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Magistrates: Consitutionality and Consent

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MAGISTRATES: CONSTITUTIONALITY AND CONSENT

I. INTRODUCTION

This note discusses the Federal Magistrates Act of 1968[1] (the Act), which formally codified the federal magisterial system and placed it under the auspices of the district courts. The initial purpose behind the magisterial system was to relieve judges of some of their procedural functions to allow them to devote more time to their "traditional adjudicatory" duties.[2] Magisterial adjudication requires party consent, and § 636(c) of the Act provides rules to help ensure that consent is obtained unambiguously and without coercion.[3] The controversy discussed in this note centers on § 636(c), which allows magistrates to enter final judgments in both jury and non-jury civil trials upon the consent of the parties.[4] The twelve circuits that have considered the constitutionality of § 636(c) have upheld it.[5] The Tenth Circuit is the only circuit that has not yet ruled on this question.[6] A minority of judges and commentators, however, argue that party consent does not, in theory or in practice, remedy the improper and arguably unconstitutional delegation of Article

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1. Pub. L. No. 90-578, 82 Stat. 1107 (codified as amended at 28 U.S.C. §§ 631-639 (1988)).

2. *See* H.R. REP. NO. 1629, 90th Cong., 2d Sess. 11 (1968), *reprinted in* 1968 U.S.C.C.A.N. 4252, 4253.

3. *See* 28 U.S.C. § 636(c)(2).

4. *See id.* § 636(c).

5. *See* Sinclair v. Wainwright, 814 F.2d 1516 (11th Cir. 1987); KMC Co. v. Irving Trust Co., 757 F.2d 752 (6th Cir. 1985); Gairola v. Virginia Dep't of Gen. Servs., 753 F.2d 1281 (4th Cir. 1985); The D.L. Auld Co. v. Chroma Graphics Corp., 753 F.2d 1029 (Fed. Cir. 1985); Fields v. Washington Transit Auth., 743 F.2d 890 (D.C. Cir. 1984); Geras v. Lafayette Display Fixtures, Inc., 742 F.2d 1037 (7th Cir. 1984); Lehman Bros. Kuhn Loeb Inc. v. Clark Oil & Ref. Corp., 739 F.2d 1313 (8th Cir. 1984) (en banc); Puryear v. Edes Ltd., 731 F.2d 1153 (5th Cir. 1984); Collins v. Foreman, 729 F.2d 108 (2d Cir. 1984); Goldstein v. Kelleher, 728 F.2d 32 (1st Cir. 1984); Pacemaker Diagnostic Clinic of Am., Inc. v. Instromedix, Inc., 725 F.2d 537 (9th Cir.) (en banc) [*Pacemaker II*], *cert. denied*, 469 U.S. 824 (1984); Wharton-Thomas v. United States, 721 F.2d 922 (3d Cir. 1983).

6. *But cf.* Clark v. Poulton, 914 F.2d 1426 (10th Cir. 1990) (holding that consent under § 636(c) must be explicit; it cannot be inferred from the conduct of the parties).

III duties to Article I judges.[7] According to this minority, the constitutionality of the Act is still in question.

In 1984, both the Ninth Circuit[8] and the Seventh Circuit[9] upheld the constitutionality of the Act. In both cases, however, dissenting judges argued against its constitutionality[10]—specifically, that § 636(c) does not impart constitutional legitimacy to the Act.[11] These dissenters asserted that the Act's requirement of consent from each party to have their case adjudicated by a magistrate does not cure the constitutional problem that arises when Article III judges are permitted to delegate their powers to magistrates, who are Article I officers.[12] Furthermore, in both dissenting opinions, the dissenters pointed out that the mechanics of getting the parties to grant their consent could be precarious, both procedurally and substantively.[13] Although the corresponding majority opinions characterized these concerns as speculative,[14] recent cases show that these dissenters' misgivings have become real issues confronting the magisterial system.[15]

This note explores the consensual aspect of magisterial referral and considers whether and to what extent—despite the plain language of § 636(c) of the Act, which requires that consent be free from inducement or coercion by any judicial officer[16]—party consent can be truly

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7. *See, e.g.*, *Geras*, 742 F.2d at 1045 (Posner, J., dissenting); *Pacemaker II*, 725 F.2d at 547 (Schroeder, J., dissenting); James C. Loy, *Recent Development:* United States v. Ford: *United States Magistrates Not Empowered to Preside Over Jury Selection in Felony Cases*, 62 TUL. L. REV. 1485 (1988) (stating that commentators question the Act's constitutionality); Raymond P. Bolanos, Note, *Magistrates and Felony Voir Dire: A Threat to Fundamental Fairness?*, 40 HASTINGS L.J. 827 (1989) (stating that commentators continue to debate the constitutionality of vesting judicial power in non-Article III officers).

8. *See Pacemaker II*, 725 F.2d at 547.

9. *See Geras*, 742 F.2d at 1045.

10. *See id.* at 1045 (Posner, J., dissenting); *Pacemaker II*, 725 F.2d at 547 (Schroeder, J., dissenting).

11. *See Geras*, 742 F.2d at 1051-54 (Posner, J., dissenting); *Pacemaker II*, 725 F.2d at 548-54 (Schroeder, J., dissenting).

12. *See Geras*, 742 F.2d at 1054 (Posner, J., dissenting); *Pacemaker II*, 725 F.2d at 550-52 (Schroeder, J., dissenting).

13. *See Geras*, 742 F.2d at 1051-54 (Posner, J., dissenting); *Pacemaker II*, 725 F.2d at 553-54 (Schroeder, J., dissenting).

14. *See Geras*, 742 F.2d at 1045 (stating that "the dangers are so clear and so fearsome that they are likely to be avoided"); *Pacemaker II*, 725 F.2d at 546 (stating that "[t]he principal disadvantage of the consensual reference plan may arise in the tendency to overuse it").

15. *See* discussion *infra* part V.D.

16. *See* Federal Magistrates Act of 1968, Pub. L. No. 90-578, 82 Stat. 1107 (codified

voluntary. In addition, it explores whether the Act's requirement of party consent avoids a potential constitutional problem. It also analyzes two compelling and forward-looking dissents[17] and their majority-opinion counterparts in *Pacemaker Diagnostic Clinic of America, Inc. v. Instromedix, Inc.*[18] and *Geras v. Lafayette Display Fixtures, Inc.*[19] In each of these cases, the court upheld the constitutionality of the consensual reference provisions in the Act despite the companion dissents.[20] Given the strong arguments by minority voices that consent does not legitimate the Act's constitutionality, and in light of the Supreme Court's interpretation of the Act in *Gomez v. United States*,[21] consent may be an issue for the Court to consider in the future. In *Gomez*, the Court held that magistrates were not authorized under the Act to conduct jury selection[22]—thereby settling a divisive issue for several lower courts.[23]

Parts II and III of this note discuss the background and history of the magisterial system prior to the institution of the Act in 1968. Part IV analyzes the Act, its purposes and effects, and its expansion by amendments enacted in 1976 and 1979. Part V analyzes the consensual reference provision in the magisterial referral system and discusses the dilemma it creates, probing whether the consent that is obtained from each party can be voluntarily given. Additionally, Part V examines how recent cases have disposed of these consent issues and how they signal early problems with the consensual reference system. Part VI concludes that

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as amended at 28 U.S.C §§ 631-639 (1988)).

17. The dissenters in *Pacemaker II* and in *Geras* were prophetic in their outlook toward the consent and constitutionality of the magisterial system. Justice Brennan explained that there are several different types of dissents. *See* William J. Brennan, Jr., *In Defense of Dissents*, 37 HASTINGS L.J. 427 (1986). The most basic type is a dissent that points to flaws in the majority analysis, hoping for correction in a later case. *Id.* at 430. This type of dissent demands accountability from the majority's decision for its rationale and consequences. *Id.* Another type of dissent challenges the majority's reasoning, tests the majority's authority, and creates a standard against which the majority's rationale can be evaluated or, possibly, superseded. *Id.* at 435. Justice Brennan speculated that the gestation period for dissents to ripen into majority opinions depends on societal developments and the foresight of individual justices. *See id.* at 436.

18. 725 F.2d at 537.

19. 742 F.2d at 1037.

20. *See id.* at 1040-42; *Pacemaker II*, 725 F.2d at 547.

21. 490 U.S. 858 (1989).

22. *See id.* at 875-76.

23. *See id.* at 861-62; *see, e.g.*, United States v. Garcia, 848 F.2d 1324, 1329 (2d Cir. 1988) (holding that magistrates are authorized to conduct jury selection under the Act); United States v. Ford, 824 F.2d 1430, 1438 (5th Cir. 1987) (holding that the Act does not authorize magistrates to conduct jury selection).

these early signals, although initially viewed as speculative possibilities, have ripened into real issues for today's magisterial referral system. Finally, this note suggests that the magisterial referral system might be better suited for use by corporate litigants, who have the resources and expertise to give uncoerced and truly voluntary consent, rather than the statutory class of less-advantaged litigants whom today's statute ostensibly protects.

II. BACKGROUND

A magistrate is an Article I officer with jurisdiction over civil jury and non-jury trials, as well as over criminal misdemeanor trials.[24] Magistrates' opinions, if reported, may carry precedential force in future litigation.[25] The first section of the Act authorizes magistrates to hear any type of non-dispositive pretrial matter;[26] the magistrate then submits findings and recommendations to a district court judge, who issues the final decision.[27] The next section of the Act applies to all prisoner petitions protesting conditions of confinement or asserting claims for habeas corpus relief.[28] This section has no consent provision and allows the magistrate fully to dispose of these limited types of cases. Finally, under the third section, civil-rights cases under Title VII[29] or 42 U.S.C. § 1983[30] may be referred to a magistrate acting in the capacity of special master.[31] Unlike prisoner habeas corpus situations, parties claiming

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24. *See* 28 U.S.C. § 636(a), (c) (1988).

25. *See* J. Anthony Downs, Comment, *The Boundaries of Article III: Delegation of Final Decisionmaking Authority to Magistrates*, 52 U. CHI. L. REV. 1032, 1033 (1985). "It is not yet clear how much precedential value will be accorded to the final decisions of magistrates. To some extent this will depend upon how widely magistrates' decisions are disseminated. Nothing in the Magistrate Act *prevents* the publication of magistrates' decisions or their use as binding precedent." *Id.* at 1053 n.118.

Magistrates' decisions are public documents, and reporting services have made them widely available. *See id.* at 1033; *see, e.g.*, USA Today v. Breakthrough Mktg., Inc., No. 84-5140, 1985 U.S. Dist. LEXIS 76 (E.D. Pa. Oct. 17, 1985).

26. *See* 28 U.S.C. § 636(b)(1)(A). This section does not require the parties' consent. *See id.*

27. *See id.* § 636(b)(1).

28. *See id.* § 636(b)(1)(B).

29. Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e to 2000e-17 (1988).

30. 42 U.S.C. § 1983 (1988).

31. *See, e.g.*, Morse v. Marsh, 656 F. Supp. 939 (N.D. Ill. 1987). *Morse* involved Title VII plaintiffs whose cases, without their consent, were referred to a magistrate. The court found that Article III is not violated when a magistrate acts as a special master and merely issues written findings of fact and recommendations of law. *See id.* at 945.

under Title VII and § 1983 must consent to the special master arrangement before their case is referred to a magistrate.[32] Because the statutes apply to civil cases and require the consent of the parties, those provisions of § 636(b) that require a magistrate to act in the capacity of a special master are similar to the consensual reference provisions in § 636(c) of the Act. The only difference between the two provisions is that under § 636(b), magistrates acting as special masters are not allowed to enter dispositive judgments.[33]

The magisterial system has been continually shaped and changed by federal legislation, the most recent being the Federal Magistrates Act of 1968,[34] as amended in 1976[35] and 1979.[36] Prior to 1979, the Act focused on the structural and procedural aspects of the system.[37] Since the 1979 amendment, however, the purpose of the Act has been to improve access to the federal courts for two specific groups of constituents.[38] First, by expanding the magistrate's jurisdiction, Congress sought to enhance court access to all parties who would be interested in litigating.[39] Second, by providing a magisterial system that would circumvent the delay and expenses that would otherwise accompany

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Additionally, Title VII of the Civil Rights Act of 1964 § 706(f)(5), 42 U.S.C. 2000e-5(f)(5) (1988 & Supp. 1991) applies to a magistrate acting as a special master, under § 636(b)(2) of the Federal Magistrates Act, governing pre-trial matters and thus does not require the parties' consent. Therefore, because of the pre-trial status of special master hearings, the absence of consent is not a violation of § 636(c). Although the Act provides for special-master hearings, *see* 28 U.S.C. § 636(b)(2), provisions in Title VII also refer the parties to a magistrate, who will act as special master for pre-trial procedures. 42 U.S.C. 2000e-5(f)(5).

32. 28 U.S.C. § 636(b)(2).

33. *See id.* § 636(b)(1). As previously mentioned, the findings and recommendations of a magistrate are subject to approval by a district court judge. *See supra* notes 26-27 and accompanying text.

