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FEDERAL MAGISTRATES FOR THE TRIAL OF PETTY OFFENSES: NEED AND CONSTITUTIONALITY

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Federal district courts annually hear about 2,000 petty offense cases which impair their dignity and clutter their dockets. Similar breaches of state law are generally heard by police and magistrates' courts, but existing federal law makes no provision for a federal magistracy which might perform the equivalent function. In this Article, Mr. Doub, Assistant Attorney General of the United States for the Civil Division, and his co-author and colleague, Mr. Kestenbaum, argue the desirability, historical propriety, and constitutionality of a proposal to make the United States commissioner a federal magistrate, vested with a general jurisdiction over federal petty offenses.

The directive force of logic has difficulty asserting itself in the area of judicial administration. Proposed reform in any aspect of the judicial system is ordinarily accompanied by doubt and hesitation upon the part of bench and bar. An art devoted to such a substantial extent to the projection of the past into the present invites adherence to traditional patterns and a follower of the art retains autochthonous inhibitions.

The machinery of legal institutions, even more than societal values, is sustained by this inertia. The discerning legal mind focuses upon the rightness of decision in the individual case as the proper measure

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The views presented in this Article are those of the authors and do not necessarily represent the position of the Department of Justice.

of justice. So vast energy is devoted to the evaluation of the decisional process in cases of national or local interest, while needed repairs in matters of judicial procedure and administration tend to be left behind the wall created by the intuitive assumptions of Doctor Pangloss.

In the federal system this wall has been at least interstitially breached, more by the vigor of the judiciary and scholarly interest than by the concern of the legislature. Such efforts have produced the Administrative Office of the United States Courts, the Federal Rules of Procedure, the work of the Judicial Conference of the United States and recent innovations in calendar practice. It cannot be anticipated that Congress will, for its part, undertake a general reconsideration of the allocations of federal judicial power, although such a review has not occurred for more than eighty years.¹ However, legislative interest in the efficient administration of the federal trial courts has led to the recent partial withdrawal of district court jurisdiction in diversity of citizenship cases.² An appropriate and salutary next step would be an appraisal of the petty offense business in the federal system and consideration of its elimination from the district court dockets.

Despite sporadic past attempts in this direction, there has been little evaluation of the wide range and large number of federal petty offense cases, or the fairness, efficiency and economy of established processes for disposition of them. Practitioners would concede the incongruity of trying petty offenses in the district courts, in view of the significance of competing matters of judicial concern and the uniform utilization outside the federal system of summary proceedings before subordinate magistrates. For that matter the historical difference between proceedings for minor classes of crimes and serious crimes has been recognized under the federal and state constitutions. Yet, although the fact has not been widely publicized, many federal offenders are now being tried and sentenced, under express statutory authority, by United States commissioners, serving as federal magistrates, when the offenses are committed upon federal enclaves.

This development has introduced an incongruity of its own—the distinction between federal criminal administration relating to offenses committed in federal areas and those outside them. While occasional proposals have been bruited to establish a general petty offense jurisdiction in the commissioners, inertia and a basic lack of interest in

1. The present allotment of jurisdiction between the federal and state judiciaries was essentially established by the Judiciary Act of 1875, ch. 137, 18 Stat. 470, the assumptions of which underlay the Act of 1887, ch. 373, 24 Stat. 552.

2. Pub. L. No. 85-554, 1958 U.S. CODE CONG. & AD. NEWS 2333, amending 62 Stat. 930, 939 (1948). See Doub, *Time for Re-Evaluation: Shall We Curtail Diversity Jurisdiction?*, 44 A.B.A.J. 243 (1958).

minor offenses have been reinforced by doubts as to the constitutionality of the congressional power to achieve it.

In this Article we propose to analyze the objection that general federal petty offense tribunals may be incompatible with article III of the federal constitution, and the reasons for the conclusion that there is no such barrier. The constitutional problem will, first, be placed in perspective by an examination of the extent of federal petty offense business, its burdensome nature, the desirability of the proposal; in this connection, we will review the existing trial jurisdiction of United States commissioners and the appropriateness, historically and functionally, of utilizing these officials as federal magistrates.

I. THE NEED FOR A FEDERAL MAGISTRACY

A. *The Problem of Federal Petty Offenses*

A habitue of the police courts will find a remarkable amount of familiar business in the administration of federal criminal law. He may chance upon persons charged with hitchhiking, picking flowers or disturbing stalactites in national parks,³ or scrawling their names upon monuments in national cemeteries.⁴ Thousands are caught yearly violating parking regulations or exceeding speed limits upon federal roads within the states.⁵ Each season, hundreds of eager hunters run afoul of federal law by using grain to entice their birds, by exceeding the permitted bag, by firing a repeating shotgun which has not been plugged to reduce capacity to three shells⁶ or by violating wildlife refuges.⁷ Hundreds of "wetbacks" are apprehended for illegal entry.⁸

Persons may be prosecuted for a wide variety of other minor infractions, including concealing a letter in a parcel post package⁹ or using a franked envelope;¹⁰ operating an interstate motor carrier

3. The penalty for violation of regulations governing national parks and monuments supervised by the Secretary of Interior is in 45 Stat. 235 (1928), 16 U.S.C. § 3 (1952), those under the Secretary of the Army in 61 Stat. 501 (1947), 16 U.S.C. § 9a (1952). The offenses in the text are in 36 C.F.R. §§ 1.2(a), 1.22(b) (1949).

4. REV. STAT. § 4881 (1875), as amended, 24 U.S.C. § 286 (1952).

5. These are usually state traffic rules which are adopted as federal law by the Assimilative Crimes Act, 18 U.S.C. § 13 (1952). Cf. *United States v. Sharpnack*, 355 U.S. 286 (1958). For the number of offenders, see note 24 *infra*.

6. Violation of migratory game regulations is a petty offense under 49 Stat. 1556 (1936), 16 U.S.C. § 703 (1952); 53 Stat. 1433 (1939), 16 U.S.C. § 704 (1952); 49 Stat. 1556 (1936), 16 U.S.C. § 707 (1952). The offenses in the text are in 50 C.F.R. §§ 6.3(a)-(b), 6.4 (1949). For the number of offenders, see note 56 *infra*.

7. 18 U.S.C. § 41 (1952).

8. 66 Stat. 229, 8 U.S.C. § 1325 (1952). A second offense is a felony, under the same section. For the number of offenders see note 56 *infra*.

9. 18 U.S.C. § 1723 (1952).

10. 18 U.S.C. § 1719 (1952).

without certification;¹¹ wearing a military uniform of the United States or a friendly nation,¹² or the costume of a letter carrier;¹³ destroying Government survey marks;¹⁴ capturing a carrier pigeon;¹⁵ falsely representing a prediction to be an official federal weather report¹⁶ or a blanket to be an authentic Indian product;¹⁷ posing as an agent or a member of the Red Cross¹⁸ or of a 4-H club.¹⁹ These and numerous other crimes²⁰ are characterized by the Federal Criminal Code as "petty offenses." Crimes punishable by death or imprisonment for a term exceeding one year are felonies; other offenses are misdemeanors; and any misdemeanor punishable by no more than six months' imprisonment, \$500 fine or both is a petty offense.²¹

Not only comparable minor criminal cases, but ones of far more importance are deemed beneath the dignity of the state courts of record and are left to local magistrates or justices of the peace. Indeed, a "clear and unbroken practice"²² of centuries in England, the American colonies and the states has distinguished minor misdeeds and established summary procedures for their trial before magistrates and without a jury.²³ Passing for later discussion the adequacy of the definition of "petty offenses" in the federal code, there is no doubt of the established historical and constitutional principle that there is a category of minor

11. 64 Stat. 574 (1950), 49 U.S.C. § 306(a) (1952); 63 Stat. 488 (1949), 49 U.S.C. § 322(a) (1952).

12. 18 U.S.C. §§ 702, 703 (1952).

13. 18 U.S.C. § 1730 (1952).

14. 18 U.S.C. § 1858 (1952).

15. 18 U.S.C. § 45 (1952).

16. 18 U.S.C. § 2074 (1952).

17. 18 U.S.C. § 1159 (1952).

18. 18 U.S.C. § 917 (1952).

19. 18 U.S.C. § 916 (1952).

20. In title 18 itself the following additional sections set forth crimes in the category of petty offenses: 18 U.S.C. §§ 42-44, 244, 489, 701, 704-08, 710, 1157-58, 1232, 1382, 1694-99, 1701, 1713, 1722, 1725-27, 1729, 1731, 1856, 1862-63, 1912, 2195, 2279 (1952). Petty offenses are also found in regulatory acts in other titles, some of which have already been cited.

21. 18 U.S.C. § 1 (1952).

22. Frankfurter & Corcoran, *Petty Federal Offenses and the Constitutional Guaranty of Trial by Jury*, 39 HARV. L. REV. 917, 980 (1926).

23. See *ibid.*; 2 HAWKINS, *PLEAS OF THE CROWN* 43-69 (16th ed. 1777); PALEY, *SUMMARY CONVICTIONS BY JUSTICES OF THE PEACE* 2-15, 46-50, 340-86 (1866); McQUILLIN, *MUNICIPAL CORPORATIONS* §§ 1.83, 27.01-03, 27.34 (3d ed. 1949); 14 AM. JUR. *Criminal Law* § 215 (1938); 31 AM. JUR. *Justices of the Peace* §§ 57, 129 (1958). See also *District of Columbia v. Clawans*, 300 U.S. 617, 624-28 (1937); BURN, *JUSTICE OF THE PEACE passim* (29th ed. 1845). Addressing the International Congress of Magistrates and Judges in Rome, Oct. 12, 1958, Sir Lionel Costello stated that non-paid and nonfee magistrates handle 90% of all criminal cases in England at the present time.

crimes collectively designated as "petty offenses," which have been, and may be, administered upon a different basis from more serious crimes.

Statistics indicating the precise extent of federal petty offense business are not readily available. However, tens of thousands of cases are certainly handled annually. In one particularly busy area, in Maryland and Virginia adjoining Washington, D.C., more than 18,500 petty traffic offenders were apprehended upon federal highways and areas during the fiscal year 1957-1958 and dealt with through the federal criminal administration.²⁴

Although, as shown hereafter, many petty offenses originating in federal enclaves are being handled by United States commissioners, petty offenses committed in federal areas where commissioners have not been appointed to handle them, and all minor offenses committed outside the federal areas, must now be tried in the district courts. The burden of such cases upon the district courts seems an onerous one when contrasted with their significant work; and it is difficult to escape the conclusion that the requirement that alleged offenders be tried in a formal criminal court of record, with or without a jury, may be oppressive to them.

