The Constitutionality of the Federal Magistrate System after the Northern Pipeline Decision

Kenneth J. Phelan

Follow this and additional works at: https://digitalcommons.law.villanova.edu/vlr

Part of the Bankruptcy Law Commons, Civil Procedure Commons, and the Constitutional Law Commons

Recommended Citation
Available at: https://digitalcommons.law.villanova.edu/vlr/vol29/iss3/7

This Issue in the Third Circuit is brought to you for free and open access by Villanova University Charles Widger School of Law Digital Repository. It has been accepted for inclusion in Villanova Law Review by an authorized editor of Villanova University Charles Widger School of Law Digital Repository.
THE CONSTITUTIONALITY OF THE FEDERAL MAGISTRATE SYSTEM AFTER THE NORTHERN PIPELINE DECISION

I. INTRODUCTION

Article III, section I of the United States Constitution provides that

[the judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress will from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Office during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.]

Although Congress did not have to create inferior courts, once it chose to do so it was bound by the constraints of article III to provide the judges of those courts with life tenure and freedom from salary diminution. The Supreme Court, however, has identified three categories of inferior courts which are exempt from the requirements of article III: military tribunals; adjuncts to article III courts; and legislative courts created pursuant to article I.


Military courts "involve a constitutional grant of power that has been historically understood as giving the political branches of Government extraordinary control over the precise subject matter at issue" and, hence, are not to be considered under the dominion of article III. Id. at 66.

Adjuncts to article III courts must be such that "the essential attributes of judicial power" rest within the article III court. Id. at 81. This has been interpreted to mean that the litigant has a right to de novo review of any objections to the finding of the adjunct tribunal. See, e.g., United States v. Raddatz, 447 U.S. 667 (1980). For a discussion of Raddatz, see notes 57-59 and accompanying text infra. For a discussion of de novo review, see notes 52-59 and accompanying text infra.

The doctrine of article I legislative courts is derived from Chief Justice Marshall's opinion in the American Insurance Co. v. Canter, 26 U.S. (1 Pet.) 511 (1828). In allowing non-article III judges to render a decision in what was then the territory of Florida, Chief Justice Marshall stated:

They are legislative Courts, created in virtue of the general right of sovereignty which exists in the government, or in virtue of that clause which enables Congress to make all needful rules and regulations, respecting the territory belonging to the United States. The jurisdiction with which they are invested, is not a part of that judicial power which is defined in the 3d article of the Constitution, but is conferred by Congress, in the execution of those general powers which that body possessed over the territories of the United States.

(745)
In response to caseload pressure burdening the federal courts, Congress has drawn upon these exemptions to create federal bankruptcy courts and to expand the judicial power of United States Magistrates. The federal bankruptcy courts, established through the Bankruptcy Reform Act of 1978 (Reform Act) are staffed by judges who serve fourteen year terms and have only statutory salary protections. The magistrate system, as amended by Section 636(c) of the Federal Magistrate Act of 1979, provides a method.

Subsequently this doctrine was limited in Glidden Co. v. Zdanok, 370 U.S. 530, 531 (1962), after Congress had specifically designated the United States Court of Claims as an article III court in contravention of previous Supreme Court rulings. Glidden involved two cases, one, a civil action and the other a criminal action, in which there were questions as to whether the judges presiding over the actions were given article III protection. Id. at 535. Two judges who were assigned judicial duties in the district court by the Chief Justice were from the Court of Claims and the Court of Customs and Patents Appeals, pursuant to 28 U.S.C. §§ 293(a), 294(b) Id. at 532 & nn.2-3 (citing 28 U.S.C. §§ 293(a), 294(b) (1982)). Previously the Court of Claims had been considered an article I legislative court but the Supreme Court accepted Congress' redesignation of its status to that of an article III court and, thus, allowed the assignment. Id. at 584.


Notwithstanding any provision of law to the contrary—

(1) Upon the consent of the parties, a full-time magistrate or a part-time United States magistrate who serves as a full-time judicial officer may conduct any or all proceedings in a jury or nonjury civil matter and order the entry of judgment in the case, when specially designated to exercise such jurisdiction over the court or courts he serves . . . . When there is more than one judge of a district court, designation under this paragraph shall be by the concurrence of a majority of all the judges of such district court, and when there is no such concurrence, then by the chief judge.

(2) If a magistrate is designated to exercise civil jurisdiction under paragraph (1) of this subsection, the clerk of court shall, at the time the action is filed, notify the parties of their right to consent to the exercise of such jurisdiction. The decision of the parties shall be communicated to the clerk of court. Thereafter, neither the district judge nor the magistrate shall attempt to persuade or induce any party to consent to reference of any civil
whereby federal magistrates, who are appointed for eight year terms, may, with the consent of the parties, conduct entire civil trials and enter judgments. Both the bankruptcy court and the magistrate system have raised constitutional questions concerning the creation of non-article III tribunals.

In 1982, the Supreme Court addressed the constitutionality of the bankruptcy courts in *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, where the Court, in a sharply divided opinion, held that the non-article III judges of the bankruptcy court could not constitutionally exercise at least part of the jurisdiction vested in them by the Reform Act. The Supreme Court's discussion of broad article III questions pertaining to the bankruptcy courts has prompted questions concerning the legitimacy of section 636(c)

matter to a magistrate. Rules of court shall include procedures to protect the voluntariness of the parties' consent.

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

4. Notwithstanding the provisions of paragraph (3) of this subsection, at the time of reference to a magistrate, the parties may further consent to appeal on the record to a judge of the district court in the same manner as on an appeal from a judgment of the district court to a court of appeals. Wherever possible the local rules of the district court and the rules promulgated by the conference shall endeavor to make such appeal expedient and inexpensive. The district court may affirm, reverse, modify, or remand the magistrate's judgment.

*Id.* § 636(c).

13. See id. § 636(c). For the text of § 636(c), see note 11 *supra*.
14. For a discussion of the constitutional questions raised by the bankruptcy court and the magistrate system, see notes 48-51 and accompanying text *infra*.
15. 458 U.S. 50 (1982). For a discussion of *Northern Pipeline*, see notes 60-77 and accompanying text *infra*.
17. *Northern Pipeline*, 458 U.S. at 87.
18. *Northern Pipeline* presented only the question of whether a non-article III bankruptcy judge could constitutionally hear a state-created cause of action involving the debtor. 458 U.S. at 87 n.40. The Court, however, found the vast jurisdictional grants to bankruptcy judges to be severable, and, therefore, held the entire jurisdictional provision to be unconstitutional. *Id.*

The plurality never decided the initially presented question of whether Congress could allow a non-article III court to hear bankruptcy cases at all. The Chief Justice in his dissent characterized the Court's holding as limited to the following proposition:
of the Magistrates Act which allows a magistrate, upon consent of the parties, to enter final judgment. 19

Recently, the Third Circuit addressed this issue in Wharton-Thomas v. United States, 20 and found that the consent procedure of section 636(c) properly distinguished the Magistrate procedure from the improper delegation of the bankruptcy courts. 21 After first providing an historical perspective, this note will discuss the Third Circuit’s analysis, concluding that the court properly found section 636(c) constitutional.

II. THE HISTORY OF THE BANKRUPTCY COURTS AND THE FEDERAL MAGISTRATES SYSTEM

A. The Bankruptcy Courts

Since 1898 there has been a federal bankruptcy law which authorized federal tribunals, on petition of either a distressed debtor or his creditors, to distribute the debtor’s available assets to his creditors and ultimately discharge him from debt liability. 22 Exclusive jurisdiction over bankruptcy cases was in the federal district courts which, pursuant to congressional authorization, would appoint bankruptcy referees to make initial recommendations subject to district court review. 23 The status and authority of the bankruptcy referee was enhanced by the Rules of Bankruptcy Procedure, a “traditional” state common law action, not made subject to a federal rule of decision, and related only peripherally to an adjudication of bankruptcy under federal law, must, absent the consent of the litigants, be heard by an “Article III court” if it is to be heard by any court or agency of the United States.

Id. at 92 (Burger, C.J., dissenting).

19. For the text of § 636(c), see note 11 supra. In light of the discussion in Northern Pipeline concerning the limits of non-article III tribunals, questions have arisen concerning the jurisdiction of federal administrative agencies. See Redish, Legislative Courts, Administrative Agencies, and the Northern Pipeline Decision, 1983 Duke L.J. 197.

20. 721 F.2d 922 (3d Cir. 1983).