34. Pub. L. No. 90-578, 82 Stat. 1107 (codified as amended at 28 U.S.C §§ 631-639 (1988)).

35. Act of Oct. 21, 1976, Pub. L. No. 94-577, 90 Stat. 2729 (codified as amended at 28 U.S.C §§ 631-639).

36. Act of Oct. 10, 1979, Pub. L. No. 96-82, 93 Stat. 643 (codified at 28 U.S.C. §§ 631-639).

37. *See* H.R. REP. NO. 1629, *supra* note 2, at 11-14, *reprinted in* 1968 U.S.C.C.A.N. at 4253-55.

38. *See* S. REP. NO. 74, 96th Cong., 1st Sess. 1 (1979), *reprinted in* 1979 U.S.C.C.A.N. 1469, 1469-70.

39. *See id.*, *reprinted in* 1979 U.S.C.C.A.N. at 1469-70.

litigation before an Article III judge, the Amendment was intended to improve court access for economically "less-advantaged" litigants.[40]

One concern, therefore, about the effect of today's magisterial system is that a "two-tiered" system of justice will develop, in which magistrates will become judges for less-advantaged litigants and Article III district court judges will serve wealthy corporate litigants.[41] Although the focus of this most recent Amendment was to expand federal court access to all interested litigants,[42] the result of expanding the magistrate's jurisdiction to minor criminal cases, including all federal misdemeanors, has been that the Act now targets the less-advantaged.[43]

This singling out of the less-advantaged for magisterial adjudication may not be an obvious problem if, for all intents and purposes, magistrates are the equals of federal judges. Magisterial adjudication may even appear beneficial in its attempt to offer an alternative forum that avoids the delay and expense typically encountered in federal courts.[44] The pivotal issue, however, is whether acquiescence to adjudication before magistrates by less-advantaged litigants really amounts to consent, or whether such litigants are actually coerced into consent because they feel the pressures of the delay and expense that accompanies litigation in Article III courts, as well as of the low probability that they will win their cases in thse courts.

A second problem with the magisterial system is a separation-of-powers issue arising from the consensual reference provision for civil cases set out in § 636(c) of the Act. Courts have questioned whether Congress can rightfully empower Article III judges to delegate Article III duties to Article I officers—or whether by so doing, Congress abdicates its constitutional responsibility for creating Article III judgeships.[45]

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40. *See id., reprinted in* 1979 U.S.C.C.A.N. at 1469.

41. *See* Pacemaker Diagnostic Clinic of Am., Inc. v. Instromedix, Inc., 725 F.2d 537, 554 (9th Cir.) (en banc) (Schroeder, J., dissenting) [*Pacemaker II*], *cert. denied*, 469 U.S. 824 (1984). "The Senate Report's explicit intent to induce the poor to choose magistrates is matched by an equally unsettling expression in a House Report that cases which do not require sophisticated legal knowledge should be given to magistrates, rather than to Article III judges." *Id.*; *see also* Reiner H. Kraakman, Note, *Article III Constraints and the Expanding Civil Jurisdiction of Federal Magistrates: A Dissenting View*, 88 YALE L.J. 1023, 1052-53 (1979) (stating that the structure of the consensual reference provision points toward simple cases and needy litigants).

42. *See supra* note 38, at 1, *reprinted in* 1979 U.S.C.C.A.N. at 1469-70.

43. *Id.*

44. *See id.* at 5, 13-14, *reprinted in* 1979 U.S.C.C.A.N. at 1473, 1481-83.

45. *See* Geras v. Lafayette Display Fixtures, Inc., 742 F.2d 1037, 1042 (7th Cir. 1984); Pacemaker Diagnostic Clinic of Am., Inc. v. Instromedix, Inc., 712 F.2d 1305, 1308 (9th Cir. 1983) [*Pacemaker I*], *rev'd en banc*, 725 F.2d 537 (9th Cir.) (en banc),

Article III judges and Article I magistrates are subject to different procedures in the areas of tenure, salary, appointment, and removal. For instance, tenure and salary for Article III judges are constitutionally protected, but tenure and salary for magistrates are set by statute and can be changed by Congress.[46] These tenure and salary protections for Article III judges are viewed as crucial to preserving an independent judiciary.[47] Similarly, Article III judges are appointed with the advice and consent of the Senate,[48] but magistrates are appointed by, and are accountable to, the district judges who appoint them and in whose districts they serve.[49] This immediate accountability of magistrates to district court judges raises the question whether magistrates' decisions will be a product of their own independent judgment or will instead reflect loyalty to their respective district judges.[50]

III. HISTORY

Over the past two-hundred years, the magistrate's function has evolved from a procedural and administrative body to an adjudicatory body within the courts. As magistrates assume more adjudicatory duties, they become more like Article III judges. Nevertheless, magistrates remain without Article III protections. The Supreme Court's opinion in *Mathews v. Weber*[51] aptly characterized the magistrate as either a "para-judge" or "super-notary."[52] Originally, magistrates were authorized only to set bail. This power derived from language in the Judiciary Act of 1789[53] that allows a "justice, judge, or magistrate" to set bail for persons accused of federal crimes.[54] Later, "[i]n 1793, Congress authorized the federal

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cert. denied, 469 U.S. 824 (1984).

46. *See* Downs, *supra* note 25, at 1033 n.12 (comparing appointment of district court judges under 28 U.S.C. § 133 (1982) with the appointment of magistrates under 28 U.S.C. § 631(a) (1982)); *see also* 28 U.S.C. §§ 631(e), 633, 634 (1988) (listing magistrates' tenure, salary, and compensation provisions).

47. *See* Downs, *supra* note 25, at 1033 n.12.

48. U.S. CONST. art. II, § 2 (stating that the president appoints "with the Advice and Consent of the Senate . . . Judges of the Supreme Court").

49. *See* Downs, *supra* note 25, at 1033 n.12.

50. *See id.*

51. 423 U.S. 261 (1976).

52. *Id.* at 268.

53. ch. 20, 1 Stat. 73.

54. *Id.*; *see also* PAUL E. DOW, DISCRETIONARY JUSTICE: A CRITICAL LOOK 60 (1981) (citing Carlson v. Landon, 342 U.S. 524 (1952) for the proposition that Congress has the right to determine whether bail should be granted in federal cases).

circuit courts to appoint 'discreet persons learned in the law' to perform functions concerning bail in federal criminal cases."[55] Approximately two decades later, in 1812, Congress gave magistrates, soon to be known as "commissioners," the power to assess fees for services permitted by state law, and Congress allowed magistrates to receive affidavits in criminal cases.[56]

The magistrates' sphere of power continued to expand with a formal, although unbounded, codification in 1878, when Congress appointed "'commissioners of the circuit courts' to exercise such powers as might be conferred by law."[57] In barely less than one-hundred years, the magistrate's role had progressed from that of administrative bail-setter to that of commissioner possessing discretionary power.

In 1896, Congress enacted additional legislation that shifted the judicial control of magistrates from the circuit court level to the district court level, where it remains today.[58] This new legislation established a formal system of "United States commissioners" and set guidelines for the district court's appointment and removal of magistrates.[59] These statutory guidelines limited tenure for magistrates to four-year terms, subject to congressional removal, and provided for magistrates' uniform compensation.[60]

For nearly fifty years, the commissioner system functioned pursuant to the statutory guidelines set out by Congress in 1878 and 1896.[61] Although commissioners had not yet become prominent within the federal court system, by 1940 they were an important feature in the National Parks System.[62] Commissioners had general jurisdiction to try persons accused of petty offenses committed within the national parks, but the statute required the parties to consent to any trial to be heard before a commissioner.[63] Although commissioners were within their own

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55. KENT SINCLAIR, PRACTICE BEFORE FEDERAL MAGISTRATES § 1.02, at 1-4 (1990) (quoting Act of Mar. 2, 1793, ch. 22, § 4, 1 Stat. 334).

56. *Id.* (citing Act of Feb. 20, 1812, ch. 25, §§ 1-2, 2 Stat. 679-82; Act of Mar. 1, 1817, ch. 30, 3 Stat. 350).

57. *Id.* at 1-4 to 1-5 (quoting [sic] Act of Mar. 9, 1878, ch. 26, 20 Stat. 27, Title XIII, ch. 6, § 627, 1 Rev. Stat. 109).

58. *Id.* at 1-5 (citing Act of May 28, 1896, ch. 252, §§ 19, 21, 29 Stat. 184). The supervisory control provided by district court judges is an argument often advanced by those in support of Article III delegation to Article I officers, such as magistrates.

59. *Id.*

60. *See id.*

61. *See id.*

62. *See id.* at 1-5 to 1-6.

63. *See id.* at 1-6 (citing Act of Oct. 9, 1940, ch. 785, 54 Stat. 1058-59).

jurisdiction in the National Parks System, they were nonetheless required to advise defendants of their right to trial in a federal district court.[64] The legislative history describes the commissioners as having petty offense jurisdiction since 1928 in the National Parks System, in which enforcement of federal laws and park regulations was vital and had to be handled expeditiously.[65]

In addition to their jurisdiction in the national parks, the commissioners had broad jurisdiction in the United States territories, which were suffering from a shortage of judges. The legislative history acknowledges the commissioners' developing role, and it recognizes the commissioners' enhanced power in the territories:

> [I]n territories, his jurisdiction was enlarged in the civil field because of the lack of state court judges. Thus, until Alaska attained statehood, the Commissioner performed duties and exercised powers of a Justice of the Peace and also served in probate matters. Also, in matters arising in Indian territory, the Commissioner had broad jurisdiction.[66]

Based on a 1942 study conducted by the Director of the Administrative Office of the United States Courts, the commissioner system was slated for substantial reform.[67] The study's results indicated that the commissioner system needed restructuring in the areas of compensation, jurisdiction, eligibility requirements, and administration.[68] The study proposed

> (1) changing from a fee system of compensation to a salary system; (2) authorizing commissioners to try all federal petty offenses . . . and some misdemeanors above the level of petty offenses; (3) adopting a policy that commissioners be members of the bar wherever practicable; (4) furnishing commissioners with space, supplies, and staff; (5) reducing the number of

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64. *See id.*

65. *Id.* at 1-4 to 1-5 n.5 (quoting *Federal Magistrates Act: Hearings on S. 3475 Before the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary*, 89th Cong., 2d Sess. 318 (1966); *Federal Magistrates Act: Hearings on S. 945 Before the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary*, 90th Cong., 1st Sess. 348 (1967)).

66. *Id.*

67. *See id.* at 1-6 to 1-7.

68. *See id.* (citing *The U.S. Commissioner System: Hearings Before the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary*, 89th Cong., 1st & 2d Sess., pt. 2, at 53, 67 (1965-66)).

commissioner positions in the district courts; and (6) combining the office of commissioner in some districts with that of other court officials, such as referee in bankruptcy.[69]

The committee enacted all of these recommendations as proposed, except for the one concerning jurisdiction.[70] The committee decided that further research would be necessary before it could expand jurisdiction.[71] Eventually, the original jurisdiction proposal—which authorized magistrates to hear, among other things, some misdemeanors and all civil federal petty offenses—was scaled back to limit magistrates' jurisdiction to accepting guilty pleas for misdemeanors and to performing sentencing functions in petty offense cases.[72]

Despite the enacted proposals, the jurisdictional enhancements for these commissioner magistrates retained striking similarities to the ministerial bail-setting functions of the colonial magistrates. With the enactment of the Federal Magistrates Act of 1968[73] and the amendments that followed, however, these ministerial functions diminished in light of the magistrate's expanded jurisdictional and discretionary authority.[74]

IV. THE MODERN GENESIS—THE FEDERAL MAGISTRATES ACT OF 1968 AND THE AMENDMENTS OF 1976 AND 1979

A. *The Federal Magistrates Act of 1968*

In 1968, Congress passed the Federal Magistrates Act to "reform the first echelon of the Federal judiciary into an effective component of a modern scheme of justice."[75] Most lower court decisions have articulated the congressional intent behind the Act as an effort "'to cull from the

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69. *Id.*

70. *See id.* at 1-7.

71. *See id.*

72. *See id.* At the federal level, under 18 U.S.C. § 1(3) (1988), a misdemeanor, or "petty offense," carries a penalty of not more than six months in prison or a fine of $500, or both. United States v. Woods, 450 F. Supp. 1335, 1337 (D. Md. 1978). Petty offenses generally do not merit jury trials, although serious offenses do. *Id.* The gravity with which society regards the misdemeanor, which determines whether it is petty or serious, depends on the penalty and, to a lesser extent, the nature of the crime. *Id.* at 1340.

73. Pub. L. No. 90-578, 82 Stat. 1107 (codified as amended at 28 U.S.C. §§ 631-639 (1988)).

74. *See* SINCLAIR, *supra* note 55, at 1-8.

