

ARTICLE I JUDGES IN AN ARTICLE III WORLD: THE CAREER PATH OF MAGISTRATE JUDGES

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Federal magistrate judges are a relatively new creation, officially dating back only to 1968 in a federal judicial system which dates to 1789. Unlike federal district and appellate judges, whose constitutional authority is rooted in Article III, federal magistrate judges are a creation of Congress through Article I. Since their inception as special masters, magistrate judges' responsibilities have steadily grown, now presiding (with the parties' consent) over civil as well as misdemeanor criminal trials. The institutional differences between magistrate and district judges are stark: selection, compensation, and tenure, to name a few. At the same time, the roles of these judges significantly overlap, and district courts vary in the power and deference granted to magistrate judges. Notwithstanding their importance in federal adjudication, our understanding of magistrate judges remains limited. This article attempts to increase our understanding by building a unique dataset that comprises the universe of sitting United States magistrate judges, capturing both biographical and professional characteristics. We find that magistrate judges come from more diverse educational and professional backgrounds than do district judges. The implications of this finding are significant because magistrate judges exercise greater decision-making discretion in federal courts and serve as a pipeline to the Article III judiciary.

INTRODUCTION

Magistrate judges are one of the most important, but least-understood, elements of the federal judiciary. Their responsibilities are not defined by the U.S. Constitution, which establishes a federal judicial branch in Article III. Acting

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pursuant to its Article I authority, Congress created the position in 1968 when it authorized, rather than mandating, the appointment of federal “magistrates.”¹ Nearly fifty years later, Congress has defined magistrate judges’ possible duties largely (though not entirely) in the negative:² Magistrate judges may be asked by district courts to undertake any task “not explicitly prohibited by statute or by the Constitution.”³ Notwithstanding the limited formal grant of specific authority from Congress, federal magistrate judges have grown dramatically in number and influence over the last half-century.⁴

The impact of magistrate judges is substantial whether measured in the raw number of cases in which they are involved or in the nature of the work that they do. Magistrate judges disposed of over one million judicial matters in 2012, involving both criminal and civil cases, ranging from preliminary proceedings to bench and jury trials.⁵ To place these numbers in context, district judges—who

¹ Federal Magistrates Act of 1968, 82 Stat. 1107 (1968) (codified as amended at 28 U.S.C. §§ 60, 631–639 (2012) and 18 U.S.C. §§ 3060, 3401–3402 (2012)) (establishing the position of magistrate within the federal judicial system); Federal Magistrates Act of 1979, 93 Stat. 643 (1968) (expanding prospective powers of magistrate judges and creating merit selection panels to aid district courts in selection of magistrate judges); Judicial Improvements Act of 1990, 104 Stat. 5089 (1990) (formal title change to magistrate *judge*).

² 28 U.S.C. § 636 (2012) (directly assigning relatively minor powers to magistrate judges—such as entering a sentence for a petty offense or Class A misdemeanor with parties’ consent—but authorizing much larger grants of authority by district judges in the district court where the magistrate judges serve).

³ *Id.* § 636(b) (allowing district judges to designate magistrate judges to handle a wide range of matters and concluding a list of such matters with a broad right to assign “such additional duties as are not inconsistent with the Constitution and laws of the United States”); *see also* *Gomez v. United States*, 490 U.S. 858, 863 (1989).

⁴ Kevin Koller, Note, *Deciphering De Novo Determinations: Must District Courts Review Objections Not Raised Before a Magistrate Judge?*, 111 COLUM. L. REV. 1557, 1557 (2011) (“Since Congress first enacted the Federal Magistrates Act in 1968, both the size and the scope of the federal magistrate system have steadily grown to the point of ubiquity.”).

⁵ *Matters Disposed of by U.S. Magistrate Judges During the 12-Month Periods Ending September 30, 2002, and September 30, 2008 Through 2012*, U.S. CTS. (Sept. 30, 2012), <http://www.uscourts.gov/statistics/table/s-17/judicial-business/2012/09/30> [<https://perma.cc/TWD6-W9XQ>] (showing that magistrate judges disposed of 1,068,153 cases in 2012).

outnumber magistrate judges in terms of authorized positions⁶ and actual numbers⁷—disposed of 364,149 cases during the same year.⁸ Furthermore, magistrate judges' rulings and recommendations occur at every phase of litigation, including settlement negotiations and across a wide array of disputes.⁹

As crucial a role as magistrate judges play in the functioning of the federal judiciary, surprisingly little is known about them.¹⁰ The imbalance between importance and information is likely the result of the source of their authority as well as the process of their selection. Although Congress formally defines the scope of magistrate judicial responsibilities, the appointing district court effectively controls the grant of actual authority to magistrate judges in their district.¹¹ Local rules reveal that the delegation of responsibility varies considerably within and across judicial districts, corresponding to the demands and preferences of their respective district judges.¹² Unlike their Article III counterparts who undergo a public confirmation process, magistrate judges are selected by district

⁶ See *History of the Federal Judiciary: Magistrate Judgeships*, FED. JUDICIAL CTR., http://www.fjc.gov/history/home.nsf/page/judges_magistrate.html [https://perma.cc/V57N-4D6S] (last visited Mar. 25, 2016) (“As of March 2009, there are 517 full-time authorized magistrate judgeships and 42 part-time authorized magistrate judgeships.”) [hereinafter *History*]. The number of magistrate judges is set by the Judicial Conference of the United States but contingent on congressional funding of the positions. *Authorized Judgeships*, U.S. CTS., <http://www.uscourts.gov/judges-judgeships/authorized-judgeships> [https://perma.cc/D4WH-4WRW] (last visited Mar. 25, 2016). For the district courts, since 2002, there have been 667 authorized judgeships. *Id.*

⁷ Sitting district judges include both active judges (appointees to authorized seats) and senior judges (appointees who have retired from their seat, freeing it for a new appointment, but still hearing cases).

⁸ See *United States District Courts—National Judicial Caseload Profile*, U.S. CTS. (2012), <http://www.uscourts.gov/statistics/table/na/federal-court-management-statistics/2012/12/31-3> [https://perma.cc/V9VK-TYYB].

⁹ See, e.g., Tim A. Baker, *The Expanding Role of Magistrate Judges in the Federal Courts*, 39 VAL. U. L. REV. 661, 661 (2005) (explaining the increased role played by magistrate judges in the judicial scheme); Douglas A. Lee & Thomas E. Davis, “Nothing Less Than Indispensable:” *The Expansion of Federal Magistrate Judge Authority and Utilization in the Past Quarter Century*, 16 NEV. L.J. 845 (2016); Koller, *supra* note 4 (“Since Congress first enacted the Federal Magistrates Act in 1968, both the size and the scope of the federal magistrate system have steadily grown to the point of ubiquity.”).

