Under existing law, it does not appear to be required constitutionally that a defendant in a petty offense case be tried before either an article III district judge or by a jury.<sup>183</sup>

The Senate Judiciary Committee reemphasized its preference for full-time judicial officers. The Committee noted that while the Judicial Conference's progress towards this goal to date was commendable, more should be done to achieve a system of full-time magistrates to the extent feasible.<sup>184</sup>

The committee believes, however, that the Judicial Conference can, and will, continue to closely monitor the justification for and workloads of those part-time magistrate positions receiving substantial annual salaries, with a view to the consolidation of such positions into full-time positions. The committee believes, moreover, that it would be feasible in some instances to authorize a full-time magistrate to "ride circuit" among several locations for the performance of a full-range of "additional duties" for the court.<sup>185</sup>

The Committee also requested suggestions from the Judicial Conference regarding the feasibility of the performance of certain magistrate duties by bankruptcy judges.

The bill passed the Senate on May 2, 1979.

### **(3) House Consideration**

The House Judiciary Subcommittee on Courts, Civil Liberties, and the Administration of Justice conducted hearings on the legislation on February 28th, March 1st and March 8, 1979.<sup>186</sup> The

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<sup>183</sup> *Id.* at 6.

<sup>184</sup> *Id.* at 8.

<sup>185</sup> *Id.* at 9. Actions by the Judicial Conference to pursue this policy are discussed at § 16(j)(2), *infra*.

<sup>186</sup> *Diversity of Citizenship Jurisdiction/Magistrates Reform - 1979: Hearings on H.R. 1046 and H.R. 2202 Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Comm. on the Judiciary, 96th Cong., 1st Sess. (1979).*



House Judiciary Committee approved H.R. 1046 without amendments on June 20, 1979.<sup>187</sup>

The House bill continued to restrict the authority to try civil consent cases to full-time magistrates. "The full-time magistrate requirement will insure the highest possible quality of civil adjudication and eliminate the possibility that a part-time magistrate, who may practice law in State courts, might favor counsel in Federal court with whom the magistrate has State court dealings."<sup>188</sup>

The House Judiciary Committee issued certain findings pursuant to its responsibility for oversight of the federal judicial system:

It is the view of the committee that Federal judicial time is a finite resource and should be treated as such. In this regard, during the last Congress this committee responded to increased demands for judge time by voting to create a substantial number of new Federal judgeships. The committee recognizes, however, that the Federal judicial branch cannot be expanded indetermining [sic] without imperiling the high quality of persons attracted to the bench or without creating an impersonal bureaucracy similar to that which litigants are often trying to avoid. Furthermore, expansion of the commodity ... is not a solution to the crisis of court overload. It merely reacts to the problem and ultimately may create more reliance on the Federal judicial system, exacerbating overload in the system.

The Magistrate Act of 1979 is a second patch in the large tapestry of improving judicial machinery. The proposed legislation addresses itself to a different exigency than that focused upon by the omnibus judgeship bill. The committee finds that there is an increasing need for flexibility in the Federal judicial system, which is called upon to act in a rapidly changing society. By redefining and by increasing the case-dispositive jurisdiction of an existing judicial officer -- the U.S. Magistrate -- the legislation provides the district court with a tool to meet the varying demands on its docket.<sup>189</sup>

The bill passed the House on June 25, 1979. On June 26, the House vacated passage of H.R. 1046 and passed in lieu thereof S. 237 as amended.

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<sup>187</sup> 1979 HOUSE REPORT, *supra* note 173, at 1.

<sup>188</sup> *Id.* at 10. This language is identical to that quoted in the 1978 report by the House committee; see *supra* note 166 and accompanying text.

<sup>189</sup> *Id.* at 19-20.

#### (4) Congressional Conference Consideration

A conference committee of the House and Senate met in August 1979 and reconciled the various differences between the Senate and House versions of the legislation.<sup>190</sup> The two primary differences centered on the procedures for selecting magistrates and the provisions for appeals from magistrates' judgments in civil cases.

Both bills included sections on the upgrading of magistrates' qualifications. The House bill required membership in a bar for a minimum of five years and specified in considerable detail the procedures for selecting magistrates through the use of merit selection panels. The Senate bill merely specified that there be public notice of vacancies and required the use of merit selection panels for selecting full-time magistrates. It left the details of the selection process to the Judicial Conference to prescribe by regulation. The conference committee compromised between the two provisions, requiring five years' membership in the bar of the state in which the magistrate is to serve, public notice of vacancies, and merit selection panels for all magistrate appointments and reappointments, but it left all procedural details to the Judicial Conference.

Both bills provided for alternate appeal routes in civil cases. The House version contained a presumption in favor of appeal to a district judge, while the Senate version set forth direct appeal to the court of appeals as the first alternative. The Congressional conference committee opted for the Senate version. "(T)he conferees felt that litigants who consented to a case disposition by a magistrate were entitled to the same presumption as to route of appeal that litigants having their case heard before a district court judge were entitled."<sup>191</sup>

The conference committee also resolved the dispute over whether part-time magistrates could exercise consensual civil trial authority by adopting the Senate's position. The conference report stated:

Lastly, part-time magistrates, pursuant to the consent of the parties (after a specific written request), may exercise such jurisdiction subject to the following requirements: the magistrate must meet the bar membership requirements set forth in the legislation and the chief judge of the district court must certify that a full-time magistrate is not reasonably available in accordance with guidelines established by the judicial council of the circuit. Among others, suggested reasons for unavailability are illness, distance, and lack of a full-time magistrate. The workload of full-time magistrates, being

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<sup>190</sup> 1979 CONFERENCE REPORT, *supra* note 177, at 1-2.

<sup>191</sup> *Id.* at 8.

a subjective determination, should not be considered as a major factor.<sup>192</sup>

## **b. Provisions of the 1979 Legislation**

The conference committee bill was approved by both houses of the Congress, and it was signed into law on October 10, 1979.<sup>193</sup> As enacted, the Federal Magistrate Act of 1979 contained the following principal provisions:

### **(1) Civil Trial Jurisdiction**

The legislation authorized a full-time magistrate (and certain part-time magistrates) to try any civil case in the district court and to enter judgment upon special designation of the district court and consent of the parties. It specified that the clerk of the district court must notify the parties at the time a case is filed of their option for trial by a magistrate; that the parties' decision in this regard must be communicated directly to the clerk; that no judge or magistrate may attempt to persuade or induce a party into consenting to a reference to a magistrate; and that local rules of court must include procedures to protect the voluntariness of the parties' consent.

The legislation required the district courts to specially designate individual magistrates to exercise civil consent authority. The conference committee report emphasized, however, that "[n]o categorization of types of cases to be tried by magistrates is to be allowed."<sup>194</sup> A part-time magistrate would be permitted to exercise civil consent authority only if he or she met the bar membership requirements and the chief judge of the district certified that a full-time magistrate was not reasonably available.

Congress anticipated instances where a party may wish to withdraw consent to trial before a magistrate. The House report stated:

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<sup>192</sup> *Id.* at 7. In implementing the civil consent provisions of the 1979 amendments, several courts authorized part-time magistrates to conduct civil trials at locations where a full-time magistrate was already stationed. The courts based their authorization upon the belief that the heavy workloads of the full-time magistrates precluded them from handling civil consent cases, thus rendering them "not reasonably available." The Magistrates Committee at its June 1990 meeting decided not to adopt model judicial council guidelines, which would have precluded courts from authorizing part-time magistrates to conduct civil trials in these situations.

<sup>193</sup> [Pub. L. No. 96-82, 93 Stat. 643 \(1979\)](#).

<sup>194</sup> 1979 CONFERENCE REPORT, *supra* note 177, at 7.

It is the view of the committee that once the parties have voluntarily, knowingly, and intelligently consented to a civil trial by magistrate, it should fall within the broad discretion of the magistrate to determine whether to permit one or more of the parties to withdraw consent. The committee feels that it should be difficult to withdraw consent, but stops short of statutorily requiring that the parties, a [sic] the time of consent, further agree that they are irrevocably bound by their agreement. In deciding whether consent can be withdrawn, the magistrate should be careful to insure that it was voluntarily, knowingly, and intelligently made. He should further examine, *inter alia*, what are the reasons for withdrawal, what prejudice may result to the other party from withdrawal, and what proceedings have occurred since the consent took place.<sup>195</sup>

The legislation also provided district judges with discretion to vacate the reference of a civil case to a magistrate for good cause shown on a judge's own motion or under extraordinary circumstances shown by any party. The Senate report discussed this provision:

This statement makes clear the court's inherent power to control its docket. This language is intended to permit in extraordinary circumstances the trial before a district judge of a matter otherwise before a magistrate. This removal power is to be exercised only where it is appropriate to have the trial before an article III judicial officer because of the extraordinary questions of law at issue and judicial decisionmaking is likely to have wide precedential importance.

It is not intended that this subsection be used to remove routinely certain categories of cases. As made clear above, if a magistrate is designated for trials in any particular type of case, he must be designated for all types of matters.

Further, while the language is intended to permit removal at any time, it should not be construed to authorize routine interlocutory appeals on rulings by magistrates.<sup>196</sup>

Court opinions discussing both the withdrawal of a party's consent and the vacation of a reference to magistrate can be found in section 8 of the [\*Inventory of United States Magistrate Judges Duties\*](#).

As originally enacted, the Federal Magistrate Act of 1979 allowed an aggrieved party to appeal from the judgment of a magistrate directly to the appropriate court of appeals, in the same manner as

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<sup>195</sup> 1979 SENATE REPORT, *supra* note 85, at 14.

an appeal from any other judgment of the district court. Alternatively, the parties at the time of reference of a case to the magistrate could agree to have any appeal taken to a judge of the district court rather than to the circuit court. This procedure was significantly modified by amendments to § 636(c) contained in *The Federal Courts Improvement Act of 1996* (see § 21, *infra*), which eliminated the option of appeal to a district judge and permitted direct appeal to the court of appeals only.

The conference committee report specifically noted that the creation of section 636(c) to permit magistrates to exercise civil case-dispositive authority did not modify the existing additional duties provision of subsection 636(b)(3). Citing as an example the use of the additional duties provision to refer requests for enforcement of IRS summonses, the conference committee stated: "This legislation would not affect that practice."<sup>197</sup>

## **(2) Criminal Trial Jurisdiction**

The legislation expanded the trial jurisdiction of magistrates in criminal cases from "minor offenses" to all federal misdemeanors. Thus, the \$1,000 fine limitation on magistrates' criminal trial jurisdiction and the enumerated "political" offenses that had been excepted from their jurisdiction were both eliminated.<sup>198</sup> For the first time magistrates were authorized to preside over jury trials in misdemeanor cases, where appropriate.

The long-standing requirement that each defendant sign a written waiver of the right to trial before a district judge and consent to trial before a magistrate was retained. The legislation provided magistrates with limited jurisdiction under the provisions of the Youth Corrections Act and the Juvenile Justice and Delinquency Prevention Act of 1974.<sup>199</sup>

## **(3) Selection of Magistrates**

The statute required that all full-time and part-time magistrates: (a) be members of the bar of the highest court of the state in which they will serve for a period of at least five years; and (b) be appointed and reappointed in accordance with regulations to be promulgated by the Judicial Conference which were to include specific provision for public notice of all vacancies and for merit

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<sup>197</sup> 1979 CONFERENCE REPORT, *supra* note 177, at 7.

<sup>198</sup> In lieu of these exceptions, the legislation provided generally that the court on its own motion or on motion by the government for good cause shown could order any misdemeanor case tried by a judge, rather than a magistrate.

<sup>199</sup> Federal Youth Corrections Act, 18 U.S.C. §§ 5005-26 [repealed; [Pub. L. No. 98-473](#), [98 Stat. 1837 \(1984\)](#)]; Juvenile Justice and Delinquency Prevention Act, 18 U.S.C.A. §§ 5031-42 (West Supp. 1991) [section 5041 was repealed in 1984]. See *infra* § 16(c).

selection panels to assist the judges in selecting and reappointing all magistrates. The law also directed the panels to give due consideration to all qualified candidates for magistrate positions, including women and members of minority groups.<sup>200</sup>

Any magistrate appointed prior to the promulgation of the selection regulations by the Judicial Conference was authorized to exercise the new civil trial jurisdiction only after designation by the district court and either: (a) reappointment under such regulations; or (b) a certification of qualification by the judicial council of the pertinent circuit to exercise such jurisdiction. The conference committee noted that the success of the 1979 amendments "will be determined by the magistrates who implement it. It is imperative, therefore, that they be qualified to meet their assigned functions."<sup>201</sup>

#### **(4) Miscellaneous Provisions**

The legislation amended [28 U.S.C. § 1915\(b\)](#) to authorize payment for transcripts and certain costs of indigents who appeal from a magistrate to a district court on the same basis that such financial assistance is provided to indigents who appeal from a district court to a court of appeals. The statute authorized the Judicial Conference to designate magistrates to serve in two or more geographically adjoining districts, and it allowed a magistrate to "hold over" in office for up to 60 days beyond the expiration of a term upon a majority vote of the district court and the circuit council. The legislation gave the Judicial Conference authority to provide legal assistant positions for magistrates, and it required the Director of the Administrative Office to include additional information on magistrates in his annual reports to the Congress. Finally, the legislation required the Judicial Conference to conduct a study of the effectiveness of the 1979 amendments and the future of the federal magistrates system, to be made available to the Congress within two years.

### **13. Implementation of the 1979 Legislation**

In February 1980 the Magistrates Committee of the Judicial Conference distributed guidelines and model rules of court to assist the district courts in implementing the various provisions of the 1979 legislation. The district courts generally amended their local rules to accommodate the changes made by the 1979 statute, and by the end of 1981 approximately 80 percent of the full-time magistrates nationally were eligible to try civil cases under [28 U.S.C. § 636\(c\)](#).

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<sup>200</sup> 1979 CONFERENCE REPORT, *supra* note 177, at 9.

<sup>201</sup> *Id.* The Senate Judiciary Committee expressed concern that "not all appointees have evidenced the same high quality." 1979 SENATE REPORT, *supra* note 85 at 9. Including in the legislation certain minimum standards for appointment was designed to "encourage" the Judicial Conference to establish detailed qualifications standards and selection procedures. *Id.* at 9-10.

The Judicial Conference at its March 1980 meeting promulgated regulations for the selection, appointment, and reappointment of magistrates. They have been in effect since April 5, 1980 and have been amended several times. In June 1981 the Administrative Office distributed to the courts a pamphlet on the selection and appointment of magistrates to assist the members of merit selection panels in performing their duties.<sup>202</sup>

The Supreme Court approved new rules for the trial of misdemeanor cases before United States Magistrates, effective June 1, 1980,<sup>203</sup> and in mid-1981 the Judicial Conference's Advisory Committees on Civil Rules and on Criminal Rules approved draft amendments to [Federal Rules of Civil Procedure 6, 16, 53, and 72-76](#) and [Federal Rules of Criminal Procedure 1, 5, 9, and 54\(b\)\(4\)](#) to incorporate the provisions of the 1979 legislation. The proposed changes were circulated for comment to the bench and bar. The amendments to the Federal Rules of Criminal Procedure became effective on August 1, 1982, while the amendments to the Federal Rules of Civil Procedure became effective on August 1, 1983.

#### **14. Judicial Conference Report on the Federal Magistrates System**

Section 9 of the Federal Magistrate Act of 1979 required the Judicial Conference to undertake a study concerning the future of the magistrates system and file a report with the Congress within two years. The precise scope of the study was left to the chairmen of the Judiciary Committees of each house of the Congress.

The study was conducted by the Magistrates Division of the Administrative Office under the supervision of the Magistrates Committee of the Judicial Conference and focused on: (1) the impact of the 1979 legislation; and (2) the future direction of the magistrates system. As part of the study a survey was conducted of all chief judges of the effectiveness of the 1979 statute. Moreover, the views of the National Council of United States Magistrates were solicited, and the study incorporated the results of a Federal Bar Association survey on the magistrates system.

The Judicial Conference approved the report at its September 1981 meeting, and the document was presented to the Congress in December 1981. The Conference concluded generally that: (1) the federal magistrates system has been of substantial assistance to the courts; (2) the jurisdiction of magistrates is appropriate in its current, amended form; (3) the organization of the magistrates system and the nature of the office of United States magistrate are appropriately constituted at present; (4) the 1979 amendments have been well received and are beneficial to the courts and to litigants; and (5) although the 1979 legislation is sound, some minor adjustments are desirable in the language of

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<sup>202</sup> The pamphlet now entitled *The Selection, Appointment, and Reappointment of United States Magistrate Judges*, also contains the Judicial Conference's selection regulations, as amended. Copies are available from the Magistrate Judges Division.

<sup>203</sup> [445 U.S. 975 \(1980\)](#).

the statute.<sup>204</sup>

The Conference concluded that the magistrates system should remain an integral part of the United States district courts and should not be reconstituted as a separate tier or court. The report emphasized that flexibility in the use of magistrates by the district courts is one of the great benefits of the magistrates system and must be retained in the statute. The Conference stated that the jurisdiction of United States magistrates should remain "open-ended" and coextensive with that of the district courts. It emphasized that the duties that magistrates perform should continue to be determined by delegation from the district courts, and that magistrates should not be given piecemeal or "original" jurisdiction over specific categories of cases.<sup>205</sup>

The Conference stated that magistrates should not be authorized to accept guilty pleas for judges in felony cases. It suggested, however, that the Congress consider creating more misdemeanors or fashioning a downgrading provision permitting magistrates to dispose of additional criminal cases. The Conference requested that the Congress amend the Federal Magistrates Act to provide that the consent of the defendant in a petty offense case be made on the record only, without the requirement that it be made in writing.<sup>206</sup> It also suggested that the Congress might wish to consider whether there is a need to extend limited contempt powers to magistrates.

The Conference specifically addressed the role of part-time magistrates in the magistrates system:

The Federal Magistrates Act authorizes the district courts to assign a full range of duties to part-time magistrates. [The 1979 amendments, though, limit the role of part-time magistrates in the trial of civil cases to those instances where there is no full-time magistrate reasonably available.]

