THE FEDERAL MAGISTRATES SYSTEM

REPORT TO THE CONGRESS
BY THE
JUDICIAL CONFERENCE OF THE
UNITED STATES

December 1981

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PURPOSE OF THE REPORT

This report is submitted to the Congress in accordance with section 9 of The Federal Magistrate Act of 1979 (Pub.L.No. 96-82), which provides that:

> The Judicial Conference of the United States shall undertake a study, to begin within 90 days after the effective date of the Act and to be completed and made available to the Congress within 24 months thereafter, concerning the future of the magistrates system, the precise scope of such study to be recommended by the Chairmen of the Judiciary Committees of each House of Congress.

The specific questions that were submitted by the Chairmen of the Judiciary Committees are set forth as Appendix A.

The report first provides a general review of the operation of the federal magistrates system. It then proceeds to address the various questions raised by the Chairmen of the Judiciary Committees. The report is divided into four sections.

- Part I traces the development of the federal magistrates system.
- Part II discusses the role of the magistrates system in the federal courts today.
- Part III evaluates the impact of the 1979 amendments.
- Part IV discusses the future of the magistrates system, with emphasis on the subjects identified by the Judiciary Committees.

In making the recommendations contained in this report the Judicial Conference considered: (1) available statistical information; (2) the developing body of literature on magistrates; (3) a survey conducted by the Administrative Office of the United States Courts of all chief judges of the district courts and all full-time United States magistrates; (4) a survey conducted by the Federal Bar Association's standing Committee on United States Magistrates; and (5) resolutions presented to the Conference by the National Council of United States Magistrates.

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SUMMARY

This report is submitted to the Congress in accordance with section 9 of Public Law 96-82 (October 10, 1979), which requires the Judicial Conference to undertake a study concerning the future of the federal magistrates system, the scope of such study to be recommended by the Chairmen of the Judiciary Committees of the two Houses of the Congress.

I. General Conclusions

The federal magistrates system, established by the Federal Magistrates Act of 1968, has been of substantial assistance to the United States district courts. As a result of the enactment of comprehensive statutory amendments in 1976 and 1979, the jurisdiction of magistrates is now appropriate in its current form. The organization of the magistrates system and the nature of the office of magistrate are also appropriately constituted at present.

II. Evaluation of the 1979 Amendments to the Magistrates Act

It has taken time to implement the several provisions of the 1979 amendments to the Federal Magistrates Act through the establishment of new regulations, rules of court, and local procedures. Moreover, only one year of caseload statistical information is available since enactment of the amendments.

Nevertheless, preliminary experience indicates that the 1979 amendments have been well received and are proving beneficial to the courts and to litigants. While the legislation is essentially sound, minor adjustments are desirable in the language of the 1979 statute.

Suggested Improvements in Language

1. The procedural details of 28 U.S.C. §636(c)(2) should be amended to give more flexibility to the clerk of the district court regarding the time and manner of notifying civil litigants as to the civil trial jurisdiction of magistrates. *(Pages 36-37; 49-50)*
2. The language of 28 U.S.C. §631(b) should be amended to require that a magistrate be a member in good standing of the bar of the highest court of the state of appointment and a member of the bar of the highest court of any state for a period of at least five years. *(Pages 39-40)*
3. The provision that specially limits the term of probation that a magistrate may impose on a youth offender should be eliminated, and the general probation provisions of federal law should apply to all magistrate cases. *(Pages 53-55)*
4. The provision that requires a youth offender to be released conditionally three months before the end of a sentence should be

eliminated, either in all misdeameanor cases or in petty offense cases alone. *(Pages 51-52)*

5. Disparities that may have been created by the 1979 amendments in Youth Corrections Act and Juvenile Delinquency Act sentencing authority between magistrates and judges should be reviewed. *(Pages 53-56)*

III. Specific Conclusions Regarding the Future of the Magistrates System

A. Organization of the Magistrates System

1. The magistrates system should remain an integral part of the United States district courts. It should not be reconstituted as a separate tier or court. *(Pages 41-43)*
2. Flexibility is one of the great benefits of the magistrates system. Maximum flexibility should be retained in the statute in order to promote the most effective use of magistrates in each district court in light of local requirements and conditions. *(Pages 41-45; 47-49; 49-50)*
3. Uniformity in court procedures and in the use of magistrates should continue to be encouraged, but only to the extent consonant with the need to retain flexibility. *(Pages 43-45)*
4. The provisions governing selection, term, and removal of magistrates and the authority granted to magistrates by statute adequately protect their independence. *(Pages 45-47)*

B. Jurisdiction of Magistrates

1. The jurisdiction of United States magistrates should remain "open." It should continue to be co-extensive with that of the district courts, and the duties that magistrates perform should continue to be determined by delegation from the district courts. *(Pages 47-49)*
2. Magistrates should not be given "original" jurisdiction over any category of cases. All causes of action should be established in the United States district courts. In creating new federal causes of action, the Congress should be cognizant of the availability of magistrates and should encourage, but not require, the reference of proceedings to magistrates. *(Pages 47-49)*
3. Magistrates should not be authorized to accept guilty pleas in felony cases. *(Pages 52-53)*
4. As part of its general review of the federal criminal laws, the Congress should consider the use of magistrates to dispose of a greater number of less-serious criminal cases as misdemeanors. *(Pages 51-52)*
5. The Congress may wish to consider whether there is a need to extend limited contempt powers to magistrates. *(Pages 59-60)*
6. The Federal Magistrates Act should be amended to provide that the consent of a defendant in a petty offense case to

trial by a magistrate be made merely on the record, without the requirement that it be made in writing. *(Pages 56-58)*

7 Flexibility should be retained for the courts to use part-time magistrates to handle civil case matters in order to meet local caseload needs and emergency situations. *(Pages 58-59)*

C. Office of Magistrate

1. The official title "United States Magistrate" is an appropriate designation, and as the bench and bar acquire greater experience with magistrates the title will not inhibit full use of these judicial officers or give rise to misunderstandings as to the nature of the office. *(Pages 60-62)*
2. The salaries of magistrates should be increased, as part of a general adjustment in judicial salaries, to ameliorate the ravages of inflation and to attract and retain highly-qualified individuals as magistrates. *(Pages 62-63)*
3. In order to attract highly-qualified private practitioners with substantial experience to become United States magistrates, the retirement system for magistrates should be improved to give additional "credit" to a magistrate for each year of service, or otherwise to facilitate the accumulation of an adequate annuity within a shorter period of service. *(Page 63)*
4. With the funding of legal assistant positions for full-time magistrates, the staffing needs of magistrates will generally be adequately met. *(Pages 63-64)*
5. The support services and facilities presently provided to magistrates are generally adequate. *(Pages 64-65)*

OUTLINE OF THE REPORT ON THE FEDERAL MAGISTRATES SYSTEM

I. DEVELOPMENT OF THE FEDERAL MAGISTRATES SYSTEM

A. In General

The Federal Magistrates Act was signed into law on October 17, 1968, and the magistrates system began nationwide operation on July 1, 1971.[1] Accordingly, the program has now been in effect for a little more than one decade. During that time United States magistrates have been given additional jurisdiction through statutory amendments in 1976[2] and 1979,[3] and the magistrates system now occupies an important and integral place in the federal judicial process. The 1976 and 1979 amendments which clarified and expanded the jurisdiction of magistrates were natural steps in the orderly development of the magistrates system and were enacted in response to the increasing use of magistrates by the district courts.

The 1968 Act gave the Judicial Conference authority to establish magistrate positions and to oversee the development and operation of the magistrates program. The Conference has exercised its continuing oversight authority through the assistance of its Committee on the Administration of the Federal Magistrates System and the support of the Administrative Office of the United States Courts. Since the inception of the magistrates program the Judicial Conference Committee has conducted an on-going review of the needs of the district courts and the magistrates, and it has closely monitored the administration of the magistrates system.

B. United States Commissioners

The Federal Magistrates Act of 1968 superseded the 175-year old United States commissioner system. In 1793 the Congress had provided for the appointment by the federal circuit courts of "discreet persons learned in the law" to take bail for the courts in criminal cases.[4] These "discreet persons" were later referred to by statute as "commissioners,"[5] and during the course of the nineteenth century additional powers and responsibilities were extended to them in order to assist the federal courts.[6]

Starting in 1894 the Congress authorized the appointment of commissioners for several of the national parks, and these individuals were given jurisdiction to try and sentence persons accused of petty offenses committed within the parks.[7]

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1. Pub.L.No. 90-578, 82 Stat. 1107 (1968) (codified as amended at 28 U.S.C. §§ 604, 631-639 and 18 U.S.C. §§ 3060, 3401-3402 (1976 & Supp. III 1979)).
2. Pub.L.No. 94-577, 90 Stat. 2729 (1976) (codified at 28 U.S.C. § 636(b) (1976)) [hereinafter cited as the 1976 amendments].
3. The Federal Magistrate Act of 1979, Pub.L.No.96-82, 93 Stat. 643 (codified at 28 U.S.C. §§ 631, 634-636, 604, 1915(b) and 18 U.S.C. § 3401 (Supp. III 1979)) [hereinafter cited as the 1979 amendments].
4. Act of March 2, 1793, ch. 22, § 4, 1 Stat. 334.
5. Act of March 1, 1817, ch. 30, 3 Stat. 350.
6. *See* McCabe, *The Federal Magistrate Act of 1979,* 16 HARV. J. LEGIS. 343, 345 (1979).
7. Act of May 7, 1894; ch. 72, §§ 5, 7, 28 Stat. 74 (Yellowstone National Park). *See* also McCabe, *supra* note 6, at 346 n.15.

In 1896 the Congress codified the law that had been developing over the past century by formally establishing the office of "United States Commissioner" and providing that these officers be given all the powers and duties of their predecessors, be appointed by the district courts for four-year terms of office, and be compensated under a uniform fee schedule.[8]

In 1940 the Congress extended general jurisdiction to try petty offenses committed on federal property to all United States commissioners who were specifically designated by their appointing district courts to exercise such jurisdiction.[9] A commissioner, however, could only proceed with the trial of a petty offense if the defendant first waived the right to trial before a district judge and consented in writing to be tried before the commissioner.

C. The Federal Magistrates Act of 1968

In 1965 the Senate Judiciary Subcommittee on Improvements in Judicial Machinery began exploratory hearings on the operation of the United States commissioner system. The witnesses who testified generally agreed that the commissioner system was in need of fundamental reform and cited the following defects: (1) the lack of a requirement that commissioners be attorneys; (2) the basic impropriety of a fee system for compensating judicial officers; (3) the inadequacy of existing compensation levels; (4) the complete discretion of a district court to appoint and remove commissioners; (5) the part-time status of virtually all the commissioners; (6) the lack of guidance given to commissioners in the conduct of their proceedings; and (7) the insufficiency of support services provided to the commissioners.[10]

Following hearings in 1965-1967 the Congress approved the Federal Magistrates Act of 1968, abolishing the office of United States commissioner and establishing the new office of United States magistrate in order to "reform the first echelon of the Federal judiciary into an effective component of a modern scheme of justice."[11] The legislative history of the Act emphasized the potential for the district courts to improve the quality of justice and expedite the disposition of their caseloads through referral of appropriate judicial matter by the judges to an upgraded class of subordinate judicial officers.

The jurisdictional section of the 1968 Act provided magistrates with three basic categories of judicial duties:

8. Act of May 28, 1896, ch. 252, §§ 19, 21, 29 Stat. 184. Although given four-year terms of office, commissioners were subject to removal by the district court at any time.
9. Act of October 9, 1940, ch. 785, 54 Stat. 1058-59 (superseded by 18 U.S.C. §§ 3401 and 3402 (1976 & Supp. III 1979)).
10. *Hearings on the U.S. Commissioner System Before the Subcommittee on Improvements in Judicial Machinery of the Senate Committee on the Judiciary*, 89th Cong., 1st and 2nd Sess. 43-45 (1965-1966) [hereinafter cited as the 1965-66 *Senate Hearings*]. *See* H.R. REP. NO. 1629, 90th Cong., 2nd Sess. 13-14 (1968) reprinted in [1968] U.S. CODE CONG. & AD. NEWS 4252 [hereinafter cited as 1968 HOUSE REPORT].
11. 1968 HOUSE REPORT, *supra* note 10, at 11.

(1) all the powers and duties formerly exercised by the United States commissioners (largely involving initial proceedings in federal criminal cases);
(2) the trial and disposition of criminal "minor offenses" (*i.e.*, most federal misdemeanors);[12] and
(3) "additional duties" to assist the judges of the district courts in disposing of their caseloads, including: (a) the conduct of pretrial and discovery proceedings in civil and criminal cases; (b) preliminary review of prisoner habeas corpus petitions; (c) service as a special master in appropriate civil cases; and (d) such "additional duties" as are not inconsistent with the Constitution and laws of the United States.

The "additional duties" that could be delegated by the judges to magistrates were not to be limited to the specific functions listed in the jurisdictional section of the statute. "The mention of the three categories was intended to illustrate the general character of duties assignable to magistrates under the Act, rather than to constitute an exclusive specification of duties so assignable."[13]

The Congress established magistrates as subordinate judicial officers of the district courts, rather than as a separate tier or court. The Congress considered it "unwise . . . to require that the district courts give magistrates duties other than those traditionally performed by commissioners." It therefore granted each district court the discretion to determine by local rule which types of duties magistrates should perform to assist the judges. The courts were expected to be innovative and experiment with the types of functions assigned to magistrates.[14]

The administrative provisions of the Federal Magistrates Act were modeled after the Referees Salary and Expense Act of 1946, which had established a system of federal judicial officers to handle bankruptcy cases. The Magistrates Act provided that magistrates must be attorneys,[15] that they receive training by the Federal Judicial Center, and that they be provided with a legal manual instructing them in the performance of their duties. It then specified that full-time magistrates be provided with office and courtroom space and that they be given secretarial and clerical assistance.[16] The Act established a salary for magistrates equal to that of referees in bank-

12. A "minor offense" was defined as any misdemeanor for which the maximum penalty prescribed by law did not exceed imprisonment for a term of one year and/or a fine of $1,000, with certain specifically excepted offenses.
13. 1968 HOUSE REPORT, *supra* note 10, at 19; S. REP. NO. 371, 90th Cong., 1st Sess. 25 (1967) [hereinafter cited as 1967 SENATE REPORT].
14. 1967 SENATE REPORT, *supra* note 13, at 26-27.
15. A non-attorney may be appointed as a part-time magistrate, however, if the appointing court and the Judicial Conference find that no qualified member of the bar is available to serve at a specific location. 28 U.S.C. § 631(b)(1) (Supp. III 1979).
16. 28 U.S.C. § 635(b) (1976) provides that part-time magistrates be reimbursed for actual expenses including clerical and secretarial assistance, but not be reimbursed for office space.

ruptcy,[17] and it included magistrates under the general civil service retirement program. A term of eight years was provided for full-time magistrates, while part-time magistrates were given four-year terms. Removal from office was to be by the district court, but only for enumerated causes.

The Federal Magistrates Act of 1968 gave the Judicial Conference of the United States responsibility for administering the magistrates system, including determining the number, type, location and salary of each magistrate position, and for supervising the Director of the Administrative Office in providing administrative direction to the system.

D. Implementation of the Magistrates System

In 1969 the Judicial Conference established the magistrates system in five pilot district courts. In 1970, following a nationwide review of court needs, the Conference authorized the courts to appoint 82 full-time magistrates, 449 part-time magistrates, and 11 "combination" magistrates—positions in which part-time bankruptcy judges or clerks or deputy clerks of court serve concurrently as part-time magistrates. By July 1971 the magistrates system had become operational nationwide, with 542 United States magistrate positions replacing more than 700 United States commissioner positions.

The "additional duties" jurisdictional provisions of the 1968 Act proved to be imprecisely drawn, and they soon gave rise to conflicting decisions among the various United States courts of appeals as to which specific types of judicial proceedings could be delegated by judges to magistrates.[18] While many district courts referred a broad range of responsibilities to their magistrates, the uncertainty in the language of the 1968 Act as to the extent of a magistrate's jurisdiction and the developing decisional law generally inhibited the full use of magistrates.[19]

In June 1974 the Supreme Court resolved one of several inter-circuit conflicts and held that a district judge lacked authority to designate a magistrate to conduct an evidentiary hearing in a habeas corpus case.[20] The decision pointed out the need to redraft the "additional duties" jurisdictional provisions of the 1968 Act. In his dissent, Chief Justice Warren Burger expressly invited the Congress to enact new legislation.[21]

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17. The 1968 Act authorized the Judicial Conference to set the salaries of full-time magistrates at amounts up to $22,500 per annum and the salaries of part-time magistrates at amounts of up to $11,000 per annum. For further discussion, *See* section II-D-8, *infra.*
18. *See* cases cited in McCabe, *supra* note 6, at 351-52 n. 45.
19. *See* S. REP. NO. 625, 94th Cong. 2nd Sess. 3 (1976) [hereinafter cited as 1976 SENATE REPORT]; H.R. REP. NO. 1609, 94th Cong. 2nd Sess. 4-5 (1976 [hereinafter cited as 1976 HOUSE REPORT].
20. Wingo v. Wedding, 418 U.S. 461 (1974).
21. "[N]ow that the Court has construed the Magistrates Act contrary to a clear legislative intent, it is for Congress to act to restate its intentions if its declared objectives are to be carried out." *Id.* at 487.

Several other factors also prompted legislative reformulation of the jurisdiction of magistrates. The Speedy Trial Act[22] imposed strict deadlines for proceedings in federal criminal cases, resulting in several adjustments in district court procedures and a greater use of magistrates in conducting pretrial proceedings for the judges. In addition, the Congress had enacted several laws creating new federal causes of action giving greater access to the district courts and increasing the caseloads of the courts.[23]

Following a study of the magistrates system, the General Accounting Office recommended in September 1974 that: (1) the Judicial Conference encourage the district courts to make greater use of magistrates under the existing law; (2) the Congress clarify the jurisdiction of magistrates; and (3) the Congress expand the criminal trial jurisdiction of magistrates.[24] In addition, a privately funded study by a delegation of judges and magistrates on the role of masters in the English judicial system concluded that the federal district courts could benefit by emulating the successful English practice of delegating all preliminary matters in civil cases to subordinate judicial officers.[25]

E. The Jurisdictional Amendments of 1976

At the request of the Judicial Conference, legislation was introduced in the Congress to clarify and expand the jurisdiction of magistrates by replacing section 636(b) of the 1968 Act with a completely new jurisdictional section authorizing a district judge to designate a magistrate to handle virtually any pretrial matter in the district courts.[26] The Senate Judiciary Committee reported out the legislation in January 1976, noting that:

> Without the assistance furnished by magistrates in hearing matters [such as preliminary motions], it seems clear to the committee that the judges of the district courts would have to devote a substantial portion of their available time to various procedural steps rather

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22. Pub.L.No. 93-619, title I, § 101, 88 Stat. 2076 (1975) (current version at 18 U.S.C. §§ 3161-3174 (1976 & Supp. III 1979)).
23. *See, e.g.,* Freedom of Information Act (1967), 5 U.S.C. § 552 (1976); Occupational Health and Safety Act (1970), 29 U.S.C. §§ 651-678 (1976); Equal Employment Opportunity Act (Title VII) (1972), 42 U.S.C. § 2000e (1976); Consumer Credit Protection Act (1968), 15 U.S.C. §§ 1601-1691f (1976) (as amended); Fair Credit Reporting Act (1970), 15 U.S.C. §§ 1681a-1681t (1976); and the Consumer Product Safety Act (1972), 15 U.S.C. §§ 2051-2081 (1976).
24. COMP. GEN. OF THE U.S. NO. B-133322, THE U.S. MAGISTRATES: HOW THEIR SERVICES HAVE ASSISTED ADMINISTRATION OF SEVERAL DISTRICT COURTS: MORE IMPROVEMENTS NEEDED 19-20 (1974).
25. R. KIRKS, C. METZNER, J. KING, J. HATCHETT, S. SCHREIBER & I. SENSENICH, REPORT OF THE COMMITTEE TO STUDY THE ROLE OF MASTERS IN THE ENGLISH JUDICIAL SYSTEM (Federal Judicial Center 1974). The study praised the effectiveness of the English procedures and suggested that the federal district courts could duplicate the English experience through new legislation and better use of United States magistrates. *See* Silberman, *Masters and Magistrates, Part I: The English Model,* 50 N.Y.U.L. REV. 1070, 1079-1104 (1975).
26. S. 1283, 94th Cong., 2nd Sess. (1975).

than to the trial itself. . . . [I]t is not feasible for every judicial act, at every stage of the proceeding, to be performed by 'a judge of the court.'[27]

The bill was signed into law in amended form on October 21, 1976. The legislation dealt only with the jurisdiction of magistrates to perform "additional duties" to assist the judges of the district courts in conducting pretrial proceedings in civil and criminal cases. It authorized judges of the district courts to delegate judicial duties to magistrates under four provisions:

1. *Non-Case-Dispositive Pretrial Matters.* Magistrates were authorized to "hear and determine" procedural motions, discovery motions, and any other pretrial matters in civil and criminal cases, except for eight enumerated case-dispositive motions.[28]
2. *Case-Dispositive Pretrial Motions and Prisoner Cases.* Magistrates were authorized to hear case-dispositive motions (such as motions for dismissal and for summary judgment) and certain prisoner litigation and to submit recommended findings of fact and a proposed disposition of such matters to a district judge for the judge's determination.
3. *Special Master Duties.* Magistrates were authorized to serve as special masters in any civil case with the consent of the parties. (As under the 1968 law, magistrates were authorized to serve as special masters without the consent of the parties in "exceptional" cases.)
4. *Other duties.* As under the 1968 Act, magistrates were authorized to perform "any other duties not inconsistent with the Constitution and laws of the United States." The House and Senate reports on the bill explain the expansive nature of the provision in the following terms:

> If district judges are willing to experiment with the assignment of magistrates of other functions in aid of the business of the courts, there will be increased time available to judges for the careful and unhurried performance of their vital and traditional adjudicatory duties, and a consequent benefit to both efficiency and the quality of justice in the Federal courts.[29]

F. The Federal Magistrate Act of 1979

In May 1977 Attorney General Griffin Bell transmitted proposed legislation to the Congress to further clarify and expand the civil and criminal

27. 1976 SENATE REPORT,*supra* note 19, at 6; 1976 HOUSE REPORT, *supra* note 19, at 7-8.
28. Motions for injunctive relief, for judgment on the pleadings, for summary judgment, to dismiss or quash an indictment or information by the defendant, to suppress evidence in a criminal case, to dismiss or to permit maintenance of a class action, to dismiss for failure to state a claim upon which relief can be granted, and to involuntarily dismiss an action.
29. 1976 SENATE REPORT, *supra* note 19, at 11; 1976 HOUSE REPORT, *supra* note 19, at 12.

jurisdiction of United States magistrates and to upgrade the procedures for selecting magistrates. The bill was designed by the Department of Justice to "improve access to the federal courts" by reducing costly delays and providing more flexible use of scarce judicial resources. The Attorney General noted the bill's potential for reducing the backlog of cases in several district courts by the greater use of magistrates.[30]

Following hearings before the Senate Judiciary Subcommittee on Improvements in Judicial Machinery, the Senate Judiciary Committee approved the bill, and it passed the Senate in July 1977.

The House of Representatives passed the legislation in amended form in October 1978. A conference committee convened during the last week of the 95th Congress, but it failed to reach agreement because of a floor amendment contained in the House bill that would have eliminated diversity jurisdiction in the federal courts. The legislation was re-introduced in both houses in early 1979, and following further hearings and action by a conference committee it was signed into law on October 10, 1979.

The 1979 amendments addressed: (1) the civil trial jurisdiction of magistrates; (2) the criminal trial jurisdiction of magistrates; (3) the selection of magistrates; and (4) miscellaneous administrative matters.

