The United States Commissioner--A Little Known Component of the Federal Judicial System

Paul Frederick Helfer
Special Comment

By Paul Fredrick Helfer*

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A. The Office

United States commissioners form an integral and important part of the federal judicial system, yet their role is not widely known despite origins which go as far back as 1793. By statute each United States district court is authorized to "appoint United States commissioners in such numbers as it deems advisable." According to the latest available figures there are 691 commissioners now serving; however, only twenty-one of these are on a full time basis. The term of office is four years and compensation is by means of a schedule of fees prescribed by statute subject to a maximum annual limit of 10,500 dollars. The district court making the appointment determines where within the judicial district the commissioner is to serve, the prime factor being the volume of judicial business. In large metropolitan areas a full time commissioner may serve along with one or more on a part time basis. Commissioners are not required to be lawyers, al-

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1 In that year federal circuit courts were authorized to appoint "discreet persons learned in the law" to take bail in criminal cases. 1 Stat. 334 (1793). In 1842, commissioners of the circuit courts were given the powers of state justices of the peace as to federal offenders. 5 Stat. 518 (1842). Circuit court commissioners were abolished in 1896 and the United States Commissioners Act, 29 Stat. 140, 184 (1896), created the office as it exists today. For an excellent treatment of the early development of the office of United States commissioner, see United States v. Maresca, 266 Fed. 713 (S.D.N.Y. 1920).

2 28 U.S.C. § 631(a) (1958). A district court may deem it advisable to appoint no commissioners, abolishing the office by local court rule; this was done by the United States District Court for the Eastern District of Michigan, see Lederle, Abolish Unnecessary Court Appendages to Improve the Administration of Justice, 36 J. Am. Jud. Soc'y 102, 104 (1952).


7 Clay v. United States, 246 F.2d 298, 304 (5th Cir. 1957), cert. denied, 355 U.S. 863 (1957).
though whenever possible lawyers are appointed. The Administrative Office of the United States Courts provides each commissioner with a copy of the *United States Commissioner's Manual* which serves as a guide to the functions of his office.

Commissioners are not judges nor is there any such thing as a "United States Commissioner's Court," but it is not unusual to find frequent reference to a commissioner as a "quasi-judicial officer" or as "almost but not quite a judicial officer" holding proceedings which are "quasi-judicial in nature," however, in evaluating his place within the federal judicial system there can be no doubt that he is performing judicial duties and, as will be seen, possesses considerable independent judicial power.

Under the Federal Rules of Criminal Procedure, United States commissioners play a very important role in the daily administration of justice in the federal district courts; their duties and responsibilities under these Rules is the subject of this paper.

**B. Arrest Warrants**

Federal officers frequently file complaints before commissioners seeking the issuance of arrest warrants. In determining whether the required probable cause for issuing such a warrant exists, the commissioner must exercise his own independent judgment and take great care in examining the allegations contained in the affidavits of the officers filing the complaint. It is not enough that the warrant be sought solely on the basis of information and belief; some allegation by the complaining officer of personal knowledge of the offense must be found or

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8 *Griffin, United States Commissioners*, 29 J. Am. Jud. Soc'y 58 (1945); see letter, op. cit. supra note 6, which refers to the commissioner as someone "who should be a member of the bar."

9 See, e.g., *Todd v. United States*, 158 U.S. 278, 282-283 (1895); *Gray v. United States*, 9 F.2d 337, 338 (9th Cir. 1926); *United States v. Casino*, 286 Fed. 976, 980 (S.D.N.Y. 1923).

10 *Swanson v. United States*, 224 F.2d 795, 797 (5th Cir. 1955).


13 *Freeman v. United States*, 160 F.2d 69, 70 (9th Cir. 1946).


the source of his belief indicated. The commissioner has the obligation to inquire as to the sources of the information, but if the affidavits offered in support of the request for the warrant allege personal knowledge, the commissioner is justified in accepting the sworn statements as true. Whether or not a commissioner may issue an arrest warrant solely on the basis of hearsay evidence is a question the Supreme Court has expressly left open.

But it has been pointed out that "it would be the better part of wisdom for the commissioner in every case to make inquiry in order to ascertain the extent of the complainant's knowledge so as to be assured of the existence of probable cause." Once the commissioner has determined that probable cause does exist and issues the warrant, his action in so doing is prima facie valid, and the defendant must bear the burden of showing any impropriety. The warrant must direct that the arresting officer bring the defendant before the nearest available commissioner, who may not be the one issuing the warrant, depending on where the defendant is arrested and how many commissioners are serving in the particular judicial district.

The official duties of commissioners in connection with arrest warrants are by no means mere technical formalities, for theirs is the very real responsibility of safeguarding the rights of an individual against unwarranted arrest.

