REPORT TO THE CONGRESS

The U.S. Magistrates: How Their Services Have Assisted Administration Of Several District Courts; More Improvements Needed

B-133322

Judicial Branch

BY THE COMPTROLLER GENERAL OF THE UNITED STATES

SEPT. 19, 1974

COMPTROLLER GENERAL OF THE UNITED STATES
WASHINGTON, D.C. 20548

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To the Speaker of the House of Representatives
and the President pro tempore of the Senate

This is our report entitled "The U.S. Magistrates: How Their Services Have Assisted Administration of Several District Courts; More Improvements Needed."

We made our review pursuant to the Accounting and Auditing Act of 1950 (31 U.S.C. 67) and the December 1968 agreement between the Director, Administrative Office of the U.S. Courts, and the Comptroller General provided for in the September 1968 resolution of the Judicial Conference of the United States.

Copies are being sent to the Director, Office of Management and Budget; the Chief Justice of the United States; the Chairman, Judicial Conference of the United States; and the Director, Administrative Office of the U.S. Courts.

Comptroller General
of the United States

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D I G E S T

WHY THE REVIEW WAS MADE

The Federal Magistrates Act of 1968 abolished the position of U.S. commissioners and created in their place a new level of officials within Federal district courts known as U.S. magistrates. The objective of the act was to provide for the disposition by magistrates of a greater range of minor offenses and relieve district judges of as many minor judicial duties as possible.

GAO reviewed the effect of this change in six Federal court districts to determine the impact magistrates have had on the Federal judicial system and whether opportunities exist for increasing magistrates' assistance to Federal district courts.

FINDINGS AND CONCLUSIONS

The full effect of the magistrate system is difficult to measure. Many variables affect the workload of district courts. The full benefits of the act, as intended by the Congress, are not yet being achieved.

However, there are indications that the new system is providing valuable assistance by providing for the disposition of a greater number of minor criminal offenses and by relieving district court judges of some judicial duties.

During fiscal year 1973, 88 full-time and 426 part-time magistrates handled 251,218 matters. More than 77,000 of these would not have been within the jurisdiction of commissioners and would have added to the district judges' workload.

The assistance provided by magistrates has contributed to the increase in cases terminated by district judges despite an increase in the relative difficulty of cases prosecuted.

Duties assigned

The duties actually performed by magistrates varied considerably among district courts reviewed.

The magistrates' trial jurisdiction includes all petty offenses, regardless of where they were committed, and most minor offenses.

The act provides that district courts may assign to magistrates other duties not inconsistent with the Constitution and law of the United States. (See p. 6.)

Determining what is or is not inconsistent with such laws frequently raises questions which

have been referred to the U.S. Courts of Appeals. The Courts of Appeals have not, however, provided needed clarification because of conflicting decisions.

Limitations

By increasing the magistrates' criminal jurisdiction to include all misdemeanors, the district judges' workload could be reduced and allow them to spend more time on felony and civil matters. The Federal Magistrates Act limits the magistrates' trial jurisdiction to those misdemeanors with penalties that do not exceed a 1-year imprisonment and/or a fine of $1,000.

GAO identified 165 other misdemeanors which have maximum fines ranging from $2,000 to $100,000. (See app. VII.) For example, a first offense for simple possession of a controlled substance (drugs) is a misdemeanor with a maximum penalty of 1 year and/or a fine of $5,000. During fiscal year 1973, 1 district heard 210 of these cases, about 10 percent of its total criminal caseload. Giving magistrates trial jurisdiction over most misdemeanors could greatly increase their assistance to district courts. (See pp. 16 and 18.)

Review of prisoner petitions

The Congress, in providing that duties of the magistrates may include review of prisoner petitions, indicated that this would afford some degree of relief to district judges and their law clerks who were burdened with these petitions.

Magistrates in three of the six district courts spent a large portion of their time reviewing petitions of Federal and State prisoners for posttrail relief. This duty consumed up to 30 percent of the magistrates' workload in these districts, whereas the other three districts used experienced law clerks to handle this function.

GAO believes that magistrates could have a greater impact upon the workload of district judges if the judges would have their law clerks assist magistrates in reviewing prisoner petitions in those districts where they are not now doing so. This would provide magistrates with more time to perform other judicial duties which could be assigned by the district judges.

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The Director of the Administrative Office of the U.S. Courts and the chief judges who responded to the report generally agreed with GAO's conclusions.

RECOMMENDATIONS

The Judicial Conference of the United States should take the lead to encourage district judges to (1) make greater use of magistrates under the existing legislation and (2) use law clerks to assist in reviewing prisoner petitions.

MATTERS FOR CONSIDERATION BY THE CONGRESS

Because of the varying interpretations of magistrates' authority by the circuit courts, GAO recommends that the Congress further define the authority of magistrates.

Also, the Congress may wish to consider amending the Federal Magistrates Act to expand the trial jurisdiction of magistrates to include most misdemeanors.

CHAPTER 1

INTRODUCTION

To improve the Federal judicial system, the Congress enacted the Federal Magistrates Act (28 U.S.C. 631) in October 1968. The act abolished the position of U.S. commissioner. In its place the Congress created a new level of court officials within district courts known as U.S. magistrates. The Congress wanted to

--upgrade the dignity and the duties of the commissioners by providing for a system of salaried attorneys to conduct initial proceedings in criminal cases;
--dispose of a greater range of minor criminal offenses which, because of more pressing business, could not be handled by district judges; and
--relieve district judges of as many judicial duties as possible, so that they might devote their time to trial cases.

The magistrate system began in 1969 with pilot programs in five district courts. In fiscal year 1971 it became fully operational with about 80 full-time and 442 part-time magistrates replacing over 600 commissioners. As of June 30, 1973, there were 88 full-time and 426 part-time magistrates.

Under the act, each district court appoints full-time magistrates for 8 years and part-time magistrates for 4 years. Full-time magistrates must be attorneys and a non-attorney is appointed only when an attorney cannot be found for a part-time position. As of June 30, 1973, all but 9 of the 426 part-time magistrates were attorneys.

Salaries are based on projected workloads with a maximum annual salary of $30,000 for full-time and $15,000 for part-time magistrates. Office space, clerical assistance, and all necessary supplies and equipment are provided to full-time magistrates and part-time magistrates are reimbursed for necessary expenses.

Operating costs of the magistrate system have grown from $3.5 million in fiscal year 1971 to $6.1 million in fiscal year 1973, compared to the $1 million annual cost of the former commissioner system.

The Judicial Conference of the United States--the policy making body for the Federal judicial system--determines the number, locations, and salaries of full and part-time magistrates. A concurrence of the majority of the judges of each district court selects the magistrates. This was believed necessary to insure that magistrates have the confidence of the district judges whom they serve.

Judicial Conference of the United States

The Judicial Conference consists of the Chief Justice of the U.S. Supreme Court, the chief judge of each circuit, the Chief Judge of the Court of Claims, the Chief Judge of the Court of Customs and Patent Appeals, and a district judge from each circuit elected by the circuit and its district judges.

The Conference's interest includes

--conditions of the courts' business,
--assignments of judges,
--general rules of practice and procedure,
--promotion of simple procedures,
--fair administration, and
--elimination of unjustifiable expense and delay.

Except for its direct authority over the Administrative Office of the U.S. Courts, the Conference is not vested with any day-to-day administrative responsibilities.

Administrative Office of the U.S. Courts

The Supreme Court of the United States appoints the Director and a Deputy Director who head the Administrative Office. The director is the administrative officer of all U.S. courts except the Supreme Court. Under the supervision and direction of the Judicial Conference, the Director is required to

--supervise administrative matters relating to the operations of the courts,
--prepare and submit various reports regarding the state of the dockets and other statistical data, and
--audit the courts' vouchers and accounts.

U.S. district courts

Each State has at least one district court and some States have as many as four. There are 89 district courts in the 50 States and 1 each in the District of Columbia and the Commonwealth of Puerto Rico. Also, there are three territorial courts, one each in the Canal Zone, Guam, and the Virgin Islands. Each district court has at least one judge, clerk, magistrate, bankruptcy judge, probation officer, and court reporter.

The standard codes of civil and criminal procedures for the district courts provide the general rules of practice for these courts. However, the judges of each district court, through majority action, formulate local rules and orders and determine how that court's internal affairs will be handled.

The district judges have direct control over the clerks of the courts. The clerks are the courts' fiscal and disbursing officers and are responsible for maintaining the courts' records and performing other assigned duties.

SCOPE OF REVIEW

We reviewed the activities of magistrates in six districts--California Central, California Southern, Georgia Northern, Massachusetts, Ohio Northern, and Texas Southern--which represent a geographic cross section of the magistrate system. (See app. VI.)

We reviewed the Federal Magistrates Act, its legislative history, court files, and reports relating to magistrate activities. Discussions were held with judges, magistrates, and other officials of the district courts and the Administrative Office, and officials of the Department of Justice.

CHAPTER 2

MAGISTRATES' AUTHORITY IN SEVERAL DISTRICT COURTS

The magistrate system has progressed toward achieving the act's objectives. Magistrates have provided considerable assistance to the district courts by relieving district judges of minor criminal and civil matters. During fiscal year 1973 omnibus judgeship hearings held by the Subcommittee on Improvements in Judicial Machinery, Senate Committee on the Judiciary, several judges indicated that they were well pleased with the system. One chief judge stated he did not think his district could operate effectively without the magistrate's assistance. However, we believe that magistrates' assistance to district courts could be improved by

--clearing up problems concerning their authority,
--amending present legislation to expand their criminal trial jurisdiction to include all misdemeanors, and
--using law clerks to review prisoner petitions.

