

A GUIDE TO THE FEDERAL MAGISTRATE JUDGE SYSTEM

Peter G. McCabe, Esq.

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

Hon. Gustavo A. Gelpí, Jr.,
United States District Judge and President of the Federal Bar Association

Hon. Michael J. Newman,
United States Magistrate Judge and Chair of the Federal Bar Association's
Magistrate Judge Task Force

August 2014

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*:

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.

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

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
Southern District of Ohio

August 2014

A GUIDE TO THE FEDERAL MAGISTRATE JUDGE SYSTEM

Table of Contents

Summary	7
PART A: EVOLUTION OF THE MAGISTRATE JUDGE SYSTEM	
(1) Historical Antecedents of the System	7
a. The Early Days	8
b. The 1896 Commissioner Statute	8
c. Studies of the Commissioner System	9
(2) The Federal Magistrates Act of 1968	10
a. Legislative Initiatives	10
b. Provisions of the Act	10
c. Implementing the Act	11
(3) Statutory Amendments Enhancing the Office of Magistrate Judge	12
a. Compensation	12
b. Retirement	13
c. Merit Selection	13
d. Title	14
(4) Statutory Amendments Enhancing Magistrate Judges' Authority	14
a. 1976 Legislation – Pretrial Duties	14
(i) The Need for Legislation	14
(ii) Duties Authorized	14
(iii) Scope of Review	15
(iv) Enactment	16
b. 1979 Legislation – Civil Trials and All Misdemeanors	16

(i) Proposals	16
(ii) Enactment	16
c. Other Legislation	17

PART B: THE MAGISTRATE JUDGE SYSTEM TODAY

(1) Magistrate Judge Positions	18
a. Authorization of Positions	18
b. Supplementary Provisions	18
(2) The Bench	19
a. The Early Days	19
b. Appointment of Magistrate Judges as Article III Judges	19
c. Current Status	20
d. Part-time Magistrate Judges	20
e. Diversity	21
(3) Participation in Court Governance	22
a. Participation Encouraged	22
b. National Level	22
c. Circuit Level	22
d. Local Court Level	23

PART C: DUTIES THAT MAGISTRATE JUDGES PERFORM

(1) Local Variations in the Utilization of Magistrate Judges	23
a. Flexibility Authorized by the Act	23
b. Greater Utilization Encouraged	24
c. Utilization Advice	24

(2) Initial Proceedings in Criminal Cases	25
a. Issuance of Criminal Process	26
(i) Complaints, Arrest Warrants, and Summonses	26
(ii) Search Warrants	26
(iii) Electronic Issuance of Process	28
(iv) Wiretaps	28
b. Probable Cause and Release or Detention Proceedings	28
(i) Initial Appearances	28
(ii) Detention Hearings	30
(iii) Detention of Material Witnesses	30
(iv) Preliminary Hearings	31
c. Felony Arraignments and Pleas	31
d. Other proceedings	32
(i) Mental Competency Proceedings	32
(ii) Extradition Proceedings	33
(iii) International Prisoner Transfers	34
(iv) Miscellaneous other Matters	34
(3) Criminal Misdemeanors	34
a. Types of Misdemeanors	35
(i) Classifications	35
(ii) Sources of law	35
b. Applicable Rules and Procedures	36
(i) In General	36
(ii) Initiating Document	37
(iii) Defendant's Consent	38

(iv) Proceedings	38
(v) Judgment, Sentence, and Appeal	40
(vi) Central Violations Bureau	41
(4) Pretrial Matters and “Additional Duties”	41
a. Authority	41
b. Case Management	43
(i) Civil Cases	43
A. Scope of Duties	43
B. Method of Assignment	44
(ii) Criminal Cases	45
c. Settlement	45
(i) Civil Cases	45
(ii) Criminal Cases	46
d. Motions	46
(i) Dispositive Motions	47
(ii) Non-dispositive Motions	48
e. Special Master Proceedings	49
f. Social Security Appeals	50
g. Prisoner Cases	51
(i) State <i>Habeas Corpus</i> Case	51
(ii) Federal <i>Habeas Corpus</i> Case	52
(iii) Petition Challenging Conditions of Confinement	53
h. <i>Voir dire</i> and Jury Selection	54
i. Post-Trial Matters	55
j. Modification or Revocation of Probation and Supervised Release	55

k. Re-Entry Court Proceedings	56
l. Naturalization Proceedings	57
m. Other Matters	57
(5) Civil Cases on Consent of the Litigants	58
a. Procedures	58
b. Advantages	59
c. Constitutional Considerations	60
(6) Contempt Authority	62
(7) Statistics	63
(8) Conclusions	64

A Guide to the Federal Magistrate Judge System

Peter G. McCabe¹

Summary

The Federal Magistrates Act of 1968 was enacted “to reform the first echelon of the Federal judiciary into an effective component of a modern scheme of justice.”² The statute created a corps of new judicial officers to “cull from the ever-growing workload of the U.S. District Courts[.]”³

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 has proven to be one of the most 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 those 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;⁴ 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. Most part-time judges serve at outlying locations or provide the District Court with back-up judicial services.

¹ J.D., Harvard Law School; A.B., Columbia University. Retired 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 H.R. REP. NO. 1629, 90th Cong., 2d Sess., 11 (1968).

³ S. REP. NO. 371, 90th Cong., 1st Sess. 9 (1967).

⁴ On July 1, 2014, there were 531 full-time Magistrate Judge positions and 39 part-time positions.

This paper: (A) explores the evolution of the Magistrate Judge system; (B) describes the current status of the system; and (C) details the various and increasingly significant role of Magistrate Judges in the federal courts.

PART A: EVOLUTION OF MAGISTRATE JUDGES

1. Historical Antecedents of the System

a. The Early Days

The antecedents of the federal Magistrate Judge 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.⁵ 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.⁶ 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.⁷

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.⁸ 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.

⁵ Judiciary Act of 1789, Ch. 20, § 33, 1 Stat. 91.

⁶ 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.

⁷ Commissioners received fees authorized by state law. Federal laws also provided fees for designated services.

⁸ Act of May 28, 1896, Ch. 252, §§ 19, 21, 29 Stat. 184.

In addition, Congress established special commissioner positions for several national parks, beginning with a position for Yellowstone National Park in 1894.⁹ Unlike United States commissioners, the park commissioners could hear and determine 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.¹⁰

c. Studies of 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.¹¹ The Office’s report, filed in 1942, concluded that the commissioner system had several serious problems that needed to be addressed.¹² The greatest concern was the fact 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 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.”¹³

The fees were increased by statute in 1946 and 1957.¹⁴ 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.

⁹ Act of May 7, 1894, ch. 72, §§ 5, 7, 28 Stat. 74. The national park commissioners were paid a salary in addition to fees.

¹⁰ Act of October 9, 1940, ch. 785, 54 Stat. 1058.

¹¹ JCUS-SEP 41, p. 12.

¹² *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.

¹³ JCUS-SEP 43, pp. 11-14. The Conference also endorsed a procedures manual, instructing commissioners on how to perform their duties.

¹⁴ Act of August 1, 1946, ch. 721, 60 Stat. 752; Act of September 2, 1957, Pub. L. No. 85-276; 71 Stat. 600 (1957).