Only a few part-time magistrates are regularly delegated a full range of assignments by the judges in civil and criminal cases. Because of the Judicial Conference's conflict-of-interest rules, the limited amount of time they have

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<sup>204</sup> The Conference suggested, *inter alia*: (1) that the language of [28 U.S.C. § 636\(c\)\(2\)](#) be amended to give the clerk of the district court more flexibility regarding the time and manner of notifying civil litigants as to the civil trial jurisdiction of magistrates; (2) that § 631(b) be amended to require that a magistrate be a member of a bar of any state for a period of at least five years; (3) that the limitation on a magistrate's authority to impose probation in Youth Corrections Act cases be amended; and (4) that disparities in sentencing authority between magistrates and judges in misdemeanor cases be reviewed.

<sup>205</sup> *See generally* § 16(j)(1), *infra*.

<sup>206</sup> *See generally* § 17(a)(2), *infra*.



available from their law practices, the unavailability of supporting staff, and the small amount of work generally available at outlying locations, it is unlikely that part-time magistrates will ever be used extensively by the district courts to assist in handling the judges' cases.

Nonetheless, the Federal Magistrates Act provides flexibility to use part-time magistrates to meet special caseload problems and to deal with emergencies that may arise. For example, a part-time magistrate may be pressed into service by the court to perform a wider range of duties during the illness or absence of a full-time magistrate or as a result of a heavy caseload surge or growing backlog in the district court. The flexibility that the current law provides the district courts to use part-time magistrates is desirable and should be retained.

The Conference noted the practical difficulties that could arise from the performance of judicial duties by a practicing attorney. The report stated that "the Conference intends to continue implementing the congressional policy of authorizing full-time magistrate positions to handle the courts' needs wherever feasible."<sup>207</sup>

The report concluded that the salaries and retirement benefits of magistrates need to be improved substantially in order to attract and retain highly-qualified individuals as magistrates. The Conference felt that the title "United States magistrate" was an appropriate designation for the office and that no change of title would be warranted. Finally, the Conference noted that the staffing arrangements and support services provided to magistrates appeared to be adequate.

## **15. Qualifications Amendments of 1982, 1986 and 1989**

### **a. 1982 Amendments**

Among the minor adjustments recommended by the Judicial Conference in its 1981 report was a modification of the qualifications requirements for appointment as a United States magistrate. The Federal Magistrate Act of 1979 required not only that each individual appointed as a magistrate be a current member of the bar of the highest court of the state of appointment, but also that each appointee have been a bar member of the state of appointment for at least five years.

The five-year experience requirement was added in the 1979 legislation to help ensure that only well-qualified persons would be appointed as magistrates. The Judicial Conference, while supporting the concept of an experience requirement, pointed out that limiting such experience only to the state in which the prospective magistrate would serve was probably more restrictive than necessary or intended:

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<sup>207</sup> Report to the Congress by the Judicial Conference of the U.S., *The Federal Magistrates System*, 59 (December 1981).

Capable individuals have applied for magistrate positions who are in fact members of the local state bar and have more than five years' experience as attorneys, but have not been members of the bar of the highest court of the particular state where they would serve as magistrate for a period of five years. Therefore, the language of the 1979 amendments should be modified to separate the two requirements of local bar membership and five years' bar membership. It should be sufficient simply to require that a magistrate be a member in good standing in the bar of the highest court of the state of appointment and a member of the bar of the highest court of *any* state for a period of at least five years.<sup>208</sup>

Legislation implementing the Conference's recommendation was introduced in the House of Representatives (H.R. 6544 and H.R. 6570). A companion measure, S. 2706, was introduced in the Senate on June 30th and passed by voice vote on the same day. On July 23d, the House considered and passed the Senate bill by unanimous consent.

The legislation retained the requirement of current membership in the bar of the state of appointment for an individual selected to serve as a magistrate. However, the experience requirement was broadened to permit membership in the bar of any state to qualify as part of the necessary five-years' bar membership.

The bill was enacted as Public Law No. 97-230, [96 Stat. 255](#), on August 6, 1982. On the same day, by action of its Executive Committee, the Judicial Conference effected a change in the Selection Regulations for U.S. Magistrates to implement the new law.<sup>209</sup>

## **b. 1986 Amendments**

### **(1) Ad Hoc Recall and Extended Service Recall**

The Criminal Justice Act Revision of 1986 amended the Federal Magistrates Act in several ways.<sup>210</sup> Primarily, however, it added a new subparagraph (h) to [28 U.S.C. § 636](#) authorizing a judicial council, upon the consent of the chief judge of the district court, to recall a retired magistrate. The recall provision was enacted to encourage retired judicial officers to continue to perform important and necessary services for the courts.

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<sup>208</sup> *Id.* at 39 (emphasis in the original).

<sup>209</sup> REGULATIONS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES ESTABLISHING STANDARDS AND PROCEDURES FOR THE APPOINTMENT OF UNITED STATES MAGISTRATES, Sec. 1.01(a) (1982).

<sup>210</sup> [Pub. L. No. 99-651](#), Title II, sections 201-3, , [100 Stat. 3642 \(November 14, 1986\)](#).

At its March 1987 session, the Judicial Conference promulgated regulations to govern the recall of retired magistrates in accordance with section 636(h). The regulations, Regulations of the Judicial Conference of the United States Establishing Standards and Procedures for the Recall of United States Magistrate Judges, were patterned after existing regulations for the recall of retired bankruptcy judges, and permitted the recall of a retired magistrate for renewable periods not to exceed six months each. At its September 1987 session, the Judicial Conference amended the regulations to extend the period of recall from six months to one year. In March 1996, the regulations were amended to extend the maximum period to one year and one day, and to provide that a recalled judge may be compensated on a full-time basis or a “when-actually-employed” basis. Subsequent amendments were made on a number of occasions.

In addition, from the time of the statute’s enactment, consideration has been given to utilizing § 636(h) as a basis for recalling magistrate judges for terms of service longer than one year. At its June 1991 meeting, the Magistrate Judges Committee established the Subcommittee on Recall Service to study development of a system to recall magistrate judges for more than one year at a time. The subcommittee submitted a draft report at the December 1991 meeting of the Magistrate Judges Committee. The Committee, however, stayed consideration of the proposed regulations at that meeting because in November the Executive Committee and two judicial councils had expressed reservations regarding the establishment of a “senior status” system for non-Article III judges. The matter was deferred for one year.

Following the Magistrate Judges Committee meeting, the Bankruptcy Committee clarified the concerns expressed and recommended regulations for extended service recall of bankruptcy judges. At its March 1992 session, the Judicial Conference adopted the bankruptcy recall regulations.

At its December 1992 meeting, the Magistrate Judges Committee recommended implementation of regulations for extended service recall of magistrate judges pursuant to [28 U.S.C. § 636\(h\)](#) that were similar, but not identical, to the bankruptcy regulations. At its March 1993 session, the Judicial Conference adopted these regulations under the full title, Regulations of the Judicial Conference of the United States Governing the Extended Service Recall of Retired United States Magistrate Judges. These regulations have since been amended on a number of occasions.

## **(2) Five-year Recall**

The Criminal Justice Act Revision also added a new section 375 to title 28, establishing a separate, additional provision for the recall of retired bankruptcy judges and magistrates for five-year periods.<sup>211</sup> Originally, the five-year recall provisions had been linked to a retirement proposal that was not enacted. The Bankruptcy and Magistrates Committees studied the new section and considered various proposals for the promulgation of regulations by the Conference.

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<sup>211</sup> *Id.*, section 201(b)(1), [100 Stat. 3642](#).

At its December 1986 meeting, the Magistrates Committee discussed the five-year recall provisions of section 375. Several members of the Committee expressed concern about whether the five-year recall provisions were needed or desirable in view of the temporary recall provisions set forth in section 636(h). Both committees also expressed concern with the certification and decertification provisions of section 375. An ad hoc subcommittee was created and met with members of the Bankruptcy Committee to discuss implementation of the five-year recall provisions. The consensus reached at that meeting was to delay implementation pending further study of the actual need and cost of the program. The subcommittee's decision to delay implementation was approved by the full Magistrates Committee in June 1987.

### **(3) Service Beyond Age 70**

The 1986 amendments also changed section 631(d) concerning the continuing service of magistrates who have attained the age of 70.<sup>212</sup> Effective January 1, 1987, section 631(d) provided that magistrates may continue to serve beyond age 70 by a majority rather than unanimous vote of the district judges. The judges vote not only when the magistrate attains age 70, but also on each subsequent anniversary of the magistrate's date of birth.

#### **c. 1989 Amendment**

In 1989 the qualifications provisions of subsection 631(b) were further simplified. The statutory requirement that the appointee's bar membership be in the state of prospective service was removed entirely by amending 28 U.S.C. § 631(b)(1).<sup>213</sup>

## **16. Utilization of Magistrates and Enhancement of the Office**

### **a. General Accounting Office Report**

In July 1983, the Comptroller General submitted a report to Congress entitled "Potential Benefits of Federal Magistrates System Can Be Better Realized." The report, which contained favorable findings concerning the efficacy of the magistrates system, concluded that the system had become an important and integral part of the Federal judicial system and has helped to reduce the workload on federal judges. The thrust of the report was to encourage greater utilization of magistrate resources by the district courts.

The report specifically recommended that the Judicial Conference of the United States: (1) issue a policy statement to encourage all district courts to develop a comprehensive plan within their

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<sup>212</sup> *Id.*, section 201(a)(1), [100 Stat. 3642](#).

<sup>213</sup> Dire Emergency Supplemental Appropriations and Transfers, Urgent Supplementals, and Correcting Enrollment Errors Act, [Pub. L. No. 101-45](#), Title II, ch. 1, sec. 104, [103 Stat. 97](#), 122 (June 30, 1989).

districts for using magistrates more effectively and efficiently; (2) disseminate to all districts on a more formal basis the criteria for approving requests for new magistrate positions; and (3) provide additional guidance to the district courts in implementing the civil trial provision of the Federal Magistrates Act. In addition, the General Accounting Office recommended to Congress that [28 U.S.C. § 636\(c\)\(2\)](#) be amended to make clear that the designation of a magistrate to conduct civil trials with the consent of the parties does not preclude a district judge from exercising jurisdiction over any case, even though the parties had consented to disposition of the matter by a magistrate.<sup>214</sup>

The Judicial Conference responded to the GAO's report at its meeting in March 1984. The Conference endorsed the actions being taken or proposed by the Administrative Office and the Magistrates Committee to encourage the further use of magistrates by the courts. At its December 1983 meeting, the Committee: (1) agreed to recommend formally to the Federal Judicial Center that future seminars and orientation programs include information on the general jurisdiction of magistrates and on the effective utilization of magistrates; (2) declined to endorse the GAO proposal to encourage courts to develop district-wide plans for the use of magistrates; (3) approved the dissemination to the courts of the criteria used in evaluating and approving new full-time magistrate positions; and (4) declined to revise the "Guidelines to Implement the 1979 Amendments to the Federal Magistrates Act" to define the limits imposed upon a federal district judge or a magistrate in informing litigants of their option to consent to a trial before a magistrate in a civil case.

The Conference also expressed a preference for the language in the proposed amendment of [28 U.S.C. § 636\(c\)\(2\)](#) submitted to Congress in the Conference's 1981 report on the magistrates system, rather than that in the amendment proposed in the GAO report. In 1990, the Congress adopted language similar to that preferred by the Conference. *See* § 18(b)(2), *infra*.

#### **b. Bail Reform Act of 1984**

The Bail Reform Act, among other things, authorized judicial officers generally, including magistrates, to detain criminal defendants prior to trial.<sup>215</sup> Section 204 of the Act amended [18 U.S.C. §§ 3041](#) and [3042](#) to allow magistrates to make detention or conditional release determinations under [18 U.S.C. §§ 3141-3156](#).<sup>216</sup>

The Act made a technical and conforming amendment to [28 U.S.C. § 636\(a\)\(2\)](#) by striking out "impose conditions of release under section 3146 of title 18" and inserting in lieu thereof "issue

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<sup>214</sup> Report to the Congress by the Comptroller General, *Potential Benefits of Federal Magistrates System Can Be Better Realized*, iv-v, 43 (1983) (B-201911).

<sup>215</sup> [Pub. L. No. 98-473](#), Title II, ch. 1, [98 Stat. 1837](#) (Oct. 12, 1984).

<sup>216</sup> *Id.*, section 204, [98 Stat. 1837](#).

orders pursuant to section 3142 of title 18 concerning release or detention of persons pending trial."<sup>217</sup> Conforming amendments were also made to rules 5(c), 15(a) and 40(f) of the Federal Rules of Criminal Procedure.

### **c. Juvenile Proceedings**

The Juvenile Justice and Delinquency Prevention Act of 1974, 18 U.S.C. §§ 5031-5042, established special procedures to be used when processing federal crimes committed by persons under age 18. The Federal Youth Corrections Act of 1974, 18 U.S.C. §§ 5005-5026, was enacted to provide indeterminate sentencing of youth offenders under age 22, and in certain instances, of young adult offenders ages 22 to 26.

The authority of magistrates to try misdemeanor cases involving youth offenders and juveniles was clarified by the Federal Magistrate Act of 1979. The Act added subsections (g) and (h) to [18 U.S.C. § 3401](#). Subsection (g) delineated a magistrate's authority in misdemeanor and petty offense cases involving youth offenders. Subsection (h) specified that a magistrate had authority to dispose of petty offense cases involving juveniles, but prohibited magistrates from imposing sentences of incarceration in those cases.

The Senate version of the Federal Magistrate Act of 1979 would have provided magistrates with the authority to try misdemeanor cases, including petty offense cases, involving juveniles. The conference report for the 1979 Act stated: "The House conferees rejected the Senate provisions and agreed to the following compromise: Magistrates are authorized to try juveniles with their consent and in petty offense cases only."<sup>218</sup>

The Comprehensive Crime Control Act of 1984<sup>219</sup> repealed the Federal Youth Corrections Act. At the same time, the Crime Control Act repealed [18 U.S.C. § 3401\(g\)](#), which delineated the authority of magistrates under the Youth Corrections Act, and redesignated subsection (h) as (g).<sup>220</sup>

At its March 1995 session, the Judicial Conference approved a recommendation of the Magistrate Judges Committee to endorse an amendment to [18 U.S.C. § 3401\(g\)](#) to provide magistrate judges with authority over juvenile Class A misdemeanor cases (misdemeanors above the level of petty offense), and to provide magistrate judges with authority to sentence juvenile defendants to

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<sup>217</sup> *Id.*, section 208, [98 Stat. 1837](#).

<sup>218</sup> *Id.* at 10.

<sup>219</sup> [Pub. L. No. 98-473](#), sec. 218(a)(8), [98 Stat. 1837](#).

<sup>220</sup> *Id.*, sec. 223(j), [98 Stat. 1837](#).

terms of imprisonment in petty offense and other misdemeanor cases.<sup>221</sup>

The *Federal Courts Improvement Act of 1996* amended [18 U.S.C. § 3401\(g\)](#) by removing the requirement of consent of a juvenile defendant to magistrate judge authority in most petty offenses as specified in the Act.<sup>222</sup> Further requirements regarding consent of a juvenile defendant to magistrate judge authority were removed by the Federal Courts Improvement Act of 2000, which also gave magistrate judges authority to sentence juvenile defendants to terms of imprisonment in misdemeanor cases. For more information on the changes made by this law, *see* § 22(b), *infra*.

#### **d. Proceedings In Felony Cases**

In June 1992, the Magistrate Judges Committee adopted a resolution stating that judicial duties in certain “critical stages of felony cases, including accepting guilty pleas, conducting sentencing proceedings, and presiding over the trial of a felony case” were within the fundamental authority of Article III judges and, therefore, were not appropriate for delegation to magistrate judges, regardless of the parties’ consent.<sup>223</sup> The Committee did not seek Judicial Conference endorsement of its position at that time.

In 1994, however, during long-range planning sessions, the Committee significantly changed its position. In a 1994 Supplement to its Long-Range Plan for the Magistrate Judges System, the Committee observed that “[t]he projected growth of the criminal caseload of the federal courts makes the delegation of expanded consensual felony authority to magistrate judges an increasingly acceptable alternative for courts attempting to manage growing felony and civil dockets.”<sup>224</sup>

A majority of the Committee believed that the litigants’ consent to magistrate judge authority satisfied constitutional concerns. A substantial minority of Committee members did not agree with this view. Therefore, the Committee agreed that “it would be prudent to proceed cautiously, expanding the involvement of magistrate judges in felony matters on an experimental basis.”<sup>225</sup> Thus, the Committee recommended that pilot programs be established in selected district courts under which magistrate judges would be authorized to accept guilty pleas and impose sentences in felony

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<sup>221</sup> JCUS-MAR 95, p. 24.

<sup>222</sup> *See generally*, § 21(b), *infra*.

<sup>223</sup> Report of the Judicial Conference Committee on the Administration of the Magistrate Judges System, 16-17 (September 1992).

<sup>224</sup> Supplement to the Long-Range Plan for the Magistrate Judges System, 4-6 (June 1994).

<sup>225</sup> *Id.* at 5.



cases with the consent of the parties and under the supervision and control of district judges.<sup>226</sup> It also recommended that if these programs were found to be constitutional and beneficial, an additional experimental pilot program be established to permit magistrate judges to try felony cases with consent.<sup>227</sup> The Committee reported these recommendations to the September 1994 session of the Judicial Conference as information items only, thus no position was taken on them by the full Conference, and although recommended in the Long Range Plan, sentencing and trial pilot programs have never been implemented. In many districts, magistrate judges are authorized to accept felony guilty pleas.<sup>228</sup>

#### e. Bankruptcy Amendments and Federal Judgeship Act of 1984

The Bankruptcy Amendments and Federal Judgeship Act [BAFJA] was passed in response to the Supreme Court's decision in [\*Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.\*, 458 U.S. 50 \(1982\)](#), which invalidated the grant of judicial authority to bankruptcy judges made under the Bankruptcy Reform Act of 1978. Many of the new jurisdictional provisions of the Bankruptcy Code, codified at [28 U.S.C. § 157](#), resembled the jurisdictional provisions of the Federal Magistrates Act, [28 U.S.C. § 636](#).

