

## United States Magistrate Judges and Their Role in Federal Litigation

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### Introduction

Some twenty-five years ago, while the federal magistrates system was in its infancy, the late Chief Judge William H. Becker<sup>1</sup> delivered a reverberating charge in a memorandum to the judges of his court. What he then observed and said resounds today with vindicating support found in decisions of constitutional and statutory dimension.

As a statutory judge the judicial allegiance of a full-time magistrate is to the (1) Constitution of the United States and the (2) governing statutes as interpreted by (a) the Supreme Court of the United States, [and] (b) the Court of Appeals for the Eighth Circuit. . . . If neither (a) nor (b) . . . exist then he is governed by his judicial interpretation of the Constitution and statutes as he concludes they should be interpreted from the relevant available legal materials. In determining the governing law he is a judge who is not subject to personal direction by any other judge or justice, district, appellate or supreme. If he errs, the review processes may correct the error, as our errors are corrected by formal review.

The statutes, legislative history and documents show that a full-time United States Magistrate is a Judge of the United States, who within his jurisdiction is entitled to the same respect, freedom from influence, dictation, or coercion, and freedom of individual judgment that we district judges, the judges of the courts of appeals, and the justices of the Supreme Court enjoy. A full-time magistrate enjoys tenure and is paid a salary of \$30,000 per year, a measure of his worth in the eyes of the law.

A full-time magistrate is not our errand boy, a supernumerary law clerk, an administrative inferior subject to orders of any other judge while performing his duties, or an employee liable to be scolded by any other judge after he has rendered his judgment.

Anyone holding the office of full-time magistrate who has any other view of the office is not worthy of the position.<sup>2</sup>

The magistrate judge's primary role and function is to assist and directly support the mission of the district judge as the latter determines appropriate. The growth and development of that role since the late Chief Judge Becker's commentary are measures of his prophetic insight into the full potential of the office of magistrate judge. Chief Judge Becker extended unselfish recognition of the judicial office of a magistrate judge.

The system of United States magistrate judges has undergone tremendous change and growth in development since its inception in 1968. In the thirty-one years of its existence, the office of United States magistrate judge has evolved into a system of primarily full-time judicial officers empowered in their support role to conduct a broad range of matters, including civil jury and non-jury trials and other dispositions upon consent of the parties. United States magistrate judges play an important role in every aspect of federal court litigation.

### Litigation Involving the United States Military

Last year, magistrate judges handled some 612,440 matters in cases before the United States district courts.<sup>3</sup> Due to the vast number of matters that magistrate judges handle, it is important for all litigants to understand the role and function of the United States magistrate judge. This understanding is especially important for the United States military since it is frequently in federal court.

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1. Western District of Missouri.

2. 2 THE BULL. OF THE NAT'L COUNCIL OF U. S. MAGISTRATES, Mar. 1974, at 3.

3. See Administrative Office of the U.S. Courts, *Judicial Business of the U.S. Courts*, ANN. REP. OF THE DIRECTOR 32 (1998).

The military has been a party to a variety of litigation in federal court. For example, federal courts have reviewed military discharges<sup>4</sup> and military board decisions.<sup>5</sup> The military has also been a litigant in federal court for tort claims<sup>6</sup> and civilian employee suits pursuant to Title VII<sup>7</sup> and the Age Discrimination in Employment Act.<sup>8</sup> Additionally, the military has also been a party to suits that have challenged the constitutionality of military regulations.<sup>9</sup> These examples demonstrate that the military is a frequent federal court litigant.

With the wide variety of cases involving the military in federal court and the vast number of matters the magistrate judge handles, a military lawyer is certain to meet the magistrate judge at some stage of litigation. Accordingly, the military lawyer should be knowledgeable about and understand the important role of the United States magistrate judge.

## The Office of the United States Magistrate Judge

### *Magistrate Judge Defined*

A United States magistrate judge is a judicial officer of the United States district court who is appointed for a statutory term of office by majority vote of the judges of each district court.<sup>10</sup> Full-time magistrate judges serve eight-year terms, and part-time magistrate judges serve four-year terms. The position of U.S. magistrate judge was created in 1968. The position was designed by Congress “to reform the first echelon of the [f]ederal judiciary into an effective component of a modern scheme of justice.”<sup>11</sup>

The office of United States magistrate judge is constitutionally distinguishable from that of United States district judge. District judges are appointed under Article II, Section 2 of the United States Constitution<sup>12</sup> and enjoy the salary diminution and tenure protections of Article III, Section 1 of the United States Constitution.<sup>13</sup> By contrast, magistrate judges serve for fixed terms, and their salaries, which are set by the Judicial Conference pursuant to statute,<sup>14</sup> are potentially subject to diminution by Congress.