75. H.R. REP. NO. 1629, *supra* note 2, at 11, *reprinted in* 1968 U.S.C.C.A.N. at 4253.

ever-growing workload of the U.S. district courts matters that are more desirably performed by a lower tier of judicial officers.'"[76]

The Act granted magistrates extensive jurisdictional authority, and included the responsibilities of the previous commissioner system,[77] the power to administer oaths and affirmations,[78] and the power to issue orders pursuant to 18 U.S.C. § 3142,[79] which governs release or detention of persons pending trial.[80] The Act, under the authority of 18 U.S.C. § 3401,[81] has also empowered magistrates to try persons accused of misdemeanors and to apply probation laws to those convicted of such crimes.[82] In addition, the Act granted magistrates new authority under the Federal Rules of Criminal Procedure[83] and set out appointment and removal procedures for magistrates,[84] which granted the "judges of each United States district court . . . [the power to] appoint United States magistrates . . . [w]here the conference deems it desirable . . . in one or more districts adjoining the district for which he is appointed."[85]

Under the 1968 Act, magistrates are required to be members of the bar in good standing for at least five years prior to appointment and must meet bar requirements at the time of reappointment.[86] The Act, however, provides some broad exceptions to the bar membership requirements. First, if there are no bar-qualified appointees for a specific geographic location, the Act provides for part-time magistrates.[87] Because part-time magistrates do not share the same jurisdictional authority as full-time magistrates, they are not held to the same standards.[88] In *Sinclair v.*

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76. United States v. Agosto, 557 F. Supp. 454, 455 (D. Minn. 1983) (quoting H.R. REP. NO. 1629, *supra* note 2, at 12, *reprinted in* 1968 U.S.C.C.A.N. at 4255); *see also* United States v. Canada, 440 F. Supp. 22, 24 (N.D. Ill. 1977) (stating that the power to hear motions and issue removal orders is "more desirably performed by a lower tier of judicial officers").

77. *See* 28 U.S.C. § 636(a)(1).

78. *See id.* § 636(a)(2).

79. *See* 18 U.S.C. § 3142 (1988).

80. *See* 28 U.S.C. § 636(a)(2).

81. *See* 18 U.S.C. § 3401 (1988).

82. *See* 28 U.S.C. § 636(a)(3).

83. *See id.* § 636(a)(1).

84. *See id.* § 636(a)-(i). This statutory structure for appointment and removal procedures was necessary, at a minimum, in light of the magistrates' newly expanded jurisdiction and authority under the Federal Rules of Criminal Procedure.

85. *Id.* § 631(a).

86. *See id.* § 631(b)(1).

87. *See id.*

88. *See* Sinclair v. Wainright, 814 F.2d 1516 (11th Cir. 1987).

Wainright,[89] for example, the court stated that a "part-time magistrate may conduct proceedings only if he serves as a full-time judicial officer or if the chief judge of the district court certifies that a full-time magistrate is not reasonably available."[90] This case illustrates the difficulties involved with part-time magistrates who do not have the same authority as full-time magistrates. More importantly, it shows that ambiguous jurisdictional authority and a lack of clear legislative guidelines may cause procedural confusion and foster grounds for reversal.[91] Recent cases, however, have addressed this problem by delineating prospective procedural guidelines in an effort to avoid future mistakes.[92]

A second, broader statutory exception to the magisterial bar requirement provides that absent bar-qualified appointees, a court may appoint a magistrate if the court determines that the magistrate-appointee is competent.[93] Because the statute does not define "competent," an appointee's competence is a matter of judicial discretion.

In addition to setting out competency requirements, the 1968 Act also structured magistrates' tenure and salary.[94] These elements are the crux of the argument that Article I magistrates, unlike their Article III counterparts, lack the constitutional protections of fixed tenure and salary, which are considered necessary to preserve political and judicial independence.[95] Yet, notwithstanding the absence of these protections, magistrates have been granted, and now possess, a jurisdictional authority that is similar to that of their Article III counterparts.[96]

The tenure provisions under the Act provide that full-time magistrates will serve eight-year terms and that part-time magistrates will serve four-year terms.[97] All magistrates are eligible for reappointment.[98] Magistrates are subject to removal during their term for incompetence, misconduct, neglect of duty, or physical or mental disability.[99] Removal

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89. *Id.*

90. *Id.* at 1519.

91. *Sinclair* involved a habeas corpus hearing on a second-degree murder charge. *See id.* at 1518-19.

92. *See, e.g.*, Silberstein v. Silberstein, 859 F.2d 40, 42-43 (7th Cir. 1988); Archie v. Christian, 808 F.2d 1132, 1137 (5th Cir. 1987).

93. *See* 28 U.S.C. § 631(b)(2).

94. *See id.* §§ 631, 634.

95. *See* Downs, *supra* note 25, at 1033 n.12.

96. *See id.* at 1033.

97. *See* 28 U.S.C. § 631(e).

98. *See id.* § 631(b).

99. *See id.* § 631(i).

is also possible if the district judge finds that the magistrate's services are no longer necessary.[100]

Although the 1968 Act sets and protects magistrates' salaries,[101] no safeguards exist to prevent Congress from repealing or amending this statute.[102] The 1968 Act provides that compensation for full-time magistrates should be at a rate of up to ninety-two percent of the salary of United States district judges.[103] Under the Act, part-time magistrates are compensated at no less than $100 per year and not more than one-half the maximum salary payable to a full-time magistrate.[104] The Act provides that setting the salary for full-time magistrates depends on the historical averaging of the quantity and quality of work for magistrates, and also takes into account work that is anticipated for the upcoming term.[105] Although the same standard does not apply for part-time magistrates, it might be equally suitable because it would provide flexibility for each district based on its caseload.

B. *The 1976 Amendments*

The 1976 amendments to the Federal Magistrate Act[106] redefined the Act's purpose and attempted to clarify some of its language.[107] While the purpose of the 1968 Act was to add structure to the magisterial system,[108] the goal of the 1976 amendments was to relieve federal judges of many of their procedural duties of adjudication, to enable them to devote more time to their trial functions.[109] The legislative history provides that "[w]ithout the assistance furnished by magistrates in hearing matters of this kind, it seems clear to the committee that district court judges would have to devote a substantial portion of their time to various procedural steps, rather than to the trial itself."[110]

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100. *See id.*

101. *See id.* §§ 633-634.

102. *See* Downs, *supra* note 25, at 1033.

103. *See* 28 U.S.C. § 634(a).

104. *See id.*

105. *See id.*

106. Act of Oct. 21, 1976, Pub. L. No. 94-577, 90 Stat. 2729 (codified as amended at 28 U.S.C §§ 631-639 (1988)).

107. *See* H.R. REP. NO. 1609, 94th Cong., 2d Sess. 2 (1976), *reprinted in* 1976 U.S.C.C.A.N. at 6162, 6162.

108. *See id.* at 4, *reprinted in* 1976 U.S.C.C.A.N. at 6164.

109. *See id.* at 7, *reprinted in* 1976 U.S.C.C.A.N. at 6167.

110. *Id.*

A second goal of the 1976 amendments was to produce procedural guidelines to clarify some of the Act's language. Particularly, the amendments clarified the seemingly unbounded "additional duties" clause in § 636(b),[111] a catch-all that gave district judges the discretion to delegate to magistrates functions that are not expressly enumerated in the statute.[112] The pre-amendment interpretation of the "additional duties" clause encompassed civil- and criminal-motion practice, preliminary procedural motions, and certain dispositive motions.[113] The amendments provided clearly demarcated procedures for dispositive motions, as well as such procedures for nondispositive, pretrial matters.[114] The Amendments made clear, however, that all magisterial orders and recommendations, whether they form the basis for dispositive or nondispositive motions, are subject to final review by the district judge.[115]

The 1976 Amendments also clarified three procedural aspects of the Act. First, the Amendments enhanced the scope of the additional duties that a judge could delegate to a magistrate, adding motions to dismiss to that category.[116] Second, and more importantly, the amendments added the requirement that judges apply de novo determination to any objections arising in response to a magistrate's findings or recommendations.[117] This requirement for de novo determination codified Congress's intent that judges give "fresh consideration" to issues of specific objection.[118] This concept of de novo determination is described in the legislative history of the Act:

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111. *See id.* at 2, *reprinted in* 1976 U.S.C.C.A.N. at 6162.

112. *See id.* Additional duties typically involved hearing motions. *See id.*

113. *See id.*

114. *See id.* at 2-3, *reprinted in* 1976 U.S.C.C.A.N. at 6162; *see also* 28 U.S.C. § 636(b) (1988) (allowing magistrates to determine pre-trial matters with certain exceptions, but allowing magistrates to submit only recommendations in dispositive motions).

115. *See* H.R. REP. NO. 1609, *supra* note 107, at 3, *reprinted in* 1976 U.S.C.C.A.N. at 6162; 28 U.S.C. § 636(b)(1) (giving judges power to make de novo determinations to accept, to reject, or to modify recommendations; the judges can reconsider pre-trial matters only when the magistrate's order is clearly erroneous).

116. *See* H.R. REP. NO. 1609, *supra* note 107, at 3, *reprinted in* 1976 U.S.C.C.A.N. at 6162; 28 U.S.C. § 636(b)(1)(A). Magistrates, however, cannot grant certain dispositive motions (e.g. motions to dismiss) on their own. They can only recommend to the district judge whether a motion should be granted or denied. *See* H.R. REP. NO. 1609, *supra* note 107, at 11, *reprinted in* 1976 U.S.C.C.A.N. at 6171.

117. *See* H.R. REP. NO. 1609, *supra* note 107, at 3, *reprinted in* 1976 U.S.C.C.A.N. at 6163; 28 U.S.C. § 636(b)(1).

118. *See* H.R. REP. NO. 1609, *supra* note 107, at 3, *reprinted in* 1976 U.S.C.C.A.N. at 6163.

> [D]*e novo* determination is not intended to require the judge to actually conduct a new hearing on contested issues. Normally, the judge, on application, will consider the record which has been developed before the magistrate and make his own determination on the basis of that record, without being bound to adopt the findings and conclusions of the magistrate. In some specific instances, however, it may be necessary for the judge to modify or reject the findings of the magistrate, to take additional evidence, recall witnesses, or recommit the matter to the magistrate for further proceedings.[119]

The requirement of de novo determination exists to protect both parties in proceedings before a magistrate.[120] The net result of this requirement, however, may be self-defeating. The stated purpose behind the magisterial system as of the 1976 amendments was to relieve judges of some of their procedural functions to allow them to focus intensively on trial functions.[121] De novo determination is problematic because it may require judges to duplicate their efforts. Judges may, as a result, become reluctant to send cases to magistrates who are aware that if it is likely that the parties will object to a finding, a de novo determination will be necessary anyway.[122] In addition, while some judges may overdelegate certain duties to magistrates, other more active judges may underdelegate such duties. These "active" judges may be less willing to delegate cases to magistrates that they could adjudicate themselves. This deterrent effect raises additional questions regarding the net positive value of the de novo determination requirement.

The third procedural clarification that the 1976 Amendments produced focuses on magistrates' authority in habeas corpus hearings. The

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119. *Id.*; *see also* Branch v. Martin, 886 F.2d 1043, 1045-46 (8th Cir. 1989) (remanding the case due to the failure of the district court to conduct a de novo review of the magistrate's factual conclusions). De novo review requires the district court to consider testimony and not merely review the magistrates findings and recommendations. *See id.* at 1046. At a minimum, this requires the district court to listen to tape recordings or read transcripts of evidentiary hearings. *See id.* De novo review further requires the district court to make its own determinations. *See id.* Failure to do so is reversible error. *Id.*

120. *See* H.R. REP. NO. 1609, *supra* note 107, at 3, *reprinted in* 1976 U.S.C.C.A.N. at 6163.

121. *See supra* notes 106-10 and accompanying text.

122. *See* H.R. REP. NO. 1609, *supra* note 107, at 3, *reprinted in* 1976 U.S.C.C.A.N. at 6163; 28 U.S.C. § 636(b)(1)(c); *see also* Branch, 886 F.2d at 1045 (remanding the case because the district court failed to conduct a de novo review after the parties objected to the magistrate's findings).

Amendments formally extended magisterial authority under Rule 8(b),[123] which, until then, gave only the district courts the authority to determine the necessity for habeas corpus petitions.[124] Additionally, Congress has authorized magistrates to conduct evidentiary hearings in habeas corpus cases.[125] In so doing, Congress expressly rejected the Supreme Court's ruling in *Wingo v. Wedding*,[126] which limited the magistrate's review of habeas corpus hearings to "preliminary review."[127]

C. *The 1979 Amendments*

In 1979, Congress amended the Act[128] by expanding magisterial jurisdiction in civil cases, in habeas corpus cases under 18 U.S.C. § 3140,[129] and in misdemeanor matters.[130] These new Amendments were revolutionary because they authorized magistrates to preside over trials and to enter dispositive judgments in both civil and criminal cases.[131]

In addition to the substantive additions, the 1979 Amendments redefined the Act's purpose significantly, evincing a shift in legislative intent for the magisterial system.[132] The Act's new ostensible purpose was to "improve access to the federal courts for the less advantaged."[133] Congress was clear on this point:

> The bill recognizes the growing interest in the use of magistrates to improve access to the courts for all groups, especially the less-advantaged. The latter lack the resources to cope with the vicissitudes of adjudication delay and expense. If their civil cases are forced out of court as a result, they lose all of their procedural safeguards.[134]

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123. FED. R. CIV. P. 8(b).