C. Preliminary Examination

Rule 5(a) of the Federal Rules of Criminal Procedure requires that a person arrested for a federal crime be taken before the nearest available United States commissioner without unnecessary delay. In Mallory v. United States, the Supreme Court gave very real meaning to this provision by requiring that convictions

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18 Giordenello v. United States, 357 U.S. 480, 486 (1958); Lathem v. United States, 259 F.2d 393, 398 (5th Cir. 1958).
19 De Hardit v. United States, 224 F.2d 673, 677-678 (4th Cir. 1955).
21 De Hardit v. United States, 224 F.2d 673, 677-678 (4th Cir. 1955).
based on incriminating statements obtained during a period of illegal detention be set aside.

Under Rule 5(b), the commissioner is charged with the obligation to inform the person arrested of the nature of the charge against him; his right to counsel; and his right not to make a statement unless he wishes to, and, if the defendant desires it, the commissioner must conduct a preliminary examination for the purpose of determining if probable cause for holding him exists.\textsuperscript{26} If the defendant waives the preliminary examination, the commissioner must hold for the district court,\textsuperscript{27} but if it is requested, the commissioner must hear the evidence within a reasonable time.\textsuperscript{28} There being no requirement that the preliminary examination be held contemporaneously with the original appearance before the commissioner, the United States attorney, in felony cases, may request a continuance for the specific purpose of procuring a grand jury indictment; there being no necessity that a preliminary examination precede an indictment, the grand jury is free to act. Once the indictment is returned it constitutes a finding of probable cause and the preliminary hearing before the commissioner is effectively circumvented.\textsuperscript{29}

At the conclusion of the preliminary examination, the commissioner must find that there is probable cause to believe a crime has been committed and the accused committed it; if such a finding is not possible the commissioner must release the defendant.\textsuperscript{30} Even though the commissioner has found probable cause, the district court, in its supervisory capacity, may review the correctness of his determination.\textsuperscript{31}

The purpose of the preliminary examination is to prevent a person arrested from being held in custody without a prompt hearing; the commissioner's determination of the sufficiency of

\textsuperscript{26} It is reversible error if the commissioner fails to notify the defendant of his right to be represented by counsel at the preliminary examination, Johnson v. Zerbst, 304 U.S. 458, 463 (1938).
\textsuperscript{27} Fed. R. Crim. P. 5(c).
\textsuperscript{28} Ibid. The commissioner may grant a continuance to allow either side time to prepare its case. United States v. Ewing, 140 U.S. 142, 150 (1891); United States v. Gray, 87 F. Supp. 436, 438 (D.D.C. 1949). One commissioner may transfer the preliminary examination to another within the same judicial district pending the adjournment. In re Wahl, 42 Fed. 822, 824 (D.Minn. 1890).
\textsuperscript{29} E.g., James v. Lawrence, 176 F.2d 18, 20 (D.C.Cir. 1949).
\textsuperscript{30} Fed. R. Crim. P. 5(c).
the evidence provides protection against any such unjust incarceration.\textsuperscript{32} The commissioner's function as a committing magistrate under Rule 5 terminates once the case is transferred to the district court,\textsuperscript{33} who if they wished could abolish the use of United States commissioners and handle all magisterial duties themselves.\textsuperscript{34} However, the increased use of commissioners precludes the district courts from having to make decisions on matters which, under the Federal Rules of Criminal Procedure, commissioners are able to free them of.

Frequently, proceedings before the commissioner under Rule 5(c) will be referred to as an "arraignment," but this is an incorrect use of that term inasmuch as the commissioner may not accept a plea whether the preliminary examination is waived or not.\textsuperscript{35} If an accused insists on admitting his guilt before the commissioner, it will only succeed in serving as a waiver to the district court.\textsuperscript{36}

The so-called Mallory rule has caused considerable controversy over what will be construed by the courts to be unnecessary delay within the meaning of Rule 5(a). Because commissioners are not always available when defendants are arrested, there has been much debate over whether United States commissioners

\textsuperscript{32} Barbee v. United States, 142 F.2d 805, 807 (4th Cir. 1944); United States v. Lucas, 13 F.R.D. 177 (D.D.C. 1952), appeal dismissed, 201 F.2d 182 (D.C. Cir. 1952); United States v. Gray, 87 F. Supp. 436, 437 (D.D.C. 1949). Not every person arrested need be brought before a commissioner for a determination of probable cause; in certain situations this issue will have already been determined; such is the case where a convicted defendant free on bail is picked up on a bench warrant, McNeil v. Gray, 158 F. Supp. 16, 18 (D.Mass. 1957); a defendant has elected to be proceeded against by information, United States v. Maher, 89 F. Supp. 289, 294 (D.Md. 1950); an indictment has been returned by a grand jury, Davis v. United States, 210 F.2d 118, 120 (8th Cir. 1954); United States v. Slaugenhoupt, 102 F. Supp. 820 (W.D.Pa. 1952); United States ex rel. Perry v. Hiatt, 33 F. Supp. 1022 (M.D.Pa. 1940).

