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Note

UNITED STATES MAGISTRATES: ADDITIONAL DUTIES IN CIVIL PROCEEDINGS*

An increasingly heavy workload in the federal district courts prompted congressional passage of the Federal Magistrates Act (28 U.S.C. § 636). The Act was drafted to facilitate delegation of judicial duties to magistrates. However, since the Act was implemented, unduly cautious and restrictive court interpretations of its language have hindered flexible delegation of duties to magistrates. The author reviews the magistrates' role in civil matters concluding that the way to resolve conflicting court interpretations of the Act is through legislation. The author critically examines recent legislation and suggests how the use of magistrates could enhance judicial efficiency without sacrificing the quality of justice.

I. INTRODUCTION

THE 90TH CONGRESS, after three years of consideration and hearings, abolished the system of United States Commissioners and replaced it with the system of United States Magistrates for federal district courts.[1] The enactment was prompted by concern for the unmanageable dockets and caseloads of the United States District Courts and the need to provide assistance to federal district judges. The magistrate system was intended "both to update and make more effective a system that has not been altered basically for over a century, and to cull from the ever-growing workload of the U.S. district courts matters that are more desirably performed by a lower tier of judicial officers."[2]

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*The author of this Note wishes to express his appreciation to Professor Sidney B. Jacoby, who introduced the "famous cases" of federal courts to a generation of law students.

1. Federal Magistrates Act, Pub. L. 90-578, 82 Stat. 1108 (1968), *amending* 28 U.S.C. §§ 631-39 (1964), (codified at 28 U.S.C. §§ 631-39 (1970), *as amended,* 28 U.S.C. §§ 634(a), 636 (e) (Supp. IV, 1974)).

A comparison of magistrates' with commissioners illustrates the increased responsibility and expertise Congress intended magistrates to have. Commissioners were formerly appointed by the district court for a term of four years, the number of commissioners being determined by each court's own assessment of its need. There were no specific qualifications for commissioners; in fact, over one-third were nonlawyers. H.R. REP. NO. 1629, 90th Cong., 2d Sess., *reprinted in* [1968] U.S. CODE CONG. & AD. NEWS 4252, 4256 [hereinafter cited as HOUSE REPORT] (citation is to U.S. CODE CONG. & AD. NEWS). By contrast, the Judicial Conference now assesses the needs of each district and appoints magistrates with the concurrence of a

Magistrates' jurisdiction is set forth in 28 U.S.C. § 636. In general, magistrates have the power to conduct trials of minor offenses and petty offenses;[3] to administer oaths and affirmations, impose conditions of release, and take acknowledgments, affidavits, and depositions;[4] and to perform additional duties delegated by local court rules that are consistent with the Constitution and laws of the United States.[5] Magistrates are also empowered to exercise all the powers and fulfill all the duties conferred upon United States Commissioners by law or by the Federal Rules of Criminal Procedure for district courts.[6]

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majority of the judges in each district. 28 U.S.C. §§ 631(a), 633 (1970). Magistrates are qualified as full- or part-time officers, and the determination of whether a full-time or part-time magistrate is appointed is a function of the particular caseloads and requirements of each district. *See* 28 U.S.C. § 633(a) (1970). Part-time magistrates are presently appointed for a four year term, but full-time magistrates serve an eight year term. 28 U.S.C. § 631(e) (1970).

The impact of the magistrates' appointment and tenure provisions is significant. The performance of magistrates and the needs of district courts are constantly reviewed by the Judicial Conference in its oversight function. 28 U.S.C. § 633 (1970). The tenure provision enhances the attractiveness of the position and assures job security; removal is only for cause. 28 U.S.C. § 631(h) (1970). The higher standard qualifications for office, 28 U.S.C. § 631(b) (1970), and the statutorily required periodic training, 28 U.S.C. § 637 (1970), insure judicial independence and disinterest and necessarily guarantee the greater expertise required as magistrates are delegated expanded responsibility pursuant to 28 U.S.C. § 636 (1970). HOUSE REPORT 4254. The magistrate is required to take the same oath of office as a judge. *Compare* 28 U.S.C. § 631(f) (1970), *with* 28 U.S.C. § 453 (1970). Furthermore, a magistrate is restricted as to the character of service and outside interests. 28 U.S.C. § 632 (1970).

The method of compensation for magistrates has also been vastly improved. Commissioners were paid on the basis of an anachronistic fee system where compensation was measured by the nature of the function and decision itself. Because a ceiling on fees was enforced, commissioners often earned the maximum after a few months each year. S. REP. NO. 371, 90th Cong., 1st Sess. (1967), *cited in* HOUSE REPORT 4255. This system may have been unconstitutional. *See* Tumey v. Ohio, 273 U.S. 510 (1927). Magistrates, however, are compensated by salary and are provided office space and facilities. 28 U.S.C. § 635 (1970). The increased compensation and change of title were intended to make the position one to which an attorney would be attracted on either a part-time or full-time basis. HOUSE REPORT 4254-55.

Magistrates also have expanded jurisdiction over that of the commissioners under the old system. First, magistrates are given all powers and duties given commissioners by law or by the Federal Rules of Criminal Procedure. 28 U.S.C. § 636(a)(1) (1970). Second, magistrates are given the power to administer oaths and affirmations, 28 U.S.C. § 636(a)(2) (1970), and impose conditions of release. 18 U.S.C. § 3146 (1970). Moreover, magistrates can take acknowledgements, affidavits and depositions, 28 U.S.C. § 636(a)(2) (1970), and they can conduct trials of minor (as opposed to petty) offenses under the limitations of 18 U.S.C. § 3401 (1970) and rules promulgated by the Supreme Court pursuant to 18 U.S.C. § 3402 (1970); 28 U.S.C. § 636(a)(3) (1970). Finally, magistrates can perform a potentially wide range of additional duties delegated by district court local rules, none of which could have been assigned to commissioners. *Compare* 28 U.S.C. § 636(b) (1970), *with* Act of June 25, 1948, ch. 646, 62 Stat. 916.

2. HOUSE REPORT 4254-55.
3. 28 U.S.C. § 636(a)(3) (1970) (amended 1976).
4. *Id.* § 636(a)(2).
5. *Id.* § 636(b).
6. *Id.* § 636(a)(1).

The volume of judicial business handled by magistrates is impressive. At the close of 1975,[7] the fourth full year of operation, magistrates had disposed of 255,061 matters.[8] Magistrates had conducted 84,505 trial jurisdiction cases, 103,326 preliminary proceedings in criminal cases, and 67,230 additional duties pursuant to section 636(b).[9]

This article is initially concerned with the 36,766 additional duties that magistrates have performed in civil proceedings [10] pursuant to section 636(b) before amendment in October 1976.[11] These duties include prisoner petitions,[12] discovery and pretrial proceedings,[13] references to magistrates as special masters,[14] and "such additional duties as are not inconsistent with the Constitution and the laws of the United States."[15] This discussion will necessarily deal with the implementation of the Act as it stood before the October 1976 amendments; the expected benefits of the amendments are examined in Part III.

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7. When dealing with statistics, all references to years are federal government fiscal years.

8. ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, 1975 ANNUAL REPORT OF THE DIRECTOR 135 table 2 [hereinafter cited as ANNUAL REPORT]. At the close of fiscal year 1975, there were 487 U.S. magistrates: 133 full-time, 337 part-time, and 17 "combination" officials. *See id.* at 133 table 1. A significant number of matters (182,475 or 72% of all matters) were disposed of by the 111 full-time magistrates on duty during 1975. *Id.* at 138-39.

9. *Id.* at 135 table 2. Trial jurisdiction cases include both minor offenses and petty offenses. Preliminary proceedings in criminal cases involve search warrants, arrest warrants, bail hearings and bail review, preliminary examinations, removal hearings, and probation revocation. Additional duties in criminal proceedings include post-indictment arraignments, pretrial conferences and omnibus hearings, and motions. Additional duties assigned in civil proceedings involve prisoner petitions, pretrial conferences, motions, special master references and reports, social security reviews, NARA (title III of Narcotics Addict Rehabilitation Act of 1966, 42 U.S.C. §§ 3411-26 (1970)) proceedings, and other matters.

10. ANNUAL REPORT 135 table 2.

11. 28 U.S.C. § 636(b) (1970) 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, or, where there is no full-time magistrate reasonably available, any part-time magistrate specially designated by the court, 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.

12. 28 U.S.C § 636(b)(3) (1970).

13. *Id.* § 636(b)(2).

14. *Id.* § 636(b)(1).

15. *Id.* § 636(b).

In its short term of implementation, section 636(b) has been the focus of much disagreement, lack of consensus, and differing interpretation among the circuits. The conflict radiates from four general sources. First, the original section 636(b) was broadly drafted. It referred to three illustrative categories of duties and responsibilities rather than defining exclusive duties assignable to magistrates.[16] Second, prisoner petition civil actions in district courts are a point of irritation among judges generally. The easy access to federal courts provided by the Habeas Corpus Act[17] and the Civil Rights Act,[18] coupled with the large number of other petitions filed in district courts each year, crowd the court dockets and make these posttrial petitions an unpopular civil action.

The well-developed common law on the use of special masters is a third point of conflict. Some courts, finding it irresistably convenient to equate magistrates to masters regardless of the nature of the duty delegated, have proceeded to analyze the magistrates' assignment within the common law framework of masters' references. Finally, despite the fact that "additional duties" are to be delegated by local court rule, neither guidelines nor standards for the promulgation of these local rules have been established.[19]

The judicial decisions concerning the civil jurisdiction of magistrates have moved beyond the question of delegation of judicial power.[20] Accordingly, inquiries concerning the manner of delegation, the actual performance of the duty delegated, and the scope of review to be applied by the judge are the subjects of this consideration. Magistrate duties, especially review of prisoner petitions, service as special master, pretrial and discovery proceedings, consensual references, and review of administrative determinations, are analyzed in terms of the existing case law with proposals for improvement.

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16. HOUSE REPORT 4262.

17. 28 U.S.C. §§ 2241-55 (1970).

18. 42 U.S.C. §§ 1981-95 (1970).

19. The Administrative Office of United States Courts has published a jurisdictional "checklist," but its main purpose is to suggest duties considered appropriate for delegation rather than to regulate the manner in which the duties are delegated. The checklist is printed in *Hearings on S. 1283 Before the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary*, 94th Cong., 1st Sess. 24-26 (1975).

20. The question of the Act's implementation has been the object of some commentary. *See, e.g.*, Doyle, *Implementing the Federal Magistrates Act*, 39 J. KAN. B. ASS'N 22 (1970); Peterson, *The Federal Magistrate's Act: A New Dimension in the Implementation of Justice*, 56 IOWA L. REV. 62 (1970). The question of delegation of judicial power has also been addressed. Note, *Masters and Magistrates in the Federal Courts*, 88 HARV. L. REV. 779 (1975). *See generally* Comment, *An Adjudicative Role for Federal Magistrates in Civil Cases*, 40 U. CHI. L. REV. 584 (1973). The criminal jurisdiction of magistrates was analyzed in Note, *The Validity of United States Magistrates' Criminal Jurisdiction*, 60 VA. L. REV. 697 (1974).

Recently, the Supreme Court has suggested that there was no constitutional question concerning the delegation of duties to magistrates. Mathews v. Weber, 423 U.S. 261 (1976).

II. PRE-AMENDMENT JUDICIAL INTERPRETATION OF MAGISTRATES' ROLE

A. Prisoner Petitions

The 1970 Federal Magistrates Act suggests that the "preliminary review of applications for posttrial relief made by individuals convicted of criminal offenses" is an additional duty assignable to a magistrate.[21] The right of persons to petition for a writ of habeas corpus is embodied in the Constitution,[22] and the jurisdictional provisions for prisoner petitions in federal courts are found in chapter 153 of Title 28.[23] For the purposes of magistrate duties, approximately two-thirds of the petitions reviewed are filed by convicted individuals who allege that they are in federal [24] or state [25] custody in violation of the "Constitution or laws or treaties of the United States," or in federal custody [26] under a sentence which is unconstitutional, unlawful, or statutorily in excess.[27] Section 2243 of the habeas corpus statute, the basic procedural provision, delineates a petitioning process that includes issuance and return of the writ, hearing, and decision by the court.[28] The balance of prisoner petitions allege civil rights grounds and are generally brought under section 1983 of the civil rights statute.[29]

Although most prisoner petition matters are terminated prior to trial,[30] prisoner petitions consume a significant amount of judicial time and resources in the federal district courts. In fiscal year 1975, 19,307 cases, or

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21. 28 U.S.C. § 636(b)(3) (1970).

22. U.S. CONST. art. 1, § 9, cl. 2.

23. 28 U.S.C. §§ 2241-55 (1970). *See also* FED. R. CIV. P. 81(a)(2).

24. 28 U.S.C. § 2241(c)(3) (1970).

25. *Id.* § 2254(a).

26. "[I]n custody under sentence of a court established by Act of Congress" is considered federal custody. *Id.* § 2255.

