The proposed Magistrate Act of 1979 will, if passed, mark the second recent expansion of the evolving powers of the United States magistrate, a judicial office created by the Federal Magistrates Act of 1968. The 1979 Act's chief innovation is a consensual-reference provision that allows magistrates to hear any civil case with district court permission and litigant consent. Although some courts already sanction consensual magistrate trials, the 1979 Act would supply such
trials with explicit authorization and clear guidelines—including provisions for either district or circuit court appeal of magistrate decisions—that promise to transform the hitherto experimental procedure into a commonplace district court practice.

This Note argues that consensual trial by magistrate presents both a danger of serious new Article III problems and an opportunity to reassess the risks that accompany existing magistrate delegation practices. The opportunity for reassessment arises from the problems that consensual reference shares with an older, nonconsensual statutory procedure that permits magistrates to preside over evidentiary hearings on prisoner petitions and to “recommend” disposition of the underlying claims. The new danger stems from long-term changes in the structure of the district courts that may accompany the expanded use of consensual reference.

Part I of the Note sketches the magistrate system and discusses the general Article III limits on Congress's authority to sanction district court delegation of judicial power to untenured court officers. The analysis contrasts such internal delegation of judicial power with the congressional allocation of jurisdiction between Article I and Article III tribunals and concludes that internal delegation constitutes the greater potential threat to the policies underlying Article III.

Part II examines the specific Article III delegation problems related to nonconsensual evidentiary hearings conducted by magistrates in prisoner petition cases and consensual trials conducted by magistrates in other civil cases. When the magistrate functions as a judicial adviser, as in hearings on prisoner petitions, the delegation problem arises from...
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the risk of de facto magistrate adjudication. In consensual-reference cases, by contrast, the magistrate serves openly as an independent adjudicator. Here the Article III difficulties center less on the conduct of individual trials than on the longrun risk of a dramatic increase in the proportion of the civil caseload handled by magistrates in busy districts. Such an increase might itself come to violate Article III constraints. It would also raise numerous other issues, ranging from discrimination among litigants to “quasi-jurisdictional” decisionmaking by district judges, inadequate magistrate independence, and a subtle erosion of the judiciary’s constitutional mandate. Part III of the Note discusses the implications for legislative action of the specific Article III problems raised by magistrate adjudication.

I. The Magistrate System and Article III

A. The Magistrate System

The magistrate is an untenured federal judicial officer who serves as a highly versatile assistant of the district judge. Although most magistrates are part-time officers, the core of the system is an expanding body of full-time magistrates, who are well-paid, eight-year appointees of the district court and whose status is comparable to that of the bankruptcy judge. Magistrate selection now falls entirely to the

10. The 1979 Act would transform the magistrate into the functional equivalent of a judge for purposes of individual references. See note 3 supra (citing bill). But see note 181 infra (magistrate adjudication would remain less formal than judicial trial). The magistrate’s status under present forms of consensual reference is more complex. See note 43 infra (consensual special master reference).

11. As of the close of fiscal 1977, the Judicial Conference had authorized 164 full-time magistrates and 305 part-time magistrates. [1977] Ad. Off. U.S. Cts. Ann. Rep. 138. Nevertheless, full-time magistrates account for 74% of all magistrate work and a still higher percentage of more discretionary magistrate tasks. Id. at 292-94. Like the bankruptcy system after which its administration was modeled, the magistrate system is converting from part-time to full-time positions as the magistrate’s powers expand. See Hearings on S. 1612 & S. 1613, the Magistrate Act of 1977, Before the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary, 95th Cong., 1st Sess. 26 (1977) (statement of Peter McCabe) [hereinafter cited as the 1977 Senate Hearings].

12. In 1977, salaries of full-time magistrates ranged from $39,600 to $46,500. 1977 House Hearings, supra note 4, at 184 (statement of Ass’t Att’y Gen. Daniel Meador). The top 1978 salary for a magistrate is estimated at $48,500, which is $6,000 less than the comparable salary of a newly appointed district judge. Id. at 502. 28 U.S.C. § 634(b) (1976) provides that a full-time magistrate’s salary may not be reduced below the level fixed at the beginning of his term.

A magistrate may be removed from office “only for incompetency, misconduct, neglect of duty, or physical or mental disability.” Id. § 631(h). Removal requires a majority vote of judges in a district. Id. At present, the salary, tenure, appointment, and dismissal provisions governing the magistrate’s office are similar to those of bankruptcy judgeships.
discretion of the district courts. However, the sensitive nature of the magistrate's proposed responsibilities under the 1979 Act and the present "unevenness" in magistrate competence have prompted the drafters of the Act to tighten magistrate qualifications by requiring five years of membership in the bar prior to appointment and by instituting merit selection procedures to guide district court selections. These measures could only enhance the already considerable reputation enjoyed by many magistrates, but of course they would not—and are not intended to—establish parity of qualifications between magistrates and judges. In their presumptive expertise, authority, prestige, support services, and, most importantly, in their constitutional status and protections of office, magistrates would remain subordinate members of the district court.


13. Individual magistrates are appointed by the concurrence of a majority of a district court's judges. 28 U.S.C. § 631(a) (1976). At present, the primary restriction on district court discretion is the requirement that appointees be members of the bar in good standing in the states in which they serve. Id. § 631(b)(1).


15. 1979 House Bill § 3(b). This requirement has been deleted from the 1979 Senate bill.

16. The 1979 Act would provide for merit selection either through promulgation by the Judicial Conference of selection standards and procedures, see 1979 Senate Bill § 3, or by the creation of "Magistrate Selection Panels" that would nominate three to five candidates for each position, see 1979 House Bill § 3.


18. The 1979 Act seeks only to ensure that magistrates are competent to adjudicate "cases which do not require those special attributes of Article III judges, but nonetheless do require an impartial generalist to resolve issues of importance to the parties." H.R. Rep. 1364, supra note 1, at 12. It has been suggested that the typical new magistrate appointee would be a younger lawyer with five to ten years' experience, who is attracted by the salary and security of the magistrate post and perhaps motivated by a long-range career interest in a judicial appointment. See 1977 House Hearings, supra note 4, at 192-93 (colloquy between Rep. Drinan and Ass't Att'y Gen. Meador).

Magistrates have minimal support services, as compared to judges; for example, they currently do not have paid law clerks. Id. at 500. In addition, magistrate opinions lack precedential weight and are currently unpublished. Id. at 67 (Thomas Ehrlich). But the most basic differences between magistrates and judges arise from the Constitution; Article III confers status, prestige, and guarantees of independence only on judges. Cf. pp. 1032-33 infra (policies of Article III's tenure and salary provisions); pp. 1055-56 infra (implications of this difference).
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At present, the magistrate's docket depends as much on local case-loads and the reference policies of individual courts and judges as on any statutory prescription. Nevertheless, certain generalizations are possible. Aside from routine tasks and the trial of minor criminal offenses, magistrates now serve most frequently as surrogate judges in pretrial proceedings, as special masters, and as hearing officers in summary civil actions including prisoner petitions and social security review.

The range of magistrate responsibilities can, in turn, be traced to the evolution of the office. Much of the original impetus for the magistrate system stemmed from dissatisfaction with the magistrate's anachronistic predecessor, the United States Commissioner. However, the subsequent development of the magistrate's authority has been a heuristic.


20. Federal law, 28 U.S.C. § 656(a)(1), (2) (1976), empowers magistrates to perform the largely ministerial tasks that were once the province of the United States Commissioner. See note 26 infra.

21. Magistrates are now authorized to try, with the defendant's consent, most misdemeanors punishable by up to one-year imprisonment, a $1,000 fine, or both. 18 U.S.C. § 3401 (1976); 28 U.S.C. § 636(a)(3) (1976). The 1979 Act would extend the magistrate's consensual jurisdiction to all "misdemeanors," which are offenses punishable by up to a year in prison. 1979 Act § 7. See generally Note, The Validity of Magistrates' Criminal Jurisdiction, 60 Va. L. Rev. 697 (1974).


23. See 28 U.S.C. § 636(b)(2) (1976) (magistrate special master appointment). Appointment of special masters to hear entire cases or evidence on key motions is tightly restricted. See Fed. R. Civ. P. 53(b) (limiting nonjury master appointments to "exceptional" conditions); note 76 infra (construction of exceptional conditions). These restrictions apply to magistrates serving as special masters except when the parties consent to the master reference. 28 U.S.C. § 636(b)(2) (1976); see note 43 infra.


process fueled by rising federal caseloads and guided in large part by the courts. The original Magistrates Act of 1968 not only vested the judiciary with responsibility for staffing and administering the magistrate system, but also left the new officer's duties open-ended in order to encourage district court experimentation. In addition, much of the post-1968 legislation has either systematized magistrate reference techniques pioneered by innovative district courts or removed case-law and legislative obstacles to their further development.

This dialogue between judicial experimentation and subsequent legislative expansion of magistrate authority characterizes the development of both of the major avenues of magistrate reference addressed here: recommended disposition and consensual reference. In brief, the first of these procedures allows magistrates to hear case-dispositive matters and file a recommended decision with the presiding judge, but provides that the parties may request a de novo determination of dis-


29. See 28 U.S.C. § 636(b)(3) (1976) (permitting district courts to assign magistrates "such additional duties as are not inconsistent with the Constitution and laws of the United States"); S. REP. 371, supra note 26, at 26 (judicial experimentation with magistrate duties not listed in 1968 Act will aid district courts).

30. 1976 Amendments sanctioned the court-developed "recommended disposition" procedure, see p. 1029 infra, and overruled Wingo v. Wedding, 418 U.S. 461 (1974), a decision that had temporarily blocked magistrate assignments of evidentiary hearings on habeas corpus petitions, see pp. 1041-42 infra. In addition, the amendments sanctioned a limited form of consensual reference of civil cases. See note 43 infra. Yet consensual reference had received support prior to the amendments. See DeCosta v. Columbia Broadcasting Sys., Inc., 520 F.2d 499 (1st Cir. 1975), cert. denied, 423 U.S. 1073 (1976). The 1979 Act would explicitly authorize the consensual reference of jury trials, a practice already pioneered by some district courts. See Sick v. City of Buffalo, 574 F.2d 689 (2d Cir. 1978) (magistrate jury trial); 1977 Senate Hearings, supra note 11, at 181 (Linda Silberman). The 1979 Act would also overcome resistance on the part of some courts of appeals to district court authorization of magistrate final adjudication. See note 136 infra (citing cases).

31. If the 1979 Act's consensual-reference provision were included, magistrate legislation would articulat four avenues of potential magistrate participation in the disposition of an entire civil case. Two would require litigant consent and subject magistrate determinations to a formal standard of review: the 1979 consensual-reference procedure and consensual master reference. See note 43 infra. The third is nonconsensual and entails formal review: the magistrate's appointment as a traditional special master under exceptional circumstances. See id. The fourth, the recommended-disposition procedure, casts the magistrate as an adviser and entails "de novo" review. See note 32 infra. In addition to these procedures, magistrates are empowered to make final determinations of non-dispositive pretrial motions. See 28 U.S.C. § 636(b)(1)(A) (1976), discussed at note 36 infra.
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puted portions of the magistrate's opinion. Although district courts employed the recommended-disposition device in a variety of civil contexts during the early years of the magistrate system, it remained vulnerable to the criticism that it amounted to de facto magistrate adjudication and extended well beyond the advisory role for magistrates sketched by the 1968 Act. Indeed, its challengers achieved a short-lived victory in 1974, when the Supreme Court barred use of the procedure, ostensibly on statutory grounds, in the trial and disposition of habeas corpus petitions that reached the hearing stage. The Court in 1976, however, approved the device for hearings in social security review actions and, almost immediately, the 1976 Amendments to the 1968 Act authorized its application to potentially dispositive pretrial motions and hearings on prisoner applications for post-trial relief.

Like the recommended-disposition procedure, magistrate trial by consent is also the product of judicial experimentation followed by legislative vindication. Support for consensual reference existed in the form of analogous cases authorizing waiver of due process rights in other contexts, a venerable case law sanctioning litigant waiver of the


Generally, however, the judge's de novo determination is based on a review of the record of the proceedings before the magistrate, and the judge holds no hearing of his own. See H.R. Rep. No. 1609, 94th Cong., 2d Sess. 3 (1976) [hereinafter cited as H.R. Rep. 1609]. There is no standard of review for magistrate recommended dispositions; the presiding judge has complete freedom to modify the magistrate's recommended factual and legal conclusions. 28 U.S.C. § 636(b)(1)(B) (1976).