The historic classification of petty offenses reflects a feeling for judicial economy and dignity, realization of the disproportionate burden upon courts, jurors and defendants of handling all crimes upon the same procedural basis, and a moral judgment distinguishing grave from petty offenses.²⁵ Putting minor offenses into the regular courts would advantage no one; as a Maryland court noted, it would "not only prove oppressive in a great many cases to the parties arrested, but it would

24. The traffic violations upon these highways and areas are among the offenses upon federal enclaves which, as explained in text accompanying notes 33-36 *infra*, are now dealt with summarily by about 270 United States commissioners. The Administrative Office of the United States Courts does not collect statistics for the total number of cases handled by them. However, inquiries by the Administrative Office disclosed that the commissioners in Upper Marlboro and Bethesda, Maryland, and in Alexandria, Virginia, disposed of 3,981, 2,789, and 11,762 petty offenses respectively during the past fiscal year. While no other commissioners are quite as busy as these three, the Administrative Office states that a large number of petty offense cases are handled by the commissioners in El Paso and San Antonio, Texas, San Francisco and Susanville, California, and Trenton, New Jersey. Most of these cases arise on military reservations.

The large figure for the Alexandria commissioner included many parking violations on the grounds of the Pentagon Building. The other enumerated cases chiefly involved traffic offenses upon highways within federal jurisdiction near the Capital—*e.g.*, George Washington Memorial Parkway, part of Baltimore-Washington Parkway, McArthur Boulevard, Suitland Parkway. See *United States v. Dreos*, 156 F. Supp. 200 (D. Md. 1957), sustaining the validity of trial by commissioners. The success of this program is indicated by the congressional proposal last year to enlarge the commissioners' powers on some of these highways. See note 127 *infra*.

It is believed that there are now approximately 2,000 petty offenses handled annually in district courts. See text accompanying note 54 *infra*.

25. See, *e.g.*, *Frankfurter & Corcoran*, *supra* note 22, at 924, 933, 937, 953-54, 961, 980-82.

be exceedingly onerous to the public.”²⁶ This is particularly true in the federal system because the district courts are often inconveniently remote from the place of the offense. And, federal court trial frequently results in wide publicity entirely disproportionate to a petty offense, illustrated to the authors’ knowledge in migratory game cases.²⁷ It would certainly be paradoxical if, alone, the federal constitution prohibited petty offenders from choosing speedy, inexpensive summary trial, and required federal judges to lay aside their weighty functions in order to perform, with juries, duties equivalent to those of a local justice of the peace.

In a 1926 article, the historical material as to the development of the petty offense jurisdiction of local magistrates was comprehensively reviewed by then Professor Felix Frankfurter and a promising graduate student. They concluded that an exception for federal petty offenses was implicit in the constitutional guarantee of trial by jury, although the modern proliferation of such offenses could not have been predicted by the framers.²⁸ The Supreme Court has substantiated this view and, accordingly, even if petty offenses were left to the district courts, jury trial for them could be abolished, with the achievement of some measure of expedition.²⁹ Indictment by grand jury for such offenses has not been required since 1930.³⁰ There has developed no substantial sentiment in favor of retaining petty offense jurisdiction in the district courts with a curtailment of jury trials, perhaps in recognition that such an alteration in district court practice would fail to meet either the petty offense caseload problem or the realities of the interests of the offender. Instead, it would appear more logical that efforts be concentrated upon a more coherent, comprehensive solution—the development of separate petty offense tribunals within the federal system.

B. *The United States Commissioners as Petty Offense Tribunals*

The federal system already contains a group of officials who are recognized as the obvious choice to preside over petty offense tribunals—the United States commissioners. Since these officials are appointed

26. *State v. Glenn*, 54 Md. 572, 605 (1880).

27. While wide publicity is oppressive, the pressure of business in the regular courts often has the opposite result—a virtual “immunity” to petty offenders, noted in *State v. Glenn*, *supra* note 26, at 605. In the administration of federal prohibition, this often yielded the so-called “bargain days” for petty offenders in the federal district courts. *Report of the National Commission on Law Observance and Enforcement*, H.R. Doc. No. 252, 71st Cong., 2d Sess. 9-12, 18 (1930).

28. Frankfurter & Corcoran, *supra* note 22, at 975-76 *passim*.

29. See cases cited note 96 *infra*.

30. See note 48 *infra*.

by the district courts at their discretion,³¹ they can be effectively utilized to meet the fluctuating needs of petty offense business, an essential characteristic of any institutional solution. Commissioners have not only long been "an important feature of the Federal judicial system,"³² but the background and nature of the office demonstrate their particular appropriateness for the function proposed.

1. More than one-third of the United States commissioners already have a limited power to dispose of petty offenses. In 1940, Congress authorized commissioners, who were specially designated by their appointing district court for that purpose, to try and sentence persons committing petty offenses in areas within their district over which the federal government has exclusive or concurrent jurisdiction.³³ Of the 655 commissioners throughout the country, 270 have received this authority.³⁴

The federal areas covered by the commissioners' existing petty offense jurisdiction include military reservations, highways, federal buildings, national parks, memorial parks and cemeteries, thus reaching a large number of federal petty offense violations. The statute provides that an offender may elect trial before the district court, and, if tried

31. 28 U.S.C. § 631(a) (1952) provides: "Each district court shall appoint United States commissioners in such number as it deems advisable." Under 28 U.S.C. § 631(c) (1952), the commissioner's term is for four years unless sooner removed by the district court.

In addition, 28 U.S.C. § 631(a) (1952) authorizes the appointment of a commissioner for each of a number of specified national parks, who may also be known as national park commissioners. See note 45 *infra*.

32. *United States v. Allred*, 155 U.S. 591, 594-95 (1895).

33. Act of Oct. 9, 1940, ch. 785, 54 Stat. 1058 (now 18 U.S.C. §§ 3401, 3402 (1952)). These sections provide: "Section 3401. Petty offenses; application of probation laws; fees. (a) Any United States commissioner specially designated for that purpose by the court by which he was appointed has jurisdiction to try and sentence persons committing petty offenses in any place over which the Congress has exclusive power to legislate or over which the United States has concurrent jurisdiction, and within the judicial district for which such commissioner was appointed. (b) Any person charged with a petty offense may elect, however, to be tried in the district court of the United States. The commissioner shall apprise the defendant of his right to make such election and shall not proceed to try the case unless the defendant after being so apprised, signs a written consent to be tried before the commissioner. (c) The probation laws shall be applicable to persons so tried and the commissioner shall have power to grant probation. (d) For his services in such cases the commissioner shall receive the fees, and none other, provided by law for like or similar services. (e) This section shall not apply to the District of Columbia nor shall it repeal or limit existing jurisdiction, power or authority of commissioners appointed for Alaska or in the several national parks.

"Section 3042. Rules of procedure, practice and appeal. In all cases of conviction by United States commissioners an appeal shall lie from the judgment of the commissioner to the district court of the United States for the district in which the offense was committed. The Supreme Court shall prescribe rules of procedure and practice for the trial of cases before commissioners and for taking and hearing of appeals to the said district courts of the United States."

34. These statistics were supplied by the Administrative Office of the United States Courts, Washington, D.C.

by a commissioner, the offender may appeal to the district court.³⁵ Under rules promulgated by the Supreme Court, the appeal brings up errors of law only; trial *de novo* is barred.³⁶

2. The United States commissioner is the counterpart in the federal system of the subordinate state magistrates and justices of the peace who have traditionally exercised jurisdiction over petty offenses and over the preliminary stages of proceedings for more serious crimes.³⁷ Commissioners were originally established to perform the latter function and the history of the office attests to the continued recognition of the close parallel between them and the state magistrates.

Under section 33 of the Judiciary Act of 1789, federal offenders were arrested and imprisoned or bailed for trial by federal judges or by state magistrates or justices of the peace.³⁸ Four years later the federal circuit courts were authorized to appoint "discreet persons learned in the law" to take bail.³⁹ After these officials had acquired the title of "commissioner" with certain additional authority, Congress in 1842 authorized them to exercise all the powers of judges and justices of the peace under this section of the Judiciary Act.⁴⁰ The chief duties of the federal commissioners have always lain in this area—the issuance of warrants for arrest and search, the conducting of preliminary examinations, commitment of prisoners for trial by the court in the same or other districts, setting bail, etc.⁴¹ Congress con-

35. 18 U.S.C. § 3401(b) (1952).

36. Rules of Procedure for Trial Before Commissioners, 18 U.S.C. § 3402, rule 4(6) (1952).

37. See note 23 *supra*.

38. 1 Stat. 91 (1789). The development of the office of the United States commissioner was described in *United States v. Allred*, 155 U.S. 591, 594-95 (1895); *United States v. Maresca*, 266 Fed. 713, 719-20, 722 (S.D.N.Y. 1920); *United States v. Hom Hing*, 48 Fed. 635, 638-40 (N.D.N.Y. 1892).

39. Act of March 2, 1793, ch. 22, § 4, 1 Stat. 334.

40. Act of Aug. 23, 1842, ch. 188, 5 Stat. 516. The appointment of such officials by the district courts, and the title "United States commissioner," dates from 1896. Act of May 28, 1896, ch. 252, § 19, 29 Stat. 184.

41. FED. R. CRIM. P. 3, 4, 5, 40, 41, 46; 18 U.S.C. § 3041 (1952). In addition, these and analogous powers of the commissioners are expressly set forth with respect to certain specific offenses—*e.g.*, civil rights (62 Stat. 908 (1948), 42 U.S.C. § 1987 (1952)); 36 Stat. 1167 (1911), 42 U.S.C. § 1989 (1952)); internal revenue (18 U.S.C. § 3045 (1952); INT. REV. CODE OF 1954 § 7604); migratory game (40 Stat. 756 (1918), 16 U.S.C. § 706 (1952)); 45 Stat. 1224 (1929), 16 U.S.C. § 7151 (1952); 48 Stat. 452 (1934), 16 U.S.C. § 718(f) (1952)); motorboat regulation (54 Stat. 166 (1940), 46 U.S.C. § 526(n) (1952)); commissioners may also hold persons to security of peace or for good behavior (18 U.S.C. § 3043 (1952)). They may administer oaths, and take bail acknowledgments, affidavits and depositions (28 U.S.C. § 637 (1952)).

