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The Expanding Influence of the Federal Magistrate, 14 J. Marshall L. Rev. 465 (1981)

Thomas J. Platt

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THE EXPANDING INFLUENCE OF THE FEDERAL MAGISTRATE

INTRODUCTION

The explosion of litigation in the federal courts has created increasing burdens on federal judges.[1] Seeking to alleviate these burdens, Congress enacted the Federal Magistrate Act of 1968.[2] The Act created a new corps of professional adjudicators to assist district court judges with their heavy caseloads and to replace the old office of the United States Commissioner.[3] Congress reacted favorably to the operation of the magistrate system by broadening the magistrates' powers through amendments to the Act in 1976 and 1979.[4] Judicial reaction to the Magistrate Act, however, has been mixed. Some decisions have held that the Act should be read broadly to permit the magistrates to handle a wide array of matters, thus helping to reduce the federal docket.[5] Opposing decisions have expressed concern over whether the magistrates' powers exceed the limits of Article III of the Constitution.[6]

Article III provides that the judges of the Supreme Court and the inferior courts of the United States shall hold their offices during good behavior and receive a compensation which may not be diminished during their terms of office.[7] These ten-

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1. For example, between 1968 and 1978, the federal caseload increased from approximately 71,000 to 138,000 cases. *See* S. REP. NO. 96-74, 96th Cong., 1st Sess. 2, *reprinted in* [1979] U.S. CODE CONG. & AD. NEWS 1469, 1470.

2. 28 U.S.C. §§ 631-39 (1968); United States v. Canada, 440 F. Supp. 22, 24 (N.D. Ill. 1977) (primary goal of Magistrate Act is to help reduce the federal caseload).

3. United States commissioners had the power to try minor criminal cases, administer oaths, take depositions, affidavits, bail and acknowledgments and to perform various other duties to assist the courts. Congress was dissatisfied with the commissioner system because many of the commissioners were non-lawyers and most lacked an understanding of the nature and limits of their role. H.R. REP. NO. 1629, 90th Cong., 2d Sess. 1, *reprinted in* [1968] U.S. CODE CONG. & AD. NEWS 4252, 4255-56; *see* 28 U.S.C. §§ 631-39 (1968).

4. 28 U.S.C. §§ 634, 636(b) (1976); 28 U.S.C. §§ 631, 633-36 (1979).

5. *See, e.g.*, Mathews v. Weber, 423 U.S. 261 (1976) (magistrates may conduct preliminary hearings of social security benefit appeals).

6. *See, e.g.*, TPO, Inc. v. McMillen, 460 F.2d 348 (7th Cir. 1972) (magistrate may not decide motion to dismiss or motion for summary judgment).

7. U.S. CONST. art. III, § 1 provides:

The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and infer-

ure and compensation protections are viewed as necessary to preserve the independence and impartiality of Article III judges from the other branches of government.[8] Magistrates do not enjoy the status of Article III judges because they serve for fixed terms of office and may or may not be reappointed.[9] The Magistrate Act, however, is broadly written; it grants powers to the magistrates which were previously exercised only by Article III judges.[10] Thus, the issue has arisen whether the Act, in effect, allows magistrates to decide cases which constitutionally may only be decided by Article III judges.

The courts' treatment of this issue has resulted in two approaches. Several courts have limited the magistrates' powers to those specifically enumerated by the statute.[11] Other courts have acknowledged the Article III problems inherent in the statute, but have nonetheless encouraged an enlargement of the magistrates' powers to effectuate Congress's goal of reducing the federal docket.[12] This comment will examine the terms and development of the Magistrate Act and analyze the courts' struggles to promote judicial efficiency while safeguarding the mandates of Article III.

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ior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation which shall not be diminished during their Continuance in Office.

8. The Court in Evans v. Gore, 253 U.S. 245 (1920) explained the importance of the tenure and compensation clause when it said:

> [T]he primary purpose of the prohibition against diminution was not to benefit judges, but, like the clause in respect of tenure, to attract good and competent men to the bench and to promote that independence of action and judgment which is essential to the maintenance of the guaranties, limitations and pervading principles of the Constitution and to the administration of justice. . . .

253 U.S. at 253; *see also* Atkins v. United States, 556 F.2d 1028, 1043 (Ct. Cl. 1977) (tenure and compensation provisions were intended to protect the judiciary from encroachments by the other governmental branches).

9. Full-time magistrates are appointed for terms of eight years and part-time magistrates for four years. Magistrates may be removed from office for incompetency, misconduct, neglect of duty, mental disability, and if the Judicial Conference of the United States decides that a position is no longer needed. 28 U.S.C. §§ 631(e), 639(i) (1979). With certain exceptions, the compensation of a magistrate may not be reduced during his term of office. 28 U.S.C. § 634(b)(1979).

10. Although the U.S. commissioners had certain judicial powers to assist the courts, and were the forerunners of the U.S. magistrates, their powers as adjudicators were relatively limited. *See* note 3 *supra*.

11. *See, e.g.*, Wingo v. Wedding, 418 U.S. 461 (1974) (magistrate may not preside at evidentiary hearing for habeus corpus petition); Banks v. United States, 614 F.2d 95 (6th Cir. 1980) (magistrate may not conduct probation revocation hearing).

12. *See, e.g.*, United States v. Southern Tanks, Inc., 619 F.2d 54 (10th Cir. 1980) (magistrate may enforce IRS summons); Muhich v. Allen, 603 F.2d 1247 (7th Cir. 1979) (magistrate may conduct civil trial with parties' consent).

THE CREATION OF THE MAGISTRATE SYSTEM

The Magistrate Act of 1968 created the office of the United States Magistrate and gave magistrates the power to make certain decisions in criminal and civil matters.[13] Section 636(a) of the Act authorized the magistrates to preside over bail and arraignment hearings, conduct preliminary examinations and hear trials in certain misdemeanor cases with the defendant's consent.[14] Section 636(b) gave the district courts the power to establish local rules which would assign to the magistrates "such additional duties as are not inconsistent with the Constitution and laws of the United States."[15] The additional duties specified by the Act authorized the magistrates to: 1) act as special masters; 2) assist the district court judge in pre-trial and discovery matters; and 3) make preliminary review of applications for post-trial relief in criminal cases.[16] The magistrates' powers

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13. 28 U.S.C. §§ 631-39 (1968).

14. Under § 636(a), magistrates possessed:

(1) all powers and duties conferred or imposed upon United States commissioners by law or by the Rules of Criminal Procedure for the United States District Courts;

(2) the power to administer oaths and affirmations, impose conditions of release under section 3146 of title 18, and take acknowledgements, affidavits, and depositions; and

(3) the power to conduct trials under section 3401, title 18, United States Code, in conformity with and subject to the limitations of that section.

28 U.S.C. § 636(a) (1968). The magistrate's power to conduct trials in subsection (3) under Title 18 was limited to trials of petty offenses where all parties had consented to the magistrate's authority.

15. 28 U.S.C. § 636(b) (1968).

16. Section 636(b) provided:

(b) Any district court of the United States, by the concurrence of a majority of all the judges of such district court, may establish rules pursuant to which any full-time United States magistrate . . . may be assigned within the territorial jurisdiction of such court such additional duties as are not inconsistent with the Constitution and laws of the United States. The additional duties authorized by rule may include, but are not restricted to—

(1) service as a special master in an appropriate civil action, pursuant to the applicable provisions of this title and the Federal Rules of Civil Procedure for the United States district courts;

(2) assistance to a district judge in the conduct of pretrial or discovery proceedings in civil or criminal actions; and

(3) preliminary review of applications for posttrial relief made by individuals convicted of criminal offenses, and submission of a report and recommendations to facilitate the decision of the district judge having jurisdiction over the case as to whether there should be a hearing.

28 U.S.C. § 636(b) (1968).

under the "additional duties" clause, however, were not limited to those delineated by the statute.[17]

A great deal of litigation followed the enactment of the Magistrate Act in an attempt to define the scope of the "additional duties" clause. Congress included the clause in the statute in the hopes that the district courts would experiment with the magistrate system and tailor the system to their needs.[18] The clause was so broadly written, however, that it permitted district courts to promulgate local rules which granted to the magistrates powers traditionally reserved to Article III judges. The Seventh Circuit in *TPO, Inc. v. McMillen*[19] was called upon to consider the constitutionality of one of these rules.

