

A GUIDE TO THE FEDERAL MAGISTRATE JUDGES SYSTEM

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A White Paper Prepared at the Request of the Federal Bar Association

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Introduction

In the United States District Courts, there are two types of federal judges: United States District Judges (confirmed by the Senate with life tenure); and United States Magistrate Judges (appointed through a merit selection process for renewable, eight year terms).

Although their precise duties may change from district to district, Magistrate Judges often conduct mediations, resolve discovery disputes, and decide a wide variety of motions; determine whether criminal defendants will be detained or released on a bond; appoint counsel for such defendants (and, in the misdemeanor context, hold trials and sentence defendants); and make recommendations regarding whether a party should win a case on summary judgment, whether a Social Security claimant should receive a disability award, whether a *habeas* petitioner should prevail, and whether a case merits dismissal. When both sides to a civil case consent, Magistrate Judges hear the entire dispute, rule on all motions, and preside at trial.

There are now 531 full-time Magistrate Judges in the United States District Courts. According to the Administrative Office of the U.S. Courts, in 2013, Magistrate Judges disposed of a total of 1,179,358 matters.¹

The importance of Magistrate Judges to the day-to-day workings of the federal trial courts cannot be overstated. Many federal cases settle early in the litigation process, and fewer civil and criminal cases now proceed to trial. Although felony criminal matters are the province of District Judges, in misdemeanor matters and in civil cases, it is often the Magistrate Judge -- and, sometimes, *only* the Magistrate Judge -- with whom the litigants and their counsel will meet and interact as their case is litigated in the federal trial court.

It is for this reason that the Federal Bar Association, under the leadership of national FBA president, United States District Judge Gustavo A. Gelpí, Jr., decided this year to celebrate the importance of United States Magistrate Judges in two publications: a special issue of *The Federal Lawyer* (May/June 2014) devoted to the day-to-day workings of Magistrate Judges and their court staff; and this *White Paper* discussing the creation, history, and current role of Magistrate Judges in the federal courts. To that end, the FBA created a Magistrate Judge Task Force.

As Judge Gelpí wrote in his introduction to the Magistrate Judge special edition of *The Federal Lawyer*:

¹ See *U.S. Magistrate Judges*, [uscourts.gov,http://www.uscourts.gov/Statistics/JudicialBusiness/2013/usmagistrate-judges.aspx](http://www.uscourts.gov/Statistics/JudicialBusiness/2013/usmagistrate-judges.aspx) (last visited Aug. 19, 2014); see also THE FEDERAL LAWYER (May/June 2014) at 34-35 (discussing A.O. statistics).

As a former U.S. Magistrate Judge (2001-2006) and president of the Federal Bar Association (FBA), I put a high priority on highlighting and educating federal judges and practitioners, as well as members of the federal executive and legislative branches, about the quintessential role Magistrate Judges play in our system of justice.

The Magistrate Judge is the face of federal courts across the nation whenever a criminal defendant, his family and friends, and any victims first walk into a federal courtroom. Likewise, in an increasing number of civil proceedings, the parties will come to court for the first time to meet a Magistrate Judge in a mediation or other proceeding.

I was incredibly honored when Judge Gelpí asked me to chair the Magistrate Judge Task Force and lead the FBA's effort to create *The Federal Lawyer* special issue and this *White Paper*. I thank Judge Gelpí for the opportunity to serve the FBA in this manner.

It has been my honor this year to work closely with Peter McCabe, the author of this *White Paper*. Mr. McCabe, who retired from government service in 2013, worked for the Administrative Office of the U.S. Courts for 44 years, and was the first-appointed Chief of the A.O.'s Magistrate Judges Division. Many consider Mr. McCabe one of the primary architects of the Magistrate Judge system in the federal courts. His knowledge of the working role of Magistrate Judges, and their history, is likely unsurpassed in the United States. The FBA is indebted to Mr. McCabe, and thanks him, for the many hours he spent writing this *White Paper*. The FBA also thanks the members of the Magistrate Judge Task Force -- including, among others, Magistrate Judge Camille Vélez-Rivé of the District of Puerto Rico and Magistrate Judge Michelle Burns of the District of Arizona -- who spent countless hours assisting in the final preparation of this *White Paper* for publication.

As I noted in the special edition of *The Federal Lawyer*, I am incredibly fortunate to be a United States Magistrate Judge. I care deeply about justice, resolving disputes fairly and equitably under the law, and treating all persons with dignity. It makes me proud to serve with fellow Magistrate Judges, across the nation and in our federal courts, who share these same goals and who care, with equal passion, about the important work Magistrate Judges do every day.

I congratulate the Federal Bar Association for publishing this *White Paper: A Guide to the Federal Magistrate Judge System*, and sincerely hope this *White Paper* will lead to a better understanding of the important role Magistrate Judges play in our system of justice.

Hon. Michael J. Newman
United States Magistrate Judge
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August 2014

A GUIDE TO THE FEDERAL MAGISTRATE JUDGE SYSTEM

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A Guide to the Federal Magistrate Judges System

Peter G. McCabe¹

Summary

The basic structure of the federal court system has been in place since the late 19th Century.² It consists of three levels of courts with broad civil, criminal, and bankruptcy jurisdiction: (1) the trial-level district courts; (2) the appellate-level circuit courts of appeals; and (3) the U.S. Supreme Court. In addition, Congress has established within the federal judiciary a limited number of other courts with specialized, national jurisdiction, including the U.S. Court of International Trade, the U.S. Court of Federal Claims, and the U.S. Court of Appeals for the Federal Circuit.³

The U.S. district courts are presided over by district judges, who under Article III of the Constitution are appointed by the President, confirmed by the Senate, and enjoy lifetime tenure. Subject to appropriate judicial review and oversight, however, the district courts delegate a good portion of their civil and criminal work to magistrate judges and all their bankruptcy cases to bankruptcy judges. Magistrate judges and bankruptcy judges serve as judicial officers of the district courts, but they are appointed for fixed terms of office by Article III judges, rather than the President. As the Supreme Court emphasized recently: “without the distinguished services of these judicial colleagues, the work of the federal court system would grind nearly to a halt.”⁴

This paper focuses on the role of magistrate judges in the district courts. The first two sections, Parts A and B, will describe the creation, evolution and current state of the magistrate judge system. The bulk of the paper, Part C, will then describe in detail the various judicial duties that magistrate judges perform.

The Federal Magistrates Act of 1968 was enacted “to reform the first echelon of the Federal

¹ J.D., Harvard Law School; A.B., Columbia University. Retired as Assistant Director for Judges Programs at the Administrative Office of the United States Courts on September 30, 2013, after 44 years with that office, including service as the first chief of the Magistrate Judges Division from 1972 to 1982, Assistant Director from 1982 to 2013, and Secretary to the Judicial Conference of the United States’ Committee on Rules of Practice and Procedure from 1992 to 2012.

² See the Judiciary Act of 1891, Act of March 3, 1891, ch. 517, 26 Stat. 826, commonly known as the Evarts Act or the Circuit Courts of Appeals Act. District and circuit courts date back as early as the Judiciary Act of 1789, but the original circuit courts were largely trial courts, exercised limited appellate jurisdiction, and had no dedicated judges of their own.

³ Congress has also created special courts outside the judiciary, including the U.S. Tax Court, the U.S. Court of Appeals for Veterans Claims, the military courts, and various bodies in the Executive Branch presided over by administrative law judges.

⁴ *Wellness Int’l Network, Ltd. v. Sharif*, 135 S. Ct. 1932, 1938-39 (2015).

judiciary into an effective component of a modern scheme of justice.”⁵ The landmark statute created a corps of new judicial officers to “cull from the ever-growing workload of the U.S. district courts matters that are more desirably performed by a lower tier” of federal judges.⁶

The 1968 Act has been amended several times, and the office of magistrate judge has evolved greatly since it was created in 1968. As a result, the creation and use of magistrate judges have proven over the last half-century to be one of the most innovative and successful judicial reforms ever undertaken in the federal courts

United States magistrate judges are appointed by the judges of the district courts and serve as an integral part of the district courts. They are not a separate court and have no original jurisdiction of their own. Rather, the jurisdiction that they exercise is that of the district court itself, delegated to them by the judges of the court under statutory authority, local rules, and court orders. A central feature of the Federal Magistrates Act is that it does not mandate the assignment of particular duties to magistrate judges. Instead, it authorizes each district court to determine what duties to assign to its magistrate judges in order to best meet the needs of the court, its judges, and the litigants.

Magistrate judges are appointed under a process that requires public notice of all vacancies and screening of candidates by a merit-selection panel of lawyers and other citizens. The great majority of magistrate judges today serve on a full-time basis, are appointed for 8-year, renewable terms of office,⁷ perform a wide variety of judicial duties in civil and criminal cases, and follow the same federal rules and code of conduct as all federal judges. A limited number of magistrate judges serve on a part-time basis and are appointed for 4-year terms of office. They serve mostly at outlying geographic locations or provide the district courts with back-up federal judicial services.

⁵ H.R. REP. NO. 1629, 90th Cong., 2d Sess., 11 (1968).

⁶ S. REP. NO. 371, 90th Cong., 1st Sess. 9 (1967).

⁷ As of September 2015, there were 536 full-time magistrate judge positions and 34 part-time positions.

PART A: EVOLUTION OF THE MAGISTRATE JUDGES SYSTEM

1. Historical Antecedents of the System

a. The Early Days of the Republic

The antecedents of the federal magistrates program date back to the early days of the republic and the development of the commissioner system. In 1789, Congress created the first federal courts and authorized federal judges – as well as certain state judicial officers – to order the arrest, detention, and release of federal criminal offenders.⁸ In 1793, drawing on the English and colonial tradition of having local magistrates and justices of the peace serve as committing officers, Congress authorized the new federal circuit courts to appoint “discreet persons learned in the law” to accept bail for them in federal criminal cases.⁹ These officers were later called “commissioners” and given a host of additional duties throughout the 19th Century, including the power to issue arrest and search warrants and to hold persons for trial. They were compensated for their services on a fee basis.¹⁰

b. The 1896 Commissioner Statute

In 1896, Congress reconstituted the commissioner system, which had developed on a piecemeal basis. It adopted the title “United States commissioner,” established a four-year term of office, and provided for appointment and removal by the district courts rather than the circuit courts.¹¹ No minimum qualifications were specified for commissioners and no limits imposed on the number of commissioners that the courts could appoint. Congress also created the first uniform, national fee schedule to compensate commissioners, fixing fees for such actions as drawing a bail bond, issuing an arrest or search warrant, and administering an oath.

In addition, Congress established special commissioner positions for several national parks, beginning with a position for Yellowstone National Park in 1894.¹² Unlike United States commissioners, the park commissioners were given criminal trial jurisdiction to hear and determine

⁸ Judiciary Act of 1789, ch. 20, § 33, 1 Stat. 91.

⁹ Act of March 2, 1793, ch. 22, § 4, 1 Stat. 334. The requirement that they be learned in the law appears to have been abandoned in 1812. Act of February 20, 1812, ch. 25, § 25, 2 Stat. 679. It was not restored until the commissioner system was replaced a century and a half later by the Federal Magistrates Act.

¹⁰ Commissioners received fees authorized by state law. Federal laws also provided fees for designated services.

¹¹ Act of May 28, 1896, ch. 252, §§ 19, 21, 29 Stat. 184.

¹² Act of May 7, 1894, ch. 72, §§ 5, 7, 28 Stat. 74. The national park commissioners were paid a salary in addition to fees.

petty offenses on designated federal territories, national parks, and roads. In 1940, general legislation was enacted authorizing all United States commissioners, if specially designated by their district courts, to try petty offenses occurring on property under the exclusive or concurrent jurisdiction of the federal government.¹³

c. Proposals to Reform the Commissioner System

In 1941, the Judicial Conference of the United States – the federal judiciary’s policy-making body – asked the Administrative Office of the U.S. Courts to conduct a comprehensive study of the commissioner system.¹⁴ The office’s report, filed in 1942, concluded that the commissioner system had several serious problems that needed to be addressed.¹⁵ Of greatest concern was that commissioner fees, not raised since 1896, were insufficient to attract able lawyers in many locations.

The report recommended that commissioners be compensated on a salary basis, if feasible. It also emphasized that the commissioners’ functions were legal in nature, and district courts should strive to appoint lawyers to the positions. The Judicial Conference generally approved the report’s recommendations, but it concluded that a salary system was not practical in light of enormous workload differences among the commissioners. It recommended seeking legislation to raise fees, and it urged the district courts to reduce the overall number of commissioners and appoint lawyers as commissioners “where possible.”¹⁶

The fees were increased by statute in 1946 and 1957.¹⁷ Additional proposals were made in the 1950s and 1960s to raise fees further and to broaden the commissioners’ petty offense jurisdiction. But the recommendations were overtaken by a much larger debate over whether more fundamental structural changes were needed in the commissioner system itself.

At the Judicial Conference’s request, the Administrative Office drafted legislation in 1964

¹³ Act of October 9, 1940, ch. 785, 54 Stat. 1058.

¹⁴ REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 12 (Sept. 1941).

¹⁵ UNITED STATES COMMISSIONERS, A REPORT TO THE JUDICIAL CONFERENCE BY THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, September 1942, reprinted in *U.S. Commissioner System: Hearings Before the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary*, 89th Cong., 1st Sess., Part 2, December 14-15, 1965, pp. 53-67.

¹⁶ REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 11-14 (Sept. 1943). The Conference also endorsed preparing a procedures manual, instructing commissioners on how to perform their duties.

¹⁷ Act of August 1, 1946, ch. 721, 60 Stat. 752; Act of September 2, 1957, Pub. L. No. 85-276; 71 Stat. 600 (1957).

to create a new commissioner system, modeled largely on the system in place for referees in bankruptcy under the Referees Salary and Expense Act of 1946.¹⁸ It provided for a system of full-time commissioners, all of whom would be lawyers, and part-time deputy commissioners. The Conference would be authorized to determine the number of commissioners in each district and set the salaries of each position, relying on recurring workload surveys.¹⁹ These features in modified form eventually made their way into the Federal Magistrates Act of 1968.

2. The Federal Magistrates Act of 1968

a. Legislative Initiatives to Create a New System

Legislative efforts to reform or replace the commissioner system were undertaken in the 89th and 90th Congresses. Extensive hearings were held, the first of which focused on the major criticisms of the commissioner system – the impropriety of a fee-based system to compensate judicial officers, the lack of a requirement that commissioners be lawyers, the excessive number of commissioners, the part-time status of almost all the commissioners, and the lack of support services and legal guidance given the commissioners.²⁰

Senate staff then drafted legislation to replace the commissioner system with an upgraded system of new federal judicial officers called “United States magistrates,” drawing in large measure on the work of the Administrative Office. (Congress changed the official title of the position to “United States magistrate judge” in 1990.)²¹ After additional hearings, a revised bill was introduced in the 90th Congress, incorporating many of the suggestions made at the hearings. It passed both houses and was signed into law as the Federal Magistrates Act on October 17, 1968.

Congress enacted the 1968 legislation expressly to satisfy two principal goals:

- (1) to replace the outdated commissioner system with a cadre of new, upgraded federal judicial officers; and
- (2) to provide judicial relief to district judges in handling their caseloads.²²

¹⁸ Act of June 28, 1946, ch. 512, § 34, 60 Stat. 324 (1946).

¹⁹ See *Senate Hearings*, *supra* note 15, at pp. 113-115.

²⁰ *U.S. Commissioner System: Hearings Before the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary*, 89th Cong., 1st Sess., Part 1, (October 13, 1965).

²¹ See *infra* Section 3d, Change of Title.

²² S. REP. NO. 371, 90th Cong., 1st Sess. 9 (1967).

b. Provisions of the 1968 Act

The Act authorized the Judicial Conference, rather than individual courts or Congress, to determine the number, location, and salary of each magistrate judge position. It established an 8-year term of office for full-time magistrates and a 4-year term for part-time magistrates, but it specified a strong preference for a system of full-time magistrates. The statute increased the authority of magistrates over that exercised by commissioners and –

- (1) extended to magistrate judges all the powers and duties that had been conferred on the commissioners by law or the Federal Rules of Criminal Procedure;
- (2) expanded the criminal trial authority of magistrates to include disposition of all “minor offenses,” whether committed on federal property or not;²³ and
- (3) authorized the district courts to assign magistrate judges “additional duties” to assist district judges in disposing of civil and criminal cases.

The “additional duties” section of the statute listed only three specific duties: (1) serving as a special master; (2) assisting district judges in conducting pretrial or discovery proceedings in civil and criminal actions; and (3) conducting a preliminary review of post-trial applications by convicted criminal defendants to help determine whether there should be a hearing. But the provision also authorized district courts very broadly to assign magistrate judges “such additional duties as are not inconsistent with the Constitution and laws of the United States.” The clear legislative purpose was to encourage the district courts to experiment in assigning a wide range of judicial duties to magistrate judges in both civil and criminal cases.²⁴

c. Implementing the Act

The Judicial Conference established a pilot magistrate judge program in five districts²⁵ and had the Administrative Office conduct an initial survey of all federal district courts to determine the number of magistrate judge positions needed in each. Staff gathered statistical data and conducted on-site interviews with judges, court staff, and others to elicit as much information as possible on how the courts would use their magistrate judges and how many would be needed at each location.

Several judges and courts were very enthusiastic from the outset about having additional

²³ The term “minor offense” was broader than “petty offense,” embracing all federal offenses for which the maximum penalty on conviction was not more than one year’s imprisonment, a fine of \$1,000, or both.

²⁴ See S. REP. NO. 371, 90th Cong., 1st Sess. 25 (1967). See also H. R. REP. NO. 1629, 90th Cong., 2d Sess. 19 (1968).

²⁵ The District of Columbia, the Eastern District of Virginia, the District of New Jersey, the District of Kansas, and the Southern District of California.

judicial officers available to assist in handling the dockets. But others had simply given little or no thought to what duties they would assign magistrate judges other than the traditional commissioner duties. Therefore, substantial educational efforts and additional court surveys and visits were initiated to explain the various types of judicial duties that might be delegated effectively to magistrate judges. After the follow-up surveys, the Judicial Conference, in September 1970, authorized a national system weighted heavily towards part-time magistrate judges, with an initial national complement of 82 full-time magistrate judges and 449 part-time magistrate judges.²⁶ By June 30, 1971, all districts in the country had converted to the new magistrate judge system, replacing all the U.S. commissioners and national park commissioners.²⁷

3. Statutory Amendments Enhancing the Office of Magistrate Judge

a. Fair Compensation

The 1968 legislation failed to include a mechanism for providing future adjustments in magistrate judge salaries. Corrective legislation to authorize periodic increases was obtained in 1972, but an unexpected, last-minute amendment capped the maximum salary of magistrate judges at only 75% of that of a district judge. Further legislation in 1988 set the maximum salaries for full-time magistrate judges and the salaries of bankruptcy judges at 92% of the salary of a district judge.²⁸ The following year, the Ethics Reform Act of 1989 raised the salaries of all judges and provided for future, automatic cost-of-living adjustments, tied to limitations on their outside income, employment,

²⁶ The Conference also authorized 8 “combination” positions in which a magistrate judge position was combined with that of a referee in bankruptcy, clerk of court, or deputy clerk.

²⁷ In addition, the judiciary: (1) prepared model local rules to assist courts in assigning duties to magistrate judges; (2) provided magistrate judges with necessary staff, law books, chambers, courtrooms, recording equipment, and supplies; (3) prepared manuals and educational programs for magistrate judges; (4) built a national statistical system to report on cases and proceedings conducted by magistrate judges; (5) established a survey process to conduct recurring surveys of magistrate judge positions; (6) promulgated special conflict of interest rules for part-time magistrate judges; (7) initiated an automated forfeiture of collateral system to expedite the handling of petty offenses; and (8) assigned a dedicated staff in the Administrative Office to serve the magistrate judges and advise the Judicial Conference on matters related to magistrate judges. The Supreme Court promulgated Rules of Procedure to Govern the Trial of Minor Offenses, effective in 1969, to supersede the rules governing petty offenses before commissioners.