On the civil side, commissioners may discharge persons imprisoned for debt. 28 U.S.C. § 2007 (1952). In addition, they have been given special authority in admiralty matters. They may summon the master of a vessel for nonpayment of seamen's wages and issue process against the vessels. 31 Stat. 956 (1901), 46 U.S.C. §§ 603, 604 (1952). Where, by treaty, foreign consular officials in the United

tinued to delineate commissioners' powers by drawing upon the analogy of justices of the peace, or by the express adoption of local state law for their governance.⁴² In recognition of this analogy, several courts have characterized the commissioners as "justices of the peace of the United States" and "examining and committing magistrates."⁴³

Inevitably, Congress began to utilize these "federal magistrates" to hear and determine minor offenses in certain specific federal areas—the territories, national parks, and federal highways.⁴⁴ This gradual

States have jurisdiction to adjudicate matters involving seamen on foreign vessels, the commissioners are to exercise their powers of arrest and commitment in aid of the consular proceedings and are to enforce the award of the foreign consular official. 28 U.S.C. §§ 257, 258(a) (1952).

In the past, commissioners have been delegated other powers aside from petty offense jurisdiction, e.g., to arrest and deport aliens. *Wong Wing v. United States*, 163 U.S. 228 (1896).

42. See, e.g., Act of Sept. 16, 1850, ch. 52, 9 Stat. 458; Act of May 2, 1890, ch. 182, § 39, 26 Stat. 98; Act of March 1, 1895, 28 Stat. 695-96, *Reagan v. United States*, 182 U.S. 419, 423, 426 (1901); Act of June 6, 1900, ch. 786, § 6, 31 Stat. 323; Act of Sept. 1, 1916, ch. 433, 39 Stat. 693.

43. *United States v. Maresca*, 266 Fed. 713, 720 (S.D.N.Y. 1920); *United States v. Schumann*, 27 Fed. Cas. 984 (No. 16235) (C.C.D. Cal. 1866); Schwartz, *Federal Criminal Jurisdiction and Prosecutors' Discretion*, 13 LAW & CONTEMP. PROB. 64, 82 (1948).

The Supreme Court has, in various connections, described commissioners as an adjunct of the court, possessing independent though subordinate judicial powers, *Grin v. Shine*, 187 U.S. 181, 187 (1902); and as inferior officers of the court, not judges, subject to the supervision and control of the appointing court at all times, *Go-Bart Importing Co. v. United States*, 282 U.S. 344, 352-54 (1931); *United States v. Casino*, 286 Fed. 976, 979-80 (S.D.N.Y. 1923).

Impressed with the judicial quality of the commissioners' work, District Judge Hough concluded that their issuance and vacating of a search warrant were acts done in the district court, which could only be challenged on appeal, in the circuit court. *United States v. Maresca*, *supra*. In *United States v. Casino*, *supra*, Judge L. Hand disagreed, analyzing the commissioners' status as subordinate ministerial officers, and the Second Circuit later sustained the authority of district judges to review acts of commissioners, supervise and apparently take over matters at any time. *In re No. 191 Front St.*, 5 F.2d 282, 286 (2d Cir. 1924). See *Collins v. Miller*, 252 U.S. 364, 369 (1920).

In analyzing and sustaining the commissioners' traditional function, other courts have observed that they are not judges, nor their powers judicial, in the constitutional sense. *Rice v. Ames*, 180 U.S. 371 (1901); *In re Kaine*, 55 U.S. (14 How.) 103, 119 (1852); *In re Sing Tuck*, 126 Fed. 386, 397 (N.D.N.Y. 1903); *Russell v. Thomas*, 21 Fed. Cas. 58 (No. 12,162) (C.C.E.D. Pa. 1894). One district judge even said that commissioners could not constitutionally be clothed with judicial power to hear and finally determine any matter whatsoever. *United States v. Berry*, 4 Fed. 779, 780 (D. Colo. 1880). See also *Ex parte Doll*, 7 Fed. Cas. 854 (No. 3968) (C.C.E.D. Pa. 1870). In *Rider v. United States*, 149 Fed. 164 (8th Cir. 1906), and *Ex parte Margrave*, 275 Fed. 200 (N.D. Cal. 1921), convictions by commissioners of offenders in federal reservations were set aside as beyond their statutory powers. There is nowhere in these cases, however, any explicit discussion of the constitutional problem treated in the second section of this Article.

44. E.g., territories—Act of May 2, 1890, ch. 182, § 39, 26 Stat. 98; Act of March 1, 1895, 28 Stat. 695-96, *Reagan v. United States*, 182 U.S. 419, 423, 426 (1901); national parks—Act of May 7, 1894, ch. 72, § 5, 28 Stat. 74, as amended; Act of June 2, 1920, ch. 218, §§ 7, 8, 41 Stat. 733, as amended; Act of June 30, 1916, ch. 197, § 6, 39 Stat. 245, as amended; Act of April 25, 1928, ch. 434, § 6, 45 Stat. 460, as amended; Act of Aug. 21, 1916, ch. 368, § 6, 39 Stat. 523, as amended; Act of Aug. 22, 1914, ch. 264, § 6, 38 Stat. 700, as amended; Act of March 2, 1929, ch. 583, § 6, 45 Stat. 1538, as amended; Act of April 26, 1928, ch. 438, § 6, 45 Stat. 464, as amended; Act of April 19, 1930, ch. 200, § 6, 46 Stat. 228, as amended. Conduit Road in Maryland near Washington, D.C.—Act of Sept. 1, 1916, ch. 433, 39 Stat. 693 (1916).

development culminated in the general 1940 statute already referred to, authorizing commissioners designated by the district courts for that purpose to try any minor offenses committed within areas of federal legislative jurisdiction.⁴⁵ It was equally predictable that any substantial increase in the number of federal petty offenses outside these enclaves would result in proposals to enlarge the authority of commissioners.

Such proposals developed during federal prohibition, when the large number of prosecutions of petty offenders caused congestion and delay in the administration of the federal district courts. The situation prompted several scholars to urge that petty offenses did not constitutionally require a jury trial.⁴⁶ It also led President Hoover's Wickersham Commission, in 1930, to make the timid recommendations that petty offenses be prosecuted upon complaint before commissioners, who would accept pleas, and, if the defendant pleaded not guilty, hold hearings and recommend conviction or acquittal; the cases would then be referred to district judges for judgment and sentencing. Such a measure was proposed in the Congress in 1930 but failed of enactment.⁴⁷

Interestingly enough, Congress then did enact a companion measure recommended by the Wickersham Commission which defined a petty offense as any misdemeanor the penalty for which did not exceed imprisonment for six months or a fine of \$500 or both, and provided that such an offense might be prosecuted upon complaint or information.⁴⁸ The definition remained disassociated from the original objec-

45. See note 33 *supra* and accompanying text. In adopting 18 U.S.C. §§ 3401, 3402 (1952), Congress noted that it was following the precedent of the national parks and the Conduit Road (see note 44 *supra*). H.R. REP. No. 2579, 76th Cong., 3d Sess. 2-3 (1940).

Special United States commissioners for national parks are still authorized to exercise petty offense jurisdiction within the parks. 28 U.S.C. §§ 631(a), 632 (1952); see note 31 *supra*. If none is appointed, the same jurisdiction could be vested in a commissioner for the district. A difference is that park commissioners are paid salaries, while other federal commissioners receive fees according to the number of cases and services, with a statutory maximum. 28 U.S.C. §§ 633, 634 (1952).

46. Frankfurter & Corcoran, *supra* note 22.

47. *Report of National Commission on Law Observance and Enforcement*, H.R. Doc. No. 252, 71st Cong., 2d Sess. 17, 24-25 (1930). The bill to confer jurisdiction on commissioners was H.R. 9937, 71st Cong., 2d Sess. (1930). Congress sought to venture further than the Wickersham Commission, which had first suggested vesting commissioners with jurisdiction only over prohibition petty offenses, although recognizing the desirability of a general petty offense authority. H.R. Doc. No. 252, *supra*. As introduced, H.R. 9937 would have covered only "casual or slight violations of Title II of the National Prohibition Act." In the House Committee, with the Commission's approval, the quoted phrase was deleted and the general words "petty offenses" substituted. H.R. REP. No. 1732, 71st Cong., 2d Sess. (1930). The bill passed the House in that form but was never reported out of the Senate Judiciary Committee. 72 CONG. REC. 10071, 10094 (1930).

48. Act of Dec. 16, 1930, ch. 15, 46 Stat. 1029. The petty offense definition is now in 18 U.S.C. § 1 (1952); the use of information in lieu of indictment is in FED. R. CRIM. P. 7(a). See Reviser's Note to 18 U.S.C. § 1 (1952).

tives of the bill until the commissioners' present petty offense jurisdiction was established in 1940.

C. *The Desirability of Extending the Commissioners' Existing Jurisdiction*

Although the commissioners' existing power in federal enclaves covers a majority of federal petty offenses, there is good reason at this time to essay an extension of jurisdiction beyond the federal areas.

Such an amplified jurisdiction would have, in the first place, a direct impact upon current proposals that the United States reduce its authority over the federal enclaves. The existing jurisdiction of commissioners is similar to that of police courts which have been created by Congress in the federal territories and the District of Columbia and are valid, as we shall see, by reason of the general power of Congress to govern areas outside the states' boundaries.⁴⁹ Similarly, the present authority of commissioners applies upon areas within the states to which a federal legislative jurisdiction extends by cession or consent of the states.⁵⁰

A bill, proposed in the eighty-fifth Congress and to be reintroduced, would dilute this constitutional basis. It authorizes, and anticipates, the relinquishment of federal legislative jurisdiction and retention by the United States of only a proprietary interest in many areas.⁵¹ The bill proposes, nevertheless, to maintain the commissioners' petty offense jurisdiction by extending it to offenses committed "in any place . . . which is under the charge and control of the United States."⁵²

The proposal of the Wickersham Commission and its results are reviewed briefly in Schwartz, *Federal Criminal Jurisdiction and Prosecutor's Discretion*, 13 LAW & CONTEMP. PROB. 64, 81-82 (1948); see *Duke v. United States*, 301 U.S. 492, 494-95 (1937). See also 72 CONG. REC. 9992, 9993, 10040-71 (1930).