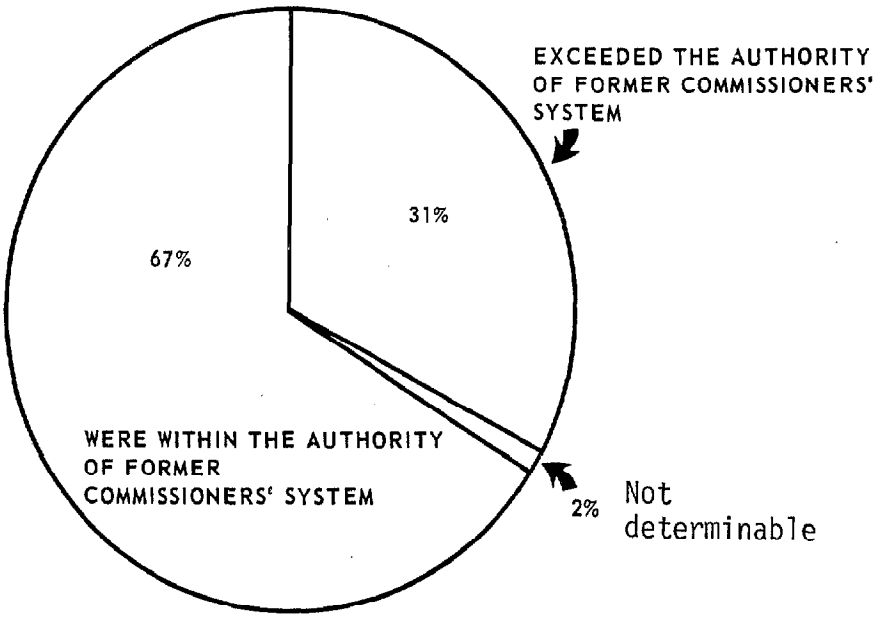
IMPACT OF THE MAGISTRATE SYSTEM

The effect of the magistrates on the judicial system is difficult to measure because of the many variables affecting the workload of district court judges. However, there are several indications that the magistrates are lessening the district court judges' workload.

According to the 1973 annual report of the Director of the Administrative Office, magistrates handled 251,218 matters of judicial business during that year. About 67 percent of these matters would have been within the jurisdiction of the former commissioners' system (see following chart). However, the remaining matters--except petty offenses committed on Federal reservations (less than 2 percent)[1]--were beyond the jurisdiction of the former commissioners' system and would have added to the burden of the district judges if the Federal Magistrates Act had not been enacted.

[1]It could not be determined whether these petty offenses were committed on Federal reservations and were therefore within the jurisdiction of commissioners.

CHART 1: MATTERS HANDLED BY MAGISTRATES DURING FISCAL YEAR 1973



Overall, district judges terminated 22 percent more cases per judgeship during fiscal year 1973 than in fiscal year 1970 despite an increase in the complexity of cases. Their workload is, of course, influenced by factors other than the assistance provided by magistrates. For example, changes in civil and criminal case filings, congressional legislation, and judgeship vacancies all affect the judges' ability to attend to the court's matters. Nevertheless, in a September 20, 1973, statement, the Chief Justice of the Supreme Court reported that one of the reasons for the increase in district court productivity was the assistance provided by magistrates. He stated that many of the matters now handled by magistrates would have taken up district court time before.

Duties performed by magistrates

Magistrates may perform the following duties formerly assumed by commissioners:

--Issuing search and arrest warrants.
--Advising a defendant of his rights and the charge against him.
--Appointing counsel and setting bail at the initial presentment.
--Conducting preliminary hearings.
--Conducting trials of petty offenses committed on Federal reservations.
--Performing certain minor, infrequently exercised functions.

The 1968 act expanded the trial jurisdiction of magistrates to all petty offenses regardless of where they were committed and all minor offenses (except for certain crimes specifically excluded by 18 U.S.C. 3401 (see app. V)). Defendants charged with petty or minor offenses[1] may elect to be tried before a judge of the district court or may waive such right and consent to be tried by a magistrate.

In addition to the above, district courts were given authority to assign additional duties as they saw fit. Section 636(b) states:

> "(b) Any district court of the United States, by the concurrence of a majority of all the judges of such district court, may establish rules pursuant to which * * * [full and part-time magistrates] may be assigned * * * such additional duties as are not inconsistent with the Constitution and laws of the United States. The additional duties authorized by rule may include but are not restricted to:
>
> "(1) service as a special master in an appropriate civil action * * *;

[1]Petty and minor offenses differ only in that a petty offense carries a maximum penalty of a 6-month imprisonment and/or a fine of $500, whereas a minor offense carries a maximum penalty of a 1-year imprisonment and/or a fine of $1,000 (18 U.S.C. 1).

"(2) assistance to a district judge in the conduct of pretrial or discovery proceedings in civil or criminal actions; and

"(3) preliminary review of applications for posttrial relief made by individuals convicted of criminal offenses, and submission of a report and recommendations to facilitate the decision of the district judge having jurisdiction over the case as to whether there should be a hearing."

The six districts which we visited have authorized their magistrates to perform many duties beyond those formerly performed by commissioners. The Administrative Office's annual report showed the following as the authorized duties and the number of matters handled during fiscal year 1973.

	DISTRICT					
	California Central	California Southern	Georgia Northern	Massachusetts	Ohio Northern	Texas Southern
Number of magistrates:						
Full time	4	3	2	2	2	3
Part time	9	2	3	6	4	2
Total	13	5	5	8	6	5
Magistrate duties authorized:						
Commissioner (note a)	4,018	8,808	2,178	1,395	1,179	6,961
Trial of petty offenses (note b)	2,187	5,481	677	844	11	5,413
Criminal:						
Postindictment arraignments	2,004	2,065	(c)	449	45	(c)
Pretrial conferences	4	2,227	0	91	0	443

	DISTRICT					
	California Central	California Southern	Georgia Northern	Massachusetts	Ohio Northern	Texas Southern
Criminal: (Continued)						
Motions	39	26	1	534	2	0
Other	4	51	2	2	0	58
Civil:						
Prisoner petitions	317	0	0	113	0	587
Pretrial conferences	1	(c)	7	12	5	1,147
Special master	0	57	10	2	0	4
Motions	0	(c)	2	287	21	1
Social Security (note d)	0	(c)	55	0	0	2
NARA (note e)	(c)	(c)	36	0	(c)	94
Other	368	112	0	7	0	328
Trial of minor offenses	236	403	125	88	0	287
Total (note f)	9,178	19,250	3,093	3,824	2,063	15,325

[a]Duties formerly handled by commissioners, excluding the trial of petty offenses.
[b]Formerly handled by commissioners only if offense was commited on a Federal reservation.
[c]Duties not authorized by the court.
[d]Appellate review of administrative decisions made by the Social Security Administration.
[e]Review of requests by narcotic addicts for treatment under provisions of the Narcotic Addict Rehabilitation Act of 1966.
[f]Because of the varying complexity of matters handled, the totals shown should not be used to compare the workloads of the districts. The total matters handled for California Southern and Texas Southern are substantially more than the total for other districts, but we were told this is because they have many illegal alien cases which generally do not require much time.

As indicated, not all duties authorized by the district courts have been performed by their magistrates.

The duties actually performed by magistrates varied considerably among district courts. (See following chart.) For example, magistrates in Ohio Northern generally performed only duties which would have been handled previously by commissioners, whereas 42 percent of the matters handled by magistrates in Massachusetts were beyond the jurisdiction of former commissioners.