United States magistrate judges are not judicial officers of a separate court, but rather serve “as an integral part” of the United States district court.<sup>15</sup> Accordingly, rulings by United States magistrate judges constitute rulings of the United States district court and are so noted on the dockets of civil and criminal cases of that court.

### *Appointment and Removal*

To ensure a high caliber of service, the Federal Magistrates Act<sup>16</sup> provides specific procedures for the selection and appointment of United States magistrate judges. Under pertinent statutes and regulations in effect since 1980, public notice is given of all vacancies, and “merit selection panels”—composed of both attorneys and non-attorneys—are established to screen, interview, and recommend applicants on behalf of each federal court.<sup>17</sup> Once the merit selection panel has designated nominees, a final selection is made following a majority vote of the district judges of the district court.<sup>18</sup> The minimum statutory qualifications for the office of United States magistrate

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4. See *Henry v. United States Dep’t of the Navy*, 77 F.3d 271 (8th Cir. 1996); *St. Clair v. Secretary of the Navy*, 155 F.3d 848 (7th Cir. 1998).

5. See *Barber v. Windall*, 78 F.3d 1419 (9th Cir. 1996).

6. See *Whitley v. United States*, 170 F.3d 1061 (11th Cir. 1999).

7. See *Warren v. Department of the Army*, 867 F.2d 1156 (8th Cir. 1989); *Hashimoto v. Dalton*, 118 F.3d 671 (9th Cir. 1997).

8. See *Dilla v. West*, 4 F. Supp. 2d 1130 (M.D. Ala. 1998).

9. See *Secretary of the Navy v. Huff*, 444 U.S. 453 (1980); *Able v. United States*, 155 F.3d 628 (2d Cir. 1998).

10. See The Federal Magistrate Act of 1968, Pub. L. No. 90-578, 82 Stat. 1107, codified as amended at 28 U.S.C. § 604, §§ 631-639 and 18 U.S.C. §§ 3401-3402 (1991).

11. S. REP. NO. 90-371 at 8 (1967), reprinted in 1968 U.S.C.C.A.N. 4252-70.

12. See 28 U.S.C.A. § 133 (West 1999).

13. See *id.* § 134, § 135.

14. See *id.* § 634(a).

15. *Wharton-Thomas v. United States*, 721 F.2d 922, 927 (3d Cir. 1984).

16. See 28 U.S.C.A. § 631.

17. See *id.* § 631(b)(5).

18. See *id.* § 631(a).

judge include at least five years as a member of the bar of the highest court of a state.<sup>19</sup> In considering the re-appointment of magistrate judges, the court may follow a similar procedure, where the merit selection panel reviews the incumbent magistrate judge's past record of service and reports thereon to the court.

Full-time magistrate judges may not engage in the practice of law or "in any other business, occupation or employment inconsistent with the expeditious, proper, and impartial performance of their duties as judicial officers."<sup>20</sup> Part-time magistrate judges may engage in the practice of law or other employment, subject to special conflict of interest regulations.<sup>21</sup>

Upon retirement (after fourteen years or more of creditable service), a magistrate judge is entitled to draw a lifetime annuity equal to the salary of the position, payable upon reaching the age of sixty-five.<sup>22</sup> A retired magistrate judge may be recalled by the judicial council of the circuit in which the magistrate judge is to serve.<sup>23</sup> In a few of the districts (for example, District of Rhode Island and the Southern District of Florida), a magistrate judge recalled for service is referred to as a Senior United States Magistrate Judge. Compensation for the recalled service is reduced by the magistrate judge's retirement annuity. A magistrate judge may be removed from office prior to the expiration of his term only for "incompetency, misconduct, neglect of duty, or physical or mental disability."<sup>24</sup>

In 1998, a total of seventy-two full time magistrate judges were appointed, forty-four of them by reappointment.<sup>25</sup> Of the twenty-eight new full time appointments, ten were for new positions.<sup>26</sup> During the same period, fourteen individuals were appointed to part time magistrate judge positions, seven of them by reappointment.<sup>27</sup> Of the seven new appointments, one was to a new position.<sup>28</sup>

Through its September 1998 session, the Judicial Conference authorized 440 full-time magistrate judge positions and sixty-nine part-time positions.<sup>29</sup>

### *Jurisdiction and Powers*

The core statute delineating the jurisdiction of United States magistrate judges is 28 U.S.C. § 636. This provision, which was substantially expanded in 1976 and 1979, establishes the framework within which each federal court assigns duties to magistrate judges. The specific powers of federal magistrate judges in individual districts are set forth in the local rules for each district.

### *Development of Jurisdiction Since 1968*

The Federal Magistrate Act<sup>30</sup> established the initial powers and duties of United States magistrates, as they were then called. These powers and duties included the following:

- (1) All of the powers and duties formerly exercised by the United States Commissioners (primarily involving initial proceedings in federal criminal cases);
- (2) The trial and disposition of criminal "minor offenses";
- (3) "Additional Duties" to assist district judges with their case loads, including:
  - (a) the conduct of pretrial and discovery proceedings in civil and criminal cases;
  - (b) preliminary review of prisoner habeas corpus petitions;
  - (c) special master duties; and

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19. *Id.* § 631(b).