At the Judicial Conference's request, the Administrative Office drafted legislation in 1964 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 1946.¹⁵ 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.¹⁶ 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

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.¹⁷

Senate staff then drafted legislation to replace the commissioner system with an upgraded system of new federal judicial officers called United States Magistrate Judges, drawing in large measure on the work of the Administrative Office. 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 judicial officers; and
- (2) to provide judicial relief to District Judges in handling their caseloads.¹⁸

b. Provisions of the 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 Magistrate Judges and a 4-year term for part-time Magistrate

¹⁵ Act of June 28, 1946, ch. 512, § 34, 60 Stat. 324 (1946).

¹⁶ See *Senate Hearings*, *supra* note 9, at 113-15.

¹⁷ *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).

¹⁸ S. REP. NO. 371, 90th Cong., 1st Sess. 9 (1967).

Judges, but it specified a strong preference for a system of full-time service. The statute increased the authority of Magistrate Judges 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 Magistrate Judges to include disposition of all “minor offenses,” whether committed on federal property or not;¹⁹ 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 applications for post-trial relief 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.²⁰

c. Implementing the Act

The Judicial Conference established a pilot program in five districts²¹ 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 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

¹⁹ 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.

²⁰ See S. REP. NO. 371, 90th Cong., 1st Sess. 25 (1967); see also H. R. REP. NO. 1629, 90th Cong., 2d Sess. 19 (1968).

²¹ The District of Columbia, the Eastern District of Virginia, the District of New Jersey, the District of Kansas, and the Southern District of California.

effectively to Magistrate Judges. After the follow-up surveys, the Judicial Conference, in September 1970, authorized a national system weighted heavily towards part-time service, with an initial national complement of 82 full-time Magistrate Judges and 449 part-time Magistrate Judges.²² 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.²³

3. Statutory Amendments Enhancing the Office of Magistrate Judge

a. 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.²⁴ 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 judges' outside income, employment, and honoraria.²⁵

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.²⁶

²³ 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

²⁴ 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. JCUS-MAR 87, p. 32.

²⁵ Pub. L. No. 101-194, 103 Stat. 1716 (1989).

²⁶ See *Beer v. United States*, 696 F.3d 1174 (Fed. Cir. 2012), *cert. denied*, ___ U.S. ___, 133 S. Ct. 1997 (2013) and collateral judicial-salary cases.

b. 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.²⁷

c. Merit Selection

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 these positions. As a result, provisions were included in the legislation mandating a merit-selection process for Magistrate Judges.²⁸

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.²⁹ 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 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.³⁰ 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.³¹

²⁷ Retirement and Survivors' Annuities for Bankruptcy Judges and Magistrates Act of 1988, Pub. L. No. 100-659, 102 Stat. 3918.

²⁸ 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).

²⁹ 28 U.S.C. § 631(b)(5).

³⁰ *Regulations of the Judicial Conference of the United States Establishing Standings and Procedures for the Appointment and Reappointment of United States Magistrates*, § 420.

³¹ *The Selection, Appointment, and Reappointment of United States Magistrate Judges*.

d. 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 Magistrate Judges. 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.”³² 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.

a. 1976 Legislation – Pretrial Duties

i. The Need for Legislation

In 1974, the Supreme Court, in *Wedding v. Wingo*,³³ 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 Magistrate Judges 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.³⁴

ii. 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

³³ 418 U.S. 461 (1974).

³⁴ 418 U.S. at 487.

proposal authorized 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.³⁵

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.³⁶ 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 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*,³⁷ in which the court of appeals 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*.³⁸ In *United States v. Raddatz*,³⁹ 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.

³⁵ JCUS-MAR 75, pp. 31-32.

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

³⁸ 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).

³⁹ 447 U.S. 663, 675-76 (1980).

iv. Enactment

The bill, with amendments, passed the House and was signed into law on October 21, 1976.⁴⁰ 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

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 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 (“DOJ”) in 1977 proposed legislation 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 DOJ’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.⁴¹

ii. Enactment

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 DOJ strongly favored limiting appeals exclusively

⁴⁰ Pub. L. No. 944-577, 90 Stat. 2729 (1976).

⁴¹ 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* JCUS-MAR 80, p. 34; JCUS-SEP 82, pp. 92-93; JCUS-MAR 83, p. 15; JCUS-SEP 90, p. 94.

to a District Judge.⁴² 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.⁴³

The bill passed both houses of Congress in 1978, but did not become law that year because 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 as 28 U.S.C. § 636(c) and the criminal-trial provisions at 18 U.S.C. § 3401.

c. Other 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 were directed to the court of appeals.⁴⁴ The need for the defendant's consent to disposition of a petty offense case by a Magistrate Judge was limited substantially in 1996⁴⁵ and eliminated completely in 2000.⁴⁶

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.⁴⁷ 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.⁴⁸

⁴² See, *e.g.*, the testimony and statement of Attorney General Griffin B. Bell, *Senate Hearings*, *supra* note 22, 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. JCUS-SEP 77, pp. 62-63; JCUS-MAR 78, pp. 16-17.

⁴³ 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* note 39.

⁴⁴ Federal Courts Improvement Act of 1996, Pub. L. No. 104-317, § 207, 110 Stat. 3847 (1996).

⁴⁵ *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.

⁴⁶ Federal Courts Improvement Act of 2000, Pub. L. No. 106-518, § 203(b), 114 Stat. 2410 (2000).

⁴⁷ *Id.*, §§ 202-203.

⁴⁸ The contempt provisions are set forth at 28 U.S.C. § 636(e).

PART B: THE MAGISTRATE JUDGE SYSTEM TODAY

The Federal Magistrates Act of 1968 created a strong foundation and framework for the Federal Magistrate Judge System. But it has taken more than 40 years of statutory changes and important internal actions by the judiciary to transform the system into what it is today.

1. Magistrate Judge Positions

a. Authorization of Positions

Under the 1968 Act, the Judicial Conference, rather than Congress, authorizes Magistrate Judge positions. It has done so very deliberately 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. On July 1, 2014, there were 531 authorized full-time Magistrate Judge positions and only 40 part-time positions. 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 appears to 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 perilous financial state of the federal judiciary – resulting from several years of inadequate appropriations and the damaging effects of Congressional sequester – has caused major cutbacks in court staff, operating expenses, and federal defender services. The prevailing budgetary crisis has led the Judicial Conference to initiate widespread cost-containment efforts 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.

b. Supplementary Provisions

The Judicial Conference takes advantage of special provisions in the statute that allow it to exert 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.⁴⁹ 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. Additionally, the circuit judicial councils frequently recall retired Magistrate Judges to active status on a voluntary basis to perform judicial duties, either in their own courts or in other courts in need of assistance.⁵⁰

2. The Bench

a. The Early Days

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 Magistrate Judges a broad range of duties or civil-consent authority. Several districts did not use their Magistrate Judges effectively, and some did not address Magistrate Judges as “judge” before the title was changed by statute in 1990.

b. Appointment of Magistrate Judges as Article III Judges

In 1976, two Magistrate Judges 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 June 15, 2014, 162 full-time Magistrate Judges and 7 part-time Magistrate Judges had each been appointed as Article III judges -- to serve as U.S. District Judges and, in one or more instances, as U.S. Circuit Judges. Magistrate Judges have been appointed to District Judgeships in 68 of the 91 Article III District Courts and 5 of the 12 circuit courts of appeals.

