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THE FEDERAL MAGISTRATES ACT OF 1979, S. 237

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HEARING
BEFORE THE
SUBCOMMITTEE ON
IMPROVEMENTS IN JUDICIAL MACHINERY
OF THE
COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

NINETY-SIXTH CONGRESS

FIRST SESSION

ON

S. 237

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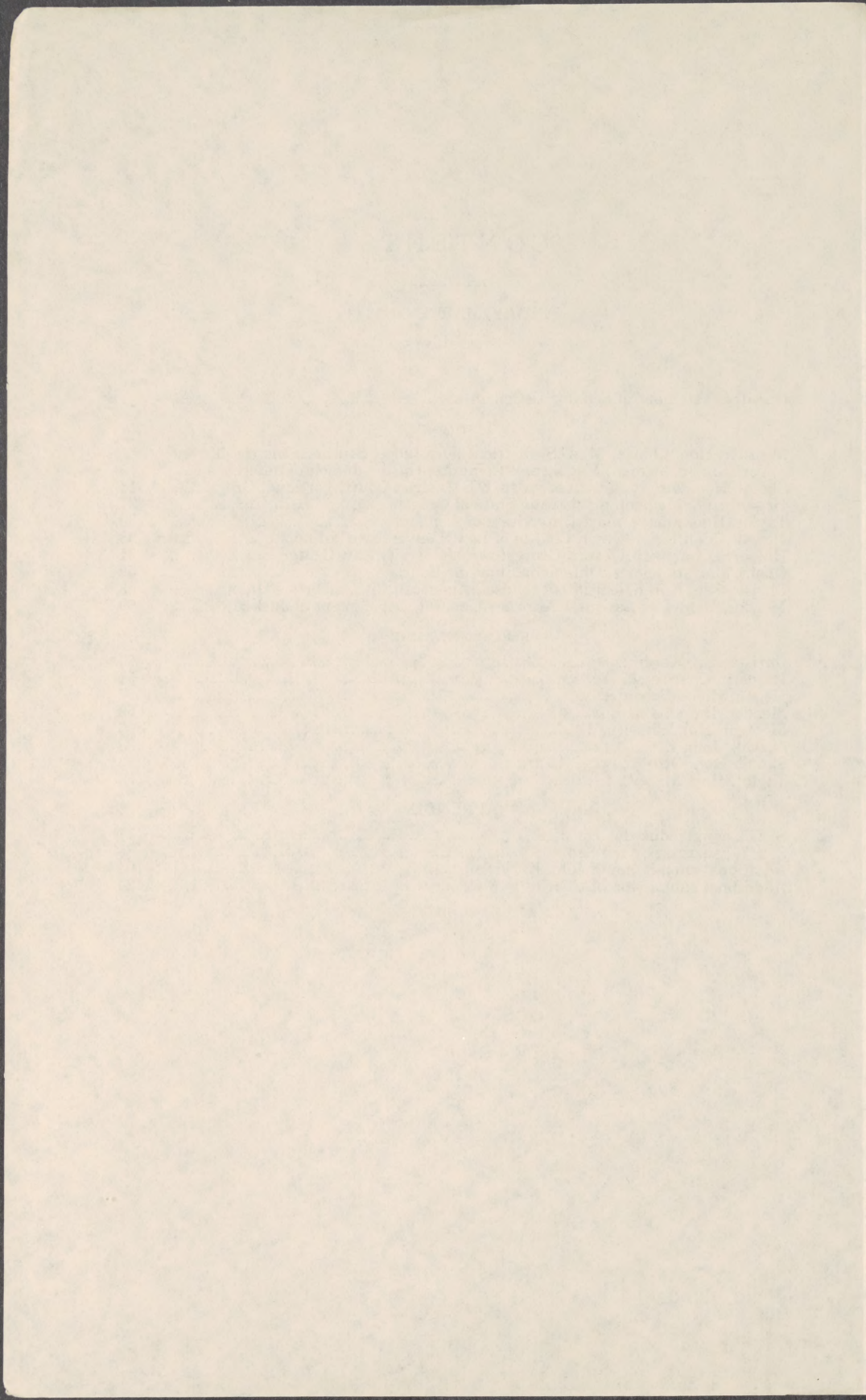
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THE FEDERAL MAGISTRATES JURISDICTION ACT OF 1979, S. 237

FRIDAY, MARCH 30, 1979

U.S. SENATE,
SUBCOMMITTEE ON IMPROVEMENTS
IN JUDICIAL MACHINERY,
OF THE COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The committee met, pursuant to notice, at 1 p.m., in room 2228, Dirksen Senate Office Building, Washington, D.C., Hon. Dennis DeConcini, presiding.

Present: Senators DeConcini, Thurmond, Heflin, and Baucus.

Also present: Robert E. Feidler, counsel; Pamela P. Eldred, counsel; Michael J. Altier, counsel; and Sally Rogers, legislative assistant.

OPENING STATEMENT OF SENATOR DeCONCINI

Today's hearing is on S. 237, the Federal Magistrates Act of 1979. The purpose of the bill is to expand the civil and criminal jurisdiction of our Federal magistrates to enable speedier justice and greater access to the courts. A bill substantially similar to the proposal before us today was passed unanimously by the Senate last Congress and also passed by the House only to die in conference due to unrelated issues.

The Magistrates Act is part of a comprehensive package legislation supported by the chairman of this committee, the Attorney General and President Carter. It has been the subject of study within the Judicial Conference for several years, and has their support. It was also the first legislative proposal sent to Congress by Assistant Attorney General Daniel Meador whose Office for Improvements in the Administration of Justice was created 2 years ago specifically to coordinate and integrate judicial court reform proposals. The magistrates bill is part of a multipronged approach to improving our Federal courts. The first step in the process was getting more Federal judges, and that effort culminated with passage of the omnibus judgeship bill last year for which I worked very hard.

The second step is to be enactment of the Magistrates Act, legislation that will provide great flexibility to the judicial system by allowing civil cases and minor criminal cases to be tried before a magistrate if the parties consent. With magistrates handling these matters as well as many motions, conducting arraignments, and presiding at pretrial conferences, the valuable time of life tenure article III judges will be conserved and better put to use on the

more momentous issues of constitutional interpretation for which they are best suited.

A third step in the overall design of opening access to justice is found in the arbitration bill. Although this hearing was scheduled as a magistrates hearing, I understand that several of the witnesses today will also comment on the arbitration bill, and I welcome that comment. The final type of proposal that has been considered in conjunction with the judgeship, magistrates and arbitration bills is that of eliminating certain types of Federal jurisdiction. But, whereas the three bills mentioned would add manpower and flexibility to the system to help it cope with caseload burdens, the latter approach has the drawback of limiting access to the Federal courts. Many people feel this is the least desirable approach to court reform and maintain that the system can cope with its present jurisdiction given adequate tools.

There can be no dispute that the tremendous caseload and backlog problems of our courts should be attacked in as many ways as possible. Parties more familiar with State court reform and the methods of resolution of those problems have been critical that Federal court reform lacks an architectural approach. I reject that reasoning and point to the concerted efforts of the President, Judicial Conference, the Justice Department and this committee over the past 2 years in working on a coordinated series of bills that share the common goal of bettering justice in our Federal courts, and doing so in a systematic way.

Senator HEFLIN. For the record, I want to thank the Chairman very much for agreeing to hold this hearing today on the Magistrates Act of 1979. I think that the Magistrates Act along with several other pieces of legislation which are now pending before the Judiciary Committee will have a farreaching impact on our Federal court system and such legislation needs to be studied thoroughly by all members of this committee so that we may better understand their implications.

I want to thank all of the witnesses who are appearing here today, many of whom have come long distances on short notice, and I certainly appreciate the efforts you have gone through to let us know your views on this proposed legislation. As my brethren on this committee know, I have had some problems with the Magistrates bill as it is currently drafted and I also have some reservations about the Court-Annexed Arbitration bill and the Diversity Abolition bill, all of which will soon be considered by the full committee, perhaps as early as next week for the Magistrates bill and the Arbitration bill. These three bills, in my judgment, should be treated as an overall package rather than one or two at a time. Because of the similar, overlapping objectives of these bills, I think they should be considered concurrently to see how they fit together and to see what their cumulative impact will be on our Federal court system.

There were some rather interesting statistics recited at the Williamsburg meeting on March 9-11, 1979, with respect to diversity and arbitration. Diversity cases comprise 22.8 percent of all cases in the Federal courts. In the arbitration pilot programs in district courts in Pennsylvania, California, and Connecticut, 17 percent of all cases qualified for arbitration (following the same guidelines as

are contained in the proposed Arbitration bill—torts, contracts, and negotiable instruments under \$100,000).

Judge John Newsom, the speaker on the arbitration pilot programs, was asked what percentage of the arbitration cases were diversity cases. He did not know, but said a substantial part of them were. He indicated it would not be difficult to review the cases and determine the percentage of diversity cases within the arbitration aegis. It appears to me that such statistics are vital to proper determinations about arbitration and diversity. Pilot programs are of little value if not studied thoroughly.

Chief Judge Coffin testified on March 20, that in his judgment the Court Improvements bill should be considered along with the Diversity Abolition bill, since he doubted that the new interlocutory appeals and transfer procedures should be adopted unless diversity was abolished. Perhaps this bill should be considered at the same markup.

In my judgment, it is imperative that the Judiciary Committee look at all of the above-referred to bills together. Let me point out just a few of the reasons. While both the Magistrates bill and the Arbitration bill seek the common objective of reducing court congestion; there is a lack of parallelism in approach. For example, the Judicial Conference is mandated to establish standards and procedures for the selection of magistrates but is not required to establish similar standards and procedures for arbitrators. In addition, the magistrate's jurisdiction is by consent while arbitration is imposed without consent. Another example of the lack of coordination is that under the proposed bills, it is possible and highly probable that a case will be tried by an arbitrator and then by a magistrate before it reaches a district court judge.

For a little more clarity, let me discuss a hypothetical tort case. The litigant is first required to take his case to an arbitrator. If the litigant is not satisfied, he can demand a *de novo* appeal which conceivably could be referred to a magistrate.

The district court judge, by subtle suggestions, such as a raised eyebrow or through a direct suggestion could point out the fact that if the litigants wanted to have their case tried before the district court judge they would have to wait 3 years, but on the other hand, if they gave their consent, the case could be tried before the magistrate in 3 months. The case would go to trial before the magistrate (either jury or nonjury), and if the litigants still were not satisfied, the case would be appealed to the district judge or, if the litigants had the foresight to anticipate problems beforehand, to the circuit court of appeals.

Thus, it is possible that what we have considered a one-tier trial court may become a three-tier court. Uniformity in procedures, rules and organization is the polestar of court reform. The proposed legislation, in almost every instance, violates this principle. The desirability of uniformity was preached constantly to the States following the adoption of the Federal Rules of Civil Procedure so that one uniform set of procedural rules in both Federal and State courts would prevail.

Most of the States accepted the rationale of the concept of uniformity and have adopted rules of practice and procedure identical to or quite similar to the Federal Rules of Civil Procedure. The

proposed legislation dealing with magistrates and arbitrators clearly violates this concept. Under the proposed Magistrates bill and the proposed Arbitration bill, it will be possible for every district to have a different set of ground rules pertaining to magistrates and arbitrators and how they will function.

Some courts could opt to have arbitrators, others could opt out; some courts will have high dollar limits, others will have low; some courts will employ magistrates in certain civil cases with varying powers, and other courts could opt out, so that the uniformity that we now enjoy in our Federal system will be largely abrogated. In today's mobile society with much litigation crossing State lines and district lines, a system that generates a lack of uniformity is a big step backward and should not be encouraged.

If the proposed Magistrates bill is passed by Congress, it will be the third act dealing with magistrates. In my judgment, Congress has just about established a two-tier trial court system in the Federal district court, but one that lacks uniformity or architectural approach.

In my opinion, it is now time to consider magistrates as a permanent fixture and approach their use from an architectural standpoint rather than from a patch-on approach. At least we ought to make it known clearly to the Judicial Conference that the Congress is interested in a uniform magistrate system and request their submission of a plan for a two-tier trial tribunal with fixed jurisdiction, which can be increased or decreased from time-to-time according to need without great difficulty.

Frankly, I am opposed to the mandatory Arbitration bill which allows Federal district judges, in their discretion, to order an out-of-court trial. Professor John Nowak of the University of Illinois Law School, in his work, *Courts and the American System of Government*, cogently argues that mandatory arbitration is a dismissal of the concept of the rule of law. In my judgment, it is a second-class justice system if it can be called a "justice" system. Moreover, there are serious constitutional problems with the Court-Annexed Arbitration bill, such as the deprivation of the right of trial by jury, equal protection, as well as deprivation of access to a justice system under due process concepts.

The portion of the Court-Annexed Arbitration bill providing for arbitration by consent does not bother me. One of the strong arguments for a Court-Annexed Arbitration bill is that it will bring about early settlement of cases. Perhaps a system of court-annexed mandatory mediation is worth exploring which would have as its purpose the encouragement of timely settlements.

It has been suggested that the procedure would involve a mediator, selected by agreement from a court-approved list, who would chair a compulsory meeting, within a specified time frame, of the parties, their attorneys and, if insurance is involved, claims representatives of insurance companies to explore settlement possibilities. I am not at this state suggesting such a system, but I think it is worth thorough exploration through hearings.

Much discussion was voiced about the tyranny of judges at the Williamsburg Conference, as well as at hearings. Some judges may not want to use arbitration, but the threat of arbitration may turn out to be a stronger club than arbitration itself, depending upon

how a judge wants to use it. Such use may increase the tyranny of such judges. Caution should be exercised not to give judges complete discretion to run their courts any way they want to.

Among my mixed feelings about the proposed diversity abolition legislation is the possibility that local bias can be a problem for nonresident litigants. Ideas have been voiced at various forums which I think should be considered. Some of these ideas center around granting nonresidents the right to have a change of venue in State courts if diversity is abolished, thereby mitigating the possibility of bias.

If diversity is abolished, it would be desirable for the 50 States to simultaneously adopt a liberal uniform change of venue procedure in their courts for nonresidents. How this could be obtained is troublesome. The carrot approach that has been used in much Federal legislation to motivate the changes of law in the States is always a questionable approach, but in this instance, it may be even more questionable.

Another possibility is not to abolish diversity jurisdiction but to make all diversity cases presumptively transferable to State courts with the right for nonresidents to change the venue in the State courts. There are several alternative approaches to this concept. I think they need to be fully considered and developed. If diversity is not abolished but reduced, Federal courts could retain jurisdiction of multidistrict litigation involving mass disasters, such as airline crashes, when diversity is the only basis for Federal jurisdiction. There may be other types of litigation that should be retained.

Again, I want to thank each of you for appearing here today to share their views with us. I think I speak for every member on the committee when I say I very much look forward to hearing what you have to say with regard to the Magistrates bill and if you care to comment on the Arbitration bill or the Diversity bill, I would appreciate hearing your thoughts on these bills also.

The first witnesses today will be Judge Charles M. Metzner, of the Southern District of New York, and also, chairman of the magistrates committee of the Judicial Conference, and Judge Otto R. Skopil, Jr., chief judge, U.S. District Court, Portland, Oreg.

I welcome both of you gentlemen. Your prepared statements will be inserted in the record.

The committee would most appreciate it if you would give us a summary of your statements, hitting only the high points.

STATEMENT OF HON. CHARLES M. METZNER, U.S. DISTRICT COURT JUDGE, SOUTHERN DISTRICT OF NEW YORK AND CHAIRMAN, MAGISTRATES COMMITTEE OF THE JUDICIAL CONFERENCE

Judge METZNER: Senator, as you said, my name is Charles M. Metzner. I am a judge in the U.S. District Court, Southern District of New York, and I am chairman of the Magistrates Committee of the Judicial Conference.

The bill which you have before you today has been the subject of a great deal of study during the last couple of years, both by the Conference and my committee, of course, and with members of the Administrative Office conferring with staffs both in the Senate and in the House on the pending legislation.

[The prepared statement of Charles M. Metzner follows:]

PREPARED STATEMENT OF CHARLES M. METZNER

Mr. Chairman, Senators, my name is Charles M. Metzner, and I am a judge of the United States District Court for the Southern District of New York, located in New York City. I am presently the chairman of the Committee on the Administration of the Federal Magistrates System of the Judicial Conference of the United States. I have been a member of the Committee since its formation in 1969 and its chairman since 1971. Accompanying me today is Otto R. Skopil, Jr., chief judge of the United States District Court for the District of Oregon, who is also a member of that Committee. It is indeed a pleasure for us to appear before you today in support of S. 237, The Magistrate Act of 1979.

HISTORY OF THE PRESENT LEGISLATION

The bill before the committee today is the product of extensive hearings, discussion and debate on S. 1613 in both Houses during the last Congress.

The legislation arose from two bills to expand the jurisdiction of the United States magistrates which were introduced in the Senate on May 26, 1977. The broader of the two, S. 1613, was offered by the Department of Justice on behalf of the administration. It contained provisions dealing with the qualifications of United States magistrates and with both the civil and criminal trial jurisdiction of magistrates. S. 1612 was introduced at the request of the Judicial Conference and dealt only with the minor offense criminal jurisdiction of magistrates and certain administrative matters.

JUDICIAL CONFERENCE POSITION

The Judicial Conference has been on record consistently in favor of the expansion of the jurisdiction of United States magistrates. It was the Conference, as you may recall, which requested the jurisdictional legislation that was enacted into law in October 1976 as Public Law 94-577. The 1976 legislation completely revised section 636(b) of Title 28, United States Code, to clarify and expand the jurisdiction of magistrates in the area of civil and criminal pretrial proceedings.

The Judicial Conference has thoroughly considered the proposals embodied in this legislation. The Conference endorses the proposals contained in S. 237, except in one instance to which I will refer later in this statement.

CREATION OF THE FEDERAL MAGISTRATES SYSTEM

The legislation being considered today is the next logical stage in the evolution of the Federal trial courts. It is a carefully deliberated step in providing the district courts with needed flexibility to cope with varied and fluctuating caseloads while avoiding the evils which would attach to the creation of a system of trial courts having specialized and potentially overlapping jurisdictions.

The Federal magistrates system itself was created in 1968 in order to upgrade the then-existing system of United States commissioners. Commissioners' functions consisted in conducting bail proceedings for defendants arrested on complaints, issuing arrest and search warrants, and the trial of petty offenses, upon the defendant's consent, if the offense were committed within the boundaries of a Federal enclave such as a national park or a military base, and subject to the determination of each district court that the particular commissioner should handle such cases.

In 1965 the Senate began extensive hearings on the commissioner system and determined that fundamental reform was needed. The principal defects then attributed to the commissioner system included: (1) commissioners were not required to be attorneys; (2) commissioners were compensated on the basis of an outdated fee system; (3) all but 6 of the approximately 700 commissioners served on a part-time basis; (4) there was no review of the number of commissioners that might be appointed by a district court, with the result that several part-time commissioners might serve in a single metropolitan area, competing for fees; (5) commissioners had no set term of office, but were removable at will; (6) commissioners received little formal guidance for the conduct of their proceedings, and (7) supporting services such as clerical assistance and office supplies were not generally provided to commissioners.

Against this backdrop, the Federal Magistrates Act of 1968 was enacted to provide a successor position with enhanced status and responsibilities. Magistrates were to be appointed for set terms, removable only for cause. The Judicial Conference was charged with the responsibility for authorizing the number of magistrate positions to be appointed in each district, and the salary for each position. Moreover, each

magistrate was required to be an attorney (unless the Conference was satisfied that exceptional circumstances at a particular location justified the appointment of a nonattorney), and guidance on the conduct of proceedings as well as support services were to be provided to the new magistrates.

The jurisdictional section of the Federal Magistrates Act of 1968 provided United States magistrates with authority to perform three basic categories of judicial duties: (1) All the powers and duties formerly exercised by the United States commissioners (largely initial proceedings in Federal criminal cases); (2) the trial and disposition of criminal "minor offenses," i.e. Federal misdemeanors for which the maximum prescribed penalty for conviction does not exceed one year's imprisonment and/or a fine of \$1,000, with certain enumerated exceptions, and (3) "additional duties" to assist the judges of the district courts, including: (a) service as a special master in appropriate civil cases, (b) the conduct of pretrial and discovery proceedings in civil and criminal cases, (c) "preliminary review" of prisoner habeas corpus petitions, and (d) "such additional duties as are not inconsistent with the Constitution and laws of the United States."

The legislative history of the bill emphasized that the "additional duties" that could be delegated by the judges to magistrates under 28 U.S.C. § 636(b) were not limited to the specific functions specifically listed in that section of the statute. "The mention of the three categories was intended to illustrate the general character of duties assignable to magistrates under the act, rather than to constitute an exclusive specification of duties so assignable."

DEVELOPMENT OF THE FEDERAL MAGISTRATES SYSTEM

The Judicial Conference and the Administrative Office began to implement the new magistrate system promptly. Regulations on magistrates' administrative operations and conflict-of-interest rules for part-time magistrates were adopted. Jurisdictional guidelines and model local court rules were developed. Procedural rules for the trial of minor offenses were transmitted to the Supreme Court and promulgated. Educational programs for newly appointed magistrates were developed and presented.

The district courts progressively expanded their use of magistrates as they developed experience with the assistance that they could provide. It was for this reason that the jurisdictional provisions of the original act had deliberately been drawn in general terms, to encourage the district courts to experiment and to fashion assignments to magistrates so as to best accommodate the needs arising from the particular caseloads of each district.

The same generality that encouraged such experimentation, however, also led to conflicting court decisions as to the permissible range of duties that could be delegated to magistrates. During the first several years of the magistrates system, numerous decisions considered the difficult question of what the Congress had intended the limits of magistrates' authority to be. It is important to note that these decisions were based on interpretations of the underlying statute and seldom even discussed any constitutional questions.

In June 1974, the first decision by the Supreme Court on the issue was handed down. In *Wingo v. Wedding*, 418 U.S. 461, the Court held that the Congress had not intended for magistrates to conduct evidentiary hearings in habeas corpus cases. In dissenting, the Chief Justice invited the Congress to reconsider the jurisdictional provisions of the original magistrates act:

"In any event, now that the Court has construed the Magistrates Act contrary to a clear legislative intent, it is for the Congress to act to restate its intentions if its declared objectives are to be carried out. (at 487)."

That decision, and the continuing conflict among appellate courts interpreting magistrates' jurisdiction, provided the springboard for legislative clarification of the "additional duties" that magistrates could perform to assist the district courts in the processing of litigation.

The Comptroller General issued a report on the magistrate system in September 1974 which recommended that Congress (1) further define that "additional duties" jurisdiction; and (2) expand the criminal trial jurisdiction of magistrates to include more misdemeanors.

Then a delegation, which I chaired, visited England to study the use of masters in civil cases within the English judicial system and recommended that the U.S. district court, through a greater use of magistrates, could build upon the successful English experience.

The implementation of the Speedy Trial Act of 1974, which imposed strict deadlines and requirements for the conduct of proceedings in Federal criminal cases, heightened the needs of the district courts for assistance in the conduct of its

responsibilities. The continuing rapid growth of case filings in the district courts was fast outstripping available judicial resources and creating intolerable backlog situations.

My committee, after an exhaustive study of the problem, submitted draft legislation to amend the Magistrates Act to the Judicial Conference. At its March 1975 meeting, the Conference approved for submission to the Congress the draft legislation, resulting from that subcommittee's study. The bill recommended: (1) specific reformulation of the "additional duties" jurisdiction of magistrates; (2) revision and expansion of the jurisdiction of magistrates to try less serious criminal cases; and (3) certain administrative improvements in the magistrates system.

The Congress, after extensive hearings, discussions and amendments, approved the legislation in October 1976. That law authorized four separate types of references to magistrates: (1) Nondispositive pretrial matters in civil and criminal cases may be referred for determination by a magistrate, subject to an interlocutory appeal to a district judge; (2) dispositive pretrial matters in civil and criminal cases and prisoner petitions may be referred to a magistrate for his recommendation to the judge as to disposition; and (3) service as a special master, including any case in which the parties consent to the magistrate's role. Finally, in order to encourage further experimentation in the use of magistrates, the new law included authorized the courts to assign magistrates to perform "any other duty not inconsistent with the Constitution and laws of the United States." (28 U.S.C. § 636(b)(3)).

THE FEDERAL MAGISTRATES SYSTEM TODAY

The district courts have continued to assign an ever-increasing range and volume of duties to magistrates. Attached hereto as appendix A is a table setting forth the duties performed by United States magistrates during the year ended June 30, 1978. Because of the growing utilization of magistrates, the number of full-time magistrates has increased from 82 in 1971 to 196 today. At the same time, the number of part-time magistrates has been reduced from 460 to 292.

[Appendix A referred to above can be found under additional submissions in the appendix.]

Since the nationwide implementation of the magistrates system in 1971, the district courts have been able to substantially increase their caseload disposition rate (from 315 per-judgeship in the year ended June 30, 1971 to 409 per-judgeship for the year ended June 30, 1978), thanks in large measure to the increased use and output of United States magistrates. It must be remembered that no new Federal judgeships had been created between 1970 and October 1978. During that period, the volume of new cases filed in the district courts increased from 127,280 to 166,447.

THE PENDING LEGISLATION

The legislation pending before the committee today results from the continued experimentation by the district courts in the use of magistrates. If enacted, it will increase the availability of magistrates to assist in the disposition of cases filed in the district courts. The provisions of the Magistrates Act of 1979 fall into four broad categories: (1) selection; (2) administrative; (3) criminal jurisdiction, and (4) civil jurisdiction.

Selection.—It is imperative that highly qualified individuals be selected and retained as United States magistrates, especially in light of the increased jurisdiction of magistrates contained in the 1976 amendments and the pending legislation. The system can only be as good as the individuals who serve as magistrates, and it is in the best interest of the courts and judges to obtain the very finest quality of service from their magistrates.

In April 1977, I appointed a subcommittee of my committee to recommend a set of standards and procedures to be followed in the appointment of magistrates. The proposed procedures were adopted by the Judicial Conference in March 1978 for the guidance of the district courts. The procedures are recommendations only, since the Judicial Conference does not now have the authority to issue binding regulations. However, they have been used by some of the district courts since the fall of 1978. A copy of the guidelines is attached as appendix B.

[Appendix B referred to above can be found under additional submissions in the appendix.]

The Judicial Conference supports the provisions in section 3 of the bill which give it authority to promulgate standards and procedures. On this matter, the magistrates committee has expressed the particular concern that detailed selection procedures, such as those proposed in the House bill, are unwise in a statute and would be difficult to modify as experience may dictate. There is very little practical experience to date on the use of selection procedures in the appointment of Federal Judicial officers and I believe that the more flexible approach of the Senate is the proper way to proceed at the present time.

Finally, I would note that there is no separate provision in either the House or Senate bill to delay the effective date of this section until the Judicial Conference can specifically adopt binding selection procedures. Yet, the bill prohibits any appointments until the Conference takes such action. Since the Judicial Conference meets only twice a year, there is a very real potential that the filling of some magistrate positions, vacant on the day of enactment of this bill, would be significantly delayed.

Administrative Provisions.—The bill contains two administrative provisions originally proposed by the Judicial Conference. Section 4 of the bill would eliminate the provision of 28 U.S.C. § 633(c) which delays the implementation of changes in magistrate positions approved by the Judicial Conference for 60 days.

Section 6 of the bill amends 28 U.S.C. § 1915(b). That provision is designed to assure that an indigent litigant is not denied an appeal simply because he cannot afford to pay the expense of the printing of a record on appeal. (The need for the record, or a transcript, is left to the determination of the court in accordance with the established standards of 28 U.S.C. § 753(f).) Section 1915(b) has never been modified to include proceedings before magistrates in its coverage. The Judicial Conference does not believe that indigent persons should be penalized for availing themselves of magistrate's jurisdiction. Accordingly, the Conference recommends that the same government financial assistance be available for indigent litigations appealing from proceedings before magistrates as are available on appeals from proceedings before district judges.

Criminal Trial Jurisdiction.—As I noted earlier, the Judicial Conference has considered and approved recommendations that the criminal jurisdiction of magistrates be enlarged to cover all misdemeanors.

Magistrates may now try misdemeanors where the maximum penalty prescribed for the offense does not exceed one year's imprisonment and/or a fine of \$1,000. The experience of the last 7 years has amply demonstrated the success of the magistrates' trial jurisdiction. The administrative office's statistics reflect that, during the year ended June 30, 1978, magistrates heard 87,654 petty offenses and 14,893 minor offenses above the petty offense level. At the same time, only 106 defendants filed appeals from the magistrates' determinations. That is an astonishingly low appeals rate of one-tenth of 1 percent. In the more serious minor offenses alone, the 36 appeals taken represent a still-impressive appeals rate of only two-tenths of 1 percent. That experience amply supports the proposed expansion of the magistrates' trial jurisdiction.

All Federal prosecutions above the level of petty offenses are included within the coverage of the Speedy Trial Act of 1974. On July 1 of this year, the permanent time limits and sanctions of that law will take effect. Expanding the criminal trial jurisdiction of magistrates will provide the district courts with additional resources and greater flexibility to help meet the goals set by the Speedy Trial Act and lessen the dangers of underenforcement of Federal criminal laws and prejudice to the court's civil dockets. It is important to note that magistrates, both full-time and part-time, are stationed at more locations throughout the country than are district judges. The availability of magistrates to handle more cases locally will reduce the burdens and expense of the required travel to the designated places of holding district court imposed on the defendant and the witnesses in the case.

In addition to expanding the criminal trial jurisdiction of magistrates, S. 237 would also provide for some important revisions in the conduct of such proceedings. First, a defendant in a case above the routine petty offense level would no longer have to waive his constitutional right to trial by jury in order to take advantage of the opportunity to proceed to trial before a magistrate. In recognition that a case may occasionally arise that might be inappropriate for trial before a magistrate, S. 237 also provides that the Government may petition to have the proceedings conducted before a district judge. The bill also clarifies the rights of juveniles and other youthful offenders to take advantage of magistrate proceedings in misdemeanor cases without the loss of basic procedural safeguards that would attach in proceed-

ings before a district judge. The administrative requirement that the Attorney General approve the filing of each case would be eliminated in petty offense cases. To the extent that any of these provisions may differ from those in the House version of the bill, the Judicial Conference supports the Senate version.

Civil Jurisdiction.—I have reserved for last, the discussion of what is perhaps the most significant provision of the bill—that authorizing a magistrate to try any civil case filed in the district court if the parties freely and voluntarily consent to that procedure. The Judicial Conference has also endorsed this provision.

As I have noted earlier, the provisions relating to magistrates' authority have always encouraged the district courts to experiment in the utilization of magistrates. Under that authority in existing law, United States magistrates in 48 judicial districts tried 540 civil cases, including 121 jury trials. There is considerable long-standing precedent for the constitutionality of such referrals upon the consent of the parties. I am not aware that any substantial question as to the constitutionality of this provision exists today.

There have, however, been substantial questions as to whether the existing statute adequately authorizes a district court to refer such proceedings to a magistrate. Mindful of the conflicting decisions rendered under the original Magistrates Act, many courts appear to be reluctant to take so important a step without clearer authority. Nonetheless, the experimentation is not only continuing but growing. The 540 cases tried by magistrates in 48 districts during the past year represent a 66 percent increase over the 325 cases tried by magistrates in 36 districts during the year ended June 30, 1977. The major thrust of the present proposal is the development of a long-range resource for the courts and not simply a reaction to an immediate docket crisis.

In reports on the recently enacted legislation authorizing new judgeships, the view was oft-repeated that the courts must streamline their processing of litigation and not look to additional judgeships alone as the only relief from caseload burdens. For example, your committee included the following observation in its 1977 report on the omnibus judgeship legislation:

" * * * However, in recent years both the Congress and the Judiciary have recognized that the twin problems of congestion and delay in our Federal courts cannot be solved solely by an increase in the number of judges. There has been an increased awareness of the fact that the processing of a large volume of cases requires improvements in our judicial machinery which would increase the efficiency of our judicial process. Recognition of this fact of judicial administration is manifested by several laws recently enacted by Congress.

"Public Law 95-578 replaced the U.S. Commissioner with a U.S. magistrate, a judicial officer with authority to handle not only petty offenses and preliminary hearings, but also the authority, when ordered by the district court, to process certain preliminary matters in both criminal and civil cases, including the screening of prisoner petitions. In the 94th Congress, Public Law 94-577 further expanded and clarified the authority of magistrates to the end that district judges would have a maximum of time available for actual trials."

S. 237 furthers the congressionally expressed desire to develop new procedures for handling litigation. It is a development solidly based on the existing experience with the use of magistrates. It is a development that is desired by litigants, as evidenced by the growing numbers consenting to trial before magistrates despite the present uncertainty of the law. It is also a development that is consistent with the American Bar Association's 1974 Standards Relating to Court Organization:

"There is a wide range of functions that judicial officers can perform. These include conducting preliminary and interlocutory hearings in criminal and civil cases, presiding over disputed discovery proceedings, receiving testimony as a referee or master, hearing short causes and motions, and *sitting in lieu of judges by stipulation* or in emergency . . . This arrangement economizes the time of the regular judges and recognizes the fact that smaller civil and criminal cases ordinarily require different legal skills, experience, and authority, particularly the capacity to function fairly and efficiently in handling large volumes of cases. At the same time, it brings the trial of smaller cases within the ambit of the principal trial court and makes them subject to the supervision of its judiciary * * * (emphasis supplied)

The Senate version of the bill contains language designed to ensure that the parties are not pressured into consenting to trial before a magistrate. The House version of the bill goes further and attempts to prescribe the procedures for implementing this provision. I believe that it is unwise to try to deal with such procedural matters in a statute. These matters are better left to development through the normal rulemaking processes. The Senate bill adequately protects the parties from coercion. Accordingly, I support the approach taken by the Senate.

In recent months there have been a number of decisions by the courts of appeals on the question of appellate review of civil trials conducted by magistrates. These cases have held that the circuit courts have no statutory jurisdiction to hear such appeals. None of the cases have held that the grant of such jurisdiction would be unconstitutional. Both the House and Senate versions of the bill would clearly specify the appellate procedures to be followed after trial before a magistrate. The clarification of the law in this regard is an important advance and I support it.

Both the Senate and House versions of the bill provide that appeals shall be taken to a district judge. Thereafter, any further appeal to the circuit court shall be by petition for leave to appeal. However, both bills permit the parties to agree in advance that any appeal shall be taken directly to the circuit court, just as if a district judge had tried the case. The Judicial Conference has recommended that an appeal in a civil case tried by a magistrate should be taken initially to a district judge and not directly to the court of appeals.

The House and Senate versions differ in that the House bill contains a specific authorization for the special appointment of court reporters to attend at civil trials conducted by magistrates. There already exists adequate authority under 28 U.S.C. § 753, the court reporter statute, for the attendance of court reporters at such proceedings. The Judicial Conference believes that court reporter services involves a matter of administration which should remain flexible. Accordingly, the Judicial Conference supports the Senate position of not including such a provision in the legislation.

The Senate bill would permit full-time magistrates and part-time magistrates who do not practice law to exercise the civil trial jurisdiction. The House bill would limit the authorization to full-time magistrates. There are 21 part-time magistrates who also serve as part-time bankruptcy judges or clerks or deputy clerks of court. One of these individuals, Magistrate Hogan of Oregon, will testify later this afternoon. There are also part-time magistrates not engaged in the active practice of law. Permitting these magistrates to exercise the full civil trial jurisdiction would not appear to pose any particular conflict-of-interest problems. Accordingly, I would support the broader Senate authorization.