27. *Id.* The petition should be directed to the court that imposed the sentence. The remedies available include vacating, setting aside, or correcting the sentence. *Id.* Persons under parole supervision or unconditional release are considered "in custody" and may apply for habeas corpus writs. *See, e.g.,* Jones v. Cunningham, 371 U.S. 236 (1963) (parole); Carafas v. LaVallee, 391 U.S. 234 (1968) (unconditional release). *See generally* C. WRIGHT, LAW OF FEDERAL COURTS § 53 (2d ed. 1970).

28. 28 U.S.C. § 2243 (1970).

29. Actions seeking declaratory and injunctive relief may be brought under the Civil Rights Act by prisoners challenging aspects of their confinement which they allege violate their federal constitutional rights. 42 U.S.C. § 1983 (1970). Habeas corpus, on the other hand, is a proper vehicle by which any prisoner, state or federal, may challenge the constitutionality of his confinement or actions of prison officials. *See* Wolff v. McDonnell, 418 U.S. 539 (1974); Preiser v. Rodriguez, 411 U.S. 475 (1973).

30. Only 664, or 3.7 percent of the prisoner petition cases terminated in district courts during fiscal year 1975, reached trial. ANNUAL REPORT 369 table C-4.

16.4 percent of all civil cases docketed in district courts, were prisoner petitions.[31] Of the 17,976 prisoner petitions terminated in district courts for 1975,[32] 8,464 were disposed of by magistrates.[33] If the past few years are an accurate indication, more than one of every five matters disposed of by federal district courts during fiscal year 1976 will be a prisoner petition.[34]

Whether magistrates will continue to perform an active role in the pretrial disposition of these matters, and what should be the degree of this participation, are soon to be resolved questions. The doubt and uncertainty over the magistrates' function in future prisoner petition matters arise from the Supreme Court's decision in *Wingo v. Wedding*.[35] Mr. Justice Brennan's opinion for the seven justice majority held that section 2243 of the habeas corpus statute requires an article III judge to conduct all evidentiary hearings in federal habeas cases[36] and that section 636(b)(3) of the Federal Magistrates Act did not alter that requirement.[37] Thus, the local rule promulgated pursuant to section 636(b) by the United States District Court for the Western District of Kentucky was invalid because it was inconsistent with the laws of the United States.[38] The Chief Justice, with Justice White concurring, vigorously dissented. Arguing that Congress intended to permit magistrates to preside over evidentiary hearings in federal habeas corpus cases, the dissenters concluded that article III was not violated so long as the district judge retained the power to make the ultimate decision on the petition. Furthermore, they argued that the majority's decision would only defeat the fundamental legislative objective of providing "district judges with more time to devote to the actual trial of cases and the writing of opinions."[39]

The *Wingo* decision is unsatisfactory in three respects. First, Carl James Wedding, who filed his petition for the writ in 1971, still had no answer to his petition three years later; he continued to serve a life sentence imposed after a guilty plea made in 1949.[40] Second, *Wingo* can only add to the confusion that existed among the circuits prior to the decision regarding the role of magistrates in section 636(b)(3) reviews.[41] Third, any anticipated judicial

31. *Id.* 208 table 25.
32. *Id.* at 369-70 table C-4.
33. *Id.* at 502 table M-4.
34. *See id.* at 208-09 table 25 & graph "Petitions Filed By State and Federal Prisoners."
35. 418 U.S. 461 (1974).
36. *Id.* at 467-69.
37. *Id.* at 469-70.
38. *Id.* at 472. A third part of the Court's holding was that the invalidity of the district court's local rule was not cured by an electronic recording which had been reviewed by the district court judge. *Id.* at 473-74.
39. *Id.* at 476 (quoting Senator Tydings, sponsor of the enabling legislation).
40. The appellate decision reversed the district court's denial of his petition for a writ of habeas corpus. Wedding v. Wingo, 483 F.2d 1131 (6th Cir. 1973), *aff'd*, 418 U.S. 461 (1974).
41. *See* 418 U.S. at 474-75 n.1 Burger, C.J., dissenting).

economies which were to be derived by injecting federal magistrates into district court review of prisoner petitions have been severely short-circuited.

In reaching its conclusion, the Court in *Wingo* relied upon its earlier holding in *Holiday v. Johnson*[42] that a district judge must hear the petitioning prisoner's testimony in a habeas corpus case and that delegating that duty to a United States Commissioner was reversible error.[43] In 1941 when *Holiday* was decided, the habeas corpus statute required a "court, or justice, or judge" to hear the testimony.[44] However, during recodification of the Judiciary Code in 1948, the procedural provisions of the Habeas Corpus Act were consolidated in 28 U.S.C. § 2243, to provide that the *court* should hold the evidentiary hearing.[45] If there were any distinction to be drawn between "court, or justice, or judge" and "court," Brennan suggested, the distinction was blunted by subsequent decisions in *United States v. Hayman*[46] and *Brown v. Allen*.[47] The majority opinion therefore held that, on the basis of section 2243, a federal district *judge* must hold the evidentiary hearing in a habeas corpus case.[48]

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42. 313 U.S. 342 (1941).

43. *Id.* at 350-54.

44. REV. STAT. § 761, *formerly* 28 U.S.C. § 461 (1940).

45. 28 U.S.C. § 2243 (1970) provides: "The court shall summarily hear and determine the facts."

46. 342 U.S. 205 (1952). In the course of its discussion of issue determination by a district court, the Court in *Hayman*, citing *Holiday* with approval, noted that the factual issues were not to be taken by a commissioner. *Id.* at 213 n.16.

47. 344 U.S. 443 (1953). The Court in *Wingo* relied upon the following language from the *Brown* decision: "A *federal judge* on a habeas corpus application is required to 'summarily hear and determine the facts, and dispose of the matter as law and justice require,' . . . This has long been the law." Wingo v. Wedding, 418 U.S. 461, 469 (1974), *quoting* Brown v. Allen, 344 U.S. 443, 462 (1953).

48. The majority opinion's analysis was unconvincing in two regards. First, the majority suggested that the change in statutory language from "court, or justice, or judge" to "court" was a mere change in form and phraseology. 418 U.S. at 469 n.9. If correct, how can the Court explain the fact that section 2243, while stating "[t]he *court* shall summarily hear and determine the facts," also provides "[a] *court, justice, or judge*" shall entertain a writ of habeas corpus application? 28 U.S.C. § 2243 (1970) (emphasis added). A uniformity of form argument would fail.

Second, the habeas corpus chapter is inconsistent throughout with regard to the "court" and "judge" phraseology. Thus, "writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district *courts* and any circuit *judge* within their respective jurisdictions," 28 U.S.C. § 2241(a) (1970) (emphasis added), could be read to suggest that writs may be granted by the district *court* so long as the petitioning prisoner is within the district court's jurisdiction and that the magistrate, or a judicial officer of the district court, would have the power to grant writs. *See* 418 U.S. at 477-78 (Burger, C.J., dissenting). *See also* 28 U.S.C. § 2254(a) (1970).

The majority relied on *Hayman* and *Brown*, cases decided after revision of the habeas corpus statute, for the proposition that "construction of § 2243 has been that given § 761 in *Holiday*." 418 U.S. at 469. But in *Holiday*, the Court's interpretation of section 2243 was that fact finding by a United States *commissioner* failed to conform to the Habeas Corpus Act. There is also support for this proposition in *Hayman*. 342 U.S. 205, 213 & n.16. In *Wingo*, the Court

The *Wingo* majority also based its conclusion on the section of the Federal Magistrates Act which provides that a local district court rule may delegate to a magistrate "preliminary review of applications for posttrial relief . . . and submission of a report and recommendations to facilitate the decision of the district judge . . . as to whether there should be a hearing."[49] The Court construed section 636(b) as precluding judges from assigning magistrates the duty of conducting any evidentiary hearings.[50] With regard to habeas corpus proceedings, the Court felt the division of labor was clear: magistrates "may receive the state court record and all affidavits, stipulations, and other documents," [51] but a judge must conduct all hearings. Moreover, those cases permitting magistrates to accept oral testimony, provided certain procedural safeguards were present, were rejected.[52]

The *Wingo* decision returns the role of magistrates in habeas corpus proceedings to the pre-Magistrates Act status of commissioner. In habeas corpus proceedings, the magistrates are to serve as little more than file clerks and digest writers for federal judges. This result hardly seems to have been the one intended either by the Federal Magistrates Act or by judicial administrative legislation in general. The Magistrates Act's jurisdiction and powers section provides that each magistrate shall have "all powers and duties conferred or imposed upon United States commissioners,"[53] plus "such additional duties as are not inconsistent with the Constitution and laws of the United States."[54] Moreover, the enumerated additional duties are suggestive, not restrictive.[55] The Court missed the mark when it precluded magis-

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appears to have been randomly casting its net in search of support for its contention that section 2243 requires a district judge to personally conduct any habeas corpus evidentiary hearings. The *Hayman* decision clearly was not a good catch.

The reliance on *Brown* is also questionable. The Court cites language from *Brown* to support its theory, 418 U.S. at 469; the language concludes: "This has long been the law." The Court in *Brown*, however, was referring to the discretion of district courts "to entertain petitions from state prisoners which raised the same issues raised in the state courts" as the long-standing rule, and not to the issue of who may hear and determine facts in a habeas corpus petition. 344 U.S. 443, 462 (1953). The Chief Justice in his dissent properly noted that "*Brown* is thus no authority for the proposition that the same limitation *Holiday* placed on Rev. Stat. § 761 (court, or justice, or judge) applies to §2243 (court) enacted after *Holiday*." 418 U.S. at 478-79.

49. 28 U.S.C. § 636(b)(3) (1970).

50. 418 U.S. at 472.

51. *Id.* at 473.

52. *Id.* at 473 n.19. *See* text accompanying note 58 *infra*.

53. 28 U.S.C. § 636(a)(1) (1970).

54. *Id.* § 636(b).

55. 28 U.S.C. § 636(b) (1970) provided: "The additional duties authorized by rule may include, ***but are not restricted to***—. . . ." (emphasis added). As the House Report clearly states:

> Proposed 28 U.S.C. 636(b) mentions three categories of functions assignable to magistrates under its provisions. The mention of these three categories *is intended to illustrate* the general character of duties assignable to magistrates under the act, rather than to constitute an exclusive specification of duties so assignable.

trates from holding *any* evidentiary hearings. The legislation clearly indicates that the role of the magistrate is to be greater and more inclusive than that formerly held by commissioners.

The 1970 statute suggests that magistrates review applications, prepare reports, and make recommendations,[56] even though performing these review duties might require a magistrate to hold a preliminary hearing to ascertain both sides of the applicant's case. Although the ultimate evidentiary hearing and the ultimate decision would be reserved for, and made by, the district judge, it is reasonable to conclude that increased responsibility was especially intended in these suggested areas of additional duties.[57]

This approach is substantially that found in the well-reasoned decision of Senior Judge Aldrich in *O'Shea v. United States*,[58] a pre-*Wingo* case. As Judge Aldrich noted, "a magistrate's primary function is not to supplant, but is to assist judges."[59] Organizing the record of a case, marshalling the arguments on both sides, and presenting a reasoned recommendation to the district judge as to whether there should be a hearing cannot be accomplished within the antiseptic constraints the *Wingo* decision has imposed upon magistrates. The view of Senator Tydings, the sponsor of the bill that later became the Federal Magistrates Act, is in concert with the view suggested here.[60] Moreover, should the district judge decide, following a review of the magistrate's report and his own review of the record, that a hearing should be held, there is no reason why the district judge could not employ

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HOUSE REPORT, *supra* note 1, at 4262 (emphasis added). This would appear to have been settled by Mathews v. Weber, 423 U.S. 261, 267 (1976), where the Court stated: "The three examples § 636(b) sets out are, as the statute itself states, not exclusive."

56. *Id.* § 636(b)(3).

57. *See* 28 U.S.C. § 636(b)(1)-(3) (1970) (service as special master, pretrial and discovery proceedings, and posttrial relief applications).

58. 491 F.2d 774 (1st Cir. 1974). The *Wingo* decision rejected Judge Aldrich's procedural safeguard of a full trial *de novo*. *See* 418 U.S. at 473 n.19.

59. 491 F.2d at 776. The *O'Shea* opinion described the role a magistrate could play in habeas corpus proceedings: "[A] magistrate, acting under subsection (3) [28 U.S.C. § 636(b)(3) (1970)], may hold a hearing; he may receive the state court record, and any undisputed documents the parties care to submit; . . . he may receive stipulations. . . . In addition, he may take evidence, but with the sole object of leading to findings of fact that all parties accept." 491 F.2d at 778.

60. Senator Tydings stated:

> Our thought was that if a district court were swamped by post-conviction petitions, it might assign the initial review of them to a magistrate. The magistrate could then make a preliminary review and a recommendation. The final determination would have to be made by the judge, but the initial screening could be done by the magistrate if the court wished.