20. *Id.* § 632(a).

21. *Id.* § 632(b).

22. *Id.* § 377.

23. *See id.* § 375, § 636(h); *see also id.* § 377 (setting forth the regulations of the Judicial Conference of the United States, which establishes standards and procedures for the recall of United States Magistrate Judges, as amended on 21 September 1987, and 12 September 1990).

24. *Id.* § 631(i).

25. *See* Admin. Off. Of the U.S. Courts, *supra* note 3, at 47.

26. *See id.* at 47-48.

27. *See id.* at 48.

28. *See id.*

29. *See id.*

30. 28 U.S.C. §§ 631-639 (1968).

(d) such “additional duties” as are not inconsistent with the Constitutional laws of the United States.

In 1976, the Act was amended to clarify and expand jurisdiction of magistrate judges. In particular, Section 636(b) of the 1968 Act was completely replaced by a new jurisdictional section authorizing district judges to designate magistrate judges to handle virtually any pretrial matter in the district courts. The 1976 amendments authorized the use of magistrate judges as follows:

- (1) Non-case dispositive pretrial matters. To hear and determine procedural motions, discovery motions and other non-dispositive pretrial matters in civil and criminal cases.
- (2) Case-dispositive motion. To hear motions for dismissal and for summary judgment and certain prisoner litigation matters and to submit recommended findings of fact and proposed disposition of such matters to district judges for the latter’s determination.
- (3) To serve as special masters.
- (4) As under the 1968 Act, magistrates judges were authorized to perform “any other duties not inconsistent with the Constitution and laws of the United States.”

The House Report on the 1976 Amendments encouraged district judges “to experiment with the assignment of other functions in aid of the business of the courts.”<sup>31</sup> Many district courts did so successfully, and as a result, the powers and duties of United States magistrate judges were substantially expanded in 1979 in recognition of their growing importance and role in the federal district courts.<sup>32</sup> The 1979 amendments<sup>33</sup> expanded the trial jurisdiction of magistrate judges in criminal cases from “minor offenses” to include all federal misdemeanors and to include jury as well as non-jury trials, where appropriate. The jurisdiction was to be exercised upon written waiver of the right to trial by a district judge and consent to trial by a magistrate judge. In addition, the amendments authorized full-time magistrate judges to exercise case-dispositive jurisdiction over any civil case pending in the district court upon either the designa-

tion of the magistrate judge by the district court to exercise such jurisdiction and on the consent of the litigants.<sup>34</sup> This specific civil consent jurisdiction and the procedures for implementing it were codified in a new subsection (c) of Section 636 of Title 28.<sup>35</sup>

As a further indication of the increasing stature and role of United States magistrate judges, the 1979 amendments also provided for the institution of specific procedures for the selection and appointment of United States magistrate judges, as noted above.

### *Present Jurisdiction*

There are two overall attributes concerning the character of a magistrate judge’s jurisdiction. First, it is important to distinguish between consensual and non-consensual exercise of jurisdiction by magistrate judges. A magistrate judge serves to assist district judges in conducting particular proceedings in a case or presides in lieu of a district judge in disposing of entire cases with consent of the parties. Second, the authority exercised by a magistrate judge in any given matter is shaped by the scope of the designation and reference from the district judge.<sup>36</sup> There are several types of specific jurisdiction.

### *Misdemeanor Trial Jurisdiction*

United States magistrate judges specially designated by the district court may conduct jury or non-jury trials in, or otherwise dispose of, misdemeanor and petty offense cases upon the written or oral consent of the defendant on the record.<sup>37</sup> This includes the power to sentence defendants convicted in such cases and to grant and revoke probation. Appeals are to a district judge, who accords the same review as that given by the circuit to a district court judgment.<sup>38</sup>

The consent of the United States is not required for this jurisdiction. The district court, however, may order that a particular misdemeanor case be conducted before a district judge rather than a magistrate judge—*notwithstanding* a defendant’s consent—

31. H.R. REP. NO. 94-1609, at 12 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6162-74.

32. See Peter G. McCabe, *The Federal Magistrate Act of 1979*, 16 HARV. J. ON LEGIS. 343 (1979).

33. See 28 U.S.C.A. § 636 (West 1999).

34. Part-time magistrate judges could likewise be authorized to exercise this jurisdiction upon certification by a district court that no full-time magistrate judge was reasonably available.

35. See Pub. L. No. 94-577, 90 Stat. 2729 (1976), codified at 28 U.S.C.A. § 636(c).

36. See Paul W. Goodale, *Federal Magistrates Play Major Role in U.S. District Court*, 13 MASS. LAW. WKLY 556, Jan. 21, 1985.