¹⁰ See generally Philip M. Pro, *United States Magistrate Judges: Present but Unaccounted for*, 16 NEV. L.J. 783 (2016).

¹¹ See, e.g., J. Anthony Downs, *The Boundaries of Article III: Delegation of Final Decisionmaking Authority to Magistrates*, 52 U. CHI. L. REV. 1032, 1034 (1985); Judith Resnik, *The Federal Courts and Congress: Additional Sources, Alternative Texts, and Altered Aspirations*, 86 GEO. L.J. 2589, 2605–08 (1998).

¹² See, e.g., Samiyyah R. Ali, Maxwell A. Sills & Tracey E. George, *The Illusion of Uniformity: The Proliferation of Local Procedural Rules in Federal Trial Court* (working paper, May 2016, available from authors) (reporting that Federal Rule of Civil Procedure 72, which addresses the magistrate judge issuance of pre-trial orders, has spawned the largest set of local rules). See also 28 U.S.C. § 636(b)(4) (2012) (“Each district court shall establish rules pursuant to which the magistrate judges shall discharge their duties.”).

court judges through a non-public process.¹³ Perhaps for this reason, the composition of federal magistrate bench, including background and attributes such as age, gender, ethnicity, schooling, and prior legal experience, remains largely unknown.

The magistrate judge statutes, then, grant substantial authority—indeed nearly unfettered—to *district* judges who have discretion in both the selection and the responsibilities of magistrate judges. The logic is apparent: Since district judges will be relying on magistrate judges to assist them in their Article III work, district judges have an incentive to pick effective magistrate judges. However, the question remains as to whom they should choose. The statute and Judicial Conference regulations state few formal requirements. Even the specified prerequisites are minimal given the stature of the position: a candidate must be younger than seventy, be a member in good standing of the jurisdiction's state bar for at least five years, and have at least five years of legal professional experience.¹⁴ Most (if not all) serious candidates would satisfy these criteria. Thus, the district courts have wide latitude in identifying and choosing magistrate judges—nearly as much discretion as with their selection of their chambers staff.

The purpose of this article is to increase our understanding of magistrate judges by examining who is chosen as a magistrate judge. As part of our broader project on magistrate judges, we have constructed a unique biographical dataset of current active magistrate judges. This data allows us to observe how the demographic characteristics of magistrate judges vary within and across federal judicial districts, and how they compare with their district judge counterparts.

To analogize from baseball, magistrate judges are a bit like setup pitchers. Both perform a myriad of important assignments without much fanfare. The infusion of advanced statistics (sabermetrics) into baseball has allowed managers, fans, and players themselves to better appreciate these types of pitchers.¹⁵ This paper is part of a broader research enterprise to better understand the many contributions of magistrate judges.

This article proceeds as follows. In Part I, we briefly describe the history of magistrate judges. In Part II, we review the existing literature on magistrate judges. Part III presents our key findings about the attributes and backgrounds of federal district and magistrate judges. We conclude by considering the implications of our findings and identifying future research questions.

¹³ 28 U.S.C. § 631 (2012); *see also* ADMIN. OFFICE OF THE U.S. COURTS, THE SELECTION, APPOINTMENT, AND REAPPOINTMENT OF UNITED STATES MAGISTRATE JUDGES, at i, 61 (2010).

¹⁴ 28 U.S.C. § 631. The law also bars nepotism by prohibiting the appointment of a person who is related “by affinity or consanguinity within the degree of first cousin” to a judge of the appointing district court. *Id.* § 458. This rule appears to reflect concerns about abuse of the discretion afforded to the district judges in selecting magistrate judges rather than concerns about family members serving together on a court because no similar rule applies to appointment of Article III judges. Indeed, there have been many instances of family members serving on the same court and in superior-inferior courts.

¹⁵ *See, e.g.*, Phil Birnbaum, *A Guide to Sabermetric Research*, SOC'Y FOR AM. BASEBALL RES., <http://sabr.org/sabermetrics> [<https://perma.cc/4LRK-MS8H>] (last visited Mar. 25, 2016).

I. A BRIEF HISTORY OF MAGISTRATE JUDGES: SELECTION AND WORK

Congress created magistrate judges when it passed the Federal Magistrates Act of 1968.¹⁶ The Act abolished the Office of the U.S. Commissioner in favor of creating magistrates, which congress believed would allow for more efficient judicial administration.¹⁷ For example, prior to the Act, district judges spent much of their time deciding minor criminal matters because the commissioner could hear only petty offense misdemeanors committed on federal reservations.¹⁸ These formal constraints led district judges to downgrade crimes so that they could be heard by commissioners, or decline to prosecute other offenses altogether.¹⁹ Magistrates were established under Congress's Article I powers rather than under its Article III powers; thus, the selection process is not the familiar Article III one, but instead a statutorily created process which has changed over time. We begin by considering the evolution in the way magistrate judges are appointed. We then turn to the dramatic increase in the breadth and depth of responsibilities delegated to magistrate judges in at least some districts. Understanding both the selection and work of magistrate judges is important to our examination of who serves as a magistrate judge.

A. The Selection Process for Magistrate Judges

In the beginning, district courts varied in how they selected magistrate judges (then known as magistrates). When Congress replaced the U.S. commissioners with the new magistrate position in 1968, Congress delegated to district judges the sole discretion over the selection process—which led some districts to select by collective agreement, and others to leave the decision entirely to the chief judge or individual district judges.²⁰ In practice, often the chief judge or another interested judge would advocate for the appointment of a lawyer with whom one or more of the district's judges had already established a positive working or personal relationship, such as a law clerk or an Assistant U.S. Attorney.²¹ Thus, magistrates were often chosen principally based on familiarity rather than an objective evaluation of qualifications.

Over the subsequent decade, litigators and other repeat players voiced concern over the uneven quality of magistrate appointees across districts and lobbied Congress to impose standards on the process.²² Congress responded with the

¹⁶ See 28 U.S.C. §§ 631–639 (2012).

¹⁷ See *id.*; see also Leslie G. Foschio, *A History of the Development of the Office of the United States Commissioner and Magistrate Judge System*, 1999 FED. CTS. L. REV. 4, 5–7 (1999).

¹⁸ See S. REP. NO. 371, at 10 (1967).

¹⁹ See *id.*

²⁰ See Christopher E. Smith, *Merit Selection Committees and the Politics of Appointing United States Magistrates*, 12 JUST. SYS. J. 210, 212 (1987).

²¹ *Id.*

²² PETER G. MCCABE, FED. BAR. ASS'N, *A GUIDE TO THE FEDERAL MAGISTRATE JUDGE SYSTEM* 13 (2014).