21. Id. at 923.


23. See Report of the Commission on the Bankruptcy Laws of the United States, H.R. Doc. No. 137, Pt. 1, 93rd Cong., 1st Sess. 1, 94 (1973) (hereinafter cited as Commission Report). In discussing proposed changes in the bankruptcy system, the Report stated, in all prior bankruptcy legislation the direct responsibility for supervising the administration of bankruptcy cases has been reposed by Congress in district judges or their appointees. The assumption underlying the Acts of 1867 and 1898 was that while the judges of the circuit and district courts were vested with jurisdiction over the administration of all cases filed and pending in their courts and of most of the controversies generated by them, the registers or referees should assume most of the burdens imposed by this class of cases. The judges were intended to exercise a supervisory role which was largely undefined but which was exemplified in the statutory provisions for . . . the review of their orders.

Id. (footnotes omitted).
promulgated in 1973,\textsuperscript{24} though the district court was still left with the right to withdraw a case from the referee and to review the referee's determination.\textsuperscript{25}

With the Bankruptcy Reform Act in 1978, Congress made significant substantive and procedural changes in the bankruptcy system.\textsuperscript{26} Two major goals of the new legislation were to enlarge the jurisdiction of the bankruptcy court and to increase its independence.\textsuperscript{27} The court's new jurisdiction included "all civil proceedings arising under . . . or related to a case arising under" the federal bankruptcy law.\textsuperscript{28} To increase the independence of the bankruptcy court the Reform Act granted the bankruptcy court, with only minor exceptions,\textsuperscript{29} all "the powers of a court of equity, law, and admiralty." The bankruptcy court, therefore, was given the power to hold jury


\textsuperscript{25} See Northern Pipeline, 458 U.S. at 53 (citing Bankr. R. 102, 801 (superseded by statute)).


\textsuperscript{27} Northern Pipeline, 458 U.S. at 53. See Note, supra note 26, at 734-36.

\textsuperscript{28} 28 U.S.C. § 1471(b) (1982). If a case which falls within the jurisdictional grant is not filed originally in the bankruptcy court, it may be removed to the bankruptcy court. 28 U.S.C. § 1478 (1982). The grant of jurisdiction became effective on October 1, 1979.

Civil proceedings related to cases arising under bankruptcy law include controversies that could have only been determined in plenary proceedings in state or federal districts courts before the Reform Act. See H.REP. NO. 595, 95th Cong., 1st Sess. 445 (1977), reprinted in 1978 U.S. CODE CONG. & AD. NEWS 5963, 6400. The expanded jurisdiction eliminated this summary/plenary distinction in order to provide a forum capable of quickly and uniformly resolving all disputes that affect a given debtor. S. REP. NO. 989, 95th Cong., 2d Sess. 17-18, reprinted in 1978 U.S. CODE CONG. & AD. NEWS 5787, 5803-04. Thus, if a debtor has common law claims against a third party while undergoing bankruptcy proceedings, the new jurisdiction would allow the bankruptcy court to hear and determine those claims. See Northern Pipeline, 458 U.S. at 54.

\textsuperscript{29} 28 U.S.C. § 1481 (1982). The courts are given power to "issue any order, process, or judgment that is necessary or appropriate to carry out the provisions" of proposed title 11. The proposed bankruptcy courts will be able to enforce their own orders, and to issue writs of execution in aid of enforcement. The grant of the power to issue writs of habeas corpus to release debtors imprisoned on dischargeable debts is explicit.

trials, issue declaratory judgments, issue writs of habeas corpus, and issue any order or judgment necessary to carry out the provisions of the Act.\textsuperscript{30}

B. The Federal Magistrate System

The federal magistrate system developed from the practice of using United States commissioners to assist the federal judiciary.\textsuperscript{31} As early as 1789, the federal judiciary was assisted by these commissioners.\textsuperscript{32} Then in 1968, Congress passed the Federal Magistrate Act\textsuperscript{33} which abolished their office and established a system of United States magistrates.\textsuperscript{34} The Act grants magistrates fixed terms of office\textsuperscript{35} at fixed salaries\textsuperscript{36} and provides that their responsibilities include all powers and duties previously conferred or imposed upon United States commissioners.\textsuperscript{37} Magistrates are also to serve as special masters pursuant to the Federal Rules of Civil Procedure\textsuperscript{38} and

\begin{flushright}
\footnotesize
\textsuperscript{31} McCabe, The Federal Magistrate Act of 1979, 16 Harv. J. on Legis. 343, 345-51 (1979). Beginning in 1789, commissioners would assist the judicial branch by performing various duties including the setting of bail for federal crimes. \textit{Id.} By 1940, Congress had extended the commissioners’ jurisdiction to try all petty offenses committed on property under the exclusive or concurrent jurisdiction of the federal government provided the district court specifically designated the exercise of such jurisdiction. \textit{Id.} For a general discussion of the establishment of United States magistrates, see Silberman, Masters and Magistrates Part II: The American Analogue, 50 N.Y.U. L. Rev. 1297 (1975); Comment, An Adjudicative Role for Federal Magistrates in Civil Cases, 40 U. Chi. L. Rev. 584 (1973); Note, Article III Constraints and the Expanding Civil Jurisdiction of Federal Magistrates: A Dissenting View, 88 Yale L.J. 1023 (1979).
\textsuperscript{32} McCabe, supra note 31, at 345.
\textsuperscript{35} 28 U.S.C. § 631(e) (1982). Section 631(e) provides: “The appointment of any individual as a full-time magistrate shall be for a term of eight years, and the appointment of any individuals as a part-time magistrate shall be for a term of four years . . . .” \textit{Id.}
\textsuperscript{36} \textit{Id.} § 634(a). Section 634(a) provides:

Officers appointed under this chapter shall receive as full compensation for their services salaries to be fixed by the conference pursuant to section 633 of this title, at rates for full-time and part-time United States magistrates not to exceed the rates now or hereafter provided for full-time and part-time referees in bankruptcy, respectively, referred to in section 40a of the Bankruptcy Act (11 U.S.C. 68(a)), as amended, except the salary of a part-time United States magistrate shall not be less than $100 nor more than one-half the maximum salary payable to a full-time magistrate. \textit{Id.}
\textsuperscript{37} \textit{Id.} § 636(a)(1). Section 636(a)(1) provides that each United States Magistrate shall have within the territorial jurisdiction prescribed by his appointment “all powers and duties conferred or imposed upon United States commissioners by law or by the Rules of Criminal Procedure for the United States District Courts . . . .” \textit{Id.}
\textsuperscript{38} \textit{Id.} § 636(b)(2). Section 636(b)(2) provides that notwithstanding any law to the contrary,
\end{flushright}
assist district judges in pretrial and discovery proceedings. Moreover, the Act provides magistrates with authority to perform “such additional duties as are not inconsistent with the Constitution and the laws of the United States.”

Because of an increasing backlog in federal district courts and the implementation of the Speedy Trial Act, Congress amended the Magistrate Act.

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

Id. § 636(b)(1). Section 636(b)(1)(A) provides that a judge may designate a magistrate to hear and determine any pretrial matter pending before the court, except a motion for injunctive relief, for judgment on the pleadings, for summary judgment, to dismiss or quash an indictment or information made by the defendant, to suppress evidence in a criminal case, to dismiss or to permit maintenance of a class action, to dismiss for failure to state a claim upon which relief can be granted, and to involuntarily dismiss an action.

Id. § 636(b)(1)(B). Section 636(b)(1)(B) provides that a judge may also designate a magistrate to conduct hearings, including evidentiary hearings, and to submit to a judge of the court proposed findings of fact and recommendations for the disposition, by a judge of the court, of any motion excepted in subparagraph (A), of applications for post-trial relief made by individuals convicted of criminal offenses and of prisoner petitioners challenging conditions of confinement.

Id. § 633(b). Responsibility for overseeing the administration of the magistrate system was given to the Judicial Conference of the United States. See id. § 633(b). The Judicial Conference consists of the Chief Justice of the United States, the chief judge of each judicial circuit, the chief judge of the Court of Claims, the chief judge of the Court of Customs and Patent Appeals, and a district judge from each judicial circuit chosen by the district and circuit judges at the annual conference to serve for three years. See id. § 331. The Conference's duties include the determination of number, type, location, and salary of each United States magistrate position.

Id. § 633(b).


42. 18 U.S.C. § 3161 (1982). The Speedy Trial Act increased existing pressure on the court docket by imposing strict deadlines and requirements of proceedings in federal criminal cases. See id.
Act in 1976.\textsuperscript{43} This legislation added more specificity to the scope of assistance which magistrates could provide the judiciary including assistance in pretrial proceedings in civil and criminal cases.\textsuperscript{44}

Further amendments were added in 1979 in an attempt to assist the poor in getting their cases to trial more quickly and to add flexibility to the magistrate system.\textsuperscript{45} The Federal Magistrate Act of 1979 extended the magistrate's power to dispose of certain minor criminal cases,\textsuperscript{46} and granted, in section 636, the power to enter final judgment without the opportunity for de

\textsuperscript{43} Jurisdiction of the United States Magistrates: Hearings on S. 1283 Before the Subcomm. on Improvement in Judicial Machinery of the Senate Comm. on the Judiciary, 94th Cong., 1st Sess. 1 (1975).