The civil provisions of the amendments authorized a full-time magistrate to exercise case-dispositive jurisdiction over any civil case pending in the district court upon: (1) designation of the magistrate by the district court to exercise such jurisdiction; and (2) the freely-given consent of the litigants.[31] Thus, a magistrate was authorized to try any civil case upon consent of the parties (with or without a jury) and to order the entry of final judgment. The 1979 amendments specified that appeals from a magistrate's judgment may be taken to the United States court of appeals, or upon consent of the parties to a district judge. In the latter case an appeal to the court of appeals lies only with permission of the appellate court.

The 1979 amendments expanded the trial jurisdiction of magistrates in criminal cases from "minor offenses" to all federal misdemeanors, and they authorized a magistrate to try a misdemeanor case before a jury, where appropriate. The Congress retained the requirement that each defendant waive the right to trial by a district judge and consent to trial by a magistrate in writing.

The Congress was also concerned about "unevenness" in the quality of magistrates and the need to foster confidence in magistrates among the bench and bar in order to encourage consensual references of civil trials.[32]

30. Proposed Magistrates Act of 1977, 123 Cong. Rec. S. 8765 (daily ed., May 26, 1977).
31. A part-time magistrate is authorized to try a civil case upon written consent of the parties where the chief judge of the district court certifies that no full-time magistrate is reasonably available, in accordance with guidelines established by the judicial council of the circuit. 28 U.S.C. § 636(c)(1) (Supp. III 1979).
32. H.R. REP. NO. 95-1364, 95th Cong., 2nd Sess. 17-18 (1978) [hereinafter cited as 1978 HOUSE REPORT]; S. REP. NO. 95-344, 95th Cong., 1st Sess. 8-10 (1977) [hereinafter cited as 1977 SENATE REPORT]; S. REP. NO. 96-322, 96th Cong., 1st Sess. 8-9 (1979) [hereinafter cited as 1979 CONFERENCE REPORT].

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Therefore, the 1979 amendments provided that all magistrates be selected in accordance with regulations promulgated by the Judicial Conference. The statute required that such regulations make provision for public notice of all vacancies in magistrate positions and for the convening of a citizen merit selection panel to screen applicants and to submit names of candidates to the district court. The regulations of the Judicial Conference took effect by law on April 5, 1980, and they have governed all appointments and reappointments of magistrates since that time.[33] The 1979 statute also required that all appointees have five years' membership in the bar of the highest court of the state of their appointment.

The 1979 amendments also addressed several admininstrative aspects of the magistrates system. The legislation: (a) authorized the Judicial Conference to provide legal assistant positions for magistrates; (b) permitted a magistrate to "hold over" for up to 60 days after the expiration of a term or until a successor is appointed, with circuit council approval; (c) authorized a magistrate to serve in a district adjoining the district of appointment; (d) facilitated the payment of transcript costs of magistrate proceedings for indigent litigants; and (e) required the Director of the Administrative Office of the United States Courts to include additional data on magistrates in his annual reports to the Congress.

33. To further ensure high standards in the conduct of civil trials by magistrates, section 3 of the 1979 amendments provided that magistrates serving prior to the promulgation of the selection regulations of the Judicial Conference may exercise the expanded civil jurisdiction only if they have been reappointed under the regulations or certified by the judicial council of the circuit as personally qualified.

II. THE FEDERAL MAGISTRATES SYSTEM TODAY

A. The Role of the Magistrates System in the Federal Courts

1. Objectives of the Magistrates System

The Congress has described the principal objectives of the federal magistrates system in the following terms:

(a) "to reform the first echelon of the Federal judiciary into an effective component of a modern scheme of justice";[34]

(b) to increase "the overall efficiency of the Federal judiciary by relieving the district courts of some of their minor burdens, while at the same time providing a higher standard of justice at the point where many individuals first come into contact with the courts";[35]

(c) to provide an expanded trial jurisdiction over misdemeanor criminal offenses and to provide "a means for a speedier resolution of certain criminal matters";[36]

(d) to "perform various judicial duties under the supervision of the district courts in order to assist the judges of these courts in handling an ever-increasing caseload";[37]

(e) "to assist the district judge to the end that the district judge could have more time to preside at the trial of cases, having been relieved of part of his duties which require the judge to personally hear each and every pretrial motion or proceeding necessary to prepare a case for trial";[38]

(f) to increase the "time available to judges for the careful and unhurried performance of their vital and traditional adjudicatory duties," with a consequent benefit to "both efficiency and the quality of justice in the Federal courts";[39]

(g) "to improve access to the Federal courts for the American public," especially "the less-advantaged";[40]

(h) to provide "a supplementary judicial power designed to meet the ebb and flow of the demands made on the Federal judiciary";[41] and

34. 1967 SENATE REPORT, *supra* note 13, at 8.
35. 1967 SENATE REPORT, *supra* note 13, at 11; 1968 HOUSE REPORT, *supra* note 10, at 4.
36. 1967 SENATE REPORT, *supra* note 13, at 8; H.R. REP. NO. 96-287, 96th Cong., 1st Sess. 2 (1979) [hereinafter cited as 1979 HOUSE REPORT].
37. 1976 SENATE REPORT, *supra* note 19, at 2; 1976 HOUSE REPORT, *supra* note 19, at 4. *Accord,* S. REP. NO. 96-74, 96th Cong., 1st Sess. 2 (1979) [hereinafter cited as 1979 SENATE REPORT].
38. 1976 SENATE REPORT, *supra* note 19, at 5; 1976 HOUSE REPORT, *supra* note 19, at 6.
39. 1976 SENATE REPORT, *supra* note 19, at 11; 1976 HOUSE REPORT, *supra* note 19, at 12. *Accord*, 1967 SENATE REPORT, *supra* note 13, at 26; 1976 SENATE REPORT, *supra* note 19, at 5.
40. 1979 HOUSE REPORT, *supra* note 36, at 1; 1979 SENATE REPORT, *supra* note 37, at 1, 4.
41. 1979 HOUSE REPORT, *supra* note 36, at 2. *Accord*, 1979 SENATE REPORT, *supra* note 37, at 4.

(i) to create "a vehicle by which litigants can consent, freely and voluntarily, to a less formal, more rapid, and less expensive means of resolving their civil controversies."[42]

2. The Jurisdiction and Work of Magistrates

United States magistrates were established by the Congress as an integral part of the United States district courts. The jurisdiction which a magistrate exercises is that of the district court itself, delegated to the magistrate by the judges of the court under governing statutory authority and local rules of court.[43] The Federal Magistrates Act contemplates that all magistrates perform the duties which had formerly been exercised by United States commissioners, but the assignment of all other duties is left to the discretion of each district court to determine based on local court needs and preferences.[44]

The basic jurisdictional provisions of the Act, as amended, are codified in section 636 of title 28, United States Code. The criminal misdemeanor jurisdiction of magistrates is set out in sections 3401 and 3402 of title 18, United States Code. The specific duties assigned to a magistrate are generally set forth in the local rules of each district court and in court orders. A detailed exposition of the jurisdiction of magistrates is found in chapter 3 of the *Legal Manual for United States Magistrates.*

The jurisdiction of magistrates falls into four broad categories of proceedings:

(a) initial proceedings in criminal cases;
(b) trial of misdemeanors;

42. 1979 HOUSE REPORT, *supra* note 36, at 2.
43. "The magistrate's power to perform judicial functions depends entirely on his connection with the district court which appoints him and retains the right to control and supervise his conduct at all times." *Hearings on S. 3475 and S. 945 Before the Subcommittee on Improvements in Judicial Machinery of the Senate Committee on the Judiciary, 89th Cong., 2nd Sess., and 90th Cong., 1st Sess. 252 (1966-67) [hereinafter cited as 1966-67 Senate Hearings].* "When a case is tried before a magistrate jurisdiction remains in the district court and is simply exercised through the medium of the magistrate." *Id.* at 256. *Accord,* 1968 HOUSE REPORT, *supra* note 10, at 21; 1979 HOUSE REPORT, *supra* note 36, at 8. *See also,* 1976 SENATE REPORT, *supra* note 19, at 2-6; 1976 HOUSE REPORT, *supra* note 19, at 4-8.
44. Under 18 U.S.C. § 3401(a) and 28 U.S.C. §§ 636(b)(1)-(4) and 636(c), a magistrate must be "designated" by a judge of the district court to perform judicial duties. The Judiciary Committees of the House and Senate have noted that: "The Congress in enacting the Magistrates Act manifested its intention to create a judicial officer and to invest in him the power to funish assistance to a judge of the district court . . . [and] gave each district court the discretionary power to use the magistrate to assist a district court judge." 1976 SENATE REPORT, *supra* note 19, at 4; 1976 HOUSE REPORT, *supra* note 19, at 6. The Committees explained that enactment of the 1976 jurisdictional amendments "will further improve the judicial system by clearly defining the additional duties which a judge of the district court may assign to a magistrate in the exercise of the discretionary power to so assign as contained in Section 636(b) of Title 28, United States Code as herein amended." 1976 SENATE REPORT, *supra* note 19, at 6; 1976 HOUSE REPORT, *supra* note 19, at 7-8.

(c) references by judges of pretrial matters and other proceedings; and
(d) trial of civil cases.

In addition to handling these four specific categories of judicial duties, a magistrate may be delegated by the district court any "additional duties as are not inconsistent with the Constitution and laws of the United States."

a. Initial Proceedings in Criminal Cases

In accordance with 28 U.S.C. § 636(a), each United States magistrate is granted "all powers and duties conferred or imposed upon United States commissioners by law or [the Federal Rules]." Under this authority magistrates conduct a variety of initial proceedings in federal criminal cases, including:

(i) issuance of search warrants, arrest warrants, and summonses;
(ii) initial appearance proceedings for criminal defendants, informing them of the charges against them and of their rights, and setting bail or other conditions of release; and
(iii) preliminary examinations, or "probable cause" hearings in criminal cases.

During the year ending June 30, 1981, magistrates conducted the following volume of such proceedings under 28 U.S.C. § 636(a):

Initial Proceedings in Criminal Cases	**67,624**
Search warrants	5,442
Arrest warrants	10,173
Summonses	1,461
Initial appearances	30,588
Material witness proceedings	6,865
Bail reviews	6,828
Preliminary examinations	6,267

Under 28 U.S.C. § 636(a) magistrates may also:

(i) appoint attorneys for defendants who are unable to afford or obtain counsel;
(ii) take oaths, bail, acknowledgements, affidavits and depositions; and
(iii) conduct extradition proceedings.

b. Trial of Criminal Misdemeanor Cases

In accordance with 18 U.S.C. § 3401 a magistrate who has been specially designated by the district court to exercise such jurisdiction may try and dispose of any federal criminal misdemeanor case upon the written consent of the defendant. A misdemeanor is defined in 18 U.S.C. § 1 as any offense punishable by imprisonment for a term of one year or less. It includes a "petty offense," which is defined as any offense for which the maximum penalty does not exceed six months' imprisonment and/or a fine of $500.

Misdemeanor cases are initiated in the federal courts and referred to magistrates under three separate authorities: (1) specific federal misdemeanor and petty offense statutes; (2) state misdemeanor and petty offense laws in-

corporated as federal law through the Assimilative Crimes Act;[45] and (3) petty offense regulations of the various federal agencies governing lands under their administration, such as the National Park Service[46] and the National Forest Service.[47]

A magistrate must carefully explain to all defendants that they have a right to trial, judgment, and sentencing by a district judge. The magistrate may not proceed to try a misdemeanor or petty offense case until the defendant first waives in writing the right to trial, judgment, and sentencing before a district judge and consents to proceed before a magistrate.

A magistrate may try a misdemeanor case with or without a jury, as may be appropriate, and has the power to invoke the federal probation laws, which authorize the imposition of a period of probation of up to five years. Under the 1979 amendments, moreover, a magistrate may exercise the sentencing provisions of the Federal Youth Corrections Act,[48] but may not impose a sentence of incarceration or a period of probation in excess of six months for a petty offense case or one year for a full misdemeanor. Under the 1979 law a magistrate also has limited powers under the Federal Juvenile Delinquency Act in petty offense cases.[49]

During the 12-month period ending June 30, 1981, United States magistrates disposed of 95,152 misdemeanor and petty offense cases. The following table breaks these cases down by nature of offense:

Misdemeanors above the level of petty offenses	**14,208**
Traffic	8,606
Theft	1,938
Food and Drug	974
Other	2,690
Petty offenses	**80,944**
Traffic	52,388
Immigration	11,318
Hunting, Fishing or Camping	5,439
Drunk/Disorderly Conduct	3,391
Food and Drug	1,347
Postal	518
Other	6,543
Total offenses	**95,152**[50]

45. 18 U.S.C. § 13 (1976).
46. 36 C.F.R., ch. I, § 1.1 (1980).
47. 36 C.F.R., ch. II, § 200.1 (1980).
48. 18 U.S.C. §§ 5005-5026 (1976).
49. 18 U.S.C. §§ 5031-5042 (1976 & Supp. III 1979).
50. The 95,152 misdemeanor and petty offense cases all involved personal appearances by the defendants before a magistrate in open court, following written consents by the defendants to trial and disposition of their cases by a magistrate. In addition to these 95,152 cases, more than 300,000 petty offense cases were disposed of by forfeiture of collateral without a personal appearance before a magistrate.

In all petty offense and misdemeanor cases an appeal of right lies from a judgment of conviction by a magistrate to a judge of the district in which the offense has been committed. During the year ending June 30, 1981, there were 211 appeals from judgments of magistrates in misdemeanor and petty offense cases to judges of the district courts.

c. References by Judges of Pretrial Matters and Other Proceedings

In accordance with 28 U.S.C. § 636(b), as revised by the 1976 amendments, a magistrate may be delegated a wide variety of duties to assist the judges in expediting the disposition of civil and criminal cases in the district courts. Under this authority a magistrate may:

(i) *Hear and determine non-case-dispositive pretrial matters* (such as procedural and discovery motions). The magistrate's decision in such matters is final, subject only to a right of appeal to a district judge under a "clearly erroneous or contrary to law" standard.

(ii) *Hear case-dispositive motions* (such as motions for summary judgment or dismissal or for suppression of evidence) *and submit proposed findings of fact and recommended dispositions of such motions to a judge of the district court.* The judge must make a *de novo* determination of those portions of the magistrate's findings or recommendations to which objection is made by a party.

(iii) *Review prisoner litigation and conduct necessary evidentiary hearings in such cases.* These matters are handled in the same manner, with the same *de novo* determination by a judge, as case-dispositive motions.

(iv) *Conduct calendar calls, pretrial conferences and settlement conferences.*

(v) *Serve as a special master* in complex cases under rule 53 of the Federal Rules of Civil Procedure, and upon consent of the parties in any civil case.

(vi) *Perform any additional duties* as are not inconsistent with the Constitution and laws of the United States.

During the year ending June 30, 1981, United States magistrates conducted the following volume of proceedings for district judges under authority of 28 U.S.C. § 636(b):

Civil Case Proceedings	**99,986**
Pretrial conferences	23,109
Procedural and discovery motions	43,691
Case-dispositive motions	7,324
Social Security cases	4,101
Prisoner cases	14,041
Evidentiary hearings	1,704
Special master references	564
Other matters	5,452

Criminal Case Proceedings	**48,249**
Post-indictment arraignments	18,981
Pretrial conferences	3,199
Procedural and discovery motions	16,547
Case-dispositive motions	2,105
Grand jury sessions	2,626
Probation revocation hearings	541
Evidentiary hearings	857
Other matters	3,393
Total Proceedings	**148,235**

The supplementary role which magistrates play in the district courts is recognized in the jurisdictional provisions of the 1968 Act and the 1976 and 1979 amendments. Flexibility in the use of magistrates by the judges of each court is the key feature of 28 U.S.C. § 636(b). The statute contemplates that magistrates will be used by the judges where most needed in a given court.[51] Since the nature and volume of the civil and criminal caseloads of the district courts vary considerably from district to district, so too the work of magistrates necessarily will vary from district to district. The availability of sufficient judicial personnel—judges and magistrates—and the nature and

51. In enacting the 1976 amendments the Congress reaffirmed the need for flexibility and experimentation among the district courts. The House and Senate Judiciary Committee reports specifically address the point.

> "Proposed subsection 636(b)(3) provides for the assignment to a magistrate of any other duty not inconsistent with the Constitution and laws of the United States. A similar provision is contained in the existing [1968] legislation. This subsection enables the district courts to continue innovative experimentations in the use of this judicial officer. At the same time, placing this authorization in an entirely separate subsection emphasizes that it is not restricted in any way by any other specific grant of authority to magistrates.
>
> "Under this subsection, the district courts would remain free to experiment in the assignment of other duties to magistrates which may not necessarily be included in the broad category of pretrial matters. . . .
>
> "If district judges are willing to experiment with the assignment to magistrates of other functions in aid of the business of the courts, there will be increased time available to judges for the careful and unhurried performance of their vital and traditional adjudicatory duties, and a consequent benefit to both efficiency and the quality of justice in the Federal courts.
>
> "Proposed subsection 636(b)(4) permits each district court to adopt local rules of court governing the performance of these duties by magistrates in the district. . . ."

1976 SENATE REPORT, *supra* note 19, at 10; 1976 HOUSE REPORT, *supra* note 19, at 12-13. *See also* McCabe, *supra* note 6, at 380, 383; 1978 HOUSE REPORT, *supra* note 32, at 22.

volume of a particular court's caseload will substantially affect the manner and extent to which the court will use its magistrates.

The Federal Magistrates Act recognizes the inherent distinctions in workload and local conditions among the various district courts by providing a permissive grant of jurisdiction to magistrates, rather than a mandatory one. Most full-time magistrates have been authorized by their district courts to perform a full range of duties under 28 U.S.C. § 636(b). The actual assignment of proceedings, however, varies according to the needs and preferences of each court. Among the 92 districts covered by the Federal Magistrates Act, the actual performance of duties by magistrates under 28 U.S.C. § 636(b) occurred in the following number of districts during the year ending June 30, 1981.

Civil Case Proceedings	**Districts**
Pretrial conferences	82
Motions	84
Prisoner cases	78
Social Security cases	76
Special master references	54

Criminal Case Proceedings	**Districts**
Post-indictment arraignments	90
Motions	77
Grand jury sessions	76
Pretrial conferences	49

d. Trial of Civil Cases

In accordance with the 1979 amendments a magistrate who has been specifically designated by the district court to exercise civil trial jurisdiction under 28 U.S.C. § 636(c) may upon the consent of the litigants conduct any and all proceedings in a civil case, including the trial of the case.[52] A civil trial before a magistrate may be conducted either with or without a jury, and the magistrate has the authority to order the entry of final judgment in the case.

The jurisdiction of magistrates to try civil cases extends to all cases pending in the district court.[53] The statute specifies that the clerk of court shall notify the parties, at the time a civil action is filed, that they may have their case disposed of before a magistrate. It further provides that the decision of the parties on this matter should be communicated directly to the clerk and that local court rules should include procedures to protect the voluntariness of the parties' "blind consent."

52. The court may subsequently vacate the reference of a civil case to a magistrate on its own motion for good cause shown or on the motion of a party under extraordinary circumstances.
53. The House Report states that 28 U.S.C. § 636(c)(1) does not permit a district court to limit references of cases by specifying that only particular types of lawsuits be tried before a magistrate. 1979 HOUSE REPORT, *supra* note 36, at 11.

A magistrate must be specially designated by majority vote of the judges of the district court to exercise the new case-dispositive jurisdiction in civil cases. Any magistrate appointed before the adoption of selection regulations by the Judicial Conference (effective April 5, 1980) may exercise the new jurisdiction only after having been either: (1) reappointed under the regulations; or (2) certified as personally qualified by the judicial council of the pertinent circuit.

The case-dispositive jurisdiction in civil cases is limited to full-time magistrates (including those bankruptcy judge-magistrates who serve the court on an aggregate full-time basis). A part-time magistrate may exercise the new jurisdiction in a given case, but only upon: (1) the specific written request of the parties; and (2) the certification of the chief judge of the district court that no full-time magistrate is reasonably available.

The 12-month period ending June 30, 1981, was the first full year in which magistrates were authorized to exercise the new civil trial jurisdiction of 28 U.S.C. § 636(c). The statistics that are available for the first year show that of the 200 full-time magistrates on duty as of June 30, 1981, 168 were eligible to try civil cases under authority of 28 U.S.C. § 636(c)—147 by individual certification of the pertinent circuit councils and 21 through appointment or reappointment under the 1980 regulations of the Judicial Conference.

During the 12-month period ending June 30, 1981, the new civil trial jurisdiction was actually exercised by 127 magistrates in 60 districts, including 124 full-time magistrates, 2 bankruptcy judge-magistrates, and one clerk of court-magistrate.

The magistrates disposed of 1,933 civil cases on consent of the litigants. Of the total, 1,322 cases were terminated on the merits without a trial, such as by motion or settlement. The remaining 611 civil cases terminated were tried before the magistrates—181 with a jury and 430 without a jury.

A review of the types of civil cases tried by magistrates indicates that the new jurisdiction is being used in a wide variety of cases. The most numerous categories of cases tried by magistrates include personal injury and other tort actions, civil rights litigation, contract actions, and prisoner petitions. The following table sets forth the nature of suit of the 611 civil cases disposed of by magistrates after trial under authority of 28 U.S.C. § 636(c) during the year ending June 30, 1981.

Nature of Civil Cases Terminated by Magistrates After Trial
12-month Period Ending June 30, 1981

Nature of Suit	Total Trials	Non-jury Trials	Jury Trials
Torts	156	61	95
Civil Rights	124	102	22
Contract	106	78	28
Prisoner Petitions	93	74	19
Real Property	70	62	8
Labor Law	18	15	3
Other	44	38	6
Total Cases	611	430	181

e. Magistrate Caseload Trends

The nature of the work allocated to magistrates has been changing significantly in character. There has been a marked shift away from the types of duties traditionally handled by the United States commissioners towards the more complex and time-consuming civil trials and "additional duties" delegated by the judges of the district courts under authority of 28 U.S.C. § 636(b). While every district court does not presently use its magistrates to the fullest extent permitted under the Federal Magistrates Act, as amended in 1976 and 1979, the caseload statistics reflect a clear nationwide trend of increasing use of magistrates by the district courts.

The substantial decline in the volume of initial proceedings conducted by magistrates in criminal cases generally reflects: (1) an overall decline in the number of new criminal cases initiated in the district courts by the Department of Justice over the last several years; and (2) procedural changes flowing from the Speedy Trial Act of 1976, including a prosecution policy in many cases of delaying the arrest of a defendant until after an indictment is returned by a grand jury, thereby obviating the need for pre-indictment proceedings before a magistrate.

The following table sets forth the work of magistrates during the first year of nationwide operation of the federal magistrates system and during the most recent reporting period available.

Proceedings Conducted by United States Magistrates During the 12-month Periods Ending June 30, 1972 and June 30, 1981

	1972	1981
Criminal Trial Jurisdiction	**72,082**	**95,152**
Misdemeanors other than petty offenses	9,167	14,208
Petty offenses	62,915	80,944
Preliminary Proceedings in Criminal Cases	**120,723**	**67,624**
Search warrants	7,338	5,442
Arrest warrants & summonses	36,833	11,634
Bail proceedings: (Total)	64,518	44,281
Initial appearances	*N/A*	*28,722*
Probation appearances	*N/A*	*1,866*
Material witness proceedings	*N/A*	*6,865*
Bail reviews	*N/A*	*6,828*
Preliminary examinations	9,554	6,267
Removal hearings	2,480	N/A
"Additional Duties," 28 U.S.C. § 636(b)	**44,717**	**149,557**
Criminal Proceedings	**22,336**	**48,249**
Post-indictment arraignments	10,799	18,981
Pretrial conferences	5,279	3,199
Motions	5,870	18,652
Final probation revocation hearings	N/A	541
Grand Jury sessions	N/A	2,626
Evidentiary hearings	N/A	857
Other matters	388	3,393

Civil Proceedings	**22,381**	**101,308**
Prisoner petitions (Total)	6,786	14,041
State Habeas corpus	*N/A*	*5,270*
Federal habeas corpus	*N/A*	*1,722*
Civil rights	*N/A*	*7,049*
Evidentiary hearings	*N/A*	*776*
Pretrial conferences	7,168	23,109
Motions	6,077	51,015
Special master reports	256	564
Social Security reviews	334	4,101
Evidentiary hearings	N/A	928
Other matters	1,760	6,774
Civil Trials, 28 U.S.C. § 636(c)	**N/A**	**611**
Jury trials	N/A	181
Non-jury trials	N/A	430

N/A = Breakdown not available. Removal hearings now included in the total for preliminary examinations.