The Senate version also contains a provision, not found in the House bill, which authorizes a district judge to vacate a reference to a magistrate. The provision parallels the provision on recall of a misdemeanor. Such a provision appears very practical. It enables the district court to review the flow of work to its magistrates to ensure that backlogs are not simply transferred from the judges' dockets to those of the magistrates. Moreover, should a magistrate become seriously ill or die, the parties would be left with no alternative but to sit out that emergency situation if there were no provision for the recall of a civil case. Accordingly, I would support the provision in the Senate bill.

CONCLUSION

The legislation being considered by the committee today is a logical extension of the development of the Federal magistrate system to date. The increase in the authority of magistrates to try criminal cases will set the boundary of that authority at a familiar benchmark—the distinction between misdemeanors and felonies—and eliminate the artificial category of minor offenses that now exists. Magistrates' exercise of their existing jurisdiction has been highly successful and that success fully justifies the expansion now being considered.

The codification of magistrates' authority to try civil cases is also supported by the existing experience with the utilization of magistrates. By clarifying the uncertainties that exist under current law, the legislation will make the opportunity to proceed before a magistrate a more readily available and more attractive alternative to litigants in all the district courts.

The Federal courts have been very pleased with the increased flexibility which the Federal magistrates system has provided. Moreover, litigants in the Federal courts, through the increasing use of magistrates, are undoubtedly obtaining prompter and more thorough consideration of their cases than would be possible if magistrates were not available. The fact that magistrates serve as officers of the district courts rather than as judges of separate and independent courts means that these benefits are being obtained without the unnecessary and confusing jurisdictional barriers that have arisen when the role of general trial courts has been divided and parceled out among several courts of limited and specialized jurisdiction. Rather than take that approach, this legislation builds on the development to date of the Federal magistrates system and parallels the use of masters to assist the judges of the English courts. I am convinced that this is the correct approach.

I want to thank you for inviting me to appear before the committee and to present the Judicial Conference's support for the legislation. I am prepared to answer any questions that you may have.

Judge METZNER [continuing]. As you know, the magistrates system was set up in 1968, as the result of a detailed survey of the problems of the court and especially directed to the Commissioners. It was decided to abolish commissioners and create the office of magistrate to the end of having full-time judicial officers available to help the courts. At that time, the average caseload per judge was something like 304. I would like to point out that today, despite the increase of judges through the Judgeship bill of 1978, including those 117 new district judges, the average caseload is 349.

We have always felt in the Conference that the magistrate system was a necessary adjunct and a useful adjunct to the administration of justice. The report that accompanied the omnibus judgeship legislation last year had the following comment to make, and I would like to read it:

"However, it is felt the Congress and the judiciary have recognized that the twin problems of congestion and delay in our Federal courts cannot be solved solely by an increase in the number of judges. There has been an increased awareness of the fact that the processing of a large volume of cases requires improvements in our judicial machinery which would increase the efficiency of our judicial process. Recognition of this fact of judicial administration is manifested by several laws recently enacted by Congress."

There is a reference to the law that created the magistrates and the jurisdiction that was originally conferred on the magistrates. In the 94th Congress, Public Law 95-577, further expanded and clarified the authority of magistrates to the end that district judges would have the maximum time available for actual trials. The reference to the 94th Congress, of course, is what we call the 1976 amendments to the act which were clarifying amendments.

The experience of the judiciary in dealing with and using magistrates has been extensive and it has been successful. Success, I measure not simply from the point of view of a district judge who has the aid of the magistrate, but its success in the sense that the bar has accepted magistrates as an integral part of the system. You will find that despite the lack of actual mention in the statute of the jurisdiction to try cases by consent of the bodies which is embodied in the provision which is before the committee today, we had over 600 trials last year on consent before magistrates and the number is growing every year.

Now the only reason we have that is because the lawyers are willing and have faith in the magistrates and therefore put the resolution of their controversy in the hands of the magistrate. That is of tremendous help in the problems which we face. I can only again refer to the fact that increasing the number of judges is not the way we can take care of the burgeoning problem of the increasing case load that we are faced with year after year, the problems we find with the Speedy Trial Act, because of the necessity of meeting the final dates which go into effect June 30, this year. The magistrates do offer a tremendous help in the areas which we discussed and which are covered by the statute. With that, Senator,

I would like to hand up a copy of my full statement for inclusion in the record.

Now, I think it is awfully important to emphasize the growth of the system. In 1968, as I said, Congress, in its wisdom created the system, after 2 years of extensive hearings and those hearings embrace a volume 2½ inches thick. Immediately thereafter we appointed 82 magistrates full-time magistrates.

In succeeding years we have grown to 193 magistrates. We have slowly but carefully extended the number and we were very careful to examine the need of the district before we approve a position of full-time magistrate.

The scope of their work, of course, is contained in my prepared statement. I pointed out that the average case load of the judge increases. The work of the magistrate increases the same way.

I want to tell you that I am convinced in my own mind that despite the increase in the number of judges by 117, by the Omnibus Judgeship bill, the necessity for magistrates remains.

In 1974, I chaired a group that made a study of the English system. I came back and wrote an extensive report of our findings. They call the officers Masters. We call ours magistrates. Their purpose is to get cases ready for trial and that is what we would like to have our ultimate objective to be, because the jurisdiction of district courts is being increased year after year. The case load keeps going up and judges should be used to dispose of the important matters, trials of cases, disposition of important proceedings such as injunctions and the like, and preliminary work should be done and is very helpful to be done by the magistrates.

I don't think the addition of new judges is the answer. We can't keep coming back, when I say "we," the judiciary can't keep coming back to the Congress and say, "Give us more judges. Give us more judges." You are faced with the fact of the cost, and if I may say so, the cost of a judge is more than 3 times the cost of a magistrate per year.

You reach the point, as has happened in several districts, where, because of the necessary increase in the number of judges you have to build new courthouses and you get into astronomical figures, millions and millions of dollars being necessary to just house this system.

Now, following the comment of the Congress in conjunction with the Omnibus Judgeship bill which I have just read to you, we need the tools to handle this increase, aside from the creation of new judges. The magistrate is the ideal tool that exists today, and it has been successful.

I thank you for asking me to come. I would be very happy to answer any questions you may wish to put to me.

Senator DeCONCINI. Judge Metzner, thank you very much. I will defer to the ranking member of the committee on the minority side, Senator Thurmond.

Do you care to make a statement, Senator?

Senator THURMOND. Thank you, Mr. Chairman.

It is a pleasure to have you gentlemen with us. S. 237, the subject matter of today's hearing is essentially the same piece of legislation as S. 1613 which was passed by the Senate during the 95th Congress. Although I originally had some misgivings about S.

1613, extensive hearings were held on this bill; and my concerns were resolved in the last Congress. I supported S. 1613 in committee and on the Senate floor.

It is my belief that S. 237, as its predecessor, S. 1613, makes necessary and beneficial changes in the jurisdiction of the U.S. magistrates. The exercise of such expanded civil and criminal jurisdiction by magistrates will give district court judges greater freedom and flexibility to determine how to spend their time most efficiently. I am also pleased by the compromise struck in S. 237 regarding the selection of magistrates. Although district court judges will continue to select and appoint magistrates, this bill gives the Judicial Conference broad discretion to establish qualifications standards and procedures for their selection. Also, my concerns about jury trials and petty criminal cases was addressed and amended in the version of S. 1613 reported by the committee.

There are several other measures currently before this subcommittee or the full committee which, like S. 237, impact on the workload of Federal judges and the efficiency of our judicial system as a whole. One such bill is S. 373, the Court Arbitration Act of 1979. I decided to cosponsor this legislation because I believe it has tremendous potential for reducing the time and expense involved for ordinary citizens to have a dispute resolved in Federal court. Although preliminary results in existing arbitration programs have been favorable, I believe a broader program is needed to fully evaluate this promising alternative to conventional litigation.

I am aware, however, that some of my colleagues on this committee are concerned about the cumulative impact of these various pieces of legislation on the Federal Judicial System. I therefore sincerely thank Senator DeConcini for having additional hearings on the magistrates bill. I hope that we will be able to identify and resolve any remaining concerns about S. 237 itself or its relationship to other legislation coming before this committee.

I would also like to thank all of our distinguished witnesses for agreeing to testify and answer questions this afternoon. I am confident their participation will make this additional hearing a most productive one.

Thank you Senator.

Senator DECONCINI. Senator Thurmond, thank you very much. Your participation was very influential in the committee's action on the bill last year. We are most appreciative. We will go ahead with Judge Skopil, and then ask questions. I am sure Senator Heflin has some questions.

Judge, your full statement will be inserted in the record; if you will highlight it for us, please.

**STATEMENT OF HON. OTTO R. SKOPIL, JR., CHIEF JUDGE, U.S.
DISTRICT COURT, PORTLAND, ORE.**

Judge SKOPIL. Thank you, Senator DeConcini. As you indicated, my name is Otto Skopil. I am a chief judge of the District of Oregon. I am also a member of Judge Metzner's committee on the Administration of the Magistrate System of the Judicial Conference Committee.

[The prepared statement of Otto R. Skopil, Jr. follows:]

PREPARED STATEMENT OF OTTO R. SKOPIL, JR.

My name is Otto R. Skopil, Jr. I am the chief judge for the District of Oregon, located in Portland, Oregon. I am a member of the Committee on the Administration of the Magistrates System of the United States Judicial Conference.

I want to express my sincere appreciation to the Members of the committee for taking the time to hear the views of a district judge on this important bill. I am a great believer in effective communication between Congress and the courts, so I value this opportunity. I also want to commend the Attorney General, Judge Bell, and his staff for their insight and effort in initiating in 1977 this and other proposed legislation, which I believe will improve the administration of justice.

In the District of Oregon magistrates have become an essential part of our system. They are one of the keys in providing the people of Oregon with a productive and efficient Federal court.

HISTORY AND DEVELOPMENT

As you know, the magistrate system builds on the preexisting experience of the United States commissioner system. However, our current magistrate system bears little resemblance to the commissioner system.

U.S. commissioners were empowered to try petty offenses committed on U.S. property, such as the national parks. Commissioners' trials were authorized only with the consent of the parties. The commissioner system was often criticized. Commissioners were not required to be members of any bar. They were part time, paid little, and had little administrative support. Appointment was at the discretion of the district judges. The procedure governing the commissioners was uncertain.

In 1968 Congress responded to these criticisms by adopting the Federal Magistrates Act of 1968. The 1968 Act worked fundamental changes in the commissioners system by creating new Federal judicial officers called "magistrates". The title "magistrate" was intended to highlight the judicial nature of the position and to emphasize the break with the commissioner system. An eight-year term of office was established. Removal from office was permissible only for cause. Salaries were raised to the level of bankruptcy referees. The magistrates' criminal jurisdiction was expanded, and they were authorized to assist the district courts in a wide variety of civil and criminal matters. Their new duties were in three basic areas: First, all duties formerly exercised by commissioners; second, jurisdiction over "minor" offenses, that is, Federal misdemeanors with a limit of 1 year's imprisonment and a \$1,000 fine, and third, were what Congress called "additional duties", including (1) serving as a special master in civil cases, (2) conducting pretrial and discovery proceedings in civil and criminal cases, (3) preliminary review of habeas corpus petitions, and (4) "additional duties".

The last category was added by Congress to ensure that magistrates would not be limited to the areas specifically listed in the act. The Judicial Conference was given the responsibility of administering the new system. By July 1971 the commissioner system had been replaced by the magistrate system in all the district courts.

Serious jurisdictional questions soon appeared, particularly with respect to the act's "additional duties" provision. Several appellate courts upheld the delegation of duties to magistrates in a wide range of cases. However, others invalidated referrals, principally because of unclear statutory authority. Although some courts voiced concern over the constitutionality of references to magistrates, this was not a significant problem. As one court put it, the question involves "not the power of the judge to refer, but the power of the parties to agree to another arbiter, absent overriding constitutional considerations."

Despite the questions raised concerning statutory authority, many districts increasingly expanded the number and range of cases referred to magistrates. This occurred in the District of Oregon.

In 1974 the U.S. Supreme Court ruled in *Wingo v. Wedding* that there was insufficient statutory authority to support the referral of a habeas corpus case to a magistrate for an evidentiary hearing. This decision was one of several factors that provided incentive for amendments to the Magistrates Act. Another important factor was the rapidly growing district court caseloads. The passage of a series of new laws creating new Federal causes of action put substantial additional pressure on the district courts. With the passage of the Speedy Trial Act of 1975, civil dockets in many districts ground nearly to a halt.

In October 1976 Congress passed new amendments to the Magistrates Act to clarify the "additional duties" section. The amendments were intended to overrule the appellate decisions that had invalidated references to magistrates under the

1968 Act. The 1976 amendments placed the jurisdiction of magistrates on much firmer ground. The amendments clarified four areas of jurisdiction:

(1) Nondispositive pretrial matters—A magistrate has complete authority to determine all pretrial matters referred by a judge, except for eight specific exceptions. The exceptions include such matters as motions to dismiss and motions for summary judgment. A district judge must accept a magistrate's findings in the nondispositive matters unless they are "clearly erroneous" or contrary to law.

(2) Dispositive pretrial matters and prisoner cases.—This category includes the exceptions to which I just referred. A magistrate makes findings and recommendations on these matters. Either party may file within 10 days written objections to the magistrates findings. A judge must then determine de novo those matters to which there is objection.

(3) Special master references—A magistrate may serve as a special master in a civil case with the consent of the parties. In exceptional cases a magistrate may be appointed special master without the consent of the parties.

(4) Other duties—In referring to this section Congress made it clear that this section was designed to permit judges to experiment with the use of magistrates with the objective of increasing both the "efficiency and the quality of justice in the Federal courts."

OPERATION OF THE SYSTEM IN OREGON

The existing Magistrates Act provides authority for a relatively wide-ranging system capable of responding flexibly to the needs of litigants in the Federal courts. The system has been used in different ways by different districts. I think it is fair to say that no district has delegated to magistrates more significant cases and functions than has the District of Oregon. Our magistrates have become critical factors in maintaining the quality of our court.

The District of Oregon has interpreted the Magistrates Act broadly. We interpret the act to authorize us to refer to magistrates the trial of any civil case—jury or non-jury—with the consent of the parties. We infer this authority not from the special master provision but from the "additional duties" section of the act, 28 U.S.C. 636(b)(3). Where the parties have so consented, a district judge accepts without review the magistrate's determination of a trial.

To give you an idea of the extent of our use of magistrates, I offer you a brief statistical profile.

MAGISTRATES' STATISTICS

Our magistrates handled more than 2,000 separate matters under the authority conferred by 28 U.S.C. 636(b). This is for the year ending June 30, 1978, as reported by the Director of the Administrative Office of the U.S. Courts. This number does not include matters such as search warrants, arrest warrants, trials of minor and petty offenses, bail and probation hearings, and the other duties performed by our magistrates that are not covered by section 636(b). I want to concentrate on section 636(b) matters because that is the area that will be most affected by the proposed amendments. It is also the area which best illustrates the range and complexity of the matters we delegate to our magistrates in Oregon.

All told, Oregon magistrates handled 2,173 matters under section 636(b) authority. Of those matters 515 were criminal, including such things as indictments, arraignments, pretrial conferences, motions, probation revocation hearings, and other such matters. Civil matters handled were 1,658. This includes a number of specialized duties such as habeas corpus petitions, social security matters, and prisoner petitions. However, from my perspective the most significant figures in the civil area are the figures for motions, pretrial conferences, and trials in civil cases.

Our magistrates handle the great majority of all the civil motions filed in our court and virtually all other pretrial matters. Last year they considered 1,064 civil motions, 227 of those were dispositive motions, reviewable by a district judge. The magistrates have assumed a major civil trial responsibility. They conducted 159 pretrial conferences in civil cases last year. These conferences help ensure that the cases that reach the courtroom are well prepared and ready for trial. This has helped make the actual trial a more efficient process. The magistrates conducted 61 trials, 25 of those were jury trials and 36 were nonjury. The magistrates' trials cover a full range of subjects, including torts, contracts, admiralty, civil rights, securities law, labor relations, patents, and other cases. The amounts in controversy range up to \$1,000,000. All of these trials were conducted with the consent of the parties. In short, our magistrates do literally everything in civil cases. They do everything in

criminal cases except that their trial jurisdiction is limited. The assistance they render to litigants and to the court is tremendous.

The key to the success of our system has been acceptance by the practicing bar. We have not found it necessary or desirable to pressure lawyers to use magistrates. Rather, the magistrate system has sold itself. Lawyers and litigants know that with current pressures on the Federal docket, their matters can be resolved much sooner if they try it before a magistrate. The quality of our magistrates has also been a significant factor in the bar's willingness to use magistrates.

We have two full-time magistrates. Judge Juba was the first. He has been a member of the bar for more than 20 years and has broad experience. He started out as an FBI agent. He then became an assistant U.S. attorney, and later chief deputy district attorney for an Oregon county. He was later appointed to the State trial bench, then clerk of our Federal court, and then he was chosen as magistrate.

Judge Leavy has more than 20 years in the legal profession. He was in private practice before being appointed to the state trial bench. He was a trial judge in the State system for 18 years. He also served as a pro tem judge for the Oregon Supreme Court before becoming a magistrate. In two "preference polls" conducted by the Oregon State Bar Association—one for a vacancy on the Oregon Supreme Court and one for the new Federal district judgeships—Judge Leavy has been the bar's number one choice.

The caliber of these men has been a most important factor in the success of the magistrate system in Oregon. In addition to the two full-time magistrates in Portland, we have a part-time magistrate in Eugene who also serves as a part-time bankruptcy judge. He will testify shortly on his experiences to date and his views on this legislation.

THE CURRENT BILL

The amendments you are now considering would make important changes in the statutory authority for the magistrates system. I will discuss what I believe are the three most important areas of change.

First, the amendments would clarify and confirm the authority of magistrates to conduct civil trials and would regulate resulting appeals. In my mind this is the most important amendment of all. Existing authority for civil trials before magistrates can be inferred only from the "additional duties" section of the Magistrates Act. A great many districts are referring civil cases to magistrates for trial under the assumption that the "additional duties" section, by not prohibiting civil trials, impliedly authorizes them. Some districts are reluctant to make this assumption and are waiting for more specific statutory authority before stepping into this important area. Moreover, currently there is no clear authority for a magistrate to enter a final judgment in a civil trial. The proposed amendments would supply the necessary authority.

By clarifying magistrates' authority in these areas, the amendments would encourage broader involvement of magistrates in conducting civil trials. The proposed amendments would also establish standards governing appeals from decisions of magistrates. Circuit courts have uniformly refused to hear appeals from the decisions of magistrates. They hold that their jurisdiction is limited to appeals from the judgments of district judges. Both the House and Senate bills would permit the parties to choose whether appeal would lie directly to a court of appeals or to a district court in the first instance.

A second important change is in the area of criminal jurisdiction. The proposed amendments would expand magistrates' jurisdiction to dispose of minor criminal cases by including all Federal misdemeanors. The current \$1,000 fine limitation would be removed. This is a logical extension of the magistrates' existing jurisdiction. The amendments would also authorize magistrates to conduct misdemeanor trials before juries. Previously they had no such authority. This created a dilemma for those defendants who were willing to be tried by a magistrate but who were not willing to waive a jury trial. The amendments would also permit magistrates to sentence juveniles under the Youth Corrections Act. The amendments would leave unchanged the current procedure of appeal exclusively to a district judge.

A third area of change would be in the process by which magistrates are selected. The importance of the magistrates makes it essential that those appointed be well qualified. Congress has expressed concern that the quality of magistrates is uneven. I can confirm that our success in Oregon would be impossible without our highly qualified and well-respected magistrates.

Currently magistrates are appointed by a majority of judges in a district with only minimal qualifications required by statute. The proposed amendments would continue the appointive power of the district judges. However, in line with the

increased importance of the magistrates, selection criteria would be addressed more extensively in the legislation.

The Senate and House differ in the mechanics of the selection process. The 1977 Senate bill would have established minimum criteria but left it to the Judicial Conference of the United States to develop detailed requirements. The House version would put in the statute itself detailed standards and procedures. The new Senate bill strikes a middle course. It would incorporate the two most significant requirements of the House bill (public notice of vacancies and establishment of selection panels), but would leave it to the Judicial Conference to develop more detailed procedures. In March 1978 the Judicial Conference adopted recommended procedures and guidelines that are in some ways more demanding than the requirements of any of the proposed bills. Of course, these are only recommended guidelines, not mandatory requirements. However, they do illustrate the nature of the Judicial Conference's commitment to merit selection of magistrates.

There are a number of other differences between the House and Senate bills. In the area of civil trial authority, the Senate bill would confer civil trial authority on both full-time magistrates and part-time magistrates who do not practice law. The House version would confer authority only on full-time magistrates. The Senate's alternative would cover a bankruptcy judge/magistrate who is full-time in the aggregate but only part-time as a magistrate. Both bills avoid potential conflicts of interest that might arise if part-time magistrates presided over trials while maintaining private law practices. The Senate bill, by permitting greater flexibility to the courts, is preferable.

The Senate version requires that court to notify the parties of the option of proceedings before a magistrate but prohibits any attempts to coerce the parties' consent to that procedure. The House version provides specifically for the clerk to notify the parties of the option of proceeding before a magistrate and for the parties to respond to the clerk, without informing the district judge of the responses. Coercion of the parties' consent by a district judge is also prohibited. The Senate version is preferable.

The Senate version has no provision for special court reporters for civil trials conducted before magistrates. The House version requires that an official court reporter take down civil trials before magistrates unless the parties and the court waive the requirement. Reporters may be transferred throughout the circuit for this purpose.

The Senate version has specific authority for a judge to vacate a reference to a magistrate of a civil case for trial. The House version has no specific provision for vacating civil references.

The Senate version contains no minimum requirement of bar membership for appointment as a magistrate. The House version requires a minimum of 5 years of bar membership for appointment as a magistrate, which may be waived for a part-time magistrate. The House version is preferable.

The Senate version includes more information to be provided on magistrates in the reports now filed by the Director. The House version requires the Director to file a new report to discuss only the process of selecting magistrates and the experience with the new civil trial jurisdiction.

The Senate version retains the right of a petty offense defendant to trial by a district judge but requires the accused to demand such a trial. The House version retains the existing requirement that a petty offense defendant must affirmatively waive trial before a district judge, in writing, before the magistrate can hear the case.

The Senate version specifically authorizes a magistrate to conduct proceedings under the juvenile delinquency laws in misdemeanor-type cases. In petty offense cases initiation of the proceedings is permitted by violation or complaint, and the certification of the Attorney General is not required. In no case may a magistrate commit a juvenile for a period in excess of 6 months. The House version contains no comparable provision regarding juveniles. The Senate version is preferable.

CONCLUSION

The modern magistrate system is in its 8th year. In that short time it has clearly demonstrated its potential. It has added a new level of flexibility and creativity to the Federal court system. It is not simply a means of stemming a flood of litigation or of reducing judges' caseloads. It is an important resource that enables the federal courts to experiment, to find new ways of meeting the changing needs of litigants. I believe that the magistrate system must finally be measured by the extent to which it improves the quality of justice to the people who must resort to it. To the extent that it serves the needs of those people, it will succeed. I believe it is succeeding

now. I suggest that the proposed amendments will enable the magistrates to achieve even greater success.

Judge SKOPIL [continuing]. I think Judge Metzner has pretty well outlined what is contained in my prepared statement. I hadn't realized that he read it before. Now I know that he has. In that statement I traced the history to the time when we had the first U.S. Commissioner in Yellowstone National Park. I traced the development of the Commissioner system, on down to the 1940's.

The Commissioner system was thoroughly evaluated to determine whether we should continue with it or whether we should abandon it and have all of the authority vested in the district judges. As a result of that study, in 1968, we had the Magistrates Act, amendments to which we are now examining.

I think that Senator Tydings probably put it as well as anybody in indicating the purpose of the 1968 act. Times had changed, and certainly the judicial process had to change. There had been no substantial change over the 100 prior years, and changes were needed.

I do want to thank Senator DeConcini and the other members of the committee for the opportunity to be here. I know that you have considered this matter thoroughly. It has been studied by many, many people. I wish to commend you on bringing the matter to the floor, I hope to the floor, so early in the session. I think it is a very desirable bill. I think it is a needed bill.

I also feel that it is one of the most important bills we have as far as the improvement of the judicial process is concerned.

I think at this time, I would like to comment on the Attorney General's position. The Federal Courts are confronted with greatly increased litigation. As a result of that, we have to become innovative and progressive in our thinking. Attorney General Bell obviously has been sensitive to that in endorsing these various bills and in the effort that he has devoted to see that they become law.

It is my purpose to be of assistance to you. If there are any matters that are of concern to you, then I would appreciate the opportunity to respond to those matters. I am a firm believer that communication is the first step in progress. I appreciate this opportunity to help resolve any differences we may have concerning the proposed amendments.

I would like to speak to our situation in Oregon, because that is the situation with which I am the most conversant. In Oregon we would not have survived had it not been for the Magistrates Act. We have formulated a very broad interpretation of the authority conferred by the Magistrates Act. Perhaps the best illustration of what that has done for us is the statistical information from last year. I think the national average of trials per actual judge was 47. In Oregon our three active judges were able to try an average of 81 cases per judge. So, you have nearly doubled the productivity of the judges by the use of magistrates in a broad way. I will also say that out of those cases, 243 were tried by three district judges. Another 61 were tried by the magistrates, with the parties' consent. Well, you can see the tremendous job that they are doing for us.

The citizens of our country have entrusted their judicial process to the legal profession, as practicing attorneys, as members of the legislative branch, and as members of the judicial branch. I think

we have a responsibility that we should honor. I think that challenge is one that is not an easy one to accept, but one that we are required to accept. We cannot afford the people early resolution of litigation unless we develop some new and innovative ideas as to how to handle these matters. I think the proposed amendments to the Magistrates Act will serve that purpose.

So, I say in conclusion that I heartily endorse the amendments to the Magistrates Act. I think there has been some question by certain appellate courts as to whether or not the magistrates have the statutory authority to decide cases. Certainly this would give them the statutory authority and that particular problem would be laid to rest.

I do, again, wish to express my appreciation for the opportunity to be here. I would not only welcome, but I would solicit any questions you have.

Senator DECONCINI. Judge Skopil, thank you also for your participation today and the efforts you have made on numerous occasions appearing before our committee and certainly last year, also.

I do have a couple of questions. First, to Judge Skopil: There has been some discussion and concern concerning the merits of the so-called blind consent provisions.

Judge SKOPIL. Yes.

Senator DECONCINI. Can you give us a little background of what this entails and what your thoughts are?

Judge SKOPIL. When I testified last year, I realized that was a concern. Perhaps I did not appreciate the extent of the concern.

Since that time our court has outlined this procedure. As soon as a complaint is filed, the plaintiff's attorney is immediately sent a packet of forms. One form sets a conference date which will be held before the magistrate. Another form asks whether the case can or cannot be tried before a magistrate.

When the papers are served on the defendant, the forms are also served. At that time both the parties and the attorneys know that they can consent to a trial by a magistrate. The parties may consent or not without any intervention by a district judge. Perhaps that is a little early to ask the parties to make that decision, because I think they are not fully aware of what the discovery is going to be or what the issues involved may be. Because of this we give the parties other opportunities to consent. At the initial conference scheduled before the magistrates we have them indicate, if they are able to at that time, whether or not the case may be tried before a magistrate.

The other judges know nothing about whether or not the parties have consented. The only time that I as chief judge am aware of it is when the calendar is presented for assigning to the judges. All I know is that this is a case that can be assigned to the magistrates by virtue of prior consent, so that we can plan on what our calendar is going to be.

Senator DECONCINI. Thank you, judge.

Let me ask either one of you or both of you, do you see any constitutional problem whatsoever with the aspects of this bill?

Judge METZNER. As I said last year, and I will repeat today, Senator, there is absolutely no constitutional problem.

Senator DECONCINI. Thank you.

Judge METZNER. Yes, sir.

Senator DECONCINI. Do you feel the same way?

Judge SKOPIL. Exactly. There has never been any question about it in my thinking.

Senator DECONCINI. Will the passage of the Magistrates Act, alone, or the elimination of Diversity Jurisdiction alone, in your opinions, be enough to meet the expected civil filings in the near future?

Judge METZNER. I don't think so, Senator. The Arbitration Act is one; Diversity is the second, and the Magistrates is third.

Senator DECONCINI. Do you think all three of these bills are necessary to improve access to justice?

Judge METZNER. I think all three are necessary in view of what we are facing in the Federal courts today, because not only do we have the normal increase of say diversity cases, the Congress sees fit every year to create 10 to 15 to 20 new areas of jurisdiction that we never had before, some of which are time-consuming. Take for example, the nuclear area.

I have a case involving the question of whether or not the bass are being killed in the Hudson River because of a nuclear power plant being erected by Rockland County. I am going to learn about nuclear physics before this case is over. The type of jurisdiction is now being broadened and it is our job to do it and we do it.

It really takes more time than the old line diversity case involving an automobile accident. So, taking away diversity isn't going to change the picture.

The Arbitration Act, I do not think is going to change the picture. It is a tool that people can use if they wish to.

The magistrates are a part of our system and they help you directly while you are on the firing line.

Senator DECONCINI. Thank you.

Judge Skopil.

Judge SKOPIL. I certainly agree with what Judge Metzner has said. I think we have to be conscious of the increased volume of litigation. The last time my district had an increase in the number of judges was in 1949, when we had some 400 filings.

We are receiving two additional judges under the new Omnibus bill. Filings are now about fourfold. About 60 percent of that volume is the result of new remedies created by Congress since 1968 forward. I think many of those remedies the public should have. The increased remedies, naturally, are going to increase volume.

I question whether the magistrates amendment alone is going to meet that need because in Oregon we are already using magistrates as the proposed amendments envision. We are still getting behind. We are not only getting behind on a day-to-day basis, our cases over 3 years of age are increasing substantially. So, I think we have to be constantly aware of the fact that the court should be equally available to everybody. Litigants are entitled to have their matters concluded much more rapidly than what the system has been able to do in the past.

Also, I think you have to consider more than just any one of those factors. You have to consider all of them.

Senator DECONCINI. Senator Thurmond.

Senator THURMOND. Thank you.

Either or both of you may answer these questions. With regard to a party's consent to trial of a civil matter by a magistrate, S. 237 presently states the court shall not attempt to persuade or induce any parties to consent to reference of any civil matter to a magistrate.

Do you feel that this language realistically offers any protection to the parties?

Judge METZNER. I think that it does. There is a more detailed provision in the House version, I know. But, if you handle it correctly, I think Judge Skopil has indicated how he does it. It is a blind operation in any event, because you are not dealing with a judge. You are dealing with the magistrate in the first instance to whom the case is sent for review when it comes in.

Maybe it ought to be turned around, Senator, and ask, should the magistrate be prevented from forcing the parties to consent. I don't think that really happens, Senator Thurmond. The court, and by the "court," I mean the whole system is as interested in seeing that the matter is handled properly as anybody. Nobody wants to be in a position of seeing litigants unhappy because of being forced. Secondly, my experience with the bar today is that if you are forcing them, they will get up on their hind legs and squeal anyhow. So, you don't have to worry about it. I think this provision is perfect.

Senator THURMOND. Do you perceive any dangers in dropping the present written consent requirement for trial of a petty offense by a magistrate?

Judge SKOPIL. No, I think that is a very, very desirable addition to the amendment. I know there are some objections to that. I think from a practical standpoint it really doesn't make that much difference. We are all very conscious of the fact that when a person has a right, we inform him of that right. They must know what the alternatives are.

In a petty offense situation, consent is not an essential ingredient. I don't have any great feelings the other way on that.

Senator THURMOND. I have several questions here on the Arbitration bill while you are here. If you don't object, Mr. Chairman, I will take the time to ask them.

Senator DECONCINI. Please proceed.

Senator THURMOND. Do you feel the passage of the Arbitration bill in any way lessens the need or the desirability of the Magistrates bill?

Judge SKOPIL. Well——

Senator THURMOND. Do you perceive any significant inconsistencies between these two pieces of legislation?

Judge SKOPIL. I think that the Arbitration bill and the Diversity bill and the amendments to the Magistrates Act are really essential matters that should be considered. Each provides ways to take care of the increased volume we have.

I do not see any inconsistencies. As I understand the Arbitration bill it would create an experimental system to operate for a 3-year period.

I would think that certainly is something which should be explored and should be used for that 3-year period and then be evaluated after that time.

We have 10 years of experience with the magistrate system. We do not have the experience yet with the arbitration system.

Senator THURMOND. Do you feel it necessary for the Judicial Conference or some other body to establish standards for the selection of the arbitrators or should this be left to the sound discretion of the district courts?

Judge METZNER. I would think the Judicial Conference should do it, just as I am in favor of the Judicial Conference setting up the standards for the appointment of magistrates.

This calls for uniformity. There are areas where there shouldn't be uniformity. There are areas where it is better to have elasticity so the district judge can mold the tools to the needed. But that is not true as to the appointment of the arbitrator or the appointment of a magistrate. I think that should be national and should be lodged in the Judicial Conference.

Judge SKOPIL. I would agree with that. I think the reelection process probably is the thing that is going to make the program successful. Certainly that is true in the magistrates situation.

Senator THURMOND. Do you feel that the ceiling of \$100,000 is a reasonable amount?

Judge METZNER. I think I am going to borrow from my colleague, Judge Skopil, and say, "Let's wait for 3 years from now, Senator, and see what the experience shows." I am not in a position to personally give a view as to whether it is good or bad at this time. At the end of 3 years we ought to have a pretty good idea.

Senator THURMOND. Thank you very much.

Thank you, Senator DeConcini.

Senator DeCONCINI. Thank you, Senator.

I would point out that under the present Arbitration bill it is \$100,000 or the amount that the district court sets as the local rule. The Arbitration bill that Senator Thurmond is referring to this year, is a 5-year instead of a 3-year experimental effort.

Judge SKOPIL. Last year as I remember.

Senator DeCONCINI. That is correct.

Senator HEFLIN.

Senator HEFLIN. Thank you, Mr. Chairman.

I notice that you say there are 196 full-time magistrates. How many district court judges did we have before the Omnibus Judge bill passed?

Judge METZNER. Three hundred ninety-nine.

Senator HEFLIN. Some 399?

Judge METZNER. Yes. We are up to five something now.

Senator HEFLIN. In other words, the ratio of judges to magistrates is about four to two.

Judge METZNER. That is an average.

Senator HEFLIN. Average, across the board.

If we create 117 new judges by the Omnibus Judgeship bill, following that same ratio, we would have in the neighborhood of 55 to 56 new magistrates that would probably be added.

Judge METZNER. No, Senator. This has been a problem with which we have been wrestling since the inception of the magis-

trates system. There is no ratio, Senator. My committee is on record as stating that there will not be any ratio when it comes to appointing magistrates in the past, and obviously, not in the future.

The number of magistrates depends on the caseload of a particular district. In addition, and this is in the Judicial Conference record, I stated in our committee report that the mere fact that there has been the appointment of a new judge does not make a full-time magistrate part of the supporting personnel, and it does not.

There are areas where you have a magistrate without regard to anything else except, for example, traffic violations in the Pentagon. There is a full-time magistrate who handles petty offenses arising out of the Pentagon area. In Hyattsville there is a magistrate who handles the Baltimore-Washington area.

The number of magistrates would be high in comparison to judges in that district. We can go to other districts and there may be one to four, one to five. In the Southern District of New York, which is the largest district in the system, we have 27 judges and 6 magistrates which is quite low.

We have, I think—the lowest ratio is one to two. Would you say that?

VOICE. One to one.

Judge METZNER. We have a one to one in one district. But that is because of the peculiar situation in that district.

So, there is no relationship.

Senator HEFLIN. Well, we know that they would vary according to many factors, but according to your figures, 196 full-time to 399 judges, that is pretty close to a one to two average across the country.

