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Federal Magistrates and the Implications of Consensual References

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NOTES

FEDERAL MAGISTRATES AND THE IMPLICATIONS OF CONSENSUAL REFERENCES

I. Introduction

The office of United States Magistrate was created in 1968, by Congressional enactment of the Federal Magistrates Act,[1] in an attempt to alleviate problems of delay and congestion caused by a substantial increase in the volume of litigation in the federal courts.[2] These magistrates were given jurisdiction over certain minor criminal offenses and could be assigned additional duties by individual district court rules.[3]

The legislative history of the Magistrates Act indicates that Congress intended the office of magistrate to be a responsible and prestigious one, thus enabling it to shoulder a part of the judicial burden.[4] However, the exact scope of the magistrate's responsibilities, as well as the related issue of the scope of the district court's review of a

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1. Federal Magistrates Act, Pub. L. No. 90-578, § 101, 82 Stat. 1107 (1968) (codified at 28 U.S.C. §§ 631-39 (1970), *as amended*, (Supp. III, 1973)).

2. United States v. Eastmount Shipping Corp., 62 F.R.D. 437, 438 (S.D.N.Y. 1974).

3. 28 U.S.C. § 636 (1970), *as amended*, (Supp. III, 1973).

4. This Congressional intent is illustrated by reference to the Senate Report concerning the Federal Magistrates Act:

> S.945 is designed to create an upgraded lower tier judicial office that will be free from the present defects of the U.S. commissioner system, and that will be a truly useful component of our Federal judiciary. By raising the standards of the lowest judicial office by making the position more attractive to highly qualified individuals, and by increasing the scope of the responsibilities that can be discharged by that office, your committee hopes to establish a system capable of increasing the overall efficiency of the Federal judiciary by relieving the district courts of some of their minor burdens, while at the same time providing a higher standard of justice at the point where many individuals first come into contact with the courts.

S. REP. No. 371, 90th Cong., 1st Sess. 11 (1967). And, in discussing the "additional duties" to which magistrates may be assigned the Report stated:

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

Id. at 26.

magistrate's actions, remains uncertain.[5] It is clear both from the wording of the statute and from the legislative history that the legislature did not intend to limit magistrates' functions to those listed in the Act.[6]

The significance of the magistrate in the efficient operation of the federal court system makes it important to analyze the extent of the magistrate's powers as well as the limitations placed thereon. This note will examine the matters which may properly be referred to a magistrate and the standard of review which is used when the magistrate's decision goes before the district court. A major consideration in this discussion will be whether parties, by their consent, can expand the scope of magistrate's powers.

II. Powers of the Magistrate

The Magistrates Act specifically delineates certain administrative-type powers, such as administering oaths and affirmations, which a magistrate possesses.[7] It also provides that under district court rules a magistrate may be assigned "such additional duties as are not inconsistent with the Constitution and laws of the United States."[8] These duties, according to the statute,[9] include but

5. *See* DeCosta v. CBS, Inc., 520 F.2d 499 (1st Cir. 1975); United States v. Eastmount Shipping Corp., 62 F.R.D. 437 (S.D.N.Y. 1974).

6. 28 U.S.C. § 636(b) (1970) states that a magistrate may be assigned additional duties authorized by district court rules and merely by way of examples adds: "The additional duties authorized by rule may include, *but are not restricted to* . . . ." (emphasis added). The remarks of Senator Tydings, Chairman of the Senate Subcommittee on Improvement in Judicial Machinery and major sponsor of the Act, are also worthy of note in this regard: "The Magistrate Act specifies these three areas [28 U.S.C. §§ 636(b)(1)-(3) (1970)] because they came up in our hearings and we thought they were areas in which the district courts might be able to benefit from the magistrate's services. We did not limit the courts to the areas mentioned." *Hearings on S. 945 Before Subcomm. No. 4 of the House Comm. on the Judiciary*, 90th Cong., 2d Sess., ser. 17, at 81 (1968).

7. 28 U.S.C. § 636(a): "Each United States magistrate serving under this chapter shall have within the territorial jurisdiction prescribed by his appointment—(2) the power to administer oaths and affirmations, impose conditions of release under § 3146 of title 18, and take acknowledgments, affidavits, and depositions . . . ."

8. 28 U.S.C. § 636(b) (1970) provides:

> Any district court of the United States, by the concurrence of a majority of all the judges of such district court, may establish rules pursuant to which any full-time United States magistrate, or, where there is no full-time magistrate reasonably available, any part-time magistrate specially designated by the court, may be assigned within the territorial jurisdiction of such court such additional duties as are not inconsistent with the Constitution and laws of the United States. The additional duties authorized by rule may include, but are not restricted to—

are not limited to: service as a special master pursuant to the Federal Rules of Civil Procedure;[10] assistance in civil and criminal pretrial and discovery proceedings;[11] and preliminary review of habeas corpus petitions.[12] A question of interpretation arises with respect to the range of these three particular duties as well as the latitude to be allowed generally under the guise of "additional duties."[13] These are but two aspects of the same problem—the permissible scope of references to a magistrate.