⁴⁹ 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, 87 Magistrate Judge positions at 60 locations have been authorized to serve in one or more adjoining districts.

⁵⁰ 28 U.S.C. § 636(h). As of July 1, 2014, 59 retired Magistrate Judges were serving on recall.

c. Current Status

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 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 been 49 to 50, 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 78 new full-time Magistrate Judges appointed in 2012 and 2013, for example, 35 came directly from law practice, 19 from a U.S. attorney’s office, 10 from a federal or state defender’s office, 8 from another judicial position, 4 from law clerk positions, and 2 from city counsel positions.⁵²

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.⁵³ As of July 1, 2014, there were 39 authorized part-time positions nationally. Most are established at outlying locations to permit 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 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.⁵⁴

⁵² See *Judicial Business of the U.S. Courts, Annual Reports of the Director of the Administrative Office*, 2012 and 2013.

⁵³ 28 U.S.C. 633(a)(3).

⁵⁴ 28 U.S.C. § 636(c)(1).

e. Diversity

Among the initial complement of 82 full-time Magistrate Judges who took office by July 1, 1971, there were three women and three African-Americans. As the number of Magistrate Judge 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 minorities.⁵⁶

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.⁵⁷ The Judicial Conference's selection regulations encourage the courts to appoint diverse selection panels and ensure that public notices of vacant Magistrate Judge positions reach a wide audience of qualified applicants, including women and minorities.⁵⁸

The federal judiciary has repeatedly affirmed its commitment to utilize fair employment practices and increase 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, are active in promoting outreach efforts of various kinds.⁵⁹ Among other things, the chairs of the Conference's Magistrate Judges Committee and Judicial Resources Committee send a letter to every 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*.

⁵⁶ *The Judiciary 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 (14.9%). Twenty five judges (5.8%) did not report their ethnicity.

⁵⁷ “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).

⁵⁸ “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. *Regulations of the Judicial Conference of the United States Establishing Standings and Procedures for the Appointment and Reappointment of United States Magistrates*, §§ 420.20.10 and 420.30.20. See JCUS-SEP 09, p. 25.

⁵⁹ The current diversity 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.⁶⁰ 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.⁶¹ 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.”⁶²

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.⁶³

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.⁶⁴ 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 conferences. In 2008, Magistrate Judges were formally added to the statutory list of judges summoned to attend annual circuit conferences.⁶⁵ In addition, all but two circuits now invite a

⁶⁰ 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.

⁶¹ See *Long Range Plan for the Federal Judiciary*, 1995, Recommendation 50, p. 84. Approved JCUS-SEP 95, pp. 38-39.

⁶² *Long Range Plan for the Federal Judiciary*, 1995, Implementation Strategy 50c, pp. 84-85. Approved JCUS-SEP 95, pp. 38-39.

⁶³ Federal Courts Improvement Act of 1996, Pub. L. No. 104-317, § 207, 101 Stat. 3847 (1996).

⁶⁴ JCUS-MAR 04, p. 22.

⁶⁵ 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.

Magistrate Judge and a Bankruptcy Judge to attend proceedings of the circuit judicial councils as non-voting participants.⁶⁶ 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.⁶⁷ 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.⁶⁸ Magistrate Judges routinely serve on these, and other, local court committees.

At least 40 of the 91 Article III 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 can be divided into four broad categories: (1) initial proceedings in criminal cases; (2) criminal misdemeanors; (3) pretrial matters and other proceedings in civil and criminal cases; and (4) civil cases 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 courts, based on differences in caseloads, local conditions, and the preferences of District Judges.

⁶⁶ 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.

⁶⁷ JCUS-MAR 90, p. 15.

⁶⁸ 28 U.S.C. § 2077(b).

The Act requires each District Court to establish local rules for the discharge of duties by its Magistrate Judges.⁶⁹ The content of the local rules, however, vary greatly from district to district. In some districts, the local rules list the various duties of Magistrate Judges and the proceedings that they are authorized by the court to conduct. In other districts, the rules merely state that the court has authorized 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. Greater Utilization Encouraged

In 1983, the General Accounting Office filed a positive report declaring 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 that 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].”⁷⁰ The GAO concluded that Magistrate Judges should be used more widely by the courts and the Judicial Conference should disseminate more information on the effective use of Magistrate Judges and urge the courts to assign them more duties.

Likewise, the Federal Courts Study Committee, established by statute on an ad hoc basis to propose changes to improve the federal court system,⁷¹ recommended in 1990 that a catalog be compiled of all cases relating to the authority of Magistrate Judges and be made available to District Judges and Magistrate Judges.⁷² In 1995, the Judicial Conference’s *Long Range Plan for the Federal Judiciary* cited the importance of local flexibility, 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.”⁷³

c. Utilization Advice

In response, the Administrative Office compiled and regularly updates an inventory and case law digest of Magistrate Judge duties to assist the courts.⁷⁴ In addition, the Magistrate Judges Committee of the Judicial Conference has issued a set of common-sense *Suggestions for Utilization of Magistrate Judges* for the courts, drawn from its years of program oversight and close observation of the use of Magistrate Judges in all the districts. The *Suggestions* emphasize

⁶⁹ 28 U.S.C. § 636(b)(4).

⁷⁰ *Potential Benefits of Federal Magistrates System Can Be Better Realized*, pp. i and 6, GAO GGD-84-46 (July 8, 1983).

⁷¹ Federal Courts Study Act, Pub. L. No. 100-172, 102 Stat. 4644 (1988).

⁷² *Report of the Federal Courts Study Committee*, April 2, 1990, pp. 80-81.

⁷³ Recommendation 65 and its advisory note, at 101-02. JSUC-SEP 95, pp. 38-39.

⁷⁴ As suggested by the Federal Courts Study Committee, the Administrative Office also prepared a constitutional analysis of Magistrate Judges’ judicial authority and an analysis of the Federal Magistrates Act.

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:

- 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 commissioner duties consisted essentially of issuing criminal process, administering oaths, conducting probable cause proceedings, and binding defendants over for trial in the District Court. But Magistrate Judges also conduct a range of other proceedings during the initial stages of federal criminal cases under authority of 28 U.S.C. § 636(b)(1) and (3).

The Federal Rules of Criminal Procedure were generally updated 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 use the term “Magistrate Judge” in several 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: “When these rules authorize a Magistrate Judge to act, any other federal judge may act.”⁷⁵ Thus, the rules authorize both District Judges and Magistrate Judges to conduct the same initial proceedings.⁷⁶

Initial proceedings in criminal cases normally arise on short notice and must be handled promptly, ahead of 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

⁷⁵ 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.”

⁷⁶ 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.

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.

