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The Federal Magistrates System and the Requirements of a “De Novo Determination” Under 28 U.S.C. § 636 (b) (3)

I. INTRODUCTION

In 1968 Congress enacted legislation creating within the Federal district courts the system of Federal magistrates.¹ With the district courts facing an increasing caseload, Congress chose not to increase the number of district judges; rather, Congress created a new judicial officer.²

The office of U. S. Magistrate is not another level of Federal court. Existing within the Federal district court, a magistrate exercises limited judicial authority at the discretion of the district judge and is subject to review by the district judge.³ Therefore, the magistrate's authority is derivative. Moreover, since the authority is derivative, the relationship between the two officials—district judge and magistrate—is crucial to understanding the magistrate system.⁴

Since the full inception of the system in 1971,⁵ the district judge/magistrate relationship has changed.⁶ Congress and the Federal courts have fashioned, and are still fashioning, a relationship attempting to balance the two interests.⁷ First, the magistrate must be effective in reducing congestion and increasing the efficiency of the Federal courts.⁸ Second, since the judicial authority of the United States is

1. Federal Magistrates Act, Pub. L. No. 90-578, 82 Stat. 1108 (1968) (codified as amended at 28 U.S.C. §§ 631-639 (1976)). The early history of the magistrate system is discussed in Spaniol, *The Federal Magistrates Act: History and Development*, 1974 ARIZ. ST. L. J. 565. A statistical study of the magistrate system from 1971-76 is included in Puro, *United States Magistrates: A New Federal Judicial Officer*, 12 JUST. SYS. J. 141 (1976). For a complete overview of this legislation, see Peterson, *infra* note 15. This article was published shortly after the magistrate system was enacted.

2. Comment, *An Expanding Civil Role for U.S. Magistrates*, 26 AM. U.L. REV. 66, 67 (1976).

3. See *infra* notes 39, 52-54 and accompanying text.

4. See *infra* notes 48-49, 58-61 and accompanying text.

5. Initially, magistrates were appointed in only five pilot districts. The intent was to gain time and information in order to implement the system properly. The transition from the U.S. Commissioner system to the U.S. Magistrate system was complete on June 30, 1971. Spaniol, *supra* note 1, at 570-73.

6. See *infra* notes 39-46 and accompanying text. This paper only discusses the situation following the 1976 amendments to the system. Other changes were instituted in 1979 when the system was again amended to allow for consensual trial by magistrates. For a discussion of these more recent changes, see McCabe, *The Federal Magistrate Act of 1979*, 16 HARV. J. ON LEGIS. 343 (1979); Aug, *The Magistrate Act of 1979: From a Magistrate's Perspective*, 49 U. CIN. L. REV. 363 (1980).

7. See *infra* notes 15-18, 22-27, 65-67 and accompanying text.

8. See *infra* notes 15-18 and accompanying text.

most appropriately exercised by duly constituted courts, this authority should not be delegated to a court not properly constituted.⁹ These interests conflict when, in order to be effective, a magistrate exercises that authority properly vested in the district court judge alone.¹⁰ Therefore, an understanding of the district judge/magistrate relationship, and thereby the office of U.S. Magistrate, rests on understanding the balancing of these interests.¹¹

This comment will address the district judge/magistrate relationship. Its focus, however, is on a single, narrow aspect of the magistrate's role. This area, involving hearing and recommending the disposition of "case dispositive matters,"¹² is unique among the range of matters on which the district judge and magistrate interact. This aspect not only illustrates the structure of the district judge/magistrate relationship and how the structure balances, at least formally, the interests noted above, but it also exposes the inherent limitations on this balancing.¹³

