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FEDERAL COURTS—JURY TRIALS BEFORE MAGISTRATES—Muhich v. Allen, 603 F.2d 1247 (7th Cir. 1979)

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NOTES

FEDERAL COURTS—JURY TRIALS BEFORE MAGISTRATES—
Muhich v. Allen, 603 F.2d 1247 (7th Cir. 1979).

I. INTRODUCTION

On October 16, 1970, Dr. Dolores Muhich was appointed an assistant professor in the Department of Guidance and Educational Psychology for Southern Illinois University. Her contract was to last one year, but Dr. Muhich anticipated that it would be renewed. In March 1971, however, she received a letter from the department chairman stating that her contract would not be renewed. After unsuccessful attempts to secure employment elsewhere, Dr. Muhich investigated the reasons for her dismissal. Suspecting that her dismissal and subsequent employment problems stemmed from discrimination on the basis of her sex, Dr. Muhich brought suit in the United States District Court for the Eastern District of Illinois. After various pretrial motions at the district court level, Chief Judge Wise referred the matter, upon the stipulation of the parties, to a United States Magistrate. The magistrate

1. Brief for Appellant at 9, Muhich v. Allen, 603 F.2d 1247 (7th Cir. 1979).
2. Muhich v. Allen, 603 F.2d 1247, 1249 (7th Cir.), rehearing and rehearing en banc denied, No. 78-1817 (7th Cir. Sept. 25, 1979).

Muhich alleged that the defendants, officials at Southern Illinois University, acting under color of state law, had discriminated against her by reason of her sex, thus denying her the equal protection of the laws according to 42 U.S.C. § 1983 (1976) and the fourteenth amendment.

3. The order read as follows:

   It is Ordered That, in accordance with Title 28 U.S.C. 636, Rule 38 of the Rules of Practice for the United States District Court, Eastern Division of Illinois, and pursuant to stipulation of the parties, this matter is referred to United States Magistrate Kenneth J. Meyers, for the purposes of conducting all proceedings, including trial and the entry of final judgment.

Muhich v. Allen, 603 F.2d 1247, 1249 (7th Cir. 1979). The basis of this order was the Federal Magistrates Act, 28 U.S.C. § 636(b) (1976), which provides: “(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.” The local rule relied on in Muhich was Rule 38 of the District Court for the Eastern District of Illinois which provides in pertinent part: “In addition to the other powers expressly provided by Rule 38(b), the Magistrate shall have the authority to: (c) With the written consent of the parties, hear and determine all motions, conduct the trial, enter findings of fact and conclusions of law and final judgments in civil cases.”

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was authorized to conduct all proceedings, including trial and entry of final judgment. The basis for the reference was the Federal Magistrates Act of 1968 which empowers magistrates to assist judges in an attempt to alleviate congestion in the federal court system. While Congress did not expressly provide for magistrate trials, it did allow magistrates to be assigned any additional duties not inconsistent with the Constitution or laws of the United States. As a result, a jury trial before Magistrate Kenneth J. Meyers was held on February 28, 1978. The magistrate granted a directed verdict to members of the Board of Trustees of the University, and the jury found in favor of the remaining defendants. Magistrate Meyers subsequently denied Dr. Muhich's motion for a new trial, and she appealed to the United States Court of Appeals for the Seventh Circuit.

Nearly three months after trial, the magistrate filed the "Report and Recommendation" with the district court. On the basis of a Seventh Circuit opinion decided subsequent to trial, the magistrate no longer considered his orders as final, appealable decisions and he urged the court to "adopt and affirm the rulings and orders." On June 15, 1978, in Muhich v. Allen, the district court, through Chief Judge Foreman, conducted a de novo review of the record and the magistrate's report and affirmed both the magistrate's decision on February 28, 1978, and the trial court's determination that the magistrate's orders were not final, appealable decisions. See notes 46-59 and accompanying text infra. The purpose of the new Act is to clarify and expand magistrate jurisdiction and to improve public access to the courts. Extensive treatment of the 1979 Act is beyond the scope of this casenote. For extensive analysis see Note, Article III Constraints and the Expanding Civil Jurisdiction of Federal Magistrates: A Dissenting View, 88 YALE L.J. 1023 (1979).

4. See note 3 supra.
6. Muhich v. Allen, 603 F.2d 1247, 1249 (7th Cir. 1979).
7. Brief for Appellant at 8.
8. Taylor v. Oxford, 575 F.2d 152 (7th Cir. 1978); see note 17 infra.
Dr. Muhich appealed to the Seventh Circuit alleging that the district court’s referral of her case to a United States Magistrate for conducting a trial was void ab initio on jurisdictional grounds. Also, she attacked the subsequent order by Judge Foreman as inadequate to cure the allegedly invalid delegation. The Seventh Circuit held, over a strong dissent, that delegating a case to a United States Magistrate for conducting a civil trial is proper when both parties consent to the procedure pursuant to a local district court rule. The court qualified its decision, however, and said that the magistrate’s findings must be subsequently presented before the district court judge for de novo review of the evidence produced at trial and the applicable law. After this review, the judge, rather than the magistrate, is entitled to enter final judgment.

II. BACKGROUND

The primary issue in Muhich was whether the adjudicatory procedure used by the district court was statutorily and constitutionally infirm. The circuit court focused on serious issues raised by Dr. Muhich concerning the jurisdiction of the magistrate under article III of the United States Constitution and the failure of the Federal Magistrates Act of 1968 to sanction magistrate references for jury trials.