A Narrow View of the Magistrate Act

In *McMillen*, the court struck down the validity of a district court rule permitting the judge to refer a motion to dismiss to a magistrate for a hearing and final decision.[20] The court found that the magistrate's ruling on the motion effectively decided the outcome of the case and held that this decision was beyond the scope of the magistrate's powers.[21] The court stated that Congress did not intend for magistrates to exercise ultimate decision-making authority over a case.[22] By referring the motion to the magistrate, the district court abdicated its judicial function in violation of Article III.[23]

McMillen is significant because it was one of the first cases to recognize Article III limitations on the Magistrate Act's "addi-

17. Section 636(b) provided: "The additional duties authorized by rule may include, but are not restricted to. . . ." 28 U.S.C. § 636(b) (1968).

18. The Senate Judiciary Committee commented:

> If district judges are willing to experiment with the assignment to magistrates of other functions in aid of the business of the courts, your committee believes that there will be increased time available to judges for the careful and unhurried performance of their vital and traditional adjudicatory duties, and a consequent benefit to both efficiency and the quality of justice in the Federal courts.

S. REP. No. 371, 90th Cong., 2d Sess. 25-27 (1968), *quoted from* TPO, Inc. v. McMillen, 460 F.2d 348, 358 (7th Cir. 1972).

19. 460 F.2d 348 (7th Cir. 1972).

20. *Id.* at 359.

21. *Id.*

22. *Id.*

23. TPO, Inc. v. McMillen, 460 F.2d 348, 359 (7th Cir. 1972):

> We conclude that magistrates have no power to decide motions to dismiss or motions for summary judgment, both of which involve ultimate decision making, and the district courts have no power to delegate such duties to magistrates. We find that the order of reference here was lacking in power and 'amounted to little less than an abdication of the judicial function depriving the parties of a trial before the court on the basic issues involved in the litigation.'

tional duties" clause.[24] In analyzing the Act's legislative history, the court indicated that magistrates could assist the district judge only in those pre-trial matters which have no direct effect on the ultimate disposition of a case.[25] *McMillen* suggests that magistrates do not have powers beyond those specifically enumerated in the Act, even though Congress authorized district courts to devise local rules granting magistrates "such additional duties as are not inconsistent with the Constitution and laws of the United States."[26] *McMillen's* concerns over the constitutionality of enlarging the magistrates' powers through the "additional duties" clause were considered by the United States Supreme Court in *Wingo v. Wedding*.[27]

Functions Reserved to Article III Judges

In *Wingo*, the Supreme Court invalidated local district court rules authorizing magistrates to conduct evidentiary hearings on petitions for habeus corpus relief.[28] The Court recognized that the Magistrate Act expressly granted magistrates the power to conduct preliminary reviews of habeus corpus petitions and to recommend the need for evidentiary hearings to a judge.[29] The Court stated, however, that the Habeus Corpus Act[30] demands that the evidentiary hearing itself be heard before a

24. *See also* Reed v. Board of Election Comm'rs, 459 F.2d 121 (1st Cir. 1972) (district court's summary adoption of a magistrate's findings on the merits of a case constituted an abdication of judicial authority); Annot., 16 A.L.R. FED. 871 (1973).

25. TPO, Inc. v. McMillen, 460 F.2d 348, 359 (7th Cir. 1972). "We need not speculate in regard to what civil functions the magistrate can constitutionally perform, however, since Congress carefully intended that in regard to civil cases the magistrate was not empowered to exercise ultimate adjudicating or decisionmaking."

26. 28 U.S.C. § 636(b)(3) (1968). For example, the court quoted this excerpt from the legislative history:

"It seems unwise to your committee [Senate Judiciary Committee] to require that the district courts give magistrates duties other than those traditionally performed by commissioners." 460 F.2d at 358.

27. 418 U.S. 461 (1974).

28. The *Wingo* decision settled a conflict among the courts of appeals over the role of the magistrates at evidentiary hearings. *Accord*, Ellis v. Buchkoe, 491 F.2d 716 (6th Cir. 1974) (conducting the evidentiary hearing is part of the district judge's Article III functions); Rainha v. Cassidy, 454 F.2d 207 (1st Cir. 1972) (court disapproved of magistrate presiding over evidentiary hearing). *Contra*, Kirby v. Ciccone, 491 F.2d 1310 (8th Cir. 1974) (court may assign magistrate to conduct preliminary evidentiary hearing); O'Shea v. United States, 491 F.2d 774 (1st Cir. 1974) (magistrate may conduct evidentiary hearing, but must give full account of factual and legal conclusions to judge); Noorlander v. Ciccone, 489 F.2d 642 (8th Cir. 1973) (Magistrate Act does not prohibit the magistrate from conducting hearing).

29. *See* note 16 *supra*.

30. 28 U.S.C. § 2243 (1974).

court, justice or judge.[31] While the *Wingo* Court did not expressly base its decision on Article III limitations, it did disapprove of the judge's sole reliance on the magistrate's written record of the evidentiary hearing to decide the disposition of the habeus corpus petition.[32] The Court stated that the judge himself should view the defendant's demeanor before making his decision and implied that this task should not be left up to a non-Article III official.[33]

Broadening the Meaning of "Additional Duties"

The issue of the powers of the magistrate was again raised in the Supreme Court in *Mathews v. Weber*.[34] In this case, however, unlike in *Wingo*,[35] the Court adopted an expansive view of the magistrates' powers. In *Mathews*, the plaintiff appealed the denial of social security benefits by the Department of Health, Education, and Welfare (HEW).[36] Pursuant to local court rules, the district judge referred the case to a magistrate to conduct evidentiary hearings and then to prepare written proposed findings of fact and conclusions of law. The court rules also provided that if a party filed a timely objection to the magistrate's findings, the district judge would review the findings and decide whether to conduct further hearings before entering a final judgment. Although the Secretary of HEW objected to the referral order, the district court refused to vacate the order.[37] Both the court of appeals and the Supreme Court affirmed this decision.

The Supreme Court examined the legislative history behind the "additional duties" clause and concluded that the procedures used by the district court to expedite the disposition of

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31. Wingo v. Wedding, 418 U.S. 461, 467, 472 (1974).

32. *Id.* at 474.

33. *Id.* In Campbell v. United States Dist. Ct. for the N. Dist. of Cal., 501 F.2d 196, 201-02 (9th Cir. 1974), the court rejected the argument that *Wingo* applied to motions to suppress as well as to habeus corpus petitions. The *Campbell* court held that a magistrate may conduct evidentiary hearings on a motion to suppress as long as the district judge makes a de novo determination of the objected portions of the magistrate's report. The procedures are codified at 28 U.S.C. § 636(b)(1) (1979).

34. 423 U.S. 261 (1976).

35. Wingo v. Wedding, 418 U.S. 461 (1974).

36. The plaintiff, Weber, had been denied reimbursement under Medicare for medical payments he made on behalf of his wife. Plaintiff appealed HEW's decision in the district court pursuant to 42 U.S.C. § 405(g) (1974).

37. The Secretary of HEW objected on two grounds: (1) the referral to the magistrate was part of a general referral order which violated Rule 53 of the Federal Rules of Civil Procedure; and (2) the Federal Magistrates Act had been violated. The Secretary did not pursue an argument made below that the referral to the magistrate violated the judicial review provisions of the Social Security Act.

social security appeals constituted a valid "additional duty."[38] The *Mathews* majority rejected HEW's argument that the magistrate's duties were confined to merely irksome and ministerial tasks.[39] The Court instead decided that the district court's procedures satisfied Article III because the magistrate's decision on the social security appeal was not a final order, but merely a recommendation; the district judge retained ultimate responsibility for the final decision.[40]

The *Mathews* Court clearly favored a much larger role for magistrates in the federal judiciary than the courts in *McMillen* and *Wingo*. *Mathews* emphasized Congress's goal of using magistrates to reduce the federal caseload, whereas *McMillen* and *Wingo* focused on the Article III problems inherent in the magistrate system.[41] *Mathews* acknowledged the statutory and Article III problems involved in the practice of referring cases to magistrates rather than judges.[42] The Court, however, expressed confidence that these problems would not exist if an Article III judge reviewed and made a final decision of the magistrate's findings.[43]

Reconciling the Results of McMillen, Wingo, and Mathews

The contrasting opinions expressed about the Magistrate Act by *McMillen, Wingo,* and *Mathews* can be attributed to two factors. First, the vague wording of the "additional duties" clause has generated confusion over whether the clause should be interpreted broadly or narrowly. Second, the legislative history of the Magistrate Act has added to the confusion because it

38. Mathews v. Weber, 423 U.S. at 272.

39. *Id.*

40. *Accord*, Yascavage v. Weinberger, 379 F. Supp. 1297 (M.D. Pa. 1974) (court found that the referral to a magistrate of an appeal of an administrative decision denying black lung benefits was authorized under the "additional duties" clause of the Magistrate Act). *Contra*, Ingram v. Richardson, 471 F.2d 1268 (6th Cir. 1972) (reference to a magistrate of an administrative appeal was an abdication of judicial responsibility).