124. *See* 28 U.S.C. § 636(b)(1)(B).

125. *See id.*

126. 418 U.S. 461 (1974).

127. *Id.* at 472-73.

128. Act of Oct. 10, 1979, Pub. L. No. 96-82, 93 Stat. 643 (codified at 28 U.S.C. §§ 631-639 (1988)).

129. *See* 18 U.S.C. § 3140 (1979).

130. *See* S. REP. NO. 74, *supra* note 38, at 1, *reprinted in* 1979 U.S.C.C.A.N. at 1469.

131. *See id.* at 4, *reprinted in* 1979 U.S.C.C.A.N. at 1472.

132. *See id.* at 1, *reprinted in* 1979 U.S.C.C.A.N. at 1469.

133. *Id.*

134. *Id.* at 4, *reprinted in* 1979 U.S.C.C.A.N. at 1472 (footnote omitted).

The 1979 Amendments also emphasized that voluntary consent is an absolute requirement for magisterial adjudication[135] and stressed that "no pressure, tacit or expressed, should be applied to the litigants to induce them to consent to trial before the magistrates."[136]

Last, the 1979 amendments structured an appeal process applicable to trials before magistrates.[137] Initially, appeals of right from magisterial determinations are sent to the circuit court rather than to the district court.[138] The appeal process following magisterial adjudication is the same as if the case had been heard before a district court.[139] Defendants whose cases are tried before a magistrate, however, may consent to an alternative appeal structure.[140] This alternative provides an appeal at the district court level, which may then be followed by an appeal at the circuit court level, subject to the circuit court's discretion.[141]

The Act's development can be traced to the changes in its purpose over the years. In 1968, the Act's purpose was to formalize and structure the magisterial system.[142] In 1976, Congress changed that purpose to allow judges to concentrate on their trial responsibilities by diverting some of the Article III judges' procedural responsibilities to magistrates.[143] In 1979, the stated purpose was again modified to that of improving court access for less-advantaged litigants by reducing the delay and expense otherwise associated with appearing before a judge in federal court.[144] It is arguable, however, that the Act's implicit purpose is instead to ensure that the federal courts give priority to *more-advantaged* litigants.[145]

V. CONSENT

Commentators are divided on whether consent to magisterial adjudication corrects the difficulties that arise when Article III judges

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135. *See id.* at 5, *reprinted in* 1979 U.S.C.C.A.N. at 1473.

136. *Id.*

137. *See id.*

138. *See* 28 U.S.C. § 636(c)(3) (1988).

139. *See id.*

140. *See id.* § 636(c)(4).

141. *See id.*

142. *See* S. REP. NO. 74, *supra* note 38, at 3, *reprinted in* 1979 U.S.C.C.A.N. at 1471.

143. *See id.*

144. *See id.* at 4, *reprinted in* 1979 U.S.C.C.A.N. at 1472.

145. *See, e.g.*, Peter G. McCabe, *The Federal Magistrate Act of 1979*, 16 HARV. J. ON LEGIS. 343, 384 (1979) (noting that some critics have argued that the "speedier resolution advantage" will actually end up being a disadvantage for minority groups).

delegate Article III duties to Article I magistrates.[146] Many courts are divided on whether consent is a waivable personal right or a non-waivable jurisdictional requirement.[147] Those who do support the waiver argument say consent is a personal right and argue that the litigant who consents to trial by a magistrate waives the right to trial by an Article III judge.[148] This reasoning implies that the purpose of Article III is to protect litigants' rights.[149] Furthermore, the proponents consider the right to an Article III judge as a fundamental right similar to the right to a jury trial and the right to be free from compelled self-incrimination.[150] Under this view, litigants may either exercise their right to Article III adjudication or they may waive it.

Other commentators argue that consenting to magisterial adjudication is analogous to consenting to arbitration. The First Circuit, in *Goldstein v. Kelleher*,[151] used this analogy to uphold the constitutionality of the

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146. *See, e.g.*, George D. Brown, *Article III As a Fundamental Value—The Demise of* Northern Pipeline *and Its Implications for Congressional Power*, 49 OHIO ST. L.J. 55 (1988); Robert N. Clinton, *A Mandatory View of Federal Court Jurisdiction: A Guided Quest for the Original Understanding of Article III*, 132 U. PA. L. REV. 741 (1984); Daniel J. Meltzer, *Legislative Courts, Legislative Power, and the Constitution*, 65 IND. L.J. 291 (1990); Martin H. Redish, *Legislative Courts, Administrative Agencies, and the* Northern Pipeline *Decision*, 1983 DUKE L.J. 197; Richard B. Saphire & Michael E. Solimine, *Shoring Up Article III: Legislative Court Doctrine in the Post* CFTC v. Schor *Era*, 68 B.U. L. REV. 85 (1985); Neal T. Buethe, Note, *United States Magistrates Hearing Civil Cases: The Constitutionality of Rendering Final Judgments After* Northern Pipeline Construction Co. v. Marathon Pipe Line Co., 59 NOTRE DAME L. REV. 897 (1984); Brendan L. Shannon, Note, *The Federal Magistrates Act: A New Article III Analysis for a New Breed of Judicial Officer*, 33 WM. & MARY L. REV. 253 (1991); Downs, *supra* note 25.

147. *See e.g.*, Geras v. Lafayette Display Fixtures, Inc., 742 F.2d 1037, 1041 (7th Cir. 1984) (viewing the right of access to Article III judges as personal to the litigants and therefore subject to waiver); Pacemaker Diagnostic Clinic of Am., Inc. v. Instromedix, Inc., 725 F.2d 537, 541 (9th Cir.) (en banc) [*Pacemaker II*] (finding that a federal litigant has a personal right to demand Article III adjudication of a civil suit), *cert. denied*, 469 U.S. 824 (1984); *id.* at 550 (Schroeder, J., dissenting) (arguing that the parties' consent does not solve the constitutional problems arising from the wholesale delegation of judicial power to non-Article III judges and that judicial power is conferred upon Article III judges by the Constitution, not by the parties).

148. *See* Downs, *supra* note 25, at 1059 (citing *Geras*, 742 F.2d at 1041-42; *Pacemaker II*, 725 F.2d at 541-43).

149. *See id.* at 1058-59.

150. *See id.*

151. 728 F.2d 32 (1st Cir. 1984).

Act's consensual reference provision.[152] *Goldstein* was a diversity case involving medical malpractice.[153] The court found that

> [f]rom a constitutional viewpoint, [it saw] no significant difference between arbitration and consensual reference for decision to magistrates. In both situations the parties have freely and knowingly agreed to waive their access to an Article III judge in the first instance . . . . If it be queried whether the dignity of Article III is being compromised by entering judgments on awards made by non-Article III personnel, the sufficient rejoinder is that judgments are entered on arbitrators' awards.[154]

The legitimacy of a magistrate's final decision—in dispositive cases—is limited to civil cases in which both parties have consented to magisterial adjudication.[155] The *Goldstein* court recognized this limitation and distinguished its facts from prior Supreme Court cases that affirmed the legitimacy of magisterial adjudication in nonconsensual cases.[156] The *Goldstein* court discerned that the final decisions in those cases had been entered by district court judges.[157] For example, in *United States v. Raddatz*,[158] a case involving a nonconsensual referral, the magistrate's recommendations were subject to the district judge's de novo review and disposition.[159] In *Goldstein*, the First Circuit relied upon *Raddatz* and *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*[160]—both of which dealt with the Article III–Article I controversy within the bankruptcy context—to uphold the constitutionality of the Act.[161] Both

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152. *See id.* at 36. *But see Pacemaker II*, 725 F.2d at 550 (Schroeder, J., dissenting) (rejecting this analogy).

153. *See Goldstein*, 728 F.2d at 32-34.

154. *Id.* at 36 (quoting DeCosta v. CBS, 520 F.2d 499, 505 (1st Cir. 1975), *cert. denied*, 423 U.S. 1073 (1976)). The *Goldstein* court, relying on *Decosta*, upheld the magistrate's jurisdiction because the litigant's interest was protected by consensual reference. *See id.* The structural concerns of the judiciary were also protected by the district court's control over both references and appointments and the availability of appeal to an Article III court. *See id.*

155. *See* 28 U.S.C. § 636(c)(1) (1988).

156. *See Goldstein*, 728 F.2d at 35.

157. *See id.*

158. 447 U.S. 667 (1981).

159. *See id.* at 681.

160. 458 U.S. 50 (1982).

161. *See Goldstein*, 728 F.2d at 34-35 (citing *Northern Pipeline*, 458 U.S. at 91 (Rehnquist, J., concurring)). *Northern Pipeline* involved a non-consensual determination

of those cases support the proposition that purely consensual reference to a magistrate for final judgment is not unconstitutional per se.[162]

Whether consent is a right that can be waived depends on the parties' ability intelligently to weigh the factors that are inherent in choosing between magisterial or Article III adjudication. Consent to magisterial adjudication essentially involves two levels of considerations. One level involves immediate, pressing, and pragmatic concerns such as the cost and duration of litigation and the likelihood of success.[163] At this level, litigants' personal interests may obscure the constitutional values of Article III.[164] The second level involves Article III concerns. Here, the overriding concern is to protect structural values—which include separation of powers, federalism, and the preservation of a high-caliber judiciary that remains insulated from the political process.[165] Consent to appear before an Article I magistrate rather than an Article III judge will often be motivated by the pragmatic considerations of the first level and will rarely involve the constitutional considerations of the second level.[166] Ideally, if consent were truly voluntary, no litigant would grant it before having weighed both levels of considerations—the pragmatic as well as the constitutional. Most litigants, however, would probably prefer to be purely pragmatic and have their day in court, than to ponder the Article III values that may be at stake in magisterial adjudication.

The magisterial system would be less controversial if magisterial adjudication were purely ministerial and were limited to routine functions. The magisterial system of today, however, is characterized by a combined incremental expansion of magisterial authority, jurisdiction, and discretion, and by an overburdened federal docket—all of which create a system that demands careful scrutiny.

The conflict over consent is illustrated by the about-face decision of the Ninth Circuit in *Pacemaker Diagnostic Clinic of America, Inc. v. Instromedix, Inc.*[167] Judge Schroeder's dissent in the second *Pacemaker*

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by an Article I bankruptcy judge. In that case, Justice Rehnquist stated that "[n]one of the cases has gone as far as to sanction this type of adjudication to which Marathon will be subjected *against its will* under the provisions of the 1978 Act." *Northern Pipeline*, 458 U.S. at 91 (Rehnquist, J., concurring) (emphasis added).

162. *See Goldstein*, 728 F.2d at 35.

163. *See* Downs, *supra* note 25, at 1059.

164. *See id.*

165. *See id.*

166. *See id.*

167. 712 F.2d 1305 (9th Cir. 1983) [*Pacemaker I*], *rev'd en banc*, 725 F.2d 537 (9th Cir.) [*Pacemaker II*], *cert. denied*, 469 U.S. 824 (1984).

decision (*Pacemaker II*) is vital because it outlines the tensions and issues that lie at the heart of the debate.[168]

Pacemaker involved a patent infringement matter between two corporations.[169] At the trial level, the defendants denied the allegations of infringement and argued that the patent was invalid.[170] Both parties consented to a magisterial, non-jury trial under § 636(c).[171] The magistrate found that the patent was valid and that the defendants did not infringe the patent.[172] Both parties appealed.[173]

In *Pacemaker I*, which was the first of two appeals, the Ninth Circuit raised the issue of magisterial jurisdiction sua sponte.[174] The court held that § 636(c) of the Federal Magistrates Act was unconstitutional[175] but never reached the merits of the patent issues.[176] In *Pacemaker II*, however, the court, sitting en banc, reversed its prior decision[177] and held that the consensual reference provisions of the Act were constitutional.[178] The court then remanded the patent issues back to the district court.[179]

A. Pacemaker I—*Majority Opinion*

In *Pacemaker I*,[180] the court held that § 636(c) of the Act was unconstitutional.[181] The court rejected the arbitration analogy relied on

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168. *See Pacemaker II*, 725 F.2d at 547 (Schroeder, J., dissenting).

169. *See Pacemaker I*, 712 F.2d at 1305. *Pacemaker I* was a Ninth Circuit case before Judges Ferguson, Boochever, and Norris. *See id.* Judge Boochever authored the opinion, and no judges dissented. *See id.* The case was decided Oct. 3, 1983. *See id.* A month later, on Nov. 13, 1983, the Ninth Circuit heard *Pacemaker II* en banc. *See Pacemaker II*, 725 F.2d at 537. The outcome was decided just over three months later, on Feb. 16, 1984. *See id.*

170. *See Pacemaker I*, 712 F.2d at 1307.