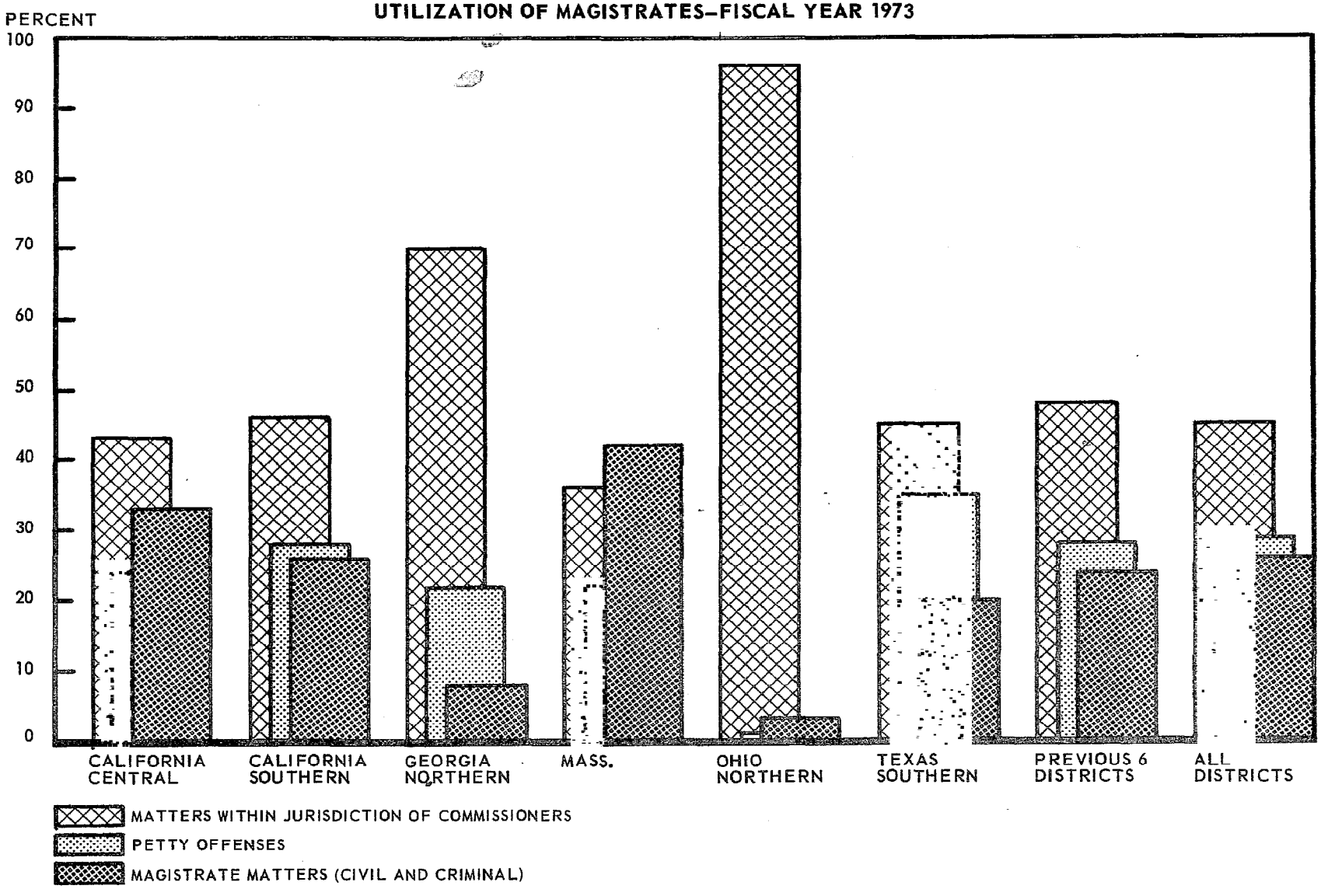
The Ohio Northern district's chief judge said before the appointment of a second full-time magistrate in February 1973, the first magistrate had been too busy with commissioner-type duties to take on magistrate-type work. After the appointment he issued a general order which provided that the full-time magistrates were to perform duties designed to assist judges in the district court and assumed that the judges were delegating functions to the magistrates in accordance with the general order and the local rules of the court. After he became aware that the magistrates were not being used by the judges, he took action to fully implement his order.

EXISTING PROBLEMS WITH MAGISTRATES' AUTHORITY

The Federal Magistrates Act provides in 28 U.S.C. 636(b), that district courts, by local rule, may assign to magistrates, "such additional duties as are not inconsistent with the Constitution and laws of the United States". Consequently, additional duties assigned to magistrates depend greatly upon each judge's interpretation of the Constitution and laws of the United States. The chief judges of all six districts reviewed said the legislation is not clear as to what additional duties may be assigned to magistrates. For example, the chief judge of the California Southern district said the act essentially provides only that magistrates assist the judges, have clear jurisdiction over minor and petty misdemeanors, and provide assistance on discovery matters. The remainder of the act is so vague that judges are uncertain as to the duties magistrates can handle.

The chief judge of Texas Southern said his district has assigned magistrates all the duties it believes are legally possible and therefore has no plans for expanding their role.

CHART 2: COMPARISON OF DISTRICT COURT UTILIZATION OF MAGISTRATES–FISCAL YEAR 1973



In contrast, the Administrative Office statistics show that the Oregon district court--a court which was not included in our review--assigned several duties to its magistrate which are not performed by magistrates in the district courts included in our review. These duties, which are not specified by law, include

--hearing and ruling on motions including discovery, summary judgment, dismissal, and preliminary injunction;
--presiding over the selection of juries in both civil and criminal cases;
--receiving jury verdicts in both civil and criminal cases; and
--trying civil cases, with juries if necessary.

The chief judge of Massachusetts stated that although there are problems regarding the clarity of a magistrate's jurisdiction he believed the circuit courts of appeals would work them out.

Decisions and opinions about the duties which may be assigned to magistrates have been rendered in several circuit and district courts during the last 2 years. However, differing views among the courts on various aspects of the magistrates' assignments are developing. The following examples point out these differing views.

The Court of Appeals for the Third Circuit upheld the constitutionality of section 636(b)(3) of the Federal Magistrates Act, permitting the reference of a prisoner petition to a magistrate for a report on the merits and a recommendation as to whether an evidentiary hearing should be held. In Henderson v. Bierley, 468 F. 2d 1193 (3rd Cir. 1972), the court held that:

> "the power given to and exercised by the magistrate neither usurps the power of the district court in making the ultimate determination as to whether an evidentiary hearing should be held nor unconstitutionally delegates judicial power to a non-Article III officer."

The court did not address the question of whether a magistrate could conduct the evidentiary hearing.

Similarly, in Asparro v. United States, 352 F. Supp. 1085 (D. Conn. 1973), the district court, in adopting the findings and conclusions of law of a magistrate in a prisoner case, stated that the authority given by the court to its magistrate to review posttrial petitions neither violates any constitutional or statutory standards nor usurps the power of the district judges. The opinion noted that:

> "Under the rules promulgated by the judges of this District under the Federal Magistrates Act, our full-time Magistrate has been given broad latitude to make findings and recommendations in pretrial civil areas (motions to dismiss, discovery applications, summary judgment petitions and related matters) and post-conviction collateral attack proceedings. He has been of immeasurable assistance to the judges and has gained a respected reputation with the bar for competence, impartiality and reasoned judgment. His consideration of hundreds of matters has made an incalculable contribution to the administration of justice in this District."

Magistrates in several districts within the Fifth Circuit regularly conduct evidentiary hearings in habeas corpus and other prisoner cases. The Court of Appeals in Parnell v. Wainwright, 464 F.2d 735 (5th Cir. 1972), ruled that the findings of fact issued by a magistrate following an evidentiary hearing in a post-conviction remedies case, when adopted by the district court, should only be rejected if they are clearly erroneous. The U.S. Court of Appeals for the Second Circuit reached a similar conclusion in Gonzalez v. Zelker, 477 F.2d 797 (2d Cir. 1973). In considering a habeas corpus case in which a magistrate had conducted the evidentiary hearing, the court ruled that the magistrate's findings of fact normally must stand unless clearly erroneous. (The courts, however, did not consider this rule to be applicable in the case actually before it.)

In Rainha v. Cassidy, 454 F. 2d 207 (1st Cir. 1972), the U.S. Court of Appeals for the First Circuit cited 28 U.S.C. 636 (b) (3) and declared that:

> "the thought that the magistrate, rather than recommending a hearing after a preliminary

> review, could be empowered to conduct the evidentiary hearing himself and make findings of fact, to be approved by a pro forma laying on of hands by the district court without notice, does not appeal to us in the least."

Similarly, in Wedding v. Wingo, 483 F. 2d 1131 (6th Cir. 1973), however, the U.S. Court of Appeals for the Sixth Circuit ruled that a magistrate had no authority under the provisions of the Federal Magistrates Act to conduct an evidentiary hearing on a habeas corpus petition:

> "The Act granted authority to the Magistrate to conduct only a preliminary review of applications for post-trial relief in order to facilitate the decision of the District Court as to whether there should be a hearing."

The Supreme Court recently upheld this position in Wingo, Warden v. Wedding, No. 73-846, June 26, 1974, at page 10:

> "The legislative history of [636(b)(3)] compels the conclusion that Congress made a deliberate choice to preclude district courts from assigning magistrates the duty to hold evidentiary hearings."

The Supreme Court limited its consideration in Wingo to whether U.S. magistrates can hold habeas corpus evidentiary hearings. However, Chief Justice Burger pointed out in his dissent that it is time for the Congress to act to restate its intentions if its declared objectives are to be carried out.

In Ingram v. Richardson, 471 F. 2d 1268 (6th Cir. 1972), the U.S. Court of Appeals for the Sixth Circuit ruled sua sponte 1/ that it was in error for a district judge to refer to a magistrate for report and recommendation on an appeal from a decision of the Secretary of Health, Education, and Welfare denying Social Security benefits. No written order of reference to the magistrate appeared in the file, and a

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1/ On its own will or motion.

copy of the magistrate's report, according to counsel, was the appellant's only notice of the reference. The court cited the provisions of rule 53 (b) of the Federal Rules of Civil Procedure and in effect treated the reference to the magistrate as comparable to an improper delegation of judicial functions to a special master. The court indicated that references to magistrates are not the solution to crowded court dockets but that such solution rests with the Congress.

Although the question was not specifically an issue, the U.S. Court of Appeals for the Fifth Circuit did not appear to be troubled by the reference of a social security case to a magistrate for report and recommendation. In Dewrell v. Weinberger, 478 F. 2d 699 (5th Cir. 1973), the district court had relied upon the written recommendations of a magistrate in affirming the administrative decision of the Secretary of Health, Education, and Welfare. The Court of Appeals affirmed without comment.

In Remington Arms Co., Inc. v. United States, 461 F. 2d 1268 (2d Cir. 1972), the U.S. Court of Appeals for the Second Circuit affirmed the order and judgment of the district court adopting the "well reasoned" recommended decision of the magistrate on cross motions for summary judgment. Likewise, the U.S. Court of Appeals for the First Circuit commented favorably on using a magistrate to conduct evidentiary proceedings in a criminal case. United States v. King, 455 F. 2d 345 (1st Cir. 1972), involved an appeal from a conviction for refusal to report for induction. The Court of Appeals remanded the case to the district court for additional evidentiary proceedings relating to draft board procedures and orders for call and suggested that the necessary evidentiary hearing "might properly be conducted by a magistrate."