\textsuperscript{33} Swanson v. United States, 294 F.2d 795, 799 (9th Cir. 1965); Freeman v. United States, 160 F.2d 69, 70 (9th Cir. 1946); United States v. Napela, 28 F.2d 898, 900 (N.D.N.Y. 1928); letter from the Director of the Administrative Office of the United States Courts to the Chairman, Senate Judiciary Committee, June 21, 1956, in 1957 U.S. Code Cong. & Ad. News 1900, 1901 (1958); see also Advisory Committee Notes to Rule 5(a), n. 1.

\textsuperscript{34} United States v. Hughes, 70 Fed. 972, 973 (E.D.S.C. 1895); Advisory Committee Notes to Rule 54(a)(2), n.n. 1, 2.

\textsuperscript{35} Goldsmith v. United States, 277 F.2d 335, 338 & n. 2a (D.C. Cir. 1960). One commissioner finds that many attorneys who appear before him insist on entering a plea, see Conan, Practice Before A United States Commissioner, 12 Syracuse L. Rev. 163 (1960).

\textsuperscript{36} Advisory Committee Notes to Rule 5(c), n. 2; White v. United States, 200 F.2d 508, 512-513 (5th Cir. 1952), cert. denied, 345 U.S. 999 (1953), there is no bar to a woman commissioner being appointed, as was the case here.
must be on duty at all hours.\textsuperscript{37} Since the commissioner is under
the supervision and direction of the district court who appoints
him,\textsuperscript{38} he could be required to maintain office hours on a twenty-
four-hour a day basis.\textsuperscript{39} However, the District of Columbia\textsuperscript{40} and
the ninth\textsuperscript{41} circuit have rejected the need for round the clock com-
mmissioners, requiring them to maintain only regular working
hours.

In one case the availability of a commissioner seventy-five
miles from the place of detention before whom the officers could
have brought their prisoner within hours after his arrest was held
to constitute an unnecessary delay; the court saying, "the prompt
taking of a detained person before a commissioner is as important
a duty as the prompt investigation of crime."\textsuperscript{42}

The nearest commissioner being away, a federal agent traveled
thirty-seven miles to the next available commissioner where he
obtained an arrest warrant, returned to the place of detention and
transported his prisoner back only to arrive too late to bring him
before the commissioner, which was done the following morning.
The court held Rule 5(a) had not been violated.\textsuperscript{43}

One defendant claimed that the Rule had been violated
because he had been arrested in the morning and not brought
before a commissioner until the following morning. The United
States commissioner, called as a witness, testified he was the only
one in the county and he did not maintain round the clock
office hours. The court found no unnecessary delay had taken
place.\textsuperscript{44}

Federal officers after making an arrest discovered that the
commissioner, who was the only one on duty that day, had left his
office. The court in finding that Rule 5(a) had been violated said

\textsuperscript{37} See Hearings Before the Special Subcommittee to Study Decisions of the
Supreme Court of the United States of the House Committee on the Judiciary,
\textsuperscript{38} Go-Bart Importing Co. v. United States, 282 U.S. 344, 354 (1931).
\textsuperscript{39} Williams v. United States, 273 F.2d 781, 796-797 (9th Cir. 1959), cert.
\textsuperscript{40} Porter v. United States, 258 F.2d 685, 689 (D.C. Cir. 1958), cert. denied,
\textsuperscript{41} Williams v. United States, 273 F.2d 781, 798 (9th Cir. 1959), cert. denied,
\textsuperscript{43} United States v. Corn, 54 F. Supp. 307, 310 (E.D. Wis. 1944).
\textsuperscript{44} Williams v. United States, 273 F.2d 781, 798 (9th Cir. 1959), cert. denied,
that the officers should have sought out the commissioner at his home. The court was also of the opinion that the commissioner would have carried out his duties under 5(a) at home or wherever he might be found after he left his office, if only the officers had requested him to do so.\(^4\)

The requirement of Rule 5(a) is that the person arrested must be taken before the "nearest available commissioner." This requirement was at issue in one case where the arresting officer drove the defendant sixty miles to bring him before a commissioner. During the ride, incriminating statements were made which the district court refused to exclude despite the defendant's claim that the commissioner before whom he was taken was not the nearest one available. On appeal, the court said that the defendant should have raised the objection at his trial that he had not been taken to the nearest town where a commissioner was known to reside, nor had he shown that this commissioner was available.\(^6\)