49. See text accompanying notes 87-92 *infra* and note 92 *infra*.

50. See notes 33, 45 *supra*. Congress may "exercise exclusive Legislation" over the District of Columbia and all places purchased or acquired by consent of the legislature of the state involved. U.S. CONST. art. 1, § 8, cl. 17.

51. S. 1538, 85th Cong., 2d Sess. §§ 1, 2 (1958). The purpose is to enable states and local communities to obtain tax revenues; to relieve the federal government from performing normally local functions; and to assure that residents of the enclaves will enjoy rights, privileges and services provided by states and localities. *Id.* § 1.

The bill was favorably reported by the Senate Committee on Government Operations (S. REP. NO. 1278, 85th Cong., 2d Sess. (1958)) and passed the Senate on March 3, 1958. It was later returned by the House upon the Senate's request and no further action occurred. 104 CONG. REC. 2838, 2840-43, 4725 (1958). The bill was the fruit of extensive governmental study (see REPORT OF THE INTERDEPARTMENTAL COMMITTEE FOR THE STUDY OF JURISDICTION OVER FEDERAL AREAS WITHIN THE STATES (1957)) and Attorney General Rogers has announced that he will continue to press for its early enactment. Address to the 52d Annual Meeting of the National Association of Attorneys General, Department of Justice Press Release, June 11, 1958, pp. 4-7.

52. S. 1538, *supra* note 51, § 4, amending 18 U.S.C. § 3401(a) (1952). See 1 REPORT OF THE INTERDEPARTMENTAL COMMITTEE FOR THE STUDY OF JURISDICTION OVER FEDERAL AREAS WITHIN THE STATES 75 (1956); 2 *id.* at 142-44 (1957). The

The validity of the extension may rest upon the connection with federal property, over which the United States has authority to make "all needful rules and regulations."⁵³ But this additional step towards a general petty offense system accentuates the desirability of establishing a constitutional principle sustaining commissioners' jurisdiction regardless of the place of the offense.

Aside from this development, the current pressure of petty offenses unrelated to federal property suggests congressional attention. It is estimated that during recent years an annual average of about 2,000 petty offenses committed outside the federal enclaves were brought before the district courts.⁵⁴ This average constitutes six to eight per cent of all criminal prosecutions in the federal courts,⁵⁵ but because of unequal geographical distribution, the burden upon particular district courts is much more substantial. Thus, migratory game violations represented ten and one-half per cent to forty-four per cent of criminal offenders in eight particular districts;⁵⁶ and hundreds of petty

"charge and control" standard accords with the language of § 3 of the bill which authorizes all agency heads (or officials empowered by them) to issue needful rules and regulations for such areas and fix penalties, not exceeding thirty days' imprisonment, \$50 fine, or both. Such general power is now exercised only by the Administrator of General Services. S. REP. NO. 1278, 85th Cong., 2d Sess. 7, 12-13 (1958).

53. This language in S. 1538, *supra* note 51, is derived from art. IV, § 3 of the federal constitution, authorizing Congress to "make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States."

54. No complete figures are available for the number of federal prosecutions in the district courts in the states, which arose outside the federal enclaves and involved petty offenses as defined by 18 U.S.C. § 1 (1952). Criminal cases for the fiscal year ended 1957, reported by the Administrative Office of the United States Courts, include migratory bird offenses—511 cases, involving 737 defendants; immigration laws—2,289 cases, involving 2,332 defendants (majority probably petty offenses; see note 56 *infra*); illegal use of uniform—105 cases, involving 103 defendants; motor carrier violations—316 cases, involving 356 defendants (probably includes substantial number of petty offenses). ANNUAL REPORT OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS 213 (1957).

An analysis of cases instituted under a few of the important petty offense provisions in a sample month (November 1957) indicated at least 135 cases. These consisted of violations of migratory game laws or regulations (49 Stat. 1556 (1936), 16 U.S.C. §§ 703, 704, 707 (1952)); 45 Stat. 1225 (1929), 16 U.S.C. § 715m (1952); 48 Stat. 452 (1934), 16 U.S.C. § 718g (1952))—50; illegal entry of aliens, or misrepresentations of facts in such connection, nearly all "wetback" cases (66 Stat. 229, 8 U.S.C. § 1325 (1952))—50; unlawful entry on military property (18 U.S.C. § 1382 (1952))—12; unauthorized wearing of uniform (18 U.S.C. § 702 (1952))—9; alien crewman wilfully exceeding permit (66 Stat. 220, 8 U.S.C. § 1282 (1952))—8; carrier operating without certificate of convenience and necessity (64 Stat. 574 (1950), 49 U.S.C. § 306 (1952))—3; sale or possession of imitation insignia of United States (18 U.S.C. § 701 (1952))—2; nonresident hunting or fishing without license (57 Stat. 306 (1943), 48 U.S.C. § 199 (1952))—1. These statistics were compiled from the statistical office of the Department of Justice.

55. In the above fiscal year, 26,049 criminal prosecutions of all kinds involving 31,937 defendants were instituted in the federal district courts in the states. ANNUAL REPORT OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS 212 (1957).

56. In the fiscal year ended 1957, 511 criminal cases were instituted in the district courts under the migratory game laws, involving 737 defendants. Of these, 197 offenders were prosecuted in the Eastern District of Louisiana, representing 37% of all criminal defendants in the district that year; 71 in the District of North Dakota

offenses under the immigration laws—the so-called “wetback” cases—were concentrated in the four districts near the Mexican border.

The extent of the present burden of petty criminal cases in the affected federal districts is presumably reflected in a renewed consideration of a general petty offense authority for commissioners, after offenses within federal enclaves had been covered in 1940. The 1940 legislation inspired studies to that end by the Administrative Office of the United States Courts and by committees of federal judges at the instance of the Judicial Conference.⁵⁷ The examples of prohibition case congestion in the 1920's and the “wetback” problem now, also indicate that in the future other federally enforced programs⁵⁸ might again magnify the pressure on the district courts and the need for expeditious handling of petty offenses.

II. THE CONSTITUTIONALITY OF A GENERAL PETTY OFFENSE JURISDICTION OF UNITED STATES COMMISSIONERS

The failure thus far to establish a general inferior offense jurisdiction in commissioners is explicable, in part at least, by past doubt and irresolution concerning the constitutionality of such a proposal.⁵⁹ Since

constituted 44% of all criminal defendants; 63 in the Western District of Louisiana constituted 24% of all criminal defendants. Other striking figures are for the Northern District of Iowa, ratio of petty offenders to all criminal defendants—36%; Southern District of Iowa—29½%; Southern District of Illinois—18%; District of South Dakota—15%; District of Maryland—10½%. *Id.* at 216-18.

Of 2,289 cases instituted under the immigration laws in the fiscal year ended 1957, 1,664 defendants were prosecuted in just four districts—539 in the Southern District of California, 437 in the Western District of Texas, 380 in the Southern District of Texas and 308 in the District of Arizona. A high proportion of these were for the petty offense of illegal entry. *Id.* at 217-18. Illegal entry, misrepresentation of facts, etc., by a first offender is a petty offense under 66 Stat. 229, 8 U.S.C. § 1325 (1952). Precise statistics as to this category of petty offenders are unavailable because the Administrative Office does not distinguish petty offenses from other misdemeanors and felonies in its report of prosecutions instituted under the immigration laws.

57. The Administrative Office reported to the Judicial Conference in September 1942; the two committees of judges reported in 1943 and 1944. The committee reporting in 1943 gave specific attention to a suggested amendment to 18 U.S.C. § 3401 (1952), which would have added the following: “And any United States Commissioner so specially designated for said purpose shall also have jurisdiction to try, and, if found guilty, to sentence persons charged with other federal petty offenses against the law, or rules and regulations made in pursuance of law, committed within the judicial district for which such Commissioner was appointed, which latter petty offenses are specifically or by general classification designated in the order of court giving such authority to said commissioners.” These reports are unpublished. See JUDICIAL CONFERENCE OF THE UNITED STATES, REPORT OF THE ANNUAL MEETING 12 (1942); *id.* at 3, 11-14 (1943); *id.* at 16-17, 22 (1944).

58. A recent study of the legal implications of a possible future federal policy, *i.e.*, international arms control and inspection, adverted to the status of the commissioners' petty offense jurisdiction in the course of a discussion of the constitutional problems involved in establishing tribunals to try violators of disarmament regulation. HENKIN, ARMS CONTROL AND INSPECTION IN AMERICAN LAW 243 n.49 (1958).

59. In connection with some analyses of the proposed “legislative courts” (see pp. 460-67 *infra*), it has been assumed, without discussion, that only courts meeting

there is now no constitutional obstacle to the elimination of trial by jury for petty offenses,⁶⁰ the remaining doubt relates solely to the tenure provisions of the Constitution. Article III, section 1 of the Constitution vests "the judicial power of the United States" in one Supreme Court and such inferior courts as Congress may establish and provides that the judges of these courts shall hold office during good behavior and, while in office, their compensation may not be reduced. The question is whether this provision bars trial and judgment of petty offenders by United States commissioners, who hold office for fixed terms of four years and are removable at the pleasure of the appointing courts.⁶¹

An analysis of this constitutional objection to the proposed commissioners' petty offense jurisdiction indicates that it does not constitute a barrier to the accomplishment of this salutary step. The historical background of the "good behavior" provision supports such a distinct treatment of petty offenses, and review upon appeal to the district courts would provide for a sufficient exercise of judicial power to satisfy article III.

A. Historical Limitation of Good Behavior Tenure

It can be demonstrated that "good behavior" tenure and guaranteed salary, while considered essential to the independence and integrity of *judges*, was never believed by the drafters of the Constitution to extend to subordinate magistrates who had the power to try petty offenses.