3. Conclusions

In approving the 1976 and 1979 amendments to the Federal Magistrates Act of 1968, the Judiciary Committees of the House and Senate expressed the view that magistrates had fulfilled the intentions of the Congress with regard to providing assistance to district judges in handling their increasing caseloads and allowing judges more time to preside at the trial of cases.[54] The effective use of magistrates by many district courts appears to have contributed to increased productivity of the courts generally. In addition to handling a wide range of functions in criminal cases, magistrates have been devoting more and more time to assisting judges in the disposition of civil cases. During the 12-month period ending June 30, 1970, before the nationwide implementation of the magistrates system, district judges had terminated an average of 201 civil cases per authorized judgeship. For the year ending June 30, 1981, this figure had risen to 345 civil terminations per authorized judgeship due in part to the assistance provided by United States magistrates.

In enacting the 1979 amendments expanding the duties of magistrates, the Congress concluded that the federal magistrates system plays an "integral and important" role in the federal judicial system. As the House Judiciary Committee noted:

> . . . Reliance on magistrates has risen dramatically during the last several years, and there is no reason to believe that it will not continue in the future. Further, lawyers and judges have increasingly accepted the use of magistrates . . . .
>
> It is (in) the view of the [House Judiciary] committee that the philosophy embodies in the proposed legislation respects the

54. 1979 SENATE REPORT, *supra* note 37, at 2-3; 1976 SENATE REPORT, *supra* note 19, at 5; 1976 HOUSE REPORT, *supra* note 19, at 6.

> views of those who created the magistrates system in 1968 and then upgraded it in 1976. The legislation is, in effect, a logical extension of the congressional will expressed in the 1968 Act and the 1976 amendments. It derives its strength from the increasing use and acceptance of magistrates by judges, practitioners and litigants in the Federal judicial system. And it recognizes that magistrates have already made a significant contribution to aiding the Federal courts to meet their delegated responsibilities and that these judicial officers should continue to play a supportive and flexible role in the Federal judicial system.[55]

The 1968 Act and the 1976 amendments sought to free the time of district judges for the trial of cases by permitting them to delegate a wide variety of pretrial functions and proceedings to magistrates. The 1979 amendments seek to accomplish the same objective of freeing the time of judges, but they do so in a different manner—by permitting magistrates to conduct the trial of civil cases where desired by both judges and litigants.

The magistrates system, thus, is designed to provide the federal district courts with flexibility to meet their varied and increasingly complex caseloads and improve access to justice on a district-by-district basis.[56] Magistrates are an important judicial resource supplementing the judges of the district bench and enabling the court as a whole to provide greater service to the bar and to litigants.

In addition to assisting district judges, magistrates serve essential law enforcement needs. In felony criminal cases they conduct virtually all initial and preliminary proceedings, and they are available in both metropolitan centers and at outlying locations across the country to issue search and arrest warrants and to conduct prompt initial appearance proceedings for arrested persons. They also dispose of federal misdemeanor and petty offense cases, of which there were more than 95,000 last year.

The Judicial Conference stated to the Congress in 1975 that the courts cannot cope with the problems of increasing caseloads merely by continually increasing the number of district judges and their supporting staff, with the concomitant need for substantial additional physical space.[57] As one prominent federal jurist has noted:

> Simply creating more judgeships to cope with increased court business is a long, expensive, frustrating, and often inefficient procedure for reducing court congestion . . . . We do need more judges. But legislatures, sensitive to public outlays, are going to balk at the millions required to build new courthouses, create more judgeships, and hire the supporting personnel if we attempt to solve all our problems by simply increasing the number of judges. It is like

55. 1979 HOUSE REPORT, *supra* note 36, at 5.
56. 1979 SENATE REPORT, *supra* note 37, at 4.
57. JUDICIAL CONFERENCE OF THE UNITED STATES, PROPOSED AMENDMENT TO THE FEDERAL MAGISTRATES ACT 3 (March 7, 1975). *Accord,* 1979 HOUSE REPORT, *supra* note 36, at 19.

adding more engineers to a railroad still operating with steam instead of diesel engines.[58]

The magistrates system is one important part of an integrated approach to dealing with the problems of increasing caseload volume and complexity. Other parts of the whole include: (1) the periodic addition of needed judgeships; (2) the reappraisal of the jurisdiction of the federal courts; and (3) effective case management techniques and procedures.[59]

B. Court Procedures

1. Federal Rules

As judicial officers of the district courts, United States magistrates are bound by the same statutes and rules that govern district judges in conducting court proceedings. The Federal Rules of Civil Procedure and the Federal Rules of Criminal Procedure are applicable generally to proceedings before both magistrates and judges. By definition, the terms "magistrate" and "Federal magistrate," as used in the criminal rules, include a judge.[60]

The Federal Rules of Evidence, which are formally entitled the "Rules of Evidence for United States Courts and Magistrates," apply with equal force to proceedings before magistrates and judges. The evidence rules, however, do not apply to certain types of proceedings that are conducted primarily by magistrates, including preliminary examinations, bail hearings, and the issuance of warrants.[61]

The federal rules governing habeas corpus cases and those governing proceedings attacking federal sentences under 28 U.S.C. § 2255 also apply to both judges and magistrates.[62]

Federal misdemeanor cases before magistrates are governed by the Rules of Procedure for the Trial of Misdemeanors Before United States Magistrates. In the case of a misdemeanor above the level of a petty offense the magistrate must essentially follow the provisions of the Federal Rules of Criminal Procedure. Likewise, the magistrate must follow the federal rules in those petty offense cases where imprisonment might be imposed.[63] In "routine," (or "malum prohibitum") petty offense cases where no imprisonment will be imposed, a magistrate is authorized to follow more expeditious and informal procedures.[64]

2. Local Rules of Court

In accordance with 28 U.S.C. § 636(b)(4) each district court must "establish rules pursuant to which the magistrates shall discharge their

58. Kaufman, *The Judicial Crisis, Court Delay and the Para-Judge,* 54 JUDICATURE 145, 147-48 (1970). *Accord,* 1979 HOUSE REPORT, *supra* note 36, at 19-20.
59. *See* 1979 HOUSE REPORT, *supra* note 36, at 20.
60. FED.R.CRIM.P. 54(c).
61. FED.R.EVID. 1101(d)(3). Under rule 1101(a), the terms "court" and "judge" include magistrates.
62. *See* FED.R.GOVERNING § 2254, 10; FED.R.GOVERNING § 2255, 10.
63. FED.R.MISD.P. 1(b).
64. FED.R.MISD.P. 1(b) and (3).

duties." The Judicial Conference of the United States, its Committee on the Administration of the Federal Magistrates System, and the Administrative Office of the United States Courts have been active in encouraging the district courts to take full advantage of the services of magistrates in expediting their civil and criminal caseloads. Model local rules of court have been distributed to the courts, and most courts have authorized their magistrates to perform a full range of judicial duties under the provisions of the Act.[65]

C. Administration of the Federal Magistrates System

1. Judicial Conference of the United States

In accordance with 28 U.S.C. § 636(b), the Judicial Conference determines the number, location, and salaries of all magistrate positions, subject to the appropriation of funds by the Congress. The Conference also oversees the operation of the magistrates system by approving rules and regulations promulgated by the Director of the Administrative Office to govern the administration of the system. It issues regulations governing conduct and potential conflicts-of-interest of magistrates. It also has general responsibility for setting policy for the judiciary, for recommending appropriate legislation, for reviewing rules of practice, and for otherwise supervising the administration of the courts.[66]

The Conference exercises its responsibilities with regard to United States magistrates through its Committee on the Administration of the Federal Magistrates System. The Committee is composed of twelve judges—one from each of the federal circuits—and one United States magistrate. It meets twice a year, and its staff and counsel functions are performed by the Magistrates Division of the Administrative Office.

2. Administrative Office of the United States Courts

The Director of the Administrative Office, under the supervision and direction of the Judicial Conference, supervises all administrative matters relating to the offices of all United States magistrates.[67] Acting through the Magistrates Division, the Director makes recommendations as to the number, type, location and salary of magistrate positions, prepares legal and administrative manuals for magistrates, serves as a clearinghouse for information on magistrates and the magistrates system, develops forms, determines staffing levels for magistrates' offices, authorizes and pays for office equipment and lawbooks for magistrates, and otherwise provides necessary support services for magistrates and their staffs. The Director also gathers, compiles, and evaluates statistical and other information on the work of magistrates for use by the Judicial Conference and presents the Congress with an Annual Report that contains detailed information on the caseload of magistrates.

65. *See* section A-2 of this Part, beginning at page 20.
66. 28 U.S.C. § 331 (1976 & Supp. III 1979).
67. 28 U.S.C. § 604(d) (1976 & Supp. III 1979).

3. Judicial Councils of the Circuits

By statute the judicial councils of the circuits are responsible generally for making all necessary orders for the effective and expeditious administration of the business of the circuits.[68] In addition, the Federal Magistrates Act contains several provisions giving the judicial councils a role in the administration of the magistrates system, including reviewing recommendations for the creation of, and changes in, magistrate positions within their circuit; reviewing requests by magistrates for legal assistant positions; certifying magistrates appointed prior to April 1980 as competent to try civil cases; and approving contractual court reporting services and courtroom and office space for magistrates.[69]

Under the 1980 judicial discipline legislation[70] the circuit councils also act on any complaints against magistrates. Actual removal or discipline of a magistrate, however, is effected by the district courts.

4. District Courts

A magistrate is a subordinate judicial officer of the district court. The judges appoint the magistrate (with the assistance of a citizen merit selection panel) and may remove the magistrate for specified cause. The court also determines by local rule the duties to be assigned to magistrates and the manner of allocating work among magistrates.[71] An appeal from an order or judgment of a magistrate lies as a matter of right to a judge of the district court in all instances—except for one situation. Under 28 U.S.C. § 636(c)(3)-(4), an appeal from a judgment in a civil case disposed of before a magistrate lies directly to the pertinent court of appeals, unless at the time of reference of the case to the magistrate the parties had consented to appeal to a judge of the district court.

5. National Council of United States Magistrates

The National Council of United States Magistrates is a private, professional association to which most magistrates belong. Although not an official body, the Council speaks for magistrates generally and maintains a regular liaison with the Judicial Conference Committee and the Administrative Office. The views of the National Council have been considered by the Magistrates Committee in the preparation of this report, and several resolutions of the Council are attached to this report as Appendix D.

D. The Office of United States Magistrate

1. Authorization of Magistrate Positions

Magistrate positions are authorized by the Judicial Conference of the United States in accordance with the provisions of 28 U.S.C. § 633. The

68. 28 U.S.C. § 332(d) (Supp. III 1979).
69. 28 U.S.C. §§ 633(c), 634(c), 635, 753(g) (1976 & Supp. III 1979; 1979 Amendments, *supra* note 3; § 3(f). *See also* 28 U.S.C. §§ 631(f), (i), and 636(c)(1) (Supp. III 1979).
70. Pub.L. No. 96-458 (1980).
71. 28 U.S.C. §§ 636(b)(4), 636(c)(2) and (4) (1976 & Supp. III 1979).

determinations of the Conference are subject to subsequent funding by the Congress through the appropriations process. The continuing need for, and the arrangements concerning, each existing magistrate position are periodically reviewed by the Conference, usually before the expiration of each term of office of an incumbent. In addition, a position may be reviewed at any time upon the request of the district court or the Administrative Office. Approximately 60 to 120 magistrate positions are reviewed each year.

As of October 1, 1981, the Judicial Conference had authorized 489 United States magistrate positions—219 full-time positions, 250 part-time positions, and 20 "combination positions," in which 7 bankruptcy judges and 13 clerks of court or deputy clerks serve concurrently as part-time magistrates. Of the 219 full-time positions authorized, funds have been appropriated by the Congress for the 1982 fiscal year to cover the cost of 217 positions. Thirty-one magistrates have been authorized by the Judicial Conference to serve in two or more adjoining districts under 28 U.S.C. § 631(a).

In determining the number, location and salaries of magistrate positions, the Conference considers the recommendations of: (1) the appointing district court; (2) the judicial council of the pertinent circuit; and (3) the Director of the Administrative Office of the United States Courts. It also considers views offered by law enforcement agencies and other interested parties.

Acting through its Committee on the Administration of the Federal Magistrates System, the Conference directs its attention primarily to three factors in evaluating a request for a new full-time magistrate position: (1) the caseload of the district court as a whole and the comparative need of the judges for additional assistance from magistrates; (2) the effectiveness of the existing magistrates system in the district and the commitment of the court to the effective use of the magistrates; and (3) the sufficiency of judicial business of the sort that the judges intend to assign to magistrates to warrant the addition of a full-time position. Consideration is also given to the areas and population to be served, convenience to the public and bar, the rights of criminal defendants to prompt court proceedings, the number and extent of federally-administered lands in the district, transportation and communication facilities, and other pertinent local conditions.

In making its determinations as to the feasibility of magistrate positions, the Conference Committee, the district court, and the circuit council are provided with a survey by the Director of the Administrative Office containing detailed statistical data and other factual information on the workload and resources of the district court, together with the Director's specific recommendations.[72] The surveys contain an analysis of the court's present and pro-

72. The following factors are considered by the Administrative Office, the district court, the circuit council, and the Judicial Conference regarding a request for an additional full-time magistrate position:
    A. Workload of the District Court:
        1. Number and location of district judges
        2. Authorized places of holding court and caseload per divisional office
        3. Number of civil and criminal cases filed in the court over the last five years

(footnote continued on next page)

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jected use of its magistrates, and they include caseload information on the work of the magistrates.

Statistics provide the foundation of the analysis and recommendations presented to the Conference. Because of the number and complexity of the factors to be considered, the variations in the sizes and caseloads of the districts, and the differences in the way magistrates are used by the courts, the Conference cannot, and should not, apply a rigid statistical formula for the authorization of magistrate positions. Rather, the Conference reviews each position on a case-by-case basis, taking into account all relevant factors.

The development of the magistrates system on a nationwide basis has taken approximately a decade to complete, as the Conference has moved

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4. Number of defendants in criminal cases
5. "Weighted" case filings in the court
6. Number of cases terminated by the court
7. Number of cases pending on the court's dockets
8. Cases filed, terminated, and pending in the court per judgeship, compared to the national averages
9. Number of trials completed per judgeship
10. Median time intervals for the disposition of civil and criminal cases
11. Breakdown of civil and criminal cases by nature of suit or offense
12. Lengthy trials and complex cases
13. Trends in caseload filings and recent changes
14. Special factors bearing on the workload of the court

B. Workload of the Magistrates
1. Number, location, and salaries of existing magistrate positions in the district
2. Areas and facilities served by the magistrates
3. Special geographic and communications considerations
4. Extent of duties delegated to the magistrates by the district court
5. Number and types of misdemeanor and petty offense cases terminated by the magistrates
6. Number and types of initial proceedings conducted by the magistrates in felony criminal cases
7. Number and types of "additional duties" handled by the magistrates upon delegation from the district judges
8. Number and types of civil cases and trials completed by the magistrates under 28 U.S.C. § 636(c)
9. Other pertinent factors particular to the district court or the magistrate position in issue

C. Analysis
1. Analysis of the overall district court workload and the comparative need of the judges for additional magistrate resources
2. Types and volume of duties available for assignment to an additional magistrate
3. Commitment of the court to the full and effective use of magistrates and the efficiency of the existing magistrate system in the district
4. Correspondence and specific views of the district court and the circuit council
5. Correspondence and specific views of law enforcement officials and other interested parties

cautiously and deliberately in authorizing full-time magistrate positions. It has chosen to build the system on a firm basis, requiring a clear showing of need by the individual district courts and a commitment to the effective use of their judicial resources. The number of positions authorized by the Conference since enactment of the Federal Magistrates Act of 1968 has been as follows:

United States Magistrate Positions Authorized by the Judicial Conference

Year	Total	Full-time	Part-time	Combination
1970 Spring	518	61	449	8
Fall	542	82	449	11
1971 Spring	546	83	450	13
Fall	558	88	455	15
1972 Spring	561	90	455	16
Fall	572	103	452	17
1973 Spring	567	103	447	17
Fall	542	112	414	16
1974 Spring	541	112	411	18
Fall	482	130	336	16
1975 Spring	487	133	337	17
Fall	482	143	322	17
1976 Spring	482	150	316	16
Fall	483	159	306	18
1977 Spring	487	164	305	18
Fall	484	166	300	18
1978 Spring	487	176	290	21
Fall	486	187	278	21
1979 Spring	488	196	271	21
Fall	485	201	264	20
1980 Spring	488	204	263	21
Fall	495	210	263	22
1981 Spring	490	217	253	20
Fall	489	219	250	20

2. Part-time Magistrates

The Federal Magistrates Act contains a strong preference for the creation and maintenance of a system of full-time magistrates. Where there is insufficient judicial business to make a full-time magistrate position "feasible or desirable," the Act authorizes the Judicial Conference to establish part-time

magistrate positions.[73] Part-time magistrate positions have generally been authorized by the Judicial Conference at locations where the volume of business does not warrant the authorization of a full-time magistrate position, and yet considerations of geography and transportation make it impractical to have initial appearances and other proceedings in criminal cases conducted by a magistrate at a distant location.

The Congress has reaffirmed its preference for a system of full-time magistrates. The Senate Report on the 1979 amendments, for example, concluded that "more should be done to meet the Congressional intention, expressed in the original Federal Magistrates Act, and reaffirmed in 1972 that the magistrates system should be a system of full-time judicial officers, to the extent feasible."[74] The Congress has specifically urged the creation of more full-time positions by consolidation of part-time positions and a reduction in the number of part-time positions where the caseload is negligible and another magistrate is located within a reasonable distance.[75] As shown in the table in the preceding section, the Conference has implemented the policy of the Congress by progressively increasing the number of full-time magistrate positions and decreasing the number of part-time positions wherever feasible.

The duties of part-time magistrates are normally limited to: (1) conducting initial proceedings in criminal cases, such as the issuance of warrants and the conduct of initial appearances; and (2) the trial of petty offenses and other misdemeanors arising on federally-administered lands, such as military installations and national parks. Fewer than 10 percent of the part-time magistrates perform "additional duties" for the judges of the district courts under authority of 28 U.S.C. § 636(b). Under the 1979 amendments to the Federal Magistrates Act part-time magistrates are authorized to try civil cases under 28 U.S.C. § 636(c) only if the district court certifies that no full-time magistrate is reasonably available.

During the 12-month period ending June 30, 1981, part-time magistrates

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73. The Senate report on the Federal Magistrates Act of 1968 noted that, "[the] creation of part-time magistracies, especially in remote or rural areas where the anticipated caseload of the magistrate would not support the creation of a full-time position, is considered essential to the accomplishment of the ends to which the Federal Magistrates Act is in part addressed. . . ." 1967 SENATE REPORT, *supra* note 13, at 20.
74. 1979 SENATE REPORT, *supra* note 37, at 8.
75. The Senate Judiciary Committee stated its belief that:
    ". . . [t]he Judicial Conference can, and will, continue to closely monitor the justification for the workloads of those part-time magistrate positions receiving substantial annual salaries, with a view toward the consolidation of such positions into full-time positions. The committee believes, moreover, that it would be feasible in some instances to authorize a full-time magistrate to 'ride circuit' among several locations for the performance of a full range of 'additional duties' for the court." *Id.* at 9.
    Accord, SENATE REPORT NO. 92-1065, 92d Cong., 2nd Sess. 4 (1972).

disposed of the following percentage of the total work performed by all United States magistrates nationally:

	Full-time Magistrates	Part-time Magistrates*
Criminal Trial Jurisdiction	**54.5%**	**45.6%**
Misdemeanors (other than petty offenses)	65.7	34.3
Petty offenses	52.4	47.6
Preliminary Criminal Proceedings	**86.2%**	**13.8%**
Search warrants	87.5	12.5
Arrest warrants	84.4	15.6
Initial appearances	86.7	13.3
Preliminary examinations	84.7	15.3
"Additional Duties" for the Courts	**93.8%**	**6.2%**
Criminal Cases	**93.9%**	**6.2%**
Post-indictment arraignments	89.3	10.7
Pretrial conferences	96.9	3.1
Motions	97.1	2.9
Civil Cases	**93.7%**	**6.3%**
Pretrial conferences	93.6	6.4
Motions	93.6	6.4
Prisoner petitions	93.3	6.7
Social security appeals	96.4	3.6

*Includes "combination" bankruptcy judge-magistrates, clerk of court-magistrates, and deputy clerk-magistrates.

3. Qualifications of Magistrates

The Federal Magistrates Act and the regulations promulgated by the Judicial Conference under authority of 28 U.S.C. § 636(b) require that an individual meet the following standards in order to be qualified for appointment as a United States magistrate: (1) be a member in good standing for at least five years of the bar of the highest court of the state in which the magistrate is to serve; (2) be engaged in the active practice of law for a period of at least five years (with some substitutions permitted for judicial or other government service); (3) be less than 70 years old at the time of initial appointment; (4) not be related by blood or marriage to a judge of the court; (5) be competent to perform the duties of the office; and (6) be of good moral character, emotionally stable and mature, committed to equal justice under the law, in good health, patient, courteous, and capable of deliberativeness and decisiveness when required to act on one's own reason and judgment.

The statute authorizes a non-attorney to serve as a part-time magistrate upon approval by the district court and the Judicial Conference if no qualified member of the bar is able to serve at a specific location. At the present time only two part-time magistrates, both of whom are located in remote geographic areas, are not members of the bar.

4. Selection and Appointment of Magistrates

United States magistrates are appointed by majority vote of the judges of the district court upon the recommendation of a citizen merit selection panel. Full-time magistrates serve for a term of eight years, while part-time magistrates are appointed for a term of four years.

The 1979 statute imposes two basic requirements for the appointment and reappointment of magistrates, both of which are elaborated upon in the regulations of the Judicial Conference: (1) public notice of all vacancies to be filled and of all impending reappointments; and (2) the convening of citizen merit selection panels to assist the district courts in identifying candidates and appraising performance.

In the case of an original appointment to a full-time magistrate position, the citizen panel screens applicants and submits a list of five qualified candidates to the district court. The court may either choose its magistrates from the list of individuals submitted or it may request the panel to submit a second list of five names. After the court has made its selection, the nominee for a full-time magistrate position must undergo an FBI full-field investigation and an IRS tax check. A nominee for a part-time magistrate position must undergo FBI and IRS file checks.

In the case of a reappointment of a sitting magistrate, the role of the merit selection panel is to review the performance of the incumbent magistrate in office and to recommend to the district court whether or not the individual should be reappointed to a new term of office.

5. Conduct of Magistrates

The American Bar Association's Code of Judicial Conduct, adopted with some modifications by the Judicial Conference in April 1973, is applicable to United States magistrates, as well as federal judges.

Full-time magistrates may not engage in the practice of law. Part-time magistrates may practice law, but are prohibited by 28 U.S.C. § 636(b) from serving as counsel in any criminal action in any court of the United States.

In accordance with 28 U.S.C. § 636(b), the Judicial Conference has adopted conflict-of-interest rules applicable to part-time magistrates and their partners and associates. In general, the rules preclude a part-time magistrate and the magistrate's partners and associates from appearing in any cases in which the magistrate has been involved in connection with official court duties. The part-time magistrate is precluded from appearing as counsel in any criminal action in any court of the United States, while the partners and associates are precluded from appearing in any criminal case in the district in which the part-time magistrate serves. A part-time magistrate who is assigned "additional duties" under 28 U.S.C. § 636(b) may not appear as counsel in any case, civil or criminal, in the district court for which the magistrate is appointed.[76]

76. Excluded from the prohibition on a part-time magistrate are the review of prisoner petitions, service as a special master in a specified case, the receipt of indictments returned by grand juries, and the conduct of post-indictment arraignments.