In *Mallory,*\(^4\) the Supreme Court ruled that a delay of approximately eight hours was too long; therefore, one appellate court was shocked by a defendant's contention that he was brought before a commissioner *too soon,* when the appearance took place within three hours of his arrest.\(^8\)

**D. Removal Proceedings**

Rule 40 of the Federal Rules establishes a procedure to be followed when a person charged with a criminal offense is taken into custody in a place other than the one in which the alleged crime was committed; the carrying out of these requirements is often the responsibility of United States commissioners. Where the arrest is made is of great significance, for Rule 40 makes different provisions for arrests made in "nearby districts" and those made in "distant districts."\(^9\) The former occurs under the following circumstances:

\(^4\) Ginoza v. United States, 279 F.2d 616, 619-621 (9th Cir. 1960).
\(^6\) Hagan v. United States, 245 F.2d 556, 558 (5th Cir. 1957).
\(^4\) Mallory v. United States, 354 U.S. 449, 450-451 (1957). The arrest was made at 2 and 2:30 p.m.; the first attempt at bringing the accused before a commissioner was made at 10 p.m.
\(^8\) Lathem v. United States, 259 F.2d 393, 395, 398 (5th Cir. 1958).
\(^9\) Compare Fed. R. Crim. P. 40(a) with 40(b).
(1) A complaint has resulted in an arrest warrant being issued and the actual arrest takes place in the same state, but in a different federal judicial district; or in a different state, but the place of arrest is less than 100 miles from the place where the arrest warrant was issued;

(2) An arrest is made without a warrant for an offense committed in another federal judicial district within the same state or committed in a different state, but the arrest is made less than 100 miles from the place of the offense.

If an arrest is made which falls into one of the above categories, the defendant must be taken before the nearest available commissioner in the district where the arrest is made, where he is entitled to have a preliminary hearing on the issue of probable cause. If the commissioner finds this to exist, the defendant is held for the district court where the prosecution is pending or the offense committed. If the arrest is made on a warrant issued after an indictment or information has been returned, the commissioner's only obligation is to set bail, there being no longer any question of probable cause to be determined.50

An arrest is considered made in a "distant district" if it is pursuant to a warrant issued in another state and the arrest is made at a point more than 100 miles from the place where the warrant was issued or the arrest is made without a warrant for an offense committed in another state at a place more than 100 miles from the place of arrest.51

A defendant arrested in a "distant district" must be taken before the nearest available commissioner in the district where the arrest is made without unnecessary delay. The commissioner must advise him of his rights exactly as under Rule 5(a), with the exception that if the defendant chooses to waive a preliminary hearing, he must do so in writing; an oral waiver not being sufficient as it is under Rule 5(c). If such a waiver is executed, the court issues a warrant of removal to the place where the prosecution is pending; if a preliminary examination is requested, the commissioner must hear the evidence and report his findings to the court who, if the commissioner has determined probable

50 Id. 40(a); 18 U.S.C. § 3041 (1958) provides the statutory basis for this rule. See Butler v. United States, 191 F.2d 433, 438 (4th Cir. 1951).
51 Id. 40(b)(1).
cause for removal exists, must issue a warrant of removal or order
the defendant discharged.⁵² If the defendant is arrested pursuant
to an indictment, all that is required for a warrant of removal is
the production of a certified copy and a showing that the person
before the commissioner is the one named in the indictment.⁵³

There is no appeal from the issuance of the warrant of re-
moval,⁵⁴ but if the defendant is committed by the commissioner
because of his inability to post bond pending removal, habeas
removal will be upset by
the district court only if there has been a strong abuse of dis-
cretion⁵⁶ or a complete refusal to consider the evidence presented
by the defendant.⁵⁷ To reverse the commissioner, the Supreme
Court has held that the reviewing court must be able to say that
there existed no substantial ground for bringing the defendant to
trial.⁵⁸

The situation frequently arises of a defendant, discharged by
one commissioner who has refused to find probable cause for
removal, being arrested again and taken before a second com-
missioner for another attempt. The Supreme Court commenting
on this practice has declared that "the utmost than can be said is
that the decision of a commissioner favorable to the accused is
persuasive and may be sufficient to justify like action upon a
second application; but it is not controlling."⁵⁹ The Court sug-