In *The Federalist No. 78*, Hamilton urged the tenure provision as an excellent barrier to oppression and the best expedient for a steady, upright, and impartial administration of the laws. He pointed to its importance in Great Britain and noted that article III thereby conformed "to the most approved of the State constitutions."⁶² This was,

the conditions of article III could try and decide criminal cases. HART & WECHSLER, *FEDERAL COURTS AND THE FEDERAL SYSTEM* 313 (1953); Katz, *Federal Legislative Courts*, 43 HARV. L. REV. 894, 916 n.106 (1930). See also *United States v. Berry*, 4 Fed. 779, 780 (D. Colo. 1880).

In their reports to the Judicial Conference, the committees of judges adverted to constitutional difficulties but expressed no opinion, while the Director of the Administrative Office of the United States Court stated the conclusion that the commissioners' petty offense jurisdiction would be constitutional. See note 57 *supra*. In the proposal by President Hoover's Wickersham Commission, see text following note 46 *supra*, it was sought to avoid this problem by leaving judgment and sentencing, considered the strictly "judicial" powers, to the district courts.

60. See text accompanying notes 28-29 *supra*, notes 79-81, 96 *infra*.

61. 28 U.S.C. § 631(c) (1952).

62. For other contemporaneous references to life tenure of judges in the states and England during discussion of the federal constitution, see 2 RECORDS OF THE FEDERAL CONVENTION 428-29 (Farrand ed. 1911); 2 ELLIOTT'S DEBATES 480.

in short, one of the rights of Englishmen, the abrogation of which had been protested in the Declaration of Independence,⁶³ to be restored in the new nation.

In the English statutes, the phrase "during good behavior" first appeared, in the Latin equivalent, in the Act of Settlement of 1700, providing that "judges' commissions shall be made *quamdiu se bene gesserint*." ⁶⁴ In 1760 the good behavior tenure was further protected and made to survive the death of the Sovereign.⁶⁵ However, this unconditional protection for "*judges*" was never considered applicable to justices of the peace. It existed alongside the continuing practice of appointing justices of the peace, to hold office "during the King's pleasure" and to have jurisdiction to try inferior offenses in summary proceedings without a jury; and the two tenures are described—by Blackstone, for example—without any consciousness of inconsistency.⁶⁶

The same distinction is evident in the practice of the colonies,⁶⁷ and later in the state constitutions to which Hamilton referred. At the time of the federal constitutional convention, each of the states had adopted a constitution, except Connecticut and Rhode Island; and all the constitutions other than those of Georgia and New Jersey provided tenure during good behavior for judges.⁶⁸ Yet none of these documents provided equivalent protection for justices of the peace.

While some of the constitutions explicitly defined a difference in tenure between justices of the peace and judges, apparently treating both as judicial officers,⁶⁹ others did not. Virginia's Constitution provided life tenure for judges of specified courts, not including the justices of the peace.⁷⁰ Maryland expressly provided life tenure for "all

63. Among its list of specific complaints, the Declaration stated that the King had "made Judges dependent on his Will alone, for the tenure of their offices and the amount and payment of their salaries."

64. 12 & 13 Will. 3, ch. 2.

65. 1 Geo. 3, ch. 23.

66. 1 BLACKSTONE, COMMENTARIES *267-68, 353; 4 *id.* at *281-82.

67. Frankfurter & Corcoran, *supra* note 22.

68. See 1 POORE, CONSTITUTIONS AND CHARTERS 275 (Del.), 819, 826-27 (Md.), 960, 968 (Mass.); 2 *id.* at 1283, 1290 (N.H.), 1336 (N.Y.), 1412 (N.C.), 1552 (Pa.), 1619, 1625, 1631-32 (S.C.), 1911 (Va.).

Georgia adopted "good behavior" tenure in its 1798 constitution. 1 *id.* at 393-94. Pennsylvania had not provided it in the 1776 constitution, but adopted it in 1790. See 2 *id.* at 1545.

69. The constitutions of Delaware, Massachusetts, New Hampshire, and New York provided for specified terms of years for justices of the peace. 1 *id.* at 275, 969; 2 *id.* at 1295, 1337. North Carolina and Pennsylvania provided commissions for justices of the peace during good behavior, but qualified this by permitting removal for additional causes not stated for judges or upon request of the legislature. 2 *id.* at 1413, 1553. Similarly, see Kentucky's 1792 constitution. 2 *id.* at 662.

70. 2 *id.* at 1191. Despite the absence of constitutional or statutory requirement, the practice apparently developed in Virginia of granting justices of the peace life tenure. DAVIS, A TREATISE ON CRIMINAL LAW 5 (1838).

judges" in its Constitution and Declaration of Rights; while its constitution mentions justices of the peace in another context, we must look to a contemporary handbook to ascertain that these officials had only fixed one-year terms.⁷¹

South Carolina presents the most striking situation. Its constitutions of 1776 and 1778 stated that justices of the peace should hold office during pleasure, all other judicial officers during good behavior. In 1790 a new constitution was adopted with phraseology modeled on article III of the federal constitution—vesting judicial power in superior and inferior courts, the judges of which shall hold their commissions during good behavior.⁷² No mention was made of subordinate magistracies or justices of the peace. Nevertheless, the following year the legislature provided for justices of the peace to hold office for terms of four years, and to hear and determine all matters theretofore within the competence of the office.⁷³

It is evident that the desirability of a commission "during good behavior" was not, at that time, believed to be applicable to inferior magistrates, and that the term "judges" or "judicial power," when used in connection with such tenure provision, did not include such officials.⁷⁴ So the federal constitution, incorporating this language, did not give new scope to the life tenure requirement for the disposition of criminal cases; it reaffirmed existing practice.

71. 1 POORE, *op. cit. supra* note 68, at 819, 826-27; COLVIN, *MAGISTRATE'S GUIDE & CITIZEN'S COUNSELOR* 336 (1819).

72. 2 POORE, *op. cit. supra* note 68, at 1619, 1625, 1631-32.

73. An Act To Amend the Several Acts for Establishing County Courts, etc., Feb. 19, 1791, in Acts of the General Assembly of South Carolina Ratified in Feb. 1791, at 25, 27.

74. This point is strikingly illustrated in a number of state cases, *e.g.*: *Shafer v. Mumma*, 17 Md. 331 (1861), holding that the state constitution's vesting of "judicial power" in certain officers did not preclude a mayor, in whom no such power was vested, from adjudging the guilt of a prostitute under a local ordinance and imposing a fine. Such control of the public peace and morals was held to be part of the police power as distinguished from the regular judicial powers of the state; this distinction had been observed from time immemorial in this country and in England. *Id.* at 336. *People ex rel. Burgess v. Wilson*, 15 Ill. 388 (1854), holding that a constitutional provision establishing citizenship and residence requirements for "the office of judge of any court of this state" did not apply to justices of the peace or to a municipal recorder's court. *State v. Young*, 3 Kan. 445, 448-49 (1866), upholding the jurisdiction of municipal courts to try violations of ordinances governing the sale of intoxicating beverages, on the ground that such power was not part of the "judicial power" vested by the Organic Act in other specified courts. See also *Sill v. Village of Corning*, 15 N.Y. 297, 300-01 (1857). The *Richmond Mayoralty Case*, 60 Va. (19 Gratt.) 673, 714-15 (1870), deciding that the word "court" in the transitional provisions of Virginia post-Civil War constitution, referred to courts of record organized under the judiciary article, not to a mayor's court. *Forbes v. State*, 18 Del. (2 Pennewill) 197, 43 Atl. 626 (1898), holding that transitional provisions continuing until a specified date "all the courts of justice now existing . . . and the chancellor and judges" then in office did not apply to inferior tribunals—justices of the peace or municipal courts.

B. Article III and the Due Process Aspect of Commissioners' Courts

This historical background of the tenure provision serves to suggest the inapplicability of the recent decisions in *Reid v. Covert*⁷⁵ and *United States ex rel. Toth v. Quarles*⁷⁶ concerning military courts, and other discussions emphasizing what might be called the due process aspect of tenure during good behavior, *i.e.*, the significance of the independent life tenure judge, along with the jury, as a right in the federal scheme of criminal trials.⁷⁷

Since due process requirements refer us to those settled common-law practices which were accepted and espoused in the Colonies,⁷⁸ the language in the recent cases may not be taken to extend to petty offenses. As we have seen, these were traditionally dealt with by magistrates without life tenure, and the safeguards of trial before a judge holding office during good behavior were not considered necessary. Indeed, a special status for petty offenses was noted by the Supreme Court in another case involving military tribunals. In *Ex parte Quirin*,⁷⁹ the Court pointed to the distinction between petty offense matters and ordinary criminal prosecutions requiring trial by jury to illustrate the fact that, by necessary implication, the panoply of constitutional safeguards does not apply to certain proceedings from which they had traditionally been excluded.⁸⁰

But just as a jury trial is not historically—hence not constitutionally—an attribute of due process for petty offenses,⁸¹ so neither is trial before a judge holding office during good behavior. To the extent, therefore, that the provision of a life tenure judiciary embodies a condition of federal due process, the requirement would not be applicable to petty offenses and would not preclude the vesting of jurisdiction over such offenses in United States commissioners.⁸²

75. 354 U.S. 1 (1956).

76. 350 U.S. 1 (1955).

77. In *Reid* and *Toth* the Court stressed this significance of the article III court, along with the civilian jury, when it invalidated the extension of court-martial jurisdiction to discharged servicemen, and to dependents of servicemen in encampments overseas. 354 U.S. at 21, 36; 350 U.S. at 17-19; see also *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 121-22 (1866). The same approach is indicated in Hamilton's observations in text accompanying note 62 *supra*.

78. *Murray's Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272, 279 (1855); *Twining v. New Jersey*, 211 U.S. 78, 100 (1908).

79. 317 U.S. 1 (1942).

80. 317 U.S. at 39-40. In *Reid v. Covert*, it may be noted, Justices Frankfurter and Harlan limited their concurrence to capital offenses. 354 U.S. at 45, 65.