37. See 18 U.S.C.A. § 3401 (West 1999); FED. R. CRIM. P. 58.

38. See 18 U.S.C.A. § 3402.

upon the court's own motion or, for good cause shown, upon motion of the government.<sup>39</sup>

Magistrate judges in all districts exercise this jurisdiction in accordance with their local designation. Generally, petty offense and misdemeanor cases are referred automatically by the court to magistrate judges for disposition upon consent of the accused. New comprehensive procedures to be followed in misdemeanor and petty offense cases conducted by magistrate judges as well as district judges are found in Rule 58 of the Federal Rules of Criminal Procedure.<sup>40</sup> During the statistical year ending 30 September 1998, magistrate judges handled 96,832 misdemeanor and petty offense cases nationally.<sup>41</sup>

### *Preliminary Criminal Proceedings*

Magistrate judges conducted 262,600 felony pretrial actions in criminal cases during 1998.<sup>42</sup> These included accepting criminal complaints, issuing search and seizure warrants, conducting initial appearances, probable cause and bail hearings, detention hearings and removal hearings in cases involving defendants charged in another district, and extradition hearings. In some districts, the magistrate judges rotate as emergency or "duty" magistrate judges, handling initial proceedings in criminal cases.<sup>43</sup>

### *Pretrial Matters and Motions*

Section 636(b)(1) sets forth the authority of magistrate judges to handle specific pretrial matters in civil or criminal cases, including motions and pretrial status or scheduling conferences pursuant to Rule 16 of the Federal Rules of Civil Procedure, upon referral by a United States district court judge. As with the preliminary criminal duties just noted, this jurisdiction does not depend upon the consent of the parties. This jurisdiction may be exercised by a full-time magistrate judge or by a part-time magistrate judge subject to the code of conduct limitations. A magistrate judge's authority under this subsection to handle pretrial motions depends on whether or not they are "dispositive" of the case. Under Section 636(b)(1)(A) magis-

trate judges may hear and decide any "non-dispositive" pretrial motion. For example any motion which, regardless of its resolution, will not dispose of any or all of a party's claims, in a civil or criminal case. Pretrial matters handled by magistrate judges under this provision include hearing and determining procedural and discovery motions and conducting various civil pretrial conferences, such as scheduling conferences and settlement conferences. A district judge may reconsider the magistrate judge's determination of a non-dispositive pretrial matter where the ruling is shown to be "clearly erroneous or contrary to law."<sup>44</sup> This may be accomplished through a motion for reconsideration filed by an aggrieved party.<sup>45</sup>

In contrast, Section 636(b)(1)(B) authorizes magistrate judges, when designated, to report proposed findings of fact and recommendations on: (1) "dispositive" motions (such as motions for summary judgment, motions to dismiss or motions to suppress evidence); (2) prisoner petitions challenging conditions of confinement; and (3) habeas corpus cases brought under 28 U.S.C. § 2254 and § 2255. Section 636(b)(1)(c) requires the magistrate judge to file any proposed findings and recommendations with the court and to mail a copy to all parties. A dissatisfied party may file and serve written objections to the magistrate judge's report. The district judge then makes a *de novo* review of the findings and recommendations to which objection is made. Rule 72(b) of the Federal Rules of Civil Procedure, as supplemented by each district's local rules, contains procedures to be followed by a party who objects to a magistrate judge's recommendation. In 1998, magistrate judges handled some 69,517 motions.<sup>46</sup>

### *Civil Consent Trials*

Section 636(c) of Title 28 provides that when specially designated by the district court, United States magistrate judges may conduct any and all proceedings in a civil case, including trial and entry of judgment, on the consent of all parties. In 1998, magistrate judges disposed of 10,339 consent cases.<sup>47</sup> Appeal of such judgment is made directly to the circuit or to a district judge sitting as an appellate court.

39. See *id.* § 3401(f).

40. See FED. R. CRIM. P. 58 advisory comm. notes.

41. See Admin. Off. Of the U.S. Courts, *supra* note 3, at 33, tbls. M-1, M-1A.

42. See *id.* at 33, tbl. M-3.

43. See 28 U.S.C.A. § 636(a)(1), (2) (West 1999); see also 18 U.S.C.A. § 3142, § 3184; FED. R. CRIM. P. 1, 3-5.1, 40-1, 58.

44. 28 U.S.C.A. § 636(b)(1)(A).