Judge METZNER. It varies.

Senator HEFLIN. I understand that. Certainly, we understand.

Now your figures show there are 292 part-time magistrates at the present time. Under the Magistrates bill you restrict part-time magistrates. There is a change in the bill which will be much more restrictive. Is that not true when you say that a part-time magistrate is one who is not engaged in the practice of law?

Judge METZNER. No, I think that is in relation to the right to try cases, as I read the bill. Part-time magistrates may be engaged in the practice of law, but he would not be able to try the consensual reference trail.

The part-time magistrates do engage in the practice of law. We have conflict of interest rules which prevent him, for example, from hearing criminal matters in a district where they are appointed. The part-time magistrate, in the main, is a person who is necessary because of distances. The border of Canada, for example, will pay \$300, \$400, \$500. They either take the job because someone is needed as in the criminal side or in relation to enforcement of the criminal law.

We have reduced the number of part-time magistrates and gradually turned over to full-time magistrates because that has been enunciated by this committee as the object of this system. We have been criticized in the past for not doing it fast enough. I suppose we believe in the "all deliberate speed" adage and we have

followed that. You see that there are maybe 10 full-time magistrates added to the system each year, and we are gradually cutting down on the part timers from some 400 down to the figure of two hundred something now.

Senator HEFLIN. My point is, I think you will find that because of this language, you will have fewer part-time magistrates because you would want a magistrate to be able to fulfill all duties rather than having part-time magistrates that cannot try cases without consent. The point I am making is that I believe you will continue to have a reduction in part-time magistrates.

Judge METZNER. Oh yes.

Senator HEFLIN. If so, then that will probably result in an increase in full-time magistrates.

Judge METZNER. In certain areas, yes.

Senator HEFLIN. Yes. Which means that your one to two ratio may be changed and it may be one and a half to one or something else in the future.

Judge METZNER. If you take overall figures, Senator Hefflin, yes.

Senator HEFLIN. What is the average full-time magistrates pay, \$47,000?

Judge METZNER. Well, some receive \$42,500 and some receive \$48,500.

Senator HEFLIN. The——

Judge METZNER. The majority receive \$48,500.

Senator HEFLIN. About \$48,500.

Judge METZNER. Yes.

Senator HEFLIN. The district court judges' salary is what?

Judge METZNER. \$54,500.

Senator HEFLIN. \$54,500.

Judge METZNER. Yes.

Senator HEFLIN. About \$6,000 difference.

Judge METZNER. They have different supporting personnel.

Senator HEFLIN. Well, I mean, I am just talking about between the two.

Judge METZNER. Between the two, yes.

Senator HEFLIN. All right, sir. Now with regard to the part-time magistrate. This language, where it says a part-time U.S. magistrate who is not engaged in the practice of law.

In the studies that were conducted did you feel that there was a problem about having a part-time magistrate who practiced law try cases? In your studies?

Judge SKOPIL. Senator, I think perhaps we ought to get on the same ground. I think the part-time magistrate is pretty well confined to the petty offense area. In Oregon it would take somebody from Portland about 6½ hours to get to the Klamath Falls area. That is a long drive just for a petty offense.

So, we have a part-time magistrate who takes care of the Crater Lake National Park—parking a trailer in the wrong place or some violation of the park rules. He is only concerned with those offenses in the National Park. I think we pay that man \$825 a year. So, I think the part-time magistrates will remain in existence. These principally are confined to petty offense trials.

By taking on that part-time magistrate position, the magistrate is precluded from taking any cases in private practice that are in

the Federal court. So, it is quite a sacrifice on their part and they are a tremendous asset to the system. Otherwise, those people would have to travel all the way to Portland which would certainly be unfair.

I am not too sure that I have answered your question.

Senator HEFLIN. No, I think the point of my question is this: With regard to consent in trying civil cases and the consent in trying criminal cases, you have made it very restrictive on part-time magistrates and have prohibited anyone who is engaged in the practice of law from trying those cases. I want to know why.

Judge METZNER. We never thought about it in those terms, but I can give you a very good reason and that is that you could not get a man to serve as a part-time magistrate at the salaries we pay and expect him to try cases.

Senator HEFLIN. Well, is there an ethical problem with regard to people who are lawyers and part-time magistrates trying cases?

Judge METZNER. No, the part-time magistrates trying cases cannot try anything in the Federal court. We find the lawyers are not willing to give up that source of income. They say, "Well, if we are going to be a part-time magistrate and you restrict our duties solely to the old commissioner duties, issuing arrest warrants, bail hearings and the like, then I can still practice on the civil side of the Federal court."

But if you are going to say, "Well, you are going to try civil cases, they answer that you don't have enough money to pay us as a part-time magistrate to do that work, we won't take the job."

Senator HEFLIN. Well, do you see any ethical problems about part-time people, lawyers, trying cases as magistrate?

Judge METZNER. I see no ethical problem if the part-time magistrate is prohibited from acting as counsel in the Federal court and that is what happens if he tries civil cases. That is the only ethical problem.

Judge SKOPIL. I think that is a concern the Senator has. I think the bar would have a feeling that perhaps there might be a conflict of interest between someone who is trying cases in the Federal court as a judge in a sense, or a magistrate, and somebody who is trying a case in court as an attorney. I agree with what Judge Metzner is saying.

I think that that is the thing that obviously both the Senate and the House are concerned about because in the authorization portion of the bill, you have restricted the civil jurisdiction of part-time magistrates or part-time magistrates who are not involved in the practice of law; the House version is just full-time magistrates, period.

I prefer the Senate version principally because in our district, we do have a full judicial officer who serves half time as a bankruptcy judge and half-time as magistrate.

So, you see, if you take the House version, that would prevent him from trying cases.

Senator HEFLIN. You do not see any ethical problem in regards to arbitrators in the same sense? Here you have part-time lawyers or people who would be serving under the Arbitration bill as arbitrators. Isn't there a similarity with regard to a conflict of interest between arbitrators who are trying cases as arbitrators. They are

lawyers, who come in and serve part-time as arbitrators. Yet you prohibit part-time lawyers from having consent cases as magistrates.

Judge METZNER. Senator, as recently as 10 days ago, in the judges' lunchroom, in the Southern District of New York, there was a heated discussion on the very question you raise.

When you are dealing with a magistrate, he is a judicial officer under the system and there are regulations concerning any ethical problem that may arise out of conflict of interest. So, we are not worried about the magistrate. But there are several judges in my court who have the same worry that you seem to have implied in the question you put.

As I say, it was a lunchroom discussion and there was serious feeling about lawyers going around saying, "Well, judge so and so appointed me; therefore, if you want something maybe you should come to me because I am the man who should appear before judge so and so." As I say, two or three judges in our district raised that at lunch. Others did not agree with them. I would say the majority of them do not because in the State system in New York there are referees to determine and referees to hear and report. They are appointed by the judge and carry out a judicial function. They take evidence and resolve a dispute. Anybody could say, "I have an in with Judge X, because Judge X always appoints me as a referee." But it just hasn't happened.

So, I can only rely on my experience that I have been exposed to for 40 years.

Senator HEFLIN. I have no further questions.

Senator DECONCINI. Judge Heflin and Judge Skopil, thank you very much for your testimony. We are most appreciative.

Our next witness will be Judge Hogan and Judge Taylor, magistrates from Oregon and Alabama.

Judges, if you will please come forward.

STATEMENT OF HON. MICHAEL HOGAN, MAGISTRATE, STATE OF OREGON

Judge HOGAN. Thank you, Mr. Chairman.

My name is Michael R. Hogan. I am a part-time U.S. magistrate.

Senator DECONCINI. Your full statements will be inserted in the record. Because of time constraints this afternoon, if you would highlight those for us, we would be most appreciative.

Judge HOGAN. Yes.

I am also a part-time bankruptcy judge at Eugene, Oregon. However, I do serve as a full-time judicial officer.

[The prepared statement of Michael R. Hogan follows:]

PREPARED STATEMENT OF MICHAEL R. HOGAN

My name is Michael R. Hogan. I serve as United States magistrate and as bankruptcy judge at Eugene, Oregon. In my dual role as magistrate and bankruptcy judge I serve as a full-time judicial officer for the United States District Court for the District of Oregon.

I am also the first vice president of the National Council of United States Magistrates, a private, professional organization which represents a majority of the United States magistrates in the country. In that capacity, I would like to express my deep appreciation, and that of the national council, to this committee for inviting me to appear and express our views on the pending Magistrate Act of 1979.

Magistrates are an integral part of the United States district courts and the Federal judiciary. We share the views of the Judicial Conference of the United States and support the pending legislation. The views of the judiciary have been presented to you by Judge Metzner, chairman of the Conference's Committee on the Administration of the Federal Magistrates System, and by Judge Skopil, who is both a member of Judge Metzner's committee and the chief judge of the United States district court which I serve. I, and the organization which I represent, fully endorse the positions of Judges Metzner and Skopil, which you have just heard. Accordingly, I would like to confine my remarks to my own perspectives on the position of United States magistrate, especially in the District of Oregon.

The headquarters of the United States District Court for the District of Oregon is at Portland. All the judges of the court, together with the clerk of court and the United States attorney are located at Portland. This arrangement is based on the fact that Portland, and the three counties immediately surrounding it, account for almost one-half of the State's total population. As a natural consequence, the Portland area generates the vast majority of our litigation.

I am stationed at Eugene, some 100 miles south of Portland. Although most of the court's caseload is in the Portland area, a number of cases arise in Eugene and the more southern counties of the State. The judges hold necessary trials and other court proceedings at Eugene on a visitation basis, coming to Eugene every 60 days for 1 to 2 weeks.

My office is located in the Federal courthouse at Eugene. My responsibilities, however, include the whole southern portion of the State of Oregon. Thus, I travel on a regular basis to conduct judicial proceedings at Medford, Coquille, Grants Pass, Klamath Falls, Roseburg, and Albany. Normally, I will combine bankruptcy business with magistrate business during my travel. I will try misdemeanor cases, conduct initial proceedings in felony criminal cases, and attend to the civil calendar of the district court. In this manner, the district court is able to serve the litigants and attorneys in Oregon by effectively bringing the court to the people.

I act for the district court in southern Oregon in the absence of the district judges, serving one-third of the State's population and land area which are too far from Portland to have reasonable access to the district court there. This makes the district court more efficient and provides an essential service to the people of Oregon. Much of my time as magistrate is devoted to expediting the civil calendar of the court for the judges. I conduct pretrial conferences with the attorneys in civil cases and rule on procedural and discovery motions filed in civil cases (subject, of course, to a right of appeal to a judge). When cases are set for trial before a district judge in these southern offices, I also assist in selecting and supervising juries. I have also been referred a large number of "dispositive" motions in civil cases, for the conduct of needed evidentiary hearings and oral arguments and for preparation of a report and recommended disposition by a district judge.

I have also been authorized, like my colleagues in Portland, to try civil cases—jury and nonjury—upon the consent of the litigants. I find that the parties are willing and eager to consent to trial before me in a large number of civil cases. The consent is initiated by the parties themselves and freely given. While such consent is forthcoming in a large number of cases, only a minority actually go to trial. Last year, for example, I tried 10 cases on consent. The other cases in which consent to trial before me was obtained were eventually disposed of without trial, such as on motion or by settlement.

In addition to keeping the district court's civil calendar current at Eugene and throughout southern Oregon, I have been assigned the duty of reviewing most of the social security appeals and prisoner cases filed in the district as a whole. Last year, for example, I filed 78 full, written opinions with the court on social security cases and 125 opinions on prisoner cases. Of course, the district judges themselves make the final disposition of these cases under 28 U.S.C. § 636(b), but they are assisted by my reports and recommendations.

I travel frequently to the State penitentiary in Salem to assist the court in handling civil rights cases and other prisoner litigation. I find that by providing the opportunity for face-to-face pretrial conferences and other meetings with prisoner-litigants and the prison officials, and by ruling directly on pretrial motions, the cases filed by inmates are disposed of expeditiously and satisfactorily.

Through the use of United States magistrates, we have been able to bring the court to the people. At the same time, the magistrates have been able to free the very limited time of the district judges so they may devote their efforts to handling those matters which only a judge may handle, such as the trial of felony cases. My availability in the southern portion of the district, in particular, enables the district judges to consolidate their efforts in Portland, where the most cases are, without

overtaxing the time of attorneys or the pocketbooks of litigants in the rest of the State.

We in Oregon are already performing the civil trial functions which are the subject of the pending Magistrate Act of 1979, S. 237. As Judge Skopil has noted, the procedure has worked beautifully. The court has received indispensable assistance in coping with its caseload burdens. Cases are reached for trial more quickly, and the output of the court is materially enhanced. Moreover, the bar and the litigants are very happy with the practice, and the people are served by a more-available, prompt and less-expensive system of quality justice.

In improving the delivery of justice we have not had to resort to the establishment of a separate court or a separate system of justice. Magistrates are a part of the United States district courts. They have no jurisdiction of their own. Rather, they exercise the jurisdiction of the district court, upon delegation from the district judges and under the supervision of the district judges. In every instance, a right of appeal lies from a magistrate's order or decision or recommendation to a district, although the parties are generally satisfied with our rulings in the overwhelming majority of cases and appeals are infrequent.

We are already exercising the civil jurisdiction set forth in the pending legislation. The courts and the litigants, however, need the Magistrate Act of 1979 to clarify the present law and to set forth specifically in the United States Code the appeals procedures from cases which have been tried by magistrates. Moreover, the pending legislation would broaden our criminal jurisdiction and permit us to dispose of a greater number of Federal misdemeanors. Again, this is good for the courts and good for the litigants.

In conclusion, I would like to thank the President, the Judicial Conference of the United States, the Department of Justice, the American Bar Association, and the many other organizations and individuals who have supported the United States magistrates system and who have endorsed the pending legislation. I appreciate the opportunity to speak to you, and I would be happy to answer any questions you may have.

Judge HOGAN [continuing]. I first want to thank the committee and the staff for their strong support of this legislation which affects magistrates. We are as hopeful as you are that this will lead to fairer, and less expensive and quicker judicial resolution of those matters designated for judicial disposition by Congress. I believe that magistrates are an integral part of the U.S. district courts and the Federal judiciary. They ought to be treated as such.

We share the views of the Judicial Conference of the United States. Speaking as an officer of the national council of U.S. magistrates, and as the chairman of the legislation committee we adopt the statement of the Judicial Conference, and also the excellent testimony by Judges Metzner and Skopil today.

The headquarters of the district court in Oregon is in Portland, Oregon. Two-thirds of the business for the district court in Oregon is near Portland, however, approximately one-third of the people and one-third of the land area in Oregon are closer to Eugene where I am headquartered. Thus, I travel on a regular basis to conduct judicial proceedings at Medford, Coquille, Grants Pass, Klamath Falls, Roseburg and Albany. Normally, I will combine bankruptcy business with magistrate business during my travel.

We in Oregon believe that this has an effect of taking the courts to the people, making the courts available and accessible to the people so that the people have an open feeling with regard to approaching the court. It is not that the court is seeking any more business. To the contrary, but when something should appropriately go into Federal court, we hope that there will be an open experience.

As Judge Skopil mentioned, we have adopted the broadest view of jurisdiction of the present Magistrate Act. I exercise all of the

duties possible. I act in the civil area, hearing preliminary motions, dispositive motions, and try both court and jury civil cases. Last year, I filed 78 full, written opinions with the court on social security cases and 125 opinions on prisoner cases. I handle preliminary matters in criminal cases and felony cases, including motions to surpress and other motions which then are reviewed by the district court. The district judges themselves make the final decision, nevertheless, much of the evidentiary portion is heard before me. I report to the district court concerning that.

I travel frequently to the State penitentiary in Salem to assist the court in handling civil rights cases and other prisoner litigation. This has given inmates with pro se complaints in the Federal court a greater feeling of openness and responsiveness of the Federal system.

By the way, the inmates of the penitentiary whether represented or not, have consented to have all of the trials that have come up so far to be held before a U.S. magistrate. I have conducted several onsite court trials there. We want to bring the court to the people, but primarily I want to emphasize that we are part of the district court. It is because we feel that magistrates can so assist the district court that we support this legislation. The Magistrate Act is not an expansion for the court in Oregon, but we believe this legislation is confirming our already successful experience.

We thank you for your interest. I hope that I may be able to answer any questions you may have.

Thank you.

Senator DECONCINI. Thank you.

Judge Taylor.

STATEMENT OF HON. MACEY TAYLOR, MAGISTRATE, STATE OF ALABAMA

Judge TAYLOR. Mr. Chairman, Senators, my name is Macey Taylor. I am a full-time magistrate in Birmingham, Alabama. There are two full-time magistrates in our district and at the present time, two part-time magistrates. I have served since the beginning of the program in 1971.

[The prepared statement of R. Macey Taylor follows:]

PREPARED STATEMENT OF R. MACEY TAYLOR

My name is R. Macey Taylor. I was appointed by the United States District Court for the Northern District of Alabama as a full-time United States magistrate in February 1971. I was reappointed this past February for a new 8-year term of office.

I am truly pleased to have the opportunity to appear before this committee to give my views on S. 237, legislation to expand the jurisdiction of United States magistrates.

The Northern District of Alabama covers approximately 22,000 square miles. The 1975 estimates indicate a population of approximately 2,000,000 people. The principle Federal enclaves within the district are Ft. McClellan, the Redstone Arsenal, TVA headquarters and projects, and the Anniston Army depot. Also falling within our Federal jurisdiction are the William B. Bankhead National Forest and portions of the Talladega National Forest, as well as part of the Natchez Trace Parkway and several reservoirs.

When I was appointed in 1971, I became the first, and only, full-time magistrate in the district. At that time, six part-time positions were authorized to serve in Huntsville/Decatur, Anniston, Florence, Tuscaloosa, Gadsden, and Haleyville.

In 1971 the district was served by four judges. During that year there were 1,476 cases filed, or an average of 369 cases filed per judge. By comparison, the national average of filings per judgeship was 341.

My initial duties included the review and recommendations on prisoner petitions and appeals from administrative decisions in social security cases. The court also assigned approximately 10-15 cases as special master references a year, for determination of such matters as the amount of damages awardable following the court's determination of liability. To the extent that time was available after performing these duties and attending to the usual U.S. commissioner-type criminal matters, I was also assigned a limited volume of pretrial motions in civil and criminal cases, primarily in the area of discovery.

Within 2 years following my appointment, I was also conducting approximately 200 pretrial conferences in criminal cases and approximately 550 postindictment arraignments under rule 10. The bulk of my "additional duties," however, consisted of prisoner petitions, social security reviews, and service as a special master.

In 1973 a survey of the magistrates system in our district was conducted and the Judicial Conference approved the authorization of a second full-time position at Birmingham. Three of the original six part-time positions were retained, since there was a sizable volume of precommitment matters arising at these locations—Florence, Anniston, and Huntsville/Decatur.

When Judge Nelson was appointed as the second full-time magistrate at Birmingham in October 1974, the district was still served by only four judges. The number of filings, however, had increased to 1,707. Each judge was now responsible for 427 cases, compared to a national per judgeship caseload of 358 cases. The district ranked 27th out of 94 districts nationally in the number of cases handled per judge.

Since the appointment of Judge Nelson, the court has expanded both the range and volume of "additional duties" assigned to the magistrates. We have assumed, in addition, the trial of minor and petty offense cases at Ft. McClellan, some 60 miles to the northeast of Birmingham. The assumption of that caseload facilitated the recent discontinuation of the part-time position at Anniston, bringing our total magistrate positions to two full-time and two part-time.

Judge Nelson and I now conduct a substantial volume of initial proceedings in criminal cases, as well as handle initially the post indictment pretrial stages of those cases until they are ready for plea or trial. We also review all prisoner petitions for the court, and conduct needed evidentiary hearings in prisoner cases. The addition of a second full-time magistrate in Birmingham has provided the court with the flexibility to increase the assignment of civil "additional duties." For example, during the year ended June 30, 1978, we conducted 37 trials of civil cases upon the consent of the parties.

During that year, there were 2,338 cases filed in the district. Thus, with four judges on duty, the district received a substantially heavier average caseload of new filings than nationally. The per-judge filings in the district were 584 as compared to the national average of 417 filings per judgeship (compared to the 369 filings per judge when I was first appointed in 1971). The judges, however, disposed of more cases more quickly than was the case nationally. As a result, the court's pending caseload at the end of the year was below the national average. The addition of three new judgeships which were authorized by the Omnibus Judgeship bill last fall will bring the court's average workload (assuming that filings remain constant) closer to, but still above, the projected national average. With seven judges the per-judgeship average last year would have been 334 as compared to the national average of 322 cases. These figures, naturally, do not include any allowance for the potential that new cases will be filed as a result of the additional judgeships. It is noteworthy that even with the addition of three new judgeships, the per-judgeship workload will still approximate the number of cases handled by the judges when I came on duty in 1971.

Accordingly, the Judicial Conference has just determined that the district's workload fully justifies the authorization of a third full-time magistrate at Birmingham. The Judicial Conference also reduced the remaining number of part-time positions in the district to one, at Decatur or Huntsville, effective upon the appropriation of necessary funds and the appointment of the third full-time magistrate at Birmingham. We expect that the assistance of the third full-time magistrate will enable us to help the court with its civil docket more effectively than time now allows.

It is my strong belief that the United States magistrates system in the Northern District of Alabama has served the court and litigants well. We have evolved from a system of one full-time and six part-time magistrates primarily handling "commissioner-type" precommitment matters, to a system of three full-time magistrates and one part-time magistrate. This shift in positions has enabled us to assist the court in

handling a wide range of criminal and civil pretrial matters, thereby freeing the judges to spend more time in the actual trial of cases and in the hearing of critical motions and the writing of opinions. Our court has been able to nearly double its caseload disposition rate from 320 cases per judge in 1971 to 599 cases per judge in 1978. The full-time magistrates in Birmingham are of the opinion that our services have contributed to this record.

PENDING LEGISLATION

(1) *Selection procedures*

It is a little awkward for me to comment on this provision in view of my present position. It has been my experience that magistrates perform important judicial duties. Litigants are entitled to have their cases processed before qualified judicial officers. Moreover, I believe that district judges have a vested interest in securing the best magistrates possible. The better the quality of the work done by magistrates initially, the less frequently will district judges be called upon to review that work.

I am not certain whether any single type of procedure for selecting magistrates will provide an absolute assurance that all magistrates will be superbly well qualified. The judiciary, however, seems quite committed to selecting good magistrates, as Judge Metzner has pointed out. Accordingly, I would agree that the legislation should provide the Judicial Conference the discretion to prescribe standards, as opposed to setting forth detailed procedures in the statute itself.

(2) *Civil jurisdiction*

S. 237 would clarify the authority for magistrates to try civil cases. I say "clarify the authority" rather than "authorize," because many magistrates, including myself and Judge Nelson, are now exercising that authority under the existing law.

Nonetheless, the jurisdictional basis is unclear. Moreover, the procedures to be followed, the scope of any appeal, and even the appropriate court to which an appeal should be taken, remain uncertain. This uncertainty undoubtedly contributes to the reluctance of attorneys and judges to experiment with this use of magistrates.

This uncertainty also means that attorneys who advise their clients to consent to trial before a magistrate must face unknown risks. For instance, attorneys who have consented to trial before myself or Judge Nelson often did so with the understanding that they could appeal directly to the United States Court of Appeals for the Fifth Circuit. Last March, however, that court, in *Kendall v. Davis*, refused to entertain such an appeal on the ground that no statute authorized it to exercise that jurisdiction. It seems unfair to litigants to leave them in such doubt on such important matters. It certainly seems unfair that litigants in another district court are deprived of the opportunity to proceed to a prompt hearing before a magistrate because of such uncertainties, when that procedure is available to them in our district. Accordingly, I wish to be recorded in favor of clarifying magistrates' authority in this area and thereby extending the benefits which Alabama litigants enjoy to litigants in federal courts across the country.

I would like to comment briefly on the procedural point of how the consent of the parties is obtained. It is my opinion that the Senate approach is preferable to that taken by the House. The Senate bill makes clear that the parties' consent must be freely and voluntarily given and that the court may not coerce that consent. I see no reason to attempt to set out a particular procedure in the statute itself. Such matters are precisely the sort of administrative housekeeping that the procedures for promulgating national and local court rules was designed to handle. Accordingly, I would certainly prefer the Senate approach on this question.

(3) *Criminal jurisdiction*

S. 237 would also expand the existing criminal trial jurisdiction of United States magistrates. The figures provided by the Administrative Office to the effect that over 100,000 defendants were heard by magistrates last year are impressive. I am proud that we have contributed our small share to that national total with the 484 petty and 152 other minor offense cases handled by magistrates during the year ended June 30, 1978, in the Northern District of Alabama. I should point out that the majority of the cases which we handle are traffic offenses arising at Ft. McClellan, the Redstone Arsenal, and that portion of the Natchez Trace Parkway which passes through the northwestern corner of Alabama. Without the availability of magistrates to handle these cases, I suspect that many would not be prosecuted at all or that defendants would have long waits for a judge to reach the case, given the congested status of the dockets in our district.

I am not aware of any complaints having arisen to our exercise of this jurisdiction. All of those who have been involved seem to be well satisfied with the work we

have done. Accordingly, the expansion of this jurisdiction to include all misdemeanors seems to be well supported by the experience to date.

The Senate bill would eliminate the requirement that a defendant in a petty offense case sign a written waiver of trial before a district judge before a magistrate may try the case. While the bill retains the defendant's right to trial by a judge, the defendant would now have to demand such a trial or it would be deemed to have been waived. Given the limited severity of most petty offenses, and the fact that many of them arise on Federal enclaves, there would not seem to be any constitutional objection to the total elimination of a defendant's right to trial in the first instance by an article III district judge. The route chosen by the Senate in this instance, although not yet adopted by the House as I understand it, is much less than that. By eliminating only the requirement for a written consent, the Senate has preserved a choice of forum for petty offense defendants, but has also eliminated a burdensome and time-consuming administrative requirement that adds nothing to the rights of the defendant, but contributes to the burdens imposed on our clerical staff. Moreover, in my 8 years as a magistrate I can recall few instances, certainly not more than about 20, in which a defendant has refused to sign the written consent form which is used in this situation.

The revision of the criminal trial jurisdiction would also afford defendants before us the opportunity to be tried by a jury. Juveniles and other youthful offenders would be empowered to proceed before magistrates without disruption of the separate statutory schemes for handling such defendants. Moreover, the Government would be provided with a limited right to remove a case for trial before a district judge where it can show that exceptional circumstances justify such treatment. These all appear to be beneficial improvements in this area and I join with the Judicial Conference in supporting them.

CONCLUSION

Mr. Chairman, Senators, I appreciate the invitation to appear before you this afternoon and to provide you with background information on how the magistrates system is operating in the Northern District of Alabama, particularly as it applies to this legislation. The bill before you today, S. 237, is an important piece of legislation in the development of the federal magistrates system and I am happy to have the opportunity to testify in support of it. With this legislation, United States magistrates across the country will be able to render improved service to the district courts and to litigants in those courts.

Mr. Chairman, I would be happy to answer any questions which you or other members of the Committee may have at this time.

Judge TAYLOR [continuing]. As the Senators will recall, the original Magistrates Act encouraged the district courts to innovate and utilize magistrates in any manner not inconsistent with constitutional requirements.

Our district, as the district in Oregon, has attempted to do that. In 1977, some of our judges, because of specialized circumstances and a group of civil cases, referred them to the full-time magistrates in Birmingham, to try and issue final judgements when the case was finally determined. At that time, we in our district were under the impression that the parties could consent to a trial by the magistrate and the entry of final judgment.

The fifth circuit corrected our thinking and reversed the case that was first appealed because of the jurisdiction requirements, nothing on the merits. They said they have no jurisdiction to hear a final judgement, to hear appeals from a final judgment of the magistrates. That is the reason that I think that the present clarification of magistrates civil jurisdiction, upon consent of the parties, is so highly important and will help dispose of the business in the district courts.

Many lawyers, even though the practice exists, are not aware but the lawyers who have participated in the program are enthusiastic about it. The question has been raised, I will just mention a few brief points, on the provisions of the Senate bill which do not

require a written consent of a defendant in the trial of a petty offense. I am in favor of that provision as it is written in the Senate Bill. As has been pointed out, it is not particularly vital, but in lieu of a printed form, I believe the provisions in the Senate bill would require that an explanation be made which is recorded either electronically or by court reporter.

In my opinion, the colloquy between the magistrate and the defendant on trial would be much more successful in establishing that the rights of the defendant have been explained and understood in lieu of signing the form. Often times, in any form-signing case, a defendant will contend months or weeks or years later that he signed the form without any knowledge of what was in it. So, I think the provision requiring explanation in lieu of written consent in petty offense cases is certainly desirable.

A brief comment on the selection of new magistrates in the Senate Bill. I heartily approve and endorse setting up guidelines for the Judicial Conference to specify the manner in which the magistrates will be appointed. I think oftentimes there is a danger in too rigid a statutory specificity which sometimes can bring about undesirable results. An illustration might be the very rigid requirements of rule 11, before a district judge can accept a guilty plea. Our circuit, the fifth circuit has ruled that there must be literal and total compliance with that rule or else the guilty plea is not valid.

So, again, I think the discretion authorized for the Conference to set up the requirements is highly desirable. Of course, my written statement is in the record, and as Judge Hogan, I would be happy to respond to any questions.

Senator DECONCINI. Thank you, Judge, very much. I do have one question of each of you gentlemen. Can you each give us the average caseload that you have as a magistrate and also, what the appeal percentages are and what the reversals are from your courts.

Judge HOGAN. I would be happy to. I do not have the full numbers. Just now our district is preparing a computerized list of all the cases referred to specific judges and magistrates. We are just bringing the list up to date for myself now.

I can tell you that I have several hundred prisoner cases in my office now because most if not—well, with just a few exceptions the prisoner cases are referred to the main district of Oregon. I have probably 40 social security cases before me just now. All of the calendar in southern Oregon from basically Albany to California and east and west of the state.

My reversal rate personally over 5½ years has resulted in one reversal in a Social Security case, one reversal on the bankruptcy cases, and I might comment that was by Judge Skopil, who is in the room, which is proof that reasonable men can disagree. There was a reversal in a criminal motion, also. I think there have been only two by the circuit court in 5½ years.

Senator DECONCINI. I thank you, Judge. We are not asking for self-confessions. I do not mean to put you or Judge Taylor in any kind of a predicament. What I am interested in getting on the record is the success of the magistrates that we do have today and that, indeed, they not only appear to be competent, but statistically

are very competent and the magistrates' decisions are very well founded.

Judge Taylor, could you give us a little background?

Judge TAYLOR. In our district the situation is a little bit different. As I mentioned earlier, the civil cases that we have tried to conclusion have been all based upon disputes between coal mine workers and the UMWA Pension Trust Fund, they have been of that specialized nature.

Those are the ones that we were authorized by the district court to try and decide and enter judgment. The very first one that I tried was appealed. That is the one that the fifth circuit declined to review on jurisdictional grounds. So, it came back to the district courts. We had to change our procedure for those cases and after trial had been concluded there was a recommendation made to the district court with recommended findings of fact and conclusions of law, with the opportunity for objections to be filed and final judgment to be entered by the court. Now one or two of those cases are on appeal and no result has been achieved yet.

Now on the other matter, Social Security reviews, prison cases, state habeas cases, we write recommendations in our district for the district judge. The district judge makes a final decision based upon the record and based on the magistrate's recommendation or if an evidentiary hearing is necessary, it is usually referred to a magistrate, the hearing is conducted and again, the report is made, the recommendations are made. We have not been authorized to enter final judgments except in the special coal miner cases that I mentioned.

Senator DeCONCINI. Thank you.

Can each of you accept guilty pleas in felony cases at the present time and would it help the district court if you could?

Judge HOGAN. Neither one of us can accept guilty pleas. That is one of those jurisdictional matters that we are careful about and under neither the Senate or House version of this bill would that be appropriate. However, Judge Skopil's comments yesterday mentioned that the fastest time he had taken a guilty plea was 25 minutes or around that. It may take longer.

We as magistrates try to keep that efficient for him by ordering any psychiatric examinations that are necessary, when any testimony from psychiatrists are necessary before the district judge gets the case. But if we could take the guilty plea and perhaps reserve the matter of sentencing to the district court, that would free up the calendar and would make that calendar flow better.

In observing the district court over the years, at least it has been my observation that many times some of these little matters have to be interjected into the regular trial calendar. This is a very important, a crucially important matter, but nevertheless, it does not take a lot of time except that it interrupts things such as I am certain the Senators are familiar with in his work.

Judge TAYLOR. I think the greatest timesaver for a district judge that I can think of is to permit a magistrate to accept a guilty plea in a felony case. I think that our district, the fastest judge, in an uncomplicated guilty plea case may take 15 minutes. I would say the range is from 15 to 30 minutes.

In the Northern District of Alabama, I do not have the exact figures, between 400 and 500 criminal defendants a year or criminal cases a year. I believe the last fiscal year statistics from the administrative office reflected about 94 percent plead guilty. So, that is an indication of the amount of time taken by the district judges just to accept guilty pleas. It has become so highly technical to comply with the rule properly that many appeals and many motions and post-conviction motions arise out of guilty pleas.

I think it would be a great help to the district court to permit magistrates to accept guilty pleas in felony cases.

Senator DECONCINI. Thank you judges very much.

Senator HEFLIN.

Senator HEFLIN. Let me first say that I would like to welcome Judge Taylor. Judge Taylor was an outstanding member of the bar and was a former Assistant U.S. Attorney and is highly regarded and respected. The people in Alabama think he is the best magistrate in the United States.

Judge TAYLOR. Thank you, Senator.

Senator HEFLIN. It is a real pleasure to have you here.

Let me ask you this. The name "magistrate" bothers me. We have had terrible experiences in my State, and I think in every State, with justices of the peace. The name "magistrate," to me is demeaning, because you are really judges. You are going to be trying cases if this bill passes. Do you have a better name that you could suggest other than "magistrate?"

Judge HOGAN. None I can get my wife to use with regard to it at any rate. [Laughter.]

The term "magistrate" of course, is a highly respected term in England. I think that the reason it was selected by Senator Tydings and that subcommittee or the predecessor subcommittee was that at that time no one really knew how effective the magistrates system could be. There was some understandable reluctance to use the term "judge." Perhaps that situation exists; perhaps it does not.

With regard to other suggestions, I would be happy to informally provide them, but otherwise I want to defer to your judgment, of course.

Judge TAYLOR. Senator, I have no suggestion for an alternate name. Of course, it would not be permissible to have a magistrate be confused with an article III, district judge. So they must be called by some other formal title. I haven't noticed, and I am sure that Judge Hogan would agree with this, any diminution of respect accorded to myself as a magistrate by litigants or by defendants or by attorneys. I do not feel the title is demeaning.

Of course, in the normal parlance of what takes place in a proceeding before a magistrate, he is always addressed as "judge" anyway, not by insistence, but by practice.

Senator HEFLIN. Well, not to be demeaning, but I have heard people come back saying that, "Well, I didn't get a trial before a judge, I got it before that magistrate."

I really think that a better term should be found because I am fearful that not too many people in Alabama have been to England to find out about how well-respected the term "magistrate" is.

Judge HOGAN, let me ask you this, you don't mind me calling you "judge," I know.

Judge HOGAN. You may call me whatever you wish. [Laughter.]

Senator HEFLIN. They call all the lawyers in Alabama, "Colonel." So—[Laughter.]

You say you have had some Social Security—I believe I added it up to three, reversals before your district court judge. Is he the one?

Judge HOGAN. Only one before the district court judge. The other two were before the court of appeals. There may have been another one lurking in the wings, but I can't recall one.