Federal Magistrate Act of 1979, requiring the creation of district-based merit selection committees, which would recommend candidates for magistrate.²³ This merit selection process was intended to diversify and upgrade the caliber of appointees by widening the pool of applicants to include all interested and qualified applicants and ensuring a rigorous and objective evaluation process.²⁴ The 1979 changes to the magistrate judicial selection method, which were the most recent statutory revisions, may be divided into those focused on *who* can serve and those focused on *how* they are selected.

1. Magistrate Judge Qualifications

The 1979 Act sets forth five minimum qualifications for a magistrate judge:²⁵

1. The candidate must be a member in good standing of the bar for the state in which the district court is located and have been such a member for at least five years.²⁶
2. The candidate must be younger than seventy when first appointed.²⁷
3. The candidate may not be related by blood or marriage to a judge of the appointing district court by affinity or consanguinity within the degree of first cousin.²⁸
4. The candidate must live in the district or, if the appointment is to serve in a national park, the candidate must reside within the exterior boundaries of that park, or at least some place reasonably adjacent thereto.²⁹
5. The candidate must be competent to perform the duties of the office by the appointing district court.³⁰

The U.S. Judicial Conference, pursuant to its authority under the Act, has supplemented these criteria by requiring that a candidate have practiced law for at least five years and by adding to the single merit criterion in the federal law.³¹ As to the former, “practice” experience may include traditional practice with a

²³ See 28 U.S.C. § 631(b)(2) (2012).

²⁴ Foschio, *supra* note 17, at 6.

²⁵ 28 U.S.C. §§ 631(b)(1)–(5), (d).

²⁶ *Id.* § 631(b)(1). Although the term “member in good standing” is not defined in any statutory provisions applicable to magistrate judges, state law generally governs the requirements for being in good standing. See *id.* The bar membership requirement can be waived for part-time magistrate judges. See ADMIN. OFFICE OF THE U.S. COURTS, *supra* note 13, at 9.

²⁷ 28 U.S.C. § 631(d) (“[N]o person may serve under this chapter after having attained the age of seventy years.”).

²⁸ *Id.* § 631(b)(4) (“He is not related by blood or marriage to a judge of the appointing court or courts at the time of his initial appointment.”).

²⁹ *Id.* § 631(b)(3) (“In the case of an individual appointed to serve in a national park, he resides within the exterior boundaries of that park, or at some place reasonably adjacent thereto.”).

³⁰ *Id.* § 631(b)(2) (“He is determined by the appointing district court or courts to be competent to perform the duties of the office.”).

³¹ JUDICIAL CONFERENCE OF THE U.S., REGULATIONS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES ESTABLISHING STANDARDS AND PROCEDURES FOR THE APPOINTMENT AND REAPPOINTMENT OF UNITED STATES MAGISTRATE JUDGES § 1.01(b) (2010).

private or public employer as well as other positions such as work as a judge, attorney for a federal or state agency, judicial clerkship, and similar activities. The more meaningful, but ambiguous, requirements are that a candidate must possess “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 his or her own reason and judgment.”³² Finally, the Conference allows district courts to establish additional requirements if designed to serve the specific responsibilities handled by the magistrate judges in that district.³³

2. *Magistrate Judicial Selection Process*

The Federal Magistrate Act of 1979 dictates the basic framework governing federal magistrate judge selection and delegates to the United States Judicial Conference the responsibility of promulgating additional standards and procedures.³⁴ The Act and regulations set forth a multi-stage process for the appointment of magistrate judges. In order to assist district courts in the selection (and to ensure consistency with the governing law), the Administrative Conference of the U.S. Courts periodically publishes a guidebook to assist district courts and the merit selection panels appointed by them in navigating the selection process for magistrate judges.³⁵

The formal selection process for a magistrate judge position begins with the district court widely circulating a required announcement that there is a magistrate judge vacancy and soliciting applications.³⁶ District courts have some latitude in how they advertise as long as the method chosen is designed to reach and attract as many qualified applicants as possible.³⁷ The announcement describes

³² *Id.*

³³ JUDICIAL CONFERENCE OF THE U.S., GUIDE TO JUDICIARY POLICY § 420.10.20 (“A district court may establish additional qualification standards appropriate for a particular magistrate judge position, taking into account the specific responsibilities anticipated for that position. In no event, however, may the additional qualification standards be inconsistent with the court’s policy as an equal opportunity employer.”).

³⁴ 28 U.S.C. § 631 (“The judges of each United States district court . . . shall appoint United States magistrate judges . . . the appointment, whether an original appointment or a reappointment, shall be by the concurrence of a majority of all judges of such district court, and when there is no such concurrence, then by the chief judge . . . [The magistrate judge shall be] selected pursuant to standards and procedures promulgated by the Judicial Conference of the United States.”); ADMIN. OFFICE OF THE U.S. COURTS, *supra* note 13, at i–ii, app. I.I.

³⁵ See ADMIN. OFFICE OF THE U.S. COURTS, *supra* note 13.

³⁶ 28 U.S.C. § 631(b)(5) (“He is selected pursuant to standards and procedures promulgated by the Judicial Conference of the United States. Such standards and procedures shall contain provision for public notice of all vacancies in magistrate judge positions.”).

³⁷ JUDICIAL CONFERENCE OF THE U.S., *supra* note 31, § 2.01 (The Judicial Conference regulations call for the circulation to “reach a wide audience of qualified individuals” and suggest placing the vacancy announcement in the “general local newspaper; a widely circulated local legal periodical; bar association web sites; government web sites; and other sources relied upon by legal professionals.”).

the duties of the position to be filled, gives qualification standards and salary, states the term in office (eight years for full-time)³⁸, and outlines application procedures.³⁹ Candidates must apply directly, rather than relying on nomination, in order to demonstrate their willingness to serve if selected.⁴⁰ Applications are strictly confidential and the identity of applicants as well as consideration of applications are not released.⁴¹

A merit selection panel, whose membership is public, screens the applications. The district judges, by majority vote, names this panel. It must have seven or more citizens, including at least two non-lawyers, and may be *ad hoc* or standing.⁴² All panelists must live in, or “have significant ties to,” the district.⁴³ None can be an active, senior, or retired federal judge or an employee of the district court.⁴⁴ Current (and recent) panelists cannot also be candidates for the magistrate judgeship (although waivers are possible).⁴⁵ The law imposes no other restrictions on who can serve on the panel, leaving a great deal of discretion with local district courts. An early empirical study of the panels found that “[t]he lack of regulations . . . has resulted in the creation of panels that reflects [district] judges’ diverse conceptions of the merit process.”⁴⁶ Based on interviews and surveys of a sample of district judges, magistrate judges, and panelists, the study author concluded that most merit panels were either Blue Ribbon (elites who had relationships with district judges) or Representative (diverse membership).⁴⁷ In a small number of districts, each district judge names one or more panelists (labeled “Proxy” panels).