The U.S. Court of Appeals for the Seventh Circuit, on the other hand, vacated the reference to a magistrate of a motion to dismiss a civil case, as well as the resulting order of the magistrate denying the motion in T.P.O., Inc. v. McMillen, 460 F. 2d 348 (7th Cir. 1972). The court discussed the legislative history of the Federal Magistrates Act in detail and concluded that:

"magistrates have no power to decide motions to dismiss or motions for summary judgment, both of which involve ultimate decision making, and the district courts have no power to delegate such duties to magistrates."

The court declared that the reference "amounted to little less than an abdication of the judicial function depriving the parties of a trial before the court on the basic issues involved in the litigation."

In United States v. Tanaka, No. 73-1436 (9th Cir. 1973), the U.S. Court of Appeals for the Ninth Circuit felt that it did not have to decide on the issue of whether the Federal Magistrates Act and pertinent local district court rules authorized a district judge to require a magistrate to hear the evidence on a motion to suppress in a criminal case and submit factual findings and a recommended ruling to the judge for final decision. The appellant did not object to this procedure until after the magistrate had completed the hearing and filed his findings and recommended order and the judge had adopted the order denying the motion. The Court of Appeals held that the objection was untimely.

The National Council of United States Magistrates--a professional organization composed of U.S. magistrates--has expressed concern about the need to clarify the authority of the magistrates. The Council stated that because judicial opinion varies widely among the various judicial circuits as to the powers and jurisdiction granted by the Congress to U.S. magistrates, there is a danger that the beneficial effects of the act will be diluted by restrictive interpretation and limited application.

EXPANDING CRIMINAL JURISDICTION OF MAGISTRATES

Increasing the magistrates' criminal jurisdiction to include all misdemeanors would reduce the workload of district judges and allow the judges to spend more time on felony and civil matters.

The magistrates' jurisdiction includes all petty offenses and most minor offenses. Both types of offenses are misdemeanors, differing in the maximum penalties (fine and imprisonment) that can be imposed. In order to be tried before a magistrate, defendants charged with minor offenses must waive their right to be tried by a district judge and a jury. Similarly, defendants charged with petty offenses must waive a trial by a district judge; however, they do not have the right to be tried by a jury. According to judges, magistrates, and U.S. attorneys that we talked to, very few defendants refuse to be tried by magistrates.

During fiscal year 1973 magistrates terminated the cases of 11,834 defendants charged with minor offenses and 72,746 defendants charged with petty offenses. In 79 percent of the cases, defendants either pleaded guilty or the cases were dismissed without a trial.

The magistrates' termination of these cases reduced the workload of district judges and enabled the Government to increase the prosecution of some crimes. For example, the total number of prosecutions of immigration law violators increased substantially in the Texas Southern and California Southern districts while the total number of such cases brought before district judges decreased. In fiscal year 1973, the Director of the Administrative Office reported that the decline of immigration cases heard before district judges was attributable to the diversion of these cases to the magistrates.

Most district court officials that we talked with said magistrates could further reduce the workload of district judges if they were given jurisdiction over all misdemeanors. By definition, Federal misdemeanors have maximum imprisonments of 1 year or less. Magistrates' trial jurisdiction is limited, however, to misdemeanors with maximum fines that do not exceed $1,000. We identified 165 misdemeanors with maximum fines ranging from $2,000 to $100,000. (See app. VII.)

The chief judges and the U.S. attorneys in five of the six districts reviewed said they were in favor of having the magistrates' trial jurisdiction expanded to include all Federal misdemeanors. For example, the chief judge of the California Central district said if magistrates had the au-

thority to try all misdemeanors then there could be a substantial impact on his court. The chief judge of the Ohio Northern district stated that expanding the magistrates' trial jurisdiction to include all misdemeanors would be a marvelous development which would greatly reduce the workload of all judges. The U.S. attorney for Ohio Northern said expanding the magistrates' trial jurisdiction would greatly benefit his office, since he could then prosecute misdemeanors on an information[1] before a magistrate, thereby eliminating the need for an indictment, arraignment, and much of the paperwork involved in a trial before a district judge.

In the Texas Southern district, both the chief judge and the U.S. attorney stated that they did not believe expanded jurisdiction would significantly reduce the workload of the judges. The judge, however, had no objection to the expanded jurisdiction. He even stated that, with consent of both parties, he would not be opposed to magistrates trying some less serious felony cases providing the statute made it legally possible.

During fiscal years 1972-73, 620 misdemeanor cases exceeding the magistrates' jurisdiction were tried by the 6 district courts included in our review. In fiscal year 1973, the 372 cases shown below amounted to about 5 percent of the total criminal caseload.

District	Number of misdemeanor cases 1972	1973
California Central	44	76
California Southern	146	219
Georgia Northern	4	22
Massachusetts	20	13
Ohio Northern	26	22
Texas Southern	8	20
Total	248	372

[1]An accusation against a person for some criminal offense, without an indictment.

About 76 percent of the cases involved first offender violations of 21 U.S.C. 844(a), simple possession of a controlled substance, which has a maximum fine of $5,000 and was passed after the enactment of the Federal Magistrates Act. The district of California Southern prosecuted 210 such cases during fiscal year 1973 (about 10 percent of its total criminal caseload) and did not impose any fines exceeding $1,000 for violation of this offense. An assistant U.S. attorney in the Georgia Northern district said the offense of simple possession of a controlled substance is seldom prosecuted because of the burden these cases would put on the court.

REVIEWING PRISONER PETITIONS

Three district courts assigned the review of post-conviction applications for relief (prisoner petitions) to magistrates.

Prisoner petitions are requests from State or Federal prisoners seeking relief because of inadequate trials, severe sentences, or violations of civil rights. The review includes determining if there is any basis for granting a hearing and developing any necessary documents for a district judge's signature. The district judges, who have the authority to deny or grant a petition, direct the reviews. Several judges have testified before a congressional committee that the greatest percentage of prisoner petitions--as much as 90 percent--are frivolous.

Before the establishment of the magistrate program, prisoner petitions were usually assigned to the judges' law clerks for review. At the time of our review, the districts of Georgia Northern, California Southern, and Ohio Northern were still following this practice.

Magistrates in the districts of Massachusetts, Texas Southern, and California Central said they spent a large portion of their time reviewing prisoner petitions. In California Central, where the magistrates spend approximately one-third of their time reviewing prisoner petitions, the judges said the magistrates could not be assigned many civil duties because they were too busy performing other authorized duties. In Texas Southern and in Massachusetts, the magistrates estimated that they devoted up to 30 percent of their time reviewing prisoner petitions.

CONCLUSIONS

Although magistrates have relieved district judges of many duties, the full benefits of the Federal Magistrates Act, as intended by the Congress, have not been achieved. The authority of the magistrates is not clearly defined by existing legislation and there is no agreement among the various circuit courts on exactly what authority the magistrates have. For the courts to achieve the full benefits from the magistrate system, the Judicial Conference should exercise leadership and encourage greater use of the magistrates within limits of this legislation.

Increasing the criminal jurisdiction of magistrates would also benefit the court system. We think it would be entirely appropriate to extend magistrate jurisdiction over most misdemeanors. We have no basis, however, for a recommendation as to what monetary limits should be set in determining the misdemeanors that magistrates should have come before them. We would not think it appropriate to set any fixed amount as a sole criteria because some of the fines relate to penalties for judges (18 U.S.C. 155, $5,000), attorneys (22 U.S.C. 277d-21, $3,000), and members of the Congress (18 U.S.C 431, $3,000).

The Congress, in providing that duties of the magistrates may include the review of prisoner petitions, indicated that this would afford some degree of relief to district judges and their law clerks who were burdened with these petitions. The volume of prisoner petitions has increased greatly since passage of the act in 1968, thereby making the review of prisoner petitions a larger part of the workload of some magistrates.

We believe that magistrates could have a greater impact upon the workload of district judges if the judges would have their law clerks assist magistrates in reviewing prisoner petitions in those districts where they are not now doing so. This would provide magistrates with more time to perform other judicial duties which could be assigned by the district judges.

- - - -

The Director of the Administrative Office of the U.S. Courts and the chief judges who responded to our report generally agreed with our conclusions.

RECOMMENDATIONS

We recommend that the Judicial Conference encourage district judges (1) make greater use of magistrates under the existing legislation and (2) use law clerks to assist in reviewing prisoner petitions.

MATTERS FOR CONSIDERATION BY THE CONGRESS

Because of the varying interpretations of magistrates' authority by the circuit courts, we recommend that the Congress further define the authority of magistrates. Also, the Congress should consider modifying the Federal Magistrates Act to expand the magistrates' trial jurisdiction to include most misdemeanors.

United States District Court
Southern District of Texas
Houston, Texas 77002

Ben C. Connally
Chief Judge

May 14, 1974

Mr. Victor L. Lowe
Director
General Government Division
United States General Accounting Office
Washington, D. C. 20548

Dear Mr. Lowe:

I acknowledge receipt of your letter of May 2, enclosing copy of draft report to the Congress on the subject of United States Magistrates. I note that you request my comments and observations by reason of the fact that this District was one of those studied by Mr. Ditmore and his associates.

I concur in much of what the report contains. I am of the view that the Magistrate System has been a notable success, and feel that the Court has received much assistance from these officers.

I share the view of the report that the power and authority of the Magistrates might well be more clearly defined by statute. I likewise believe it might be expanded. I see no reason why Magistrates should not try any misdemeanor case and would favor statutory authorization.