The duties of Magistrate Judges at the initial stages of a federal criminal case can be grouped conveniently into four general categories: (1) issuance of criminal process; (2) conduct of bail and detention proceedings; (3) conduct of arraignments; and (4) other proceedings.

a. Issuance of Criminal Process

i. Complaints, Arrest Warrants, and Summonses

A criminal complaint is the initiating document in a federal criminal case, unless a defendant is first indicted by a grand jury.⁷⁷ 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.⁷⁸ 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.⁷⁹

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 illegally possessed items; (3) property used or intended for use in committing a crime; or (4) a person to be arrested or one who is unlawfully restrained.⁸⁰ They also have authority to issue administrative search and inspection warrants required under a variety of federal statutes.⁸¹

Search warrants are issued *ex parte* based on an application and accompanying affidavits presented by a law enforcement officer or attorney for the government.⁸² In reviewing a warrant application, a Magistrate Judge must determine that the documents presented by the government

⁷⁷ 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.

⁷⁸ FED. R. CRIM. P. 3.

⁷⁹ 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.

⁸⁰ FED. R. CRIM. P. 41(b) and (c).

⁸¹ Compare 28C.F.R. §§ 60.2 with 60.3.

⁸² 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 Judiciary's website, uscourts.gov.

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 is used directly in committing a crime. But warrants today are sought more often because a computer or other storage device is thought to contain electronically stored 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 it. 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.⁸³ 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 or property.⁸⁴ They also may issue anticipatory or “sneak and peek” warrants. A

⁸³ “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 Rule 41.

⁸⁴ 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).

Magistrate Judge may delay notice of a search warrant if the government provides adequate justification and if the delay is authorized by statute.⁸⁵

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.⁸⁶ 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. 41. 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.”⁸⁷

iv. Wiretaps

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

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.⁸⁸ If the arrest is made without a warrant, the government must promptly file a complaint that meets the probable cause requirements of Rule

⁸⁵ 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).

⁸⁶ See 18 U.S.C. § 3123.

⁸⁷ 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.

⁸⁸ FED. R. CRIM. P. 5(a)(1). An initial appearance may be conducted using video teleconferencing technology, in the Magistrate Judge’s discretion, 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).

4(a). At the initial appearance, the Magistrate Judge will explain the nature of the proceedings and advise the defendant of: (1) the charges and statutory maximum sentence; (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.⁸⁹

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 shows that he or she is "financially unable to obtain counsel."⁹⁰ If the defendant does not speak English, the Magistrate Judge will obtain an interpreter.⁹¹

Under the Bail Reform Act,⁹² 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."⁹³ 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 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.⁹⁴ 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.

⁸⁹ FED. R. CRIM. P. 58. 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.

⁹⁰ 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.

⁹¹ 28 U.S.C. § 1827.

⁹² 18 U.S.C. § 3141-3150.

⁹³ 18 U.S.C. § 3142(b).

⁹⁴ 18 U.S.C. § 3142(c)(1)(B).

The Magistrate Judge may amend the release order at any time to impose additional or different conditions of release.⁹⁵ If, for example, the defendant violates a condition of release, the government or the probation/pretrial services office may ask to modify or revoke the release order.

ii. Detention Hearings

A Magistrate Judge must hold a detention hearing on the government's motion in certain categories of serious cases.⁹⁶ In addition, a detention hearing may be held on the Magistrate 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.⁹⁷ The hearing must be held immediately upon the defendant's first appearance before a Magistrate Judge, unless the government seeks a continuance.⁹⁸

At the detention hearing, the defendant may present information and cross-examine witnesses. If detention is ordered, the Magistrate Judge must file written findings of fact and a written statement of reasons.⁹⁹ A District Judge may review a Magistrate Judge's release order on motion of either party. A defendant may move the court to revoke or amend a Magistrate Judge's detention order.¹⁰⁰

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 criminal proceedings, and if it is shown that it may become impracticable to secure the presence of the person by subpoena."¹⁰¹

⁹⁵ 18 U.S.C. § 3142(c)(3).

⁹⁶ 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).

⁹⁷ 18 U.S.C. § 3142(f)(2).

⁹⁸ 18 U.S.C. § 3142(f). Continuances, though, are stringently limited. *Id.* 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.

⁹⁹ 18 U.S.C. § 3142(i)(1).

¹⁰⁰ 18 U.S.C. § 3145. A District Judge, on application, should review a Magistrate Judge's release or detention order *de novo*.

¹⁰¹ 18 U.S.C. § 3144.

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.¹⁰² The defendant may cross-examine witnesses and introduce evidence at the hearing.

c. Felony Arraignments and Pleas

After the defendant has been indicted or charged by information, an arraignment must be conducted in open court with the defendant present.¹⁰³ The Magistrate 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.¹⁰⁴

The defendant may plead guilty, not guilty, or *nolo contendere*.¹⁰⁵ 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 Magistrate 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.¹⁰⁶

¹⁰² 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.

¹⁰³ 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).

¹⁰⁴ FED. R. CRIM. P. 10(a).

¹⁰⁵ FED. R. CRIM. P. 11(a).

¹⁰⁶ FED. R. CRIM. P. 11(b)(2) and (3)

Magistrate Judges have no authority to dispose of felony cases. Nevertheless, most District Courts assign Magistrate Judges to conduct arraignments in felony cases. The practice saves time for District Judges, but it also 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. 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, 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 make such arraignments. In more than a quarter of the districts, Magistrate Judges are not referred felony guilty pleas at all.¹⁰⁷

d. Other 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.¹⁰⁸

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

¹⁰⁷ 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.

¹⁰⁸ 18 U.S.C. § 4241(a).

court.¹⁰⁹ If necessary, the Magistrate Judge may order the defendant committed to a suitable hospital or facility for a reasonable period.¹¹⁰

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.¹¹¹ 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 Magistrate 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.¹¹²

ii. Extradition Proceedings

Magistrate Judges conduct extradition hearings, which are probable cause proceedings governed by treaty, rather than the Federal Rules.¹¹³ 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.¹¹⁴ 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.

¹⁰⁹ 18 U.S.C. § 4241(b).

¹¹⁰ The commitment period may not exceed 30 days, but may be extended for 15 days for good cause. 18 U.S.C. § 4247(h).

¹¹¹ 18 U.S.C. § 4247(d) and (e).

¹¹² See 18 U.S.C. §§ 4241(d), 4246, and 4248.

¹¹³ FED. R. CRIM. P. 1(a)(5) makes the Federal Rules inapplicable to the extradition and rendition of a fugitive.

¹¹⁴ See 18 U.S.C. § 3184. The contents of the hearing depend 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).

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.¹¹⁵ 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 voluntarily consents to the transfer with full knowledge of the consequences.¹¹⁶

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 empanelling a grand jury; accepting the return of grand jury indictments;¹¹⁷ conducting *Nebbia* hearings to determine the source of bail provided on behalf of a criminal defendant;¹¹⁸ issuing warrants to gain access to telephone and toll records;¹¹⁹ issuing peace bonds;¹²⁰ 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.¹²¹ In practice, misdemeanor cases

¹¹⁵ See 18 U.S.C. §§ 4100-4115.

¹¹⁶ 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.

¹¹⁷ 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.

¹¹⁸ See *United States v. Nebbia*, 357 F.2d 303 (2d Cir. 1966).

¹¹⁹ 18 U.S.C. § 2703.

¹²⁰ 50 U.S.C. § 23.