Beyond the stated criteria, the statute and regulations offer little guidance as to how panels should evaluate applicants. As a result, the individual panels generally formulate their own internal selection procedures.⁴⁸ The panel must act by majority vote, but has discretion over open versus secret ballots and quorum

³⁸ 28 U.S.C. § 631(e).

³⁹ JUDICIAL CONFERENCE OF THE U.S., *supra* note 31, § 2.02.

⁴⁰ *Id.* (The Judicial Conference regulations state, “The notice should specify that applications are to be submitted only by the applicant personally, indicating the person’s willingness to serve if selected.”).

⁴¹ *Id.* § 3.03.

⁴² JUDICIAL CONFERENCE OF THE U.S., *supra* note 33, §§ 420.30.10–420.30.20(c). The requirement concerning the number of lawyers versus non-lawyers comes exclusively from the Judicial Conference regulations. *Id.*

⁴³ 28 U.S.C. § 631(b)(5) (the requirement that the individuals composing the merit selection panel be residents of the pertinent district comes from the Federal Magistrate Act); ADMIN. OFFICE OF THE U.S. COURTS, *supra* note 13, at 17, app. J.

⁴⁴ JUDICIAL CONFERENCE OF THE U.S., *supra* note 31, § 3.02 (required by the Judicial Conference regulations).

⁴⁵ *Id.*

⁴⁶ Smith, *supra* note 20, at 216.

⁴⁷ *Id.* at 216–23, 217 (Table 1).

⁴⁸ See ADMIN. OFFICE OF THE U.S. COURTS, *supra* note 13, at 21–22; Smith, *supra* note 20, at 216–29.

rules.⁴⁹ The panel must review all applications, although they may delegate that the initial review to a subset of the panel.⁵⁰ The panel may, but is not required to, conduct interviews.⁵¹ The Judicial Conference requires only that the panel ensure that the candidates meet the stated requirements and that they “designate those individuals whom the panel considers best qualified.”⁵² The Administrative Office encourages the panel to make that assessment based on each applicant’s academic record and related scholastic achievements in law school and college, how long the applicant has practiced law and the type of legal practice, and the applicant’s familiarity with the rules and procedures of the federal court system.⁵³ The Administrative Office advocates for “some degree of uniformity” as “essential in the selection process,” but acknowledges that the process is sufficiently flexible that uniformity may not be possible.⁵⁴

Within ninety days of its creation, the merit selection panel submits to the district court a confidential report, which includes the names of the five best-qualified applicants and an analysis of their qualifications.⁵⁵ The panel may choose to rank the candidates or list them without preference.⁵⁶ The report must include all written materials received or prepared as part of the panel’s process.⁵⁷ At this point, the merit panel’s work is done unless the court rejects all of the five people on the list. In such an event, the panel will submit a second list of five names.⁵⁸

The district judges select the new magistrate judge by majority vote from the merit panel’s list of five (or ten, if no name on the initial list garners a majority vote).⁵⁹ The court may not consider names outside the list. However, it can conduct an additional inquiry into the named candidates’ qualifications.⁶⁰ If the district judges cannot choose a magistrate judge after receiving two lists, then the chief judge appoints one of the panel’s nominees to the open seat.⁶¹

⁴⁹ See ADMIN. OFFICE OF THE U.S. COURTS, *supra* note 13, at 21–22; JUDICIAL CONFERENCE OF THE U.S., *supra* note 33, § 420.30.30(c).

⁵⁰ See JUDICIAL CONFERENCE OF THE U.S., *supra* note 33, § 420.30.30(d); see also ADMIN. OFFICE OF THE U.S. COURTS, *supra* note 13, at 21–22.

⁵¹ ADMIN. OFFICE OF THE U.S. COURTS, *supra* note 13, at 22; JUDICIAL CONFERENCE OF THE U.S., *supra* note 33, § 420.30.30(d).

⁵² JUDICIAL CONFERENCE OF THE U.S., *supra* note 33, § 420.30.30.

⁵³ See ADMIN. OFFICE OF THE U.S. COURTS, *supra* note 13, at 26–27.

⁵⁴ See ADMIN. OFFICE OF THE U.S. COURTS, *supra* note 13 at 27.

⁵⁵ JUDICIAL CONFERENCE OF THE U.S., *supra* note 31, §§ 3.01–.04; see also ADMIN. OFFICE OF THE U.S. COURTS, *supra* note 13, at 29–30.

⁵⁶ ADMIN. OFFICE OF THE U.S. COURTS, *supra* note 13, at 30.

⁵⁷ See ADMIN. OFFICE OF THE U.S. COURTS, *supra* note 13 at 29–30.

⁵⁸ JUDICIAL CONFERENCE OF THE U.S., *supra* note 31, § 4.01; see also ADMIN. OFFICE OF THE U.S. COURTS, *supra* note 13, at 32.

⁵⁹ ADMIN. OFFICE OF THE U.S. COURTS, *supra* note 13, at 32.

⁶⁰ See ADMIN. OFFICE OF THE U.S. COURTS, *supra* note 13 at 31–34.

⁶¹ JUDICIAL CONFERENCE OF THE U.S., *supra* note 31, § 4.01.

Magistrate judges, like bankruptcy and tax judges, are Article I judges and are subject to both statutory⁶² and constitutional⁶³ constraints. Article I judges receive neither the lifetime tenure⁶⁴ nor salary guarantees⁶⁵ afforded to Article III judges.⁶⁶ They serve eight-year terms, and are eligible for re-appointment.⁶⁷

A comparison of the method for choosing the two sets of district court judicial officers is enlightening. The two figures below show the stages for the Article III selection process and the magistrate judicial selection process. Obviously, the method of selection is likely to impact who serves. What is less clear is what differences we will see in the visible qualifications of each group.

⁶² See 28 U.S.C. §§ 631–639 (2012).

⁶³ See Downs, *supra* note 11 (noting that Article I judges' constitutional protections differ from Article III judges).

⁶⁴ See *History*, *supra* note 6. Magistrate judges serve an eight-year term, eligible for successive reappointment. *Id.*

⁶⁵ 28 U.S.C. §§ 634(a)–(b) (2012). The salary for a magistrate judge is 92 percent of the district court judges. *Id.* The statute protects a sitting magistrate judge from a reduction in salary during her term. *Id.*

⁶⁶ See U.S. CONST. art. III, § 1.

⁶⁷ ADMIN. OFFICE OF THE U.S. COURTS, *supra* note 13, at 37 (“Normally, an incumbent magistrate judge who has performed well in the position should be reappointed to another term of office.”); JUDICIAL CONFERENCE OF THE U.S., *supra* note 31, §§ 6.01–6.03.