36. See 28 U.S.C. § 636(b)(1)(B) (1976). With respect to all motions that are not potentially dispositive, the magistrate's determination is final unless "clearly erroneous or contrary to law." Id. § 636(b)(1)(A).

37. Id. § 636(b)(1)(B).

38. See, e.g., Garner v. United States, 424 U.S. 648 (1976) (criminal defendant may waive right against self-incrimination when disclosure voluntary); Schneckloth v. Bustamonte, 412 U.S. 218 (1973) (criminal defendant waives right to be free from unreasonable searches). On the civil side, the right to a jury trial may be waived by failure to serve a demand for one. Fed. R. Civ. P. 38(d).

right to an Article III judge, and the 1968 Act itself, which conditioned the magistrate's criminal jurisdiction on defendant consent. Armed with these precedents and the congressional mandate to experiment, innovative district courts soon developed the waiver principle into a foundation for civil trial by magistrate. Congress responded in 1976 by sanctioning consensual reference in a limited form that preserved an element of formal judicial responsibility for magistrate judgments. The 1979 Act, however, moves much closer toward fashioning an independent judicial role for the magistrate by authorizing both magistrate jury trials and entry by magistrates of final judgments and by limiting the supervision of the district judge to two stages: the selection of cases suitable for consensual reference and the provision of appellate review.

B. Article III Constraints on the Delegation of Judicial Power

Analysis of the constitutional questions raised by recommended disposition and consensual reference must necessarily begin with a discussion of Article III limits on Congress's power over the lower federal courts. Although these limits are notoriously murky, their source lies in Article III's two central features. The first of these features is the

40. "Article III judges" are judges enjoying the constitutional guarantees of life tenure and irreducible salary specified in that article of the Constitution. See U.S. Const. art. III, § 1. All Article III judges serve in courts established under Congress's Article III, § 1 powers and exercise jurisdiction over some portion of the cases and controversies enumerated in Article III, § 2. Congress, however, has also established specialized "legislative" courts and other tribunals under its Article I powers, and the officers of these forums may also preside over cases within the Article III, § 2 jurisdictional field. See note 48 infra; Glidden Co. v. Zdanok, 370 U.S. 530, 549-51 (1962) (plurality opinion). For this reason, only the Article III, § 1 tenure and salary guarantees are both necessary and sufficient conditions for an Article III judge. Waiver of the right to an Article III judge is waiver of the right to an adjudicator enjoying these constitutional protections of office.

Throughout this Note, the terms "judge" and "judiciary" refer to Article III judges unless these terms are otherwise qualified.

41. 18 U.S.C. § 3401 (1976); see note 21 supra (magistrate criminal jurisdiction).

42. See, e.g., Sick v. City of Buffalo, 574 F.2d 689 (2d Cir. 1978); DeCosta v. Columbia Broadcasting Sys., Inc., 520 F.2d 499 (1st Cir. 1975), cert. denied, 423 U.S. 1073 (1976).

43. The 1976 Amendments removed Fed. R. Civ. P. 53(b) constraints on consensual appointment of magistrates as special masters. See 28 U.S.C. § 636(b)(2) (1976), discussed at note 23 supra. This change permits magistrates to hear nonjury civil cases and to reach factual conclusions reviewable only under a narrow "clearly erroneous" standard. See Fed. R. Civ. P. 53(e). The magistrate/master's legal conclusions remain open to complete district judge reconsideration. See Gallagher, supra note 33, at 92-94. The 1976 House Committee report also invited the courts to relax constraints on nonconsensual magistrate/master references. H.R. Rep. 1609, supra note 32, at 12. This invitation has not gone unheeded. See Loral Corp. v. McDonnell Douglas Corp., 558 F.2d 1130, 1133 n.3 (2d Cir. 1977).

44. 1979 Act § 2(2).

45. Id.

46. Id. The district court also retains authority to withhold or grant consensual-reference jurisdiction. Id.
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specification of a jurisdictional field for the federal courts by Article III, section 2. Much of the uncertainty over the actual restrictions imposed by Article III surrounds Congress's power to ignore this field by transferring categories of cases from the jurisdiction of the Article III courts to specialized Article I tribunals. It is, however, Article

47. U.S. CONST. art. III, § 2 provides:
The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty, and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States; between a State and Citizens of another State;—between Citizens of different States,—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or citizens thereof, and foreign States, Citizens or Subjects.


Justice Brandeis expressed one viewpoint on Congress's power to transfer Article III trial jurisdiction:
The "judicial power" of Article III of the Constitution is the power of the federal government, and not of any inferior tribunal. There is in that Article nothing which requires any controversy to be determined as of the first instance in the federal courts. The jurisdiction of those courts is subject to the control of Congress. Matters which may be placed within their jurisdiction may instead be committed to the state courts. If there be any controversy to which the judicial power extends that may not be subjected to the conclusive determination of administrative bodies or federal legislative courts, it is not because of any prohibition against the diminution of the jurisdiction of the federal district courts as such, but because, under certain circumstances, the constitutional requirement of due process is a requirement of judicial process. Crowell v. Benson, 285 U.S. 22, 86-87 (1932) (dissenting opinion) (footnote omitted). This position is widely cited by commentators on the magistrate system. E.g., 1966-67 Senate Hearings, supra note 26, at 254; Silberman, supra note 19, at 1310-11 n.89. Others advance various models for a jurisdictional core of cases, within the broader range of cases sketched by Article III, § 2, that cannot be transferred to non-Article III tribunals. See HART & WECHSLER, supra, at 397 (court-martial case law suggests that federal criminal trials within state may not be held in Article I tribunals); Note, supra, at 781-89 (exploring constraints on jurisdictional transfer). Of course, Article III constraints are not the only source of limits on Congress's power to transfer jurisdiction; due process considerations and the inherent limits on Congress's Article I powers may also restrict transfer of particular classes of cases. See note 80 infra (transfer of diversity jurisdiction to Article I forums outside scope of Congress's power); Crowell v. Benson, 285 U.S. 22, 86-87 (1932) (Brandeis, J., dissenting) (due process restrictions).

Beyond the question of Congress's power to transfer particular categories of cases lies the starker question of Congress's power to impair or destroy the lower federal courts through wholesale jurisdictional transfer to Article I tribunals. See HART & WECHSLER, supra, at 396. Article III must bar such wholesale transfer if it is to provide the institution and functions of the federal judiciary with any constitutional protection whatsoever. Indeed, it has been persuasively argued that Article III bars Congress from restricting the jurisdiction of the lower federal courts in ways that impair their contributions to the constitutional system. See Eisenberg, Congressional Authority to Restrict Lower Federal
III's second essential feature, the establishment of a judicial office protected by life tenure and irreducible compensation,\textsuperscript{49} that limits congressional discretion to authorize the delegation of judicial power\textsuperscript{50} to untenured officers within the Article III courts. These two Article III limitations on congressional power, delegation constraints and limits on jurisdictional transfer, both safeguard the access of individual litigants to an Article III judge. Nevertheless, these constraints are not interchangeable; they differ chiefly because Article III's jurisdictional-field and judicial-office provisions make disparate contributions to the core functions of the federal judiciary.

The federal courts have never exercised the full scope of their Article III jurisdiction.\textsuperscript{51} Instead, from the outset, the federal judiciary has remained a compact, highly skilled body\textsuperscript{52} charged with particular tasks requiring exceptional objectivity and insulation from political pressure.\textsuperscript{53} In the eyes of the Framers, these tasks ranged from checking the other two governmental branches\textsuperscript{54} to assuring the priority of federal concerns over competing state interests,\textsuperscript{55} providing for the uniform
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development of federal law,\textsuperscript{56} guaranteeing an impartial forum for foreigners and out-of-state litigants,\textsuperscript{57} and protecting individual rights within the scope of federal jurisdiction.\textsuperscript{58} Although national concerns have multiplied and the fate of alien litigants in state courts is no longer suspect,\textsuperscript{59} these tasks remain the central functions of the federal judiciary today. Moreover, their discharge is equally dependent on the forms of institutional integrity that the tenure and salary provisions are designed to safeguard\textsuperscript{60}—an integrity that entails uniform\textsuperscript{61} and competent adjudication,\textsuperscript{62} and, above all, judicial decisionmaking free of any untoward influences.\textsuperscript{63}
Thus, although Article III’s central elements include both a jurisdictional field and a judicial office protected by the tenure and compensation provisions, it may be that only manipulation of the second necessarily implicates the core functions of the federal judiciary. Nevertheless, Article III appears to frame both elements as rigid constitutional imperatives. Since the early nineteenth century, friction between these imperatives and growing federal adjudicative responsibilities has engendered a tradition of pragmatic Article III construction. Nevertheless, Article III appears to frame both elements as rigid constitutional imperatives. Since the early nineteenth century, friction between these imperatives and growing federal adjudicative responsibilities has engendered a tradition of pragmatic Article III construction. Nevertheless, Article III appears to frame both elements as rigid constitutional imperatives. Since the early nineteenth century, friction between these imperatives and growing federal adjudicative responsibilities has engendered a tradition of pragmatic Article III construction.

65. Discussing the approval of territorial courts staffed by nontenured judges in American Ins. Co. v. Canter, 26 U.S. (1 Pet.) 511 (1828), Justice Harlan observed: It would have been doctrinaire in the extreme to deny the right of Congress to invest judges of its creation with authority to dispose of the judicial business of the territories. It would have been at least as dogmatic, having recognized the right, to fasten on those judges a guarantee of tenure that Congress could not use and that the exigencies of the territories did not require. . . .

66. The bulk of premagistrate delegation case law centers on the use of special masters. See, e.g., La Buy v. Howes Leather Co., 352 U.S. 249 (1957) (tightly restricting use of special masters as trial officers); Ex parte Peterson, 253 U.S. 300, 312 (1920) (discussing courts’ inherent power to use masters when necessary for discharge of duties). See generally note 76 infra.
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Glidden Co. v. Zdanok is the leading case illustrating judicial sensitivity to the constitutional protections enjoyed by adjudicators within the Article III courts. Glidden examined two challenges to otherwise flawless decisions by adjudicators who appeared to be Article I judges but who, with congressional authorization, sat on Article III courts and heard cases falling within Article III's jurisdictional field. The sole issue in Glidden was the status of the these judges, who were said to have exercised the decisionmaking power of the Article III courts without enjoying the protections of office guaranteed by the tenure and compensation provisions. A divided Supreme Court ultimately held that the Glidden judges were indeed Article III appointees, by determining that the forums to which they had originally been appointed were established under Congress's Article III powers. Yet Glidden implies that without such an Article III appointment, the actions of the Glidden judges would have been invalid.