Hearings on S. 945, H.R. 5502, H.R. 8277, H.R. 8520, H.R. 8932, H.R. 9970, and H.R. 10841 Before Subcomm. No. 4 of the House Comm. on the Judiciary, 90th Cong., 2d Sess., ser. 17, at 80 (1968).

the magistrate's report and research during judicial review of the case.[61]

The *Wingo* decision also suffers because of the Court's failure to distinguish between delegation of a part of the judicial decisionmaking function and the retention of the authority to render the ultimate judicial decision. There is no abdication of judicial power and no violation of the Constitution [62] when statutorily sanctioned responsibilities are delegated to a lower tier of judicial officers created to assist in "the expeditious administration of justice." [63]

The impact of the *Wingo* decision upon the rights of the accused and the rights of the convicted creates a three-fold irony. First, consider the Court's decision in *Palmore v. United States.*[64] In *Palmore* the Court stated that "there is no support . . . in either constitutional text or in constitutional history and practice" for the view that "an Art. III judge must preside over every proceeding in which a charge, claim, or defense is based on an Act of Congress or a law made under its authority." [65] When the *Palmore* and *Wingo* decisions are considered together, they indicate than an individual could be *convicted and sentenced* for a crime based on an act of Congress in a proceeding presided over by a nontenured, elected, non-article III judge. But should this individual subsequently petition the district court, according to *Wingo*, an article III judge would be required by law to conduct all hearings.

Second, the irony becomes more acute when it is noted that the *Palmore* decision is consistent with the Federal Magistrates Act provision establishing

61. The legislative intent supports this view: "A qualified, experienced magistrate will, it is hoped, acquire an expertise in examining these [post-conviction review] applications and summarizing their important contents for the district judge, thereby facilitating his decisions." SENATE COMM. ON THE JUDICIARY, THE FEDERAL MAGISTRATES ACT, REPORT ON S. 945, S. REP. NO. 371, 90th Cong., 1st Sess. 26 (1967).

62. U.S. CONST. art III, § 1. *See* Wingo v. Wedding, 418 U.S. 461, 486 n.11 (1974) (Burger, C.J., dissenting):

> The Court does not suggest that [a magistrate's] conduct of an evidentiary hearing, where the district judge retains the power to make the final decision on an application for a writ of habeas corpus, would be unconstitutional . . . . Where this situation obtains, the magistrate's conduct of the hearing would be clearly constitutional.

Id. at 486.

There are certain occasions when a district judge would be constitutionally required to review a matter whether or not the magistrate had reviewed it. The case of McKinney v. Parsons, 488 F.2d 452 (5th Cir. 1974), was a habeas corpus appeal brought by an individual convicted for violation of an obscenity ordinance. The per curiam decision stated that personal inspection of allegedly obscene material was the district judge's "ineluctable duty to do, with or without the preliminary assistance of the Magistrate." *Id.* at 453.

63. *Cf.* 28 U.S.C. § 633(c) (1970).

64. 411 U.S. 389 (1973). *See* Campbell v. United States Dist. Ct., 501 F.2d 196, 201 (9th Cir.), *cert. denied*, 419 U.S. 879 (1974).

65. 411 U.S. at 400. "It was neither the legislative nor judicial view, therefore, that trial and decision of all federal questions were reserved for Art. III judges." *Id.* at 402.

trial jurisdiction of magistrates for "minor offenses." [66] A magistrate has the jurisdiction and authority to try and convict an individual for commission of a misdemeanor punishable under the laws of the United States, and he can imprison this individual for a period of one year or fine him not more than $1,000, or both.[67] Yet should the convicted misdemeanant apply to a federal district court for relief from his sentence and/or fine, only a federal district judge could hear his petition.

Third, the decision in *Palmore* speaks in terms of a "proceeding in which a . . . claim . . . is based on an act of Congress." [68] Arguably, an application filed for posttrial relief in a federal district court pursuant to 28 U.S.C. § 2243 invokes a civil proceeding in which a claim based upon an act of Congress is at issue. Were this interpretation of *Palmore* and habeas corpus petitions found to be consistent, then the interpretation of the Habeas Corpus Act and the judicial gloss placed upon section 636(b)(3) of the Federal Magistrates Act would be irreconcilable with the *Palmore* theory.

In the aftermath of *Wingo*, there appear to be three separate instances where an evidentiary hearing conducted by a magistrate in a prisoner petition action does not require a new evidentiary hearing to be conducted by a district court judge. The first occasion is not of general application; it is probably unique to the operative facts of that case. In *Rosenfeld v. Rumble*,[69] an officer in the Naval Reserve Medical Corps sought a writ of habeas corpus to compel his discharge from the Navy as a conscientious objector. The matter was originally heard by a magistrate, but following the announcement of the *Wingo* decision, the district judge felt compelled to make independent findings. However, because the petitioner was prepared to rest on the pleadings and record, and because the parties had stipulated that the record was complete, no new evidentiary hearing was held.[70]

The second instance in which evidentiary hearings by a judge were not required after hearings by a magistrate involved a trilogy of cases in which it was determined that the individuals had never been entitled to any evidentiary hearing. In *Willis v. Ciccone*,[71] a federal prisoner sought a writ of habeas corpus alleging a denial of various federal rights.[72] An evidentiary

66. *See* 28 U.S.C. § 636(a)(3) (1970); 18 U.S.C. § 3401 (1970).

67. "Minor offenses" are, with certain enumerated exceptions, "misdemeanors punishable under the laws of the United States, the penalty for which does not exceed imprisonment for a period of one year, or a fine of not more than $1,000, or both." 18 U.S.C. § 3401(f) (1970). The legislative history indicates that the minor offense jurisdiction was "to give U.S. magistrates more extensive trial jurisdiction than that [formerly] conferred upon U.S. commissioners," and was "intended to relieve the U.S. district courts of the burden of trying a considerable number of minor criminal matters." HOUSE REPORT, *supra* note 1, at 4263.

68. 411 U.S. at 400.

69. 386 F. Supp. 476 (D. Mass. 1974).

70. *Id.* at 477.

71. 506 F.2d 1011 (8th Cir. 1974). Two cases decided with *Willis* were Proffitt v. Ciccone, 506 F.2d 1020 (8th Cir. 1974), and Frazier v. Ciccone, 506 F.2d 1022 (8th Cir. 1974).

hearing was held by the magistrate and the district judge adopted the magistrate's findings and recommendation. The prisoner appealed, citing the magistrate's lack of authority to hold the evidentiary hearing. Following the announcement of *Wingo,* the prison-official respondent filed a motion seeking remand for the purpose of a new hearing before a district court judge.[73] The Court, noting that "[a] hearing is not required [for prisoner petitions] if one is not necessary to a determination on that issue," [74] ruled that an evidentiary hearing was unnecessary to resolve any of the allegations raised in the case.[75]

Finally, a magistrate can hold an evidentiary hearing when a prisoner fashions his complaint as an action for declaratory and injunctive relief under section 1983 of the civil rights statute, so long as the reference is made to the magistrate in his capacity as a special master. The *Wingo* holding, prohibiting magistrates from conducting evidentiary hearings for prisoner petitions under the Habeas Corpus Act,[76] was based upon the specific language of section 2243 of the habeas statute as interpreted in *Holiday v. Johnson.*[77] Therefore, when a prisoner's allegation is actionable under either the Civil Rights Act or the Habeas Corpus Act, but he chooses to bring his action under section 1983 of the civil rights statute, *Wingo* would not prevent a district court judge from referring the action to a magistrate.

This distinction was recognized and sanctioned in *Cruz v. Hauck,*[78] a section 1983 action brought to prohibit the enforcement of county jail regulations restricting inmates' possession and use of legal materials. The magistrate conducted an evidentiary hearing after which he submitted proposed findings of fact and conclusions of law to the district court. After affording the litigants an opportunity to file objections, the district judge adopted the magistrate's report with slight modifications. The reference was sustained as one made to a magistrate serving as a special master pursuant to the provisions of Rule 53 of the Federal Rules of Civil Procedure.[79]

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72. Willis alleged that he was the subject of punitive isolation on the basis of a false disciplinary report and an unconstitutional disciplinary hearing, that the disciplinary hearing was devoid of certain procedural due process safeguards, that he was denied access to the courts, and that, on the basis of race, his freedom to associate with other prisoners had been abridged. 506 F.2d 1011, 1013 (8th Cir. 1974).

73. *Id.*

74. *Id.* at 1016.

75. *Id.* at 1017. The court treated the testimony taken by the magistrate as oral affidavits. 506 F.2d at 1017-18. *See also* Proffitt v. Ciccone, 506 F.2d 1020, 1021 n.1 (8th Cir. 1974). With respect to the prisoner's due process and false charges allegations, the court in *Willis* concluded that a review of the record of action taken by the prison disciplinary board, along with affidavits, would provide sufficient evidence to determine whether due process had been afforded in the disciplinary hearings and whether there were facts to support the action taken by prison officials. Thus there was no necessity for a hearing.

Where infringement of fundamental rights is alleged, the court cautioned that strict judicial scrutiny is required. Here, because the allegation in the habeas corpus writ did not set forth a

Because the *Cruz* decision relied upon Rule 53, rather than the Magistrates Act,[80] as the source of the district court's power to refer the matter to the magistrate, it did not definitively state whether a magistrate, pursuant to a local district court rule promulgated in accordance with section 636(b) of the Federal Magistrates Act, may hold an evidentiary hearing when a civil rights prisoner petition is referred to him by a district judge. However, based on the Court's construction of the specific language of section 2243 of the habeas corpus statute in *Wingo* and the *Cruz* decision, neither the Magistrates Act nor the Civil Rights Act appear to prevent section 1983 prisoner petitions from being referred to magistrates for evidentiary hearings.

A problem yet to be addressed, and clearly overlooked in the *Rosenfeld* case,[81] is how to treat habeas corpus and civil rights petitions when filed by persons who have not been "convicted of criminal offenses" and/or who are not seeking "posttrial relief." The additional duty suggested by section 636(b)(3) concerns "preliminary review of applications for posttrial relief made by individuals convicted of criminal offenses." [82] The *Wingo* decision applies only to references made pursuant to section 636(b)(3) involving Habeas Corpus Act petitions.[83] There are many habeas corpus actions, such

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claim as a matter of law, no evidentiary hearing was necessary. 506 F.2d at 1019. *See also* Proffitt v. Ciccone, 506 F.2d 1020 (8th Cir. 1974).

76. 28 U.S.C. §§ 2243-55 (1970).

77. 313 U.S. 342 (1941). In *Holiday*, the Court was actually interpreting the language in 28 U.S.C. § 461 (1940), which was later combined with other sections to form 28 U.S.C. § 2243 (1970).

78. 515 F.2d 322 (5th Cir. 1975). *See also* Bel v. Hall, 392 F. Supp. 274 (D. Mass. 1975), discussed in text accompanying note 106 *infra.*.

79. 515 F.2d at 327. This would clearly fit within the illustrative reference suggested in the Federal Magistrates Act. *See* 28 U.S.C. § 636(b)(1) (1970). The district court judge referred the matter to the magistrate pursuant to an order authorizing magistrates to perform certain duties in *criminal* actions. 515 F.2d at 326. Because the district judge directed that the proceedings be conducted pursuant to Rule 53, the court treated the reference "as though ordered pursuant to Rule 53." 515 F.2d at 327.

The *Cruz* decision does not explicitly approve of a magistrate *qua* magistrate conducting an evidentiary hearing in a prisoner's civil rights action, but it does sustain a reference to a magistrate in his capacity as a special master. The court noted:

> [T]he instant reference was not ordered pursuant to an applicable rule adopted under the Federal Magistrates Act; therefore, the Act may not be used to sustain the reference. The sole source of power for this reference is Rule 53 of the Federal Rules of Civil Procedure.

Id. at 326 n.3. Whether an additional duty assigned to a magistrate should be governed by Rule 53 and its case law, or by a more expansive standard implied under the Magistrates Act, is the subject matter of the next section. It is enough for the present to state that the area is riddled with confusion.

80. 515 F.2d at 326 n.3. *See* note 79 *supra*.

81. *See* text accompanying note 69 *supra*.

82. 28 U.S.C. § 636(b)(3) (1970).

83. 515 F.2d at 326 n.5.

as the discharge from active naval duty sought in the *Rosenfeld* case,[84] that do not involve posttrial relief for convicted individuals. If reference to a magistrate in a habeas corpus action is not made pursuant to section 636(b)(3), is the magistrate still prohibited from conducting an evidentiary hearing because, as the *Wingo* decision would seem to insist, *all* evidentiary hearings in habeas corpus actions must be conducted by a judge? Or does the *Wingo* prohibition operate only where one finds the nexus of a habeas corpus action and a reference to a magistrate pursuant to section 636(b)(3) specifically involving posttrial relief? Would reference of a habeas corpus action to a magistrate who served as a Rule 53 special master [85] overcome the *Wingo* prohibition?

Cruz and *Wingo* also leave unanswered questions in the area of civil rights actions for declaratory and injunctive relief, whether brought by convicted persons seeking posttrial relief or otherwise. May these actions be referred to a federal magistrate with power to conduct evidentiary hearings, or would this only be possible if the reference to the magistrate were made pursuant to Rule 53, as was the case in *Cruz?* Could the referral occur pursuant to a rule adopted under the Federal Magistrates Act? If the rule cannot be promulgated pursuant to section 636(b)(3), section 636(b)(1) may grant the appropriate authority.