²⁸ Judiciary Appropriations Act of 1988, Pub. L. No. 100-202, Title IV, § 408, 101 Stat. 1329-26 and 27 (December 22, 1987). The Judicial Conference has endorsed parity in the salaries of magistrate judges and bankruptcy judges, and it has approved a standing resolution extending to magistrate judges all future salary adjustments given to bankruptcy judges. REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 32 (Mar. 1987).

and honoraria.²⁹

The statutory salary problem appeared to have been resolved. But a new difficulty arose when Congress failed to provide the regular cost-of-living adjustments every year that the law required. As a result, the salaries of judges deteriorated progressively in real terms for more than 20 years before they were partially restored eventually through litigation.³⁰

b. Judicial Retirement

The Federal Magistrates Act of 1968 included all magistrate judges in the government's civil service retirement system. But, unlike career civil servants, judges generally join the bench later in life after a successful legal career and do not accumulate enough years of federal service to earn an adequate annuity under the regular employee retirement system. In 1988, the judiciary secured legislation establishing a special judicial retirement system for bankruptcy judges and magistrate judges.³¹

c. Merit Selection of Magistrate Judges

In 1978, as part of the deliberations to obtain legislation authorizing magistrate judges to try and dispose of civil cases on consent of the litigants, concern was expressed about "unevenness" in the quality of magistrate judges at the time. In particular, complaints were voiced that some courts had not opened up the selection process to all potential candidates and had selected "insiders" to certain magistrate judge positions. As a result, provisions were included in the legislation mandating a merit-selection process for magistrate judges.³²

The statute, enacted in 1979, requires that magistrate judges be appointed and reappointed under regulations issued by the Judicial Conference that include: (1) public notice of all vacancies; and (2) selection of magistrate judges by the district court from a list of candidates proposed by a merit selection panel of residents of the district.³³ The legislation also urges the district courts to broaden their selection process by fully considering under-represented groups, such as women and minorities, and it requires the Administrative Office to provide annual reports to Congress on the

²⁹ Pub. L. No. 101-194, 103 Stat. 1716 (1989).

³⁰ *See Beer v. United States*, 696 F.3d 1174 (Fed. Cir. 2012), *cert. denied*, 133 S. Ct. 1997 (2013) and collateral judicial-salary cases.

³¹ Retirement and Survivors' Annuities for Bankruptcy Judges and Magistrates Act of 1988, Pub. L. No. 100-659, 102 Stat. 3918.

³² H.R. REP. NO. 95-1364, 95th Cong., 2d Sess. 17-18 (1978). *See also* H.R. REP. NO. 96-287, 96th Cong., 1st Sess. 14-16 (1979).

³³ 28 U.S.C. § 631(b)(5).

qualifications of the persons selected.

The Judicial Conference's regulations prescribe the composition and duties of the merit selection panels and set forth the district court's obligations with regard to selecting a magistrate judge from a list of candidates submitted by the panel.³⁴ To assist the panels, the Administrative Office distributes a pamphlet, approved by the Magistrate Judges Committee of the Judicial Conference, that sets forth the Conference regulations, provides sample notice and application forms, and offers practical guidance on the appointment process and the identification of suitable candidates.³⁵

d. Change of Title

In 1990, the title "United States magistrate" was changed after years of debate. By that time, the titles of virtually all other non-Article III federal judicial officers had been changed. Referees, trial commissioners, and executive branch hearing examiners had all acquired the statutory title "judge." But there was considerable debate over an appropriate new title for magistrates. Many suggestions were offered, including "assistant United States district judge," "associate judge," and "magistrate judge." The legislation adopted the title of "United States magistrate judge."³⁶ The statutory change in title immediately brought a great deal of prestige to the position and clearly emphasized the judicial role of magistrate judges.

4. Statutory Amendments Enhancing Magistrate Judges' Authority

The statutory authority provided to magistrate judges in the 1968 Act was both too restrictive and too broad. On the one hand, 28 U.S.C. § 636(b) was too detailed in limiting a magistrate judge's authority in habeas corpus cases. On the other, the elastic "additional duties" clause, authorizing district courts to assign magistrate judges "any other duties not inconsistent with the Constitution and laws of the United States," was very broad and vague. The authority of magistrate judges under the Act quickly came under attack in litigation, and the Supreme Court had to intervene to resolve uncertainties that had developed.

³⁴ JUDICIAL CONFERENCE OF THE UNITED STATES, REGULATIONS ESTABLISHING STANDINGS AND PROCEDURES FOR THE APPOINTMENT AND REAPPOINTMENT OF UNITED STATES MAGISTRATES, § 420.

³⁵ *The Selection, Appointment, and Reappointment of United States Magistrate Judges*.

³⁶ Federal Courts Study Committee Implementation Act of 1990, Pub. L. No. 101-650, § 321 (1990). The Conference quickly changed the name of its committee to the Committee on the Administration of the Magistrate Judges System.

a. 1976 Legislation – Pretrial Duties

i. The Need for Legislation

In 1974, the Supreme Court, in *Wedding v. Wingo*,³⁷ invalidated a district judge’s delegation of an evidentiary hearing in a habeas corpus case because the 1968 statute and the Habeas Corpus Act only authorized a magistrate judge to recommend that a district judge conduct a hearing. Chief Justice Burger dissented, objecting that the decision was inconsistent with the expansive purpose of the Federal Magistrates Act. He recommended that Congress amend the Act.³⁸

ii. Judicial Duties Authorized

In light of the Chief Justice’s invitation and continuing uncertainty over a magistrate judge’s “additional duty” authority under the 1968 Act, the Judicial Conference concluded that it was essential to clarify and expand the statute, at least regarding pretrial proceedings in civil and criminal cases. It pursued legislation to recast 28 U.S.C. § 636(b) to permit magistrate judges to conduct hearings in prisoner cases and handle a broad range of pretrial matters. Its March 1975 proposal would allow magistrate judges to handle any pretrial matter in the district court: (1) deciding with finality any matter that does not dispose of a civil case or claim; and (2) making a recommendation to a district judge for the judge’s disposition of any matter that would in fact dispose of a civil case or claim.³⁹

The proposal was modified by the Senate to authorize magistrate judges to decide all pretrial procedural and discovery motions with finality, except for eight *de facto* case-dispositive motions.⁴⁰ Magistrate judges could hear those motions, but only recommend appropriate findings and disposition to a district judge.

iii. Scope of Review

A serious policy dispute arose over the appropriate scope for a district judge to apply in reviewing a magistrate judge’s report and recommendations on “dispositive” motions. The Senate

³⁷ 418 U.S. 461 (1974).

³⁸ *Id.* at 487.

³⁹ REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 31-32 (Mar. 1975).

⁴⁰ Summary judgment, dismissal for failure to state a claim upon which relief may be granted, judgment on the pleadings, involuntary dismissal for failure to comply with a court order, injunctive relief, certification of a class action, suppression of evidence in a criminal case, and dismissal by the defendant of an indictment or information.

bill merely provided that a district judge “may accept, reject, or modify,” in whole or in part, a magistrate judge’s findings and recommendations. The House, though, insisted on specifying a “de novo review” standard, essentially requiring a district judge to rehear the motion anew.

Agreement was eventually reached to adopt the approach taken by the Ninth Circuit in *Campbell v. United States District Court*,⁴¹ in which the court of appeals had used the term “*de novo determination*,” rather than “*de novo review*.” The opinion held that the reviewing district judge would not have to rehear all the evidence, but could rely on the record developed by the magistrate judge and make a *de novo decision* on that record. Appropriate language was added to the House report referring to *Campbell*.⁴² In *United States v. Raddatz*,⁴³ the Supreme Court explained that the 1976 revision of 28 U.S.C. § 636(b)(1)(B) had provided for a *de novo* determination, rather than a *de novo* hearing. As a result, a district judge does not have to hold a new hearing and has discretion either to accept the evidence presented before the magistrate judge or hear additional evidence.

iv. Enactment of the 1976 Amendments

The bill, with amendments, passed the House and was signed into law on October 21, 1976.⁴⁴ Its provisions, dealing with pretrial proceedings by magistrate judges in civil and criminal cases, are codified at 28 U.S.C. § 636(b).

b. 1979 Legislation – Civil Trials and All Misdemeanors

i. Proposals to Expand the Authority of Magistrate Judges

The 1976 legislation solved most of the problems associated with the authority of magistrate judges to handle pretrial matters. But jurisdictional uncertainty continued because many district courts were using magistrate judges to conduct full civil trials on consent of the parties, relying largely on the general provision in the 1968 Act allowing a district court to refer “such additional duties as are not inconsistent with the Constitution and laws of the United States.”

The Judicial Conference pursued additional legislation that would authorize magistrate

⁴¹ 501 F.2d 196 (9th Cir.), *cert. denied*, 419 U.S. 879 (1974).

⁴² It explained that the district judge would not have “to actually conduct a new hearing on contested issues.” Rather, the judge, on application, would consider the record developed before the magistrate judge and make his or her determination on the basis of that record. The judge could modify or reject the magistrate judge’s findings and take additional evidence. H. R. REP. NO. 94-1609, 94th Cong., 2d Sess. 3 (1976).

⁴³ 447 U.S. 663, 675-76 (1980).

⁴⁴ Pub. L. No. 944-577, 90 Stat. 2729 (1976).

judges explicitly to try and order final judgment in any civil case with the consent of the parties and the court. The legislation would also authorize magistrate judges to try all federal criminal misdemeanors, rather than just “minor offenses.” Moreover, magistrate judges would be authorized to try both civil and misdemeanor cases with a jury.

Coincidentally, the Department of Justice proposed legislation in 1977 that would permit magistrate judges to try certain designated categories of civil cases, generally smaller federal benefit claims, and all criminal misdemeanors. Opposition developed to the Department’s bill, though, on the grounds that it would establish a separate, *de facto* federal small claims court and two different tiers of federal civil justice. The Judicial Conference proposal, on the other hand, emphasized that magistrate judges are an integral part of the district courts and should – on consent – be able to try any civil case or criminal misdemeanor filed in the court.⁴⁵

ii. Enactment of the 1979 Amendments

The Senate largely adopted the Judicial Conference’s proposal. During deliberations on the bill, serious concern arose over where an appeal should be taken from a final judgment in a civil case decided by a magistrate judge. Several witnesses recommended that all appeals be taken directly to the court of appeals, but the Department of Justice strongly favored limiting appeals exclusively to a district judge.⁴⁶ As eventually enacted in 1979, the legislation allowed both appellate routes, but it listed direct appeal to the court of appeals as the first option.⁴⁷

The bill passed both houses of Congress in 1978, but did not become law that year because

⁴⁵ The Conference has consistently opposed legislative proposals either to give magistrate judges “original” jurisdiction over specific categories of civil cases or to restrict the reference of specific categories of cases to them. *See* REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 34 (Mar. 1980); REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 92-93 (Sept. 1982); REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 15 (Mar. 1983); REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 94 (Sept. 1990).

⁴⁶ *See e.g.*, the testimony and statement of Attorney General Griffin B. Bell, *Magistrate Act of 1977: Hearings Before the Subcomm. on Improvements in Judicial Machinery of the Senate Committee on the Judiciary*, 95th Cong., 1st Sess. (June 6, 1977) pp. 152-159, 162-163. The Judicial Conference approved the legislation at its September 1977 and March 1978 meetings, but it too opposed the direct appeal provision. REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 62-63 (Mar. 1978); REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 16-17 (Mar. 1978).

⁴⁷ *See* S.REP.NO.96-322, 96th Cong., 1st Sess. 8 (1979) (Congressional conference committee report). The statute was later amended in 1996 to eliminate appeals to the district court. *See infra* Section 4c, More Recent Legislation.

a controversial, extraneous provision was added on the House floor that would have eliminated diversity jurisdiction in the federal courts. The bill was introduced again in the next Congress without the diversity proposal and signed into law on October 10, 1979. The civil-trial provisions appear at 28 U.S.C. § 636(c) and the criminal-trial provisions at 18 U.S.C. § 3401.

c. More Recent Legislation

In 1996, the option of taking an appeal from a final judgment of a magistrate judge in a civil consent case to the district court was eliminated, and all appeals in civil consent cases were directed to the court of appeals.⁴⁸ The need for the defendant's consent to disposition of a criminal petty offense case by a magistrate judge was limited substantially in 1996⁴⁹ and eliminated completely in 2000.⁵⁰

The Federal Magistrates Act did not provide magistrate judges with contempt authority. Instead, they had to certify contempt matters to a district judge for appropriate action. In 2000, they were given summary criminal contempt authority by statute to punish any misbehavior occurring in their presence that obstructs the administration of justice.⁵¹ In those cases where they have final decisional authority – *i.e.*, civil consent cases and misdemeanors – they were given general criminal and civil contempt authority to deal with disobedience or resistance to their lawful orders, but only on notice and hearing.⁵²

PART B: THE MAGISTRATE JUDGE SYSTEM TODAY

The Federal Magistrates Act of 1968 created a strong foundation and framework for the federal magistrate judges system. But it has taken nearly 50 years of statutory changes and important internal actions by the judiciary to transform the system into what it is today.

⁴⁸ Federal Courts Improvement Act of 1996, Pub. L. No. 104-317, § 207, 110 Stat. 3847 (1996).

⁴⁹ *Id.* § 202. The consent requirement was eliminated in 1966 for Class B misdemeanor motor offenses, Class C misdemeanors, and infractions. It was retained for Class A misdemeanors and Class B misdemeanors other than motor offenses.

⁵⁰ Federal Courts Improvement Act of 2000, Pub. L. No. 106-518, § 203(b), 114 Stat. 2410 (2000).

⁵¹ *Id.* §§ 202-203.

⁵² The contempt provisions are set forth at 28 U.S.C. § 636(e).

1. Magistrate Judge Positions

Under the 1968 Act, the Judicial Conference, rather than Congress, authorizes magistrate judge positions. It has done so deliberatively and cautiously over the past four decades. It has been cognizant of the strong legislative preference for a system of full-time judges. Nevertheless, before authorizing any additional position, it has always demanded a strong workload justification and a district court's commitment to effective use of its magistrate judges.

The Judicial Conference's initial national allocation to the district courts in 1970 was for 82 full-time magistrate judge positions and 449 part-time positions. The numbers today, though, are reversed. As of September 2015, there were 536 authorized full-time magistrate judge positions and only 34 part-time positions.⁵³ The slow, but steady increase in the number of full-time positions over the years was partly the result of increased district court caseloads, but due also to the increasing delegation of a broad range of additional judicial duties by the district courts.

After years of steady growth, however, the number of positions has grown very slowly in the last decade. This is likely due to two factors. First, the magistrate judge system may have matured fully as a national program and reached its natural size – unless, of course, major increases in district court caseloads occur in the future. Second, the difficult financial state of the federal judiciary – resulting from several years of inadequate appropriations and the damaging effects of Congressional sequesters – has caused major cutbacks in court staff, operating expenses, and federal defender services. The recurring budgetary shortfalls have led the Judicial Conference to implement widespread cost-containment measures and be particularly demanding in considering requests for additional magistrate judge positions. Moreover, vacancies in all existing positions are reviewed rigorously before courts are allowed to fill them. As a result, several magistrate judge vacancies have been placed on hold.

The Judicial Conference also takes advantage of special provisions in the statute that allow it to exert additional position control and contain or reduce costs. For example, it designates certain magistrate judge positions to exercise jurisdiction on a standing basis in other districts adjoining their own.⁵⁴ In addition, magistrate judges may be assigned on a temporary basis to serve in other courts in an emergency with the consent of the chief judges of the courts involved. And the circuit judicial councils frequently recall retired magistrate judges to active status on a voluntary basis to perform

⁵³ ADMIN. OFFICE OF THE U.S. COURTS: JUDICIAL FACTS AND FIGURES 2015, tbl. 1.1.

⁵⁴ 28 U.S.C. § 631(a). The 1968 Act authorized adjoining-district jurisdiction only where a federal property spanned two or more adjacent districts. The 1979 amendments, extended it to cover all of any contiguous districts. Pub. L. No. 96-82, § 3(a). Over the years, 86 magistrate judge positions at 60 locations have been authorized to serve in one or more adjoining districts.

judicial duties, either in their own courts or in other courts in need of assistance.⁵⁵

2. The Bench

a. The Early Days of the Magistrate Judge System

Development of the magistrate judge system was impeded at the outset by the low salary of magistrate judges, the lack of a true judicial retirement system, the absence of the title “judge,” unclear statutory authority, and general uncertainty about the system among both bench and bar.

Despite these problems, several district courts took immediate advantage of the new magistrate judge system in the 1970s and began assigning their magistrate judges a broad range of judicial duties. Many were able to appoint excellent magistrate judges, including respected practicing attorneys and experienced state judges, using them to supervise civil and criminal discovery, settle cases, and try civil cases, even before the 1979 legislation authorized the practice.

On the other hand, there was considerable lack of appreciation of the system in some courts and direct opposition to assigning magistrates a broad range of duties or civil-consent authority. Several districts did not use their magistrates effectively, and some did not address magistrate judges as “judge” before the title was changed by statute in 1990.

b. Presidential Appointment of Magistrate Judges as Article III Judges

In 1976, two magistrates were appointed by President Ford as United States district judges, inaugurating a pattern followed by every succeeding president to appoint magistrate judges to Article III judgeships. As of September 1, 2016, 169 full-time magistrate judges and 7 part-time magistrate judges had each received presidential appointments to serve as Article III judges. Magistrate judges have been appointed to district judgeships in 69 of the 91 Article III district courts and 5 of the 12 circuit courts of appeals. In addition, many other magistrate judges have been appointed as bankruptcy judges, state court judges, and state Supreme Court justices.

c. Current Status of the Magistrate Judge System

The high quality of magistrate judge appointments today is due in large part to a better salary, a sound judicial retirement system, and addition of the title “judge.” The strength of the bench can also be attributed to the merit-selection process mandated by the 1979 legislation, which requires courts to reach out for qualified candidates to fill magistrate judge positions. Most importantly, though, the lure of a magistrate judge position derives from the nature of the judicial duties assigned by most district courts and the enhanced status that magistrate judges currently enjoy among the

⁵⁵ 28 U.S.C. § 636(h). As of September 30, 2015, 68 retired magistrate judges were serving on recall.

bench and bar. Potential candidates, moreover, are surely aware in applying for a position that many magistrate judges have been rewarded by eventual promotion to an Article III judgeship.

At the time of appointment, the average age of new full-time magistrate judges has consistently been 49 to 50 years old, and they have had an average of 21 to 22 years of legal experience. The most common positions held by new magistrate judges directly before appointment were private law practitioners, prosecutors, and public defenders. Of the 51 new full-time magistrate judges appointed in 2015, 25 came directly from law practice, 12 from a U.S. attorney's office, 5 from a federal public defender's office, 3 were part-time magistrate judges, 3 were state judges, 2 were general counsels, and 1 was an assistant state district attorney.⁵⁶

d. Part-time Magistrate Judges

The Federal Magistrates Act contemplates a system of full-time magistrate judges, but it authorizes the Judicial Conference to establish part-time magistrate judge positions where the relevant workload does not make a full-time position "feasible or desirable."⁵⁷ As of September 2015, there were 34 authorized part-time positions nationally. Most are established at outlying locations to facilitate prompt and efficient issuance of process and to permit individuals charged with criminal offenses to be brought before a judge promptly after arrest. A few are located near a military base or other federal enclave where petty-offense dockets are conducted on a regular basis, and a few part-time magistrate judges have been authorized at court locations to provide back-up federal judicial services.

Part-time magistrate judges may be authorized to perform all the duties of a full-time magistrate judge, but a majority of them handle only misdemeanors and initial proceedings in criminal cases. Part-time magistrate judges may exercise civil-consent authority under 28 U.S.C. § 636(c) only if the chief judge of the district court certifies that a full-time magistrate judge is not reasonably available.⁵⁸

e. Diversity in the Magistrate Judge System

Among the initial complement of 82 full-time magistrates who took office by July 1, 1971, there were three women and three African-Americans. As the number of magistrate positions increased over the years, the number of women and minorities on the bench also increased. By 2012, nearly a third of sitting full-time magistrate judges were women, and almost 15 percent were

⁵⁶ See ADMIN. OFFICE OF THE U.S. COURTS, 2015 ANNUAL REPORT OF THE DIRECTOR: JUDICIAL BUSINESS 2015, STATUS OF MAGISTRATE JUDGE POSITIONS AND APPOINTMENTS.

⁵⁷ 28 U.S.C. § 633(a)(3).

⁵⁸ 28 U.S.C. § 636(c)(1).

minorities.⁵⁹

The 1979 legislation that authorized magistrate judges to try civil cases on consent of the litigants also mandated a merit-selection process for appointing magistrate judges. As noted above, the legislation urged the district courts to broaden their selection process by fully considering women and minorities.⁶⁰ The Judicial Conference's selection regulations encourage the courts to appoint diverse selection panels and assure that public notices of vacant magistrate judge positions reach a wide audience of qualified applicants, including women and minorities.⁶¹

The federal judiciary strongly promotes fair employment practices and increasing the pool of qualified candidates for all positions. To that end, several Judicial Conference committees, including the Magistrate Judges Committee, and private organizations, such as the Federal Magistrate Judges Association actively manage outreach efforts of various kinds.⁶² Among other things, the chairs of the Conference's Magistrate Judges Committee and Judicial Resources Committees send a letter to each court at the start of the process of filling a magistrate judge vacancy urging the court to consider the need for diversity in all aspects of the magistrate judge selection process. Practical guidance on promoting diversity is also included in the pamphlet distributed to the courts and merit selection panels, *The Selection, Appointment, and Reappointment of United States Magistrate Judges*.