171. *See id.*

172. *See id.*

173. *See id.*

174. *See id.*

175. *See id.*

176. *See id.*

177. *See Pacemaker II*, 725 F.2d at 547.

178. *See id.*

179. *See id.*

180. *Pacemaker I*, 712 F.2d at 1305.

181. *See id.* at 1310. Judge Boochever stated that "[n]o case squarely holds that litigant consent will solve the constitutional problems." *Id.* at 1311 (footnote omitted).

in the earlier First Circuit decision in *Goldstein*,[182] characterizing it as "inapt"[183] and finding that

> [w]hen the parties use an arbiter, they do not invoke the judicial power of the United States courts. An arbiter may render a decision, but its effects flow from the parties' contractual agreement to abide by it, not from an exercise of judicial power. The arbiter has no authority to enter a judgment, and the parties must look to the courts for enforcement of an arbitration award. Also, an arbiter's decision is generally not subject to review on the merits.[184]

The court distinguished Article III adjudication from a due process right and concluded that, because Article III adjudication is a jurisdictional requirement, similar to diversity jurisdiction, it is not waivable.[185] *Pacemaker I* realigned the Article III power, which, the court found, had been inappropriately delegated to the Article I magisterial system. In so doing, the court limited the system's expanded jurisdiction. The court emphasized that its "holding prohibits magistrates from rendering final decisions in civil cases, a function reserved for [A]rticle III officers."[186] Accordingly, the court limited the function of magistrates to those "lesser functions of presiding over a trial and recommending a disposition," provided that a district judge enter the final disposition.[187]

The court compared the older "additional duties" provision of § 636(b)(3), which authorized judges to delegate certain duties to magistrates, with its new § 636(c) counterpart, which permits magistrates to conduct civil trials and enter dispositive judgments if the parties have consented to appear before a magistrate.[188] In this comparison, the court noted that the old section provided for de novo review but that the new one did not.[189] Thus, the "adjunct" quality of the magistrate vis-a-vis the district court had disappeared because the magistrate was now permitted to enter final dispositive judgments.[190]

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182. *See* Goldstein v. Kelleher, 728 F.2d 32, 35-36 (1st Cir. 1984).

183. *Pacemaker I*, 712 F.2d at 1311.

184. *Id.* (citation omitted).

185. *See id.* at 1312.

186. *Id.* at 1314.

187. *Id.*

188. *See id.* at 1308.

189. *See id.*

190. *See id.*

Many decisions have attempted to legitimate consent by way of analogy. The *Pacemaker I* court, and the later *Geras* dissent,[191] have rejected several of these analogies. One analogy, rejected by *Pacemaker I*, was the analogy to arbitration.[192] Other analogies, also rejected by *Pacemaker I*, involved the application of legal principles appearing in two nineteenth-century cases, *Kimberly v. Arms*[193] and *Heckers v. Fowler*.[194] *Kimberly* supports a proposition analogous to de novo review. In that case, the court held that upon the parties' consent, the master could hear the matter and report findings of fact and law to the judge.[195] Because the judge was the final arbiter, responsibility ultimately remained with the judge, and therefore, no judicial power was vested in the magistrate.[196]

The *Heckers* analogy is a more complicated one. In *Heckers*, the parties consented to an adjudication and a dispositive judgment by a referee, both of which carried the same weight as they would have if they had been presided over by a judge.[197] As in *Kimberly*, the power of final disposition remained with the judge and not with the magistrate. Before entering the referee's judgment, the court had to review the referee's report and "decide whether or not to accept it."[198] This rule, which had similarities to an appeal, empowered the losing party to object to the referee's recommendations.[199] If objections arose, a hearing would ensue, which would be based on whether the court would accept or reject the referee's report.[200] After the hearing, the court would presumably enter its decision to accept or to reject. As an alternative, the rule provided that if either party desired, the report could be "recommitted" upon a showing of good cause.[201] The *Pacemaker I* court distinguished

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191. *See* Geras v. Lafayette Display Fixtures, Inc., 742 F.2d 1037, 1045 (7th Cir. 1984) (Posner, J., dissenting).

192. *See Pacemaker I*, 712 F.2d at 1311.

193. 129 U.S. 512 (1889).

194. 69 U.S. (2 Wall.) 123 (1864).

195. *See Kimberly*, 129 U.S. at 523-24. In *Kimberly*, the Court found that a master in chancery is an officer appointed by the court to assist it in various proceedings. *See id.* The information communicated by the master, however, is merely advisory; the court may accept and act upon it, or disregard it in whole or in part. *See id.*

196. *Pacemaker I*, 712 F.2d at 1311.

197. *See Heckers*, 69 U.S. (2 Wall.) at 123.

198. *Pacemaker I*, 712 F.2d at 1311 n.12.

199. *See Heckers*, 69 U.S. (2 Wall.) at 133.

200. *See id.*

201. *See id.*

both *Kimberly* and *Heckers* on the grounds that in both cases, the power to enter dispositive judgments ultimately rested with the district judge.[202]

B. Pacemaker II—*Majority Opinion*

The two *Pacemaker* courts used divergent frameworks in their analyses of the constitutionality of the Federal Magistrates Act. For Judge Boochever in *Pacemaker I*, the issue was whether Congress could delegate responsibility for final decision-making authority to a non-Article III officer.[203] The court found that Congress could not delegate this responsibility and declared the Act unconstitutional on those grounds.[204] In *Pacemaker II*,[205] Judge Kennedy, writing for the en banc court and reversing *Pacemaker I*,[206] reduced the analysis to two issues: (1) whether the transfer of the litigation to a magistrate infringed the rights of litigants,[207] and (2) assuming that the parties had properly consented to trial before a magistrate, whether the magisterial "forum" compromised the judiciary's independence.[208]

At the outset, the *Pacemaker II* court acknowledged the Supreme Court's attentiveness to the "consent" issue. The *Pacemaker II* majority found that "in the Court's latest interpretation of Article III [in *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*[209]], all the Justices, although not forced to confront the issue squarely, indicated that consent is important to the constitutional analysis."[210] Judge Kennedy's analysis, however, touched only briefly on the voluntary nature of consent. In Judge Kennedy's view, no litigant could demonstrate the standard of hardship required to invalidate the waiver of an Article III trial.[211] He explained that such hardship would exist only if the alternative to the waiver were the endurance of delay, costs, or other serious burdens by the litigant.[212] Access to district judges in the current

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202. *See Pacemaker I*, 712 F.2d at 1311 & n.12.

203. *See id.* at 1308.

204. *See id.* at 1310.

205. Pacemaker Diagnostic Clinic of Am., Inc. v. Instromedix, Inc., 725 F.2d 537 (9th Cir.) (en banc) [*Pacemaker II*], *cert. denied*, 469 U.S. 824 (1984).

206. *See id.* at 547.

207. *See id.* at 541.

208. *See id.*

209. 458 U.S. 50 (1982).

210. *Pacemaker II*, 725 F.2d at 542 (construing *Northern Pipeline*, 458 U.S. at 50).

211. *See id.* at 543.

212. *See id.*

judicial system, the court concluded, "is not so restricted that adjudication of cases by magistrates is a compelled alternative."[213]

The en banc court rejected the *Pacemaker I* analysis[214] that had analogized waiver of adjudication by an Article III judge to waiver of the diversity of citizenship requirement for jurisdiction over non-federal question disputes, the latter of which was impermissible.[215] The court noted that diversity jurisdiction is a form of subject-matter jurisdiction that cannot be conferred on Article III courts, absent congressional or Constitutional authority.[216] By contrast, the case at bar involved patent law, which was exclusively a question of federal law, and it therefore did not represent an attempt by the parties to bootstrap themselves into federal court.[217] The court noted as well that diversity jurisdiction involves the transfer of jurisdiction to another forum, not the expansion of Article III jurisdiction to Article I judges.[218] Accordingly, the court found that waiver of an Article III trial is actually waiver of personal jurisdiction and thus is within the authority of Congress.[219]

The *Pacemaker II* court decided that confusion on the part of the litigant or the public as to whether a magistrate or an Article III judge had entered a decision was of limited constitutional significance.[220] Rather, the greater danger of the consensual reference plan could arise from the tendency to overuse it.[221] The remedy for overuse, according to this court, would be active judicial supervision, the mechanics for which already existed in two sections of the statute: (1) that which provides for consent to trial before a magistrate, and (2) that which empowers district judges to cancel references for good cause.[222]

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213. *Id*; *see also* Geras v. Lafayette Display Fixtures, Inc., 742 F.2d 1037, 1042 (7th Cir. 1984) (characterizing magisterial disposition as a "real option" to a trial before a district court judge).

214. *See Pacemaker I*, 712 F.2d at 1312.

215. *See Pacemaker II*, 725 F.2d at 543.

216. *See id.*

217. *See id.*

218. *See id.*

219. *See id.*

220. *See id.* at 546.

221. *Id.*

222. *See id.* (discussing 28 U.S.C. § 639(c)(1), (2), (6)); *see also* Geras v. Lafayette Display Fixtures, Inc., 742 F.2d 1037, 1040 (7th Cir. 1984) (discussing the protection of removal for good cause, but noting that the standard requires extraordinary circumstances). *But cf.* Downs, *supra* note 25, at 1061 n.161 (stating that "[p]recisely what is meant by 'good cause or extraordinary circumstances' has yet to be determined, although the few district courts which have considered the question suggest that it must be more than mere dissatisfaction with the magistrate's handling of the trial"). For examples of cases applying

In upholding the constitutionality of the magisterial reference system, the *Pacemaker II* court lauded the Act's practical effect, which was to "provide and explore new, flexible methods of adjudication" in the face of the ever-expanding caseloads of the Article III courts.[223] The court found that if the magisterial system was carefully supervised by Article III judges, the system might "strengthen an independent judiciary, not undermine it."[224]

C. Pacemaker II—*Dissent*

The dissent in *Pacemaker II* discusses the most significant issues surrounding the consensual reference debate.[225] While these points were absent from the majority opinion, they are well-reasoned and well-articulated and, as such, could provide substance for future majority opinions. In his dissent, Judge Schroeder argued against three "misguided" points the majority raised in its discussion of the judiciary.[226] First, he rejected the majority's assumption that Article III judges could depend on the litigants' consent to validate the magistrate's entry of final judgment.[227] Second, he rejected the assumption that magistrates are "independent" officers of the court even though they "operate under the thumb of district court judges and [their] salaries are not protected from retaliatory diminution by Congress."[228] Lastly, Judge Schroeder's dissent took issue with the majority's presumption that consent to appear before a magistrate is voluntarily granted by each litigant. He stated that the purpose of the consensual reference provision was to "encourage certain classes of litigants to abandon their right to Article III adjudication because the overloaded federal docket prevented all cases from being heard promptly."[229]

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the "good cause" standard, see Swallow Turn Music v. Tidal Basin, Inc., 581 F. Supp. 504, 510 n.8 (D. Me. 1984) (finding that "good cause" does not exist when revocation of consent is made prior to trial in an effort to delay final adjudication); Southern Agric. Co. v. Dittmer, 568 F. Supp. 645, 646 (W.D. Ark. 1983) (finding that good cause is not shown when a magistrate has presided over the matter for a year and is familiar with the factual and legal issues presented, and vacating the reference would result in delay); Gomez v. Harris, 504 F. Supp. 1342, 1345 n.6 (D. Alaska 1981) (vacating the reference to the magistrate was justified by controlling questions of law and procedural difficulties).

223. *Pacemaker II*, 725 F.2d at 547.

224. *Id.* at 546.

225. *See id.* at 547 (Schroeder, J., dissenting).

226. *Id.*

227. *See id.*

228. *Id.*

229. *Id.*

The dissent described the Act as "creat[ing] mutations in our system of government that transcend its effects on individual litigants."[230] Quoting extensively from the Federalist Papers, Judge Schroeder's dissent described magistrates as devoid of independence because "[t]hey are beholden to the Article III judiciary for their appointment, retention, and authority to decide cases . . . . [Simultaneously, magistrates are] beholden to Congress for their pay."[231] This system runs contrary to the framers' intent to make "'federal judges servants . . . only of their consciences.'"[232]

Pacemaker II's dissent also framed the consent issue in relation to the often-used separation of powers argument, which restricts Congress from delegating the Article III power of Article III judges to Article I officers.[233] Judge Schroeder compared the Act's questionable delegation of power to the Supreme Court's decision in *INS v. Chadha*,[234] which held it unconstitutional for Congress to usurp executive power, even with presidential consent.[235] Judge Schroeder rejected what he described as a consensual "abrogation of power" by Congress or litigants, which power was more appropriately reserved by the Constitution to Article III judges.[236] Furthermore, the dissent emphasized that it was the Constitution that empowered the Article III judge, not the parties' consent.[237]

Judge Schroeder also rejected the use of nineteenth-century case law, which other courts had used to legitimate Supreme Court approval of the judicial delegation of Article III powers to non-Article III judges.[238] The dissent correctly noted that those old cases did not contain any separation of powers analysis and, in fact, lacked any mention of Article III.[239] Furthermore, Judge Schroeder argued that the courts' use of this precedent

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230. *Id.* at 548.