Other courts have upheld the referral to magistrates of an equally wide variety of cases under the pertinent statutes. See McCabe, supra note 31, at 351 n.45 (citing Campbell v. United States Dist. Court, 501 F.2d 196 (9th Cir.), cert. denied, 419 U.S. 879 (1974) (motion to suppress evidence in a criminal case); Givens v. W.T. Grant Co., 457 F.2d 612 (2d Cir.), vacated on other grounds, 409 U.S. 56 (1972) (motion to dismiss a civil case); Asparro v. United States, 352 F. Supp. 1085 (D. Conn. 1973) (evidentiary hearings in habeas corpus cases)).

Since the different holdings were due only to statutory interpretation, the 1976 law affirmed the broad range of duties which were already being performed by magistrates in an attempt to put them on a more uniform basis nationally. See H.R. Rep. No. 1609, 94th Cong., 2d Sess. 5 (1976). The codified version of these duties is at 28 U.S.C. § 636(b)(1)(B) (1982), the text of which can be found at note 39 supra.

\textsuperscript{45} S. Rep. No. 74, supra note 7, at 4, reprinted in 1979 U.S. CODE CONG. & AD. NEWS at 1472. The amendment recognized the growing interest in improving access to the courts for all groups, especially the less advantaged since the latter lack the resources to cope with the vicissitudes of adjudication delay and expense. \textit{Id.} This outcome may be more pronounced as the exigencies of the Speedy Trial Act increase the demands on the federal courts. \textit{Id.} The amendments to the magistrate system are thought to be able to help the federal judiciary cope with the mounting queue of civil cases pushed to the back of the docket. \textit{Id.} Increased flexibility would be added by the limited tenure of magistrates. \textit{Id.} Magistrate positions can be selectively placed by the Judicial Conference to accommodate surges of litigation in particular districts at particular times. \textit{Id.}

\textsuperscript{46} \textit{Id.} at 5-6, reprinted in 1979 U.S. CODE CONG. & AD. NEWS at 1474. The United States magistrates were previously empowered to try persons accused of minor offenses for which the maximum penalty that may be imposed does not exceed imprisonment for a term of one year or a fine of $1,000, or both (with certain limited exceptions), if the defendant consents to trial before a magistrate rather than before a district judge, and if the defendant waives whatever right to trial by jury he may have. \textit{Id.}

The 1979 Act expanded the magistrate's criminal trial jurisdiction to include any misdemeanor prosecuted in the federal district court. See 18 U.S.C. § 3401 (1982).
III. Questions of Constitutionality

A. Introduction

The bankruptcy court and the magistrate system have raised constitutional questions concerning the delegation of article III judicial power to non-article III judges. Article III judges are to hold their office during good behavior and may not have their compensation diminished during their continuance in office. Bankruptcy judges and magistrates, however, have fixed terms of office and are only statutorily protected from salary diminution.

Prior to the Bankruptcy Reform Act of 1978, the constitutionality of using referees rested upon the opportunity for de novo review in the district court. Similarly, prior to the adoption of the Federal Magistrate Act of 1979, the Supreme Court upheld the validity of non-article III tribunals staffed by federal magistrates, on the basis that the tribunals' decisions were subject to de novo review by an article III court. In Mathews v. Weber, the


48. See S. REP. NO. 74, supra note 7, at 4-6, reprinted in 1979 U.S. CODE CONG. & AD. NEWS at 1973-75. For a discussion of the exceptions to the article III requirement, see note 4 supra. For a discussion of the constitutional questions raised by the Magistrate Act and the 1976 amendments, see McCabe, supra note 31, at 365; Comment, supra note 44, at 80-82; Comment, supra note 31, at 587-88.


51. For the statutory language fixing a magistrate's salary and term in office, see notes 35-36 supra. The magistrate's salary cannot be reduced during the term of office. 28 U.S.C. § 634(b) (1982). Magistrates serve eight year terms and neither full-time nor part-time magistrates may be removed from office except for "incompetency, misconduct, neglect of duty, or physical or mental disability" as found by a majority of the judges of the district. Id. § 631(i).

Bankruptcy judges are to be appointed by the President, with the consent of the Senate, to fourteen year terms. Id. §§ 152, 153(a). Bankruptcy judges are subject to removal by the judicial conference for the same reasons that warrant removal of magistrates. Id. §§ 153(b).


53. See United States v. Raddatz, 447 U.S. 667 (1980) (statute calls for de novo determination, not de novo review); Mathews v. Weber, 423 U.S. 261 (1976) (preliminary review of social security cases by a magistrate is an “additional duty” under the statute). Under the magistrate system this requirement was codified in § 636(b)(1), which states:

Within ten days after being served with a copy, any party may serve and file written objections to such proposed findings and recommendations as provided by rules of court. A judge of the court shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made. A judge of the court may accept, reject, or modify, in whole or in part, the findings or recommenda-
Supreme Court found constitutional the practice of referring all social security benefit cases to magistrates for preliminary review. The Court stressed the fact that magistrates do no more than give recommendations; "[t]he authority—and the responsibility—to make an informed, final determination, we emphasize, remains with the judge." The Court allowed further expansion of the role of magistrates in United States v. Raddatz. In Raddatz, the Court reviewed the statutory question of whether a de novo determination of a magistrate’s finding required the court to re hear testimony in order to make an independent evaluation of credibility. The Supreme Court held that since the statute called for a de novo determination and not a de novo hearing, the court did not have to re hear the testimony upon which the magistrate based his findings and recommendations.

B. The Northern Pipeline Decision

The Bankruptcy Reform Act, however, does not provide for de novo review and, therefore, has raised important article III objections. The

55. Id. at 270-72. In Weber, the plaintiff wished to challenge the final determination that he was not entitled to reimbursement under the Medicare provisions of the Social Security Act. Id. at 263. The clerk of the court, pursuant to a court rule for social security cases, assigned the case to a magistrate “to notice and conduct such factual hearings and legal argument as may be appropriate” and to “prepare a proposed written order or decision, together with proposed findings of fact and conclusions of law where necessary or appropriate . . . .” Id. at 263-64. The Secretary of Health, Education, and Welfare moved to vacate the order of reference, but the motion was denied. Id. at 265.
56. Id. at 271.
57. 447 U.S. 667 (1980). In Raddatz, the defendant, prior to his trial on federal criminal charges, moved to suppress certain incriminating statements he had made. Id. at 669. Over the defendant’s objections, the district court referred the motion to a magistrate for an evidentiary hearing pursuant to the Federal Magistrates Act, 28 U.S.C. § 636(b)(1)(B) (1982). Id. For the text of § 636(b)(1)(B), see note 39 supra. The magistrate, after hearing evidence and testimony, recommended that the motion be denied. Raddatz, 447 U.S. at 671. The district court accepted his recommendation over the defendant’s objections without hearing the testimony. Id. at 671-72.
58. 447 U.S. at 672-73. The Court focused on statutory interpretation, rejecting the constitutional challenges. Id. at 673-76.
59. Id. at 673-76. The Ninth Circuit has held that the de novo determination cannot simply be a pro forma approval. See Coolidge v. Schooner California, 637 F.2d 1321 (9th Cir. 1980), cert. denied, 451 U.S. 1020 (1981). In Coolidge, the district court, without considering the objections of the parties, accepted the magistrate’s opinion as the court’s “findings of fact and conclusions of law.” Id. at 1323. The Ninth Circuit overturned the district court’s judgment and held that the Magistrates Act required the judge to re examine any findings as to which the litigants had objection. Id. at 1327.
60. See Northern Pipeline, 458 U.S. at 53. The Act establishes a special procedure for appeal from orders of bankruptcy courts. Id. at 55. The circuit council is empowered to direct the chief judge of the circuit to designate panels of three bankruptcy judges to hear appeals. Id. (citing 28 U.S.C. § 160 (1982)). These panels have juris-
Supreme Court addressed these objections in *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.* A plurality of the Court held that section 241(a) of the Reform Act was unconstitutional because the broad grant of jurisdiction to bankruptcy judges "impermissibly removed most, if not all, of the essential attributes of the judicial powers" from the Art[icle] III district Court," and vested those powers in a non-article III bankruptcy court.62