Senator HEFLIN. How many appeals were taken to the district court judge would you say for that one reversal?

Judge HOGAN. I can't say.

Senator HEFLIN. Would over 100?

Judge HOGAN. Oh yes.

Senator HEFLIN. Two hundred?

Judge HOGAN. Probably. Well, perhaps not. I would say 100, but I am really shooting in the dark.

Senator HEFLIN. Trial judges' percentages, district court judges, state judges is much higher. That must be a compliment to you or is it a problem of what could be called the "one courthouse syndrome." The connection between the district court judge and the magistrate is so close, that there is really not an arm's length dealing on appeals.

Judge HOGAN. Well, may I refer to the one reversal by Judge Skopil I told you about. I have a hard time imagining two men having a greater respect for each other and really friendship and affection for each other than Judge Skopil and I have.

However, it did not bother him in the least to reverse me, because we take our responsibilities very seriously. I take mine seriously. We are interested in the people in this country and in maintaining the integrity of the judicial system. That is true for me. It is true for him. I do not believe it is a part of any one courthouse syndrome, at least for the district where I am.

Senator HEFLIN. Well, assuming everything you say is correct, isn't there something inherently wrong with that closeness of an appellate judge to a trial judge?

Judge HOGAN. I don't believe so. I think my particular experience is good before the circuit court and the district court. I think that in most cases, in most districts, we also find that friendships develop between district judges and circuit judges, and for those lucky few, perhaps even friendship with a Supreme Court judge.

I do not think that this makes a difference for judges. They take their responsibility seriously. I believe this is the vast majority of judges in the Federal court system.

Senator HEFLIN. Thank you.

Senator DECONCINI. Senator Baucus.

Senator BAUCUS. I have no questions.

Senator DECONCINI. Thank you very much, judges. We appreciate your time and your expert testimony.

Judge HOGAN. Thank you.

Judge TAYLOR. Thank you.

Senator DeCONCINI. Our next witness is Professor John E. Nowak, from the University of Illinois, School of Law.

Your statement will be inserted into the record. We would ask, because of time limits, that you highlight it for us.

**STATEMENT OF JOHN E. NOWAK, PROFESSOR, COLLEGE OF
LAW, UNIVERSITY OF ILLINOIS**

Dr. NOWAK. Thank you very much, Senator.

[The prepared statement of Dr. John E. Nowak follows:]

PREPARED STATEMENT OF DR. JOHN E. NOWAK

I. SUMMARY

Based on my experience as a reporter for the Speedy Trial Act planning groups for two U.S. district courts, and as reporter for the National Center for State Courts Task Force on Courts and the American System of Government, I appreciate the need for experimentation with new forms of procedure that will allow for the more efficient processing of cases within our judicial systems. But my experiences with those Federal and State groups has made me concerned with the proposals of some judges, lawyers, and professors to create new systems for the resolution of disputes that currently are placed in the traditional litigation process. It is my belief that the public will be well served by changes in the adversary system only if such changes take place in a gradual manner, and allow for time to evaluate whether each change produces a fair, as well as efficient, adjudicative system. While the traditional adversary system and the assignment of cases to full time judges may not be the most efficient system that can be hypothesized for dispute resolution, there can be no doubt that our adversary system has produced the fairest means for dispute resolution in a large society. The Federal judicial system, in particular, has been a model to the rest of the common law world for the fair resolution of disputes through the adversary process. While the increasing jurisdiction of Federal courts has produced a serious backlog of cases in many U.S. district courts, we should be hesitant to adopt proposals that alter the Federal judicial system any more than is necessary to reduce such backlogs to manageable numbers.

I am not opposed to increasing the jurisdiction of U.S. magistrates, but I am opposed to the manner in which litigation before Federal district courts would be changed by S. 237 and the magistrates bill now before the House of Representatives, H.R. 1046. These bills increase the jurisdiction of magistrates in an open ended manner, by allowing all civil cases or misdemeanor cases to be tried before magistrates with the consent of the parties. Appeals from decisions of magistrates would go to the district court, with only the possibility of discretionary review by the U.S. court of appeals. This system, in my opinion, will effectively place most civil litigation, and all misdemeanor criminal prosecutions, before U.S. magistrates with no meaningful possibility of review of those decisions by anyone other than a single U.S. district judge. Because I view this as an unnecessarily major change in Federal procedure I would recommend the following changes to S. 237: First, all appeals should go from the magistrate to the U.S. court of appeals. Second, in the appeal of criminal cases it should be specified that the court of appeals may reduce the sentence imposed by the magistrate. Third, the Congress should exclude from magistrate jurisdiction certain classes of cases in which there is a strong public interest in having the determinations of law and fact made by a judge approved pursuant to the provisions of article III. I suggest that most civil rights actions, other than employment discrimination cases, be excluded from the civil jurisdiction of the magistrates and that all misdemeanor cases in which the prosecution seeks consecutive sentences that would total above 1 year of imprisonment for the defendant also be excluded from magistrate jurisdiction. Fourth, the Senate should adopt provisions of H.R. 1046 that: (1) Provide for the use of court reporters at magistrate trials; (2) detail the manner in which magistrates are to be selected; and (3) require certain reports concerning experience under the Magistrates Act during the 2 years following its date of enactment. Fifth, the Judiciary Committee should table all bills that would alter the litigation system in the Federal courts through use of alternative dispute resolution systems, such as arbitration or mediation, until such time as it receives and evaluates reports on the experience under the Magistrates Act.

II. COMPLETE TESTIMONY

There can be no doubt that the judges of the U.S. district courts have had their functions impeded by their ever increasing case loads. As this committee has had documented for it in a variety of settings, the increase in the types of causes of action that may be brought before the Federal courts, ranging from antitrust cases to social security disputes, has created a situation in which few Federal judges can process the cases on their dockets within a time span that seems reasonable to litigants. By 1973, the processing of criminal cases in some districts had fallen behind to such an extent that the public, as well as individual litigants, expressed concern over the worth of a Federal criminal justice system that did not seem able to effectively process its docket effectively; for this reason the Congress adopted the Speedy Trial Act of 1974. That act has resulted in a streamlined criminal justice system in many districts and increasingly efficient processing of criminal dockets. As the reporter for the Speedy Trial Act planning groups for the eastern and southern Districts of Illinois, I have been impressed by the speed with which district judges have adjusted to the time limits set by the act. But, as might have been expected, the civil docket of district courts had to suffer as a result of the Speedy Trial Act. While it may be true that it takes no more time to try a case now than later (which, I take it, reflects the view of the drafters of the Speedy Trial Act), having to give priority to criminal cases in the manner specified by the Speedy Trial Act has made it difficult to schedule cases on the civil docket with regularity. Thus it has indeed become necessary to look for ways to make the entire litigation process more efficient; this certainly calls for a review of the role of U.S. magistrates. Indeed, the Speedy Trial Act planning groups of the Nation have asked for the creation of over 50 new magistrate positions and an increase in magistrate jurisdiction, so as to relieve pressure on the dockets of the judges of the district courts. But it is for Congress to determine whether members of the public will be better served by a system that relies more heavily on the use of magistrates and, if so, what particular types of dispute should be placed before magistrates.

At first glance there seems to be little reason to be concerned with an increase in magistrate jurisdiction, due to the trend toward the use of full time magistrates and the desire of their performance in recent years. However, the increase in magistrate jurisdiction must be seen against the background of other proposals for alteration of the jurisdiction of the U.S. district courts. The ultimate question to be asked and answered by this committee and the Congress, is whether the people will be better served by a system which relegates a very limited amount of Federal litigation to an article III judge. The alternative is to attempt to provide greater resources to the district courts, in terms of additional judgeships, and supporting personnel, so that cases can be processed more efficiently within the traditional district court system.

Currently, there are several proposals before the Congress which would greatly alter the role of the U.S. district court in dispute resolution. The several proposals for reduction or elimination of diversity jurisdiction would eliminate a significant percent of the civil docket of the district courts. As the reporter for the National Center for State Courts, Task Force on Courts and the American System of Government, I wrote a monograph and task force report which endorsed the elimination of diversity jurisdiction, but which was concerned with the increase in cost and administrative problems caused the State courts by assumption of jurisdiction over traditional diversity cases. Reduction of diversity jurisdiction would be the remedy least intrusive on the relationship of the public as a whole to the Federal courts. There are also proposals before this committee, in particular bill S. 373, to provide alternative dispute resolution systems, such as arbitration for the resolution of many disputes that are now brought to the U.S. district court; such proposals would drastically alter the function of the district courts in dispute resolution in the Federal system. The magistrates bills represent a middle road between the elimination of some of the civil docket, as in the diversity proposals, and the freeing of cases from the adversary system, as in the arbitration proposal. Senate bill 237 must be understood as a part of the process of altering the Federal dispute resolution system.

The task force on courts in the American system of Government noted that there were six basic questions that had to be addressed in either formulating or evaluating alternatives to the traditional adversary system. [The task force report may be found in National Center for State Courts, "State Courts: A Blueprint for the Future" at 179 (1978).] They are as follows: First, whether the system is designed to offer a qualitatively better method of dispute resolution or whether it is designed primarily to relieve congestion in specific courts. Second, whether greater societal return will be produced from investing economic resources in the expansion of an existing adjudicative process or experimentation with a new process. Third, whether

we will free disputes from the rule of law by placing them before tribunals which are not subjected to strict legal rules and traditional forms of judicial procedure. Fourth, whether the new system, in practice, will result in the creation of "second class courts" to which disputes considered unimportant by a majority of the populace are confined. Fifth, whether the creation of the new system will alter the traditional function of existing courts. Sixth, whether existing governmental departments or agencies have the functional competence to administer a proposed new system. Let us briefly examine the way that these questions apply to the proposals before the Judicial Committee.

It is critical for the committee to determine whether it wishes to offer a "better" method of resolving disputes within Federal jurisdiction, or merely a quicker method of resolving cases before the district courts. With the magistrates proposals we are concerned only with relieving congestion, S. 237 is not designed to create a new form of dispute processing divorced from the traditional adversary process. Because we are worried about district court congestion, it is important to note that the appeal of magistrates' decisions to the district courts would reduce the docket clearing benefit of the new system to some degree. Currently, the appeals from magistrates' decisions offer little additional work for the district courts because of the limited jurisdiction of the magistrates. If magistrates try a wide variety of cases, we can expect that the appeals will increase correspondingly. District courts will have to learn to operate as one judge appellate courts.

The second question we must ask when considering an alternative dispute processing system is whether the return on time and money spent on the new system, in terms of the amount of justice produced, justifies the expenditure. Economic analysis teaches us to focus on the concept of scarcity when making such decision; there are not enough goods or services to fulfill every need, or for the adoption of all seemingly meritorious programs. The concept of scarcity shows us that the essence of decision making is resource allocation. One must assume that there is only a finite amount of money available for Federal expenditures in general, and for the judicial system in particular. Thus, we must ask whether the expenses incurred by providing for an increased number of full time Federal magistrates, with supporting personnel such as court reporters and marshals, or creation of an entirely new arbitration system will produce a greater return to society that would increase any funding for the existing systems. I do not believe that this type of decision making analysis has been engaged in to date. For this reason I strongly recommend against funding any system wide proposal, such as arbitration, until the Congress receives a complete analysis, in terms of cost and efficiency in processing of cases, of the new magistrate system.

The third, and most fundamental, question that we must ask is whether the creation of a new system will release disputes from the "rule of law". It has become quite fashionable to cite Dean Rosco Pound's lecture on the problems of the adjudicative system when arguing for what are popularly known today as "alternative dispute resolution systems". But Pound never endorsed the freeing of significant disputes from the traditional adversary process, although he advocated the streamlining of the adversary process. Dean Pound warned that there was little that we could do about what he called the first "universal" cause of dissatisfaction with the legal process—"the necessarily mechanical operation of rules and hence of laws." [Pound, "The Causes of Popular Dissatisfaction with the Administration of Justice" (1906), reprinted in 35 F.R.D. 273]. Pound noted that the desire to have "justice without law" seems eternal but unattainable, it dates back at least to the practices of Athens in the Teutonic Moots. Some proposals before this committee call for totally new systems of dispute resolution, such as arbitration, that would release cases from the rule of law. One need only examine proposals for system-wide arbitration, such as those contained in S. 373, to see how that result would occur. That particular bill would create a system by which the arbitrator would be able to resolve disputes in a manner that is not subject to the rules of evidence and procedure; these decisions which would be based on an ad hoc assessment of a variety of factors that would be difficult, if not impossible, to review. For that reason, the bill would allow for trials de novo before district courts; this trial de novo system will only add complexity to the dispute resolution process. It must be remembered that the current overflow of court actions is attributable in part to inaccurate assessments of the probabilities of winning at trial; there is no reason to believe the parties would be any more likely to choose wisely when deciding on whether to seek a trial de novo rather than an "original" trial. I am opposed to the arbitration proposal because I believe in a system that is dependent upon those mechanical rules known as laws. Under the adversary system society establishes the guidelines for dispute resolution rather than leaving them subject only to the

wisdom of a single individual, such as an arbitrator hired by contract under the provisions of the S. 373 proposal. To the extent that there are such proposals before the Senate, I am pleased to see that they exclude most civil rights actions from the arbitration plans; I do not believe that society would be well served by a system that allows a nonjudicial adjudicator to make an assessment on the worth of a constitutional claim, even if all of the parties to a specific arbitration are pleased with the result. All of society has an interest in insuring that constitutional claims are brought before an article III judge who, by the nature of his position, has a special responsibility and dedication to the protection of the constitutional rights of all Americans.

I have spent some time raising the question of releasing of disputes from the rule of law, without yet talking about the magistrates bill in these terms. Let me now explain the changes in S. 237 that are necessary to ensure that the rule of law is effectuated rather than subverted by the new a magistrate system. I have two recommendations in this regard: First, that appeals from magistrates' decisions constituting final judgments proceed to the U.S. court of appeals, rather than to the district courts; second, that magistrate jurisdiction be limited so as to exclude consideration of some, if not all, civil rights actions, and criminal cases where the Department of Justice seeks consecutive sentences for a defendant that may exceed that for a single misdemeanor.

The most important change that needs to be made to S. 237, in my opinion, is a change to have appeal from final judgment in cases before a magistrate go directly to the U.S. court of appeals, instead of the district court. As I have already mentioned, the increasing appellate workload of the district courts would in itself tend to impair the ultimate goal of this magistrates act, the lessening of caseload congestion at the U.S. district court level. But more importantly, the district court appeals system denies the litigants a key right of the adjudicative process, that of having a right to appeal to a panel of judges that will collectively consider whether reversible error was committed in the trial process. While the requirement of a panel of judges on appeal may not be a constitutional necessity, it has been virtually the uniform judgment of the State and Federal Government throughout our history that appellate systems should involve ready access to a panel of judges rather than a single judge, although some States have used a trial court-appellate division system. Under S.237 and H.R. 1046, the parties would have to decide at the time of referral to a magistrate whether they wished appeal to lie to the U.S. court of appeals instead of the district court. This would require unanimous consent at the time of the referral, and the decision over appellate rights might well be used as a bargaining point between the parties in their negotiations over whether to settle their case, try it before a magistrate, or try it before a judge of the U.S. district court. Yet, all of society, not just the litigants in an individual case, have an interest in insuring that the Federal adjudicative system is designed to operate under well defined rules of law that have been established by society through its legislative bodies. Under the current magistrate jurisdiction proposals we may create what I would term "one court house adjudication." In many districts, particularly the smaller districts, the magistrates and judges will have to have a close working relationship if the expanded magistrate system is to operate. Magistrates are dependent for the assignment of their caseloads, and continuation of their positions, on the district judges; the district judges are dependent upon the magistrates cooperating with them in the assignment of jurisdiction and the handling of cases. Thus, there is at least a chance that magistrates and judges in a single district will tend to adopt a single view of how certain types of cases should be treated, and the preferable resolutions of certain types of disputes. This may well mean that there is no meaningful appeal from a magistrate's decision, at least in a smaller district, because the district judge will almost certainly affirm the decision of the magistrate. Indeed, the magistrate may well have made his ruling with an eye to the preferences of the district judges to whom he is responsible. Proponents of these bills might claim that such problems can exist in the relationship between a U.S. district court and a U.S. court of appeals, except that one would have to turn ones eyes from reality in order to do so. The judges of the U.S. court of appeals and judges of the district courts do not have any necessary mutuality of interest in terms of mutual support or organizational relationships. To the contrary, the judges of the district courts and the court of appeals have very distinct impressions of the relative responsibilities of judges in the trial and appellate processes. One need only witness the division of judges regarding proposals for sentencing review in the Federal system to appreciate that there is little danger of a "one courthouse" syndrome developing in rulings between the U.S. district judges, or magistrates, and the U.S. court of appeals. A proponent of the bill act may claim that that act solves this problem by allowing for appeal to

the U.S. court of appeals from the district court. However, S.237 does not provide for appeal from the district judge to the court of appeals; it provides for filing a petition for leave to appeal to the court of appeals. Few persons who have worked with a court that exercises discretionary appellate jurisdiction, either by way of leave to appeal petitions or writs of certiorari, believe that petitions for discretionary review receive the same intensive consideration as do papers filed in connection with an appeal as of right. Even if an appeal as of right is dealt with summarily, there is the assurance that the adjudicative system has mandated that the appellate in the appeal of their merits.

It is especially important that sentences imposed by a magistrate in a criminal case be reviewed by the U.S. court of appeals. We do not yet have legislation authorizing the review of sentences imposed by a U.S. district court, but we need not get involved with that problem in order to settle this issue. Given the mutuality of interests between a U.S. magistrate and a U.S. district judges, it is possible that the district judge will not rigorously review the sentence imposed by a magistrate in a given case; this practice might be prevalent among those trial judges who believe that there is no one better suited to determine a permissible sentence than the person who is charged with the responsibility of conducting the trial. If Congress does not specify whether or not the sentences imposed by the magistrates are reviewable by a U.S. court of appeal, even if review is only upon petition for leave to appeal from the district court, the court of appeals judges will have to resolve this issue without the benefit of congressional guidance.

My second proposal to ensure that the rule of law is adequately protected within an expanded magistrate system is for the committee and the Congress to give consideration to excepting some classes cases from magistrate jurisdiction. The most important point I want to stress here is that the determination of what types of cases should be excepted from magistrate jurisdiction is a decision to be made by Congress, not by the judiciary. It is the responsibility of the Congress, not the Supreme Court or any subsidiary institution in the judicial branch, to determine the extent of Federal court jurisdiction and the jurisdiction of any specific level of Federal tribunal. There is certainly nothing wrong with Congress sharing this decisionmaking authority with the judiciary, but this fact should not blind the Members of the Congress to their institutional responsibility to determine the parameters of Federal jurisdiction. If some cases are considered unworthy of consideration by the U.S. district courts, they should be exempted from the scope of Federal jurisdiction. For those cases are seen as proper subject for the Federal courts, it must be determined whether each specific type of case is properly protected by a given type of forum available in the Federal court system. If the available forums were those of (1) arbitration, (2) magistrates courts, or (3) U.S. district courts, then Congress should categorize the cases as follows: (1) Those disputes that are considered so unimportant as to be ordered to be resolved without legal rules through an arbitration process not subject to the rules of procedure or evidence; (2) disputes that should be subject to traditional adjudicatory procedures but which do not need to have an article III judge involved in the initial adjudicatory process, so that they may be assigned to magistrates; (3) disputes that are sufficiently "important" to require the use of a judge appointed in conformity with article III. When we face the question of allocating jurisdiction in this way we appreciate that there is a societal interest in how the allocation is made that goes beyond the interests of the litigants, or even the interests of the members of the judicial branch. I do not pretend to know exactly how Congress should make this allocation of jurisdiction but I do not believe the Congress has considered fully whether it should exempt certain cases from magistrate jurisdiction due to the perceived public interest in the litigation. While I will not offer a solution to this problem, I will inform you of my initial conclusion concerning the limitation that should be imposed upon the consent jurisdiction of the magistrates. I believe that most civil rights actions, with a possible exemption of some employment discrimination actions which involve solely matters of fact determination, should be tried before an article III judge. Those judges are best suited to make the basic determination of when constitutional liberties are endangered by specific actions. I note that the proposal for arbitration in S. 373 would exempt certain civil rights actions from arbitration, presumably because of the high public interest in making sure that these are subjected to adjudication in conformity with all traditional adjudicatory procedures as well as substantive legal rules. In the criminal area, I would exempt from magistrate jurisdiction all cases in which the Government seeks consecutive sentences that would total more than the allowable misdemeanor punishment for a single offense. At least one Federal circuit now allows magistrates to impose consecutive sentences which go beyond their apparent jurisdiction limitations [see, *U.S. v. Manjarrez-Arce*,

382 F. Supp 1046 (D. Cal. 1974) affirmed 504 F.2d 426 (9th Cir. (1975), cert. denied, 419 U.S. 1112.] I believe, as apparently do the Members of Congress, that serious punishment, in terms of incarceration for over 1 year, should only be imposed by a district judge after a full trial in a true article III court.

The fourth basic question concerning creation of a new dispute processing system concerns the true nature of the system. One might assume that he knows what magistrates do, but it is not clear under current practice or the Senate and House proposals, whether magistrates are primarily assistants to the district judges or whether they are to operate primarily as independent trial judges. I am not opposed to the exercise of greater trial jurisdiction by the magistrates but, if magistrates are to preside over a new class of Federal court, I would like them kept as independent as possible from all outside influence, including that of the district judges. It is my belief that a magistrate who is insulated from acting as an assistant to the district judges is more likely to make independent rulings when presiding over cases that come within his basic jurisdiction.

The American Bar Association "Standards on Court Organization" section 1.12(b) endorses the use of "judicial officers" both for subsidiary functions in the processing of cases to be tried by a trial court judge and for presiding over trials of minor civil and criminal matters. However, the standards do not take a position on whether the same judicial officers should be involved in both processes; it seems clear that there are disadvantages to having persons who are perceived, by themselves and others, as judicial assistants presiding over trials of a wide range of criminal and civil cases. For this reason, the National Advisory Commission on Criminal Justice Standards and Goals, in its "Standards on Courts," took the position that there should only be one level of trial judge. In its commentary the Commission stated any division of trial jurisdiction "would result in the processing of less serious offenses retaining its present inferior status and insufficient efforts being made to deal with the matter adequately." This position was taken over the objection of the Commission's task force, headed by then professor and now Assistant Attorney General Daniel Meador; the task force recommended the use of judicial officers who would have been subject to the control of trial court judges and who would have acted primarily in assisting the judges in the processing of criminal cases. I would take a position in between that of the seemingly open ended suggestion of the ABA standards and the "only one type of judge" position of the National Advisory Commission. I believe that Congress should designate two classes of magistrates. One class of magistrates would assist trial judges with the processing of civil and criminal cases as is currently done, in terms of pretrial and motion practice. A second classification of magistrates, all of them full time magistrates, would preside over trials of minor civil and criminal cases, as specified by statute. The second group of magistrates would comprise a system of minor courts, in fact if not in law; but they would be acting with all of the safeguards of traditional adversary procedure and with appeal lying to the U.S. court of appeals.

The fifth question that we ask in determining the wisdom of a proposal for an alternative system is the extent to which it will alter the traditional judicial function. The sixth question concerns whether any department of the Government has the competence to administer the new system. These two questions come together in terms of the magistrate jurisdiction proposals. It is clear that the traditional functions of the U.S. district courts will be greatly altered by this bill, and particularly if the "companion" proposals for alteration of diversity jurisdiction and the creation of an arbitration system become law. If all such proposals would be enacted, U.S. district judges would hear only major criminal cases and a few civil cases, usually involving major economic institutions. Most minor Federal question, contract, or property cases would be dismissed from the realm of the district judge and sent to arbitrators. Most civil rights cases and minor criminal offenses, both of which involve the less economically powerful members of our society, would be given to the magistrates. This change would not only alter the traditional function of the district courts, it would also constitute a wide ranging experiment to determine if someone other than an article III judge will be able to process fairly civil rights and minor criminal matters and whether arbitrators, acting outside of the rules of law and procedure, will give justice to "minor case litigants." It may be that this will be the best of all worlds, but I find no reason for engaging in such wide ranging experimentation with the judicial function at this time. Instead, I would caution a moderate approach and make two specific suggestions: (1) That the Congress approve wider magistrate jurisdiction under the S. 237, if it is modified as I have suggested; (2) that the Judiciary Committee postpone for several years any consideration of truly new forms of dispute resolution such as system wide arbitration or mediation. Your consideration of limiting diversity jurisdiction in the Feder-

al courts need not be postponed for years, but it might be advisable to wait until you can learn the results of your actions in enlarging magistrate jurisdiction before moving to elimination of diversity jurisdiction. Arbitration proposals can be deferred until such time as you have concrete data regarding the results of the new magistrate system, even if that takes several years.

On the assumption that much, if not all, of my advice will be disregarded and that you will proceed to recommend the adoption of the magistrates bill basically as written, I would make the following "technical" suggestions regarding the S. 237 provisions. I believe that there are several provisions of the house proposal to extend magistrate jurisdiction, H.R. 1046, which are superior to the S. 237 provisions and which should be incorporated into a senate bill of this subject. First, I would suggest that section 2 of the proposed bill use the last sentence of section 2 of the House bill relating to the amendment to Section 636 of Title 28 that states: "When there is more than one judge of a district court, the designation shall be by concurrence of a majority of all judges of such district court, and when there is no such concurrence, then by the chief judge." Second, I believe that the new paragraph "(c)(2)" that follows that sentence in H.R. 1046 should be adopted as part of the Senate bill because it more clearly protects the voluntariness of the choice to appear before the magistrate than does the corresponding section of the S. 237 [new section (c)(5)]. Third, I suggest that the Senate bill include detailed provisions concerning how magistrates are to be selected, whether or not the committee chooses to adopt the provisions contained in section 3 of H.R. 1046. While it is permissible to delegate this form of appointment power to the judiciary, I feel that society is not well served by handing over open-ended discretion to even so fair a body as the Judicial Conference of the United States. It may be that the appointment provisions in H.R. 1046 are not ones that the Senate would agree with, but those provisions do represent the basic proposals of the Judicial Conference. Fourth, the Senate bill should include a provision such as section 5 of H.R. 1046, which calls for a detailed report by the Director regarding the experience under expanded magistrate jurisdiction. This provision correlates with my recommendation that no further action be taken on system wide arbitration or mediation bills until you determine the effect of the expanded magistrate jurisdiction. The last, and most technical, of my suggestions relates to section 2 subparagraph (c)(6) of H.R. 1046, regarding the use of court reporters by magistrates. It has been my experience, as a reporter with two Speedy Trial Act Planning Groups, that two of the most serious problems faced by magistrates in the trial process are the lack of court reporters and the lack of U.S. marshals to assist them with the trials. The specification that court reporters are to be provided for magistrate trials should facilitate both the processing of cases before the magistrates and any appeals from decisions of the magistrates.

[See appendix for additional submission of Professor Nowak.]

Dr. NOWAK [continuing]. I am a professor of law which may not give me too much practical experience with the magistrates system, but I have headed a study group for the National Center for State Courts on courts and the governmental structure and I also served as reporter for two Speedy Trial Act planning groups, the planning groups for the Eastern District of Illinois and the Southern District of Illinois.

Based with my experience with them, I have developed some serious concerns about these bills, which I think Senator Thurmond tied together very nicely in his statement on the companion bills to relieve problems in the Federal docket.

Let me briefly state my concerns. They center primarily on S. 237. Let me do this and describe the problems that were raised by the National Center for State Courts task force regarding courts and the American system of Government with the alteration of the State processing system with many proposals for new types of courts or arbitrations, which involves the companion bill, S. 373.

The first point which we raised is that the legislative body considering such changes should focus on whether it wants to create a

better system of dispute resolution or whether it simply wishes to relieve congestion.

Here we have a situation where all we want to do is relieve congestion. That is very important to keep in mind. You do not want to name an arbitrator or a magistrate that is going to do a better job than the traditional adversary trial system. That is, it is not like suggestions in several States for the neighborhood legal justice centers where there will be community participation in solving community disputes.

That is really important, because the second question that we would suggest that for all legislative bodies considering such changes relates to doing an analysis in terms of efficiency of the use of resources. The idea is that anyone proposal could produce greater a relief in congestion; one could produce more justice if you use your resources to expand an existing system as opposed to creating a new system.

Sometime today, in hearing testimony, I have had a feeling that magistrates' courts do not need court reporters and that magistrates with jury trials don't need courthouses. But, they do. There must be a large amount of funds for support personnel, and buildings; if you are going to have a second judge or magistrate, you really have these same costs.

The most important question is the third one; the extent to which you release disputes from the rule of law. The essence of our adversary process has been that we enforce society-made rules for how disputes are to be resolved something I mentioned in my written testimony. It has become very popular to quote Dean Pound's lecture on the problems of the adjudicative system when arguing for what are popularly known today as "alternative dispute resolution systems." But Pound never endorsed the freeing of significant disputes from the traditional adversary process, although he advocated the streamlining of the adversary process. Dean Pound warned that there was little that we could do about what he called the first "universal" cause of dissatisfaction with the legal process: "the necessarily mechanical operation of rules and hence of laws." He said that the desire to have "justice without law" seems eternal but unattainable; it dates back at least to the practices of Athens and the Teutonic Moots.

All of us would wish, I suppose, that there would be a group of wise men, whether arbitrators or someone other than judges, that could rapidly solve disputes without all these legal technicalities. But we haven't found them yet. This system has been our primary procedural safeguard.

Well, how does this relate to the Magistrates bill? Really in two ways, the first, and the one of which I consider the most important, is, as Senator Heflin has referred to, the "one courthouse syndrome," under the expanded Magistrates bill, I want to state that I am not an opponent of expanding the magistrate jurisdiction as a general theoretical matter, but I do oppose it in its open ended form.

Let me tie this in with the "one courthouse syndrome." We have appeals only from the magistrate to the district court; we eliminate that which has been historically considered the essence of a fair appeal. That is, that a panel of judges will consider errors at the

trial, the basic fact determination level. While that is not an essential due process guarantee—I am not saying that the Supreme Court would strike that system—but throughout the Anglo-American experience that has been the essence of appeal.

The petition to the court of appeals for the specific circuit is discretionary. Anyone who has worked, whether as a law clerk or a judge, in a court that has discretionary appeal—be it termed “leave to appeal” as in the Senate bill or certiorari in the House bill—knows that such petitions are not examined in the same way as are appeals as of right, wherein you must consider the papers on the merits.

The only real appeal system here, in traditional procedural terms, is to the district judge. I think there is a very severe problem because of the mutuality of interest between the magistrate and the district judge; we will not have the same due process guarantees.

Now, one can say, as has been said, this could get occur between the court of appeals judge and a district judge, except that there is no essential mutuality of interest between them. There is no need for the district judge and the court of appeals judge to have a close administrative or personal relationship in order to get on with business.

I am reminded very much of the complaint which we have all heard from many legal aid and public defender groups that too often the participants they see in the small case courtroom are so dependent upon each other, get on with business, that we don’t really have a fair trial for minor cases or indigent cases.

Here the magistrate is dependent upon the judge for his jurisdiction and his job. The judge is dependent on the magistrate to get things ready for processing his caseload. That, I think, is a very dangerous relationship and a major modification is needed.

I would suggest that you allow for appeals directly to the court of appeals from the magistrate’s decision. I think if we are going to have a new class of Federal court, I do not see anything inherently evil about that, we should treat it as what it is and provide for such an appeal if we are going to be really committed to upholding the rule of law in the Federal adversary system.

As a part of that, I would also suggest that this committee consider assigning specific cases to each part of the court system. The case has been made that there is nothing really wrong, in terms of article III, dealing with these problems in the discretion of the court. It seems to me that the first responsibility in creating Federal jurisdiction under article III is clearly that of the Congress if, for instance, we are to have three separate forums. Let us assume that our forums are: Trial before a district judge, trial before a magistrate or arbitration; it seems to me that, in terms of institutional responsibility of the country, under article III, your article I, that you should be making the decision what type of cases go to each. Which are so unimportant that they can be totally freed from the rule of law and sent to an arbitrator; a great many people with small claims would think that their liberties would be involved in some of those.

Second, you might decide a certain type of cases needs to be tried within the judicial rules of law and procedure but which you do not

think requires a judge with qualifications of an article III judge, and perhaps that special dedication to the defining and upholding of constitutional liberties; assign those cases to a magistrate.

Third, the remaining cases, of course, would go to the district judges. I think that if we do this division in the Congress rather than leaving it to the judges and magistrate you will understand the complaints of those who would be relegated to those lesser forums.

Finally, I think that if we are going to create any kind of second tier of courts, we should do so very formally. We should create independence in those judges by freeing them from administrative duties. I would suggest that we even title them, perhaps, "associate judges." There is nothing wrong with that in terms of the Constitution; Congress is free to create courts other than article III courts. Judges of the tax court, for instance are titled "judges." I would call the full-time magistrate who is going to try cases an "associate judge," and have him only try cases. This way he will be more independent.

Then I would feel the other magistrates, full or part-time, could assist the judges in the processing of the caseload, as they do today. In that way you would have a more efficient processing of cases for the article III judge. You would have independence in the second level court and appeal would lie to the court of appeals. I think that we could do a much better job within our adversary process; I would like to see us try that sort of moderate approach before we go further with nonadversary proceedings such as arbitration.

Thank you very much, Senators.

Senator DECONCINI. Thank you very much.

Senator HEFLIN.

Senator HEFLIN. Professor Nowak, you mention that arbitration as being outside the rule of law. Of course, it provides for a de novo appeal. Would you recite what you see as some of the errors of that and what or how they can arise?

Dr. NOWAK. Well, even with de novo appeal you very clearly have the problem of the "one courthouse syndrome," or worse, because the arbitrator is dependent for each contract upon the district judge. The district judge-arbitrator relationship may be much too close.

Second, there will be severe problems with delay. I was surprised to note, in the statistics from Pennsylvania container, in the committee report, that in cases in which the arbitrator did issue a judgment, virtually 50 percent went to a trial de novo—19 did not, 18 did. So, for 50 percent of the cases in which there was an arbitrator award all the arbitration did was to slow down the process. Those minor litigants faced increased cost rather than speedier adjudication. I think they were not well served. Most importantly, to quote Dean Pound again, they were totally released from the "rule of law."

On the way down here I was reading a recent "Harvard Law Review" article that was a reprint of Lon Fuller's commentary on adjudication. Fuller reminds us that you can call anything adjudication that has some sort of adversaryness; a trial before a judge or a father solving a dispute between two children is adjudication. One can't really say an arbitrator is an adjudicator, so there is

your "rule of law"; that arbitrator was set up with no rules to govern procedure to bind him. That is very, very important, I think.

Senator HEFLIN. You mentioned a report from the Philadelphia, Pennsylvania Bar Association. I have here a copy of this to which is attached a memorandum from "Congress Watch" in which they recite numbers of problems and suggestions for improvement detailed in the evaluation. Pages 4 through 11 demonstrate the need to continue experimenting with arbitration [in the three districts of Pennsylvania, California, and Connecticut], before extending the program nationwide.

Now that is Congress Watch's evaluation of it. Do you have any objection if we enter it in the record as a part of your testimony, this study which shows some of the problems that they had with arbitration in the Pennsylvania Court.

Dr. NOWAK. I would have no objection.

Senator DeCONCINI. Without objection, so ordered.

Senator HEFLIN. Now into the Arbitration bill, you read this Arbitration bill?

Dr. NOWAK. Yes, Senator, I have the committee report.

Senator HEFLIN. I notice that it refers to arbitrator throughout and then in the end speaks of arbitrators. Is my understanding correct, that you would have only one arbitrator or a panel of arbitrators or that you would have whatever the district court judge desired for you to have?