6. Discipline and Removal of Magistrates

In accordance with the provisions of the Judicial Councils Reform and Judicial Conduct and Disability Act of 1980,[77] a person who alleges disability or improper conduct on the part of a magistrate or a judge may file a written complaint with the clerk of the court of appeals of the appropriate circuit. The chief judge of the circuit may either dismiss the complaint or appoint a special committee of the circuit council to investigate the allegations of the complaint. The council may then direct the chief judge of the district whose magistrate is the subject of the complaint to take necessary action against the magistrate, which may include the initiation of removal proceedings under 28 U.S.C. §636(i).

In accordance with 28 U.S.C. § 636(i), removal of a magistrate during a term of office may only be made for specified cause, *i.e.,* incompetence, misconduct, neglect of duty, or physical or mental disability. The Judicial Conference, however, may abolish a magistrate position at any time if it is no longer needed.

Removal of a magistrate is effected by a majority vote of the judges of the district court, following the furnishing of a full specification of charges to the incumbent and an opportunity for the individual to be heard. If there is a tie vote among the judges of the district court, removal may be effected by a majority vote of the judges of the judicial council of the circuit.

7. Profile of Sitting Magistrates

On June 30, 1981, 204 full-time magistrate positions had been authorized by the Judicial Conference and funded by the Congress. Four positions were vacant on June 30, 1981, and 200 full-time magistrates were actually on duty. A survey of the 200 individuals on duty indicates that 26 were women or members of minority groups, including 16 women and 12 blacks and members of other minority groups (of whom 2 were black women).

As of June 30, 1981, the average age of sitting full-time magistrates was 47.7 years. At the time of their original appointment, the average age of full-time magistrates had been 42.4 years. The average full-time magistrate had been a graduate of a law school for 16 years at the time of initial appointment.

The professional experience of most full-time magistrates prior to appointment had been diverse, as most magistrates had held several positions before entering federal service. Most prominent among the former vocations of full-time magistrates were the following: private practice of law (80%); United States attorney or assistant United States attorney (39%); law clerk to a judge (34%); state or local prosecutor (25%); United States commissioner (14%); and part-time United States magistrate (13%). In addition, 19% of the full-time magistrates had held positions in private industry, 9% had been law professors, 7% had served at one time as clerks of court, and 6% had been state judges.

There were 256 part-time magistrates on duty as of June 30, 1981, including 20 individuals who serve in combined bankruptcy judge-magistrate

77. Pub.L.No. 96-458 (1980).

and clerk or deputy clerk-magistrate positions. The average age of the sitting part-time magistrates was 49.9 years on June 30, 1981, while their average age at the time of initial appointment by the district courts had been 43 years.

Unlike the complete background records compiled and maintained on full-time magistrates, no such extensive documentation is maintained on part-time magistrates. The limited sources presently available, though, reveal the current professional background of 138 of the 256 sitting part-time magistrates. Among the incumbents, 107 are presently involved in the private practice of law; 9 are state judges; and 2 are law professors. The remaining 20 part-time magistrates serve in combination positions—7 as bankruptcy judges, 11 as clerks of court, and 2 as deputy clerks of court (all of whom are members of the bar).

Thirteen former United States magistrates presently serve as federal district judges or circuit judges, including 10 former full-time magistrates and 3 former part-time magistrates.

8. Salaries of Magistrates

In accordance with 28 U.S.C. § 636(a) the salaries of full-time and part-time magistrates are set by the Judicial Conference at rates not to exceed those fixed by law for full-time and part-time bankruptcy judges. The Conference has consistently endorsed the policy that the salaries of United States magistrates should be on a par with those of bankruptcy judges.[78] Therefore, the salary of a full-time magistrate has been set by the Judicial Conference at $53,000 per annum.[79]

By statute, the salary of a part-time magistrate may not be less than $100 per annum nor more than half the salary payable to a full-time magistrate. The Conference has established a system of 16 standard salary levels for the 250 authorized part-time magistrate positions (exclusive of "combination" positions). The number of part-time magistrates in each level is set out in the following table:

Annual Salary	Number of Magistrates	Annual Salary	Number of Magistrates
$ 900	61	$11,800	7
1,800	37	13,600	7
2,700	25	15,500	14
3,600	13	17,900	3
4,500	25	20,300	8
6,400	15	23,100	1
8,200	6	26,750	19
10,000	9	29,200*	

*Not presently payable due to appropriations limitations.

78. The 1968 Act set maximum salary rates of $22,500 and $11,000 for full-time and part-time magistrates, respectively. These were the same rates set for referees in bankruptcy at the time.
79. Two full-time magistrates receive a salary of less than $53,000, based on the nature and volume of their caseload.

9. Retirement and Other Employment Benefits

All magistrates are subject to the provisions of the general Civil Service Retirement System.[80] Under the system all covered federal employees have seven percent of their salary deducted and placed in a retirement fund, with a matching seven percent contribution made by the employing agencies.

The most common type of retirement is labeled "optional." It permits an individual to retire and receive payment of an immediate annuity upon meeting the following age and service requirements:

Minimum Age	Minimum Service
62	5 years
60	20 years
55	30 years

The amount of a retiree's annuity is determined by two factors: (1) length of service; and (2) average annual salary for the highest three consecutive years of employment.[81] Assuming a salary of $53,000 per annum, a full-time magistrate who served one eight-year term of office would be entitled to an annuity of approximately $6,800 per annum upon reaching retirement age. With two terms, or 16 years of service, the magistrate's pension would be about $15,500 per annum. After three terms, or 24 years of service, the magistrate's annuity would rise to about $23,700 yearly.

E. Staff and Support Services

In accordance with 28 U.S.C. § 636, full-time magistrates are provided with necessary staff, office space, equipment and supplies in the same manner as other federal officers. Part-time magistrates, on the other hand, obtain their own secretarial and clerical assistance and claim reimbursement for the cost thereof in accordance with regulations prescribed by the Judicial Conference.

1. Staff

Each full-time magistrate is provided with a secretary. Clerical assistant positions are allocated upon a showing of need and are normally provided on the basis of one employee per full-time magistrate. Clerical assistants generally handle necessary courtroom functions, scheduling and noticing of proceedings, overflow secretarial work, and various paperwork and administrative procedures involved with the conduct of proceedings before the magistrate.

80. 5 U.S.C. §§ 8331-8348 (1976 & Supp. III 1979).
81. The exact basic annuity formula is as follows:
    (a) 1-1/2 percent of the "high three" years' average salary for each of the first five years of service; plus
    (b) 1-3/4 percent of the "high three" years' average salary for each of the next five years of service; plus
    (c) 2 percent of the "high three" years' average salary for each year of service over 10 years.
    5 U.S.C. §§ 8331(4) & 8339(a) (1976).

The 1979 amendments to the Federal Magistrates Act have authorized the Judicial Conference to provide legal assistant positions to full-time magistrates. The Conference has established criteria for the approval of such positions, requiring: (1) a review of each magistrate's needs on a case-by-case basis, in light of the particular nature and volume of the magistrate's caseload; (2) a showing that the magistrate performs a full range of judicial duties under 28 U.S.C. §§ 636(b) and (c); (3) approval of the magistrate's request by the district court; and (4) approval of the request by the judicial council of the pertinent circuit. As of October 1, 1981, the Conference had approved 124 legal assistant positions for the 217 full-time magistrate positions authorized and funded for the 1982 fiscal year. No more than one legal assistant has been authorized by the Judicial Conference for any magistrate.

Part-time magistrates are authorized to use a secretary or clerical assistant employed in their private law office for all support services associated with their magistrate duties. The amount of reimbursement that the magistrates may claim for such services is limited to their actual and necessary expenses, and the rates that they pay their employees may not exceed the rates payable to employees of a full-time magistrate.

2. Space and Facilities

Full-time magistrates are provided with necessary courtroom and office space in federal buildings in accordance with guidelines approved by the Judicial Conference. Jury courtrooms are not automatically provided to magistrates. Rather, a magistrate is normally expected to use an available judge's courtroom or other district court facility to conduct jury trials. Upon a showing of sufficient volume and need, however, jury facilities may be built for one or more magistrates within a given federal building.

Part-time magistrates generally use their private law offices to handle their magistrate work. They are entitled to use district court facilities, if available, to conduct their courtroom proceedings. Upon a showing of need, some space may be set aside in the federal building for a part-time magistrate whose volume of work warrants such space. Part-time magistrates are not allowed reimbursement for the cost of their office space.

3. Court Reporting Services

Proceedings conducted before United States magistrates are generally recorded on suitable sound recording equipment. This arrangement has been found to be sufficient for most proceedings. Under the 1979 amendments to the Federal Magistrates Act, however, civil case proceedings under 28 U.S.C. § 636(c) generally must be taken down by a court reporter. Under the federal misdemeanor rules a court reporter is required for criminal misdemeanor trials where a litigant has requested a reporter. In addition, court reporter services may be authorized for a magistrate in court proceedings conducted under the authority of 28 U.S.C. § 636(b), where the magistrate acts in lieu of a district judge. In such circumstances it is expected that the magistrate will use an official court reporter of the district court, *i.e.*, a judge's reporter, if one is available. If, however, no official court reporter is available to take down such proceedings, the magistrate may obtain the services of a contractual court reporting service on a daily basis.

4. Support Services

Full-time magistrates are provided with necessary equipment and office supplies in the same manner as other federal officers. Lawbooks are provided to them on a case-by-case basis upon a showing of need, based on the nature and volume of duties which they perform.

Part-time magistrates are not generally provided with equipment or supplies other than sound recording equipment to record court proceedings. They are expected to purchase necessary office materials locally and claim reimbursement for the cost thereof. A limited range of lawbooks will be provided to part-time magistrates upon a showing of need.

5. Education and Training

Each magistrate is invited to attend a general orientation training seminar conducted by the Federal Judicial Center within one year of initial appointment. Advanced training programs are provided on a periodic basis. The Center also conducts periodic training programs for the staff of full-time magistrates.

In accordance with 28 U.S.C § 604(d)(4), the Director of the Administrative Office provides all magistrates with the *Legal Manual for United States Magistrates,* which describes the various types of proceedings which arise before them and assists them in discharging their duties. In addition, the Administrative Office distributes recent court decisions and other materials of importance to magistrates on an on-going basis. An administrative manual is provided to magistrates to assist them in establishing and maintaining their offices.

6. Comparative Cost of a Magistrate Position

The cost of establishing and maintaining a full-time United States magistrate position is approximately one-half that of establishing and maintaining a district judgeship.

Expenses, October 1, 1981	District Judge	Full-Time Magistrate
Salary	$ 70,300	$ 53,500
Related employment benefit costs	3,850*	5,400
Supporting staff	115,300	47,300**
Miscellaneous office expenses:		
Initial cost	61,000	37,300
Annual recurring cost	32,000	14,700
Space and facilities:		
Initial cost	121,000	45,000
Annual recurring cost	83,000	28,000
Total:		
Initial cost	$ 371,450	$ 188,500
Annual recurring cost	304,450	148,900

*Does not include funds required for retirement of a district judge or of a district judge serving in senior status.
**Includes secretary and legal assistant.

III. EVALUATING THE 1979 AMENDMENTS TO THE FEDERAL MAGISTRATES ACT

A. Implementation of the Amendments

The 1979 amendments to the Federal Magistrates Act were signed into law on October 10, 1979. The Judicial Conference and the individual district courts and circuit councils have now generally completed the various steps necessary to implement the new law.

In March 1980 the Magistrates Committee of the Judicial Conference distributed detailed guidelines on the legislation to all judges, magistrates, and clerks of court to assist the courts in adopting local rules and procedures to implement the legislation. At the same time, model local rules and suggested forms were distributed to the courts.

Effective June 1, 1980, the Supreme Court promulgated new Rules of Procedure for the Trial of Misdemeanors Before United States Magistrates. Moreover, the Advisory Committee on Civil Rules and the Advisory Committee on Appellate Rules have given preliminary consideration to proposals for changes in the federal rules to implement the civil trial provisions of the 1979 law.

In March 1980 the Judicial Conference promulgated regulations governing the selection and appointment of magistrates by the district courts. In June 1981 the Administrative Office of the United States Courts distributed to the courts a brochure on the selection and appointment of magistrates to assist the members of the citizen merit selection panels in performing their duties.

The 1979 amendments require the Director of the Administrative Office to report additional caseload information on proceedings conducted by magistrates. Statistical reporting forms for both magistrates and clerks of court were revised in 1980 and 1981, and the additional information is now being compiled for presentation to the Judicial Conference and the Congress in the Annual Reports of the Director.

The *Legal Manual for United States Magistrates* was revised to take account of the provisions of the 1979 amendments. In addition, the Federal Judicial Center has conducted educational programs for magistrates concerning the duties that they may perform in civil cases under 28 U.S.C. § 636(c).

B. Methods Used to Evaluate the Effectiveness of the Amendments

Section 9 of the 1979 amendments requires the Judicial Conference to file this report with the Congress by January 1982. Naturally, the Conference and the individual district courts have needed time at the outset to implement the various provisions of the new statute by promulgating regulations and establishing local rules and procedures. Moreover, because of the established statistical reporting-year cycle, only one full year of caseload information is presently available for this report, covering the period of July 1, 1980 through June 30, 1981. The statistical information on civil trials is set forth in Part II of this report, at page 16.

The two-year period prescribed by the statute for the filing of this report has not allowed for the accumulation of a sufficient body of statistical data to

appraise conclusively the effectiveness of the 1979 amendments. Therefore, the Magistrates Committee of the Judicial Conference authorized a survey of all chief judges of the district courts and all full-time United States magistrates in order to obtain their first-hand evaluations of the effect of the recent statutory amendments. Responses were received from the chief judges of 69 of the 92 district courts in the magistrates system and from 150 of the 200 full-time magistrates on duty on May 1, 1981. The results of the survey are set out in detail in Appendix B and will be summarized in the following pages.

C. Civil Trial Jurisdiction

The 1979 amendments added a new subsection 636(c) authorizing a full-time magistrate, upon designation of the district court and upon consent of the litigants, to exercise case-dispositive jurisdiction in any civil case filed in the court. The results of the recent survey indicate that about 80 percent of the district courts that have full-time magistrates have designated their magistrates to try civil cases, and that more than 75 percent of the designated magistrates have actually tried cases on consent of the parties.

A large majority of the judges and magistrates who have used the new procedures report that they are satisfied with the operation of the new civil trial jurisdiction to date. Among the chief judges, 57 percent expressed satisfaction, 4 percent expressed dissatisfaction, and 39 percent stated that it was too early to draw definitive conclusions. Among the full-time magistrates, 62 percent stated that satisfactory results had been achieved. Two percent of the magistrates expressed the view that the results of the new jurisdiction were not satisfactory, while the remaining 36 percent indicated that insufficient experience had been accumulatd to make a conclusive appraisal of the effectiveness of the 1979 amendments.

The judges and magistrates indicate that the new authority has saved judge-time. Sixty-five percent of the judges and 69 percent of the magistrates agreed that savings in judge-time had been achieved, while 10 percent of the judges and 3 percent of the magistrates disagreed with this appraisal. Twenty-five percent of the judges and 28 percent of the magistrates were of the view that insufficient experience has been attained to date to measure savings of judge-time.

Fifty-three percent of the chief judges and 58 percent of the magistrates stated that the new jurisdiction has served to expedite the dispositon of cases in the district courts. Twelve percent of the judges and 4 percent of the magistrates saw no savings to date, while 35 percent of the judges and 37 percent of the magistrates indicated that it was too early to demonstrate the effect of the new jurisdiction on expediting cases.

While the judges and magistrates have expressed clear satisfaction with the general operation of the new civil trial jurisdiction, a substantial number of survey respondents voiced misgivings about one of the procedural details set forth in the 1979 amendments. Section 636(c)(2) of title 28 now requires the clerk of the district court to notify the parties at the time a civil action is filed in the court that they may consent to have a magistrate dispose of their case. The survey results show general support, particularly among magistrates, for the concept of notifying the parties of their opportunity to request trial and disposition of their litigation before a magistrate. Between 42

percent and 48 percent of the judges stated that the notice requirement is beneficial, helps to inform the bar, and encourages the use of magistrates. The responses among magistrates ranged between 61 percent and 75 percent in support of the notice requirement in general. The survey showed, however, that only 36 percent of the judges and 42 percent of the magistrates found "no significant problems" with the notice procedure.

A majority of both the chief judges (62 percent) and the magistrates (53 percent) expressed the view that greater discretion should be afforded to the individual courts in prescribing the manner and the timing of the notification by the clerk of court. About one-third of the judges and the magistrates saw "no significant problems" with the present timing requirement for the notice.

D. "Blind Consent" Provision

In enacting the 1979 amendments the Congress took steps to insure the voluntariness of the parties' consent to the exercise of civil case jurisdiction by magistrates. Under 28 U.S.C. § 636(c)(2), the parties are instructed to communicate their consent (or failure to consent if appropriate) to the clerk of the district court only. No judge or magistrate may "persuade or induce" a party to consent, and the local rules of the district court must include procedures to protect the voluntariness of the parties' consent.

The judges and magistrates who responded to the survey expressed the virtually unanimous view that the blind consent provision has worked well. Ninety-six percent of the judges and 93 percent of the magistrates stated that no complaints or comments had been received from the bar or from litigants regarding the consent procedure.

The blind consent procedure also appears to have caused no administrative problems for the courts. Ninety-six percent of the judges and 91 percent of the magistrates stated that the requirement of blind consent has not "caused any difficulty" in implementing the new civil trial jurisdiction of magistrates.

Many of the judges (39 percent) and magistrates (50 percent) indicated that the preliminary reaction of the bar has been generally favorable to having the option of consenting to the disposition of civil cases before a magistrate. As with many of the other responses, however, many respondents stated that their limited experience with the new procedure has been insufficient to draw definitive conclusions. Forty-three percent of the judges and 45 percent of the magistrates either had no opinion to offer on the matter or were of the view that it was too early to measure the reaction of the bar. Twelve percent of the judges and 6 percent of the magistrates stated that the bar was either reluctant to exercise the new jurisdiction or was opposed to it.

E. Selection of Magistrates

Under the 1979 amendments all United States magistrates must be selected, appointed, and reappointed in accordance with standards and procedures promulgated by the Judicial Conference. The Conference's regulations, which became effective on April 5, 1980, provide for: (1) public notice of all vacancies in magistrate positions and of all impending reappointments; and (2) the convening of citizen merit selection panels to submit names of

candidates to the court and to appraise the performance of incumbent magistrates.

As of June 30, 1981, 86 United States magistrates had been appointed or reappointed under the regulations of the Judicial Conference.

33 original appointments:	20 full-time magistrates
	13 part-time magistrates
53 reappointments:	8 full-time magistrates
	40 part-time magistrates
	5 "combination" magistrates

The chief judges and magistrates who participated in the survey were asked to evaluate the effectiveness of the new statute and regulations governing appointment procedures. Seventy percent of the judges and 73 percent of the magistrates indicated general satisfaction with the new procedures. Nine percent of the judges and 2 percent of the magistrates stated that they were not satisfied with the new procedures, while 22 percent of the judges and 25 percent of the magistrates indicated that there was insufficient experience with which to appraise the effectiveness of the selection procedures.

Thirty-three percent of the judges and 42 percent of the magistrates were of the view that the new procedures have broadened the field of qualified candidates for magistrate positions in their districts. Forty-four percent of the judges and 49 percent of the magistrates stated that it was too early to make such an appraisal. Forty-two percent of the judges and 31 percent of the magistrates agreed that the statute and regulations have fostered applications for magistrate positions from women and members of minority groups. Thirty-one percent of the judges and 8 percent of the magistrates indicated that the new procedures had not increased applications from women and minorities, while 27 percent of the judges and 61 percent of the magistrates stated that it was too early to tell whether the new procedures have increased the number of applications from women and members of minority groups.

There was little indication in the survey responses that the new statute and regulations have actually discouraged applications from well-qualified candidates. Only 16 percent of the judges and 8 percent of the magistrates were of the view that the new procedures have inhibited qualified individuals from applying for magistrate positions. Forty-five percent of the judges and 32 percent of the magistrates saw no such inhibitions, while 38 percent of the judges and 60 percent of the magistrates were of the view that there was insufficient experience to date to make an evaluation on this matter.

While there was general acceptance of the new appointment procedures, some support was voiced in the survey for two specific changes in the statute and regulations. First, several judges and magistrates stated that the merit selection panel system should be eliminated and the selection process should be entrusted to the discretion of the district courts. Second, several magistrates stated that the merit selection panel system should be limited to original appointments of magistrates. They were of the view that the convening of a panel should not be required for reappointments, since only the district court itself is able to effectively appraise the performance of an incumbent magistrate.

In addition, experience to date has shown that the new selection procedures required by the 1979 amendments are time-consuming and have tended to slow down the appointment of magistrates and the filling of vacancies. They have also added costs for newspaper advertisements and travel and per diem expenses for merit selection panel members. It is questionable whether a merit selection panel should be mandated by statute for the appointment and reappointment of part-time magistrates, most of whom are located in outlying areas and have minimal caseloads.

Finally, experience over the last two years has shown that the language of the 1979 amendments has excluded some qualified individuals for consideration for magistrate positions because they have changed their residences. As amended, 28 U.S.C. 631(b)(1) requires that a candidate for a magistrate position be a member in good standing of the bar of the highest court of the state of appointment for at least five years. The language is probably more restrictive than intended. Capable individuals have applied for magistrate positions who are in fact members of the local state bar and have more than five years' experience as attorneys, but have not been members of the bar of the highest court of the particular state where they would serve as magistrate for a period of five years. Therefore, the language of the 1979 amendments should be modified to separate the two requirements of local bar membership and five year's bar membership. It should be sufficient simply to require that a magistrate be a member in good standing in the bar of the highest court of the state of appointment and a member of the bar of the highest court of *any* state for a period of at least five years.

F. Conclusions

It has taken the courts time to implement the several provisions of the 1979 amendments to the Federal Magistrates Act. Moreover, only one full year of caseload statistical information is available following approval of the amendments.

Nevertheless, preliminary indications, based on the first year's statistics and the survey of chief judges and magistrates, show considerable satisfaction with the 1979 amendments. A majority of the district courts have now designated their magistrates to try civil cases under authority of 28 U.S.C. § 636(c), and a majority of full-time magistrates have tried at least one civil case under the new statute. The subject matter of the cases tried by magistrates during the reporting year ending June 30, 1981, is varied, embracing all categories of federal civil litigation.

While the civil trial jurisdiction appears to have been well received, the courts have encountered some administrative difficulties regarding procedural aspects of the 1979 amendments, particularly the manner and timing of the notification that the clerk of court must give to civil litigants. A specific proposal to the Congress for a technical amendment to cure this problem is set forth in Part IV of this report at pages 49-50.

The "blind consent" provision of the 1979 amendments appears to be working well also. The chief judges and magistrates have reported no difficulties with the manner in which the litigants give their consent to trial by a magistrate.

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The new procedures for the selection of magistrates appear to be working satisfactorily, even though they have slowed down the appointment process and increased costs. Well-qualified candidates appear to have been selected for magistrate positions, although the limited number of appointments made to date under the new statute and the Judicial Conference's regulations does not permit a conclusive determination at this point on the effectiveness of all aspects of the merit selection procedure. The statutory five-year local bar membership requirement has restricted the field of qualified candidates and should be modified to permit the consideration of a broader field of capable applicants.

IV. THE FUTURE OF THE FEDERAL MAGISTRATES SYSTEM

In accordance with section 9 of the 1979 amendments, the Chairmen of the Judiciary Committees of the House and Senate asked the Judicial Conference to review several specific aspects of the federal magistrates system.[82] Most of the identified areas of interest relate to policy decisions already made by the Congress. The Conference, however, was also asked to address the basic needs and future direction of the magistrates system.