⁵⁹ The JUDICIARY'S FAIR EMPLOYMENT PRACTICES ANNUAL REPORT for 2012 specified that the 517 full-time magistrate judges sitting on September 30, 2012, included 349 men (67.5%), 168 women (32.5%), and 77 minorities (14.5%). 25 judges (5/8%) did not report their ethnicity.

⁶⁰ "The merit selection panels established under section 631(b)(5) . . . in recommending persons to the district court, shall give due consideration to all qualified individuals, especially such groups as women, blacks, Hispanics, and other minorities." Pub. L. No. 96-82, § 3(e).

⁶¹ "To encourage applicants from all qualified individuals, the court is encouraged to transmit the public notice to state and local bar associations and interest groups that focus on women and minorities. The court should also consider utilizing national publications and the judiciary's [national job vacancies] site. JUDICIAL CONFERENCE OF THE UNITED STATES, REGULATIONS ESTABLISHING STANDINGS AND PROCEDURES FOR THE APPOINTMENT AND REAPPOINTMENT OF UNITED STATES MAGISTRATES, §§ 420.20.10 and 420.30.20. See REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 25 (Sept. 2009).

⁶² The current efforts of the Federal Magistrate Judges Association are described in: Marian Payson, *Diversity in the Magistrate Judge System*, 61 FEDERAL LAWYER 57 (May/June 2014).

3. *Participation in Court Governance*

a. **Participation Encouraged**

Governance of the judiciary is the clear statutory responsibility of life-tenured Article III judges.⁶³ The Judicial Conference, though, has encouraged “broad, meaningful participation” of magistrate judges and bankruptcy judges, as well as senior Article III judges, in all aspects of court governance.⁶⁴ It has urged district courts to take appropriate steps to involve magistrate judges and bankruptcy judges in local court governance, noting that they have “relevant, and sometimes unique perspectives that can inform and enrich the decision-making process.”⁶⁵

b. **National Level**

In 1980, Chief Justice Burger appointed the first magistrate judge to a Judicial Conference committee. Today, magistrate judges serve on 16 of the Conference’s 25 committees. Moreover, many former magistrate judges who became Article III judges have chaired or served on Conference committees. Several have served as members of the Judicial Conference itself and its Executive Committee. In addition, legislation was enacted in 1996 to add a magistrate judge as a statutory member of the board of directors of the Federal Judicial Center, the judiciary’s principal education and research arm.⁶⁶

In March 2004, the Judicial Conference approved having the Chief Justice invite a magistrate judge and a bankruptcy judge to attend sessions of the Judicial Conference in a non-voting capacity.⁶⁷ In addition, the magistrate judge and bankruptcy judge participate in business meetings held in conjunction with each Conference session.

c. **Circuit Level**

At first, magistrate judges were not invited to participate in the annual circuit judicial

⁶³ See, e.g., 28 U.S.C. § 331, 332(a), and 132(b), specifying that the Judicial Conference, the judicial councils of the circuits, and the district courts are comprised exclusively of Article III judges.

⁶⁴ See JUDICIAL CONFERENCE OF THE UNITED STATES: LONG RANGE PLAN FOR THE FEDERAL COURTS 84, Recommendation 50 (1995); REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 38-39 (Sept. 1995).

⁶⁵ *Id.* at 84-85. Implementation Strategy 50c.

⁶⁶ Federal Courts Improvement Act of 1996, Pub. L. No. 104-317, § 207, 101 Stat. 3847 (1996).

⁶⁷ REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 22 (Mar. 2004).

conferences. But in 2008, they were formally added to the statutory list of judges summoned to attend annual circuit conferences.⁶⁸ In addition, all but two circuits now invite a magistrate judge and a bankruptcy judge to attend proceedings of the circuit judicial councils as non-voting participants.⁶⁹ Magistrate judges also serve on various committees of the circuits.

d. Local Court Level

Magistrate judges serve on local district court committees. The Judicial Conference has urged each court to have a court security plan and a local court security committee that includes a magistrate judge.⁷⁰ Courts are also encouraged to appoint local automation committees to coordinate district-wide information technology efforts. Each district, moreover, is required by law to have an advisory committee to make recommendations to the court concerning local rules.⁷¹ Magistrate judges commonly serve on these, and other, local court committees.

At least 35 of the 91 district courts have designated a “chief,” “presiding,” or “administrative” magistrate judge to coordinate magistrate judge activities in the district, make duty assignments, monitor magistrate judge workloads, prepare reports, regularly meet with the chief district judge, and maintain liaison with the district judges and other court officers and committees. The position is not recognized by statute, and the duties differ from court to court. In addition, more than half the districts now invite the chief magistrate judge, or all the magistrate judges, to attend district judge meetings.

PART C: DUTIES THAT MAGISTRATE JUDGES PERFORM

1. Local Variations in the Utilization of Magistrate Judges

a. Flexibility Authorized by the Act

The duties that magistrate judges perform may be divided into four broad categories –

⁶⁸ Judicial Administration and Technical Amendments Act of 2008, Pub. L. No. 110-406, § 9, 122 Stat. 4291 (2008), codified at 28 U.S.C. § 333.

⁶⁹ The circuit councils consist of an equal number of circuit and district judges and are chaired by the chief judge of the circuit. They have broad authority over internal administration of the federal judiciary and may make all necessary and appropriate orders for the effective and expeditious administration of justice” within the circuit. 28 U.S.C. § 332.

⁷⁰ REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 15 (Mar. 1990).

⁷¹ 28 U.S.C. § 2077(b).

- (1) conducting initial proceedings in felony criminal cases;
- (2) adjudicating criminal misdemeanors with finality;
- (3) conducting pretrial matters and other proceedings that the district courts delegate to them in civil and criminal cases; and
- (4) adjudicating civil cases with finality on consent of the parties.

A particular genius of the Federal Magistrates Act is that it does not mandate the assignment of particular duties to magistrate judges. Instead, it lets each district court determine what duties are most needed in light of local conditions and changing caseloads. This flexibility has been beneficial, and most districts use their magistrate judges broadly and imaginatively. But it has also led to substantial disparity in usage of magistrate judges among the federal courts, based on differences in caseloads, local conditions, and the preferences of district judges.

The Act requires each district court to establish local rules for the discharge of duties by its magistrate judges.⁷² The content of the local rules, however, vary greatly from district to district. In some districts, the local rules list the various duties and proceedings delegated to their magistrate judges. In other districts, the rules merely state broadly that the court authorizes its magistrate judges to exercise all the powers authorized by statute, subject to general orders of the court and orders of individual district judges.

b. Encouraging Greater Utilization of Magistrate Judges

In 1983, the General Accounting Office reported favorably to Congress that magistrate judges “have become an important and integral part of the federal judicial system” and were being used effectively in several districts. It pointed out they “had made a substantial contribution to the movement of cases in Federal district courts which is demonstrated by the dramatic increase in district court production [from 1970 to 1982].”⁷³ But the GAO concluded that magistrate judges should be used more widely by the courts, and it urged the Judicial Conference to disseminate more information on the effective use of magistrates and encourage the courts to assign them more duties.

In 1988, Congress established the ad hoc Federal Courts Study Committee to propose revisions in the law that would improve the federal court system.⁷⁴ With reference to the magistrate judge system, the Committee pointed out in its 1990 report that some district courts had been reluctant to expand the role of their magistrate judges because of confusion over the limits of

⁷² 28 U.S.C. § 636(b)(4).

⁷³ U.S. GOV'T ACCOUNTABILITY OFFICE, GAO GGD-84-46, COMPTROLLER GENERAL'S REPORT TO THE CONGRESS: POTENTIAL BENEFITS OF FEDERAL MAGISTRATES SYSTEM CAN BE BETTER REALIZED at I and 6 (1983).

⁷⁴ Federal Courts Study Act, Pub. L. No. 100-172, 102 Stat. 4644 (1988). The Committee, appointed by the Chief Justice, was comprised of members of Congress and federal judges.

magistrate judges' statutory and constitutional authority.⁷⁵ Therefore, it recommended that the Judicial Conference study the magistrate judge system, analyze all cases and statutes affecting magistrate judges, and provide district judges with a full compilation of all potential duties that they could assign to magistrate judges.⁷⁶

In 1995, the Judicial Conference's comprehensive *Long Range Plan for the Federal Judiciary* reaffirmed the importance of local flexibility to the federal judiciary, but concluded that "[a]lthough each district court exercises discretion to its use of magistrate judges, the effort to encourage effective utilization of magistrate judges must be national in approach and effect."⁷⁷

c. Utilization Advice to the Courts

In response to the Federal Courts Study Committee's recommendation that the Judicial Conference provide the courts with greater information on the utilization of magistrate judges, the Conference's Magistrate Judges Committee, staffed by the Administrative Office's Magistrate Judges Division, prepared and distributed three comprehensive documents to assist the courts: (1) an inventory of magistrate judge duties; (2) a constitutional analysis of potential magistrate judge duties; and (3) a legislative history of the Federal Magistrates Act and its amendments.⁷⁸

In addition, the Magistrate Judges Committee has issued a set of common-sense *Suggestions for Utilization of Magistrate Judges* for the courts, drawn from its years of program oversight and closely observing the use of magistrate judges in all the districts. The *Suggestions* emphasize that there is no single best way to use magistrate judges, but they offer the courts a set of "lessons learned" on the most effective and efficient ways to delegate duties. Regardless of which functions a district court may delegate to its magistrate judges, the *Suggestions* encourage courts to –

⁷⁵ Much of the confusion resulted from three Supreme Court decisions in the 1980s that had raised questions about what matters non-Article III judicial officers could appropriately handle. *See, e.g., Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982); *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33 (1989); *Gomez v. United States*, 490 U.S. 858 (1989).

⁷⁶ FED. COURTS STUDY COMM., REPORT OF THE FEDERAL COURTS STUDY COMMITTEE 80-81 (April 2, 1990).

⁷⁷ JUDICIAL CONFERENCE OF THE UNITED STATES: LONG RANGE PLAN FOR THE FEDERAL COURTS 101-02, Recommendation 65 and its advisory note (1995); REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 38-39 (Sept. 1995).

⁷⁸ MAGISTRATE JUDGES DIV., ADMIN. OFFICE OF THE U.S. COURTS: A GUIDE TO THE LEGISLATIVE HISTORY OF THE FEDERAL MAGISTRATE JUDGES SYSTEM (1991); A CONSTITUTIONAL ANALYSIS OF MAGISTRATE JUDGE AUTHORITY (1993); and INVENTORY OF UNITED STATES MAGISTRATE JUDGE DUTIES (1995). The publications are periodically updated by the Administrative Office to reflect case law developments.

- (1) make decisions regarding magistrate judge utilization on a court-wide basis;
- (2) distribute assignments to magistrate judges within a district randomly and evenly;
- (3) establish a system for automatic, rather than *ad hoc*, assignment of cases to magistrate judges;
- (4) use magistrate judges as generalists, rather than specialists; and
- (5) consider whether specific matters may be more appropriately or efficiently handled directly by a district judge or assigned to law clerks.

2. Initial Proceedings in Criminal Cases

Magistrate judges conduct the great majority of initial proceedings in federal criminal cases. Under 28 U.S.C. § 636(a)(1), each United States magistrate judge has been accorded “all powers and duties conferred upon United States commissioners or by the [Federal Rules of Criminal Procedure.]” The commissioners’ duties consisted essentially of issuing criminal process, administering oaths, conducting probable cause proceedings, and binding defendants over for trial in the district court. But under authority of 28 U.S.C. § 636(b)(1) and (3), magistrate judges also conduct a wide range of other proceedings during the initial stages of federal criminal cases.

The Federal Rules of Criminal Procedure were completely restyled in 2002 to make them more easily understood and to make style and terminology consistent throughout the rules. As a result, the criminal rules now generally use the term “magistrate judge” in the provisions governing initial proceedings. Rule 1(b)(5) defines the term “magistrate judge” as a United States magistrate judge. But Rule 1(c) specifies that: “[w]hen these rules authorize a magistrate judge to act, any other federal judge may act.”⁷⁹ Thus, the federal criminal rules authorize both district judges and magistrate judges to conduct the same initial proceedings.⁸⁰

Initial proceedings in criminal cases normally arise on short notice, and judges must handle them promptly, ahead of their other duties. For that reason, where two or more magistrate judges are located in the same courthouse, they normally rotate the handling of initial proceedings. Each magistrate judge will take a turn as the “duty judge” and handle all or virtually all initial proceedings for a set period, such as a week or month. The duty assignment allows the other magistrate judges to concentrate without interruption on other court business.

⁷⁹ The 2002 committee note to FED. R. CRIM. P. 1 explained that: “The Committee believed that the rules should reflect current practice, i.e., the wider and almost exclusive use of United States magistrate judges, especially in preliminary matters.”

⁸⁰ State judges are also authorized to issue arrest warrants, conduct initial appearances, and issue some search warrants if no magistrate judge is reasonably available. *See* FED. R. CRIM. P. 3, 4(a) and (c), 41 (b) and (d). They are not authorized to use the electronic process authorized in Rule 4.1.

The duties of magistrate judges at the initial stages of a federal criminal case can be grouped conveniently into four general categories: (a) issuance of criminal process; (b) conduct of probable cause and release or detention proceedings; (c) conduct of felony arraignments and plea proceedings; and (d) other criminal proceedings. Each of the four will be discussed in turn.

a. Issuing Criminal Process

i. Complaints, Arrest Warrants, and Summonses

A criminal complaint is the initiating document in a federal felony criminal case, unless a defendant is first indicted by a grand jury.⁸¹ The complaint must be presented under oath to a magistrate judge. It consists of a written statement by the government setting forth the essential facts constituting the offense charged.⁸² If the magistrate judge concludes that the complaint and any accompanying affidavits establish probable cause to believe that a federal offense has been committed and that the defendant has committed it, the magistrate judge must issue an arrest warrant or summons to compel the defendant's presence before the court.⁸³

ii. Search Warrants

Magistrate judges issue warrants to search and seize any of the following: (1) evidence of a crime; (2) contraband, fruits of crime, or other items illegally possessed; (3) property designed for use, intended for use, or used in committing a crime; or (4) a person to be arrested or one who is unlawfully retained.⁸⁴ They also have authority to issue administrative search and inspection warrants required under a variety of federal statutes.⁸⁵

Search warrants are issued *ex parte* based on an application and accompanying affidavits presented by a law enforcement officer or attorney for the government.⁸⁶ In reviewing a warrant

⁸¹ A complaint is not necessary when an indictment or information has been filed, if the defendant waives indictment, or the defendant has been charged with a petty offense.

⁸² FED. R. CRIM. P. 3.

⁸³ After the defendant has been arrested, the law enforcement officer must return the warrant to the judge before whom the defendant is brought for an initial appearance. FED. R. CRIM. P. 4(b)(4). Rule 4(a) provides that a magistrate judge must issue a summons, instead of a warrant, if requested by the attorney for the government.

⁸⁴ FED. R. CRIM. P. 41(b) and (c).

⁸⁵ See 28 C.F.R. §§ 60.2 and 60.3.

⁸⁶ The Administrative Office has promulgated standard, national forms for applications, search and seizure warrants, and tracking warrants (AO Forms 93, 93A, 93B, 102, 103, 104, 106, 108, and 109). See the federal judiciary's national website, uscourts.gov.

application, a magistrate judge must determine whether the documents presented by the government describe with specificity both the place to be searched and the objects or person to be seized. If they fail to meet either requirement, the judge will reject them and return them to the government for amendment or other action.

Search warrant applications require thorough and sensitive review by a judge because evidence seized under the warrant may be essential to obtaining a criminal conviction. If a warrant is issued in error, the evidence may later be suppressed and a conviction invalidated.

Search warrant law is complicated and continues to evolve, especially as a result of the almost universal use of computers and cellular phones today to store private and business information electronically, such as financial and business records, personnel information, email communications, and images. Search warrant applications for electronically stored information have become a common feature of white collar investigations, narcotics cases, and various government surveillance and security activities.

A computer itself may be the object of a traditional search warrant because it is contraband or has been used directly in committing a crime. But warrants today are sought more often because a computer or other storage device is thought to contain electronic information bearing on the commission of a crime. The application and search warrant must be carefully crafted because the device that stores the incriminating evidence may also be in regular use for legitimate business purposes or contain protected personal information. The computer, moreover, may be in the custody of an innocent third party.

Incriminating electronic evidence may well be encrypted, mislabeled, hidden, or erased. As a result, the government needs adequate time to locate and decode the pertinent information. Therefore, many warrants contemplate a two-step process under which: (1) law enforcement officers seize the computer or image its contents on-site; and (2) FBI or other computer forensics experts later search the contents.⁸⁷ Accordingly, many judges impose detailed safeguards and conditions on the scope and manner of the search.

Magistrate judges issue warrants to install tracking devices to track the movement of a person

⁸⁷ “Computers and other electronic storage media commonly contain such large amounts of information that it is often impractical for law enforcement to review all of the information during execution of the warrant at the search location. This rule acknowledges the need for a two-step process. Officers may seize or copy the entire storage medium and review it later to determine what electronically stored information falls within the scope of the warrant.” *See* the Committee Note to the 2009 amendments to FED. R. CRIM. P. 41.

or property.⁸⁸ They also may issue anticipatory or “sneak and peek” warrants. A magistrate judge may delay notice of a search warrant, if the government provides adequate justification, if the delay is authorized by statute.⁸⁹

Magistrate judges issue orders for installation and use of pen registers or trap and trace devices that record incoming or outgoing telephone numbers if the information sought is relevant to an ongoing investigation.⁹⁰ A less stringent “material and relevant” standard is applied to review of those orders.

iii. Electronic Issuance of Process

Magistrate judges, in their discretion, may use a telephone or other reliable electronic means to receive applications, review complaints, and issue warrants and summonses under FED. R. CRIM. P. 4.1. The rule is designed to improve access for law enforcement officers to judges and encourage them to seek search warrants, “thereby reducing the necessity of government action without prior judicial approval.”⁹¹

iv. Wiretaps

Magistrate judges have not been authorized to issue wiretaps under 18 U.S.C. § 2518.

⁸⁸ FED. R. CRIM. P. 41(b)(4). A tracking warrant may be authorized for a reasonable period, not to exceed 45 days, and it may be extended for additional 45-day periods. FED. R. CRIM. P. 41(e)(2)(C).

⁸⁹ FED. R. CRIM. P. 41(f)(3). A judge who issues or denies a search warrant authorizing delayed notice, or an extension of such a warrant’s reporting period, must file a report with the Administrative Office. The Administrative Office is required to report annually to Congress on the number of applications for delayed-notice search warrants and extensions, and the number of warrants and extensions granted and denied. 18 U.S.C. § 3103a(d)(2).

⁹⁰ *See* 18 U.S.C. § 3123.

⁹¹ FED. R. CRIM. P. 4.1 was added in 2011 to expand and enhance a process previously authorized only for search warrants. See the 2011 Committee Note to Rule 4.1. Under the rule, the officer submits the written application and affidavits to a magistrate judge electronically. The officer is placed under oath to attest to the contents of the documents. The magistrate judge may examine the applicant over the telephone, and must make a record of any testimony. The judge signs and files the original warrant or summons, and a copy is transmitted and given to the applicant.

b. Probable Cause and Release or Detention Proceedings

i. Initial Appearances

A person who has been arrested must be taken “without unnecessary delay” before a magistrate judge for an initial appearance.⁹² If the arrest is made without a warrant, the government must promptly file a complaint that meets the probable cause requirements of Rule 4(a). At the initial appearance, the magistrate judge will explain the nature of the proceedings and advise the defendant of: (1) the complaint against the defendant and any affidavit filed with it; (2) the right to retain or request appointment of counsel; (3) the circumstances, if any, under which release may be secured; (4) any right to a preliminary hearing; and (5) the right not to make a statement.⁹³

If the defendant has not engaged an attorney, the magistrate judge will order appointment of a federal defender or a private attorney from the court’s panel of qualified counsel if the defendant files a financial affidavit and demonstrates that he or she is “financially unable to obtain counsel.”⁹⁴ If the defendant does not speak English, the magistrate judge will obtain an interpreter.⁹⁵

Under the Bail Reform Act,⁹⁶ the magistrate judge must decide whether the defendant will be released before trial or held in custody. A defendant must be released on personal recognizance or unsecured personal bond unless the judge determines that “such release will not reasonably assure the appearance of the person, as required, or will endanger the safety of any other person or the community.”⁹⁷ To assist the magistrate judge in making the decision, the court’s probation or pretrial services office will normally interview the defendant, speak with the government, gather information on the defendant’s background and personal circumstances, and file a report with the

⁹² FED. R. CRIM. P. 5(a)(1). In the magistrate judge’s discretion, an initial appearance may be conducted using video teleconferencing technology, if the defendant consents to proceeding in this manner. FED. R. CRIM. P. 5(f). Initial appearances in misdemeanor and petty offense cases are governed by FED. R. CRIM. P. 58(b)(2).