The case law presently provides some answers to these questions of magistrates' jurisdiction. For example, on the basis of *Wingo,* a magistrate may review any petition for a writ of habeas corpus filed pursuant to section 2243, whether filed for posttrial relief or otherwise, but he cannot conduct an evidentiary hearing as a part of his review. This applies regardless of whether the habeas corpus petition seeks posttrial relief and the reference is made pursuant to section 636(b)(3), or whether the habeas corpus petition is based upon any other proper ground for the extraordinary relief, and the reference is made pursuant to any local district court rule promulgated under the authority of the Magistrates Act. It is settled that "[i]t was the Court's reading of the habeas corpus statute, 28 U.S.C. § 2243, that formed the basis for the holding in *Wingo v. Wedding.*"[86]

The *Cruz* decision defines another aspect of a magistrate's jurisdiction. The decision stands as well-reasoned authority for permitting a magistrate to conduct an evidentiary hearing when a prisoner fashions his petition for posttrial relief as an injunctive and declaratory action brought pursuant to section 1983 of the civil rights statute, when the matter is referred to the magistrate in his capacity as a master. The reasoning of *Cruz* and *Wingo,* taken together, should permit a magistrate to conduct an evidentiary hearing

84. 386 F. Supp. 476 (D. Mass. 1974).
85. *Cf.* Cruz v. Hauck, 515 F.2d 322 (5th Cir. 1975).
86. Mathews v. Weber, 423 U.S. 261, 275 (1976).

in a civil rights petition so long as the statute does not specifically require a judge—which it presently does not—and the local district court rule is properly drafted to authorize the delegated duty.[87]

B. *The Other Additional Duties*

The remaining duties which a magistrate may be assigned in civil proceedings arise from three overlapping grants of authority to district courts. A magistrate may be directed by Rule 53 to serve as a special master,[88] he may assist in conducting pretrial or discovery proceedings,[89] or he may perform "such additional duties as are not inconsistent with the Constitution and laws of the United States." [90]

A great deal of confusion has erupted over the assignment of magistrates to perform these duties. Some decisions have ignored the legislative intent of the Magistrates Act, while others have demonstrated a parochial dedication to the special masters rule and an improper equation of magistrates to masters that has limited the reference of matters to exceptional cases.[91] As a reaction to these decisions, the Judicial Conference and the Congress have begun to take steps to rectify the problems. The following sections examine the case law that has developed in the area of additional duties in civil proceedings.

1. *Service as Special Master*

Matters are often referred to special masters in an attempt to lighten the judges' workload by enabling a lower judicial officer to perform certain ministerial acts of the court. Federal Rule of Civil Procedure 53 governs the appointment of, and reference of matters to, special masters in civil cases. The rule's origin can be found in several of the Federal Equity Rules of

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87. Part III of this article examines legislative and rulemaking changes that would clarify and make uniform the treatment of prisoner petitions by federal district courts, regardless of the statutory basis of the petition. Because so many prisoner petition actions are terminated prior to trial, *see* note 30 *supra*, the pretrial disposition of the petitions warrants attention and standardization.

88. 28 U.S.C. § 636(b)(1) (1970).

89. *Id.* § 636(b)(2).

90. *Id.* § 636(b).

91. Rule 53(b) provides: "A reference to a master shall be the exception and not the rule." FED. R. CIV. P. 53(b).

In Ingram v. Richardson, 471 F.2d 1268 (6th Cir. 1972), the Sixth Circuit wrongly applied a special master analysis in determining that reference of a social security disability benefits matter was improper. *See* discussion of Mathews v. Weber, 423 U.S. 261 (1976), in text accompanying note 160 *infra*.

1912.[92] The role of a master was early characterized by the Supreme Court: "A master in chancery is an officer appointed by the court to assist it in various proceedings incidental to the progress of a cause before it."[93]

The rule distinguishes the role of masters between jury and non-jury proceedings,[94] but provides in all cases that "reference to a master shall be the exception and not the rule."

The Federal Magistrates Act specifically provides that a magistrate may serve as a special master.[95] A close reading of the Act suggests that a magistrate could only serve as a special master if the duty were delegated by a district judge pursuant to a local district court rule,[96] but it is clear from several cases, including *Cruz v. Hauck*,[97] that Rule 53 provides an independent basis for appointment of a magistrate as special master, so long as the delegation itself is "not inconsistent with the Constitution and laws of the United States."[98]

Appointment of magistrates as special masters would overcome several disadvantages associated with references to special masters. First, neither party would have to bear the cost of compensating the magistrate for service as master. Thus, a burdensome and inequitable barrier to appointment of special masters under rule 53(a) would be removed by the use of magistrates.[99] Second, the delay frequently experienced when matters were referred to any master [100] "well versed in the law and fit to perform the

92. *See* Equity R. 49, 51 (Evidence Taken Before Examiners, etc.), 52 (Attendance of Witnesses Before Commissioners, Master, or Examiner), 59 (Reference to Master—Exceptional, not Usual), 60 (Proceedings Before Master), 61 (Master's Report—Documents Identified But Not Set Forth), 61½ (Master's Report—Presumptions as to—How Reviewed), 62 (Powers of Master), 65 (Claimants Before Master Examinable by Him), 66 (Return of Master's Report—Exceptions—Hearing), and 68 (Appointment and Compensation of Masters), 226 U.S. 657 (1912), *as amended*, 286 U.S. 570 (1932).

93. Kimberly v. Arms, 129 U.S. 512, 523 (1889).

94. Rule 53(b) provides: "In actions to be tried by a jury, a reference shall be made only when the issues are complicated; in actions to be tried without a jury, save in matters of account and of difficult computation of damages, a reference shall be made only upon a showing that some exceptional condition requires it." FED. R. CIV. P. 53(b).

95. 28 U.S.C. § 636(b)(1) (1970). For a discussion of the constitutional basis of delegation of judicial power to magistrates, see Note, *Masters and Magistrates in the Federal Courts*, 88 HARV. L. REV. 779, 780-89 (1975).

96. 28 U.S.C. § 636(b) (1970) provides that "[t]he additional duties *authorized by rule* may include . . . (1) service as a special master" (emphasis added).

97. 515 F.2d 322 (5th Cir. 1975). *See* text at note 78 *supra*.

98. 28 U.S.C. § 636(b) (1970). *See* Flowers v. Crouch-Walker Corp., 507 F.2d 1378 (7th Cir. 1974), and text accompanying note 117 *infra*. *See also* Wingo v. Wedding, 418 U.S. 461 (1974).

99. Rule 53(a) provides: "The compensation to be allowed to a master . . . shall be charged upon such of the parties or paid out of any fund or subject matter of the action . . . as the court may direct." FED. R. CIV. P. 53(a). *See* Kaufman, *Masters in the Federal Courts: Rule 53*, 58 COLUM. L. REV. 452 n.4 (1958).

100. A. VANDERBILT, CASES AND OTHER MATERIALS IN MODERN PROCEDURE AND JUDICIAL ADMINISTRATION 1240-41 (1952).

duties," [101] would be overcome by appointment of a magistrate as master, because magistrates are restricted with respect to any outside occupation or business.[102] Finally, any apparent or real conflict that might be present with a regular master because of involvement in the case or conflicting outside interests would be overcome by having a magistrate, a judicial officer employed by the court, serve as master.[103]

There are several types of civil actions for which utilization of magistrates as special masters has been judicially approved. Actions for declaratory and injunctive relief brought under the Cvil Rights Act by prisoners have been referred to magistrates for evidentiary hearings and reports. In *Cruz v. Hauck*,[104] the district court referred the county jail inmates' action against enforcement of jail regulations to a magistrate who functioned as a special master. The magistrate conducted evidentiary hearings and filed a report which was adopted, with minor modifications, by the district judge.[105]

Bel v. Hall,[106] decided a few months prior to *Cruz*, approved the practice of referring civil rights prisoner petitions to magistrates as masters. In this district court decision, the judge adopted the report of the magistrate sitting as special master, and remanded the case to the magistrate for consideration of remedial proposals.

While the Supreme Court has not specifically decided a case concerning reference of a civil rights petition to a magistrate serving as a master, the Chief Justice favors such a practice. Chief Justice Burger has argued that "[f]ederal judges should consider referring . . . civil rights cases brought by prisoners for preliminary consideration by a United States magistrate sitting as a special master and reporting to the Court."[107] As analogous authority, Chief Justice Burger pointed to the use of special masters by the Supreme Court in original jurisdiction disputes between states. In those cases, the Court "regularly designate[s] special masters to take all the evidence and recommend the disposition of multimillion dollar litigation."[108]

101. 5A J. MOORE, FEDERAL PRACTICE ¶ 53.03, at 2922 (2d ed. 1975).

102. "Full-time United States magistrates may not engage in the practice of law, and may not engage in any other business, occupation, or employment inconsistent with the expeditious, proper, and impartial performance of their duties as judicial officers. 28 U.S.C. § 632(a) (1970). Part-time magistrates are similarly restricted when serving as judicial officers. 28 U.S.C. § 632(b) (1970). *Cf.* Flowers v. Crouch-Walker Corp., 507 F.2d 1378, 1379 (7th Cir. 1974).

103. *Cf.* United States v. O'Connor, 291 F.2d 520, 526 (2d Cir. 1961).

104. 515 F.2d 322 (5th Cir. 1975). *See* text accompanying note 78 *supra*.

105. The court of appeals did not specifically sanction the reference, stating it "need not consider whether the district judge acted improperly in making the reference for we believe that appellants have waived their right to object." 515 F.2d at 326. Another reason for not specifically approving the reference was that the judgment was vacated and the case remanded—for the third time—on other grounds. Nonetheless, the court spent several pages discussing judicial references to magistrates, leaving the impression that it would have decided, if required to, that the reference was proper. *See* 515 F.2d at 326-331.

106. 392 F. Supp. 274 (D. Mass. 1975).

107. Burger, *Report on the Federal Judicial Branch—1973*, 59 A.B.A.J. 1125, 1128 (1973).

108. *Id.*

A second area where utilizing magistrates as masters to assist judges has received judicial approval is in the disposition of preliminary injunction actions. In *CAB v. Carefree Travel, Inc.*,[109] the Civil Aeronautics Board brought an action against fourteen corporations and nineteen individuals to enjoin certain "black market" charter flights. The district court referred the matter to the magistrate as master who made initial findings in connection with a preliminary injunction. The order of reference was made by the court pursuant to a local court rule promulgated under the authority of Rule 53(b) [110] and section 636(b)(1) of the Magistrates Act. The Second Circuit found several grounds upon which to hold the reference proper. First, the reference was not for the entire case but for the limited purpose of making initial findings in connection with a preliminary injunction, subject to the district judge's examination and further review. Therefore, there was no abdication of judicial decisionmaking.[111] Second, the proceedings had been complicated by the large number of parties and their individual motions. Delegating one aspect of the proceeding would serve "to aid [the] judge in the performance of specific judicial duties, as they [might] arise in the progress of a cause." [112] Third, reference to the magistrate as master served the public interest in prompt determination of preliminary injunction questions. Finally, the appeals court found the reference to have been made under "exceptional circumstances," and therefore properly within Rule 53(b).[113]

Masters traditionally have been assigned "matters of account and of difficult computation of damages." [114] In two Sixth Circuit Title VII cases, computation of back pay was referred to a magistrate as special master. In *Thornton v. East Texas Motor Freight*,[115] the trial court determined that

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109. 513 F.2d 375 (2d Cir. 1975).

110. *Id.* at 378 n.1. "By order dated April 20, 1971, the United States District Court for the Eastern District of New York authorized magistrates to perform all additional duties permitted by statute. General Rule 25.1." *Id.* at 379 n.3.

111. *See* LaBuy v. Howes Leather Co., 352 U.S. 249 (1957); *cf.* 28 C.F.R. § 50.11 (1975).

In Reed v. Board of Election Comm'rs, 459 F.2d 121 (1st Cir. 1972), a motion for provisional voter registration of students was approved by the district court on the basis of a magistrate's order. Because the court rendered its final judgment without reviewing the over 100 pages of testimony, the First Circuit determined that this was "an abnegation of judicial authority by the court entirely contrary to the provisions of Article III. The extent to which even preliminary injunctions should be passed on in this manner deserves very careful consideration at some future date." *Id.* at 123.

The *Carefree Travel* decision established the standard for "very careful consideration" of preliminary injunction cases. It was recently cited with approval by the Supreme Court in Mathews v. Weber, 423 U.S. 261, 274 n.9 (1976).

112. 513 F.2d 375, 382 (2d Cir. 1975), *quoting Ex parte* Peterson, 253 U.S. 300, 312 (1920).

113. 513 F.2d at 383.

114. FED. R. CIV. P. 53(b).

115. 497 F.2d 416 (6th Cir. 1974). *See also* United States v. Masonry Contractors Ass'n. of Memphis, Inc., 497 F.2d 871 (6th Cir. 1974). Both decisions are Title VII cases alleging discriminatory employment practices in violation of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* (1970).

back pay should be awarded; then, prior to referring the matter to the magistrate, it established a flexible standard for the magistrate to apply in computing the back pay awards. Thus only after all of the Title VII substantive matters had been determined by the judge was the case referred to the magistrate serving as master.[116] The appellate court approved this procedure.