⁵² Id. 40(b)(2)(3); see United States ex rel. Kassin v. Mulligan, 295 U.S.
In a rare case the district court may hold another hearing; see United States v.
⁵³ Id. 40(b)(3); Advisory Committee Notes to Rule 40, n. 3; see cases in
note 52, supra.
⁵⁴ Binion v. United States, 201 F.2d 498 (9th Cir. 1953), cert. denied, 345
U.S. 935 (1953); Meltzer v. United States, 188 F.2d 916 & n. 3 (9th Cir., 1951).
Fries v. United States, 284 Fed. 825 (9th Cir. 1922).
⁵⁵ See Rumely v. McCarthy, 250 U.S. 283, 289 (1919); United States ex rel.
Struck v. United States Marshal, 197 F.2d 118 (2d Cir. 1952); United States ex
rel. Hagan v. Kelly, 101 F.2d 1022 (2d Cir. 1939); Pratt v. United States, 279
Fed. 263, 265 (5th Cir. 1922); United States ex rel. Costello v. McDermott, 21
F. Supp. 608 (D.N.J. 1937). There is no appeal from the district court's refusal
to grant the writ. 25 U.S.C. § 2253 (1958).
⁵⁶ United States ex rel. Scharlon v. Pulver, 54 F.2d 261, 264 (2d Cir. 1931).
⁵⁷ United States ex rel. Kassin v. Mulligan, 295 U.S. 396, 402 (1935); United
⁵⁹ United States ex rel. Rutz v. Levy, 268 U.S. 390, 394 (1925). But see
United States ex rel. Silberstein v. Mathues, 12 F.2d 787, 789 (E.D.Pa. 1926),
aff'd sub nom., Mathues v. United States ex rel. Schwartz, 19 F.2d 7, 9 (3d Cir.
1927).
gested that the second application should be made before the district court and not before another commissioner.\textsuperscript{60} However, the lower federal courts have continued to allow the second attempt at removal to be brought before a different commissioner.\textsuperscript{61} But it should make no difference if the second attempt is before a commissioner or a district judge for in conducting removal proceedings both are functioning as committing magistrates.

E. Search Warrants

A criminal case may often have its inception through the issuance of a search warrant. The Federal Rules of Criminal Procedure authorize United States commissioners to issue such warrants for persons or places located within the judicial district for which he is appointed.\textsuperscript{62} The test, as in the case of arrest warrants, is probable cause\textsuperscript{63} which the commissioner must determine solely from the affidavits presented to him.\textsuperscript{64} As long as he makes no independent determination that the grounds alleged as justifying the search probably exist, the commissioner may issue the warrant.\textsuperscript{65} He has no obligation to go behind the affidavits to investigate their truth,\textsuperscript{66} and even a subsequent showing that the affidavits were in fact false cannot invalidate the warrant if the commissioner had at least some substantial basis for believing their probable truth.\textsuperscript{67} Whether or not the facts before the commissioner are sufficient to establish probable cause for the issuance of a search warrant is a question of law,\textsuperscript{68} and as such is reviewable by the district court by virtue of its authority to assume control in the preliminary stages of matters over which

\textsuperscript{60} United States ex rel. Rutz v. Levy, 268 U.S. 390, 394 (1925).
\textsuperscript{61} See United States ex rel. Maggio v. Schneider, 68 F.2d 50, 51 (3d Cir. 1933); United States ex rel. Povlin v. Hecht, 48 F.2d 90, 91 (2d Cir. 1931); United States ex rel. Greenberg v. Epstein, 33 F.2d 128 (E.D.N.Y. 1929).
\textsuperscript{62} Fed. R. Crim. P. 41(a)(c).
\textsuperscript{63} Id. 41(c).
\textsuperscript{65} Evans v. United States, 242 F.2d 534, 536 (6th Cir. 1957), cert. denied, 353 U.S. 976 (1957); Gracie v. United States, 15 F.2d 644, 646 (1st Cir. 1926), cert. denied, 273 U.S. 748 (1927); United States v. Harnich, 289 Fed. 256, 258 (D.Conn. 1922).
\textsuperscript{66} United States v. Doe, 19 F.R.D. 1, 4 (E.D.Tenn. 1956).
\textsuperscript{67} Jones v. United States, 362 U.S. 257, 271-272 (1960); see also United States v. Brunett, 53 F.2d 219, 223 (W.D. Mo. 1931).
\textsuperscript{68} See, e.g., United States v. Evans, 97 F. Supp. 95, 96 (E.D. Tenn. 1951).
it has the final decision.\textsuperscript{69} Review will come about by means of a motion to suppress evidence under Rule 41(e) of the Federal Rules of Criminal Procedure.\textsuperscript{70} The only question that is open on such a motion is the reasonableness of the commissioner’s action in issuing the search warrant;\textsuperscript{71} his judgment is conclusive unless “arbitrarily exercised.”\textsuperscript{72} New evidence which tends to contradict the affidavits upon which the warrant was issued is not admissible.\textsuperscript{73} Only if it can be found that the commissioner deliberately disregarded evidence\textsuperscript{74} will his judgment be overruled. In a close case, the very fact that the commissioner made a determination of probable cause is a very substantial factor tending to uphold the validity of the search warrant.\textsuperscript{75}