This comment proceeds from a discussion of the history of the office of U.S. Magistrate to a discussion of the 1976 legislation which codified the magistrate's current role in regard to "case dispositive matters." Some recent court decisions which reveal a more complex relationship between the district judge and the magistrate than is evident in the statutory language are also discussed. These cases reveal that the Federal courts, in the process of interpreting purposely ambiguous statutory language, depart from the legislative conception of the magistrate system which balanced the interests noted above. Perhaps the Federal courts are actually preferring one interest over the other.¹⁴

II. THE FEDERAL MAGISTRATES ACT OF 1968: BACKGROUND AND DEVELOPMENT

Arising from the perceived inadequacy of the U.S. Commissioner system¹⁵ and a need for improvement in the administration of justice in

9. See *infra* note 27.

10. *Id.*

11. There may be other ways of understanding the system of federal magistrates; no claim to uniqueness is made. Nevertheless, an investigation of this balancing is both a means to understanding the system's theory as well as practice. It is also an approach to the office of magistrate not discussed in the secondary literature on this subject.

12. See *infra* notes 39, 45-47 and accompanying text.

13. See *infra* notes 65-67 and accompanying text.

14. See *infra* notes 65-79 and accompanying text.

15. Spaniol, *supra* note 1, at 566. For background on the U.S. Commissioner system, see Goldsmith, *The Role and Jurisdiction of the U.S. Commissioner in The Federal Judicial Structure*, 1 LINCOLN L. REV. 89 (1966); Peterson, *Federal Magistrates Act: A New Dimension in the Implementation of Justice*, 56 IOWA L. REV. 62, 66-71 (1970). The latter article discusses the commissioner system's defects.

the Federal courts,¹⁶ the objective of the 1968 Federal Magistrate Act is clear: magistrates were the means chosen to improve the Federal courts. By relieving judges of some functions, thereby permitting a concentration of judicial resources, the effectiveness of the district court would increase.¹⁷ Although this express intent was clear, the legislation enacted was loosely worded and eventually would prove inadequate.¹⁸

Among other things, the 1968 act provided that a district court, by its local rules, could assign "additional duties" to a magistrate.¹⁹ Without specification, the realm of additional duties had only to meet the requirement that any duty assigned not be "inconsistent with the Constitution and laws of the United States."²⁰ The lack of definiteness and the vagueness of this standard governing referrals pursuant to the additional duties provision generated the review of many local district court rules authorizing referral. In the process, the role of the magistrate was brought into question and the office's capacity to fulfill its intended function lessened.²¹

The Seventh Circuit, in *TPO, Inc. v. McMillen*,²² vacated a district court's order assigning to a magistrate for resolution a motion to dismiss. The assignment had been made pursuant to the "additional duties" provision.²³ Going first through detailed legislative history,²⁴ the

16. See H.R. REP. NO. 1629, 90th Cong., 2d Sess. 12, reprinted in 1968 U.S. CODE CONG. & AD. NEWS 4252, 4257.

17. *Id.* For some discussion of the legislative intent, see Note, *Federal Magistrates and The Implications of Consensual References*, 4 FORDHAM URB. L. J. 129 (1975).

18. See *infra* notes 21-38 and accompanying text. See also Note, *U.S. Magistrates: Additional Duties in Civil Proceedings*, 27 CASE W. RES. L. REV. 542, 556 (1977).

19. 28 U.S.C. § 636(b) (1970), amended by 28 U.S.C. § 636 (1976).

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

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

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

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

This provision forms the historical basis for the magistrates' authority in regard to "case-dispositive matters"—the focus of this paper. For discussion of the district court's rule making authority in this context, see Note, *supra* note 18, at 577.

20. 28 U.S.C. § 636(b) (1976).

21. *Id.*

22. 460 F.2d 348 (7th Cir. 1972).

23. *Id.* at 349.

24. *Id.* at 350-51.

court concluded that "magistrates have no power to decide motions to dismiss or motion for summary judgment, both of which involve ultimate decision making, and the district courts have no power to delegate such duties to magistrates."²⁵ In the opinion of the court the referral of any such matter "amounted to little less than an abdication of the judicial function depriving the parties of a trial before the court on the basic issues involved in the litigation."²⁶ Maintaining the exercise of judicial power in an article III judge²⁷ was of prime concern to the *TPO* court.