41. In *Mathews*, the Court quoted this passage from the legislative history: "We hope and think that innovative, imaginative judges who want to clean up their caseload backlog will utilize the U.S. magistrates in these areas [*i.e.*, those specified in § 636(b) of the Act] and perhaps even come up with new areas to increase the efficiency of their courts." Mathews v. Weber, 423 U.S. at 267, quoting *Hearings on the Federal Magistrates Act before Subcommittee No. 4 of the House Committee on the Judiciary*, 90th Cong., 2d Sess. 81 (1968).

42. Mathews v. Weber, 423 U.S. at 269-70.

43. *Cf.* United States v. Foundas, 610 F.2d 298 (5th Cir. 1980) (court held that the procedure by which a judge reviewed a magistrate's recommendation on a motion to dismiss was valid because the ultimate disposition of the case was by the district judge).

contains many contradictory statements of intent.[44] Certain portions of the legislative history, for example, encourage the courts to liberally construe the magistrates' range of powers under the "additional duties" clause, while other portions urge them to confine the magistrates' duties to very specific functions.[45]

The courts have dealt with these two factors either by narrowly reading the Magistrate Act, as in *McMillen*,[46] or by condemning the magistrates' powers as a usurptation of Article III functions, as in *Wingo*.[47] Later, however, as the *Mathews* case illustrates, the courts began to define the magistrates' powers more in terms of Congress's desire to increase the use of the magistrate system. Nevertheless, Congress became aware that the *Mathews* decision, by itself, was not sufficient to encourage greater use of magistrates. Thus, in 1976, Congress enacted several amendments expanding the magistrates' powers.

CLARIFICATION AND EXPANSION OF THE MAGISTRATES' POWER

The 1976 Amendments

The 1976 amendments to the Magistrate Act were enacted to strengthen and clarify the duties of magistrates and to correct the effect of court decisions interpreting the Act contrary to Congress's intent.[48] The "additional duties" provision (section 636(b)) of the old Act was completely rewritten to grant magistrates the power to hear and determine all pretrial matters, except certain case-dispositive motions such as a motion to dismiss.[49] Additionally, the amendments empowered magistrates to conduct evidentiary hearings for the court on case-dispositive motions, habeus corpus applications, and prisoner

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44. *See* the excerpts of legislative history set forth in notes 3 and 18 *supra*.

45. *Id.*

46. TPO, Inc. v. McMillen, 460 F.2d 348 (7th Cir. 1972).

47. Wingo v. Wedding, 418 U.S. 461 (1974).

48. *See* H.R. REP. NO. 94-1609, 94th Cong., 2d Sess. 5-6, *reprinted in* [1976] U.S. CODE CONG. & AD. NEWS 6162, 6165.

49. Amended 636(b)(1) reads in part:

> (A) a judge may designate a magistrate to hear and determine any pretrial matter pending before the court except a motion for injunctive relief, for judgment on the pleadings, for summary judgment, to dismiss or quash an indictment or information made by the defendant, to suppress evidence in a criminal case, to dismiss or to permit maintenance of a class action, to dismiss for failure to state a claim upon which relief can be granted, and to involuntarily dismiss an action. A judge of the court may reconsider any pretrial matter under this subparagraph (A) where it has been shown that the magistrate's order is clearly erroneous or contrary to law.

28 U.S.C. § 636(b)(1)(A) (1979).

petitions[50] and to submit to the district judge proposed findings of fact and recommendations for the disposition of these matters. Upon timely objections by a party to the magistrate's findings and recommendations, the judge would be required to make a de novo determination of the objected portions.[51] The amendment clearly states that the magistrates' findings and recommendations carry no presumptive weight and thus may be accepted, rejected or modified in whole or in part by the district judge.[52] Congress also retained the additional duties clause contained in section 636(b).[53]

The new version of the Magistrate Act contrasted sharply with its predecessor. On pretrial matters, the old law merely allowed the magistrates to "assist" the district judge. The new amendments permitted the magistrates to hear and determine non-case-dispositive pretrial matters, such as discovery sanctions, and enter final orders on these matters.[54] The district judge's review of the pretrial order would be discretionary and the judge would overturn the magistrate's decision only if clearly erroneous or contrary to law.[55] Also, under the 1968 Act, the magistrates had no specific powers to handle case-dispositive motions or prisoner petitions, and on habeus corpus petitions they could only recommend to the judge whether a hearing should be conducted.[56] The 1976 amendments specifically au-

50. Section 636(b)(1)(B) provides:

> (B) a judge may also designate a magistrate to conduct hearings, including evidentiary hearings, and to submit to a judge of the court proposed findings of fact and recommendations for the disposition, by a judge of the court, of any motion excepted in subparagraph (A), of applications for posttrial relief made by individuals convicted of criminal offenses and of prisoner petitions challenging conditions of confinement.

28 U.S.C. § 636(b)(1)(B) (1979).

51.
> Within ten days after being served with a copy, any party may serve and file written objections to such proposed findings and recommendations as provided by rules of court. A judge of the court shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made.

28 U.S.C. § 636(b)(1) (1979).

52. "A judge of the court may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate. The judge may also receive further evidence or recommit the matter to the magistrate with instructions." 28 U.S.C. § 636(b)(1) (1979).

53. 28 U.S.C. § 636(b)(3) (1979).

54. In Sherrell Perfumes, Inc. v. Revlon, Inc., 77 F.R.D. 705 (S.D.N.Y. 1977), a magistrate granted plaintiffs a protective order against defendant's request for the plaintiffs to produce certain tape recordings. The district judge upheld the protective order, noting that orders on discovery motions rendered by magistrates are final unless clearly erroneous or contrary to law.

55. 28 U.S.C. § 636(b)(1)(A) (1979).

56. *See* note 28 *supra*.

thorized magistrates to conduct evidentiary hearings on all these matters and make recommendations to the district judge. This new provision clearly overruled the results in *Wingo, McMillen*, and several other cases.[57] Finally, Congress included the "additional duties" clause to allow the courts to continue innovative experimentation into the use of magistrates. The clause was placed in a separate paragraph to indicate that its meaning was not subject to restriction by more specific portions of the Act.[58]

New Concern Over the Additional Duties Clause

Many of the cases following the 1976 amendments promoted the expansive view of the magistrates' powers established by *Mathews v. Weber*[59] and codified in the 1976 amendments. Other cases, however, continued to express Article III reservations over the emergence of the magistrates' authority. *Muhich v. Allen*[60] is a post-1976 case which reflects the expansive view. In *Muhich*, the Seventh Circuit upheld the validity of a local district court rule permitting the judge to assign a civil case for trial by a magistrate upon consent of the parties.[61] The court noted that the magistrate, upon completion of the trial, submitted his findings of fact and recommendation for disposition to the district judge who made his own de novo determination of the issues.[62] The district judge then entered a final order of judgment adopting the magistrate's findings and recommendation. This procedure, the court ruled, was entirely proper within the statute and Article III because the "additional duties" clause permitted the court to assign new duties to the magistrate consistent with the statute.[63] Moreover, the court indicated that

57. H.R. REP. NO. 94-1609, 94th Cong., 2d Sess. 5, *reprinted in* [1976] U.S. CODE CONG. & AD. NEWS 6162, 6165; *see* White v. Estelle, 556 F.2d 1366 (5th Cir. 1977) (1976 amendments to Magistrate Act clearly overrule *Wingo v. Wedding*).

58. H.R. REP. NO. 94-1609, 94th Cong., 2d Sess. 12, *reprinted in* [1976] U.S. CONG. & AD. NEWS 6162, 6172.

59. 423 U.S. 261 (1976).