The Seventh Circuit's decision in *Flowers v. Crouch-Walker Corp.*,[117] on the other hand, limited the use of reference to a magistrate as master in Title VII actions. The procedure followed in the district court was particularly offensive to the letter and spirit of Title VII and Rule 53 because the court clerk, rather than the chief judge of the district, assigned the case to a magistrate, not to a judge. Applying the restrictive *Wingo* analysis to Title VII, the Seventh Circuit held that the local rule[118] requiring the district court clerk to assign all civil rights employment discrimination cases to magistrates was invalid because it was inconsistent with the Title VII provision[119] requiring the chief judge of each district to immediately assign each pending Title VII case to a *judge* in the district. It was not until after the magistrate had conducted pretrial conferences, supervised discovery, and received status reports that the clerk referred the case to a district judge. Soon thereafter, the judge referred the case back to the magistrate for further conferences and a final pretrial order. This procedure clearly violated Title VII.[120] The case was returned to the judge, who, "using a standard form and without purporting in any way to exercise a discriminating judgment with respect to this particular case,"[121] ordered that in compliance with the

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116. 497 F.2d at 421-22. The same procedure was followed by the district court and affirmed with approval in United States v. Masonry Contractors Ass'n, 497 F.2d 871, 876 (6th Cir. 1974).

117. 507 F.2d 1378 (7th Cir. 1974).

118. Local Magistrates Rule 1(D)(2)(b)(i) of the Northern District of Illinois provides:

> D. Pursuant to section 636(b), Title 28, United States Code, each full-time magistrate is assigned and shall perform the following additional duties anywhere in this district and for those purposes is hereby granted the following plenary powers:
>
> . . . .
>
> (2) Civil Proceedings
>
> . . . .
>
> (b) to consider all motions and, where appropriate, [prepare] findings of fact and proposed conclusions of law in the following nonjury matters:
> (i) Actions brought under Title VII

appearing in 507 F.2d at 1379.

119. 42 U.S.C. § 2000e-5(f)(4) (1970), requires the chief judge of the district to "designate a judge in such district to hear and determine the case." The only exception is found in 42 U.S.C. § 2000e-5(f)(5) (1970), which permits appointment of a master pursuant to Rule 53 if the designated judge "has not scheduled the case for trial within one hundred and twenty days after issue has been joined."

120. 42 U.S.C. § 2000e-5(f)(4) (1970).

121. 507 F.2d at 1379. The standard form is clearly violative of the "exception" doctrine of Rule 53.

one hundred and twenty day restriction in Title VII,[122] the case be referred to the magistrate as a master for preparation of a report, including findings of fact and conclusions of law. The magistrate's report was upheld "in all essential respects" by the district judge when he entered judgment.[123] In sum, the magistrate had not served to assist the judge, he had supplanted him.[124]

In *TPO, Inc. v. McMillen*,[125] an earlier Seventh Circuit case, the practice of referring motions to dismiss or motions for summary judgment to magistrates was considered. The court concluded that the magistrate did not have the power to decide such motions because they involved decisionmaking that should be reserved to article III judges. Because such delegation by the district court was inconsistent with the Constitution, the Federal Magistrates Act could not be a source of that power.[126]

In cases like *Flowers* and more specifically *TPO*, it appeared that there was "an increasing use by district judges of special masters for purposes involving the abdication of judicial decision making authority forbidden by the Constitution or in contravention of Rule 53(b)." In response to this perception, then Acting Attorney General Bork ordered all Department of Justice attorneys "not to agree to the designation of a Magistrate as a special master whenever they conclude that such designation would be in contravention of the Constitution or Rule 53(b)." [127] Barely a month after the

122. 42 U.S.C. § 2000e-5(f)(5) (1970).

123. 507 F.2d at 1379.

124. *See* O'Shea v. United States, 491 F.2d 774, 776 (1st Cir. 1974).

A related area in which magistrates have also been utilized as masters is in actions arising under the Voting Rights Act, 42 U.S.C. § 1973 *et seq*. (1970). In City of Richmond v. United States, 376 F. Supp. 1344 (D.D.C. 1974), the city of Richmond sought a declaration, as required by 42 U.S.C. § 1973c (1970), that its annexation of certain land neither intended to nor in fact would deny or abridge the right to vote on account of race or color. The court referred the case to a magistrate, pursuant to Rule 53, who heard testimony as to whether the plan of annexation would dilute the black vote. On the basis of the magistrate's findings that the city had failed to meet its burden of disproving any discriminatory purpose or effect, the court declined to grant declaratory relief.

On appeal, the Supreme Court vacated the judgment and remanded. 422 U.S. 358 (1975). In concluding that further proceedings were necessary to update and reassess the evidence, the Court discussed the role of the master in such proceedings, leaving the clear implication that the reference to the master was permissible practice. 422 U.S. at 372-79. Moreover, the dissent also implicitly approved of the reference to a master. 422 U.S. at 384. (Brennan, J., dissenting).

125. 460 F.2d 348 (7th Cir. 1972). The *TPO* decision is invaluable for its discussion of the relevant legislative history of the Magistrates Act.

126. 460 F.2d at 359. The court, quoting from the Senate report that accompanied passage of the Magistrates Act, S. REP. NO. 371, 90th Cong., 1st Sess. 25-26 (1967), stated that section 636(b) does not permit the " 'abdication of the decisionmaking responsibility' of district courts," and " 'cannot be read in derogation of the fundamental responsibility of judges to decide the cases before them'." 460 F.2d at 359 & n. 57.

127. 28 C.F.R. § 50.11 (1975). The order also suggests that where necessary, relief by application for a writ of mandamus could be sought from appellate courts.

promulgation of the regulation, Judge Frankel, in *United States v. Eastmount Shipping Corp.*,[128] presided over an action by the United States against a carrier for alleged cargo damage. The Department of Justice attorney opposed the designation of a magistrate to serve as a master in the case. Although recognizing the innovative spirit of the Magistrates Act, Judge Frankel reluctantly concluded that "the court accepts the position . . . that a reference to one of our distinguished Magistrates of [a] claim for $10,010.47 would, as the law now stands, be an impermissible 'abdication of judicial decisionmaking powers.' "[129]

On the basis of the decisions involving magistrates serving as special masters, it appears settled that magistrates may be delegated the duties of a special master either pursuant to a local district court rule promulgated under authority of section 636(b)(1), or pursuant to Rule 53. In either case, the delegation cannot be inconsistent with a law of the United States—as was the case in *Flowers*—or inconsistent with the Constitution—as in *TPO*. Finally, in either form of delegation, when a magistrate serves as a special master in a civil action, he must perform only those tasks traditionally permitted by Rule 53.[130]

2. *Pretrial and Discovery Proceedings*

Section 636(b)(2) suggests that magistrates may be delegated duties that assist district judges in the conduct of pretrial or discovery proceedings. Of

128. 62 F.R.D. 437 (S.D.N.Y. 1974).

129. *Id.* at 441. *But see* Kliban v. United States, 65 F.R.D. 6 (D. Conn. 1974). Judge Frankel's opinion in *Eastmount* spoke very highly of the potential of the Magistrate's Act and of his district's magistrates: "The five magistrates serving in this court have performed a valuable array of services in the management of pretrial and other aspects of our proceedings." 62 F.R.D. at 438.

130. In this respect, the Supreme Court reaffirmed that the principles regarding references to masters set forth in LaBuy v. Howes Leather Co., 352 U.S. 249 (1957), still apply whenever the reference is made pursuant to Rule 53. Mathews v. Weber, 423 U.S. 261, 273 (1976).

In two cases that postdate the promulgation of 28 C.F.R. § 50.11 (1975), courts have refused to grant writs of mandamus to vacate references to magistrates as masters. In Vickers Motors, Inc. v. Wellford, 502 F.2d 967 (6th Cir. 1974), the private-party defendant was denied the mandamus writ he had sought after the district judge referred discovery motions to a magistrate for a hearing and recommendation. In Chicago Housing Authority v. Austin, 511 F.2d 82 (7th Cir. 1975), the city housing authority sought mandamus to vacate the district judge's order referring proceedings to review implementation of an order to desegregate housing where there had been a five-year delay in compliance. In both cases, the appellate courts determined that there had been no abdication of the ultimate decisionmaking and that if the challenged order or reference were erroneous or prejudicial, appeal would provide an adequate remedy. However, in TPO, Inc. v. McMillen, 460 F.2d 348 (6th Cir. 1972) (decided prior to issuance of 28 C.F.R. § 50.11 (1975)), the court of appeals issued the writ, holding that the district judge had delegated ultimate decisionmaking duties to the magistrate by permitting the magistrate to decide motions to dismiss or motions for summary judgment. With regard to these duties *see* discussion of "dispositive" matters in Act of Oct. 21, 1976, Pub. L. No. 94-577, 90 Stat. 2729, reprinted at note 174 *infra*.

the various 36,766 additional duties assigned to magistrates in civil actions during fiscal 1975, magistrates conducted 17,776 civil pretrial conferences and reviewed 7,938 discovery and other motions in civil cases.[131] Despite the significant degree of participation by magistrates in these matters, there have been only a handful of cases involving magistrates and discovery or pretrial procedures. However, this is explainable by the limited number of conflicts that arise in this area; discovery and pretrial proceedings usually involve nonappealable orders that can be resolved by the district judge prior to or at trial.

Kliban v. United States[132] is the only significant case decided squarely on the authority of section 636(b)(2).[133] In this action for refund of estate taxes, the parties stipulated to the facts and filed cross-motions for summary judgment. The motions and briefs were referred to the magistrate for his "initial review, hearing of any requested oral argument and submission of a recommended memorandum ruling for adoption, modification or rejection" pursuant to a local court rule.[134] The government attorney objected to the referral, citing the Department of Justice directive,[135] and challenged the court's authority to utilize a magistrate as a master for this purpose.

The *Kliban* court's response provided a thorough and much-needed analysis. First, the court noted that the summary judgment motions had not been referred to the magistrate in his capacity as special master, but to a magistrate *qua* magistrate in accordance with section 636(b)(2) and a local district court rule.[136] The court condemned the narrowness of the govern-

131. ANNUAL REPORT, *supra* note 8, at 135 table 2.

132. 65 F.R.D. 6 (D. Conn. 1974). *See* Remington Arms Co. v. United States, 461 F.2d 1268 (2d Cir. 1972), affirming the district court's approval and adoption of the magistrate's recommendation to grant plaintiff's summary judgment motion in an excise tax refund case.

An example of the high esteem in which a magistrate can be held by his district court and its bar can be found in these Connecticut, Second Circuit cases, all involving the same magistrate, and all approving his actions. *See, e.g.*, Kliban v. United States, 65 F.R.D. 6, 7 (D. Conn. 1974); Remington Arms Co. v. United States, 461 F.2d 1268 (2d Cir. 1972); Givens v. W.T. Grant Co., 457 F.2d 612, 613 & n.1 (2d Cir.), *vacated and remanded on other grounds*, 409 U.S. 56 (1972); Asparro v. United States, 352 F. Supp. 1085, 1086 (D. Conn. 1973).

133. There have been several cases concerning referral of evidentiary hearings to magistrates on motions to suppress evidence in criminal cases. The foremost case is Campbell v. United States Dist. Ct., 501 F.2d 196 (9th Cir.), *cert. denied*, 419 U.S. 879 (1974), in which the court held that a magistrate could preside over such evidentiary hearings, make proposed findings of fact and conclusions of law, and present them along with a proposed order to the district court. Unlike the Supreme Court's conclusion in *Wingo*, discussed at notes 35-57 *supra* and accompanying text, the court found no requirement in the Federal Rules of Criminal Procedure that a judge conduct such hearings. The court also stated that if the magistrate's factual findings were challenged, a *de novo* review by the judge would be required. *See also* United States v. Bergera, 512 F.2d 391 (9th Cir. 1975); United States v. Belculfine, 508 F.2d 58 (1st Cir. 1974); United States v. Ciovacco, 384 F. Supp. 1385 (D. Mass. 1974).

134. 65 F.R.D. 6, 7 (D. Conn. 1974). The local rule is quoted at 65 F.R.D. at 8-9.

135. 28 C.F.R. § 50.11 (1975).

136. In Mathews v. Weber, 423 U.S. 261, 273 (1976), the Court stated: "[N]ot every reference, for whatever purpose, is to be characterized as a reference to a special master."

ment's approach, observing that it was clearly contemplated by the statute that magistrates would provide "assistance to a district judge in the conduct of pretrial or discovery proceedings."[137] Second, there was no judicial abdication. The final decision on the motions was wholly reserved to the judge following review of the magistrate's report and recommendation. Moreover, even after reaching his decision, the judge would entertain requests for reconsideration unless previously waived.

The principle that emerges from the *Kliban* decision is important in several respects. When a reference is made to a magistrate *qua* magistrate, rather than to a magistrate as a special master, the restrictions that attach to Rule 53 referrals do not apply. Given the large number of discovery, pretrial, and preliminary motion matters that are annually disposed of by magistrates and the paucity of judicial decisions, it is reasonable to conclude that magistrates are being well utilized in this area. The *Kliban* decision, in recognition of these facts, allows magistrates to continue functioning in these areas pursuant to local district court rules.[138] Finally, the decision in *Kliban* reemphasizes that subsections (1)-(3) of section 636(b) are merely illustrative of the wide range of duties which may be delegated.[139] Two such additional duties, consensual references and review of appeals from administrative agency orders, have received judicial review.