Two leading cases dealing with the problem are *TPO, Inc. v. McMillen*[14] and *Wingo v. Wedding*.[15] Although both opinions represent restraints on a magistrate's activities, they have been limited to their facts.[16] In *TPO* the court of appeals ruled that magistrates do not have power to decide motions to dismiss or motions for summary judgment since both involve ultimate decision making which district courts cannot delegate to magistrates.[17] In so holding, the court said that reference to a magistrate in such a situation "amounted to little less than an abdication of the judicial function depriving the parties of a trial before the court on the basic issues

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

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

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

9. *Id.*

10. *See generally* Note, *Masters and Magistrates in the Federal Courts*, 88 HARV. L. REV. 779 (1975). FED. R. CIV. P. 53(b) provides: "A reference to a master shall be the exception and not the rule. In actions to be tried by a jury, a reference shall be made only when the issues are complicated; in actions to be tried without a jury, save in matters of account and of difficult computation of damages, a reference shall be made only upon a showing that some exceptional condition requires it."

11. For a personal account of the role of the United States magistrate in pre-trial proceedings, see Naythons, *The Civil Settlement Conference*, 9 FORUM 75 (1973).

12. *See generally* Note, *The Validity of United States Magistrates' Criminal Jurisdiction*, 60 VA. L. REV. 697 (1974).

13. 28 U.S.C. § 636(b) (1970).

14. 460 F.2d 348 (7th Cir. 1972).

15. 418 U.S. 461 (1974).

16. Campbell v. United States Dist. Ct., 501 F.2d 196 (9th Cir. 1974), *cert. denied*, 419 U.S. 879 (1974). *See* text accompanying notes 34-36, 45-47 *infra*.

17. 460 F.2d at 359.

involved in the litigation."[18]

The *TPO* court stressed that the legislative history of the Magistrates Act demonstrated that the functions to be assigned to magistrates should be limited to those which could be handled by a non-Article III judge.[19] The *TPO* court also pointed to a definite legislative intent to so curb magistrates' powers by comparing the original statutory wording of the "additional duties" that might be assigned to a magistrate with the final formulation which is designed to maintain the magistrate's role as an advisory one.[20] Thus,

18. La Buy v. Howes Leather Co., 352 U.S. 249, 256 (1957), *quoted in* 460 F.2d at 359.

19. " '[I]t contemplates assignments to magistrates under circumstances where the ultimate decision of the case is reserved to the judge, except in those instances where action can properly be taken by a nonarticle III judge' ". 460 F.2d at 358, *quoting* S. REP. No. 371, 90th Cong., 1st Sess. 25-27 (1967). U.S. CONST., art. III, § 1 provides: "The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office." Cases and controversies in any of the nine enumerated areas in Article III can be adjudicated at the federal level only by Article III courts exercising the judicial power of the United States. *See* Glidden Co. v. Zdanok, 370 U.S. 530, 544 (1962); Williams v. United States, 289 U.S. 553, 578 (1933). Courts have recognized that there are three general categories in which cases may be decided by non-Article III courts because they do not involve the exercise of Article III defined judicial power. These categories are: territorial courts and local District of Columbia courts; matters which are not considered to be inherently judicial; and specific subject matter areas such as taxation and military discipline. Note, *supra* note 10, at 781-82. References by an Article III district court judge of matters properly before that court cannot fit into any of those categories. However, determination of facts by non-Article III officials aiding Article III judges is constitutionally permissible.

In Crowell v. Benson, 285 U.S. 22 (1932) the Supreme Court held that "there is no requirement that, in order to maintain the essential attributes of the judicial power, all determinations of fact in constitutional courts shall be made by judges" *id.* at 51, and that "the reservation of full authority to the court to deal with matters of law provides for the appropriate exercise of the judicial function . . . ." *Id.* at 54. This reasoning can be extended to conclude that magistrates may constitutionally assist district court judges subject to the proviso found in *TPO* that the judge be the final decision maker. For a detailed discussion of the question of Article III courts and the constitutionality of references to magistrates, see Note, *supra* note 10.

The *TPO* court noted that the report of the Senate Committee on the Judiciary mentioned the safeguards which existed to prevent an abdication of its judicial function by the district court: first, that assignments to magistrates under 28 U.S.C. § 636(b) were to be governed by district court rule and not by individual judges; and second, that 28 U.S.C. § 636(b) prohibited assignments inconsistent with the Constitution and laws of the United States. With these provisions, the Committee felt that any delegation of responsibility to a magistrate would be within the constitutionally permissible duties of a non-Article III judicial officer. 460 F. 2d at 357.

20. 460 F.2d at 357.