Glidden's concern about the Article III status of decisionmakers within the federal courts is echoed by the magistrate case law, which suggests that Article III bars magistrates from exercising case-dispositive authority, at least without the consent of the litigants. The chief

70. Glidden examined both the trial of a District of Columbia criminal case by a Court of Claims judge and the participation of a Court of Customs and Patent Appeals judge in a circuit panel reviewing an appeal of a lower court diversity decision. Id. at 532 (plurality opinion).
71. Id. at 533.
72. See id. at 584 (rejecting precedents of Ex parte Bakelite Corp., 279 U.S. 438 (1929), and Williams v. United States, 289 U.S. 553 (1933)) (disputed judges enjoyed tenure and salary protections because their original appointments were to courts that had always been Article III tribunals); 370 U.S. at 586-89 (Clark, J., concurring) (recent expression of Congress's intent to grant courts Article III status had irrevocably established constitutional tenure and compensation protection for their judges); id. at 592-94 (Douglas, J., dissenting) (judges remained officers of Article I courts and hence lacked constitutional protections of Article III judicial office).
73. See 370 U.S. at 533 (plurality opinion) (although judges enjoyed statutory tenure and denial of "independent judicial hearings" took place, Article III "is explicit and gives the petitioners a basis for complaint without requiring them to point to particular instances of mistreatment"); id. at 605 (Douglas, J., dissenting) (as Article I appointees, judges could not serve on Article III courts because they lacked guarantees of tenure and compensation); Currie, The Federal Courts and the American Law Institute, 36 U. CHI. L. REV. 1, 13 n.67 (1968); Note, supra note 21, at 702. But see Silberman, supra note 19, at 1304-05 (Glidden leaves open question of validity of exercise of federal judicial power by non-Article III officers).
74. See, Mathews v. Weber, 423 U.S. 261, 270 (1976) (dictum) (1968 Act meets Article III concerns by ensuring that district judges retain ultimate decisionmaking responsibility); Sick v. City of Buffalo, 574 F.2d 689, 693 n.17 (2d Cir. 1978) (dictum) (advisory function of magistrates generally relied on to meet Article III objections); Reciprocal Exch. v. Noland, 549 F.2d 462, 463 (8th Cir. 1976) (Article III bars judges from delegating final decisionmaking power); Reed v. Board of Election Comm'rs, 459 F.2d 121, 133 (1st Cir. 1972) (magistrate final determination of facts contrary to provisions of Article II). The point at which magistrate authority over a case becomes sufficiently autonomous to
examples of nontenured adjudicators within the Article III courts are special masters, who are ad hoc appointees serving under “exceptional” conditions, and bankruptcy judges, who are specialists limited to a single class of technical cases. By contrast, administrative agencies qualify as dispositive is still uncertain, although recent case law and the 1976 Amendments to the Magistrates Act, 28 U.S.C. § 636(b) (1976), may indicate that the permissible level of authority comes very close to outright magistrate adjudication, see p. 1044 infra (acceptance of magistrate evidentiary hearings on habeas petitions); Loral Corp. v. McDonnell Douglas Corp., 558 F.2d 1130, 1133 (2d Cir. 1977) (dictum) (judges retain ultimate decisionmaking power despite master reference). Courts have been more reluctant to authorize delegation within Article III courts, see Wedding v. Wingo, 418 U.S. 461 (1974) (statutory holding suggesting that magistrate recommended disposition of habeas claims is impermissibly risky), than they have been to authorize jurisdictional transfer, see Swain v. Pressley, 430 U.S. 572 (1977) (upholding exclusive habeas jurisdiction of Article I District of Columbia courts). See generally p. 1044 infra (magistrate evidentiary hearings now authorized by statute and generally accepted).

The special master is an ad hoc court appointee who may preside over nonjury civil hearings only under “exceptional” conditions. Fed. R. Civ. P. 53(b). Traditionally, this constraint was held to bar only systematic master reference of classes of cases, although the courts have always been reluctant to delegate matters depending largely on the evaluation of oral testimony. See Kaufman, Masters in the Federal Courts: Rule 53, 58 COLUM. L. REV. 452, 453 n.6, 453-59 (1958). See generally Note, supra note 48, at 789-96. In 1957, however, the Supreme Court construed the exceptional-condition constraint narrowly, holding that neither congested dockets nor the duration or complexity of an action will suffice to justify master reference. See La Buy v. Howes Leather Co., 352 U.S. 249, 259 (1957).

It has frequently been argued that both the exceptional-condition constraint and the La Buy decision were merely responses to the poor performance of many special masters, who were usually private attorneys serving in a part-time capacity. See, e.g., Cruz v. Hauck, 515 F.2d 322, 329-30 (6th Cir. 1975); Silberman, supra note 19, at 1326-29; cf. Crowell v. Benson, 285 U.S. 22, 57 (1932) (special master tradition establishes that judges need not make all factual determinations in order to preserve “essential attributes of judicial power”); CAB v. Carefree Travel, Inc., 518 F.2d 375, 379-83 (2d Cir. 1975) (relaxation of La Buy constraints justified for master reference to magistrate, in light of purpose of the 1968 Act, court congestion, nondispositive character of magistrate/master’s duties, and pre-La Buy case law). Yet the central concern of the La Buy opinion was the danger of wholesale abdication of judicial trial responsibility, see 352 U.S. at 258-59a—concern with distinct Article III overtones, see Note, supra note 21, at 765-67 (La Buy has implicit Article III dimension); cf. Mathews v. Weber, 423 U.S. 261, 275 (1976) (magistrate review of social security actions does not threaten “the important premises from which the La Buy decision proceeded”).

77. Currently, all voluntary bankruptcy petitions are referred to a bankruptcy judge for a final disposition, which is subject to district court appeal. See 11 U.S.C. § 66 (1976); R. BANKR. P. 102(a). But the involuntary bankrupt retains the right to trial by jury before the district judge, 11 U.S.C. § 42 (1976), while trustee suits against persons holding property of the bankrupt are heard by the bankruptcy judge only on consent. Id. § 46(b). But cf. note 12 supra (recent changes in authority of bankruptcy judges).

Although the bankruptcy judge presents a paradigm of routine intracourt delegation, he, like the special master, see note 76 supra, provides a poor analogy to the magistrate because of institutional differences. The narrow limits of bankruptcy jurisdiction confine the risk of uncontrolled delegation. In addition, the bankruptcy judge’s authority is similar to the special master’s “exceptional condition” writ large, for many of the bankruptcy judge’s unique powers were born in the crush of depression defaults and have since developed as inertial solutions to subsequent increases in the bankruptcy caseload.
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and Article I courts are established and highly developed forms of specialized adjudication outside the Article III system.

The institutional predominance of jurisdictional transfer over delegation—of Article I tribunals over the models presented by the special master and bankruptcy court—may reflect practical exigencies, as well as the differing constraints implied by the judicial-office and jurisdictional-field provisions of Article III. But given the established position of Article I forums, the significance attributed to Article III judicial appointment in *Glidden* and the magistrate case law must be based on something more than merely practical concerns. Judicial reticence about delegation of decisionmaking power within the Article III courts can be explained as an effort to preserve any but the most attenuated protective content for the policies underlying the tenure and salary provisions. Without delegation limits, the protection af-

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*See* H.R. Rep. No. 595, 95th Cong., 1st Sess. 8-9 (1977) (report on bankruptcy law revision). Since bankruptcy matters have long dwarfed other federal cases in sheer number, their return to the district judges is now inconceivable. *Id.* at 20-21.

78. As a solution to problems raised by a rigid interpretation of Article III, jurisdictional transfer to novel forums is, in most instances, inherently more flexible than delegation within Article III tribunals. For some problems, an Article I forum may be the only plausible solution. *See* note 65 *supra* (*Glidden*’s analysis of early territorial courts); O’Callahan v. Parker, 395 U.S. 258, 261 (1969) (dictum) (military law necessary for military discipline). In other instances, transfer to an Article I forum offers liberation from the cumbersome procedural and structural constraints attending Article III adjudication. *Cf.* H. FRIENDLY, *supra* note 51, at 64-68 (advantages of flexibility, expertise, and uniform adjudication accruing from administrative agency fact-finding in appropriate cases). As an answer to the chronic problem of overcrowded Article III courts, delegation and jurisdictional transfer (to state courts or, when Congress’s Article I powers permit, to Article I tribunals) may serve as functional equivalents. *Cf.* 1977 *House Hearings, supra* note 4, at 216 (Judge Friendly) (elimination of federal diversity jurisdiction may affect need for magistrate trials). The problems for which delegation serves as the most convenient answer are perceived structural inadequacies or inefficiencies in the federal courts themselves. *See* note 76 *supra* (special master appointment permitted under exceptional circumstances); H.R. Rep. 1364, *supra* note 1, at 12, 22 (magistrate trials meet need for greater district court flexibility and novel form of speedy, informal district court adjudication). *But see* note 181 *infra* (widespread magistrate trials, unlike master reference, respond to structural inadequacies that are open to alternative solutions).

79. *See* p. 1033 *supra* (policies underlying tenure and salary provisions). One might reject a broad reading of the policies underlying the tenure and salary provisions in favor of a minimalist view that these guarantees seek only to protect the judiciary from incursions by the other branches. *See* Silberman, *supra* note 19, at 1316-18; *cf.* R. BEROE, IMPEACHMENT: THE CONSTITUTIONAL PROBLEMS 154 (1973) (Framers’ remarks on judicial independence refer exclusively to freedom from executive and legislative encroachments). Such a minimalist position would seem to permit unrestrained delegation within the Article III courts as long as the Article III judiciary were able to shield litigants from outside meddling through judicial control of the delegation process. *See* Silberman, *supra* note 19, at 1317 (Article III requirement of judicial independence preserved by magistrate decisionmaking when Article III judges retain power to review decisions, appoint magistrates, and regulate magistrate jurisdiction); *cf.* H.R. Rep. 1364, *supra* note 1, at 10-11 (three elements providing constitutional basis for 1979 Act are litigant consent, judicial review, and magistrate’s position within district court).

The minimalist reduction of the tenure and compensation provisions into a proxy for separation-of-powers concerns is, however, unpersuasive. It is the larger aggregate of pro-
forded by those provisions would be vitiated, not only in cases assigned to Article I forums, but also in cases remaining in the Article III courts. The result would be an incongruous broader system of Article I and Article III forums: a system that relied on Congress's Article III power to support its centerpiece, the district courts, but which also denied any secure foothold to the institutional protection that Article III courts were designed to provide.\footnote{80}

In addition to requiring at least some delegation constraints, however, Article III's protective policies also favor jurisdictional transfer over delegation in three key respects. First, the range of cases losing the protection of a hearing before an Article III judge as the result of a jurisdictional transfer to an Article I tribunal is necessarily localized by the terms of the statute involved. By contrast, a permissive delegation policy loosens the judiciary's grip on its whole jurisdiction and thus raises the specter of a comprehensive denial of trial before an Article III judge to all litigants.\footnote{81} Second, transfer leaves Article III's protections accompanying a protected judicial office, including protections for litigants and for the institution of the judiciary itself, see p. 1033 \textit{supra}, and not merely insulation from interbranch meddling, that is safeguarded by a hearing before an Article III judge. Thus, it cannot be argued that the tenure and salary provisions are interchangeable with more attenuated controls that focus on the institution of the judiciary rather than individual adjudicators. In addition, the minimalist view cannot account for case law suggesting that, absent litigant consent, Article III bars magistrates from exercising ultimate decisionmaking power. \textit{See note 74 \textit{supra} (citing cases). Note that an analogous controversy over the scope of Article III's policy of judicial independence characterizes the debate about whether judges may be removed through a judicial review procedure that bypasses the impeachment process. \textit{Compare} Kaufman, \textit{supra} note 60, at 712-13 (principle of judicial independence extends beyond separation-of-powers concerns) \textit{with} S. \textit{Rep.} No. 1035, 95th Cong., 2d Sess. 8 (1978) (judicial independence has "historically referred, not to the independence of judges from one another, but rather to the independence of the judiciary as an institution from other branches of government").}

\textit{80.} \textit{See pp. 1032-33 \textit{supra} (contribution of tenure and salary provisions to special functions of Article III courts); cf. H.R. \textit{Rep.} 1364, \textit{supra} note 1, at 38 (dissenting views of Reps. Drinan and Kindness) (logic of consensual reference permits Congress to replace inferior federal courts with greatly expanded magistrate system). Of course, wholesale jurisdictional transfer would also deny a secure foothold for Article III protections. \textit{See note 48 \textit{supra}. Wholesale jurisdictional transfer is, however, hardly a threat today. In addition, the text of Article III lends itself more easily to transfer than to delegation. When Congress authorizes transfer, it merely overlooks Article III, § 2, in favor of a specific Article I power. When Congress authorizes delegation, it makes use of Article III power without regard for the restrictions imposed by Article III's judicial office. Indeed, a permissive delegation policy allows the paradoxical result that Congress may employ its Article III power to deprive federal litigants of an Article III judge in cases in which it could not use its Article I powers to achieve the same result. For example, diversity cases might be delegated, although Congress would seem to lack power to authorize Article I adjudication of cases falling within most of the party-based heads of federal jurisdiction sketched by Article III, § 2. \textit{See note 47 \textit{supra} (quoting text of Article III, § 2); cf. Note, \textit{supra} note 48, at 787 (arguing from conservative view of Congress's power to transfer jurisdiction that delegation should be similarly limited).}

allocation of functions between Congress and the judiciary undisturbed because it preserves control over jurisdictional allocation firmly in congressional hands. Widespread delegation, on the other hand, raises parallel questions about the extent to which Congress may relinquish—and the extent to which the judiciary may perform—a task that lies at the core of jurisdictional allocation: the prescribing of policies that determine the distribution of Article III judges among litigants.  