Whether Magistrates should arraign in all criminal cases I believe has been the subject of some difference of opinion among the courts. If authorized by statute, I am aware of no reason that the Magistrates could not perform this function. If a criminal defendant pleads not guilty before a Magistrate, his period within

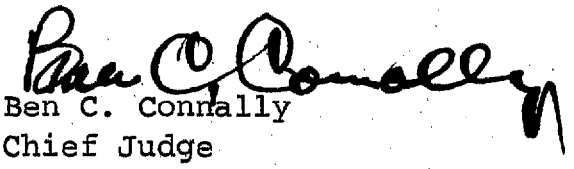
which to file motions would begin to run and the Court could set the matter for trial at a convenient time thereafter. If such defendant pleads guilty, the Magistrate could give him his full warning, request the preparation of a presentence report, and set the matter for the imposition of sentence before the Judge. In the absence of specific statutory authority, I question whether a Magistrate presently should accept a plea of guilty.

With respect to prisoner petitions, and the provision therefor contained in § 636(b)(3) of Title 28, I consider that statutory provision to be ill-advised. Apparently it contemplates in this respect that the Judge will make use of the services of the Magistrate as a glorified law clerk. I visualize the Magistrate as an independent judicial officer. With respect to prisoner petitions, as you may be aware we have for sometime in this District made use of the services of the Magistrate to hear the civil actions for damages filed by state prisoners by means of appointing the Magistrate as a special master under Rule 53. This is particularly helpful as the Magistrate may, and does, hear such cases in the city (some fifty miles from Houston) where the state penitentiary is located. This avoids the necessity of bringing the petitioner and all of his witnesses (who are in custody) to Houston, keeping them confined overnight in the local jail and guarding them during their stay. We have found the procedure useful and beneficial except for the following problem.

What in my judgment is needed to greatly increase the efficiency and utility of the Magistrate System is an increase in the number of our court reporters. The Magistrate may not arraign a criminal defendant for the Court, and he may not hear, as a master,

a prisoner's civil action unless an accurate and complete record is available. This is a necessity, by reason of the present practice of relitigating these matters at every opportunity. An accurate and permanent record is not available by the use of tape recorders. If there were any doubt on this score, the news stories in the daily press should convince any interested person that tapes may be erased or otherwise altered, by accident or design; portions may be inaudible or unintelligible; some may be lost in their entirety. It seems to me to be false economy to fill and staff the positions which have a great potential to assist the Courts, and perhaps reduce the number of Judges required to meet their obligations, and yet to deprive these offices of their real efficiency by inability to supply a court reporter and a permanent record.

Sincerely,



Ben C. Connally
Chief Judge

APPENDIX II

United States District Court
Central District of California
Los Angeles, California 90012

Chambers of
Albert Lee Stephens, Jr.
Chief Judge

May 24, 1974

Honorable Victor L. Lowe
General Government Division
United States General Accounting Office
Washington, D.C. 20548

Dear Mr. Lowe:

This is in response to your letter of May 2, 1974, inviting comments on your draft report to the Congress concerning the authority of the United States Magistrates.

[See GAO note, p. 26.]

If that paragraph proposes that law clerks be authorized to aid magistrates, I would concur in the conclusion. However, if it means that you are recommending that Congress abolish the authority of magistrates to review prisoner petitions, I must express serious disagreement.

The legislative history of the Magistrates Act, clearly reveals that a motivation for the Act, was the recognition by Congress that district judges had to have assistance in processing the enormous caseload of prisoner petitions. Congress rightfully determined that magistrates should perform that function. Before Congress authorized district courts

to utilize magistrates in reviewing prisoner petitions, the judges of this court, of course, were assisted by their law clerks. But law clerks are employed generally for a year. By the time they became proficient, it was time for their successors to assume the duty. As a result, the time-consuming, although not legally difficult, burden of reviewing great numbers of petitions fell more upon the judges personally and consumed an enormous amount of time

The Central District of California is the largest populated district in the United States. Los Angeles County, which is in this district, has the largest felony trial court in the world. This court and the felony trial courts of the other heavily populated counties within our district, create a staggering amount of felony convictions. Those convictions result in prisoner petitions, and it falls upon this court to dispose of them. Any statistical information which you may want to use will show that two of these districts which use law clerks to screen prisoner petitions have such a small number of prisoner petitions that it doesn't make any difference who reviews them.

Your survey shows that all districts have unique problems. One of our problems is the review of prisoner petitions. There should be no attempt to prohibit any district from solving its own problems in a way which furthers the administration of justice even though it may differ from other methods used in other districts.

[See GAO note, p. 26.]

With reference to the chart set forth on page 13, the statistics are misleading. California Southern and Texas Southern show such a greater number of cases handled by magistrates because these districts have a large number of illegal alien cases. I am certain that you realize a great many of such cases may be processed very simply. I therefore ask that a footnote be made to the chart to explain what otherwise does not reflect an accurate portrayal of the work done by our four magistrates compared to the three in each of those districts.

I agree with your conclusion that (1) magistrates should be given increased trial jurisdiction, (2) the present statute needs clarification as to the extent of magistrates' authority and (3) their authority should be exercised to the limit.

With the exceptions noted, your draft report is excellent.

Sincerely,

GAO note: Deleted material concerns statements in the report draft which were revised in this report in accordance with data supplied by the Chief Judge.

United States District Court
Southern District of California
San Diego, California 92101

Chambers of
Edward J. Schwartz
Chief Judge

May 29, 1974

Mr. Victor L. Lowe,
Director
United States General
Accounting Office
Washington, D. C. 20548

Dear Mr. Lowe:

The draft report of the Congress pertaining to authority of United States Magistrates has been reviewed with the Magistrates of this District.

In general, we agree with the findings and conclusions of the report and believe that the recommendations encompassed therein are constructive.

We would call attention to the recent Ninth Circuit Court of Appeals decision in Campbell v. United States District Court, decided April 19, 1974, which may have some impact on the potential criminal jurisdiction of Magistrates. A Xerox copy of that opinion is enclosed.

Sincerely,

EDWARD J. SCHWARTZ

EJS/eap

Encl.

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRUCE A. CAMPBELL,
Petitioner,

vs.

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA,
Respondent.

No. 73-3022

OPINION

[April 19, 1974]

ON PETITION FOR A WRIT OF MANDAMUS

Before: DUNIWAY and CARTER, Circuit Judges, and SOLOMON,* District Judge.

JAMES M. CARTER, Circuit Judge:

This case presents a problem of great importance in the administration of justice in the area of criminal law. The question presented by way of a petition for mandamus is whether an order of reference in a criminal case to a magistrate to hold an evidentiary hearing on a motion to suppress, and to make findings of fact and recommend conclusions of law, is valid.

Petitioner raises two questions:

(1) Is the statute, 28 U.S.C. § 636,[1] under which the reference was made, constitutional as applied?

*Honorable Gus J. Solomon, Senior United States District Judge for the District of Oregon, sitting by designation.

[1]28 U.S.C. § 636.

"§ 636. Jurisdiction, powers, and temporary assignment

(a) Each United States magistrate serving under this chapter shall have within the territorial jurisdiction prescribed by his appointment—

(1) All powers and duties conferred or imposed upon United States commissioners by law or by the Rules of Criminal Procedure for the United States District Courts;

(2) the power to administer oaths and affirmations, impose conditions of release under section 3146 of title 18, and take acknowledgments, affidavits, and depositions; and

(2) Is the order of reference within the scope of the statute?

At the argument petitioner contended that the district court abused its discretion in making the order of reference. The contention was not presented by the petition for the writ, nor briefed on this appeal. It has no merit.

We deny the petition for a writ of mandamus.

I

Procedural Background

A criminal case, *United States v. Bruce A. Campbell,* was pending before the United States District Court for the Northern District of California. Campbell, the petitioner herein, filed a motion to suppress evidence. Pursuant to Local Rules 503 and 505[2] of the Northern District of California, the district court, on

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(3) the power to conduct trials under section 3401, title 18, United States Code, in conformity with and subject to the limitations of that section.

(b) Any district court of the United States, by the concurrence of a majority of all the judges of such district court, may establish rules pursuant to which any full-time United States magistrate, or, where there is no full-time magistrate reasonably available, any part-time magistrate specially designated by the court, may be assigned within the territorial jurisdiction of such court such additional duties as are not inconsistent with the Constitution and laws of the United States. The additional duties authorized by rule may include, but are not restricted to—

(1) service as a special master in an appropriate civil action, pursuant to the applicable provisions of this title and the Federal Rules of Civil Procedure for the United States district courts;

(2) assistance to a district judge in the conduct of pretrial or discovery proceedings in civil or criminal actions; and

(3) preliminary review of applications for posttrial relief made by individuals convicted of criminal offenses, and submission of a report and recommendations to facilitate the decision of the district judge having jurisdiction over the case as to whether there should be a hearing.

. . . ."

[2]"Local Rules of Practice, United States District Court, Northern District of California:

RULE 503:

MAGISTRATES—ADDITIONAL POWERS AND DUTIES—CRIMINAL MATTERS

Pursuant to 28 U.S.C. §636(b), each of said magistrates in this district shall have the additional power and duty, whenever requested by a Judge's

October 12, 1973, referred the motion to suppress to the United States Magistrate for recommended findings of fact and conclusions of law.

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order of reference and in the manner and subject to the review hereinafter provided in Rule 505, to perform any and all powers of a Judge of this Court in criminal matters which are not inconsistent with the Constitution and laws of the United States, including but not limited to the following:

(1) To hear discovery motions in criminal cases, including, but not limited to motions and proceedings under F.R. Crim. P. 16; to conduct pretrial proceedings in criminal cases, including, but not limited to pretrial motions and proceedings under F.R. Crim. P. 17.1 and Local Rule 208.