TPO stands for the proposition that references can be made to a magistrate under the Magistrates Act only when such a reference will not remove the ultimate decision making function from the judge.[21]

The Supreme Court in *Wingo v. Wedding*[22] also limited the power of a magistrate by holding that that part of a district court rule authorizing a magistrate to hold evidentiary hearings in federal habeas corpus cases was invalid.[23] The Court concluded that 28 U.S.C. § 2243, a section of the habeas corpus statute, requires the district judge to conduct such evidentiary hearings personally.[24] Thus, the local rule authorizing a magistrate to do so is "inconsistent with the . . . laws of the United States."[25] In addition, the Court concluded that the language of 28 U.S.C. § 636(b)(3) precluded magistrates from this assignment by calling for the magistrate to make only a preliminary review and recommendation regarding the need for a posttrial hearing.[26] The Court pointed out that the Judicial Conference of the United States[27] refused to approve the wording of the subsection until it clearly indicated that magistrates could not be given the responsibility of holding evidentiary hearings on applications for posttrial relief.[28]

The changes in the three categories of "additional duties" were drastic: (1) "service as a special master" was expressly made subject to the Federal Rules of Civil Procedure which include the highly restrictive Rule 53; (2) "supervision of the conduct" of pretrial or discovery proceedings was reduced to "assistance to a district judge"; and (3) "preliminary consideration of application for posttrial relief" was reduced to "preliminary review" leading to "submission of a report and recommendation to facilitate the decision of the district judge" as to "whether there should be a hearing."

Id.

21. *See generally* Doyle, Implementing The Federal Magistrates Act, 39 J. KAN. B.A. 25, 29 (1970).

22. 418 U.S. 461 (1974).

23. *Id.* at 472.

24. *Id.* at 477-78. 28 U.S.C. § 2243 (1970) is given the construction given to its predecessor statute, Rev. Stat. § 631, 18 Stat. 143 (1873), in Holiday v. Johnston, 313 U.S. 342 (1941). *See also* Brown v. Allen, 344 U.S. 443 (1953); United States v. Hayman, 342 U.S. 205 (1952).

25. 418 U.S. at 472.

26. *Id.* 28 U.S.C. § 636(b)(3) (1970) provides that additional duties may include "preliminary review of applications for posttrial relief made by individuals convicted of criminal offenses, and submission of a report and recommendations to facilitate the decision of the district judge having jurisdiction over the case as to whether there should be a hearing."

27. The Judicial Conference of the United States was established pursuant to 28 U.S.C. § 331 (1970). It is provided that the conference "shall make a comprehensive survey of the condition of business in the courts . . . ." and also that the conference "carry on a continuous study of the operation and effect of the general rules of practice and procedure . . . ." *Id.*

28. 418 U.S. at 470.

Both *TPO* and *Wingo* have certain constraining effects on the office of United States Magistrate. However, they both deal with particular matters and, when properly limited to their facts, need not prevent the courts from further liberalizing their utilization of magistrates.[29] For example, *Campbell v. United States District Court*[30] presented the question of whether a magistrate could recommend findings of fact and conclusions of law on a motion to suppress evidence. The Ninth Circuit decided that *Wingo's* application should be limited to habeas corpus petitions and that the case had no relevance to a hearing on a motion to suppress evidence.[31] The court further held that Rule 12 of the Federal Rules of Criminal Procedure controls proceedings on motions to suppress evidence and does not require that the district court itself conduct the hearing.[32]

The Second Circuit, relying on the "additional duties" rubric of Section 636(b),[33] has approved the use of magistrates to recommend whether a motion to dismiss[34] or a motion for summary judgment[35] should be granted. In *Dewrell v. Weinberger*,[36] the Fifth Circuit affirmed a district court's ruling that considered recommendations of a magistrate concerning whether a claimant had been denied due process in her disability hearing and whether the decision of the Secretary of Health, Education and Welfare to deny her claim was supported by substantial evidence.[37]

Although in each of the above cases the courts approved various magisterial powers, these powers only involved the making of pro-

29. *See* Campbell v. United States Dist. Ct., 501 F.2d 196, 205 (9th Cir. 1974), *cert. denied*, 419 U.S. 879 (1974). *See also* text accompanying notes 33-43 *infra*.

30. 501 F.2d 196 (9th Cir. 1974), *cert. denied*, 419 U.S. 879 (1974).

31. *Id.* at 202.

32. *Id.* at 204. FED. R. CRIM. P. 12 provides in part: "All other issues of fact shall be determined by the court with or without a jury or on affidavits or in such other manner as the court may direct."

33. *See* text accompanying notes 8-12 *supra*.

34. Givens v. W.T. Grant Co., 457 F.2d 612 (2d Cir. 1972). "The record in this case reflects a commendable utilization . . . of the services of the full-time United States Magistrate . . . in conformity with the Federal Magistrates Act, 28 U.S.C. § 636(b) (1970) . . . ." *Id.* at 613 n.1.

35. Remington Arms Co. v. United States, 461 F.2d 1268 (2d Cir. 1972).

36. 478 F.2d 699 (5th Cir. 1973).