82. By disengaging adjudication before Article III judges from the subject-matter jurisdiction of the Article III courts, widespread delegation splits a previously unitary sphere of congressional authority into two components: the initial decision to allocate jurisdiction (which remains in congressional hands), and the subsequent, iterative decision to channel cases to Article III judges or nontenured adjudicators. Traditional doctrines of subject-matter jurisdiction appear to attach only to the first of these components. See Silberman, supra note 19, at 1350-51. Yet because the Article III judiciary is the constitutive feature of the Article III courts, the iterative delegation decision retains a strong quasi-jurisdictional character, which may account for its frequent analysis in jurisdictional terms. See De Costa v. Columbia Broadcasting Sys., Inc., 520 F.2d 499, 503-05 (1st Cir. 1975), cert. denied, 423 U.S. 1073 (1976), discussed in note 132 infra; H.R. Rep. 1364, supra note 1, at 38 (dissenting views of Reps. Drinan and Kindness). The history of the 1979 Act also demonstrates the quasi-jurisdictional character of delegation decisionmaking by revealing the controversial policy implications of singling out particular classes of cases for magistrate adjudication. See pp. 1052-53 infra; cf. note 175 infra (hypothetical illustrating role of policy choice in delegation decisions).

The significance of the quasi-jurisdictional nature of delegation decisionmaking stems from separation-of-powers concerns, since widespread delegation entails a major shift in hitherto jurisdictional authority from Congress to the courts. To be sure, Congress may assign a wide range of policymaking powers to the other branches. See, e.g., J. Weinstein, Reform of Court Rule-Making Procedures 89-96 (1977) (separation of powers permits delegation of rulemaking authority to Supreme Court and Judicial Conference). Nevertheless, Congress may not ignore the basic functional divisions among the branches of the federal government. See Buckley v. Valeo, 424 U.S. 1, 120-43 (1976) (exercise of executive and judicial functions by Federal Election Commission staffed by congressional appointees is barred by separation-of-powers concerns and appointments clause). Unlike the usual legislative delegation of policymaking authority, assignment to the judiciary of control over the allocation of Article III judges is a transfer of authority over a central structural feature of the judiciary itself. As an incident of Congress's power to establish the inferior courts, this authority belongs to the system of specific constitutional checks that divide responsibility for supervising organizational change within one branch of the federal government between the other two branches. Cf. id. at 124-37 (role of appointments clause in maintaining separation of powers); Kaufman, supra note 60, at 712 (Judicial Conference expresses reservations about constitutionality of congressional delegation to judiciary of removal power over judges). Whether judicial control over jurisdictional choices raises a constitutional problem may hinge on the scope of judicial authority over delegation policy. Clearly, Congress might retain the whole of its jurisdictional power by promulgating detailed statutory guidelines to govern delegation decisions. Alternatively, resort to the federal rulemaking machinery on the national level would preserve an element of congressional participation in formulating delegation policy. But the 1979 Act would eschew any congressional participation; instead, it would limit district court discretion over delegation policy only by providing the consensual-reference mechanism and, in the case of the 1979 House bill, by proscribing wholesale judicial delineation of reference targets through local court rules. See pp. 1052-53 infra (requirement of reference on case-by-case basis). Individualized reference limits the reach and formality of judicial reference decisions. The consensual-reference technique implies that Congress's transfer of quasi-jurisdictional authority is in part an assignment to the litigants themselves, and
Finally, transfer on a moderate scale does not jeopardize the Article III policy of safeguarding an independent, respected and capable institution of federal courts. Widespread delegation, however, introduces a novel dimension of Article III risk by opening the courts to the uncertain longrun consequences of routine adjudication by untenured officials.\textsuperscript{83}

It is true that the constraints implied by each of Article III's elements—a jurisdictional field and a tightly insulated judicial office—have been relaxed in the past in order to permit both Article I forums and, under some circumstances, the delegation of judicial power within Article III tribunals. Yet, as Glidden suggests, courts are reluctant to authorize officials other than Article III judges to exercise the decision-making power of the Article III courts. For the most part, Article III has proven more receptive to the resolution of practical difficulties accompanying federal adjudication through jurisdictional transfer than through delegation.\textsuperscript{84} Moreover, a compelling rationale for this difference emerges from the disparate riskiness of transfer and delegation for the judiciary's grip on its entire jurisdiction, for the traditional allocation of functions between Congress and the courts, and for the longrun institutional development of the courts.

II. Article III and Particular Modes of Magistrate Reference

The intimate relationship between constraints on the delegation of judicial power within Article III courts and the protective function of the Article III judicial office requires close constitutional scrutiny of any large-scale program of internal delegation. The following discussion examines two modes of delegation to magistrates, recommended disposition and consensual reference, in light of the critical significance of delegation constraints. In both instances, the analysis probes risks to Article III delegation policy that accompany widely accepted magistrate procedures.

is, therefore, less vulnerable to separation-of-powers criticism. Yet, both consensual reference and individualized reference decisions may cease to be effective limitations of district court discretion if delegation became a routine practice. See pp. 1050-51 infra (consensual reference); p. 1055 infra (individualized reference).

83. See pp. 1050-57 infra (institutional risks attending widespread delegation to magistrates). Traditional congressional authority to allocate jurisdiction between state and federal courts suggests non-Article III tribunals as a familiar solution to Article III rigidity. See Glidden Co. v. Zdanok, 370 U.S. 530, 551 (1962) (dictum); cf. 3 Elliot Debates, supra note 55, at 517, 547 (Pendleton at Virginia Deliberations) (Congress's power to vest Article III jurisdiction in state courts provides necessary flexibility).

84. Of course, jurisdictional transfer and delegation do not present equally viable solutions to the same range of problems. See note 78 supra.
A. Habeas Corpus Evidentiary Hearings and the Limits of Recommended Disposition

As codified in the 1976 Amendments to the Magistrates Act,\(^{85}\) the recommended-disposition procedure\(^{86}\) is generally believed to satisfy Article III delegation constraints because it both preserves the judiciary’s untrammeled power to modify magistrate recommendations and retains for the parties the right to invoke judicial scrutiny.\(^{87}\) Analysis of the Supreme Court’s 1974 decision in *Wingo v. Wedding*\(^{88}\) suggests, however, that magistrate evidentiary hearings and subsequent recommended disposition of habeas corpus petitions may present constitutional problems that remain unsolved.

Justice Brennan’s majority opinion in *Wedding* presented two rationales for barring such a procedure for handling habeas petitions that reach the evidentiary stage. The Court’s formal holding was that both the Federal Habeas Corpus Statute\(^{89}\) and the 1968 Magistrates Act\(^{90}\) restrict habeas evidentiary hearings to district judges.\(^{91}\) Yet, as Chief Justice Burger’s dissent demonstrated,\(^{92}\) these conclusions were at best arguable. Following the Sixth Circuit’s reasoning below,\(^{93}\) the Court’s interpretation of the habeas corpus statute rested on a 1941 decision, *Holiday v. Johnston*,\(^{94}\) that had itself resorted to a narrow statutory construction in order to bar habeas evidentiary hearings by United States Commissioners.\(^{95}\) Yet, unless *Holiday* was read to hint at

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86. See pp. 1028-29 supra.
91. 418 U.S. at 472.
92. Id. at 487, quoted in S. Rep. No. 625, 94th Cong., 2d Sess. 3 (1976) (“the Court has construed the Magistrates Act contrary to a clear legislative intent”) [hereinafter cited as S. Rep. 625].
94. 313 U.S. 342 (1941).
constitutional concerns, it was controlling in the magistrate context only if, as Wedding asserted, Congress also intended to bar magistrate evidentiary hearings in the 1968 Act. But the 1968 Act neither prohibited nor approved such hearings. Instead it contained a sweeping provision sanctioning magistrate assignment of all duties "not inconsistent with the Constitution or laws of the United States," coupled with an illustration in the habeas area that stopped short of condoning magistrate evidentiary hearings. Moreover, the Act's legislative history suggested only that Congress wished to avoid an explicit recommendation that the courts might find constitutionally risky, not that

96. The Sixth Circuit had suggested such a reading. See Wedding v. Wingo, 483 F.2d 1131, 1134 (6th Cir. 1973), aff'd, 418 U.S. 461 (1974) (quoting Payne v. Wingo, 442 F.2d 1192 (6th Cir. 1971) ("'[a]ssuming, without deciding that Congress could have constitutionally changed the result of Holiday . . . , it is evident that Congress chose not to do so'"). But see Noorlander v. Ciccone, 489 F.2d 642, 648 (8th Cir. 1973) (suggesting that Sixth Circuit's Wedding opinion read Holiday as possessing constitutional overtones) ("we do not read Holiday v. Johnston . . . as holding that the Constitution prohibits magistrates from conducting evidentiary hearings") (citation omitted). Subsequently, the Sixth Circuit made its own constitutional reservations explicit. See Ellis v. Buchkoe, 491 F.2d 716, 717 (6th Cir. 1974).

97. 418 U.S. at 470 (both text and legislative history of 1968 Act "plainly reveal a congressional determination to retain the requirement" of judge conducting habeas evidentiary hearings). Yet the applicability of the requirement to magistrates was established only after Wedding's statutory excess. See note 104 infra (citing cases).


Holiday also played a broader role in the Wedding opinion. Holiday's dicta supported Wedding's assertion of a risk of de facto magistrate adjudication following habeas hearings, see p. 1043 infra, and Holiday's analogy between commissioner evidentiary hearings and special master functions, 315 U.S. at 351-53, may have influenced Wedding's outcome, see note 113 infra.

99. See 1968 Act, § 636(b).

100. Id. § 636(b)(3). Referring to the list of items that included § 636(b)(3), the Senate and House reports stressed that it was intended to "illustrate the general character of duties assignable to magistrates under the Act, rather than to constitute exclusive specifications of duties so assignable." H.R. Rep. 1629, supra note 26, at 19; accord, S. Rep. 371, supra note 26, at 25.

101. The original draft of the 1968 Act contained a broad provision governing magistrate postconviction relief authority, which "was susceptible of the interpretation that magistrates might conduct evidentiary hearings." Wingo v. Wedding, 418 U.S. 461, 471 (1974) (citing S. 3475, 89th Cong., 2d Sess. (1966)). That provision, together with the entire subsection 636(b), was withdrawn at the urging of the Judicial Conference. See 418 U.S. at 484 (Burger, C.J., dissenting). As Chief Justice Burger suggested, the final language of § 636(b)—a broad permissive clause and a conservative set of illustrations—reflected the drafters' desire to avoid the appearance of recommending a procedure that might entail an impermissible delegation of judicial power. Id. at 484-85. S. Rep. 371, supra note 26, signals this conclusion as well. After noting that law clerks performed the specific function of reviewing and reporting on prisoner petitions authorized by § 636(b)(3), id. at 26, it concluded a discussion of the magistrate's powers by encouraging district judges to experiment with the assignment of magistrates to other functions, subject only to the constraints of Article III, id. at 26-27. The remarks of Senator Tydings, sponsor of the 1968 Act, indicate that he believed that magistrate hearings on prisoner petitions would not violate Article III by delegating ultimate decisionmaking power. See 1966-67 Senate Hearings, supra note 26, at 111-13.
it desired to withhold a procedure deemed useful and permissible by the courts. The extent to which the Wedding majority seemed to misread Congress's intent can be gauged by the drift of circuit court opinion prior to Wedding, as well as by Congress's prompt rejection of the Wedding result in the 1976 Amendments.

In addition to its statutory analysis, however, the Wedding majority offered a second, supporting rationale for its decision: magistrate habeas hearings inevitably result in the risk of de facto magistrate adjudication, since the small percentage of habeas petitions surviving to the evidentiary hearing stage turn largely on factual determinations that are highly dependent on evaluations of witness credibility. In the Court's view, even safeguards such as the judicial review of recorded testimony may be unable to ensure that habeas petitions turning on evidentiary hearings will always receive the benefit of judicial, rather than magistrate determination.