45. See FED. R. CIV. P. 72(a).

46. See Admin. Off. Of the U.S. Courts, *supra* note 3, at tbl. M-4A.

47. See *id.* at 42, tbl. M-4A.

Magistrate judges' authority to try and dispose of civil cases upon consent of the parties was by far the most significant expansion of jurisdiction granted by the 1979 amendments<sup>48</sup> to the Federal Magistrates Act.<sup>49</sup>

### *Special Master References*

Title 28 U.S.C. § 636(b)(2) authorizes a magistrate judge, when designated by a district judge, to serve as a special master pursuant to Rule 53 of the Federal Rules of Civil Procedure. Moreover, upon consent of the parties, a judge may designate a magistrate judge to serve as a special master in any case without regard to Rule 53, that is, without regard to whether complicated issues or exceptional circumstances are present in the case. Again, local rules implement this authority in the individual districts.

### *“Additional Duties”*

Section 636(b)(3) provides that “[a] magistrate [judge] may be assigned such additional duties as are not inconsistent with the Constitution and laws of the United States.” The legislative history to the Federal Magistrates Act indicates that the purpose behind this grant of open-ended jurisdiction was to encourage the courts to continue “innovative experiments” in the assignment of duties to magistrate judges.<sup>50</sup> Additional duties assigned to the magistrate judges over the years include conducting arraignments in felony cases, reviewing administrative determinations regarding the grant of benefits to claimants under the Social Security Act, and administering the Oath of Allegiance to new citizens at naturalization proceedings. Local rules in the various districts set forth these types of duties, tailored to each district's needs. The United States Supreme Court has interpreted the “additional duties” provision of Section 636 as authorizing the conduct of jury selection and voir dire in criminal felony trials with the consent of the parties. In *Gomez v. United States*,<sup>51</sup> the Court prohibited the conduct of voir dire proceedings by a magistrate judge where the parties did not consent, stating that such proceedings were outside the magistrate's jurisdiction.<sup>52</sup> Two years later, however, in *Peretz v.*

*United States*,<sup>53</sup> the Court upheld the delegation of the same duty—the conduct of jury selection and voir dire—where the parties had consented. The Court deemed this exercise of jurisdiction constitutional, noting that the parties had freely waived their personal rights to an Article III judge for this procedure and that the structural (non-waivable) protections of Article III were not implicated.<sup>54</sup>

According to the United States Supreme Court, consent and the availability of review by a district judge are critical to the authority of magistrate judges to conduct proceedings in civil or criminal trials. In *Peretz* and *Gomez* the Court noted the consent provisions of the jurisdiction of magistrate judges to conduct civil trials under Section 636(c) as well as the availability of review by a district court judge.

### *Contempt*

Acts or conduct which if committed before a district judge would constitute contempt of court will constitute contempt when committed before a magistrate judge. Magistrate judges do not, however, possess the power to punish directly contempts committed before them.<sup>55</sup> Upon commission of any such act or conduct the magistrate judge is required to certify the facts to a district judge of the district court and order that person to appear before the district judge who then hears the evidence and decides what sanction, if any, is warranted. Contempts committed before magistrate judges are punishable in the same manner and to the same extent as contempts committed before district judges.<sup>56</sup>

### *Magistrate Judge's Significant Role in Civil Cases*

In two particular areas of federal litigation magistrate judges have assumed a significant role. The first involves the referral of civil cases to magistrate judges for pretrial proceedings pursuant to Federal Rules of Civil Procedure Rule 16(b). The second concerns the jurisdiction of magistrate judges under 28 U.S.C. § 636(c), sitting in lieu of a district judge, to conduct jury or non-jury civil trials or otherwise dispose of civil cases.

48. See 28 U.S.C.A. § 631.

49. See *infra* note 61 and accompanying text for a discussion of this jurisdiction.

50. S. REP. NO. 94-625, at 10 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6162-74.

51. 490 U.S. 858 (1989).

52. See *id.* at 876.

53. 501 U.S. 923 (1991).

54. See *id.*

55. See 28 U.S.C.A. § 636(e) (West 1999).

56. See *id.*

Both types of assignments are of importance to attorneys who practice in federal district courts.

### *Rule 16(b) Referrals*

In 1983, Federal Rule of Civil Procedure Rule 16 was substantially amended and expanded in order to promote greater judicial management and earlier judicial involvement by a judge in civil cases. These amendments in effect abolished the previous practice by federal district courts of issuing a standard six-month (or other fixed time period) discovery order in every civil case and instead called for more active supervision and scheduling by judicial officers in the pretrial phase of such cases.<sup>57</sup> As amended, Rule 16 *requires* the entry of a scheduling order within 120 days of the filing of the complaint and strongly encourages the holding of one or more “scheduling conferences” in all civil cases except those exempted by local rule.

Rule 16(b) specifically permits a magistrate judge “when authorized by local court rule” to conduct such conferences and to enter scheduling orders.<sup>58</sup> The jurisdiction of magistrate judges to conduct such proceedings is found in 28 U.S.C. § 636(b)(1), (3) and in each district’s local rules.