37. Ingram v. Richardson, 471 F.2d 1268 (6th Cir. 1972) also deals with a review of the Secretary's decision on a disability claim, but the reference was for disposition. Because a magistrate cannot make a decision on this question, the reference was held improper. *Id.* at 1270-71.

posals, recommendations, or reports to the district court. In fact, *Campbell* specifically mentioned that the magistrate who conducts a hearing on a motion to suppress may not exercise ultimate decision making power.[38] According to *Campbell*, there is no abdication by the district court of its judicial function in these cases as there was in the case of *La Buy v. Howe*[39] where the trial of an entire, complicated case was referred to a master,[40] and in *TPO* where the reference to the magistrate was for the purpose of a decision.[41] Thus, magistrates may hold evidentiary hearings on issues other than federal habeas corpus petitions, and may make proposed findings of fact, conclusions of law and a proposed order in certain circumstances.[42] However the district court must make the final adjudication.[43]

III. The Effect of a Consensual Reference

Another question concerning the scope of a magistrate's power is whether matters which would not otherwise be assignable to a magistrate may be properly referred if both parties consent.[44] A major argument in favor of such reference is that the Magistrates Act invests the magistrate with authority to conduct trials[45] for certain

38. 501 F.2d at 205. *See also* O'Shea v. United States, 491 F.2d 774 (1st Cir. 1974). In *O'Shea*, involving a reference of a habeas corpus application, the First Circuit recognized that the magistrate decides nothing but merely recommends. *Id.* at 776. *O'Shea* was later overruled in part by *Wingo* where the Supreme Court disagreed with *O'Shea's* suggestion that magistrates could hear oral testimony in a federal habeas corpus case provided that the parties would have the right to a de novo hearing before the district judge. 418 U.S. at 473 n.19.

The First Circuit had previously proscribed any acceptance of final decision making by a magistrate, calling it an abnegation of judicial authority. *See* Reed v. Board of Election Comm'rs, 459 F.2d 121 (1st Cir. 1972); Rainha v. Cassidy, 454 F.2d 207 (1st Cir. 1972).

39. 352 U.S. 249 (1957). *La Buy* involved an attempted reference to special masters of all the issues of a complicated antitrust trial despite the fact that the district court judge had been involved in extensive pretrial proceedings. The Court held that a congested calendar and the presence of complex issues are not sufficient justification for reference to a master. Rather, it said, reference in such a case would be an abdication of the decision making responsibility of the district courts. *Id.* at 256-59.

40. 501 F.2d at 205.

41. *Id.*

42. Campbell v. United States Dist. Ct., 501 F.2d 196, 206 (9th Cir. 1974); *see* Wingo v. Wedding, 418 U.S. 461, 470-71 n.11 (1974).

43. TPO, Inc. v. McMillen, 460 F.2d 348, 359 (7th Cir. 1972). For approval of references respecting all types of pretrial motions to magistrates so long as their role remains advisory, see Doyle, *supra* note 21, at 67, 69.

44. United States v. Eastmount Shipping Corp., 62 F.R.D. 437, 439 (S.D.N.Y. 1974).

45. 28 U.S.C. § 636(a): "Each United States magistrate serving under this chapter shall

petty criminal offenses so long as the defendant has consented.[46] Noting this, the court in *United States v. Eastmount Shipping Corp.*[47] approved the practice of referring cases involving relatively small amounts of money to magistrates with consent.[48]

The problem involving consensual references is often presented when referring matters to a magistrate as a special master under 28 U.S.C. § 636(b)(1).[49] This section requires that such a reference be made pursuant to the Federal Rules of Civil Procedure,[50] particularly the Rule 53(b) requirement that references to special masters be made only upon a finding of exceptional circumstances.[51]

The legislature and the courts have said that Rule 53(b) embodies the rule announced by the Supreme Court in *La Buy* to protect against abdication of decision making by district courts.[52] Nevertheless, many courts have approved consensual references to special masters or other referees (before and after Rule 53 and the Magistrates Act) in other than exceptional circumstances, arguing that the parties have the right to make this decision.[53] On the other hand some courts have insisted upon following the stricter test espoused in *La Buy* and Rule 53(b) regardless of any consent by the parties.[54]

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

46. 28 U.S.C. § 636(a)(3) (1970) incorporates the provisions of 18 U.S.C. § 3401 (b) which includes the requirement of the defendant's consent to a trial before a magistrate. 18 U.S.C. § 3401(f) provides: "As used in this section, the term 'minor offenses' means misdemeanors punishable under the laws of the United States, the penalty for which does not exceed imprisonment for a period of one year, or a fine of not more than $1,000, or both . . . ."

47. 62 F.R.D. 437 (S.D.N.Y. 1974).

48. *Id.* at 439.

49. *See* note 8 *supra.*

50. 62 F.R.D. at 439.

51. *See* note 10 *supra.*

52. TPO, Inc. v. McMillen, 460 F.2d 348, 357 (7th Cir. 1972). The court said: "These conditions, which in essence reflect the rule laid down by the Supreme Court in La Buy v. Howes Leather Company, 352 U.S. 249 (1957), protect against any abdication of the decision-making responsibility that is properly that of the district courts." *Id.*, *citing* S. REP. No. 371, 90th Cong., 1st Sess. 25-27. For a discussion of special masters and Rule 53, see Kaufman, *Masters in the Federal Courts: Rule 53*, 58 COL. L. REV. 452 (1958).