(2) To hear motions regarding bill of particulars; transfer proceedings under F.R. Crim. P. 20; removal proceedings under F.R. Crim. P. 20(b); mental competency proceedings under 18 U.S.C. §§ 4241-4248; revocation of probation; narcotic rehabilitation proceedings under 18 U.S.C. §§ 4251-4255; suppression of evidence under F.R. Crim. P. 41 or of statements obtained through illegal interrogation (Local Rule 205(b)); change of place of trial; severance of trial as to multiple defendants; appointment of expert witnesses, interpreter or examining physician; fixing the terms and conditions of bail (F.R. Crim. P. 46; 18 U.S.C. §§ 3141-3152); appointment and release of counsel; to conduct voir dire examination and impanel trial juries in criminal cases upon written agreement of the parties.

RULE 504:

MAGISTRATE—SERVICE ON CRIMINAL CALENDAR OF THE COURT

Pursuant to 28 U.S.C. § 636(b), each of said magistrates in this district shall have the additional power and duty, whenever assigned and directed by a General Order of this Court, to preside over the Criminal Calendar of the Court (L.R. 200) and, when so assigned and directed, to perform, without further request or reference from a Judge, the following functions of Criminal Calendar Judge as set forth in L.R. 200(b) and L.R. 205(a).

(1) To appoint counsel.

(2) To fix terms and conditions of bail.

(3) To conduct arraignments under Rule 10, F.R. Cr. P.

(4) To take or enter pleas of "not guilty" and to thereupon refer the case to the Judge to whom assigned as provided in L.R. 200(c) for all further proceedings.

(5) To order prejudgment reports whenever a defendant states an intention to plead "guilty" or "nolo contendere" and thereupon to refer the case for plea and judgment to the Judge in the same manner as in (4) hereof.

At the time the court proposed to refer the motion to the magistrate, both the petitioner and the government opposed the suggestion. The petitioner listed his objections as follows:

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(6) To grant motions to dismiss when made by the United States Attorney; to accept waivers of indictment under Rule 7(b), F.R. Cr. P., and to permit amendments of information under Rule 7(e).

(7) To hear motions made prior to plea under Rule 12, F.R. Cr. P., or Local Rule 205(a) without any reference by a Judge but only in the manner and to the extent prescribed by statute and subject to review by the assigned Judge as hereinafter provided in L.R. 505. Such motions include motions for bill of particulars under Rule 7(f); motions to strike surplusage under Rule 7(d) F.R. Crim. P.; motions regarding mental competency under 18 U.S.C. §§ 4244 and 4248; motions for transfer under Rule 20, F.R. Cr. P.; motions for removal under Rule 40(b), F.R. Cr. P.

RULE 505:

REFERENCES TO MAGISTRATES—PROCEDURE—REVIEW

(1) Except as otherwise provided by Rule 504, the additional powers and duties described in Rules 502 and 503 shall be exercised only upon written order of reference by a Judge of this Court precisely setting forth the subject matter and terms of the reference. Any such reference order shall be filed with the Clerk in the action or matter from which the reference arises and a certified copy thereof delivered by the Clerk to the Presiding Magistrate, who shall have power to subassign any such reference to another magistrate.

(2) Magistrates, acting under such a reference are authorized to set hearings on the referenced matter, notify and require parties to appear, witnesses to appear, require proofs, briefs and argument, and to make such further orders as may be incidental or necessary to the completion of the reference.

(3) The magistrate's records (which shall be maintained separately from the Clerk's file and entitled "Magistrate's File Re .....," bearing the same title and number as the District Court file), shall consist of the certified copy of the order of reference, all papers, transcripts or summaries of evidence, all exhibits or briefs filed with the magistrate during the reference and the docket of proceedings taken before him, together with the magistrate's report and recommendation, findings, conclusions, and proposed order.

(4) Any party who desires review of a magistrate's decision by the Judge, shall promptly (in no event later than 5 days from notice of the magistrate's action or decision) so notify the magistrate and the adverse party in writing with a statement of his objections.

Upon completion of the reference and expiration of the time for notice of request for review (or upon admission of notice by all parties), the magistrate shall lodge his record with the Clerk for delivery to the referring Judge, including in the record the magistrate's certificate of

(1) Difficulty in getting a proper transcript from the magistrate because the procedure in effect provides for the use of a tape recording device rather than a court reporter;

(2) The statute, 28 U.S.C. § 636, does not authorize a magistrate to exercise the power to hear motions to suppress and Congress did not intend for a magistrate to sit in an Article III proceeding.

(3) The outcome of the motion to suppress will dispose of the case.

The government then joined in these objections.

The district judge stated as his "philosophy" in reviewing the proceedings of the magistrate that he accepted his rulings on facts because the magistrate "is a judicial officer" and a defendant is "entitled to one hearing on the question of fact on the motion to suppress."

The judge further stated that he did not hear appeals from decisions of magistrates on questions of law and mixed questions of law and fact, and that he had previously granted a motion to suppress when the magistrate recommended that the motion be denied.

Local Rule 503 tracked the language of 28 U.S.C. § 636(b) limiting the scope of a magistrate's duties in criminal matters to those which were "not inconsistent with the Constitution and laws of the United States."

Local Rule 505(4) provides for a "review of a magistrate's decision by the Judge" upon a notification in writing to the magis-

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service of notice of his decision (or their admission of notice thereof) and any objections or requests for review (or any waiver by the parties of review).

If review is requested, the Clerk shall promptly set and reasonably notice the time for review by the [illegible]rring Judge; otherwise, the Court shall proceed to consider and take such action as it deems proper upon the report and any proposed order of the magistrate.

(5) The Presiding Magistrate shall maintain a register of all references pending before a magistrate showing the title and number of the case, the date of the reference order, the Judge making the reference, the magistrate to whom the reference was assigned, and the subject matter of the reference. The Presiding Magistrate shall also quarterly report to the Chief Judge upon the condition of the Reference Register."

trate and the adverse party, with a statement of objections to be made promptly but in no event later than five days from notice of the magistrate's action or decision. It further provides that *"If review is requested,* the clerk shall promptly set and reasonably notice the time for review by the referring Judge; *otherwise* the court shall proceed to consider and take such action as it deems proper upon the report and any proposed order of the magistrate." (Emphasis supplied.)

Following the order of referral, and before any proceedings were held, the petitioner Campbell, on October 12, 1973, filed a petition in this court for a writ of mandamus, directing the trial judge to withdraw his previously entered order of reference and directing the judge to take evidence on the hearing of the motion to suppress, and for a stay pending the court's decision. A panel of this court granted a stay and expedited the proceeding.

II

Constitutionality of the Statute as Applied

Petitioner makes no frontal attack on the constitutionality of the statute on its face. In substance, petitioner is contending that the statute as applied is unconstitutional.

Petitioner's first contention is based in part on Sec. I, Article III, of the Constitution of the United States. He contends that only an Article III judge can hear a motion to suppress. The section reads:

"ARTICLE III.—THE JUDICIARY

> Section 1. The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office."

Palmore v. United States, 411 U.S. 389 (1973), by analogy, decides this question. In that case, Palmore was tried and con-

victed by the Superior Court of the District of Columbia of a felony under the District's Criminal Code. He contended he was entitled to be tried by an Article III judge with lifetime tenure and salary protection. The District of Columbia Court of Appeals affirmed and the Supreme Court, in turn, affirmed the District of Columbia Court of Appeals.

The defendant's contention in *Palmore* was summed up by the Court as follows: ". . . an Article III judge must preside over every proceeding in which a charge, claim, or defense is based on an Act of Congress or a law made under its authority. At the very least, it asserts that criminal offenses under the laws passed by Congress may not be prosecuted except in courts established pursuant to Article III." The Court held, "In our view, however, there is no support for this view in either constitutional text or in constitutional history and practice." [p. 400]. And, "It was neither the legislative nor judicial view, therefore, that trial and decision of all federal questions were reserved for Art. III judges. Nor, more particularly, has the enforcement of federal criminal law been deemed the exclusive province of federal Art. III courts." [p. 402]. Amount of salary, lack of tenure and provisions for removal by a commission were found not to dictate a different decision. [pp. 407-410]

The magistrate serves for a term without tenure, at a salary below that of a district judge, and can be removed by the appointing judges. We see in these facts no reason to view his service as a violation of Article III of the Constitution.

III

Under 28 U.S.C. § 636(b) a United States Magistrate May Hold an Evidentiary Hearing on a Motion to Suppress

Section 636(b) provides that there may be assigned to magistrates, in addition to the duties listed in Section 636(a), "such additional duties as are not inconsistent with the Constitution and laws of the United States."

The additional duties authorized are not limited solely to those listed in § 636(b)(1), (2) and (3), nor by *ejusdem generis*, but

may include any duties not inconsistent with the Constitution or laws of the United States.[3]

The doctrine of *ejusdem generis* was held in *Wedding v. Wingo* (6 Cir. 1973) 483 F.2d 1131, cert. granted January 21, 1974, Sup. Ct. No. 73-846, 42 U.S.L.W. 3416, to bar a magistrate from conducting an evidentiary hearing in a *habeas* proceeding and making recommended findings of fact and conclusions of law. The Eighth Circuit in *Noorlander v. Ciccone* (1973) 489 F.2d 642, declines to subscribe to *Wedding's ejusdem generis* reasoning (p. 647) and we likewise refuse to follow it.