⁹³ FED. R. CRIM. P. 5(d). Under the Crime Victims’ Rights Act, 18 U.S.C. § 3771(a)(2) and (3), any victim of the offense has the right to notice of “any public court proceeding . . . involving the crime . . . of the accused,” and to attend that proceeding. Judges may ask the government whether there are any victims, and if so, whether the government has fulfilled its duty to notify them.

⁹⁴ 18 U.S.C. § 3000A(b). The magistrate judge determines whether the defendant’s net financial resources and means are insufficient to obtain qualified counsel, taking into account the cost of providing the defendant and his or her family with the necessities of life and the cost of any bail bond or case deposit.

⁹⁵ 28 U.S.C. § 1827.

⁹⁶ 18 U.S.C. §§ 3141-3150.

⁹⁷ 18 U.S.C. § 3142(b).

judge and counsel regarding whether release is appropriate and what conditions might be imposed. The office will later supervise the defendant if released.

If the magistrate judge decides that release on personal recognizance or unsecured bond runs a risk of the defendant's non-appearance or danger to others, the judge may impose additional conditions of release on the defendant.⁹⁸ The magistrate judge's release order sets forth all the conditions of release in a manner sufficiently clear and specific to serve as a guide for the defendant's conduct. The judge also advises the defendant of the penalties and consequences for violating any of the conditions of release and of the defendant's right to seek review of the conditions of release.

The magistrate judge may amend the release order at any time to impose additional or different conditions of release.⁹⁹ If, for example, the defendant violates a condition of release, the government or the probation office may ask to modify or revoke the release order.

ii. Detention Hearings

A judge must hold a detention hearing on the government's motion in certain categories of serious cases.¹⁰⁰ In addition, a detention hearing may be held on the judge's own motion or the government's motion in any case that involves serious risk of flight or serious risk that the person will attempt to obstruct justice.¹⁰¹ The hearing must be held immediately upon the defendant's first appearance before a judge, unless the government seeks a continuance.¹⁰²

At the detention hearing, the defendant may present information and cross-examine witnesses. If detention is ordered, the judge must file written findings of fact and a written statement of reasons.¹⁰³ A district judge may review a magistrate judge's release order on motion of either

⁹⁸ 18 U.S.C. § 3142(c)(1)(B).

⁹⁹ 18 U.S.C. § 3142(c)(3).

¹⁰⁰ Crimes of violence, offenses carrying a penalty of life imprisonment or death, drug offenses with a penalty of 10 years or more, and any felony following previous conviction for two or more serious offenses. 18 U.S.C. § 3142(f)(1).

¹⁰¹ 18 U.S.C. § 3142(f)(2).

¹⁰² *Id.* Continuances, though, are stringently limited. It is common practice in many courts to hold a detention hearing at the time of the initial appearance. Otherwise, the defendant is detained temporarily by the U.S. marshal's office until a formal detention hearing is scheduled and conducted.

¹⁰³ 18 U.S.C. § 3142(i)(1).

party. A defendant may move the court to revoke or amend a magistrate judge's detention order.¹⁰⁴

iii. Detention of Material Witnesses

Magistrate judges have authority to arrest and detain an individual if the government establishes by affidavit “that the testimony of a person is material in a criminal proceedings, and if it is shown that it may become impracticable to secure the presence of the person by subpoena.”¹⁰⁵ A material-witness detention proceeding is often sought when there is a risk that key witnesses to criminal conduct will flee and no condition of release will adequately ensure their appearance to testify. It is used both to detain material witnesses in criminal investigations before a criminal case is filed and to secure their testimony in a pending case.

iv. Preliminary Hearings

At the conclusion of the initial appearance or detention hearing, a magistrate judge will schedule a preliminary hearing unless the defendant is indicted or waives indictment and the United States attorney files an information. The preliminary hearing is a further probable cause proceeding before a magistrate judge to determine whether a defendant who has been charged with a federal criminal offense by complaint should be required to appear for further court proceedings in the district court.¹⁰⁶ The defendant may cross-examine witnesses and introduce evidence at the hearing.

c. Felony Arraignments and Plea Proceedings

After the defendant has been indicted or charged by information, an arraignment must be conducted in open court with the defendant present.¹⁰⁷ The judge presiding at the arraignment must ensure that the defendant has a copy of the indictment or information, read the indictment or information to the defendant or state its substance, and ask the defendant to plead to the indictment or information.¹⁰⁸

¹⁰⁴ 18 U.S.C. § 3145. A district judge, on application, should review a magistrate judge's release or detention order *de novo*.

¹⁰⁵ 18 U.S.C. § 3144.

¹⁰⁶ FED. R. CRIM. P. 5.1. The preliminary hearing must be held within 14 days if the defendant is in custody, and 21 days if not. *See also* 18 U.S.C. § 3060.

¹⁰⁷ There are two exceptions to the requirement that the defendant be physically present: (1) the court may hold an arraignment in the defendant's absence when the defendant has waived the right to be present in writing and the court consents to that waiver; and (2) the court may hold arraignments by video teleconferencing when the defendant is at a different location. FED. R. CRIM. P. 10(b) and (c).

¹⁰⁸ FED. R. CRIM. P. 10(a).

The defendant may plead guilty, not guilty, or *nolo contendere*.¹⁰⁹ A not guilty plea continues the case for further court proceedings and possible trial. On the other hand, a guilty or *nolo contendere* plea, if accepted by the court, results in the defendant's conviction, and the case will proceed to sentencing and entry of judgment.

It is common for the defendant to plead not guilty at first, giving his or her attorney time to investigate the case and negotiate a potential plea agreement with the U.S. attorney's office. After an agreement is reached, the court entertains a change of plea.

Before accepting a guilty or *nolo contendere* plea, the judge must address the defendant personally in open court and inform the defendant of several rights that will be waived and several consequences that may ensue as a result of the guilty plea. The judge must also determine that: (1) the plea is voluntary and did not result from force, threats, or promises (other than promises in a plea agreement); and (2) there is a factual basis for the plea.¹¹⁰

Magistrate judges have no authority to dispose of felony cases. Nevertheless, a majority of district courts assign magistrate judges to conduct arraignments in felony cases. The practice saves time for district judges, but it also raises serious legal and policy issues and depends on the law of each circuit. All circuits authorize magistrate judges to conduct the Rule 11 plea colloquy, but only if the defendant consents.¹¹¹ In most circuits, the magistrate judge will then submit a report and recommendation to a district judge on whether the plea should be accepted. The report and recommendation are subject to *de novo* review by the district judge.

Although reports and recommendations are generally disfavored because they lead to duplication of judicial work, experience has shown that in the districts where magistrate judges conduct Rule 11 guilty-plea proceedings with consent, the parties rarely object to the resulting reports and recommendations, and *de novo* review by a district judge is not necessary. In a few circuits, a magistrate judge may accept a guilty plea without issuing a report and recommendation.

Assignment practices vary widely among the district courts. In some districts, especially those with very heavy criminal caseloads along the nation's southwest border, magistrate judges are automatically assigned virtually all guilty plea proceedings in felony cases. In other districts, the proceedings are referred either routinely or on an ad hoc basis by some district judges, but other district judges do not assign arraignments. In more than a quarter of the districts, magistrate judges

¹⁰⁹ FED. R. CRIM. P. 11(a).

¹¹⁰ FED. R. CRIM. P. 11(b)(2) and (3)

¹¹¹ The Supreme Court made clear in *Peretz v. United States*, 501 U.S. 923 (1991), that critical stages in felony cases may be referred to magistrate judges under 28 U.S.C. § 636(b)(3) with the defendant's consent. See also *Gonzales v. United States*, 553 U.S. 242 (2008).

are not referred felony guilty pleas at all.¹¹²

d. Other Criminal Proceedings

i. Mental Competency Proceedings

In conducting initial proceedings in criminal cases, magistrate judges frequently encounter issues relating to a defendant's mental competency. The U.S. attorney or defense counsel may move for a hearing to determine the defendant's mental competency under 18 U.S.C. § 4241(a). The magistrate judge must grant the motion, or order an evidentiary hearing on his or her own motion, if there is reasonable cause to believe that the defendant is not mentally competent to: (a) understand the nature and consequences of the proceedings against him or her; or (b) assist properly in his or her defense.¹¹³

Before the evidentiary hearing is conducted, however, the magistrate judge will normally order that a psychiatric or psychological examination be conducted and a report filed with the court.¹¹⁴ If necessary, the magistrate judge may order the defendant committed to a suitable hospital or facility for a reasonable period.¹¹⁵

If authorized by the court, the magistrate judge will conduct the evidentiary hearing, at which the defendant is represented by counsel and may confront witnesses, present evidence, and subpoena witness on his or her behalf.¹¹⁶ After the hearing, if the magistrate judge finds that the defendant is mentally competent, the case will be set for further proceedings and trial. If, on the other hand, the judge finds the defendant to be mentally incompetent, the defendant will be remanded to the custody of the Attorney General for additional hospitalization, monitoring, and legal proceedings.¹¹⁷

ii. Extradition Proceedings

Magistrate judges conduct extradition hearings, which are probable cause proceedings

¹¹² One of the policy arguments against having magistrate judges conduct felony arraignments is that it eliminates an additional opportunity for a district judge to observe the defendant face to face. In courts with heavy criminal caseloads, however, the district judges may simply not have the time to conduct the Rule 11 colloquy in all their cases.

¹¹³ 18 U.S.C. § 4241(a).

¹¹⁴ 18 U.S.C. § 4241(b).

¹¹⁵ The commitment period may not exceed 30 days, but may be extended for 15 days for good cause. 18 U.S.C. § 4247(h).

¹¹⁶ 18 U.S.C. § 4247(d) and (e).

¹¹⁷ See 18 U.S.C. §§ 4241(d), 4246, and 4248.

governed by treaty, rather than the federal rules.¹¹⁸ Extradition is triggered by the request of a foreign government through diplomatic channels to the Department of State and the Department of Justice. After the United States attorney obtains a warrant, the person is arrested and brought before a magistrate judge to determine whether the extradition request complies with an applicable treaty, whether there is probable cause to believe that the person committed the identified offense, and whether other treaty requirements have been met.¹¹⁹ If so, the magistrate judge enters an order certifying the case for extradition, at the discretion of the Secretary of State.

The accused person has no right to appeal the magistrate judge's order, but may be entitled to limited habeas corpus relief. If a magistrate judge refuses to authorize extradition, the requesting government may ask that a new complaint be filed before a different judge.

iii. International Prisoner Transfers

The international prisoner transfer program authorizes prisoners who have been convicted abroad to be transferred back to their home country to serve the remainder of their sentence.¹²⁰ The program is available both to American citizens incarcerated abroad and to foreign nationals incarcerated in the United States, as long as there is an applicable treaty between the two countries.

Once a convicted prisoner has obtained the necessary approvals from the Department of Justice and the pertinent foreign country for the transfer, a proceeding must be held before a magistrate judge in the country where the sentence was imposed and the offender is incarcerated. In the case of U.S. citizens incarcerated abroad, the magistrate judge will conduct the proceeding in the other country. The magistrate judge must personally inform the offender of the conditions of the transfer, determine that the offender understands and agrees to them, and verifies that the offender

¹¹⁸ FED. R. CRIM. P. 1(a)(5) makes the federal rules inapplicable to extradition and rendition of a fugitive.

¹¹⁹ See 18 U.S.C. § 3184. The contents of the hearing depends on the applicable treaty, but generally a magistrate judge decides whether: (1) there is a valid treaty in effect with the requesting state; (2) the person arrested is in fact the person being sought; (3) the offense charged is extraditable under the treaty; (4) the offense meets the requirement of dual criminality; (5) sufficient evidence has been presented to establish probable cause to believe that the person committed the offense charged; (6) the required documents have been presented and are in order, translated, and authenticated; and (7) all other treaty requests and statutory procedures have been followed. See Michael John Garcia & Charles Doyle, *Extradition To and From the United States: Overview of the Law and Recent Treaties*, CONGRESSIONAL RESEARCH SERVICE, No. 98-958 (March 17, 2010).

¹²⁰ See 18 U.S.C. §§ 4100-4115.

voluntarily consents to the transfer with full knowledge of the consequences.¹²¹

iv. Miscellaneous Other Matters

Magistrate judges have been assigned a variety of other preliminary proceedings in criminal cases, including such diverse matters as selecting and empaneling a grand jury, accepting the return of grand jury indictments;¹²² conducting *Nebbia* hearings to determine the source of bail provided on behalf of a criminal defendant;¹²³ issuing warrants to gain access to telephone and toll records;¹²⁴ issuing peace bonds;¹²⁵ ruling on applications for line-ups, blood samples, and fingerprints; and issuing orders to seal or unseal documents filed with the court.

3. Criminal Misdemeanors

Under 18 U.S.C. § 3401 and 28 U.S.C. §§ 636(a)(3)-(5), magistrate judges are authorized to try and dispose of any misdemeanor in the district courts.¹²⁶ In practice, misdemeanor cases are assigned to magistrate judges automatically at filing by the clerk of the district court or the judiciary's national Central Violations Bureau.

a. Types of Misdemeanors

i. Misdemeanor Classifications

The federal criminal code classifies non-felony offenses into the following four categories:

¹²¹ 18 U.S.C. §§ 4107-4108; 28 U.S.C. § 636(g). The Department of Justice administers the transfer program, and a federal defender is normally appointed to represent the defendant at the verification hearing. The Administrative Office coordinates magistrate judge arrangements with the Department.

¹²² FED. R. CRIM. P. 6(f). Under Rule 6(f), the indictment must be returned to a magistrate judge in open court. The return may be made by video teleconferencing.

¹²³ See *United States v. Nebbia*, 357 F.2d 303 (2d Cir. 1966).

¹²⁴ 18 U.S.C. § 2703.

¹²⁵ 50 U.S.C. § 23.

¹²⁶ United States commissioners could, if authorized by their appointing district court, try petty offenses committed on federal property. The Federal Magistrates Act of 1968 expanded the authority for magistrate judges to include "minor offenses," defined in the Act as all offenses for which the maximum penalty did not exceed one year's imprisonment or a fine of \$1,000, or both, whether committed on federal property or not. In 1979, the authority of magistrate judges was expanded to include all federal misdemeanors, regardless of the fine amount.

Above the level of petty offenses:

- *Class A misdemeanors* – maximum penalty: not more than 1 year of incarceration, but more than 60 days, and a \$100,000 fine;

Petty offenses:¹²⁷

- *Class B misdemeanors* – maximum penalty: not more than 6 months of incarceration, but more than 30 days, and a \$5,000 fine;
- *Class C misdemeanors* – maximum penalty: not more than 30 days of incarceration, but more than 5 days, and a \$5,000 fine;
- *Infractions* – maximum penalty: 5 or fewer days of incarceration and a \$5,000 fine.¹²⁸

ii. Sources of Law

Federal misdemeanors arise from three different sources: (a) federal statutes; (b) state statutes assimilated into federal law; and (c) federal agency regulations.

- Federal statutes.* Various federal statutes create criminal offenses that carry a maximum penalty of not more than one year of imprisonment. They deal with a wide range of different subjects, such as theft, food and drug violations, assault, trespass, destruction of property, postal violations, and protection of wildlife and natural habitat. The most commonly charged federal misdemeanor statute is 8 U.S.C. § 1325 – first offense illegal entry into the United States at an improper time or place – which carries a maximum penalty of 6 months of imprisonment. It generates thousands of cases along the national border with Mexico for disposition by magistrate judges.
- Assimilated state statutes.* The Assimilative Crimes Act, 18 U.S.C. § 13, is designed to borrow state law to fill in gaps in federal criminal law for offenses committed on lands within the exclusive or concurrent jurisdiction of the United States.¹²⁹ Under the Act, conduct occurring on a federal enclave that would constitute a criminal offense under state law may be incorporated as a federal offense – as long as it is not punishable by a “federal enactment.”
- Federal agency regulations.* Several federal agencies, such as the U.S. Park Service, the U.S. Forest Service, and the military, are authorized to issue regulations governing conduct arising on the federal lands that they administer. The regulations

¹²⁷ A petty offense is defined in 18 U.S.C. § 19 as a Class B misdemeanor, a Class C misdemeanor, or an infraction.

¹²⁸ See 18 U.S.C. §§ 3581(b) and 3571(b) and (c). The maximum fines are higher for organizations and for Class A misdemeanors resulting in death.

¹²⁹ See *Lewis v. United States*, 523 U.S. 155 (1998).

typically deal with such subjects as traffic offenses, drunk and disorderly conduct, public safety, possession of marijuana, protection of endangered species and habitat, and various hunting, fishing, and camping violations. A violation of those agency regulations constitutes a misdemeanor or petty offense that may be prosecuted in a federal court.¹³⁰

b. Applicable Rules and Procedures

i. In General

FED. R. CRIM. P. 58 governs procedure in petty offense and misdemeanor cases. It specifies that the Federal Rules of Criminal Procedure apply with a few modifications. Rule 58(a)(2), though, authorizes courts to create a separate, streamlined process to deal with “a petty offense for which no imprisonment will be imposed.” For that category of case, a court may follow any provision of the federal rules that the court considers appropriate and is not inconsistent with Rule 58.

As a practical matter, therefore, a magistrate judge must make a decision at the outset of a petty offense case as to whether imprisonment is a possibility if the defendant is convicted. If the judge rules out any possibility of imposing a sentence of imprisonment, he or she may adopt abbreviated procedures, as long as they are fair and satisfy due process standards. On the other hand, if the judge does not rule out the possibility of imprisonment upon conviction, the requirements of the Federal Rules of Criminal Procedure are applicable.

The result is that Class A misdemeanors and “serious” petty offense cases are handled essentially like felonies, but petty offenses for which no imprisonment will be imposed are processed in a variety of ways, depending on the nature of the charges, the volume of a court’s petty offense dockets, and the preferences of each court.

Magistrate judges are authorized to try misdemeanor cases with a jury.¹³¹ Generally, the right to a jury trial exists for a criminal offense in which the maximum potential term of imprisonment that may be imposed exceeds six months – the maximum penalty for a petty offense.¹³² In reality,

¹³⁰ See, e.g., 16 U.S.C. § 3 (authorizing the Secretary of the Interior to issue regulations governing the use and management of parks, monuments, and reservations under the jurisdiction of the National Park Service, violation of which may be punished by imprisonment of up to 6 months and a maximum fine of \$500); 16 U.S.C. § 9(a) (granting similar authority to the Secretary of the Army, with penalties of up to 3 months and \$100); and 16 U.S.C. § 1540 (setting penalties for violation of regulations to protect endangered species, with penalties of up to 1 year and \$50,000).

¹³¹ 18 U.S.C. § 3401(b).

¹³² *Frank v. United States*, 395 U.S. 147 (1969). There is no right to a jury trial when the defendant is charged with multiple petty offenses. *Lewis v. United States*, 518 U.S. 322 (1996).

only a small percentage of misdemeanor cases are tried before a jury.¹³³

A defendant may retain and pay for his or her own attorney in any case. Appointment of counsel at government expense under the Criminal Justice Act is authorized explicitly only for a person charged with a felony or Class A misdemeanor.¹³⁴ The Act, however, also allows appointment of counsel in a Class B or C misdemeanor or infraction if the judge determines that “the interests of justice so require.”¹³⁵ In practice, counsel is appointed in all petty offenses cases in which imprisonment may be imposed.¹³⁶

ii. Initiating Documents

A misdemeanor may be initiated by an indictment, information, or complaint. A petty offense may proceed also on a citation or violation notice.¹³⁷ Misdemeanors and petty offenses that may result in imprisonment are generally initiated by an information or complaint.¹³⁸ But petty offenses that will only result in a fine on conviction – such as most traffic offenses – are normally initiated by a violation notice issued by a federal law enforcement officer, such as a park ranger or military police officer.

iii. Defendant’s Consent

Until 1996, a magistrate judge could not proceed with a petty offense or other misdemeanor until the defendant first waived in writing his or her right to trial by a district judge and consented to disposition before the magistrate judge. In 1996, the requirement of the defendant’s consent was eliminated for infractions, Class C misdemeanors, and motor vehicle offense Class B

¹³³ In 2015, only 9 Class A misdemeanor cases were tried by magistrate judges with a jury out of 8,710 cases terminated. JUDICIAL BUSINESS 2015, *supra* note 56, tbl. M-1A.