81. See cases cited note 96 *infra*.

82. At most, the due process side of good behavior tenure represents a preferred element in federal criminal administration. Like the exclusion of evidence uncovered in an unreasonable search, it is not applicable to state proceedings; and the abandonment by the states of life tenure for their judiciaries does not present a question

This conclusion is particularly significant because the famous case of *Wong Wing v. United States*,⁸³ striking down the imposition of criminal punishment by a commissioner, turned wholly upon a due process point. Congress had authorized commissioners to adjudicate and order deportations of Chinese; if the commissioners found them unlawfully in the United States, the commissioners were authorized to imprison them at hard labor. The Court sustained deportation ordered by a commissioner but held the sentence of imprisonment at hard labor to be unconstitutional as an "infamous punishment," only imposable after indictment by grand jury, jury trial, etc. *Wong Wing* thus confirmed the inviolability of the usual criminal procedures⁸⁴ but does not stand for any constitutional requirement that all crimes, including petty offenses, must be adjudicated by a judge holding office during good behavior. Indeed, in a subsequent case, the Court explicitly declared that *Wong Wing* depended entirely upon the infamous nature of hard labor and implied that imprisonment without hard labor could have been imposed by the commissioner.⁸⁵

C. Article III and the Power of Congress To Establish the Proposed Jurisdiction of Commissioners

Aside from its due process aspect may article III's assignment of judicial power to a judiciary with life tenure be considered as a limitation upon the power of Congress to establish courts? This approach brings us to the learning distinguishing between constitutional and so-called "legislative" courts, which is pertinent to the legal problem here.⁸⁶

The Supreme Court has held that Congress may establish "legislative courts," *i.e.*, courts not complying with article III, in two situations—(1) to exercise jurisdiction in territories not within the

under the fourteenth amendment. Furthermore, since even federal courts outside the states, *e.g.*, in the territories, may concededly be staffed by judges with fixed terms, it is clear that life tenure does not have the dignity of other elements of due process—*e.g.*, independence of the tribunal, right to counsel and cross-examination—which may be required in federal criminal courts wherever located. *Cf. Reid v. Covert*, 354 U.S. 1, 5-10, 44-45, 64, 75 (1956).

83. 163 U.S. 228 (1896).

84. Some of these, like indictment, jury trial, would not apply to petty offenses. See text accompanying notes 28-30 *supra*.

85. *United States v. Moreland*, 258 U.S. 433, 439-40 (1922), involved a proceeding in the District of Columbia Juvenile Court for wilful neglect to support minor children, a misdemeanor punishable by \$500 fine, or twelve months in hard labor at the District of Columbia workhouse, or both. The Court held that hard labor—whether in reformatory or jail—constituted infamous punishment and required indictment by grand jury.

86. See note 59 *supra*.

jurisdiction of the states;⁸⁷ and (2) to decide civil matters, arising between the Government and others, *e.g.*, claims against the United States, which do not constitutionally require judicial determination and yet are susceptible of it.⁸⁸ These tribunals rest upon constitutional authority other than article III⁸⁹ and hence, although incapable of the receipt of the judicial power referred to in article III, they are also free of its conditions. They may, therefore, be staffed with judges who hold office for terms of years, and whose compensation may be reduced;⁹⁰ they may be required to render advisory opinions and to decide matters which do not qualify as "cases" or "controversies."⁹¹

It may be suggested that these authorities, by implication, exclude any exception to article III other than the two categories mentioned. Thus, since legislative courts may be established outside the jurisdiction of the states, Congress can validly authorize commissioners to try petty offenses committed in federal enclaves.⁹² As to federal offenses committed in the states, the point may be made that no similar tribunals can be created, for article III is the sole basis for federal court jurisdiction over them; and "judges appointed to administer them must possess the constitutional tenure of office before they can become invested with any part of the judicial power of the Union."⁹³

Analogizing the second category of legislative court jurisdiction, it may be argued that, in the states, Congress has validly given United States commissioners only such functions as do not require judicial determination,⁹⁴ but criminal punishment, even of a minor nature, cannot be inflicted without judicial proceedings and the only judicial

87. *American Ins. Co. v. Canter*, 26 U.S. (1 Pet.) 511 (1828); *Benner v. Porter*, 50 U.S. (9 How.) 235, 244 (1850); *Downes v. Bidwell*, 182 U.S. 244, 266 (1901).

88. *Ex parte Bakelite Corp.*, 279 U.S. 438, 451 (1929); *Williams v. United States*, 289 U.S. 553 (1933).

89. The legislative courts involved in the above cases are sometimes called "article I courts," since the legislative power of Congress provided in that article was relied upon. However, as a recent study has noted, tribunals free of the requirements of article III may also be established under other constitutional powers. Thus, the territorial courts are sustainable under Congress' authority over territories, set forth in article IV, § 3 (see cases cited note 87 *supra*); and courts established by the President in occupied territory were upheld under his authority as commander-in-chief in article II, *Madsen v. Kinsella*, 343 U.S. 341 (1952); *HENKIN, op. cit. supra* note 58, at 242-43 n.49.

90. *American Ins. Co. v. Canter*, 26 U.S. (1 Pet.) 511, 546 (1828); *Williams v. United States*, 289 U.S. 553 (1933).

91. See *Ex parte Bakelite Corp.*, 279 U.S. 438 (1929).

92. The validity of the police courts in the territories and the District of Columbia has plainly been assumed by the Supreme Court. See *Schick v. United States*, 195 U.S. 65, 71 (1904); *Reagan v. United States*, 182 U.S. 419, 423, 426 (1901); *Callan v. Wilson*, 127 U.S. 540, 555-57 (1888).

93. See *Benner v. Porter*, 50 U.S. (9 How.) 235, 244 (1850); *American Ins. Co. v. Canter*, 26 U.S. (1 Pet.) 511, 546 (1828); *Downes v. Bidwell*, 182 U.S. 244, 266 (1901).

94. For such powers, see note 41 *supra*.

proceeding available under the Constitution is before a life tenure judge. Thus, assuming that the drafters of the Constitution would have provided federal magistracies without life tenure for petty offenses, had they foreseen the present situation, is there room for implied authority in Congress to create them?⁹⁵

The argument above rests upon a twofold premise—that the “judicial power” vested in article III comprehends all criminal proceedings, and excludes the possibility of distinction between petty offenses and others; and that the vesting of judicial power in article III courts requires the entire process of federal adjudication to be carried out before such courts. Despite supporting dicta in the legislative court cases, a less superficial analysis indicates that neither of these inferences is warranted.

As to the first assumption, the Supreme Court has recognized the historical basis warranting special treatment of petty offenses, and read it into another portion of article III. In excluding petty offenses from the guarantee of trial by jury, the Court not only distinguished the sixth amendment, but also dealt with the explicit requirement of article III, section 2 that “the trial of all crimes shall be by jury.” It deferred to the traditional procedures and held that “crimes” in article III does not include petty offenses.⁹⁶

In the same way, the inapplicability to petty offenses of life tenure as a due process concept should carry over to the construction of article III, section 1. Here, we are also aided by the ample historical evidence, already reviewed, that the term “judicial power” did not comprehend the disposition of petty offenses.⁹⁷

The interpretation of “judicial power” in light of the historical material is established by a second line of authorities under article III—those concerning the grant of jurisdiction over federal crimes to the

95. This argument could be buttressed by evidence from the drafting of the Constitution. It was apparently believed that, without the provision for “inferior courts,” state courts would be used for federal business and the Supreme Court would be the only federal court—leaving no implied power to create United States magistracies. 1 RECORDS OF THE FEDERAL CONVENTION 124-25, 172, 205-07 (Farrand ed. 1911); Warren, *Federal Criminal Law and the State Courts*, 38 HARV. L. REV. 545, 546-47 (1925). But see note 103 *infra*.

If this view were accepted, the exercise by commissioners of the proposed general petty offense jurisdiction would not be saved by the waiver of the accused. Since a limitation upon the power of Congress is involved, such waiver would appear irrelevant. Cf. *McClaghry v. Deming*, 186 U.S. 49, 65-69 (1902); *Rider v. United States*, 149 Fed. 164, 165 (8th Cir. 1906); *Ex parte Margrave*, 275 Fed. 200 (N.D. Cal. 1921).

96. *District of Columbia v. Clawans*, 300 U.S. 617 (1937); *Schick v. United States*, 195 U.S. 65 (1904). See *Callan v. Wilson*, 127 U.S. 540, 557 (1888); *District of Columbia v. Colts*, 282 U.S. 63, 72-73 (1930); see text accompanying notes 28-29, 60, 79-81 *supra*.

97. See pp. 456-58 *supra*, especially text accompanying notes 72-74 and note 74 *supra*.

state courts. It was originally believed, by Justice Story and others, that state court jurisdiction over federal crimes was barred by article III.⁹⁸ This was felt to be required by the Constitution's parallelism which extended "judicial power" to "all cases" of federal crimes (article III, section 2) and "vested" the identical power only in courts created under article III, section 1. Significantly, the same view underlies the development of the concept of "legislative courts" in *American Ins. Co. v. Canter*⁹⁹ and may be found in later opinions which appeared to prejudice the utilization of commissioners for the handling of petty offenses.¹⁰⁰

Here again, the Supreme Court has ultimately come to look not to the bare mandatory words of article III, but to the historical evidence—the contemporary understanding that the state courts were a natural alternative channel for the execution of federal laws. It now seems clear that jurisdiction over federal crimes and other federal causes of action can be vested in the state courts;¹⁰¹ and, incidentally, that no constitutional infirmity would be presented by the fact that states generally do not now have any life tenure requirement even for judges of their courts of record.¹⁰² Similarly, the accepted traditional difference between petty offenses and serious crimes belies identical treatment and broadly supports disposition of petty offenses in the customary manner by subordinate magistrates without life tenure. Although susceptible of determination in the regular federal courts, jurisdiction over petty offenses may also be vested in other tribunals, whether state or federal. And Congress can create the necessary "legislative courts," in the form of the proposed commissioner-magis-

98. *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 330-37 (1816); 2 STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES §§1748-56, especially 1756. The authority of state magistrates to arrest and commit federal offenders was then considered sustainable only on the ground that these were not judicial powers but only incidental to them. See *Robertson v. Baldwin*, 165 U.S. 275, 278-80 (1897); see note 43 *supra*. *Robertson* refers to the magistrates' authority as "such power as is ordinarily given to officers of courts not of record." *Robertson v. Baldwin*, *supra* at 279. Courts run by the United States commissioners would be courts not of record subordinate to the federal district courts.