Although the Wedding majority mustered solid support for its finding of possible de facto magistrate adjudication, Wedding pointedly left open the question of whether Article III prohibited Congress from authorizing magistrate habeas hearings. Nevertheless, unarticulated reservations based on Article III provide a cogent explanation for Wedding's holding.

103. But see note 114 infra (Wedding correctly read Congress's intent insofar as it rests on Article III reservations).
104. Two circuits had concluded prior to Wedding that magistrates were authorized to conduct habeas hearings. See O'Shea v. United States, 491 F. 2d 774, 778 (1st Cir. 1974); Noorlander v. Ciccone, 489 F. 2d 642, 648 (8th Cir. 1973). Two other circuits assumed that such authorization existed. See United States ex rel. Gonzalez v. Zelker, 477 F. 2d 797 (2d Cir. 1973); Parnell v. Wainwright, 464 F. 2d 735 (6th Cir. 1972).
105. See note 92 supra.
107. Id. at 468, 474 (citing Holiday v. Johnson, 313 U.S. 342, 352 (1941)).
108. The Wedding district court had offered petitioners de novo judicial review of recorded testimony by local court rule. See id. at 465-66.
109. Id.
110. Id. at 468, 474. Wedding may also have tacitly relied on a 1973 empirical study of habeas petitions in Massachusetts. The study suggested that magistrate evidentiary hearings often resulted in de facto magistrate adjudication and was critical of magistrate performance. See Shapiro, supra note 98, at 362, 366. Some of the Massachusetts hearings were conducted without an opportunity for petitioner appeal of magistrate recommendations to the deciding judge. Id. at 362. Appeal rights were afforded to the Wedding petitioner, see 418 U.S. at 464, and are included in the 1976 Amendments, see 28 U.S.C. § 636(b)(2) (1976).
111. 418 U.S. at 467 n. 4 (quoting Wedding v. Wingo, 483 F. 2d 1131, 1133 n. 1 (6th Cir. 1973)) (indicating no views "on Congress's power to authorize habeas hearings by officers 'outside the pale of Article III'.")
toward such reservations,¹¹³ and, paradoxically, the *Wedding* dissent also hints at majority doubts through its assertion that the disputed habeas hearings satisfy constitutional constraints because "ultimate decisionmaking authority" remains in judicial hands.¹¹⁴ Unless decisionmaking authority is understood to encompass only the formal power to modify magistrate recommendations, one strand of the *Wedding* majority's argument is precisely that decisionmaking authority may slip from judicial hands in the course of magistrate habeas hearings.¹¹⁵ Despite these considerations, however, *Wedding's* possible constitutional reservations were ignored by the drafters of the 1976 Amendments in favor of the dissent's Article III analysis.¹¹⁶


¹¹³. In particular, *Wedding's* reliance on the *Holiday*-based statutory construction of the Sixth Circuit, see pp. 1041-42 supra, suggests Article III reservations, since the Sixth Circuit made its own constitutional doubts explicit well before the Court's *Wedding* opinion. *See* Ellis v. Buchko, 491 F.2d 716, 717 (6th Cir. 1974). *Wedding's* reliance on *Holiday*, see note 95 supra, suggests that an analogy between magistrate habeas hearings and special master appointments also influenced *Wedding's* outcome. *See id.;* Wingo v. *Wedding*, 418 U.S. 461, 482 (1974) (Burger, C.J., dissenting); 1975 Senate Hearings, supra note 87, at 34 & n.5. However, the influence that the master analogy may have exerted on *Wedding* melds with deeper Article III concerns. No authoritative legislative materials accompanying the 1968 Act tied master appointments to habeas hearings, and moreover, the *Wedding* hearing itself did not formally resemble a master appointment. Therefore, as developments in the Sixth Circuit suggest, *see* note 96 supra, constitutional reservations may have motivated the court's introduction of *Holiday* and the master analogy into the context of magistrate habeas hearings.

¹¹⁴. 418 U.S. at 486-87 n.11. The dissent also observed that the majority opinion did not suggest a constitutional barrier to magistrate habeas hearings. *Id.* at 481 n.6 (Burger, C.J., dissenting). A second paradox underlying *Wedding* is that if, as suggested, the majority doubted the constitutional status of magistrate habeas hearings, they could have relied on Congress's own doubts and consequent avoidance of the issue to support a straightforward statutory interpretation rejecting such hearings. *See* note 101 supra (1968 Act sought to avoid impermissible delegation of decisionmaking power). Yet ruling openly on this ground would have forced the majority to be explicit about its own constitutional reservations. Thus *Wedding* remains true to the 1968 Act's legislative intent insofar as *Wedding* itself is a vehicle for constitutional reservations. *Wedding's* strained statutory construction may be the only middle path between avoiding a difficult constitutional ruling and accepting the task that the 1968 Act thrust on the courts—namely, marking the constitutional limits on magistrate authority.

¹¹⁵. 418 U.S. at 474 (quoting Speiser v. Randall, 357 U.S. 513, 520 (1958)) ("'it is commonplace that the outcome of a lawsuit . . . depends more often on how the factfinder appraises the facts than on a disputed construction of a state or interpretation of a line of precedents'").

¹¹⁶. *See* S. Rep. 625, supra note 92, at 3-4; 1975 Senate Hearings, supra note 87, at 1-41 (failing to mention possibility of *Wedding* Article III reservations). Post-1974 developments have eviscerated *Wedding* without resolving the doubts that it raises. The 1976 Amendments, 28 U.S.C. § 636(b) (1976), drafted largely by the Judicial Conference, might be viewed as a collective per curiam reversal of *Wedding*. *See* 1975 Senate Hearings, supra note 87, at 33-38 (Judicial Conference report on Proposed Amendment to the Federal Magistrates Act). In addition, challenges to magistrate hearings since the Amendments
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A second recent opinion, Swain v. Pressley,\(^{117}\) eliminated the possibility that Wedding's constitutional reservations might be traced to the unique constitutional status of habeas corpus rather than to the delegation problem itself.\(^{118}\) Pressley upheld a grant of exclusive habeas jurisdiction to the Article I District of Columbia courts by ruling that the Constitution's suspension clause\(^{119}\) does not mandate a hearing before an Article III judge when habeas procedures are otherwise adequate and effective.\(^{120}\) Thus, the doubts accompanying Wedding's finding of a risk of de facto magistrate adjudication may continue to haunt not only habeas hearings, but also other potentially dispositive magistrate recommendations\(^{121}\) that turn on evaluation of contradic-

have fared poorly in the circuits. See, e.g., Rees v. United States Dist. Court, 572 F.2d 700 (9th Cir. 1978), discussed at note 130 infra; White v. Estelle, 556 F.2d 1366 (5th Cir. 1977); cf. RULES GOVERNING SECTION 2254 CASES IN THE UNITED STATES DISTRICT COURTS 8(b) (effective Feb. 1, 1977) (incorporating 1976 Amendments' provision for magistrate habeas hearings).

The only recent Supreme Court decision to address recommended disposition, Mathews v. Weber, 423 U.S. 261 (1976) (Burger, C.J.), unanimously approved magistrate hearings of social security review actions—a task entailing none of the dangers isolated by Wedding, since social security hearings focus on a closed administrative record that is equally accessible to magistrate and judge, id. at 270 n.6. Weber took care to stress the nonevidentiary character of social security hearings, id. at 270, but nevertheless distinguished Wedding as a habeas corpus statutory holding, id. at 275, and rejected the assertion that judges would accept magistrate recommendations automatically, id. at 273-74. Weber also reiterated the significance of final judicial decisionmaking as a bulwark against impermissible delegation. Id. at 270. But the meaning of final decisionmaking now seems frozen in the mold cast by the Wedding dissent. See p. 1044 supra (Wedding dissent); Blackledge v. Allison, 431 U.S. 63, 81 n.22 (1977) (citing Wingo v. Wedding, 418 U.S. 461, 473-74 (1974)) (newly promulgated habeas corpus rules authorize magistrate performance "of virtually all the duties of a district judge, except for the exercise of ultimate decision-making authority").


119. See U.S. CONST. art. I, § 9, cl. 2 ("The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.")

120. 430 U.S. at 382-84 (relying on Palmore v. United States, 411 U.S. 389 (1973)). Pressley observed that a statutory clause permitting Article III jurisdiction upon a showing that local court relief was "inadequate or ineffective" obviated constitutional reservations, 430 U.S. at 381. A footnote implied that judicial tenure might be relevant to a showing of inadequacy in rare circumstances. Id. at 385 n.20. Since Pressley's presumption of local judge competency to decide habeas constitutional issues rests on the local District of Columbia judge's authority to try the underlying criminal charges, see id. at 382-83, a similar presumption would not extend to magistrates. Unlike District of Columbia judges, who are comparable in status to state court judges, magistrates are subordinate officers of the federal district court who may try minor offenses only on a consensual basis. See note 21 supra.

121. The prime matters affected are evidentiary hearings on other kinds of prisoner petitions. See note 125 infra (prisoner civil rights petitions); 28 U.S.C. § 636(b)(1) (1976) (all hearings on prisoner petitions may be referred to magistrates).
tory oral testimony. To be sure, in the wake of the 1976 Amendments these reservations alone will no longer support a challenge to what are now established district court procedures. Yet the acceptance achieved by magistrate habeas hearings may reveal less about the risks that they entail than about the countervailing pressures on overcrowded courts that have rendered those risks acceptable.

Beyond the doubts raised by Wedding, however, one characteristic that habeas petitions share with prisoner civil rights petitions makes them especially poor subjects for experiments conducted on the edges of Article III: for the most part, they are brought by state prisoners requesting a federal court to set aside a state court verdict, often on grounds already rejected by a state's highest tribunal. Prior to Wedding, it was suggested that under these circumstances less confident magistrates may sometimes be reluctant to grant relief even when it is warranted. Yet a more pressing constitutional argument against magistrate evidentiary hearings rests on comity and federalism principles. The resentment already felt by state court judges at being overthrown by a district court may be heightened by the suspicion that the

122. Wedding's exclusive focus on habeas corpus also leaves open the possibility that its reservations extended solely to the delegation of habeas hearings within Article III courts. This alternative reading would follow a fortiori from a view that all restrictions on special master appointments rest on nonconstitutional considerations. See note 76 supra (special master restrictions).

123. See note 116 supra (citing cases).

124. See Wingo v. Wedding, 418 U.S. 461, 475-76 & n.3 (1974) (Burger, C.J., dissenting) (purpose of 1968 Act to provide time for district judges, and habeas applications are heavy burden on courts); 1975 Senate Hearings, supra note 87, at 36 (Judicial Conference report on proposed amendment) (volume, complexity, and uneven distribution of prisoner petitions seriously burden federal courts). Acceptance of magistrate habeas hearings also evidences growing judicial confidence in magistrate competency. See id. at 35 (high level of magistrate performance will hold down appeals from magistrate recommendations).

125. Prisoner petitions allege constitutional deprivations in conditions of confinement. Most state-prisoner civil rights actions are filed under 42 U.S.C. § 1983 (1976) (action for deprivation of constitutional rights "under color of state law").


127. One commentator noted: [W]hatever resentment may be felt in the state courts at having the Supreme Judicial Court overturned by a district judge must be heightened if the overturning is, in substance, at the hands of a magistrate—an attitude to which the magistrates are probably sensitive and which is likely to make them somewhat reluctant to grant relief to a petitioner even when circumstances require.

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reversal was in practice the work of a magistrate, and de facto magistrate adjudication also triggers concern about impermissible forms of federal intervention in the state judiciary. A 1978 challenge by the State of California to magistrate habeas hearings demonstrates that the federalism and comity issues remain live concerns. Thus the sensitive position of prisoner petitions at a key pressure point in state-federal relations adds urgency to the risks that accompany the expansion of the magistrate's role as a judicial adviser to include authority to conduct prisoner evidentiary hearings.