The United States Supreme Court also ruled on the propriety of a reference to a magistrate under the "additional duties" provision. However, in *Wingo v. Wedding*²⁸ it was the referral of a prisoner's petition for writ of habeas corpus. The Court's decision was equally as critical as that in *TPO, Inc. v. McMillen* but its reasoning differed. Justice Brennan's opinion did not reach the constitutional question. Affirming the decision to vacate the order of referral, Justice Brennan's opinion rested on an analysis of the 1968 act and other Federal statutes.²⁹ As a result, the Court found that the referral of this additional duty was inconsistent with the laws of the United States and not the Constitution as in *TPO*.³⁰

Chief Justice Burger, writing in dissent,³¹ argued that the legislative history revealed that Congress did envision the referral of these matters and that the Court's failure to recognize this frustrated the intent of Congress, i.e. to improve the effectiveness of the Federal courts through

25. *Id.* at 359.

26. *Id.* (quoting *LaBuy v. Howes Leather Co.*, 352 U.S. 249 (1957)). The *LaBuy* decision discussed the propriety of a district judge's referral of matters to a master. This case has been very influential in discussions of the propriety of using magistrates for "additional duties." See also *Ingram v. Richardson*, 471 F.2d 1268 (6th Cir. 1972); *Campbell v. United States District Court*, 501 F.2d 196 (9th Cir. 1974); Kaufman, *Masters in the Federal Courts: Rule 53*, 58 COLUM. L. REV. 452 (1958).

27. For the Seventh Circuit and other courts (e.g., *Ingram*, 471 F.2d at 1268), the concern was that only an article III judge can exercise the ultimate decision-making authority of the United States. Article III gave this power to judges enjoying both salary and tenure protection. U.S. CONST., art. III, § 1. Magistrates enjoy neither. 28 U.S.C. §§ 631-639 (1976). Therefore, the exercise of a district judge's decision-making authority by a magistrate amounts to an impermissible delegation either as a violation of article III or of a party's due process rights. *TPO*, 460 F.2d at 359. This criticism of the magistrate was not restricted to the courts. See comments of Rep. Cahill in H.R. REP. NO. 1629, *supra* note 16, at 4267-68. For further discussion, see Comment, *The Federal Magistrate Act—An Exercise in Article III Constitutionality*, 17 WAYNE L. REV. 1483 (1971); Note, *Article III Constraints & the Expanding Civil Jurisdiction of Magistrates: A Dissenting View*, 88 YALE L.J. 1023 (1979); Note, *Article III Limits on Article I Courts*, 80 COLUM. L. REV. 560 (1980).

28. 418 U.S. 461 (1974).

29. *Id.*

30. *Id.* at 472.

31. *Id.* at 474 (Burger, C.J., dissenting).

the magistrate system.³²

Although *TPO* and *Wingo* illustrate significant Constitutional and statutory challenges to the referral of various matters to magistrates, other decisions upheld the referral of various matters: whether a motion to dismiss should be granted,³³ whether summary judgment should be granted,³⁴ a motion to suppress evidence,³⁵ and a consensual reference.³⁶ However, none of these decisions had the impact of the two noted above.³⁷ *TPO* and *Wingo* created an uncertainty about the magistrate system. Although areas of proper and improper referral were identified, the extent of permitted additional duties was unclear. Two interests, the one Congress created the office for and the one exhibited by *TPO*, clashed and left the office of U.S. Magistrate basically undefined. Chief Justice Burger, in his *Wingo* dissent, recognized the uncertainty and the potential problems it would cause. "[I]t is for the Congress to act to restate its intentions if its declared objectives are to be carried out."³⁸

III. THE FEDERAL MAGISTRATES ACT OF 1976

Congress accepted the Chief Justice's challenge and undertook to resolve the problems posed by *TPO* and *Wingo*. The result was the Federal Magistrates Act of 1976.³⁹ Unlike its predecessor, this legislation

32. *Id.* at 475.