During the interim period between *Marathon* and the effective date of BAFJA procedures were instituted to allow courts to utilize magistrates to hear and determine "core" bankruptcy proceedings. After the enactment of BAFJA, however, the need to use magistrates in bankruptcy proceedings was eliminated. The Magistrates Committee therefore determined at its meeting in December 1984 that the routine reference of core bankruptcy proceedings should not be encouraged and that the Committee should not consider bankruptcy matters in its deliberations on the need for additional magistrate resources.

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<sup>226</sup> *Id.* at 4.

<sup>227</sup> *Id.* at 6.

<sup>228</sup> All circuits which have dealt with this issue have held that plea colloquies under [Fed. R. Crim. P. 11](#) in felony cases are additional duties that may be delegated to magistrate judges under [28 U.S.C. § 636\(b\)\(3\)](#) with the defendants' consent. See e.g., [United States v. Benton](#), 523 F.3d 424 (4th Cir. 2008); [United States v. Vega-Martinez](#), 425 F.3d 15 (1st Cir. 2005); [United States v. Woodard](#), 387 F.3d 1329 (11<sup>th</sup> Cir. 2004); [United States v. Reyna-Tapia](#), 328 F.3d 1114 (9th Cir. 2003) (*en banc*); [United States v. Torres](#), 258 F.3d 791 (8th Cir. 2001); [United States v. Dees](#), 125 F.3d 261 (5th Cir. 1997), *cert. denied*, 522 U.S. 1152 (1998); [United States v. Ciapponi](#), 77 F.3d 1247 (10th Cir.) *cert. denied*, 517 U.S. 1215 (1996); [United States v. Williams](#), 23 F.3d 629 (2d Cir. 1994).



**f. Retirement and Survivors' Annuities for Bankruptcy Judges and Magistrates Act of 1988**

The Retirement and Survivors' Annuities for Bankruptcy Judges and Magistrates Act was enacted on November 15, 1988.<sup>229</sup> Many of its provisions are codified at [28 U.S.C. §§ 376](#) and 377. The Act authorized the Director of the Administrative Office to regulate and administer the new retirement system under the supervision of the Judicial Conference.

The retirement provisions of the Act added a new section 377 to title 28 of the United States Code and entitled any full-time magistrate who retires after attaining the age of 65 years and serving at least 14 years to receive an annuity equal to the salary being received at the time the magistrate left office. The Act provides for a partial annuity for magistrates retiring after at least eight years of full-time service.

The Act also affected the Judicial Survivors' Annuities System [JSAS]. The JSAS plan, originally enacted in 1956 and amended in 1976 and 1986, provides an annuity to the surviving spouse and any surviving dependents of Article III judges. The Act amended [28 U.S.C. § 376](#) to extend eligibility to participate in JSAS to bankruptcy judges and magistrates.

**g. Federal Employees' Group Life Insurance (FEGLI) Benefits Changes for Magistrate Judges**

Before 1998, Article III judges had the exclusive right to carry full Federal Employees' Group Life Insurance (FEGLI) coverage into retirement. In addition, then and now, Article III judges are entitled to carry such coverage at no increased cost over the employee rate paid by active employees. However, in 1998, Congress enacted legislation that expanded the right to carry full FEGLI coverage into retirement to all federal employees, including magistrate judges and bankruptcy judges, although, unlike Article III judges, these employees must pay the additional premiums over what they paid as active employees. As a result of this statutory change widening the covered group of retirees, the Office of Personnel Management (OPM) imposed rate changes in FEGLI premiums that would significantly increase the cost for all judges of maintaining the insurance and, for judges aged 65 and older, made continued coverage prohibitively expensive.

To minimize the impact of this change for Article III judges, Congress passed legislation known as the "FEGLI fix" in November 1999,<sup>230</sup> which authorized the Director, on direction of the Judicial Conference, to pay "on behalf of Justices and judges of the United States appointed to hold office during good behavior, aged 65 or over, any increases in the cost of [FEGLI] imposed after April

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<sup>229</sup> [Pub. L. No. 100-659](#), [102 Stat. 3910 \(1988\)](#).

<sup>230</sup> [Pub. L. No. 106-113](#), [113 Stat. 1501 \(1999\)](#).

24, 1999, including any expenses generated by such payments . . .”<sup>231</sup> Shortly thereafter, in 2000, the Judicial Conference authorized the Director to pay the increased FEGLI premiums for all active Article III judges aged 65 and older, senior judges and retired Article III judges, effectively capping their personal life insurance costs after age 65.<sup>232</sup>

While the legislation for the “FEGLI fix” for Article III judges was still pending, the Court of Federal Claims was instrumental in adding a provision to the federal courts improvement bill in the 106<sup>th</sup> Congress that was intended to treat Court of Federal Claims judges the same as life-tenured judges for purposes of FEGLI, including extension of the “FEGLI fix” to them.<sup>233</sup> Because Congress was considering also extending the “FEGLI fix” to magistrate judges and bankruptcy judges, the Magistrate Judges Committee and the Bankruptcy Committee, at their respective meetings in December 1999 and January 2000, endorsed supporting legislation to equalize life insurance benefits for all federal judges.”<sup>234</sup>

Around the same time, however, the Judicial Branch Committee recommended to the Judicial Conference that it oppose the extension of the “FEGLI fix” to Court of Federal Claims judges. The Judicial Conference agreed.<sup>235</sup>

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<sup>231</sup> See [28 U.S.C. § 604\(a\)\(5\)](#).

<sup>232</sup> JCUS-SEP 00, pp. 54-55.

<sup>233</sup> The three FEGLI benefits sought by the Court of Federal Claims judges were: (1) the right of retired judges to FEGLI Basic Life insurance at premiums that are capped at active government employee rates; (2) the elimination of the five-year enrollment requirement for continuing full FEGLI coverage into retirement; and (3) the payment by the Director of the AO of the cost increases for FEGLI Option B coverage imposed after April 24, 1999 for judges aged 65 and older. The last benefit being known as the “FEGLI” fix.

<sup>234</sup> The Magistrate Judges Committee approved the following recommendation: “that the Judicial Branch Committee recommend that the Judicial Conference support legislation to equalize life and health insurance benefits for non-Article III judges provided that the total benefits available to these judges do not exceed those available to Article III judges.”

The Bankruptcy Committee endorsed a slightly different recommendation: that the Judicial Branch Committee recommend that the Judicial Conference support legislation to provide access to life and health insurance benefits for non-Article III judges according to the same standards as Article III judges.

<sup>235</sup> JCUS-SEP 00, pp. 39-40.

Becoming aware of proposed legislation that would include magistrate judges and bankruptcy judges within the “FEGLI fix,” the Executive Committee, acting on behalf of the Conference, requested that Congress defer action on extending the “FEGLI fix” to magistrate judges and bankruptcy judges until a complete review and discussion could be had within the judicial branch. In so doing, the Executive Committee noted that the “FEGLI fix” was passed because it was “critical in maintaining the *status quo* for Article III judges, who were in peril of losing a long-time benefit—applicable only to life-tenured federal judges—upon which many of them had come to rely as the keystone of their financial and estate planning.”<sup>236</sup> However, despite the opposition of the Judicial Conference, Congress extended the “FEGLI fix” to Court of Federal Claims judges as part of the Federal Courts Improvement Act of 2000, [Pub. L. No. 106-518](#).

A few years later, in May 2004, the Federal Courts Improvement Act of 2004 (S. 2396) was introduced containing a provision that extended the “FEGLI fix” to magistrate judges, bankruptcy judges, and territorial court judges. The bill was referred to the Senate Judiciary Committee where no further action was taken on it.

Approximately a year later, at its March 2005 session, the Judicial Conference adopted a recommendation of the Committee on the Judicial Branch to endorse extending the FEGLI fix to bankruptcy judges and magistrate judges who are in active status or are retired under the Judicial Retirement System, exclusive of those judges who elect to practice law after retirement.<sup>237</sup> Shortly thereafter, on June 2, 2005, the judiciary transmitted proposed court security legislation to the 109<sup>th</sup> Congress that included a FEGLI fix provision for non-Article III judges.

In the closing days of the 109<sup>th</sup> Congress, the Senate passed a House version of court security legislation (H.R. 1751) with a substituting amendment that included a version of the FEGLI fix that differed in language and effect from the FEGLI benefits legislation for magistrate judges, bankruptcy judges, and territorial court judges that was contained in the 2004 Senate bill, S. 1968. The different version would have extended to these judges the right to payments of increases in Option B premiums for judges aged 65 and older, but did not include the right to Basic life insurance premiums that are capped at active government employee rates or elimination of the five-year rule, the two other FEGLI benefits sought by non-Article III judges. The House, however, failed to pass H.R. 1751 as amended by the Senate, before adjournment of the 109<sup>th</sup> Congress.

At its December 2006 meeting, the Magistrate Judges Committee reaffirmed its recommendation to the Judicial Branch Committee to seek legislation to extend the FEGLI fix to magistrate judges and bankruptcy judges. The Judicial Branch Committee agreed to continue to seek this legislation in the 110<sup>th</sup> Congress, and the Executive Committee of the Judicial Conference “supported” the various positions of the Committees at its February 2007 meeting. The Federal Magistrate Judges Association, after consulting with the AO, initiated efforts in the Senate to resolve

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<sup>236</sup> *Id.* at 40.

<sup>237</sup> JCUS-MAR 05, pp. 21-22.

any issues concerning the FEGLI benefits legislation for non-Article III judges and to reinstate the proposed FEGLI legislation for these judges as it previously existed in S. 1968 in the 109<sup>th</sup> Congress.

In the 110<sup>th</sup> Congress, the Senate and House court security bills (S. 378 and H.R. 660) as introduced, both contained the scaled down version of the FEGLI fix, as described above, carried over from the 109<sup>th</sup> Congress. However, when the Senate passed S. 378 on April 19, 2007, it adopted an amendment offered by the bill's sponsor and Chairman of the Senate Judiciary Committee, Sen. Patrick Leahy (D-VT), that replaced the changed FEGLI fix with new language that, although different from the language used in S. 1968, would effectively restore all three FEGLI benefits (*see* Footnote 232, *supra*), including the FEGLI fix, sought by magistrate judges, bankruptcy judges, and territorial court judges. However, the House-passed bill, [H.R. 660](#), still contained the version of the FEGLI fix carried over from the 109<sup>th</sup> Congress. House staff assured the Administrative Office that the House would agree to the Senate language on the FEGLI fix in the final bill to be approved by both houses.

In December 2007, both Houses of Congress passed the legislation containing the FEGLI fix and the two other FEGLI benefits sought by magistrate judges. However, the legislation did not extend the fix to bankruptcy judges and territorial court judges due to pay-as-you-go budget rules. The Court Security Improvement Act of 2007 was signed by the President into law on January 7, 2008. On March 11, 2009, the President signed the Omnibus Appropriations Act, 2009,<sup>238</sup> a nine-bill consolidated spending measure that included not only the fiscal year 2009 funding for the judiciary, but also the FEGLI fix for bankruptcy judges and territorial court judges.

#### **h. Anti-Drug Abuse Act of 1988**

On November 18, 1988, the President signed the Anti-Drug Abuse Act of 1988.<sup>239</sup> The Act represented a compromise between several anti-drug measures introduced in both Houses.

The Act made certain clarifying and conforming amendments regarding petty offense jurisdiction. The definition of petty offense in [18 U.S.C. § 19](#) was altered to raise the limit on a fine imposed for a petty offense to not more than \$5,000 for an individual and \$10,000 for an organization. Conforming amendments were incorporated into rule 9 of the Rules of Procedure for the Trial of Misdemeanors before United States Magistrates and rule 54 of the Federal Rules of Criminal Procedure.

The Act also added a fourth subsection under [28 U.S.C. § 636\(a\)](#) specifically authorizing a magistrate to enter a sentence for a misdemeanor or infraction "with the consent of the parties."<sup>240</sup>

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<sup>238</sup> [Pub. L. No. 111-8](#), [123 Stat. 524 \(2009\)](#).

<sup>239</sup> [Pub. L. No. 100-690](#), [102 Stat. 4181 \(1988\)](#).

<sup>240</sup> *Id.*, Title VII, section 7322, [102 Stat. 4181 \(1988\)](#).

The new subsection was apparently intended to make clear that magistrates have authority to enter sentences for infractions, a new category of offenses created by the Sentencing Reform Act of 1987.

#### **i. Judicial Improvements and Access to Justice Act of 1988**

The Judicial Improvements and Access to Justice Act of 1988 was enacted as an omnibus judicial "housekeeping" measure on November 19, 1988. The Act made two non-jurisdictional changes to 28 U.S.C. § 636.<sup>241</sup>

The housekeeping measure removed certain restrictions on the method of recording court proceedings and allowed magistrates to use their discretion in determining whether to utilize electronic sound recording equipment, a court reporter, or other means of recording proceedings in a civil consent case. Previously, [28 U.S.C. § 636\(c\)\(7\)](#) had set forth specific instances in which a particular method of reporting (or none at all) was required. The Act amended this section to provide that such matters shall be left to the magistrate's discretion, "subject to guidelines of the Judicial Conference." Guidelines are published in Volume VI, Chapter XII, of the *Guide to Judiciary Policies and Procedures*.

In addition, [28 U.S.C. § 636\(d\)](#) was amended to conform to the Rules Enabling Act amendments of Title IV of the housekeeping measure. That title revised sections 2072-74 of title 28, providing the Supreme Court with the power to prescribe rules of practice, procedure and evidence for cases in the district courts, including proceedings before magistrates.

#### **j. Ethics Reform Act of 1989**

[H.R. 3660](#), the Ethics Reform Act, was introduced in the House by Congressman Foley on November 15, 1989. It provided for a 25% salary increase for Article III judges and full-time magistrates in conjunction with limitations on outside earned income, outside employment and honoraria.

The act passed the House on November 16, 1989. The Senate passed an amendment in the nature of a substitute by voice vote on November 17, 1989, and the House concurred in the amendment by voice vote on the same day. The act was signed by the President on November 30, 1989.<sup>242</sup>

#### **(1) Salary Increase**

Section 703 of Title VII of the act provided Article III judges with a 25% salary increase

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<sup>241</sup> [Pub. L. No. 100-702](#), Title IV, sect. 404(b)(1), Title X, sect. 1014, [102 Stat. 4642](#), 4651, 4669 (1988).

<sup>242</sup> [Pub. L. No. 101-194](#), [103 Stat. 1716](#) (1989).

effective the first pay period on or after January 1, 1991. The salaries of bankruptcy judges and the ceiling on the salaries of full-time magistrates are set at 92% of the salary of district judges by [28 U.S.C. §§ 153](#) and 634, respectively.<sup>243</sup> A March 1987 standing resolution of the Judicial Conference provides that salary increases granted to bankruptcy judges automatically will be extended to full-time magistrates.<sup>244</sup>

The salary increase did not extend to part-time magistrates. A specific resolution of the Judicial Conference is necessary for part-time magistrates to receive a salary adjustment.<sup>245</sup> Section 634 of title 28, enacted in 1976, places a ceiling on the salaries of part-time magistrates at not more than "one-half the maximum salary payable to a full-time magistrate." At its meeting in September 1990, the Judicial Conference declined to extend the 25% salary increase to part-time magistrates "[i]n keeping with this preference for full-time magistrate positions...."<sup>246</sup> Instead, the Conference approved a cost-of-living adjustment for part-time magistrates in the same percentage as granted by the Congress to federal employees generally in 1991.<sup>247</sup>

## **(2) Ethics Reform**

In conjunction with the salary increase, the Ethics Reform Act placed new restrictions on financial disclosure (Title II), gifts and travel (Title III), and outside employment and elimination of honoraria (Title VI). The Act authorized the Judicial Conference to promulgate rules to implement its provisions, and permitted the Conference to issue advisory opinions.

Volume II of the *Guide to Judiciary Policies and Procedures* contains the codes of conduct for judges and judicial employees. Chapter I, "Code of Conduct for United States Judges," applies to district judges, bankruptcy judges, and magistrates. Advisory opinions published by the Judicial Conference Committee on the Codes of Conduct are contained in Chapter IV. The regulations of the

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<sup>243</sup> Continuing Appropriations Act, [Pub. L. No. 100-202](#), Title IV, sect. 408, [101 Stat. 1329 \(1987\)](#).

<sup>244</sup> JCUS-MAR 87, p. 32.

<sup>245</sup> A March 1988 standing resolution of the Judicial Conference does grant to part-time magistrates automatically the same "cost-of-living adjustments" (in percentage terms) as are extended to full-time magistrates.

<sup>246</sup> JCUS-SEP 90, p. 93.

<sup>247</sup> At its meeting in June 1990, the Magistrates Committee had discussed at length whether to recommend that the Judicial Conference extend the 25% salary increase to part-time magistrates. The Committee reported to the Judicial Conference that "your Committee determined that extension of a 25% salary increase to part-time magistrates at this time would impede the transition to a full-time magistrates system."

Judicial Conference promulgated under the authority of the Ethics Reform Act are located in Volume II, Chapter V, of the *Guide*.

#### **k. 1990 Amendments to the Federal Rules of Criminal Procedure**

On May 1, 1990, the Chief Justice submitted to Congress several amendments to the Federal Rules of Criminal Procedure.<sup>248</sup> The rules went into effect December 1, 1991. New criminal rule 58 abrogated and replaced the Rules of Procedure for the Trial of Misdemeanors before United States Magistrates [hereinafter Misdemeanor Rules].

[Fed. R. Crim. P. 58](#) largely restated the Misdemeanor Rules, which had been promulgated in 1980 to implement the 1979 Congressional grant of authority to magistrates to try misdemeanor cases with the consent of the parties. The advisory committee note indicates that a single new rule should be incorporated into the Rules of Criminal Procedure so that those charged with its execution may locate it readily and use it in connection with the other criminal rules. The title of the new rule, "Procedures for Misdemeanors and Other Petty Offenses," deletes a reference to magistrates to indicate that the rule is to be used by district judges as well.<sup>249</sup>

Most of the changes to the Misdemeanor Rules were technical only. The advisory committee note indicates that no major changes were envisioned in the trial procedures for misdemeanor and petty offense cases.