The specific questions raised by the Judiciary Committees relate to: (1) the organization of the magistrates system in the federal courts; (2) the jurisdiction of magistrates; and (3) the office of United States magistrate.

A. The Organization of the Magistrates System

Dean Roscoe Pound suggested that the guiding principles governing organization of the courts should be: unification; flexibility; conservation of judicial power; and responsibility.[83]

The federal magistrates system best meets these objectives in its present organizational form. Magistrates work closely with the judges of the United States district courts as a unified team in expediting the disposition of the courts' civil and criminal cases. Maximum flexibility is provided in the current law for each court to use magistrates in the ways that best address local conditions and changing caseload needs. As supplemental judicial resources within the district courts, magistrates conserve the scarce time of district judges so the judges may perform the duties that they alone should perform as a matter of law or constitutional propriety. As subordinate, but independent, officers of the district courts, magistrates are subject to the general supervision of the district courts, but are responsible in their own right for making important judicial decisions.

1. Part of the District Court

The Judicial Conference has been asked whether the district courts should be restructured as two-tier trial courts, using judges and magistrates as separate tiers.

The federal magistrates system was created by the Congress as an integral part of the district courts. Experience has affirmed the wisdom of the drafters of the 1968 statute. There appears to be no advantage to establish the system as a separate tier or court, or as a formal division within the district courts. To the contrary, the success of the magistrates system over the past decade has been derived in large measure from the fact that judges have been free to delegate a wide variety of responsibilities to magistrates in civil and criminal cases without the hinderance of divisional or other administrative barriers. Innovation, experimentation, and responsiveness to

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82. The questions posed by the Chairmen of the Judiciary Committees are set forth as Appendix A.
83. Pound, *Principles and Outline of a Modern Unified Court Organization,* 23 J.AM.J.SOC'Y 225, 225 (1940).

caseload demands are facilitated under the present organizational framework.

The jurisdiction of magistrates flows exclusively from that of the district courts and is co-extensive, upon delegation, with that of the district courts. Judges and magistrates commonly work on the same cases, and the duties that magistrates perform dovetail with the work of the judges. Magistrates assist in expediting the judges' cases by conducting pretrial conferences, ruling on motions, and conducting evidentiary hearings. They also help the judges by handling the judges' prisoner litigation and by serving as special masters for them in appropriate cases. Under 28 U.S.C. § 636(b) magistrates perform these various duties in each instance upon "designation" of a judge or the court as a whole.

The civil trial jurisdiction of magistrates under 28 U.S.C. § 636(c) also depends on the close relationship between magistrates and judges within the district court. Magistrates try civil cases that the judges would otherwise try in the absence of consent of the parties. Moreover, the availability of magistrates to try cases depends on the overall workload which has been assigned to them by the judges. In given districts it may be more beneficial for the court to use the magistrates for proceedings other than civil trials. Magistrates are essentially a supplemental resource for each district court, and one of the primary benefits of the magistrates system as presently constituted is that it gives each court maximum flexibility to divide up the total work of the court in a sophisticated and efficient manner among the judges and magistrates to best meet local needs and changing conditions.

Only in the area of ciminal misdemeanor jurisdiction does there appear to be a ready distinction, or *de facto* division between the caseload of judges and magistrates. Certain types of offenses, such as traffic and national park violations, are heard almost exclusively by magistrates. Even here, though, district judges occasionally try misdemeanor cases in the absence of consent by the defendant to trial by a magistrate.

A separate tier or independent entity would have a potentially detrimental effect on the present and future corps of United States magistrates and on the court system and litigants. Presently, a magistrate may be authorized by the district court to conduct a wide variety of proceedings in all types of federal cases. The work of magistrates can be challenging and varied, and the nature of the work helps to attract well-qualified candidates. If a separate tier or court were established magistrates could well evolve as a *de facto* small claims court or justice of the peace division. This spectre of diminished stature and responsibilities could well result in separate standards of justice for federal litigants.

A separate tier could also decentralize paperwork and proliferate bureaucracy. Magistrates today follow the same rules and procedures as judges, are served by the same clerks' offices, and share the same support services as judges. The creation of a new tier or other entity would require additional personnel and perhaps a separate administrative unit to process magistrate cases. If magistrates were separated into a distinct entity, differences could develop in the handling of federal litigation, in the selection of juries, the docketing of cases, the mailing of notices, the provision of courtroom services, and in communications among court personnel. The creation

of a separate unit would sacrifice administrative efficiency and entail needless additional costs.[84]

The Federal Bar Association conducted a poll of its chapters and its circuit representatives on this point and on most of the other questions raised by the Judiciary Committees of the Congress.[85] Near unanimity was voiced by the individuals who responded in favor of continuing magistrates as a component of the United States district courts. Proponents of the existing system observed that if magistrates were converted into a separate tier, the benefits of flexibility and the fundamental purpose of the magistrates system would be lost. The members of the bar association also pointed out that a separate tier would lead to the creation of a new bureaucracy, a reduction in the quality of candidates for magistrate positions, and a barrier to the interaction between district judges and magistrates which is essential to an efficient and smooth operation of the courts.

The National Council of United States Magistrates also strongly supports the present organization of the magistrates system as an integral part of the district courts, and it opposes the creation of a separate entity within the court system.

Finally, the creation of a separate tier or court would run counter to the trend of court reform in this country towards establishing unified trial court systems. The Standards Relating to Court Organization of the American Bar Association, for example, recommend that a trial court be organized as a single court with jurisdiction over all civil and criminal cases.[86] Under the A.B.A. Standards the trial court should have a single class of judges and a convenient number of other judicial officers, such as magistrates, to assist the judges.[87] Formal divisions within the court may be acceptable, but only where dictated by a clear need.

2. Uniformity

The Judicial Conference has been asked to identify the steps that should be taken to promote uniformity in the magistrates system throughout the federal courts.

Considerable uniformity exists in the magistrates system at the present time. Standardization in the conduct of court procedures prevails through application of the Federal Rules of Civil Procedure, the Federal Rules of Criminal Procedure, the Federal Rules of Evidence, and the federal rules governing habeas corpus cases and proceedings under 28 U.S.C. § 2255. The Rules of Procedure for the Trial of Misdemeanors before United States Magistrates ensure uniformity in the conduct of misdemeanor and petty offense proceedings by magistrates generally.

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84. *See* ABA COMMISSION ON STANDARDS OF JUDICIAL ADMINISTRATION, STANDARDS RELATING TO COURT ORGANIZATION (1974), including commentary at § 1.12(a) [hereinafter cited as the ABA COMMISSION ON STANDARDS].
85. A summary of the Federal Bar Association survey is set forth as Appendix C.
86. ABA COMMISSION ON STANDARDS, *supra* note 84 at § 1.12(a) and commentary.
87. *Id.* at § 1.12(b) and commentary.

With regard to the delegation of judicial responsibilities to magistrates, the Judicial Conference has encouraged the district courts to take full advantage of the provisions of the Federal Magistrates Act and use their magistrates extensively. The Magistrates Committee of the Conference has distributed to the courts model local rules and suggested procedures for the reference of civil and criminal matters to magistrates, guidelines for implementing the 1979 amendments to the Act, and checklists on the jurisdiction and proper use of magistrates. The Federal Judicial Center at its continuing education programs for judges and for magistrates has devoted considerable time to the effective use of magistrates. The Administrative Office, moreover, has served as a clearing house of information on the magistrates system and regularly distributed written materials and oral advice to judges, magistrates, and other court officers.

The Federal Magistrates Act, however, does not contemplate uniformity from district to district in the actual assignment of duties to magistrates. Flexibility and diversity are a necessary part of the genius of the magistrates system. The Congress intended that magistrates serve as supplemental resources within the district courts, to be used in the ways that best address local caseload exigencies.

In every district magistrates conduct virtually all initial proceedings in criminal cases (including the issuance of search and arrest warrants and the conduct of bail hearings and probable cause proceedings) and try misdemeanor and petty offense cases. The delegation of "additional duties" to magistrates by the judges of the district courts, though, is purely discretionary with the judges of each court. The pertinent statutory provisions, found at 28 U.S.C. § 636(b) and (c), speak in each instance of the court or a judge "designating" a magistrate to conduct a particular proceeding or category of proceedings.

The Congress has urged the courts to be innovative and experimental in adapting the Federal Magistrates Act to local circumstances.[88] Even within a given district court, the use of magistrates will not always be uniform. A study of magistrates conducted recently in the Southern and Eastern Districts of New York cites the benefits that may accrue from tailoring the types of duties assigned to individual magistrates within a court to the particular circumstances of the court and its individual judges.

> Each judge determines how the magistrates can work most effectively. Since each judge has his own areas of competence and expertise, he can utilize magistrates to assist him in different ways, say, for all pretrial matters or a limited part of the case. The high degree of flexibility in magistrate use depending on the magistrate's and judge's expertise is an important element underlying the magistrates system.[89]

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88. 1967 SENATE REPORT, *supra* note 13, at 26; 1976 SENATE REPORT, *supra* note 19, at 11.
89. Turo, Goldman and Padawer-Singer, *The Evolving Role of U.S. Magistrates in the District Courts,* 64 JUDICATURE 437, 444 (1981). Examples set forth in the text are drawn from this article.

Under the individual calendar system used in most federal trial courts, a district judge usually assumes control of a case at an early stage. The conduct of pretrial proceedings and the techniques used for calendar management, though, will necessarily vary. Some judges participate actively in the early pretrial stages of litigation, while other judges prefer a more passive role during this phase. Judges, moreover, may find it efficient to adapt their case management approaches to the various categories of cases that come before them. Corporate litigation, for example, may best be handled differently from *pro se* prisoner litigation. The assignment of duties to magistrates will predictably reflect the individual preferences of the judges and the varying demands of a court's caseload. The delegation of responsibilities and proceedings to magistrates should necessarily be designed to complement the work and practices of the judges of the court.

As the recent New York study suggests, the flexible use of magistrates within a given court may also recognize the special skills or expertise of the individual members of the court. Thus, a magistrate skilled in negotiation and civil practice will likely be delegated to handle pretrial and settlement conferences by the court. Some judges, however, may wish to conduct their own pretrial conferences to better acquaint themselves with their cases and choose to refer other types of matters, such as the review of prisoner litigation and Social Security appeals, to magistrates. In like fashion, a magistrate experienced in class action suits may be referred all pretrial and discovery proceedings in such cases by the judges of the court. Unusual circumstances that arise within a district, moreover, such as a lengthy trial, an illness, or a large backlog of cases, may alter the nature and types of duties referred to a magistrate.

As is apparent from the findings of the New York study, there is no single, proper or uniform formula for the delegation of duties to magistrates. The caseload and the individual talents of the judges and magistrates of a district court should be viewed in totality. The specific manner in which the caseload is divided among the judges and the magistrates is necessarily a matter of local administration.

3. Independence of Magistrates

The Judicial Conference has been asked to explore what steps might be taken to ensure the independence of magistrates in exercising their civil and criminal jurisdiction.

A magistrate exercises the jurisdiction of the United States district court and in so doing shares the overall independence and protection that is provided to the court itself under the separation of powers prescribed by article III of the Constitution. Within the court system itself, however, a magistrate's independence contains some necessary limits. While magistrates have considerable independence in conducting proceedings and making judicial decisions, they are by statute subordinate officers of the district courts. Magistrates are appointed by the courts, work closely with the judges of the courts, and are subject to the general supervision of the courts. The House

Judiciary Committee recognized in 1979 that there is a delicate balance between the autonomy of a magistrate to try a case and the authority of the district court over the magistrate.[90]

Under 18 U.S.C. § 3401 and 28 U.S.C. § 636(c), magistrates may serve in lieu of district judges and exercise full case-dispositive jurisdiction. In misdemeanor and petty offense cases a magistrate may order the entry of final judgment and sentence a defendant to a term of imprisonment or probation. An appeal from the final judgment of conviction may be taken to a judge of the district court. In civil cases a magistrate may exercise full case-dispositive jurisdiction on consent of the litigants. Appeal lies directly from the magistrate to the court of appeals, unless the parties have agreed mutually to take any appeal to a district judge.

Even when not exercising case-dispositive jurisdiction, magistrates conduct district court proceedings in the capacity of independent judicial officers. A magistrate who assists a judge under 28 U.S.C. § 636(b) in conducting pretrial proceedings enjoys considerable independence to make rulings, issue orders, and take other judicial actions, subject only to *post facto* appeal to, or review by, the judge. The magistrate, for example, has full power to "determine" procedural and discovery motions in civil and criminal cases. In handling case-dispositive motions and prisoner litigation, or when serving as a special master, the magistrate may only "hear and recommend" a disposition to the judge. Nevertheless, the magistrate's report is filed with the clerk of the district court and is submitted over the magistrate's signature to both parties and the judge. The parties have the right to object to the magistrate's findings and recommendations to the judge. The judge must make a *de novo* determination of case-dispositive motions and prisoner litigation, but must accept the magistrate's findings when made as a special master in a nonjury case "unless clearly erroneous."

The provisions governing selection, term of office, and removal tend to enhance the independence of magistrates. The Federal Magistrates Act provides that all magistrates be selected by the concurrence of a majority of all the judges of the district court from a list of individuals submitted by a citizen merit selection panel. A magistrate is appointed to a specified term of office (eight years for a full-time magistrate and four years for a part-time magistrate) and may only be removed during that term for specified cause following notice and hearing. The present method of appointment of magistrates by majority vote of the district courts for a fixed term is desirable and is endorsed by the Judicial Conference and the National Council of United States Magistrates.

The Federal Bar Association survey has disclosed that magistrates and attorneys believe that a magistrate's independence is sufficiently protected under current law. The respondents were of the view that the appointment of magistrates by the district courts has little or no impact on independence or accountability. The magistrates who responded to the survey stated that they "call the cases as they see them" and enjoy the support and confidence of the judges, even though they incur occasional reversals.

90. 1979 HOUSE REPORT, *supra* note 36, at 11.

The only suggestion voiced by respondents in the Federal Bar Association study to enhance the independence of magistrates was to establish a longer term of office. Slightly more than half the participants in the survey favored the current eight-year term for full-time magistrates, while the remaining half supported a longer term. The Conference expresses no views on this matter.

B. The Jurisdiction of Magistrates

1. Civil Cases

a. In General

The Judicial Conference has been asked for its views as to whether the civil jurisdiction of magistrates should "remain open or should it be fixed in whole or in part."

United States magistrates may serve in either of two roles in a civil case: (1) as an assistant to a district judge in conducting pretrial or evidentiary proceedings in the judge's cases; or (2) as a substitute for a judge on consent of the parties in disposing of a civil case with finality. As judicial officers of the district courts, magistrates' authority to try civil cases is not now limited by subject matter or by amount in controversy. The jurisdiction of magistrates is effectively limited, however, by: (1) the exercise of the discretion of the judges of the district court to delegate duties, and (2) the consent of the litigants in each particular case. These two limitations are sufficient to serve the needs of the bench, the bar, and litigants and are appropriate as a matter of policy.

In enacting the 1979 amendments to the Federal Magistrates Act, the Congress was concerned about the specialization of magistrates' jurisdiction and consciously chose a broad, generalist role for magistrates in civil cases. As the House Judiciary Committee noted:

> . . . If a magistrate is competent to handle any case-dispositive jurisdiction, he should be fully competent to handle all case-dispositive jurisdiction. Such a rule preserves the generalist posture of the magistrate, as well as insures that, in districts where magistrate competence is being upgraded, certain disfavored cases are not routinely referenced to less-able judicial personnel or that there is an impetus to appoint "specialized" magistrates to handle only narrow types of cases. It thus prevents the creation of so-called "poor people's" courts.[91]

The present "open-ended" civil jurisdiction of magistrates allows maximum flexibility for the courts to meet their caseload requirements. The imposition of an arbitrary limitation on magistrates' jurisdiction in civil cases, either by specifying the nature of cases to be tried or by imposing a maximum dollar amount in controversy, would hamper the courts in assigning appropriate work to their magistrates. Providing maximum flexibility to the courts was one of the major purposes of the 1979 legislation.

91. *Id.*

The bill recognizes the growing interest in the use of magistrates to improve access to the courts for all groups, especially the less-advantaged.* The latter lack the resources to cope with the vicissitudes of adjudication delay and expense. If their civil cases are forced out of court as a result, they lose all their procedural safeguards. This outcome may be more pronounced as the exigencies of the Speedy Trial Act increase the demands on the Federal courts. The imaginative supply of magistrate services can help the system cope and prevent inattention to a mounting queue of civil cases pushed to the back of the docket.

The bill would allow increased use of magistrates to improve access to justice on a district-by-district basis. More flexibility is also created by the limited tenure of magistrates. Magistrate positions would be selectively placed by the Judicial Conference to accommodate surges in litigation in particular districts at particular times. All this would be accomplished without resort to the process of congressional confirmation.

The bill would permit magistrates, where specially designated by their district courts, to try any civil case upon the consent of the parties. No limitation is placed on the type of case which may be referred to a magistrate under this provision. Thus, cases may be referred regardless of complexity or the amount of recovery sought.[92]

Fixing or categorizing the civil jurisdiction of magistrates by statute would lead to a compartmentalization of the civil jurisdiction of the federal trial courts and would be contrary to the sound principle of a single trial court of general jurisdiction. Moreover, if the jurisdiction of magistrates were to be fixed or categorized by statute, it would take further substantive statutory action to make any necessary adjustments in their jurisdiction in the future. The broad jurisdictional provisions of the current statute will make it possible for the courts to adapt to the developing demands of federal litigation without legislation.

By a large majority, the Federal Bar Association survey demonstrates support for the current jurisdiction of magistrates. The respondents pointed to several benefits of the "open-ended" jurisdiction, the most important of which is the flexibility it provides to the courts to meet changing and expanding caseload needs. The bar members also noted that the variety of cases that magistrates handle makes their work more interesting and serves to attract more qualified candidates for appointment as magistrates. The fixing of jurisdiction was also seen as leading potentially to unnecessary and wasteful

*American Bar Association, Supplemental Report on the Pound Conference Follow-up Task Force (1977); Cf. Department of Justice Committee on Revision of the Federal Judicial System, The Needs of the Federal Courts (1977) (use of Article I courts). See also Silberman, "Masters and Magistrates Part II; The American analogue, 50 N.Y.U.L. Rev. 1297, 1360-1372 (1975).

92. 1979 SENATE REPORT, *supra* note 37, at 4.

"fourth-tierism" or the *de facto* establishment of a federal small claims or poor people's court, with a downgrading in the status of magistrates and the quality of justice.

The fixing or categorization of civil jurisdiction might also entail a system of mandatory references of certain types of cases to magistrates. Under the current statute *all* litigants have a right to have their cases disposed of by an article III judge, but they may choose to waive that right and consent to trial before a magistrate.

Accordingly, "original" jurisdiction over any specific categories of cases should not be vested directly in United States magistrates. In establishing federal causes of action, the Congress should not mandate the reference of any particular types of cases or proceedings of magistrates. All causes of action should be established in the United States district courts. The Congress, however, should be aware that magistrates are an available resource to assist the district courts and may wish to facilitate or to encourage the reference of proceedings to magistrates.

b. Clarifying the Language of the 1979 Amendments

The 1979 amendments contain procedural language that has created uncertainty and difficulty in implementing the civil trial provisions of the statute. 28 U.S.C. § 636(c)(2) states that if a magistrate has been designated to exercise the civil trial jurisdiction, "the clerk of court shall, at the time [a case] is filed, notify the parties of their right to consent to the exercise of such jurisdiction." The chief judges and magistrates who participated in the survey of the effects of the 1979 amendments reported that the requirement of notice is beneficial. Nevertheless, a majority of judges and magistrates were of the view that the district court should be given more discretion to determine the timing and manner of the notification.

The 1979 amendments state that the clerk must notify "the parties." There is, however, only one active party at the time an action is filed. The Congressional Conference Report on the legislation attempts to overcome this difficulty by advising that notice may actually be given either "[a]t the time an action is filed, or as soon thereafter as is feasible."[93] Additional parties frequently join the litigation at a later stage and cannot be notified at the time of filing.

Moreover, a majority of civil cases never reach the stage of trial. Prisoner litigation and other *pro se* cases are frequently dismissed or resolved at an early stage. Many cases are settled or terminated with limited court action. The requirement that all parties in these cases be notified of the magistrate's civil trial jurisdiction is procedural excess. Accordingly, it is recommended that the statute be amended to provide the district court with authority to determine by local rule or order the timing and manner of notifying the parties of the civil jurisdiction of the magistrates.

The district court has general authority to control its calendar and to divide up the caseload among its judges and magistrates.[94] The option of the

93. 1979 Conference Report, *supra* note 32, at 8.
94. *See, e.g.*, 28 U.S.C. § 137 (1976).

parties to have their case tried and disposed of by a magistrate does not operate to divest the judges of the district court of control over their own cases or general supervision over the delegation of work to the magistrates of the court. The approval of the judge to whom a particular case has been assigned should be obtained as a matter of basic policy and sound administration in order to perfect the reference of a case to a magistrate. Consequently, no case should be removed from a judge to a magistrate without the judge's concurrence.

Nevertheless, the language of 28 U.S.C. § 636(c)(2) speaks in terms of the "right" of the parties to consent to a magistrate's jurisdiction. The word "right" appears to have been employed to describe what is merely the *opportunity* of the parties to choose an authorized alteration in local court procedures. There is no right to demand a magistrate rather than a judge. In fact, no magistrate may be reasonably available to hear the case. Such a result would effectively divest the court of its ability and responsibility to control and manage its civil docket and supervise its magistrates.[95] Some district courts have been reluctant to implement the new civil trial jurisdiction because of the uncertainty which has been seen to flow from the language of section 636(c)(2).

It is recommended that the first sentence of 28 U.S.C. § 636(c)(2) be amended to read as follows:

> If a magistrate is designated to exercise civil jurisdiction under paragraph (1) of this subsection, the clerk of court:

EXISTING LANGUAGE	*PROPOSED LANGUAGE*
shall, at the time the action is filed, notify the parties of their right to consent to the exercise of such jurisdiction.	shall notify the parties in a civil action of the availability of a magistrate to exercise such jurisdiction.

2. Criminal Cases

a. In General

The criminal trial jurisdiction of magistrates extends to all federal misdemeanors. A misdemeanor is an offense for which the maximum penalty prescribed by law does not exceed one year's imprisonment.

As with civil cases, the criminal trial jurisdiction of magistrates should remain open-ended, at least to the extent that it includes all misdemeanor cases. There is no further need to categorize cases by nature of offense or otherwise determine which specific misdemeanor cases a magistrate may or may not try. The case-dispositive jurisdiction of magistrates in criminal cases

95. Under 28 U.S.C. § 636(c)(6) (Supp. III 1979), a district judge has the power to vacate, for good cause, a reference of a matter to a magistrate. Moreover, 28 U.S.C. §§ 636(c)(2) and 636(c)(4) (Supp. III 1979) all speak in terms of a "reference" from the court to a magistrate in each case. The statute also declares at several points that local rules of the district court are necessary to implement the exercise of jurisdiction by magistrates. *See, e.g.,* 28 U.S.C. §§ 636(b)(4), 636(c)(2), and 636(c)(4) (1976 & Supp. III 1979).

is already effectively "fixed," as there are three limitations on a magistrate's criminal trial jurisdiction:

(1) The magistrate must be specially designated by the district court to exercise such jurisdiction.
(2) The maximum penalty which may be prescribed for an offense may not exceed one year's imprisonment.
(3) The defendant must consent to trial before a magistrate and specifically waive trial, judgment, and sentencing by a district judge.

b. Downgrading of Offenses

A majority of misdemeanor and petty offense cases presently disposed of before United States magistrates arise under regulations of federal agencies or under state law incorporated through the Assimilative Crimes Act. A minority of misdemeanor and petty offense cases arise directly under specific federal criminal statutes. The most frequently used federal criminal statutes involve illegal entry immigration matters, [96] obstruction of the mail, [97] and petty theft.[98] In fact, there are comparatively few misdemeanor offenses set forth in the present federal criminal code.