Dr. NOWAK. Senator, I think it is clear, normally you could, or would have only one arbitrator. The bill is phrased, I think, in an unclear manner. In one section of the bill, talking about certification of arbitrators, it says that each court is able to certify arbitrators, a seemingly an unlimited number as a pool in each district.

But then, when it talks about "arbitrators" in a hearing, sometimes in plural and sometimes in the singular, which seems to indicate that there could be any number. I would expect most commonly only one arbitrator. Of course, the objections to arbitration increase as the number of arbitrators decrease.

This is one of the points where I feel it critical that Congress makes the determination. You do not really want cases set with just one person to resolve them, at \$50 a case. If you do not want that you should specify an arbitration panel. Of course, with a lower number you are indeed ending a rule of law for these disputes that involve minor case litigants.

Senator HEFLIN. Well, under this arbitration bill it makes reference to the fact that an arbitrator may consider any evidence that he considers relevant and trustworthy, however, the Federal Rules of Evidence may be used as a guide to admissibility, which I gather means that the arbitrator can determine a case the way he wants to, informally, without having to follow rules of evidence if he does not want to, or if he wants to, he may use it. Is that a correct interpretation?

Dr. NOWAK. That is how I understand it. There cannot be appeal where in our traditional sense there are no guidelines at all.

Senator HEFLIN. I notice that right above that provision the bill makes reference to the Federal rules of civil procedure and refers

to rule 45. I believe there is a statutory rule of construction that if reference is made to a specific portion, it excludes the rest.

Dr. NOWAK. That would be the normal method of statutory construction, indeed, in both the State and Federal courts, the one that is commonly called, I believe, the rule of *expressio unius est exclusio alterius*. I won't try to go on with the rest of it in Latin. The civil procedure rules would be up to the sole discretion of the arbitrator.

Senator HEFLIN. If the arbitrator followed this language of this act, and interpreted it that way, then arbitrators would not have the right to use certain rules of civil procedure in trying cases such as requests for admissions, physical and mental examinations, or other rules of the Federal rules of civil procedure.

Dr. NOWAK. Certain they don't seem to have the right to adopt them directly since there is no law governing them. I suppose an arbitrator might well assert that he can make up his own rules. Of course, if he does, then to do so is going to cause some delay or expense to the party. I assume we will see any number of appeals in both the district and the appellate courts concerning this point of whether it is lawful for an arbitrator to adopt those rules. It is an added expense he can put people to; so, I would expect to see litigation on that.

Senator HEFLIN. Most contractual arrangements for arbitration make reference to an existing body of rules such as the rules of the American Arbitration Association, or some other particular reference.

Under this Arbitration bill is there a rulemaking power that you see for each individual district court to have its own set of ground rules for arbitration?

Dr. NOWAK. Certainly there will be the ability to have the courts define what cases go to arbitration, and to name the arbitrators, but the arbitrator seems totally on his own, when the parties are before him, as to what procedure will be employed. There is no reference to any laws, in this bill, that would bind the arbitrator.

Senator HEFLIN. Well then, clearly if that is true there cannot be a concept of justice under the "rule of law," under this arbitration procedure.

Dr. NOWAK. I would certainly agree with that position, Senator Hefflin.

Senator HEFLIN. Do you see some problems about people that are—I would assume that the selection of the people to become arbitrators would be done by the court. I assume they would be coming from the legal profession. Would that be a normal assumption?

Dr. NOWAK. I assume so.

Senator HEFLIN. Do you see ethical problems arising with regard to this system?

Dr. NOWAK. I think there will be some problems in that sense if the arbitrator is taking cases that involve attorneys or parties against whom he might have contrary interests in his firm. There certainly are problems under the Canons of Ethics. They happen less often with part-time magistrates because they are not final adjudicators and, as they have a more well-defined docket, they can

control it. I assume that the courts would try and take care of this on a case-by-case basis.

Senator HEFLIN. Is there any provision in the bill that you feel would allow for the guarantees of strike from an arbitrator or even allows for a grievance process.

Will it just sort of be left up to each district however it wants to run it with regards to what arbitrator you get from a list?

Dr. NOWAK. I take it, under the bill, that is left totally to the district court. They can be hired by the case. I imagine the district court simply would assign them. Of course, the district courts have a fair degree of flexibility and there is no one controlling them now. I assume they would have more so with the arbitrators. I see no particular guidelines, here, as to how arbitrators are selected.

Senator HEFLIN. Normally, in labor relations, you agree on an arbitrator, but there is no guarantee that you can agree on an arbitrator under this bill.

Dr. NOWAK. Not that I see. I believe the statement from the American Arbitration Association indicated that the difference of procedures on employment of the arbitrators is that they can object to the naming of an arbitrator. As they found it, this is not a type of arbitration that they commonly use and endorse.

Senator HEFLIN. No further questions.

Senator DECONCINI. Dr. Nowak, you do agree from looking at the Arbitration bill that it is fair to say that it is an experimental effort on behalf of Congress and the judicial system?

Dr. NOWAK. Yes, Senator.

Senator DECONCINI. You also concur in my observation, that obviously the arbitration bill is nonbinding, and there is trial de novo for any party. So there certainly is an adequate safeguard that no one is going to be forced to accept the finding of the arbitrator.

Dr. NOWAK. Well, I am afraid I would not concur in that, Senator. You still have the right to trial. But, in some ways it is like saying trial court orders aren't binding unless you appeal from them.

Senator DECONCINI. You do agree that it provides for a trial de novo?

Dr. NOWAK. It would certainly provide for a full trial if you—

Senator DECONCINI. If you ask for it. Despite the fact that it is an experimental effort, you still do not believe it is proper to experiment with our court system to see what works best when it potentially could infringe on a litigants rights. Is that one of the fears that underline your opposition to the bill?

Dr. NOWAK. Very much so, Senator. It is a point which professor—excuse me, now Attorney General—Meador and I have disagreed on any number of occasions. I think that we should experiment with the least number of live human beings possible when all we are trying to do is relieve congestion.

I think we ought to see how diversity case reductions and the Magistrates bill will work before we send any people off to arbitrate—5 years worth of people.

Senator DECONCINI. You answered the question. Thank you very much.

Dr. NOWAK. Thank you.

Senator DeCONCINI. Our next witness is Charles Halpern, professor of law, Georgetown Law Center.

Professor Halpern, your full statement will be printed in the record. Due to time constraints, we would ask you to highlight it for us.

**STATEMENT OF CHARLES HALPERN, PROFESSOR,
GEORGETOWN UNIVERSITY LAW CENTER**

Dr. HALPERN. Thank you, Senator. I will try to be brief. In particular, because this is the second time I have testified before you this week, and I think you are entitled to a summary today, as well.

[The prepared statement of Dr. Charles Halpern follows:]

PREPARED STATEMENT OF CHARLES R. HALPERN

Almost 2 years ago, I testified on a bill to grant adjudicatory authority to Federal magistrates. I am pleased that S. 237, the bill currently under consideration, is a substantially stronger bill than its predecessor. However, in my opinion, some of the basic problems remain. I have prepared my testimony in collaboration with Abram Chayes, Felix Frankfurter professor of law at Harvard Law School and currently a visiting research scholar at the Institute for Public Representation of Georgetown University Law Center. He joins in the views expressed in this statement.

The current bill proposes a significant alteration in the functioning of the Federal courts, creating a new class of quasi-judicial officers with authority to adjudicate disputes between litigants in Federal court. Unfortunately, the bill does not rest on a systematic analysis of the role of the Federal courts and the problems that the courts face in handling their caseload. It is not accompanied by a satisfactory analysis of the bill's impact on the Federal judicial system as a whole. Regrettably, these shortcomings are more significant now than in 1977 since, in the current legislative session, this bill is one of three bills addressed to essentially the same problem.

The other legislation I am referring to are the "Court-Annexed Arbitration Act of 1979", S. 373, and the bill to alter the diversity jurisdiction of the Federal courts, S. 679. Each of these bills is addressed in a different way to the problem of overcrowding and consequent delay in the Federal courts. Each is primarily concerned with those numerous Federal cases involving relatively small sums of money and, frequently, State law problems. They are not addressed to the antitrust, desegregation, or administrative agency review of cases which frequently occupy much of the time of Federal judges.

Assessment of these three bills is further complicated by the fact that Congress recently passed the Omnibus Judgeship Act of 1978 to help deal with the overcrowding problem. More than 150 new judges will take their seats on the Federal bench within the next year, an increase of more than 25 percent in sitting Federal judges. This will make a substantial, although unpredictable, dent in the court backlog. Less predictable still is the cumulative impact of the three pieces of legislation now pending. If the courts' diversity jurisdiction is substantially reduced in this Congress, for example, would a mandatory arbitration system be needed? If magistrates are given adjudicatory powers, will there be a need for mandatory arbitration?

The Federal courts have played a crucial role in developing a body of Federal principles, protecting the constitutional rights of individuals, and setting a high standard for all courts in the Nation. Congress, the bar, and the public have an interest in assuring that this great institution is not damaged. Well-intentioned reform efforts can, of course, impose such damage. I hope that Congress will not pass any legislation affecting the courts in fundamental ways until it has assessed comprehensively the duties of the Federal courts, the role that the Federal courts ought to play in our society, and the kinds of cases that the Federal courts should handle. Only after these preliminary questions have been answered should new legislation to alter the fundamental structure of the courts be initiated.

I would urge that these three bills be considered together. I do not believe that a case has been made out for the passage of all three, nor do I believe that the relationship of the three bills has been adequately explored. In my view, the bill which deserves priority attention is S. 679 which would focus on the Federal courts' jurisdiction. It is this bill which deals frontally with the question of which kinds of

cases the Federal courts ought to be handling. If diversity were abolished or significantly cut back, it would then be time enough to consider whether the case load of the courts, after passage of such a bill, justified the innovations in the other two bills.

This is not to say that the Federal court system does not need careful scrutiny and overhaul. In fact, the ordinary citizen does not have adequate access to the Federal courts; and recent Supreme Court decisions have cut down on access to the Federal courts in a number of ways. In my opinion the most urgent matter relating to the Federal judiciary is improving access—by removing barriers to standing, by facilitating class actions, and by providing attorney's fee awards to successful litigants who vindicate important public policies. I hope that the Judiciary Committees in the two Houses will turn to these access issues promptly, and not put unwarranted emphasis on efforts to facilitate the handling of relatively minor disputes in the district courts through use of appended decisionmakers.

Despite my serious concern with hasty, piecemeal action, I understand that this subcommittee is likely to move promptly to consider S. 237 and S. 373. In the remainder of my testimony I shall assume that these bills will be marked up by this subcommittee in the near future. I will, therefore, address my comments to some amendments which I feel are urgently needed. A primary objective in the amendments which I shall propose is to harmonize the two bills with each other and to bring their provisions into conformity with the President's policies and procedures in regard to judicial selection—a commitment to open processes, broaden public participation and integrating the Federal courts in terms of gender and minorities.

MAGISTRATE ACT OF 1979—S. 237

A. SELECTION OF MAGISTRATES

1. INTEGRATING THE FEDERAL COURTS

President Carter has established as a priority concern assuring that women and minorities are given a fair share of positions on the Federal bench. The President's policy should also be reflected in the selection of magistrates. Congress should establish as a criterion for selection of magistrates, following the President's Executive Order 12097, November 8, 1978, "a demonstrated commitment to equal justice under law." In addition, the bill should be amended to include the following language:

"Congress (i) takes notice of the fact that women and minorities are underrepresented in the Federal judiciary relative to the population at large; and (ii) directs that the merit selection panel, in recommending persons to the district court, and the district court in selecting magistrates, shall give due consideration to qualified women, blacks, Hispanics and other minority individuals."

The importance of this provision is highlighted by a report recently published by the Southern Regional Council indicating that the Federal courts in the deep south have extremely poor employment records with respect to women and minorities. This evidence of inattention to discrimination in hiring underlies the importance of a congressional expression of concern with the gender and race composition of the Federal magistracy.

2. STATUS OF MAGISTRATES APPOINTED PRIOR TO PASSAGE OF THIS ACT

A number of magistrates now sitting were appointed for reasons having nothing to do with their capacity to discharge the decisional responsibility of a Federal judge. Such magistrates should not be given case dispositive authority under this new legislation, unless they are reselected to discharge such responsibilities. In the reselection process, sitting magistrates should be reconsidered by the merit selection panels, just as new magistrates are, with due attention being given to gender and race considerations.

3. PART-TIME MAGISTRATES

Because of problems of conflict of interest, part-time magistrates should not be given case dispositive authority. The bill recognizes the conflict of interest problem (sec. 2(2)(c)(1)). But the proposed response to the conflict problem is unsatisfactory, since the prohibition on law practice would disqualify virtually all lawyers who would otherwise be qualified to serve as part-time magistrates.

4. MERIT PANELS

This bill should contain language stating that the merit panels should be broadly representative of the population of the district in which the district court sits. Specifically, it should be adequately balanced in terms of gender, racial minorities, and lawyers who come from a public interest law background where their primary efforts have been to serve the poor and other inadequately represented groups.

B. CONSENT PROCEDURES

There is an obvious and legitimate concern that the parties' consent to have a case considered by the magistrate will not be wholly voluntary. In a variety of subtle ways, a district judge can strongly influence the parties' decision to have a matter handled by a magistrate. The process established for consent should insulate the decision from judicial pressure to the extent possible; the judge ought not to know which party has withheld consent and brought the case before the judge. There is no justification, either, for different consent procedures in civil and two different kinds of criminal cases as proposed in the bill. The approach of section 7(2)(b) regarding misdemeanors that are not petty offenses (p. 6, 1.11), calling for a blind process and written consent, should be adopted for all matters.

C. THE PROCEDURES OF THE JUDICIAL CONFERENCE

The bill would delegate to the Judicial Conference important responsibilities in establishing the magistrate system. Indeed, the legislation only creates a framework and leaves the details to the Judicial Conference and to the various district courts. The legislation should specifically direct the Judicial Conference to adopt rules for the implementation of this legislation through an open process, giving full opportunity for participation and comment to the various elements of the legal profession and to interested members of the public. The rulemaking provisions of the Administrative Procedure Act have not as yet been applied to the Judicial Conference, but this legislation should make clear that the policies of public participation and openness in the APA are the fundamental guidelines under which the Judicial Conference should undertake its important rulemaking business.

D. RELATIONSHIP OF MANDATORY ARBITRATION TO MAGISTRATES' JURISDICTION

These two pending bills hold open the possibility that the district judge himself would sit at the third tier of decision within the Federal judicial system. The magistrate bill should explicitly state that any matter which has been subjected to mandatory arbitration should not be heard by a magistrate. Trial de novo should automatically be before a district judge.

These two bills hold much possibility for confusion and widely varying practices among the district courts. The suggested provision would avoid the creation of a judicial system with five levels of adjudication and review.

E. OBLIGATION OF CONTINUING STUDY

The legislation should direct the Federal judicial center and the administrative office of the Federal courts to subject to continuing study the administration of the magistrate system, including gathering data on the process by which magistrates are appointed, the race and gender of magistrates, and the level of satisfaction among lawyers and their clients with the functioning of the system. Annual reports to Congress on such matters should also be required.

COURT-ANNEXED ARBITRATION ACT OF 1979—S. 373

A. SELECTION OF ARBITRATORS

The bill does not provide any guidance in the selection of arbitrators. It also omits the delegation to the Judicial Conference of the responsibility for "standards and procedures" for such selection, which is a feature of the magistrate bill. Section 3(b)(5). The bill should be amended to direct the Judicial Conference to promulgate such standards and procedures. The bill should also include a standard for selection, following the President's lead in judicial selection, that each arbitrator have "a demonstrated commitment to equal justice under law."

Language concerning the race and gender of the persons certified as arbitrators should also be included in the legislation, following the model which I have previously suggested concerning the magistrate bill.

Finally, the bill should clarify whether parties being directed to mandatory arbitration can choose the arbitrator (or arbitrators) themselves, or are to be assigned to an arbitrator (or arbitrators) by (a) the district judge or (b) the clerk. If parties are to have a role in selection, the bill or the legislative report accompanying it should also clarify what happens in the situation in which parties cannot agree on an arbitrator.

B. THE ROLE OF THE JUDICIAL CONFERENCE

As I have previously suggested, the rulemaking responsibilities of the Judicial Conference, pursuant to this legislation, should be exercised through an open process, with ample opportunities for public participation.

The legislation should direct the Judicial Conference to set up rules concerning conflict of interest policy and other ethical issues for arbitrators. It apparently is anticipated that the pool of arbitrators will be made up of practicing attorneys who derive their primary income from law practice. At present there are no generally accepted rules concerning what conflict rules and other ethical principles govern the behavior of arbitrators. The magistrates bill recognized, albeit unsatisfactorily, the problems posed by a decisionmaker in the Federal court system who is engaged in part-time law practice. Obviously, there is a need for some similar provisions in the arbitration bill.

C. TAXING COSTS OF ARBITRATION

There is no justification for taxing the costs of arbitration to a party who requests a trial *de novo* before a district judge. There is no precedent within the Federal court system for legislation which imposes a financial penalty on a litigant for seeking judicial review of a lower court decision. It seems peculiarly incongruous that the only "financial disincentive" of this kind to be built into the Federal judicial system is a penalty for a party who insists on having his case heard by an article II judge. There are constitutional problems with the entire scheme set forth in this legislation; those constitutional concerns are heightened by imposing a financial barrier to seeking a district court trial.

D. COMPENSATION OF ARBITRATORS

While it is desirable that local practices be considered in compensating arbitrators, the Judicial Conference should be directed to establish guidelines for such compensation. In particular, the Conference should assure that the fees paid to arbitrators are adequate to permit lawyers in private practice to undertake such assignments. This does not mean that the top-dollar local market rate for lawyer services should become the standard; but it does mean that rates should not be set so low that only the affluent can serve as arbitrators. Service as an arbitrator should not be a charitable contribution, but an adequately compensated public service.

E. CONSENT TO ARBITRATION

Section 654(a)(1) states that parties can consent to arbitration. The voluntariness of such consent should be assured in the same way consent is assured in the magistrates bill.

F. OBLIGATION OF CONTINUING STUDY

The functioning of the arbitration system should be subjected to the continuing review and reporting which I have recommended for the magistrate bill.

CONCLUSION

The magistrate and arbitration bills, to which I have directed primary attention, will take a number of matters out of the district judge's court room. Whether they lead to a satisfactory form of adjudication, whether they will lead to the most effective utilization of Federal judicial resources, and whether they will in fact save district judges time are all open questions. I hope that in further efforts to alter the procedures and activities of the Federal district courts a more systematic approach is taken, and a greater effort is made to clarify the appropriate role of the Federal courts.

Dr. HALPERN [continuing]. I testified first on the Magistrates bill 2 years ago, on an earlier version. I am pleased that in reviewing

the legislation under consideration by the subcommittee it is a very much stronger bill here than you had in 1977, when it was last under consideration by the subcommittee.

However, some of the objections that I had then remain, and in addition, I think the subcommittee has to confront the legal problems which make it harder to reach a judgment on the Magistrates bill than it was 2 years ago.

An objection I raised previously, I would like to renew, in the sense that this bill does not grow out of a comprehensive review of the Federal court system, the roles that we want the courts to play, the kind of cases the Federal courts are best equipped to handle, indeed, the unique kind of contribution the Federal courts have made and can continue to make to our society.

I think the kind of comprehensive review should precede any legislation which has as its purpose a fundamental shift in any practices or adjudicatory personnel of the Federal courts. I do not believe that kind of comprehensive analysis has taken place.

The new problems which have arisen over the past 2 years to make consideration more difficult are these: First of all, the passage of the Omnibus Judgeship Act of 1978, which created 150 new judgeships. Those judgeships, as you well know, have not yet been filled, and when they are, we will have a very different Federal judiciary and the overcrowding problems that the Magistrates bill is largely directed at will have a different aspect, it may even be unrecognizable, it may not exist.

The other problem that confronts this subcommittee at this time is the fact that there are three bills pending all of which are addressed at substantially the same problem, not identical problems, but they are very much overlapping approaches to the problem of overcrowding, all three have been directed at the relatively small cases frequently involving State law issues which occupy a considerable amount of district judges' time.

I refer, of course, to the Arbitration bill, the Magistrates bill and the Diversity bill.

My own bias in dealing with reform of the Federal courts is admittedly a conservative one. I think the Federal court system as a general matter has served us well, and we should be very cautious in tampering with procedures in the Federal courts and with its personnel.

To my way of thinking, there is a heavy burden on anyone who seeks to alter the Federal court system in some fundamental respect, and to my way of thinking, the burden has not been carried in this case.

Concerning the particular problem in which the Magistrate bill is addressed, that is, the large volume of small cases in the Federal court system, I think that should be addressed more directly and frontally through the approach suggested in the diversity legislation on which hearings were held in the Judiciary Committee last week.

Despite my reservations about the basic theory in the Magistrate bill, however, I would like to devote the remainder of my testimony to some suggested amendments, proceeding on the assumption that this subcommittee will be proceeding to mark up in the near future.

I would also like to make some suggested amendments with respect to the arbitration legislation, because I think the two have to be harmonized and seen together. They suggest essentially similar approaches to the same kinds of problems we have in Federal courts.

My purpose in suggesting these amendments is really two-fold, first, harmonizing the two bills, and second, to try to get them to conform to President Carter's policies regarding Federal judicial selection; namely, an open process, full public participation and the policy objective of integrating the Federal courts in terms of gender and race.

Concerning—I set out some proposed amendments in fair detail in my written statement. I will not go into each and every one. However, regarding the Magistrates act, there are four large areas that I would highlight in my oral statement.

First, selection; second, consent procedures; third, the role of the Judicial Conference, and fourth, the need for continuing study.

Concerning the selection process, I have recommended that the proposed legislation be amended to include language which would establish as a priority integration of the Federal magistracy in terms of race and sex.

The problem, particularly the key one seem to be the magistrates legislation would delegate to Federal district judges appointing powers for Federal magistrate.

The record and sensitivity to discrimination issues in the hiring of Federal district courts is not impressive.

The Southern Regional Council several months ago published a report on hiring practices in the Federal district courts in the Deep South and their record for employment of women and minorities was poor.

The second point under the selection heading I would want to make concerns the status of magistrates previously appointed to their position prior to the passage of this act.

None of the magistrates who have been appointed in the past have been exceptionally well-qualified and you could comfortably delegate to them new adjudicatory responsibilities, however that is not uniformly true of magistrates previously appointed. They were not, after all, expected to discharge the responsibilities of the Federal judges, and a different set of criteria went into their appointment.

Another selection point is the use of the merit panel and the composition of merit panels. I think the inclusion of this provision in the new legislation is one of its strong points and I think language should be added to assure that the merit selection panels themselves are representative of the population of the district in which the district court sits with due regard to inclusion of minorities and women.

The consent procedures continued in the Magistrates Act are threefold. There is one consent procedure for civil cases and two different consent procedures for different types of criminal cases.

I would urge that the full consent procedure be adopted for all three uses and specifically, that the procedure for misdemeanors other than minor offenses, people want to adopt it in all three contexts. This would require written, signed consent by the party.

The third point I wanted to focus on was the role of the Judicial Conference. The Magistrates bill assigns important responsibilities to the Judicial Conference for filling in the details on how this act will actually work in particular with respect to selection of magistrates.

The legislation should, in my view, instruct the Judicial Conference to undertake this rulemaking responsibility through an open process, akin to the kind of rulemaking process that administrative agencies use when they are adopting rules for their practices.

Finally, with respect to the Magistrates bill, I would urge that the legislation itself direct the Federal judicial center and the administrative office of the U.S. courts to engage in a continuing study of the functioning of the magistrates system and to report once a year to Congress on the functioning of that system.

Mr. Chairman, you noted in the questions to the last witness the fact that the arbitration legislation is explicitly experimental. I would hope that the Magistrates Act also be viewed as an experiment and the same 5-year limit on the functions of the arbitrators under 373 should probably be adopted in the context of the Magistrates bill, S. 237.

Many of these points that I have made with respect to the Magistrates bill apply with equal force to the Arbitration bill. The selection process there too raises questions that ought to be answered in the first instance through legislation and in greater detail by the Judicial Conference.

The Judicial Conference there too should function with open processes.

The last witness spoke of the ethical problems and the conflict of interest problems inherent in the arbitrator situation, the bill assumes that most arbitrators are going to be practicing lawyers when they are not arbitrating. There are no generally accepted ethical principles that govern or bind an arbitrator under those circumstances. Someone is going to have to develop those kinds of principles.

My suggestion would be that the Judicial Conference be expressly delegated with this responsibility and they again be directed to operate in an open process with true and full opportunity for comment and participation.

One provision of the arbitrator—of the Arbitration bill which I think is particularly unfortunate is the provision of section 657(d), which provides for the taxing of the costs of arbitration to the person seeking de novo review.

I do not believe that that provision should be clarified or amended. I think it should be taken out of the act. To the best of my knowledge, there is no other comparable legislative provision relating to the Federal courts which puts a financial disincentive on seeking judicial review of an unfavorable decision in a lower forum.

It seems particularly incongruous that this financial incentive be imposed on the litigant usually in the matter of the rights to a small sum of money because that litigant wants to have his case heard by an article III judge.

Finally, I would want to say one word about the compensation provisions for arbitrators. While I think it is praiseworthy and

appropriate that the fees to be paid to arbitrators should be kept modest, I think that equally important the legislation reflect the policy that service as an arbitrator is a kind of public service and not a charitable contribution.

In other words, the fees paid to arbitrators should not be so low that only the affluent can serve as arbitrators. The fee should be set at a reasonable level depending on the marketplace of course, where the arbitrators are sitting so that all members of the bar who have a demonstrated commitment to equal justice, picking up President Carter's phrase on judicial selection, should have an opportunity to serve in that role.

I would be happy to answer any questions you might have, Senators.

Senator DeCONCINI. Thank you, Dr. Halpern, very much.

Senator HEFLIN.

Senator HEFLIN. In the relationship of the Magistrates bill to the Arbitration bill, going down the provisions, you mentioned the selection procedure. I believe, under the Magistrates bill the standards are to be promulgated by the Judicial Conference. There are no similar instructions to the Judicial Conference with respect to arbitration.

In other words, there are no standards to be applied as I understand it.

Dr. HALPERN. That is my understanding, Senator.

Senator HEFLIN. The other parallelisms that follow between the Magistrates bill and the Arbitrators bill ought to be borne in mind.

Dr. HALPERN. Well, I think the two pieces of legislation ought to be laid side by side and one ought to ask some fundamental questions about why they don't answer to the questions in similar ways. For example, most obviously, it is unclear to me why the arbitration system is mandatory and the magistrates system is discretionary on the part of the parties. It could have been flipped around just the other way, it seems to me.

Yet, if there is a rationale for that, I think the two bills should be placed together and Congress should explain why one approach was adopted and in one case, and not in the other.

The other striking lack of parallelism I have already averted to briefly and that is that the Arbitration bill is explicitly experimental. The Magistrates bill seems on its face to alter the Federal court system for the indefinite future. I think those are anomalies that should be addressed.

Senator HEFLIN. Well, normally an experimental program is generally approached from a consent basis rather than a mandatory basis.

Dr. HALPERN. That would suggest that the arbitration system should be a voluntary one, a consensual one. The fact that it is experimental, that even heightens the incongruousness of making it mandatory.

Senator HEFLIN. I believe that is all.

Senator DeCONCINI. Thank you very much, professor. We appreciate your testimony.

Dr. HALPERN. Thank you.

Senator DeCONCINI. Our next witness is Marian Opala, a Justice of the Oklahoma Supreme Court.

Judge, we appreciate your being here and coming on such short notice to these hearings. Your full statement will appear at the conclusion of your oral testimony. We would ask that you highlight it for us.

STATEMENT OF MARIAN OPALA, JUSTICE, OKLAHOMA SUPREME COURT

Judge OPALA. I am sorry I have no prepared statement because of the limitations of time. I appreciate the invitation. I am very grateful to you and Senator Heflin for giving me the opportunity to be here.

I would like to share with you, hopefully without sounding presumptuous since I come from a State court system, some of my very deep concerns about the two bills before you.

First, I would like to tell you that the States have picked up a good deal of experience in managing a court system such as that of the Federal in which there is a single level, a single tier, as Senator Heflin said, trial court.

The problem before you, essentially, is whether to abandon the single-tier system, as Senator Heflin indicated, and go into a two-tier system in which you will have a full-fledged second level, the magistrates-level courts, or whether you want to retain the present single-level system and fit a lower-ranking judicial officer into it.

If you do so, if you will pardon me, I think you went about it the wrong way, based on the experience of the States.

Illinois and Oklahoma are the best examples of States oldest probably, with a single-level system trial court.

The example given by the States that have a complete single-level system is that lower-ranking judicial officers must have uniform responsibilities throughout the system.

The approach you took in the bill is a kind of two-step dance around the problem. The first step consists of the decision by the U.S. district judge that his magistrate is fit to hear the case. That is an individual decision—a very cumbersome managerial decision that will take a great deal of his administrative time and effort—and after that, will follow the second step, the litigants agreement that the anointed, chosen magistrate will hear their case, a consensual, discretionary approach.

I too, along with the other speakers would like to say that you have the problem reversed. Arbitration should be purely optional, whereas the responsibility of the magisterial officer should be imposed by mandate of the Congress.

In Oklahoma, we solved this problem in the following manner: the legislature sets the basic responsibility, not by a jurisdictional limit, but simply by giving the magistrate a certain basic level of authority which is defined as, for example, misdemeanors only, or misdemeanors with punishment not to exceed so much, and then by allowing the district judge to assign other cases to the magistrate if the litigants should agree or if no one should object.

This is the kind of managerial flexibility that I think you need. It will provide the system a method of dividing labor between the district judge and the magistrate without unduly encumbering the administrative responsibility of the U.S. district judge making the assignments. This is my number one concern.

Number two, I have a great concern with reference to the Arbitration bill for one reason that has already been stated and another one that has not yet been addressed.

Professor Halpern very eloquently stated to you that the provision taxing costs against the losing litigant in arbitration when he seeks a trial de novo, so to speak in the district court, should be eliminated, excised from the bill.

I go further. I would say to you, without fear of contradiction, that is one provision that will make the entire bill highly vulnerable to constitutional attack. It may be viewed as a burden on one's seventh amendment right to a trial by jury, and such an attack, if launched I venture to say, might be successful.

There is another problem with the Arbitration bill that has not been addressed at all by anyone, and no mention has been made of it in the position paper prepared for your benefit in which a legal analysis was presented.

The U.S. Supreme Court has come to grips with problems that arise when certain litigants or classes of litigants are deprived of trial by jury as a result of classifications of State law. As was pointed out to you in the memo before you, the U.S. Supreme Court held in 1953 that the basic concepts of the equal protection clause in the 14th amendment are incorporated into the fifth amendment's due process clause. So equal protection does apply even in the Federal system as it governs us today and has for some 100 years in the State systems.

I submit to you that your classification in the arbitration bill may be vulnerable to an attack on the basis of lacking reasonableness. I shall submit to you by way of an example a litigant in the Federal court system whose litigation has a value of \$99,999. Why, I ask, should he should have his seventh amendment's right of trial by jury deferred and, additionally, be saddled with the costs of an unsuccessful arbitration, while another litigant, his next door neighbor perhaps, having a claim with a value of \$100,002, have a ready, immediate, unencumbered seventh amendment access to a jury.

I don't think that this attack, if launched, is likely to be less than successful.

Those are my concerns about your Arbitration bill, in addition to those Senator Heflin has stated in his letter. You have standards for qualifying the magistrates but no standards for qualifying the arbitrators.

Additionally, my concern is also about possible conflict of interest which the preceding speaker so ably addressed. There are no tested methods by which you can eliminate and excise from the system the hazards of conflict of interest in connection with the use of arbitrators who are practitioners. That is why in most States part-time judges have been eliminated and that is why we went to a more expensive full-time judge and magistrate system in Oklahoma, in Illinois, and in most other States. We decided that having part-time judicial officers or part-time arbitrators was simply a risk we could not afford.

Before I complete my formal remarks, I would like to add this, if I may. I think that a single-level trial court system such as that of the Federal Republic may well accommodate within it lower rank-

ing judicial officers without creating a new second-tier empire. If you define their basic responsibility in clear statutory terms, and then allow additional assignments to be made by consent of the parties, administration of the magistrates' judicial work would be most efficient.

I, along with most people who claim to have some experience in judicial management systems, feel that basic uniformity is important and that total elasticity is but a license to perpetuate the feudal fiefdoms that so often exist in most of the court systems and are counterproductive, managerially speaking.

I would be happy to answer any questions you may have.

Senator DECONCINI. Thank you, judge, very much for your testimony.

Do you feel that perhaps litigants having to wait 2 or 3 years for a civil trial may be having their rights under the seventh amendment violated in the Federal courts or maybe in Oklahoma as well. I do not know what the standard time is for a trial there.

Judge OPALA. I am well-aware of the problem of lagging justice. I am conscious of the fact that this bill seeks to relieve the problem of congestion. My concern is that in so doing you might be creating additional problems.

Senator DECONCINI. Additional constitutional problems.

Judge OPALA. Yes, sir.

Senator DECONCINI. I have no further questions.

Senator HEFLIN.

Senator HEFLIN. In regards to delayed justice under the arbitration approach, the parks would have to begin arbitration 150 days after papers were filed. But after the arbitration is decided and a person takes a de novo appeal, I don't believe that under this bill that there is any requirement that that de novo appeal has to be tried within a certain period of time. It just falls into the regular category of cases.

Judge OPALA. That is my understanding. I see nothing in these two bills that address the problem, the specific problems of accelerating judicial process. I rather see in the Magistrates bill an attempt to enlarge the authority of a lower-ranking judicial officer on a single-level district court which possibly might accelerate the process in certain cases.

In the Arbitration bill, I see simply a method to relieve the district judge of his present responsibility without creating additional district judgeships.

If you agree with me, Senator Heflin, mandatory arbitration is not likely to produce the accelerated case flow management that is sought to be accomplished.

Senator HEFLIN. You mention uniformity. Under the arbitration and to some degree, under the Magistrate bill, district courts can pretty well run their courts in those relationships pretty much as they want to with some restrictions which means that each district court could have its own distinct method of dealing with magistrates or dealing with arbitrators.

One of the polestars of court reform as the States know it is to try to achieve uniformity. I think this is also the polestar in the adoption of the Federal rules of civil procedure wherein the missionary work that was done thereafter to get the State court sys-

tems to adopt these rules so that you do not have to have a different set of ground rules and procedure and practice in every different court.

Judge OPALA. That is correct. Elasticity, if allowed "to go drunk" and at times it does, might lead to the creation of jurisdictions within the Federal system which will be, procedurally speaking, totally alien to each other.

A lawyer from one district will not ultimately be able to practice in the neighboring district because the procedures will be so entirely different.

Senator HEFLIN. It seems that this is the third bill on magistrates. I think the magistrates are here to stay now. We really have a two-tier court system regardless of what it may be called.

I feel that one of your arguments would be that they ought to have fixed jurisdiction in certain matters such as misdemeanors rather than this or that. What are the advantages of having fixed jurisdiction as opposed to the proposal?

Judge OPALA. A minimum waste of time in dividing labor by assigning cases. The cases will be sent to the magistrate, by operation of law, simply because they fall into the class of misdemeanors or civil cases he is allowed to hear.

Then I would also provide for direct appeal, as all the State systems have provided, from decisions of lower-ranking officers in a single-tier system (such as the Federal) directly to an appellate court.

What you have done in this bill is to try to save judge time, but in so doing you built into the system more than a possibility of litigants, civil and criminal, receiving more than one trial. That in itself, I submit to you, is managerially counter-productive.