33. *Givens v. W.T. Grant Co.*, 457 F.2d 612 (2d Cir. 1972) (Order dismissing portion of a complaint alleging a class action after having accepted magistrate's recommendation vacated on grounds of lack of subject matter jurisdiction).

34. *Remington Arms Co. v. United States*, 461 F.2d 1268 (2d Cir. 1972) (Order granting motion for summary judgment after accepting magistrate's recommendation affirmed without opinion).

35. *Campbell*, 501 F.2d 196 (9th Cir. 1974) (Petition for writ of mandamus which asked for the withdrawal of an order referring to a magistrate a motion to suppress evidence denied).

36. *DeCosta v. CBS, Inc.*, 520 F.2d 499 (1st Cir. 1975) (The First Circuit upheld on both statutory and constitutional grounds the consensual reference of a trademark infringement case to a magistrate for findings of fact and conclusions of law). *Id.* at 507-08.

37. The frequency and length at which these cases were discussed in subsequent cases and by commentators were determinative of their influence.

38. 418 U.S. 461, 487 (Burger, C.J., dissenting). For a similar expression of a need for change, see *Puro*, *supra* note 1, at 156.

39. 28 U.S.C. § 636(b)(1) (1976) (amending 28 U.S.C. § 636(b) (1970)).

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

(A) a judge may designate a magistrate to hear and determine any pretrial matter pending before the court, except a motion for injunctive relief, for judgment on the pleadings, for summary judgment, to dismiss or quash an indictment or information made by the defendant, to suppress evidence in a criminal case, to dismiss or to permit maintenance of a class action, to dismiss for failure to state a claim upon which relief can be granted, and to involuntarily dismiss an action. A judge of the court may reconsider any pretrial matter under this subparagraph (A) where it has been shown that the magistrate's order is clearly erroneous or contrary to law.

(B) a judge may also designate a magistrate to conduct hearings, including evidentiary hearings, and to submit to a judge of the court proposed findings of fact and recommendations for the disposition, by a judge of the court, of any motion excepted in subparagraph (A),

was more specific. Moreover, the 1976 Act embodied a perspective differing greatly from the uncertain and restricted view of the magistrates' role following from the 1968 Act.⁴⁰ The functioning of a magistrate in the 1968 Act had to be "consistent with the Constitution and laws of the United States."⁴¹ However, the 1976 Act had a more expansive tone—"Notwithstanding any provision of law to the contrary."⁴² This language of the 1976 Act alone suggests a modified role for the magistrate.

Consistent with the new tone, the 1976 Act included a limited adjudicatory role among a magistrate's duties. Magistrates could now "hear and determine any pretrial matter pending before the court."⁴³ Although a list of exceptions keeps the scope of this adjudicatory role limited to discovery matters,⁴⁴ another provision granted magistrates a role involving those "additional duties" which previously had proved so troublesome.⁴⁵ A district judge could now refer to a magistrate for proposed findings and recommendations a range of matters touching upon ultimate decision-making authority—"case dispositive matters."⁴⁶

Together with the discovery role, Congress' specification of the magistrate's role in "case-dispositive" matters is consistent with and furthers the original intent of Congress. The magistrate could now be more effective in assisting the district court.⁴⁷ This specification also

of applications for post-trial relief made by individuals convicted of criminal offenses and of prisoner petitions challenging conditions of confinement.

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

Within ten days after being served with a copy, any party may serve and file written objections to such proposed findings and recommendations as provided by rules of court. A judge of the court shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made. A judge of the court may accept, reject, or modify, in whole or in part, the findings or recommendations, to which objection is made. A judge of the court may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate. The judge may also receive further evidence or recommit the matter to the magistrate with instructions.