In prior opinions, the Seventh Circuit had consistently lim-
ited the expansion of magistrate jurisdiction, even when based upon consent of the parties. Dr. Muhich relied on dictum in the Seventh Circuit's decision in *Taylor v. Oxford*,\(^{17}\) which apparently limited the magistrate's trial jurisdiction. The *Muhich* court, however, distinguished *Taylor* and expanded the magistrate's jurisdiction. The court decided to prohibit only the entry of final judgment by magistrates.\(^{18}\) Since the district court judge in *Muhich*, rather than the magistrate, had entered final judgment, jurisdictional requirements were satisfied.\(^{19}\)

The court also defended the *Muhich* procedure against the claim that it violated the article III command that the judicial power of the United States be vested in article III courts.\(^ {20}\) The first half of the procedure consisted of a consensual reference to a magistrate for a civil trial, and the second half of the procedure involved a de novo review by the district court. The first half of the procedure had been previously recognized as constitutionally valid in *DeCosta v. Columbia Broadcasting System, Inc.*\(^ {21}\) To support the second half of the procedure, the *Muhich* court relied on the United States Supreme Court's landmark decision of *Mathews v. Weber*.\(^ {22}\) *Mathews* required that a magistrate exercising "additional duties" jurisdiction must remain subject to the supervisory powers of the district judge.\(^ {23}\) The authority and responsibility to make informed, final determinations, even when magistrates conduct the proceedings, remain with the judge.\(^ {24}\) Since Chief Judge Foreman retained jurisdiction by exercising his supervisory power in the

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\(^{17}\) *575 F.2d 152 (7th Cir. 1978).* In *Taylor* a different panel of the Seventh Circuit invalidated local Rule 38 as it pertains to entry of final judgment by magistrates. *See* note 4 *supra.* The court noted that while innovative experiments were intended by § 636(b)(3) of the Magistrates Act, those experiments must stay within the administrative limits of the statute. The court also indicated that consent alone cannot confer upon a magistrate jurisdiction which he otherwise does not possess. *Id.* at 154. *See also* United Steelworkers, AFL-CIO v. Bishop, 598 F.2d 408, 411 (5th Cir. 1979).

\(^{18}\) 603 F.2d at 1250.

\(^{19}\) *Id. See also* 28 U.S.C. § 1291 (1976).

\(^{20}\) U.S. CONST. art. III, § 2 provides: "The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority. . . ."

\(^{21}\) 520 F.2d 499 (1st Cir. 1975), *cert. denied,* 423 U.S. 1073 (1976). *See* text accompanying notes 63-75 *infra.*

\(^{22}\) 423 U.S. 261 (1976). In *Mathews* the Court unanimously held that the 1968 Magistrates Act permitted the district court to refer all social security benefit cases to United States Magistrates for preliminary review, argument, and recommendation subject to the independent decision on the record by the judge.

\(^{23}\) *See* note 3 *supra.*

\(^{24}\) 423 U.S. at 270-71.
form of a de novo review and by invoking his exclusive authority to order final judgment, the *Muhich* court concluded that the strictures of article III were satisfied.\(^{25}\)

The court in *Muhich* also rejected the plaintiff’s claim that the Magistrates Act failed to allow magistrates to conduct jury trials. It found statutory support for such references in the broad language of the “additional duties” that may be assigned to magistrates under the Act.\(^{26}\) Since Dr. Muhich’s case was referred to the magistrate according to a local rule\(^ {27}\) governing the discharge of the magistrate’s duties,\(^ {28}\) the referral was permissible.

As a final determination, the circuit court found no error because the magistrate’s decision received de novo review by the district court in compliance with section 636(b)(2)(C) of the Act.\(^ {29}\) Although Dr. Muhich had not filed formal objections against the magistrate’s report to the district court,\(^ {30}\) Chief Judge Foreman reviewed the record and entered judgment accordingly.\(^ {31}\) The circuit court commended Chief Judge Foreman on his exercise of discretion since this review precluded any possible constitutional infirmities\(^ {32}\) and also satisfied the final judgment requirement.\(^ {33}\)

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25. 603 F.2d at 1251. The court contended that jurisdiction remains vested in the district court and is merely exercised through the medium of the magistrate.
26. Id. at 1251.
27. Section 636(b)(4) requires that the district courts establish local rules, pursuant to which the magistrates shall discharge their duties. The court placed reliance on local Rule 38 despite its invalidation, in part, by the *Taylor* court. See note 17 supra.
29. Section 636(b)(1)(C) provides:
   [T]he magistrate shall file his proposed findings and recommendations . . . 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 made by the magistrate. The judge may also receive further evidence or recommit the matter to the magistrate with instructions.
30. 603 F.2d at 1252. The court correctly observed that neither party formally objected to the magistrate’s report. Appeal of the trial findings commenced on April 7, 1978, three days after Magistrate Meyers denied the motion for a new trial. Therefore, Muhich objected, at least constructively, to any findings in the “Report and Recommendation.” Brief for Appellant at 8.
31. 603 F.2d at 1252.
32. Id. The court cited dictum in *Sick v. City of Buffalo, N.Y.*, 574 F.2d 689, 692-93 (2d Cir. 1978), to illustrate that meaningful review avoids possible constitutional infirmities.
33. 603 F.2d at 1252. The court did provide room to modify this standard when
Judge Swygert dissented from the Muhich majority on jurisdictional grounds and on the issue of legislative intent. Furthermore, he contended that the review was not truly de novo.\textsuperscript{34} The thrust of his jurisdictional objection was against the judicial delegation to magistrates of the traditional article III function of presiding over jury trials. While acknowledging that Dr. Muhich had consented to referring her case to the magistrate, Swygert negated the importance of this consent. He said that parties cannot confer subject matter jurisdiction themselves.\textsuperscript{35}