*Northern Pipeline* dealt with the question of whether non-article III bankruptcy courts could constitutionally adjudicate state-created common law rights which involve the debtor.63 Northern Pipeline Construction Company filed for reorganization under the Reform Act and subsequently filed suit in the bankruptcy court against Marathon Pipe Line Company for a variety of common law claims.64 Justice Brennan, writing for the plurality, considered the constitutionality of the broad jurisdictional grants under the Reform Act and their relationship to the jurisdictional limits on non-article III courts.65

The plurality first discussed the principles of article III, section 1, which requires that federal judges have life tenure and freedom from salary diminution, and the importance of these provisions to the framers of the Constitution.66 In finding that bankruptcy court judges lack these essential protections, the plurality went on to consider possible saving provisions.67 Justice Brennan discussed the three exceptions to the article III requirements recognized by the court: military courts; legislative courts; and adjuncts to article III courts.68 The plurality found that Congress did not establish the bankruptcy courts as military courts or as legislative courts.69 Moreover,

diction over all appeals from final judgments, orders, and decrees of bankruptcy courts, and, with leave of the panel, over interlocutory appeals. *Id.* (citing 28 U.S.C. § 1482 (1982)). If no such appellate panel is established, then the district court would be empowered to exercise appellate jurisdiction. *Id.* (citing 28 U.S.C. § 1334 (1982)). The court of appeals is given jurisdiction over appeals from either the panel or the district court. *Id.* (citing 28 U.S.C. § 1293 (1982)). Should the parties agree, a direct appeal to the court of appeals may be taken from a final judgment of a bankruptcy court. *Id.* (citing 28 U.S.C. § 1293(b) (1982)).

62. *Id.* at 87.
63. *Id.* at 56, 84-85.
64. *Id.* at 56. Northern Pipeline filed suit seeking damages for an alleged breach of warranty, as well as for misrepresentation, coercion, and duress. *Id.*
65. *Id.* at 54. Justice Brennan began the plurality opinion by framing the issue as "whether the assignment by the Congress to bankruptcy judges of the jurisdiction granted in 28 U.S.C. § 1471 . . . by § 241(a) of the Bankruptcy Act of 1978, violates Art. III of the Constitution." *Id.* at 53. The jurisdiction provision to which Justice Brennan referred describes the entire jurisdiction of the bankruptcy courts and is not limited to the joining of a common law claim to the bankruptcy proceeding. See 28 U.S.C. § 1471 (1982).
66. 458 U.S. at 57-60. For a discussion of the importance of this provision to the framers of the Constitution, see note 147 infra.
67. 458 U.S. at 60-62.
68. *Id.* at 63-77. For a discussion of the three exceptions to the requirements of article III, see note 4 infra.
69. 458 U.S. at 63-66. For a discussion of legislative courts, see note 4 supra.
Justice Brennan stated that only in the face of an exceptional grant of power by the Constitution to Congress “has the Court declined to hold the authority of Congress subject to the general prescriptions of Art[icle] III.” The Court discerned no such exceptional grant of power applicable in the case before it.\textsuperscript{70}

The plurality also rejected the argument that the bankruptcy court was merely an “adjunct” to the district court because the Reform Act failed to retain “the essential attributes of judicial power” in an article III court.\textsuperscript{71}

While the plurality opinion discussed broad article III questions regarding the bankruptcy courts, the concurring opinion of Justice Rehnquist, joined by Justice O’Connor, was limited to the situation before the court.\textsuperscript{72}
The concurrence concluded that a traditional state common law action must be heard by an article III court because it related only peripherally to an adjudication of bankruptcy under federal law.\textsuperscript{73} Since the concurring jus-

\textsuperscript{70} 458 U.S. at 70.

\textsuperscript{71} Id. at 84-85. Having concluded that the broad grant of jurisdiction to the bankruptcy courts contained in § 241(a) is unconstitutional, the plurality did not apply the decision retroactively. Id. at 87-88. Its decision rested upon three considerations: the Act was not clearly foreshadowed by earlier cases; retroactive application would not further the operation of the holdings; and retroactive application could produce substantial inequitable results in individual cases. Id. at 88.

\textsuperscript{72} Id. at 89 (Rehnquist, J., concurring). The concurring Justices stated that Marathon had not been subjected to the full range of authority granted bankruptcy courts in § 241(a) but was simply a named defendant in a contract suit initiated by the appellant, Northern Pipeline, after having previously filed a petition for reorganization under the Bankruptcy Act. Id.

\textsuperscript{73} Id. In reaction to the holding in \textit{Northern Pipeline}, the Judicial Conference for the United States urged adoption of local rules for the processing of bankruptcy cases. Coastal Steel Corp. v. Tilghman Wheelabrator Ltd., 709 F.2d 190, 199 (3d Cir. 1983). To that end, the Judicial Conference, on September 23, 1982, passed a resolution proposing an interim rule to insure the continued operation of the bankruptcy system pending Congressional action to cure the Constitutional infirmity of 28 U.S.C. § 1471. Cooper-Jarrett, Inc. v. Central Transport, Inc., 726 F.2d 93, 95 (3d Cir. 1984).

Local Rule 47 of the District Court for the District of New Jersey, pursuant to a directive of the Third Circuit Judicial Council, provides one example of a court tracking the resolution of the conference by providing that

[orders and judgments of bankruptcy judges in civil proceedings related to cases arising under Title 11, but not arising in or under Title 11, or otherwise constitutionally required, judgments as defined in Rule 54(a) of the Federal Rules of Civil Procedure, which would be appealable if rendered by a district judge and which do not result from a stipulation among the parties, shall not be effective and shall not be entered until the judgment has been signed by a district judge.

\textit{Coastal Steel}, 709 F.2d at 199.

In an attempt to cure the constitutional infirmities of § 1471, Congress passed the Bankruptcy Amendments and Federal Judgeship Act of 1984. Pub. L. No. 98-353, 1984 U.S. CODE CONG. & AD. NEWS (98 Stat.) 333 (to be codified at 28 U.S.C. §§ 151-158, 1334, 1408-1412, 1452, 1930). Title I of the Act created a new bankruptcy court arrangement whereby bankruptcy judges act as article I adjuncts to federal district courts in the resolution of core bankruptcy proceedings. \textit{See id.} Accordingly, “the district courts shall have original and exclusive jurisdiction of all cases under Title 11” and “original but not exclusive jurisdiction of all civil proceedings
tices found the jurisdictional grants to the bankruptcy courts inseparable, they concurred fully in the result. 74

Justice White, with whom the Chief Justice and Justice Powell joined, dissented on the grounds that the doctrine of article I legislative courts should be extended to federal bankruptcy proceedings. 75 The dissent strongly emphasized the need to better define this area of law. 76

Chief Justice Burger, while joining in the dissent, wrote a separate opinion to emphasize that the holding of Northern Pipeline was limited to that suggested in the concurring opinion of Justice Rehnquist. 77

C. Northern Pipeline’s Possible Effect on the Magistrate System

The decision in Northern Pipeline raised doubts as to the constitutionality of the Federal Magistrate Act of 1979. 78 Using the strict interpretation of article III urged by Justice Brennan’s plurality opinion in relation to the bankruptcy court, a court could find that the Magistrate Act, by permitting a magistrate to conduct civil trials and enter judgment upon consent of the litigants, is also unconstitutional. 79

The legislative history of the Magistrate Act of 1979 indicates that a majority of Congress believed that the Act would be constitutional because it required that any reference be with the consent of the parties. 80 Congressional confidence in the Act stemmed from the belief that the article III tenure and salary requirements are due process protections insuring the

arising under Title 11, or arising in or related to cases under Title 11. 97

74. Northern Pipeline, 458 U.S. at 91 (Rehnquist, J., concurring).
75. Id. at 93 (White, J., dissenting).
76. Id. at 92-93 (White, J., dissenting).
77. Id. at 92 (Burger, C.J., dissenting).
79. See Pacemaker Diagnostic Clinic of Am. v. Instromedix, Inc., 712 F.2d 1305 (9th Cir. 1983), rev’d, 725 F.2d 537, (9th Cir. 1984) (en banc).
80. S. REP. NO. 74, supra note 7, at 4, reprinted in 1979 U.S. CODE CONG. & AD. NEWS at 1473. The Senate Report stated:
The bill makes clear that the voluntary consent of the parties is required before any civil action may be referred to a magistrate. In light of this requirement of consent, no witness at the hearings on the bill found any constitutional question that could be raised against the provision. Near unanimity existed among the witnesses on the overall constitutionality of the bill.

Id.
dependence of the judge, which, like any other due process right, can be waived by a knowing and intelligent consent. Strong emphasis was placed by the Senate Judiciary Committee on the requirement that “no pressure, tacit or expressed, should be applied to the litigants to induce them to consent to trial before the magistrates.”