3. *Consensual References*

As the plain meaning of the statute, its legislative history, and its judicial interpretation make clear, the three magisterial duties noted in section 636(b) are illustrative rather than exhaustive. Too much litigation has been wasted trying to fit a particular task performed by a magistrate within one of the three subsections. The central thrust of section 636(b) is that district courts, by promulgating local court rules, may delegate any additional duty to a magistrate which is not offensive to the Constitution or the federal laws.

The purpose behind the Magistrates Act was to create a new tier of judicial officers [140] which would "provide district Judges with more time to devote to the actual trial of cases and the writing of opinions."[141] This would

137. 65 F.R.D. at 8, *quoting* 28 U.S.C. § 636(b)(2) (1970). The court stated that "[t]he Act has plainly created a new judicial officer of potentially far greater utility than the former master intermittently drawn from the bar for special service in the extraordinary case. Accordingly, this Court's implementation of the statute has been governed by considerations of practical substance to the extent 'not inconsistent with the Constitution and laws of the United States'." 65 F.R.D. at 8.

138. 28 U.S.C. § 636(b) (1970).

139. 65 F.R.D. at 8. In Mathews v. Weber, 423 U.S. 261 (1976), the Court stated that the "three examples § 636(b) sets out are . . . not exclusive." *Id.* at 267. *See* note 55 *supra*. *See also Hearings on the Federal Magistrates Act Before Subcomm. No. 4 of the House Comm. on the Judiciary*, 90th Cong., 2d Sess. 81 (1968) (testimony of bill sponsor Senator Tydings).

140. HOUSE REPORT, *supra* note 1, at 4257.

141. *Hearings on S. 3475 Before the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary*, 89th Cong., 2d Sess. 3 (1966).

be accomplished if the district judges were "willing to experiment with the assignment to magistrates of other functions."[142] It was hoped that the judges would be "innovative" and "imaginative," and not merely assign to magistrates the three suggested duties of section 636(b). It was foreseen that judges would utilize magistrates "in these areas and perhaps even come up with new areas to increase the efficiency of their courts."[143]

The First Circuit, in *DeCosta v. CBS*,[144] discussed and approved a procedure for consensual reference by parties of certain matters to magistrates. The *DeCosta* case is part of a twelve year trademark, service mark, and unfair competition suit concerning allegedly unauthorized use of the Paladin character and "Have Gun Will Travel" slogan. In this trial, the parties stipulated that certain counts be determined on the basis of the trial transcript and additional testimony. The matter was referred to a magistrate who took testimony and reported his findings of fact and conclusions of law. Only then did the defendants object to the reference, arguing that the reference and the magistrate's recommendation sustaining the plaintiff's position were *ultra vires*. On the basis of the Magistrates Act and *Kimberly v. Arms*,[145] the district court ruled that the delegation did not contravene the Constitution and that the magistrate's exercise of jurisdiction was legitimate. It concluded that a consensual reference to a magistrate was not a reference to a special master pursuant to section 636(b)(1).[146] On appeal, the First Circuit decided that it was "constitutionally and statutorily permissible to refer cases, with the consent of all parties, for intitial decision" by a magistrate.[147] The court also affirmed that the cross-motions were not made to the magistrate as a master, but were referred to the magistrate *qua* magistrate as an additional duty.

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142. S. REP. No. 371, 90th Cong., 1st Sess. 26 (1967).

143. *Hearings on S. 945 before Subcomm. No. 4 of the House Comm. on the Judiciary*, 90th Cong., 2d Sess., ser. 17, at 81 (1968).

144. 520 F.2d 499 (1st Cir. 1975), *rev'g on other grounds* 383 F. Supp. 326 (D.R.I. 1974). For an analysis of the *DeCosta* decision, see Note, *Federal Magistrates and the Implications of Consensual References*, 4 FORDHAM URB. L.J. 129, 137-39, 142-45 (1975).

145. 129 U.S. 512 (1889). In *Kimberly*, a consensual reference to a non-article III officer was considered constitutional and not an abdication of power by the article III judge so long as the determination of the non-article III officer was subject to the judge's review.

146. 383 F. Supp. 326, 337 (D.R.I. 1974). The court of appeals reversed that part of the *DeCosta* decision dealing with the standard of review to be employed by the judge. The district court relied on the standards set forth in *Kimberly*: the magistrate's report was "presumptively correct" and would only be reversed if there were "manifest error." *Id.* at 336-39. The court of appeals suggested that a more appropriate standard of review would be that found in Rule 52(a) of the Federal Rules of Civil Procedure. It found the district court's failure to review the magistrate's report under Rule 53(a) and to employ the "clearly erroneous" standard of Rule 52(a) was itself erroneous. 520 F.2d 499, 508-09 (1st Cir. 1975).

147. 520 F.2d at 507-08. This obviously meets the basic requirement of 28 U.S.C. § 636(b) (1970).

Viewing the magistrate as an article I judge[148] appointed pursuant to constitutionally granted congressional power,[149] the First Circuit Court of Appeals reviewed the authority for consensual references to non-article III officers once a court proceeding has begun. In an early Supreme Court decision, *Heckers v. Fowler,*[150] a consensual reference was determined to be "one of the modes of prosecuting a suit to judgment as well established and as fully warranted by law as a trial by jury."[151] Unlike the situation in *Labuy v. Howes Leather Co.,*[152] where there was wholesale reference of a complex antitrust suit to a private master despite objections on all sides, a consensual reference by definition would involve a mutual decision by both parties to agree to another arbiter. Comparing consensual reference to a magistrate with an agreement to arbitrate a future dispute, the *DeCosta* court noted that in a consensual reference the parties were able to make a more informed choice to waive their access to an article III judge because the issues of their dispute were already defined.[153]

Finally, the court decided that Congress had considered consensual references an additional magisterial duty when the Act was passed. As an early Senate staff memorandum noted: "The use of magistrates for duties that do not require the employment of an Article III judge, or in cases in which parties consent to the use of a magistrate, may do much to increase the efficiency of the Federal Courts."[154]

The *DeCosta* decisions and analyses go a long way towards fully implementing the Federal Magistrates Act. A previously lurking, often suggested but never fully pronounced notion was articulated in these well-reasoned decisions: a magistrate may be delegated, pursuant to local district court rules, any additional duty that all parties to a civil suit mutually consent to have the magistrate perform, so long as the duty is permitted by the Constitution, not violative of any federal law, and the referring judge retains the power to review, and to adopt, modify, or reject the magistrate's determination.[155] District courts should utilize magistrates to a much greater degree

148. *See* Glidden Co. v. Zdanok, 370 U.S. 530, 543, 552 (1962)

149. U.S. CONST. art. I, § 8, cl. 9.

150. 69 U.S. (2 Wall.) 123 (1864).

151. *Id.* at 128-29, *quoted in* 520 F.2d at 504. *See also* Kimberly v. Arms, 129 U.S. 512, 524 (1889).

152. 352 U.S. 249 (1957).

153. The court noted that the goal of arbitration and consensual reference was the same: "relieving scarce judicial resources and . . . accommodating the parties." 520 F.2d at 505. Certainly the former, if not the latter, is a goal of the Federal Magistrates Act. *See Hearing on S. 3475 Before the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary*, 89th Cong., 2d Sess. (1966) [hereinafter cited as *Hearings*].

154. *Hearings, supra* note 153, at 14.

155. The First Circuit's decision noted that 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." 520 F.2d at 504.

through the consensual reference technique, a method which would effectively provide district judges with more time to hear trials and write opinions.

4. Review of Administrative Determinations: Social Security Appeals

At the opposite end of the spectrum from consensual reference is reference ordered by a district judge *sua sponte.* Many matters now come before the federal district courts as appeals on the record from administrative agencies. This area presents an excellent but largely untapped opportunity for district judges to utilize non-article III judicial officers. The role of district courts in these cases typically involves a review of the agency's legal conclusions and a determination of whether the record contains substantial evidence to support the contested finding.[156] There are no *de novo* evidentiary hearings involved. Magistrates could be used to review and summarize the record (which is often massive) and make a recommendation for disposition of such appeals either as special masters under section 636(b)(1) or as magistrates *qua* magistrates pursuant to section 636(b)(2).

Social security benefit cases constitute a large and constantly growing area of federal district courts' appellate jurisdiction.[157] Since 1968, social security cases have increased almost 400 percent; from 1974 to 1975 alone, the increase was 63 percent.[158] The Social Security Act provides for review of the Secretary's final determination by a district court on the basis of the pleadings and the administrative record, but the court must accept the Secretary's findings of fact so long as they are supported by substantial evidence.[159]

In *Mathews v. Weber,*[160] a unanimous Supreme Court, speaking through Chief Justice Burger, approved the reference of social security disability cases to magistrates. The Court determined that on the basis of the district court's local rule,[161] the reference to magistrates for preliminary review was an "additional duty" contemplated by the Federal Magistrates Act. Rejecting the Secretary's argument that the magistrate was functioning as a special master, the Court noted that "not every reference, for whatever purpose, is

156. *See* 5 U.S.C. § 706(2)(E) (1970).

157. In fiscal year 1975, there were 5,846 social security reviews. ANNUAL REPORT, *supra* note 8, at 226-27 table 34.

158. *Id.*

159. 42 U.S.C. § 405(g) (1970).

160. 423 U.S. 261 (1976).

161. General Order No. 104-D(A) of the United States District Court for the Central District of California, appearing in part at 423 U.S. 261, 264 n.1 (1976), provides for reference of "[a]ctions to review administrative determinations re entitlements to benefits under the Social Security Act and related statutes, including but not limited to actions filed under 42 U.S.C. § 405(g)." 423 U.S. at 264 & n.1.

to be characterized as a reference to a special master."[162] Referring to section 636(b), the district court's local rule, and the *LaBuy* decision, the Court concluded that "[t]he Magistrate here acted in his capacity as a magistrate . . . under a reference authorized by an Act passed 10 years after *LaBuy* was decided."[163] Finally, it was clear that the earlier *Wingo* decision should have no bearing on the appellate review references to magistrates.[164]

While the Court went to great lengths to caution that its decision was limited to the precise reference and to the local rule that was challenged, the decision suggests that any local rule delegating a preliminary review function to magistrates in social security cases will be permissible, so long as the ultimate decision rests with an article III district judge.[165] By local rule, a district court should be able to direct the magistrates to make a preliminary review of the closed administrative record, and a recommendation as to whether there is substantial evidence on the record to support the Secretary's decision.[166] Such a procedure would provide substantial assistance to the judge and the parties, and would be consonant with the Magistrates Act's general purpose.[167] By culling through what are often voluminous records and focusing the court's attention on the relevant portions, the magistrate would expedite the disposition of the case. With the parties participating at each step and addressing their arguments to the court on the basis of the magistrate's preliminary evaluation and recommendation, this procedure would also narrow the dispute. Yet because the judge may follow the magistrate's report, ignore it, or conduct review in whole or in part, the full right of the parties to judicial review would be protected.[168]

If district courts take advantage of the *Weber* decision, there should be a vast increase in the utilization of magistrates. During 1975, while there were 5,846 social security reviews filed,[169] only 537 were disposed of by magistrates.[170] Given the volume and size of the administrative records found in social security cases and the Supreme Court's endorsement of a broadly

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162. 423 U.S. at 273.

163. *Id.* at 274-75.

164. *Id.* at 275.

165. "The authority—and the responsibility—to make an informed, final determination, we emphasize, remains with the judge." *Id.* at 271.

166. The Court suggested that where a case turns solely upon issues of law, *e.g.*, statutory interpretation, the case should be sent directly to the judge. *Id.* at 270 n.6.

167. During magistrates' salary hearings in 1972, a Senate subcommittee noted that magistrates may be authorized to review social security appeals. S. REP. NO. 1065, 92d Cong., 2d Sess. 3 (1972). The Judicial Conference approved a jurisdictional checklist of delegable duties. Item 24 specifically discusses and suggests social security reviews. The checklist is printed in *Hearings on S. 1283 Before the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary*, 94th Cong., 1st Sess. 24-26 (1975).

168. 423 U.S. at 271.

169. ANNUAL REPORT, *supra* note 8, at 226-27 table 34.

170. *Id.* at 502-06 table M-4. The number of social security cases should eventually be halved by the removal of Black Lung benefit claims to the Department of Labor, pursuant to the

phrased local rule referring preliminary review of such records to magistrates, it is fairly certain that district judges will find it prudent judicial administration to promulgate such a rule and take advantage of this opportunity to avail themselves of the assistance of magistrates.

III. RECENT AND PROPOSED CHANGES

A. *Pretrial and Prisoner Petitions*

The *Wingo* decision demonstrates one paradox in the current implementation of the Federal Magistrates Act. If a prisoner petitions a federal district court pursuant to the Habeas Corpus Act, a magistrate cannot conduct an evidentiary hearing; yet if the same prisoner seeks the same relief by means of a Civil Rights Act petition, the magistrate may conduct a hearing. However, according to the *Flowers* decision, if an individual files a complaint pursuant to Title VII of the Civil Rights Act, a magistrate is barred from hearing any evidence. These inconsistent determinations are the result of statutes that require "judges" or "courts" to perform specific functions, despite the fact that these functions are not exclusively the rendering of ultimate decisions.