¹³⁴ 18 U.S.C. § 3006A(a)(1)(A).

¹³⁵ 18 U.S.C. § 3006A(a)(2).

¹³⁶ All defendants, including those charged with a petty offense, have a constitutional right to appointed counsel if the charges lead to any “actual imprisonment.” *Argersinger v. Hamlin*, 407 U.S. 35 (1977); *Scott v. Illinois*, 440 U.S. 367 (1979); *see also Alabama v. Shelton*, 535 U.S. 654 (2002) (dealing with the possibility of imprisonment).

¹³⁷ FED. R. CRIM. P. 58(b).

¹³⁸ Some cases, though, may have been filed originally by indictment as felonies, but are later downgraded, often through negotiation, to a misdemeanor.

misdemeanors.¹³⁹ In 2000, the consent requirement was eliminated for all petty offenses.¹⁴⁰ Accordingly, the defendant's consent to trial and disposition by a magistrate judge is required only in a misdemeanor other than a petty offense, *i.e.*, a Class A misdemeanor. The consent may be made in writing or orally on the record.¹⁴¹

iv. Location and Procedures

Misdemeanor proceedings are normally conducted in the federal courthouse, like other criminal proceedings. They must be recorded by a court reporter or suitable recording device.¹⁴² Clerk's office staff provide courtroom support, keep case records, and accept fines. The probation office and federal defender's office are also available if needed. Under the Court Interpreters Act, court interpreter services are provided if the defendant does not speak enough English or suffers from a hearing impairment that inhibits his or her comprehension of the proceedings or communications with the judge or counsel.¹⁴³

Because many petty offenses arise on federal enclaves, such as national parks and military bases, magistrate judges in some districts travel periodically to preside over criminal dockets at outlying locations. The proceedings may be held at a divisional courthouse, a state courthouse, or a special facility located on the federal enclave.

Misdemeanor proceedings may also be conducted remotely by video teleconferencing or in the defendant's absence, if the defendant consents in writing.¹⁴⁴ The process is discretionary with the judge and designed for the convenience of defendants. It may be appropriate, for example, for a visitor who has received a traffic ticket while vacationing at a national park and has returned home to a distant location.¹⁴⁵

¹³⁹ Federal Courts Improvement Act of 1996, Pub. L. No. 104-317, § 202, 110 Stat. 3847 (1996).

¹⁴⁰ Federal Courts Improvement Act of 2000, Pub. L. No. 106-518, § 203(b), 114 Stat. 2410 (2000).

¹⁴¹ 18 U.S.C. § 3401(b). The Administrative Office has issued a standard national form (AO Form 86A) for the defendant's waiver of rights and consent to proceed before a magistrate judge.

¹⁴² FED. R. CRIM. P. 58(e).

¹⁴³ 19 U.S.C. § 1827(d).

¹⁴⁴ FED. R. CRIM. P. 43.

¹⁴⁵ The 1944 committee note to the adoption of FED. R. CRIM. P. 43 explains that "appearance in court may require considerable travel, resulting in expense and hardship not commensurate with the gravity of the charge, if a minor infraction is involved and a small fine is eventually imposed."

At the defendant's initial appearance, the magistrate judge must inform the defendant of the charges and the maximum and minimum penalties, the right to retain counsel, and the right not to make a statement.¹⁴⁶ In a Class A misdemeanor, the magistrate judge must also inform the defendant of the right to appointed counsel, the right to a jury trial, the right to a preliminary examination, and the right to trial, judgment, and sentencing by a district judge.¹⁴⁷

In appropriate cases, the magistrate judge will schedule the arraignment and further court proceedings for a later date. In most petty offense cases, though, the judge will proceed directly from the initial appearance to the arraignment and plea. Since most petty offense defendants plead guilty – often with an explanation for their conduct – the magistrate judge will proceed immediately with sentencing. In appropriate cases, though, the magistrate judge may ask the probation office to prepare a presentence investigation report.

In a petty offense for which no sentence of imprisonment will be imposed, the magistrate judge may accept a guilty or *nolo contendere* plea if “satisfied that the defendant understands the nature of the charge and the maximum possible penalty.”¹⁴⁸ In other cases, the arraignment and plea must comply with the requirements of FED. R. CRIM. P. 11.¹⁴⁹ In a Class A misdemeanor where the defendant does not consent to disposition of the case by a magistrate judge, the magistrate judge will order the defendant to appear for further proceedings before a district judge.¹⁵⁰

In Class A misdemeanors and petty offense cases where incarceration is not ruled out, a magistrate judge may need to rule on pretrial motions, decide discovery proceedings, and conduct pretrial conferences, as in felony cases. But in most petty offense cases, trial proceedings will immediately follow the arraignment if the defendant pleads not guilty and the pertinent law enforcement officers and witnesses are present. The defendant, therefore, will have to appear only once for a combined initial appearance, arraignment, and trial. Combining and abbreviating the various components of a case promotes efficiency and is convenient for defendants and law enforcement personnel. It is common, for example, in traffic cases and other types of petty offenses where many cases are heard together on the same docket. But it is clearly not appropriate in all petty

¹⁴⁶ FED. R. CRIM. P. 58(b)(2).

¹⁴⁷ *Id.*

¹⁴⁸ FED. R. CRIM. P. 58(c)(1).

¹⁴⁹ Under Rule 11, the court must advise the defendant explicitly of several rights that the defendant waives by a guilty plea, inform the defendant in greater detail about the nature of the charges and the penalty and consequences on conviction, assure that the plea is voluntary, and determine that there is a factual basis for the plea. FED. R. CRIM. P. 11(b).

¹⁵⁰ FED. R. CRIM. P. 58(b)(3).

offense cases.¹⁵¹

v. Judgment, Sentence, and Appeal

The federal sentencing guidelines apply to Class A misdemeanors, but not to petty offenses and infractions.¹⁵²

The federal probation laws are applicable to persons sentenced by a magistrate judge. Magistrate judges have power to grant probation and to revoke, modify, or reinstate the probation of any person granted probation by a magistrate judge.¹⁵³ In addition, they have power to modify, revoke, or terminate supervised release of any person sentenced to a term of supervised release by a magistrate judge.¹⁵⁴

In a Class A misdemeanor or petty offense for which incarceration has not been ruled out, the court's probation office will conduct a presentence investigation and submit a report to assist the magistrate judge in sentencing – unless the magistrate judge finds that the information already in the record is sufficient to proceed without a report and explains his or her finding in the record.¹⁵⁵ At sentencing, the judge must allow the parties to comment on the presentence report and resolve any matters in dispute.¹⁵⁶ Before imposing sentence, the judge must provide the defendant's attorney an opportunity to speak on the defendant's behalf, address the defendant personally and permit the defendant to speak or present any information to mitigate the sentence, and provide the government an opportunity to speak equivalent to that of the defendant's attorney.¹⁵⁷

In a petty offense for which no sentence of imprisonment will be imposed, a magistrate judge need only give the defendant an opportunity to be heard in mitigation and then proceed immediately to sentencing. The judge may, however, postpone sentencing to allow the probation office to investigate and prepare a background report or to permit either party to submit additional evidence.¹⁵⁸

¹⁵¹ See, e.g., *United States v. Roblero-Solis*, 588 F.3d 692 (9th Cir. 2009), where the Ninth Circuit held that a magistrate judge's action in conducting a simultaneous guilty plea and sentencing procedure for a large number of petty offense immigration cases violated FED. R. CRIM. P. 11.

¹⁵² U.S. SENTENCING GUIDELINES §§ 1B1.9, 2X5.2, and App. A.

¹⁵³ 18 U.S.C. § 3401(d).

¹⁵⁴ 18 U.S.C. § 3401(h)(1).

¹⁵⁵ FED. R. CRIM. P. 32(c)(1).

¹⁵⁶ See FED. R. CRIM. P. 32(i)(1)-(3).

¹⁵⁷ FED. R. CRIM. P. 32(j).

¹⁵⁸ FED. R. CRIM. P. 58(c)(3).

In all cases of conviction by a magistrate judge, an appeal of right lies from the judgment of the magistrate judge to a district judge.¹⁵⁹ After imposing sentence, the magistrate judge must advise the defendant of any right to appeal the sentence.¹⁶⁰

vi. Central Violations Bureau

Many petty offense cases and infractions, such as routine traffic offenses, are disposed of by forfeiture of collateral. FED. R. CRIM. P. 58(d)(1) authorizes a district court to issue a local forfeiture rule that lets defendants end a case by submitting a fixed-sum payment in lieu of appearing in court. Most districts have issued a schedule establishing payments for each of various categories of *malum prohibitum* petty offenses. The schedules also list specific mandatory-appearance offenses, such as DUI and reckless driving, that require the defendant to appear in person before a magistrate judge.

In most routine petty offense cases arising on federal property, a federal law enforcement officer issues a citation or violation notice. One copy is given to the offender (or left on the vehicle for a parking offense) and one copy is sent to the judiciary's national Central Violations Bureau (CVB) in San Antonio, Texas. The CVB uses state-of-the-art technology to process the violation notices, schedule appearances before the magistrate judges, send out notices, accept payments of collateral, and handle docket entries.

If a defendant fails to pay the collateral, request a hearing, or otherwise respond to a violation notice, the CVB sends out a warning notice giving the person an additional opportunity to comply with the court's directions. If no response is forthcoming, a magistrate judge may proceed to issue a summons or warrant for the defendant's appearance.

4. Pretrial Matters and "Additional Duties"

a. Judicial Authority

The 1976 amendments to the Federal Magistrates Act authorize the district courts, "notwithstanding any provision of the law to the contrary,"¹⁶¹ to delegate to a magistrate judge: "any

¹⁵⁹ 18 U.S.C. § 3402. *See also* 18 U.S.C. § 3742(a)-(b), setting out generally the right of a defendant and the government to appeal a sentence and their application to appeal from a sentence imposed by a magistrate judge. 18 U.S.C. § 3742(h).

¹⁶⁰ FED. R. CRIM. P. 32(j), 58(c)(4).

¹⁶¹ 28 U.S.C. § 636(b)(1)(A). Congress noted that the 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 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 to the contrary' referring to 'judge' or 'court.'" H.R. REP. NO. 1609, 94th Cong.,

pretrial matter pending before the court;” and “such additional duties as are not inconsistent with the Constitution and laws of the United States.”¹⁶²

The “additional duties” provision, part of the original 1968 Act, was relocated by the 1976 amendments to “an entirely separate subsection [to] emphasize that it is not restricted in any way by any other specific grant of authority to magistrates.”¹⁶³ Courts have interpreted the provision to permit referral to magistrate judges of a variety of duties not specifically mentioned in the Federal Magistrates Act or in other statutes. Case law varies to some extent from circuit to circuit and must be consulted to ascertain the precise scope of a magistrate judge’s authority.

The Supreme Court has also given some guidance on the scope of duties that may be assigned. First, in 1989, the Court ruled in *Gomez v. United States*,¹⁶⁴ that duties performed under the general “additional duties” provision of the statute should bear some reasonable relation to duties specified in the Act. But then two years later in *Peretz v. United States*,¹⁶⁵ the Court acknowledged that its holding in *Gomez* had been “narrow,” and it took a much broader approach, declaring that

The generality of the category of “additional duties” indicates that Congress intended to give federal judges significant leeway to experiment with possible improvements in the efficiency of the judicial process that had not already been tried or even foreseen. If Congress had intended strictly to limit these additional duties to functions considered in the committee hearings or debates presumably it would have included in the statute a bill of particulars rather than a broad residuary clause. Construing this residuary clause absent concerns about raising a constitutional issue or depriving a defendant of an important right, we should not foreclose constructive experiments that are acceptable to all participants in the trial process and are

2d Sess. 9 (1976); S. REP. NO. 625, 94th Cong., 2d Sess. 7 (1976).

¹⁶² 28 U.S.C. §§ 636(b)(1)(A) and 636(b)(3).

¹⁶³ Under § 636(b)(3), “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. H.R. REP. NO. 1609, 94th Cong., 2d Sess. 12 (1976); S. REP. NO. 625, 94th Cong., 2d Sess. 10 (1976).

¹⁶⁴ 490 U.S. 858 (1989).

¹⁶⁵ 501 U.S. 923 (1991).

consistent with the basic purposes of the statute.¹⁶⁶

The 1979 amendments to the Act add the element of consent to the mix by expressly authorizing magistrate judges to try and determine civil cases with finality if the litigants consent. In *Peretz*, the Court found that consent had completely changed the constitutional analysis from that in *Gomez* and held that it was appropriate for a magistrate judge to conduct the voir dire in a felony criminal trial when the defendant had effectively consented.¹⁶⁷

b. Case Management

i. Civil Cases

The Federal Rules of Civil Procedure contemplate that judges will be active civil case managers. Civil case management is one of the principal functions assigned to magistrate judges in most courts. It is the primary duty of magistrate judges in many courts, and they have become experts in civil case management, discovery, and settlement.

There are, however, considerable differences among the courts in the scope of duties referred to magistrate judges in civil cases and in the way that cases are assigned to them, based largely on the workloads of the individual courts and the personal preferences of the district judges.

A. Scope of Duties

Most courts use magistrate judges broadly and expansively in civil cases, but some courts and individual district judges delegate only limited civil pretrial duties to magistrate judges because they do not see a need to do so or because they prefer to handle pretrial matters and trials themselves, rather than delegate them to a judicial alter ego.

Traditional case management teaching encourages early judicial involvement and active management of a case. But there are clear differences of opinion on how best to accomplish that objective. Some district judges believe that they personally must assert active hands-on control of cases at the outset. Others, however, routinely and effectively assign initial pretrial conferences, case scheduling, motions, discovery disputes, and settlement efforts to magistrate judges, especially in complicated cases and cases involving electronically stored information. The flexibility of the Federal Magistrates Act accommodates these variations.

¹⁶⁶ *Id.* at 932-33.

¹⁶⁷ For a comprehensive discussion of *Peretz* and the expanded utilization of magistrate judges occurring since the 1990s, see Douglas A. Lee & Thomas E. Davis, “*Nothing Less Than Indispensable*”: *The Expansion of Federal Magistrate Judge Utilization in the Part Quarter Century*, 16 NEV. L. J. 845 (2016).

In some courts, magistrate judges are assigned all civil cases for full or extensive case management. The magistrate judges are normally responsible for imposing discovery and motion cut-off dates, setting pretrial conference and trial dates, resolving all discovery and procedural disputes, and conducting settlement efforts, subject to any necessary coordination, review, and oversight by the presiding district judge. District judges will normally conduct the final pretrial conference under FED. R. CIV. P. 16, but some ask a magistrate judge to handle that conference also.

Magistrate judges may be referred case-dispositive motions, such as summary judgment and dismissal motions. But the Magistrate Judges Committee of the Judicial Conference has urged courts as a general rule to limit the referral of these motions because it may result in an additional layer of review and duplication of judicial efforts.¹⁶⁸

In some districts magistrate judges perform different types of duties for different district judges. Some district judges, for example, delegate substantial pretrial duties and case management responsibilities, while others pick and choose the proceedings to refer to magistrate judges on an ad hoc basis. In other districts, the magistrate judges are routinely assigned extensive duties in certain categories of cases and ad hoc matters in other civil cases. In some districts, the magistrate judges are routinely assigned all discovery and procedural motions, but the district judges conduct most of their own pretrial conferences.

B. Methods of Assignment to Magistrate Judges

The way that civil cases are assigned to magistrate judges varies from district to district. In many courts, the clerk's office randomly assigns both a district judge and a magistrate judge to each case at filing. The magistrate judge conducts whatever proceedings that local rules or the presiding district judges refer. In many other courts, each of the magistrate judges is paired with specific district judges and works closely with those judges on their cases. The pairings are usually adjusted periodically to equalize workloads and allow all the magistrate judges and district judges on a court to work with each other.

A growing practice, now used in about one-third of the district courts is to include magistrate judges on the wheel for the direct assignment of civil cases at filing. The magistrate judge is the presiding judge on a case and handles all case management and pretrial proceedings. If all the parties consent to give the magistrate judge full case-disposition authority under 28 U.S.C. § 636(c), the

¹⁶⁸ The Committee, however, recognizes that referrals of some case-dispositive motions may result in significant time savings for a district judge without significant duplication of judicial work when the magistrate judge conducts an evidentiary hearing and issues proposed findings of fact. Referral may also be appropriate when experience has shown that *de novo* review will not be necessary for most or all of the issues presented. SUGGESTIONS FOR UTILIZATION OF MAGISTRATE JUDGES, NO. 5.

magistrate judge will eventually try or otherwise dispose of the case. If consent is not forthcoming, the case will be assigned by the clerk to a district judge. Preliminary research indicates that the direct-assignment system has been successful in expediting the disposition of cases and increasing the number of consents. A few courts have created a separate direct-assignment wheel just for social security cases, which the clerk assigns randomly at filing only to magistrate judges.

The Magistrate Judges Committee of the Judicial Conference has suggested that, generally, referring an entire case to a magistrate judge for pretrial purposes better utilizes judicial time and resources than assigning limited duties in a case. When referral of an entire case is not practical, referral of certain pretrial duties may still be appropriate and effective. In particular, referring a case to a magistrate judge for a settlement conference capitalizes on the unique authority and credibility that a judge can bring to the settlement process, and by facilitating settlement, magistrate judges can reduce the number of cases requiring disposition of case-dispositive motions and trial.¹⁶⁹

ii. Criminal Cases

Criminal cases are given priority in the federal courts because of the time requirements imposed by the Speedy Trial Act.¹⁷⁰ That legislation, coupled with the Bail Reform Act, promotes the goal of protecting defendants from needless detention pending resolution of the charges against them.

The general rule of the Speedy Trial Act is that a defendant who pleads not guilty must be brought to trial within 70 days from the filing of an indictment or information or 70 days from the defendant's first appearance in court before a judge, whichever is later.¹⁷¹ In computing the limits, though, the Act, specifically excludes certain periods of time to take account of reasonable and necessary delays that may occur in a case.¹⁷²

Each district court is required to conduct a continuing study of the administration of criminal justice in the court and approve a Speedy Trial Act plan to accelerate the disposition of its criminal

¹⁶⁹ SUGGESTIONS FOR UTILIZATION OF MAGISTRATE JUDGES, NO. 3.

¹⁷⁰ 18 U.S.C. §§ 3161 *et seq.*

¹⁷¹ 18 U.S.C. § 3161(c)(1). If a defendant consents in writing to trial by a magistrate judge on a complaint in a misdemeanor case, the trial must begin within 70 days from the date of the consent.

¹⁷² The statute, for example, allows a court to exclude time delays for such matters as mental competency proceedings, hospitalization of the defendant, other charges against the defendant, interlocutory appeals, pretrial motions, transfer or removal of a case from another district, time to consider a proposed plea agreement or a matter taken under advisement, and the absence of the defendant or an essential witness. *See* 18 U.S.C. § 3161(h).

cases.¹⁷³ In formulating the plan, the court must consider the recommendations of the Federal Judicial Center and those of a planning group that includes the chief district judge, a magistrate judge, the U.S. attorney, the Federal Public Defender, the chief probation officer, two private attorneys, and a person skilled in criminal justice research.¹⁷⁴

As noted above, magistrate judges handle virtually all initial proceedings in felony criminal cases up until indictment. After that point, however, the duties delegated to magistrate judges in felony criminal cases vary from court to court. It is very common, for example, for magistrate judges to accept grand jury returns, conduct arraignments, and take pleas in felony cases if the defendant consents. In several districts, the magistrate judges are also actively involved in managing criminal cases, conducting pretrial conferences, and hearing motions. In some districts, the district judges assign pretrial proceedings and motions to magistrate judges on an ad hoc basis, but in other districts the district judges prefer to conduct all proceedings after the arraignment and delegate few pretrial matters to magistrate judges.