#### **l. Magistrate Judge Participation in Circuit Conferences**

On October 13, 2008, President Bush signed into law the "Judicial Administration and Technical Amendments Act of 2008" (S. 3569).<sup>250</sup> Section 9 of the new law (which amended [28 U.S.C. § 333](#)) added magistrate judges to the list of circuit, district, and bankruptcy judges in active service, who may by statute be summoned by the chief judges of the circuits to attend circuit judicial conferences. Magistrate judges were not included in Section 333 upon its enactment in 1939 because the modern office of magistrate judge was not created until 1968. As a practical matter, however, magistrate judges in all circuits participate in circuit judicial conferences either by invitation of the

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<sup>248</sup> See generally H.R. DOC. NO. 185, 101st Cong., 2d Sess. (May 1, 1990), for the amendments to the rules and excerpts from the report of the Judicial Conference containing the advisory committee notes. The Supreme Court declined to adopt proposed rule 41(a)(3), which would have authorized federal magistrates (including U.S. magistrate judges) to issue warrants to search property outside the United States.

<sup>249</sup> *Id.* at 35-36.

<sup>250</sup> [Pub. L. No. 110-406](#), [122 Stat. 4291 \(2008\)](#).



chief judge or as provided by circuit rules.<sup>251</sup>

### **m. Other Policies**

#### **(1) Original Jurisdiction**

The issue of whether magistrates may exercise original jurisdiction in certain categories of cases has been debated since the creation of the system in 1968. The discussion has centered most recently on whether the requirement of defendants' consent to magistrate jurisdiction in petty offense cases should be eliminated. *See* §§ 2.17(a)(2) and (3), *infra*.

In 1976 the House Committee on the Judiciary discussed whether a multi-tiered district court would result should Congress grant original jurisdiction in certain instances to magistrates.<sup>252</sup> The Committee acknowledged that multi-tiered systems develop in recognition of the fact that certain cases and judicial functions are of differing importance and thus justify different treatment by the court system. Therefore, the Committee believed it would be constitutional for Congress to create a lower-tier court roughly equivalent to state municipal courts. The concept of a two-tiered system was ultimately rejected by the Committee in favor of a single-tier district court, where magistrates serve in a supplementary role to assist Article III judges.<sup>253</sup>

In providing magistrates with the authority to try civil cases with the consent of the parties, Congress made clear that no limitation is to be placed on the type of case which can be referred to a magistrate under [28 U.S.C. § 636\(c\)](#).<sup>254</sup> Both the Senate and House conference reports to the 1979 amendments of the Federal Magistrates Act state succinctly: "No categorization of types of cases to

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<sup>251</sup> Section 10 of the Judicial Administration and Technical Amendments Act of 2008 also amended [18 U.S.C. § 3152\(c\)](#) to provide that chief pretrial services officers are to be chosen in the same way as chief probation officers, i.e. "by the district court." This section removed magistrate judges' absolute right to be included in the selection process for these officers, which had been their right under the previous version of [18 U.S.C. § 3152\(c\)](#).

<sup>252</sup> 1976 HOUSE REPORT, *supra* note 114, at 8.

<sup>253</sup> *Id.* The Committee felt that the magistrates system would withstand constitutional scrutiny in a single-tiered system, even though it would not be feasible for "every judicial act, at every stage of the proceeding, to be performed by a 'judge of the court.'" *See also* 1979 HOUSE REPORT, *supra* note 173, at 7 n.16.

<sup>254</sup> S. CONF. REP. NO. 322, 96th Cong., 1st Sess. 7 (1979); 1979 CONFERENCE REPORT, *supra* note 177, at 7.



be tried by magistrates is to be allowed."<sup>255</sup>

In its 1981 report to Congress, the Judicial Conference stated that "'original' jurisdiction over any specific categories of cases should not be vested directly in United States magistrates."<sup>256</sup> In September 1982, the Conference approved the following resolution:

Resolved, that it continues to be the position of the Judicial Conference of the United States that the Federal Magistrates System should continue to be an integral part of the district courts, that the jurisdiction of magistrates should remain "open" and should neither be expanded to include "original" jurisdiction in special categories of cases, nor restricted in special types of cases or proceedings. It is, furthermore, the policy of the Judicial Conference to encourage the full and effective utilization of United States magistrates by the district courts in civil and criminal cases under existing statutory authority and to oppose restrictions on the utilization of magistrates by the district courts.<sup>257</sup>

On several occasions the Judicial Conference has opposed the creation of original jurisdiction in magistrates and disapproved legislation mandating that district courts automatically refer particular types of cases to magistrates.<sup>258</sup> The Magistrates Committee has also opposed such legislation.<sup>259</sup>

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<sup>255</sup> *Id.*

<sup>256</sup> Report to the Congress by the Judicial Conference of the United States, *The Federal Magistrates System*, 49 (December 1981). Acknowledging a de facto categorization of petty offense and misdemeanor cases, the Conference discusses at length the disadvantages of a multi-tiered court system. *Id.* at 41-43.

<sup>257</sup> JCUS-SEP 82, pp. 92-3.

<sup>258</sup> In March 1980, the Conference disapproved in principle legislation mandating that district courts automatically refer particular types of case to magistrate judges (proposed Small Business Judicial Access Act of 1980). In March 1983, the Conference reaffirmed its opposition to legislative proposals either prohibiting or mandating the reference of specific cases to magistrate judges (proposed Judicial Reform Act of 1982). In a prepared statement delivered to Congress on September 11, 1986, Chief Judge H. Dale Cook stated on behalf of the Conference that the "creation of an additional tier of special magistrates [for cases arising on Indian reservations] is unnecessary and is opposed, as a matter of policy." In September 1990, the Conference reaffirmed its disapproval of legislation "which mandates that a district court automatically refer particular types of cases to magistrates," and objected to proposed legislation which would vest magistrates with authority to decide certain

## (2) Preference for Full-time Judicial Officers

The Judicial Conference and the Magistrates Committee have on several occasions taken action to implement the Congressional and Conference policy favoring full-time magistrate positions rather than part-time positions.<sup>260</sup> In addition, related concerns regarding potential role confusion have led to policies disfavoring combination clerk-magistrate positions.

The Magistrates Committee approved a policy in July 1985 whereby courts with a combination clerk-magistrate position were to be advised during the survey process of the general policy disfavoring such positions. Upon the occurrence of a vacancy, the Committee stated, the need for the position would be reassessed in light of the criteria for initial approval of such positions.

At its June 1990 meeting, the Magistrates Committee made the following recommendation for consideration by the Judicial Conference in September 1990:

Your Committee concluded that it must move faster in achieving a system composed primarily of full-time magistrates. Consequently, your Committee concluded that all part-time magistrate positions should be examined in the near future, with a view towards expediting the process of eliminating, consolidating, or converting the positions. Some part-time magistrate positions will undoubtedly need to be retained at locations where the volume of district court business clearly does not warrant the authorization of a full-time magistrate position, but where other legitimate considerations exist. In this respect, your Committee is of the opinion that geographical considerations and the cost-savings generally associated with part-time magistrate positions are not sufficient in and of themselves to justify retention of individual part-time magistrate positions.

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Federal Tort Claims Act cases automatically (recommendation of the Federal Courts Study Committee).

<sup>259</sup> In June 1989, the Committee disagreed with the proposition that legislation should be recommended to presume consent in civil cases unless later objected to by the parties. At the same time, the Committee opposed a recommendation by the Federal Courts Study Committee to authorize magistrate judges to try cases without the consent of the parties in certain non-Article III type cases (cases under the Federal Tort Claims Act). In December 1990, the Committee declined to endorse a proposal to enact legislation providing magistrate judges with original, nonconsensual jurisdiction over landlord-tenant disputes arising from public housing authorities located on Indian reservations.

<sup>260</sup> See notes 37, 47, 85, 167, 184 and 207, *supra*, and accompanying text.

In September 1990, the Judicial Conference reaffirmed its preference for a system of full-time judicial officers. It endorsed the plans of the Magistrates Committee to review each part-time magistrate position on an individual basis with a view towards eliminating as many of the part-time positions as feasible, either by abolishing them, combining them, or converting them to full-time status.<sup>261</sup>

The Magistrates Committee reaffirmed its policies disfavoring combination clerk-magistrate positions at its meeting in December 1990, and it adopted two additional policy statements. First, a clerk-magistrate position in a district would be reviewed with a view toward its elimination whenever a district requested the authorization of additional magistrate resources. Second, clerk-magistrate positions would be discontinued absent compelling and unusual circumstances whenever vacancies occurred.

### **(3) Survey Methodology**

The Federal Magistrates Act of 1968 empowered the Judicial Conference to make changes in the number, locations, and salaries of magistrate positions. The Conference directed the Director of the Administrative Office to prepare local surveys regarding the needs of each district court for magistrate services. The Director in turn delegated the preparation of survey reports to the Magistrates Division.

Originally, the Magistrates Division prepared a survey report for consideration by the Magistrates Committee prior to the scheduled expiration of the term of each full-time or part-time magistrate position. The survey made recommendations as to whether the position should be continued for an additional eight-year or four-year term and whether any change should be made in the salary or other arrangements. Many such surveys involved the routine continuation of magistrate positions and were triggered automatically by the impending expiration of an incumbent's term.

At its December 1990 meeting, the Magistrates Committee discussed and recommended certain changes in the timing and methodology of the survey process. As a result, the Judicial Conference approved the following resolution:

In light of twenty years' experience with the magistrate judge system, the Judicial Conference determines that surveys of magistrate judge positions prior to the expiration of the incumbents' terms are no longer necessary. Absent specific action, the Conference determines that all magistrate judge positions continue to be needed with no change in the salary or arrangements. In accordance with [28 U.S.C. § 633\(a\)\(1\)](#), the Conference deems it expedient to direct the Director of the Administrative Office periodically to prepare local surveys reviewing all magistrate judge resources in each district to determine whether there should be changes in the numbers, locations, salaries, or arrangements. Each district will be surveyed no less frequently

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<sup>261</sup> JCUS-SEP 90, p. 93.

than every four years, if the district is authorized part-time magistrate judge positions, or every five years, if the district is authorized only full-time magistrate judge positions. Specific Judicial Conference action will be required only in instances where new magistrate judge positions are authorized, a position is terminated, or where a change is required in the salary or arrangements.<sup>262</sup>

With surveys to be conducted less frequently than before, each report now reviews all full-time and part-time magistrate positions in a given district.

#### **(4) Long Range Plan for the Federal Courts**

In December 1995, the Judicial Conference approved a comprehensive Long Range Plan for the Federal Courts to guide future policy-making of the judicial branch. The Long Range Plan included several recommendations concerning the utilization of magistrate judges. Of particular importance is recommendation 65 which states that:

Magistrate judges should perform judicial duties to the extent constitutionally permissible and consistent with sound judicial policy. Individual districts should retain flexibility, consistent with the national goal of effective utilization of all magistrate judge resources, to have magistrate judges perform judicial services most needed in light of local conditions and changing caseloads.

### **17. Federal Courts Study Committee**

In 1988 Congress created the Federal Courts Study Committee [FCSC] within the Judicial Conference, with fifteen members appointed by Chief Justice Rehnquist. Congress directed the committee to "recommend revisions to be made to laws of the United States as the Committee, on the basis of such study, deems advisable...."<sup>263</sup> On December 22, 1989, the Committee distributed a draft copy of its recommendations for public comment. Its final report was issued on April 2, 1990.

#### **a. Proposals Submitted by the Magistrates Committee**

The Magistrates Committee considered recommendations to the Federal Courts Study Committee at its meeting in June 1989. The Committee reviewed a background paper on the magistrates system prepared by the Magistrates Division of the Administrative Office.<sup>264</sup> The

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<sup>262</sup> JCUS-MAR 91, p. 21.

<sup>263</sup> Federal Courts Study Act, [Pub. L. No. 100-702](#), [102 Stat. 4642 \(1988\)](#).

<sup>264</sup> Admin. Office of the U.S. Courts, *The Federal Magistrates System: Report to the Subcomm. on the Structure of the Federal Courts of the Federal Courts*

recommendations of the Magistrates Committee were submitted to a subcommittee of the Federal Courts Study Committee in a report dated June 27, 1989. In the report, the Magistrates Committee expressed its opinion that the magistrates system was working well and that fundamental changes should not be made.<sup>265</sup>

The Magistrates Committee also recommended the enactment of legislation to implement certain changes in the system. The Committee cautioned, however, "that substantial changes in the jurisdictional authority of magistrates, especially regarding civil consent power, may lead eventually to a role transformation and thus should be considered very carefully."<sup>266</sup> The Committee's proposals included the following "fine-tuning adjustments" to the magistrates system.

### **(1) Contempt Authority**

In 1981, the Judicial Conference had examined the issue of contempt authority for magistrate judges and stated that empirical data was unavailable concerning the need for such authority. The Conference recommended that Congress might wish to consider whether a need to extend contempt powers to magistrate judges existed, either limited to a specific number of days of incarceration and/or a dollar fine limit.

The Magistrates Committee addressed the issue at its June 1989 meeting. Recognizing that there may be constitutional concerns, the Committee agreed that a need existed to provide magistrate judges with the power to issue contempt orders contemporaneous with the contumacious behavior:

The Magistrates Committee is concerned, however, that the lack of power to impose immediate sanctions for misbehavior committed during court proceedings engenders disrespect of the office, and more importantly, undermines the integrity of the judicial proceeding itself. In particularly litigious courts, this inability sometimes serves to embolden counsel to test

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*Study Committee, (May 1, 1989).*

<sup>265</sup> The Committee made the following recommendations regarding the basic structure of the magistrates system: (1) the Judicial Conference should continue to authorize magistrate positions; (2) the district courts should continue to appoint individual magistrates; (3) the present eight-year term of office for full-time magistrates should not be changed; and (4) the Judicial Conference should continue to fix the salaries of magistrates. Committee on the Administration of the Federal Magistrates System, *The Federal Magistrates System: Report to the Federal Courts Study Committee on the Present State of the Federal Magistrates System and the Role of Magistrates Into the Twenty-first Century*, 3-7 (June 27, 1989).

<sup>266</sup> *Id.* at 1.

the ability of a magistrate to control a proceeding.<sup>267</sup>

The Committee also agreed that legislation should be recommended to provide magistrate judges with limited contempt power similar to the power provided to bankruptcy judges under Bankruptcy Rule 9020, subject to further consideration of the constitutional issues.

The recommendation of the Magistrates Committee was transmitted to the Federal Courts Study Committee. The FCSC's report in April 1990 did not comment on the issue of contempt authority.<sup>268</sup> However, in August 1990, the Executive Committee of the Judicial Conference responded to proposed legislation in the 105<sup>th</sup> Congress (S.2516 and H.R. 2294)<sup>269</sup> that would have provided limited contempt authority to magistrate judges by opposing any change to [28 U.S.C. § 636\(e\)](#) related to the contempt power of magistrate judges.

Upon reconsideration of the issue in June 1992, the Magistrate Judges Committee reaffirmed in principle its June 1989 view that a need existed to provide magistrate judges with summary contempt power, but declined to request that the Judicial Conference seek specific legislation in its report to the Conference. Then, in 1995, the *Long Range Plan for the Federal Courts* included a recommendation to vest magistrate judges with limited contempt authority. In December 1995, the Magistrate Judges Committee recommended to the Judicial Conference that it endorse a proposed amendment of [28 U.S.C. § 636\(e\)](#) to provide magistrate judges with summary contempt authority for criminal contempts that occur in their presence and additional civil and criminal contempt authority in civil consent and misdemeanor cases.

In March 1996, the Judicial Conference approved the Committee's recommendation and endorsed for the first time a proposed amendment of [28 U.S.C. § 636\(e\)](#) to provide magistrate judges with summary contempt authority for criminal contempts that occur in their presence and additional contempt authority in civil consent cases.<sup>270</sup>

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<sup>267</sup> *Id.* at 8.

<sup>268</sup> The subcommittee report to the FCSC provided the reasoning behind the decision not to make a recommendation on contempt power for magistrates. The subcommittee wrote, "[T]his is a fine-tuning issue better left to some other committee. Also, the issue of contempt is fraught with constitutional hurdles, as has been demonstrated by the recent history of cases involving the bankruptcy judges." Report of the Subcommittee on Structure to the Federal Courts Study Committee, at 7.

<sup>269</sup> The proposed Federal Court Improvement Act of 1998.

<sup>270</sup> JCUS-MAR 96, p. 29.

Ultimately, the Judicial Conference approved the enhancements to magistrate judge contempt authority, and they were included in the Federal Courts Improvement Act of 2000 (*see* § 22, *infra*).

## (2) Consent in Petty Offense Cases

The Magistrates Committee made two separate recommendations regarding the right of a defendant in a petty offense case to proceed to trial before an Article III judge: (1) the requirement of consent in all petty offense cases should be eliminated; or (2) if consent in petty offense cases is not eliminated altogether, the requirement of filing a written consent should be eliminated. Both ideas were discussed repeatedly by the Judicial Conference and in the Congress for many years.<sup>271</sup>

In September 1991, the Judicial Conference endorsed a provision in a “housekeeping” bill drafted by the Legislative and Public Affairs Office of the Administrative Office and recommended by the Magistrate Judges Committee that, if passed, would have eliminated the consent requirement in petty offense cases.<sup>272</sup>

***Elimination of the Filing of a Written Consent.*** The Judicial Conference had recommended in its December 1981 report to Congress that “[t]he Federal Magistrates Act should be amended to provide that the consent of a defendant in a petty offense case to trial by a magistrate be made merely on the record, without the requirement that it be made in writing.”<sup>273</sup> The Conference considered such an amendment to be “administratively advantageous,” reducing paperwork burdens of the court.<sup>274</sup>

In its June 1989 recommendations to the FCSC, the Magistrates Committee reaffirmed the Conference's 1981 recommendation to Congress. The Committee attributed the absence of legislation to abolish the written consent requirement more to the lack of a suitable legislative vehicle than to the presence of any identifiable opposition or objection. The FCSC's Report in April 1990, however, did not include a discussion of this issue.<sup>275</sup>

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<sup>271</sup> A complete chronology of actions taken by both the Conference and Congress is contained as an appendix to the Magistrate Committee's report to the Federal Courts Study Committee.