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

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

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

40. See Comment, *supra* note 2, at 99-102.

41. See *supra* note 19.

42. 28 U.S.C. § 636(b)(1) (1976). This observation is discussed in Comment, *supra* note 2, at 100. See also *supra* note 39.

43. 28 U.S.C. § 636(b)(1)(A) (1976) (emphasis added). See *supra* note 39.

44. *Id.*

45. *Id.* § 636(b)(1)(B). See *supra* notes 39, 19-21 and accompanying text.

46. *Id.* § 636(b)(1). See *supra* note 39.

47. See *supra* notes 15-18 and accompanying text.

formalized one aspect of the current district judge/magistrate relationship—the scope of referral. The 1976 Act specified the range of matters on which the district judge and magistrate can permissibly interact.⁴⁸ It is this aspect of the two institutions' relationship which responds to the purpose for which the magistrate system was created—more effective courts.⁴⁹

However, the provisions of the 1976 Act specifying the scope of permissible referral solved only some of the earlier challenges. Statutory challenges, as in *Wingo*, were overcome by definition, but the constitutional questions still remained.⁵⁰ Formerly, the local district rules were challenged as unconstitutional delegations, as in *TPO*. Now the 1976 Act itself permitted similar delegations. Is a matter any less a delegation of article III decision-making authority having been made pursuant to a statute than made pursuant to a local rule authorized by statute?⁵¹

Congress was not unmindful of this question. In response to it, the 1976 Act included provisions for the review of a magistrate's activity by a district judge.⁵² But still true to the interest in making the magistrate as effective as possible, the standard of review established by Congress depends on the extent to which the magistrate approaches the exercise of ultimate judicial authority. Regarding discovery matters, the district judge was obligated to review according to a "clearly erroneous" standard.⁵³ However, when a case dispositive matter is at issue, the district judge is required to do more—to make a "de novo determination."⁵⁴

This statutory scheme, which also provides for differing standards of review, is seemingly able to balance both interests underlying the magistrate system: effectiveness and the proper exercise of judicial author-

48. The importance of this definition of the scope of permissible referrals should not be underestimated. Research of the functioning of magistrates in two sample districts illustrates a connection between the uncertainty of the magistrate's role and what a district judge will refer to a magistrate. See, Padawer, *Evolving Role of the U.S. Magistrate in the District Courts*, 64 JUDICATURE 437, 445 (1981).

49. See *supra* notes 15-18 and accompanying text.

50. See *supra* notes 22-27 and accompanying text.

51. Although the 1976 Act tries to avoid the problems presented by *TPO* and other cases by permitting the magistrate only to hear and recommend the disposition of case dispositive matters, the problem still remains. In many cases, the decision about the matter referred will depend on the assessment of credibility and the district judge is leaving that assessment to the magistrate. Therefore, ultimate decision-making authority is being delegated, exactly the problem in *TPO*. This time, however, it is expressly made pursuant to the statute. See also Note, *Standards of Review: A Solution to the Potential Problems of the 1976 Amendment of the Federal Magistrates Act?*, 37 LA. L. REV. 1268, 1273 (1977).

52. See *supra* note 39. For an argument that this was the congressional purpose, see Comment, *supra* note 2, at 99.

53. See Comment, *supra* note 2, at 102.

54. *Id.* at 104.

ity.⁵⁵ When the matter does not involve the exercise of ultimate decision-making authority, the district judge is restrained by the clearly erroneous standard. The magistrate's work in a sense is protected and duplication of effort is prevented.⁵⁶ Where, however, the magistrate exercises authority directly impacting upon the disposition of a case, the district judge is free to upset the magistrate's work and substitute his own judgment under the less restrictive standard of a "de novo determination."⁵⁷ Or so the phrase "de novo" would indicate.