FED. R. CRIM. P. 17.1 authorizes the court, on its own or on a party's motion, to hold one or more pretrial conferences to promote a fair and expeditious trial. Magistrate judges in several districts are delegated by district judges to conduct these conferences. In some districts, especially those with "open file" policies, magistrate judges conduct omnibus hearings in felony cases and meet face-to-face with the attorneys to address all pending procedural and discovery disputes.

c. Settlement

i. Civil Cases

Magistrate judges in most districts are active in settlement programs in civil cases. They regularly conduct settlement conferences and have developed considerable expertise and experience in performing this function. Many judges do not feel comfortable in discussing settlement with the parties in cases over which they may preside at trial, particularly a bench trial. The Magistrate Judges Committee explains that referring a case to a magistrate judge for a settlement conference capitalizes on the unique authority and credibility that another judge can bring to the settlement process. By facilitating settlement, magistrate judges can reduce the number of cases that require disposition of case-dispositive motions or a trial.¹⁷⁵

In addition to traditional settlement activities, each district court is required by local rule to establish its own court-annexed alternative dispute resolution program and to designate a judge or employee knowledgeable in ADR practices and processes to implement, administer, oversee, and

¹⁷³ 18 U.S.C. §§ 3165 and 3166.

¹⁷⁴ 18 U.S.C. § 3168.

¹⁷⁵ SUGGESTIONS FOR UTILIZATION OF MAGISTRATE JUDGES, NO. 3.

evaluate the program.¹⁷⁶ The programs differ from court to court, but mediation is the most common form of alternative dispute resolution, followed by arbitration, early neutral evaluation, and mini-trials. Magistrate judges serve regularly as mediators in many courts, and some have also been designated to oversee their court's ADR program. Some courts offer the parties the option of choosing among a traditional settlement conference or mediation before a magistrate judge or private mediator from the court's panel of ADR professionals.

ii. Criminal Cases

Unlike civil cases, where magistrate judges are heavily involved in pretrial settlement efforts in most courts, the district court's involvement in settlement is restricted in criminal cases by FED. R. CRIM. P. 11(c)(1). It specifies that "the court must not participate" in plea negotiations between the government and the defense.¹⁷⁷ In 2013, the Supreme Court held that it was a violation of the rule for a magistrate judge to urge the defendant to plead guilty at an *in camera* pre-plea hearing without the government's presence.¹⁷⁸

d. Motions

The 1976 amendments to the Federal Magistrates Act established two categories of motions, commonly referred to as "dispositive" and "non-dispositive" motions. Magistrate judges may hear dispositive motions, but only present recommend findings and conclusions for decision by a district judge. On the other hand, they may hear and determine non-dispositive motions with finality.

i. Dispositive Motions

The statute lists the following six dispositive motions in civil cases –

¹⁷⁶ 28 U.S.C. §§ 651(b) and (d).

¹⁷⁷ The prohibition, introduced in 1974, addresses the concern that a judge's participation in negotiations may improperly influence a defendant to go along with the disposition apparently desired by the judge, rather than plead not guilty, at least if the same judge were to conduct the trial. Although urged to change the rule, the rules committee in 2002 left the prohibition intact, explaining that it had "considered whether to address the practice in some courts of using judges to facilitate plea agreements. . . . Some courts apparently believe that [Rule 11(c)(1)'s prohibition] acts as a limitation only upon the judge taking the defendant's plea and thus permits other judges to serve as facilitators for reaching a plea agreement between the government and the defendant. . . . The Committee decided to leave the Rule as it is with the understanding that doing so was in no way intended either to approve or disapprove the existing law interpreting that provision." 2002 Committee Note to FED. R. CRIM. P. 11.

¹⁷⁸ *United States v. Davila*, 133 S. Ct. 2139, 2147-48 (2013).

summary judgment,
dismissal for failure to state a claim upon which relief may be granted,
judgment on the pleadings,
involuntary dismissal for failure to comply with a court order,
injunctive relief, and
certification of a class action.

It lists the following two dispositive motions in criminal cases –

suppression of evidence, and
dismissal by the defendant of an indictment or information.¹⁷⁹

The list, though, is not exclusive. Courts have interpreted the statute to allow referral of analogous case-dispositive motions to magistrate judges for report and recommendation. The federal rules, moreover, include as a dispositive matters in civil cases “a pretrial matter dispositive of a claim or defense or a prisoner petition challenging the conditions of confinement.”¹⁸⁰ In criminal cases, the rules include “any matter that may dispose of a charge or defense.”¹⁸¹ The Committee Note to the criminal rule, adopted in 2005, explains that the rule does not attempt to further define or catalog what motions may fall within either the dispositive or non-dispositive categories, leaving that task to case law.¹⁸²

When assigned a dispositive motion, a magistrate judge must promptly conduct the required proceedings and make a record of any evidentiary proceeding. The magistrate judge enters on the record a recommendation for disposition of the matter, including any proposed findings of fact, and the clerk serves copies on all parties.¹⁸³

Within 14 days after being served with a copy of the recommended disposition, a party may serve and file specific written objections to the proposed findings and recommendations. A party in a civil case may respond to another party’s objections within 14 days of being served with a

¹⁷⁹ 28 U.S.C. § 636(b)(1)(A).

¹⁸⁰ FED. R. CIV. P. 72(b)(1).

¹⁸¹ FED. R. CRIM. P. 59(b)(1).

¹⁸² See 2005 Committee Note to FED. R. CRIM. P. 59.

¹⁸³ FED. R. CIV. P. 72(b)(1); FED. R. CRIM. P. 59(b)(1). The magistrate judge must also make a record of any other proceeding considered necessary.

copy.¹⁸⁴ Failure to object waives a party's right to review.¹⁸⁵

The district judge must make a “de novo determination” of the matter, but is not required to hear the matter anew. The district judge, on application, considers the record developed before the magistrate judge and makes his or her own determination on the basis of that record, without being bound by the findings and conclusions of the magistrate judge. The district judge may accept, reject, or modify the magistrate judge's findings, receive further evidence, or resubmit the matter to the magistrate judge.¹⁸⁶

In a civil case, the report and recommendation procedure does not apply if the parties consent to having the magistrate judge decide a dispositive motion with finality.¹⁸⁷ When referral of an entire case is not practical, referral of particular case-dispositive motions may be appropriate and effective, an approach known as “partial” or “limited” consent. The Administrative Office has issued an official form for notice, consent, and reference of a dispositive motion to a magistrate judge.¹⁸⁸

ii. Non-Dispositive Motions

The 1976 amendments specify that, on reference from the district court, a magistrate judge may hear and determine all other motions pending before the court pursuant to 28 U.S.C. § 636(b)(1)(a).¹⁸⁹

The federal rules, likewise, specify that a district judge may refer to a magistrate judge for determination any matter that does not dispose of a civil claim, criminal charge, or defense.¹⁹⁰

¹⁸⁴ 28 U.S.C. § 636(b)(1)(C); FED. R. CIV. P. 72(b)(2). *See* FED. R. CRIM. P. 59(b)(2)

¹⁸⁵ The waiver provision appears expressly only in the criminal rule. Adopted 22 years after the civil rule, it was added to establish the requirement for objecting in the district court in order to preserve appellate review of a magistrate judges' decision in light of *Thomas v. Arn*, 474 U.S. 140, 155 (1985). In addition, the Supreme Court held in *Peretz*, 501 U.S. at 939, that a *de novo* review of a magistrate judge's decision or recommendation is only required to satisfy Article III concerns when a party objects. *See* 2005 Committee Note to FED. R. CRIM. P. 59.

¹⁸⁶ 28 U.S.C. § 636(b)(1); FED. R. CIV. P. 72(b)(3); FED. R. CRIM. P. 59(b)(3). *See* H.R. REP. NO. 1609, 84th Cong., 2d Sess. 3 (1976).

¹⁸⁷ FED. R. CIV. P. 72(b)(1).

¹⁸⁸ AO Form 85A. Proceedings on consent are covered by FED. R. CIV. P. 73, rather than FED. R. CIV. P. 72.

¹⁸⁹ 28 U.S.C. 636(b)(1)(A).

¹⁹⁰ FED. R. CRIM. P. 59(a) specifies that: “A district judge may refer to a magistrate judge for determination any matter that does not dispose of a charge or defense.” FED. R. CIV. P. 72(a) applies

The pretrial matters that may be referred under § 636(b)(1)(A) include “a great variety of preliminary motions and matters which can arise in the preliminary processing of either a criminal or civil case.”¹⁹¹ In most districts, discovery and procedural motions are referred routinely to magistrate judges.

When assigned non-dispositive motions, a magistrate judge must promptly conduct the required proceedings and issue an oral or written order on the record. A party may serve and file objections to the magistrate judge’s order within 14 days after being served with the written order or 14 days after the oral order is stated on the record. If a timely objection is made, the district judge must consider the objection and modify or set aside the order, or any part of it, that is clearly erroneous or contrary to law. Failure to object waives a party’s right to object.¹⁹²

The district judge to whom a case has been assigned retains general supervisory powers over the entire case, including the power to rehear or reconsider matters *sua sponte*. Thus, when there is an issue as to whether a motion is truly non-dispositive, courts have generally allowed a district judge to consider the matter as dispositive. For example, courts have held consistently that magistrate judges may issue a final order *granting* a motion to proceed *in forma pauperis* under 28 U.S.C. § 1915 as a non-dispositive matter. But they have generally held that *denial* of a plaintiff’s motion to proceed *in forma pauperis* is a case-dispositive matter requiring a magistrate judge to prepare a report and recommendation. Likewise, discovery motions and sanctions for discovery violations are considered non-dispositive matters, but in certain cases a sanction may effectively dispose of a claim or defense.

Courts have also held that although a pretrial matter is originally referred to a magistrate judge as a non-dispositive matter, the magistrate judge acts properly in issuing a report and recommendation when it becomes apparent that case-dispositive relief is sought. Likewise, in appropriate cases, district judges have construed a magistrate judge’s order as a report and recommendation basis, subject to *de novo* review.¹⁹³

when “a pretrial matter not dispositive of a party’s claim or defense is referred to a magistrate judge to hear and decide. . . .”

¹⁹¹ H.R. REP. NO. 1609, 94th Cong., 2d Sess. 9 (1976); S. REP. NO. 625, 94th Cong., 2d Sess. 7 (1976).

¹⁹² FED. R. CIV. P. 72(a); FED. R. CRIM. P. 59(a).

¹⁹³ The Supreme Court addressed this issue recently in *Exec. Benefits Ins. Agency v. Arkison*, 134 S. Ct. 2165 (2014), when it discussed the parallel authority of bankruptcy judges under 28 U.S.C. § 157, a provision that is modeled directly on the 1979 amendments to the Federal Magistrates Act. The Court instructed that when bankruptcy judges are uncertain as to whether a proceeding is dispositive of an Article III claim, they should issue proposed findings of fact and

e. Special Master Proceedings

A district judge may designate a magistrate judge to serve as a special master, subject to the limitations of the federal rules.¹⁹⁴ If the parties consent, however, a magistrate judge may serve as a special master in any civil case without regard to the limitations of the rules.¹⁹⁵

Since magistrate judges are authorized by statute to perform many pretrial functions in civil actions – and to try and dispose of any civil case on consent of the parties – there is no apparent reason in most cases to appoint a magistrate judge to perform duties as a master that could readily be performed in the role of magistrate judge.¹⁹⁶

Magistrate judges, though, have often been appointed as special masters in Title VII employment discrimination cases under the specific authority of 42 U.S.C. § 2000e–5(f)(5), which authorizes a district judge to appoint a special master if the judge has not scheduled the case for trial within 120 days after issue has been joined. The statute effectively supersedes the limitations of FED. R. CIV. P. 53(a), which would normally require either the consent of the parties or some exceptional condition.

Magistrate judges are also occasionally appointed as special masters by the courts of appeals in contempt proceedings that arise in the appellate courts.¹⁹⁷

f. Social Security Appeals

Magistrate judges are used in many districts to review social security appeals, *i.e.*, appeals from the denial of social security benefits, especially disability benefits, by the Secretary of Health and Human Services. The cases are referred to magistrate judges because of the large number of them filed in many courts, the time that referral saves for district judges, and the expertise that

conclusions of law for *de novo* review and entry of judgment by a district judge. The advice is also appropriate for magistrate judges. For additional detail, *see infra* Section 5c, “Constitutional Considerations.”

¹⁹⁴ 28 U.S.C. § 636(b)(2). FED. R. CIV. P. 53(a) conditions the appointment of a master on “some exceptional condition” or the need to perform an accounting or resolve a difficult computation of damages, unless the parties consent or a statute provides otherwise.

¹⁹⁵ 28 U.S.C. § 636(b)(2). This provision was added by the 1976 amendments to the Federal Magistrates Act. It references limitations that had been set out in FED. R. CIV. P. 53(b). That provision was recast and moved to Rule 53(a) when the rule was revised extensively in 2003 to reflect changing practices in using masters.

¹⁹⁶ *See* 2003 Committee Note to FED. R. CIV. P. 53.

¹⁹⁷ *See* FED. R. APP. P. 48.

magistrate judges have developed in the specialized areas of the law involved in social security appeals.

Social security appeals are generally decided on a motion for summary judgment or on cross appellate briefs, upholding or rejecting the decision of the commissioner under the prevailing statute and the administrative record developed by the Social Security Administration. Since summary judgment is a dispositive motion under 28 U.S.C. § 636(b)(1)(A), a magistrate judge may only review the administrative record and file a report and recommendations for disposition of the appeal by a district judge unless both sides consent to a magistrate judge's dispositive authority. In many cases, moreover, the administrative record is incomplete or otherwise defective, and the case has to be remanded to the agency for further consideration.

Referral of social security cases to magistrate judges saves the time of district judges, but may duplicate judicial work by adding a layer of review if parties file objections to a magistrate judge's report and recommendations, requiring *de novo* determination by a district judge. In addition, magistrate judges' reports and recommendations are often lengthier than the opinion or order they would produce if they were able to rule on the motion.

As a result, it is now common for courts to encourage the parties to consent to disposition of social security cases by a magistrate judge under 28 U.S.C. §636(c). Consent retains all the benefits noted above, but reduces judicial work, avoids *de novo* review, and expedites disposition of the cases. More than half the social security appeals handled by magistrate judges nationally are now disposed of directly by a magistrate judge on consent, rather than by filing a report and recommendation.¹⁹⁸

g. Prisoner Cases

A district judge may “designate a magistrate [judge] 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 applications for posttrial relief made by individuals convicted of criminal offenses and prisoner petitions challenging conditions of confinement.”¹⁹⁹ They are handled as dispositive motions in civil cases.²⁰⁰

Prisoner petitions are referred routinely to magistrate judges in most, but not all, district

¹⁹⁸ During the year ending September 30, 2015, magistrate judges disposed of 7,220 social security appeals on consent of the parties and 5,446 through reports and recommendations to a district judge. ADMIN. OFFICE OF THE U.S. COURTS, 2013 ANNUAL REPORT OF THE DIRECTOR: JUDICIAL BUSINESS 2013, tbl. M-4B.

¹⁹⁹ 28 U.S.C. § 636(b)(1)(B).

²⁰⁰ FED. R. CIV. P. 72(b).

courts for pretrial management, any necessary hearings, and preparation of reports and recommendations. Like social security appeals, they are referred in bulk because of the large number of petitions filed in many courts, the time that referral saves for the district judges, and the expertise that magistrate judges have developed in habeas corpus and prison-condition law. But unlike social security appeals, where the court's role is confined to reviewing the sufficiency of the administrative record, magistrate judges in prisoner cases may have to go beyond the record, receive additional evidence, and conduct hearings relevant to the allegations raised in the petition, which usually are of a constitutional nature. In some cases, the parties consent under 28 U.S.C. § 636(c) to having a magistrate judge dispose of the case with finality.

There are three principal categories of prisoner cases: (1) state habeas corpus proceedings; (2) federal habeas corpus proceedings; and (3) petitions challenging conditions of confinement.

i. State Habeas Corpus Cases

A state habeas corpus case is filed under 28 U.S.C. § 2254 by a prisoner convicted of a criminal offense in a state court.²⁰¹ The petition asks the federal district court for collateral relief on the grounds that the state conviction allegedly violated the Constitution, laws, or treaties of the United States. The prisoner must exhaust all available state remedies before filing the petition in the district court.

The Rules Governing Section 2254 Cases in the United States district courts specify that the clerk must promptly forward the petition to a judge for preliminary review.²⁰² If it plainly appears from the petition and any attachments that the prisoner is not entitled to relief in the district court, the petition must be dismissed. If not dismissed, the state is ordered to file an answer, motion, or other response.²⁰³

If the petition is not dismissed, the judge must review the state's answer, any transcripts and records of state-court proceedings, and any other materials submitted to determine whether an evidentiary hearing is needed.²⁰⁴ If a magistrate judge conducts the evidentiary hearing, he or she will file proposed findings and recommendations for disposition of the petition.²⁰⁵ A party may file

²⁰¹ See also 28 U.S.C. § 2241 (dealing the power to issue writs of habeas corpus).

²⁰² SECTION 2254 RULE 2(d) specifies that the petition must substantially follow either the standard form appended to the rules or a form prescribed by a local district court.

²⁰³ SECTION 2254 RULE 4.

²⁰⁴ SECTION 2254 RULE 8(a).

²⁰⁵ SECTION 2254 RULE 8(b) reiterates the statute and FED. R. CIV. P. 72(b) by specifying that a district judge may, under 28 U.S.C. § 636(b), refer the petition to a magistrate judge to conduct hearings and to file proposed findings and recommendation for disposition. Rule 10 adds that a

objections within 14 days after being served, and a district judge must determine *de novo* any proposed finding or recommendation to which objection is made.²⁰⁶

As a general rule, district courts do not refer to magistrate judges those habeas corpus cases in which the death penalty has been imposed. But a handful of districts do refer these enormously difficult and time-consuming death-penalty cases to selected magistrate judges.

ii. Federal Habeas Corpus Cases

A federal habeas corpus case brought under 28 U.S.C. § 2255 is an action filed by a prisoner convicted and sentenced by a federal district court. It is initiated by a motion asking the court to vacate, set aside, or correct the sentence on the grounds that it was imposed in violation of the Constitution or laws of the United States; that the court was without jurisdiction to impose it; that it was in excess of the maximum authorized by law; or that it is otherwise subject to collateral attack.²⁰⁷ Even though a motion under § 2255 is technically classified as a separate, collateral civil case, it is essentially a continuation of the federal criminal case.

The Rules Governing Section 2255 Proceedings for the United States District Courts are very similar to the Section 2254 Rules described immediately above. They permit a district judge to refer the motion to a magistrate judge to conduct hearings and file proposed findings of fact and recommendations for disposition.²⁰⁸

The Magistrate Judges Committee has suggested, though, that assignment of a motion attacking a sentence under 28 U.S.C. § 2255 is generally not appropriate because it places a magistrate judge in the potentially awkward position of evaluating decisions of a district judge.²⁰⁹

magistrate judge may perform the duties of a district judge under the rules, as authorized under 28 U.S.C. § 636(b).

²⁰⁶ SECTION 2254 RULE 8(b). *See also* FED. R. CIV. P. 72(b)(2) and (3).

²⁰⁷ SECTION 2255 RULE 2(c) specifies that the motion must substantially follow either the standard form appended to the rules or a form prescribed by a local district court.

²⁰⁸ SECTION 2255 RULE 8(b).

²⁰⁹ SUGGESTIONS FOR UTILIZATION OF MAGISTRATE JUDGES, NO. 8. In *United States v. Johnson*, 258 F.3d 361 (5th Cir. 2001), the Fifth Circuit ruled *sua sponte* that referral of a 2255 motion to a magistrate judge was not constitutionally permissible, even though both parties had consented to the magistrate judge under 28 U.S.C. § 636(c). A § 2255 motion directly questions the ruling of an Article III judge and may unwisely embroil a magistrate judge in the conduct of a felony criminal trial. If the matter is a civil proceeding and the parties consent, the district judge who tried the felony case is given no opportunity to review the matter, and any appeal lies exclusively to the court of appeals.

Referral may also duplicate judicial effort because the district judge who presided over the case is already very familiar with the facts and issues in the case and is normally able to handle the motion more efficiently. The committee, though, recognizes that some § 2255 motions may be appropriate for referral if they require an evidentiary hearing or involve alleged conduct or events occurring outside the courtroom and unobservable by the trial judge.²¹⁰

iii. Petitions Challenging Conditions of Confinement

A petition challenging conditions of confinement is filed by a prisoner in state custody under the Civil Rights Act of 1871, 42 U.S.C. § 1983. It alleges that state officials acting under color of state law violated the petitioner's constitutional or federal statutory rights. A prisoner in federal custody may not use the Civil Rights Act, but may file a *Bivens* action under 28 U.S.C. § 1331, a cause of action against a federal official individually for a violation of the plaintiff's constitutional rights.²¹¹

Prisoners commonly allege that they have suffered cruel and unusual punishment or a deprivation of liberty or property without due process because of the actions of prison officials. The range of allegations is wide. Frequently charged violations include such diverse matters as: prison overcrowding, inadequate protection against violence, improper searches by guards, other types of privacy invasions, lack of adequate medical care, violation of religious practices, lack of access to mail and other communications, denial of access to courts and law libraries, discrimination in prison treatment, and lack of due process in disciplinary proceedings.