A few congressmen did not, however, find these measures sufficient, arguing that the purpose of the article III protection is the preservation of the court’s subject matter jurisdiction, which cannot be waived by litigant consent. Another argument suggested balance of power difficulties, in that the magistrate would be acting like a district court judge but would not be appointed by the President nor approved by the Senate.

Judicial support for a consensual reference procedure appeared as early as 1864 in *Heckers v. Fowler*. In *Heckers*, the Supreme Court upheld the constitutionality of the litigants’ consent agreement to refer their case to a referee whose report was to be filed with the clerk of the court and have the

---

81. See, e.g., DeCosta v. Columbia Broadcasting Sys., 520 F.2d 499, 506-08 (1st Cir. 1975), cert. denied, 423 U.S. 1073 (1976). For example, it has been argued that consensual magistrate jury trials are constitutionally proper because, if parties may waive their right to a trial by jury altogether, they may consent to a lesser form of jury trial. See Sick v. City of Buffalo, 574 F.2d 689, 690 n.6 (2d Cir. 1978); Comment, Article III Limits on Article I Courts: The Constitutionality of the Bankruptcy Court and the 1979 Magistrate Act, 80 COLUM. L. REV. 560 (1980); Comment, supra note 31, at 594.

82. S. REP. NO. 74, supra note 7, at 5, reprinted in 1979 U.S. CODE CONG. & AD. NEWS at 1473.

83. 124 Cong. Rec. 33,546-47 (1978) (statement of Rep. Seiberling). According to this view the “judicial power” clause is a requirement of the Constitution which, in effect, creates a right for society, for “the people,” who have a legitimate interest in the administration of justice and in the proper functioning of the courts . . . . While an individual may waive his or her personal rights, the individual may not waive the rights of the public or the requirements of the Constitution including the “judicial power” clause.

*Id.* at 33,547.

84. *Id.* at 32,901 (statement of Rep. Drinan). Congressman Drinan reasoned as follows:

Under this bill, the heretofore clear distinction between the functions of magistrates and those of district judges would be lost. The magistrate would preside over trials in a black robe in the same courtroom used by article III judges; he would empanel juries, examine witnesses, make evidentiary rulings, find facts, and enter judgments. He could even, in the Marbury against Madison tradition, invalidate legislative or executive actions which he found unconstitutional. This would debase our balance-of-powers system, since a legislative or executive act could be nullified by a “judge” who had not been appointed by the President or approved by the Senate.

*Id.*

85. 69 U.S. (2 Wall.) 123 (1864). *Heckers* involved a breach of covenant concerning the use of a patent. *Id.* While the case was pending, the parties agreed to refer it to a “referee, to hear and determine the same, and all issues therein, with the same powers as the court, and that an order be entered, making such reference; and that the report of said referee have the same force and effect as a judgment of said court.”

*Id.* The referee found the defendant liable for $9500 on which judgment was entered and defendant appealed to the Supreme Court. *Id.* at 124.
same “force and effect as a judgment of the court.”

Similarly, in *Kimberly v. Arms*, the Court held that upon consent of the parties, a master could hear the matter and report findings of fact and conclusions of law to the district judge, who was to accept the findings unless clearly erroneous. On the basis of these precedents, several lower federal courts have upheld consensual references to magistrates predating the Magistrate Act of 1979 pursuant to the additional duties provision of the Federal Magistrate Act of 1968.

86. *Id.* at 127. The Court held that a trial by arbitrators, appointed by the court, with the consent of both parties, was one of the modes of prosecuting a suit of judgment as well established and as fully warranted by law as a trial by jury trial, and, in the judgment of this court, there can be no doubt to the correctness of that proposition.

87. *Id.* at 128-29 (citing Alexandria Canal Co. v. Swann, 46 U.S. (5 How.) 89 (1847)).

88. *Id.* at 516. The master agreed to have the case referred to a master “to hear the evidence and decide all the issues” between them. *Id.* The master found that Kimberly owned a one-half interest from which Arms appealed. *Id.* at 512-22.


*Muhich v. Allen* concerned a civil action under 47 U.S.C. § 1983 for employment discrimination. 603 F.2d at 1248. The parties consented to have the case referred to a United States magistrate “for purposes of conducting all proceedings, including trial and the entry of final judgment” pursuant to 28 U.S.C. § 636. *Id.* at 1249. Rejecting the constitutional challenge, the court held that the reference procedure employed in this case did not constitute a divestiture of the judicial power vested in article III courts. *Id.* at 1251. The court ruled that jurisdiction “remains vested in the district court and is merely exercised through the medium of the magistrate.” *Id.* The Seventh Circuit could “find no constitutional infirmity where the litigants have voluntarily and knowingly agreed to waive their right to a civil trial before an article III judge.” *Id.* In *Muhich*, the referral was based on 28 U.S.C. § 636(b)(3), which provides that a magistrate may be assigned such additional duties as are not inconsistent with the Constitution and laws of the United States. *Id.* *See* 28 U.S.C. § 636(b)(3) (1982).

*DeCosta v. Columbia Broadcasting System* involved an action brought against a tele-
IV. APPLICATIONS OF NORTHERN PIPELINE TO THE MAGISTRATE SYSTEM

A. Pacemaker I

Since the decision of Northern Pipeline, the constitutionality of the reference procedure has been directly addressed by both the Third and Ninth Circuits. In 1983, in Pacemaker Diagnostic Clinic of America, Inc. v. Instromedix, Inc.,[90] the Ninth Circuit found the reference procedure of section 636(c) to be unconstitutional since magistrates were performing the full range of duties of an article III court while lacking the article III attributes of life tenure.

In Geffgren v. Republic Nat'l Life Ins. Co., the plaintiff moved to vacate entry of the judgment of the magistrate after trial by him pursuant to the parties' stipulations using 28 U.S.C. § 636(b)(3). 451 F. Supp. at 1229. The district court held that there was "no constitutional inhibition to the reference made here any more than there would be for the parties to choose binding arbitration. Nor is it constitutionally prohibited that the Magistrate enter the judgment." Id. at 505. Furthermore, the court held that the "magistrate's findings being treated as final, . . . are here subject to the same standard of review as are district court findings under Fed.R.Civ.Pro. 52(a)." Id. at 514.

In Calderon v. Waco Lighthouse for the Blind, 630 F.2d 352 (5th Cir. 1980), Calderon was an employment discrimination action under the Civil Rights Act of 1964. Id. at 353. A threshold issue was whether the employee had consented to a referral since the district judge had informed the parties, sua sponte, that he was referring the case to a magistrate for trial on the merits. Id. The court held that the appellant consented to the reference because he did not object to the reference before his appeal. Id. at 354. The Fifth Circuit further held "that consensual references to a magistrate for trial on the merits were permitted under section (b)(3) [28 U.S.C. § 636(b)(3)(1982)] independent of Rule 53 of the Federal Rules of Civil Procedure and subsection (b)(2)[28 U.S.C. § 636(b)(2)(1982)] (permitting appointments of a magistrate as a special master) even before the 1979 amendments to the statute." Id. at 355. However, the court found that under this provision, the 1976 version of § 636 required a de novo determination. Id.

90. 712 F.2d 1302 (9th Cir. 1983), rev'd, 725 F.2d 537 (9th Cir. 1984) (en banc). Pacemaker Diagnostic Clinic of Am., Inc., brought an action against Instromedix, Inc. for patent infringement. Id. at 1306. Pursuant to the Federal Magistrate Act of 1979, the parties consented to have the case tried before the magistrate sitting without a jury. Id. at 1307. For the text of § 636(c) of the Federal Magistrate Act, see note 11 supra. The magistrate found the patent valid but not infringed, and both parties appealed to the circuit court. 712 F.2d at 1307. The United States Court of Appeals for the Ninth Circuit reversed, holding that § 636(c) was unconstitutional. Id. at 1313.
and freedom from salary diminution.\footnote{91}

The court, after finding that magistrates were not article III judges, looked into possible exceptions to the article III requirements as presented in \textit{Northern Pipeline}. The Ninth Circuit found that the magistrate system did not qualify as a legislative court since

Congress may only establish separate courts in a limited class of cases "in which the grant of power to the Legislative and Executive branches . . . [is] so exceptional that the congressional assertion of a power to create legislative courts was consistent with, rather than threatening to, the constitutional mandate of separation of powers."\footnote{92}

The court further found that the magistrate did not qualify as an adjunct to the district court because the 1979 Act permitted the magistrate to enter final judgment which would violate the requirement that "the authority—and the responsibility—to make an informed, final determination" remain with the district court judge.\footnote{93}

An argument was presented that there was no threat to the separation of powers, because litigants and judges, both within the judicial branch, and not Congress or the President, decide whether cases may be referred to a magistrate. The \textit{Pacemaker} court circumvented this argument by expanding the notion of separation of powers to include freedom from undue influence within the judicial branch itself.\footnote{94}