60. 603 F.2d 1247 (7th Cir. 1979).

61. Muhich v. Allen, 603 F.2d 1247, 1252 (7th Cir. 1979).

62. In Orand v. United States, 602 F.2d 207 (9th Cir. 1979), the court held that under the 1976 amendments to the Magistrate Act, the magistrate may conduct an evidentiary hearing on defendant's motion for modification of sentence. But it is essential, the court noted, for the district judge to make a de novo determination of the magistrate's findings upon receipt of objections to these findings. In Park Motor Mart, Inc. v. Ford Motor Co., 616 F.2d 603 (1st Cir. 1980), however, the court held that a de novo review of the magistrate's findings is not required if the parties do not file objections to it.

63. *See* United States v. Southern Tanks, Inc., 619 F.2d 54 (10th Cir. 1980) (magistrate had power under the "additional duties" clause to enforce an IRS summons); *In re* Establishment Inspection of Gilbert & Bennett Mfg.

the district judge retained ultimate responsibility for the entry of the final order in the case.[64]

Other post-1976 cases, however, had begun to define limits on the magistrates' power under the "additional duties" clause. *Banks v. United States*[65] concerned a district court's referral to a magistrate of a probation revocation proceeding. The defendant had been previously convicted of possessing stolen mail and accused of breaking the terms of her probation. The magistrate conducted both the preliminary and final hearing on the probation revocation issue and heard testimony from the defendant and the probation officer.[66] The magistrate recommended that the defendant's probation be revoked. The district judge adopted the magistrate's finding without rehearing any of the witnesses and imposed a prison sentence on the defendant.[67]

The issue in *Banks* was whether it was statutorily permissible for the magistrate to conduct the final probation hearing. The government argued that the magistrate was empowered to conduct the hearing under the "additional duties" clause of the Magistrate Act. The court concluded, however, that this clause only applied to procedural and administrative duties.[68] The court stated that, in this case, the magistrate was performing the role of a factfinder and making credibility assessments.[69] This role could be performed only by the district judge since only he

Co., 589 F.2d 1335 (7th Cir. 1979) (magistrate had authority under "additional duties" clause to issue OSHA warrants).

64. *Compare* Muhich v. Allen, 603 F.2d 1247 (7th Cir. 1979) *with* Hill v. Jenkins, 603 F.2d 1256 (7th Cir. 1979). The *Hill* court reversed the district court's decision to adopt the magistrate's findings of fact and law verbatim. The court of appeals noted that the district court failed to comply with standards set forth in *Muhich* for supervising the trials of the magistrate.

65. 614 F.2d 95 (6th Cir. 1980).

66. At the hearing, the probation officer testified that the defendant had failed to make payments in restitution for the theft she had been convicted of and had failed to report her arrest on an unrelated charge. The defendant testified that she had not made restitution because she was unable to afford it from her welfare checks. She also failed to report her arrest for fear of being placed on the probation officer's "bad list." *Id.*

67. The defendant's original sentence was thirty days in jail and two years probation. After the probation revocation hearing, the judge sentenced the defendant to twenty-three months imprisonment. *Id.* at 96.

68. "The legislative history speaks of 'innovative experimentations' in the use of the magistrate, but it does not suggest that probation revocation hearings were meant to be so included. On the contrary, the legislative history suggests that this provision was meant to apply only to procedural and administrative matters. . . ." Banks v. United States, 614 F.2d 95, 97 (6th Cir. 1980).

69. The magistrate had to decide the case on the basis of whether he thought the defendant or her probation officer were more believable.

was authorized to make final decisions on the merits and disposition of the case.[70]

Muhich and *Banks* reflect two interesting and contrasting interpretations of the "additional duties" clause. *Muhich* found that the clause permits two parties to consent to a trial before a magistrate as long as the district judge enters the final order of judgment.[71] *Banks*, however, says that the "additional duties" clause grants only additional procedural and administrative duties to magistrates.[72] The trial authorized by the *Muhich* court could hardly be characterized as a procedural or administrative matter and *Banks* would seem to disapprove of the *Muhich* result.[73] The cases are distinguishable, however, since the parties in *Muhich* consented to a magistrate presiding over a civil case, whereas the magistrate in *Banks* was entrusted by the district judge to make a final determination on the merits of a criminal case without the parties' consent. The *Banks* decision also voiced additional concern over the constitutionality of allowing the district judge to enter judgment on a case where credibility was at issue and where the judge did not personally hear the testimony given at the magistrate's hearing.[74]

The Magistrate As a De Facto Decisionmaker

The issue of whether the district judge may, from the written record of a magistrate's hearing, constitutionally resolve disputes over credibility was recently considered by the Supreme Court in *United States v. Raddatz*.[75] Raddatz was indicted for

70. Banks v. United States, 614 F.2d 95, 98 (6th Cir. 1980).

71. *Cf.* Hill v. Jenkins, 603 F.2d 1256 (7th Cir. 1979) (trial before a magistrate was improper without party's consent).

72. Other cases have also recognized limits on the "additional duties" clause. *Cf.* United States v. Edwards, 602 F.2d 458 (1st Cir. 1979) (magistrates have no authority to rule on legality of sources of information for purposes of denying a search warrant); United Steelworkers of America v. Bishop, 598 F.2d 408 (5th Cir. 1979) (magistrate lacked authority to enter injunction); *In re* Worksite Inspection of Quality Prod., 592 F.2d 611 (1st Cir. 1979) (magistrate lacked authority to stay and recall an inspection warrant after it had been issued); Kendall v. Davies, 569 F.2d 1330 (5th Cir. 1978) (magistrate may not enter final judgment in case).

73. *Cf.* Harding v. Kurco, 603 F.2d 813, 814 (10th Cir. 1979), where the court stated:

> A magistrate exercising "additional duties" [§ 636(b)(3) of Title 28] jurisdiction remains constantly subject to the inherent supervisory power of the district judge and the judge retains "the ultimate responsibility for decision making in every instance." Thus, the discretionary authority to direct entry of a final judgment is a fundamental and exclusive power of an Article III judge.

74. Banks v. United States, 614 F.2d 95, 98-99 (6th Cir. 1980). This same concern over the judge's failure to personally hear credibility evidence was raised by Wingo v. Wedding, 418 U.S. 461 (1974). *See* text accompanying notes 27 and 28 *supra*.

75. 100 S. Ct. 2406 (1980).

receiving a firearm in violation of a federal statute. During the investigation of the offense, he made several incriminating statements to local and federal officers. Prior to trial, Raddatz sought to suppress these statements on the grounds that they were not freely given.[76] The district court referred the motion to a magistrate to conduct an evidentiary hearing. At the hearing, the defendant and the officers related different versions of the facts. The magistrate submitted his findings in which he characterized the officers' testimony as more believable,[77] and recommended that the defendant's motion be denied.

As part of his de novo review of the magistrate's findings, the district judge examined the transcript of the magistrate's hearing and his recommended decision. The judge, however, chose not to rehear the testimony of the defendant and the officers and upon completion of his review, entered a final order denying defendant's motion. The court of appeals reversed this decision[78] and the Supreme Court granted certiorari. The basic issue addressed by the Court was whether it was proper for the district judge to rely solely on his reading of the transcript of the evidentiary hearing and the magistrate's findings and conclusions in dismissing the motion to suppress, or whether the district judge was required to conduct a de novo hearing himself.

The Supreme Court decided that a de novo hearing was not required. The Court stated that the legislative history of the Act makes it clear that the necessity for conducting a de novo hearing is left to the district judge's discretion.[79] The Court dismissed the defendant's Article III argument that since the judge did not view the demeanor and assess the credibility of the wit-

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76. Raddatz claimed that in exchange for a promise of immunity, he acted as an informant for the officers.

77. United States v. Raddatz, 100 S. Ct. 2406, 2410 (1980).

78. United States v. Raddatz, 592 F.2d 976 (7th Cir. 1979).

79. United States v. Raddatz, 100 S. Ct. 2406, 2415 (1980). The Court also decided that the wording of the Magistrate Act does not require the judge to make a de novo hearing. The Court pointed to the Act's legislative history which states that a "de novo determination" as used in the statute is not the necessary equivalent of "de novo hearing." The House Judiciary Committee reported:

> The use of the words "de novo determination" is not intended to require the judge to actually conduct a new hearing on contested issues. Normally, the judge, on application, will consider the record which has been developed before the magistrate and make his own determination on the basis of that record. . . .