231. *Id.* at 549.

232. *Id.* (quoting United States v. Woodley, 726 F.2d 1328, 1332 (9th Cir. 1983)); *see also id.* at 548 (quoting THE FEDERALIST NO. 48, at 332 (James Madison) (Jacob Cooke ed., 1961); THE FEDERALIST NO. 78, at 524 (Alexander Hamilton) (Jacob Cooke ed., 1961)) (viewing independent courts as essential).

233. *See id.* at 552.

234. 462 U.S. 919 (1983).

235. *See id.* at 946.

236. *Pacemaker II*, 725 F.2d at 552 (Schroeder, J., dissenting).

237. *See id.* at 550.

238. *See id.* at 550 n.1 (citing Kimberly v. Arms, 129 U.S. 512 (1889); Newcomb v. Wood, 97 U.S. 581 (1878); Heckers v. Fowler, 69 U.S. (2 Wall.) 123 (1864); Alexandria Canal Co. v. Swann, 46 U.S. (5 How.) 83 (1847)).

239. *See id.*

ignores historical context and is ill-suited for use as support for the proposition that the Supreme Court endorses this delegation of Article III powers to magistrates.[240]

The second part of Judge Schroeder's dissent negates the argument that active judicial supervision of the consensual reference process legitimates Congress's delegation of Article III powers to Article I magistrates.[241] He pointed out that supervision, disguised as de novo determination, may not be as thorough in practice as it is in design.[242] His concern was that judges would not be able to discern when magistrates were erring to the extent that their decisions would require de novo determination.[243] Additionally, he noted that the mounting caseload in the federal docket could prevent judges from providing the thorough review that would be necessary for each case.[244] Support for this argument exists in the context of one of the primary purposes of the Act—to ease an overloaded federal docket.[245] Furthermore, Judge Schroeder questioned the need for a magisterial system if judges could currently provide such supervision as well as de novo review of certain decisions entered by erring magistrates.[246]

The third point in Judge Schroeder's dissent focuses on "supervisory control" and the dilemma that arises when a magistrate must choose between the "right" decision and a decision that "will please the district court."[247] To force a magistrate to make this choice would necessarily impede any magistrate's independent judgment, which is recognized as a crucial element of an impartial judiciary.[248] Interrelated with this problem of divisive choices is the issue of control that arises when judges control other judges.[249] The result in the magisterial context is that Article III judges control the decisions of Article I judges.[250]

Apart from the separation of powers argument and the procedural concerns, the dissent in *Pacemaker II* viewed "voluntary" consent as

240. *See id.*
241. *See id.* at 552.
242. *See id.*
243. *See id.*
244. *See id.*
245. *See id.*
246. *See id.*
247. *Id.*
248. *See id.*
249. *See id.* at 553.
250. *See id.*

impossible because of an ever-present element of coercion.[251] Judge Schroeder stated that "[s]uch economic coercion will be joined by coercion on litigants from the district courts themselves. It ignores reality to suppose that at least some busy district courts will not control their dockets by pressuring litigants to consent to trial before a magistrate."[252]

D. *Cases After* Pacemaker II

Shortly after the Ninth Circuit's en banc decision in *Pacemaker II*, the Seventh Circuit addressed the consent issue in *Geras v. Lafayette Display Fixtures, Inc.*[253] Like the *Pacemaker I* court, the *Geras* court considered the constitutionality of § 636(c) of the Federal Magistrates Act.[254] *Geras* similarly contained an incisive dissent, this one by Judge Posner.[255]

After considering the constitutionality of § 636(c), the Seventh Circuit joined its sibling circuits upholding the Act's constitutionality.[256] In deciding to uphold the statute, the *Geras* majority negotiated its way through the issues that are integral to the constitutional analysis of § 636(c). These issues included (1) contrasting the lifetime tenure of Article III judges with their non-tenured Article I counterparts; (2) evaluating appointment and removal procedures for magistrates; and (3) considering the statutory salary structure for magistrates and the lack of constitutional safeguards to prevent Congress from repealing or overriding these statutory protections.[257]

In *Geras*, the statute's constitutionality rested on whether the magistrates were exercising federal judicial power.[258] If the magistrates were found to be "adjuncts" and therefore not exercising federal power, the statute would survive; if the magistrates were acting as Article III judges, the statute would fail.[259] To further distinguish the magistrate's role as an "adjunct" or as an Article III officer, the court used two Article III values as a threshold in determining whether magistrates were exercising federal power: (1) the requirement that federal judicial power be exercised by an independent federal judiciary; and (2) the assurance of

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251. *See id.*

252. *Id.* at 554.

253. 742 F.2d 1037 (7th Cir. 1984).

254. *See id.* at 1042-43.

255. *See id.* at 1045 (Posner, J., dissenting).

256. *See id.* at 1045 (majority opinion).

257. *See id.* at 1039.

258. *See id.* at 1040.

259. *See id.*

a continued separation of powers between the three government branches.[260]

The *Geras* court concluded that magistrates were adjuncts of the district courts.[261] The characteristics of this system of adjuncts, according to the *Geras* court, include appointment and removal of magistrates by district courts and the supervisory power of de novo review, counterbalancing the effects of § 636(c), which allows magistrates to enter final dispositive judgments.[262] The court characterized the power of magistrates to enter final judgments as a technical encroachment on Article III authority rather than a substantive one; a technical encroachment, being procedural in nature, is perceived as a mild infraction as compared with a substantive encroachment.[263]

In analyzing the review process, the court found that although the review process provided de novo consideration, a new hearing would defeat the system's purpose of efficiency and thus was not part of the process.[264] Rather, under de novo review, most courts are more likely to be willing to defer to the magistrate as a fact finder. In *Geras*, the court found that such deference was constitutionally insignificant.[265] The court determined that given the adjunct quality of the magisterial system, the magistrate's power to enter final judgments is nonsubstantive. The clearer distinction between Article III power and Article I power, the court noted, is the contempt power.[266] Thus, because magistrates are not authorized

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260. *See id.*

261. *See id.* at 1045. To bolster its argument, the *Geras* court compared the magisterial system to the bankruptcy court. *See id.* at 1043. The bankruptcy court lacks thorough procedures for consent and review of decisions. Controversy exists today about the appropriate role of the bankruptcy system, which is often compared to the magisterial system. For bankruptcy cases examining the court's appropriate role, see, e.g., *In re* Wedtech v. Banco Popular de P.R., 94 B.R. 293 (Bankr. S.D.N.Y. 1988) (allowing bankruptcy court jurisdiction until a defendant bank's right to a jury trial is implicated or until dispositive motions beyond the scope of analogous magisterial referral are brought); *In re* American Community Servs. v. Wright Mktg., Inc., 86 B.R. 681 (Bankr. D. Utah 1988) (holding that a defendant buyer's right to a jury trial in a noncore adversary proceeding warrants withdrawal of the reference from the bankruptcy court); *In re* Jennings v. Coblentz, 83 B.R. 752 (Bankr. D. Nev. 1988) (holding that nothing constitutionally bars litigants from consenting to bankruptcy court jurisdiction over noncore proceedings); Tvorik v. Pontak, 83 B.R. 450 (Bankr. W.D. Mich. 1988) (holding that a bankruptcy court can not enter final judgment without consent of the parties in a Chapter 7 trustee's action for recission of a prepetition contract).

262. *See Geras*, 742 F.2d at 1043.

263. *See id.*

264. *See id.* at 1044.

265. *See id.*

266. *See id.*

to levy contempt sanctions, Article III power has not been improperly delegated.[267]

Furthermore, the *Geras* court upheld the consent provisions and found that voluntary consent "obviates the need for Article III protections."[268] The court described the statute as one that facilitated uncoerced and anonymous consent.[269] In support of these consent provisions, the court also highlighted the counter-provision allowing parties to withdraw the referral, but only "under extraordinary circumstances."[270] The court distinguished this consent provision from the Bankruptcy Reform Act of 1978,[271] which was held unconstitutional because it lacked a consent provision.[272]

Next, the court acknowledged the possible development of a "two-tiered" system of justice resulting from the 1979 Amendment's purpose to "improve access to the federal courts for the less-advantaged."[273] The *Geras* court used the *Pacemaker II* dissent as a basic outline in its analysis of consent. Judge Cudahy described the *Pacemaker II* dissenters' version of double justice as "a second-class magistrate system for the impecunious and a first class district court system for the wealthy and for large corporations."[274] Judge Cudahy claimed that the *Pacemaker II* view was "speculat[ive] . . . at this time" because it was evident "that parties, regardless of their wealth, often voluntarily [selected] the extra-judicial avenue of arbitration rather than . . . the costlier and often much lengthier judicial process."[275]

Judge Cudahy's analogy to arbitration, however, is faulty for two reasons. First, magisterial adjudication is a judicial process which is more like litigation than arbitration. The majority in *Pacemaker II* rejected the

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267. *See id. But see* Miami Valley Carpenters Dist. Council Pension Fund v. Scheckelhoff, 123 F.R.D. 263 (S.D. Ohio 1988) (holding that U.S. magistrates have the authority to issue civil contempt orders).

268. *Geras*, 742 F.2d at 1040.

269. *See id.*

270. *Id.* at 1041.

271. Pub. L. No. 95-598, 92 Stat. 2549 (1978) (codified as amended at 11 U.S.C. §§ 101-1330 (1988 & Supp. III 1991).

272. *See* Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 80 n.31 (1982) (holding that the Bankruptcy Reform Act of 1978 is unconstitutional because it eliminated a consent requirement for jurisdiction). In *Geras*, the court reasoned that the lack of "required consent" distinguished the Magistrates Act from the Bankruptcy Act. *See Geras*, 742 F.2d at 1041.

273. *Geras*, 742 F.2d at 1041 (citing S. REP. NO. 74, *supra* note 38, at 1, *reprinted in* 1979 U.S.C.C.A.N. 1469, 1469).

274. *Id.*

275. *Id.*

arbitration analogy for similar reasons,[276] although the same argument was later used by the First Circuit to uphold the magisterial system in *Goldstein v. Kelleher*.[277] Second, the *Geras* court erred when it reasoned that parties, rich or poor, often choose arbitration over traditional adjudication and that choosing arbitration was analogous to choosing magisterial adjudication.[278] The concern with magisterial adjudication, as opposed to arbitration, is that the choosers—in this case the less-advantaged—are not in fact choosing between the two alternatives. Rather, it is the wealthy who have the greater latitude in their choice of an alternative for adjudication because the delays and expense of litigation, although admittedly ever-present, are not as burdensome as they are to the less-advantaged.

The *Geras* court, again using the *Pacemaker II* dissent as a starting point, reasoned that the right to an Article III judge is more aptly characterized as a personal right because it expands a party's forum for personal, rather than subject-matter jurisdiction.[279] Furthermore, in an estoppel-like argument, the court said that once parties choose to voluntarily waive their rights, they should not be allowed to challenge the constitutionality of the provisions under which they chose to proceed.[280] The court found that a real option of a trial is preserved, even though, as suggested by Judge Schroeder's *Pacemaker II* dissent, "Congress has delegated to judicial councils the power to create magistrate positions and thereby has abdicated [the] constitutional responsibility [to create judgeships]."[281] The court also found that "[i]f a litigant were required to wait ten years for a trial before an Article III judge in lieu of a prompt trial before a magistrate, we would have little difficulty finding that the constitutional grant of jurisdiction had been frustrated."[282]

Although litigation may have been adjudicated more efficiently in 1984, increasingly overcrowded dockets since that time have slowed the pace considerably.[283] A question exists, therefore, as to whether a "real

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276. *See* Pacemaker Diagnostic Clinic of Am. v. Instromedix, 725 F.2d 537, 547 (9th Cir.) (en banc) [*Pacemaker II*], *cert. denied*, 469 U.S. 824 (1984).

277. 728 F.2d 32, 36 (1st Cir. 1984).

278. *See Geras*, 742 F.2d at 1041.

279. *See id.*

280. *See id.*

281. *Id.* at 1042 (alterations in original) (quoting *Pacemaker II*, 725 F.2d at 549 (Schroeder, J., dissenting)).

282. *Id.*

283. *See* Larry Kramer, *Few Reasons Exist for Keeping Diversity*, NAT'L L.J., Oct. 1, 1990, at 12 (discussing the overcrowded federal dockets and arguing for eliminating diversity jurisdiction); Lewis Lowenfels & Alan R. Bromberg, *Challenging Securities*

option" for a trial before a district judge exists today. Moreover, if one were to conclude that corporations and wealthy individuals are better able to wait for trial than are the less wealthy or indigent, one must admit the concept of double justice. As an alternative to distinctions based on a litigant's wealth, the distinction could instead focus on the injury involved. An injury-based distinction, however, would nonetheless frame the issue of a two-tiered system of justice in terms of economic injury: whether large, affluent corporations have more important economic injuries than their less-affluent counterparts.