99. 26 U.S. (1 Pet.) 511 (1828). In *Canter*, the Court sustained a decree in admiralty rendered by a Florida territorial court. It apparently agreed with the appellant's contention that under article III the decree would be invalid since the "judicial power" involved in "all cases of admiralty and maritime jurisdiction" had to be vested in a regular federal court. 26 U.S. at 528-30, 546. Consequently, in holding that a constitutional power other than article III had been exercised by Congress, the Court assumed that no such situation could arise within the states.

100. See, e.g., *Williams v. United States*, 289 U.S. 553, 566-67 (1933), and the case there relied upon, *Levin v. United States*, 128 Fed. 826 (8th Cir. 1904).

101. *Testa v. Katt*, 330 U.S. 386 (1947); Warren, *Federal Criminal Law and the State Courts*, 38 HARV. L. REV. 545, 546-54, 570-80 (1925).

102. Cf. *Minneapolis & St. L.R.R. v. Bombolis*, 241 U.S. 211 (1916). See note 82 *supra*.

trates, under its authority to make all laws "necessary and proper" to carry out other delegated powers.¹⁰³

Alternatively, even if the petty offense tribunals are deemed to exercise federal "judicial power," *i.e.*, to be included among "such inferior courts" as Congress may create under article III, the historical evidence shows that these particular tribunals do not have any "judges" to whom the Constitution's requirement of "good behavior" tenure applies.¹⁰⁴ In this view, although the petty offense tribunals are article III courts, they may nevertheless be presided over by subordinate judicial officers, not judges, because of the nature of their jurisdiction. Congress can therefore authorize the appointment of commissioner-magistrates, as in the case of referees in bankruptcy, and may establish appropriate tenure provisions for them without any constitutional infirmity.

As to the second assumption, that the full process of adjudication must be in constitutional courts, it appears that the exercise of federal judicial power over petty offenses by a process of review will satisfy the requirements of article III, even if it were deemed applicable to such offenses.

The alternatives of an original proceeding or review in the federal courts have always been recognized. Thus, while *Martin v. Hunter's*

103. In *American Ins. Co. v. Canter*, 26 U.S. (1 Pet.) 511, 546 (1828), the Court held that the territorial courts were validly established pursuant to Congress' express power over the territories (U.S. Const. art. IV, § 3) or "in virtue of the general right of sovereignty which exists in the government." Use of a similar residual authority is here indicated.

The history of the Constitutional Convention supports the conclusion that the extent of federal jurisdiction, defined in article III, § 2, should be considered apart from the extent to which such jurisdiction must be placed in the regular federal courts, *i.e.*, vested under article III, § 1. The early drafts proposed and agreed upon contained two separate clauses—"that a national judiciary be established . . ."; and, "that the jurisdiction of the national judiciary shall be . . ." 1 RECORDS OF THE FEDERAL CONVENTION 21-22, 28, 95, 223-24, 226, 230-33, 244 (Farrand ed. 1911); 2 *id.* at 132-33, 146-47, 157. The introduction of the parallel language of "judicial power" in both clauses took place in the Committee on Detail. 2 *id.* at 172-73, 186, 575-76. There is nothing to indicate any objective other than a stylistic one, to make the language correspond to the vesting of legislative and executive powers in the previous articles, and thus to carry out the terminology of the proposed introductory article II: "The Government shall consist of supreme legislative, executive and judicial powers." 2 *id.* at 163, 177, 565.

See also the opinion of Mr. Justice Jackson in *National Mut. Ins. Co. v. Tidewater Transfer Co.*, 337 U.S. 582 (1949), considering article I as a source of judicial power for federal courts in the states.

104. This approach is suggested by the decisions under state constitutions which have sustained minor offense tribunals as covered by a residual legislative power to establish "other courts," or "other inferior courts" (*e.g.*, *Gray v. State*, 2 Del. (2 Harr.) 76, 89-91 (1833); *State v. Dreger*, 97 Minn. 221, 106 N.W. 904 (1906); *Corey v. State*, 28 Tex. Ct. App. R. 490, 13 S.W. 778 (1890)), and by *People ex rel. Burgess v. Wilson*, 15 Ill. 388 (1854), distinguishing between such power to create courts and the tenure applicable and holding that the minor tribunals were not included in a tenure provision covering "the office of judge of any court." See note 74 *supra*. The historical evidence that the officers presiding over petty offense tribunals are not "judges" for the purpose of life tenure is set forth at pp. 456-58 *supra*.

*Lessee*¹⁰⁵ erroneously assumed that federal crimes could not be tried in state tribunals, its holding was that federal matters which may be considered by state courts must be reviewed by the federal courts precisely in order that the requirements of article III be satisfied.

Although this question has never been raised in the criminal area, the vesting of jurisdiction in administrative tribunals presented similar constitutional arguments. Just as the appellant in *American Ins. Co. v. Canter* contended that admiralty matters must be decided by constitutional courts and the decree of a territorial court was void,¹⁰⁶ so the respondent in *Crowell v. Benson*¹⁰⁷ urged that article III barred the decision of an admiralty case by the federal administrative tribunal created by the Longshoremen's and Harbor Workers' Compensation Act.

In *Crowell v. Benson*, the Court decided that it was not necessary, in order to maintain the essential attributes of judicial power, that determinations of fact in constitutional courts be made by judges, and sustained the use of an administrative officer subject to review by the court.¹⁰⁸ However, article III's provision that the judicial power extended to admiralty cases did require that the existence of admiralty jurisdiction be ultimately determined by a federal court; hence, it was held, on those issues review in court must be by trial de novo.¹⁰⁹ Justices Brandeis, Stone and Roberts dissented, believing that even as to the latter issue review upon the administrative record was sufficient.

It is thus apparent that article III can be satisfied on the civil side by provision for judicial review—if necessary, amounting to trial de novo. This was the assumption of both majority and dissent.¹¹⁰ Indeed, the dissenting justices (opinion by Brandeis, J.) went further and flatly asserted that article III's "judicial power" never of itself requires trial by a federal constitutional court; this is solely a matter of due process:

105. 14 U.S. (1 Wheat.) 141 (1816).

106. See note 99 *supra*.

107. 285 U.S. 22 (1932). The respondent's arguments are set forth in 285 U.S. at 32-36.

108. 285 U.S. at 48-54. The Court first noted that compensation claims under the act presented civil cases between private parties and were wholly unlike claims against the United States which did not require exercise of article III power and could be confined to legislative courts. 285 U.S. at 50-51. This demonstrates the Court's awareness that the challenged proceeding had to satisfy article III.

109. 285 U.S. at 54-65.

110. Moreover, this lesson of *Crowell v. Benson* is not affected by subsequent doubts that the majority's requirement of trial de novo is still good law. Schwartz, *Does the Ghost of Crowell v. Benson Still Walk?*, 98 U. PA. L. REV. 163 (1949); Dickinson, *Crowell v. Benson: Judicial Review of Administrative Determinations of Questions of "Constitutional Fact,"* 80 U. PA. L. REV. 1055 (1932).

"There is in that Article nothing which requires any controversy to be determined as of first instance in the federal district courts. The jurisdiction of those courts is subject to the control of Congress. Matters which may be placed within their jurisdiction may instead be committed to the state courts. If there be any controversy to which the judicial power extends that may not be subjected to the conclusive determination of administrative bodies or federal legislative courts, it is not because of any prohibition against the diminution of the jurisdiction of the federal district courts as such, but because, under certain circumstances, the constitutional requirement of due process is a requirement of judicial process."¹¹¹

Turning to federal criminal procedures, it seems clear that, in the prosecution of serious crimes, due process would not be satisfied by merely an eventual interposition of article III's judicial process, but rather requires a constitutional court from the start as it does a jury from the beginning. The Supreme Court has held that, as to major criminal offenses, a summary proceeding with later appeal to a trial by jury does not satisfy the guaranteed right to such trial.¹¹² However, the Court clearly distinguished petty offenses, stating that appeal to a jury would be sufficient. The inference follows that trial by commissioner with the right to review in the district court would also represent a "judicial process" consistent with due process,¹¹³ and hence would meet the demands of article III as well as of the sixth amendment. Precisely this kind of trial was approved as "judicial" in the immigration field, in the leading case of *Ng Fung Ho v. White*.¹¹⁴

Such review by the district court maintains the character of commissioners as subordinate judicial officers, subject to control and supervision by the district courts.¹¹⁵ The Court's comparison of the administrative officers in *Crowell v. Benson* to masters¹¹⁶ recalls a similar earlier observation regarding commissioners.¹¹⁷

Furthermore, such a practice would be consonant with traditional procedures for the disposition of petty offenses. Since the latter part of the seventeenth century, trial by magistrate has been subject to appeal

111. 285 U.S. at 86-87.

112. *Callan v. Wilson*, 127 U.S. 540 (1888).

113. *Crowell v. Benson*, 285 U.S. 22, 87 (1932).

114. 259 U.S. 276 (1922). The Court there held that due process required a "judicial trial" of the claim of citizenship made by a person being deported, and remanded for trial by the district court. But the Court also approved deportation procedures under another law as "judicial in its nature. It is commenced usually before a commissioner of the court; but on appeal to the District Court additional evidence may be introduced and the trial is *de novo*." 259 U.S. at 283.

115. See note 43 *supra*.

116. 285 U.S. at 51-54.

117. *United States v. Allred*, 155 U.S. 591, 595 (1895).

to a regular criminal court of record, where fresh evidence could be submitted and witnesses re-examined, a new trial usually being afforded.¹¹⁸ Not only was this historic procedure generally embodied in the legislation of the states, but, even when such laws trench upon offenses for which the state constitutions guaranteed trial by jury, it was uniformly held that a right of appeal from a conviction to a jury trial was sufficient, so the initial hearing might be before a magistrate alone.¹¹⁹ Such deferred consideration by a federal district court after a trial by a commissioner should likewise be constitutionally sufficient, particularly if the district court hearing involves a trial de novo.

III. CONCLUSION

The consideration of a substantial constitutional question ordinarily involves an appraisal of competing social objectives soliciting acceptance, qualified by commitments to ends embodied in the Constitution. However, objection to the proposed petty offense tribunals is not seriously predicated upon such balancing of values. It rests upon a supposed absence of power due to the framers' failure to anticipate federal petty offenses, and upon a reading of the Constitution which pays scant heed to historical evidence or the actualities of criminal law administration.