The best way to ameliorate this situation is by legislation. In the Federal Rules of Evidence, for example, it is explicitly provided that "[t]he terms 'judge' and 'court' in these rules include United States magistrates." [171] The Congress of the United States has in fact recently dealt with the Magistrates Act.

In response to the *Wingo* decision, in which the Chief Justice registered his support for supplemental legislation in a dissenting opinion,[172] the Committee on the Administration of the Federal Magistrates System of the Judicial Conference proposed an amendment to the Federal Magistrates Act.[173] In early 1976, the Senate passed an amendment to section 636(b) very similar to that proposed by the Judicial Conference which amendment, with minor changes, became law in October 1976.[174] The effect of this amendment is to authorize a district judge to designate a magistrate to per-

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Federal Coal Mine Health and Safety Acts of 1969, 30 U.S.C. § 901 *et seq.* (1970). At present, almost half of the social security reviews are Black Lung disability benefits denials. ANNUAL REPORT, *supra* note 8, at 228 table 35. *But see* note 211 *infra*.

171. FED. R. EVID. 1101(a).

172. 418 U.S. 461, 487 (1974).

173. *Hearings on S. 1283 Before the Subcomm. on Improvements in Judicial Machinery of the Senate Subcomm. on the Judiciary*, 94th Cong., 1st Sess. 33-38 (1975). A discussion of the *Wingo* decision appears *id.* at 36-37.

174. Act of Oct. 21, 1976, Pub. L. No. 94-577, 90 Stat. 2729. A full reprint of Pub. L. No. 94-577 follows.

> An Act to improve judicial machinery by further defining the jurisdiction of United States magistrates, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 636(b) of title 28, United States Code, is amended to read as follows:

(b)(1) Notwithstanding any provision of law to the contrary—

(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.

(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.

(C) the magistrate shall file his proposed findings and recommendations under subparagraph (B) with the court and a copy shall forthwith be mailed to all parties.

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. 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.

(2) A judge may designate a magistrate to serve as a special master pursuant to the applicable provisions of this title and the Federal Rules of Civil Procedure for the United States district courts. A judge may designate a magistrate to serve as a special master in any civil case, upon consent of the parties, without regard to the provisions of rule 53(b) of the Federal Rules of Civil Procedure for the United States district courts.

(3) A magistrate may be assigned such additional duties as are not inconsistent with the Constitution and laws of the United States.

(4) Each district court shall establish rules pursuant to which the magistrates shall discharge their duties.

SEC. 2. (a) (1) Rule 8(b) of the Rules Governing Section 2254 Cases in the United States District Courts is amended to read as follows:

(b) FUNCTION OF THE MAGISTRATE.—

(1) When designated to do so in accordance with 28 U.S.C. § 636(b), a magistrate may conduct hearings, including evidentiary hearings, on the petition, and submit to a judge of the court proposed findings of fact and recommendations for disposition.

(2) The magistrate shall file proposed findings and recommendations with the court and a copy shall forthwith be mailed to all parties.

(3) 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.

(4) 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. A judge of the court may accept, reject, or modify in whole or in part any findings or recommendations made by the magistrate.

(2) Rule 8(b) of the Rules Governing Section 2255 Proceedings for the United States District Courts is amended to read as follows:

(b) FUNCTION OF THE MAGISTRATE.—

(1) When designated to do so in accordance with 28 U.S.C. § 636(b), a magistrate may conduct hearings, including evidentiary hearings, on the mo-

form additional duties "notwithstanding any provision of law to the contrary." [175] This provision is intended to assure that magistrates could be permitted to perform those pretrial, nondispositive duties intended by the Magistrates Act, and it would overcome restrictions derived from statutes enacted prior to the Magistrates Act.[176]

Amended section 636(b)(1) expands the civil jurisdiction of magistrates and authorizes courts to delegate duties to magistrates according to whether the matter is dispositive or not dispositive of the litigation. Motions for continuance, discovery questions, and general procedural matters would be considered nondispostive issues, and the magistrate's determination would become the ruling of the court unless a party filed a timely appeal.[177] With certain enumerated motions and determinations considered dispositve, the magistrate would be empowered to conduct all proceedings, including evidentiary hearings,[178] and recommend a decision to the judge, who would then make the ultimate determination.

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tion, and submit to a judge of the court proposed findings and recommendations for disposition.

(2) The magistrate shall file proposed findings and recommendations with the court and a copy shall forthwith be mailed to all parties.

(3) 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.

(4) 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. A judge of the court may accept, reject, or modify in whole or in part any findings or recommendations made by the magistrate.

(b) (1) Rule 8(c) of such Rules Governing Section 2254 Cases is amended by striking out "and shall conduct the hearing" and inserting in lieu thereof the following: "and the hearing shall be conducted."

(2) Rule 8(c) of such Rules Governing Section 2255 Proceedings is amended by striking out "and shall conduct the hearing" and inserting in lieu thereof the following: "and the hearing shall be conducted."

(c) The amendments made by this section shall take effect with respect to petitions under section 2254 and motions under section 2255 of title 28 of the United States Code filed on or after February 1, 1977.

175. Act of Oct. 21, 1976, Pub. L. No. 94-577 § 1, 90 Stat. 2729 (amending 28 U.S.C. § 636(b)(1)).

> [T]hat language . . . was intended to overcome the debate they had in the decision in Wingo v. Wedding, as to just what was meant when the statute on habeas corpus uses the word, judge. And of course, it would be virtually impossible for Congress to go through and amend every appropriate statute, to say judge and/or magistrate . . . . So it is the intent of the drafters of both the Judicial Conference and the legislative staff that that language "notwithstanding any provision of law to the contrary" is intended to cover just that situation.

Hearings on S. 1283, supra note 173, at 30.

176. *See* Wingo v. Wedding, 418 U.S. 461, 468-69 (1974); JUDICIAL CONFERENCE OF THE UNITED STATES, PROPOSED AMENDMENT TO THE FEDERAL MAGISTRATES ACT, *reproduced in Hearings on S. 1283, supra* note 173, at 36 [hereinafter cited as JUDICIAL CONFERENCE] (citation to *Hearings on S. 1283*).

177. Act of Oct. 21, 1976, Pub. L. No. 94-577 § 1, 90 Stat. 2729 (amending 28 U.S.C. § 636 (b)(1) (1970)).

178. *Id.*, (amending 28 U.S.C. § 636 (b)(1)(B) (1970)). *See* TPO, Inc. v. McMillen, 460 F.2d 348 (7th Cir. 1972).

The amendment specifically provides, perhaps unnecessarily, that a magistrate may be designated to preside over "applications for posttrial relief made by individuals convicted of criminal offenses and . . . prisoner petitions challenging conditions of confinement," in the same manner and subject to the same restrictions imposed for nondispositve matters.[179] This provision, expanding section 636(b)(3), and the habeas corpus amendments added to the Senate bill by the House overcome the problematic *Wingo* decision by altering the requirements of 28 U.S.C. § 2243 for habeas relief under 28 U.S.C. §§ 2254, 2255.[180] Amended section (b)(1) concludes by delineating the magistrate's reporting procedure to the judge and the parties, and by providing a ten-day right of objection to proposed findings and recommendations by the magistrate.[181] The judge's right to accept, modify, or reject the magistrate's report, to consider the matter *de novo*, or to remand the matter to the magistrate with instructions would be preserved.[182]

The intent of amended section 636(b)(1) is clear. It would permit a district court judge to designate a magistrate to hear *any* pretrial matter. The reference would be made to the magistrate as a judicial officer, not a special master,[183] and his function would be to discharge his duties *qua* magistrate. All statutes that require a "court" or "judge" to perform a certain function would be modified to permit a magistrate to conduct the task. Because all determinations which would be dispositive of the matter before the court would be reserved for determination by an article III judge, no constitutional guarantee would be disturbed. Moreover, the provision does not overrule statutory provisions which are non-jurisdictional in nature.[184] The explicit grant of power should encourage maximum utilization of magistrates by district courts in pretrial and prisoner petition matters.

B. *Special Master and Consensual Reference*

Under the amended statute, a magistrate may still be appointed to serve as a special master whenever the matter before the court appropriately calls

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179. Act of Oct. 21, 1976, Pub. L. No. 94-577 § 1, 90 Stat. 2729 (amending 28 U.S.C. § 636(b)(1)(B) (1970)). This would not cover applications to original judges for reduction of sentences, pursuant to Rule 53 of the Federal Rules of Criminal Procedure. JUDICIAL CONFERENCE, *supra* note 176, at 36.

180. *See* Wingo v. Wedding, 418 U.S. 461, 469-73 (1974). Note also that section 2 of Pub. L. No. 94-577, cited in full at note 174 *supra*, amends the habeas corpus rules of procedure effective Feb. 1, 1977, to make those rules comport with the amended Magistrates Act.

181. Act of Oct. 21, 1976, Pub. L. No. 94-577 § 1, 90 Stat. 2729 (amending 28 U.S.C. §§ 636(b)(1) and (b)(1)(C) (1970)). *See* JUDICIAL CONFERENCE, *supra* note 176, at 37.

182. Act of Oct. 21, 1976, Pub. L. No. 94-577 § 1, 90 Stat. 2729 (amending 28 U.S.C. § 636 (b)(1) (1970)).

183. *See* Flowers v. Crouch-Walker Corp., 507 F.2d 1378 (7th Cir. 1974).

184. *See, e.g.*, 28 U.S.C. § 455 (1970) (basis for judicial disqualification).

for such a reference.[185] These references are made by the judge *sua sponte* and can be made without the consent and over the objection of the parties. In these situations, the reference is one to a special master; the magistrate is appointed to serve the limited function of a special master.[186] Thus, the controlling restrictions of the "exception" language found in Rule 53 and *LaBuy v. Howes Leather Co.*[187] have not been changed by the recent amendment.[188] The advantages of having a judicial officer serve as special master at no cost to the litigants, as well as the absence of potential for conflict or delay in making the appointment, speak well for the retention of this section. The decision to retain the Rule 53 limitations was apparently also motivated by the desire to avoid any constitutional complication regarding ultimate decisionmaking by a non-article III judicial officer in a nonconsensual reference.[189]

The amendment to the Magistrates Act also codifies the consensual reference notion discussed in the *DeCosta v. CBS*[190] decisions. Both the district court and the appellate court decisions regarded the consensual reference to a magistrate as an additional duty not inconsistent with the Constitution or federal laws, but one to be distinguished from a reference to the magistrate as a special master.[191] The amendment technically categorizes the consensual reference as one to a special master, but with a new twist: the reference is to be "without regard to the provisions of Rule 53(b)."[192] The provision thus relieves the reference of the "exceptional" limitations of Rule 53(b) and the *LaBuy* decision, while at the same time providing the courts with a set of rules to govern the powers of the magistrate, the conduct of the proceedings, and the submission of the report.

No article III problems like those found in traditional references to masters are present in consensual reference. Unlike the special master reference pursuant to Rule 53(b), this reference is not *sua sponte* by the judge but by the consent of all parties. Hence, all parties concerned freely waive access to an article III judge in favor of another forum. The favorable experience in the federal courts with consensual agreement to alternative modes of dispute

185. 28 U.S.C. § 636(b)(1) (1970). *See* FED. R. CIV. P. 53(b).

186. In other words, the judge is referring the matter to a master pursuant to Rule 53(b) and the magistrate is a person appointed to be master pursuant to Rule 53(a).

187. 352 U.S. 249 (1957). *LaBuy* continues to govern special master references. *See* Mathews v. Weber, 423 U.S. 261, 274 (1976).

188. Act of Oct. 21, 1976, Pub. L. No. 94-577 § 1, 90 Stat. 2729 (amending 28 U.S.C. § 636 (b)(2) (1970)).

189. JUDICIAL CONFERENCE, *supra* note 176, at 37.

190. 520 F.2d 499 (1st Cir. 1975), *rev'g on other grounds* 383 F. Supp. 326 (D.R.I. 1974). *See* Act of Oct. 21, 1976, Pub. L. No. 94-577 § 1, 90 Stat. 2729 (amending 28 U.S.C. § 636 (b)(2) (1970)). *See also* Kimberly v. Arms, 129 U.S. 512 (1889).

191. 383 F. Supp. at 336-37; 520 F.2d at 507.

192. Act of Oct. 21, 1976, Pub. L. No. 94-577 § 1, 90 Stat. 2729 (amending 28 U.S.C. § 636 (b)(2) (1970)).

resolution under the Federal Arbitration Act [193] would seem to undermine any contention that such a consensual procedure compromises the dignity of article III. In addition, the standard of review to be employed by the judge would appear to be that generally applied to findings by a special master. The findings of fact should be adopted unless clearly erroneous;[194] the findings of law should be subject to full review by the court.[195]

C. *"Such Additional Duties": Automatic Referrals*

The amendment of section 636 specifically states that "[a] magistrate may be assigned such additional duties as are not inconsistent with the Constitution and laws of the United States."[196] This condition, contained in the central paragraph of the original section 636(b), was recognized as the primary restriction on "the range of matters that may be referred to a magistrate." [197] This section is designed to encourage continued experimentation and innovation by district courts in utilizing magistrates.[198] By placing this authorization in an entirely separate subsection, the drafters intended to free it from any restrictions imposed by other specific grants of authority to magistrates.[199] Furthermore, amended subsection 636(b)(3) should overcome the obstacles to automatic referrals identified in prior cases.