FIGURE 1: ARTICLE I JUDICIAL SELECTION PROCESS— U.S. MAGISTRATE JUDGES

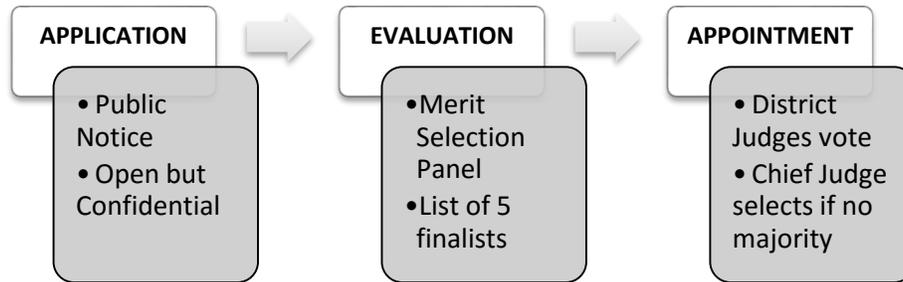
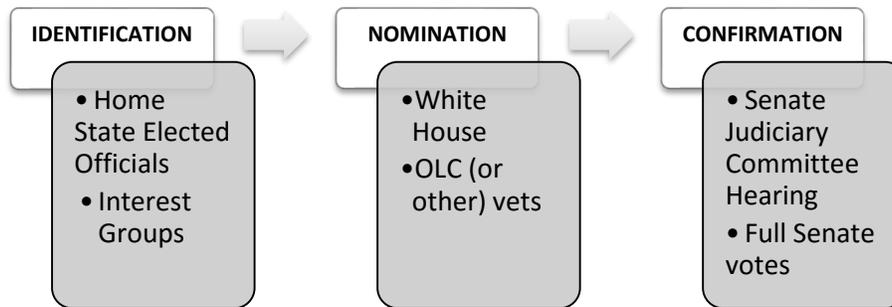


FIGURE 2: ARTICLE III JUDICIAL SELECTION PROCESS— U.S. DISTRICT JUDGES



The Federal Magistrate Act of 1979 limited the discretion of district judges by requiring the involvement of a third party in the screening and prioritizing of candidates and by listing certain criteria for selection. However, as we have seen, Congress left the district judges with significant influence over the selection process and the sole authority to make the final determination of who is appointed.⁶⁸ As we consider the identity of those who currently serve as magistrate judges, it is important to keep in mind the method by which they gained their positions.

B. The Work of Magistrate Judges

At their inception, magistrate judges’ responsibilities largely overlapped with those of U.S. commissioners. Thus, magistrate judges had ministerial powers such as the power to administer oaths and affirmations, issue orders concerning the release or detention of persons pending trial, and take affidavits and depositions.⁶⁹ The authority of magistrate judges is largely derived from the district judges of their corresponding judicial district, who may designate a magistrate judge to hear and determine any pretrial matter—with the exception of certain

⁶⁸ Smith, *supra* note 20, at 213.

⁶⁹ See 28 U.S.C. § 636(a)(1)–(2) (2012).

dispositive motions—pending before the court.⁷⁰ In that same spirit, Congress allowed wide latitude in determining the scope of magistrate judges' responsibilities, enacting that "a magistrate judge may be assigned such additional duties as are not inconsistent with the Constitution and laws of the United States."⁷¹

Over time, Congress has refined the assigned and permissible responsibilities of magistrate judges in response to feedback from the U.S. Judicial Conference and rulings of the U.S. Supreme Court. Despite concerns regarding constitutionality,⁷² the Federal Magistrate Act of 1979 enlarged the scope of magistrate judges' authorities.⁷³ Congress expanded magistrate judges' power by allowing them to conduct trials in civil cases with the consent of both parties,⁷⁴ to hear all federal misdemeanor cases,⁷⁵ and to try cases with or without a jury.⁷⁶ More recently, the Federal Courts Improvement Act of 2000 (FCIA) granted limited contempt powers to magistrate judges.⁷⁷

In relatively short order, magistrate judges have emerged as an integral part of the federal judiciary. The Supreme Court itself has noted, "the role of the magistrate in today's federal judicial system is nothing less than indispensable."⁷⁸ As their responsibilities have grown, magistrate judges have grown significantly in number. At their inception in 1968, there were only twenty-eight magistrate judges.⁷⁹ That number increased steadily over the following years, hitting 439 in 1980, 483 in 1993, and 543 in 2003.⁸⁰ As of 2014, there were 573 U.S. magistrate judges including 534 full-time judges and thirty-nine part-time judges.⁸¹ In addition, district courts frequently recall retired magistrate judges, including seventy-three in 2014.⁸²

⁷⁰ *See id.* § 636(b)(1).

⁷¹ *See id.* § 636(c)(3).

⁷² *See* H.R. 1046, 96th Cong. (1979). Wisconsin Representative, F. James Sensenbrenner raised concerns regarding the constitutionality of a judge not contemplated by the Constitution entering judgment in matters instead of just making recommendations to the district court judge. *See id.*

⁷³ *See* 28 U.S.C. § 631(b)(2) (2012).

⁷⁴ *See id.* § 636(c).

⁷⁵ *See id.* § 636(a)(3).

⁷⁶ *See id.* § 636(c).

⁷⁷ *See id.* § 636(e).

⁷⁸ *See* *Peretz v. United States*, 501 U.S. 923, 928 (1991) (citing *Virgin Islands v. Williams*, 892 F.2d 305, 308 (3d Cir. 1989)).

⁷⁹ *Baker*, *supra* note 9, at 671.

⁸⁰ *See id.*

⁸¹ *See Appointments of Magistrate Judges—Judicial Business 2014*, U.S. CTS. <http://www.uscourts.gov/statistics-reports/appointments-magistrate-judges-judicial-business-2014> [<https://perma.cc/KD6Z-XXSC>] (last visited Mar. 25, 2016).

⁸² 28 U.S.C. § 636(h) (2012). A 1999 GAO Report found that the demand for recalled judges exceeded the available supply and that recalled judges, who serve either 366-day or three-year terms, are often asked to renew. U.S. GEN. ACCOUNTING OFFICE, INFORMATION ON THE USE OF RECALLED MAGISTRATE AND BANKRUPTCY JUDGES 29 (1999).

II. EXISTING LITERATURE ON MAGISTRATE JUDGES

Much of the existing literature on magistrate judges describes the evolution of magistrate judges within the federal system or discusses the efficacy of these positions. Early scholarship traces the creation of the federal magistrate system and its subsequent amendments,⁸³ and how it fit within Congress' broader plan for civil justice reform.⁸⁴

As Congress expanded the potential role of magistrate judges, scholars examined the implications of these new powers for litigants. Early scholarship questioned the creation of federal magistrates, lamenting their encroachment on matters historically reserved for Article III district judges,⁸⁵ and raising the potential separation of power concerns that ensue.⁸⁶ Others noted the increasing responsibilities of magistrate judges without the corresponding institutional support.⁸⁷

As magistrate judges became increasingly involved with pre-trial and trial matters, scholars have accepted the role of magistrate judges but argue for greater judicial review⁸⁸ or more explicit consent by parties.⁸⁹ Others counter that additional requirements are onerous and inconsistent with Congressional authority.⁹⁰

⁸³ See, e.g., Philip M. Pro & Thomas C. Hnatowski, *Measured Progress: The Evolution and Administration of the Federal Magistrate Judges System*, 44 AM. U. L. REV. 1503, 1504 (1995); see also Baker, *supra* note 9, at 674–80 (explaining the increased role played by magistrate judges in the judicial scheme).