The *Geras* court rejected the *Pacemaker II* dissenters' concern over coercion in the consent process, describing it as "almost entirely speculative," finding "no hard evidence of economic, or other systemic, coercion."[284] The court was convinced that the statute's provisions safeguarded litigants against "undue influence by either judges or magistrates."[285] According to the court in *Geras*, consent provisions redeem the statute with its constitutionality; if these provisions did not exist, clear grounds for plenary invalidation of the magistrate system would exist.[286] Because the results would do more harm than good, however, the court suggested that such invalidation would not present the best course of action:

> To invalidate the magistrate reference system would only be to increase further the cost and delay of district court litigation for those—whether poor or wealthy—who prefer to litigate in district court. Such an invalidation would also deny to those who would choose a magistrate a reasonably quick and less costly alternative. Again the result of invalidation might well be to deny to less advantaged litigants access to the federal courts altogether. At the same time those who would persevere with the existing system . . . would be severely burdened.[287]

Despite the majority view that consent imparts constitutionality and that proper safeguards exist to ensure that such consent is not coerced, subsequent cases in the lower courts prove the contrary. In a 1988 short

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Industry Arbitration Awards, N.Y.L.J., Feb. 16, 1990, at 1 (discussing the overcrowded court dockets and the possibility of lessening this workload by rerouting a substantial number of cases to arbitration).

284. *Geras*, 742 F.2d at 1042.

285. *Id.*

286. *See id.*

287. *Id.*

and unpublished opinion, the Sixth Circuit, in *Levine v. Torvik*,[288] decided the issue of coerced consent and voided a magistrate's order granting habeas corpus relief. The *Levine* court found that the parties' consent to the plenary jurisdiction of the magistrate under § 636(c) was "impermissibly obtained" because the district court's referral order stated that "[t]he Magistrate is urged to seek the consent of the parties to magistrate trial jurisdiction under 28 U.S.C. § 636(c)."[289] The court found that § 636(c)(2) prohibited such action[290] and that pursuant to the statute, "'neither the district judge nor the magistrate shall attempt to persuade or induce any party to consent to reference of any civil matter to a magistrate.'"[291] Echoing the words of Judge Cudahy in *Geras*, the *Levine* court stated that "[t]his statute clearly prohibits the action taken by the district court in this matter."[292] The result was that the magistrate's order was voided, the appeal was dismissed, and the court's prohibition on coercive addenda to referral orders was applied prospectively.[293]

In addition to cases such as *Levine* in which a court's actions are directly contradictory to the plain language of the statute, certain cases' factual scenarios are not within the statutory categories for magisterial referral. In *Roberts v. Manson*,[294] decided in 1989, the plaintiff alleged that by discharging him from his labor job without a pre-termination or post-termination hearing, the city violated his First and Fourteenth Amendment rights.[295] While in prison at the Arkansas Department of Correction, Roberts filed his complaint pro se.[296] The office of the clerk for the district court sent Roberts a notice and a consent form that enabled him to have the final disposition of his case entered by a federal magistrate under § 636(c).[297] Roberts, responding in writing, withheld

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288. No. 88-3385, 1988 U.S. App. LEXIS 6949 (6th Cir. May 24, 1988).

289. *Id.* at *1.

290. *Id.*

291. *Id.* at *2 (quoting 28 U.S.C. § 636(c)(2) (1988)).

292. *Id.*

293. *See id.* The extent of prospective application of an unpublished opinion is limited, because unpublished opinions are not strong authority. *See* J. Myron Jacobstein, *Some Reflections on the Control of the Publication of Appellate Court Opinions*, 27 STAN. L. REV. 791, 798 (1975) (citing CAL. SUP. CT. (CIV.) R. 977 (West Supp. 1974) (prohibiting citation of unpublished opinions of Courts of Appeals)).

294. 876 F.2d 670 (8th Cir. 1989).

295. *See id.* at 671.

296. *See id.*

297. *Id.*

his consent and requested that his case go before a district court judge.[298]

Even though Roberts refused to consent, his case was referred to a magistrate pursuant to a local rule, modeled after § 636(b), that permits all pretrial matters to be referred to a magistrate.[299] In *Roberts*, however, the only pending pre-trial motion was a request for the appointment of counsel.[300] The magistrate denied that motion but proceeded forward with an evidentiary hearing.[301] At the hearing, the magistrate considered evidence and arguments from both sides, entered his findings, and recommended that the complaint be dismissed with prejudice.[302] Although Roberts provided written objections to the magistrate's findings and recommendations, the district court entered an order summarily adopting the magistrate's findings and dismissing Roberts's complaint with prejudice.[303] Roberts's pro se complaint reached the Court of Appeals for the Eighth Circuit, which remanded the case for a new trial.[304] The Eighth Circuit agreed with Roberts that his case had been improperly referred to the magistrate for a trial on the merits.[305] The court analyzed four provisions of the Federal Magistrates Act and concluded that none of them applied in Roberts's case.[306]

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298. *Id.*

299. *Id.*

300. *See id.*

301. *See id.*

302. *See id.*

303. *See id.*

304. *See id.* at 674.

305. *See id.*

306. *See id.* at 671-74. The four provisions were 28 U.S.C. § 636(b)(1)(A), (b)(1)(B), (b)(3), (c) (1988). *Roberts*, 876 F.2d at 674. Section 636(b)(1)(A) provides that magistrates may hear and determine pretrial matters referred to them. *See id.* at 672. An evidentiary hearing, however, requires fact finding and credibility assessment by the magistrate. *See id.* Thus, the court found this section inapplicable because the evidentiary hearing was not a pre-trial matter, but more like a trial on the merits. *See id.*

An alternative provision, § 636(b)(1)(B), allows referral of prisoner petitions challenging conditions of confinement and applications for criminal post-trial relief. *See id.* at 672. The court found this section inapplicable because even though Roberts was a prisoner at the time of his complaint, his claim was neither related to conditions of confinement nor was it an application for post-trial relief. *See id.*

The third provision was § 636(b)(3), the "additional duties" clause, used as an "all inclusive authority for delegation of duties to a magistrate." *Id.* In holding that this provision was also inapplicable, the *Roberts* court relied on its earlier decision in United States v. Trice, 864 F.2d 1421 (8th Cir. 1988). *See Roberts*, 876 F.2d at 671. In *Trice*, the court held that jury voir dire was more appropriately within the "'traditional adjudicatory duti[es]' of a trial judge" and therefore not within the scope of the "general duties" clause.

Furthermore, the court noted that the record did not clearly show which provision governed the referral.[307] The *Roberts* court concluded that "no consent was given, and in fact [consent] was expressly withheld."[308] The court cited legislative history illustrating congressional concern for uncoerced consent: "[W]ith regard to magistrates' authority to try civil cases, . . . the free and voluntary consent of the parties is required before a civil action may be referred to a magistrate for a final decision."[309]

The plaintiff in *Roberts* was certainly among the class of less-advantaged litigants contemplated by Congress when it passed the 1979 Amendments. And yet, the consent provisions essentially failed, as demonstrated by the fact that although Roberts expressly withheld his consent, his case was referred to and adjudicated by a magistrate. Therefore, despite the plain meaning of the statute and its clear congressional intent, both *Levine* and *Roberts* illustrate that the referral and consent provisions of the statute are not fail-safe. Over the years, the *Pacemaker II* dissenters' concerns have materialized as real-life scenarios in subsequent cases,[310] thus negating the *Geras* court's characterization of these concerns as "almost entirely speculative."[311]

The *Geras* dissent hinged on a separation-of-powers argument. Judge Posner focused on preserving the integrity of Article III rather than on

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Trice, 864 F.2d at 1429; *see also* Gomez v. United States, 490 U.S. 858 (1989) (holding that a magistrate cannot conduct voir dire and jury selection for criminal defendants as part of the "additional duties" that the Federal Magistrate Act permits courts to assign magistrates). Similarly, in *Roberts*, the court held that an evidentiary hearing is equivalent to a trial on the merits. *See Roberts*, 876 F.2d at 672. This is a traditional adjudicatory duty and not within the scope of the general duties clause. *See id.* at 673. The court pointed out that the three exceptions for evidentiary hearings are habeas corpus cases, all prisoner proceedings challenging conditions of confinement, and all civil cases by consent of both parties. *See id.*

Finally, no jurisdiction existed under § 636(c), which allows referral of civil matters to magistrates for final disposition with consent of the parties. The court found that Roberts did not give his consent nor did the magistrate make a final determination. *See id.* at 671.

307. *See Roberts*, 876 F.2d at 671.

308. *Id.* at 673.

309. *Id.* at 674 (quoting 125 CONG. REC. H26,821 (1977) (statement of Mr. Kastenmeier)); *see also* Houghton v. Osborne, 834 F.2d 745 (9th Cir. 1987) (concluding that a prisoner's civil-rights petition against a rule requiring prisoners to wear jail clothing in non-jury appearances did not fall within the scope of § 636(b)(1)(B) governing challenges to "conditions of confinement"); Hill v. Jenkins, 603 F.2d 1256 (7th Cir. 1979) (finding that in a prisoner's civil-rights action regarding prison shakedown practices, the reference of an evidentiary hearing to a magistrate, sua sponte and without consent, is impermissible).

310. *See infra* notes 325-74 and accompanying text.

311. Geras v. Lafayette Display Fixtures, Inc., 742 F.2d 1037, 1042 (7th Cir. 1984).

emphasizing the potential for deleterious effects to the judiciary arising from the consent provisions, as posed in the *Pacemaker II* dissent. Judge Posner stated that

> [a]lthough impressed by the unbroken phalanx of opposing authority in our sister circuits, and by my brethren's reasoning, I cannot repress my conviction that 28 U.S.C. § 636(c), especially in allowing magistrates to preside and enter judgment in diversity cases (provided only that the parties consent to trial by magistrate), violates the Constitution.[312]

Judge Posner's dissent also stressed the preservation of pure Article III adjudication instead of delegating it to an alternative body. He cited Hamilton's *Federalist No. 78*[313] and offered his own hypothetical to illustrate judicial independence—asking whether judges could delegate authority to their assistants or law clerks.[314] Posner noted that many titles have been ascribed to judges, even that of magistrate. The substance and not the form of the judicial office, however, is material: "What [judges] are called is not important; what they do is important."[315] In Posner's view, the proper role of a judicial adjunct is to advise and assist the district judge.[316] This echoes the notion of a magistrate as "super-notary" or "para-judge."[317]

Judge Posner's insights into the risks of magisterial adjudication as it affects an independent Article III judiciary subsequently unfolded before the Supreme Court in *Gomez v. United States*.[318] In *Gomez*, the Court held that conducting jury voir dire at a felony trial is not within the "additional duties" clause under § 636(b)(3).[319] The Court found that "it is more difficult to review the correctness of a magistrate's decision on . . . matters [such as jury voir dire] than on pretrial matters, such as discovery motions, decided solely by reference to documents."[320] The Court continued,

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312. *Id.* at 1045 (Posner, J., dissenting).

313. *See* THE FEDERALIST No. 78, at 464 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

314. *See Geras*, 742 F.2d at 1046. "The judges can have assistants who are not themselves judges, but cannot just hand over their authority to those assistants." *Id.*

315. *Id.* at 1046.

316. *See id.* at 1047.

317. Mathews v. Weber, 423 U.S. 261, 268 (1976).

318. 490 U.S. 858 (1989).

319. *See id.* at 872.

320. *Id.* at 874 n.27.

> [f]ar from an administrative empanelment process, *voir dire* represents jurors' first introduction to . . . legal issues in a case. To detect prejudices . . . the court . . . must elicit . . . candid answers about intimate details of [the jurors] lives . . . . [The court must] scrutinize . . . spoken words . . . gestures and attitudes . . . to ensure the jury's impartiality. But only words can be preserved for review; no transcript can recapture the atmosphere of the *voir dire*, which may persist throughout the trial.[321]

By removing jury voir dire from the scope of magisterial adjudication, the Supreme Court's decision in *Gomez* addressed Judge Posner's misgivings concerning inappropriate delegation of substantive Article III duties to Article I officers. The Court's decision also addressed the *Pacemaker II* dissenters' arguments that questioned magistrates' "judicial" independence as compared to their Article III counterparts.

Circuit courts have demonstrated divergent approaches to deciding procedural errors that occur in the course of obtaining the parties' consent. Some courts view these errors as serious encroachments of jurisdiction,[322] while others characterize such errors as procedural defects that have no effect on jurisdiction.[323] The Act provides that "[r]ules of court for the reference of civil matters to magistrates shall include procedures to protect the voluntariness of the parties' consent."[324] From this statutory mandate, courts have issued guidelines to apply prospectively to ensure that consent be voluntary, that procedures for obtaining it be clear and administratively efficient, and that these procedures be rigidly upheld.

Silberstein v. Silberstein[325] was a 1988 diversity action involving a palimony suit and a Rule 11 sanctions hearing.[326] The Court of Appeals for the Seventh Circuit dismissed the plaintiff's case for lack of jurisdiction under § 636(c) because the parties had not consented to the magistrate's referral.[327] Judge Manion stated that courts should ensure that the clerk notifies the parties of their right to refuse to a trial and a judgment by a magistrate under § 636(c) and that the clerk should ensure

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321. *Id.* at 874-75.