A “Rule 16(b) referral,” or general reference, is distinct from the assignment to magistrate judges of individual motions or other specific matters for hearing and determination. Rather, it involves the reference of almost the entire pretrial segment of a case, in which the magistrate judge conducts scheduling conferences, enters scheduling orders, and rules on non-dispositive pretrial motions. Dispositive motions (such as motions to dismiss or motions for summary judgment) are reserved for the district judge, although the magistrate judge may report and recommend rulings on such motions.<sup>59</sup> In certain cases, the magistrate judge may inquire as to the possibility of an early settlement. The magistrate judge tracks the case from the filing of pleadings until it is ready for a final pretrial conference and trial before a district judge.

The conduct of Rule 16(b) proceedings by magistrate judges has proved to be of enormous benefit to those federal district courts making such referrals. The availability of magistrate judges to assist with civil pretrial proceedings provides the

courts with additional flexibility in handling their caseloads. District judges making such referrals have been able to devote more of their time to other matters, including the trial of civil and criminal felony cases.

### *Civil Consent Jurisdiction*

The 1979 amendments to the Federal Magistrate Act<sup>60</sup> gave United States magistrate judges the jurisdiction to try or otherwise dispose of any civil case and to enter judgment upon consent of all of the parties.<sup>61</sup> The judgment entered by the magistrate judge is appealable directly to the appropriate Court of Appeals. Pursuant to this jurisdiction, a magistrate judge specially designated by the district court may not only conduct civil trials (with or without a jury) on consent of the parties, but may also hear and *decide* dispositive motions (for example, a motion to dismiss for failure to state a claim or a motion for summary judgment) and thereby dispose of cases without trial. This consensual jurisdiction is thus distinct from a magistrate judge’s power to report and recommend on the disposition of such motions without the consent of the parties pursuant to Section 636(b)(1)(B).

The civil consent jurisdiction of magistrate judges represents an unprecedented and historic grant of power by Congress to non-article III judicial officers. This extraordinary authority was granted for the purpose of creating “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” in federal court.<sup>62</sup>

The 1979 amendments provide that a magistrate judge may exercise this jurisdiction only after having been either appointed or re-appointed pursuant to Judicial Conference selection regulations or certified by the appropriate circuit as qualified to exercise such jurisdiction.<sup>63</sup> All magistrate judges are now eligible to exercise civil consent jurisdiction. Most have been designated to exercise this jurisdiction.<sup>64</sup>

The constitutionality of magistrate judges’ civil consent jurisdiction has been upheld by courts of appeals for every circuit that has addressed the issue.<sup>65</sup> All of these courts have found the civil consent jurisdiction of magistrate judges to be

57. See FED. R. CIV. P. 16.

58. *Id.* 16(b).

59. See *supra*, *Pretrial Matters and Motions*.

60. See 28 U.S.C.A. § 631.

61. See *id.* § 636(c).

62. H. R. REP. NO. 96-287, at 2 (1979), *reprinted in* 1979 U.S.C.C.A.N. 1469-87.

63. See ADMINISTRATIVE OFF. OF THE U.S. CTS., A GUIDE TO THE LEGISLATIVE HISTORY OF THE FEDERAL MAGISTRATE JUDGE SYSTEM 36 (1995).

64. See 28 U.S.C.A. § 636(c)(1).

distinguishable from the plenary jurisdiction of federal bankruptcy judges struck down in *Northern Pipeline Construction Co. v. Marathon Pipe Line Construction Co.*<sup>65</sup> In *Goldstein v. Kelleher*, for example, the First Circuit found Article III interests to be adequately protected under the statute, noting that, “[t]he litigants’ interests are safeguarded by the consensual nature of the reference; the institutional interests of the judiciary are secured by the district court’s control over both the references and appointments, and by the availability of appeal to an Article III court.”<sup>67</sup>

The procedures for the exercise of a magistrate judge’s civil dispositive jurisdiction are set forth in somewhat overlapping fashion in 28 U.S.C. § 636(c), Rule 73 of the Federal Rules of Civil Procedure, and in the local rules of the various districts. Attorneys who contemplate consenting to such jurisdiction should review the statute and rules. Essentially, the procedures to be followed include: (1) notice to the parties of the opportunity to consent, (2) the consent, (3) reference of the entire case by a district judge, (4) proceedings before the magistrate judge, and (5) (if necessary) appeal.

*Notice*—Under the pertinent statute and rules, the clerk of court must notify the parties at the time an action is filed that they may consent to have a magistrate judge conduct any and all proceedings in a case and enter final judgment.<sup>68</sup>

*Consent*—As noted above, Section 636(c) was amended in 1990 to encourage federal court litigants to consent to the disposition of their case before United States magistrate judges where appropriate. The amendment specifically provides that either a district court judge or a magistrate judge may again advise the parties of the availability of a magistrate judge to exercise this jurisdiction, while at the same time assuring the parties that they may withhold consent without adverse consequences. Local rules of court governing the references of civil cases to magistrate judges “shall include procedures to protect the voluntariness of the parties consent.”<sup>69</sup>

The prohibition contained in the statute and rules against attempts by a judicial officer “to persuade or induce” parties to consent to references to magistrate judges is not intended to

preclude a district judge or magistrate judge from informing or reminding the parties of their option to proceed before a magistrate judge. Such a reminder might be appropriate, for example, in the course of a rule 16 scheduling conference conducted before a district judge or magistrate judge, so long as it is made clear that the decision is entirely voluntary.