The court recognized that the most persuasive argument in favor of the constitutionality of section 636(c) is the requirement for litigant consent.\footnote{95} In response, the Ninth Court stated that "[n]o case squarely holds that litigant consent will solve the constitutional problems."\footnote{96} The panel distinguished \textit{Heckers v. Fowler}, where the litigants agreed that the referee’s report was to have the same binding effect as a judgment of the court, by stating that the report was still required to be reviewed and accepted by the district court.\footnote{97}

Rejecting a proffered analogy to arbitration, the \textit{Pacemaker} court found that enforcement of an arbiter’s decision stems from the parties’ contractual agreement to abide by the decision, that judicial review on the merits is now allowed, and that judgment cannot be entered by the arbiter.\footnote{98}

The panel refuted the argument that the right to an article III judge is a due process right, for the benefit of the litigants, and therefore waivable as

---

91. The case was heard by Circuit Judges Ferguson, Boochever, and Norris. Judge Boochever delivered the opinion for the unanimous panel.
92. 712 F.2d at 1309 (quoting \textit{Northern Pipeline}, 458 U.S. at 64).
93. \textit{Id.} at 1310 (citing \textit{Raddatz}, 447 U.S. at 682).
95. \textit{Id.} at 1310.
96. \textit{Id.} at 1311.
97. \textit{Id.} n.12.
98. \textit{Id.} at 1311.
with any due process right.\textsuperscript{99} Instead, the panel suggested that the requirement of an article III judge was similar to subject matter jurisdiction in that it was meant to be part of the framework of government and, hence, not waivable.\textsuperscript{100}

The panel also discussed the argument that appellate review by an article III judge satisfies article III requirements.\textsuperscript{101} Relying on \textit{Northern Pipeline}, the Ninth Circuit panel held that "the text of article III and the Court's 'precedents make it clear that the constitutional requirements for the exercise of judicial power must be met at all stages of adjudication, and not only on appeal."\textsuperscript{102}

\section{Wharton-Thomas v. United States}

After the Ninth Circuit's original decision in \textit{Pacemaker}, the Third Circuit found section 636(c) of the Magistrate Act to be constitutional in \textit{Wharton-Thomas v. United States}.\textsuperscript{103}

\textit{Wharton-Thomas} involved a claim for damages under the Federal Tort Claim Act, for injuries allegedly sustained in an automobile collision with a Post Office jeep.\textsuperscript{104} With the consent of the parties, the case was tried before a federal magistrate pursuant to section 636(c) of the Magistrate Act.\textsuperscript{105}

The magistrate entered judgment for the plaintiff in the amount of \$7,500.\textsuperscript{106} The plaintiff appealed, claiming that the award was inadequate and that the magistrate's finding was clearly erroneous.\textsuperscript{107} Since the original \textit{Pacemaker} decision characterized the right of magistrates to enter judgment upon the consent of the parties as one of jurisdiction, the Third Circuit raised the issue \textit{sua sponte}.\textsuperscript{108}

\textsuperscript{99} \textit{Id.} at 1312.
\textsuperscript{100} \textit{Id.}
\textsuperscript{101} \textit{Id.} at 1313.
\textsuperscript{102} \textit{Id.} (quoting \textit{Northern Pipeline}, 458 U.S. at 86 n.39 (plurality opinion)).
\textsuperscript{103} 721 F.2d 922 (3d Cir. 1983). The case was heard by Circuit Judges Weis, Higginbotham, and Slodiver. Judge Weis delivered the opinion for a unanimous court.
\textsuperscript{104} \textit{Id.} at 923. The plaintiff was injured in two automobile accidents within the span of five months. \textit{Id.} The first was a minor collision between the plaintiff's station wagon and the Post Office jeep. \textit{Id.} Five months later, the plaintiff was again injured in a chain reaction accident involving four cars. \textit{Id.}
\textsuperscript{105} \textit{Id.} at 924. The United States did not seriously contest liability for the collision with the Post Office jeep, but contended that the more serious second accident caused most of the plaintiff's injuries. \textit{Id.}
\textsuperscript{106} \textit{Id.} at 923. For the text of § 636(c), see note 11 supra.
\textsuperscript{107} \textit{Id.} at 924.
\textsuperscript{108} \textit{Id.} at 925. The court first had to confront whether it was presented with an appealable order. \textit{Id.} at 924. While § 636(c)(3) permits an appeal directly to the court of appeals in a case tried by consent, § 636(c)(4) allows the parties, prior to trial, to consent to have any appeals go before the district judge. \textit{Id.} The parties in \textit{Wharton-Thomas} consented to the latter procedure, but, according to counsel for both parties, did so erroneously. \textit{Id.} Because the procedure was new, the Third Circuit granted the parties' request to set aside the consent to bypass the district judge. \textit{Id.}
The Third Circuit identified litigant consent as the vital distinction between the decision in *Northern Pipeline*, regarding the Bankruptcy Reform Act, and the constitutionality of section 636(c) of the Magistrate Act.\(^{109}\)

The court characterized the *Northern Pipeline* holding as being that a “traditional” state common-law action, not made subject to a federal rule of decision, and related only peripherally to an adjudication of bankruptcy under federal law, must, *absent the consent of the litigants*, be heard by an “Article III court” if it is to be heard by any court or agency of the United States.\(^{110}\)

The Third Circuit further found that the “parties’ consent went not to the jurisdiction of the district court as an entity, but to the judicial officer within the court who conducted the trial” and “[w]aiver of a particular mode of trial or factfinder is not unknown.”\(^{111}\) Hence, consent to a trial by a magistrate was likened to a waiver of a jury trial.\(^{112}\)

After finding that consent distinguished the magistrate system from the bankruptcy court system, the court further distinguished the two by finding that the magistrate was an actual adjunct to the district court.\(^{113}\) The court noted that in the bankruptcy system, cases were not referred by the district court but were filed directly in the bankruptcy court.\(^{114}\) Furthermore, the district court in the bankruptcy system could not terminate references.\(^{115}\) In contrast, the Third Circuit found that the magistrate is “truly a part of the district court, appointed by its judges and subject to dismissal by them.”\(^{116}\) Moreover, cases heard by a magistrate must be referred and can be vacated by the district judge.\(^{117}\)

The Third Circuit did not accept the argument proffered by the Ninth

\(^{109}\) *Id.* at 925-26.

\(^{110}\) *Id.* at 926 (citing *Northern Pipeline* (Burger, C.J., dissenting)) (emphasis supplied by the Third Circuit).

\(^{111}\) *Id.* at 926. See 28 U.S.C. § 636(c)(2) (1982). For the text of § 636(c)(2), see note 11 supra.

\(^{112}\) 721 F.2d at 926. The Third Circuit stated that waiver of a particular mode of trial or factfinder has long standing recognition and gave, as examples, rule 38(d), which provides for an automatic waiver of a jury trial if a timely request is not made, and rule 39(c), which allows the district judge, with the consent of the parties, to order a jury trial not otherwise triable by right. *Id.* (citing FED. R. CIV. P. 38(d), 39(c)).

\(^{113}\) *Id.* at 927.

\(^{114}\) *Id.* at 926-27. The court recognized that the bankruptcy judges are independent of the district court since under the new Reform Act they would be appointed by the President with the advice and consent of the Senate. *Id.* (citing 28 U.S.C. § 152 (1982)). Moreover, cases are filed directly in the bankruptcy court. *Id.*

\(^{115}\) *Id.* at 927.

\(^{116}\) *Id.*

\(^{117}\) *Id.* The Third Circuit held that the “magistrate does not function independently of the district court, but as an integral part of it.” *Id.*
Circuit panel in the original *Pacemaker* decision that the doctrine of separation of powers should be extended to include conflicts within the judicial branch.\(^ {118}\) Instead, the court noted that when a magistrate is assigned cases for hearing and recommendation, his work must be reviewed and approved by the district judge before becoming final\(^ {119}\) which is the "ultimate in influencing the decision." The court then noted that the Supreme Court has found such procedures to the constitutional.\(^ {120}\)

In sum, the Third Circuit found that section 636(c) does not violate article III because:

1. The reference to a magistrate is consensual;
2. The district judge has the power to vacate a reference;
3. The magistrate is appointed by the district judges, is a part of the district court, and is specially designated to try cases; and
4. The parties have a right of appeal to a district judge or the court of appeals.\(^ {121}\)

C. *Pacemaker* II

After the Third Circuit's decision in *Wharton-Thomas*, the Ninth Circuit, sitting *en banc*, reviewed and reversed its original *Pacemaker* decision.\(^ {122}\) The Ninth Circuit held that "in light of the statutory precondition of voluntary

ruptcy judges. See *Hearings on S. 3475 before the Subcomm. on Improvements in the Judicial Machinery of the Senate Comm. on the Judiciary*, 95 Cong., 1st Sess. 100 (1977).