B. The Limits of Consensual Reference

Like recommended disposition, consensual reference is now widely believed to be constitutionally permissible. The case law has not yet fully explained why consent justifies a relaxed delegation policy, but

128. See note 127 supra.
130. See Rees v. United States Dist. Court, 572 F.2d 700 (9th Cir. 1978). Rees ruled on two state requests for a writ of mandamus barring magistrate habeas hearings authorized by the 1976 Amendments. The state argued, inter alia, that judicial hearings were required by considerations of federalism and comity. Id. at 702. The Ninth Circuit acknowledged the importance of the state's claim, but refused the requested writs, in part because it did not view the district court rule authorizing magistrate hearings as clearly erroneous. Id. at 702-03. But cf. Orand v. United States, 589 F.2d 472, 473 (9th Cir. 1979) (without discussing Rees, indicating that magistrates may conduct all post-conviction evidentiary hearings).
132. See DeCosta v. Columbia Broadcasting Sys. Inc., 520 F.2d 499 (1st Cir. 1975), cert. denied, 423 U.S. 1073 (1976). DeCosta is the leading authority on the constitutional validity of consensual reference. Nonetheless, DeCosta erroneously analyzed consensual reference as though it presented a litigant the choice between two tribunals with overlapping jurisdiction, rather than between two adjudicators from the same tribunal. The magistrate is alternately portrayed as an Article I officer, id. at 503 n.5, and analogized to an arbitrator, id. at 505. This framework intentionally excludes the issue of Article III limits on delegation:

[Q]uite different policy and precedent should apply where the parties to a civil dispute themselves select another forum. Under such circumstances, it is inappropriate to evaluate the problem as one of the right of the judiciary to relinquish its authority. The issue is not the power of the judge to refer, but the power of the parties to agree to another arbiter, absent overriding constitutional considerations. Id. at 504 (footnote omitted). However, the magistrate is not an Article I judge, but an officer who adjudicates on behalf of an Article III court. See Mathews v. Weber, 423 U.S. 261, 268 (1976); Gallagher, supra note 53, at 76 n.53 (DeCosta's error). Under present forms of consensual reference, judges retain the power to initiate references while the parties are restricted to a veto right. See note 43 supra (consensual master appointment); 1979 Act § 2(2). Difficult though the issue of delegation within Article III courts is, it seems
The reason must lie in waiver's ability to mitigate the concerns that underlie restrictions on the delegation of judicial power. Consent partially safeguards the individual's interest in neutral and expert adjudication and it seems to preserve his right to receive, and the judicial duty to provide, a trial before a tenured adjudicator. At the same time, it relieves judges of part of the onus of engaging in a "jurisdictional" balancing of values prior to reference. Nevertheless, the recent reluctance of circuit courts to sanction complete withdrawal by judges from magistrate trials suggests that litigant consent may be an incomplete answer to Article III delegation concerns. The longrun risk of mass consensual reference introduced by the 1979 Act, coupled with the magistrate system's past record of rapid development, is deeply troubling.

The magistrate system differs from older solutions to court overcrowding in its unique flexibility and political convenience. The Judicial Conference is empowered to authorize new magistrate positions on the basis of need and with none of the jostling, visibility, and political oversight that attend the creation of additional judgeships. On the district level, consensual reference offers the lure of manageable dockets painlessly achieved through the multiplication of magistrates, references, or both. Furthermore, magistrate expansion has no natural far more tractable than the issues raised by DeCosta's Article I analysis, which ultimately implies that Congress has tacitly vested the entire Article III civil jurisdiction in a parallel system of Article I forums. Nevertheless, the DeCosta impulse to analyze consensual reference in jurisdictional rather than delegation terms is instructive. See pp. 1038-39 supra (Article III preference for transfer).

133. See note 184 infra. Consent may act as a market control. When litigants suspect lack of magistrate competence or neutrality, they may reserve a judge by paying higher waiting costs.

134. But see p. 1050 infra (as courts plan on magistrates to meet rising caseloads, growing portion of jurisdiction loses right to tenured judge).


136. See, e.g., Sick v. City of Buffalo, 574 F.2d 689 (2d Cir. 1978) (magistrate jury trial remanded for district judge review and entry of final judgment); Reciprocal Exch. v. Noland, 542 F.2d 482 (8th Cir. 1976) (affirming magistrate judgment after remand on Article III grounds for treatment as recommended disposition). The Sick holding was based on ambiguity in the original magistrate reference order and on Fed. R. Civ. P. 58 (governing entry of final court orders), but Sick also cited possible Article III infirmities attending magistrate final judgment. Sick v. City of Buffalo, 574 F.2d 689, 693 & n.17 (2d Cir. 1978) (dictum). Other circuits have rejected appeals from magistrate final judgments on the basis of 28 U.S.C. § 1291 (1976) (granting appellate jurisdiction over district court judgments). See, e.g., Carmena v. Operating Eng'rs Local 406, 572 F.2d 1031 (5th Cir. 1978); United States v. Reeds, 552 F.2d 170 (7th Cir. 1977).

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antagonists among interest groups.138 Unlike additional judgeships, it does not dilute the status of the judicial appointment;139 it merely lightens the judiciary's workload. Unlike jurisdictional cutbacks, it neither offends particular classes of litigants on its face, nor forces hard decisions about the judiciary's priorities.140 Finally, a new magistrate post costs only half as much as a new judgeship,141 a consideration that greatly enhances the magistrate's relative political attractiveness.142

These factors, as well as the rising federal caseload, suggest that the magistrate system is susceptible to an inherent expansionist dynamic and that longrun pressures toward mass consensual reference may be too intense for many district courts to resist. Although it has been argued that the system will find its natural limits when an equilibrium is reached between the capacities of equally busy magistrates and judges,143 this view overlooks the attractions of adding additional magistrates to cope with overall pressures on district court caseloads.144

138. Cf. 1977 House Hearings, supra note 4, at 511 (ABA House of Delegates report) ("the most notable feature of the magistrate system is the absence of any criticism of its use").
139. See H.R. Rep. 1364, supra note 1, at 21 (judiciary cannot be expanded indefinitely without threatening high quality of persons seeking judgeships); H. FRIENDLY, supra note 51, at 29-30 (prestige of judgeships declines with increase in judiciary's size).
140. See generally 1977 House Hearings, supra note 4 (1979 Act and curtailment of diversity jurisdiction considered simultaneously).
141. Id. at 498-501.
142. See id. at 170 (Judge Metzner) (because of cost considerations, "Congress says 'use magistrates'" when asked for more judges and courthouses); S.D.N.Y. Magistrate System, supra note 17, at 41-42.
143. See Silberman, supra note 19, at 1360; cf. Comment, supra note 39, at 595 n.71 (as magistrates will be perceived as inferior to judges, absolute demand for magistrates will be less than for judges).
144. One report has recommended appointment of additional magistrates, in lieu of judges, in response to the expanding caseload in the Southern District of New York, and noted that most judges and magistrates agreed. See S.D.N.Y. Magistrate System, supra note 17, at 37. The reasons proffered include limited physical plant, preservation of collegiality and consensus among judges, cost, and a congressional preference for magistrates. Id. at 41. But note that Article III concerns presently limit the use that some Southern District judges make of magistrates. Id. at 26.

One serious objection to predictions of mass reference is the prospect that judicial workloads will stabilize with the recent addition of 117 new district judgeships. See Omnibus Judgeship Act of 1978, Pub. L. No. 95-486, 47 U.S.L.W. 81-82 (1978). Despite this act, however, the long-term risk of caseload-induced mass reference remains. A second wave of additional judgships is unlikely. See H.R. Rep. 1364, supra note 1, at 21 (judiciary cannot be expanded indefinitely). Further, the risk of widespread delegation persists even if the expanding workload assumption is dropped. Judges may wish to spend more time on fewer cases, and magistrates may effectively lobby for expanded judicial responsibilities. Cf. note 184 infra (magistrate career prospect improved by display of judicial skills).

The 1979 consensual reference provision itself may suggest other objections to predictions of mass reference. Litigants who benefit from delay will have an incentive to reject reference, see note 148 infra; litigants who desire circuit court review as of right may insist on a judicial trial, see note 3 supra; and the 1979 House bill—unlike its Senate counterpart—would constrain reference practices by the requirement of case-by-case ref-
Both the addition of magistrates and the multiplication of references are likely to be low-visibility, evolutionary processes that do not entail any sudden break with established district court practices.\textsuperscript{145} Moreover, both processes will always be in the short-term interests of judges and litigants alike. Each decision to refer a case to a magistrate will pit the parties' or the court's pressing momentary needs against amorphous Article III concerns about the aggregate level of delegations.\textsuperscript{146}

The most straightforward problem posed by the risk of widespread delegation is also the most long range: the aggregate denial of Article III hearings to large numbers of federal litigants. Unlike the deprivation analyzed by the Wedding Court,\textsuperscript{147} this denial will appear illusory on the individual level, since any litigant tapped by the district court for reference might choose instead to "purchase" a constitutional judge by accepting the attendant waiting costs and forcing his adversary to do likewise.\textsuperscript{148} Yet, on an institutional level, the denial will assume a tangible form as district courts plan on magistrate reference of a growing percentage of their caseload, and these expectations are reflected in Administrative Office projections and budgetary requests. In high-reference districts, the provision of Article III judges for all litigants will become a sheer impossibility, since a constriction of references would force mushrooming case-flow backups and waiting periods that would seem unacceptable relative both to participant expectations and to the value of litigation itself. Moreover, as reference becomes routine, mass delegation may lose a portion of its consensual character on the individual level as well. The 1979 Act explicitly seeks to insulate litigants from judicial prodding to consent to reference,\textsuperscript{149} but the Act's
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protections have yet to be tested in a pressured environment where reference is perceived by all participants to be the norm rather than the exception. Even without judicial coercion, however, routinization and expansion of consensual reference must eventually come to violate Article III constraints. It would be impossible to reconcile magistrate adjudication of the bulk of a district court's civil caseload either with the policies of the tenure and salary provisions or with the mandate vesting ultimate decisionmaking power in the Article III judiciary. Such an outcome would vitiate the features of consensual reference that justify a relaxed delegation policy by reducing consent to a formality. Still more important, routine, mass reference would entirely sever the linkage in the district courts between the Article III guarantees of office and the courts' jurisdictional field, and thus lead to the very out-

shall he attempt to persuade or induce any party to consent to reference of any civil matter to a magistrate." Id. The 1979 Senate bill offers a similar blind consent procedure. See 1979 Senate Bill § 2(2).

150. The blind consent procedure offered by the 1979 Act seems well-designed to insulate the parties. Its only potential flaw may be the fact that district judges would know which cases had been selected for reference, since they would participate in the selection process. See 1979 Act § 2(2). In some instances, disparate party interests or ability to bear waiting costs might suggest which litigant refused the reference invitation. The danger of tainting judicial neutrality would be particularly great when one party was suspected of delaying tactics. Cf. United States v. Baer, 575 F.2d 1295, 1302-03 (10th Cir. 1978) (Doyle, J., dissenting) (lawyer who received two $50 fines, two 30-day suspended sentences, and two years' probation for parking tickets and "gamesmanship" was punished for exercising right to trial of minor offenses before Article III judge). Compare the 1979 Act blind consent procedure with that proposed by Silberman, supra note 19, at 1359-60 (magistrate explores party willingness to consent off record).

151. In civil cases consent might also become a leverage tool between parties.

152. There is no standard for determining when longrun expansion of the sheer volume of references might violate Article III constraints. Indeed, this difficulty of line-drawing compounds the risks of widespread reference, for it suggests an almost insuperable obstacle to judicial development and enforcement of limitations on expansion of consensual reference. The Article III concerns associated with expansion alone have at least two dimensions. One is that a gradual institutional metamorphosis accompanying expansion will erode the safeguard of litigant consent through a process of routinization. See pp. 1049-50 supra. A second dimension is the weakening of the Article III judicial office as a meaningful institutional protection, regardless of litigant behavior or attitudes. Together, the two dimensions of Article III concern might induce most observers to agree that constitutional values were jeopardized at some point along the vector of expanding reference; yet there may be little agreement about when the turning point is reached. The evolutionary character of the process of expansion and the likelihood that conditions might vary dramatically from district to district make agreement still less probable.

153. See note 63 supra.

154. See note 74 supra.

155. If a small proportion of judicial time were devoted to civil cases, attempts by significant numbers of new litigants to obtain judicial hearings would be deterred by steeply rising waiting costs. Thus consent could not operate to exclude low-quality magistrates, very little of the onus of the reference decision would be shifted to the litigants, and the litigants' right to a judicial hearing would become an absolute formality.