<sup>272</sup> JCUS-SEP 91, pp. 66-67.

<sup>273</sup> Report to the Congress by the Judicial Conference of the United States, *The Federal Magistrates System*, at iv-v (December 1981).

<sup>274</sup> *Id.* at 57.

<sup>275</sup> In discussing why it did not recommend eliminating the written consent requirement for petty offenses, the subcommittee wrote, “As a Subcommittee, we had no objection to this proposal. However, any time-saving would be negligible and frankly the issue seemed too specific for the broad mandate of our committee.” Report of the Subcommittee on Structure to the Federal Courts

***Elimination of the Consent Requirement.*** The Judicial Conference had favored the elimination of the consent requirement during the passage of the 1979 amendments to the Federal Magistrates Act. The Senate had approved such a proposal in 1977,<sup>276</sup> but the House objected to the provision and the consent requirement was reinstated into the legislation ultimately enacted into law. The report of the House Judiciary Committee explained that the provision had been retained for two policy reasons: (1) "fundamental notions of equality" dictated that petty offenders be accorded the same right to be tried by a district judge as other criminal defendants or civil litigants; and (2) the vast majority of defendants consent to trial by a magistrate in any event.<sup>277</sup> Because of this policy decision, the House Committee declined to take a position on the constitutionality of nonconsensual trials of petty offense cases before magistrates.

The Judicial Conference revisited the issue in 1981 in its report to Congress. The Conference affirmed the justifications for eliminating consent in petty offense cases, but refrained from recommending legislation in light of Congress' action in 1979. Instead, the Conference suggested only that Congress re-examine the issue.<sup>278</sup>

The Magistrates Committee considered this subject at its meeting in December 1985 at the request of the Department of Justice, which favored the elimination of the consent requirement. The Committee decided not to act on the Department's proposal until the constitutional and policy issues could be studied more fully.

When the Magistrates Committee again considered the elimination of the consent requirement at its meeting in June 1989, it noted that "[u]nlike the filing of a written consent, the elimination of consent entirely has encountered some opposition."<sup>279</sup> In recommending to the FCSC that the consent requirement be eliminated, the Committee stated, "[t]he requirement of consent is not necessary,

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Study Committee, at 7.

<sup>276</sup> See 1977 SENATE REPORT, *supra* note 85, at 5. The Senate felt that the requirement that a defendant in a petty offense case waive the right to be tried before an Article III judge and consent to trial by a magistrate judge was not constitutionally required, that it lengthened the time needed to hear each case, and that it produced a growing volume of unnecessary paperwork. *Id.* at 6.

<sup>277</sup> 1979 HOUSE REPORT, *supra* note 173, at 18.

<sup>278</sup> Report to the Congress by the Judicial Conference of the United States, *The Federal Magistrates System*, 57-58 (December 1981).

<sup>279</sup> Committee on the Administration of the Federal Magistrates System, *The Federal Magistrates System: Report to the Federal Courts Study Committee on the Present State of the Federal Magistrates System and the Role of Magistrates Into the Twenty-first Century*, 10 (June 27, 1989).



particularly in light of the enhanced caliber of professionals appointed as magistrates."<sup>280</sup> However, in the April 1990 FCSC Report did not comment on the proposal to eliminate the consent requirement in petty offense cases.<sup>281</sup>

Pursuant to a request of the Executive Committee that each Conference committee biennially review items for legislative action within its jurisdiction to consider whether any provisions previously approved by the Conference and not enacted should continue to be pursued, in March 1999, the Magistrate Judges Committee reaffirmed its support of the following four legislative proposals that had been approved by the Judicial Conference and that affected the magistrate judges system:

- (1) provide magistrate judges with the power to exercise limited summary criminal contempt authority for misbehavior occurring in their presence, and with additional civil and criminal contempt authority in civil consent and misdemeanor cases;
- (2) eliminate the requirement that a defendant, including a juvenile, consent to the jurisdiction of a magistrate judge in all petty offense cases;
- (3) give magistrate judges authority over class A misdemeanors involving juvenile defendants and provide magistrate judges with the authority to sentence juvenile defendants to terms of imprisonment in petty offense and misdemeanor cases; and
- (4) provide the Judicial Conference with authority to establish magistrate judge positions in the District Court of Guam and the District Court for the Northern Mariana Islands.

Ultimately, all of these proposals were implemented by the Federal Courts Improvement Act of 1996 (*see* § 21, *infra*), or the Federal Courts Improvement Act of 2000 (*see* § 22, *infra*).

### **(3) Relaxation of Consent Procedures for Civil Trials**

In its June 1989 report to the Federal Courts Study Committee, the Magistrates Committee recommended that district judges and magistrates be allowed to advise and encourage parties at any time prior to trial to consent to have a civil case tried by a magistrate. This recommendation was endorsed by the FCSC in April 1990 and was subsequently enacted into law as part of the Judicial

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<sup>280</sup> *Id.*

<sup>281</sup> As with the proposal to eliminate the written consent requirement, the subcommittee's report sheds some light on why the FCSC did not comment on this issue. "There are philosophical problems with eliminating consent altogether. In effect, this would be the first step in creating a two-tier trial court system." Report of the Subcommittee on Structure to the Federal Courts Study Committee, at 8.

Improvements Act of 1990. *See* § 2.18(b)(2), *infra*.

At the same time, the Magistrates Committee rejected a proposal urging legislation to recognize "original" jurisdiction for magistrates by authorizing them to try cases without the consent of the parties in certain non-article III type cases (primarily federally-created remedies under Article I). The Committee also rejected a proposal to recommend legislation to presume consent in civil cases unless later objected to by the parties. The Committee was concerned that such changes might transform the magistrates system into a separate and independent tier of the Judiciary.

#### **(4) Change of Title**

In June 1988 the Magistrates Committee endorsed the practice of addressing a magistrate as "Judge" or "Your Honor" in the courtroom. No official change in title, by way of legislation, was proposed at that time. In June 1989 the Committee voted to recommend to the Federal Courts Study Committee that legislation be proposed to change the title of full-time magistrates to include the word "judge."

The Federal Courts Study Committee made no recommendation on a change in title in its April 1990 report. Instead, the FCSC's Subcommittee on Structure proposed that, if the Judicial Conference were to recommend a change in title, the title chosen be "Magistrate Judge."<sup>282</sup> *See* § 2.18(b)(1), *infra*.

#### **(5) Appellate Magistrates**

In July 1981 the Magistrates Committee was asked to consider the concept of establishing a new class of judicial officers called "appellate magistrates." The primary functions of the new positions, which would be established in the courts of appeals, would be to prepare reports and recommended dispositions in frivolous appeals and to enter orders on the consolidation of appeals, the establishment of schedules, and pre-argument conferences.

The Magistrates Committee declined to endorse the concept. The Committee was concerned about the prospect that an appellate magistrate, as a subordinate judicial officer, might in effect be called upon to review the work of or otherwise "second-guess" district court judges.

The issue of creating a new tier of appellate magistrates was discussed in the report of the Magistrates Committee to the FCSC in June 1989. The Magistrates Committee strongly reaffirmed

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<sup>282</sup> Report of the Subcommittee on Structure to the Federal Courts Study Committee, at 7. Regarding the preference for "magistrate judge," the subcommittee wrote, "That title implies no independent role but recognizes that when a judicial officer acts with full authority, as in consent cases, he or she acts as a judge and merits the respect of that office." *Id.*

its opposition to appellate review by "appellate magistrates." The concept was not discussed by either the Subcommittee on Structure or the full Federal Courts Study Committee.

#### **b. Recommendations of the Federal Courts Study Committee**

The final report of the Federal Courts Study Committee in April 1990 commented favorably on the magistrates system as a whole. The report stated that magistrate judges play a "vital role" in the work of the federal courts, and that the role of magistrate judges must continue to be "supportive and flexible."<sup>283</sup>

The FCSC made the following recommendations relating to the magistrates system: (1) Congress should amend 28 U.S.C. § 636(c)(2) to allow district judges and magistrates to remind parties of the possibilities of consent to civil trials before magistrates; (2) the Judicial Conference should authorize a study of the constitutional limits of United States magistrates' possible jurisdiction and catalog their duties; (3) Congress should establish a \$10,000 minimum jurisdictional amount for federal tort claims and establish a small-claims procedure for claims below the minimum (one possible procedure being the establishment of divisions in the district court administered by magistrate judges); (4) courts should consider using magistrates or special masters as fee taxing masters to simplify the process of assessing attorney fee awards; and (5) the Judiciary should endeavor to select the most qualified people to serve as supporting personnel of the federal courts, including bankruptcy judges and magistrates, with due regard for the heterogeneity of the American people.

In anticipation of legislation to implement the recommendations contained in the FCSC report, the Executive Committee of the Judicial Conference requested the chairmen of the committees of the Conference to review those recommendations in the report which would affect their Committee's particular responsibilities. On behalf of the Magistrates Committee, Circuit Judge Joseph W. Hatchett responded and noted the positions taken on each item by the Conference or the Committee:

- (1) The Magistrates Committee "strongly" endorsed the relaxation of the statutory restrictions which discouraged parties from consenting to the trial of their case before a magistrate under [28 U.S.C. § 636\(c\)](#).<sup>284</sup>
- (2) A Judicial Conference study of the constitutional limits of the jurisdiction of magistrates "falls within the scope" of the Committee's general responsibility to oversee the magistrates system and its responsibility to supervise the Administrative Office in matters affecting the system.<sup>285</sup>

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<sup>283</sup> Report of the Federal Courts Study Committee, 79 (April 2, 1990).

<sup>284</sup> See § 18(b)(2).

<sup>285</sup> See generally § 19.

- (3) Divisions in the courts for federal tort claims, administered entirely by magistrates, "would conflict with longstanding policy of the Judicial Conference" that the jurisdiction of magistrates remain "open" and not be expanded to include "original" jurisdiction.<sup>286</sup>
- (4) The use of magistrates to assess attorney fee awards "complies with the general Judicial Conference policy which encourages courts to utilize magistrates fully."
- (5) The Magistrates Committee "has taken several positive actions to ensure" the selection of the best qualified magistrates, with due regard for the heterogeneity of the American people, through the promulgation of selection regulations for the office of magistrate and an explanatory pamphlet.

An additional recommendation was to extend the life of the United States Parole Commission or create a successor agency to conduct supervised release revocation hearings. At its 1989 summer meeting, the Committee on Criminal Law and Probation Administration adopted a resolution objecting to the establishment of an independent administrative agency for the purpose of conducting revocation of supervised release proceedings. The Committee also resolved that Article III judges or magistrates should conduct these proceedings. The Magistrates Committee in June 1990 agreed unanimously that magistrates would be appropriate judicial officers to conduct supervised release revocation proceedings, but that the findings of a magistrate in a final revocation proceeding should be submitted to the court on a report and recommendation basis.

## **18. Judicial Improvements Act of 1990**

The Judicial Improvements Act of 1990<sup>287</sup> was signed by President Bush on December 1, 1990. Title I of that legislation consisted of the Civil Justice Reform Act. Title III contained the Federal Courts Study Committee Implementation Act. Other titles created new Article III judgeships and revised judicial discipline and removal procedures. The Judicial Improvements Act amended the Federal Magistrates Act, and had far-reaching effects on the Judiciary as a whole.

### **a. Civil Justice Reform Act**

Senator Biden and Senator Thurmond initially introduced the Civil Justice Reform Act on January 25, 1990, as S. 2027. The stated purpose of the legislation was to improve access to the

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<sup>286</sup> At its June 1990 meeting, the Magistrates Committee reaffirmed this policy and authorized staff to advise and work with the appropriate committee of the Judicial Conference to oppose legislation to enact the FCSC's recommendation.

<sup>287</sup> [Pub. L. No. 101-650](#), [104 Stat. 5089 \(1990\)](#).

courts by reducing costs and delays in civil litigation.<sup>288</sup>

### **(1) S. 2027 and its Treatment of Magistrate Judges**

S. 2027 would have required that "a mandatory discovery-case management conference, presided over by a judge and not a magistrate, be held in all cases..." and would have otherwise reduced the role of magistrate judges in the pretrial process.<sup>289</sup> In testimony before the Judiciary Committee, several witnesses, including the Judicial Conference's representative, favored reinstatement of a pretrial role for magistrate judges.<sup>290</sup> Staff members of the Judiciary Committee also met with representatives of the National Council of United States Magistrates in April 1990. The Council, too, had opposed the provisions of S. 2027 prohibiting the involvement of magistrate judges at the pretrial stage of a case.

### **(2) The Judicial Conference's Response to S. 2027**

At its meeting in March 1990, the Judicial Conference unanimously voted to oppose S. 2027 and its House counterpart, H.R. 3898. The Conference reaffirmed the Judiciary's longstanding commitment to case management and resolved to seek constructive solutions to the problems raised by Senator Biden. The Conference created a task force headed by Judge Robert Peckham to discuss alternatives to the bill with the Judiciary Committee.

Chief Justice Rehnquist met with Senator Biden in April 1990 to discuss the Judiciary's concerns with the legislation. The task force and the Executive Committee of the Judicial Conference subsequently proposed that the Judiciary implement a voluntary 14-point civil case management program rather than submit alternative legislation. The Conference approved the 14-point plan by mail ballot in late April 1990.

### **(3) S. 2648 and Revisions to Civil Justice Reform**

After discussions were held with members of the Judicial Conference, the bill was revised and resubmitted on May 17, 1990, as S. 2648. Senator Biden noted in his statement introducing S. 2648 that the bill reflected a number of changes made in the original legislation, S. 2027. Responding to

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<sup>288</sup> The bill was based upon recommendations contained in a Brookings Institution task force report entitled *Justice for All--Reducing Costs and Delay in Civil Litigation*.

<sup>289</sup> S. REP. NO. 416, 101st Cong., 2d Sess. 20 (Aug. 3, 1990), *reprinted at* 1990 U.S.C.C.A.N. 6823.

<sup>290</sup> *See The Civil Justice Reform Act: Hearing on S. 2027 Before the Senate Judiciary Comm.*, 101st Cong., 2d Sess. 108 (March 6, 1990) (testimony of Judge Richard A. Enslen and Judge Aubrey E. Robinson, Jr.).

testimony at the Judiciary Committee's first hearing on the original bill, the revised legislation restored the full role of magistrate judges in the pretrial process.<sup>291</sup>

The report provided several reasons for utilizing magistrate judges fully in the pretrial stages of civil litigation. First, the Committee noted that fewer cases may settle if an Article III judge presides over each conference, since the parties would be reluctant to be "frank" with the judge who would ultimately preside over a trial. Second, permitting magistrate judges to conduct case-management conferences would leave Article III judges with more time to perform adjudicatory functions. Finally, "given the increasingly heavy demands of the civil and criminal dockets and the increasingly high quality of the magistrates themselves, the committee believes that magistrates can and should play an important role, particularly in the pretrial and case management process."<sup>292</sup>

The Act was signed into law by the President on December 1, 1990. At its March 1991 meeting, the Judicial Conference rescinded the 14-point plan as redundant, except as already implemented.

#### **b. Federal Courts Study Committee Implementation Act**

Title III of the Judicial Improvements Act of 1990 contained the Federal Courts Study Committee Implementation Act. On July 26, 1990, Congressmen Kastenmeier and Moorhead introduced H.R. 5381, an omnibus court reform bill to implement many of the recommendations of the FCSC. Its companion bill, title III of S. 2648, was introduced in the Senate by Senator Biden.

The original version of the legislation contained proposals to: (1) eliminate the requirement of written consent to trial before magistrate judges in petty offense cases; (2) permit magistrate judges to conduct jury selection in criminal and civil cases upon the consent of the parties; and (3) authorize magistrate judges to conduct supervised release revocation proceedings and submit proposed recommendations to a district judge. These proposals were deleted from the final version of the Act.

The Act's statement of purpose described the legislation as proposing "noncontroversial" recommendations of the Federal Courts Study Committee. The Federal Courts Study Committee Implementation Act contained several significant amendments to the Federal Magistrates Act.

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<sup>291</sup> 136 CONG. REC. S6473 (daily ed. May 17, 1990).

<sup>292</sup> S. REP. NO. 416, 101st Cong., 2d Sess. 20 (Aug. 3, 1990) (footnote omitted), *reprinted at* 1990 U.S.C.C.A.N. 6823. Noting that the Judicial Improvements Act in its current form would provide for the exercise of the "full role of magistrates in the pretrial process," the Committee stated that valid questions had been raised about the full extent of magistrates' constitutional authority. The Committee therefore endorsed the recommendation of the Federal Courts Study Committee that the Judicial Conference conduct an in depth study of magistrate judge authority. *Id.* at 20 n.10. *See infra* § 2.19.

## **(1) Change of Title**

H.R. 5381 provided for a change of title for magistrates to "Assistant United States District Judge." The Executive Committee of the Judicial Conference, acting on behalf of the full Conference, opposed any formal name change for magistrates.

Section 321 of the Act ultimately changed the title of a United States magistrate to "United States magistrate judge." The section states:

After the enactment of this Act, each United States magistrate appointed under section 631 of title 28, United States Code, shall be known as a United States magistrate judge, and any reference to any United States magistrate or magistrate that is contained in title 28, United States Code, in any other Federal statute, or in any regulation of any department or agency of the United States in the executive branch that was issued before the enactment of this Act, shall be deemed to refer to a United States magistrate judge appointed under section 631 of title 28, United States Code.

The title change applies equally to both part-time and full-time magistrate judges.<sup>293</sup>

The committee report noted that the title "judge" is commonly assigned to non-Article III adjudicators in the federal court system, and that the new title of magistrate judge is consistent with that of other judicial officers such as bankruptcy judges, tax court judges and claims court judges. "The provision is one of nomenclature only and is designed to reflect more accurately the responsibilities and duties of the office. It is not intended to affect the substantive authority or jurisdiction of full-time or part-time magistrates."<sup>294</sup>

On June 4, 1991, the Executive Committee of the Judicial Conference changed the name of the Magistrates Committee to "Committee on the Administration of the Magistrate Judges System." In addition, the Magistrates Division of the Administrative Office became the "Magistrate Judges Division" on June 28, 1991.