118. 721 F.2d at 927 n.8. For a discussion of the Ninth Circuit's analysis of separation of powers in the first *Pacemaker* decision, see note 94 supra.
119. 721 F.2d at 927 (citing 28 U.S.C. § 636(b)(1982)).
120. *Id.* The Third Circuit recognized that in *Raddatz*, *Weber*, and *Northern Pipeline*, where the Supreme Court emphasized that final decision making authority must rest in an article III court, the reference was not consensual but was forced upon the parties. *Id.* at 928. For a discussion of *Raddatz*, see notes 57-59 and accompanying text *supra*. For a discussion of *Weber*, see notes 54-56 and accompanying text *supra*. For a discussion of *Northern Pipeline*, see notes 61-77 and accompanying text *supra*.

The Third Circuit cited *Heckers*, in which "[t]he Supreme Court held that the reference was valid because it 'does not directly involve the question of jurisdiction, but has respect to the mode of trial as substituting the report of the referee for the verdict of the jury . . . . Practice of referring pending actions is coeval with the organization of our judicial system.'" 721 F.2d at 928 (quoting *Heckers*, 69 U.S. (2 Wall.) at 128). For a discussion of *Heckers*, see notes 85-86 and accompanying text *supra*.

The Third Circuit disagreed with the distinction made by the Ninth Circuit panel in *Pacemaker* that the report of award must be "accepted or confirmed by the court" stating that "the very point of *Heckers* is that, because of the agreement of the parties, the judgment was valid even though an Article III judge did not review and accept the report." 721 F.2d at 929.

121. 721 F.2d at 930. Another panel of the Third Circuit has adopted the rationale of *Wharton-Thomas* to hold § 636(c) constitutional. See *Williams v. Mussomelli*, 722 F.2d 1130 (3d Cir. 1983).
122. *Pacemaker* Diagnostic Clinic of Am., Inc. v. *Instromedix*, Inc., 725 F.2d 537, 540 (9th Cir. 1984) (*en banc*). The *en banc* appeal was heard by Chief Judge
litigant consent and the provisions for the appointment and control of the magistrates by Article III courts, the conduct of civil trials by magistrates is constitutional."

The court observed that separation of powers protections, in some cases, have two components. "One axis reaches to the person affected by government action and encompasses his or her relation to a constitutional branch; the other axis runs from each governmental branch to the others to insure separation and independence in the constitutional structure." The court found that the personal right to an article III judge may be waived but stated that the "purported waiver of the right to an Article III trial would not be an acceptable ground for avoiding the constitutional question if the alternative to the waiver were the imposition of serious burdens and costs on the litigant."

In overcoming the second axis of the separation of powers protections, the court held:

Upon examination of the statute before us, we conclude that it contains sufficient protection against the erosion of judicial power to overcome the constitutional objections leveled against it. The statute invests the Article III judiciary with extensive administrative control over the management, composition, and operation of the magistrate system. It permits, moreover, control over specific cases by the resumption of district court jurisdiction on the court's own initiative.

Browning and Judges Sneed, Kennedy, Tang, Schroeder, Farris, Pregerson, Alarcon, Poole, Nelson, and Canby.

123. Id.
124. Id. at 541.
125. Id.
126. Id. at 542. The court stated that the "independent character of federal adjudication under Article III imports to a judgment qualities of authority and respect that are well understood. It follows that the federal litigant has a personal right, subject to exceptions in certain classes of cases, to demand Article III adjudication of a civil suit." Id. at 541.

The court further noted that in recent cases the Supreme Court has not had to consider the constitutional implications of consent by the parties to go before a non-article III judge, because in none did all parties consent to the procedure. Id. at 542 (citing Northern Pipeline, 458 U.S. 50 (1982); Raddatz, 447 U.S. 667 (1980); Palmore v. United States, 411 U.S. 389 (1973); Glidden, 370 U.S. 530 (1962)). The court, however, found that the Supreme Court in Northern Pipeline indicated that consent is important to the constitutional analysis. 725 F.2d at 542.

The en banc court also gave considerable weight to the judgment of Congress that consent of the parties eliminates constitutional objections. Id. The court noted that the House Committee gave explicit consideration to the issue of constitutionality and concluded that the consent of the parties suffices to overcome objections on constitutional grounds. Id.

127. Id. at 543.
128. Id. at 544. The court further stated that [t]he power to cancel a reference, taken together with the retention by Article III judges of the power to designate magistrate positions and to select
The dissent of Judge Schroeder, with whom Judges Pregerson and Canby joined, emphasized the need to insure an independent judiciary.\textsuperscript{129} The dissent stated that:

[\textit{Northern Pipeline}] thus extends the line of cases beginning with \textit{Crowell} and continuing through \textit{Raddatz} which, while containing many differences, are all connected by one critical theme: Congress may not delegate away power that properly belongs in the hands of Article III judges. When the power taken from the Article III courts is the power to make final decisions in any type of civil case, as in the Magistrates Act, the reasoning of all these decisions leads me inescapably to the conclusion that the Constitution has been violated.\textsuperscript{130}

V. \textit{Wharton-Thomas and Pacemaker II}: The Better View

In reviewing the decisions in \textit{Wharton-Thomas} and \textit{Pacemaker}, it is submitted that the Third and Ninth circuits properly found section 636(c) of the Federal Magistrate Act of 1979 to be constitutional.\textsuperscript{131} The requirement that the reference be consensual, together with the fact that magistrates work and remove individual magistrates, provides Article III courts with continuing, plenary responsibility for the administration of the judicial business of the United States. This responsibility sufficiently protects the judiciary from the encroachment of other branches to satisfy the separation of powers embodied in Article III.

\textit{Id.} at 546.

129. \textit{Id.} at 547 (Schroeder, J., dissenting).

130. \textit{Id.} at 552 (Schroeder, J., dissenting). The dissent further discussed the need for independence within the judiciary by stating that “[s]trong voices have argued that under our Constitution, no judge should be accountable to any other judge.” \textit{Id.}

Moreover, the dissent argued that consent was but an illusion since economic burdens and pressure from district courts wishing to reduce their crowded dockets would eliminate any real choice in the reference. \textit{Id.} at 553-54 (Schroeder, J., dissenting).

131. \textit{See} Kimberly v. Arms, 129 U.S. 512 (1889); Heckers v. Fowler, 69 U.S. (2 Wall.) 123 (1864). The Ninth Circuit originally distinguished these cases, which allowed consensual reference, by making a very fine distinction as to who enters final judgment. \textit{Pacemaker}, 712 F.2d at 1310-11. For the Ninth Circuit’s original discussion of the authority to enter final judgment, see note 90 \textit{supra}. In \textit{Kimberly}, the Supreme Court held that review of a decision by a master who was to hear all the evidence and decide all the issues was only by application of the clearly erroneous standard. 129 U.S. at 524. For a discussion of \textit{Kimberly}, see notes 87-89 and accompanying text \textit{supra}. In \textit{Heckers}, the Supreme Court allowed a consensual reference whereby the parties agreed that the report of the referee would have the same force and effect as the judgment of the court. 69 U.S. at 123. It is submitted that since the Supreme Court allowed such removals from the district court upon consensual reference and further required that the review be limited to the clearly erroneous standard, it makes little difference if the decision is formally entered by the district court. For a discussion of \textit{Heckers}, see notes 85-86 and accompanying text \textit{supra}. 

https://digitalcommons.law.villanova.edu/vlr/vol29/iss3/7
within the Article III judiciary, provides the needed protection against disrupting the separation of powers.

*DeCosta v. Columbia Broadcasting System* provides an example of a district court allowing magistrates to conduct entire trials before the 1979 amendments to the Magistrate Act. In *DeCosta*, the court had no difficulty finding a consensual reference to be constitutional. The court’s greatest concern was the degree of review required for conclusions of law: it stated that “[u]ntil Congress . . . fashions a review procedure for consensual reference for final (or semi-final) determination of all issues of law and fact, it might be better to rely on the formulation contained in Rule 53(e)(4).” The court’s decision to require a district court to review objections to a magistrate’s decision on the law, therefore, was based on statutory analysis and not on constitutional prohibitions.

The Seventh Circuit expanded on this view in *Muhich v. Allen*. In *Muhich*, the court stated that “we find no constitutional infirmity where the litigants have voluntarily and knowingly agreed to waive their right to a civil trial before an article III judge.”