Affidavits being the sole basis upon which a United States commissioner may issue a search warrant, considerable case law has developed concerning what they must contain before the commissioner can make a determination that probable cause exists. Neither the fourth amendment nor the Federal Rules of Criminal Procedure set forth any special requirements as to the form or contents of affidavits.\textsuperscript{76} Rule 41(c) does provide that the warrant shall issue on affidavits sworn to \textit{before the commissioner}. This requirement cannot be satisfied if the affidavit is sworn to before some other official and then presented to the commissioner.\textsuperscript{77} However, if an affidavit not sworn to before a commissioner is presented along with others that are, a search warrant

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\item \textsuperscript{69} In re No. 191 Front Sheet, 5 F.2d 282, 286 (2d Cir. 1924); In re Film and Pictorial Representation of Dempsey-Tunney Fight, 22 F.2d 837, 839 (N.D.Ga. 1927). The power of a commissioner in issuing a search warrant is no less than if it was issued by a district judge. United States ex rel. Finch v. Elliott, 3 F.2d 496, 498 (W.D.Wash. 1924), \textit{aff'd}, 5 F.2d 292, 293 (9th Cir. 1925).
\item \textsuperscript{70} The motion may be made only to the district court not to the commissioner, see Advisory Committee Notes to Rule 41(e).
\item \textsuperscript{71} See, e.g., Clay v. United States, 246 F.2d 298, 303 (5th Cir. 1957), \textit{cert. denied}, 355 U.S. 863 (1957); United States v. Evans, 97 F. Supp. 95, 96 (E.D.Tenn. 1951).
\item \textsuperscript{73} United States v. Gianaris, 25 F.R.D. 194 (D.D.C. 1960).
\item \textsuperscript{74} United States v. Lotempio, 58 F.2d 358, 360 (W.D.N.Y. 1932).
\item \textsuperscript{75} United States v. Ramirez, 279 F.2d 712, 716 (2d Cir. 1960), \textit{cert. denied}, 364 U.S. 850 (1960).
\item \textsuperscript{76} Lowrey v. United States, 161 F.2d 30, 33 (8th Cir. 1957).
\item \textsuperscript{77} Davis v. United States, 35 F.2d 957 (5th Cir. 1929) (before a notary public).
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is not invalid if the commissioner could determine probable cause from the warrants that were properly sworn to before him. If the officers seeking the warrant bring the person who provided them with information before the commissioner, who then proceeds to inquire of the informant whether the statements in the officers' affidavits are true, issuing the warrant not upon the sworn affidavits, but upon the unsworn statements of the informant, the search warrant is invalid.

The commissioner's job is to make a determination that there is probable cause to believe an offense is being committed as of the time the warrant is sought and not at some prior time. The warrant must identify the person or property to be searched.

If the place to be searched is not recited in the warrant, the commissioner may not fill in this information in response to a telephone call from the officers at the scene of the search. The Federal Rules provide that once the warrant is issued, the search must be carried out and a return of any property seized made within ten days. If the warrant is not executed within the ten-day period and the officers make application for a new one, the commissioner may not issue it based solely on the affidavits presented when the warrant was originally obtained and which have not been supplemented so that the commissioner may find that probable cause for a search exists at the time the second warrant is requested.

The issuance of search warrants is an area of law that is beset with many distinctions and complexities; thus the comment of one court that, "It is the plain duty of all United States Commissioners carefully to study the search warrant provisions . . . and to exercise scrupulous care that all proceedings before them and processes issued by them conform strictly to the provisions of [Rule 41]" is very timely.

80 Sigro v. United States, 287 U.S. 206, 210-211 (1932); Dixon v. United States, 211 F.2d 547, 548 (5th Cir. 1954).
81 Fed. R. Crim. P. 41(c).
85 Murby v. United States, 293 Fed. 849, 851 (1st Cir. 1923).
F. Bail

Any person arrested for the commission of a non-capital federal crime has an absolute right to be admitted to bail. The enforcement of this right frequently is the responsibility of United States commissioners, for the first contact that an arrested person has with the federal judicial machinery often comes with his appearance before the commissioner. Such an appearance for the purpose of setting bail may come about in any of several ways: there may be an arrest on a warrant issued after an indictment or information has been returned; the commissioner after conducting a preliminary examination may find there is probable cause to hold the person arrested; or a fugitive from justice may be arrested in a judicial district other than the one in which the offense was committed.