¹²¹ 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

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. Classifications

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

Above the level of petty offenses:

Class A misdemeanors – maximum penalty: not more than 1 year of incarceration, but more than 6 months, and a \$100,000 fine;

Petty Offenses:¹²³

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.¹²²

ii. Sources of Law

Federal misdemeanors arise from three different sources: (a) federal statutes; (b) state statutes assimilated into federal law; and (3) federal agency regulations.

- (a) *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.

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.

¹²³ A petty offense is defined in 18 U.S.C. § 19 as a Class B misdemeanor, a Class C misdemeanor, or an infraction.

¹²² See 18 U.S.C. §§ 3581(b) and 3571(b). The maximum fines are higher for organizations and for Class A misdemeanors resulting in death.

- (b) *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.¹²⁴ 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.”
- (c) *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 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.¹²⁵

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.

¹²⁴ See *Lewis v. United States*, 523 U.S. 155 (1998).

¹²⁵ 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 six 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 three months and \$100); and 16 U.S.C. § 1540 (setting penalties for violation of regulations to protect endangered species, with penalties of up to one year and \$50,000).

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.¹²⁶ 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.¹²⁷ In reality, only a small percentage of misdemeanor cases are tried before a jury.¹²⁸

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.¹²⁹ 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.”¹³⁰ In practice, counsel is appointed in all petty offenses cases in which imprisonment may be imposed.¹³¹

ii. Initiating Document

A misdemeanor may be initiated by an indictment, information, or complaint. A petty offense may proceed also on a citation or violation notice.¹³² Misdemeanors and petty offenses that may result in imprisonment are generally initiated by an information or complaint.¹³³ 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.

¹²⁶ 18 U.S.C. § 3401(b).

¹²⁷ *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).

¹²⁸ In 2013, only 11 Class A misdemeanor cases were tried by Magistrate Judges with a jury out of 8,385 cases terminated. *Judicial Business of the U.S. Courts, 2013*, Table M-1A.

¹²⁹ 18 U.S.C. § 3006A(a)(1)(A).

¹³⁰ 18 U.S.C. § 3006A(a)(2).

¹³¹ 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).

¹³² FED. R. CRIM. P. 58(b).

¹³³ Some cases, though, may have been filed originally by indictment as felonies, are later downgraded, often through negotiation, to a misdemeanor.

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 misdemeanors.¹³⁴ In 2000, the consent requirement was eliminated for all petty offenses.¹³⁵ 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.¹³⁶

iv. Proceedings

Misdemeanor proceedings are normally conducted in the federal courthouse, like all other criminal proceedings. They must be recorded by a court reporter or suitable recording device.¹³⁷ Clerk's office staff provide courtroom support, keep case records, and accept fines. The probation/pretrial services 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.¹³⁸

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.¹³⁹ 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.¹⁴⁰

¹³⁴ Federal Courts Improvement Act of 1996, Pub. L. No. 104-317, § 202, 110 Stat. 3847 (1996).

¹³⁵ Federal Courts Improvement Act of 2000, Pub. L. No. 106-518, § 203(b), 114 Stat. 2410 (2000).

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

¹³⁷ FED. R. CRIM. P. 58(e).

¹³⁸ 19 U.S.C. § 1827(d).

¹³⁹ FED. R. CRIM. P. 43.

¹⁴⁰ The 1944 committee note to 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.¹⁴¹ 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.¹⁴²

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.”¹⁴³ In other cases, the arraignment and plea must comply with the requirements of Fed. R. Crim. P. 11.¹⁴⁴ 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.¹⁴⁵

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 petty offense cases, trial proceedings can 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 offense cases.¹⁴⁶

¹⁴¹ FED. R. CRIM. P. 58(b)(2).

¹⁴² FED. R. CRIM. P. 58(b)(2).

¹⁴³ FED. R. CRIM. P. 58(c)(1).

¹⁴⁴ 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).

¹⁴⁵ FED. R. CRIM. P. 58(b)(3).

¹⁴⁶ In *U.S. v. Roblero-Solis*, 588 F.3d 692 (9th Cir. 2009), for example, 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.

v. Judgment, Sentence, and Appeal

The federal sentencing guidelines apply to Class A misdemeanors, but not to petty offenses and infractions.¹⁴⁷

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.¹⁴⁸ 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.¹⁴⁹

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.¹⁵⁰ At sentencing, the judge must allow the parties to comment on the presentence report and resolve any matters in dispute.¹⁵¹ 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.¹⁵²

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.¹⁵³

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.¹⁵⁴ After imposing sentence, the Magistrate Judge must advise the defendant of any right to appeal the sentence.¹⁵⁵

¹⁴⁷ Sentencing Guidelines §§ 1B1.9, 2X5.2, and Appendix A.

¹⁴⁸ 18 U.S.C. § 3401(d).

¹⁴⁹ 18 U.S.C. § 3401(h)(1).

¹⁵⁰ FED. R. CRIM. P. 32(c)(1).

¹⁵¹ See FED. R. CRIM. P. 32(i)(1)-(3).

¹⁵² FED. R. CRIM. P. 32(j).

¹⁵³ FED. R. CRIM. P. 58(c)(3).

¹⁵⁴ 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 imposed by a Magistrate Judge. 18 U.S.C. § 3742(h).

¹⁵⁵ FED. R. CRIM. P. 32(j), 58(c)(4).

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 court to issue a local forfeiture rule that lets defendants end a case by paying 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. Authority

The 1976 amendments to the Federal Magistrate Judges Act authorize District Courts, "notwithstanding any provision of the law to the contrary,"¹⁵⁶ to delegate to a Magistrate Judge: "any pretrial matter pending before the court;" and "such additional duties as are not inconsistent with the Constitution and laws of the United States."¹⁵⁷

The "additional duties" provision, included in the original 1968 Act, was relocated by the 1976 amendments to "an entirely separate subsection [to] emphasize[e] that it is not restricted in

¹⁵⁶ 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., 2d Sess. 9 (1976); S. Rep. No. 625, 94th Cong., 2d Sess. 7 (1976).

¹⁵⁷ 28 U.S.C. §§ 636(b)(1)(A), 636(b)(3).

any way by any other specific grant of authority to magistrates.”¹⁵⁸ 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. In *Gomez v. United States*,¹⁵⁹ the Court ruled in 1989 that duties performed under the general “additional duties” provision of the statute should bear some reasonable relation to duties specified in the Act. But two years later in *Peretz v. United States*,¹⁶⁰ it took a much broader approach and held 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 consistent with the basic purposes of the statute.¹⁶¹

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 and to serve as a special master in any case upon the consent of the litigants. In *Peretz*, the Court found that consent had 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.

¹⁵⁸ 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), quoting S. Rep. No. 625, 94th Cong., 2d Sess. 10 (1976).

¹⁵⁹ 490 U.S. 858 (1989).

¹⁶⁰ 501 U.S. 923 (1991).

¹⁶¹ 501 U.S. at 932-33.

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 in fact 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.