The Judicial Conference has been asked for its views as to whether the jurisdiction of magistrates should be expanded to include felony cases that have been reduced to misdemeanor status. Such an arrangement would permit the disposition of a substantially greater number of federal criminal cases before magistrates.

The suggestion could be implemented either by creating additional misdemeanors in the criminal code or by permitting cases presently charged as felonies to be charged as misdemeanors. Under either approach there would be no increase or adjustment in the jurisdiction of United States Magistrates. The proposal, rather, is directed towards the substantive sentencing provisions of federal criminal law and toward the discretion extended to federal prosecutors. It therefore addresses questions of public policy that would best be left to the consideration of the executive and legislative branches of the Government.

As a matter of judicial administration, several advantages might accrue if governing law authorized additional numbers of cases to be charged as misdemeanors rather than as felonies. First, magistrates could handle some categories of cases that now may be heard only by judges. If used properly, a downgrading provision might free the judges to dispose of more cases and provide the court with additional flexibility and resources to meet their criminal caseload responsibilities. The proposal might also give United States attorneys greater access to the courts by facilitating the prosecution and prompt disposition of certain less serious cases that may not merit full felony charges. Because of the exigencies of the Speedy Trial Act and the busy

96. 8 U.S.C. § 1325 (1976).
97. 18 U.S.C. § 1701 (1976).
98. 18 U.S.C. §§ 659 and 661 (1976).

dockets of district judges, magistrates could be used as a supplementary judicial resource to permit the prosecution of some cases that might otherwise be declined for lack of available judge-power.

The great majority of those who responded to the Federal Bar Association survey expressed support for a general provision authorizing the downgrading of appropriate felony cases to misdemeanor status. The respondents indicated, though, that such a provision would have to be carefully drafted to avoid potential abuses in application.

It should also be noted that the Congress has been considering the enactment of a new Federal Criminal Code for several years. Most versions of the code have increased the numbers of substantive offenses that might be charged as misdemeanors.

The proposed new omnibus criminal code appears to be the appropriate vehicle for the Congress to use in considering the categorization of federal criminal cases. It is suggested that the Congress consider the use of United States magistrates to dispose of a larger number of less serious criminal cases by fashioning the sentencing provisions of the code in such a way as to permit a greater number of criminal cases to be disposed of before magistrates.

c. Guilty Pleas in Felony Cases

The Judicial Conference has been asked to consider whether magistrates should be authorized to accept guilty pleas in felony cases with the defendants' consent.

While there may be some merit to the suggestion, there are disadvantages that outweigh the potential benefits. Magistrates could save time for district judges by conducting the detailed inquiry that must be made of a defendant under rule 11 of the Federal Rules of Criminal Procedure to determine whether the guilty plea is voluntary and has a factual basis. The procedure would give the courts added flexibility in meeting caseload demands. The Federal Bar Association survey, moreover, endorses the proposal on the grounds that it would save scarce and valuable judge-time.

Nevertheless, the taking of a guilty plea is a critical step in a criminal case and represents a disposition on the merits. It should normally be handled by the sentencing judge in the case. The arraignment and plea provide the sentencing judge with an opportunity to communicate personally with the defendant and to appraise sincerity and manner. Moreover, the dialogue with the defendant is prescribed exactly by rule and case law, and it is the subject of frequent appeals and collateral attacks.

Magistrates are personally capable of conducting rule 11 proceedings, and in fact they routinely accept *not guilty* pleas in felony cases. Yet, it is preferable for the judge who is later to pronounce judgment and determine the sentence to conduct the proceeding. Delegating the function to magistrates would lead to an unnecessary fractionalization of the plea process and a duplication of effort, since the judge would have to repeat part of the proceeding in order to fulfill the responsibility of ultimately adjudicating the case. The judge would have to address the defendant to such extent as to make an independent determination that there is a factual basis for the plea. Therefore, the total amount of judicial time required for the plea process—by judge and magistrate—would actually be increased.

Because of the sensitivity and critical nature of the guilty plea procedure and its close interrelationship with the sentencing function, it is recommended that no change be made in the current law that reserves the function to judges.

d. Youth Corrections Act

The Federal Youth Corrections Act[99] applies to criminal defendants under the age of 22 at the time of conviction. Under the sentencing provisions of the Y.C.A. a youth offender who is convicted by a judge is remanded to the custody of the Attorney General for treatment and supervision for an indeterminate period of up to six years. The actual length of confinement is left in the hands of the Parole Commission. [A judge, however, may find that the youth offender will not derive benefit from treatment under the Act and may instead decide to sentence the individual under the general adult sentencing procedures.][100]

The Federal Magistrates Act of 1968 did not authorize magistrates to use the sentencing provisions of the Youth Corrections Act, largely because of the indeterminate period of custody authorized by the Y.C.A. is in excess of the general one-year imprisonment limit on a magistrate's misdemeanor jurisdiction. The 1979 amendments to the Magistrates Act have now authorized magistrates to impose sentence and exercise other powers granted to the district court under the Y.C.A. The 1979 legislation, though, imposes three limitations on a magistrate's authority:

(1) A magistrate may not place a youth offender on *probation* for a period in excess of six months for a petty offense or one year for a full misdemeanor. 18 U.S.C. § 3401(g)(3). (The maximum period of probation for all other cases, whether imposed by a magistrate or a judge, is five years. 18 U.S.C. § 3651.)

(2) A magistrate may not sentence a youth offender to the *custody* of the Attorney General for a period in excess of six months for a petty offense or one year for a full misdemeanor. 18 U.S.C. § 3401(g)(1). (A district judge must sentence a youth offender to the custody of the Attorney General for an indeterminate period of up to six years.)[101]

(3) A youth offender must be *released conditionally*, under supervision, at least three months before the end of the term imposed by the magistrate, and he must be discharged unconditionally on or before the end of such term. 18 U.S.C. § 3401(g)(2).

Each of the three limitations has presented problems.

i. Probation

The National Council of United States Magistrates recommends that the probation limitation of the 1979 amendments be eliminated. The magistrates are of the view that the limitation has rendered the 1979 amendments inef-

99. 18 U.S.C. §§ 5005-5026 (1976).
100. 18 U.S.C. § 5010(c) (1976).
101. 18 U.S.C. §§ 5010(b) and 5017(c) (1976).

fective. A six-month or one-year period of probation simply does not provide sufficient time in many cases for a probation officer to prepare and to execute a meaningful program of assistance or rehabilitation for a youth offender. Magistrates see no reason for placing a limit on the term of probation for youth offenders that is considerably shorter than the maximum period for adult offenders.[102]

The General Accounting Office is presently reviewing the operation of the federal probation and parole system. Staff from that office have indicated, preliminarily, that they concur in the appraisal of the magistrates and will recommend to the Congress that the 1979 legislation be modified to remove the special limitation on the period of probation for youth offenders.

ii. Custody

As a result of the 1979 amendments a magistrate may impose a sentence under the Y.C.A. of up to six months for a petty offense or one year for a full misdemeanor. A district judge, though, must impose a sentence of up to six years for the same offense. Accordingly, a defendant as a practical matter is forced to waive the right to trial by a district judge and consent to trial before a magistrate. The disparate sentencing power between two judicial officers in the same case is an anomalous result that was probably not considered by the Congress when it approved the 1979 amendments.

The problem has been recognized in recent decisions by two of the United States courts of appeals.[103] The courts in these decisions ruled that the Congress intended in the 1979 amendments to apply the six-month and one-year limitations on sentencing in petty offense and misdemeanor cases to district judges as well as magistrates. Although the other federal courts of appeals may or may not reach the same result, these decisions manifest a serious concern regarding the disparity in sentencing authority between magistrates and judges in similar cases.

iii. Conditional Release

A youth offender who has been sentenced by a magistrate under the Y.C.A. must be released under supervision three months before the end of the term of custody imposed by the magistrate. In effect, the offender must be released in three months or less in a petty offense case and in nine months or less in the case of a misdemeanor above the level of a petty offense.[104]

The United States Parole Commission has proposed that the conditional release provision of the 1979 amendments be repealed. Under its regulations

102. Resolutions of the National Council of United States Magistrates are set forth in Appendix D.

103. United States v. Amidon, 627 F.2d 1023 (9th Cir. 1980); United States v. Hunt, 661 F.2d 72 (6th Cir. 1981).

104. A youth offender convicted of a felony or misdemeanor by a judge is remanded to custody for six years (unless a probationary sentence is imposed) and must be released conditionally under supervision two years before the end of the term; *i.e.*, after serving up to four years. 18 U.S.C. § 5017(c) (1976). But see the decision of the United States Court of Appeals for the Ninth Circuit in United States v. Amidon, 627 F.2d 1023 (9th Cir. 1980).

the Parole Commission must conduct a hearing before the release of an offender. A three-month period of incarceration is said not to provide sufficient time to process an offender into an institution, to give notice of a parole determination proceeding, to conduct the hearing, and to release the offender. The mandatory three-month period of supervision by a parole officer following discharge, moreover, is too short to be effective. The costs of administration and paperwork in such a short-term situation are significant. Even a nine-month period is said by the Commission to be too short to warrant consideration of parole. The Commission has therefore recommended an amendment to the 1979 legislation to make misdemeanants and petty offenders ineligible for parole and to allow a magistrate to determine the date of release at the time of sentencing, as is the case with adult misdemeanants under 18 U.S.C. § 4205(f).

The General Accounting Office staff has indicated their support for the recommendation of the Parole Commission and will suggest that the conditional release provision of the 1979 amendments to the Federal Magistrates Act be eliminated.

iv. Recommendations

(a) Action should be taken by the Congress to repeal the provision of the 1979 amendments to the Federal Magistrates Act that limits the term of probation that a magistrate may impose under the Youth Corrections Act in misdemeanor and petty offense cases.

(b) The Congress should consider clarifying the 1979 amendments to eliminate any disparities that may exist in Y.C.A. sentencing authority between magistrates and judges in misdemeanor cases.

(c) Favorable consideration should be given to the recommendation of the Parole Commission and the anticipated recommendation of the General Accounting Office that the conditional release provision of the 1979 amendments be modified to eliminate the requirement that youth offenders be discharged three months before the end of their term, either in all misdemeanor cases or in petty offense cases alone.

e. Juvenile Delinquency Provisions

The Juvenile Justice and Delinquency Prevention Act of 1974[105] established special provisions for the adjudication of federal offenses committed by persons under the age of eighteen. The Act prescribes a federal policy of deferral to state authorities in such cases, but it recognizes the need to process some offenses committed by juveniles in the federal courts. In those cases handled in the federal courts, the Act authorizes special arrangements for representation of juveniles, mandates segregated facilities for the detention and confinement of juveniles, requires a certification by the Department of Justice that state and local authorities cannot or will not assume jurisdiction over a case, provides special procedures for the trial of

105. 18 U.S.C. §§ 5031-5042 (1976 & Supp. III 1979).

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juvenile cases, and assures the confidentiality and subsequent expunging of juvenile records.

Before enactment of the 1979 amendments to the Federal Magistrates Act, there had been considerable uncertainty as to the applicability of the juvenile delinquency statute to magistrates' criminal trial jurisdiction. The amendments clarified the application of the juvenile law to magistrates' proceedings in three respects. First, magistrates have been given explicit authority to conduct delinquency proceedings in petty offense cases, but only if the juvenile consents to adjudication by a magistrate rather than by a district judge. Second, the 1979 amendments preclude a magistrate from imposing a term of imprisonment in such juvenile delinquency proceedings. Third, the amendments authorize the initiation of a petty offense case against a juvenile by the issuance of a violation notice or complaint, and such case may proceed to the stage of arraignment before the Department of Justice must file a certification that state and local authorities cannot or will not assume jurisdiction.

The 1979 amendments have generally proved helpful. By clearly authorizing the initiation of petty offenses by violation notice and by deferring the time for filing a certification of federal jurisdiction, the law now enables juveniles to voluntarily dispose of most petty offense cases by simple forfeiture of collateral in the same manner as adults charged with such offenses. The amendments have thus made it convenient to dispose of petty offenses committed by juveniles without requiring waiver of the various protections of the juvenile delinquency statute.

The sentencing limitation imposed by the 1979 amendments has presented some difficulty, however. By removing any possibility of imprisonment, the law permits only a probationary term or payment of a fine. No realistic sanction is available if the juvenile violates the terms of probation or otherwise defies the court. The limitation diminishes the ability of a magistrate to formulate rehabilitative measures or restitution for some juveniles. The 1979 amendments make it possible for similarly situated juveniles charged with like offenses to receive different sentences, depending merely on whether their sentences are determined by judges or magistrates. Accordingly, the Congress may wish to reformulate the juvenile delinquency provisions of the 1979 amendments to eliminate such sentencing disparities.

f. Elimination of Written Waiver in Petty Offense Cases

The 1979 amendments expanded magistrates' criminal trial jurisdiction to include all federal misdemeanors, including those where the maximum fine prescribed by law is in excess of $1,000. The legislation, however, preserved the prior requirement of law that each defendant waive in writing the right to trial by a judge and consent to trial before a magistrate.

The Judicial Conference has previously recommended to the Congress that it eliminate the requirement that a defendant in a petty offense case consent to trial by a magistrate. Petty offenses were not considered "crimes" at common law and were historically subject to summary disposition by officers

other than judges, such as justices of the peace and magistrates.[106] The Supreme Court has recognized the historical difference in treatment accorded petty offenses and has excluded them from the requirement of the sixth amendment and article III of the Constitution that the trial of all "crimes" be by jury.[107] The right to trial by an article III judge, moreover, would not appear to be constitutionally required for offenses committed in territory subject to the exclusive or concurrent jurisdiction of the United States or in cases otherwise subject to special article I authority of the Congress.[108]

The original version of the 1979 amendments to the Federal Magistrates Act, approved by the Senate in 1977, provided for the elimination of the requirement that a defendant in a petty offense case waive the right to trial by a judge and consent to trial by a magistrate, on the grounds that such waiver/consent was not needed constitutionally, that it lengthened the time needed to hear each case, and that it produced a growing volume of unnecessary paperwork.[109] Nevertheless, the Congress carried forth the requirement in the legislation as approved. The report of the Judiciary Committee of the House of Representatives explained that the provision had been retained for two reasons of policy: (1) petty offenders should be accorded the same right to be tried by a judge as other criminal defendants or as civil litigants in the federal courts; and (2) as a practical matter almost all defendants consent to trial by a magistrate in any event.[110]

The subject matter merits further reflection by the Congress. Elimination of at least the requirement that the waiver/consent be made in writing would be administratively advantageous. Experience indeed demonstrates that very few petty offense violators actually request a full scale trial before a district judge or appeal a magistrate's judgment of conviction. A statutory provision should be considered which would retain the right of each defendant to trial by a district judge, while eliminating the burden of executing and processing paperwork. The statute might be amended to retain the obligation of a magistrate to carefully explain the defendants that they have a right to demand trial by a judge, and require only that the defendants' waiver and consent be made on the record but not necessarily in writing.

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106. *See* Frankfurter and Corcoran, *Petty Offenses and the Constitutional Guaranty of Trial by Jury,* 39 HARV.L.REV. 917 (1926); Doub and Kestenbaum, *Federal Magistrates for the Trial of Petty Offenses: Need and Constitutionality,* 107 U.PA.L.REV. 443, 463-64 (1959); Note, *The Validity of United States Magistrates' Criminal Jurisdiction,* 60 VA.L.REV. 697, 704-05 (1974).
107. *Id. See* District of Columbia v. Clawens, 300 U.S. 617 (1937); Shick v. United States 195 U.S. 63 (1904). Certain offenses, though, have traditionally been considered "serious offenses" or "crimes" at common law, even though the maximum penalty currently prescribed by statute may be no more than 6 months' imprisonment or a fine of $500—the limits of a petty offense under 18 U.S.C. § 1. These offenses, therefore, may be considered petty offenses by statute, but not necessarily petty offenses in the constitutional sense. *See* discussion and cases cited in Brady v. Blair, 427 F.Supp. 5, 9-10 (S.D.Ohio 1976); and United States v. Craner, _____ F.2d _____ (9th Cir. 1981).
108. *See* Palmore v. United States, 411 U.S. 398 (1973).
109. 1977 SENATE REPORT, *supra* note 32, at 6.
110. 1979 HOUSE REPORT, *supra* note 36, at 18.

The National Council of United States Magistrates recommends that the requirement of a written waiver/consent by eliminated in all misdemeanor cases. This approach, however, appears broader than is necessary. The revision should be limited to petty offenses.

Accordingly, it is recommended that the Congress give further consideration to this issue, with a view towards eliminating the requirement that a defendant's written waiver of trial, judgment and sentencing by a judge and consent to trial by a magistrate be eliminated in petty offense cases.

3. The Role of Part-time Magistrates

The Federal Magistrates Act of 1968 established a system of full-time and part-time magistrates. Part-time magistrate positions have always been recognized as a necessary element of the program, fulfilling the purpose of providing prompt access to a judicial officer for law enforcement officers seeking warrants and for individuals arrested on federal criminal charges. The need to provide ready access to judicial officers for such purposes in outlying areas clearly requires that part-time magistrates be appointed to handle such activities.

The Judicial Conference regularly reviews locations where the number of part-time positions can be reduced through consolidation to create a single full-time magistrate position or eliminated due to a lack of judicial business. As of July 1, 1981, the number of authorized part-time magistrate positions had declined to 250, from a high of 455 in 1971. Most part-time magistrates have limited caseloads and serve at modest levels of compensation. In many instances they hold their positions as a service to the district courts to ensure that warrants and other preliminary proceedings in criminal cases are handled expeditiously. They are also available to try federal petty offense and misdemeanor cases at outlying locations, such as national parks and military bases.

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

Only a few part-time magistrates are regularly delegated a full range of assignments by the judges in civil and criminal cases. Because of the Judicial Conference's conflict-of-interest rules, the limited amount of time they have available from their law practices, the unavailability of supporting staff, and the small amount of work generally available at outlying locations, it is unlikely that part-time magistrates will ever be used extensively by the district courts to assist in handling the judges' cases.

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

At the same time, the Federal Magistrates Act calls for a system of full-time magistrates wherever feasible, and the Judicial Conference is aware of the practical difficulties that can arise from the performance of judicial duties by a practicing attorney. Therefore, the Conference intends to continue implementing the congressional policy of authorizing full-time magistrate positions to handle the courts' needs wherever feasible.

Finally, as part of a discussion of the role of part-time magistrates, it should be noted that seven bankruptcy judges presently serve as part-time United States magistrates. These "combination" magistrate positions have been beneficial to the district courts concerned. As a consequence of the 1978 omnibus bankruptcy reform legislation, however, the seven positions must be dissolved by March 31, 1984.[111] They will probably be replaced by new full-time or part-time magistrate positions.

4. Other Matters

With the approval of the 1979 amendments, there is no pressing need for further substantive changes in the Federal Magistrates Act. The suggestions for statutory adjustments which have been discussed in this section are either technical in nature or would generally facilitate the exercise of magistrates' existing jurisdiction. The Federal Magistrates Act, as amended, is thus essentially sufficient to meet the courts' forseeable needs for magistrate services.

The only additional jurisdictional change that has been suggested to the Conference by magistrates is the establishment of limited contempt power for magistrates.

Magistrates currently have no power to punish for contempt. They may only cite instances of contumacious conduct for appropriate action by a district judge. A majority of individuals responding to the Federal Bar Association poll favored giving magistrates direct summary contempt power, although most would limit such power to a specific number of days of incarceration and/or a dollar fine limit. Some individuals were of the view that a magistrate should have contempt power only when the parties and counsel have consented to the magistrate's trial jurisdiction and the magistrate is acting in lieu of a district judge.

The matter of contempt is a sensitive and controversial one. Summary contempt power in general has been narrowed by recent decisional law. The bifurcated approach of having a second judge adjudicate a contempt charge is required in many situations.[112] This procedure is mandated in all situations under the Federal Magistrates Act.[113]

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111. Section 231 of the 1978 omnibus bankruptcy reform legislation deleted from the Federal Magistrates Act (at 28 U.S.C. § 631(c) (Supp. III 1979)) the authority for a referee in bankruptcy, *i.e.*, bankruptcy judge, to serve concurrently as a part-time magistrate. Pub.L.No. 95-598, 92 Stat. 2549 (1978). In accordance with section 402 of the legislation, this amendment will take effect on April 1, 1984.

112. *See* Mayberry v. Pennsylvania, 400 U.S. 455 (1971); United States v. Combs, 390 F.2d 426 (6th Cir. 1968). *See also* Annotations, 64 A.L.R.2d 600 (1959); 3 A.L.R.Fed. 420 (1970).

113. 28 U.S.C. § 636(e) (Supp. III 1979).

In light of the unavailability of empirical data at this point as to the need of magistrates for contempt authority, no recommendation is made on the matter at this time. The Congress, however, may wish to explore whether there is a need for such authority for magistrates in appropriate circumstances.

C. The Office of United States Magistrate

1. Title

The Judiciary Committees have asked "[w]hat should be the title . . . for Federal magistrates, especially in comparison to other Federal judicial officers?" In addition, a member of the Senate Judicial Committee has asked "whether a new title such as 'division judge' or 'associate judge' should be fashioned to enhance the status and prestige of the magistrates who primarily engage in the trial of cases within their jurisdiction or serve as full-time judicial officers."

The Federal Magistrates Act of 1968 was designed to replace the system of United States commissioners with a new and upgraded echelon of federal judicial officers. The Congress decided to fashion an enhanced title for the position to signify a distinct break with the commissioner system.

The term "United States magistrate" was the only title seriously considered for the new office. Although concern was voiced that the title would invite comparisons to odious experiences with "magistrates" and justices of the peace in the judicial systems of some states, the term was generally accepted as one of dignity and honor that would add stature to the new office.[114] Reference was made during the legislative process to the English system of justice, in which the term "magistrate" is an honorable and prestigious title and form of address.[115]

Substantial deference was also accorded to a 1959 law review article which had recommended that the office of United States commissioner be upgraded in duties and title.[116] The title United States "magistrate" was adopted by the Congress as appropriate to the duties and responsibilities of the new office.

> The name of "magistrate," despite some obvious disadvantages, was selected in preference to the present title of "commissioner," which was the only other possibility seriously advocated. The feeling was that there are altogether too many Federal officials who are known as "commissioners" of one sort or another; that the name "commissioner" does not in any way make clear the judicial nature of the office; and that it would be best to break away from the old commissioner system in name as well as substance. The name of "United States Magistrate" was selected as the only acceptable alternative, despite its unfavorable connotations in some state judicial systems. The new system envisioned by the bill will soon make a reputation for itself, if, as it is hoped, the reputation is a good one, any unfavorable connotations presently attached to the name of "magistrate" will quickly disappear.[117]

The title 'judge" is clearly a term that inherently carries considerable prestige and respect. A trend has developed over the last several years in both the federal and state court systems to extend the use of the title "judge" to embrace a variety of lower level judicial officers and hearing officers. Many state court systems have now replaced their magistrates, justices of the peace, and commissioners with a system of lower courts presided over by "judges." In the federal system the title "hearing examiner" in the Executive Branch agencies has been changed to "administrative law judge," and "referees in bankruptcy" are now "bankruptcy judges."

United States magistrates are subordinate judicial officers of the United States district courts. While they perform many of the same duties as district judges, they are not article III judges as the district judges are. They are neither appointed for life nor protected by the undiminished compensation clause of the Constitution.[118]

A change in the title "magistrate" to "division judge" or "associate judge" might blur very real distinctions in both status and function between article III judges and magistrates. Most United States magistrates serve in a capacity that is indeed greater than that of the traditional "magistrates" in state and local court systems. Nevertheless, they are essentially assistants to the judges of the district courts. They may sit in lieu of a judge, but by statute and commission they are not judges of the court in their own right.

The title "magistrate" is an honorable one, and the term "United States magistrate" has grown substantially in prestige and status due to the contributions made by magistrates during the first decade of the federal magistrates system. Awareness of the authority and responsibilities of United States magistrates is growing among bench and bar, and as attorneys become accustomed to having their cases pre-tried and tried by magistrates, any unfavorable connotations that might be perceived regarding the title will disappear.