⁸⁴ See R. Lawrence Dessem, *The Role of the Federal Magistrate Judge in Civil Justice Reform*, 67 ST. JOHN'S L. REV. 799, 800 (1993) (describing how Congress sought to respond to the costs and delay inherent in federal court litigation).

⁸⁵ See Note, *Article III Constraints and the Expanding Civil Jurisdiction of Federal Magistrates: A Dissenting View*, 88 YALE L.J. 1023, 1025 (1979) (discussing how magistrate judges are performing tasks district judges once performed routinely).

⁸⁶ See Brendan Linehan Shannon, Note, *The Federal Magistrates Act: A New Article III Analysis for a New Breed of Judicial Officer*, 33 WM. & MARY L. REV. 253, 274 (1991) (arguing that magistrate judges may be encroaching on powers specifically designated for Article III judges); see also David A. Bell, *The Power to Award Sanctions: Does It Belong in the Hands of Magistrate Judges?*, 61 ALB. L. REV. 433, 454 (1997) (noting that even if a magistrate judge were to award damages, the district judge still retains judicial review).

⁸⁷ See Michael J. Newman, *United States Magistrate Judges: Suggestions to Increase the Efficiency of Their Civil Role*, 19 N. KY. L. REV. 99, 106, 113 (1991) (noting that magistrate judges lack the same support by judicial clerks and serve only an eight-year term); see also Jeffrey Manske & Mark Osler, *Crazy Eyes: The Discernment of Competence by a Federal Magistrate Judge*, 67 LA. L. REV. 751, 764 (2007) (noting that magistrate judges are asked to evaluate a defendant's mental competence but receive little in the way of training on this matter).

⁸⁸ See Matthew J. Hank, *District Court Review of a Magistrate Judge's Pretrial Detention Order*, 33 UWLA L. REV. 157, 172 (2001) (noting that every circuit court requires *de novo* review of pretrial detention orders by magistrate judges).

⁸⁹ See, e.g., Mark S. Kende, *The Constitutionality of New Contempt Powers for Federal Magistrate-Judges*, 53 HASTINGS L.J. 567, 570 (2002) (favoring explicit consent by litigants in the form of consent forms for magistrate contempt powers).

⁹⁰ See, e.g., Durwood Edwards, *Can a U.S. District Judge Accept a Felony Plea with a Magistrate Judge's Recommendation?*, 46 S. TEX. L. REV. 99 (2004) (arguing that magistrate

Of particular concern is that certain types of cases or litigants are reserved to magistrate judges, raising constitutional concerns.⁹¹ As magistrate judges have progressed from case management to matters of adjudication—involving questions of law as well as fact—recent scholarship has explored the appropriate level of judicial review.⁹²

Empirical inquiries into magistrate judges have made important contributions but remain few in number. Early work evaluated the effect of court-specific initiatives (e.g., a one-case, one-judge system⁹³), but the central focus has been on the implicit principal-agent relationship between district and magistrate judges. An examination of magistrate opinions between 1991 and 2001 found that magistrate judges' decisions correlated closely with those of their respective district judges.⁹⁴ A study looking at magistrate opinions between 2000 and 2006 similarly found a positive correlation between the two judge types.⁹⁵ The agency relationship is perhaps not surprising, given that district judges exercise oversight over magistrate judges in numerous ways, from appointment to judicial review to re-nomination.⁹⁶

III. ATTRIBUTES AND BACKGROUNDS OF JUDGES IN DISTRICT COURTS

We focus on the demographic and biographical characteristics of the two types of judges appointed directly to federal district courts: Article III district judges and Article I magistrate judges. For the former, we use data provided by the Federal Judicial Center (FJC), which contains information on every Article III judge (district, circuit, Supreme Court), past and present. For each Article III judge, the FJC provides the age, gender, ethnicity, education, prior employment, and jurisdiction (e.g., district/circuit). We included only active district judges,

judges should be able to accept felony plea upon the consent of the defendant, *without* submitting a finding of fact and a recommendation to the district court).

⁹¹ See, e.g., Lois Bloom & Helen Hershkoff, *Federal Courts, Magistrate Judges, and the Pro Se Plaintiff*, 16 NOTRE DAME J. L. ETHICS & PUB. POL'Y 475, 484 (2002) (expressing concern that *pro se* cases present unique challenges to the court given their complexity and constitutional issues).

⁹² See Koller, *supra* note 4, at 1558 (recommending the approach taken by the 9th Circuit that allows district courts discretion but requires judges to exercise actual discretion).

⁹³ See James G. Woodward & Michael E. Penick, *Expanded Utilization of Federal Magistrate Judges: Lessons from the Eastern District of Missouri*, 43 ST. LOUIS U. L.J. 543, 586 (1999) (finding that a one-case, one-judge civil system allowed district courts to resolve cases faster while reducing the workload across the district).

⁹⁴ See BRUCE A. CARROLL, *THE ROLE, DESIGN, AND GROWING IMPORTANCE OF UNITED STATES MAGISTRATE JUDGES* 74 (2004) (noting that “there appears to be very little difference between the decision-making of the Magistrate Judges and the District Judges. The data display a difference of only 2.5 percent greater liberal decision-making.”).

⁹⁵ See Christina L. Boyd & Jacqueline M. Sievert, *Unaccountable Justice? The Decision Making of Magistrate Judges in the Federal District Courts*, 34 JUST. SYS. J. 249, 269 (2013) (finding a correlation when looking at both consent and report and recommendations).

⁹⁶ See *id.* (concluding that judges have “numerous effective mechanisms at their disposal that allow them to delegate vast swaths of decision making to magistrates while avoiding many of the pitfalls of the moral hazard of principal-agent relationships”).

excluding senior district judges because there is no comparable position for magistrate judges.

To the best of our knowledge, there does not exist any parallel source of data for magistrate judges with the same richness and completeness as for Article III judges. Accordingly, we constructed our own from existing public sources. We began with any judicial biographies available on an official court site. Most district courts, however, do not provide biographies of their judges. Thus, we expanded our sources to include legal directories (including Lexis, Westlaw, Bloomberg, Martindale, the Almanac of the Federal Judiciary, and the American Bench) and other published profiles. Because the provision of this data was voluntary, the extent of information varied by judge. We include full-time and part-time magistrate judges in our analysis.