The amount to be set as bail is subject to the commissioner's discretion, but he must apply the criteria set forth in Rule 46(c). If the defendant challenges the amount set by the commissioner as excessive, he may make a motion to reduce bail in the district court from whose decision he may appeal. If the district court hearing the motion decides that the commissioner has set an excessive amount, a reduction must be ordered for "there is no discretion to refuse to reduce excessive bail." In one case involving the setting of what appeared to be excessive bail, the defendant, arrested in California pursuant to an indictment returned in New York, was committed pending removal in default of 100,000 dollars bail set by a commissioner. The defendant sought to reduce the amount as excessive. The district court granted the motion, but the court of appeals reversed saying that the defendant must seek his remedy for excessive bail from the courts of the jurisdiction where the indictment was returned. It also said, "There seems to be no Constitutional requirement that any bail be fixed until the defendant is in the jurisdiction of the

88 Stack v. Boyle, 342 U.S. 1, 6 (1951).
89 Ibid.
90 Meltzer v. United States, 188 F.2d 913 (9th Cir. 1951).
court of indictment. ... The District Court had no right to over-
rule the discretion of the commissioner in a matter committed
to the official as a grace to the defendant."901 It would seem that
the appellate court was wrong, for the defendant had a right to be
admitted to non-excessive bail under Rule 40(b)(2)(3). The
commissioner has no power to set bail in capital cases,92 nor may
he do so once the defendant has been convicted;93 in both these
areas release on bond must be sought from the court. A commis-
sioner may order a prisoner brought before him to allow bail to
be given94 and there is no objection to his setting bail on a
Sunday.95 Commissioners may order material witnesses to give
bail for their appearance and is empowered to order their com-
mitment if they fail to do so.96 Proceedings involving the justifica-
tion of sureties may be held before commissioners,97 but a United
States commissioner may not declare the forfeiture of a bail bond;
this is reserved to the district court.98

While the district courts could, if they wished, assume com-
plete control of matters pertaining to bail and eliminate this
function of the commissioner,99 their continued use relieves over-
worked judges of a great burden leaving them more time to
devote to court matters. The late Mr. Justice Jackson recognized
the importance of the work done by commissioners in this area
when he commented that "the first fixing of bail by a commis-
sioner is a serious exercise of judicial discretion."100

G. TRIALS BEFORE COMMISSIONERS

United States commissioners, specially designated by the
appointing district court, have jurisdiction to try and sentence
persons who commit petty offenses any place within the judicial

91 Id. at 915. In a companion case, Meltzer v. United States, 188 F.2d 916, 917 (9th Cir. 1951), the court said "ball on removal is in the discretion of the trial
court," interpreting Rule 46(a)(1) out of context.
93 Id. 46(a)(2); see United States v. McGee, 39 F.2d 135 (E.D.N.Y. 1930).
94 United States v. Hardin, 10 Fed. 802, 805-806 (W.D.N.C. 1883).
95 DeOrozco v. United States, 237 Fed. 1008, 1013 (5th Cir. 1916).
96 Fed. R. Crim. P. 46(b); Hallett v. United States, 63 Fed. 817, 822 (D.
Mass. 1894).
97 Id. 46(e); see United States v. Cook, 17 F.R.D. 412, 414 (S.D.Tex. 1955).
98 Id. 46(f)(1); Swanson v. United States, 224 F.2d 795, 799 (9th Cir.
100 Stack v. Boyle, 342 U.S. 1, 11 (1951).
district that is subject to federal authority.\textsuperscript{101} However, the defendant has the right to elect to be tried before he district court and the commissioner must so advise him and procure a waiver of this right.\textsuperscript{102} In the event of conviction before the commissioner, there is an automatic right of appeal to the district court.\textsuperscript{103} That this right does not seem to be frequently exercised is evidenced by the fact that there is only one such reported case.\textsuperscript{104}

Trials before commissioners are governed by a special set of rules promulgated by the Supreme Court and not by the Federal Rules of Criminal Procedure.\textsuperscript{105} Most of the petty offense matters tried before commissioners stem from infractions committed on military reservations and in national parks and forests.\textsuperscript{106} The latter is important because each national park commissioner is also a United States commissioner authorized to try petty offenses committed in the national park for which he is appointed.\textsuperscript{107}

H. THE COMMISSIONER SYSTEM—WHAT CHANGES?

"The system of United States Commissioners serves a necessary and useful purpose in the Federal judicial system and . . . on the whole, it is working well. The system needs improvement, however, in a number of respects. . . ."\textsuperscript{108} Although this statement is as true today as it was when made almost twenty years ago, no significant changes in the commissioner system have been forthcoming in the interim.