The Federal Bar Association's poll of its local chapters shows that approximately half the individuals who responded, including magistrates and attorneys, were satisfied with the present title of "United States magistrate." The other half of the respondents expressed agreement with the suggestion that the title be changed to "associate judge," "deputy judge," or some similar term.

114. 1966-67 *Senate Hearings, supra* note 43, at 34.
115. Samuels, *Magistrates: The Justices of the Peace Act 1968,* 1968 CRIM.L.REV. 662. The author consistently uses the term "magistrate"to describe the English office, as modified by the Justice of the Peace Act. In addition, the professional organization of these officials is called the Magistrates' Association, and the title of its official monthly publication is *The Magistrate.* For a general discussion of the modern magistrate system in England, see Reichert, *The Magistrates' Courts: Lay Cornerstone of English Justice,* 57 JUDICATURE 138 (1973).
116. Doub and Kestenbaum, *Federal Magistrates for the Trial of Petty Offenses: Need and Constitutionality,* 107 U.PA.L.REV. 443, 470 (1959).
117. 1966-67 *Senate Hearings, supra* note 43, at 34.
118. By statute, the salary of a full-time magistrate may not be reduced during a term of office below the salary fixed for the magistrate at the beginning of that term. 28 U.S.C. § 634(b) (1976).

Those who would prefer a change in title state that the term "magistrate" has traditionally referred to a low-level local official who performs a narrow range of functions in criminal cases, *i.e.*, a justice of the peace. They point out that this traditional association of the term is inaccurate when applied to full-time United States magistrates. They also note that many state magistrates are not well regarded and some have been prosecuted for wrongdoing.

The proponents of a change in title are also of the view that the term "magistrate" tends to inhibit the full use of magistrates, since the bar is less likely to consent to having their cases tried by "magistrates" than by "judges." In other words, the bar's perception of a magistrate is not necessarily one of a judicial officer with important responsibilities.

While many individuals who responded to the bar survey expressed a preference for a change in title, these persons were of the view that the issue is not sufficiently important to warrant seeking affirmative action on the matter. The magistrates who responded on the issue stated that they would not take any action that would appear to be personal aggrandizement. They were of the view that any initiative on this issue should come from elsewhere.

Those who favor the current title state that it is an appropriate one and has neither caused difficulties nor impeded magistrates in performing their duties. Moreover, these individuals point out that with the passage of time and the development of the magistrates system, any problems that may exist now will disappear.

United States magistrates are generally accorded the honor and dignity to which their important office entitles them. Members of the bar commonly use the terms "your honor" or "judge" in addressing magistrates, particularly during courtroom proceedings. This is an expression of respect from the bar. Moreover, the fact that lawyers and litigants consent to have their cases tried by magistrates is an indication of confidence in, and acceptance of, the role of magistrates. The best way to overcome any localized concerns as to the appropriateness of the title United States magistrates is for the district courts to use their magistrates to the fullest and to inform the bar as to the importance attaching to the office. An informed bar and a supportive district court will accord a competent "United States magistrate" all the honor and respect due the position.

2. Compensation

The current salary of a full-time magistrate is $53,500 per annum. The salaries of part-time magistrates are set at 16 standard levels, ranging from $900 per annum to $26,750 per annum, based upon pertinent caseloads.

In enacting the Federal Magistrates Act of 1968 the Congress equated the salaries of magistrates to those of referees in bankruptcy. The Judicial Conference has consistently endorsed the principle that there should be parity in the salaries of magistrates and referees in bankruptcy or bankruptcy judges based on the responsibilities of the two offices. The Federal Bar Association survey results support this policy.

In order to attract and retain the most capable attorneys as United States magistrates it is essential to provide a salary commensurate with the experience and abilities needed for the job and consistent with the magnitude of responsibilities that must be exercised. The present salary of $53,500 per

annum is not sufficient compensation for a United States magistrate in today's economy. The problem of inadequate compensation, though, is a broader one that affects all judicial salaries. As a matter of fundamental fairness, action should be taken to raise the salary of all judges and other judicial officers to arrest the precipitous decline in their real income over the last several years.

The most recent Quadrennial Commission recommended a salary of $85,000 for district judges and $75,000 for magistrates and bankruptcy judges. Implementation of these reasonable recommendations should be considered as a first step in restoring equity in compensation.

3. Retirement

United States magistrates are covered by the general Civil Service Retirement System. Most magistrates enter on duty at a later stage of life than the typical career federal employee, and most magistrates do not have prior federal service to apply towards their eventual annuity.[119] As a result, magistrates generally do not have the opportunity to accumulate the number of years of service that a career employee gathers. The shorter period of service results in a lesser annuity. In this respect, magistrates are in the same posture as bankruptcy judges and trial commissioners of the Court of Claims.

The Federal Bar Association survey results show support for giving magistrates an option of civil service retirement or "article I retirement." Article I judges generally receive a full salary retirement after 14 years of service at age 65. Their annuity system is non-contributory. The respondents expressed the view that a better retirement system would help in the recruitment of magistrates, especially among attorneys without prior federal service.

Consideration should be given by the Congress to making adjustments in the magistrates' retirement system to recognize that magistrates' service to the Federal Government is "telescoped" into a period of service shorter than that of the average employee. While the granting of "article I retirement" may not be feasible for magistrates, the Congress as an alternative should consider giving additional "credit" to a magistrate for each year of service or otherwise facilitating the accumulation of an adequate annuity within a shorter period. This approach was recently used by the Congress with regard to "interim" bankruptcy judges.

Improved retirement for magistrates should be included in consideration of a more general review of the appropriate retirement system for all non-article III judicial officers, including bankruptcy judges and judges of the proposed new Claims Court.

4. Staffing Needs

The staff of a full-time magistrate generally consists of two employees: a secretary and a clerical assistant. Under the 1979 amendments to the Federal Magistrates Act, the Judicial Conference has authorized legal assistant positions for magistrates on an individual showing of need, based upon the recommendations of the respective district courts and circuit councils.

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119. As noted at page 29, the average age of full-time magistrates at the time of original appointment is 42.4 years.

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The Magistrates Committee of the Judicial Conference has determined that the size of a magistrate's staff should generally remain at two employees, even after the provision of a legal assistant. Much of the present work of the magistrates' clerical assistants consists of courtroom duties, docketing, and case paperwork. These duties are performed for district judges by personnel in the clerks' offices. Accordingly, it is anticipated that most of the magistrates' clerical assistants will eventually be transferred to the offices of the clerks of court.

Some of the duties of the magistrates' clerical assistants, however, including overflow typing, reception work, telephone duties, and office administration, have to be performed in the magistrate's own office. Therefore, at some locations it may be necessary to retain an existing clerical assistant position in a magistrate's office to handle heavy clerical duties.

With the provision of legal assistants to those full-time magistrates whose breadth and volume of judicial responsibilities warrants such staff assistance, the supporting personnel needs of magistrates will generally be satisfied for the near future. A staff of a secretary and a legal assistant will normally suffice as long as the clerk of court provides the same level of support services to magistrates that is given to district judges. Adequate flexibility and funds must be retained, however, to provide additional typing and other clerical help, particularly on a temporary basis, to take care of surges in litigation.

Court reporting services is an area of increasing concern to the courts. Magistrates presently record most of their proceedings on suitable sound recording equipment, and this procedure has generally been found to be satisfactory. Nevertheless, court reporting services are needed for certain types of important proceedings that magistrates conduct in lieu of district judges. Under 28 U.S.C. § 636(c)(7), for example, court reporting services will generally be required for civil trials conducted before magistrates.

As magistrates conduct more trials, more court reporter services will be needed. Increases in reporter costs are a necessary by-product of greater court efficiency and output. The additional needs for court reporting services for magistrates can be addressed through existing statutory procedures, [120] and the Judicial Conference will continue to require that official court reporters make themselves available to serve magistrates wherever feasible.

Part-time magistrates obtain their own staffing locally and claim reimbursement for the cost thereof. Normally, a part-time magistrate's staff needs will be handled on a part-time basis by members of the private law office staff. In some instances where the part-time magistrate's caseload is substantial, it may be necessary to hire a clerk specifically to handle the paperwork arising from magistrate proceedings. Generally, though, part-time magistrates have modest caseloads, and their staffing needs do not present substantial problems.

5. Support Services and Facilities

Full-time magistrates are provided with typewriters, other equipment, lawbooks, and office supplies to the extent justified by the nature and volume

120. 28 U.S.C. §§ 753(a) and (g) (1976 & Supp. III 1979).

of their work and the size of their staff. Few problems exist in the authorization of services, and magistrates have generally expressed satisfaction with the services provided by the Administrative Office.

Space and facilities are also provided to magistrates by the Administrative Office on an "as needed" basis. The Judicial Conference has approved guidelines for courtroom and office space for magistrates that provide less space than that authorized for judges. These guidelines have worked well, although there are frequent delays in the actual construction or remodeling of space by the General Services Administration.

As a result of the 1979 amendments, magistrates are trying civil and criminal jury cases in increasing numbers. There will be a need to provide additional courtroom space and jury facilities for some magistrates. These needs can be addressed adequately through the existing space guidelines.

CONCLUSIONS

The federal magistrates system, now a little more than one decade old, "plays an integral and important role in the federal judicial system."[121] The program has fulfilled the objectives of the Congress: (1) in upgrading the status and quality of the first echelon of the federal judiciary; (2) in establishing an effective forum for the disposition of federal misdemeanor cases; (3) in providing needed assistance to district judges in the disposition of their civil and criminal cases; (4) in improving access to the federal courts for litigants; and (5) in providing the courts with a supplementary judicial resource to meet the ebb and flow of their caseload demands.

The key feature of the Federal Magistrates Act since its original enactment has been the flexibility that it provides to the district courts to use their magistrates in the ways that best address local caseload needs. The original Act and the statutory amendments of 1976 and 1979 have delineated a broad and "open-ended" jurisdiction for United States magistrates that is appropriate and effective in its current form. The needs of the courts and litigants for the forseeable future can be met within the general structure of the present law.

It has taken time at the outset for the courts to implement the various provisions of the 1979 amendments to the Federal Magistrates Act. Moreover, only one year of caseload statistical information is presently available to evaluate the effects of the 1979 statute. Preliminary indications demonstrate that the amendments have been well received and are proving beneficial to the courts and to litigants. The legislation is sound, although minor adjustments in the specific language of the 1979 amendments would improve their administration.

The federal magistrates system is best constituted in its present form as an integral component of the United States district courts. There is no need or advantage to establish the magistrates system as a separate court, tier, or division. A change in the statutory title of "United States magistrate" is also not needed. The Congress, however, should take necessary action to provide a more equitable level of compensation for magistrates and to improve their retirement benefits.

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121. 1979 HOUSE REPORT, *supra* note 36, at 5.

APPENDIX A

January 14, 1980

Mr. William E. Foley
Director
Administrative Office of the
United States Courts
Washington, D.C. 20544

Dear Mr. Foley:

During the conference on the Magistrate Act of 1979, the consensus of the Senate and House conferees was that certain aspects of the magistrates system should be examined by the Judicial Conference of the United States and that the Conference should make recommendations to the Congress with respect to the continued utilization of magistrates.

Section 10 of the Act provides as follows:

> "The Judicial Conference of the United States shall undertake a study, to begin within 90 days after the effective date of this Act and to be completed and made available to Congress within 24 months thereafter, concerning the future of the magistrate system, the precise scope of such study to be recommended by the Chairman of the Judiciary Committees of each House of Congress."

The purpose of this letter is to advise you of some of the areas of interest to the House and Senate Committees.

The Committees on the Judiciary solicit your conclusions and recommendations with respect to the following:

1. What are the present and future needs of the Federal Magistrates System, including whether the magistrates should constitute a separate tier of trial court?

2. What steps should be taken to insure the independence of magistrates in exercising their civil and criminal trial jurisdiction and to promote the uniformity of the magistrate system througout the federal courts?

3. What should be the title, pay, retirement, disability and annuity scale for Federal magistrates, especially in comparison to other Federal judicial officers?

4. What is the need for support personnel and facilities for magistrates bearing in mind the differences between part-time magistrates and full-time magistrates?

5. What has been the experience with magistrates exercising their civil jurisdiction?

Although several questions were answered in the Magistrates Reform Act of 1979 (P.L. 96-82), the Conference may feel free to give further feedback on these previously made policy decisions:

1. Should the civil jurisdiction of magistrates and their criminal misdemeanor jurisdiction remain open or should it be fixed in whole or in part?

2. Have the blind consent procedures been effective, and is there a need for legislative modification?

3. Should part-time magistrates continue to be authorized to exercise jurisdiction in civil cases?

4. How effective have the merit selection standards and procedures been?

5. Should the jurisdiction of magistrates in criminal cases be expanded to include such things as accepting pleas in felony cases or hearing felony cases that have been reduced to misdemeanor status?

During early consideration of the Magistrates Act, Senator Heflin was especially concerned that the Judicial Conference keep the Congress abreast of how the Magistrate system was operating and its future needs. Attached is an Appendix for your guidance in answering the above questions, and is the exact language in which Senator Heflin's concerns were expressed in the bill as it passed the Senate.

Thank you for your assistance and cooperation on this important matter.

Sincerely,

Peter W. Rodino, Jr.
Chairman
House Committee on the Judiciary

Edward M. Kennedy
Chairman
Senate Committee on the Judiciary

APPENDIX

Questions concerning magistrates posed by Senator Howell Heflin during Senate Judiciary Committee discussions of the Magistrate Act of 1979

1. Whether the Federal district courts should be uniformly structured as two-tier trial courts utilizing Federal district judges and magistrates as separate independent tiers.

2. What steps should be taken to insure the independence of magistrates in exercising their civil and criminal trial jurisdiction and to promote the uniformity of the magistrate system throughout the Federal district court system.

3. Whether a new title such as "division judge" or "associate judge" should be fashioned to enhance the status and prestige of the magistrates who primarily engage in the trial of cases within their jurisdiction or serve as full-time judicial officers.

4. The need for support personnel and facilities for magistrates bearing in mind the differences between part-time magistrates and full-time magistrates.

5. Whether the civil jurisdiction of magistrates should be fixed or should remain open, and if it should be fixed, what jurisdiction should be entrusted to magistrates.

6. If fixed civil jurisdiction of magistrates is recommended, what procedures should be utilized to change the jurisdiction from time to time without long delay.

7. Whether part-time magistrates should be authorized to exercise jurisdiction in civil cases.

APPENDIX B

EVALUATION OF THE 1979 AMENDMENTS TO THE FEDERAL MAGISTRATES ACT

SUMMARY OF A SURVEY OF ALL CHIEF JUDGES OF THE UNITED STATES DISTRICT COURTS AND ALL FULL-TIME UNITED STATES MAGISTRATES

MARCH - MAY 1981

Responses were received from 69 of the 92 chief judges (75%) and from 150 of the 200 incumbent full-time magistrates (75%)

Questions **Responses**

I. CIVIL TRIAL JURISDICTION, IN GENERAL

	Chief Judges Number	Chief Judges Percent	Magistrates Number	Magistrates Percent
1. Has your court designated its magistrates to exercise the new civil jurisdiction?				
Yes	49	80%	122	82%
No	12	20%	27	18%
[7 chief judges stated that their court has no full-time magistrate]				
2. Have your magistrates actually tried any civil cases on consent?				
Yes	37	76%	94	78%
No	12	24%	27	22%
3. Is your court satisfied with the results to date?				
Yes	28	57%	67	62%
No	2	4%	2	2%
Insufficient experience to determine yet	19	39%	39	36%
4. Has the new jurisdiction saved any judge-time to date?				
Yes	32	65%	79	69%
No	5	10%	3	3%
Insufficient experience to determine yet	12	25%	32	28%
5. Has the new jurisdiction expedited the disposition of cases?				
Yes	26	53%	68	59%
No	6	12%	5	4%
Insufficient experience to determine yet	17	35%	42	37%

Questions	Responses			
II. NOTIFICATION REQUIREMENT	Chief Judges Number	Percent	Magistrates Number	Percent
6. 28 U.S.C. § 636(c)(2) requires the clerk of court to notify the parties in every case at the time of filing of their opportunity to request trial and disposition by a magistrate.				
A. What is your view of the requirement that the parties be *notified* specifically of the magistrates' jurisdiction?				
Number responding	65		140	
—It is beneficial	27	42%	103	73%
—It helps to inform the bar	31	48%	107	75%
—It encourages the use of magistrates	27	42%	87	61%
—It causes no significant problems	23	36%	59	42%
—It is too rigid a requirement	8	13%	18	13%
—It is unduly burdensome	7	11%	4	3%
—It is unnecessary	12	19%	9	6%
B. What is your view of the requirement that such notification be sent by the clerk *at the time of filing?*				
Number responding	64		145	
—It is beneficial	16	25%	68	47%
—It causes no significant problems	20	31%	51	35%
—Notification at the time of filing is too early	12	19%	36	25%
—A later time should be set by statute	3	5%	8	6%
—The court should be given discretion to determine the time and manner of any notification	39	62%	77	53%

Questions	Responses			
III. "BLIND CONSENT" PROVISION	Chief Judges Number	Percent	Magistrates Number	Percent
7A. Have you received any complaints or comments from the bar or from litigants that any pressure has been applied upon them to consent to trial before a magistrate?				
Yes	1	2%	2	2%
No	45	96%	104	93%
Insufficient experience to determine yet	1	2%	6	5%
7B. Has the requirement that the parties communicate their consent to trial before a magistrate directly to the clerk of court caused any difficulty in implementing the new jurisdiction?				
Yes	1	2%	4	4%
No	45	96%	99	91%
Insufficient experience to determine yet	1	2%	6	5%
8. What has been the general reaction of the bar to having the option of consenting to the disposition of civil cases before a magistrate?				
Number responding	49		119	
Favorable	15	31%	52	44%
Somewhat favorable	4	8%	7	6%
Mixed	3	6%	1	1%
Reluctant	4	8%	7	6%
Opposed	2	4%	0	0%
Insufficient experience to determine yet	18	37%	43	36%
Don't know or no opinion	3	6%	9	8%

Questions	Responses			
IV. SELECTION OF MAGISTRATES	Chief Judges Number	Percent	Magistrates Number	Percent
9. Has your court had the opportunity to appoint or reappoint any magistrates under the 1979 statute and the merit selection regulations of the Judicial Conference?				
Yes	46	66%	83	56%
No	23	33%	64	44%
10. Are you generally satisfied with the statute and/or regulations, based on your experience to date?				
Yes	22	48%	47	59%
More or less	10	22%	11	14%
No	4	9%	2	2%
Insufficient experience to determine yet	10	22%	20	25%
11. Have the statute and/or regulations served to broaden the field of qualified candidates for magistrate positions in your district?				
Yes	14	31%	24	30%
Somewhat	1	2%	10	12%
No	10	22%	7	9%
Insufficient experience to determine yet	20	44%	40	49%
12. Have the statute and/or regulations fostered applications for magistrate positions from women and members of minority groups				
Yes	11	24%	17	22%
Somewhat	8	18%	7	9%
No	14	31%	6	8%
Insufficient experience to determine yet	12	27%	48	61%

Questions	Responses			
IV SELECTION OF MAGISTRATES (Continued)	Chief judges Number	Percent	Magistrates Number	Percent
13. Have the statute and/or regulations discouraged applications from individuals whom your court considers to be well qualified?				
Yes	6	14%	3	4%
Somewhat	1	2%	3	4%
No	19	45%	25	32%
Insufficient experience to determine yet	16	38%	46	60%
14. Would you favor any amendments in the current statute and/or regulations regarding the selection and reappointment of magistrates?				
Yes	21	30%	26	18%
No	16	23%	38	26%
No opinion at this time	32	46%	80	56%

APPENDIX C

August 6, 1981

Mr. William E. Foley
Director
Administrative Office of the
United States Courts
Washington, D.C. 20544

Dear Mr. Foley:

In connection with the study required by Section 9 of the Federal Magistrate Act of 1979 to be conducted by the Judicial Conference of the United States, the Standing Committee on United States Magistrates of the Federal Bar Association (FBA) undertook a national survey of FBA members last year on a number of questions relevant to the future use and development of the Federal Magistrate system. This Committee has now concluded its survey.

The Final Report of the Committee has been reviewed by the members of the Executive Committee of the Federal Bar Association and has been formally approved as a report of the Federal Bar Association. That report, which includes an article published in the April 1981 issue of the *Federal Bar News*, distributed to all of our members, is transmitted herewith for your use and the use of the Judicial Conference of the United States. I am also enclosing a more detailed version of the tentative interim report on which the article was predicated as additional background material.

The Federal Bar Association concludes that this effort was a very worthy endeavor for our Association to undertake and we hope that the results will be beneficial and of substantial assistance to you in preparing the Judicial Conference's report to the Congress.

Sincerely yours,

J. Clay Smith, Jr.
President

Enclosures

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FINAL REPORT OF THE STANDING COMMITTEE ON UNITED STATES MAGISTRATES ON THE FUTURE USE AND DEVELOPMENT OF THE FEDERAL MAGISTRATE SYSTEM

Following the preparation of the tentative interim report in January 1981, a summary version was prepared and published in the April 1981 issue of the Federal Bar News[1] distributed to the nearly 16,000 members of the Federal Bar Association, with an introductory notice requesting the views, reactions and comments of all interested members of the Association for consideration by the Committee in preparing its Final Report.

Either in direct response to that article or as an outgrowth of the previously initiated survey, a number of subsequent letters and memoranda has been received. Basically the subsequent comments and remarks fully supported the views expressed in the published article.

The results of an extensive Ninth Circuit survey were received May 18, 1981 involving approximately 110 participants.[2] On the questions presented, it is significant that 74 responses favored open-ended civil jurisdiction, 70 responses favored giving Magistrates the authority to accept guilty pleas in felony cases, with the authority to impose sentence, and 68 responses favored Congress enacting a general misdemeanor provision which would permit the prosecutor to downgrade any federal felony to a misdemeanor within the current jurisdiction of Federal Magistrates. Additionally, some 73 responses favored eliminating the requirement for the execution of a written consent form by a defendant in petty offense cases and providing that Magistrates shall have original jurisdiction of all petty offenses. Some 82 responses favored giving Magistrates the power of contempt, with 49 of these individuals indicating it should be a limited power and 33 indicating it should be general. To the question of whether the term of the Magistrates should be extended from the current 8 years in order to increase independence, some 74 responses favored the existing term of 8 years. Concerning the title of "Magistrate" many individuals did not comment thereon. Of those who did, 48 responses favored keeping the title and 21 favored changing the title.[3] Finally, on the question of Magistrates' salaries, some 70 individuals favored the salary of full-time U.S. Magistrates being identical to the salary of full-time Bankruptcy Judges[4] and the adjustment of such salary automatically at

[1] Burnett, Standing Committee on United States Magistrates Prepares Report on Future Use and Development of the Federal Magistrate System, The Federal Bar News, pp 69-72 (April 1981).

[2] Some individuals did not respond to all questions.

[3] In this connection it is noted that comments received from others concerning title, urged a change to include the word "judge" as being essential to attract the highest possible caliber of practitioner and for the fullest possible utilization of consent jurisdiction.

[4] A number of other individuals, however, have responded that full-time Magistrates' salary should be set independently of full-time Bankruptcy Judges' salary and should be expressed as a fixed percentage of the salary for district judges. Some have suggested that the percentage be 95% since magistrates contribute 7 percent of their salaries to the Civil Service Retirement system while district judges do not. However, it is noted that district judges do have to make a payment to a fund to provide survivor benefits for spouse and children.

the same time as salary increases take effect for other members of the judiciary. One individual observed that thepay should be reasonably close to, but certainly less than, that of district judges because there is a need to attract the same caliber of people who would be attracted to a district judgeship.