The statutory provisions for review created the second aspect of the district judge/magistrate relationship. Together with referral, provisions for review define a relationship which positions the magistrate as an "adjunct" to the Federal district court judge.⁵⁸ The 1976 Act makes the role of the magistrate more than only an assistant to the district judge. Taking care not to supplant the district judge, the provisions of the 1976 Act allow a magistrate to share in the district judge's authority without violating article III. To the extent this sharing involves a matter directly impacting on the ultimate decision of a case, it is limited by the tailored standard of review.

The dual nature of the district judge/magistrate relationship—reference and review—responds to and seeks to balance both the interest in effectiveness and the need to keep ultimate decision-making authority in an article III judge. But this balancing is accomplished, at least with regard to case dispositive matters, by utilizing a standard of review which is essentially meaningless. Nowhere does the statute specify that a "de novo determination" requires the district judge to assert his power. Congress intentionally left the expression undefined and, in fact, intended that it would not require the district judge to duplicate a magistrate's work.⁵⁹ The result, therefore, is that the 1976 Act only formally balances the relevant interests. The standard of review which

55. See *supra* notes 5-10 and accompanying text. But see *infra* notes 62-79 and accompanying text.

56. Comment, *supra* note 2, at 102; Note, *supra* note 51, at 1273. Both these commentators identify the "clearly erroneous" standard as a less restrictive and more effective provision.

57. The observation that the "de novo determination" standard requires more from the district judge is made in many places. But see Comment, *supra* note 2, at 103-06.

58. The concept of the magistrate as an "adjunct" to the district judge is discussed in McCabe, *supra* note 6, at 369-74. "A better view of the magistrate system acknowledges it as a subordinate part of the article III court and not as a distinct entity. The jurisdiction exercised by United States magistrates is not that of a separate, special tribunal; rather, Congress concluded that the jurisdiction exercised by the magistrate is the jurisdiction of the district court itself." *Id.* at 369. For discussion of the importance of the review provisions, see Note, *supra* note 17.

59. "De novo determination" does not mean "de novo review." The legislative history is clear on this point. "The use of the words 'de novo determination' is not intended to require the judge to actually conduct a new hearing on contested issues." H.R. REP. NO. 1609, 94th Cong., 2d Sess. 3 (1976). The report notes that a "de novo determination" could require nothing more than a review of the record, making it nearly identical to the clearly erroneous standard, or it could involve calling and rehearing witnesses, putting it closer to what is understood as a "de novo

maintains ultimate power in the district judge does not require the assertion of that power. The standard allows something less. But what? The actual balancing of the pertinent interests was moved to another level where the Federal courts would decide how effectiveness and the proper exercise of judicial authority would mesh in conducting a "de novo determination."⁶⁰ The Chief Justice's search for certainty from Congress to define the magistrate's role was redirected to the Federal courts.⁶¹

IV. THE REQUIREMENTS OF A "DE NOVO DETERMINATION"

The Federal Magistrates Act of 1976 formalized the elements of the district judge/magistrate relationship, a relationship which is at the core of the current magistrate system. The dual structure of this relationship is very evident in regard to case dispositive matters. Where the referral of these matters was a source of controversy under the 1968 Act,⁶² the 1976 Act established the propriety of referral.⁶³ Moreover, while the referral of dispositive matters allows a magistrate to perform more effectively, a strict standard for review—a "de novo determination" keeps this efficacy within the limits of article III.⁶⁴ Thus, the statutory scheme is nicely balanced.

However, the exact nature of the essential "de novo determination" is uncertain. It has been left to the Federal courts to articulate the requirements of this standard of review. Unfortunately, the results of the Federal courts' efforts do not achieve the same balance of interests reflected in the 1976 legislation. In deciding what is required at a "de novo determination," the courts have actually given priority to one interest over the other with procedural due process concerns complicating the analysis.⁶⁵ Depending on the context in which the district judge is required⁶⁶ to make a "de novo determination," a district judge may

review." *Id.* The question then becomes if the choice between the alternatives can in any sense be considered "balancing."