In discussing the essential subject matter jurisdiction, Judge Swygert reviewed the Magistrates Act extensively to determine if Congress had intended to confer upon magistrates the power "to accept jurisdiction and preside over jury trials."\textsuperscript{36} He referred to the landmark case of \textit{TPO, Inc. v. McMillen}\textsuperscript{37} to provide an analysis of the Act prior to the 1976 amendments. In \textit{TPO, Inc.}, the Seventh Circuit surveyed the legislative history of the 1968 Magistrates Act, concluding that Congress had not attempted to devolve upon magistrates powers which were judicial, such as motions to dismiss or motions for summary judgment. Furthermore, the court in \textit{TPO, Inc.} said that judges also do not have the power to delegate such duties to magistrates.\textsuperscript{38} In holding that magistrates had no authority to decide motions involving ultimate decision-making power, the court emphasized that the additional duties assigned to magistrates must remain within the bounds of what may be constitutionally performed by non-article III judicial officers.\textsuperscript{39}

Judge Swygert reviewed the 1976 amendments to the Magistrates Act which clarified and defined the additional duties legis-
latively assignable to magistrates. He concluded that Congress had intended for these additional duties to be merely administrative and to enable the district court judge to have more time to preside at trial. Congress never contemplated that the amendments would be considered "as authorizing a magistrate to do all but enter final judgment in a federal civil trial." He contended that the procedure followed in Muhich contradicted the congressional intent.

Judge Swygert also argued that even if Congress had sanctioned such magistrate reference, the de novo review conducted in Muhich did not satisfy constitutional requirements since it was not truly de novo. Instead of an independent weighing of each situation as it existed prior to the ruling, Chief Judge Foreman merely reviewed the record to find evidence supporting a given conclusion. By allowing the magistrate to preside over a jury trial on the merits, Judge Swygert stated that the review could be scarcely other than a broad appellate review. Because the jury's verdict is not lightly set aside and because the judge may be reluctant to re-try the entire case, the result is often merely a review to determine if the magistrate's rulings were arguably supportable. Consequently, Swygert stated, even if a true de novo review could cure constitutional defects, such a review was not present in the Muhich case.

III. THE MAGISTRATES ACT OF 1976

Judge Bauer explains that the Federal Magistrates Act, as amended in 1976, supports the majority's decision. Contrary to

41. Id. at 6, reprinted in [1976] 5 U.S. CODE CONG. & AD. NEWS at 6166. The report states:

It seems to the committee that in 1968 the Congress clearly indicated its intent that the magistrate should be a judicial officer whose purpose was to assist the district judge to the end that the district judge could have more time to preside at the trial of cases having been relieved of part of his duties which required the judge to personally hear each and every pretrial motion or proceeding necessary to prepare a case for trial.

Id.

42. 603 F.2d at 1254.
43. See notes 60-130 infra and accompanying text.
44. Judge Swygert defined de novo as the "independent weighing of each situation as it existed at the time prior to a given ruling . . . with an independent judgment reached and then matched against that made by the magistrate." 603 F.2d at 1255.
45. Id.
46. Id. at 1252.
the majority’s assertions, however, the 1976 amendments to the Magistrates Act did not expressly sanction the procedure allowing magistrates to preside over federal civil trials. The purpose of the 1976 amendments was to clarify and further define assignable additional duties after numerous judicial setbacks to magistrate expansion. The congressional intent, rather than abnegating judicial power, was for the magistrate to assist the district court. For example, by assisting the judge in pretrial and preliminary matters, the magistrate would facilitate “the ultimate and final exercise of the adjudicatory function at the trial of the case.” The mandate was clear that magistrates would facilitate the adjudicatory process by relieving judges of some non-article III functions, but not the central duty of presiding at trials.

Absent any clear legislative support for magistrate jury trials, the majority was forced to rely on the broad language of section 636(b)(3) of the Act which shows a congressional intent to delegate to magistrates additional duties not inconsistent with the Constitution or laws of the United States. The 1976 amendments encourage the district courts to continue innovative experiments.

47. Subsequent to Muhich, however, Congress expanded the jurisdiction of magistrates to include their presiding at civil trials upon the consent of the parties. See note 3 supra.

48. See H.R. REP., supra note 40, at 2, 5, reprinted in [1976] 5 U.S. CODE CONG. & AD. NEWS at 6162, 6165. The Report expresses the congressional intent to overrule the holdings in several restrictive cases. See Wingo v. Wedding, 418 U.S. 461 (1974) (magistrate could not hold evidentiary hearing in a habeas corpus proceeding; a judge must preside); Ingram v. Richardson, 471 F.2d 1268 (6th Cir. 1972) (no power in magistrate to review the Secretary of Health, Education & Welfare denial of social security benefits and to make proposals to district judges on the facts and the law); TPO, Inc. v. McMillen, 460 F.2d at 348 (motion to dismiss).


50. Id.

51. See United States v. First Nat’l Bank, 576 F.2d 852, 853 (8th Cir. 1978) (purpose of Magistrates Act was to provide a method to relieve judges of some of their non-article III functions); Taylor v. Oxford, 575 F.2d at 154 (adjudicatory power over dispositive motions was to be executed only by judges); 460 F.2d at 359 (section 636(b) cannot be read in derogation of the fundamental responsibility of judges to decide the cases before them).