In *Wedding*, a magistrate, pursuant to a rule of the district court, issued an order assigning to himself an evidentiary hearing. Prior to the hearing, the district court overruled a motion to disqualify the magistrate on the ground he was not authorized by the Federal Magistrates Act of 1968, 28 U.S.C. §§ 631-639, to hold evidentiary hearings.

The magistrate held the hearing, made findings of fact and conclusions of law, and recommended the petition be dismissed. The petitioner moved for a *de novo* hearing. The district court listened to the recording made at the magistrate's hearing, then adopted the magistrate's findings of fact and conclusions of law as his own and dismissed the petition.

The district court rule authorized the magistrate to make reports and recommendations in habeas matters and "to hear evidentiary matters deemed by the Magistrate to be necessary and proper in the determination of each such petition;" to cause the testimony of such hearings to be recorded; to submit the recording and proposed findings of fact and conclusions of law to the judge, with copies of the petitioner and respondent. The rule provided that on written request of either party, filed within ten days of the transmission of the proceedings and recording tape to the judge, "the District Judge shall proceed to hear the recording of the testimony given at the evidentiary hearing and give it *de novo* consideration." [p. 1133].

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[3]The legislative history of Sec. 636 is set forth in detail in *TPO, Inc. v. McMillen* (7 Cir. 1972) 460 F.2d 348, and *Noorlander v. Ciccone* (8 Cir. 1973) 489 F.2d 642.

In reversing, the court applied the doctrine of statutory construction denominated *ejusdem generis*. The court stated: "This doctrine directs that a general provisions of a statute will be controlled and limited by subsequent statutory language more specific in scope." [p. 1135]. *Fourco Glass Co. v. Transmirra Prods. Corp.*, 353 U.S. 222, 228-229 (1957), was cited as authority for this proposition.

We cannot agree with the court's application of the *ejusdem generis* doctrine to Section 636(b). In *Fourco* the Supreme Court held that a special venue statute, 28 U.S.C. § 1400(b), controlled over a general venue statute, 28 U.S.C. § 1391(c). The *Fourco* case does not support the Sixth Circuit's conclusion regarding Section 636(b).

Congress, in § 636(b), used language which clearly stated its intentions. With such an express statement in the statute, it cannot be argued that the statute did not mean what it said. No conflict between a general and a specific proposition of law is involved as in the typical *ejusdem generis* situation.

The use of magistrates has been upheld in the following situations not listed in § 636(b)(1), (2) or (3).

(a) Post-conviction proceedings:

Although § 636(b)(3) only authorizes a magistrate to make a "preliminary review" and a "submission of a report and recommendations" as to whether a hearing should be had, magistrates have been held to have authority to conduct evidentiary hearings in post-conviction proceedings. *Noorlander v. Ciccone, supra; United States ex rel. Henderson v. Brierley* (3 Cir. 1972) 468 F.2d 1193, 1194-5; *Bridwell v. Ciccone* (8 Cir. 1973) 490 F.2d 310; and *Johnson v. Wainwright* (5 Cir. 1972) 456 F.2d 1200. Cf. dictum in *Rainha v. Cassidy* (1 Cir. 1972) 454 F.2d 207, 208, which would disapprove of this procedure.

(b) Recommendation to the district court as to whether a motion to dismiss should be granted: *Givens v. W. T. Grant Co.* (2 Cir. 1972) 457 F.2d 612.

(c) Recommendation to the district court as to whether a motion for summary judgment should be granted: *Remington Arms Co. v. United States* (2 Cir. 1972) 461 F.2d 1268.

(d) Recommendation to the district court as to whether claimant was denied due process in her disability hearing and whether there was substantial evidence to justify the Secretary of Health, Education and Welfare in his denial of her claim. *Dewrell v. Weinberger* (5 Cir. 1973) 478 F.2d 699.

We therefore hold that a magistrate may preside at a pre-trial motion to suppress evidence.[4] It follows that the magistrate may make proposed findings of fact and conclusions of law, and present them to the district court along with a proposed order.

A magistrate may not, in a hearing on a motion to suppress, exercise ultimate decision-making power. *La Buy v. Howes Leather Co.,* 352 U.S. 249 (1957), holds that in the particular facts of that case, a district court abdicated its judicial function. [p. 255-6]. However, *La Buy* is not here controlling.

There the district judge referred to a master two anti-trust cases (one with a prospective period of six weeks for trial), with instructions to prepare findings of fact and conclusions of law. The judge had made rulings and written memoranda and opinions on the cases over a period of years. The master was a private practioner, not a judicial officer. The case stands for the proposition that the trial of an entire, complicated case may not be referred to a master. The case is not helpful on the question of a reference to a magistrate for an evidentiary hearing and recommended findings and conclusions on a motion to suppress evidence.

In *TPO, Inc. v. McMillen* (7 Cir. 1972) 460 F.2d 348, the district court referred a motion to dismiss, treated as a motion for a summary judgment, to a magistrate for *decision.* A motion to vacate the reference, on the ground a magistrate was without power to rule on a motion to dismiss, was denied. The court of

[4]See *United States v. Matlock,* ..... U.S. ..... (2/20/74) 14 CrL 3108, 3110, where the Court stated:

> ". . . the rules of evidence normally applicable in criminal trials do not operate with full force at hearings before the judge to determine the admissibility of evidence."

Citing *Brinegar v. United States,* 338 U.S. 160, 173, 174 (1949). And in Note 9, 14 CrL at 3110, reference is made to the difference between admissibility of evidence on the merits as contrasted to use of evidence ". . . for the purpose of determining a preliminary question of admissibility. . . ."

appeals granted a writ of mandamus, directing the district court to vacate the reference and the magistrate's resultant order.

The court, quoting from the statute and legislative history, held:

> "Congressional intent is clear that magistrates' civil jurisdiction includes only 'such additional duties as are not inconsistent with the Constitution and laws of the United States,' that there is to be 'no abdication of the decision-making responsibility' of district courts, that 'the district judge is to retain the ultimate responsibility for the conduct of pretrial or discovery proceedings,' and that § 636(b) 'cannot be read in derogation of the fundamental responsibility of judges to decide the cases before them.'
>
> . . . .
>
> "We conclude that magistrates have no power to decide motions to dismiss or motions for summary judgment, both of which involve ultimate decision making, and the district courts have no power to delegate such duties to magistrates." (p. 359; Footnotes omitted.)

Thus, while a magistrate may recommend to the district court whether to grant a motion to dismiss, *Givens, supra,* or a motion for summary judgment, *Remington, supra,* he may not himself decide the motion. ***TPO, Inc., supra.*** Although a magistrate may recommend to the district court whether there is substantial evidence to support a denial by the Secretary of Health, Education and Welfare of a disability clause, *Dewrell, supra,* he may not make a decision on this question. *Ingram v. Richardson* (6 Cir. 1972) 471 F.2d 1268, and ***TPO, Inc., supra.*** See *Dye v. Cowan* (6 Cir. 1972) 472 F.2d 1206, where the court in dictum states that the granting of a certificate of probable cause by a magistrate is *ultra vires* and void.

As to *Holiday v. Johnston,* 313 U.S. 342 (1941), we agree with the Eighth Circuit's statement in *Noorlander v. Ciccone, supra* (p. 648):

> "Finally, we do not read *Holiday v. Johnston,* 313 U.S. 342 (1941), as holding that the Constitution prohibits magistrates from conducting evidentiary hearings in all habeas corpus matters. We rather read that case as indicating that the

> statute being construed by the Court at the time did not permit commissioners to conduct evidentiary hearings in habeas corpus matters. We deal with a different statute here."

Moreover, our case involves an evidentiary hearing on a motion to suppress evidence in a criminal case and not one on the merits of a habeas proceeding.

Although we hold that a magistrate is authorized to preside at an evidentiary hearing, and is authorized to make recommended findings of fact, conclusions of law and a proposed order after a hearing on a motion to suppress, we hold that the district court must make the final adjudication on the motion. ***TPO, Inc. v. McMillen, supra; United States ex rel. Henderson v. Brierley, supra; Noorlander v. Ciccone, supra; Asparro v. United States*** (D.C. Conn. 1973) 352 F.Supp. 1085.[5] The district court, on application, must review the recording of the magistrate's proceeding, proposed findings and conclusions of law, and then make an independent decision as to the facts, the legal conclusions applying thereto, and finally, its own adjudication.[6]

---

[5]In discussing the magistrate's function of assisting judges on criminal pretrial motions, Judge William E. Doyle, Chairman of the Judicial Conference's Committee to Implement the Federal Magistrate's Act, now a judge of the Tenth Circuit, wrote:

> "The provision adopted makes clear that the magistrate in performing this function is rendering assistance to the judge. This does not set any limit on the extent of pretrial work which is subject to performance by the magistrate. It does, however, require that the district judge retain the ultimate responsibility in every such matter. *It would seem that within this framework the magistrate could hear and preliminarily at least determine every type of pretrial motion so long as the decision making function is not surrendered.*"
>
> * * * * * *
>
> "So long as the assignments are specific and do not involve the delegation to the magistrate of the trial of a case and as long as the report is advisory, most any specific task is subject to referral." *Implementing the Federal Magistrates Act,* 39 Journal of Kansas Bar Assn. 25, 67, 69 (1970). (Emphasis added).

[6]See *McKinney v. Parsons* (5 Cir. 1/17/74) 488 F.2d 452, a post-conviction case where the district judge adopted the findings of a magistrate that certain films and magazines were obscene. The court reversed because the district judge did not personally inspect the alleged obscene material.