60. The irony of this should be noted since it was the inability of the federal courts to balance these interests which initially required congressional action in 1976.

61. See *supra* note 38 and accompanying text.

62. See *supra* note 22-38 and accompanying text.

63. See *supra* notes 45-47 and accompanying text.

64. See *supra* note 57 and accompanying text.

65. Corollary to the issue of whether or not the referral of certain matters amounts to an unconstitutional delegation of judicial power is whether or not such a referral also constitutes infringement upon a party's due process rights. Many of the cases deciding the requirements of a "de novo determination" discuss this issue. See *United States v. Raddatz*, 447 U.S. 667 (1980); *Louis v. Blackburn*, 630 F.2d 1105 (5th Cir. 1980). See also Comment, *supra* note 27. This issue of due process rights is a complicating factor in the analysis of a de novo determination. Since this paper discusses whether the judicial formulation of the magistrate system reflects the same balancing as the legislative formulation, due process is not addressed.

66. The district judge is only required to undertake a "de novo determination" when a party objects to his report and recommendation(s). See *supra* note 39.

simply review the magistrate's record or may be required to rehear witness testimony.⁶⁷ The former requirement favors the effectiveness of the magistrate by avoiding repetition while the latter responds to that interest which seeks to maintain ultimate decision-making authority in the district judge. The two may indeed be compatible (presumably this was the conviction of Congress). However, the decisions discussed below illustrate that the phrase "de novo determination" does not mean one thing, and the determination of what it does mean will depend on contexts where the court feels one interest should be preferred over the other.

Initially, the circuit courts were split on the requirements for a "de novo determination."⁶⁸ They shared, however, two crucial elements in their analyses, i.e., whether the magistrate had been required to assess credibility and whether the district court judge had accepted or rejected the magistrate's work.

The Ninth Circuit,⁶⁹ together with the Fifth Circuit,⁷⁰ judged that the acceptance or rejection context was dispositive on the issue of whether the heightened review of rehearing a witness was necessary. The Fifth Circuit discussed the role a magistrate plays in the administration of justice. Quoting an earlier decision, the court approved simply reviewing the record when a magistrate's work is accepted.⁷¹ The Ninth Circuit expressed a similar high regard for the effectiveness of a magistrate. "Since the magistrate sees and hears the evidence, the district court is entitled to rely upon his recommendations when making its decision on the motion."⁷² The Ninth Circuit also decided that repetition was not necessary in the face of acceptance. In contrast to these circuits, the Seventh Circuit dispensed with the context of rejection or acceptance⁷³ and mandated a duplication of the magistrate's efforts by rehearing witness testimony.⁷⁴ The Seventh Circuit was concerned about the proper exercise of ultimate decision-making authority,⁷⁵

67. See *supra* note 59. There has been some suggestion that listening to a tape recording will suffice. *Campbell v. United States District Court* 510 F.2d 196 (9th Cir. 1974). Cf. *United States v. Bergera* 512 F.2d 391 (9th Cir. 1975).

68. *United States v. Marshall*, 609 F.2d 152 (5th Cir. 1980); *Raddatz*, 592 F.2d 976 (7th Cir. 1979), *rev'd*, 447 U.S. 667 (1980); *Bergera*, 512 F.2d 391 (9th Cir. 1975). All these decisions arose in the context of motions to suppress evidence in criminal proceedings.

69. *Bergera*, 512 F.2d 391 (9th Cir. 1975).

70. *Marshall*, 609 F.2d 152 (5th Cir. 1980).

71. *Id.* at 155 (quoting *United States v. Whitmire*, 595 F.2d 1303 (5th Cir. 1979)). "[T]he district court has the benefit of a carefully developed record, a magistrate's thoughtful consideration of the issues, and argument of counsel regarding specifics not agreeable to the parties." *Id.* at 1305 (emphasis added).