52. The Muhich court, by implication, indicated the lack of legislative support by failing to allude to legislative history. 603 F.2d at 1251.

53. Id. at 1251-52.

54. “If district judges are willing to experiment with the assignment to magistrates of other functions in aid of the business of the courts, there will be increased time available to judges for the careful and unhurried performance of their vital and traditional adjudicatory duties . . . .” H.R. REP., supra note 40, at 12, reprinted in [1976] 5 U.S. CODE CONG. & AD. NEWS at 6172. The Taylor court while
unrestricted by other specific grants of authority to magistrates. The examples given, however, are merely administrative,\textsuperscript{55} and not adjudicatory responsibilities. This assignment of additional duties is to aid judges in the administrative functions of the courts rather than to replace them in their traditional functions.\textsuperscript{56} Section 636(b)(4)\textsuperscript{57} requires the district court judges to establish rules governing these additional duties. While the Muhich court relies on this section\textsuperscript{58} to validate the reference under the existing Local Rule 38, Congress simply intended this section to give notice to litigants or to equalize magistrate workloads rather than to expand jurisdiction to magistrates.\textsuperscript{59} Consequently, Judge Swygert is correct in his conclusion that the Magistrates Act of 1976 does not expressly sanction civil trials by magistrates. Therefore, before this adjudicatory procedure may be implied from the Act, it is necessary to determine whether the procedure is consistent with article III of the United States Constitution.

IV. THE CONSTITUTION

Article III of the United States Constitution requires that the judicial power of the United States be exercised by article III judges.\textsuperscript{60} While some delegation of power to non-article III judges has been approved,\textsuperscript{61} this delegation must not be so excessive as to constitute an abnegation of the judicial power.\textsuperscript{62} In Muhich, the

\begin{footnotesize}
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\item \textsuperscript{55} H.R. REP., supra note 40, at 12, reprinted in [1976] 5 U.S. CODE CONG. & AD. NEWS at 6172.
\item This subsection (636(b)(3)) would permit, for example, a magistrate to review default judgments, order the exoneration or forfeiture of bonds in criminal cases, and accept returns of jury verdicts where the trial judge is unavailable. This subsection would also enable the court to delegate some of the more administrative functions to a magistrate. . .
\item Id.
\item 56. Id.
\item 57. See note 3 supra.
\item 58. 603 F.2d at 1251.
\item 60. See 603 F.2d at 1251. See generally Glidden Co. v. Zdanok, 370 U.S. 530, 561 (1962); Silberman, Masters and Magistrates Part II: The American Analogue, 50 N.Y.U. L. REV. 1297, 1304 (1975).
\item 61. Section 636(b)(1)(A) permits magistrates to hear pretrial matters with stated exceptions. Subsection (B) permits evidentiary hearings and motions for post trial relief to be held by the magistrate. See also note 88 infra.
\item 62. Hill v. Jenkins, 603 F.2d 1255 (7th Cir. 1979); Reed v. Board of Election Comm'rs, 459 F.2d 121 (1st Cir. 1972).
\end{itemize}
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Seventh Circuit held that the delegation of trial jurisdiction to Magistrate Meyers was within the realm of judicial authority. The court relied on the voluntary consent of the parties and a properly administered de novo review to support its assertion that constitutional requirements were satisfied.63 There are potential problems, however, both legal and practical, which influence the constitutionality and desirability of such delegations in Muhich and in future applications. These problems include the validity and voluntariness of the consent given, the actual scope of the de novo review, and the integrity of the judicial system itself.

A. Consent

Courts have differed in their analysis of exactly how consent by the parties enlarges the trial jurisdiction of magistrates. Some courts have considered trials before magistrates as an extension of the parties' right to consent to adjudication before a forum other than an article III court.64 It is not disputed that parties have the freedom, without violation of article III, to consent to adjudication by an arbitrator.65 This approach, however, has not been widely accepted since the magistrate is not part of a private dispute resolution process, but rather is a judicial officer in the public aegis of the United States district court system.66 As a part of this framework, the public maintains an interest in the controversy from a precedential viewpoint, quite unlike the private nature of arbitration in which decisions are not necessarily used as a basis from which to decide subsequent issues.

Magistrate trial jurisdiction also may be invoked under the consent provision of section 636(b)(2) which allows magistrates to serve as special masters.67 Congress has expressly given litigants an option of choosing a magistrate to serve as a specialized factfinder

63. See notes 64-126 infra.
64. 520 F.2d at 505. See Gelfgren v. Republic Nat'l Life Ins. Co., 451 F. Supp. 1229 (C.D. Cal. 1978) (the constitution does not prevent references to magistrates for final judgment any more than it prevents the parties from choosing binding arbitration). See also Comment, Adjudicative Role for Federal Magistrates in Civil Cases, 40 U. Chi. L. Rev. 584 (1973).
65. See Burchell v. Marsh, 58 U.S. 344 (1854); Butler Products Co. v. Unistrut Corp., 367 F.2d 733 (7th Cir. 1966).
66. 603 F.2d at 1251, 1253.
67. 28 U.S.C. § 636(b)(2) (1976). In Sick v. City of Buffalo, N.Y., 574 F.2d 689 (2d Cir. 1978), the court assumed that the reference was properly made to a magistrate as a special master and that the jury trial was proper after the parties consented. Id. at 689-90.
when the parties consent. 68 While a previous limitation 69 on the use of special masters was abolished by the 1976 Magistrates Act, 70 there do remain serious restrictions on their use. Congress intended that the Federal Rules of Civil Procedure, other than Rule 53(b) in special circumstances, 71 would apply to references to magistrates serving as masters. Rule 53 contains “many important rules governing the powers of masters, the conduct of proceedings before them, and the submission of reports.” 72 For example, Rule 53(e)(4) commands that the effect of a master’s report is the same regardless of whether the parties have consented to the referral. 73 Therefore, while consent can invoke magistrate jurisdiction as a special master, it cannot relieve a magistrate of limitations imposed upon him when acting as a judge.