*Reference by District Judge*—Once the parties consent to a magistrate judge’s civil dispositive jurisdiction, a district judge approves or “ratifies” the reference of the case to a magistrate judge. Although not expressly required by statute or rule, approval of each reference by a district judge is based on recognition of the policy consideration that each district judge ultimately controls his or her own case calendar. Moreover, Section 636(c)(4) provides that a district judge may vacate a reference of a civil case to a magistrate judge, sua sponte for good cause, or upon motion by any party showing extraordinary circumstances. This provision “makes clear the [district judge’s] court’s inherent power to control its own docket.”<sup>70</sup>

*Proceedings Before Magistrate Judge*—Once the case is before the magistrate judge pursuant to Section 636(c), the case proceeds as any other case before the district court. Depending on how far the case has progressed at the time consent is given, the magistrate judge will order completion of pretrial discovery, rule on any dispositive motions, hold a final pretrial conference, and have the case proceed to jury or non-jury trial.<sup>71</sup> Title 28 U.S.C. § 636(c)(5) provides for the means of making a record in a case referred to the magistrate judge. The magistrate judge must determine whether the proceedings are to be taken down by a court reporter or recorded by electronic recording equipment.

*Appeal*—28 U.S.C. § 636(c)(3) provides that “an aggrieved party may appeal directly to the appropriate United States Court of Appeals from the judgment of a magistrate judge in the same manner as an appeal from any other judgment of the district court.”<sup>72</sup> The Advisory Committee note to rule 73(c) provides that the same procedures and standards of appealability that govern appeals from district court judgments govern appeals from magistrate judges’ judgments. Presumably, interlocutory appeals may be taken when appropriate as well.

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65. *Accord* Wharton-Thomas v. United States, 721 F.2d 922 (3d Cir. 1983); *Fields v. Washington Metro. Transit Auth.*, 743 F.2d 890 (D.C. Cir. 1984); *Goldstein v. Kelleher*, 728 F.2d 32 (1st Cir. 1984); *Collins v. Forman*, 729 F.2d 108 (2d Cir. 1984); *Puryear v. Ede’s Ltd.*, 731 F.2d 1153 (5th Cir. 1984); *Gouge v. Carter Cty. Bd. of Ed.*, 738 F.2d 439 (6th Cir. 1984); *Geras v. Lafayette Display Fixtures, Inc.*, 742 F.2d 1037 (7th Cir. 1984); *Lehman Bros, Kuhn, Loeb, Inc. v. Clark Oil & Refining Co.*, 739 F.2d 1313 (8th Cir. 1984) (en banc); *Pacemaker v. Instromedix Inc.*, 725 F.2d 537 (9th Cir. 1984) (en banc); *Campbell v. Wainwright*, 734 F.2d 1480 (11th Cir. 1984).

66. 458 U.S. 50 (1982).

67. *See* 728 F.2d 32, 36 (1st Cir. 1984).

68. *See* 28 U.S.C.A. § 626(c)(2) (West 1999).

69. *Id.*

70. S. REP. NO. 96-74, at 14 (1979), *reprinted in* 1979 U.S.C.C.A.N. 1469-87.

71. Limitations on the contempt power of magistrate judges are fully applicable to their civil consent jurisdiction. *See* 28 U.S.C.A. § 636(e).

The opportunity to consent to disposition of a civil case by a magistrate judge provides federal court litigants with an additional means of securing prompt adjudications of their claims. The civil consent jurisdiction has been extensively used in a number of federal districts.

### *Alternative Dispute Resolution*

The United States magistrate judge plays an active role in alternative dispute resolution (ADR) in the district courts.<sup>73</sup> Alternative Dispute Resolution can occur at any stage of the litigation at the request of the parties or can be mandatory under local court rules. The magistrate judge's primary objective in ADR is to dispose of the case with the consent of the parties. Additionally, ADR serves to (1) aid respective counsel in identifying the issues, (2) promote settlement dialog between them, (3) facilitate the negotiation process, and (4) provide the parties and counsel a neutral assessment of the case on the merits.