No person in any judicial system that is streamlined, modern and rid of the medieval nonsense, should be allowed to have more than one trial and one appeal.

Senator HEFLIN. The States through local legislation created many different courts, many different procedures and ground rules. One of the movements in the State court reform is to do away with local legislation. Am I correct in saying that instead of local legislators doing it here, it is now largely up to the judge himself as to how he wants to operate his court, leaving the way open to destroy uniformity?

Judge OPALA. That is correct, Senator; that is my understanding.

Senator HEFLIN. I believe that is all the question I have.

Senator DECONCINI. Thank you very much, judge. We appreciate your testimony.

Judge OPALA. Thank you.

Senator DECONCINI. Our next witness is Karen Christenson American Civil Liberties Union, Washington, D.C.

Your full statement will appear in the record, if you have one, at the end of your oral testimony.

We would appreciate it if you would highlight your testimony for us.

STATEMENT OF KAREN CHRISTENSEN, LEGISLATIVE COUNSEL, AMERICAN CIVIL LIBERTIES UNION

Ms. CHRISTENSEN. I will outline very briefly the context of my statement which contains a number of very specific amendments to the magistrates legislation. I would be happy to answer any questions that you might have.

[The prepared statement of Karen Christensen follows:]

PREPARED STATEMENT OF KAREN CHRISTENSEN

I appreciate this opportunity to testify on S. 237, legislation to expand the jurisdiction of Federal magistrates. As an organization, the American Civil Liberties Union is dedicated to the enforcement of federally-protected rights.

The Federal courts are the principal forum for enforcement of constitutional rights. For this reason, the ACLU supports the efforts of this Congress to devise measures which will reduce the delay many litigants face in Federal court, while guaranteeing that those who seek to vindicate federally protected rights will be able effectively to press their claims.

The ACLU has testified before this subcommittee in the past concerning the expansion of magistrates jurisdiction. In July 1977, the ACLU submitted testimony concerning the Magistrates Act of 1977 (S. 1612 and S. 1613). At that time, we recommended that consideration of magistrates legislation be postponed in order to permit an opportunity to consider the implementation of Public Law 94-577, the previous expansion of magistrate jurisdiction. This year, the subcommittee has the benefit of past experience under Public Law 94-577 as well as full hearing records in the House and the Senate to guide its consideration of the bill before it.

We would like to commend the chairman and the subcommittee for the many improvements which have been made in the magistrates legislation since its introduction in the 95th Congress. Several of the initial concerns of the ACLU and other public interest groups have been addressed by the changes reflected in S. 237. Despite these improvements, however, there are several important issues we believe should be addressed by the subcommittee. We would also like to call the subcommittee's attention to other methods of improving citizens' access to the Federal courts which should accompany the proposed expansion of magistrates jurisdiction.

I. EXPANSION OF MAGISTRATES JURISDICTION

An expansion of magistrates jurisdiction has been proposed as one answer to the problem of improving citizens' access to justice. This is an acceptable answer only if (1) any exercise of article III jurisdiction by a magistrate is based on the informed and uncoerced consent of litigants, and (2) selection criteria and procedures assure that highly qualified, competent individuals act in the stead of district court judges.

The subcommittee should take account of the unique features of the Federal courts as an article III forum. These features include a high level of technical competence, a special sensitivity to the commands of the Federal Constitution, and an ability to withstand political and social pressures favoring the powerful over the powerless. As a result of these institutional characteristics, article III judges are uniquely suited to resolve Federal questions and enforce Federal rights. A diversion of cases from article III judges can only be justified for cases which do not require the unique presence of Federal judges to resolve the dispute. For example, cases based on diversity jurisdiction, where the primary beneficiaries are commercial and tort litigants, whose claims do not involve federally protected rights and do not require the enunciation and implementation of counter-majoritarian norms. Since the quality of justice dispensed to such litigants does not depend on the unique institutional services available in article III courts, it is proper, in view of the scarcity of article III resources, to require litigants in diversity cases to press their claims in state courts.

A. THE EXERCISE OF JURISDICTION BY A MAGISTRATE MUST BE CONSENSUAL IN BOTH CIVIL AND CRIMINAL CONTEXTS

Senate bill 237 expands the jurisdiction of magistrates to "any or all proceedings in a jury or nonjury civil matter." The parties must consent to referral to a magistrate. It is imperative that parties who agree to proceed before a magistrate in a civil action do so freely, without pressure and with a full understanding of their rights to proceed before an article III judge. The realities of daily practice are such

that Congress must take all reasonable measures to assure that no pressure, tacit or expressed, can be applied to litigants to induce them to consent to trial before a magistrate.¹ We urge that the subcommittee amend S. 237 by adopting a mechanism for notice and consent which will remove the election procedure entirely from judicial influence. Similar legislation, H.R. 1046, now pending before the House, contains such a procedure which requires that the clerk of the court to set forth the options of magistrate trial and court trial to the parties and then receive their responses. This amendment can also be justified as a matter of judicial economy, one of the purposes of this legislation, which dictates that a district court judge not be required to schedule hearings or in chambers meetings to inform the parties of their options of magistrate referral or court trial. For these reasons we suggest the following amendment:

Strike Sec.2(c)(5) (page 3, lines 18-22) in entirety and substitute:

"(5) The clerk of the court shall provide written notice to the parties to inform them of the provisions of this subsection. The decision of the parties shall be communicated to the clerk of the court. No district judge shall be informed of the parties' response to this notice, nor shall the court attempt to persuade or induce any party to consent to reference of any civil matter to a magistrate."

Senate bill 237 also expands the criminal trial jurisdiction of magistrates to include any misdemeanor prosecuted in a Federal district court. Currently, magistrates may try persons accused of minor offenses² only if the defendant signs a written consent and specifically waives a trial before a district court judge.³ Senate bill 237 would eliminate the present requirement that a defendant accused of a petty offense consent to trial before a magistrate in writing. The provision of S. 237 allowing the magistrate to proceed unless the defendant affirmatively demands a trial before a district judge is, in our view, highly questionable on constitutional grounds and should therefore be replaced by the existing written consent requirement.⁴

Defendants charged with misdemeanor or petty offenses have a right to trial before a district judge. The burden should not be on the defendant affirmatively to assert a constitutional rights. The system should assure that defendants, whether accused of petty offenses or misdemeanors, are fully apprised of their rights and waive any rights in a knowing and voluntary manner. The presence of counsel will assist in ensuring that this waiver of constitutional rights meets these standards. While the draft committee report recognizes the waiver stage as a "critical stage" of prosecution, the language of the bill should expressly require that defendants be permitted to consult with counsel before exercising any waiver of their right to be tried before a Federal judge.

For these reasons we suggest the following amendment to effect the preceding suggestions:

Strike sec. 7(2) paragraph 2 (page 6, lines 11-18) and substitute:

"The magistrate shall not try any misdemeanor or petty offense case unless the defendant, after opportunity to consult with counsel, signs a written consent to be tried before the magistrate that specifically waives a trial before a district judge."

This amendment essentially conforms S. 237 to H.R. 1046.

B. THE QUALITY OF JUSTICE DISPENSED BY MAGISTRATES MUST BE ASSURED BY STATUTORY PROCEDURES AND CRITERIA FOR SELECTING AND APPOINTING MAGISTRATES

I have discussed earlier the unique features of article III courts which enable Federal judges to enforce federally protected rights and reach decisions on objective grounds, freed from the pressures of majoritarian concerns.

Litigants who consent to a magistrate trying their case deserve the same quality of justice. The reasons which cause them to consent to a speedier resolution of their

¹ Indeed, the first circuit already has acknowledged that consent for retrial to magistrates may be "subtly coerced by a harried court." *DeCosto v. Columbia Broadcasting System, Inc.*, 520 F.2d 449, 507 (1st Cir. 1975).

² A minor offense is defined as one for which the maximum penalty that may be imposed does not exceed imprisonment for a term of one year or a fine of \$1000, or both.

³ 18 U.S.C. § 3401(b).

⁴ The proposed elimination of the existing consent requirement is justified on the ground that "[the requirement that each of these defendants sign a written form to be tried before a magistrate lengthens the time needed to hear each case and produces a growing volume of unnecessary paperwork". Senate Report at 10-11. This is simply not a sufficient justification for adopting a constitutionally suspect departure from current law.

claim do not justify any diminution in the fairness, objectivity and legal competence that litigants expect in the Federal court system.

In order to assure that magistrates dispense the same quality of justice as the judge for whom they act as substitute, magistrates must be independent and free from conflicts of interest. To allow part-time magistrates to exercise the jurisdiction of the district court invites ethical problems and may create the appearance of impropriety. The expressed intent of Congress in enacting the original Federal Magistrates Act was that the magistrate system should consist of full-time officers. Accordingly, I urge the subcommittee to consider amendments which would allow only full-time magistrates to carry out the work of the Federal courts:

Strike sec.2(c)(1) "or a part-time U.S. magistrate who is not engaged in the practice of law", (page 2, lines 6-7).

Strike sec. 3(b) "in the case of appointments to full-time magistrate positions" (page 4, lines 11-12).

If the subcommittee's record indicates that some judicial districts may be unable to utilize a full-time magistrate, a narrow exception to the rule of requiring a full-time magistrate could be provided. Nevertheless the same process used for selection of full-time magistrates must be used to select part-time magistrates in order to assure that every magistrate who exercises district court authority meets the requisite qualifications. Practicing lawyers could be eligible for selection as part-time magistrates. Selection of a panel of such potential magistrates from which parties could choose a part-time magistrate, would assure that conflicts of interest are voided.

Accordingly, we suggest the following amendment:

Strike sec.2(c)(1) "who is not engaged in the practice of law (page 2, lines 6-7). Strike sec.3(b) "in the case of appointments to full-time magistrate positions" (page 4, lines 11-12). Add a new subsection (d) which reads

"A panel of part-time magistrates may be selected pursuant to the standards and procedures promulgated by the Judicial Conference in those districts which do not require a full-time magistrate. The district court shall file with the Judicial Conference the reasons for selection of a panel of part-time magistrates."

The quality of justice dispensed by the Federal judiciary is also affected by the backgrounds and characteristics of the lawyers who compose its ranks. I commend the subcommittee for the improvements which have been made in the process of selecting magistrates, such as providing for establishment of merit selection panels and requiring the Judicial Conference to establish standards and procedures.

Congress should expressly encourage the recruitment of women and minorities and members of the public interest law bar as magistrates. The Federal judiciary should generally reflect the characteristics of the population at large and this opportunity to balance the ranks of U.S. magistrates should be a matter of express congressional intent and concern.⁵

We urge the adoption of the following amendment:

Strike sec.3(c) (page 4, lines 17-20) and substitute:

"Congress (i) takes notice of the fact that women and minorities are underrepresented in the Federal judiciary relative to the population at large; and (ii) recommends that the merit selection panel, in recommending persons to the district court, shall give due consideration to qualified women and minority individuals."

This amendment would conform S. 237 to H.R. 1046.

I also recommend that the committee report in listing selection criteria (Senate Report, page 18) for magistrates include such characteristics as reputation for integrity and good character, demonstrated legal ability and commitment to equal justice under law.

II. ACCESS TO JUSTICE

There are now pending before Congress numerous proposals which seek to achieve greater access to justice. It is our belief that "access to justice" means more than speedy processing of legal papers, more than the prompt resolution of court actions, and more than the opportunity to have just any person vested with certain powers (such as an arbitrator or magistrate) hear the claims of the parties to a legal action. Access to justice for civil rights-civil liberties litigants means the guarantee of an

⁵ At present, there are 169 full-time magistrates of whom 13 are women, 4 are black, 2 are Hispanic and 1 is Asian-American.

opportunity to present the merits of their claims to a Federal judge without unnecessary technical barriers, procedural delay, or prohibitive cost.

This subcommittee should carefully examine the impact of the various measures designed to improve access to justice, for each of the proposals will have a substantial effect on the functioning of the Federal judiciary. Bills to abolish or limit diversity jurisdiction, create a system of mandatory arbitration of certain Federal claims, and create alternative dispute resolution mechanisms will each have an effect on the workload of the Federal judiciary as well as on the system by which citizens bring their grievances to the courts for resolution.

The subcommittee must remain sensitive to the constitutional mandate of the Federal courts to hear important constitutional and statutory rights. The forum for these rights cannot be sacrificed in the name of efficiency.

Legislation which streamlines the functioning of the Federal courts will not eliminate the more difficult barriers to citizen access to justice. Restrictive court rulings on standing, attorneys fees, class action prerequisites and abstention deny access to justice more effectively and more seriously than crowded court dockets. Effective access to Federal courts calls for congressional action which eliminates the unnecessary procedural and financial barriers to citizens seeking to vindicate important rights. The arbitrary use of these technical doctrines has created precedents confusing to courts and litigants alike. As a result, there is an enormous waste of judicial resources on threshold issues rather than on the merits of the controversy. The result is a frustrating catalog of important claims which are not resolved by the Federal courts. For example: the Federal courts have made it impossible for indigents to challenge a tax regulation that denied them medical care; impossible for a citizen to challenge allegedly illegal Government secrecy; impossible for the Attorney General to assert the constitutional rights of institutionalized mental patients; impossible for consumers cheated out of billions of dollars to recover damages from those who defrauded them; impossible for citizens to use the Federal courts to assert constitutional claims against state officials acting under color of State law.⁶

Congress can strengthen the Federal judiciary by passing legislation which will reform requirements for standing to bring suit, provide for recovery of attorney fees in appropriate circumstances, eliminate unnecessary prerequisites for class actions, and limit the use of the doctrines of exhaustion and abstention. The need for access to justice demands that this challenge be met. I urge you to consider the magistrates legislation before you today as only a first step in meeting this challenge—a step that will be followed by broader legislative reforms of the Federal judiciary which will help strengthen its role as the principal enforcement agent for federally protected rights.

Thank you for this opportunity to appear before the subcommittee.

Ms. CHRISTENSEN [continuing]. I am the legislative counsel for the American Civil Liberties Union. This organization is dedicated to the enforcement of federally-protected rights.

Therefore, we support efforts of Congress to reduce delay while guaranteeing that litigants who seek to vindicate federally protected rights will be able effectively to press their claims, without facing the so-called barriers to access to justice.

I believe the real barriers to access to justice have not been discussed this afternoon. Restrictive court rulings on standing to sue, attorneys' fees, class action prerequisites, and abstention deny access to the courts more effectively and have more impact than any crowded court docket.

Furthermore, the restrictive court decisions create confusing precedents for courts and litigants and have themselves resulted in enormous waste of resources on threshold questions.

This committee must remain sensitive to the constitutional mandate of the Federal court to hear important constitutional and statutory rights. The Federal forum cannot be sacrificed in the name of efficiency or economy.

⁶ *Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26 (1976); *United States v. Richardson*, 418 U.S. 166 (1974); *United States v. Solomon*, 563 F.2d 1121 (4th Cir. 1977); *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974); *Rizzo v. Goode*, 423 U.S. 362 (1976).

The magistrates legislation is one of the answers that has been proposed to reduce delay in Federal courts. Perhaps it is a worthwhile answer, however, I urge you to look carefully at the provisions of this legislation.

Senate bill S. 237 is an improvement over previous magistrates legislation. Particularly commendable are the subcommittee's efforts to assure that there is no classification of cases sent to a magistrate.

To classify certain cases as "magistrates cases," develops a sense of elitism in the Federal courts. Magistrates competent to handle any case should be allowed to hear all cases.

The subcommittee should also be commended for the appellate structure provisions of the bill which allow litigants a direct appeal to the circuit court. The right of appeal to the circuit court must be preserved.

Despite these improvements over previous legislation, the magistrates legislation should be subjected to two tests. First is the expansion consensual? Do all provisions of S. 237 assure that it will be consensual? Second, are the alternatives posed by this expanded magistrates system of comparable quality to justice available through trial by a district court judge?

Currently, the provisions of S. 237 for consent in the context of civil jurisdiction do not assure that the expanded jurisdiction will be consensual.

A previous witness described the Oregon procedure for informing litigants of their rights to magistrate jurisdiction or to a district court jurisdiction. In that procedure, it was the magistrate who explained to the litigants their rights.

The procedure provided by S. 237, does not provide that the magistrate explain the alternatives of magistrate trial or district court trial, rather, the judge is required to perform this role.

For a bill that is supposedly addressed to alleviating the workload of a judge, this procedure simply does not make sense. Why impose on a judge the burden of scheduling a hearing or an in camera meeting in order to explain to the parties their rights to a district court trial and a magistrate trial.

A preferable procedure is for a neutral third party, such as the clerk of the court, to explain to the parties their rights, that is, trial before a magistrate or trial before a district court.

This would avoid any subtle or indirect pressure which might be applied to the parties, such as the judge who states, "Your claims are a small amount. I encourage you to consent to a magistrate's jurisdiction. I encourage you to consent to arbitration."

A second test to apply to the provisions of the bill is that of whether the alternatives offered to litigants are of comparable quality to trial by a district court judge. The provision which allows for part-time magistrates does not meet this test. The exclusion of persons who are practicing law is not a sufficient answer to the question whether a magistrate would exercise the independence of judgment and be free from conflicts of interest.

I encourage you to amend S. 237 so that there will be full-time magistrates that exercise civil jurisdiction. A system of full-time magistrates was contemplated in the original legislation on magis-

trates and I encourage you to ensure that such a system is required now.

If there are reasons for part-time magistrates in some districts, it is possible to provide for a panel of part-time magistrates from which the litigants themselves might select a person who would hear their claims. This would allow the parties to exercise their judgment as to who might have a conflict of interest. Choice by the parties among candidates selected by a merit selection panel would assure that the panel would be well qualified and highly competent.

According to the administrative office of U.S. courts there are presently 13 females, 4 blacks—and that includes 1 black female who is about to be appointed—2 Hispanics and 1 Asian-American work as full-time magistrates.

This obviously is an under representation of women and minorities. There should be an expressed congressional notice of this fact, along with express encouragement that the merit selection panel give due consideration to qualified women and minorities.

Finally, current law provides that before a person who has been accused of a minor offense may be tried by a magistrate, that person must sign a written consent to trial before the magistrate.

Senate bill 237 changes that requirement. Ironically, the original version of S. 1613 which the ACLU opposed, maintained the requirement, that any person tried by a magistrate would have to sign a written waiver of a trial before a district judge. A written waiver would not be in lieu of a full explanation of the rights, but would be addition to such explanation.

The points raised by other witnesses do not give any substantial reason to take away this current provision for written waiver. On the contrary, previous witnesses have testified that written waivers do not constitute an administrative burden. A written waiver can help to assure that a defendant is intentionally and knowingly waiving his or her rights.

In conclusion, I urge you to consider as priority legislation bills to clarify the standing of the Attorney General to bring suits on behalf of institutionalized persons, to reform prerequisites for class actions, to provide for attorneys fees in appropriate circumstances and to control use of the doctrines of abstention and exhaustion.

Thank you.

Senator DeCONCINI. Thank you very much. Are you aware of the amendment that has already been offered to the Magistrates bill by Senator Kennedy and myself regarding the minority problem that you raised and I am very pleased you did, the language in part that will be submitted and perhaps reported out says, "Congress notes that members of recognized minority groups do not serve in the Federal judiciary in proportion of the ratio of the total population, and suggest that due consideration be given all qualified individuals."

What is your reaction to that statement as far as correcting the problem that you state?

Ms. CHRISTENSEN. I think that it is an improvement over the current language. However, I would encourage you to be more explicit and state, as I have suggested in my written statement,

that "due consideration be given to qualified women and minority individuals."

Senator DECONCINI. Fine. Thank you very much. I have no further questions.

Senator HEFLIN.

Senator HEFLIN. Do you prefer the language that Congress take notice of the fact that women and minorities are underrepresented in the Federal judiciary relating to the population at large and recommend that the merit selection panels in recommending persons to the district court shall give due consideration to qualified women, blacks, Hispanics and other minority individuals.

Ms. CHRISTENSEN. I would prefer that or a simple statement that "due consideration be given to women and minority individuals." There need not be a specification of minorities.

Senator HEFLIN. What is your position of the part-time magistrates?

Ms. CHRISTENSEN. I would prefer a system of only full-time magistrates, which would be more comparable to the district court system which now exercise the jurisdiction.

District court judges are now appointed by the President with the advice and consent of the Senate and have a salary for the rest of their life. This gives them independence and freedom from political and social pressures.

A magistrate should feel as comparable to a district judge as possible. A part-time magistrate, whether it is someone who is a law professor or an attorney in private practice, is obviously going to be subject to political and social economic pressures which the district court judge is removed from.

Therefore, it is preferable that the magistrates be only full-time.

Senator HEFLIN. That is all I have.

Senator DECONCINI. Thank you very much.

Ms. CHRISTENSEN. Thank you.

Senator DECONCINI. Our next witness is Prof. Meador, Assistant Attorney General, Department of Justice.

Professor, we want to thank you for being with us all afternoon and also for the tremendous help which your office and staff members in numerous pieces of legislation before this committee, not just the Magistrates and Arbitration bill.

If you would please proceed with highlighting your remarks, if you have a prepared statement, it will be inserted at the end of your oral testimony.

Please proceed.

STATEMENT OF DANIEL J. MEADOR, ASSISTANT ATTORNEY GENERAL, DEPARTMENT OF JUSTICE

Mr. MEADOR. Thank you, Mr. Chairman. I am happy to be here again to present the views of the Department of Justice in support of S. 237, the Magistrate Act of 1979.

[The prepared statement of Daniel J. Meador follows:]

PREPARED STATEMENT OF DANIEL J. MEADOR

Mr. Chairman and members of the committee: During the past 2 years, the Department of Justice—in close cooperation with the judiciary, private groups, and especially with the Congress—has attempted to develop a series of proposed new

procedures and structures for the Federal judiciary. The purpose of these proposals is to ensure high-quality, rapid, and inexpensive justice for all Americans amidst the ever-increasing volume of litigation. The proposed Magistrate Act of 1979 (S. 237, H.R. 1046) is an essential feature of this comprehensive program. I am happy to present the views of the Department of Justice in support of this bill.

The proposed legislation is the product of over 10 years of experience with the Federal magistrate system. The Federal Magistrates Act of 1968 (28 U.S.C. §§ 631-639, as amended (1976)) permitted district courts to experiment with magistrate utilization. The system became fully operational in 1971, and currently 92 district courts use magistrates to supplement judicial resources. From the experiences of recent years, the bench and bar have come to view Federal magistrates as a valuable—and indeed essential—part of the Federal district courts. Because of the proven worth of the magistrates, there is now wide agreement that they should be given somewhat larger authority, thereby enabling the district courts to provide better access to justice and to function more effectively.

The key features of S. 237 are these: (1) It would establish more demanding standards and procedures for the appointment of magistrates; (2) it would authorize magistrates to enter dispositive judgments in civil cases if designated to do so by the district court and if all parties consent in advance; and (3) it would increase slightly the existing authority of magistrates to try less serious criminal cases.

In view of the extensive consideration which this proposal has received in both Houses of Congress during the past 2 years, this submission on behalf of the Justice Department can be brief. Two sets of hearings have been held in the House of Representatives spanning both the 95th and 96th Congresses and consuming nearly 3 days of subcommittee time.¹ In 1977 hearings were conducted by this committee's Subcommittee on Improvements in Judicial Machinery.² Moreover, both this committee and the House Judiciary Committee in the 95th Congress approved the key features of this proposal.³ The Senate passed a bill essentially the same as S. 237 on July 22, 1977.⁴ The House passed its version of the bill in 1978.⁵ The proposal now before this committee is thus one which has already won the support of both Houses of Congress as well as that of many other groups, both public and private. In addition, the proposal has been endorsed by the President in his message to Congress on February 27, 1979.

The magistrate system provides a sophisticated, flexible resource designed to cope with the varied and ever-changing conditions of the district courts across the Nation. The increases in Federal statutory entitlements and regulatory activities do not have an equal impact in all judicial districts. Because magistrates have limited tenure and function as part of the district court rather than as a separate tribunal, the system provides supplementary judicial manpower that can be increased or taken away as docket needs fluctuate from district to district and from time to time. The bill does not compel the use of magistrates in any district. As under existing law, the Judicial Conference would determine where magistrates are needed to enable the district courts to serve the needs of the public.

Because of widely varying procedures and standards used for the appointment of magistrates in 1971 and thereafter, it is important now to enact guarantees of a nationally uniform means of appointment to ensure a high quality of personnel for these positions, particularly in view of the expanded authority being given to them. S. 237 and the currently pending House bill (H.R. 1046) deal somewhat differently with this subject. Both bills require public notice of all vacancies in magistrate positions. The House bill establishes an elaborate and careful merit selection procedure that applies to both full-time and part-time magistrates. The Senate bill, on the other hand, provides for the selection of full-time magistrates pursuant to standards and procedures promulgated by the Judicial Conference and calls for the establishment of merit selection panels, composed of residents of the judicial district. Although either of these bills would make a marked improvement in the quality of magistrates, in the last Congress the Department of Justice supported provisions similar to those in the Senate bill. The Department continues to believe that this is the sounder approach.

¹ Magistrate Act of 1979: Hearings on S. 1046 before House Judiciary Subcomm. on Courts, Civil Liberties, and the Administration of Justice, 96th Cong., 1st Sess. (1979); Diversity of Citizenship/Magistrates Reform: Hearings on S. 1613 Before House Judiciary Subcomm. on Courts, Civil Liberties, and the Administration of Justice, 95th Cong., 1st Sess. (1977).

² Magistrate Act of 1977: Hearings on S. 1613 before Senate Judiciary Subcomm. on Improvements in Judicial Machinery, 95th Cong., 1st Sess. (1977).

³ H.R. Rep. No. 95-1364, 95th Cong., 2d Sess. (1978); S. Rep. No. 15-344, 95th Cong., 1st Sess. (1977).

⁴ 123 Cong. Rec. S12,647 (1977) (July 22, 1977).

⁵ 124 Cong. Rec. H11,512 (1978) (Oct. 4, 1978).

The use of selection panels for Federal judges is still in the experimental stage, and much remains to be learned about the functioning of these panels and the selection process in general. Rather than freezing into statute one specific plan, it seems preferable to leave this matter in a more flexible posture. Under its mandate from the Congress, the Judicial Conference could evolve standards and procedures in light of continually accumulating experience.

The authorization for magistrates to enter dispositive judgments in civil cases is one of the most important elements of S. 237. This authority may be exercised, however, only if the district court designates the magistrate for this purpose and, in addition, only if all parties in the case mutually agree in advance to the exercise of this jurisdiction. The Department believes that S. 237 amply assures full, uncoerced consent by the parties to magistrate jurisdiction. If there is any apprehension on this point, however, we would have no objection to the inclusion by the Senate of a so-called "blind consent" provision similar to the one already contained in the House bill.

In criminal cases, S. 237 would authorize a small, yet significant increase in the trial jurisdiction of magistrates. Under present law, magistrates have jurisdiction, if a defendant consents, to hear and decide cases involving minor offenses. These are offenses for which a maximum sentence of 1 year imprisonment or a maximum fine of \$1,000 may be imposed. Under S. 237, a magistrate would have jurisdiction, with the consent of the defendant, to try all misdemeanor cases. These are cases in which, like the minor offenses, the maximum term of imprisonment is 1 year, but in which there is no limit as to the amount of fine which may be imposed.

Although numerous witnesses in the past hearings have endorsed the constitutionality of these proposals, and the Judiciary Committees of both Houses have deemed them to be constitutional, it is not amiss to restate the Department's view that this bill is constitutional. The constitutional issue involved may be stated thus: May a binding civil judgment be entered in an article III controversy by a U.S. magistrate, subject to appeal to article III judges, where Congress has authorized the exercise of such jurisdiction and where all parties to the controversy have agreed to its exercise? We believe that the answer is clearly affirmative.

Based on both history and authority, it is inaccurate to say that every article III controversy must be decided at every stage only by an article III judge. There are numerous instances, in the past and the present, where non-article III forums enter binding judgments in article III cases. Large amounts of article III business are handled by the territorial courts, the U.S. Court of Military Appeals, the Tax Court of the United States, the courts of the District of Columbia, and the State courts, all of which are non-article III forums. The question here is not whether Congress can exclude an article III case altogether from an article III judge at any stage. The bill clearly preserves the right to appeal to an article III forum.

Some persons who have questioned the constitutionality of this bill have relied upon judicial decisions holding that jurisdiction cannot be conferred upon a tribunal by consent of the parties where Congress and the Constitution have not authorized jurisdiction. But those decisions are not in point here. Under this bill, Congress would expressly authorize magistrates' jurisdiction, if designated by the district court. Thus, the parties would be consenting to a jurisdiction specifically conferred by statute.

In testifying on the magistrates bill in the Senate subcommittee during the last Congress, Prof. Linda Silberman, one of the leading scholars on magistrate jurisdiction, concluded on the basis of her extensive research, that the bill is "clearly constitutional." She went on to say, "[Indeed . . . Congress could make broader delegation under less restrictive procedures without incurring constitutional difficulties."⁶

As to the procedures for appeals from magistrates' judgments in civil cases, the Department continues to believe, as the Attorney General testified in the last Congress, that initial review of such judgments should be vested in the district court. Such review would be accorded as a matter of right on the record made before the magistrate. Thereafter, further review would be available in the court of appeals on a petition for leave to appeal, which the court would pass upon discretionarily. This petition could argue any prejudicial errors below; it is contemplated that the court of appeals would grant full review on the merits if there were any arguable errors of substance. If the court of appeals accorded full review on the merits, its decision could be reviewed on certiorari by the Supreme Court, as can other courts of appeals' decisions. If the court of appeals did not grant leave to appeal, there would be no further review.

⁶ Magistrate Act of 1977, Hearings *supra* note 2, at 185.

Preference for this appellate structure is based on two premises: (1) litigants in the Federal system should be entitled only to one appeal by right; and (2) the considerations which would lead parties to prefer magistrate trials point also to rapid, less expensive, initial appeals to the district court. Almost all modern thinking about judicial structures holds that one appeal of right is all that should be provided. Moreover, most modern thinking holds that we should not have two trials de novo. An initial appeal on the record to the district courts is consistent with this philosophy. Furthermore, initial appeal to the district courts is in line with the general spirit which pervades the move to enlarge magistrate jurisdiction; that is to say, to accord an appellate procedure for cases that have gone to a magistrate which is somewhat simpler, somewhat more expeditious, somewhat less expensive than existing procedures.

Taken as a whole, S. 237 would be a significant step in placing the Federal district courts in a better position to deal with the changing volume and nature of litigation in the years ahead. It is one of the key bills which this Congress needs to enact to prevent a recurrence of the conditions which necessitated the Omnibus Judgeship bill enacted last year. Accordingly, the Department of Justice urges this committee and the Senate again to pass this bill and to cooperate with the House of Representatives to the end that this proposed Federal Magistrate Act will become law in the near future.

Mr. MEADOR [continuing]. Since arbitration has been a matter of some discussion here today, I would also like to state that we also of course, support S. 373, the court-annexed Arbitration bill. As the committee knows, these two bills are part of a much larger cluster of bills which are designed to put the Federal courts in a better position to deal with the problems of the country and the legal business that comes before them. The grand objective of all these bills is to increase access to justice and to improve the quality of justice. These goals require reduction of costs and delay in bringing a case to trial, so that people have the ability to get an answer to their problems in a reasonable length of time.

The afternoon is drawing late. We have had able and knowledgeable witnesses here. We have also had 2 years of very serious consideration of these bills by both Houses of Congress, many other groups, and the Department of Justice. So there may be very little need to add anything to the record in addition to the written statement that I have filed. It seems to me that I might use my brief time best by making a few general comments in response to the discussion here this afternoon.

As the committee knows, these two bills have a very broad range of support. Both Houses of Congress passed the Magistrates bill last time, and the Senate passed the Arbitration bill. In addition, support comes from all segments of the bench, the bar, the Government and the Congress itself.

The criticisms and objections that have been voiced today are not essentially new. We have known about them and thought about them in the 2 years that we have been considering these measures. In general, I would say the criticisms tend to overlook several key circumstances of the times, including the conditions and circumstances in which the Federal judiciary functions and in which litigants seek to receive some relief. Let me try to mention two or three of those circumstances.

The first consideration can be illustrated by just a few essential facts. There is a U.S. district court sitting in Maine, on the Atlantic seaboard against the Canadian border; there is another U.S. district court sitting in the northern Marianas, in the far western reaches of the Pacific Ocean. Between those two courts lie approxi-

mately 13,600 miles. There is a U.S. district court sitting in Puerto Rico; there is another U.S. district court sitting in Alaska. The distance between those two courts is about 5,700 miles. In between those extremities there are a total of 95 Federal judicial districts. The conditions, the settings, the volume and nature of business, vary greatly among those districts. There are some in which we have impacted urban population; in others we have vast reaches of almost uninhabited territory. There are all kinds of terrain, social conditions, and human activity in each district.

Now, we heard some mention of uniformity this afternoon. In that—as in all other things in life—there must be a reasonable balance. There is, of course, merit to some degree of uniformity. The Federal judicial structure is basically uniform. We have a trial tier of U.S. district courts, and an intermediate tier of appellate courts. Already, though, within that structure, we have a great deal of variation—and properly so. The question is, how much. The fact is that there is also a great deal to be said for flexibility to adjust to varied conditions. It would be difficult for Congress to specify in detail all of the personnel and practices that should prevail from one district to another—from Oregon to Puerto Rico, Alaska, Hawaii, New York and so on.

One of the strong features, I think, of both the arbitration and the magistrates bills is the flexibility and the leeway that they will give to the Federal judiciary to adjust its operations to the local conditions which are confronted across this immense country. These bills will make justice more accessible and less expensive to people in the circumstances and peculiar conditions of each district.

There is another point which I think may have been overlooked by those who criticize these measures. There is a thirsting in this country for a new and better way to resolve disputes. There is a deep sense of consternation that we are “over-lawed,” if I may use that expression. Bayless Manning, the former dean of the Stanford Law School, has written a fine law review article called “Hyperlexis: Our National Disease,” in which he sketches the way in which the law and the adversary process have permeated every area of American life. There is a reaction against this. There is a thirsting for better ways of settling fusses between people—new ways, ways that are less cumbersome, less formal, less expensive, and quicker.

These two bills are steps in that direction. They are in a sense both experimental—the Arbitration bill more so than the Magistrates bill—and we should not do anything to retard or stifle experimentation. The only thing Congress would be doing, in the Arbitration bill especially, is to authorize, for a 5-year period, continued experimentation with an idea that has proved very workable and salutary in the courts of some of the States, and to a much more limited degree, in three Federal judicial districts. So, experimentation and innovation should be key elements we keep in mind when we consider this legislation.

Brandeis made the point that one of the virtues of the Federal system is that it gives us many laboratories for experimentation. Indeed, the Federal judicial districts provide, potentially, 95 laboratories through which new procedures and other innovations can be

attempted in this effort to make justice less expensive and less delayed.

Another circumstance and characteristic of our contemporary condition which I think tends to be overlooked is the changing nature of Federal law and of the Federal question of litigation in the Federal courts.

Today Federal law permeates life to a far greater extent than ever before. Witnesses earlier have pointed out that new Federal regulatory statutes are passed every Congress. These statutes come into our lives and the lives of our people in hundreds of ways in which Federal law did not come 2 and 3 and 4 decades ago. This means that today we have many disputes, many problems arising in the administration of Federal law. Many of these are very small in terms of dollar amounts and in relation to people's lives, yet they are troubling, and we need a ready, informal way of deciding those matters. We have to keep that in mind. The Arbitration bill is an effort to see what can be done in that direction. Likewise, the Magistrates bill is designed to set up an option that provides a less expensive and quicker means of resolution of disputes.