H.R. REP. NO. 94-1609, 94th Cong., 2d Sess. 3, *reprinted in* [1976] U.S. CODE CONG. & AD. NEWS 6162, 6163. *See* United States v. Southern Tanks, Inc., 619 F.2d 54 (10th Cir. 1980), where the court held that a district court was not required to conduct a de novo review of a magistrate's order enforcing an IRS summons where the only issues presented for review were of a technical, legal type.

nesses firsthand, the magistrate effectively made the ultimate decision in the case.[80] The Court observed that despite the judge's decision not to rehear the testimony, the district court's procedures still left the final decision in the hands of the judge and this result therefore satisfied Article III requirements.[81]

The majority's decision on the Article III question gives the district judge complete discretion to decide whether credibility assessments of witnesses appearing before the magistrate should be ultimately made by himself or the magistrate. As the dissent pointed out, however, a decision to let the magistrate's findings of credibility stand without a rehearing by the judge violates Article III because the magistrate's findings affect the personal liberty of the defendant.[82] In *Raddatz*, the defendant's

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80. United States v. Raddatz, 100 S. Ct. 2406, 2415 (1980).

81. *Id.* The defendant also made an argument based on the Due Process Clause and the holdings of Mathews v. Eldridge, 424 U.S. 319 (1976) and Morgan v. United States, 298 U.S. 468 (1936). The defendant contended that his case demonstrated a need for a rehearing by the district judge based on the three factors set forth in *Eldridge*: 1) his private interest to be free from self-incrimination was at stake; 2) the risk of erroneous deprivation of that interest was substantial if the judge did not conduct a rehearing; and 3) the government interest in preventing a rehearing was not substantial because a rehearing would not be overly burdensome. Additionally, the defendant asserted the *Morgan* principle that "he who decides must hear," and that the judge, as final decisionmaker in the motion to suppress, did not hear the necessary testimony.

The majority dismissed the defendant's arguments on the grounds that the defendant's due process rights require less protection at a suppression hearing than in other situations. The Court noted that since the denial of the motion to suppress did not ultimately decide the case itself, the defendant's right to a hearing was adequately protected by the Magistrate Act's procedures which grant the judge discretion over whether or not to conduct a rehearing. United States v. Raddatz, 100 S. Ct. 2406, 2413-15 (1980).

82. The dissent's theory was based on the landmark case of Crowell v. Benson, 285 U.S. 22 (1932). In *Crowell*, the Court ruled that it was proper for the district court to hear and determine at a trial de novo the facts of a claim brought under the Longshoremen's and Harbor Worker's Compensation Act even though the claim had already been presented before an administrative hearing officer. The Court rejected the argument that the district court had to rely solely on the record of the administrative proceedings in making its decision. The Court said:

> In cases brought to enforce constitutional rights, the judicial power of the United States necessarily extends to the independent determination of all questions, both of fact and law, necessary to the performance of that supreme function. * * * We think that the essential independence of the exercise of the judicial power of the United States, in the enforcement of constitutional rights requires that the Federal court should determine such an issue upon its own record and the facts elicited before it.

285 U.S. at 60, 64.

Justice Marshall acknowledged that Justice Brandeis' dissent in *Crowell* reflects the modern view of the adjudicatory powers of administrative bodies. Nevertheless, Marshall pointed to language in Brandeis' dissent and subsequent language in St. Joseph Stockyards v. United States, 298 U.S. 38 (1936), which supports limitations on the use of magistrates in cases

motion hinged on whether or not the magistrate believed his version of the facts.[83] The judge made his "ultimate decision" on the basis of the cold record of the magistrate's evidentiary hearing without having had an opportunity to observe the demeanor of the witnesses.[84] Thus, the defendant's fifth amendment right against self incrimination was effectively decided by the magistrate and not the judge.[85]

Although a non-Article III judge may make binding factual determinations in many cases, he is precluded from doing so by Article III where a party's personal liberty is at stake as in a criminal proceeding.[86] This preclusion is necessary because

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where personal liberties are at stake. Brandeis noted in *Crowell* that "under certain circumstances, the constitutional requirement of due process is a requirement of judicial process." 285 U.S. at 87 (Brandeis, J., dissenting). Later in *St. Joseph Stockyards* he stated that "[a] citizen who claims that his liberty is being infringed is entitled, upon habeus corpus, to the opportunity of a judicial determination of the facts." 298 U.S. at 77 (Brandeis, J., concurring).

Although the *St. Joseph Stockyards* opinion gave greater deference to factual determinations made by administrative bodies than in *Crowell*, it should not be read to hold that all issues of fact may be transferred to non-Article III courts. The holding in Ng Fung Ho v. White, 259 U.S. 276 (1922) indicates that a person is entitled to a judicial determination for certain issues of fact. In *White*, the Court upheld this entitlement in a deportation case where the defendants claimed to be citizens. The potential deprivation of liberty by deportation makes the result of this proceeding analogous to a criminal prosecution. Combining the *White* analogy with the Brandeis language cited in *Crowell* and *St. Joseph Stockyards*, it follows that where personal liberties are at stake, a judicial determination of the facts is still required by Article III.

83. Justice Marshall viewed the motion to suppress as vital to the defendant's case. He knew that the defendant would have a very difficult time at trial if his incriminating statements became admissible evidence. A similar situation was involved in United States v. Bergera, 512 F.2d 391 (9th Cir. 1975). The *Bergera* court commented: "The ultimate result in many cases like the one presented here is determined by a ruling on a motion to suppress evidence. Since that ruling in turn is often dictated by a factual determination, the method used to ascertain facts must be as accurate as possible." 512 F.2d at 393.

84. The decision in United States *ex rel*. Graham v. Mancusi, 457 F.2d 463, 469 (2d Cir. 1972) pointed out the importance of demeanor evidence: "Due process forbids that, when an issue of fact is presented, a man should be sent to prison without the trier of facts having seen and heard his accusers and himself, if he desires to testify, and weighing their credibility in the light of their demeanor on the stand."

85. *See* McKinney v. Parsons, 488 F.2d 452 (5th Cir. 1974), *cert. denied*, 423 U.S. 960 (1975), where the court held that it was the duty of the district judge to personally view allegedly obscene material to make his own determination of defendant's guilt. It was not sufficient for the judge to rely on the magistrate's assessment of the material.

86. United States v. Raddatz, 100 S. Ct. at 2431 (Marshall, J., dissenting):

> Mr. Justice Brandeis would have restricted the requirement of independent judicial factfinding to situations in which personal liberty was at stake, such as habeus corpus and deportation. I agree that for both criminal cases and deportation, a citizen is constitutionally enti-

magistrates, unlike Article III judges, do not have the degree of independence afforded to district judges by the tenure and salary protections of Article III.[87] This independence is crucial particularly where, as in *Raddatz*, the decisionmaker must decide whether a criminal defendant is more credible than a government official.[88]

The constitutional concerns raised in *Raddatz* were also discussed in the *Banks* case.[89] The defendant in *Banks* was denied an opportunity to personally present to the district judge the reasons why she violated the terms of her probation.[90] Both *Raddatz* and *Banks* raised the concern of the degree of discretion a judge should have in referring cases to or in reviewing cases heard by the magistrate.[91] Does the magistrate become the ultimate decisionmaker in violation of Article III where the judge makes an incomplete review of the magistrate's findings and conclusions?[92] *Banks* implied an affirmative answer to this question, but confined the scope of its decision to statutory grounds only. *Banks* ruled that the Magistrate Act itself prohibits judges from referring any cases to the magistrate where the magistrate must perform fact-finding functions and decide case-dispositive issues.[93] The *Raddatz* majority, on the other hand, found that no such limitations exist in the Magistrate Act or the

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tled to an independent determination of case-dispositive facts by an Art. III court. My conclusion is based on two factors, the nature of the issue and the individual interest in a determination by an Art. III judge. Resolution of the issues involved in criminal cases and deportation proceedings does not require specialization or expertise in an area where a federal judge is untrained [as one might need in an administrative agency case]. Moreover, the Framers adopted Art. III precisely in order to protect individual interest of the sort involved here. In my view, the independence provided by Art. III is hardly dispensable in finding facts underlying a motion to supress evidence on Fifth Amendment grounds.