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 or may not be referred case-dispositive motions, such as summary judgment and dismissal motions. 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.¹⁶²

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 a Magistrate Judge 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. Method of Assignment

The way that civil cases are assigned to Magistrate Judges varies among districts. In many courts, the Clerk's Office randomly assigns both a District Judge and a Magistrate Judge to a 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 more than a quarter 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 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

¹⁶² 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.*

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.¹⁶³

ii. Criminal Cases

Criminal cases are given priority in the federal courts because of the time requirements of the Speedy Trial Act.¹⁶⁴ The 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.¹⁶⁵ The Act, though, specifies that certain periods of time are to be excluded in computing the time limits in order to take account of reasonable and necessary delays that may occur in a case.¹⁶⁶

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 cases.¹⁶⁷ 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.¹⁶⁸

c. Settlement

i. Civil Cases

Magistrate Judges in most districts are active in settlement 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

¹⁶³ *Suggestions for Utilization of Magistrate Judges, No. 3.*

¹⁶⁴ 18 U.S.C. §§ 3161, *et seq.*

¹⁶⁵ 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.

¹⁶⁶ The statute, for example, allows a court to exclude for 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).

¹⁶⁷ 18 U.S.C. § 3165 and § 3166.

¹⁶⁸ 18 U.S.C. § 3168.

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 and trial.¹⁶⁹

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 evaluate the program.¹⁷⁰ 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.¹⁷¹ In 2013, the Supreme Court held that it was a flagrant 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.¹⁷²

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

¹⁶⁹ *Suggestions for Utilization of Magistrate Judges, No. 3.*

¹⁷⁰ 28 U.S.C. § 651(b), (d).

¹⁷¹ 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 left the prohibition intact in 2002, 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.

¹⁷² *United States v. Davila*, ___ U.S. ___, 133 S. Ct. 2139 (2013).

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 –

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.¹⁷³

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 dispositive matters in civil cases “a pretrial matter dispositive of a claim or defense or a prisoner petition challenging the conditions of confinement.”¹⁷⁴ In criminal cases, the rules include “any matter that may dispose of a charge or defense.”¹⁷⁵ 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.¹⁷⁶

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.¹⁷⁷

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 copy.¹⁷⁸ Failure to object waives a party’s right to review.¹⁷⁹

¹⁷³ 28 U.S.C. § 636(b)(1)(A).

¹⁷⁴ Fed. R. Civ. P. 72(b)(1).

¹⁷⁵ Fed. R. Crim. P. 59(b)(1).

¹⁷⁶ See 2005 Committee Note to FED. R. CRIM. P. 59.

¹⁷⁷ 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.

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

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.¹⁸⁰

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.¹⁸¹ 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.¹⁸²

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).

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.¹⁸⁴

The pretrial matters that may 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

¹⁷⁹ 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 Judge’s 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 293, 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.

¹⁸⁰ 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).

¹⁸¹ FED. R. CIV. P. 72(b)(1).

¹⁸² AO Form 85A. Proceedings on consent are covered by FED. R. CIV. P. 73, rather than FED. R. CIV. P. 72.

¹⁸⁴ 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 when “a pretrial matter not dispositive of a party’s claim or defense is referred to a Magistrate Judge to hear and decide. . . .”

criminal or civil case.”¹⁸⁵ 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.¹⁸⁶

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, subject to *de novo* review.

e. Special Master Proceedings

A District Judge may designate a Magistrate Judge to serve as a special master in any civil case, upon consent of the parties pursuant to Federal Rule 53(b).¹⁸⁸ 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 special master that could readily be performed in the role of Magistrate Judge.¹⁹⁰

¹⁸⁵ H.R. Rep. No. 1609, 94th Cong., 2d Sess. 9 (1976); S. Rep. No. 625, 94th Cong., 2d Sess. 7 (1976).

¹⁸⁶ FED. R. CIV. P. 72(a); FED. R. CRIM. P. 59(a).

¹⁸⁸ FED. R. CIV. P. 53(a) requires “some exceptional condition” or the need to perform an accounting or resolve a difficult computation of damages, unless the parties consent; *see also* 28 U.S.C. § 636(b)(2).

¹⁹⁰ *See* 2003 Committee Note to FED. R. CIV. P. 53.

Magistrate Judges, though, are often 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.¹⁹¹

f. Social Security Appeals

Magistrate Judges serve in many districts to review Social Security appeals, *i.e.*, appeals from the denial of Social Security benefits, especially disability benefits, by the Commissioner of the Social Security Administration. 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 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 recommendation for disposition of the appeal by a District Judge, unless both sides consent to Magistrate Judge jurisdiction. 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 appeals 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 recommendation, 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 merits of the appeal.

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 appeals. About half the Social Security appeals handled by Magistrate Judges nationally

¹⁹¹ See FED. R. APP. P. 48.

are now disposed of directly by a Magistrate Judge on consent, rather than by filing a report and recommendation.¹⁹²

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 post[-]trial relief made by individuals convicted of criminal offenses and prisoner petitions challenging conditions of confinement.”¹⁹³ They are handled like dispositive motions in civil cases.

Prisoner petitions are referred routinely to Magistrate Judges in most, but not all, District 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 conditions 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 Case

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.¹⁹⁵ 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.

¹⁹² During the year ending September 30, 2013, Magistrate Judges disposed of 4,992 Social Security appeals on consent of the parties and 4,977 through reports and recommendations to a District Judge. *Judicial Business of the U.S. Courts, 2013*, Table M-4B, <http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2013/appendices/M04BSep13.pdf>.

¹⁹³ 28 U.S.C. § 636(b)(1)(B).

¹⁹⁵ See also 28 U.S.C. § 2241 (dealing with the power to issue writs of *habeas corpus*).

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.¹⁹⁶ 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.¹⁹⁷

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.¹⁹⁸ If a Magistrate Judge conducts the evidentiary hearing, he or she will file proposed findings and recommendations for disposition of the petition.¹⁹⁹ A party may file objections within 14 days after being served, and a District Judge must hear *de novo* any proposed finding or recommendation to which objection is made.²⁰⁰

As a general rule, District Courts do not refer *habeas corpus* cases to Magistrate Judges where 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 Case

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 sentence authorized by law; or that it is otherwise subject to collateral attack.²⁰¹ 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

¹⁹⁶ 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.

¹⁹⁷ SECTION 2254 RULE 4.

¹⁹⁸ SECTION 2254 RULE 8(a).

¹⁹⁹ 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 Magistrate Judge may perform the duties of a District Judge under the rules, as authorized under 28 U.S.C. § 636(b).

²⁰⁰ SECTION 2254 RULE 8(b). *See also* FED. R. CIV. P. 72(b)(2) and (3).

²⁰¹ 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.

Judge to refer the motion to a Magistrate Judge to conduct hearings and file proposed findings of fact and recommendations for disposition.²⁰²

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.²⁰³ Referral may also duplicate judicial efforts 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.²⁰⁴

iii. Petition Challenging Conditions of Confinement

A petition challenging conditions of confinement is filed under the Civil Rights Act of 1871, 42 U.S.C. § 1983, by a prisoner in state custody. 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 prisoner's constitutional rights.²⁰⁵

Prisoners commonly allege that they have suffered cruel and unusual punishment, or a deprivation of liberty or property without due process of law, because of the actions of prison officials. The range of allegations is wide, and frequently charged violations include such diverse matters as: prison overcrowding; inadequate protection against violence; improper searches by guards; other 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.

²⁰² SECTION 2255 RULE 8(b).

²⁰³ *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.

²⁰⁴ *Suggestions for Utilization of Magistrate Judges, No. 8*.