53. *See* Kimberly v. Arms, 129 U.S. 512 (1889); Newcomb v. Wood, 97 U.S. 581 (1878); Heckers v. Fowler, 69 U.S. 123 (1864); De Costa v. CBS, Inc., 520 F.2d 499 (1st Cir. 1975); Hart v. Williams, 202 F.2d 190 (D.C. Cir. 1952); United States v. Eastmount Shipping Corp., 62 F.R.D. 437 (S.D.N.Y. 1974).

54. *See* Wilver v. Fisher, 387 F.2d 66 (10th Cir. 1967); Bartlett-Collins Co. v. Surinam Navigation Co., 381 F.2d 546 (10th Cir. 1967); Cademartori v. Marine Midland Trust Co., 18 F.R.D. 277 (S.D.N.Y. 1955). It has been concluded that "[t]he court may also refuse to

A recent judicial analysis of the propriety of consensual reference to a magistrate where such a reference would not otherwise be permitted appears in *De Costa v. CBS, Inc.*,[55] involving a purported consensual reference to a magistrate for findings of fact and conclusions of law in a trademark or service mark infringement and unfair competition case.

In *De Costa*, the First Circuit found the consensual reference to be proper under both the Constitution and the Magistrates Act.[56] The court held that the parties to a civil dispute may constitutionally select another forum; in this case, a magistrate.[57] In a consensual reference, the court continued, an Article III district judge is not investing the magistrate with decision making authority. Rather, it is the parties themselves who are selecting another arbiter for their dispute. The *De Costa* court felt that they may do so, absent overriding constitutional considerations.[58]

Comparing the situation in its case to that in several old Supreme Court cases[59] in which references to arbitrators were approved, the *De Costa* court said that both situations involved a knowing waiver of access to an Article III judge in favor of another forum, and

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refer a matter though both parties have consented to the reference." C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE: CIVIL § 2603 (1971).

55. 520 F.2d 499 (1st Cir. 1975). Consensual reference to a magistrate for decision raises a constitutional question involving the requirement that the judicial power of the United States be exercised only by Article III court judges. *See* note 19 *supra*. While the parties may have the right to waive their right to a trial by an Article III judge, *see* text accompanying note 67 *infra*, the respective powers of the district court and the magistrate is a question of subject matter jurisdiction. Since subject matter jurisdiction cannot be created or waived by the parties, the constitutional question remains unresolved.

56. 520 F.2d at 507-08. "It therefore seems clear to us that the Congressional intent was to leave untouched the tradition, as Congress understood it, that parties could, without violation of Article III freely consent to refer cases to non-Article III officials for decisions." *Id.* at 507. The district court's analysis of the case stated that the consensual reference to a magistrate was not a reference to a special master under 28 U.S.C. § 636(b)(1), but was governed by the "additional duties" language of 28 U.S.C. § 636(b). It concluded that adjudication of a civil case by a magistrate based on the parties' consent was constitutionally and statutorily permissible. 383 F. Supp. at 336-37. The court of appeals, on the other hand, never clearly defined which part of the Act controlled this consensual reference. It did indicate, however, that it would not limit consensual references to "some exceptional conditions" as required by FED. R. CIV. P. 53(b) for references to special masters. 520 F.2d at 507.

57. 520 F.2d at 503-04.

58. *Id.*

59. Kimberly v. Arms, 129 U.S. 512 (1889); Newcomb v. Wood, 97 U.S. 581 (1878); Heckers v. Fowler, 69 U.S. 123 (1864).

concluded that both were constitutional.[60] *La Buy* was distinguished on its facts. Unlike *De Costa*, it involved judicial references of complicated issues over the parties' objections to private masters in order to clear crowded dockets.[61]

The *De Costa* decision also suggested, through an examination of the legislative history of the Magistrates Act, that there was no statutory impediment to a consensual reference.[62] In so deciding, the court cited a Senate subcommittee staff memorandum accompanying the draft of the legislation.[63] That memorandum, in discussing the Magistrates Act, stated:[64]

> The use of magistrates for duties that do not require the employment of an Article III judge, or in cases in which the parties consent to the use of a magistrate, may do much to increase the efficiency of the Federal Courts.

The court further mentioned a memorandum by the Senate subcommittee staff concerning the constitutionality of magistrates trying minor offenses.[65] This memo stated that if there is any right to trial by an Article III judge, it is a right which can be waived by the consent of the defendant.[66] A subsection in the same memorandum also recognized that in ordinary practice parties can consent to the delegation of judicial responsibility to a special master.[67] Finally, the opinion referred to the Senate Report which accompanied the proposed legislation in the Senate.[68] This Report, while recognizing the statutory requirement[69] of following Rule 53(b), in-

60. 520 F.2d at 504-06. Arguing in favor of the constitutionality of a consensual reference to a magistrate, the court points out: "The authority of the courts to relinquish their decision making authority in favor of the arbitrators to the extent described in a private contract has long been assumed to have passed constitutional muster." *Id.* at 505. (citations omitted).