87. *See* note 9 *supra*.

88. United States v. Bergera, 512 F.2d 391 (9th Cir. 1975) (in rejecting magistrate's decision on a motion to suppress, the district judge must rehear the testimony himself before making a decision); *see also* United States v. Lieberman, 608 F.2d 889 (1st Cir. 1979) (so long as a motion to dismiss, assigned to a magistrate, did not involve credibility judgments, judge could make review of case based on magistrate's recommendations only).

89. 614 F.2d 95 (6th Cir. 1980).

90. *See* text accompanying notes 65-67 *supra*.

91. *See* Bruno v. Hamilton, 521 F.2d 114 (8th Cir. 1975) (district court has inherent power to review final decisions of the magistrate except where the statute allows the magistrate to make a final disposition).

92. The standards for de novo determination were set forth in two cases: Hill v. Jenkins, 603 F.2d 1256 (7th Cir. 1979) (it was improper for the district judge to adopt verbatim the proposed findings of fact and conclusions of law submitted to the magistrate by one of the parties); O'Shea v. United States, 491 F.2d 774 (1st Cir. 1974) (district court's failure to invite and consider the parties' objections to the magistrate's findings was error).

93. Banks v. United States, 614 F.2d 95, 98 (6th Cir. 1980).

Constitution and that the district judge should retain the wide discretion he now holds.[94]

Justice Marshall's dissent in *Raddatz* favored less discretion for the district judge and was based on Article III considerations rather than the statutory grounds relied on in *Banks*. Marshall argued that the district judge in *Raddatz* should have reheard the testimony of the defendant and the officers since the credibility and demeanor of these witnesses were essential to the final outcome of the case.[95] His solution to the problem of the magistrate becoming the de facto decisionmaker in a case did not totally remove the magistrate from a role in the decision as the *Banks* court suggested.[96] Instead, Marshall suggested a reduction of the discretion the district judge has in deciding whether to rehear the testimony presented before the magistrate.[97] By this reduction of discretion, the magistrates could remain instrumental in assisting the district judge while retaining their proper roles as arbiters within the context of Article III.[98]

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94. *Accord*, United States v. Whitmire, 595 F.2d 1303 (5th Cir. 1979) (section 636(b)(1) of the Magistrate Act provides sufficient safeguards both to ensure the integrity of the factfinding process and retention by the judge of final responsibility for a ruling).

95. *Compare* United States v. Raddatz, 100 S. Ct. 2406 (1980) *and* United States v. Whitmire, 595 F.2d 1303 (5th Cir. 1979) *with* United States v. Bergera, 512 F.2d 391 (9th Cir. 1975) *and* Louis v. Blackburn, 630 F.2d 1105 (5th Cir. 1980). While the district courts in *Raddatz* and *Whitmire* accepted the credibility assessments of the magistrate without a de novo hearing, the district courts in *Bergera* and *Blackburn* rejected the magistrate's findings and recommendations without a rehearing. In *Bergera*, the district judge denied a motion to suppress which had been granted by the magistrate and in *Blackburn* the court reversed the magistrate's recommendation to accept a habeas corpus petition. The Ninth Circuit in *Bergera* and the Fifth Circuit in *Blackburn* both held that where the district judge *rejects* the magistrate's findings of credibility, he must conduct a de novo hearing of the relevant testimony. The plurality in *Raddatz* indicated its agreement with this result:

> The issue is not before us, but we assume it is unlikely that a district judge would *reject* a magistrate's proposed findings on credibility when those findings are dispositive and substitute the judge's own appraisal; to do so without seeing and hearing the witness or witnesses whose credibility is in question could well give rise to serious questions we do not reach.

United States v. Raddatz, 100 S. Ct. at 2415 n.7.

96. United States v. Raddatz, 100 S. Ct. 2406, 2424 (1980) (Marshall, J., dissenting).

97. *Id.*

98. For other recent cases on the necessity of a de novo hearing and the adequacy of de novo review, see Calderon v. Waco Lighthouse for the Blind, 630 F.2d 352 (5th Cir. 1980) (de novo review requires at least a review of trial transcript where magistrate decided case-dispositive matters); United States v. First Nat'l Bank of Atlanta, 628 F.2d 871 (5th Cir. 1980) (district judge need only make de novo review of objected portions of magistrate's findings); Anaya v. Romero, 627 F.2d 226 (10th Cir. 1980) (factfinder magistrate who heard evidence must make the formal decision on witness credi-

The Additional Duties Clause Today

Raddatz and *Banks* illustrate the new issues which have arisen from the enactment of the 1976 amendments to the Federal Magistrate Act. These amendments clarified many of the ambiguities of the 1968 Act by detailing the specific duties and powers of the magistrates.[99] Nevertheless, some ambiguity still remains, largely because Congress has retained the Act's "additional duties" clause. The clause gives district court judges wide discretion to decide the scope of the magistrates' power within the Constitution and laws of the United States.[100] This discretion continues to be a source of litigation because district judges disagree over the limits which Article III and the Magistrate Act impose upon the magistrates' powers.

The decisions in *Muhich*, *Banks*, and *Raddatz* provide examples of this continuing disagreement. The *Muhich* court favored a broad interpretation of the "additional duties" clause when it held that the clause authorized magistrates to conduct civil trials upon the consent of the parties.[101] The *Banks* court, in contrast, took a restrictive view when it declared that the clause should be limited to additional procedural and administrative duties and does not permit magistrates to preside at case-dispositive hearings.[102] The Supreme Court in *Raddatz* examined the magistrates' power in terms of Article III rather than the "additional duties" clause, yet the Court's decision on the Article III issue affects the clause's future interpretation by the lower courts.

The *Raddatz* Court's view that Article III does not restrain the district judge's discretion whether to rehear testimony implies that the Court would accept a broad reading of the "additional duties" clause.[103] According to the Court, Article III does not inhibit the district judge from relying on the reasoning and

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bility); United States v. Fry, 622 F.2d 1218 (5th Cir. 1980) (directly followed *Raddatz* result); United States v. Lewis, 621 F.2d 1382 (5th Cir. 1980) (district judge must use transcript of magistrate's hearing to make proper de novo review of credibility issues); United States v. Marshall, 609 F.2d 152 (5th Cir. 1980) (district judge must review transcript of magistrate's hearing before rejecting magistrate's credibility assessments).

99. *See* notes 49-52 *supra*.

100. *Id.*

101. Foster v. Gloucester County Bd. of Chosen Freeholders, 465 F. Supp. 293 (D.N.J. 1978) also encouraged an expansive reading of the Magistrate Act. The court stated that even though the Act does not explicitly authorize magistrates to preside over a motion for attorney fees, the pretrial matters listed in § 636(b)(1)(A) were not intended to be the outer limits of the magistrate's authority. The court found validity for the magistrate's action in § 636(b)(3), the "additional duties" clause.

102. *See* note 68 *supra*.

103. *See* United States v. Raddatz, 100 S. Ct. at 2414-15.

conclusions of the magistrate in making his own final decision on a particular case.[104] It would then follow that Article III places few limits on the district judge's discretion in assigning other Article III type functions to the magistrate pursuant to the "additional duties" clause. *Raddatz* thus re-affirms the Court's reasoning in *Mathews v. Weber* that the Magistrate Act contains no inconsistencies with Article III and should be read as broadly as possible to effectuate the magistrate system's purpose of helping to clear the federal dockets.[105]

THE CODIFICATION OF CONSENSUAL REFERENCE: THE 1979 AMENDMENTS

The problem of overloaded federal dockets shows few signs of ending and Congress recently acted to further extend magisterial power to ease this problem.[106] In 1979, Congress amended the Magistrate Act to codify the concept of consensual reference.[107] Consensual reference is the process wherein the parties to a civil case agree to try their case before a magistrate instead of an Article III judge.[108] The amendment represents Congressional satisfaction with the magistrate system and approval for the system's continued expansion.[109]

Consensual reference had been instituted by some courts prior to the 1979 amendments under one of two theories. The first theory upheld the magistrates' power to hear consensual reference cases pursuant to the "additional duties" clause.[110] The second theory held that magistrates could hear consensual reference cases when they acted as special masters pursuant to a provision in the Magistrate Act.[111] Masters are appointed by the court with specific powers to assist the judge in disposing of

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104. *Id.* at 2415.