As an example of the importance the magistrate judge plays in ADR, magistrate judges in the United States District Court for the District of Rhode Island conducted 314 ADR conferences during 1998.<sup>74</sup> Forty-five percent of those cases settled. Nationally, magistrate judges conducted some 23,113 ADR conferences last year.<sup>75</sup>

### *Growth in Stature and Importance of the Office of Magistrate Judge*

There have been many changes to the character and scope of the office of magistrate judges over the years. Magistrate judges' salaries have reached 92% of district judges' salaries.<sup>76</sup> In 1988 the magistrate judges' Committee of the Judicial Conference of the United States endorsed the wearing of robes by magistrate judges.<sup>77</sup> The robing endorsement changes the Committee's earlier position taken in 1973 when the matter was

left to be decided by each district court. In its endorsement, the Judicial Conference Committee recognized that magistrate judges, under 18 U.S.C. § 3401 and 28 U.S.C. § 636 (c), often serve in lieu of district judges and exercise full case-dispositive jurisdiction. As further justification for its robing policy the Committee stated that "even when not exercising case-dispositive jurisdiction [magistrate judges] conduct district court proceedings of the utmost importance."<sup>78</sup> All ninety-four federal district courts accept and follow the Judicial Conference Committee's policy and endorsement of magistrate judges wearing robes.

In addition, the Judicial Improvements Act of 1990<sup>79</sup> contained several provisions intended to further underscore the role and reemphasize the judicial stature of United States magistrate judges in Federal District Courts. In one provision of the Act, Congress abolished the magistrate and created a judge.<sup>80</sup> In recognition of the importance which the office had achieved, the title and the address of the United States magistrate was statutorily changed to United States magistrate judge. The legislative history of the Judicial Improvements Act of 1990 makes clear the import of this change.

'Judge' is an appellation commonly assigned to non-article III adjudicators in the federal court system. Examples include Claims Court Judges, Tax Court Judges and Bankruptcy Judges. Accordingly, appending 'judge' to the magistrates' title renders it consistent with adjudicators of comparable status. Moreover, United States magistrates are commonly addressed as 'judge' in their courtrooms, so that the change of designation provided for in this section largely conforms to current practice. The provision is one of nomenclature only and is designed to reflect more accurately the responsibilities and duties of the office.<sup>81</sup>

72. FED. R. CIV. P. 73(c).

73. See 28 U.S.C.A. § 653.

74. Mediation Settlement Conference Activity Report 1998/9, United States District Court, District of Rhode Island (on file with the author).

75. Admin. Off. of the United States Courts, *supra* note 3, at 32.

76. 28 U.S.C.A. § 634.

77. Memorandum from Judge Joseph W. Hatchett, Chairman of the Magistrates Committee (Dec. 8, 1988) (reprinted as Section II of the Policies of the Judicial Conference of Magistrates Committee regarding Magistrate Judge Utilization) (on file with the author).

78. *Id.*

79. Pub. L. No. 101-650, 104 Stat. 5089 (1990).

80. See *id.*

81. See *id.* § 204.

The Act also amended 28 U.S.C. § 636(c) to encourage consent by litigants to civil trials and/or other dispositions by United States magistrate judges. Congress, through the Act, called on the federal courts to utilize magistrate judges to play an important role in implementing Title I of the Judicial Improvements Act of 1990, the Civil Justice Reform Act.<sup>82</sup> The Civil Justice Reform Act was intended to expedite federal civil litigation and to reduce costs and delay inherent in such litigation.

### Conclusion

The history of the role and character of the magistrate judge is a history rich in contribution of assisting district judges in doing justice in individual cases in the federal courts. The United States Supreme Court recently noted that, in light of growing number of cases before the district courts, “the role of the magistrate [judge] in today’s federal judicial system is nothing less than indispensable.”<sup>83</sup> The Court also pointed out that their recent decisions have reemphasized the importance,

which Congress placed on the role of the magistrate judge.<sup>84</sup> The need for the enhanced use of magistrate judges by district judges is an issue that continues to knock at the doors of Congress and is not likely to disappear given the onslaught of case filings nationwide.

The United States district courts of this nation have, at their immediate disposal, a variety of statutorily authorized means through which to enhance the support and assistance role played by the magistrate judge in the United States’ Court system. The Supreme Court in *Peretz* applauded and encouraged the liberal employment of the “additional duties” statutory clause in using magistrate judges. The Court declared that “Congress intended to give federal [district] judges significant leeway to experiment with possible improvements in the efficiency of the judicial process that had not already been tried or even foreseen.”<sup>85</sup> Lastly, the Court observed that “we should not foreclose constructive experiments that are acceptable to all participants and are consistent to the basic purposes of the statute.”<sup>86</sup>

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82. Title I of the Judicial Improvements Act of 1990 consists of the Civil Justice Reform Act, codified in 28 U.S.C.A. §§ 471-482 (West 1999).

83. *Peretz v. United States*, 501 U.S. 928 (1991) (quoting *Government of the Virgin Is. v. Williams*, 892 F.2d 305, 308 (3d Cir. 1989)).

84. *See id.* at 927 n.5.

85. *See id.* at 931.

86. *Id.*