In the famous case of *Los Angeles Brush Manufacturing Corp. v. James*,[200] the Supreme Court interpreted Equity Rule 59's "exceptional condition" language to forbid blanket referrals of patent cases to masters.[201] The petitioners argued that by referring all cases to masters, the district court had established a policy that unjustly discriminated against them because it exposed patent litigants to unnecessary trouble: the pro-

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193. 9 U.S.C. §§ 1-14 (1970). The First Circuit in *DeCosta* has suggested that "the decision to waive in the case of a consensual reference is more knowledgeable than in the case of an agreement to arbitrate a future dispute because it is made after the issue has crystalized." 520 F.2d 499, 505 (1st Cir. 1975).

194. *See* DeCosta v. CBS, 520 F.2d 499, 509 (1st Cir. 1975); FED. R. CIV. P. 52(a), 53(e)(2); J. MOORE, FEDERAL PRACTICE ¶ 53.12(4), at 3007 (2d ed. 1975). The parties could stipulate that the magistrate's findings would be final, in which case only questions of law concerning his report could be raised. FED. R. CIV. P. 53(e)(4).

195. *See* DeCosta v. CBS 520 F.2d 499, 508-09 (1st Cir. 1975). In this respect, the *DeCosta* appellate court overruled the district court's adoption of the "manifest error" standards derived from Kimberly v. Arms, 129 U.S. 512 (1889). *See* 383 F. Supp. at 338-39.

196. Act of Oct. 21, 1976, Pub. L. No. 94-577 § 1, 90 Stat. 2729 (amending 28 U.S.C. § 636 (b)(3) (1970)).

197. Mathews v. Weber, 423 U.S. 261, 270 (1976).

198. JUDICIAL CONFERENCE, *supra* note 176, at 37. *See Hearings on the Federal Magistrates Act Before Subcomm. No. 4 of the House Comm. on the Judiciary*, 90th Cong., 2d Sess., at 81 (1968).

199. JUDICIAL CONFERENCE, *supra* note 176, at 37.

200. 272 U.S. 701 (1927).

201. *Id.* at 707.

ceedings before the masters were protracted and expensive. As the litigants had to bear the costs of the proceedings, they were, they asserted, forced to maintain a patent court at their own expense. The *LaBuy* case,[202] decided thirty years later under the Federal Rules of Civil Procedure, reiterated the issues of expense and delay as factors limiting references to masters.

The expense and delay problems that plagued the special master system in *Los Angeles Brush* and *LaBuy* no longer exist under the magistrate system. The perception of the master as a mere assistant to the trial judge, which led the court in *LaBuy* to characterize that reference as "little less than an abdication of the judicial function," [203] has evolved into a magistrate system where findings of fact may either be determinative, or be left undisturbed unless "clearly erroneous." [204] In addition, by listing this power separately, it escapes the restriction of the "exceptional" language of Rule 53,[205] which would apply only to certain references pursuant to amended section 636(b)(2).

In *Mathews v. Weber*,[206] the Supreme Court approved the delegation to magistrates of social security appeals. The decision permitted the automatic referral of social security cases to magistrates, but the Court limited its holding to social security appeals and the specific district court rule in dispute. Although the court expressed "no opinion with respect to either the wisdom or the validity of automatic referral in other types of cases,"[207] general use of automatic reference is both constitutionally valid and wise.

There are no constitutional impediments to automatic referrals of social security cases. These are appeals on the record; the magistrate's role would be to review the record, summarize it, and make a recommendation to the district judge. The ultimate decision, and the power to accept, modify, or reject the magistrate's report, as well as review the entire matter *de novo*, would rest with the judge. There would be no "abdication of the judicial function," but rather full compliance with the requirements of article III. In fact, this is the precise procedure approved of by the Court in *Weber*.[208] Thus, in response to the Court's first qualification, automatic re-

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202. 352 U.S. 249 (1957).

203. *Id.* at 256.

204. *See* discussion of consensual reference, note 190 *supra* and accompanying text.

205. *See* text accompanying note 199 *supra*.

206. 423 U.S. 261 (1976).

207. *Id.* at 274. While it expresses no explicit opinion, there is arguably an underlying assumption of automatic referral in at least one of the decision's footnotes: "Experience with the magistrate's role under the [Social Security] Act may well lead to the conclusion that sound judicial administration calls for sending directly to the District Judge those cases that turn solely upon issues of law." *Id.* at 271 n.6. The implication is that in cases not turning solely on issues of law, the cases should be sent "directly" to a magistrate.

208. 423 U.S. at 270. The subsequent brief paragraph attempting to limit the Court's approval to the specific review function at issue, *id.* at 270-71, does not detract from the Court's

ferrals of social security cases pursuant to amended section 636(b)(3) would be valid.

The second consideration is the wisdom of automatic referrals. In 1975 there were 5,846 social security cases filed in district courts, a 63.1 percent increase over 1974.[209] These social security appeals accounted for approximately five percent of all civil cases commenced in district courts.[210] There is, therefore, the potential to reduce a significant amount of a court's civil caseload by automatically referring these appeals to magistrates.[211] This potential has hardly been tapped: in 1975 only 537 social security cases were disposed of by magistrates.[212]

Utilization of magistrates is not only prudent from a caseload management perspective, but also from a judicial administration and political viewpoint. During hearings on the Omnibus Judgeship Bill, which requested additional district judges, the alternative of efficient utilization of magistrates was clearly an important factor.[213] Thus, there is great practical wisdom in

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sanction of such a preliminary review procedure. The rule involved was very broadly phrased and can be duplicated by any court desiring to avail itself of magistrate's assistance with social security cases.

209. ANNUAL REPORT, *supra* note 8, at 226 table 34.

210. *Id.* at 195.

211. The potential relief available to district courts is even more pronounced when the make-up and distribution of the social security cases are examined. Forty eight percent of these appeals are from denials of "Black Lung" disability benefits. Until the administration of these benefits is transferred to the Department of Labor, and thus made appealable to the courts of appeals, these cases will continue to flood the Social Security Administration and the district courts. Most of these "Black Lung" appeals are concentrated in the district courts of coal-producing areas. In 1975, Kentucky (Eastern District) had 667 Black Lung filings; West Virginia (Southern District), 507 filings; Pennsylvania (Middle District), 403 filings; and Virginia (Western District), 296 filings. ANNUAL REPORT, *supra* note 8, at 225. Use of automatic referrals to magistrates in these districts would greatly reduce the burden these cases place on the courts' dockets. Moreover, magistrates would quickly develop an expertise in this area which would bolster the efficient handling of these appeals.

Recent legislative developments provide additional support for this argument. On March 2, 1976, the House passed a bill amending the Federal Coal Mine Health and Safety Act, 30 U.S.C. § 801 *et seq.* (1970). H.R. 10760, 94th Cong., 2d Sess. (1976). "This legislation provides that the district court of the state in which the claimant resides will have jurisdiction to review, by civil action, any decision by the Secretary of Labor."

"Potentially, H.R. 10760 has ramifications for the magistrate workload . . . ." 8 THE THIRD BRANCH, March 1976, at 5.

Disability cases generally have created immense administrative problems for the Social Security Administration's appeals process. *See* Smith, *Social Security Appeals in Disability Cases,* 28 AD. L. REV. 13 (1976).

212. ANNUAL REPORT, *supra* note 8, at 502 table M-4. Five hundred thirty-seven is a miniscule fraction of the 36,766 civil matters disposed of by magistrates during 1975. *Id.*

213. JUDICIAL CONFERENCE, *supra* note 176, at 33. The Senate Judiciary Subcommittee conducting these hearings "strongly criticized the chief judges of several district courts who had been invited to testify as to their needs for additional judges because their courts had allegedly failed to take full advantage of the provisions of the Magistrates Act before seeking additional judge-power." *Id.*

the automatic referral process. Moreover, social security cases may only be the tip of the iceberg. There are numerous administrative orders that are appealable on the record to district courts. There is no reason why most of these orders should not be considered subject matter that could be automatically referred to magistrates using the same type of local rule and procedure as those found in *Weber.*

D. *Judicial Rules and Judicial Rulemaking*

Under the original statute, district courts were to delegate additional duties to magistrates by promulgating local court rules. Implementation of this portion of the Magistrates Act appears to have been less than successful. These local rules are not currently published nor is there any facility through which one district court can learn what another district court is doing to take advantage of the Magistrates Act.[214] The Administrative Office itself does not have a complete and current file of these local rules; it depends upon the individual courts to forward such information. Confusion is also created because many district courts establish magistrate duties through "general orders" of the court,[215] and even those courts that do authorize duties through rules often do not publish those rules with the bulk of the court's local rules.

Because the amendments to section 636(b) retain the rulemaking mechanism,[216] several improvements are necessitated. First, district courts should only delegate duties to magistrates by establishing rules; these delegation rules should be incorporated and published with the local rules of the district court. Furthermore, each court should be required to submit all rules to the Division of Magistrates or some other central office as soon as the rule becomes effective. The rules of all district courts should then be collected in one publication, distributed publicly, and seasonably updated. This publication would remove any confusion that now exists and would serve as a clearinghouse for courts to observe the substance and form of duties being delegated to magistrates in civil proceedings.

Second, either the Supreme Court, the Judicial Conference, or some similar body should have the power to promulgate certain uniform rules.

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214. Part of this discussion is based upon conversations with Daniel R. Caven, Division of Magistrates, Administrative Office of United States Courts. The only real set of guidelines available for promulgating local rules is the jurisdictional checklist published by the Judicial Conference and printed in *Hearings on S. 1283 Before the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary,* 94th Cong., 1st Sess. 24-26 (1975).

215. *See, e.g.,* Mathews v. Weber, 423 U.S. 261 (1976).

216. Act of Oct. 21, 1976, Pub. L. No. 94-577 § 1, 90 Stat. 2729 (amending 28 U.S.C. § 636(b)(4) (1970)) provides: "Each district court shall establish rules pursuant to which the magistrates shall discharge their duties."

These rules would deal with those civil proceedings in district courts that are of a standard and national character and would parallel the treatment afforded by the Federal Rules of Civil Procedure. Consider, for example, discovery. Discovery matters are delineated to a significant degree in Rules 26-37 of the Federal Rules of Civil Procedure. Delegation of many discovery duties to magistrates could be authorized by a similar uniform rule throughout all district courts. This same approach could also be used with prisoner petition duties and administrative appeal duties. However, the pretrial area, where great discretion and flexibility have traditionally been reserved for the judge,[217] would probably not benefit from uniform rules; each district court should be free to promulgate local rules that conform to its particular pretrial procedures.

What should be avoided at all costs is a loss of the judicial rulemaking power and a resort to statutes for delegating magistrates' duties. Statutory delegation would stifle the innovation, experimentation, and flexibility that are the underpinnings of the Magistrates Act. Judicial rulemaking is more apt to achieve greater utilization of magistrates, and thereby fulfill the clear and persistent intent of Congress. Certainly the Federal Rules of Civil Procedure and the Federal Rules of Criminal Procedure are examples of the widely held view that court rulemaking is superior to statutes for the regulation of federal court procedure.[218] Rulemaking for magistrates' duties in civil proceedings should likewise be employed and successfully utilized.

IV. CONCLUSION

Within the last decade, United States Magistrates have assumed an increasingly significant role in the disposition of matters within the civil jurisdiction of federal district courts. Magistrates assisted district judges in the disposition of over a quarter-million matters in 1975. However, unfortunate drafting of 28 U.S.C. § 636(b) and a mixture of hesitant and unnecessarily restrictive interpretations of the section have resulted in judicial decisions temporarily stifling the intended growth of activity under the Act.

Congress, the Judicial Conference, and the Chief Justice have made it clear that they want to see greater utilization of magistrates in civil proceedings. Congress's commitment to provide an upgraded tier of judicial officers to assist district judges has been reaffirmed by its insistence upon greater magistrate utilization as a condition precedent to the creation of more dis-

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217. *See* FED. R. CIV. P. 16; F. JAMES, CIVIL PROCEDURE § 6.16 (1965); C. WRIGHT, FEDERAL COURTS § 91 (2d ed. 1970).

218. *See* F. JAMES, CIVIL PROCEDURE, § 1.6 at 18 (1965); Ashman, *Measuring the Judicial Rule-making Power*, 59 J.AM. JUD. SOC'Y 215 (1976). *See generally* The Rule-making Function and the Judicial Conference of the United States, 21 F.R.D. 117 (1958).

trict court judgeships. Recent legislation which corrects drafting and interpretation errors of the past, further expands magistrates' civil jurisdiction. In addition, in *Mathews v. Weber*, for example, a unanimous Supreme Court endorsed automatic referrals of social security cases to magistrates.

Courts are finding they are able to employ magistrates in an efficient and effective manner, heightening the efficiency of the administration of justice without sacrificing the quality of that justice. As the original House Report that accompanied the Magistrates Act provided, district courts should continue to cull from their "ever growing workload . . . matters that are more desirably performed by a lower tier of judicial officers," classify these matters as "additional duties," and have them performed by magistrates in a local rule framework "consistent with the Constitution and laws of the United States."

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