Table 1 reports summary statistics, comparing the personal attributes of the two groups of judges. The findings include both surprising and unsurprising results. Because the magistrate judge position can serve as a path to a district judgeship, we expected that district judges would be much older at the time of appointment than magistrate judges. However, district judges were, on average, not even four years older than magistrate judges when they were commissioned. We were not surprised to find that magistrate judges are much more likely than district judges to be white. While non-white judges make up less than half of either type of judge, district judges have a much greater minority presence: nearly twice as many district judges as magistrate judges are non-white. While the U.S. Judicial Conference and Administrative Office of the U.S. Courts have strongly encouraged districts to hire non-white magistrate judges,⁹⁷ the diffusion of responsibility to fulfill this mandate has predictably resulted in less diversity.

⁹⁷ See, e.g., ADMIN. OFFICE OF THE U.S. COURTS, *supra* note 13, at 1–2, 6 (describing the U.S. Judicial Conference’s Judiciary Diversity Recruiting and Outreach Program, providing diversity statistics on all court employees, and mentioning specifically that “some measure of progress is needed to further diversify the ranks of magistrate judges”); JUDICIAL CONFERENCE OF THE U.S., *supra* note 31, § 3.02(e) (“To further efforts to achieve diversity in all aspects of the magistrate judge selection process, the court is encouraged to appoint a diverse merit selection panel.”).

TABLE I: COMPARISON OF ATTRIBUTES OF FEDERAL DISTRICT JUDGES AND FEDERAL MAGISTRATE JUDGES⁹⁸

	District Judges	Magistrate Judges
Average Age at Commission	49.76 (6.32)	46.11 ⁹⁹ (8.71)
Average Current Age	59.87 (7.98)	59.86 (8.77)
Women (Percentage)	33%	29%
Non-White (Percentage)	28%	15% ¹⁰⁰
N	623	600

With respect to legal educational background, both district and magistrate judges attended, on average, high-ranking law schools (based on the U.S. News and News Report annual law school rankings).¹⁰¹ However, district judges were much more likely to attend law schools described as “elite”: district judges were more than 50 percent more likely than magistrate judges to attend schools perennially ranked in the top fourteen by the U.S. News and World Report and they were three times more likely to attend Yale, Harvard, or Stanford.

⁹⁸ The U.S. District Judge figures are based on the Federal Judicial Center’s Biographical Database of Article III judges. The U.S. Magistrate Judge figures are based on the George-Yoon Article I Biographical Database. Standard deviations are in parentheses.

⁹⁹ The reported age is based on birth year when available. For those magistrate judges for whom birth year was unknown, we estimated birth year based on college graduation year minus twenty-two, which has a correlation coefficient of .99 percent with actual birth year. We were unable to locate birth year or college graduation year for seventy magistrate judges. The seventy judges are missing from both the average age at commission and average current age figures.

¹⁰⁰ The reported race figure is based on the 591 magistrate judges for whom we know race. Race is missing for nine magistrate judges (or 1.5 percent).

¹⁰¹ We used the law school rankings reported in the 2015 U.S. News ranking of law schools. *See Best Law Schools*, U.S. NEWS & WORLD REP., <http://grad-schools.usnews.rankingsandreviews.com/best-graduate-schools/top-law-schools> [<https://perma.cc/K46A-W5ZX>] (last visited Mar. 25, 2016).

TABLE 2: COMPARISON OF EDUCATIONAL BACKGROUND OF FEDERAL DISTRICT JUDGES AND FEDERAL MAGISTRATE JUDGES¹⁰²

	District Judges	Magistrate Judges
Average Rank of Law School Attended	56.09	67.23
Top 14 Law School (Percentage)	30%	19%
Home State Law School	55%	63%
N	623	600

Table 3 breaks down the professional experience of district judges and magistrate judges. For several reasons, we expected to see marked differences between the two groups. First, the criteria for selecting magistrate judges would seem to favor candidates like prosecutors and public defenders who have substantial trial experience. However, fewer magistrate judges, as compared to district judges, are former prosecutors and the same (low) percentage of both groups are former public defenders. The prosecutor finding may reflect the countervailing political incentives in the Article III process to support “law-and-order” judicial candidates for appointment to the district bench.¹⁰³ Prosecutors would certainly appear to voters to be more likely than non-prosecutors (or public defenders) to support the government over criminal defendants in criminal cases. Elected officials generally have not run on a pro-criminal liberties platform. Thus, it is perhaps unsurprising that half of district judges previously served as prosecutors. Yet, by the same reasoning, our expectations would be that public defenders should fare better in the merit panel process than in the political appointment one. However, public defenders are rarely appointed to magistrate judgeships.

The greatest difference amongst district and magistrate judges was in prior judicial experience. Nearly half of all district judges had prior judicial experience, either as state judges or as Article I federal judges (e.g., bankruptcy, tax, and in some instances, as magistrate judges). By comparison, only eleven percent of magistrate judges had prior judicial experience. Slightly more magistrate judges than district judges served as a judicial clerk. Many of those magistrate judges served as career clerks, with several going directly from an elbow clerkship to a magistrate judgeship. We do not see that happen with district judges.

¹⁰² The U.S. District Judge figures are based on the Federal Judicial Center’s Biographical Database of Article III judges. The U.S. Magistrate Judge figures are based on the George-Yoon Article I Biographical Database. Standard deviations are in parentheses.

¹⁰³ See, e.g., SHELDON GOLDMAN, *PICKING FEDERAL JUDGES: LOWER COURT SELECTION FROM ROOSEVELT THROUGH REAGAN 198–235* (1997) (explaining how President Nixon campaigned on a promise of appointing “law-and-order” judges to counteract the Warren Court’s pro-criminal liberties rulings).

TABLE 3: COMPARISON OF PROFESSIONAL BACKGROUND OF FEDERAL DISTRICT JUDGES AND FEDERAL MAGISTRATE JUDGES¹⁰⁴

	District Judges	Magistrate Judges
Judicial Clerkship	35%	37%
Prosecutor	50%	38%
Public Defender	11%	11%
Prior Judicial Experience (Percentage)	44%	11%
Private Practice	88%	73%
N	623	600

The patterns that emerge on the aggregate level, while interesting, may mask the differences that may exist within individual districts. To better observe this individual-level variation, we look at each jurisdiction separately and report a few of them below. The next two figures (Figures 3 and 4) looks at five districts: Central District of California; Alaska; Eastern District of Michigan; Eastern District of Arkansas, and Connecticut. We chose these specific districts both because they collectively represent a broad geographic range, and also the magistrate data in these districts were complete.