Sorting out the facts in a prisoner case can be difficult because the petitions are usually filed *pro se* and tend to be lengthy, legally naive, and confusing. To ease the burden on judges and court staff, many districts have developed standard forms for prisoners in civil rights cases. Congress, moreover, has attempted to control prisoner litigation by enacting the Prison Litigation Reform Act.²¹² The Act requires prisoners to exhaust their prison grievance procedure before filing a petition, and it prohibits them from alleging mental or emotional injury without a showing of physical injury.²¹³ It also requires prisoners who proceed *in forma pauperis* to pay the full filing fee in installments according to a statutory formula.²¹⁴

²¹⁰ SUGGESTIONS FOR UTILIZATION OF MAGISTRATE JUDGES, NO. 8.

²¹¹ See *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971).

²¹² 42 U.S.C. § 1997e.

²¹³ 42 U.S.C. § 1997e(a) and (e).

²¹⁴ 28 U.S.C. § 1915(b)(1) and (2). A prisoner must pay the full filing fee up front, though, and may not proceed *in forma pauperis* if he or she has had three previous cases dismissed as frivolous, malicious, or failing to state a claim upon which relief may be granted. 28 U.S.C. § 1915(g).

The Act requires a court, *sua sponte* or on motion, to screen all prison-condition cases and all *in forma pauperis* cases at the outset of litigation and dismiss any action that: (1) is frivolous; (2) is malicious; (3) fails to state a claim upon which relief can be granted; or (4) seeks monetary relief from a defendant who is immune from such relief.²¹⁵ District and magistrate judges rely on the court's *pro se* law clerks and other supporting staff to help process the intake of prisoner cases, initially screen the petitions and other papers, and make recommendations regarding dismissal. Many prisoner cases are dismissed at this stage, but others require factual development, discovery, and evidentiary hearings. Magistrate judges usually conduct all the necessary pretrial proceedings. If the prisoner's personal participation is required, magistrate judges frequently will conduct the proceedings by telephone or video teleconferencing, or they may travel to a prison facility to conduct needed hearings.²¹⁶

In some cases, district judges have appointed magistrate judges to serve as special masters to monitor conditions in prisons and help enforce court decrees. In several districts, magistrate judges also manage the district court's *pro se* program and directly supervise the court's *pro se* law clerks and supporting staff.

h. Voir Dire and Jury Selection

The Supreme Court held in *Peretz v. United States* that a district judge may assign a magistrate judge to conduct voir dire and jury selection in a felony criminal case with the defendant's consent.²¹⁷ Following the reasoning of *Peretz*, which focused on a criminal defendant's consent, some circuits have held that a magistrate judge may not preside over voir dire in a civil case if a party objects.

Case law has allowed magistrate judges to fill in for a district judge when the district judge is unavailable – such as to read back the testimony of a witness to a deliberating jury, to answer a juror's question, to preside over deliberations – particularly when the district judge is available by telephone. Magistrate judges have also been allowed to read the district judge's instructions, give the standard *Allen* charge, accept the jury's verdict, and dismiss the jury. These activities are clearly appropriate if the parties consent to them.

²¹⁵ 42 U.S.C. § 1997e(c)(1); 28 U.S.C. § 1915(e)(2).

²¹⁶ 42 U.S.C. § 1997e(f).

²¹⁷ 501 U.S. 923 (1991). *See Gomez*, 490 U.S. at 872-75 (a magistrate judge may not conduct voir dire in a felony case if the defendant objects). The express consent of the defendant's counsel changes the constitutional analysis and is sufficient to permit a magistrate judge to preside over jury selection in a felony. *See also Gonzalez v. United States*, 551 U.S. 242 (2008).

i. Post-Trial Matters

District judges refer post-trial matters to magistrate judges on occasion. Although 28 U.S.C. § 636(b)(1)(A) states that magistrate judges may hear “any pretrial matter,” some judges have used this provision to refer post-judgment duties to magistrate judges on the grounds that they are collateral to pretrial matters. Post-trial referrals, though, are more commonly made to magistrate judges under 28 U.S.C. § 636(b)(1)(B), the “additional duties” provision.

Claims for attorney’s fees must be made by motion within 14 days after the entry of judgment.²¹⁸ A judge may refer a motion for attorney’s fees to a magistrate judge under FED. R. CIV. P. 72(b) as if the motion were a dispositive pretrial matter, subject to *de novo* determination by a district judge.²¹⁹

j. Modification or Revocation of Probation and Supervised Release

When a probationer or person on supervised release fails to abide by the conditions of supervision or is arrested for another offense, the court’s probation office or the U.S. attorney’s office may ask the court to revoke or modify the terms of release. If the person is in custody, he or she must be taken without unnecessary delay before a magistrate judge for an initial appearance and a preliminary hearing to determine whether there is probable cause to believe that a violation occurred. If the judge finds probable cause, a revocation hearing must be conducted within a reasonable time. If probable cause is not found, the judge must dismiss the proceedings.²²⁰

At the revocation hearing, the person is notified of the right to retain counsel or request appointed counsel under the Criminal Justice Act. The individual is also entitled to: written notice of the alleged violation; disclosure of the evidence against him or her; present evidence and question adverse witnesses; make a statement; and present any information in mitigation.²²¹

A magistrate judge may revoke, modify, or reinstate probation and modify, revoke, or terminate supervised release in any misdemeanor case where a magistrate judge has imposed

²¹⁸ FED. R. CIV. P. 54(d)(2).

²¹⁹ FED. R. CIV. P. 54(d)(2)(D). A judge may also refer issues concerning the value of services to a special master without regard to the consent or exceptional-condition limitations of Rule 53(a)(1). The Magistrate Judges Committee, though, has suggested that referral of a fee motion in a case tried by district judge may require a magistrate judge to make recommendations based on reviewing a lengthy record of the proceedings when the district judge who tried the case is in a better position to make the determination. SUGGESTION FOR UTILIZATION OF MAGISTRATE JUDGES NO. 8.

²²⁰ FED. R. CRIM. P. 32.1(a) and (b)(1). The person may waive the hearing.

²²¹ FED. R. CRIM. P. 32.1(b)(2).

probation or supervised release.²²² In other cases, a district judge may designate a magistrate judge to conduct hearings and submit proposed findings of fact and recommendations for modification, revocation, or termination by the district judge, including, in the case of revocation, a recommended disposition under 18 U.S.C. § 3583(e).²²³

k. Re-Entry Court Programs

Magistrate judges are actively involved in drug re-entry court programs now adopted in more than half the federal district courts. The programs provide a comprehensive, collaborative approach to prevent recidivism by released substance-abuser offenders and to facilitate their successful reintegration into the community. In lieu of the traditional adversarial nature of federal-court proceedings, re-entry programs are more informal and empathetic. They focus on rehabilitation of the offenders and include more regular drug testing, more supervision and personal contacts, and enhanced access to counseling, treatment, and community services. As a result, they tend to be very resource intensive.

The programs vary in details among the districts, but the key feature is a collaborative effort by a team composed of a district judge or magistrate judge, a probation officer, an assistant U.S. attorney, an assistant federal defender, and often a drug and alcohol treatment professional or community services provider.²²⁴ Participation in the program is voluntary, and the offenders agree in advance to greater supervision, periodic urinalysis, and other reporting. Services provided may include housing assistance, job placement help, transportation, education and training opportunities, drug or alcohol treatment, mental health assistance, and family counseling.

Under the judge's leadership, the team meets regularly to agree on the appropriate course of action to take with each offender, based on his or her progress and recent behavior. They then meet and dialogue with the offenders as a group, most often in a courtroom. The proceedings before the judge normally take place monthly, but in several districts are scheduled more frequently.

A cornerstone of the program is the collaboration of the team in devising appropriate incentives to reward positive behavior and appropriate sanctions to punish negative behavior. Rewards and sanctions are imposed immediately for greater effect and to teach accountability.²²⁵

²²² 18 U.S.C. § 3401(h).

²²³ 18 U.S.C. § 3401(j).

²²⁴ Additional details about the various programs established by the district courts are set out in the Federal Judicial Center's 2013 publication: Barbara S. Meierhoefer and Patricia D. Breen, *Process-Descriptive Study of Judge-Involved Supervision Programs in the Federal System*.

²²⁵ Rewards for good behavior might include public praise, token gifts, reduced reporting requirements, and lessening of supervision restrictions. Sanctions for violations of the rules might

The offenders are encouraged to reflect on their mistakes and correct them. The program lasts 12 months for participants in most courts. At the end of that period, offenders who stay sober and make sufficient progress graduate from the program in a public ceremony in the courtroom with family, friends, and supporters. They also normally receive a reduction in, or termination of, their supervised release punishment.

Magistrate judges who participate in re-entry programs must devote considerable time to the programs, not only in conducting the regular meetings with offenders, but in reviewing files, conferring with members of the team, issuing appropriate court orders, and attending to administrative details.

I. Naturalization Proceedings

District courts may delegate magistrate judges to conduct naturalization proceedings. They are regarded by most judges as very meaningful and rewarding experiences. Once the citizenship applications are approved by the Department of Homeland Security's U.S. Citizenship and Immigration Services, a special public ceremony is normally scheduled in a courtroom or at another public site. The judge presides over the ceremony and administers the oath of allegiance to the new citizens. In addition, members of Congress and other public figures are frequently invited to attend, patriotic speeches are given, and musical artists may perform.²²⁶

m. Other Matters

On delegation from the district court or a district judge, magistrate judges may be assigned a wide range of other judicial duties in civil and criminal cases under authority of four distinct provisions of the Federal Magistrates Act. In summary, magistrate judges may –

- (1) hear and determine with finality “any pretrial matter pending in the court” not dispositive of a party’s charge, claim, or defense;²²⁷
- (2) hear and submit proposed findings of fact and recommended decision to a district judge on eight motions specified in the Act and any other matter that may dispose of a charge, claim, or defense, or a prisoner petition seeking post-trial relief or challenging conditions of confinement;²²⁸

include tightened monitoring and supervision, restriction to living in a half-way house, a short period in jail, or even ejection from the program.

²²⁶ 8 U.S.C. §§ 1421, 1443-1448. If the Immigration and Naturalization Service denies an application, the applicant may ask the district court for *de novo* review. 8 U.S.C. § 1421(c).

²²⁷ 28 U.S.C. § 636(b)(1)(a); FED. R. CIV. P. 72(a); FED. R. CRIM. P. 59(a).

²²⁸ 28 U.S.C. § 636(b)(1)(B); FED. R. CIV. P. 73(b); FED. R. CRIM. P. 73(b).

- (3) perform “such additional duties as are not inconsistent with the Constitution and laws of the United States;”²²⁹ and
- (4) with the consent of the parties, conduct any or all proceedings in a jury or nonjury civil matter and order the entry of judgment in the case.²³⁰

Magistrate judges have been assigned literally hundreds of different matters under these four authorities. For the most part, there is now little dispute over a magistrate judge’s authority. But there have been many court opinions discussing whether a particular matter in a particular case should have been handled by the court as a dispositive matter or non-dispositive matter, whether consent of the parties was needed, whether consent could be implied from a party’s conduct, and whether assignment of a particular matter was consistent with the Constitution and laws of the United States. If a question or dispute arises, circuit case law, which occasionally varies from circuit to circuit, must be consulted.²³¹

5. Disposition of Civil Cases on Consent of the Litigants

Under the 1979 amendments to the Federal Magistrates Act, a full-time magistrate judge may conduct any civil action or proceeding, including a jury or nonjury trial, and order the entry of final judgment in the case if all parties in the litigation consent.²³² Each district court has designated its magistrate judges to exercise this power, giving a magistrate judge authority over an entire civil case or any specified aspect of the case, such as a designated dispositive motion.

a. Consent Procedures

Case-dispositive proceedings before a magistrate judge are handled in the same manner as those before a district judge and must conform to the Federal Rules of Civil Procedure.²³³ An appeal from a judgment entered at a magistrate judge’s direction may be taken to the court of appeals as any

²²⁹ 28 U.S.C. § 636(b)(3).

²³⁰ 28 U.S.C. § 636(c).

²³¹ An illuminating summary of the wide range of duties addressed in the case law is set forth in: Timothy A. Baker, *The Expanding Role of Magistrate Judges in the Federal Courts*, 39 VAL. U. L. REV. 661, 677-680 (2005). The Administrative Office monitors the case law and disseminates information memoranda and an inventory of duties to magistrate judges. *See supra* Section 1c, Utilization Advice to the Courts.

²³² 28 U.S.C. § 636(c)(1); FED. R. CIV. P. 73(a). A part-time magistrate judge may exercise the authority if the chief judge of the district court certifies that a full-time magistrate judge is not reasonably available in accordance with guidelines established by the judicial council of the circuit. 28 U.S.C. § 636(c)(1)

²³³ 28 U.S.C. § 636(d).

other appeal from a district-court judgment.²³⁴

The clerk of the district court, at the time a civil case is filed, must notify the parties of their opportunity to consent to the dispositive authority of a magistrate judge. The parties communicate their consent by filing a statement consenting to the reference, either jointly or separately.²³⁵ The Administrative Office has issued standard national forms for the notice, consent, and reference of both an entire civil case and a dispositive motion in a civil case.²³⁶

A district judge or magistrate judge may be informed of a party's response to the notice only if all parties have consented to the referral. A district judge, magistrate judge, or other court official may remind the parties of a magistrate judge's availability, but must also advise them that they are free to withhold consent without adverse substantive consequences.²³⁷ A district judge, for good cause shown, or on the judge's own motion, or under any extraordinary circumstances shown by any party, may vacate a reference of a civil matter to a magistrate judge.²³⁸

b. Advantages of Consent

The Magistrate Judges Committee of the Judicial Conference recommends that district courts encourage and facilitate parties' consent to magistrate judges' decisional authority in civil cases. It points out that when magistrate judges exercise full authority in civil cases, district judges' time is conserved and the court can manage its civil docket more effectively.²³⁹

Consenting to a magistrate judge also offers the parties the prospect of an early, firm trial date. Magistrate judges often have more flexible trial schedules than district judges because they do not preside over felony cases, which are given priority and may bump civil trials. The parties are

²³⁴ 28 U.S.C. § 636(c)(3); FED. R. CIV. P. 73(c).

²³⁵ FED. R. CIV. P. 73(b)(1).

²³⁶ AO Forms 85 and 85A.

²³⁷ FED. R. CIV. P. 73(b); 28 U.S.C. § 636(c)(2). The 1979 statute had prohibited judges from discussing consent with the parties after the clerk of court had sent the parties the original consent notice. The restriction, though, was relaxed by a 1990 statutory amendment designed both to encourage consent and protect the voluntariness of the parties' action. Federal Courts Study Commission Implementation Act of 1990, Pub. L. No. 101-650, § 308, 104 Stat. 5104, 5112.

²³⁸ 28 U.S.C. § 636(c)(4); FED. R. CIV. P. 73(b)(3).

²³⁹ SUGGESTIONS FOR UTILIZATION OF MAGISTRATE JUDGES, NO. 4. The Committee suggests that courts take steps to educate the bar about the quality, abilities, and experience of their magistrate judges and the availability and advantages of the consent option. Judges may disseminate this and other information about the consent option in pretrial conference notices, referral orders, and articles written for local legal publications, and it can highlight the consent option on its website.

also more likely to consent when a magistrate judge has already become familiar with a case because of his or her pretrial management and discovery supervision in the case. The parties may feel comfortable with the magistrate judge from that experience. A practice adopted by a growing number of district courts is to facilitate consent by including magistrate judges on the civil case assignment wheel for direct assignment of a designated number or percentage of civil cases at filing, subject to later consent by the parties to full adjudication of the case by the magistrate judge.

It is the policy of the Department of Justice to encourage the use of magistrate judges to assist the courts in resolving civil disputes. “In conformity with this policy, the attorney for the government is encouraged to accede to a referral of an entire civil action for disposition by a magistrate judge, or to consent to the designation of a magistrate judge as special master if the attorney . . . determines that such a referral or designation is in the interest of the United States,” based on several standard factors.²⁴⁰

c. Constitutional Considerations

The constitutional authority for magistrate judges to decide civil cases with finality rests on two factors: (1) consent of the parties, who freely waive their right to an Article III judge and opt instead to have a magistrate judge dispose of their case; and (2) the status of magistrate judges as an integral part of the Article III district courts. The circuit courts addressing the 1979 statute held unanimously that the consent provision was consistent with the requirements of Article III of the Constitution.²⁴¹ The Supreme Court did not address the constitutional question directly, but it referred to the consent authority of magistrate judges on several occasions without apparent constitutional concern.²⁴²

Then, after more than 30 years of case law stability, the Supreme Court considered three challenges to the constitutionality of almost identical provisions in the statute defining the authority of bankruptcy judges. The 1984 bankruptcy provisions were modeled closely on the 1976 and 1979

²⁴⁰ 28 C.F.R. § 52.01.

²⁴¹ See cases cited in *Wellness*, 135 S.Ct. at 1948 n.12.

²⁴² In *Roell v. Withrow*, 538 U.S. 580 (2003), for example, the Court specifically addressed 28 U.S.C. § 636(c) and held that the requisite consent to adjudication of a civil case by a magistrate judge could be implied by a party’s conduct in the litigation. 538 U.S. at 586-91. In *Peretz v. United States*, the Court upheld a magistrate judge’s conduct of jury voir dire proceedings at a felony criminal trial with the defendant’s consent, analogizing that “with the parties’ consent, a district judge may delegate to a magistrate supervision of entire civil and misdemeanor trials. These duties are comparable in responsibility and importance to presiding over *voir dire* at a felony trial.” 501 U.S. at 933.

amendments to the Federal Magistrates Act.²⁴³ So the bankruptcy challenges clearly implicated the constitutional authority of magistrate judges. Like magistrate judges, bankruptcy judges are non-Article III judicial officers of the Article III district courts. They are appointed by the respective courts of appeals for 14-year terms and serve collectively as a unit of the district court.²⁴⁴

Under the parallel bankruptcy statute, a bankruptcy judge may decide with finality a “core” bankruptcy proceeding²⁴⁵ – just as a magistrate judge may decide a non-dispositive motion in a civil or criminal case.²⁴⁶ On the other hand, a “non-core” proceeding is essentially an independent state-law claim “related to” the bankruptcy case that may only be determined by an Article III district judge.²⁴⁷ Consequently, a bankruptcy judge who hears a “non-core” proceeding in a bankruptcy case must file proposed findings of fact and conclusions of law for *de novo* review by a district judge²⁴⁸ – just as a magistrate judge must file a report and recommendations when handling a case-dispositive motion in a civil or criminal case.²⁴⁹ With the consent of the parties, however, a bankruptcy judge may decide a “non-core” Article III matter with finality²⁵⁰ – just as a magistrate judge may decide a civil case with consent.²⁵¹

In 2011, the Supreme Court introduced considerable jurisdictional uncertainty when it ruled by a 5 to 4 vote in *Stern v. Marshall*²⁵² that a counterclaim by the bankruptcy estate against a person filing claims against the estate – a claim that the bankruptcy statute specifically designates as a “core” bankruptcy proceeding – was a state-created common-law claim lying beyond the authority of a non-Article III judge to order final judgment. *Stern* dealt only with one category of “core”

²⁴³ Compare 28 U.S.C. § 157(a), (b), and (c) with 28 U.S.C. § 636(b) and (c).

²⁴⁴ 28 U.S.C. §§ 151 and 152(a)(1).

²⁴⁵ Although the term is not defined, the bankruptcy statute sets out a non-exclusive list of 16 “core proceedings” that Congress thought bankruptcy judges could determine constitutionally. 28 U.S.C. § 157(b)(2). They deal with the federal bankruptcy process itself and generally address such matters as administration and liquidation of the debtor’s estate and adjustment of debtor-creditor relationships.

²⁴⁶ 28 U.S.C. § 636(b)(1)(A).

²⁴⁷ Non-core proceedings, also undefined in the statute, essentially involve rights created under state law that may exist apart from the bankruptcy case, but are related to the bankruptcy case because they may augment the debtor’s estate or affect creditors’ rights.

²⁴⁸ 28 U.S.C. § 157(c)(1).

²⁴⁹ 28 U.S.C. § 636(b)(1)(B) and (C).