In addition to the decisions cited, support for the consensual reference procedure could be gained through rule 53(e)(4) of the Federal Rules of Civil Procedure. This rule allows litigants to consent to having a master make a final determination of the facts. Moreover, rule 52(a) states that “findings of a master, to the extent that the court adopts them, shall be considered the findings of the court.” Reading rule 53(e)(4) with rule 52(a), a master is, in effect, entering the findings of the court as to the facts when the parties so consent.

These federal rules indicate that the right to have an article III judge to determine the facts is waivable. In such a situation, if only the facts are contested, the magistrate would be making the final decision for the court. It follows logically that parties should be able to consent to having a magistrate determine questions of law.

Further support for the consensual reference procedure arises in the analogous procedure of arbitration which has been long recognized as a means of “private” dispute resolution that removes disputes from the district courts. The primary distinction from arbitration and consensual refer-

---

132. 520 F.2d 499 (1st Cir. 1975), cert. denied, 423 U.S. 1073 (1976).
133. Id. at 507-08.
134. Id. at 508.
135. For a discussion of *DeCosta*, see note 89 supra.
136. 603 F.2d 1247.
137. Id. at 1251. For a discussion of *Muhich*, see note 89 supra.
138. Rule 53(e)(4) of the Federal Rules of Civil Procedure states that “[t]he effect of a master’s report is the same whether or not the parties have consented to the reference; but, when the parties stipulate that a master’s findings of fact shall be final, only questions of law arising from the report shall thereafter be considered.” *Fed. R. Civ. P.* 53(e)(4).
140. *See* Heckers v. Fowler, 69 U.S. (2 Wall.) 123, 128-29 (1864); Burchell v.
ence is that an arbitration order can be reversed only on very limited grounds.\textsuperscript{141} Moreover, arbiters need not adhere to court procedure,\textsuperscript{142} the rules of evidence,\textsuperscript{143} or the Federal Rules of Civil Procedure.\textsuperscript{144} If the Constitution allows parties to reconcile their disputes by consenting to arbitration and doing without legal procedural protections, then it certainly should allow consensual reference to magistrates.\textsuperscript{145}

It is further submitted that there should be no difference between waiving the right to an article III judge and waiving other guaranteed due process rights. Article III, section 1 has two important components. The first sentence creates the framework of our judicial system by designating a Supreme Court and what lower courts Congress may establish.\textsuperscript{146} The second pertains to life tenure judges whose salary can not be diminished.\textsuperscript{147} While the first sentence provides the framework of the judicial

---

\textsuperscript{141} See Comment, supra note 31, at 592 n.54. The Federal Arbitration Act, 9 U.S.C. § 10 (1982), provides that an award may be vacated only when procured by corruption, fraud, or undue means; where the arbiters were obviously prejudiced; where the arbiters engaged in misconduct prejudicial to the rights of the parties; or where the arbiter exceeded or imperfectly executed their powers so that a proper award was not made. \textit{Id.}

\textsuperscript{142} See Compania Panemenra Maritima San Gerassimo, S.A. v. J.E. Hurley Lumber Co., 244 F.2d 286 (2d Cir. 1957) (parties who adopt arbitration may not insist on legal formalities); American Almond Prod. Co. v. Consolidated Pecan Sales Co., 144 F.2d 448 (2d Cir. 1944) (parties adopting arbitration must accept the informalities associated therewith).

\textsuperscript{143} See Petroleum Separating Co. v. Interamerican Refining Corp., 296 F.2d 124 (2d Cir. 1961) (arbiter may consider hearsay evidence).


\textsuperscript{145} In the original \textit{Pacemaker} decision the court found that arbitration is not analogous to consensual reference since the former does not “invoke the judicial power of the United States courts.” 712 F.2d at 1311. The court reasoned that enforcement of an arbitration decision is done through a contractual obligation, not from an exercise of judicial power. \textit{Id.} While this distinction may invite interesting conceptual discussions, it is submitted that the effect of both systems is virtually identical.

\textsuperscript{146} U.S. Const., art. III, § 1. It is interesting to note that Congress did not have to establish inferior courts, thereby leaving initial action to non-article III state courts with appeal to the Supreme Court. The protection of life tenured judges would, thus, not come until the appeal was brought, whether or not the parties consented.

\textsuperscript{147} \textit{Id.} The second sentence of article III, § 1 ensures the separation of powers and protects the independence of the judiciary by providing that the “Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behavior, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.” \textit{Id.} The Framers believed this provision to be very important and stated that “[n]ext to permanency in office, nothing can contribute more to the independence of the judges than a fixed provision for their support. . . . In the general course of human nature a power over a man’s subsistence amounts to a power over his will.” \textit{THE FEDERALIST} No. 79, at 491 (A. Hamilton) (H. Lodge ed. 1888) (emphasis in original). The life tenure and salary requirement
system, the second sentence is to ensure impartiality and fairness on the part of federal judges. Since impartiality and fairness are the basis of all due process rights, trial by an article III judge should be waivable as with other due process rights.148

It must be emphasized, however, that the constitutional saving provision is the requirement that the reference be consensual.149 The Third Circuit's holding that the magistrates are "adjuncts" to the district court should not be interpreted to allow dispositive jurisdiction absent the consent of the parties.150 Furthermore, to ensure the consensual nature of the reference, a balance must be struck between the availability of magistrates and district court judges to ensure that a real choice exists.151

The validity of the magistrate system is of enormous importance, as thousands of cases are being tried across the country by magistrates with the consent of the parties.152 The magistrate system promotes judicial economy by allowing less difficult legal issues to be referred to magistrates, freeing the district court to tackle more difficult legal issues. The parties and society as a whole benefit from the more expedient resolution of their disputes. A mag-

were, therefore, included in article III, § 1 as an assurance of impartiality and independence of decision from the legislative branch—to increase the chance for fairness.

148. See Shick v. United States, 195 U.S. 65, 72 (1904) ("[w]hen there is no constitutional or statutory mandate, and no public policy prohibiting, an accused may waive any privilege which he is given the right to enjoy"). See also Faretta v. California, 422 U.S. 806 (1975) (waiver of right to counsel); Barker v. Wingo, 407 U.S. 514 (1972) (waiver of right to a speedy trial); Brookhart v. Janis, 384 U.S. 1 (1966) (waiver of right to cross examine witnesses); Johnson v. Zerbst, 304 U.S. 458 (1938) (waiver of right to counsel); Patton v. United States, 281 U.S. 276 (1930) (waiver of right to trial by jury); Fed. R. CRIM. P. 11 (waiver of right to trial by pleading guilty).

149. Without a consensual reference, it is submitted that the magistrate's judgment would run afoul of the requirement that the final decision-making step rest in an article III judge when forced upon the parties. See, e.g., Radlant; Weber; Northern Pipeline. For a discussion of Weber, see notes 54-56 and accompanying text supra. For a discussion of Northern Pipeline, see notes 61-74 and accompanying text supra.

150. The Third Circuit emphasized that magistrates are "adjuncts" to the district court. Wharton-Thomas, 721 F.2d at 927. An expansion of this reasoning would allow Congress to empower magistrates to try cases absent the consent of the parties. The Third Circuit, however, used its reasoning in the context of an entirely consensual procedure. See id. The importance of internal delegation was listed as one of four factors assuring the constitutionality of § 636(c), but was listed after the requirement that the reference be consensual. Id. at 930.

151. Any delay or inconvenience caused by not consenting to a magistrate can be considered an economic cost. These costs must not amount to such a penalty that it greatly influences a litigant's decision. If a litigant cannot afford the cost of delay and is in effect forced to consent to a magistrate when he would prefer a district judge, there is a lack of meaningful choice. See Pacemaker, 725 F.2d at 543.

152. According to figures provided by the Department of Justice, federal magistrates terminated 262 jury and 563 nonjury trials with the consent of the parties in the year ending June 30, 1982. Pacemaker, 712 F.2d at 1313 n.18. Magistrates also terminated 1627 consent cases without trial. Id. (citing the Administrative Office of the United States Courts, Consent Cases Terminated by U.S. Magistrates - year ended June 30, 1982).
The magistrate may be hired for only one term in order to eliminate presently existing congestion without the long term burdens imposed by tenured judges who may be unnecessary after the congestion is relieved. The removal of the consent procedure would mean a lessening of the judicial system’s flexibility and effectiveness.

VII. CONCLUSION

The procedure allowing a magistrate, upon consent of the parties, to conduct entire civil trials and enter final judgment is a constitutional innovation providing economy and flexibility to the federal judicial system. The constitutionality of the system rests upon the knowing and intelligent waiver of the due process right to an article III judge. This waiver, however, requires that no pressure, either tacit or express, be exerted upon the litigants to force a reference to a magistrate and, hence, close judicial scrutiny is needed to assure this end.

Kenneth J. Phelan