## **(2) Consent to Trial in Civil Actions**

Section 308(a) of the Act amended [28 U.S.C. § 636\(c\)\(2\)](#) to permit judges and magistrate judges to advise civil litigants of the option to consent to trial by a magistrate judge. Under the previous language of the statute, district judges and magistrate judges were prohibited from persuading or inducing any party to consent to the reference of a civil matter to a magistrate judge for

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<sup>293</sup> H.R. REP. NO. 734, 101st Cong., 2d Sess. 31 (1990), *reprinted at* 1990 U.S.C.C.A.N. 6877.

<sup>294</sup> *Id.*

trial. Some judicial officers had interpreted that provision as barring them from reminding parties that they may consent to have a civil matter referred to a magistrate judge because of concerns that parties would be coerced to accept such references.

Section 308(a) also amended § 636(c)(2) regarding communications by clerks of court with the parties concerning their option to consent to a magistrate judge's civil jurisdiction. The first sentence in subsection (2) formerly read, "the clerk of court shall, at the time the action is filed, notify the parties of *their right to consent to the exercise of* such jurisdiction." (emphasis added). The new amendment replaced the underlined language with "the availability of a magistrate to exercise."

### **(3) Extension of Terms of Office**

Section 308(b) amended [28 U.S.C. § 631\(f\)](#) in order to lengthen the "hold over" period from 60 days to 180 days, during which a court may retain a magistrate judge in office after expiration of his or her term. This amendment allows a magistrate judge to continue to perform duties after his or her term has expired for a period of 180 days or until a successor can be appointed, whichever is earlier. The continuation of service must still be approved by a majority of the judges of the appointing district court and by the judicial council of the circuit.

## **19. Judicial Conference Study on Magistrate Judge Authority**

In its comprehensive review of the federal judiciary in 1990, the Federal Courts Study Committee concluded: "The district courts clearly need the assistance of the magistrates in order for the judges to focus on those matters that require Article III attention."<sup>295</sup> The Committee determined, however, that confusion over the constitutional and statutory authority of magistrate judges had made some courts reluctant to take full advantage of the magistrate judge system. In particular, the far-reaching 1976 and 1979 jurisdictional amendments to the Federal Magistrates Act had raised questions regarding the limits on the authority of the courts to refer certain types of proceedings to magistrate judges.

The Federal Courts Study Committee recommended that a comprehensive jurisdictional review be undertaken of the duties assigned to magistrate judges, together with a catalog of pertinent statutory and case law citations and an analysis of the legislative history of the Federal Magistrates Act.<sup>296</sup> In response, the Judicial Conference authorized its Committee on the Administration of the Magistrate Judges System to oversee the study. The Magistrate Judges Division of the Administrative Office conducted the study under the supervision of a special subcommittee of the Magistrate Judges Committee.

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<sup>295</sup> Report of the Federal Courts Study Committee, 79 (April 2, 1990).

<sup>296</sup> *Id.* at 80-81. The study has been endorsed by the Senate Judiciary Committee; *see supra* note 269.



The first part of the study, the [\*Inventory of United States Magistrate Judges Duties\*](#), was first distributed in December 1991 and has been periodically updated since then. It provides district courts with a quick guide to the types of duties that magistrate judges may perform under statutory and case law. The second part of the study, *A Constitutional Analysis of Magistrate Judge Authority*, was published in June 1993, and was reprinted at [150 F.R.D. 247 \(1993\)](#). It analyzes various Supreme Court and circuit court opinions examining the constitutional limits of magistrate judge authority. It also reviews pertinent Supreme Court opinions discussing the authority of other non-Article III judicial officers, including bankruptcy judges.

This publication, *A Guide to the Legislative History of the Federal Magistrate Judges System*, constitutes the legislative analysis of the Federal Magistrates Act recommended by the Federal Courts Study Committee.

## **20. Federal Courts Administration Act of 1992**

The Federal Courts Administration Act of 1992<sup>297</sup> was signed by President Bush on October 29, 1992. Title I of that legislation implemented certain recommendations of the Federal Courts Study Committee. Title II contained significant amendments to the Judicial Survivors' Annuities System. Other titles made various changes in judicial financial administration, jury selection in federal courts, and other miscellaneous matters. The Act amended the Federal Magistrates Act and contained other provisions which directly affected the magistrate judges system.

### **a. Implementation of Federal Courts Study Committee Recommendations**

Section 103 of the Act amended [18 U.S.C. § 3401](#) to add a new subsection (h) granting magistrate judges the power to modify, revoke, or terminate supervised release of any person sentenced to a term of supervised release by a magistrate judge. This provision overturns [United States v. Williams, 919 F.2d 266 \(5th Cir. 1990\)](#), which held that a magistrate judge lacked authority to revoke or modify the supervised release of a defendant the magistrate judge had sentenced.

Section 103 also amends § 3401(d) to grant magistrate judges the power to modify the terms of probation imposed by a magistrate judge. Magistrate judges already had statutory authority to revoke or reinstate such probation. Although many magistrate judges had routinely conducted both preliminary and final probation revocation proceedings under the authority of [28 U.S.C. § 636\(b\)\(3\)](#), some circuit courts had held that Congress did not intend to permit the assignment of final probation revocation functions to magistrate judges.

Section 103 also added a new subsection (I) to § 3401 specifically allowing district judges to designate magistrate judges to conduct hearings (including evidentiary hearings) to modify, revoke, or terminate supervised release terms and to submit proposed findings of fact and recommendations, including, in the case of revocation, a recommended sentence. The legislative history indicates that

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<sup>297</sup> [Pub. L. 102-572, 106 Stat. 4506 \(1992\)](#).

the proposed recommendations are to be submitted in accordance with [28 U.S.C. § 636\(b\)\(1\)\(B\)](#), enabling the district judge to make a de novo review.

## **21. Federal Courts Improvement Act of 1996**

On October 19, 1996, the President signed into law the Federal Courts Improvement Act of 1996.<sup>298</sup> The Act included many provisions related to the judicial process, judiciary personnel administration and benefits, judicial financial administration, and miscellaneous matters. The law also contained amendments to the Federal Magistrates Act and other provisions directly affecting the magistrate judges system, as described below.

### **a. Civil Consent Authority in Emergency Assignments**

Section 201 of the Act amended [28 U.S.C. § 636\(f\)](#) to authorize a magistrate judge who is serving on a temporary emergency assignment in another district under [28 U.S.C. § 636\(f\)](#) to try cases with consent in that district. This provision corrected a drafting oversight when the civil consent statute was enacted in 1979 that failed to include consent authority among the powers and duties of magistrate judges on inter-district assignment.<sup>299</sup>

### **b. Consent Requirement in Misdemeanor Cases**

Generally, before enactment of the Act, magistrate judges could not try any misdemeanor petty offense cases without the defendant's consent. *See* § 3(e)(2), *supra*. Section 202 of the Act eliminated this requirement for petty offense infractions, Class C misdemeanors, and Class B misdemeanors charging a motor vehicle offense. The Senate Judiciary Committee found that "the Federal magistrate judge system is mature and well equipped to provide a fair and effective means for processing petty offense cases without resort to an article III judge."<sup>300</sup> The original language of the proposed legislation would have eliminated the consent requirement in all petty offense cases. However, the continuance of the consent requirement for Class B misdemeanor offenses other than those charging motor vehicle offenses in the enacted legislation was the result of a compromise with minority opposition in the House to abrogation of consent in all petty offense cases.

This section further amended [18 U.S.C. § 3401\(b\)](#) to provide that in the misdemeanor cases in which the defendant's consent to a magistrate judge is still required, the consent may be given

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<sup>298</sup> [Pub.L. No. 104-317, 110 Stat. 3847 \(1996\)](#).

<sup>299</sup> S. REP. NO. 366, 104<sup>th</sup> Cong., 2d Sess. 26-27 (1996), *reprinted in* 1996 U.S.C.C.A.N. 4202, 4206.

<sup>300</sup> S. REP. NO. 366, 104<sup>th</sup> Cong., 2d Sess. 28 (1996), *reprinted in* 1996 U.S.C.C.A.N. 4202, 4207.

either in writing or orally on the record.<sup>301</sup>

The Act also amended [18 U.S.C. § 3401\(g\)](#) to eliminate the requirement that a juvenile defendant consent to magistrate judge jurisdiction in petty offense cases involving an infraction, a Class C misdemeanor, or a Class B misdemeanor charging a motor vehicle offense. Before the Act, magistrate judges were not able to try any misdemeanor petty offense cases involving a juvenile defendant without the juvenile’s consent. *See generally* § 16(c), *supra*.

### **c. Elimination of Optional Appeal Route to District Court in Civil Consent Cases**

Under prior law, parties that had consented to the case-dispositive authority of a magistrate judge in a civil case had the option to appeal the judgment directly to the court of appeals or, with the parties’ agreement, to a district judge. Section 207 of the 1996 Act amended subsections (c) and (d) of [28 U.S.C. § 636](#) to abolish the optional appeal to a district judge, retaining the court of appeals as the sole route of appeal. The Senate Report accompanying the legislation noted that the optional route of appeal was “inconsistent with the principle underlying the consent authority of magistrate judges — that the parties agree to disposition of their case without involving a district judge.”<sup>302</sup>

Rule 73 of the Federal Rules of Civil Procedure, which sets forth procedures for civil consent proceedings, was modified on April 11, 1997 (effective December 1, 1997), to conform to the statutory changes in the route of appeal. At the same time, Rules 74, 75, and 76 were abrogated for the same reason.<sup>303</sup>

### **d. Magistrate Judge on Federal Judicial Center Board**

Section 601 of the Act amended [28 U.S.C. § 621](#) to include a magistrate judge on the Board of the Federal Judicial Center.

## **22. Federal Courts Improvement Act of 2000**

On November 13, 2000, the President signed into law the Federal Courts Improvement Act of 2000.<sup>304</sup> Among its provisions, the new law amended the Federal Magistrates Act to eliminate the consent requirement in all Class B misdemeanor cases, to expand magistrate judge authority in cases

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<sup>301</sup> For a description of Judicial Conference actions on the issue of consent in petty offense cases, *see* § 17(a)2, *supra*

<sup>302</sup> S. REP. NO. 366, 104<sup>th</sup> Cong., 2d Sess. 31 (1996), *reprinted in* 1996 U.S.C.C.A.N. 4202, 4211.

<sup>303</sup> [Fed. R. Civ.P. 73](#) advisory committee’ s note.

<sup>304</sup> [Pub. L. No. 106-518](#), [114 Stat. 2410 \(2000\)](#).

involving juveniles, to provide for the authorization of magistrate judge positions in Guam and the Northern Mariana Islands, and to expand the contempt authority of magistrate judges.

**a. Consent to Trial in All Petty Offense Cases**

Section 636(a) of Title 28 and 18 U.S.C. § 3401(b) were amended to expand the authority of magistrate judges to try all petty offense cases without defendant’s consent. Prior law only allowed magistrate judges to dispose of all infractions, Class C misdemeanors and Class B misdemeanors charging a motor vehicle offense without the defendant’s consent. *See* § 21(b), *supra*. However, the Act did not change the requirement that a defendant must consent to magistrate judge jurisdiction to dispose of a Class A misdemeanor.

**b. Magistrate Judge Authority in Juvenile Cases**

Section 203 of the Act expanded magistrate judge authority in juvenile cases by amending [18 U.S.C. § 3401\(g\)](#) to permit magistrate judges to preside over Class A misdemeanor cases involving juvenile defendants with the juvenile’s consent, and to provide magistrate judges with authority to sentence juvenile defendants to terms of imprisonment in misdemeanor cases, which they were not authorized to do previously.<sup>305</sup> In essence, the Act provided magistrate judges with the same authority over juvenile defendants as they have over adult defendants, i.e., they may preside in all petty offense cases without the juvenile defendant’s consent and they may preside in Class A misdemeanor cases with the juvenile defendant’s consent.

**c. Authority for Magistrate Judge Positions in Guam and the Northern Mariana Islands**

Section 201 of the Act amended the Federal Magistrates Act to allow the Judicial Conference to establish magistrate judge positions in the district courts of Guam and the Northern Mariana Islands.

**d. Contempt Authority for Magistrate Judges**

The statute governing the contempt authority of magistrate judges, [28 U.S.C. § 636\(e\)](#), was amended significantly by Section 202 of the Federal Courts Improvement Act of 2000<sup>306</sup> as follows:

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<sup>305</sup> Prior law prohibited magistrate judges from imposing a term of imprisonment on a juvenile defendant in a misdemeanor case. *See* generally § 16(c).

<sup>306</sup> For a fuller discussion of the history of magistrate judge contempt authority *see* § 17(a)(1), *infra*.

### **(1) Summary Criminal Contempt Authority**

Section 202 of the Act gave magistrate judges “summary criminal contempt authority” to punish “by fine or imprisonment such contempt of authority of such magistrate judge constituting misbehavior of any person in the magistrate judge’s presence so as to obstruct the administration of justice.” The limited penalties magistrate judges may impose for summary criminal contempt are set forth in subsection (4), *infra*.

### **(2) Criminal Contempt Authority in Civil Consent Misdemeanor Cases**

Section 203 gave magistrate judges additional criminal contempt authority in their civil consent cases under [28 U.S.C. § 636\(c\)](#) and in misdemeanor cases under [18 U.S.C. § 3401](#). The section provided magistrate judges with criminal contempt authority to punish misbehavior occurring *outside* their presence that constitutes disobedience or resistance to the magistrate judges’ lawful writ, process, order, rule, decree, or command in civil consent and misdemeanor cases over which they preside. The criminal contempt authority was provided to enable a magistrate judge to enforce his or her orders and to vindicate the magistrate judge’s (and the court’s) authority over cases tried by the magistrate judge.

The section further required that the disposition of such contempt must be conducted upon notice and hearing under the Federal Rules of Criminal Procedure. The penalties magistrate judges may impose for criminal contempt proceedings in these circumstances are set forth in subsection (4), *infra*.<sup>307</sup>

### **(3) Civil Contempt Authority in Civil Consent and Misdemeanor Cases**

Section 203 authorizes magistrate judges to exercise civil contempt authority in civil cases in which they preside with the consent of the parties pursuant to [28 U.S.C. § 636\(c\)](#), and in misdemeanor cases proceeding before them under [18 U.S.C. § 3401](#). In such cases, the magistrate judge may exercise civil contempt authority identical to the civil contempt authority of a district judge to order sanctions pursuant to any other statute, the Federal Rules of Civil Procedure, or the Federal Rules of Criminal Procedure.

### **(4) Criminal Contempt Penalties**

For a summary criminal contempt committed in the magistrate judge’s presence, or for a criminal contempt occurring outside the magistrate judge’s presence in a civil consent or misdemeanor case, the magistrate judge may impose penalties up to thirty (30) days incarceration, and/or a \$5,000 fine. However, in the event that the magistrate judge believes that the punishment should be more severe, § 636(e)(6) allows him or her to certify the contempt to the district judge for further contempt proceedings.

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<sup>307</sup> See also [28 U.S.C. § 636\(e\)](#).

## (5) Appeals of Magistrate Judge Contempt Orders

Section 202(e)(7) of the Act<sup>308</sup> provides that an appeal of a contempt order issued by a magistrate judge in a any civil case in which the magistrate judge presides with consent of the parties shall be made to the court of appeals. In all other cases, the appeal of any other order of contempt issued by a magistrate judge must be made to the district court. The statute thus follows the principle that an appeal of a magistrate judge’s contempt order should be heard by the same court that hears the appeal of the final order on the merits of the case or proceeding.

### 23. Court Security Improvement Act of 2007

On January 7, 2008, the President signed into law the “Court Security Improvement Act of 2007.”<sup>309</sup> The Act included three sections (502, 503 and 504) affecting magistrate judges. The first section, 502, extended to active full-time magistrate judges age 65 and over and retired under [28 U.S.C. § 377](#), the Judicial Retirement System (JRS), the same Federal Employees’ Group Life Insurance (FEGLI) benefits enjoyed by Article III judges. The other two sections of the Act amended two statutes related to the participation of senior district judges in court governance generally and in the appointment of United States magistrate judges.

#### a. FEGLI Provisions

Section 502 extended to active full-time United States magistrate judges age 65 and over and full-time magistrate judges retired under the JRS, the same FEGLI benefits, including the FEGLI fix, enjoyed by Article III judges and judges of the Court of Federal Claims (*see generally* § 2.16(g), *supra*). As a result, effective February 1, 2008, the rate for FEGLI Option B-Additional coverage for magistrate judges age 65 and over was fixed at the monthly rate that was in effect before the Office of Personnel Management implemented new age bands on January 1, 2003 (or \$1.517 per \$1,000 of coverage).

In addition to the FEGLI Option B premium “fix,” the new law provided that retired JRS annuitants, including “hybrid” annuitants (who combine a JRS annuity with a CSRS or FERS annuity), are deemed “employees” for life insurance purposes. As a result, as of February 1, 2008, these retired judges pay the employee rate for Basic Life insurance coverage rather the rate of an annuitant for the same coverage. By treating magistrate judges as Article III judges for life insurance purposes, it also eliminated the requirement that any new or increased coverage be in effect for five years prior to retirement to continue the insurance into retirement. In addition, retired JRS and hybrid JRS annuitants were given the right to increase life insurance coverage by showing evidence of insurability or enrolling during an open season.

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<sup>308</sup> See [28 U.S.C. § 636\(e\)\(7\)](#).

<sup>309</sup> [Pub. L. No. 110-177](#), [121 Stat. 2534 \(2008\)](#).