²⁰⁵ See *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971).

Congress, moreover, has attempted to control prisoner litigation by enacting the Prison Litigation Reform Act.²⁰⁶ 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.²⁰⁷ It also requires prisoners who proceed *in forma pauperis* to pay the full filing fee in installments according to a statutory formula.²⁰⁸

The Act requires a court, *sua sponte* or on motion, to screen all prison conditions 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 may be granted; or (4) seeks monetary relief from a defendant who is immune from such relief.²⁰⁹ District Judges 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.²¹⁰

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 support staff.

h. *Voir dire* and Jury Selection

The Supreme Court held in *Peretz* 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.²¹¹ 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.

²⁰⁶ 42 U.S.C. § 1997e.

²⁰⁷ 42 U.S.C. § 1997e(a) and (e).

²⁰⁸ 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).

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

²¹⁰ 42 U.S.C. § 1997e(f).

²¹¹ 501 U.S. 923 (1991). *See also Gomez v. United States*, 490 U.S. 858 (1989) (a Magistrate Judge may not conduct *voir dire* in a felony case if the defendant objects). The express consent of the defendant's counsel is sufficient to permit a Magistrate Judge to preside over jury selection in a felony. *Gonzalez v. United States*, 551 U.S. 242 (2008).

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 and to answer a juror’s question and 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.

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.²¹² 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.²¹³

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 probation office or U.S. Attorney’s office may ask the court for revocation or modification of 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.²¹⁴

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 an opportunity to: written notice of the alleged violation; disclosure of the evidence against him or

²¹² FED. R. CIV. P. 54(d)(2).

²¹³ 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 a 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.*

²¹⁴ FED. R. CRIM. P. 32.1(a) and (b)(1). The person may waive the hearing.

her; present evidence and question adverse witnesses; make a statement; and present any information in mitigation.²¹⁵

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 probation or supervised release.²¹⁶ 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).²¹⁷

k. Re-Entry Court Proceedings

Magistrate Judges are actively involved in 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 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 and/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. 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 and clothing 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 occur monthly, but in some 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.

²¹⁵ FED. R. CRIM. P. 32.1(b)(2).

²¹⁶ 18 U.S.C. § 3401(h).

²¹⁷ 18 U.S.C. § 3401(j).

Rewards and sanctions are imposed immediately for greater effect and to teach accountability.²¹⁸ The offenders are encouraged to reflect on their mistakes and correct them. The program lasts 12-18 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.

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, U.S. Citizenship and Immigration Services, a special public ceremony is normally scheduled in the 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.²¹⁹

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 separate provisions of the Federal Magistrates Act, as amended. In summary, Magistrate Judges may:

hear and determine with finality “any pretrial matter pending in the court” not dispositive of a party’s charge, claim, or defense;

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;

²¹⁸ Rewards for good behavior might include public praise, reduced reporting requirements, and lessening of supervision restrictions. Sanctions for violations of the rules might include tightened monitoring and supervision, restriction to living in a half-way house, a short period in jail, or even ejection from the program and a return to prison.

²¹⁹ 8 U.S.C. §§ 1421, 1443-48.

perform “such additional duties as are not inconsistent with the Constitution and laws of the United States; and

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.

28 U.S.C. § 636(b)(1)(a)-(c); Fed. R. Civ. P. 72(a); Fed. R. Crim. P. 59(a), 73(b).

Magistrate Judges have been assigned literally hundreds of different matters under these four authorities. For the most part, there is 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, should be consulted.²²⁴

5. Civil Cases on Consent of the Litigants

If all parties consent, a full-time Magistrate Judge may conduct any civil action or proceeding, including a jury or non-jury trial, and order the entry of judgment in the case.²²⁵ All the District Courts have designated their Magistrate Judges to exercise this power, which gives a Magistrate Judge authority over an entire civil case or any specified aspect of the case, such as a designated dispositive motion.

a. Procedures

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.²²⁶ An appeal from a judgment entered at a Magistrate Judge’s direction may be taken to the court of appeals as would any other appeal from a district-court judgment.²²⁷

²²⁴ 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.

²²⁵ 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).

²²⁶ 28 U.S.C. § 636(d).

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

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 Magistrate Judge. The parties communicate their consent by filing a statement consenting to the reference, either jointly or separately.²²⁸ 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.²²⁹

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.²³⁰ 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.²³¹

b. Advantages

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.²³²

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 also more likely to consent when a Magistrate Judge has already become familiar with a case because of his or her pre-trial 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

²²⁸ FED. R. CIV. P. 73(b)(1). Even though Rule 73 requires the parties to signify their consent by filing a statement and 28 U.S.C. § 636(c)(1) refers to the parties' "specific written request," the Supreme Court has held that consent may be implied in particular circumstances by a party's conduct. *Roell v. Throw*, 538 U.S. 581 (2003).

²²⁹ AO Forms 85 and 85A. The AO forms combine three of the forms attached to the Federal Rules of Civil Procedure – illustrative forms 80, 81, and 82. The Judicial Conference's Civil Rules Committee has proposed abrogating the appendix of forms and FED. R. CIV. P. 84.

²³⁰ FED. R. CIV. P. 73(b); 28 U.S.C. § 636(c)(2).

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

²³² *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 can 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.

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.²³³

c. Constitutional Considerations

All twelve circuits that have addressed the matter have concluded that the statutory authority of Magistrate Judges -- to order final judgment in civil cases on consent of the litigants -- is constitutional. The Supreme Court has referred to the consent authority on several occasions without apparent concern, but it has not addressed the matter directly.

In 2011, the Court in *Stern v. Marshall* introduced uncertainty regarding a key aspect of the statutory structure for Bankruptcy Judges.²³⁴ The bankruptcy court structure is modeled in large part on the 1976 and 1979 amendments to the Federal Magistrates Act.²³⁵

Under the governing statute, 28 U.S.C. § 157, a Bankruptcy Judge may decide with finality a “core” bankruptcy proceeding, just as a Magistrate Judge may decide a non-dispositive motion. But a “non-core” bankruptcy proceeding is an Article III claim that, without the parties’ consent, may only be decided by a District Judge. Therefore, a Bankruptcy Judge hearing a “non-core” proceeding must file proposed findings of fact and conclusions of law for *de novo* review by a District Judge, as a Magistrate Judge must do when handling a dispositive motion. A Bankruptcy Judge may decide a “non-core” Article III matter, though, if the parties consent, as a Magistrate Judge may decide any civil case on consent.

In 2014, the Supreme Court avoided discussing the constitutionality of a Bankruptcy Judge disposing of an Article III civil claim on consent of the litigants, even though the issue had been presented to it squarely by the parties.²³⁶ The Court prescribed a practical solution that

²³³ 28 C.F.R. § 52.01.

²³⁴ 564 __ U.S. __, 131 S. Ct. 2594 (2011). The Court held in *Stern* that although 28 U.S.C. § 157(b) authorizes a Bankruptcy Judge to decide with finality a counterclaim for tortious interference, it is in fact a claim that Article III prohibits a Bankruptcy Judge from deciding with finality.

²³⁵ Cf. 28 U.S.C. § 157 with 28 U.S.C. § 636(b)-(c).