The most prolific use of consent to gain jurisdiction has been the consensual reference of magistrates under the additional duties section of the Magistrates Act. 74 Consensual reference as a basis for supplying magistrates with trial jurisdiction received strong support in DeCosta. 75 There, the court held that parties may consent to having a magistrate preside over a jury trial and make an initial decision subject to district court review if one party contends that the magistrate’s decision is clearly erroneous. 76 DeCosta has been cited with general approval by the courts, 77 Congress 78 and commenta-

68. There are, however, limitations to a reference under this section. For example, magistrates cannot enter final judgments. Kendell v. Davis, 569 F.2d 1330 (5th Cir. 1978).

69. In La Buy v. Howes Leather Co., 352 U.S. 249, 259 (1957), the Supreme Court held that references to special masters were justified only in “exceptional circumstances.” FED. R. CIV. P. 53(b).


73. See Duryea v. Third Northwestern Nat’l Bank, 602 F.2d 809 (8th Cir. 1979).

74. 28 U.S.C. § 636(b)(3) (1976). See generally Silberman, supra note 60; Note, Federal Magistrates and the Implications of Consensual References, 4 FORDHAM URB. L.J. 129 (1975); Comment, supra note 64; Note, supra note 3.

75. 520 F.2d at 499.

76. Id. at 508.

77. Horton v. State St. Bank & Trust Co., 590 F.2d 403, 404 (1st Cir. 1979); Small v. Olympic Prefabricators, Inc., 588 F.2d 287, 292 (9th Cir. 1978). But cf. Taylor v. Oxford, 575 F.2d at 154 n.5 (consent of the parties is provided for in the statute only for special masters indicating that Congress considered consent favorable in one situation but not in other circumstances).

The *Muhich* court also relied on *DeCosta*. In effect, however, it departed from *DeCosta* in several significant respects, with the major difference being the scope of the consensual reference. *DeCosta* expressly prohibited even a clearly worded consensual reference that purported to bind the parties finally to the magistrate’s rulings of law. Dr. Muhich consented to precisely that which *DeCosta* prohibits, entry of final judgment by a magistrate. The *Muhich* majority found significance in the initial consent and chose to disregard the invalid portion of the reference.

By exceeding the scope of *DeCosta*, the court in *Muhich* indicates a strong preference favoring expansion of the magistrate’s role once the parties have given their initial consent. Another indication of this judicial preference is found in the court’s reliance on Local Rule 38 which provides for the delegation of jury trials to magistrates. These local rules are promulgated by the district court judges in an attempt to alleviate their trial burdens when litigants are willing to consent to magistrates as a substitute. Consent apparently mitigates the infirmities behind excessive delegation and judges have increasingly employed this waiver. There are, however, important limitations on consent as the basis of subject matter jurisdiction. Judge Swygert’s contention that consent cannot cure or waive subject matter jurisdictional requirements has received some support, but this argument has been discounted by one commentator who asserts that article III rights can be

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80. The *Muhich* court recognized that magistrates are judicial officers within the control of the district judge. 603 F.2d at 1251. The *Decosta* court erroneously analyzed consensual reference as though it presented a litigant a choice between two tribunals with overlapping jurisdiction, rather than between two adjudicators of the same tribunal. See Note, supra note 3, at 147 n.132.
81. 520 F.2d at 408.
82. 603 F.2d at 1250.
83. Id. at 1251.
84. “Consent partially safeguards the individual’s interest in neutral and expert adjudication and it seems to preserve his right to . . . a trial before a tenured adjudicator. At the same time, it relieves judges of part of the onus of engaging in a ‘jurisdiction’ balancing of values prior to reference.” Note, supra note 3, at 1049.
85. In 1978, 540 civil trials were conducted by magistrates pursuant to consent by the parties, representing a 66.2% increase over the number of trials conducted by magistrates in 1977. [1978] AD. OFF. U.S. CTS. ANN. REP. 138 (table 69). In 1979, 570 civil trials were conducted by magistrates. [1979] AD. OFF. U.S. CTS. ANN. REP. 10 (table 10).
waived. A more significant limitation on consent has been the inability to confer jurisdiction on magistrates to enter final judgments appealable directly to the courts of appeals. Parties may consent to initial decisions by magistrates, but the courts have applied *Mathews* to preclude delegation of such a fundamental and exclusive article III power as the entry of final judgment by magistrates. This judicial reluctance to delegate final judgment authority demonstrates one area in which consent is generally inadequate in conferring subject matter jurisdiction.

Regardless of the validity of consent in conferring jurisdiction, there are pressures from the system which adversely influence the voluntariness of consent. Litigants may not want, nor be in a position, to wait two to three years for a judge when a magistrate is available for trial within three months. There are also internal pressures influencing consent. As explained previously, there is a strong judicial preference to use magistrates in expanded ways.