61. *Id. See* Comment, *An Adjudicative Role for Federal Magistrates in Civil Cases*, 40 U. CHI. L. REV. 584, 588, 592 (1973), which argues that the principle of *La Buy* does not reach the federal magistrates and that magistrates should be awarded a larger role, especially if the parties consent.

62. 520 F.2d at 506; *see* text accompanying notes 49-54 *supra*.

63. 520 F.2d at 506.

64. *Hearings on S. 3475 and S. 945 Before the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary*, 89th Cong., 2d Sess. & 90th Cong., 1st Sess. 14 (1967).

65. 520 F.2d at 507.

66. *Hearings on S. 3475 and S. 945 Before the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary*, 89th Cong., 2d Sess. & 90th Cong., 1st Sess. 256 (1967).

67. *Id.* at 253.

68. 520 F.2d at 507.

69. 28 U.S.C. § 636(b)(1)(1970).

corporates[70] a memorandum of the subcommittee staff which states that a party can waive his right to trial by judge and/or jury by consenting to a reference.[71]

The First Circuit concluded that a consensual reference of a case to a magistrate is both constitutionally and statutorily permissible, and is not limited by the "exceptional condition" language of Rule 53(b).[72] The key factor in *De Costa* was the consent of *all* the parties. That consent persuaded the First Circuit to conclude that the case could be referred to a magistrate for initial decision.[73] Thus, the rule announced in *De Costa* represents a new line of reasoning concerning consensual references, permitting even decision making by magistrates if the parties have so consented. It clearly contradicts the view of some commentators that the language in *TPO*, and its progeny, restricts even consensual references to protect against "an abdication of the judicial function."[74]

IV. The Scope of District Court Review

A corollary to the issue of the scope of a federal magistrate's power is the question of the scope of review of that magistrate's actions by the district court. The issues are related since the district court's scope of review increases or decreases according to what powers the magistrate has been given.

Absent the consent of the parties, the general rule is that a magistrate only may make recommendations, while the district court judge must formulate the final decision.[75] When the magistrate is serving as a special master under 28 U.S.C. § 636(b)(1), review by the district court is governed by the Federal Rules of Civil Proce-

70. S. REP. No. 371, 90th Cong., 1st Sess. 25 (1967).

71. *Hearings on S. 3475 and S. 945 Before the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary*, 89th Cong., 2d Sess. & 90th Cong., 1st Sess. 281-83 (1967).

72. 520 F.2d at 507-08; *see* note 55 *supra*.

73. 520 F.2d at 507.

74. Comment, *supra* note 61, at 592. "This concept of constitutional restrictions [on a court's ability to make consensual references] conflicts with long-standing approval in several areas of the law of federal court enforcement of decisions by non-Article III federal tribunals when the parties had consented to the tribunal." *Id.* But, the Seventh Circuit in *TPO* never discussed the relevancy of consent. *Id.* at 587; *see* text accompanying notes 16-24, 32 *supra*. It is suggested that *TPO* should be limited to its facts; therefore its broad language would not apply to a consensual reference.

75. *See* text accompanying notes 16-24, 38-42 *supra*.

dure.[76] Where there is no stipulation that the master's findings of fact are to be final, the court, in a non-jury action, must accept those findings unless they are clearly erroneous.[77]

A finding of fact by the master is clearly erroneous when "the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed."[78] If the parties stipulate that a master's findings of fact shall be final, then the court will consider only questions of law arising upon the report.[79]

Rule 53 contains no provision concerning the effect to be given a master's conclusions of law.[80] As such, it is agreed that a master's conclusions of law need carry no weight with the district court, although they are entitled to careful consideration.[81]

Application to the court for action upon the master's report and any objections to the report must be by motion.[82] The court must hold a hearing on the motion.[83] It then may adopt the report, modify it, or reject it in whole or in part. It may choose to receive further evidence or may recommit the report to the master with instructions.[84] The report is not automatically adopted if there are no objections. However, absent any specific objections, the court is likely to

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76. *See* note 8 *supra*.

77. FED. R. CIV. P. 53(e)(2) which provides: "*In Non-Jury Actions.* In an action to be tried without a jury the court shall accept the master's findings of fact unless clearly erroneous. Within 10 days after being served with notice of the filing of the report any party may serve written objections thereto upon the other parties. Application to the court for action upon the report and upon objections thereto shall be by motion and upon notice as prescribed in Rule 6(d). The court after hearing may adopt the report or may modify it or may reject it in whole or in part or may receive further evidence or may recommit it with instructions."

78. United States v. United States Gypsum Co., 333 U.S. 364, 395 (1948); *see* Trans World Airlines, Inc. v. Hughes, 308 F. Supp. 679, 685 (S.D.N.Y. 1969); McGraw Edison Co. v. Central Transformer Corp., 196 F. Supp. 664, 666-67 (E.D. Ark. 1961), *aff'd*, 308 F.2d 70 (8th Cir. 1962).