105. Justice Marshall commented in his dissent to the *Raddatz* majority: "The Court's holding today is undoubtedly influenced by its sympathy with Congress' perception that the assistance of federal magistrates was a necessary measure to ensure that the already severe pressures on the federal district courts do not become overwhelming." *Id.* at 2432 (Marshall, J., dissenting).

106. *See generally* Margolis, *U.S. Magistrates Get Broader Powers*, 66 A.B.A. J. 322 (1980).

107. Federal Magistrate Act of 1979, Pub. L. 96-82, 93 Stat. 643 (codified at 28 U.S.C. §§ 631-36 (1979)).

108. *See generally* Comment, *An Adjudicative Role for Federal Magistrates in Civil Cases*, 40 U. CHI. L. REV. 584 (1973).

109. *See* S. REP. NO. 96-74, 96th Cong., 1st Sess. 2-4, *reprinted in* [1979] U.S. CODE CONG. & AD. NEWS 1469, 1470-72.

110. Muhich v. Allen, 603 F.2d 1247, 1251 (7th Cir. 1979).

111. *See* Duryea v. Third Northwestern Nat'l Bank of Minneapolis, 602 F.2d 809 (8th Cir. 1979) (referral to a magistrate made in accordance with Rule 53 of the Federal Rules of Civil Procedure).

certain matters.[112] Special masters are masters appointed to work on a particular case as opposed to masters who hold standing positions with the court.[113] The passage of the 1979 amendments resolved many of the problems the courts dealt with in applying these two theories and augmented the powers of the magistrates beyond those formerly granted.

The consensual reference provisions of the Magistrate Act permit the magistrate to enter a final order in jury or non-jury civil matters which have been referred to the magistrate upon the parties' consent.[114] From this order, the parties have a right of appeal directly to the court of appeals.[115] The parties may choose to bring their appeal before the district court and from that court's decision then file a petition for leave to appeal to the appellate court.[116] The Act also provides procedural safeguards

112. FED. R. CIV. P. 53(a),(c). Rule 53 provides for the appointment of masters to the federal district courts. Standing masters are appointed by a concurrence of a majority of judges in a judicial district. The court may appoint a special master for a particular case. FED. R. CIV. P. 53(a). The duties of a master in a case may be delineated by order of the court. Subject to any limitations by the court, section 53(c) authorizes the magistrate to "exercise the power to regulate all proceedings in every hearing before him and to do all acts and take all measures necessary or proper for the efficient performance of his duties under the order." FED. R. CIV. P. 53(c).

Section 53(b) limits the circumstances under which a master can be used. The reference of a case to a master is for the purpose of assisting the court in obtaining facts and arriving at a correct result in complicated litigation. The section expressly states that a reference to a master is the exception and not the rule. A master will be appointed to a jury trial only when the issues are complicated and in actions tried without a jury, only upon a showing of exceptional circumstances. FED. R. CIV. P. 53(b). *See* 9 C. WRIGHT & A. MILLER, FEDERAL PRACTICE & PROCEDURE: CIVIL §§ 2601-15 (1971).

113. FED. R. CIV. P. 53(a).

114. 28 U.S.C. § 636(c)(1) (1979) provides in part:

(c) Notwithstanding any provision of law to the contrary—

(1)Upon the consent of the parties, a full-time United States magistrate or a part-time United States magistrate who serves as a full-time judicial officer may conduct any or all proceedings in a jury or nonjury civil matter and order the entry of judgment in the case, when specially designated to exercise such jurisdiction by the district court or courts he serves.

115. 28 U.S.C. § 636(c)(3) (1979) provides:

(3) Upon entry of judgement in any case referred under paragraph (1) of this subsection, an aggrieved party may appeal directly to the appropriate United States court of appeals from the judgment of the magistrate in the same manner as an appeal from any other judgment of a district court. In this circumstance, the consent of the parties allows a magistrate designated to exercise civil jurisdiction under paragraph (1) of this subsection to direct the entry of a judgment of the district court in accordance with the Federal Rules of Civil Procedure. Nothing in this paragraph shall be construed as a limitation of any party's right to seek review by the Supreme Court of the United States.

116. 28 U.S.C. §§ 636(c)(4), (5) (1979) permit appeal in this manner:

(4) Notwithstanding the provisions of paragraph (3) of this subsection,

to insure that consent to a trial or hearing before a magistrate is totally voluntary and has not been prompted by pressure from the district judge.[117]

Constitutionality of Consensual Reference

The 1979 codification of consensual reference occurred shortly after the procedure was upheld as constitutional. The validity of consensual reference under Article III was confirmed in *DeCosta v. Columbia Broadcasting System, Inc.*[118] The parties in *DeCosta* stipulated that certain issues in their case would be decided by a magistrate.[119] The defendant later changed his mind and objected to the magistrate's authority, but the district court dismissed these objections.[120] The appellate court agreed with the district court and found that the parties' properly referred the case to the magistrate.[121]

The appellate court observed that when the parties themselves choose to have their case decided in a non-Article III fo-

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at the time of reference to a magistrate, the parties may further consent to appeal on the record to a judge of the district court in the same manner as on an appeal from a judgment of the district court to a court of appeals. Wherever possible the local rules of the district court and the rules promulgated by the conference shall endeavor to make such appeal expeditious and inexpensive. The district court may affirm, reverse, modify, or remand the magistrate's judgment.

(5) Cases in the district courts under paragraph (4) of this subsection may be reviewed by the appropriate United States court of appeals upon petition for leave to appeal by a party stating specific objections to the judgment.

117. (c)(2) If a magistrate is designated to exercise civil jurisdiction under paragraph (1) of this subsection, the clerk of court shall, at the time the action is filed, notify the parties of their right to consent to the exercise of such jurisdiction. The decision of the parties shall be communicated to the clerk of court. Thereafter, neither the district judge nor the magistrate shall attempt to persuade or induce any party to consent to reference of any civil matters to a magistrate. Rules of court for the reference of civil matters to magistrates shall include procedures to protect the voluntariness of the parties' consent.

28 U.S.C. § 636(c)(2) (1979).

118. 520 F.2d 499 (1st Cir. 1975), *cert. denied*, 423 U.S. 1073 (1976). Although the constitutionality of consentual reference was confirmed, the trial court's decision was reversed on other grounds.

119. *DeCosta* was a long-running trademark infringement and unfair competition case. Plaintiff alleged that he was the originator of the character, Paladin, and that Columbia Broadcasting System had used the name, costume and symbols of this character in the television show, "Have Gun Will Travel" without plaintiff's permission. The parties entered into a written stipulation order to have counts two and three of the complaint decided by a magistrate on the basis of the trial transcript of count one as well as additional exhibits and testimony.

120. DeCosta v. Columbia Broadcasting System, Inc., 520 F.2d 499 (1st Cir. 1975), *cert. denied*, 423 U.S. 1073 (1976).

121. *Id.* at 507-09.

rum, there is no need to consider the constitutional concerns raised in other decisions based on Article III.[122] The *DeCosta* situation, the court remarked, is constitutionally sound for the same reasons an arbiter's decision may be enforced over Article III objections.[123] The court additionally noted that the magistrate in *DeCosta* was not subject to the restrictions imposed on special masters under the Federal Rules of Civil Procedure. The appellate court stated that the magistrate's authority stemmed from the "additional duties" clause of the Magistrate Act, rather than the provision of the Act allowing magistrates to act as special masters.[124]

Magistrates and Special Masters

Appointment of matters to special masters has long been strongly discouraged by the courts except where "exceptional circumstances" are shown.[125] In some decisions, the courts have characterized a reference to a magistrate as a reference to a special master.[126] The courts would then invalidate the refer-

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122. *Id.* at 503-04.

> Defendants argue that it is constitutionally impermissible for an Article III judge to abjure decision making responsibilities and that the judge is therefore without power to invest other non-Article III judicial officers or parajudges, such as magistrates, with broad authority. However persuasive such an argument may be where governmental sanction is threatened, indicating a strong public interest in the outcome of litigation and creating a countervailing necessity for extending the full measure of judicial process to the defendant, or where parties to civil litigation properly before the federal judiciary insist on judicial resolution, quite different policy and precedent should apply where the parties to a civil dispute themselves select another forum. Under such circumstances, it is inappropriate to evaluate the problem as one of the right of the judiciary to relinquish its authority. The issue is not the power of the judge to refer, but the power of the parties to agree to another arbiter, absent overriding constitutional considerations.