87. Silberman, *supra* note 60, at 1350-51. In support the author states:

[N]othing in the first section of article III, which vests the judicial power of the United States in the courts and provides for life tenure of judges, inseparably links the exercise of particular subject matter jurisdiction set up in that article, to the presiding officer. It is the court, not the judge, to which doctrines of subject matter jurisdiction apply. Thus, the Constitution supplies no subject matter jurisdictional provision barring magistrates from exercising article III judicial power with the parties' consent. *Id.*

88. Harding *v.* Kurco, Inc., 603 F.2d 813 (10th Cir. 1979); Horton *v.* State St. Bank & Trust Co., 590 F.2d 403 (1st Cir. 1979); Small *v.* Olympic Prefabricators, Inc., 588 F.2d 287 (9th Cir. 1978); Cason *v.* Owen, 578 F.2d 572 (5th Cir. 1978); Taylor *v.* Oxford, 575 F.2d 152 (7th Cir. 1978); Sick *v.* City of Buffalo, N.Y., 574 F.2d 689 (2d Cir. 1978); Swanson & Yongdale, Inc. *v.* Seagrave Corp., 542 F.2d 1008 (8th Cir. 1976). See note 143 *infra*. But see Gelfgren *v.* Republic Nat'l Life Ins. Co., 451 F. Supp. 1229, 1330 (C.D. Cal. 1978) (district judge allowed entry of final judgement by the magistrate).

89. Also, there has been concern that magistrates might become poor people's judges. See Note, *supra* note 3, at 1052 nn. 61-63.

90. Telephone conversation with the office of United States Magistrate Kenneth J. Meyers. These figures are indicative of the congestion in the federal court system. There were over 19,089 civil cases pending over three years on June 30, 1979, representing an all time high. 1979 AD. OFF. U.S. CTS. ANN. REP. 81-83 (table 39).

91. See note 83 *supra*.


United States magistrates now assist the district judges in expediting civil and criminal litigation in the great majority of the 92 district courts covered by the Federal Magistrates Act. During the 12-month period ended June 30, 1979, for example, magistrates in 74 districts filed written reports and recommendations for disposition of 12,062 prisoner petitions. Magis-
Local Rule 38 employed in *Muhich* is similar to previous attempts to delegate final judgment authority to magistrates. While each of these previous attempts has been invalidated as excessive, the policies behind the rules clearly show that district court judges rely on magistrates to a large extent and that the judges are not hesitant to delegate even traditional functions such as trial jurisdiction.

Another pressure influencing the voluntariness of consent is the potential for subtle coercion by the judiciary to encourage consent in an attempt to either promote judicial economy or avoid presiding over certain types of litigation. The *DeCosta* court suggested a procedure to insulate the identities of the parties after realizing that a harried court might subtly coerce parties to consent to a trial by magistrate. A by-product of the coercion problem is that judges may unintentionally become predisposed against a nonconsenting litigant, which could adversely influence the result in a close case. The *Muhich* opinion failed to discuss the need for these safeguards, unjustly assuming that there would be complete voluntariness on

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trates conducted 24,231 civil pretrial conferences for the judges in 77 districts. In 77 districts they reviewed 34,311 motions in civil cases, of which 4,361 were dispositive matters in which magistrates submitted full reports and recommended decisions under 28 U.S.C. § 636(b)(1)(B). In addition, magistrates filed reports and recommendations on 4,074 social security appeals in 68 districts.

*Id.* This trend is especially true when the parties consent since the court is relieved from the jurisdictional balancing before referring the matter to a magistrate. See note 83 supra. Moreover, the influx of local rules promulgated by the district judges, which give magistrates unlimited discretion, indicate the confidence that district judges have in these magistrates. Harding v. Kurco, Inc., 603 F.2d 813 (10th Cir. 1979); Horton v. State St. Bank & Trust Co., 590 F.2d 403 (1st Cir. 1979); Small v. Olympic Prefabricators, Inc., 588 F.2d 287 (9th Cir. 1978); Cason v. Owen, 578 F.2d 572 (5th Cir. 1978); Taylor v. Oxford, 575 F.2d 152 (7th Cir. 1978); Sick v. City of Buffalo, N.Y., 574 F.2d 689 (2d Cir. 1978); Swanson & Yongdale, Inc. v. Seagrave Corp., 542 F.2d 1008 (8th Cir. 1976).

93. See note 92 supra.

94. TPO, Inc. v. McMillen, 460 F.2d 348, 360 n.62 (7th Cir. 1972) (the danger of coerced consent is real); United States v. Eastmount Shipping Corp., 62 F.R.D. 437, 440 (S.D.N.Y. 1974) (judge expressed surprise and regret over Department of Justice rule stating that "neither calendar congestion nor complexity of an issue involved justifies reference of a case to a special master"); see Comment, supra note 64, at 587-88 (suggesting incentives to gain consent).

95. See Note, supra note 3, at 1052. (1979 house bill required case by case reference decisions to insure that district courts will not stigmatize categories of litigants as undeserving of the attention of article III judges).

96. 520 F.2d at 507 (suggesting a "blind" procedure "requiring that parties file with the clerk of the court a letter of consent to have a magistrate render a decision in the case with the clerk being bound not to disclose the identity of any who consent or who withhold consent."). See H.R. REP. NO. 287, 96th Cong., 1st Sess. 31 (1979) (dissenting view of Rep. E. Holtzman).
the part of the parties. Instead, the court relied on the availability of de novo review as an adequate safeguard to solve any procedural deficiencies which may arise. 97

B. De Novo Review

The United States Supreme Court has clearly mandated that the authority and responsibility for informed and final determinations must remain with the judge. 98 Thus, the Muhich court properly recognized the necessity of conducting a review as a method to correct possible improper rulings and to avoid constitutional difficulties. 99 The critical issue in Muhich, however, involves not the availability of de novo review, but rather the nature and scope of Chief Judge Foreman's actual review in the district court.