After all, remember a person in a dispute is not really interested in all the trappings of justice that lawyers and judges like. Many of the arguments made against these bills are lawyers' arguments. They are not people's arguments. The man out there in the street, the workman or small businessman with a \$500 or \$1,000 or \$3,000 dispute with somebody or with the Government, wants to get it settled. Naturally, he would like to win; but above all he wants to get into some forum where he can get the case decided without having to spend more money than is involved in the controversy. Now, that is also the goal of these two bills.

I would strongly disagree with the assertion made earlier that the only purpose of these bills is to reduce the congestion in the Federal court. That would be one effect of these bills, but it is not their primary purpose. Rather the goal is to make the courts work better, to provide citizens with a less expensive, quicker way to resolve disputes. That is the major concern here. That is why the Department of Justice tackled this problem to begin with a few years ago. As I have said before, these bills are only part of the larger cluster of bills that are all designed to that end.

Let me say a word or two specifically about the Magistrates bill and the Arbitration bill. The Magistrates bill is not a radical change in existing practice. It is in the best tradition of the development and evolution of the Anglo-American judicial system. The genius of the common law system, with its pragmatic approach, is that it builds upon experience that is born out of the facts and needs of the times. That is what brought the magistrate system into being in 1968. It was a reaction to the felt necessities of the times that the Federal judiciary needed supplemental resources to deal adequately with people's problems. The old commissioner system had serious defects. It was discarded, and in its place the new magistrate system was created.

We have now had 10 years' experience under that system. It has gradually grown. This bill simply carries that expansion forward a few more steps. It makes a modest change—not radical, not drastic. It builds upon what we already have. With this added increment to

the magistrates authority, it may well be that in 5 years, 10 years, or at some point in the future, Congress may want to make other changes in light of further experience.

I think it is fairly significant that those who have had experience with the magistrate system in the last 10 years have endorsed this bill and believe in the system. It is an important adjunct to the Federal district courts. Indeed, it is an essential means of serving the litigants and not merely a means of clearing the dockets.

As to the Arbitration bill, it does not mandate arbitration anywhere in the United States. It merely authorizes the judges in each district to consider whether they want to adopt an arbitration plan, by local rule—not on a case-by-case basis. The local judges would adopt a plan which would govern all the designated cases within the plan.

The experimental arbitration projects with which we have had experience so far in the Federal courts—the three in Connecticut, Pennsylvania, and California—have all been worked out and approved there by the Federal judges of each district in close cooperation with the bar. We do not have a situation here where a Federal judge whimsically sends parties into arbitration on a case-by-case basis. These are carefully worked out plans, closely collaborated in by the bar.

Reference was made earlier to a bar report from Philadelphia. Taken as a whole, that report is highly supportive of the arbitration plan there. A large majority of all the lawyers polled reacted favorably. Of course, there are defects. To discover those problems is the very idea of experimentation. We know that if this bill is passed and other districts attempt arbitration plans we will learn more. We will learn what works well and what does not work well. All of this is aimed ultimately at evolving a better system.

The theory in the bill is that the type of case that is most likely to be amenable to resolution through the arbitration process is a case where money damages are being sought, where there are fusses over the amount of money that one party owes to the other. Moreover, these are cases in which the disputes are likely to be primarily factual, with few or no complex legal questions. Now, whether or not that is a sound theory, and whether that works in practice, is one of the things that we will find out in the 5 years of experimentation if this bill passes. The exact cases that go to arbitration will of course, be specified by each local district, and the precise rules will be refined with experience.

There are many other important things about all of this which I could comment on, which have emerged along the way over the last 3 years, but time moves on, Mr. Chairman. I would prefer to have questions from the committee.

Senator DECONCINI. Thank you very much, Dr. Meador. We are most appreciative of your testimony.

You believe that both these bills will not diminish the quality of justice in any way and actually enhance them; is that correct?

Mr. MEADOR. It is very difficult to say which way the quality of justice will go under any system. Obviously, we do not believe the quality of justice will be diminished. How high the quality level is maintained, I guess remains to be seen. We do believe, though, that both bills have a high likelihood of improving overall the adminis-

tration of justice, including its quality, along with reductions in costly delay.

Senator DECONCINI. Do you see any constitutional problems with either one of these bills? Maybe that is set forth in your statement.

Mr. MEADOR. No, sir, we see no constitutional problems. We have previously submitted statements and analyses on that point.

Senator DECONCINI. Thank you.

I have no further questions.

Senator Heflin.

Senator HEFLIN. I have no questions.

Senator DECONCINI. Thank you very much, Dr. Meador. We appreciate your testimony.

Mr. MEADOR. Thank you.

Senator DECONCINI. That will conclude the hearing on S. 237, today. We want to thank all the witnesses for coming and for their time and effort and travel today.

I want to thank Senator Heflin for his time.

[Whereupon, the hearing was adjourned, subject to the call of the chair.]

96TH CONGRESS
1ST SESSION

S. 237

To improve access to the Federal courts by enlarging the civil and criminal jurisdiction of United States magistrates, and for other purposes.

IN THE SENATE OF THE UNITED STATES

JANUARY 25 (legislative day, JANUARY 15), 1979

Mr. DECONCINI introduced the following bill; which was read twice and referred to the Committee on the Judiciary

A BILL

To improve access to the Federal courts by enlarging the civil and criminal jurisdiction of United States magistrates, and for other purposes.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*
3 That this Act may be cited as the "Magistrate Act of 1979".

4 SEC. 2. Section 636 of title 28, United States Code, is
5 amended—

6 (1) by redesignating subsections (c) through (f)
7 thereof as subsection (d) through (g), respectively; and

1 (2) by inserting immediately after subsection (b)
2 thereof the following new subsection:

3 “(c) Notwithstanding any provision of law to the con-
4 trary—

5 “(1) Upon the consent of the parties, a full-time
6 United States magistrate or a part-time United States
7 magistrate who is not engaged in the practice of law
8 may conduct any or all proceedings in a jury or non-
9 jury civil matter and order the entry of judgment in the
10 case, when specially designated to exercise such juris-
11 diction by the district court or courts he serves.

12 “(2) Upon entry of judgment in any case referred
13 under paragraph (1) of this subsection, an aggrieved
14 party may appeal on the record to a judge of the dis-
15 trict court in the same manner as on an appeal from a
16 judgment of the district court to a court of appeals.
17 Wherever possible the local rules of the district court
18 and the rules promulgated pursuant to section 2072 of
19 this title shall endeavor to make such appeal expedi-
20 tious and inexpensive.

21 “(3) Cases in the district courts under paragraph
22 (2) of this subsection may be reviewed by the appropri-
23 ate United States court of appeals upon petition for
24 leave to appeal by a party stating specific objections to
25 the judgment. Nothing in this paragraph, however,

1 shall be construed to be a limitation on any party's
2 right to seek review by the Supreme Court of the
3 United States.

4 “(4) Notwithstanding the provisions of paragraphs
5 (2) and (3) of this subsection, at the time of reference
6 to a magistrate, the parties may further consent to
7 appeal directly to the appropriate United States Court
8 of appeals from the judgment of the magistrate in the
9 same manner as an appeal from any other judgment of
10 a district court. In this circumstance, the consent of
11 the parties allows a magistrate designated to exercise
12 civil jurisdiction under paragraph (1) of this subsection
13 to direct the entry of a judgment of the district court in
14 accordance with the Federal Rules of Civil Procedure.
15 Nothing in this paragraph shall be construed as a limi-
16 tation on any party's right to seek review by the Su-
17 preme Court of the United States.

18 “(5) The district court shall inform the parties of
19 the provisions of this subsection. The court, however,
20 shall not attempt to persuade or induce any party to
21 consent to a reference of any civil matter to a magis-
22 trate under this subsection.

23 “(6) The court may, on its motion, or for good
24 cause shown, vacate a reference of a civil matter to a
25 magistrate under this subsection.”.

1 SEC. 3. (a) The first sentence of section 631(b) of title
2 28, United States Code, is amended by inserting "reappoint-
3 ed to" immediately after "appointed or".

4 (b) Section 631 of title 28, United States Code, is
5 amended by inserting immediately at the end thereof the fol-
6 lowing new paragraph:

7 "(5) He is selected pursuant to standards and pro-
8 cedures promulgated by the Judicial Conference of the
9 United States. Such standards and procedures shall
10 contain provision for public notice of all vacancies in
11 magistrate positions and in the case of appointments to
12 full-time magistrate positions for the establishment by
13 the district courts of merit selection panels, composed
14 of residents of the individual judicial districts, as to
15 assist the courts in identifying and recommending per-
16 sons who are best qualified to fill such positions."

17 (c) The Congress suggests that the district courts, in
18 selecting individuals for appointment to magistrate positions,
19 select the best qualified individuals regardless of race, color,
20 sex, religion, or national origin.

21 SEC. 4. Section 633(c) of title 28, United States Code,
22 is amended by striking the final sentence.

23 SEC. 5. Section 604(d)(3) of title 28, United States
24 Code, is amended by adding immediately after the word
25 "magistrates" the following: " , their professional back-

1 grounds and qualifications, and any appeals that may be
2 taken from the decisions of magistrates”.

3 SEC. 6. Section 1915(b) of title 28, United States Code
4 is amended to read as follows:

5 “(b) Upon the filing of an affidavit in accordance with
6 subsection (a) of this section, the court may direct payment
7 by the United States of the expenses of (1) printing the
8 record on appeal in any civil or criminal case, if such printing
9 is required by the appellate court; (2) preparing a transcript
10 of proceedings before a United States magistrate in any civil
11 or criminal case, if such transcript is required by the district
12 court, in the case of proceedings conducted under section
13 636(b) of this title or under section 3401(b) of title 18, United
14 States Code; and (3) printing the record on appeal if such
15 printing is required by the appellate court, in the case of
16 proceedings conducted pursuant to section 636(b) of this title.
17 Such expenses shall be paid when authorized by the Director
18 of the Administrative Office of the United States Courts.”.

19 SEC. 7. Section 3401 of title 18, United States Code, is
20 amended—

21 (1) by amending subsection (a) to read as follows:

22 “(a) When specially designated to exercise such jurisdic-
23 tion by the district court or courts he serves, a United States
24 magistrate shall have jurisdiction to try persons accused of,

1 and sentence persons convicted of, misdemeanors committed
2 within that judicial district.”;

3 (2) by amending subsection (b) to read as follows:

4 “(b) The magistrate shall carefully explain to the de-
5 fendant that he has a right to trial before a district judge in
6 any misdemeanor case, including a petty offense case, and
7 that he also has a right to trial by jury before either a judge
8 or magistrate. A petty offense case, however, shall not be
9 tried before a jury except as guaranteed by the United States
10 Constitution.

11 “If the offense charged is a petty offense, the magistrate
12 shall not try the case if the defendant, before the commence-
13 ment of the trial, demands to be tried before a judge of the
14 district court. If the offense charged is a misdemeanor other
15 than a petty offense, the magistrate shall not try the case
16 unless the defendant first signs a written consent to be tried
17 before the magistrate that specifically waives a trial before a
18 district judge.”.

19 (3) by adding at the beginning of subsection (d)
20 the following:

21 “A magistrate may impose sentence and exercise all
22 powers under chapter 402 of this title. No such sentence
23 shall include a commitment for a period in excess of the
24 maximum term which could have been imposed on an adult
25 convicted of the same offense.”;

1 (4) by amending subsection (f) to read as follows:

2 “(f) The district court may order that proceedings in a
3 misdemeanor case be conducted before a district judge rather
4 than a United States magistrate upon the court’s own motion
5 or, for good cause, shown, upon petition by the attorney for
6 the Government. Such petition should note the novelty, im-
7 portance, or complexity of the case, or other pertinent fac-
8 tors, and be filed in accordance with regulations promulgated
9 by the Attorney General.”; and

10 (5) by adding at the end thereof the following new
11 subsection:

12 “(g) A magistrate may exercise all powers of the court
13 pursuant to chapter 403 of this title in the case of a juvenile
14 accused of a violation which would be a misdemeanor, includ-
15 ing a petty offense, if committed by an adult. If the violation
16 would be a petty offense if committed by an adult, proceed-
17 ings pursuant to chapter 403 may be initiated against the
18 juvenile by a violation notice or complaint without the certifi-
19 cation of the Attorney General referred to in section 5032 of
20 this title. Any term of commitment or imprisonment imposed
21 upon a juvenile by a magistrate shall not exceed six
22 months.”.

23 SEC. 8. (a) The heading for section 3401 of title 18,
24 United States Code, is amended by striking the words

1 "Minor offenses" and inserting in lieu thereof "Misdemean-
2 ors".

3 (b) The item relating to section 3401 in the table of
4 sections of chapter 219 of title 18, United States Code, is
5 amended by striking the words "Minor offenses" and insert-
6 ing in lieu thereof "Misdemeanors".

7 SEC. 9. Such sums as may be necessary to carry out the
8 purposes of this Act are hereby authorized to be appropriated
9 for expenditure on or after October 1, 1979.

Calendar No. 76

96TH CONGRESS
1ST SESSION**S. 237****[Report No. 96-74]**

To improve access to the Federal courts by enlarging the civil and criminal jurisdiction of United States magistrates, and for other purposes.

IN THE SENATE OF THE UNITED STATES

JANUARY 25 (legislative day, JANUARY 15), 1979

Mr. DECONCINI introduced the following bill; which was read twice and referred to the Committee on the Judiciary

APRIL 24 (legislative day, APRIL 9), 1979

Reported by Mr. DECONCINI, with an amendment

[Strike all after the enacting clause and insert the part printed in italic]

A BILL

To improve access to the Federal courts by enlarging the civil and criminal jurisdiction of United States magistrates, and for other purposes.

- 1 *Be it enacted by the Senate and House of Representa-*
- 2 *tives of the United States of America in Congress assembled,*
- 3 ~~That this Act may be cited as the "Magistrate Act of 1979".~~

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2 amended—

3 (1) by redesignating subsections (c) through (f)
4 thereof as subsection (d) through (g), respectively; and

5 (2) by inserting immediately after subsection (b)
6 thereof the following new subsection:

7 “(c) Notwithstanding any provision of law to the con-
8 trary—

9 “(1) Upon the consent of the parties, a full-time
10 United States magistrate or a part-time United States
11 magistrate who is not engaged in the practice of law
12 may conduct any or all proceedings in a jury or non-
13 jury civil matter and order the entry of judgment in the
14 case, when specially designated to exercise such juris-
15 diction by the district court or courts he serves.

16 “(2) Upon entry of judgment in any case referred
17 under paragraph (1) of this subsection, an aggrieved
18 party may appeal on the record to a judge of the dis-
19 trict court in the same manner as on an appeal from a
20 judgment of the district court to a court of appeals.
21 Wherever possible the local rules of the district court
22 and the rules promulgated pursuant to section 2072 of
23 this title shall endeavor to make such appeal expedi-
24 tious and inexpensive.

1 “(2) Cases in the district courts under paragraph
2 (2) of this subsection may be reviewed by the appropri-
3 ate United States court of appeals upon petition for
4 leave to appeal by a party stating specific objections to
5 the judgment. Nothing in this paragraph, however,
6 shall be construed to be a limitation on any party’s
7 right to seek review by the Supreme Court of the
8 United States.

9 “(4) Notwithstanding the provisions of paragraphs
10 (2) and (3) of this subsection, at the time of reference
11 to a magistrate, the parties may further consent to
12 appeal directly to the appropriate United States court
13 of appeals from the judgment of the magistrate in the
14 same manner as an appeal from any other judgment of
15 a district court. In this circumstance, the consent of
16 the parties allows a magistrate designated to exercise
17 civil jurisdiction under paragraph (1) of this subsection
18 to direct the entry of a judgment of the district court in
19 accordance with the Federal Rules of Civil Procedure.
20 Nothing in this paragraph shall be construed as a limi-
21 tation on any party’s right to seek review by the Su-
22 preme Court of the United States.

23 “(5) The district court shall inform the parties of
24 the provisions of this subsection. The court, however,
25 shall not attempt to persuade or induce any party to

1 consent to a reference of any civil matter to a magis-
2 trate under this subsection.

3 “(6) The court may, on its motion, or for good
4 cause shown, vacate a reference of a civil matter to a
5 magistrate under this subsection.”.

6 SEC. 3. (a) The first sentence of section 631(b) of title
7 28, United States Code, is amended by inserting “reappoint-
8 ed to” immediately after “appointed or”.

9 (b) Section 631 of title 28, United States Code, is
10 amended by inserting immediately at the end thereof the fol-
11 lowing new paragraph:

12 “(5) He is selected pursuant to standards and pro-
13 cedures promulgated by the Judicial Conference of the
14 United States. Such standards and procedures shall
15 contain provision for public notice of all vacancies in
16 magistrate positions and in the case of appointments to
17 full-time magistrate positions for the establishment by
18 the district courts of merit selection panels, composed
19 of residents of the individual judicial districts, as to
20 assist the courts in identifying and recommending per-
21 sons who are best qualified to fill such positions.”.

22 (c) The Congress suggests that the district courts, in
23 selecting individuals for appointment to magistrate positions,
24 select the best qualified individuals regardless of race, color,
25 sex, religion, or national origin.

1 SEC. 4. Section 632(c) of title 28, United States Code,
2 is amended by striking the final sentence.

3 SEC. 5. Section 604(d)(2) of title 28, United States
4 Code, is amended by adding immediately after the word
5 "magistrates" the following: " , their professional back-
6 grounds and qualifications, and any appeals that may be
7 taken from the decisions of magistrates".

8 SEC. 6. Section 1915(b) of title 28, United States Code
9 is amended to read as follows:

10 “(b) Upon the filing of an affidavit in accordance with
11 subsection (a) of this section, the court may direct payment
12 by the United States of the expenses of (1) printing the
13 record on appeal in any civil or criminal case, if such printing
14 is required by the appellate court; (2) preparing a transcript
15 of proceedings before a United States magistrate in any civil
16 or criminal case, if such transcript is required by the district
17 court, in the case of proceedings conducted under section
18 636(b) of this title or under section 3401(b) of title 18, United
19 States Code; and (3) printing the record on appeal if such
20 printing is required by the appellate court, in the case of
21 proceedings conducted pursuant to section 636(b) of this title.
22 Such expenses shall be paid when authorized by the Director
23 of the Administrative Office of the United States Courts.”.

24 SEC. 7. Section 3401 of title 18, United States Code, is
25 amended—

1 (1) by amending subsection (a) to read as follows:

2 “(a) When specially designated to exercise such jurisdic-
3 tion by the district court or courts he serves, a United States
4 magistrate shall have jurisdiction to try persons accused of,
5 and sentence persons convicted of, misdemeanors committed
6 within that judicial district.”;

7 (2) by amending subsection (b) to read as follows:

8 “(b) The magistrate shall carefully explain to the de-
9 fendant that he has a right to trial before a district judge in
10 any misdemeanor case, including a petty offense case, and
11 that he also has a right to trial by jury before either a judge
12 or magistrate. A petty offense case, however, shall not be
13 tried before a jury except as guaranteed by the United States
14 Constitution.

15 “If the offense charged is a petty offense, the magistrate
16 shall not try the case if the defendant, before the commence-
17 ment of the trial, demands to be tried before a judge of the
18 district court. If the offense charged is a misdemeanor other
19 than a petty offense, the magistrate shall not try the case
20 unless the defendant first signs a written consent to be tried
21 before the magistrate that specifically waives a trial before a
22 district judge.”.

23 (3) by adding at the beginning of subsection (d)
24 the following:

1 “A magistrate may impose sentence and exercise all
2 powers under chapter 402 of this title. No such sentence
3 shall include a commitment for a period in excess of the
4 maximum term which could have been imposed on an adult
5 convicted of the same offense.”;

6 (4) by amending subsection (f) to read as follows:

7 “(f) The district court may order that proceedings in a
8 misdemeanor case be conducted before a district judge rather
9 than a United States magistrate upon the court’s own motion
10 or, for good cause, shown, upon petition by the attorney for
11 the Government. Such petition should note the novelty, im-
12 portance, or complexity of the case, or other pertinent fac-
13 tors, and be filed in accordance with regulations promulgated
14 by the Attorney General.”; and

15 (5) by adding at the end thereof the following new
16 subsection:

17 “(g) A magistrate may exercise all powers of the court
18 pursuant to chapter 403 of this title in the case of a juvenile
19 accused of a violation which would be a misdemeanor, includ-
20 ing a petty offense, if committed by an adult. If the violation
21 would be a petty offense if committed by an adult, proceed-
22 ings pursuant to chapter 403 may be initiated against the
23 juvenile by a violation notice or complaint without the certifi-
24 cation of the Attorney General referred to in section 5032 of
25 this title. Any term of commitment or imprisonment imposed

1 upon a juvenile by a magistrate shall not exceed six
2 months.”.

3 SEC. 8. (a) The heading for section 3401 of title 18,
4 United States Code, is amended by striking the words
5 “Minor offenses” and inserting in lieu thereof “Misdemean-
6 ers”.

7 (b) The item relating to section 3401 in the table of
8 sections of chapter 219 of title 18, United States Code, is
9 amended by striking the words “Minor offenses” and insert-
10 ing in lieu thereof “Misdemeanors”.

11 SEC. 9. Such sums as may be necessary to carry out the
12 purposes of this Act are hereby authorized to be appropriated
13 for expenditure on or after October 1, 1979.

14 That this Act may be cited as the “Federal Magistrate Act of
15 1979”.

16 SEC. 2. Section 636 of title 28, United States Code, is
17 amended—

18 (1) by redesignating subsections (c) through (f)
19 thereof as subsection (d) through (g), respectively; and

20 (2) by inserting immediately after subsection (b)
21 thereof the following new subsection:

22 “(c) Notwithstanding any provision of law to the con-
23 trary—

24 “(1) Upon the consent of the parties, a full-time
25 United States magistrate or a part-time United States

1 *magistrate who serves as a full-time judicial officer*
2 *may conduct any or all proceedings in a jury or non-*
3 *jury civil matter and order the entry of judgment in*
4 *the case, when specially designated to exercise such ju-*
5 *risdiction by the district court or courts he serves.*
6 *Upon the specific written request of the parties and*
7 *with the approval of the district court, any other part-*
8 *time magistrate agreed to by the parties may exercise*
9 *such jurisdiction.*

10 *“(2) Upon entry of judgment in any case referred*
11 *under paragraph (1) of this subsection, an aggrieved*
12 *party may appeal directly to the appropriate United*
13 *States court of appeals from the judgment of the mag-*
14 *istrate in the same manner as an appeal from any*
15 *other judgment of a district court. In this circum-*
16 *stance, the consent of the parties allows a magistrate*
17 *designated to exercise civil jurisdiction under para-*
18 *graph (1) of this subsection to direct the entry of a*
19 *judgment of the district court in accordance with the*
20 *Federal Rules of Civil Procedure. Nothing in this*
21 *paragraph shall be construed as a limitation of any*
22 *party’s right to seek review by the Supreme Court of*
23 *the United States.*

24 *“(3) Notwithstanding the provisions of paragraph*
25 *(2) of this subsection, at the time of reference to a mag-*

1 istrate, the parties may further consent to appeal on
2 the record to a judge of the district court in the same
3 manner as on an appeal from a judgment of the dis-
4 trict court to a court of appeals. Whenever possible the
5 local rules of the district court and the rule promulgat-
6 ed pursuant to section 2072 of this title shall endeavor
7 to make such appeal expeditious and inexpensive.

8 “(4) Cases in the district courts under paragraph
9 (3) of this subsection may be reviewed by the appropri-
10 ate United States court of appeals upon petition for
11 leave to appeal by a party stating specific objections to
12 the judgment. Nothing in this paragraph, however,
13 shall be construed to be a limitation on any party’s
14 right to seek review by the Supreme Court of the
15 United States.

16 “(5) The district court shall inform the parties of
17 the provisions of this subsection. The court, however,
18 shall not attempt to persuade or induce any party to
19 consent to a reference of any civil matter to a magis-
20 trate under this subsection. Rules of court for the refer-
21 ence of civil matters to magistrates under this subsec-
22 tion shall include procedures to protect the voluntari-
23 ness of the parties’ consent.

1 ~~subsection~~“(6) The court may, on its motion, or for good
2 ~~cause shown~~, vacate a reference of a civil matter to a
3 ~~magistrate under this subsection.”.~~

4 ~~SEC. 3. (a)~~ Section 631(a) of title 28, United States
5 Code, is amended by striking the last sentence and inserting
6 in lieu thereof the following: “Where the conference deems it
7 desirable, a magistrate may be designated to serve in one or
8 more districts adjoining the district for which he is appoint-
9 ed. Such a designation shall be made by the concurrence of a
10 majority of the judges of each of the district courts involved
11 and shall specify the duties to be performed by the magistrate
12 in the adjoining district or districts.”.

13 (b) Section 631(b) of title 28, United States Code is
14 amended—

15 (1) by inserting “reappointed to” immediately
16 after “appointed or”;

17 (2) by adding the word “or” at the end of subpar-
18 agraph (1)(A);

19 (3) by striking the word “or” from the end of sub-
20 paragraph (1)(B); and

21 (4) by striking subparagraph (1)(C).

22 (c) Section 631(b) of title 28, United States Code, is
23 amended by inserting immediately at the end thereof the fol-
24 lowing new paragraph:

1 “(5) He is selected pursuant to standards and
2 procedures promulgated by the Judicial Conference of
3 the United States. Such standards and procedures
4 shall contain provision for public notice of all vacan-
5 cies in magistrate positions and in the case of appoint-
6 ments to full-time magistrate positions for the estab-
7 lishment by the district courts of merit selection panels,
8 composed of residents of the individual judicial dis-
9 tricts, to assist the courts in identifying and recom-
10 mending persons who are best qualified to fill such
11 positions.”.

12 (d) Section 631 of title 28, United States Code, is
13 amended—

14 (1) by redesignating subsections (f) through (j)
15 thereof as subsections (g) through (k), respectively; and
16 (2) by inserting immediately after subsection (e)
17 thereof the following new subsection:

18 “(f) Upon the expiration of his term, a magistrate may,
19 by a majority vote of the judges of the appointing district
20 court or courts, continue to perform the duties of his office
21 until his successor is appointed, or for one hundred and
22 eighty days from the date of the expiration of the magistrate’s
23 term, whichever is earlier.”.

24 (e) The Congress suggests that the district courts, in
25 selecting individuals for appointment to magistrate positions,

1 *select the best qualified individuals regardless of race, color,*
2 *sex, religion, or national origin. The Congress notes that*
3 *members of recognized minority groups and women do not*
4 *serve in the Federal judiciary in proportion to their ratio of*
5 *the total population and suggests that due consideration be*
6 *given all qualified individuals.*

7 (f) *Magistrates serving prior to the promulgation of*
8 *magistrate selection standards and procedures by the Judicial*
9 *Conference of the United States may only exercise the juris-*
10 *isdiction conferred by section 2 of this Act after having been*
11 *reappointed under such standards and procedures or after*
12 *having been certified as qualified to exercise such jurisdic-*
13 *tion by the chief judge of the circuit in which the magistrate*
14 *serves.*

15 (g) *Section (c) of this section shall not take effect until*
16 *thirty days after the meeting of the Judicial Conference of the*
17 *United States next following the effective date of this Act.*

18 SEC. 4. *Section 633(c) of title 28, United States Code,*
19 *is amended by striking the final sentence.*

20 SEC. 5. *Section 604(d)(3) of title 28, United States*
21 *Code, is amended by adding immediately after the word*
22 *"magistrates" the following: " , their professional back-*
23 *grounds and qualifications, and any appeals that may be*
24 *taken from the decisions of magistrates".*

1 *SEC. 6. Section 1915(b) of title 28, United States*
2 *Code, is amended to read as follows:*

3 “(b) Upon the filing of an affidavit in accordance with
4 subsection (a) of this section, the court may direct payment
5 by the United States of the expenses of (1) printing the
6 record on appeal in any civil or criminal case, if such print-
7 ing is required by the appellate court; (2) preparing a tran-
8 script of proceedings before a United States magistrate in
9 any civil or criminal case, if such transcript is required by
10 the district court, in the case of proceedings conducted under
11 section 636(b) of this title or under section 3401(b) of title
12 18, United States Code; and (3) printing the record on
13 appeal if such printing is required by the appellate court, in
14 the case of proceedings conducted pursuant to section 636(b)
15 of this title. Such expenses shall be paid when authorized by
16 the Director of the Administrative Office of the United States
17 Courts.”.

18 *SEC. 7. Section 3401 of title 18, United States Code,*
19 *is amended—*

20 (1) by amending subsection (a) to read as follows:

21 “(a) When specially designated to exercise such juris-
22 diction by the district court or courts he serves, a United
23 States magistrate shall have jurisdiction to try persons ac-
24 cused of, and sentence persons convicted of, misdemeanors
25 committed within that judicial district.”;

1 (2) by amending subsection (b) to read as follows:

2 “(b) The magistrate shall carefully explain to the de-
3 fendant that he has a right to trial, judgment, and sentencing
4 before a district judge in any misdemeanor case, including a
5 petty offense case, and that he also has a right to trial by
6 jury before either a judge or magistrate. A petty offense case,
7 however, shall not be tried before a jury except as guaranteed
8 by the United States Constitution.

9 “The magistrate shall not try the case unless the defen-
10 dent first signs a written consent to be tried before the magis-
11 trate that specifically waives a trial before a district judge.”.

12 (3) by adding at the beginning of subsection (d)
13 the following:

14 “A magistrate may impose sentence and exercise all
15 powers under chapter 402 of this title. No such sentence shall
16 include a commitment for a period in excess of the maximum
17 term which could have been imposed on an adult convicted of
18 the same offense.”;

19 (4) by amending subsection (f) to read as follows:

20 “(f) The district court may order that proceedings in a
21 misdemeanor case be conducted before a district judge rather
22 than a United States magistrate upon the court’s own motion
23 or, for good cause shown, upon petition by the attorney for
24 the Government. Such petition should note the novelty, im-
25 portance, or complexity of the case, or other pertinent factors,

1 and be filed in accordance with regulations promulgated by
2 the Attorney General.”; and

3 (5) by adding at the end thereof the following new
4 subsection:

5 “(g) A magistrate may exercise all powers of the court
6 pursuant to chapter 403 of this title in the case of a juvenile
7 accused of a violation which would be a misdemeanor, in-
8 cluding a petty offense, if committed by an adult. If the vio-
9 lation would be a petty offense if committed by an adult,
10 proceedings pursuant to chapter 403 may be initiated against
11 the juvenile by a violation notice or complaint without the
12 certification of the Attorney General referred to in section
13 5032 of this title. Any term of commitment or imprisonment
14 imposed upon a juvenile by a magistrate shall not exceed six
15 months.”.

16 SEC. 8. (a) The heading for section 3401 of title 18,
17 United States Code, is amended by striking the words
18 “Minor offenses” and inserting in lieu thereof “Misdemean-
19 ors”.

20 (b) The item relating to section 3401 in the table of
21 sections of chapter 219 of title 18, United States Code, is
22 amended by striking the words “Minor offenses” and insert-
23 ing in lieu thereof “Misdemeanors”.

24 SEC. 9. Rule 11 of the Federal Rules of Criminal Pro-
25 cedure is amended by adding the following new subsection:

1 “(h) In a case not triable before a United States magis-
2 trate under section 3401 of title 18, United States Code,
3 such magistrate may perform the duties of the court under
4 subsections (a), (b), (c), and (d) and accept a plea of not
5 guilty, or upon the consent of the defendant a plea of guilty
6 or nolo contendere.”.

7 SEC. 10. (a) Congress finds that this is the third Act in
8 a little over ten years dealing with the Federal magistrates
9 system; that at the time of the passage of the Omnibus Judge-
10 ship Act of 1978 there were one hundred and ninety-six full
11 time magistrates and two hundred and ninety-two part-time
12 magistrates and three hundred and ninety-nine district court
13 judges, indicating that the nationwide ratio of full time mag-
14 istrates to judges is approximately one to two; that this ratio
15 and the number of magistrates will probably increase because
16 the Omnibus Judgeship Act of 1978 created one hundred and
17 seventeen new district court judges and the jurisdiction of
18 magistrates is substantially increased by this Act.

19 Since it appears that the magistrate system has become
20 a permanent fixture in the Federal district courts, Congress
21 feels that careful study and consideration from a structural
22 viewpoint is desirable. Therefore, the Judicial Conference of
23 the United States is requested to undertake a study within
24 ninety days after the effective date of this Act and report to

1 Congress its conclusions and recommendations with respect
2 to the following:

3 (1) Whether the Federal district courts should be
4 uniformly structured as a two-tier trial courts utilizing
5 Federal district judges and magistrates as separate, in-
6 dependent tiers.

7 (2) What steps should be taken to insure the inde-
8 pendence of magistrates in exercising their civil and
9 criminal jurisdiction and to promote the uniformity of
10 the magistrate system throughout the Federal district
11 court system.

12 (3) Whether a new title such as "Division Judge"
13 or "Associate Judge" should be fashioned to enhance
14 the status and prestige of the magistrates who are pri-
15 marily engaged in the trial of cases within their juris-
16 diction or who serve as full-time judicial officers.

17 (4) The need for supportive personnel and facili-
18 ties for magistrates, bearing in mind the differences be-
19 tween part-time magistrates and full-time magistrates.

20 (5) Whether the civil jurisdiction of magistrates
21 should be fixed or should remain open-ended, and if it
22 should be fixed, what jurisdiction should be entrusted
23 to magistrates.

1 (6) *If fixed civil jurisdiction of magistrates is rec-*
2 *ommended, procedures by which the jurisdiction may*
3 *be changed from time to time without long delay.*

4 (7) *Whether or not part-time magistrates should*
5 *exercise jurisdiction in civil cases.*

6 (b) *The results of the study directed to be made in ac-*
7 *cordance with (a) above shall be made available to Congress*
8 *within eighteen months after the effective date of this Act.*

9 SEC. 11. (a) *Section 634(c) of title 28, United States*
10 *Code, is amended by inserting "legal", immediately after the*
11 *word "necessary".*

12 (b) *Section 635(a) of title 28, United States Code, is*
13 *amended by inserting "legal", immediately before the word*
14 *"clerical".*

15 SEC. 12. *Such sums as may be necessary to carry out*
16 *the purposes of this Act are hereby authorized to be appropri-*
17 *ated for expenditure on or after October 1, 1979.*

A P P E N D I X

ADDITIONAL SUBMISSION OF JOHN E. NOWAK

SPECIAL FEDERAL ARBITRATION PROJECT EVALUATION

By: Seymour Kurland, Esquire

Number of cases evaluated: 25
 Number of lawyers contacted for evaluation: 121
 Number of arbitrators - 73
 Number of counsel - 48
 Number of lawyers who did not respond: 28
 Number of arbitrators - 15
 Number of counsel - 13

OUTCOME OF ARBITRATION PROCEEDINGS

12 cases settled (3 settled before hearing)
 9 cases filed for Trial de Novo
 1 case filed a Default Judgment
 1 case filed a Judgment of Dismissal for lack of jurisdiction
 1 case filed a Motion for Class Action
 1 case was rescheduled for a hearing within a month

RESULTS

Most lawyers seemed generally in favor of the program and felt that it should be strongly encouraged.

Eleven lawyers were generally against the program. All of them experienced a case which was appealed or in which certain problems were encountered.

Eleven lawyers made no real comment either way.

One lawyer declined to comment because his partner had filed an objection to the Federal Arbitration Program.

Twenty-eight lawyers did not respond.