## **b. Senior Judge Voting on Magistrate Judge Appointments**

The first provision of the new law on senior judge voting rights, Section 503, amended [28 U.S.C. § 296](#) to allow senior judges who in the preceding year performed an amount of work equal to or greater than the amount of work an average active judge performs in 6 months, may elect to participate in the appointment of court officers and magistrate judges, rulemaking, governance, and administrative matters.<sup>310</sup> The second provision, Section 504, amended the Federal Magistrates Act, [28 U.S.C. § 631\(a\)](#), to allow all senior judges, in addition to all active district judges, to appoint magistrate judges.

As is evident, these provisions are inconsistent with one another in regard to participation in magistrate judge appointments. Section 503 specifically restricts senior judge participation in court governance, including the appointment of magistrate judges, to those senior judges whose performance of judicial duties has met or exceeded what an average active judge on the court would perform in six months. It also provides that only those senior judges who elect to exercise such powers may do so. The second amendment confers the right to vote on the appointment of magistrate judges on all senior district judges in their respective courts, and does not provide any requirement for a senior judge to elect to exercise that power.

At its June 2008 meeting, the Magistrate Judges Committee was advised that the Court Administration and Case Management Committee (CACM Committee) had agreed to recommend that the Judicial Conference seek legislation to repeal Section 504. The Committee voted to support the CACM Committee's recommendation to seek repeal of this section. In addition, at its June 2008 meeting, the Magistrate Judges Committee agreed to recommend that the Judicial Conference amend the Regulations of the Judicial Conference of the United States Establishing Standards and Procedures for the Appointment and Reappointment of United States Magistrate Judges by removing the word "active" from "active district judges" to make clear that references to district judges include active district judges and senior district judges. It also recommended that a note be added to the introduction to the selection and appointment regulations explaining that there is a conflict in the law regarding senior judges' involvement in the appointment of magistrate judges.

The Judicial Conference approved the Committee's recommendation at its September 2008 session. The Conference-approved language in the introduction to the regulations now reads as follows:

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<sup>310</sup> Under prior law, senior judges did not have a statutory or regulatory right to vote on the appointment of magistrate judges in their districts. The Judicial Conference official position, taken in 1959, was that a district court (for purposes of appointing court officials) should consist of only active judges and not senior judges.



References to district judges in . . . these regulations include all active district judges and, as determined by the court, either all senior judges or those senior judges who performed in the preceding calendar year an amount of work equal to or greater than the amount of work an average judge in active service on that court would perform in six months, and who elect to exercise such powers. [Ed. Note: There is a conflict in the law as it relates to senior judges voting on the appointment of magistrate judges. See [28 U.S.C. §§ 296](#) and 631(a), as amended January 7, 2008. The Executive Committee, on behalf of the Judicial Conference, is seeking the repeal of section 504 of the Court Security Improvement Act of 2007, which amended [28 U.S.C. § 631\(a\)](#) to allow all senior judges to participate in the appointment of magistrate judges.]

At its June 2008 meeting, the CACM Committee also recommended that the Judicial Conference issue guidance that courts follow the provisions of section 503. The Judicial Conference at its September 2008 session adopted the recommendation of the CACM Committee and agreed to issue the following guidance:

(a) the 50 percent workload requirement for senior judges set forth in section 503 should apply to governance activities (including appointing magistrate judges) while legislative repeal of section 504 is being sought; and (b) the 50 percent workload requirement should be based on the amount of work actually performed by a senior judge within the district, but that courts, at their discretion, may include work performed by the senior judge outside the district to assist courts in need.

JCUS-SEP 08, p. 12.

Unless and until Section 504 is repealed, both amendments remain in effect. Although the guidance issued by the Judicial Conference is to follow Section 503, the Administrative Office will accept appointment decisions under either section.



## ATTACHMENT A

### LEGISLATIVE HISTORY OF THE FEDERAL MAGISTRATES ACT

#### 1. **The Federal Magistrates Act of 1968.**

[Pub. L. No. 90-578](#); [82 Stat. 1107](#)

- Senate Report No. 371 (June 28, 1967)
- House Report No. 1629 (July 3, 1968)  
[1968 U.S.C.C.A.N. 4252](#)
- Passed Senate: June 29, 1967 and Oct. 3, 1968
- Passed House: Sept. 26, 1968
- Signed: Oct. 17, 1968

#### 2. **Temporary Assignment of Magistrates Legislation**

[Pub. L. No. 92-239](#); [86 Stat. 47](#)

- Senate Report No. 617 (Feb. 16, 1972)  
[1972 U.S.C.C.A.N. 1981](#)
- House Report No. 582 (Oct. 21, 1971)
- Passed House: Nov. 1, 1971
- Passed Senate: Feb. 18, 1972
- Signed: March 1, 1972

#### 3. **1972 Salary Legislation**

[Pub. L. No. 92-428](#); [86 Stat. 721](#)

- House Report No. 1037 (May 2, 1972)
- Senate Report No. 1065 (Aug. 16, 1972)  
[1972 U.S.C.C.A.N. 3350](#)
- Passed House: May 16 and Sept. 12, 1972
- Passed Senate: Aug. 18, 1972
- Signed: Sept. 21, 1972

#### 4. **1976 Jurisdictional Amendments**

[Pub. L. No. 94-577](#); [90 Stat. 2729](#)

- Senate Report No. 625 (Feb. 3, 1976)
- House Report No. 1609 (Sept. 17, 1976)  
[1976 U.S.C.C.A.N. 6162](#)
- Passed Senate: Feb. 5 and Oct. 1, 1976
- Passed House: Oct. 1, 1976
- Signed: Oct. 21, 1976

**5. Adjustment of Salaries and Positions for the Virgin Islands**

[Pub. L. 94-520; 90 Stat. 2458](#)

- Senate Report No. 624 (Feb. 3, 1976)
- House Report No. 1607 (Sept. 17, 1976)  
[1976 U.S.C.C.A.N. 5458](#)
- Passed Senate: Feb. 5 and Sept. 30, 1976
- Passed House: Sept. 29, 1976
- Signed: Oct. 17, 1976

**6. Prisoner Transfer Legislation of 1977**

[Pub. L. No. 95-144; 91 Stat. 1212](#)

- Senate Report No. 435 (Sept. 15, 1977)
- House Report No. 720 (Oct. 19, 1977)  
[1977 U.S.C.C.A.N. 3146](#)
- Passed Senate: Sept. 21, 1977
- Passed House: Oct. 25, 1977
- Signed: Oct. 28, 1977

**7. Bankruptcy Reform Act of 1978**

[Pub. L. No. 95-598; 92 Stat. 2549](#)

- House Report No. 595 (Sept. 8, 1977) (Judiciary Committee)  
[1978 U.S.C.C.A.N. 5963](#)
- Senate Report No. 989 (July 14, 1978) (Judiciary Committee)  
[1978 U.S.C.C.A.N. 5787](#)
- Passed House: Feb. 1, Sept. 28, and Oct. 6, 1978
- Passed Senate: Sept. 7, Sept. 22, and Oct. 5, 1978
- Signed: Nov. 6, 1978

**8. The Federal Magistrate Act of 1979**

[Pub. L. No. 96-82; 93 Stat. 643](#)

**95th Congress**

- Senate Report No. 344 (July 14, 1977)
- House Report No. 1364 (July 17, 1978)

**96th Congress**

- Senate Report No. 74 (April 24, 1979)  
[1979 U.S.C.C.A.N. 1469](#)

- House Report No. 287 (June 20, 1979)
- [Senate Conference Report No. 322 \(Sept. 18, 1979\)](#)
- [House Conference Report No. 444 \(Sept. 19, 1979\)](#)  
[1979 U.S.C.C.A.N. 1487](#)
- Passed Senate: May 2 and Sept. 20, 1979
- Passed House: June 26 and Sept. 28, 1979
- Signed: Oct. 10, 1979

**9. 1982 Qualifications Amendment**

[Pub. L. No. 97-230, 96 Stat. 255](#)

- Passed Senate: June 30, 1982
- Passed House: July 23, 1982
- Signed: August 6, 1982

**10. Bail Reform Act of 1984**

[Pub. L. No. 98-473, 98 Stat. 1837](#)

- Passed Senate: Sept. 27-29, Oct. 1-4, and Oct. 11, 1984
- Passed House: Sept. 25 and Oct. 10, 1984
- Signed: Oct. 12, 1984

**11. 1986 Qualifications Amendment**

[Pub. L. No. 99-651, 100 Stat. 3642](#)

- Passed Senate: Oct. 6 and Oct. 16, 1986
- Passed House: Dec. 9, 1985, and Oct. 15, 1986
- Signed: Nov. 14, 1986

**12. Retirement and Survivors' Annuities For Bankruptcy Judges and Magistrates Act of 1988**

[Pub. L. No. 100-659, 102 Stat. 3910](#)

Signed: Nov. 15, 1988

**13. Anti-Drug Abuse Act of 1988**

[Pub. L. No. 100-690, 102 Stat. 4181](#)

Signed: Nov. 18, 1988

**14. Judicial Improvements and Access to Justice Act of 1988**

[Pub. L. No. 100-702, 102 Stat. 4642](#)

Signed: Nov. 19, 1988

**15. 1989 Qualifications Amendment**

[Pub. L. No. 101-45](#), [103 Stat. 97](#)

- Passed Senate: May 18 and June 22, 1989
  - Passed House: May 18, May 24, and June 23, 1989
- Signed: June 30, 1989

**16. Ethics Reform Act of 1989**

[Pub. L. No. 101-194](#), [103 Stat. 1716](#)

- Passed Senate: Nov. 17, 1989
  - Passed House: Nov. 16 and Nov. 17, 1989
- Signed: Nov. 28, 1989

**17. Judicial Improvements Act of 1990**

[Pub. L. No. 101-650](#), [104 Stat. 5089](#)

- Senate Report No. 416 (Aug. 3, 1990)  
[1990 U.S.C.C.A.N. 6802](#)
  - House Report No. 734 (Sept. 21, 1990)  
[1990 U.S.C.C.A.N. 6860](#)
  - Passed Senate: Oct. 27, 1990
  - Passed House: Sept. 27 and Oct. 27, 1990
- Signed: Dec. 1, 1990

**18. Federal Courts Administration Act of 1992**

[Pub. L. No. 102-572](#); [106 Stat. 4506](#)

- Senate Report No. 342 (July 27, 1992)
  - House Report No. 1006 (Oct. 3, 1992)  
[1992 U.S.C.C.A.N. 3921](#)
  - Passed Senate: Aug. 3 and Oct. 7, 1992
  - Passed House: Oct. 3, 1992
- Signed: Oct. 29, 1992

**19. Federal Courts Improvement Act of 1996**

[Pub. L. No. 104-317](#); [110 Stat. 3847](#)

- Senate Report No. 366 (Sept. 9, 1996)  
[1996 U.S.C.C.A.N. 4202](#)
- House Report No. 798 (Sept. 17, 1996)

- Passed Senate: Oct. 3, 1996
- Passed House: Sept. 17 and Oct. 4, 1996
- Signed: Oct. 19, 1996

**20. Federal Courts Improvement Act of 2000**

[Pub.L. No. 106-518](#); [114 Stat. 2410](#)

- House Report No. 112 (Sept. 9, 1999)
- Passed Senate: Oct. 19, 2000 and October 27, 2000
- Passed House: Oct. 25, 2000
- Signed: Nov. 13, 2000

**21. Court Security Improvement Act of 2007**

[Pub.L. No. 110-177](#); [121 Stat. 2534](#)

- House Report No. 218 (July 10, 2007)
- Passed House: July 10, 2007 and Dec. 17, 2007
- Passed Senate: Dec. 17, 2007
- Signed: Jan. 7, 2008

## ATTACHMENT B

### TEXT AND AMENDMENTS TO 28 U.S.C. § 636

The authority to exercise certain powers as federal judicial officers is provided to magistrate judges primarily by 28 U.S.C. § 636. The original text of the section and to its amendments is provided here in the official slip law format. The text and amendments to other sections of the Federal Magistrates Act or to the federal rules have not been included.

#### **1. Federal Magistrates Act of 1968, Pub. L. No. 90-578, 82 Stat. 1107**

"§ 636. Jurisdiction and powers

"(a) Each United States magistrate serving under this chapter shall have within the territorial jurisdiction prescribed by his appointment--

"(1) all powers and duties conferred or imposed upon United States commissioners by law or by the Rules of Criminal Procedure for the United States District Courts;

"(2) the power to administer oaths and affirmations, impose conditions of release under section 3146 of title 18, and take acknowledgments, affidavits, and depositions; and

"(3) the power to conduct trials under section 3401, title 18, United States Code, in conformity with and subject to the limitations of that section.

"(b) Any district court of the United States, by the concurrence of a majority of all the judges of such district court, may establish rules pursuant to which any full-time United States magistrate, or, where there is no full-time magistrate reasonable available, any part-time magistrate specially designated by the court, may be assigned within the territorial jurisdiction of such court such additional duties as are not inconsistent with the Constitution and laws of the United States. The additional duties authorized by rule may include, but are not restricted to--

"(1) service as a special master in an appropriate civil action, pursuant to the applicable provisions of this title and the Federal Rules of Civil Procedure for the United States district courts;

"(2) assistance to a district judge in the conduct of pretrial or discovery proceedings in civil or criminal actions; and

"(3) preliminary review of applications for posttrial relief made by individuals convicted of criminal offenses, and submission of a report and recommendations to facilitate the decision of the district judge having jurisdiction over the case as to whether there should be a hearing.

"(c) The practice and procedure for the trial of cases before officers serving under this chapter, and for the taking and hearing of appeals to the district courts, shall conform to rules promulgated by the Supreme Court pursuant to section 3402 of title 18, United States Code.

"(d) In a proceeding before a magistrate, any of the following acts or conduct shall constitute a contempt of the district court for the district wherein the magistrate is sitting: (1) disobedience or resistance to any lawful order, process, or writ; (2) misbehavior at a hearing or other proceeding, or so near the place thereof as to obstruct the same; (3) failure to produce, after having been ordered to do so, any pertinent document; (4) refusal to appear after having been subpoenaed or, upon appearing, refusal to take the oath or affirmation as a witness, or, having taken the oath or affirmation, refusal

to be examined according to law; or (5) any other act or conduct which if committed before a judge of the district court would constitute contempt of such court. Upon the commission of any such act or conduct, the magistrate shall forthwith certify the facts to a judge of the district court and may serve or cause to be served upon any person whose behavior is brought into question under this section an order requiring such person to appear before a judge of that court upon a day certain to show cause why he should not be adjudged in contempt by reason of the facts so certified. A judge of the district court shall thereupon, in a summary manner, hear the evidence as to the act or conduct complained of and, if it is such as to warrant punishment, punish such person in the same manner and to the same extent as for a contempt committed before a judge of the court, or commit such person upon the conditions applicable in the case of defiance of the process of the district court or misconduct in the presence of a judge of that court.

**2. 1972 Temporary Assignment of Magistrates Legislation, [Pub. L. No. 92-239](#), [86 Stat. 47](#)**

[S]ection 636 of title 28, United States Code, is amended by adding at the end thereof the following new subsection:

"(e) In an emergency and upon the concurrence of the chief judges of the districts involved, a United States magistrate may be temporarily assigned to perform any of the duties specified in subsection (a) or (b) of this section in a judicial district other than the judicial district for which he has been appointed. No magistrate shall perform any of such duties in a district to which he has been temporarily assigned until an order has been issued by the chief judge of such district specifying (1) the emergency by reason of which he has been transferred, (2) the duration of his assignment, and (3) the duties which he is authorized to perform. A magistrate so assigned shall not be entitled to additional compensation but shall be reimbursed for actual and necessary expenses incurred in the performance of his duties in accordance with section 635."

Sec. 2. The section heading of section 636 of title 28, United States Code, is amended to read as follows:

"§ 636. Jurisdiction, powers, and temporary assignment."

Sec. 3. The item relating to section 636 in the section analysis of chapter 43 of title 28, United States Code, is amended to read as follows:

"§ 636. Jurisdiction, powers, and temporary assignment."

**3. 1976 Jurisdictional Amendments, [Pub. L. No. 94-577](#), [90 Stat. 2729](#)**

[S]ection 636(b) of title 28, United States Code, is amended to read as follows:

"(b)(1) Notwithstanding any provision of law to the contrary--

"(A) a judge may designate a magistrate to hear and determine any pretrial matter pending before the court, except a motion for injunctive relief, for judgment on the pleadings, for summary judgement, to dismiss or quash an indictment or information made by the defendant, to suppress evidence in a criminal case, to dismiss or to permit maintenance of a class action, to dismiss for failure to state a claim upon which relief can be granted, and to involuntarily dismiss an action.

A judge of the court may reconsider any pretrial matter under this subparagraph (A) where it has been shown that the magistrate's order is clearly erroneous or contrary to law.

"(B) a judge may also designate a magistrate to conduct hearings, including evidentiary hearings, and to submit to a judge of the court proposed findings of fact and recommendations for the disposition, by a judge of the court, of any motion excepted in subparagraph (A), of applications for posttrial relief made by individuals convicted of criminal offenses and of prisoner petitions challenging conditions of confinement.

"(C) the magistrate shall file his proposed findings and recommendations under subparagraph (B) with the court and a copy shall forthwith be mailed to all parties. Within ten days after being served with a copy, any party may serve and file written objections to such proposed findings and recommendations as provided by rules of court. A judge of the court shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made. A judge of the court may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate. The judge may also receive further evidence or recommit the matter to the magistrate with instructions.

"(2) A judge may designate a magistrate to serve as a special master pursuant to the applicable provisions of this title and the Federal Rules of Civil Procedure for the United States district courts. A judge may designate a magistrate to serve as a special master in any civil case, upon consent of the parties, without regard to the provisions of rule 53(b) of the Federal Rules of Civil Procedure for the United States district courts.

"(3) A magistrate may be assigned such additional duties as are not inconsistent with the Constitution and laws of the United States.

"(4) Each district court shall establish rules pursuant to which the magistrates shall discharge their duties."