Here the district court, in stating its "philosophy" that it must accept the findings of the magistrate, was in error. The district court has the ultimate authority and duty to make the findings of fact. It must accept, reject or modify the proposed findings of fact or make completely new findings.

IV

The Local Rules

We acknowledge that the Northern District was one of the first districts in the United States to implement the Magistrates Act and took a broader view than many of the other districts in the country.

We prefer not to discuss the local rules in detail. The evidentiary hearing has not been held, nor has the district court reviewed the magistrate's recommendations. The matter has not been briefed. We make one comment.

Local Rule 503 provides magistrates shall "have the additional power and duty . . . subject to the review hereinafter provided in Rule 505, to *perform any and all powers of a Judge of this Court* in criminal matters which are not inconsistent with the Constitution and laws of the United States, including but not limited to the following: . . . (2) *To hear motions* regarding . . . suppression of evidence under F.R.Crim.P. [Rule 41] or of statements obtained through illegal interrogation (Local Rule 205(b)); . . ." (Emphasis added).

The phrase "to perform any and all powers of a Judge of this Court," even coupled with the statutory limitations (not inconsistent, etc.) raises questions of uncertainty and ambiguity. In certain situations the magistrate can exercise power of the judge, without any further action by the judge. (E.g., appointing counsel for indigents; approving substitution of counsel; fixing bail; etc.) In other situations the magistrate can make recommendations but the adjudication power rests only with the judge. (E.g., decision on a motion to suppress; for change of venue; for severance of trial of codefendants; etc.) The magistrate may prepare a memorandum and a recommended order, but the judge must adjudicate the motion.

Accordingly, Local Rules 503 and 504(7) should be reexamined by the district court, and the district court should make clear the two categories and the matters properly included in each. Except in situations where the magistrate can act independently, without review, the rules should provide that the magistrate make specific findings and/or recommendations and the district judge review and adjudicate them.

There are important questions concerning the hearing by a magistrate of a motion to suppress which we do not decide:

(1) What is the proper standard of review? Is it the "clearly erroneous" standard of Rule 52(a), Fed. Rules of Civ. P.? See *Parnell v. Wainwright* (5 Cir. 1972) 464 F.2d 735, and *Gonzalez v. Zelker* (2 Cir. 1973) 477 F.2d 797. (Cases where a magistrate made recommendations in post-conviction proceedings.) See *Crowell v. Benson*, 285 U.S. 22, 51 (1932).

(2) Instead of review, should there be a *de novo* hearing before the district court on application of either party? *Noorlander v. Ciccone, supra,* stated: "To summarize, we do not believe the statute prohibits magistrates from holding hearings in habeas corpus matters *if a full opportunity is given for a de novo hearing before an Article III judge in the event that a dispute as to a material issue of fact develops during the course of a hearing* and if the final decision-making power is retained in the court." (p. 648) (Emphasis added). *Palmore, supra,* was decided by the Supreme Court on April 23, 1973, before *Noorlander* was filed. The case is not discussed in the *Noorlander* opinion.

But there is a question whether such a *de novo* hearing, from the standpoint of saving judicial time, would seriously undercut the effective use of magistrates.[7]

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[7]Former Justice Tom Clark recommended full use of the magistrate: "Rather than more judges, I submit that we need to change our attitude about the functions that require a judge's attention. 'There was a time when we could perhaps afford the luxury of having full-time judges deal with every minute detail of a judicial proceeding; but that moment is gone. We are in a crisis. We have more litigation, the cases are more complex, and the load continues to grow.'" (Citation omitted).

* * * *

"It remains to be seen whether all the district courts will utilize the magistrate system to its fullest extent. In some districts, the

The Petition for Writ of Mandamus is denied.

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judges have been reluctant to extend the magistrate's functions much beyond those of a commissioner, apparently feeling that every part of the judicial function requires the personal attention of the district judge. Hopefully, the success of the program in other districts will convince everyone that effective administration of justice is best achieved by full use of the magistrate." *Parajudges and the Administration of Justice*, 24 Vanderbilt L.R. 1167, 1170, 1172, 1173, 1178 and 1179 (1971).

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EXECUTIVE ASSISTANT TO THE DIRECTOR

JUN 10 1974

Victor L. Lowe, Director
General Government Division
United States General Accounting Office
Washington, D. C. 20548

Dear Mr. Lowe:

I appreciate the opportunity of reviewing the draft report to the Congress of the United States regarding the United States magistrates system. We have no comment to make regarding the report except to endorse generally the recommendation that the trial jurisdiction of United States magistrates in misdemeanor cases be enlarged.

The draft report is returned herewith.

Sincerely yours,

Rowland F. Kirks

Rowland F. Kirks
Director

Enclosure

APPENDIX V

MINOR OFFENSES EXCLUDED FROM THE TRIAL JURISDICTION OF MAGISTRATES

2 U.S.C. 192	Refusal of a witness to testify or produce papers at a congressional hearing.
2 U.S.C. 252(a)	Federal Corrupt Practices Act.
18 U.S.C. (210)	Offer to procure appointive office.
18 U.S.C. 211	Acceptance of solicitation to obtain appointive public office.
18 U.S.C. 242	Deprivation of civil rights under color of law.
18 U.S.C. 594	Intimidation of voters.
18 U.S.C. 597	Expenditures of influence voting.
18 U.S.C. 599	Promise of appointment by candidate.
18 U.S.C. 600	Promise of employment or other benefit for political activity.
18 U.S.C. 601	Deprivation of employment or other benefit for political activity.
18 U.S.C. 1304	Broadcasting lottery information.
18 U.S.C. 1504	Influencing juror by writing.
18 U.S.C. 1508	Recording, listening to, or observing proceedings of grand or petit juries while deliberating or voting.
18 U.S.C. 1509	Obstruction of court orders.
18 U.S.C. 2234	Authority exceeded in executing warrant.
18 U.S.C. 2235	Search warrant procedure malicious.
18 U.S.C. 2236	Searches without warrants.

DISTRICTS INCLUDED IN REVIEW

District	Major city	Population (1970 census)	Authorized district judges (6-30-73)	Case filings (FY 1973)		Weighted filings per judgeship (note a)	
				Civil	Criminal	Civil	Criminal
California Central	Los Angeles	10,342,051	16	3,118	2,016	205	136
California Southern	San Diego	1,432,346	5	563	1,998	108	300
Georgia Northern	Atlanta	2,327,699	6	2,032	696	334	121
Massachusetts	Boston	5,689,170	6	4,091	353	530	67
Ohio Northern	Cleveland	5,979,998	8	1,900	847	266	108
Texas Southern	Houston	3,384,478	8	2,496	1,573	276	158
Total				14,200	7,483	1,719	890

[a] Gives heavier count to cases which, based upon periodically conducted time studies by the Administrative Office of the U.S. Courts, are known to be of a more difficult and time consuming nature.

APPENDIX VII

MISDEMEANOR OFFENSES CARRYING MAXIMUM

FINES IN EXCESS OF $1,000

$2,000 - $4,999

7 USC 87c
491
1380o(a)
8 USC 333
334
338
15 USC 715e
16 USC 1184
1338(a)(b)
18 USC 431
432
873
1901
1911
1920
1923
2232
19 USC 70
21 USC 17
145
22 USC 277d-21
703(c)
1182
26 USC 7212(a)
7266(a)(1)
33 USC 406
410
411
441
442
444
941(f)
1005
42 USC 2277
46 USC 170(14)
194
526m
1352
49 USC 1(7)
917(f)
1472(d)(e)(g)
50 USC App 1985
2213a

$5,000 - $9,999

2 USC 269(a)
7 USC 13-1
96
517
1373
1379i(b)
2023(b)(c)
8 USC 1287
12 USC 211
1464d(12)(A)(C)
1730(p)
1818j
15 USC 8
13a
20
24
50
54(a)
68h
69i
70i
72
293
1196
1611
16 USC 742j-1(a)
18 USC 155
207(c)
209(a)
213
214
215
216
243
351(e)
437
440
441
799
1011
1265
1383
1714
1906
1907
1909
19 USC 1304e
1438
1581(c)(d)
1587(a)

$5,000 - $9,999 (continued)

21 USC 117
372a
841(b)(3)
844(a)

22 USC 618(a)
1623(f)
1641(p)(a)
1642m
1643k

26 USC 5686
7215(a)
7231
7262
7264
9012(a)(2);(b)(3);(f)(3);(g)(2)

29 USC 503(c)

33 USC 502
519
533

42 USC 271(b)
2278a

43 USC 1619f(2)

46 USC 831

47 USC 37
409(m)

49 USC 10(1)
46
917(b)(c)(d)
1021(d)

50 USC 797(a)

50 USC App 2017m

$10,000 - $19,999

7 USC 13(c)
13a
586
596

12 USC 1730a(j)(2)
1847

13 USC 224

15 USC 330d
1338

16 USC 916f
1030(a)(b)(c)

18 USC 337
371

26 USC 7203

29 USC 186(d)
216(a)
439(a)(b)(c)
461(c)
463(b)
502(b)
504(b)

33 USC 1161(b)(4)

45 USC 228m(a)
359(a)(b)(c)

46 USC 817b
817c

47 USC 501
508(g)
509(c)

50 USC App 1152(a)(5)
1941d

APPENDIX VII

$20,000 - $49,999

16 USC 957(d)

21 USC 842(c)(2)(A)

45 USC 152 - 10th duty

182

49 USC 41(1)

$50,000 - $99,999

15 USC 1

2

3

$100,000

16 USC 957(f)

1082(a)

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