123. *Accord*, Gelfgren v. Republic Nat'l Life Ins. Co., 451 F. Supp. 1229 (C.D. Cal. 1978) (no constitutional inhibition to reference to a magistrate exists any more than where a case is assigned to an arbiter).

124. In Small v. Olympic Pre-Fabricators, Inc., 588 F.2d 287 (9th Cir. 1978), the court noted that where the parties consent to assign a case to a magistrate for trial, *DeCosta* demands that the district court use a clearly erroneous standard of review in accordance with Rule 53 of the Federal Rules of Civil Procedure.

125. The leading case in this area is La Buy v. Howes Leather Co., 352 U.S. 249 (1957). In *La Buy*, the Court found that a district judge's reference of two antitrust cases to a special master was unjustified by the "exceptional circumstances" provision of Rule 53 of the Federal Rules of Civil Procedure. The complexity of the cases, combined with the judge's congested calendar, were not considered enough to constitute "exceptional circumstances." *See also* Adventures in Good Eating, Inc. v. Best Places to Eat, Inc., 131 F.2d 809 (7th Cir. 1942) (references to masters tend to delay proceedings and increase litigation costs).

126. The courts premised their reasoning on the portion of the 1968 Magistrate Act which provided that "additional duties" shall include:

ence to the magistrate on the grounds that no exceptional circumstances were shown to justify the reference. In *TPO, Inc. v. McMillen*, for example, the court characterized the reference of a motion to dismiss to the magistrate as a reference to a special master.[127] Using cases developed in the law of special masters, the *McMillen* court found that the referral was not permissible because there was no showing of exceptional circumstances.[128] By amending the Magistrate Act to specifically provide for consensual reference, there is no longer any reason for the courts to presume that a reference to a magistrate is a reference to a special master. Referral to a special master and referral by consensual reference are now clearly defined as two distinct legal procedures.[129]

Consensual Reference in Practice

Consensual reference can help the district courts unclog their dockets and save parties time and litigation costs.[130] Moreover, parties to litigation can also be better assured of a magistrate's qualifications due to the stricter standards for appointing magistrates incorporated in the 1979 amendments.[131] With these provisions, parties will be less hesitant to use consensual

"(1) service as a special master in an appropriate civil action, pursuant to the applicable provisions of this title and the Federal Rules of Civil Procedure for the United States district courts. . . ." 28 U.S.C. § 636(b) (1968). No specific guidelines existed in the Magistrate Act for the magistrates to conduct trials.

127. TPO, Inc. v. McMillen, 460 F.2d 348, 360-62 (7th Cir. 1972).

128. *Id.*

129. *See* Oliver v. Allison, 488 F. Supp. 885 (D.D.C. 1980) (absent clear intent to have Rule 53 control, court must presume that trial by magistrate will be conducted pursuant to existing local rules).

130. Prior to the 1979 amendments, even in those circuits which allowed consensual reference, the magistrate's order still had to be reviewed by the district court. *See* United Steelworkers of America v. Bishop, 598 F.2d 408 (5th Cir. 1979) (although parties consented to magistrate's hearing of the case, magistrate was unable to enter final order of injunction); Horton v. State Street Bank & Trust Co., 590 F.2d 403 (1st Cir. 1979) (parties' agreement to make a direct appeal from magistrate's order to appellate court cannot be enforced); Cason v. Owen, 578 F.2d 572 (5th Cir. 1978) (decision of magistrate cannot be directly appealed); Taylor v. Oxford, 575 F.2d 152 (7th Cir. 1978) (although parties stipulated to referral of motion to dismiss to a magistrate, the magistrate's order was not appealable); Sick v. City of Buffalo, 574 F.2d 689 (2d Cir. 1978) (a magistrate's decision is not a decision of a federal district court).

131. The 1979 amendments listed several new selection requirements including one requiring the prospective magistrate be a member in good standing for the last five years of the bar of the highest court in the state in which he is to serve. The most important new requirement limited the unfettered discretion district judges had in selecting magistrates. Magistrates must now be selected pursuant to standards set by the Judicial Conference of the United States. These standards must include public notice of all magistrate vacancies and the establishment of merit selection boards. 28

reference, especially for matters where modest forms of relief are requested.[132]

Although consensual reference can be beneficial to litigants, difficulty may occur over whether the parties in fact gave their consent to the procedure.[133] Despite the provisions of the statute which help guarantee that consent will be truly voluntary,[134] in some instances there may be some lingering doubts on this issue. Although this issue has not been litigated, one commentator has suggested its probable appearance.[135]

CONCLUSION

The power of the federal magistrates has grown considerably since the enactment of the Magistrate Act of 1968. When first confronted with the Act, courts were reluctant to expand the magistrates' powers beyond those specified by the literal terms of the statute, even though Congress intended the statute to be liberally construed. The courts' greatest concern was the magistrates' potential encroachment on the power of Article III judges. The broad reading of the "additional duties" clause by the Supreme Court in *Mathews v. Weber*[136] and the addition of several new amendments to the Act in 1976 eased this concern and encouraged the courts to take a more favorable view toward the power of magistrates.[137]

A new question of the magistrates' power has arisen concerning the adequacy of the district courts' de novo review of magistrates' decisions. One method employed to confine the power of the magistrates within Article III is to provide procedures which allow the district judge to review the magistrate's decision and render the final decision of the case. Even if these

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U.S.C. § 631(b) (1979); S. REP. NO. 96-74, 96th Cong., 2d Sess. 9-10, *reprinted in* [1979] U.S. CODE CONG. & AD. NEWS 1469, 1477-78.

132. *See generally* S. REP. NO. 96-74, 96th Cong., 1st Sess. 4-6, *reprinted in* [1979] U.S. CODE CONG. & AD. NEWS 1469, 1472-75.

133. *E.g.*, Calderon v. Waco Lighthouse for the Blind, 630 F.2d 352 (5th Cir. 1980). The district judge informed the parties that he was referring their case to a magistrate for trial. The plaintiff did not object to this referral until oral argument on appeal. The court held that plaintiff's failure to object to the referral at the time it was made constituted a waiver of his objection. The court noted that the 1979 amendments were not applicable at the time of referral and refused to rule whether a nonconsensual reference to a magistrate is unconstitutional.

134. *See* note 117 *supra*.

135. *See* Note, *Article III Constraints and the Expanding Civil Jurisdiction of Federal Magistrates: A Dissenting View*, 88 YALE L.J. 1023 (1979).

136. 423 U.S. 261 (1976).

137. *See* Note, *United States Magistrates: Additional Duties in Civil Proceedings*, 27 CASE W. RES. L. REV. 542 (1977); Comment, *An Expanding Civil Role for United States Magistrates*, 26 AM. U.L. REV. 66 (1976).

procedures are followed the magistrate may be rendering the ultimate decision if the district judge fails to personally rehear testimony or otherwise fails to make a complete review.[138] Therefore, an amendment to the Magistrate Act should be added which would require the district judge to rehear the testimony when the magistrate's findings of fact are based wholly or in part upon the credibility of the witnesses.

Finally, the codification of consensual reference in the 1979 amendments is a welcome improvement to the Magistrate Act. Although consensual reference to a hearing before a magistrate has been held constitutionally permissible, confusion has resulted over the rules under which this process should be implemented.[139] The 1979 amendments not only delineate these rules, but also contain guarantees to insure voluntary consent to a hearing before the magistrate. With the codification of consensual reference, the Federal Magistrate Act has made a great advance toward Congress's goal of providing qualified assistants to the federal court who can continue to play a vital role in expediting justice.

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138. Other views of the de novo determination issue were considered in United States v. Miller, 609 F.2d 336 (8th Cir. 1979) (no de novo hearing by a judge is required on magistrate's findings on proper issuance of an IRS summons); United States v. Grant, 476 F. Supp. 400 (S.D. Fla. 1979) (district court reversed magistrate's recommendation on a motion to suppress upon a de novo review of the record); Webb v. Califano, 468 F. Supp. 825 (E.D. Cal. 1979) (objections to magistrate's report must be timely to demand de novo review).

139. *See* Sussman, *The Fourth Tier in the Federal Judicial System: The United States Magistrate*, 56 CHI. B. REC. 134 (1974); Note, *Masters and Magistrates in the Federal Courts*, 88 HARV. L. REV. 779 (1975).