This Article has indicated the fallacy of these objections. Summary proceedings by subordinate magistrates have traditionally characterized petty offense trials. The provision of life tenure for the judiciary in the regular courts of record, embodied in article III of the Constitution, carries an implicit exception for inferior tribunals which try minor crimes. And any possible demand of article III is satisfied by provision of review. It may be concluded that there are no substantial obstacles to the creation of federal petty offense tribunals or the endowment of United States commissioners with such authority.

118. Frankfurter & Corcoran, *Petty Federal Offenses and the Constitutional Guaranty of Trial by Jury*, 39 HARV. L. REV. 917, 927 (1926); see 1 BURN, JUSTICE OF THE PEACE 167 (29th ed. 1845); PALEY, SUMMARY CONVICTIONS BY JUSTICES OF THE PEACE 12-15, 367-373 (5th ed. 1866); 31 AM. JUR. *Justices of the Peace* § 129 (1958).

119. *E.g.*, *City of Des Moines v. Pugh*, 231 Iowa 1283, 2 N.W.2d 754 (1942); *Sprague v. Inhabitants of Androscoggin County*, 104 Me. 352, 71 Atl. 1090 (1908); *Jones v. Robbins*, 74 Mass. (8 Gray) 329 (1857); *State v. Tate*, 169 N.C. 373, 85 S.E. 383 (1915); *Brown v. Epps*, 91 Va. 726, 21 S.E. 119 (1895); *City of Bellingham v. Hite*, 37 Wash. 2d 652, 225 P.2d 895 (1950); *Vetock v. Hufford*, 74 W. Va. 785, 82 S.E. 1099 (1914).

There are numerous such decisions involving the right to trial by jury in civil cases. *E.g.*, *Capital Traction Co. v. Hof*, 174 U.S. 1 (1899).

A conviction as to the constitutionality of this proposal is, no doubt, allied to the recognition of its desirability which has animated the historical treatment of petty offenses. The contrary notion that the Constitution impels federal district courts to act as police courts would benefit no public or private interest. Despite the commissioners' existing authority, the present system continues to impose an intolerable amount of trivial criminal business upon the district courts to the prejudice of their dignity and of their significant work. The power vested in commissioners to hear and determine petty offenses committed in federal areas and the jurisdiction of the district courts to try federal petty offenses committed in state areas are distinguishable only upon the basis of the locus of the act involved, not by reason of the quality or significance of the offenses. Indeed, many offenses tried in the district courts, such as violations of migratory game regulations of the Federal Fish and Wild Life Service, seem more inconsequential than offenses handled by the commissioners.

The paucity of appeals from state magistrates to courts of record, as well as the insignificant number of appeals to the district courts from judgments of commissioners under their existing petty offense jurisdiction, testifies to the widespread preference of the public for summary disposition of such offenses.¹²⁰ Experience over several centuries with summary procedures for the handling of trivial offenses makes apparent that, however valuable trial before courts of record, upon indictment or information with or without trial by jury, may be to the accused in the area of serious crimes, these procedures are not beneficial to the accused but onerous to him when applied to minor offenses.

The adoption of summary proceedings for federal petty offenses can be achieved, as already indicated, by an extension of the power already vested in United States commissioners; and no substantial problems of statutory drafting are likely to be encountered. Thus, no change is required in the present definition of petty offenses, even though its sole criterion is the severity of potential punishment—six months' imprisonment or \$500 fine or both.¹²¹ When classifying petty offenses in the District of Columbia, the Supreme Court has held that the historic treatment of each crime and its moral quality must also be considered and that even a lesser punishment might characterize a grave offense, requiring regular jury trial, when it is "of such obvious

120. For example, the United States Attorney for the District of Maryland advises us that, in that district, only three appeals have been taken from the judgments of United States commissioners during the last three years. In fiscal 1957 alone, more than 6,700 petty offense cases were disposed of by two commissioners in Upper Marlboro and Bethesda, Maryland. See note 24 *supra*.

121. 18 U.S.C. § 1 (1952).

depravity that to characterize it as a petty offense would be to shock the general moral sense.”¹²² However, these additional factors have only academic relevance here, for all offenses now in the United States Code which fall within the petty offense definition appear clearly not to involve any “obvious depravity” and hence may constitutionally be classed as petty offenses.¹²³

The simplest way to establish a general petty offense jurisdiction in commissioners would be to amend the present provision by striking out the condition that the offense be committed within an area of federal jurisdiction.¹²⁴ This would present the question whether the present provision meets the necessities of article III for offenses committed in the states—whether less than a trial *de novo* on appeal in the district court is sufficient, whether an opportunity to elect district court trial is equivalent to a later trial *de novo* and whether, in view of such election, court review of errors of law is sufficient.¹²⁵ On the other hand, if trial *de novo* is made available with respect to the proposed new jurisdiction,¹²⁶ it is advisable that the existing procedures for offenses in the federal areas be left unaltered. A lack of uniformity between treatment of offenses committed in federal areas and outside them is a small price for the unimpaired maintenance of the existing expeditious procedures, without double trials, for the majority of petty federal offenses.¹²⁷

122. *District of Columbia v. Colts*, 282 U.S. 63, 73 (1930); see *District of Columbia v. Clawans*, 300 U.S. 617, 625-30 (1937). Although the sale of second-hand property without a license, punishable by ninety days' imprisonment or \$300 fine, was classified as petty in the *Clawans* case, *Colts* held that reckless driving was not, notwithstanding a maximum penalty of thirty days or \$100, on the theory that the latter was *malum in se*, indictable at common law and “of such obvious depravity.”

In the 1930 debate upon the Wickersham Commission's proposal, a Congressman referred to the court decisions and observed that an offense can not be made petty by calling it so. 72 CONG. REC. 9992 (1930). See also Frankfurter & Corcoran, *supra* note 118, at 977-81.

123. See, e.g., offenses cited notes 3-20 *supra*.

124. 18 U.S.C. § 3401(a) (1952) is set forth at note 33 *supra*. The words to be struck are those italicized as follows: “try and sentence persons committing petty offenses in any place *over which the Congress has exclusive power to legislate or over which the United States has concurrent jurisdiction*, and within the judicial district for which such commissioner was appointed.”

The bill now pending which would extend the commissioners' petty offense jurisdiction to properties under the control of the United States seeks to amend § 3401(a) by the addition of another place to those in the italicized phrase. See note 52 *supra*.

125. The appeals to district courts from commissioners' trials are governed by the rules established by the Supreme Court. Rules of Procedure for Trial Before Commissioners, 18 U.S.C. § 3402, rule 4(6) (1952).

126. See text accompanying notes 110-19 *supra*. While the privilege of trial *de novo* in the district courts seems desirable, the new legislation should not (and need not) make such a full hearing mandatory since a less extensive district court hearing may suffice for limited factual issues.

127. The modern tendency has been to restrict the use of trial *de novo*, in view of criticism of its inefficiency. E.g., VANDERBILT, MINIMUM STANDARDS OF JUDICIAL ADMINISTRATION 389-95 (1949); NATIONAL COMMITTEE ON LAW OBSERVANCE & ENFORCEMENT, REPORT ON CRIMINAL PROCEDURE 14-15 (1931).

Under the existing commissioners' jurisdiction, recent proposals have likewise been to limit, not enlarge, the availability of court proceedings. H.R. 6251, 85th Cong.,

Due to the geographical distribution of the petty offenses covered by the existing power and the proposed extension, they may, at least in substantial part, be vested in different commissioners. Congress could provide for the extension of the new jurisdiction, as in the case of the old, through designation by the district courts of the commissioners to be clothed with this authority. If a limited test of the proposal is preferred, Congress might select specific districts in which the petty offense authority is most needed, or enumerate specific offenses to which it may be applied.¹²⁸

In the drafting of legislation, it would be appropriate to consider changing the name "United States commissioner" to "United States magistrate." The term "magistrate" would dignify the office and would accord with comparative usage in the states, as does the proposed broad petty offense jurisdiction. To the public, the present title suggests members of administrative bodies, rather than officers exercising functions in the judicial sphere. Although it seems desirable that the appointive power of commissioner-magistrates continue to be vested in the chief judge of each district, who is acquainted with the qualifications of members of the local bar, it is suggested that this power be exercised subject to minimum standards or qualifications established by the Judicial Conference of the United States.

In keeping with the dignity of their office, the commissioner-magistrates should receive fixed salaries in lieu of the present system of fees per case. Congress should abandon the primitive and archaic practice requiring commissioners to look to fee payments for the compensation for public services, which it does not apply to the analogous national park commissioners.¹²⁹ The disparity in the volume of work handled by different commissioner-magistrates can readily be recognized by providing for a permissible salary range within designated limits. In order that uniform salary policies be applied, it seems preferable that the determination of individual salaries be made by the Administrative Office of United States Courts.

1st Sess. (1957), would have raised the maximum jurisdiction of commissioners in Maryland, who cover the Suitland and Baltimore-Washington Parkways, to offenses punishable by one year imprisonment or a fine of \$1,000 or both. In addition, it would have entirely removed the offender's right to elect trial in the district court, leaving only the appeal procedure after trial by commissioner. The bill was approved by the Judicial Conference. JUDICIAL CONFERENCE OF THE UNITED STATES, REPORT OF THE ANNUAL MEETING 27 (1957).

128. The selection of specific districts by Congress is suggested by the approach of the bill in the previous note. Designation of specific offenses for the commissioners' jurisdiction was also essentially done in the same bill (naming traffic offenses), was proposed by the wording considered in 1943 by the Judicial Conference, see note 57 *supra*, and was part of the original recommendation in the report of the Wickersham Commission (naming prohibition offenses), see note 47 *supra*.

129. Compare 28 U.S.C. § 633 (1952), with 28 U.S.C. § 634 (1952).

Such prosaic details of the proposed extension of the commissioners' authority seem remote from the abstruse constitutional dogma required to defeat it; but the details of criminal law administration determine its effectiveness. A similar remoteness separates present federal petty offense business from the framers' conception of the role of the national government. The unifying element is the vitality of the Constitution and the ability of its institutions to accommodate new responsibilities and tasks, and to articulate the necessary governmental forms. The problem of federal petty offenses should be resolved in the same spirit.