In the 1976 amendments to the Federal Magistrates Act, Congress redefined de novo review as it pertains to judicial review of magistrate findings. 100 Congress did not intend for a de novo review to require the judge actually to conduct a new hearing on each contested issue. Rather, the district court judge, in making his determination, was directed to give fresh consideration to those issues to which specific objection had been made. 101 In Muhich, Magistrate Meyers filed a report which became the focus of the de novo review. His findings and recommendations carried only such

97. For example, note the court's reliance on de novo review to cure the partially invalid local rule. See note 17 supra.
99. 603 F.2d at 1250 (citing Sick v. City of Buffalo, N.Y., 592 F.2d 689, 692-93 (2d Cir. 1978)).
101. Id. The report adopted to a great extent the approach used in Campbell v. United States Dist. Court, 501 F.2d 196 (9th Cir.), cert. denied, 419 U.S. 879 (1974). In Campbell, the court stated:

If neither party contests the magistrate's proposed findings of fact, the court may assume their correctness and decide the motion on the applicable law. The district court, on application, shall listen to the tape recording of the evidence and the proceedings before the magistrate and consider the magistrate's proposed findings of fact and conclusions of law. The court shall make a de novo determination of the facts and the legal conclusions to be drawn therefrom. Finally, the court may accept, reject or modify the proposed findings or may enter new findings. . .

501 F.2d at 206-07.

The cases are in harmony with the view that the district courts must review the magistrate's record de novo, but the scope of that review is unclear. One case suggests that this might vary depending upon the expertise of the magistrate and other circumstances when no formal objection has been filed. Webb v. Califano, 468 F. Supp. 825 (E.D. Cal. 1979) (objection filed after a ten day statutory period).
weight as their merits warranted under the discretion of Chief Judge Foreman. The judge considered these findings under the standard requiring them to be supported by the evidence and law applicable thereto before entering final judgment for the defendants. On appeal, the Muhich majority was satisfied that the extent of this de novo procedure was sufficient under the Federal Magistrates Act’s guidelines.

Judge Swygert’s dissenting opinion that the same de novo review upheld by the majority was a mere rubber stamp illustrates the real dangers inherent in this de novo procedure. There are pressures influencing the independence of a district court judge’s review which place him in a precarious position. If he chooses to disregard the magistrate’s recommendation, he may be required to hear witnesses personally to insure the integrity of the fact-finding process. But if he conducts too extensive a review, judicial economy is sacrificed. Conversely, the judge may hesitate to disturb the factfinder without such an extensive review since jury decisions are not to be lightly set aside. The result is a strong possibility that the de novo review becomes merely a search for evidence in support of the magistrate’s given conclusion, rather than an independent search for the proper conclusion. While the Supreme Court has rejected this assumption, several cases indicate that the possibility of a cursory or even no review is quite real. The Seventh Circuit has already remanded a case for abuse of a district court judge’s discretion in applying the Muhich stan-

102. 603 F.2d at 1253. Judge Swygert contended that the judge failed to exercise a de novo review but in fact “devolved it upon the magistrate and retained merely the power to conduct an administrative, appellate review in the broadest sense.” Id. at 1255. Cf. Noorlander v. Ciccone, 489 F.2d 642, 648 (8th Cir. 1973) (judge will personally take testimony of witnesses and determine credibility on de novo review of material issues of fact.)

103. In United States v. Bergera, 512 F.2d 391 (9th Cir. 1975), the Ninth Circuit held that the district court erred when it set aside the magistrate’s recommendation and ruled on the motion to suppress without hearing the evidence of the motion itself. Id. at 394. Judge Cambers, dissenting, rejected the court’s proposition, stating that “if the district judge wants to approve the magistrate, he may stamp it ‘approved’, but if he doubts the wisdom he must conduct a hearing de novo.” Id. at 395. See also United States v. Raddatz, 592 F.2d 976 (7th Cir.), cert. granted, 444 U.S. 824 (1979) (No. 79-8).


105. 603 F.2d at 1255.

106. See Mathews v. Weber, 423 U.S. at 274 (“we categorically reject the suggestion that judges will accept, uncritically, the recommendation of magistrates.”)

107. See note 111 infra.
dards. In *Hill v. Jenkins*, the district court judge referred to a magistrate the task of conducting evidentiary hearings at a prison. These hearings, in effect, became a trial on the merits when arguments were heard from both sides. The case was remanded because the judge adopted verbatim the findings of fact and conclusions of law without even the benefit of the transcript. *Hill* demonstrates that district court judges may automatically presume that the magistrate's findings are correct. Relying on this presumption, some judges have occasionally neglected to conduct reviews, even over the objection of the parties. These abnegations of judicial power, however, have consistently been invalidated by higher courts.

A second major problem frequently associated with the administration of the de novo review is the lack of any real access to an article III judge. The district court judge does retain jurisdiction, but it "is . . . exercised [indirectly] through the medium of the magistrate." Whenever the parties consent to referral to a magistrate, the magistrate assumes complete control of the entire proceedings. The judge, in effect, remains insulated from the litigants but for the official record. As a result, the judge serves essentially an appellate function, while the verdict itself is shaped by the immediate events occurring before the magistrate. Chief

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108. 603 F.2d at 1256. The district judge adopted the findings of appellee prison officials, rather than the magistrate, since no report and recommendation was ever filed. Material deficiencies also included the lack of consent to the procedure and the absence of a local rule permitting a magistrate to preside over civil trials. *Id.* at 1258-59.