#### **4. 1977 Prisoner Transfer Legislation, [Pub. L. No. 95-144](#), [91 Stat. 1212](#), 1220**

Sec. 2. That section 636 of title 28, United States Code, is amended by adding a subsection (f) as follows:

"(f) A United States magistrate may perform the verification function required by section 4107 of title 18, United States Code. A magistrate may be assigned by a judge of any United States district court to perform the verification required by section 4108 and the appointment of counsel authorized by section 4109 of title 18, United States Code, and may perform such functions beyond the territorial limits of the United States. A magistrate assigned such functions shall have no authority to perform any other function within the territory of a foreign country."

#### **5. The Federal Magistrate Act of 1979, [Pub. L. No. 96-82](#), [93 Stat. 643](#).**

[T]his Act may be cited as the "Federal Magistrate Act of 1979".

Sec. 2. Section 636 of title 28, United States Code, is amended--

(1) by redesignating subsections (c) through (f) thereof as subsections (d) through (g), respectively; and

(2) by inserting immediately after subsection (b) thereof the following new subsection:



"(c) Notwithstanding any provision of law to the contrary--

"(1) Upon the consent of the parties, a full-time United States magistrate or a part-time United States magistrate who serves as a full-time judicial officer may conduct any or all proceedings in a jury or nonjury civil matter and order the entry of judgment in the case, when specially designated to exercise such jurisdiction by the district court or courts he serves. Upon the consent of the parties, pursuant to their specific written request, any other part-time magistrate may exercise such jurisdiction, if such magistrate meets the bar membership requirements set forth in section 631(b)(1) and the chief judge of the district court certifies that a full-time magistrate is not reasonably available in accordance with guidelines established by the judicial council of the circuit. When there is more than one judge of a district court, designation under this paragraph shall be by the concurrence of a majority of all the judges of such district court, and when there is no such concurrence, then by the chief judge.

"(2) If a magistrate is designated to exercise civil jurisdiction under paragraph (1) of this subsection, the clerk of court shall, at the time the action is filed, notify the parties of their right to consent to the exercise of such jurisdiction. The decision of the parties shall be communicated to the clerk of court. Thereafter, neither the district judge nor the magistrate shall attempt to persuade or induce any party to consent to reference of any civil matter to a magistrate. Rules of court for the reference of civil matters to magistrates shall include procedures to protect the voluntariness of the parties' consent.

"(3) Upon entry of judgment in any case referred under paragraph (1) of this subsection, an aggrieved party may appeal directly to the appropriate United States court of appeals from the judgment of the magistrate in the same manner as an appeal from any other judgment of a district court. In this circumstance, the consent of the parties allows a magistrate designated to exercise civil jurisdiction under paragraph (1) of this subsection to direct the entry of a judgment of the district court in accordance with the Federal Rules of Civil Procedure. Nothing in this paragraph shall be construed as a limitation of any party's right to seek review by the Supreme Court of the United States.

"(4) Notwithstanding the provisions of paragraph (3) of this subsection, at the time of reference to a magistrate, the parties may further consent to appeal on the record to a judge of the district court in the same manner as on an appeal from a judgment of the district court to a court of appeals. Wherever possible the local rules of the district court and the rules promulgated by the conference shall endeavor to make such appeal expeditious and inexpensive. The district court may affirm, reverse, modify, or remand the magistrate's judgment.

"(5) Cases in the district courts under paragraph (4) of this subsection may be reviewed by the appropriate United States court of appeals upon petition for leave to appeal by a party stating specific objections to the judgment. Nothing in this paragraph shall be construed to be a limitation on any party's right to seek review by the Supreme Court of the United States.

"(6) The court may, for good cause shown on its own motion, or under extraordinary circumstances shown by any party, vacate a reference of a civil matter to a magistrate under this subsection.

"(7) The magistrate shall determine, taking into account the complexity of the particular matter referred to the magistrate, whether the record in the proceeding shall be taken, pursuant to section 753 of this title, by electronic sound recording means, by a court reporter appointed or employed

by the court to take a verbatim record by shorthand or by mechanical means, or by an employee of the court designated by the court to take such a verbatim record. Notwithstanding the magistrate's determination, (A) the proceeding shall be taken down by a court reporter if any party so requests, (B) the proceeding shall be recorded by a means other than a court reporter if all parties so agree, and (C) no record of the proceeding shall be made if all parties so agree. Reporters referred to in this paragraph may be transferred for temporary service in any district court of the judicial circuit for reporting proceedings under this subsection, or for other reporting duties in such court."

**6. 1986 Criminal Justice Act Revision, [Pub. L. No. 99-651](#), [100 Stat. 3646-48](#)**

Sec. 201. Recall of Certain Retired Judicial Officers

(a) MAGISTRATES.--(2) Section 636 of title 28, United States Code, is amended by adding at the end the following:

"(h) A United States magistrate who has retired may, upon the consent of the chief judge of the district involved, be recalled to serve as a magistrate in any judicial district by the judicial council of the circuit within which such district is located. Upon recall, a magistrate may receive a salary for such service in accordance with regulations promulgated by the Judicial Conference, subject to the restrictions on the payment of an annuity set forth in subchapter III of chapter 83, and chapter 84, of title 5. The requirements set forth in subsections (a), (b)(3), and (d) of section 631, and paragraph (1) of subsection (b) of such section to the extent such paragraph requires membership of the bar of the location in which an individual is to serve as a magistrate, shall not apply to the recall of a retired magistrate under this subsection or section 375 of this title. Any other requirement set forth in section 631(b) shall apply to the recall of a retired magistrate under this subsection or section 375 of this title unless such retired magistrate met such requirement upon appointment or reappointment as a magistrate under section 631."

**7. Bail Reform Act of 1984, [Pub. L. No. 98-473](#), Title II, [98 Stat. 1985](#), 1986**

Sec. 208. Section 636 of title 28, United States Code, is amended by striking out "impose conditions of release under section 3146 of title 18" and inserting in lieu thereof "issue orders pursuant to section 3142 of title 18 concerning release or detention of persons pending trial".

**8. Anti-Drug Abuse Act of 1988, [Pub. L. No. 100-690](#), [102 Stat. 4467](#)**

Sec. 7322. SENTENCING JURISDICTION.

Section 636(a) of title 28, United States Code, is amended by--

(1) striking out "and" at the end of paragraph (2);

(2) striking out the period at the end of paragraph (3) and inserting in lieu thereof ",and"; and

(3) adding at the end thereof the following paragraph;

"(4) the power to enter a sentence for a misdemeanor or infraction with the consent of the parties."

**9. Judicial Improvements and Access to Justice Act of 1988, [Pub. L. No. 100-702](#), Title IV, Title X, [102 Stat. 4642](#)**

Sec. 404. CONFORMING AND OTHER TECHNICAL AMENDMENTS.

(b) CONFORMING AMENDMENTS RELATING TO MAGISTRATES.--(1) Section 636(d) is amended by striking out "section 3402 of title 18, United States Code" and inserting in lieu thereof "section 2072 of this title".

Sec. 1014. METHOD OF RECORDING.

Paragraph (7) of section 636(c) is amended to read as follows:

"(7) The magistrate shall, subject to guidelines of the Judicial Conference, determine whether the record taken pursuant to this section shall be taken by electronic sound recording, by a court reporter, or by other means."

**10. Federal Courts Study Committee Implementation Act, [Pub. L. No. 101-650](#), Title III, [104 Stat. 5089](#)**

Sec. 308. MAGISTRATES.

(a) CONSENT TO TRIAL IN CIVIL ACTIONS.--Section 636(c)(2) of title 28, United States Code, is amended--

(1) in the first sentence, by striking out "their right to consent to the exercise of" and inserting in lieu thereof "the availability of a magistrate to exercise"; and

(2) by striking out the third sentence and inserting in lieu thereof the following: "Thereafter, either the district court judge or the magistrate may again advise the parties of the availability of the magistrate, but in so doing, shall also advise the parties that they are free to withhold consent without adverse substantive consequences."

**11. Federal Courts Improvement Act of 1996, [Pub. L. No. 104-317](#), [110 Stat. 3847](#)**

Sec. 201. DUTIES OF MAGISTRATE JUDGE ON EMERGENCY ASSIGNMENT. The first sentence of section 636(f) of title 28, United States Code, is amended by – striking out “(a) or (b)” and inserting in lieu thereof “(a), (b), or (c)”.

Sec. 202. CONSENT TO TRIAL IN CERTAIN CRIMINAL ACTIONS.

(a) Amendments to Title 18.--(1) Section 3401(b) of title 18, United States Code, is amended--

(A) in the first sentence by inserting, “other than a petty offense that is a class B misdemeanor charging a motor vehicle offense, a class C misdemeanor, or an infraction,” after “misdemeanor”;

(B) in the second sentence by inserting “judge” after “magistrate” each place it appears;

(C) by striking out the third sentence and inserting in lieu thereof the

following: “The magistrate judge may not proceed to try the case unless the defendant, after such explanation, expressly consents to be tried before the magistrate judge and expressly and specifically waives trial, judgment, and sentencing by a district judge. Any such consent and waiver shall be made in writing or orally on the record.”; and

(D) by striking out “judge of the district court” each place it appears and inserting in lieu thereof “district judge”. (2) Section 3401(g) of title 18, United States Code, is amended by striking out the first sentence and inserting in lieu thereof the following: “The magistrate judge may, in a petty offense case involving a juvenile, that is a class B misdemeanor charging a motor vehicle offense, a class C misdemeanor, or an infraction, exercise all powers granted to the district court under chapter 403 of this title. The magistrate judge may, in any other class B or C misdemeanor case involving a juvenile in which consent to trial before a magistrate judge has been filed under subsection (b), exercise all powers granted to the district court under chapter 403 of this title.”

(b) Amendments to Title 28.--Section 636(a) of title 28, United States Code, is amended--

(1) by striking out, “and” at the end of paragraph (3) and inserting in lieu thereof a semicolon; and

(2) by striking out paragraph (4) and inserting the following: “(4) the power to enter a sentence for a petty offense that is a class B misdemeanor charging a motor vehicle offense, a class C misdemeanor, or an infraction; and (5) the power to enter a sentence for a class A misdemeanor, or a class B or C misdemeanor not covered by paragraph (4), in a case in which the parties have consented.”.

Sec. 207. APPEAL ROUTE IN CIVIL CASES DECIDED BY MAGISTRATE JUDGES WITH CONSENT.

Section 636 of title 28, United States Code, is amended--

(1) in subsection (c)-- (A) in paragraph (3) by striking out “In this circumstance, the” and inserting in lieu thereof “The”; (B) by striking out paragraphs (4) and (5); and (C) by redesignating paragraphs (6) and (7) as paragraphs (4) and (5); and (2) in subsection (d) by striking out “, and for the taking and hearing of appeals to the district courts,”.

**12. Federal Courts Improvement Act of 2000, Pub. L. No. 106-518, Title II, 114 Stat. 2410**

Sec. 201. EXTENSION OF STATUTORY AUTHORITY FOR MAGISTRATE JUDGE POSITIONS TO BE ESTABLISHED IN THE DISTRICT COURTS OF GUAM AND THE NORTHERN MARIANA ISLANDS.

Section 631 of title 28, United States Code, is amended--

- (1) by striking the first two sentences of subsection (a) and inserting the following: “The judges of each United States district court and the district courts of the Virgin Islands, Guam, and the Northern Mariana Islands shall appoint United States magistrate judges in such numbers and to serve at such locations within the judicial districts as the Judicial Conference may determine under this chapter. In the case of a magistrate judge appointed by the district court of the Virgin Islands, Guam, or the Northern Mariana Islands, this chapter shall apply as though the court appointing such a magistrate judge were a United States district court.”; and
- (2) by inserting in the first sentence of paragraph (1) of subsection (b) after “Commonwealth of Puerto Rico,” the following: “the Territory of Guam, the Commonwealth of the Northern Mariana Islands,”.

Sec. 202. MAGISTRATE JUDGE CONTEMPT AUTHORITY.

Section 636(e) of title 28, United States Code, is amended to read as follows:

(e) Contempt Authority.--

- (1) In general.--A United States magistrate judge serving under this chapter shall have within the territorial jurisdiction prescribed by the appointment of such magistrate judge the power to exercise contempt authority as set forth in this subsection.
- (2) Summary criminal contempt authority.--A magistrate judge shall have the power to punish summarily by fine or imprisonment such contempt of the authority of such magistrate judge constituting misbehavior of any person in the magistrate judge's presence so as to obstruct the administration of justice. The order of contempt shall be issued under the Federal Rules of Criminal Procedure.
- (3) Additional criminal contempt authority in civil consent and misdemeanor cases.--In any case in which a United States magistrate judge presides with the consent of the parties under subsection (c) of this section, and in any misdemeanor case proceeding before a magistrate judge under section 3401 of title 18, the magistrate judge shall have the power to punish, by fine or imprisonment, criminal contempt constituting disobedience or resistance to the magistrate judge's lawful writ, process, order, rule, decree, or command. Disposition of such contempt shall be conducted upon notice and hearing under the Federal Rules of Criminal Procedure.

- (4) Civil contempt authority in civil consent and misdemeanor cases.--In any case in which a United States magistrate judge presides with the consent of the parties under subsection (c) of this section, and in any misdemeanor case proceeding before a magistrate judge under section 3401 of title 18, the magistrate judge may exercise the civil contempt authority of the district court. This paragraph shall not be construed to limit the authority of a magistrate judge to order sanctions under any other statute, the Federal Rules of Civil Procedure, or the Federal Rules of Criminal Procedure.
- (5) Criminal contempt penalties.--The sentence imposed by a magistrate judge for any criminal contempt provided for in paragraphs (2) and (3) shall not exceed the penalties for a Class C misdemeanor as set forth in sections 3581(b)(8) and 3571(b)(6) of title 18.
- (6) Certification of other contempts to the district court.--Upon the commission of any such act--
  - (A) in any case in which a United States magistrate judge presides with the consent of the parties under subsection (c) of this section, or in any misdemeanor case proceeding before a magistrate judge under section 3401 of title 18, that may, in the opinion of the magistrate judge, constitute a serious criminal contempt punishable by penalties exceeding those set forth in paragraph (5) of this subsection, or
  - (B) in any other case or proceeding under subsection (a) or (b) of this section, or any other statute, where--
    - (I) the act committed in the magistrate judge's presence may, in the opinion of the magistrate judge, constitute a serious criminal contempt punishable by penalties exceeding those set forth in paragraph (5) of this subsection,
    - (ii) the act that constitutes a criminal contempt occurs outside the presence of the magistrate judge, or
    - (iii) the act constitutes a civil contempt, the magistrate judge shall forthwith certify the facts to a district judge and may serve or cause to be served, upon any person whose behavior is brought into question under this paragraph, an order requiring such person to appear before a district judge upon a day certain to show cause why that person should not be adjudged in contempt by reason of the facts so certified. The district judge shall thereupon hear the evidence as to the act or conduct complained of and, if it is such as to warrant punishment, punish such person in the same manner and to the same extent as for a contempt committed before a district judge.
- (7) APPEALS OF MAGISTRATE JUDGE CONTEMPT ORDERS.--

The appeal of an order of contempt under this subsection shall be made to the court of appeals in cases proceeding under subsection (c) of this section. The appeal of any other order of contempt issued under this section shall be made to the district court."

Sec. 203. CONSENT TO MAGISTRATE JUDGE AUTHORITY IN PETTY OFFENSE CASES AND MAGISTRATE JUDGE AUTHORITY IN MISDEMEANOR CASES INVOLVING JUVENILE DEFENDANTS.

(a) Amendments to Title 18.--

(1) Petty offense cases.--Section 3401(b) of title 18, United States Code, is amended by striking "that is a class B misdemeanor charging a motor vehicle offense, a class C misdemeanor, or an infraction," after "petty offense".

(2) Cases involving juveniles.--Section 3401(g) of title 18, United States Code, is amended--

(A) by striking the first sentence and inserting the following: "The magistrate judge may, in a petty offense case involving a juvenile, exercise all powers granted to the district court under chapter 403 of this title.";

(B) in the second sentence by striking "any other class B or C misdemeanor case" and inserting "the case of any misdemeanor, other than a petty offense,"; and

(C) by striking the last sentence.

(b) Amendments to Title 28.--Section 636(a) of title 28, United States Code, is amended by striking paragraphs (4) and (5) and inserting the following:

(4) the power to enter a sentence for a petty offense; and

(5) the power to enter a sentence for a class A misdemeanor in a case in which the parties have consented.

**13. Court Security Improvement Act of 2007, [Pub. L. No. 110-177](#), Title V, [121 Stat. 2534](#).**

Sec. 502. MAGISTRATE JUDGES LIFE INSURANCE.

(a) In General.--Section 604(a)(5) of title 28, United States Code, is amended by inserting after "hold office during good behavior", the following: "magistrate judges appointed under section 631 of this title,".

(b) Construction.--For purposes of construing and applying chapter 87 of title 5, United States Code, including any adjustment of insurance rates by regulation or otherwise, the following categories of judicial officers shall be deemed to be judges of the United States as described under section 8701 of title 5, United States Code:

(1) Magistrate judges appointed under section 631 of title 28, United States Code.

- (2) Magistrate judges retired under section 377 of title 28, United States Code.
- (c) Effective Date.--Subsection (b) and the amendment made by subsection (a) shall apply with respect to any payment made on or after the first day of the first applicable pay period beginning on or after the date of enactment of this Act.

Sec. 503. ASSIGNMENT OF JUDGES.

Section 296 of title 28, United States Code, is amended by inserting at the end of the second undesignated paragraph the following new sentence: “However, a district judge who has retired from regular active service under section 371(b) of this title, when designated and assigned to the court to which such judge was appointed, having performed in the preceding calendar year an amount of work equal to or greater than the amount of work an average judge in active service on that court would perform in 6 months, and having elected to exercise such powers, shall have the powers of a judge of that court to participate in appointment of court officers and magistrate judges, rulemaking, governance, and administrative matters.”

Sec. 504. SENIOR JUDGE PARTICIPATION IN THE SELECTION OF MAGISTRATE JUDGES.

Section 631(a) of title 28, United States Code, is amended by striking “Northern Mariana Islands” the first place it appears and inserting “Northern Mariana Islands (including any judge in regular active service and any judge who has retired from regular active service under section 371(b) of this title, when designated and assigned to the court to which such judge was appointed)”.