NATURE OF CLAIMS

- Settled - 1) No. 78-417 Peerless Insurance Co. v. Timothy F. McGee - customs bond (\$4,500.00);
 2) No. 78-448 (nature of claim not stated);
 3) No. 78-498 Collier v. New Deal Lumber & Millwork Co., et al - small diversity claim for property damage due to fire;
 4) No. 78-519 Plaintiff had not made a prima facie case;

- 5) No. 78-749 Motor vehicle accident - dispute over amount of recovery;
- 6) No. 78-857 Personal injury suit against General Motors due to loss of finger;
- 7) No. 78-1207 Claim on insurance policy;
- 8) No. 78-1209 (nature of claim not stated);
- 9) No. 78-1244 Diversity of citizenship automobile accident (\$5,000.00);
- 10) No. 78-1270 Personal injury claim;
- 11) No. 78-1473 Simple action on a book account;
- 12) No. 78-1912 Contract dispute, non-payment (\$11,500.00).

Trial de
Novo

- 1) No. 78-374 Supermarket fall - counsel not satisfied with \$6,300.00 award;
- 2) No. 78-400 L.C. Thomsen & Sons, Inc. v. Narwyn Machinery Co., et al - appealed by defendant - damages claimed in complaint exceeded \$50,000., but counsel had not wanted to prevent arbitration;
- 3) No. 78-429 Tina Falcone, a minor v. Lester Talbot - severe medical injury;
- 4) No. 78-608 Jones Act Case - Seaman's personal injury action - maximum damage \$10,000.00;
- 5) No. 78-818 Quick v. H&O Steak, et al - appeal inevitable due to lack of medical examination;
- 6) No. 78-1312 Katzman v. Spectrum - Trespass claim arising out of fall by plaintiff;
- 7) No. 78-1641 Case in excess of \$10,000.00;
- 8) No. 78-1772 Suit brought by mortgage broker against his client for a fee payable for obtaining an FHA Commitment;
- 9) No. 78-680 Manoogian v. Hovnanian - appeal from Award of Arbitrators.

Default

- Judgment - 1) No. 78-845 Defendant failed to appear - case awarded to plaintiff in full.

- Dismissal- 1) No. 78-528 Miller Act Claim (41 U.S.C. §2706) - lack of jurisdiction.

- 1) No. 78-826 Filed Motion for certification of case as class action.

- 1) No. 78-625 Rescheduled - both parties agreed for need of continuance.

REASONS LISTED IN FAVOR OF FEDERAL COURT ARBITRATION

The program should bring about early trial listings and therefore early settlements since parties are brought together before trial. It is a good way to clear up the current backlog of small cases cluttering up the docket. The program removes cases expeditiously and in the interest of all parties; it saves time and money.

The administering and scheduling of the arbitration was very successful; all preliminary work is handled very well by the Federal Court. For the majority of cases, pleadings and relevant materials were sent to the parties well in advance.

The limited time frame forces clients to seriously undertake settlement negotiations and bring matters swiftly to trial.

The Arbitrators were extremely qualified and well prepared; the Deputy Clerk was very helpful; the panels took their responsibilities very seriously. The program is realistic and desirable if the panel members give care, sincerity and objectivity to their assignments.

Holding proceedings in a courtroom is a distinct advantage owing to the atmosphere and seriousness with which everyone conducts themselves; it lends dignity and judicial formality to the proceedings.

The program and the way it was handled caused both sides to focus on the real issues and moved them toward settlement and rapid resolution.

The idea that the panel was composed of neutral, plaintiff-oriented and defendant-oriented members was well liked.

The program is effective and worthwhile. The Federal Court should support it if they wish to retain diversity jurisdiction in its present form.

REASONS LISTED AGAINST FEDERAL COURT ARBITRATIONScheduling:

There is an anticipation of scheduling problems; stumbling block in scheduling lawyers, litigants and courtroom space. There was some administrative slowup in payment of compensation, reception of and timing of materials sent.

In one case the hearing was scheduled arbitrarily on a date before the discovery deadline as set forth by the Court. A medical exam was scheduled for the plaintiff a day or two before the deadline, so the arbitration had to proceed without the benefit of the exam; the case was appealed.

Another case was listed for arbitration much too quickly. (Suit was instituted on February 27, notification of hearing on August 10 and listed for August 30). Discovery was not completed by either side. A continuance was requested, and denied. Such hasty litigation is a detriment to all parties. If both parties are in agreement that a matter should be continued, or are not yet ready for trial, the judiciary should not interfere with the agreement. The purpose of a judge is to help resolve disputes.

In one case a second hearing was required, but was repeatedly postponed or cancelled due to conflicts. It was scheduled three months later. It was concluded hurriedly, with interruptions and demands for expedition by the arbitrators who then refused to hear closing arguments and requested post-hearing briefs. The panel had difficulty remembering details of the testimony and evidence presented and relied very heavily on one panelist's handwritten notes. The decision was reached on the basis of the extension of the legal principle "Good Samaritan" doctrine.

One lawyer saw a serious weakness in one case because of the lawyers' lack of preparation (through no fault of their own). A sufficient amount of time had not elapsed to allow them to conduct discovery and to

agree upon stipulations of facts in order to narrow the issues. Some problems could have been avoided if the Magistrate had conducted a pre-trial conference and if more time was allowed for discovery. The case could have been tried in one day instead of two. If a pretrial memo had been submitted with the applicable law at the beginning of the case, it would have made it easier for the arbitrators, especially if they have no knowledge of the area.

Discovery:

The 120-day discovery limitation was found to be an inconvenience and a hinderance to adequate preparation of the case for trial; discovery limitation should be more flexible or should be extended. The immediate referral to arbitration was felt by one, far too prompt for parties to align their positions.

Specialized Areas:

There may be problems with regard to suits involving specialized areas (i.e. suits in admiralty, real estate financing, etc.). Panels need specialized knowledge in these areas to make fair decisions. The background of the arbitrators should be considered in view of the subject matter of the case.

\$50,000.00 Limitation:

The \$50,000.00 limit was questioned (see suggestions). In one case, the claim was for \$49,000.00 but the counterclaim exceeded the limit and it was apparent there would be an appeal.

The limitation may prevent arbitration for some cases that may otherwise be quickly settled.

Cases involved in amounts substantially in excess of \$10,000.00 are not the kind that lend themselves to arbitration hearings with the right of appeal and complete trial de novo. Such a procedure makes additional work for lawyers with costs for witnesses without much being accomplished.

Complexity:

It was generally felt the program would work with simple, factual and legal issues with limited monetary claim, but problems were foreseen in more complex legal issues possibly involving multiple defendants, with the inability on the part of counsel to stipulate to a number of documents. It was questionable whether a busy lawyer would be prepared to participate in more extended proceedings. It is also unfair to require litigants to engage counsel at great expense for a longer period.

In one case involving nonconformity in the sale of goods, it was clear from the outset that time constraints would prevent testimony beyond the first day's hearing. As a result, various stipulations were entered into with regard to evidence which had the effect of shortening the time needed to present basically noncontradicted testimony. A decision had not yet been rendered three weeks after the hearing.

Since the minimum figure involves sums in excess of \$10,000.00, and issues which might be more complex, it would be impossible to conduct these hearings within the time constraints imposed by panel members.

Guidelines:

* Arbitration should not be mandatory but discretionary. The program should provide another alternative to the parties in an effort to seek a resolution to their differences.

One lawyer finds there are no guidelines in this program which makes it meaningless. He did not receive a Notice of Appeal taken by the opponent until three weeks after the time period for appeal had expired. In Common Pleas Arbitration, the rules are very definite in regard to appeal times and costs which must be furnished prior to the taking of an appeal.

There are no hardships upon the loser who takes an appeal in Federal Court; it becomes incumbent upon counsel to provide a court stenographer and to pay entire cost of the proceedings. Since an appeal can be taken and trial de novo scheduled, any party who can afford to do so will get a second trial, therefore, favoring the wealthier party. Many parties will conduct minimal discovery, use the arbitration as a practice ground and take an appeal from any adverse decision. (Same problem in Common Pleas, but since the amount is so much greater here, the number of appeals will be greater).

There was difficulty concerning a continuance; none seemed to know who had the authority to continue the matter. Some procedure should be established whereby continuances can be obtained where necessary. The fact that the trial date is set by the court tends to cut down on continuances which is sometimes a problem in the state court arbitration system.

One lawyer feels the program is illconceived and poorly administered; this arbitration procedure has no rules to guide the litigants and arbitrators concerning when the rules of evidence are to be altered or suspended; the arbitrators had to meet two days to try the case and a third day to decide the case.

One lawyer felt the panel was too disorganized and spent a lot of time reviewing the pleadings.

One lawyer feels a more efficient judiciary is far more beneficial to the Federal Courts than a permanent arbitration program; perhaps a 12 or 18 month rule for most kinds of civil cases could be instituted in the Eastern Districts now that more judges are available.

There may be a problem obtaining balanced panels which are not prejudiced against the plaintiff. A potential problem may be the attitude of the District Judge toward the losing party.

There may be difficulty in following existing federal rules rather than the Common Pleas Arbitration Rules.

SUGGESTIONS FOR THE FEDERAL ARBITRATION PROGRAM

There should be some mechanism for reviewing those cases assigned to the arbitration program to ensure they are the type of case appropriate for such treatment. The Philadelphia Rules, for example, permit reference to an arbitration panel only in certain cases.

Scheduling:

It was suggested that counsel be consulted for a convenient date and time before scheduling the hearing.

The administrator should be given more authority to administer the arbitration program in the same fashion as the administrative judge would allow that person to rule on questions of continuances and procedural problems that arise that pertain to the facilitation of the program. The chairman should be able to schedule proceedings to liberally allow for continuances and resumptions of the procedure at convenient times to facilitate the arbitration process.

Discovery:

Discovery limitation should be more flexible or extended. More flexibility should be allowed to afford postponements when required or necessitated. If a case will be appealed regardless of the outcome because discovery period was too short, etc., the purpose of the arbitration is nullified. How seriously will counsel take the arbitration if an appeal is almost certain. They may save key evidence for trial.

Perhaps the entire file (deposition transcripts, interrogatory answers, rulings on pretrial motions for panel members, etc.) should be sent to the panel before the hearing.

Guidelines:

A local rule should permit expert testimony to go into evidence by means of reports rather than live testimony. A procedure should be

set forth for the introduction of medical and other records at the time of the hearing; the present rules in this regard are by no means clear. Affidavits of physicians should be a regular requirement.

Rules could be established to reduce the necessity of subpoenaing documents: tendering proposed documents to opposing counsel ten days in advance and if no objection is made, make them available and admissible for purposes of arbitration.

A record should be kept of the hearing, since by having a trial de novo the lower court proceeding becomes a nullity, and the picture of the case can change after a thorough review of the testimony adduced at the arbitration hearing.

If a stenographer is ordered, the hearing may in some instances avoid the necessity of depositions.

The program needs definite improvement in the area of procedure for appeals. There does not seem to be specificity nor sufficient prerequisites to make the taking of an appeal more than a prefatory exercise.

It may be more appropriate if the appealing party were required to pay the costs of the successful party and take such other steps as may be borrowed from the procedures in the compulsory arbitration program of the Philadelphia Common Pleas Court.

It should be mandatory that the arbitration proceedings be taken down by reporter and the transcript be ordered by the party appealing to make it difficult for people to try their luck on trial de novo on a different approach (or split 50/50).

\$50,000.00 Limitation:

All cases involving claims of less than \$50,000.00 should not automatically be subjected to arbitration since many of these cases are too complex.

Arbitrators should not be precluded from awarding more than \$50,000.00. There should be a procedure by which any party may make a motion to get a case into arbitration if he proves it is the kind of case that should be arbitrated; conversely, a party ought to be able to, by motion and affidavit, remove a case from the arbitration program.*

Some lawyers have experienced with a few Judges the problem of making a demand which is close to the arbitration limit of \$50,000.00 and the immediate response is maybe the case should be sent down. This does hinder the candor which is essential if settlement is to be effected.

Someone suggested that the amount involved not exceed \$25,000.00; a higher limit may result in more appeals.

Arbitrator's Role:

Arbitrators should be given more stringent guidelines for their function and capacity - so as not to incessantly interfere in arbitration. The Chairman's role should be clearly defined. He is expected to make all rulings and "lead" the panel.

Following the hearing, parties should discuss settlement while Arbitrators deliberate; if the parties cannot settle, Arbitrators should finish their deliberations, announce and record their decision.

Arbitrators should be advised of the final disposition of a case.

One suggests that the Chairman be at the Bar for at least ten years and one of the other two Arbitrators for at least two years.

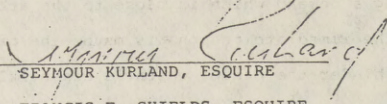
Compensation:

Some thought should be given to increasing the remuneration to Arbitrators in order to maintain an experienced and well qualified panel of lawyers to draw from; if Arbitrators have to spend two or three days on some cases, they should be fully and adequately compensated for their time.

Rule 49 does not recognize probable length of the arbitration as a factor in deciding whether the case should be sent there; anything more

than two days is likely to result in very cumbersome scheduling and rescheduling problems and in a fall-off in the quality and experience level of the arbitrators.

SUBMITTED TO THE FEDERAL ARBITRATION
JUDICIAL COMMITTEE


SEYMOUR KURLAND, ESQUIRE

FRANCIS E. SHIELDS, ESQUIRE

MARSHALL A. BERNSTEIN, ESQUIRE

* In his letter, Henry Kolowrat, Esquire, gives suggested wording to change Section 4 to include these points.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Arbitration Summary

February 1, 1978 to December 31, 1978

A total of 342 cases have been terminated prior to the entry of an order of referral to arbitrators. Two-hundred-forty-three or 71% of those cases were terminated by settlement or dismissal, and 88 or 26% were terminated by court order on motion. The remaining 11 cases or 3% were terminated by the entry of a default judgement.

A total of 85 cases have been terminated after the entry of an order of referral to arbitrators. Arbitration hearings were scheduled in 63 cases which were reported settled prior to the hearing. There have been 33 arbitration hearings held. Award and Judgement has been entered in 16 cases and, after hearing, a settlement has been entered in two cases. Fifteen appeals for trial de novo were filed during this period. Two of the cases which were appealed settled prior to trial de novo. Plaintiff's motion for dismissal has been approved by the court in four cases.

Overall, a total of 427 or 44% of the 970 cases eligible for arbitration were terminated during the 11 month period the arbitration rule has been in effect. Three-hundred-twelve or 72% of those cases were terminated by

settlement, stipulation or voluntary dismissal. Eighty-eight or 21% were terminated by court order on motion. Sixteen or 4% were terminated by arbitration award. The remaining 11 cases or 3% were terminated by entry of default judgement.

One-hundred-seven or 34% of the 310 total cases filed during the month of February, 1978, were eligible for arbitration. Sixty-five or 17% of the 367 cases filed during the month of December, 1978, were eligible for arbitration. This represents a reduction of 17% in the number of cases eligible for arbitration at the time of filing.

There are currently 31 cases scheduled for hearing and 62 additional cases which are in the process of being scheduled for hearing.

At present 546 attorneys have been certified as arbitrators, and 99 arbitrators have served on panels.

Chairmen of the arbitration panels are compensated at the rate of \$70.00 per case. Other panel members receive \$40.00 per case. The total fees paid to the three arbitrators per case is \$150.00. Therefore, to date, a sum of \$4,950.00 has been paid to the 99 attorneys who have served on the 33 cases in which arbitration hearings have been held.

Attached hereto are the following tables which show a detailed monthly breakdown of the number of cases filed, terminated and pending during the period February 1, 1978, to December 31, 1978. Also, the tables illustrate the method of termination.

Statistical TablesTable

- I. Summary of Cases Eligible for Arbitration Under Local Civil Rule 49, Filed, Terminated and Pending from February 1, 1978, to December 31, 1978.
- II. Manner in Which the 342 Cases were Terminated Prior to Order of Referral to Arbitrators as of December 31, 1978.
- III. Manner in Which the 85 Cases were Terminated After Order of Referral to Arbitrators as of December 31, 1978.
- IV. Manner in which the 427 Cases were Terminated Prior to and After Entry of Order of Referral to Arbitrators as of December 31, 1978.
- V. Eligible Cases Terminated After Order of Referral to Arbitrators by Month Terminated.
- VI. Miscellaneous Information

TABLE I

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA
 Summary of Cases Eligible for Arbitration Under Local Civil Rule 49
 Filed, Terminated and Pending from February 1, 1978 to December 31, 1978

1978	Total Cases Filed	Cases Eligible after \$50,000 Certifications have been Filed	Percent of Total Cases Filed Eligible for Arbitration	Eligible Cases		Total Eligible Cases Terminated	Total Eligible Cases not Terminated
				Terminated Prior to Order of Referral to Arbitrators	Eligible Cases Terminated After Order of Referral to Arbitrators		
February	310	107	34.5	55	21	76	31
March	408	113	27.7	63	14	77	36
April	378	102	26.9	47	24	71	31
May	389	93	23.9	47	11	58	35
June	438	96	21.9	39	7	46	50
July	352	81	23.0	38	4	42	39
August	342	68	19.8	22	3	25	43
September	337	75	22.2	11	1	12	63
October	370	94	25.4	13	0	13	81
November	370	76	20.5	7	0	7	69
December	367	65	17.7	0	0	0	65
	4061	970	23.9	342	85	427	543

TABLE II

Manner in Which the 342 Cases were Terminated

Prior to Order of Referral to Arbitrators as of December 31, 1978

<u>Method of Termination</u>	<u>Number of Cases</u>	<u>Percent</u>
1. Settled	141	41%
2. Dismissal or Judgement by Court Order	71	21%
3. Dismissal by Stipulation	66	19%
4. Voluntary Dismissal by Plaintiff	36	11%
5. Transferred to Another District or Remanded to State Court by Court Order	17	5%
6. Default Judgement	11	3%
TOTAL	342	100%

TABLE III

Manner in Which the 85 Cases were Terminated
After Order of Referral to Arbitrators as of December 31, 1978

<u>Method of Termination</u>	<u>Number of Cases</u>	<u>Percent</u>
1. Settled Prior to Arbitration Hearing	63	74%
2. Settled After Arbitration Hearing	2	2%
3. Award of Arbitrators and Judgement	16	19%
4. Voluntary Dismissal	4	5%
TOTAL	85	100%

TABLE IV

Manner in which the 427 Cases were Terminated

Prior to and After Entry of Referral to Arbitrators as of December 31, 1978

<u>Method of Termination</u>	<u>Cases Terminated Prior to Order of Referral to Arbitrators</u>	<u>Cases Terminated After Order of Referral to Arbitrators</u>	<u>Total</u>	<u>Percent</u>	<u>Percent</u>
Settled	141	65	206	48%	
Dismissal by Stipulation	66	0	66	15%	
Voluntary Dismissal by Plaintiff	36	4	40	9%	72%
Dismissal or Judgement by Court Order	71	0	71	17%	
Transferred to Another District or Remanded to State Court by Court Order	17	0	17	4%	21%
Award of Arbitrators	0	16	16	4%	4%
Default Judgement	11	0	11	3%	3%
	<u>342</u>	<u>85</u>	<u>427</u>	<u>100%</u>	<u>100%</u>

TABLE V
Eligible Cases Terminated After
Order of Referral to Arbitrators
by Month Terminated

February	0
March	0
April	0
May	1
June	4
July	7
August	5
September	10
October	10
November	32
December	16
TOTAL	85

TABLE VI

Miscellaneous Information

1. Arbitration Awards	31
2. Appeals for Trial <u>De Novo</u>	15
3. Arbitration Hearings Scheduled and Continued	53

ADDITIONAL SUBMISSIONS OF CHARLES F. METZNER

APPENDIX A

Additional duty proceedings

Civil cases:

Motions, Total		28,820
(dispositive)	(2,768)	
Pretrial conferences		24,093
Prisoner petitions		11,620
Special master reports		699
Civil trials		540
Social security reviews		4,059
Other proceedings		4,322

Criminal cases:

Motions, Total		9,806
(dispositive)	(1,318)	
Pretrial conferences		4,435
Rule 10 arraignments		21,956
Indictments returned		8,332
Other proceedings		5,343

Total § 636(b) proceedings		<u>124,483</u>
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Trial jurisdiction cases

Minor offenses (other than petty)		14,893
Traffic	10,473	
Theft	2,124	
Fraud	731	
Food and drug	352	
Postal	328	
Other	885	
Petty offenses		87,654
Traffic	58,330	
Immigration	13,504	
Hunting, fishing, and camping	6,314	
Postal	2,235	
Drunk and disorderly conduct	1,841	
Trespass	1,229	
Other	4,201	

Total minor and petty offenses		<u>102,547</u>
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U.S. Commissioner-type duties

Search warrants	4,491
Arrest warrants	14,721
Summonses	1,413
Rule 5 Initial appearances	34,939
Material witness proceedings	6,481
Initial probation appearances	1,727
Bail reviews	6,427
Preliminary examinations	5,384
Removal hearings	1,749

Total proceedings	<u>77,332</u>
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Total, all matters	<u>304,362</u>
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MARCH 1978

APPENDIX B

STANDARDS AND PROCEDURES OF THE JUDICIAL CONFERENCE OF THE
UNITED STATES FOR THE APPOINTMENT OF UNITED STATES MAGISTRATES

IN 1968 CONGRESS ENACTED THE FEDERAL MAGISTRATES ACT, WHICH HAS RESULTED IN THE INCREASED USE OF MAGISTRATES AND HAS CONTRIBUTED TO THE MORE EFFICIENT ADMINISTRATION OF JUSTICE. IT IS CONTEMPLATED THAT MAGISTRATES WILL BE GIVEN ADDITIONAL CIVIL AND CRIMINAL JURISDICTION, AND IT IS IMPERATIVE THAT QUALIFIED PERSONS BE SELECTED AND RETAINED AS MAGISTRATES TO CARRY OUT THESE IMPORTANT RESPONSIBILITIES. TO PROVIDE FOR UNIFORMITY IN THE APPOINTMENT OF MAGISTRATES AND TO ENSURE THE SELECTION AND RETENTION OF HIGHLY COMPETENT PERSONS AS MAGISTRATES, THE JUDICIAL CONFERENCE OF THE UNITED STATES ESTABLISHES THE FOLLOWING PROCEDURES AND STANDARDS TO BE USED AS GUIDELINES BY THE COURTS IN SELECTING FULL-TIME MAGISTRATES, AND PART-TIME MAGISTRATES RECEIVING A SALARY OF AT LEAST ONE-THIRD OF THE MAXIMUM AMOUNT AUTHORIZED BY STATUTE FOR A FULL-TIME MAGISTRATE.

STANDARDS FOR SELECTION OF MAGISTRATES

I. TO BE QUALIFIED FOR APPOINTMENT, POTENTIAL NOMINEES SHOULD MEET THE FOLLOWING STANDARDS:

(A) THEY MUST BE MEMBERS IN GOOD STANDING OF THE BAR OF THE HIGHEST COURT OF THE STATE IN WHICH THE PERSON SELECTED IS TO SERVE OR, IN THE CASE OF AN INDIVIDUAL APPOINTED TO SERVE --

(1) IN THE DISTRICT OF COLUMBIA, A MEMBER IN GOOD STANDING OF THE BAR OF THE DISTRICT OF COLUMBIA.

APPENDIX B

(2) IN THE COMMONWEALTH OF PUERTO RICO, A MEMBER IN GOOD STANDING OF THE BAR OF THE SUPREME COURT OF PUERTO RICO.

(3) IN THE VIRGIN ISLANDS OF THE UNITED STATES, A MEMBER IN GOOD STANDING OF THE BAR OF THE VIRGIN ISLANDS.

(4) IN AN AREA UNDER THE ADMINISTRATION OF THE NATIONAL PARK SERVICE, THE UNITED STATES FISH AND WILDLIFE SERVICE, OR ANY OTHER FEDERAL AGENCY THAT EXTENDS INTO TWO OR MORE STATES, A MEMBER IN GOOD STANDING OF THE BAR OF THE HIGHEST COURT OF ONE OF THOSE STATES.

(B) THEY SHOULD HAVE BEEN ENGAGED IN THE ACTIVE PRACTICE OF LAW FOR A PERIOD OF FIVE YEARS. THE COURT MAY CONSIDER AS SUBSTITUTE EXPERIENCE FOR THE ACTIVE PRACTICE OF LAW THE FOLLOWING, INCLUDING ANY COMBINATION THEREOF:

- (1) JUDGE OF A STATE COURT OF RECORD.
- (2) OTHER STATE JUDICIAL OFFICER.
- (3) UNITED STATES MAGISTRATE.
- (4) REFEREE IN BANKRUPTCY.
- (5) OTHER FEDERAL JUDICIAL OFFICER.
- (6) ATTORNEY FOR FEDERAL OR STATE AGENCIES.
- (7) LAW CLERK TO ANY JUDGE OR JUDICIAL OFFICER (LIMITED TO TWO YEARS).
- (8) OTHER LEGAL EXPERIENCE WHICH IS SUITABLE AS A SUBSTITUTE IN THE OPINION OF THE MAJORITY OF THE COURT.

(C) THEY SHOULD BE COMPETENT TO PERFORM THE DUTIES OF THE OFFICE, OF GOOD MORAL CHARACTER, EMOTIONALLY STABLE AND MATURE, COMMITTED TO EQUAL JUSTICE UNDER THE LAW, IN GOOD HEALTH, PATIENT, COURTEOUS, AND CAPABLE OF DELIBERATION AND DECISIVENESS WHEN REQUIRED TO ACT ON THEIR OWN REASON AND JUDGMENT.

(D) THEY MUST NOT BE RELATED BY BLOOD OR MARRIAGE TO A JUDGE OF THE APPOINTING COURT OR COURTS WITHIN THE DEGREES SPECIFIED IN 28 U.S.C. §455(b)(5) AT THE TIME OF THE INITIAL APPOINTMENT.

(E) IN THE CASE OF AN INITIAL APPOINTMENT, THEY WILL NOT REACH THE AGE OF 70 YEARS BEFORE THE EXPIRATION OF THE TERM OF THE APPOINTMENT.

II. A DISTRICT COURT MAY INCLUDE ADDITIONAL QUALIFICATION STANDARDS APPROPRIATE FOR A PARTICULAR MAGISTRATE'S POSITION, TAKING INTO ACCOUNT THE SPECIFIC RESPONSIBILITIES ANTICIPATED FOR THAT POSITION.

III. TO IMPLEMENT THE ABOVE STANDARDS, THE COURT MAY ADOPT SUCH ADDITIONAL CRITERIA OR GUIDELINES AS IT CONSIDERS APPROPRIATE FOR THE SELECTION OF THE BEST QUALIFIED INDIVIDUALS TO SERVE AS UNITED STATES MAGISTRATES.

COURT ACTION

I. PUBLIC NOTICE

(A) IN THE CASE OF A NEW APPOINTMENT OR IF THE PRESENT MAGISTRATE IS NOT SELECTED BY THE DISTRICT JUDGES FOR REAPPOINTMENT, THE COURT SHOULD MAKE A PUBLIC ANNOUNCEMENT OF THE VACANCY. THE PUBLIC NOTICE SHOULD BE PUBLISHED IN A

BAR JOURNAL, NEWSLETTER, LOCAL LEGAL PERIODICAL, OR GENERAL LOCAL NEWSPAPER OR SIMILAR PUBLICATION AND SHOULD BE FILED AND POSTED IN THE DISTRICT CLERK'S OFFICE. THE PUBLIC ANNOUNCEMENT SHOULD DESCRIBE THE DUTIES OF THE POSITION, THE QUALIFICATION STANDARDS, AND THE PROCEDURE FOR SUBMISSION OF APPLICATIONS, INCLUDING THE NAME AND ADDRESS OF THE PERSON TO WHOM APPLICATIONS SHOULD BE SUBMITTED.

(B) THE PUBLIC NOTICE SHOULD SPECIFY THAT APPLICATIONS ARE TO BE SUBMITTED ONLY BY THE POTENTIAL NOMINEE PERSONALLY, INDICATING THE PERSON'S WILLINGNESS TO SERVE IF SELECTED.

II. SELECTION

THE SELECTION OF MAGISTRATES SHOULD BE BY A MAJORITY VOTE OF THE ACTIVE DISTRICT JUDGES. IN THE EVENT A MAJORITY OF THE DISTRICT COURT CANNOT AGREE UPON ANY ONE PERSON, THE CHIEF JUDGE SHALL MAKE THE APPOINTMENT.

III. JUDICIAL COUNCIL

(A) THE NAME OF THE PERSON SELECTED BY A MAJORITY OF THE DISTRICT COURT FOR APPOINTMENT OR REAPPOINTMENT AS A MAGISTRATE SHOULD BE SUBMITTED TO THE JUDICIAL COUNCIL OF THE CIRCUIT. THE JUDICIAL COUNCIL OF THE CIRCUIT SHOULD CERTIFY THAT THE APPOINTEE IS COMPETENT TO PERFORM THE DUTIES OF THE OFFICE. ANNOUNCEMENT OF THE APPOINTMENT SHOULD BE MADE BY THE DISTRICT COURT AFTER NOTICE OF THE JUDICIAL COUNCIL'S CERTIFICATION HAS BEEN RECEIVED AND A BACKGROUND INVESTIGATION HAS BEEN COMPLETED BY THE FEDERAL BUREAU OF INVESTIGATION.

(B) IF THE JUDICIAL COUNCIL REFUSES TO CERTIFY THE PERSON SELECTED, THE DISTRICT COURT MAY SELECT ANOTHER PERSON.

NOMINATING COMMISSION

I. ESTABLISHMENT OF NOMINATING COMMISSION

(A) AT THE TIME A MAGISTRATE POSITION TO WHICH THESE STANDARDS AND PROCEDURES ARE APPLICABLE IS CREATED, OR AT A REASONABLE TIME BEFORE THE TERM OF SUCH A POSITION EXPIRES OR AN EXISTING POSITION BECOMES VACANT FOR ANY REASON, THE JUDGES OF THE DISTRICT COURT MAY, IN THEIR DISCRETION, APPOINT A NOMINATING COMMISSION. THE COMMISSION SHOULD RECOMMEND FOR NOMINATION PERSONS WHOSE CHARACTER, EXPERIENCE, ABILITY, AND COMMITMENT TO EQUAL JUSTICE UNDER THE LAW FULLY QUALIFY THEM TO SERVE AS UNITED STATES MAGISTRATES.

(B) THE COMMISSION SHOULD BEGIN TO FUNCTION WHEN THE CHIEF JUDGE OF THE DISTRICT COURT NOTIFIES ITS CHAIRMAN THAT THE COMMISSION'S ASSISTANCE IS NEEDED TO SELECT THE NOMINEES TO FILL A VACANCY.

(C) MEMBERS OF THE COMMISSION SHOULD RECEIVE NO COMPENSATION FOR THEIR SERVICE, BUT THEY MAY BE ALLOWED TRAVEL EXPENSES, INCLUDING PER DIEM IN LIEU OF SUBSISTENCE, AS AUTHORIZED BY LAW.

(D) EACH APPOINTMENT TO THE COMMISSION SHOULD TERMINATE THIRTY DAYS AFTER SUBMISSION OF THE COMMISSION'S FINAL REPORT TO THE CHIEF JUDGE.

II. MEMBERSHIP

(A) THE COMMISSION SHOULD BE COMPOSED OF A CHAIRMAN AND OTHER MEMBERS APPOINTED BY MAJORITY VOTE OF THE ACTIVE DISTRICT JUDGES OF THE DISTRICT. THE COMMISSION SHOULD HAVE NO LESS THAN SIX MEMBERS, INCLUDING THE CHAIRMAN.

(B) THE CHAIRMAN SHOULD HAVE SUCH DUTIES AS THE DISTRICT JUDGES MAY ASSIGN.

(C) THE COMMISSION SHOULD CONSIST OF LAWYERS AND OTHER LEADING MEMBERS OF THE COMMUNITY. EACH MEMBER OF THE COMMISSION SHOULD BE A RESIDENT OF THE DISTRICT AND OF THE DIVISION (IF ANY) WITHIN WHICH THE APPOINTMENT IS TO BE MADE.

III. DUTIES

(A) ALL INFORMATION MADE AVAILABLE TO THE MEMBERS OF THE COMMISSION IN THE PERFORMANCE OF THEIR DUTIES, INCLUDING THE NAMES OF POTENTIAL NOMINEES AND THE IDENTITY OF PERSONS RECOMMENDED BY THE COMMISSION, SHOULD BE KEPT IN STRICTEST CONFIDENCE.

(B) ALL DECISIONS OF THE COMMISSION SHOULD BE BY MAJORITY VOTE OF THE MEMBERS.

(C) THE COMMISSION SHOULD EXAMINE THE APPLICATIONS OF POTENTIAL NOMINEES AND MAY, IN ITS DISCRETION, PERSONALLY INTERVIEW POTENTIAL NOMINEES.

(D) THE COMMISSION SHOULD FIRST DETERMINE THOSE PERSONS AMONG THE POTENTIAL NOMINEES WHO MEET ALL OF THE STANDARDS SET FORTH HEREIN FOR APPOINTMENT AS A UNITED STATES MAGISTRATE.

(E) THE COMMISSION SHOULD THEN DESIGNATE THE FIVE PERSONS WHOM IT CONSIDERS BEST QUALIFIED TO SERVE AS A UNITED STATES MAGISTRATE.

(F) THE COMMISSION SHOULD RENDER A REPORT TO THE CHIEF JUDGE AS DIRECTED IN THE FOLLOWING SECTION.

IV. REPORT TO CHIEF JUDGE

(A) IF A NEW APPOINTMENT IS TO BE MADE TO A VACANT OR NEWLY-CREATED POSITION, THE COMMISSION SHOULD, WITHIN NINETY DAYS AFTER THE CREATION OF THE COMMISSION, REPORT TO THE CHIEF JUDGE THE RESULTS OF ITS ACTIVITIES.

(B) IF AN APPOINTMENT IS TO BE MADE BECAUSE OF THE EXPIRATION OF THE TERM OF THE INCUMBENT MAGISTRATE, THE ACTIVE DISTRICT JUDGES OF THE DISTRICT SHOULD MEET TO DETERMINE WHETHER A MAJORITY RECOMMENDS REAPPOINTMENT, BASED ON THE STANDARDS FOR APPOINTMENT SET FORTH HEREIN.

(1) IF THE MAJORITY OF THE DISTRICT JUDGES RECOMMENDS THE REAPPOINTMENT OF THE PRESENT MAGISTRATE, THE CHIEF JUDGE SHOULD SEND THE NAME OF THE MAGISTRATE TO THE CIRCUIT COUNCIL FOR ACTION PURSUANT TO PARAGRAPH III(A) OF COURT ACTION.

(2) IF THE MAJORITY OF THE DISTRICT JUDGES DOES NOT RECOMMEND THE REAPPOINTMENT OF THE PRESENT MAGISTRATE, THEN THE COMMISSION SHOULD, WITHIN NINETY DAYS AFTER NOTIFICATION OF THE VACANCY, REPORT TO THE CHIEF JUDGE THE RESULTS OF ITS ACTIVITIES, INCLUDING ITS DETERMINATION AS TO THE FIVE PERSONS WHOM THE COMMISSION CONSIDERS BEST QUALIFIED TO FILL THE VACANCY.

(C) WHEN A PART-TIME MAGISTRATE POSITION IS UPGRADED TO FULL-TIME, THE INCUMBENT PART-TIME MAGISTRATE SHOULD BE SUBJECT TO CONSIDERATION FOR THE FULL-TIME POSITION AS IF HE WERE A FULL-TIME MAGISTRATE WHOSE TERM WAS EXPIRING.

(D) NO PERSON SHOULD BE CONSIDERED AS A NOMINEE WHILE SERVING AS A MEMBER OF THE COMMISSION OR FOR A PERIOD OF ONE YEAR AFTER THE COMPLETION OF SUCH SERVICE.