156. See pp. 1037-38 supra.
come that the distinction between jurisdictional transfer and delegation constraints sought to avoid: a total collapse of Article III.157

Yet well before this point is reached, routinized consensual reference might aggravate weaknesses already endemic to the magistrate system. Two categories of problems were identified during congressional hearings in 1977 and 1978:158 discrimination among classes of litigants,159 and "role problems" stemming from the complicated working relationship between magistrates and district judges.160

Critics of the 1979 Act's precursors located the discrimination problem in the prospect that trial by magistrate might be reserved for classes of cases brought predominantly by poor litigants161—a fear that found ample support in the legislative history of the original Senate draft of the Act.162 Recognizing the danger that the magistrate might become a "'poor people's' judge,"163 the 1979 House bill incorporates a procedure requiring case-by-case reference decisions.164 This remedy bars formal discrimination through wholesale reference by district court rule and helps to ensure that district courts will not stigmatize categories of litigants as undeserving of the attention of Article III judges. In addition, the strong language of the 1978 House Report165 would


The weakness of the logic of those who argue that consent cures all may be seen when carried to its inevitable conclusion. Under the consent theory, Congress could abolish all inferior Federal courts ... and replace them with a greatly expanded magistrate system. Litigants who desired a Federal forum would then only have to consent to appear before the magistrate in order to have their cases adjudicated. If one did not like the Federal magistrate system, then one could sue in the State courts. ... It is inconceivable that Congress could so easily escape the life-tenure and undiminished compensation strictures of Article III . . . .

158. 1977 House Hearings, supra note 4; 1977 Senate Hearings, supra note 11.

159. See note 161 infra (citing sources).

160. See note 179 infra (citing sources).

161. See, e.g., 1977 House Hearings, supra note 4, at 62-63, 122-24 (Rep. Drinan); id. at 54-55 (statement of Thomas Ehrlich); id. at 138 (statement of Pamela Horowitz); cf. Legal Services Corporation, Preliminary Comments on Legislation Proposed by the Justice Department to Expand the Jurisdiction of United States Magistrates (Mar. 15, 1977) (criticizing early Justice Department proposal for magistrate adjudication of social security, black lung, and related benefit matters) [hereinafter cited as Preliminary Comments].

162. See, e.g., 1977 House Hearings, supra note 4, at 27 (statement of Att'y Gen. Bell); S. Rep. 344, supra note 137, at 1 (purpose of S. 1613, 1979 Act's precursor, is to expand magistrate jurisdiction and improve access to courts for "less-advantaged").


164. 1979 House Bill § 2(2).

165. H.R. Rep. 1364, supra note 1, at 13:

If a magistrate is competent to handle any case-dispositive jurisdiction, he should be fully competent to handle all case-dispositive jurisdiction. [Individualized reference] preserves the generalist posture of the magistrate, as well as insures that . . . certain disfavored cases are not routinely referenced to less-able judicial personnel or that there is an impetus to appoint "specialized" magistrates to handle only narrow types of cases. It thus prevents the creation of so-called "poor people's" courts.
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guarantee that judges will not restrict references solely to disadvantaged litigants if the House measure were to prevail. Despite these substantial improvements, however, the House has not cured the discrimination problem altogether.\textsuperscript{166} The structure of the consensual-reference provision still points toward simple cases and needy litigants,\textsuperscript{167} and the 1978 House Report itself suggests systematic distinctions by targeting "cases which do not require those special attributes of article III judges" as appropriate candidates for reference.\textsuperscript{168}

Poor litigants, moreover, are not the only potential victims of discriminatory reference practices, for any systematic caseload division introduces invidious distinctions that may work to the detriment of a particular portion of the court's jurisdiction, even when it aids individual parties.\textsuperscript{169} One danger is inhibiting collective judicial exploration of affected areas of law. Magistrate opinions possess very low visibility. Not only are they presently unpublished,\textsuperscript{170} but even if publicly available they would lack the precedential weight of decisions by district judges. The expansion of magistrate jurisdiction over a progressively larger portion of district court jurisdiction might only discourage judicial scrutiny of the precedential implications of routine reference decisions; it would not alter the perceived "informal" char-

\textsuperscript{166} See \textit{id.} at 42 (dissenting view of Rep. Holtzman).
\textsuperscript{167} Litigants with the strongest incentive to accept magistrate trial are those with low stakes, simple cases (low adjudicator risk), and little ability to bear waiting costs.
\textsuperscript{168} H.R. REP. 1364, \textit{supra} note 1, at 12.
\textsuperscript{169} A general problem accompanying consensual reference is an unequal division of judicial resources. Under the 1979 Act, most magistrate cases would receive truncated review. See \textsuperscript{note 3 supra} (review procedure under 1979 Act). In addition, magistrates lack the prestige, authority, and experience of district judges. See \textsuperscript{note 18 supra} (contrasting magistrates and judges). At present, for example, much of the estimated 50\%, saving that would result from the use of magistrates in lieu of judges stems from differential support services. See \textit{1977 House Hearings, supra} note 4, at 502-03 (memorandum on estimated costs of S. 1618). Thus, consensual reference accelerates justice only in part by expanding "judicial resources." In part, consensual reference merely reallocates resources by giving more to those who wait, and giving it more quickly by encouraging the exit of those who do not wait. This reallocation may be insignificant to litigants whose primary concern is speedy justice. As reference expands, however, magistrates may begin to hear cases brought by litigants who would prefer trial before an Article III judge but cannot afford the waiting costs.
\textsuperscript{170} See \textit{1977 House Hearings, supra} note 4, at 67 (statement of Thomas Ehrlich); \textit{1977 Senate Hearings, supra} note 11, at 142 (statement of Charles Halpern). Both argued that publication of magistrate opinions would alleviate inhibition of legal development in areas in which magistrates hear a high proportion of cases. Paradoxically, when the magistrate serves as a judicial adviser under the recommended-disposition procedure, the likelihood of publication of a major opinion under the imprimatur of a district judge may be greater than when the magistrate assumes the full judicial function under the 1979 Act. Cf. \textit{Alexander v. Yale Univ.}, 459 F. Supp. 1, 2-7 (D. Conn. 1978) (adopting Magistrate Arthur H. Latimer's recommended disposition of motion to dismiss) (reprinted magistrate opinion establishes student right of action under Title IX for sexual harassment in private university).
acter\textsuperscript{171} of individual magistrate opinions or the status disparity between magistrates and judges. In addition, the 1979 Act would compound the impact of widespread consensual reference by channelling most appeals of magistrate decisions away from authoritative review in the circuit courts.\textsuperscript{172}

The potential discriminatory effects of widespread reference also underscore the quasi-jurisdictional nature of reference policies, and thus raise the related issue of whether the courts are the appropriate institution for developing such policies.\textsuperscript{173} If litigant consent arguably relieves courts of most responsibility for individual reference decisions,\textsuperscript{174} it cannot sanction aggregate-level reference policies. Yet, short of randomly allocating reference invitations among litigants, courts must develop reference policies in order to answer the basic value questions\textsuperscript{175} posed by two classes of potential adjudicators—questions that would grow more acute as reference became commonplace.\textsuperscript{176}

\textsuperscript{171} Cf. H.R. Rep. 1364, supra note 1, at 12 (parties may desire less formal adjudication offered by magistrates).

\textsuperscript{172} 1979 Act § 2(2). Circuit court review as of right is available only on special litigant agreement. 1979 House Bill § 2(2) (agreement required prior to final magistrate judgment); 1979 Senate Bill § 2(2) (agreement required at time of magistrate reference). This provision ensures that most appeals from magistrate decisions would be to district judges, with possible review by a circuit court only on petition for a writ of certiorari. 1979 Act § 2(2). Thus, most litigants before magistrates benefit from a relatively inexpensive review procedure in the district court, but sacrifice the right to a more authoritative—and institutionally removed—appeal.

\textsuperscript{173} See note 82 supra.

\textsuperscript{174} See p. 1048 supra.

\textsuperscript{175} A hypothetical may illustrate the value questions. Consider the reference choice between a factually complex antitrust matter, involving large damage claims, and an unusually simple, individual Title VII action. Cf. Flowers v. Crouch-Walker Corp., 507 F.2d 1378, 1380 (7th Cir. 1974) (vacating decision reached following magistrate trial and recommended disposition, despite local rule sanctioning reference of Title VII matters; action alleged racially motivated discharge). Size, complexity, amount at stake, and possible economic ramifications caution against the antitrust reference. Cf. La Buy v. Howes Leather Co., 352 U.S. 249, 259 (1957) (complexity of antitrust matters is reason for judicial trial). Yet potential savings of judicial time, coupled with the routine factual character of many issues, sophistication of counsel, and likelihood of appeal, argue in favor of the antitrust reference. By contrast, the relative simplicity and low monetary value of the Title VII action weigh in favor of reference, while its symbolic importance and possible constitutional dimensions seem to demand a judicial statement. Decision between these cases would be difficult on administrative grounds alone. Once other values are introduced, the choice necessarily assumes an ideological dimension as well. The 1979 Senate bill would permit advance resolution of the dilemma through local court rules—a solution that extends or withholds reference invitations without regard for the factual peculiarities of cases. See note 3 supra. The 1979 House bill would both require an individualized decision and discourage reference solely on the basis of litigant need. See id.; pp. 1052-53 supra. Yet the absence of guidelines or restrictions would only make individual reference decisions more difficult and apparently arbitrary.

\textsuperscript{176} If decisions proceeded on a case-by-case basis, commonplace reference would soon exhaust the pool of "easy" cases—those for which extreme simplicity, litigant need, or other unusual factors made the reference decision obvious. If decisions proceeded on a
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Thus, even the House bill, which mandates case-by-case reference,\textsuperscript{177} might not diminish the likelihood of de facto reference policies. Under either version of the 1979 Act, then, the courts, rather than Congress, are left to supply the fundamental reference values and hence assume authority over a key element of jurisdictional policy.\textsuperscript{178}

The second group of systemic difficulties associated with consensual reference includes role problems arising from the magistrate's dual position as judicial subordinate and independent adjudicator. The congressional hearings in 1977 and 1978 focused primarily on the circumscribed problem of the district judge's ability to review with detachment the decisions of his own appointee and colleague.\textsuperscript{179} However, the converse role problem of magistrate independence in relation to district judges is more sensitive on traditional Article III grounds and is also less amenable to procedural solution.\textsuperscript{180}

The premise of the 1979 consensual-reference provision is that litigant consent permits the magistrate to assume the full judicial function.\textsuperscript{181} The integrity of magistrate decisions is insulated by the...
same standard of review that safeguards judicial decisionmaking. Yet the magistrate is not a judge. In addition to the familiar "control" of appellate review that all higher federal tribunals exercise over the judges of lower courts, the magistrate is also subject to a qualitatively different form of bureaucratic control that may attend district court authority to determine his reappointment prospects and, more importantly, the day-to-day contents of his docket. Moreover, district judges must evaluate the magistrate's decisional record in the course of exercising their administrative functions, if only in order to maintain the standards of the court. This ongoing, informal oversight creates the risk of impermissible intrusion on the magistrate's substantive decisions. The danger is not that magistrates will come to function as judicial alter egos, but rather that they may be encouraged to adopt a risk-averse strategy of adjudication by the pressure of judicial scrutiny, a strategy that terminate class of appropriate reference candidates may be large. See pp. 1048-52 supra. Finally, it is by no means clear that magistrate adjudication differs enough from judicial trial. A need for informality, speed, and economy might better be served by entirely novel institutions outside the Article III courts; for example, large-scale, federally subsidized arbitration permitting appeal to the Article III courts, or, when appropriate, administrative agency fact-finding and initial adjudication.