322. *See infra* notes 325-54 and accompanying text.

323. *See infra* notes 355-74 and accompanying text.

324. 28 U.S.C. § 636(c)(2) (1988).

325. 859 F.2d 40 (7th Cir. 1988).

326. *See id.* at 41; FED. R. CIV. P. 11.

327. *See Silberstein*, 859 F.2d at 43.

that copies of these notices appear in the record.[328] The court, Judge Manion said, should insist that the parties give their consent, preferably signed and in writing, before referral to a magistrate.[329] Moreover, the court should ensure that the record identifies the statutory provision that the referral falls under, in this case, § 636(b) or (c).[330] The *Silberstein* court added that the parties are expected to know or to act diligently in finding out jurisdictional requirements and are expected to correct jurisdictional defects where they exist.[331]

In *Adams v. Heckler*,[332] a magistrate summarily dismissed the plaintiff's Social Security claim.[333] The plaintiff had been asked to sign the consent form on the day of the hearing—after the magistrate had already scheduled the hearing. The plaintiff claimed that this practice was "inherently coercive."[334] Nevertheless, his claim was unsuccessful at every level of administrative review.[335] The Seventh Circuit found that the plaintiff's decision about whether to sign the consent was not a "Hobson's choice"[336] and that the court should not assume that the magistrate, in the more limited role, would have been prejudiced against the plaintiff.[337] Under § 636(b), the more limited magistrate role would allow the magistrate to make pre-trial findings but not dispositive judgments.[338] Furthermore, the court determined that "[w]hile ideally the parties should have executed the consent form prior to the day of the scheduled hearing, the failure to do so does not render consent invalid."[339] The court analogized this to the situation in *Collins v. Foreman*.[340] The court, citing *Collins* in which the Second Circuit

328. *See id.* at 42.

329. *See id.*

330. *See id.*

331. *See id.* at 43; *see also* United States v. Mortensen, 860 F.2d 948, 950 (9th Cir. 1988) (stating that a mistrial does not invalidate consent), *cert. denied*, 490 U.S. 1036 (1989). Consent continues as long as jurisdiction is unsevered by appeal. *See Silberstein*, 859 F.2d at 43. It may, however, be revoked or withdrawn if such action is timely. *Id.*

332. 794 F.2d 303 (7th Cir. 1986).

333. *See id.* at 305.

334. *Id.*

335. *See id.*

336. *Id.* at 307. "Hobson . . . was an English liveryman. This phrase derives from his requirement that customers take either the horse nearest the stable door or none at all." *Id* at 307 n.2 (citing AMERICAN HERITAGE DICTIONARY 615 (2d College ed. 1982)).

337. *See id.*

338. *See id.*

339. *Id.*

340. 729 F.2d 108 (2d Cir.), *cert. denied*, 490 U.S. 870 (1984).

upheld the constitutionality of the Act, found that "two phone calls plus a letter from the magistrate do not constitute inducement or pressure . . . sufficient to render . . . consent involuntary."[341] The *Adams* Court succinctly laid out the standards for magisterial consent under § 636(c). Consent must be "clear and unambiguous," explicit, voluntary, and cannot be inferred from the parties' conduct.[342]

In the 1985 decision of *Geaney v. Carlson*,[343] the district court construed a prisoner's written communication as a voluntary dismissal, but the prisoner argued that the dismissal was involuntary.[344] In this case, the magistrate had jurisdiction over the prison in which the plaintiff was incarcerated.[345] Preliminary approval was required from the magistrate to transfer prisoners, who had pending litigation, to another facility.[346] The prisoner's communication was unclear. The writing requested relief from the magistrate's transfer directive.[347] Alternatively, it requested the magistrate to dismiss appellant's suit.[348] Finally, it said that if the suit was in fact dismissed, the appellant would appeal the dismissal as obtained under duress.[349]

The Court of Appeals for the Seventh Circuit dismissed the case for lack of jurisdiction under § 636(b)(1)(A), which prohibits magistrates from hearing motions to dismiss an action involuntarily.[350] According to the circuit court, § 636(b)(1)(A) applies only before a district court, while § 636(c)(1) governs appeals before a circuit court.[351] In this case, only one side of the litigation had consented to the referral.[352] They argued that it would be unfair to require consent from the other side because appellants were the only parties before the court.[353] The court

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341. *See Adams*, 794 F.2d at 307 (citing *Collins*, 729 F.2d at 111). For a different view, see Levine v. Torvik, No. 88-3385, 1988 U.S. App. LEXIS 6949 (6th Cir. May 24, 1988), in which the court held that the consent provision in § 636(c)(2) was violated by an attachment to the consent form that strongly suggested that the parties go before a magistrate.

342. *Adams*, 794 F.2d at 307.

343. 776 F.2d 140 (7th Cir. 1985).

344. *Id.* at 141.

345. *See id.*

346. *See id.*

347. *See id.*

348. *See id.*

349. *See id.*

350. *See id.* at 142.

351. *See id.*

352. *See id.*

353. *See id.*

refused to relax or eliminate the consent requirement and also refused to imply consent from the parties' conduct.[354]

Compare the later, case of *Archie v. Christian*,[355] decided in 1987. *Archie* involved a prisoner's civil rights action tried before a magistrate over the defendant's objection.[356] The district court adopted the magisterial forum's findings and dismissed the action.[357] The prisoner appealed.[358] The circuit court held that, although the reference to the magistrate without the defendant's consent was improper, the district court was not beyond its jurisdiction.[359] The failure to correct this lack of consent was characterized as a procedural error, not as a jurisdictional error.[360]

In upholding the district court's jurisdiction, the Fifth Circuit distinguished the district court's jurisdiction from the magistrate's. The *Archie* court held that district court jurisdiction allows for the appeal to a circuit court; magisterial jurisdiction, on the other hand, is based solely on the party's consent and "is a matter of contract, akin to that exercised by the estimable Judge Wapner."[361]

The court's reasons for finding that jurisdiction superseded a procedural error were based in the congressional intent for the Federal Magistrates Act and in case law.[362] According to the *Archie* court, jurisdiction cannot be waived, but § 636(c) allows the parties to waive both a trial before an Article III judge and the entry of final judgment by

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354. *See id.*; *see also* Ambrose v. Welch, 729 F.2d 1084, 1085 (6th Cir. 1984) (dismissing the case for lack of appellate jurisdiction due to the absence of consent under § 636(c)); Alaniz v. California Processors, Inc., 690 F.2d 717 (9th Cir. 1982) (dismissing the case for lack of jurisdiction under § 636(c)(2) and remanding to the district court in accordance with § 636(b)(2)). The *Alaniz* court found that the magistrate lacked the authority to enter a final disposition without consent of the parties in employment discrimination cases. *See Alaniz*, 690 F.2d at 720. Therefore, final judgment was only appropriate from the district court if a "clear and unambiguous expression of consent" existed to the magistrate's authority under § 636(c). *Id.* at 720.

355. 808 F.2d 1132 (5th Cir. 1987).

356. *See id.* at 1133.

357. *See id.*

358. *See id.* at 1134.

359. *See id.* at 1133.

360. *See id.* at 1134; *see also* Parker v. Mississippi Dep't of Pub. Welfare, 811 F.2d 925, 929 (5th Cir. 1987) (holding that the failure to raise procedural objections at trial is a waiver of the right to do so on appeal and characterizing the lack of consent and the absence of a written order as a procedural defect).

361. *Archie*, 808 F.2d at 1134 n.2.

362. *See id.* at 1134-35.

an Article III judge.[363] Therefore, the court reasoned that Congress must have concluded that it was constitutional for the parties to give their consent and thus waive their rights to an Article III judge.[364] This waiver, however, maintained jurisdiction. The *Archie* court also relied on a 1972 Supreme Court case in which the Court held that improper removal could not be raised as an issue for the first time on appeal; rather, the issue had to be whether the district court would have had original jurisdiction.[365]

The Fifth Circuit was careful not to impose a per se rule: "[w]e need not conclude today that no imaginable procedural lapse could be so egregious as to deprive a federal district court of jurisdiction of the case."[366] The court, however, ignored the constitutional safeguards of the consent provision in the Federal Magistrates Act. The court found that "a procedure that wanted only the advance consent of the parties to be regular . . . [did not] deprive the district court of power to enter the judgment."[367] The court added that if the parties had complained, "a speedy reversal on the summary calendar would [have] ensued."[368]

Chief Judge Clark, in dissent, asked rhetorically, "[i]s this close enough for government work?" and characterized the majority's use of Article III power as "critically defect[ive]."[369] Chief Judge Clark acknowledged that jurisdiction would have existed if the district judge conducted the trial.[370] But in this case, the magistrate conducted the trial, not the district judge. Additionally, because this was an improper referral, the judge stated that "[t]he magistrate was as much a legal stranger to the judicial process . . . as would have been a bystander called in from the street."[371] Furthermore, the judge noted that even though the majority knew that the parties did not consent, they did not reverse the

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363. *See id.* at 1134.

364. *See id.*

365. *See id.* (citing Grubbs v. General Elec. Credit Corp., 405 U.S. 699 (1972)).

366. *Id.* at 1135.

367. *Id.*

368. *Id.* The procedural problem in this case, however, was more complex. Shortly after *Archie* was decided by the district court, the Fifth Circuit, in Ford v. Estelle, 740 F.2d 374 (5th Cir. 1984), held that non-consensual references for jury matters were not within the purview of § 636(b)(1)(B), which applies to challenges of prisoner confinement, nor were such matters within the scope of § 636(b)(3), the additional duties clause governing pre-trial matters, *Estelle*, 740 F.2d at 380-82.

369. *Archie*, 808 F.2d at 1138 (Clark, C.J., dissenting).

370. *See id.*

371. *Id.*

case, but instead issued a prospective rule.[372] Chief Judge Clark emphasized that the court's obligation in its "error-correction function" requires the court to "notice a breach of the statutory and decisional limits on the exercise of [A]rticle III judicial power . . . by a non-[A]rticle III official . . . . [S]uch unauthorized action cannot be put beyond our independent notice by the adopting stamp of the district judge."[373] Urging strict compliance with the consent requirement, the judge stated that consent was as vital as jurisdiction.[374]

VI. CONCLUSION

Recently, the consensual reference section of the Federal Magistrates Act has presented some difficulty to the lower courts in their efforts to obtain parties' consent properly and to ensure that referral is pursuant to the appropriate statutory section. Lively debate has encouraged speculation whether the magisterial system erodes the separation of powers between Article III judges and Article I judges. The magistrates' expanding jurisdictional authority has evoked concerns over the propriety of any substantive delegation of Article III power to Article I officers. Yet, the majority of courts have held that the consent provisions of the Act impart to it its constitutionality. Two out of the three statutory sections require the parties' consent. The trend is for majority opinions to downplay transgressions of these rules as procedural rather than substantive. This direct disregard of these procedural rules, which were enacted by Congress to ensure the constitutionality of the magisterial system, endangers litigants' rights—especially the rights of the pro se litigants and the less-advantaged litigants for whom the system has been tailored.

To avoid these dangers, the purpose of the magisterial system—to promote access to the courts for the less-advantaged—should be re-evaluated. If the system does reduce the expense and time involved in litigation, the system might be better directed to corporate litigants who are arguably less susceptible to coerced consent. Moreover, this shift in purpose may ease the concern of the foreseeable evolution of a two-tiered

372. *See id.*

373. *Id.*

374. *See id.* Compare this with Judge Higgenbotham's concurrence, stating that the majority's error was not of jurisdictional consequence nor of sua sponte import. *See id.* at 1137 (Higgenbotham, J., concurring). Judge Higgenbotham's view of consent was that even though there was no written consent, the parties failure to object to the magistrate's adjudication, although the parties were well aware of it, was "in every real sense," consent. *Id.* Judge Higgenbotham authored the opinion upholding the constitutionality of consensual reference to magistrates under § 636(c) in Puryear v. Edes Ltd., 731 F.2d 1153 (5th Cir. 1984).

system of justice—one for the less-advantaged and one for the more affluent. In this way, the magisterial system would become more like the Bankruptcy Court, which expeditiously handles cases falling under federal bankruptcy law in one court.[375] Similarly, the magisterial system could adjudicate the claims of specific plaintiffs, such as corporate litigants with civil claims. Corporate litigants have the resources and the expertise to make an informed election of either magisterial or Article III adjudication. This would limit magistrates' responsibilities under § 636(c) similar to the way they are limited under § 636(b), which governs all prisoner petitions protesting conditions of confinement. Whether corporate litigants would receive preferential, equal, or unfavorable treatment by the suggested limitations of § 636(c) is beyond the scope of this note. The problem of coerced consent would be substantially reduced, however, by narrowing the category of litigants permitted to proceed before a magistrate under § 636(c).

Claudia L. Psome

375. *See* 1 DANIEL R. COWANS, BANKRUPTCY LAW AND PRACTICE § 1.1, at 4 (1987).