²⁵⁰ 28 U.S.C. § 157(c)(2).

²⁵¹ 28 U.S.C. § 636(c).

²⁵² 564 U.S. 462 (2011).

bankruptcy claim, but it raised the strong possibility that other types of “core” proceedings regularly decided by bankruptcy judges could also be held to lie outside their constitutional authority to determine.

Of particular concern in *Stern*, moreover, was the “formalistic and unbending” approach and restrictive language that the majority used in interpreting Article III,²⁵³ raising the specter that the Court in future opinions might impose additional limits on the authority of both bankruptcy judges and magistrate judges. The four dissenting justices argued strongly that the majority in *Stern* had broken with recent, controlling precedents in which the Court had applied a pragmatic approach in evaluating claims that a particular congressional delegation of adjudicatory authority violates separation-of-power principles derived from Article III.²⁵⁴

In 2014, the Supreme Court considered a second case in which a bankruptcy judge had decided a statutory “core” proceeding that under *Stern* may be a claim reserved for a district judge to decide – a fraudulent conveyance claim. But in *Executive Benefits Ins. Agency v. Arkison*,²⁵⁵ the Court avoided the constitutional problems posed by *Stern*. Instead, it held narrowly that the district court in the case had cured any constitutional error because on appeal it had reviewed *de novo* the bankruptcy judge’s grant of summary judgment and had entered its own judgment.

The Supreme Court did not discuss the key issue of litigant consent, even though raised by the parties. Instead, the unanimous opinion prescribed a practical solution whenever a potential conflict arises between the bankruptcy statute and Article III. The Court instructed that when a bankruptcy judge is presented with a claim that the statute designates as “core,” but Article III reserves for decision by a district judge, the bankruptcy judge should treat the claim as a “non-core” proceeding and issue proposed findings of fact and conclusions of law for a district judge to review *de novo* and enter judgment.

In 2015, the Supreme Court finally resolved the consent issue in the third bankruptcy case, *Wellness Int’l Network, Ltd. v. Sharif*.²⁵⁶ By a 6 to 3 vote, it took a sharp turn from the formalistic

²⁵³ See Justice Breyer’s dissent, quoting *Commodity Futures Trading Comm’n v. Schor*, 478 U.S. 833, 851 (1986). 564 U.S. at 511.

²⁵⁴ *Id.* “[P]ractical attention to substance rather than doctrinaire reliance on formal categories should inform application of Article III.” *Thomas v. Union Carbide Agric. Prods., Co.*, 473 U.S. 568, 587 (1985) (emphasis in the original). “[T]he Court has explicitly declined to adopt formalistic and unbending rules” and “weighed a number of factors . . . with an eye to the practical effect that the congressional activity will have on the constitutionally assigned role of the judiciary.” *Schor*, 478 U.S. at 851.

²⁵⁵ 134 S. Ct. 2165 (2014).

²⁵⁶ 135 S. Ct. 1932 (2015).

language of *Stern* and returned to the pragmatic approach of recent Court precedents, holding that bankruptcy judges may adjudicate non-core Article III claims as long as the parties knowingly and voluntarily consent.

The Court was clearly aware of the practical impact that the case would have on the magistrate judge system, as well as on the bankruptcy courts, and it included numerous references to magistrate judges in its opinion and case law analysis. It noted at the outset that –

Congress has . . . authorized the appointment of bankruptcy and magistrate judges, who do not enjoy the protection of Article III, to assist Article III courts in their work. . . . And it is no exaggeration to say that without the distinguished services of these judicial colleagues, the work of the federal court system would grind nearly to a halt.²⁵⁷

The Court emphasized that consent is central to the constitutional analysis, pointing out that adjudication by consent has been a feature of the federal court system since the early days of the republic.²⁵⁸ The Court relied especially on the “foundational case” of *Commodity Futures Trading Comm’n v. Schor*,²⁵⁹ reasoning that the right to adjudication before an Article III court is personal in nature and may be waived by the litigants.²⁶⁰ But the litigants’ waiver of their “personal right” to an Article III court, by itself, is not always determinative because Article III also serves a structural purpose that the litigants may not waive – to protect the public’s interest in the institutional integrity of the judicial branch.²⁶¹

The Court explained that the lesson to be drawn from precedent is “plain.”

The entitlement to an Article III adjudicator is “a personal right” and thus ordinarily “subject to waiver.” . . . Article III also serves a structural purpose, “barring congressional attempts ‘to transfer jurisdiction [to non-Article III tribunals] for the purpose of emasculating’ constitutional courts and thereby prevent[ing] ‘the encroachment or aggrandizement of one branch at the expense of the other.’” . . . But

²⁵⁷ *Id.* at 1938-39.

²⁵⁸ *Id.* at 1942-44.

²⁵⁹ 478 U.S. 833 (1986).

²⁶⁰ The Court also relied on *Peretz*, 501 U.S. at 932, which had approved a magistrate judge supervising jury voir dire proceedings in a felony criminal case because “the defendant’s consent significantly changes the constitutional analysis.” 135 S. Ct. at 1943.

²⁶¹ Article III “not only preserves to litigants their interest in an impartial and independent federal adjudication of claims . . . , but also serves as ‘an inseparable element of the constitutional system of checks and balances.’ . . .” *Id.* (quoting *Schor*, 478 U.S. at 850-51).

allowing [non-Article III] adjudicators to decide claims submitted to them by consent does not offend the separation of powers so long as Article III courts retain supervisory authority over the process.”²⁶²

Thus, the question for the Court was whether allowing non-Article III bankruptcy judges to decide Article III *Stern* claims by consent would “impermissibly threate[n] the institutional integrity of the Judicial Branch.”²⁶³ That question, the Court said, must be decided not by “formalistic and unbending rules,” but with an eye to the “practical effect” that the practice will have on the constitutionally assigned role of the federal judiciary.”²⁶⁴

The Court, liberally quoting precedent, concluded that allowing bankruptcy litigants to waive the right to Article III adjudication of *Stern* claims does not usurp the constitutional prerogatives of Article III courts because –

Bankruptcy judges, like magistrate judges, “are appointed and subject to removal by Article III judges. . . . They “serve as judicial officers of the United States district court,” . . . and collectively “constitute a unit of the district court” for that district. . . . Just as “[t]he ‘ultimate decision’ whether to invoke [a] magistrate [judge’s] assistance is made by the district court,” . . . bankruptcy courts hear matters solely on a district court’s reference, . . . which the district court may withdraw *sua sponte* or at the request of a party. . . . “[S]eparation of powers concerns are diminished” when, as here, “the decision to invoke [a non-Article III forum] is left entirely to the parties and the power of the federal judiciary to take jurisdiction” remains in place.”²⁶⁵

The Court also emphasized the practical benefits to the judiciary of having its non-Article III judges resolve claims submitted to them by mutual consent of the litigants.

Congress could choose to rest the full share of the Judiciary’s labor on the shoulders

²⁶² *Id.* at 1944 (citations omitted).

²⁶³ *Id.* (quoting *Schor*, 478 U.S. at 851).

²⁶⁴ *Id.*

²⁶⁵ The language echoes that used by the Court in *Peretz* and quoted earlier in the *Wellness* decision: “Magistrate [judges] are appointed and subject to removal by Article III judges. . . . The ‘ultimate decision’ whether to invoke the magistrate’s assistance is made by the district court, subject to veto by the parties. The decision whether to empanel the jury whose selection a magistrate has supervised also remains entirely with the district court. Because ‘the entire process takes place under the district court’s total control and jurisdiction,’ . . . there is no danger that use of the magistrate [judge] involves a ‘congressional attempt “to transfer jurisdiction [to non-Article III tribunals] for the purpose of emasculating” constitutional courts.’” *Id.* at 1945 (quoting *Peretz*, 501 U.S. at 937).

of Article III judges. . . . Instead, Congress has supplemented the capacity of district courts through the able assistance of bankruptcy judges. So long as those judges are subject to control by the Article III courts, their work poses no threat to the separation of powers.²⁶⁶

Wellness Int'l Network, Ltd. v. Sharif, thus, put to rest the uncertainty that the *Stern* decision had raised over the constitutionality of the consent authority of bankruptcy judges and magistrate judges.²⁶⁷ As a result, it is clearly appropriate for the parties in any civil case in the district court, in accordance with 28 U.S.C. § 636(c), to consent to a magistrate judge determining their case, or any part of the case, and ordering entry of final judgment.

If the parties do *not* consent to the dispositive authority of a magistrate judge under 28 U.S.C. § 636(c), the court may still proceed under 28 U.S.C. § 636(b), which authorizes a magistrate judge to –

- (1) hear and determine with finality any “non-dispositive” matter pending before the court, *i.e.*, a pretrial matter not dispositive of a party’s charge, claim, or defense;²⁶⁸ and
- (2) hear and submit proposed findings of fact and recommended decision to a district judge on eight “dispositive” motions specified in the statute²⁶⁹ and any other matter that may dispose of a charge, claim, or defense.²⁷⁰

When there is uncertainty as to whether a particular matter is in fact “dispositive” of a claim or defense, consideration should be given to the practical procedure that the Supreme Court laid out in *Executive Benefits Ins. Agency v. Arkison*. It instructs bankruptcy judges to treat questionable claims as dispositive proceedings and file proposed findings of fact and conclusions of law for *de*

²⁶⁶ *Id.* at 1946.

²⁶⁷ With regard to the case-dispositive consent authority of magistrate judges, the Court added specifically that “[c]onsistent with our precedents, the Courts of Appeals have unanimously upheld the constitutionality of 28 U.S.C. § 636(c).” *Id.* at 1948 n.12.

²⁶⁸ 28 U.S.C. § 636(b)(1)(A); FED. R. CIV. P. 72(a).

²⁶⁹ A motion 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. 28 U.S.C. § 636(b)(1)(A).

²⁷⁰ 28 U.S.C. § 636(b)(1)(B); FED. R. CIV. P. 72(b). The civil rule expands on the statutory list of 8 motions to include more broadly any “pretrial matter dispositive of a claim or defense or a prisoner petition challenging the conditions of confinement.”

novo review and entry of judgment by a district judge. Though the advice in *Arkison* was directed specifically to bankruptcy judges, it appears equally apt for magistrate judges in civil cases.

d. Implied Consent

In *Wellness Int'l Network, Ltd. v. Sharif*, the Supreme Court held that the parties' consent must be knowing and voluntary, but it need not be express. Consent may be inferred from a party's conduct in certain circumstances.²⁷¹

In interpreting the consent provision of the bankruptcy statute, the Court relied heavily on its 2003 holding in *Roell v. Withrow*,²⁷² interpreting the parallel consent provisions in the Federal Magistrates Act. In *Roell*, the Court noted that 28 U.S.C. § 636(c) authorizes a magistrate judge to decide a civil case upon “the consent of the parties,” but does not specify the form of the consent.²⁷³ This unadorned language, the Court said, contrasts with other language in the Act requiring that consent to a magistrate judge be made in writing.²⁷⁴ Moreover, these textual clues are reinforced by a good pragmatic reason to believe that Congress intended to permit implied consent. By giving magistrate judges case-dispositive civil authority, Congress hoped to create a supplemental resource that would promote judicial efficiency, relieve the district courts' civil workloads, and improve public access to the courts.²⁷⁵

In *Roell*, the Court acknowledged that imposing a requirement of express consent would provide a simple bright line test and minimize any risk of compromising the right to an Article III judge. But it would also open the door to sandbagging, gamesmanship and potential waste of court time and effort by undeserving and opportunistic litigants. Thus, when a party has signaled consent

²⁷¹ “Nothing in the Constitution requires that consent to adjudication by a bankruptcy court be express. Nor does the relevant statute, 28 U.S.C. § 157, mandate express consent; it states only that a bankruptcy court must obtain ‘the consent’ – consent *simpliciter* – ‘of all parties to the proceeding’ before hearing and determining [an Article III claim].” 135 S. Ct. at 1947.

²⁷² 538 U.S. 580 (2003).

²⁷³ The Court pointed out, however, that the procedure specified in the federal rules envisions advance, written consent. FED. R. CIV. P. 73(b)(1) specifies that the parties signify their consent by jointly or separately filing a statement consenting to the referral. In administering the consent process, the district clerks use the judiciary's national form, sometimes with local variations – AO Form 85, *Notice, Consent, and Reference of a Civil Action to a Magistrate Judge*.

²⁷⁴ 28 U.S.C. § 636(c)(1), which governs consent to disposition of a civil case by a part-time magistrate judge requires a “specific written request” by the parties, and 18 U.S.C. § 3401(b) specifies that a magistrate judge may try a [Class A] misdemeanor only if the defendant “expressly consents . . . in writing or orally on the record.”

²⁷⁵ 538 U.S. at 588.

to a magistrate judge’s authority through “actions rather than words” –

The bright line is not worth the downside. We think the better rule is to accept implied consent where, as here, the litigant or counsel was made aware of the need for consent and the right to refuse it, and still voluntarily appeared to try the case before the Magistrate Judge. Inferring consent in these circumstances thus checks the risk of gamesmanship by depriving parties of the luxury of waiting for the outcome before denying the magistrate judge’s authority. Judicial efficiency is served; the Article III right is substantially honored.²⁷⁶

The Court added that the specific referral procedures prescribed in the Federal Rules of Civil Procedure are by no means just advisory. Nevertheless, the text and structure of the statute as a whole and the Congressional intent suggest that a defect in the referral to a magistrate judge does not invalidate the reference so long as the parties have in fact voluntarily consented.²⁷⁷

In extending *Roell* to the bankruptcy courts, the Court explained in *Wellness* that the implied consent standard “possesses the same pragmatic virtues – increasing judicial efficiency and checking gamesmanship – that motivated our adoption of it for consent-based adjudications by magistrate judges.”²⁷⁸ But the Court also cautioned that –

Even though the Constitution does not require that consent be express, it is good practice for courts to seek express statements of consent or nonconsent, both to ensure irrefutably that any waiver of the right to Article III adjudication is knowing and voluntary and to limit subsequent litigation over the consent issue. Statutes or judicial rules may require express consent where the Constitution does not.²⁷⁹

The “good practice” advised by the Supreme Court is for courts to encourage parties to express their consent early and in writing by adhering to the procedures laid out in FED. R. CIV. P. 73 and AO Form 85. Nevertheless, in *Wellness* and *Roell*, the Court left the door slightly ajar to additional litigation over whether a party’s consent to a magistrate judge may be implied in specific factual circumstances “through actions rather than words.” Those instances of implied consent, however, should be limited and exceptional.

²⁷⁶ *Id.* at 590.

²⁷⁷ *Id.* at 587.

²⁷⁸ 135 S. Ct. at 1948.

²⁷⁹ *Id.* 1948 n.13.

6. Contempt Authority

Magistrate judges were given contempt powers by the Federal Courts Improvement Act of 2000.²⁸⁰ They may exercise summary criminal contempt authority to punish any misbehavior occurring in their presence that obstructs the administration of justice.²⁸¹ This summary authority enables them to control the courtroom, maintain order, and protect the court's dignity in response to contumacious behavior by witnesses, parties, counsel, and others present at court proceedings. The maximum penalties that a magistrate judge may impose for criminal contempt are 30 days of incarceration and a fine of \$5,000.²⁸²

Additional criminal contempt authority is provided to magistrate judges in those cases where they have final decision-making authority – civil consent cases under 28 U.S.C. § 636(c) and criminal misdemeanor cases under 18 U.S.C. § 3401. In those cases, they may punish as criminal contempt misbehavior occurring outside their presence that constitutes disobedience or resistance to their lawful writ, process, order, rule, decree, or command.²⁸³ This authority enables them to enforce their orders and vindicate the district court's authority over cases tried by a magistrate judge. Disposition of contempt under this authority, though, must be conducted on notice and hearing under the Federal Rules of Criminal Procedure. The maximum penalties that a magistrate judge may impose are the same as those for summary criminal contempt – up to 30 days of incarceration and a \$5,000 fine.

Some contumacious conduct may be so egregious as to require more severe punishment. Therefore, magistrate judges may also certify the facts of a criminal contempt occurring in their presence, or outside their presence in any matter referred to them, to a district judge for further contempt proceedings.²⁸⁴

Magistrate judges may exercise civil contempt authority only in civil consent cases under 28 U.S.C. § 636(c) and criminal misdemeanor cases under 18 U.S.C. § 3401. Their authority in these cases is identical to that of a district judge.²⁸⁵ The limited civil contempt authority, though, does not restrict limit the authority of magistrate judges to order sanctions under any other statute or provision of the federal rules.

²⁸⁰ Federal Courts Improvement Act of 2000, Pub. L. No. 106-518, §§ 202-203, 114 Stat. 2410 (2000).

²⁸¹ 28 U.S.C. § 636(e)(2).

²⁸² 28 U.S.C. § 636(e)(5).

²⁸³ 28 U.S.C. § 636(e)(3).

²⁸⁴ 28 U.S.C. § 636(e)(6).

²⁸⁵ 28 U.S.C. § 636(e)(4).

An appeal from a magistrate judge's contempt order in a civil consent case under 28 U.S.C. § 636(c) lies to the court of appeals. An appeal of any other contempt order issued by a magistrate judge is taken to a district judge.²⁸⁶ The underlying principle behind the statute is that an appeal of a magistrate judge's contempt order should be heard by the same court that hears the appeal of the final judgment in the case.

7. Statistics

During the statistical year ended September 30, 2015, magistrate judges nationally disposed of 1,090,734 cases and proceedings nationally, including –

Preliminary proceedings in felony cases	349,938
Misdemeanors and petty offense cases	94,906
Civil cases on consent	16,802
Prisoner litigation	25,959
“Additional duties” in:	
Civil cases	348,963
Criminal cases	192,593
Miscellaneous other proceedings	61,573
Total	1,090,734 ²⁸⁷

Conclusions

The Federal Magistrates Act of 1968 initiated a landmark reform in the work of the federal courts by establishing a new cadre of federal judges within the district courts to assist district judges in disposing of their civil and criminal caseloads. Much of the genius of the Act lies in the great flexibility it provides to the courts. Among other things, it –

- (1) authorizes the federal judiciary itself to establish or discontinue magistrate judge positions when caseload demands change, without having to return to Congress for additional legislation;
- (2) vests the appointment of magistrate judges in the district courts themselves, rather than in the political process; and
- (3) provides magistrate judges with broad judicial authority, as described throughout this paper, but gives each district court discretion to decide what specific duties and proceedings to delegate to its magistrate judges, based on the court's local needs and circumstances.

²⁸⁶ 28 U.S.C. § 636(e)(3).

²⁸⁷ JUDICIAL BUSINESS 2015, *supra* note 56, tabl. S-17. A more detailed breakdown of the duties, including duties by district, may be found in the *Judicial Business of the U.S. Courts* page of the federal judiciary's website, uscourts.gov.

The magistrate judge system has evolved greatly since enactment of the 1968 legislation. Many important and needed statutory changes were made to expand magistrate judge authority, install a strong merit-selection process, improve pay and benefits, and change the title of the office. In addition, over the course of nearly 50 years, the federal judiciary initiated many significant internal enhancements to improve the process for evaluating, authorizing, and eliminating magistrate judge positions; inject greater rigor and diversity into the process for recruiting and appointing magistrate judges; improve and monitor all administrative aspects of the system; and control costs associated with the program,

Most importantly, the volume, range, and importance of the judicial work performed by magistrate judges has expanded greatly over the years as a result of the statutory increases in their judicial authority, prodding by the Congress for greater use of magistrate judges, promotion of greater utilization within the judiciary itself, a substantial increase in the prestige of magistrate judge positions, and favorable case law developments.

Magistrate judges today are an integral and indispensable component of the federal district courts. The great majority of districts use their magistrate judges effectively and extensively, and the remaining courts that delegate fewer duties are challenged by the judiciary on a regular basis to evaluate and expand their usage. As the Supreme Court pointedly asserted in 2015: “[I]t is no exaggeration to say that without the distinguished services of these judicial colleagues, the work of the federal court system would grind nearly to a halt.”²⁸⁸

In summary, to underscore the Supreme Court’s recent endorsement, it is fair to say that the magistrate judge system has clearly lived up to the twin objectives set by Congress in 1968 of: (1) “reform[ing] the first echelon of the Federal judiciary into an effective component of a modern scheme of justice,” and (2) providing the district courts with an efficient supplemental judicial resource to assist in expediting their workload.²⁸⁹

²⁸⁸ 135 S. Ct. at 1938-39.

²⁸⁹ H. R. REP. NO. 1629, 90th Cong., 2d Sess. 11 (1968) and S. REP. NO. 371, 90th Cong., 1st Sess. 9 (1967).