By contrast, when the magistrate is represented as the full equal of the district judge, consensual reference can be offered as a solution for a different set of problems: chronically overcrowded dockets and temporary peaks in demand for judicial services, see H.R. Rep. 1364, supra note 1, at 27; the legitimate needs of disadvantaged litigants for access to traditional district court adjudication, see S. Rep. 344, supra note 137, at 1; and even the high costs of judicial services, see note 142 supra. In this case, however, widespread consensual reference is only a partial substitute for reforms that might expand the availability—or decrease the workload—of the Article III judiciary itself. See 1977 House Hearings, supra note 4, at 127 (remarks of Judge Metzner responding to Rep. Drinan) (judicial determination of all federal court matters preferable to magistrate adjudication, but infeasible given congressional reluctance to furnish funds); H.R. Rep. 1364, supra note 1, at 35 (dissenting views of Reps. Drinan and Kindness) (bills to create additional judgeships and abolish diversity jurisdiction lessen need for S. 1613, 1979 Act's precursor). In addition, criticisms of the 1979 Act that focus on role problems, see p. 1057 infra, and the distribution of judicial resources, see pp. 1052-54 supra, are particularly telling if the underlying rationale for consensual reference hinges on the need to expand the existing services offered by Article III judges.

182. 1979 Act § 2(2).
183. 1979 House Bill § 2(2) (magistrate must be "specially designated" to try civil cases); 1979 Senate Bill § 2(2) (magistrate must be "specially designated" to try cases and court may always vacate references on its own motion or on showing of good cause). See S. Rep. 344, supra note 137, at 11 (magistrate reference jurisdiction limited by judicial approval so that court may protect itself that an individual magistrate is fully qualified to try cases and that the magistrate's performance of his other duties will not be unduly impeded"; 1977 House Hearings, supra note 4, at 507 (letter from Dennis Sweeney) (magistrate consensual reference jurisdiction may be withdrawn at any time). In addition to control over the magistrate's authority to hear civil cases, the 1979 Act would also permit the district judges to shape the magistrate's docket by regulating which cases may be heard. See 1979 Act § 2(2).
184. This danger reflects solely on the magistrate's difficult role. Cf. Kaufman, Chilling Judicial Independence, Benjamin Cardozo Lecture, Association of the Bar of the City of New York (Nov. 1, 1978) ("A judge who feels threatened by the perception that other
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eschewing unconventional decisions that might otherwise be prompted by novel legal claims or by pressing factual idiosyncracies. Such "judicious" decisionmaking would be inconsistent with the premise that the magistrate is capable of serving as the functional equivalent of the judge. It would be equally inconsistent with the broader policy of autonomous adjudication within the federal courts that underlies the Article III judicial office.

Beyond the pressures on magistrate decisions, however, lies the more general problem of role confusion in the public eye. The fungibility of judge and magistrate implied by widespread consensual reference would shift the basis of the federal judge's perceived legitimacy away from a specific constitutional mandate and toward a pragmatic view of the work of the judiciary as merely another essential public service. Yet judges who invoke the Constitution daily and depend on it for their power to check the other branches of government can ill afford an erosion of public respect for their unique constitutional qualifications.

Analysis of consensual reference thus reveals multiple difficulties at-
tending the magistrate's piecemeal elevation to the functional equal of the district judge—difficulties even more complex than the *Wedding* problem of ensuring that the magistrate remains the functional subordinate of the judge. The two levels of problems are complementary; together they suggest that hierarchical relations between individual adjudicators, no matter how structured, will always prove less compatible with the policies behind the Article III judicial office than the traditional "hierarchical system of courts, not of judges."189

III. The Proper Legislative Constraints on Trial by Magistrate

The proposed expansion of the magistrate's civil jurisdiction in the 1979 Act threatens to trigger a profound structural change in the federal courts. The system's past record of rapid growth and its potential for uncontrolled future development are more disturbing than any one of its individual problems. In part, the system's dynamism testifies to its success in meeting the pressing day-to-day needs of overcrowded district courts. The magistrate's service as a judicial assistant, particularly in the pretrial arena, has made substantial contributions to district court efficiency. Most of these gains have been achieved without offsetting constitutional risks. Nevertheless, even the magistrate's advisory role is not free of Article III problems. Although recommended disposition is now well-established, *Wedding* cautions that acceptance of magistrate evidentiary hearings on prisoner petitions entails a continuing risk of impermissible delegation, a risk that also impinges on federalism concerns in the case of state prisoners. Now, however, the 1979 Act proposes the magistrate's formal promotion to the role of independent adjudicator in the face of constitutional difficulties less amenable to judicial resolution than the already difficult task of delimiting the magistrate's role as a judicial assistant.

The juxtaposition of old problems and the proposed 1979 legislation points to one context in which consensual reference might be used to strengthen existing procedures: namely, in the disposition of prisoner petitions that reach the evidentiary hearing stage. Ideally, litigant consent would supplement the safeguard of "de novo" district court re-

190. *See* pp. 1049-50 *supra*.
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view\textsuperscript{193} that now accompanies magistrate hearings. Consent would defuse federalism objections to magistrate hearings by preserving state access to a full determination of factual issues before an Article III judge. Similarly, consent recognizes the interests of prisoners in a judicial hearing and provides a remedy for \textit{Wedding}'s lingering suspicion of possible de facto delegation.\textsuperscript{194} Yet, because a supplemental consent requirement might face strenuous administrative objections,\textsuperscript{195} a less satisfactory alternative also merits consideration: final magistrate disposition of prisoner petitions on a consensual basis.\textsuperscript{196} Full consensual reference retains the virtues of supplemental consent; it mitigates existing federalism problems and responds to \textit{Wedding}'s concerns by allowing magistrate adjudication in a form that poses minimal Article III risks. However, final magistrate disposition would also introduce novel problems. It would entail the loss of the 1976 de novo review procedure as well as the addition of the weaknesses inherent in any system of consensual reference—risk of coerced consent, role problems, and possible inhibition of legal development. These drawbacks must be balanced against corresponding problems in the existing recommended-disposition procedure.\textsuperscript{197} Ultimately, the choice may hinge on the equally uncertain merits of allowing parties to safeguard factual determinations beforehand through the right to a judicial hearing, or of continuing to rely on judicial redetermination of all contested factual matters despite \textit{Wedding}'s reservation.\textsuperscript{198}

195. \textit{Cf. 1977 Senate Hearings, supra note 11}, at 29 (statement of Peter McCabe) (magistrates vigorously press for elimination of defendant-waiver requirement prior to magistrate trial of petty offenses). Note also that consensual magistrate hearings on prisoner petitions were proposed immediately following the \textit{Wedding} decision. See Comment, \textit{supra note 112}, at 356-58.
196. Consensual reference and final magistrate disposition of prisoner petitions are not addressed by legislative materials accompanying either the 1979 Senate or House bills. However, since prisoner petitions are civil matters, they may be eligible for reference. See note \textit{3 supra} (1979 consensual-reference provision).
197. The risk of coerced consent attending consensual reference seems preferable to mandatory reference of prisoner hearings under the recommended-disposition procedure. Role problems accompanying the two procedures might be similar despite the differing formal characterizations of magistrate functions that they entail. See note \textit{127 supra}; pp. 1056-57 \textit{supra}. The most telling drawback of consensual reference might be the diversion of judicial attention away from prisoner petitions that would be occasioned by replacement of de novo review with an ordinary appellate review procedure.
198. Empirical investigation of magistrate reversal on factual issues under the present de novo appeals procedure, see note \textit{32 supra}, might shed light on the dangers of introducing final magistrate determination subject to conventional appellate review. It should also be noted that appeals under a conventional appellate procedure might entail greater delay. See \textit{id.} (under 1976 Amendments parties have 10 days to request de novo determination of disputed issues).
If full consensual reference of prisoner petitions receives consideration, however, it should not emerge as an application of an omnibus consensual-reference provision, but as an independent legislative proposal. In this form it would escape the interpretative difficulties generated by the original 1968 Act. Still more important, it would remain within the confines of a limited congressional value determination, and thus avoid both the nagging issues that surround judicial exercises of quasi-jurisdictional authority and the danger of a long-run dynamic of expanding delegation.

The problems that consensual reference eludes in the case of prisoner petitions—or any other single class of matters—are far less easily avoided by legislation that would permit magistrate reference across the jurisdictional field. Article III risks as well as separation-of-powers concerns suggest that the House and Senate Judiciary Committees might wisely reassess present drafts of the 1979 consensual-reference provision. Moreover, the case for reconsideration is particularly compelling because pressures on district court dockets may be less acute in the near future than in any previous phase of the magistrate system’s development.

Congressional reassessment, however, should look to revision rather than rejection of the 1979 consensual-reference provision. The drafting challenge is to minimize the risks accompanying a procedure that, even without express statutory authorization, is already established in some districts. Thus, revision of the 1979 House and Senate bills should firmly restrict prospects for future expansion of magistrate reference.


200. See p. 1042 supra (1968 Act’s permissive umbrella clause and restrictive illustration in habeas area).


202. The recent creation of 117 additional district judgeships should do much to relieve short-term pressures on the district courts. See Omnibus Judgeship Act of 1978, Pub. L. No. 95-486, 47 U.S.L.W. 81-82 (1978). Possible reintroduction of legislation to curtail diversity jurisdiction may further relieve overcrowding. Cf. note 59 supra (recent efforts to curtail diversity jurisdiction). Until the effects of these reforms are known, even the administrative grounds for expanded magistrate jurisdiction remain open to question. See 1977 House Hearings, supra note 4, at 216 (Judge Friendly); H.R. REP. 1364, supra note 1, at 35-36, 41 (dissenting views of Reps. Drinan, Kindness, and Seiberling). But see id. at 21-22 (diversity curtailment, additional judgeships, and expanded magistrate jurisdiction are complementary reforms).

203. See note 4 supra (consensual reference without express statutory authorization).

204. Even restrictive regulation would permit some expansion of consensual reference as the majority of districts that have hitherto hesitated to permit any magistrate trials adjust to the new guidelines. Indeed, short-term congressional projections of the 1979 Act’s impact, see note 6 supra, rest primarily on expected increases in magistrate trials in districts that have not previously allowed them.
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In addition, it should relieve the judiciary of responsibility for determining either the appropriate levels of aggregate reference or the criteria that should inform reference decisions. A range of statutory provisions might serve both objectives. One possibility is the creation of fixed, maximum delegation rates coupled with conservative reference procedures—for example, a requirement that parties initiate the reference process by filing a joint request for magistrate trial. A second alternative might be to borrow the exceptional-condition language from the special master tradition, but leave to the litigants the burden of overcoming a presumption in favor of judicial trial. Finally, a third option might be congressional specification of individual categories of cases that are appropriate for magistrate trial.

Conclusion

Any expansion of magistrate jurisdiction that risks widespread, routine delegation within the district courts also threatens a serious erosion of the policies underlying the Article III judicial office. Neither Congress nor the courts should allow the administrative conveniences of reference to obscure this danger. The answer, however, is not prohibition of all magistrate adjudication. Instead, legislation should respond by introducing a consent requirement in those cases, such as prisoner petitions requiring evidentiary hearings, in which the magistrate’s advisory role might informally extend to de facto adjudication, and by carefully restricting the number and kinds of matters in which the magistrate may formally assume the full judicial function.

205. Shifting reference initiative to the parties has several advantages. It highlights the unusual character of reference, protects against judicial pressure (or perceived pressure), relieves the judiciary of most burdens of the reference decision, and lessens the utility of reference as a docket-clearing device.

206. See note 23 supra.

207. Cf. note 82 supra (reference decisionmaking entails resolution of basic quasi-jurisdictional value issues traditionally resting with Congress). But see S. Rep. 344, supra note 137, at 4 (rejecting, because of Congress’s lack of experience, suggestion that specific categories of cases be designated for reference). Congressional designation of categories of cases for reference would, of course, discriminate among cases—but with the crucial difference that it would also force Congress to make value decisions that are too important to rest on administrative convenience and too arbitrary for judicial determination. Lack of experience is one reason for hesitating to make such designations. The sensitivity demonstrated by the House Judiciary Committee to the prospect of systematic reference of “poor people’s” cases suggests a second reason: the inherent difficulty of prescribing reference values on the concrete level of deciding among categories of cases. See H.R. Rep. 1364, supra note 1, at 13. This inherent difficulty, however, is also a persuasive reason for congressional determination of reference policy. The performance of the House Judiciary Committee previews the care with which Congress might fashion a specific reference policy. Congressional designation of too many categories of cases for possible reference would, of course, replicate the expansionist dangers of present drafts of the 1979 Act.