¹⁰⁴ The U.S. District Judge figures are based on the Federal Judicial Center's Biographical Database of Article III judges. The U.S. Magistrate Judge figures are based on the George-Yoon Article I Biographical Database. All prior experience is included, thus totals exceed 100 percent.

FIGURE 3: DEMOGRAPHICS OF SELECTED DISTRICT AND MAGISTRATE JUDGES

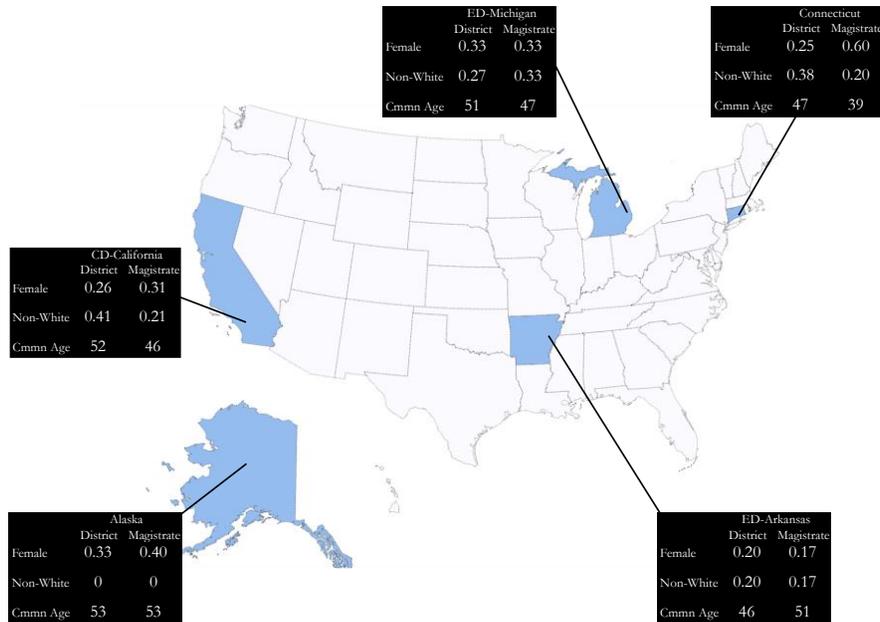


Figure 3 shows the demographic characteristics—gender, ethnicity, and age—of the current district and magistrate judges in five markedly different districts to look for district-based patterns. But, in all of the districts, women comprise roughly the same or a higher fraction of magistrate judges than their female counterparts on the district court. Minority judges, in contrast, do not have a greater presence as magistrates, compared with district judges. In every district, non-white judges comprise roughly the same or a lower percentage of magistrate judges than district judges.

The greatest variation was the relative age at which magistrate and district judges joined the bench. In densely populated districts in California, Michigan, and Connecticut, the commission age was higher for district judges than it was for magistrate judges. In more sparsely populated districts in Alaska and Arkansas, the district judges on average were commissioned at a younger age than magistrate judges. While geography appears to explain these divergent patterns, less clear is the underlying phenomena. One possibility is that in jurisdictions with larger legal labor markets, a magistrate judgeship is viewed more as a mid-career attainment, while in smaller legal labor markets, this judgeship is more of a senior-level attainment, at least for a subset of lawyers.

FIGURE 4: EDUCATION AND PRIOR JUDICIAL EXPERIENCE OF SELECTED DISTRICT AND MAGISTRATE JUDGES

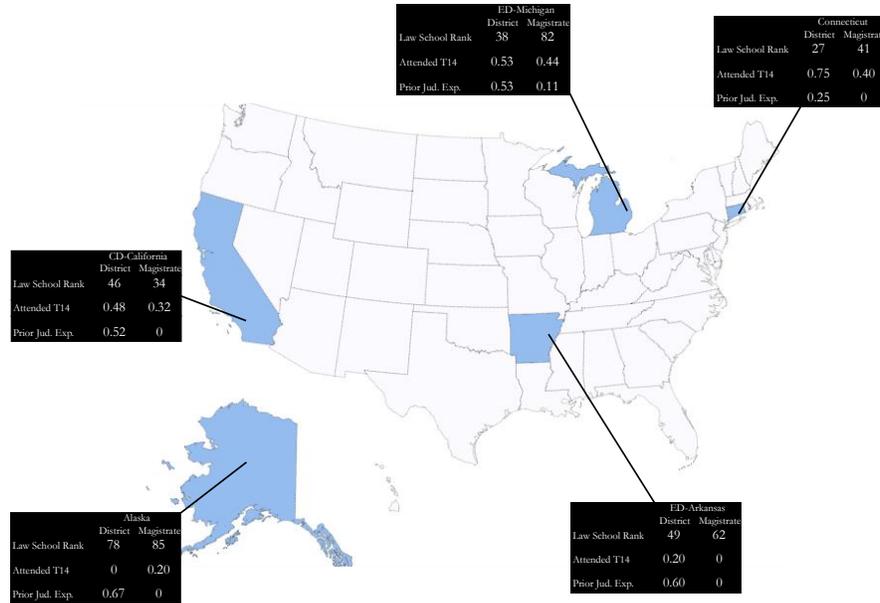


Figure 4, examining education and prior judicial experience, reveals greater differences both within and across judicial districts. Geography appears to influence the law school which district and magistrate judges attend. The two districts where both types of judges attended the highest ranking schools were Connecticut and the Central District of California. Connecticut contains Yale, which the U.S. News has ranked number one every year, and the University of Connecticut, which historically has been a top fifty law school. It is also in close proximity to other high-ranked schools, such as Harvard, Columbia, and New York University. Similarly, the Central District of California contains UCLA and USC, two perennial top twenty law schools, and is in the same state as Stanford, Berkeley, and other University of California law schools. Accordingly, both magistrate and district judges attend higher than average law schools.

Geography, however, does not explain the Eastern District of Michigan. The high average ranking of district judges' schooling (including over half of them attending a top fourteen law school) may reflect that many of them attended the University of Michigan, one of the national elite public institutions. Nearly half of magistrate judges similarly attended a top fourteen school, but the average rank of law school attended is significantly lower. These two figures taken together reflect a much greater variance in the law schools from which magistrate judges graduated.

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An alternative theory to explain any patterns we observe, both within and across jurisdictions, is the preferences of the district judges themselves. Since district judges ultimately decide who becomes appointed to the magistrate bench and the tasks that they perform, their choices may simply reflect their own preferences. Judges in some districts may prefer to choose magistrates consistent with their own background and experiences, while others may opt for judges with distinct and perhaps complementary backgrounds.

CONCLUSION

This article is meant as a first step to understand the composition of magistrate judges, who provide an increasingly important but enduringly underexplored role in the functioning of the federal judiciary. We have explored the possible relationship between the selection process and the composition of the two separate district court benches. In future work, we will extend our study to consider other judges as well as how the composition of the bench influences magistrate judge performance.