79. FED. R. CIV. P. 53(e)(4) provides: "*Stipulation as to Findings.* The effect of a master's report is the same whether or not the parties have consented to the reference; but, when the parties stipulate that a master's findings of fact shall be final, only questions of law arising upon the report shall thereafter be considered." *But see* note 56 *supra*. *De Costa*, holding that parties may agree to have a magistrate make the final decision, implies that consensual references to a magistrate as a special master need not be limited by Rule 53. 520 F.2d at 507.

80. FED. R. CIV. P. 53.

81. *See* D.M.W. Contracting Co. v. Stolz, 158 F.2d 405 (D.C. Cir. 1946), *cert. denied*, 330 U.S. 839 (1947).

82. FED. R. CIV. P. 53(e)(2).

83. C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE: CIVIL § 2612 (1971).

84. FED. R. CIV. P. 53(e)(2).

approve the findings of the master.[85] The magistrate who is functioning as a special master is always subject to review under these procedures.[86]

When the magistrate is performing other duties, the district court is not restricted to the review dictated by the Federal Rules of Civil Procedure.[87] Recognizing this, the district court in *American Honda Motor Co. v. Vickers Motors, Inc.*,[88] a case involving the reference of a discovery dispute to a magistrate, decided to follow its own court rule and to conduct a hearing to review the magistrate's report only if it deemed such a hearing necessary or desirable.[89] Even in the absence of a hearing, its review of the magistrate's reports and recommendations would consist of a review of "all the record, information and material essential for a proper adjudication . . . ."[90]

In another instance, while emphasizing that the district court must make the final adjudication on a motion to suppress evidence, the court in *Campbell* outlined the method of review that the district court should follow to insure a proper final adjudication.[91] First, if neither party objects to the magistrate's proposed findings of fact, the court may accept them as correct and proceed to decide the motion on the applicable law.[92] But, if either party so requests, the district court will listen to the tape recording of the proceedings before the magistrate and consider his proposed findings of fact and conclusions of law before making a de novo determination of the facts and conclusions of law to be drawn from those facts.[93]

Furthermore, while the court may request and receive additional evidence or call and hear the testimony of one or more witnesses, it is not required to do so;[94] nor is it required to hold a second hearing

85. C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE: CIVIL § 2612 (1971).

86. 28 U.S.C. § 636(b)(1) (1970).

87. *Id.* § 636(b); *see* American Honda Motor Co. v. Vickers Motors, Inc., 64 F.R.D. 118, 120-21 (W.D. Tenn. 1974).

88. 64 F.R.D. 118 (W.D. Tenn. 1974).

89. *Id.* at 121. FED. R. CIV. P. 53(e)(2) would have required a hearing by the district court upon objection by any party to the magistrate's report. *See* text accompanying notes 82-83 *supra*.

90. 64 F.R.D. at 121.

91. Campbell v. United States Dist. Ct., 501 F.2d 196, 206 (9th Cir. 1974), *cert. denied*, 419 U.S. 879 (1974).

92. *Id.*

93. *Id.*

94. *Id.* at 206-07.

of the case.[95] The *Campbell* decision concluded that the district court could accept, reject, or modify the proposed findings of the magistrate or might even enter new findings,[96] as long as the district court itself makes the final determination of the facts and the final adjudication of the motion to suppress.[97]

Each procedure for district court review of a magistrate's decision discussed above has its own variations. However, there is one common element in each; that is the requirement of final decision making by the district court itself.[98] Again, the possibility of a different standard for a consensual reference is present. It has been suggested in *De Costa* that a magistrate's ruling on both the facts and the law might be subject to little or no review by the district court if the parties' consent to the reference clearly gave the magistrate such broad power.[99] However, this particular question was never reached in the case.[100]

The implications of such a suggestion are profound because once it is accepted that a magistrate acting under a consensual reference may properly perform even the decision making function if the parties so agree,[101] the same reasoning can be applied in concluding that the parties could legally agree to a lesser standard of district court review. Indeed, allowing the magistrate to make the initial decision necessarily involves a lower degree of district court review than is generally invoked.[102]

There is some authority cited in *De Costa* to support this suggestion. First, the court mentions language in an old reference case, *Kimberly v. Arms*,[103] which limited district court review to the question of "manifest error" in law or fact.[104] There is also the arbitration tradition and the Federal Arbitration Act,[105] under which the court

95. *Id.* at 207.
96. *Id.*
97. *Id.*
98. *See* text accompanying notes 74-97 *supra*.
99. 520 F.2d at 508.
100. *Id.*
101. *See* text accompanying notes 44-45, 54-73 *supra*.
102. *See* text accompanying note 99 *supra*.
103. 129 U.S. 512 (1889).
104. *Id.* at 524. The Court said that review would lie to correct "manifest error in the consideration given to the evidence, or in the application of the law, but not otherwise." *Id.* The *De Costa* court referred to this statement since it was the standard applied by the district court, but expressed the opinion that the term lacked content. 520 F.2d at 508.
105. 9 U.S.C. §§ 1-14 (1970).