Considering the importance of the judicial functions which a commissioner is daily required to perform there should be an absolute requirement that all commissioners be lawyers. The day of the lay-judge is rapidly declining and a commissioner, vested

\textsuperscript{101} 18 U.S.C. § 3401(a) (1958). A petty offense is "any misdemeanor, the penalty for which does not exceed imprisonment for a period of six months or a fine of not more than $500 or both. . . ." 18 U.S.C. § 1(3) (1958).
\textsuperscript{102} 18 U.S.C. § 3401(b) (1958).
\textsuperscript{104} United States v. Jones, 141 F. Supp. 641 (E.D.Va. 1956), where the defendant was tampering with a government owned vehicle on a naval base.
\textsuperscript{105} "Rules of Procedure for Trials Before Commissioners" may be found in 18 U.S.C. following the Federal Rules of Criminal Procedure. See Advisory Committee Notes to Rule 54(b)(4).
\textsuperscript{108} Letter from the Director of the Administrative Office of the United States Courts to the Chairman of the Senate Judiciary Committee, December 7, 1943, in 1946 U.S. Code Cong. Serv. 1326, 1327 (1947).
with the important discretion and power that he is, should be in a position to bring a legally trained mind to bear on matters that come before him. It is not enough that lawyers are preferred for the post when they may be available as indicated by the latest figures which show that of the 670 commissioners serving part time, 503 are lawyers.\(^\text{109}\)

The abolition of the fee system as a means of compensation would go a long way toward attracting lawyers to serve as commissioners. Compensating judicial officials according to the volume of business they handle is an anachronism and something which cannot be squared with sound judicial administration.\(^\text{110}\) The Administrative Office of United States Courts has indicated its preference for a fixed salary as a means of compensation of commissioners.\(^\text{111}\) The chief obstacle seems to be the fact that not all commissioners put in the same amount of time at their work.\(^\text{112}\) It would be ideal to be able to propose that the office of United States Commissioner be required to be a full time occupation. However, the amount of business in certain areas of the country does not justify or require the services of a full time commissioner. The necessity and importance of having a commissioner available in all sections of the country, no matter how infrequently called upon, makes part time commissioners an element of the system that must be retained. This does not compel a perpetuation of compensation by fees rather than a fixed salary. There would be no bar to paying full time commissioners a substantially larger salary than that paid to those required for part time work only. The salary differentiation between these two classes could be worked out on the basis of recommendations to Congress by the Judicial Conference of the United States.\(^\text{113}\)

\(^{109}\) [1962] Director of the Administrative Office of the United States Courts Ann. Rep. 165 (1963). Of the remaining 167 part time commissioners, sixty-three are district court clerks or deputy clerks, referees in bankruptcy and one court reporter; presumably some of these persons are members of the bar, leaving only 103 commissioners who are definitely not lawyers.

\(^{110}\) See Lederle, Abolish Unnecessary Court Appendages to Improve the Administration of Justice, 36 J. Am. Jud. Soc'y 102, 103 (1952).

\(^{111}\) See letter, op. cit. supra note 108.

\(^{112}\) Ibid.

The burdens under which the federal district courts function in their daily activities can be lessened to a great extent by the more effective use of United States commissioners.\textsuperscript{114} It is suggested that at present these courts do not in fact use the commissioner system to its full potential. District judges are still performing tasks that under the Federal Rules of Criminal Procedure could be handled by commissioners, allowing the courts additional time for more pressing matters.

At present the trial jurisdiction of United States commissioners is limited to petty offenses committed on federal reservations;\textsuperscript{115} it is suggested that they be given the statutory jurisdiction to try all federal misdemeanors committed anywhere within the district for which they are appointed, preserving the present requirement that the defendant waive his right to be tried before the district court; this would preclude any argument that giving the commissioner such jurisdiction would result in infringement upon a constitutionally guaranteed right to a jury trial.\textsuperscript{116}

Finally, the title "commissioner" can hardly be said to be descriptive of the duties and responsibilities of the office. In point of fact, the United States commissioners are federal magistrates. Reference to commissioners as "quasi-judicial officers" seems improper in light of the importance of the place of the commissioner in the federal judicial system.

It would be appropriate to give United States commissioners full judicial standing and the office what in effect is its proper designation, "United States Magistrate."

\textsuperscript{116} The Judicial Conference has indicated its approval of legislation that would expand the commissioner's trial jurisdiction to include "an offense punishable by imprisonment for not more than one year or by a fine of not more than $1,000, or both." [1961] Judicial Conference of the United States Ann. Rep. 95 (1962); [1960] Judicial Conference of the United States Ann. Rep. 41-42 (1961). However, this would not change the requirement of 18 U.S.C. § 3401(a) that the offense, to be triable by the commissioner, must be committed "in any place over which Congress has exclusive power to legislate or over which the United States has concurrent jurisdiction. . . ."