²³⁶ *Arkison*, 573 U.S. __, __ S. Ct. __, (2014). In *Arkison*, the Bankruptcy Judge granted summary judgment on a fraudulent conveyance claim – a matter that a Bankruptcy Judge may not decide with finality under *Stern*. The District Court reviewed the claim *de novo* and affirmed the Bankruptcy

avoids implicating the constitutional problem identified in *Stern*. It held that when a Bankruptcy Judge is presented with a matter that is “core” under the statute, but “non-core” under Article III, and the parties have not consented, the Bankruptcy Judge should issue proposed findings of fact and conclusions of law for a District Judge to review *de novo* and enter judgment. It did not address the issue of consent any further.

The constitutionality of the consent provision for Magistrate Judges rests in essence on two factors: (1) the consent of the parties, who freely waive their right to have an Article III judge dispose of their case; and (2) the status of a Magistrate Judge as an integral, inseparable part of the Article III District Court itself.

Consent has often been cited by the Court as a key factor in much of the pertinent case law. In *Commodity Futures Trading Commission v. Schor*,²³⁷ for example, the Supreme Court explained that: “[T]he relevance of concepts of waiver to Article III challenges is demonstrated by our decision in *Northern Pipeline* [invalidating the Article I bankruptcy courts enacted by Congress in 1978], in which the absence of consent to an initial adjudication before a non-Article III tribunal was relied on as a significant factor in determining that Article III forbade such adjudication.”²³⁸

Schor involved adjudication of a common law counterclaim by an administrative agency, rather than an Article III court. The Court’s analysis noted that two interests are served by Article III: (1) the interest of individual litigants in having had their case decided by an independent Article III judge; and (2) the institutional interest of society in having an independent judiciary free from pressure or control by the other two branches of the government. (The Court noted, though, that Article III “serves to protect primarily personal, rather than structural, interests.”)²³⁹ The parties may waive their individual right to adjudication by an Article III judge, as they may waive virtually every other constitutional right. But they cannot waive the structural interest.

Judge. The court of appeals affirmed, holding that there had been implied consent to the Bankruptcy Judge’s authority by the losing party. It also observed that the Bankruptcy Judge’s judgment could have been treated as proposed findings of fact and conclusions of law subject to *de novo* review. The Supreme Court held that the District Judge’s *de novo* review had cured any potential error.

²³⁷ 478 U.S. 833 (1986).

²³⁸ 478 U.S. at 849. In *Thomas v. Union Carbide Agric. Prods. Co.*, the Court noted that the holding in *Northern Pipeline* “establishes only that Congress may not vest in a non-Article III court the power to adjudicate, render final judgment, and issue binding orders in a traditional contract action arising under state law, without consent of the litigants, and subject only to ordinary appellate review.” 473 U.S. 568, 584 (1985). In *Peretz v. United States*, the Court noted 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. In *Roell v. Withrow*, 538 U.S. 580 __ (2003), Court held that consent to adjudication of a civil case by a Magistrate Judge could be implied by a party’s conduct in litigation.

²³⁹ 478 U.S. at 848.

The Court listed three factors to consider in judging whether a statute authorizing adjudication of an Article III claim in a non-Article III tribunal “threatens the institutional integrity of the Judicial Branch.”²⁴⁰ (1) the extent to which the essential attributes of judicial power are reserved to Article III courts; (2) the origins and importance of the right to be adjudicated; and (3) the concerns that drove Congress to depart from the requirements of Article III. Based on the Court’s analysis in *Schor* – assuming that it still represents a majority of the current Court’s thinking – the consent provisions of 28 U.S.C. § 636(c) do not violate any structural interest of Article III.

Magistrate Judges are not an administrative agency or a separate Article I court. They have no jurisdiction of their own. They perform their duties entirely within the Article III District Court and are an integral part of the court. They exercise the jurisdiction of the District Court itself, delegated to them expressly in the discretion of the Article III judges of each individual court. Moreover, Magistrate Judges are appointed by the judges of the District Court, may be removed for cause by the District Court, are supervised by the District Court, and are subject to the same court rules and procedures as the District Judges. Magistrate Judges’ orders are all subject to review by an Article III judge or court.

6. Contempt Authority

Magistrate Judges were given contempt powers by the Federal Courts Improvement Act of 2000.²⁴¹ They may exercise summary criminal contempt authority to punish any misbehavior occurring in their presence that obstructs the administration of justice.²⁴² 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 \$5,000.²⁴³

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.²⁴⁴ 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

²⁴⁰ 478 U.S. at 851.

²⁴¹ Federal Courts Improvement Act of 2000, Pub. L. No. 106-518, §§ 202-203, 114 Stat. 2410 (2000).

²⁴² 28 U.S.C. § 636(e)(2).

²⁴³ 28 U.S.C. § 636(e)(5).

²⁴⁴ 28 U.S.C. § 636(e)(3).

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.²⁴⁵

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.²⁴⁶ The limited civil contempt authority, though, does not restrict the authority of Magistrate Judges to order sanctions under any other statute or provision of the Federal Rules.

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.²⁴⁷ 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, 2013, Magistrate Judges disposed of 1,179,358 cases and proceedings nationally, including –

Preliminary proceedings in felony cases	377,176
Misdemeanors and petty offense cases	123,156
Civil cases on consent	15,804
Prisoner litigation	26,666
“Additional duties” in:	
Civil cases	374,229
Criminal cases	202,252
Miscellaneous other proceedings	60,075
Total	1,179,358 ²⁴⁸

²⁴⁵ 28 U.S.C. § 636(e)(6).

²⁴⁶ 28 U.S.C. § 636(e)(4).

²⁴⁷ 28 U.S.C. § 636(e)(3).

²⁴⁸ *Judicial Business of the U.S. Courts, 2013*, Table S-17, <http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2013/tables/S17Sep13.pdf>. 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, <http://www.uscourts.gov>.

Conclusions

The Federal Magistrates Act of 1968 was truly a landmark reform in the federal courts. The Magistrate Judge system has clearly come a long way since enactment of the 1968 legislation. Many important and beneficial changes have been made in the statute to expand Magistrate Judge authority, install a strong merit selection process, improve pay and benefits, and change the title of the office. There have also been more than 40 years of internal operational improvements initiated by the judiciary. The Judicial Conference of the United States, the Magistrate Judges Committee of the Conference, and the Administrative Office work closely to monitor all aspects of the Magistrate Judge system, including the authorization of positions, the filling of vacancies, the utilization of Magistrate Judges in each court, and the costs associated with the program.

Magistrate Judges today are both an integral and indispensable component of the federal District Courts. They have no original jurisdiction of their own, but exercise the jurisdiction of the District Court itself. Their duties are delegated by the court under authority of the 1968 Act, as amended -- which gives each court great flexibility to address its own particular workload needs. The great majority of District Courts today use their Magistrate Judges effectively and extensively, and the remaining courts that delegate fewer duties are challenged on a regular basis to evaluate and expand their usage.

In summary, the Magistrate Judge system has clearly lived up to the twin purposes set by Congress 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 its workload.²⁴⁹

²⁴⁹ H. R. REP. NO. 1629, 90th Cong., 2d Sess. 11 (1968); S. REP. NO. 371, 90th Cong., 1st Sess. 9 (1967).