must enter judgment upon the decision of the arbitrators unless certain abuses are apparent; an arbitration award can be reversed only on very limited grounds.[106] Finally, it was provided in Equity Rule 61 ½,[107] from which Rule 53(e)(4) is derived,[108] that when the parties clearly so intend, the court may review the case only in the manner it could review the decision of an arbitrator.[109]

It remains to be seen whether a court faced with an unequivocal consent to a final determination by a magistrate will allow that magistrate to be the decision maker with only appellate review or very limited district court review. Its alternatives will be to dismiss this possibility[110] or wait for Congress to fashion a review procedure for such consensual references.[111]

V. Conclusion

It has been suggested by a United States Magistrate that:[112]

> [T]he office of U.S. Magistrate constitutes the most dynamic change in federal procedure since the adoption of the civil rules, and the only significant change in the structure of the federal judiciary in recent years. The office of magistrate should not be regarded merely as a mini-district court, but a truly distinct office, with possibilities of change and opportunities for growth entirely its own.

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106. *Id.* § 9 provides that judgment "shall be entered upon the award . . . unless the award is vacated, modified, or corrected as prescribed in sections 10 and 11 [of title 9]. . . ." Under these sections an award can be vacated only when procured by fraud or corruption, or for bias or misconduct on the part of the arbitrators. The district court may modify an award only for material miscalculations or an assumption of jurisdiction not granted to the arbitrator. *Id.* §§ 10-11.

107. 286 U.S. 571 (1932).

108. 5A J. MOORE, FEDERAL PRACTICE P. 53.12 [1] (2d ed. 1974).

109. Equity Rule 61 ½ read in part: "[W]hen a case or any issue is referred by consent and the intention is plainly expressed in the consent order that the submission is to the master as an arbitrator, the court may review the same only in accordance with the principles governing a review of an award and decision by an arbitrator." Equity R. 61 ½, 286 U.S. 571 (1932).

110. *See* De Costa v. CBS, Inc., 520 F.2d 499, 515 (1st Cir. 1975) (concurring opinion). Judge Aldrich concluded: "I see no basis for suggesting that a magistrate should be in such a unique position that he is less reviewable than anyone else in the judicial system, and I regret that my brethren should be willing even to contemplate it." *Id.* at 516.

111. *Id.* at 508. The court said: "Until Congress, on reviewing the experience under the Federal Magistrates Act, fashions a review procedure for consensual reference for final (or semi-final) determination of all issues of law and fact, it might be better to rely on the formulation contained in Rule 53(e)(4)." *Id.*

112. Sussman, *The Fourth Tier in the Federal Judicial System: The United States Magistrate*, 56 CHI. B. REC. 134, 141 (1974).

Since the Magistrates Act allows for the assignment of a magistrate to duties "as are not inconsistent with the Constitution and laws of the United States",[113] there should be a bounty of responsibilities which he could share with the district court judge.[114] In view of the temporal and financial economies of shifting more and more of the district court's burden to the magistrate, the growth of the office of magistrate should be encouraged.

Consensual references for decision would certainly broaden the amount of assistance which a magistrate could render. However, the constitutional question persists. On the one hand, the argument would be that only an Article III court may hear Article III cases, a proposition which runs to subject matter jurisdiction and so cannot be affected by the consent of the parties. On the other hand, an argument could be made that since the office of magistrate is within the judicial framework, reference to a magistrate does not remove the case from the purview of the Article III district court. Another argument in favor of constitutionality of consensual references to magistrates for decision is the language of the Supreme Court in *Kimberly v. Arms*,[115] a case involving a consensual reference to a special master in 1889. The Court said:[116]

> [W]hen the parties consent to the reference of a case to a master or other officer to hear and decide all the issues therein, and report his findings, both of fact and of law, and such reference is entered as a rule of the court, the master is clothed with very different powers from those which he exercises upon ordinary references, without such consent; and his determinations are not subject to be set aside and disregarded at the mere discretion of the court.

The decision on constitutionality must ultimately be made by the Supreme Court. If other courts follow the lead of *DeCosta*, the question will certainly be raised. If the Supreme Court determines that consensual references for decision are constitutional, it would be appropriate to establish procedural safeguards for the references

113. 28 U.S.C. § 636(b) (1970).

114. It is suggested in *In re* Wainwright, 518 F.2d 173, 175 (1975), that it is probably within the power of a magistrate to release a state prisoner on bail pending district court hearing and decision on a writ of habeas corpus application. The court stated that: "There is nothing to indicate that a magistrate's jurisdiction vis-a-vis bail is more limited than that of the District Court which he serves." *Id.* at 175 n.1.

115. 129 U.S. 512 (1889).

116. *Id.* at 524.

and for review of the magistrate's decision. This will insure that the protections offered by Article III courts will still inure to the parties.

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