72. See *Bergera*, 512 F.2d at 394.

73. *Raddatz*, 592 F.2d 976 (7th Cir. 1979).

74. *Id.*

75. *Id.*

which lessens the effectiveness of the magistrate.

The United States Supreme Court has resolved these differences by reviewing the Seventh Circuit's decision.⁷⁶ The Court upheld the reasoning of the Fifth and Ninth Circuits and overruled the Seventh Circuit's conclusion that credibility was the dispositive context. The Court's reasoning followed closely the reasoning of the two circuit courts: when a district judge accepts a magistrate's recommendation, anything more than a review of the record is not required. Recognizing the value of magistrates, the Supreme Court found in the magistrate's work sufficient procedural safeguards to minimize any due process problems.⁷⁷ Moreover, since the final decision remained with the district judge, article III was not offended.⁷⁸

The importance of these decisions is the protection of the magistrate's work by allowing the district judge to avoid any duplication of the magistrate's work in situations involving credibility. Although consistent with the original 1968 legislative intent, it gives up the balancing which characterizes the relationship created by the 1976 Act. Concern for the proper exercise of ultimate decision-making power is restricted to the single magistrate's work.⁷⁹ Otherwise, a "de novo determination" should be interpreted to maintain the greatest possible effectiveness for a magistrate and require nothing more than a review of the record. The idea of a "de novo determination" as a check on the impermissible exercise of authority is lost.

V. CONCLUSION

Ultimately, the balancing of interests which not only justifies the office of U.S. Magistrate but also accounts for the structure of the district judge/magistrate relationship is not successful. The statutory scheme created by the 1976 Act, superficially successful, only shifted the real balancing to another level, the Federal courts. On this level, at least in regard to case dispositive matters, the impossibility of balancing becomes evident. The requirements of decision seem to mandate a choice.

In making a choice about the meaning and requirements of a "de

76. *Raddatz*, 447 U.S. 667 (1980).

77. *Id.* at 680-81.

78. *Id.* at 681-82.

79. How little this leaves to the notion of "de novo determination" as a heightened standard of review is underscored when it is realized what an impetus it provides busy district judges to accept recommendations in order to avoid rehearing witnesses. The notion can be further restricted if the cases giving rise to at least this area of heightened review are distinguished as only applying the requirement only when important personal, constitutional rights of criminal defendants are implicated. The latter point is suggested in *Louis v. Blackburn*, 630 F.2d 1105, 1109 n.3 (5th Cir. 1980).

novo determination,” the Federal courts select one of two alternatives. The first alternative is followed by the Seventh Circuit. Regardless of whether the magistrate’s work is accepted or rejected, anything less than a repetition is improper. The second approach, accepted by the Supreme Court, finds in the acceptance of the magistrate’s work adequate procedural safeguards and an adequate exercise of authority by the district judge, requiring only a review of the record. The choice, depending on the context, actually represents asserting one interest over another. To the degree the interest in effective magistrates is asserted, the reason for the existence of a “de novo determination” standard is contradicted.

If there is any balancing accomplished by these decisions, it lies not in the determination of what a “de novo determination” requires but in articulating the contexts in which the interest in an effective system of magistrates may properly take precedence and the contexts where the constraints of article III are determinative. However, the courts seemed to favor an effective U.S. Magistrate. Only when credibility is at issue *and* the magistrate’s work is rejected do the courts require that the district judge rehear testimony during a “de novo determination.” Otherwise, the judge may simply review the record and perform little more than a “clearly erroneous” form of review.

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Special note should be made concerning the single most complete and authoritative review of the early magistrate system. Although not cited directly, Silberman, *Masters and Magistrates Part II: The American Analogue*, 50 N.Y.U. L. REV. 1297 (1975) was indispensable as a guide and source of understanding.

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