Concerning consent civil trials before the Magistrate, several individuals have questioned the practicality of the requirement of the Clerk notifying the parties at the time the suit is filed of their option to a civil trial before the Magistrate, and have suggested that this notice might well be more effective if given at a later stage during discovery or at a pretrial conference when all discovery has been completed and the parties are then aware of the trial complexity and how long they may have to wait to go to trial before a district judge. One individual has suggested that while the legislative history of any modification of the provision for consent civil trials before the Magistrate should continue to make clear that neither a judge or magistrate should "pressure" a litigant or counsel in exercising the option, it should make clear that there is no prohibition against either a judge or magistrate "reminding" the parties and counsel of their option at any stage of a civil proceeding prior to commencement of the trial itself.

Another individual has noted that the civil consent jurisdiction of Magistrates should continue to be open-ended in order to be fully compatible with the expanded role of the Magistrate in pretrial proceedings. This individual observed that from the practitioner's standpoint, the expanded role of Magistrates in pretrial proceedings should facilitate the more expeditious movement of civil cases through pretrial and allow the Magistrate to have more intimate familiarity with the case, the parties, and their counsel, as the matter proceeds to a final adjudication. Where the Magistrate has had extensive pretrial involvement and the parties are confident of that Magistrate's abilities, the parties should be able to consent to that Magistrate presiding at the trial, regardless of the nature of the cause of action or the amount of money or the nature of relief sought. This individual concludes that obviously the more civil cases that can benefit in this way from the use of Magistrates, the better will the ends of justice be served.

In conclusion, the subsequent comments received are fully supportive of the views expressed in the article in the April 1981 issue of the Federal Bar News, which are incorporated by reference herein. As Chairman of the Standing Committee on United States Magistrates, I urge the Executive Committee of the Federal Bar Association formally to approve this report as the report of the Federal Bar Association on the Future Use and Development of the Federal Magistrate System. I have been advised that the Committee on the Administration of the Federal Magistrates System will meet July 23-24, 1981 and they may consider our views for inclusion in the Judicial Conference's Report to the Congress, required by Section 9 of the Federal Magistrate Act of 1979.

Respectfully submitted,

Arthur L. Burnett, Chairman
Standing Committee on
United States Magistrates

Standing Committee on United States Magistrates Prepares Report on Future Use and Development of The Federal Magistrate System

By Arthur Burnett

Arthur L. Burnett, a United States Magistrate of the District of Columbia, is Chairman of the Federal Bar Association's Committee on United States Magistrates. The following is a summary version of a tentative interim report of the Standing Committee prepared in January 1981. It is being published here to solicit the views,reactions and comments of all interested members of the Federal Bar Association, for consideration by the Committee in preparing its Final Report. Interested members may respond by writing to the author of this article at Room 1207, U.S. District Court, Third and Constitution Avenue, N.W., Washington, D.C., no later than May 15, 1981. The Final Report will be submitted to the Executive Committee, and possibly the National Council, for approval for transmittal to the Administrative Office of the United States Courts, probably in June 1981. The Judicial Conference of the United States will use the report in connection with the study, as required by the Federal Magistrate Act of 1979, of the future development and utilization of the federal Magistrate system within the federal Judiciary.

On July 14, 1980 as the first Chairman of the Committee on United States Magistrates, I initiated the first major project of the committee by sending a number of survey questions to the circuit representatives from each of the Federal judicial circuits who comprise the executive steering group for the Committee on United States Magistrates. The questions were developed to obtain information relevant to the comprehensive study which the Judicial Conference of the United States must submit to the Congress by January 1982, pursuant to Section 9 of the Federal Magistrate Act of 1979 (Public Law 96-82). Section 9 reads:

> "The Judicial Conference of the United States shall undertake a study, to begin within 90 days after the effective date of this Act and to be completed and made available to Congress within 24 months thereafter, concerning the future of the magistrate system, the precise scope of such study to be recommended by the Chairmen of the Judiciary Committees of each House of Congress."

Thereafter the circuit representatives contacted United States Magistrates within their respective circuits, Federal Bar Association members, officers of local chapters of the FBA, and other knowledgeable individuals. While the response which preceded the preparation of the tentative interim report was not as extensive as desired, and thus we now solicit your views, it nevertheless was substantial and formed the basis for the comments set forth below. Each survey question is set forth in italics followed by a summary of the comments received and set forth in greater detail in the interim report.

1. *Should Magistrates' civil jurisdiction continue to be open-ended to include all civil cases filed in the Federal District Court or should the Act fix and categorize the type of civil cases by the amount involved?*

Under the Federal Magistrate Act of 1979, with consent of the parties, and subject to the approval of a District Court judge, a United States Magistrate can try any civil case filed in a United States District Court, with or without a jury, with appeal either to the court of appeals or to a district court judge. By almost 5 to 1 response the predominant view was that the magistrate's civil jurisdiction should continue to be open-ended. Several persons responded that the advantage of the magistrate system was its flexibility and the fact that it provides additional judicial officers capable of absorbing the varying workloads peculiar to each individual district court and to meet the continually expanding caseload. Variety in the types of civil cases handled by United States Magistrates makes the work more interesting and attracts more highly qualified candidates for appointment as United States Magistrates. Any limiting or categorizing of cases would cause litigants and counsel to view magistrates as second class courts and could result in a movement towards creation of an unnecessary fourth tier to the federal judicial hierarchy.

2. *Should Congress enact laws providing for mandatory reference on certain civil cases to magistrates with review either by District Court Judges or courts of appeals? Do mandatory references create unnecessary constitutional problems with regard to the magistrate's non-Article III status?*

The responses were more than 3 to 1 against mandatory references. Most opponents thought that mandatory references would create unnecessary constitutional problems, could lead to creation of a lower separate tier within the federal judiciary, and could result in setting up a second class court system. Proponents of mandatory references, however, suggested that mandatory references of certain types of cases would not create unnecessary constitutional problems under Article III if the parties had a right to a *de novo* trial review of the magistrate's action before a district court judge.

3. *Should Congress provide by statute that magistrates may take felony pleas in criminal cases with consent of the defendant or can take felony pleas where the period of imprisonment would not exceed five (5) years or ten (10) years?*

Some 37 individual responses favored giving the magistrate the authority to accept guilty pleas in felony cases and the power to sentence. It might be argued that if consent provides the constitutional basis for the magistrate to take a guilty plea to a multi-count misdemeanor information and to impose sentence, for example, on five (5) counts, each carrying one year, so that they run consecutively for a total aggregate sentence of five (5) years, the magistrate could constitutionally be given the authority to take a guilty plea on a felony count which carries a maximum sentence of five (5) years, or for that matter, even ten (10) years, provided the consent of the defendant is voluntarily and knowingly given.

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1 OF 2

Opponents observed that felony jurisdiction with authority to sentence may present a judge-shopping image with the appearance that a defendant expects the magistrate to be more lenient than the district court judge. If the magistrate were only to take the Rule 11 plea with the district court judge to impose the sentence, such a separation of function may not be too practical as the time spent in the magistrate submitting a written report and recommendation and the need for the district judge to assure himself that there is a factual basis for the plea prior to imposing sentence, would not save judicial time, and indeed may involve more time than if the district court judge both took the plea initially and sentenced the offender. Further, some opponents thought that most judges who are going to impose a sentence would prefer to take the guilty plea so that they could get a "feel" for the case and the defendant and make some tentative judgement from the defendant's demeanor and candor concerning remorse, the need for rehabilitation, and the extent of punishment.

4. *Should Congress enact a general misdemeanor provision which would permit the prosecutor to downgrade any federal felony to a misdemeanor within the current jurisdiction of federal Magistrates, e.g., a provision for "attempt" to commit the offense to be charged as a misdemeanor? (For example of another method of downgrading a felony, see Section 17b of the California Penal Code.)*

Almost seventy (70) percent of the individual responses favored a general misdemeanor provision being enacted by the Congress as a part of the federal criminal law. Opponents were concerned about possible prosecutive abuse, observing that prosecutors might encourage plea bargaining when the government really had no case. Some others thought that the initiative for such a misdemeanor provision should come from the Attorney General and the Department of Justice and not from the Judiciary.

5. *Should the Federal Magistrate Act be amended to provide that magistrates may sentence offenders under the Federal Youth Corrections Act for a period of probation longer than the period of possible imprisonment for the offense? A restriction was first added in the 1979 legislation (otherwise probation could be up to five (5) years).*

Under the Federal Magistrate Act of 1979, magistrates were given explicit authority to sentence under the Federal Youth Corrections Act and the Young Adult Offender Act, but the period of probation was restricted to one (1) year for a misdemeanor offense and to six (6) months for a petty offense. Many magistrates have found this restriction as to the period of time for probation to be an obstacle to using these beneficient provisions in dealing with a misdemeanor or petty offender on welfare with little or no education and job skills, the narcotics user, or where a sentence to probation would reasonably suggest restitution as one of the conditions, but the amount is of a sum beyond the means of the offender to repay within six (6) months or within one (1) year. Of those persons who responded to this question, they favored 2 to 1 the amendment of the probation restriction so that a longer period of probation may be imposed where warranted.

The proponents of an amendment to the probation restriction observed that the restriction now frustrates rehabilitation and encourages magistrates to make "no benefit" determinations and to sentence under the adult provision of 18 U.S.C. § 3651 in order to have meaningful probation for the time period necessary in the judgment of the individual magistrate. Thus, the restriction is unrealistic and frustrates the design of the Federal Youth Corrections Act to provide rehabilitation, supervision, and training and to give the individual the opportunity to earn a "clean slate."

6. *Should the Federal Magistrate Act be amended to provide that magistrates shall have original jurisdiction of all petty offense cases, thus eliminating the need for the written consent of a defendant?*

On a more than 5 to 1 basis those persons who responded to this question favored petty offense original jurisdiction in the United States Magistrates, although some qualified their responses that this change should be effected only if it can be constitutionally developed. The proponents of the change observed that at present the matter of defendants consenting to petty offenses being handled by the magistrate is actually perfunctory, a time-consuming chore, and a formality, and that it would be better to develop a mechanism whereby the magistrate's jurisdiction is deemed automatically established unless the defendant affirmatively elects to go before a district court judge and executes a form so indicating.

7. *Should magistrates be given the power of contempt? Should this power be general or should it be limited, e.g., maximum of ten (10) days incarceration or a fine of $250 or $500, or no jail but a $250 or $500 fine?*

A majority of those responding favored giving the magistrates direct summery contempt power, although by a 2 to 1 ratio they would limit the contempt power to a specific number of days and/or dollar fine limit. Some individuals thought the magistrate should have the general contempt power only against the parties and counsel when they are before the magistrate under consent jurisdiction where the magistrate is acting for all practical purposes as a district court judge. Where the matter is before the magistrate solely by referral from a district court judge, some thought the current certification procedure of 28 U.S.C. § 636(e) was adequate or that the contempt power should be limited. One commentator observed that it seemed contradictory to expand the magistrate's jurisdiction, as Congress has recently done, and yet not entrust magistrates with the necessary tools to control their own courtrooms.

The matter of contempt, both criminal and civil, is sensitive, and the bifurcated approach of 28 U.S.C. § 636(e), that is, the judge who prefers the contempt charge or cites a person for contempt should not be the judge who adjudicates the matter, is one which seems to be gaining an increasing number of adherents. Thus, it is hoped that a substantial number of FBA members will comment on this question.

8. *Should the magistrates system continue as a component of the United States District Courts or should the system be converted to a separate tier of lower Federal courts?*

The overwhelming number of those responding to this question favored continuing the magistrates as a component of the United States District Courts. They observed that if magistrates were to be converted to a separate tier, the benefits of flexibility and the fundamental purpose of the magistrate system would be lost. Because of the additional powers conferred by the Federal Magistrate Act, where the magistrates can function as deputy federal judges in a broad range of matters, the system functions best in its present unitized form. A separate tier system would create an artificial barrier and preclude this type of flexibility and would likely lead to a reduction in the level of competence of those persons who would seek to become magistrates. Finally, a two-tiered approach runs counter to the movement in this country during the last decade toward a unified trial court system.

9. *Should magistrates continue to be appointed by District Court judges or should the appointment be by the President with Senate confirmation?*

The overwhelming number of responses favored appointment of the magistrates by the District Court judges. Since magistrates serve as deputies and assistants to the judges, when a vacancy occurs their self-interest promotes the selection of the best qualified candidate who has applied to become a United States Magistrate. Some commenters observed that the current appointment process provides the one means by which a person can enter the federal judiciary on a merit basis, especially with the requirement for use of merit selection panels mandated by the Federal Magistrate Act of 1979, and then, based on the quality of his or her performance, be elevated from within the system to higher judicial office.

10. *Does the method of appointment affect the degree of independence magistrates should have in view of the greatly expanded functions magistrates are increasingly assuming under various Acts of Congress?*

By almost a 3 to 1 margin those responding thought that the method of appointment had little or no significant impact on the independence of magistrates and that it makes magistrates properly accountable. A full-time magistrate's independence, according to the majority, is protected to a substantial degree by a fixed eight (8) year term and 28 U.S.C. § 631(i) which provides that a magistrate may be removed only for incompetency, misconduct, neglect of duty, or physical or mental disability based on majority vote of the active judges of the District Court concerned.

11. *Should the term of the magistrates, in order to increase independence, be extended from the current 8 year term to one of 12, 14 or 15 years?*

Slightly more than one-half of those responding thought that the eight (8) year term was adequate. The remainder opted for 12, 14, 15 or some period longer than eight (8) years as an appropriate term. The proponents of continuing with the eight (8) year term observed that it is a long term and, if a magistrate is performing properly, there would be no reason why he or she should not be reappointed. A limited term promotes accountability which has its value in the eyes of some of our citizens who have, on occasion, criticized life tenure of judges. An eight (8) year term would allow "unloading" an incompetent magistrate in a way which would not provoke a "messy" controversy and would further strengthen the magistrate system by assuring quality performance in order to be reappointed.

The supporters of a longer term viewed the longer term as providing the magistrate greater independence in making his or her decisions without the fear that the district court judges would not reappoint him or her. They note that many magistrates are appointed after a number of years in private practice when they are between 40 and 50 years of age and thus may be somewhat apprehensive about their future security with only an eight (8) year term. However, proponents of the eight (8) year term caution that merit selection panels and judges must be careful not to appoint individuals more concerned about their security than the quality of their judicial performance and who lack confidence in their abilities to perform at such a quality level as to be assured of reappointment upon the expiration of their initial eight (8) year term.

12. *Should the title of "Magistrate" be continued or should there be a title change such as "Associate Judge", "Division Judge" or "Deputy Judge" or some other appropriate title which reflects the full breadth of the magistrate's functions?*

Perhaps this question, more than any other, provoked the most controversy among those responding to the survey. While almost one-half of the individuals who responded were satisfied with the title "Magistrate", almost thirty-five (35) percent strongly suggested that the title should be changed to "Associate Judge" to reflect adequately the broad scope of duties performed by the magistrate, and another five (5) percent suggested the title be changed to "Deputy Judge." Some persons suggested that only the title of full-time magistrates should be changed to "Associate Judge" and "Magistrate" should continue to be used for part-time magistrates.

Those individuals who favored continuing the present title concluded that a change in title was not particularly urgent and that while the title had suffered somewhat because of its association with the title of state court magistrates and their functions and duties, with the passage of time, and the development of experience with the United States Magistrate system, the problem will diminish. They noted that the term "Associate Judge" was too close in sound and appearance to "Associate Justice" and thus might connote to the public that magistrates were the equal of district court judges and thus create unwarranted confusion. A potential compromise based on analogy to the term "Bankruptcy Judge" could be adoption of the title "Magistrate Judge" by statute, with the judicial officer being referred to as "judge" as is currently the practice in many district courts.

Since this is such a sensitive issue, it is hoped that *News* readers will make thoughtful comments on this question.

13. *Should magistrates be given an option as to retirement, either electing civil service retirement system coverage, or being treated like Article I Judges with a right of retirement after reaching a minimum age with at least fifteen (15) years of service?*

The overwhelming number of responses favored giving magistrates an option to elect civil service retirement or Article I judge retirement. The pro-

ponents of providing the option observed that Article I retirement would facilitate recruiting capable attorneys in mid-career with no prior government service. They observed that the civil service retirement system was designed for the career government employee who entered the federal civil service in his or her early 20's and would spend 30-40 years in the federal service. They observed that the civil service retirement system would not even provide minimally adequate retirement benefits for United States Magistrates appointed initially when they are between 45 and 55 years of age and who are thus unable to build up the appropriate number of years necessary to obtain any significant retirement benefits. As seasoned lawyers between 45 and 55 may be the best candidates available, it is important to give these persons the prospect of retirement security, they urged.

14. *Should Magistrates' salaries be identical to the salary of Bankruptcy Judges in view of the breadth of duties of Magistrates including the conducting of civil trials and the salary adjustment be automatic based on the Salary Commission's recommendation as submitted by the President to the Congress? That is, should Magistrates' salaries be set like those of Article II Judges, without the necessity of Judicial Conference setting and approval of salary adjustments within the framework of the Commission's recommendation, as is currently the practice?*

The majority view was that the salary for full-time United States Magistrates performing the full range of expanded duties authorized by the Federal Magistrate Act of 1979 should be identical to the salary of a full-time bankruptcy judge. Almost fifty (50) percent took the position that independently of consideration of what salary was paid bankruptcy judges, full-time magistrates' salary should be set at ninety (90) percent of the salary of a district court judge. Proponents of the percentage approach observed that generally the professional qualifications of magistrates are as high as those of district court judges. The reason why they should not be paid the same as district court judges is that they do not have the same ultimate responsibility as a district court judge nor do magistrates have felony jurisdiction. They advocate the 90 percent formula in light of the full range of responsibility and jurisdiction now potentially residing with the United States Magistrate, especially in civil cases based on the consent jurisdiction aspect of the Federal Magistrate Act of 1979 with direct appeals to a court of appeals.

A number of individuals also commented that for full-time magistrates performing the full range of duties there is no longer a need for the Judicial Conference of the United States to set salaries administratively, based on workload and volume. They suggest that just as with Bankruptcy Judges and Court of Claims Commissioners, salary adjustments for United States Magistrates should occur automatically at the same time as they do for federal judges and these other judicial officers. If full-time magistrates are fully utilized by their District Courts to the extent authorized by the Federal Magistrate Act of 1979, including the trials of civil cases with consent of the parties, there should be no more justification for salary differentials among full-time magistrates than there would be for District Court judges where there might be slight differences in workload. They further observed that

automatic salary adjustments for magistrates, without the necessity of Judicial Conference action, would enhance the independence of the judicial office of magistrate and eliminate the usual delay under the present system between salary adjustments for Article II judges, Bankruptcy Judges and Court of Claims Commissioners and salary adjustments for United States Magistrates.

15. *In those districts which permit civil jury trials before U.S. Magistrates by consent, to what extent have lawyers utilized U.S. Magistrates for such trials, how well have those trials been conducted, and has the consent procedure worked in a way to assure that consent is entirely voluntary?*

The response to this question was very limited due to the fact that in some districts magistrates were just being certified by their respective courts to try civil cases and the procedures were just being established. However, a number of magistrates responded, advising that the number of consents to both jury and non-jury civil trials before them was increasing and that they had tried Title VII EEO, workmen's compensation, breach of contract, Federal Employee Liability Act, negligence, tax, admiralty, and labor cases during the past year. As this trend continues it may be anticipated that lawyers and litigants will utilize the magistrates for civil trials even more extensively in more District Courts thoughout the United States. As this is one of the questions that both the House and Senate Judiciary Committees have suggested, the candid views and comments of members of the FBA who have tried cases before United States Magistrates would be most appreciated so that they may be incorporated in the Final Report for the benefit of the Judicial Conference of the United States and of the Congress.

16. *Has the use of merit selection panels improved the quality of magistrate appointments? How has it affected the appointment of minority and women judicial officers?*

The initial survey results disclosed that there had been very limited experience as of December 1980 with merit selection panels. Some magistrates felt that they would not have been appointed but for the merit selection procedures. Several individuals also indicated they thought the use of merit selection panels had led to consideration of more highly qualified minority and women candidates. This question is also of interest to the Congressional committees and your views will be most helpful to us.

17. *To what extent, if any, should federal magistrates who have performed their duties well, be recommended by the FBA and others for consideration for higher federal judicial appointments in the future?*

While those persons who responded concluded that United States Magistrates should not receive any special preference for appointment to higher judicial office and should be evaluated in competition with other candidates on the basis of merit alone, they did observe that service as a United States Magistrate provides excellent training for higher judicial appointment. Several persons, however, suggested that a magistrate who has passed the rigid requirements and qualifying standards under the new Federal Magistrate Act, plus a full review of the merit selection panel and district court judges,

and whose work is subject to continuous monitoring by District Court judges, should qualify for serious consideration for higher federal judicial office.

This is an exceptional opportunity for members of the Federal Bar Association to participate in a survey and study which will be far more than of just academic interest. The Final Report, if approved by the Executive Committee of the FBA, may be a valuable resource document for the Judicial Conference of the United States and indeed could be forwarded to the House and Senate Judiciary Committees. Further, the President or some other appropriate representative of the Federal Bar Association may have the opportunity and occasion to testify before these committees. Thus, we encourage all interested members of the FBA to communicate their views, comments and reactions to the survey questions and the preliminary results set forth in this article.

APPENDIX D

RESOLUTIONS OF THE NATIONAL COUNCIL OF UNITED STATES MAGISTRATES

BE IT RESOLVED that this Council, assembled in its Nineteenth Annual Conference at Detroit, Michigan, on June 24-27, 1981, does hereby:

1. *Organization of the Magistrates System*

   Support the present organization and constitution of the federal magistrates system as an integral component of the United States District Courts and oppose the creation of a separate additional tier, division, or court within the Federal courts.

2. *Jurisdiction of Magistrates*

   Support the existing, open-ended statutory provisions which authorize the referral to magistrates of all civil cases within the jurisdiction of the district courts, thereby preserving maximum flexibility for each district court to utilize magistrates as fully and effectively as local requirements warrant, and does oppose mandatory grants of "original" jurisdiction limited by cause-of-action, subject-matter or monetary amount in controversy.

3. *Appointment of Magistrates*

   Support the existing method of appointment of United States Magistrates by Judges of the United States District Courts upon the advice of merit selection panels and does hereby oppose appointment by the President with Senate confirmation.

4. *Maximum Assistance to the District Courts*

   Support the efforts of the Judicial Conference to assist the judges of the United States District Courts in discharging their caseload responsibilities by encouraging the maximum utilization of magistrates, through the assignment of "additional duties" under 28 U.S.C. Sec. 636(b) and the designation of magistrates to exercise the civil trial jurisdiction provided in 28 U.S.C. Sec. 636(c).

5. *Written Consent to Trial by a Magistrate in Misdemeanor Cases*

   Propose legislation to eliminate the filing of a written consent by a defendant as a condition to the exercise of misdemeanor trial jurisdiction by United States Magistrates under 18 U.S.C. Sec. 3401.

6. *Youth Corrections Act Sentencing Authority*

   Propose an amendment to the Federal Magistrate Act of 1979 to delete the following language contained in 18 U.S.C. Sec. 3401(g)(3):

The magistrate may not suspend the imposition of sentence and place the youth offender on probation for a period in excess of 1 year for conviction of a misdemeanor or 6 months for conviction of a petty offense

in order to eliminate differences between district judges and magistrates in sentencing youth offenders in misdemeanor cases.

7. *Contempt Power*

Propose the enactment of an amendment to the Federal Magistrates Act to give Magistrates contempt power.

8. *Compensation*

Endorse the recommendations of the Judicial Conference and the 1980 Quadrennial Commission on Executive, Legislative, and Judicial Salaries that the salaries of all judicial officers be increased to make them fair and equitable under present economic conditions and provide that full-time Magistrates receive as compensation a salary of ninety percent of the annual rate of salary for district judges, with any adjustments to take effect at the same time as adjustments for judges and other officials within the Judiciary.

9. *Retirement*

Urge the Congress to examine thoroughly the system of retirement benefits for United States Magistrates, and to revise applicable provisions to make them fair and reasonable, and consistent with those applicable to other federal judicial officers.

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