109. *Id.* at 1258.

110. Orland v. United States, 602 F.2d 207 (9th Cir. 1979) (where federal prisoner filed written objections to magistrate's report the district court erred in not making a de novo determination of contested findings).

111. Reed v. Board of Election Comm'rs, 459 F.2d 121 (1st Cir. 1972). The court held that court approval of a magistrate memorandum which transformed preliminary hearing into a case on the merits was an abnegation of judicial authority entirely contrary to the provisions of article III. *See also* Rainha v. Cassidy, 454 F.2d 207 (1st Cir. 1972).

112. *See* text accompanying notes 121-126 *infra* for a discussion of the problems associated with the lack of access to an article III judge.

113. 603 F.2d at 1251 (quoting TPO, Inc. v. McMillen, 460 F.2d 348, 353 (7th Cir. 1972)).

114. In Horton v. State St. Bank, 590 F.2d 403 (1st Cir. 1979) the court, in discussing final judgment by magistrates, stated "we cannot overlook the pressures to acquiesce in this procedure which could develop over time, thereby effectively depriving litigants of trials before an Article III court." *Id.* at 404. *See* 460 F.2d at 361 n.67 (dual role imposed on judges). *See generally* Note, *supra* note 3, at 1051-55.

115. 603 F.2d at 1255. (events are controlled in a significant part by the magis-
Judge Wise, when referring the case to Magistrate Meyers, recognized the importance that testimony of the parties' credibility would assume in the case's outcome since crucial facts were in dispute.116 Testimony of witnesses presented in the official record may give impressions contrary to those derived from personal observations.117 The Supreme Court has acknowledged that procedures used at trial may be as important as the substantive law in influencing a decision.118 In Muhich, however, Chief Judge Foreman did not actively participate in the adjudication of the matter. Instead, Magistrate Meyers presided over the trial and made decisions which influenced the outcome.119 While the de novo record review theoretically served as a check to insure the compliance with the evidence and law adduced at trial,120 the lack of real access to an article III judge indicates a serious limitation diminishing the effectiveness of this bifurcated procedure.

C. Integrity of the Judicial System

A major issue not addressed in the Muhich opinion concerns the effect of magistrate trials on the overall integrity of the judicial system.121 Constitutional reservations have been expressed at each
stage of magistrate expansion\textsuperscript{122} centering on the delegation of judicial authority to non-article III judges. The major objection is that magistrates should not exercise the judicial power to preside over jury trials without the traditional safeguards deemed necessary to preserve the independence of the judiciary.\textsuperscript{123} The premise behind this objection is that magistrates are materially distinguishable from article III judges in several critical respects which may influence their ability to perform adjudicatory duties effectively. Unlike judges, magistrates do not enjoy the protections of life tenure and undiminishable salary.\textsuperscript{124} Moreover, differences in the selection processes, experience and expertise indicate that judges are better qualified than magistrates in the task of conducting a trial.\textsuperscript{125}

Three separate lines of analysis have been offered to counter these concerns.\textsuperscript{126} First, the magistrates act merely as an adjunct of the district court which appoints and exerts control over them. When a magistrate tries a case, jurisdiction remains vested in the district court and is simply exercised through the medium of the magistrate. While theoretically sound, this argument fails to consider the practical problems in devolving such an important task as presiding at a jury trial. As discussed previously, the actual control over the magistrate may be less than complete.\textsuperscript{127} Second, consent

\textsuperscript{122} See, e.g., TPO, Inc. v. McMillen, 460 F.2d 348, 352-54 (7th Cir. 1972), for a survey of judicial and legislative reservations to the 1968 Federal Magistrates Act. For adverse comment on the 1976 amendments, see H.R. REP., \textit{supra} note 40, at 8, reprinted in [1976] 5 U.S. CODE CONG. & AD. NEWS at 6168. For criticism of the 1979 amendments, see H.R. REP. No. 287, 96th Cong., 1st Sess. 32 (1979) (dissenting view of Rep. F. Sensenbrenner, Jr.) ("In my view this bill is unconstitutional.")

\textsuperscript{123} The waiver of the right to an article III judge is a waiver to the right to an adjudicator enjoying the constitutional protections of office. Note, \textit{supra} note 3, at 1030 n.40. Alexander Hamilton noted: "In the general course of human nature, \textit{a power over a man's substance amounts to a power over his will.}" (emphasis in the original). \textit{THE FEDERALIST} No. 79, at 497 (B. Wright ed. 1961) (A. Hamilton). See also Horton v. State St. Bank & Trust Co., 590 F.2d 403 (1st Cir. 1979). The court stated that "without questioning the high caliber of magistrates, in this and other circuits, nor the vital function they serve, we cannot ignore that the procedures for appointing and removing magistrates, their tenure, and the part-time status of some of them materially distinguish magistrates from Article III judges." \textit{Id.} at 404.

\textsuperscript{124} Magistrates are appointed by a concurrence of a majority of the district court's judges, with the primary requirement that appointees be members of the bar in good standing. 28 U.S.C. §§ 631(a), (b)(1) (1976). \textit{See note} 146 \textit{infra} for additional 1979 standards.

\textsuperscript{125} Note, \textit{supra} note 3, at 1026 n.18. ("the typical new magistrate would be a younger lawyer with five to ten years experience. . . .").


\textsuperscript{127} \textit{See notes} 102-120 \textit{supra} and accompanying text.
is a prerequisite to invoking magistrate jurisdiction. A voluntary and knowledgeable consent may mitigate several constitutional concerns since the parties waive their right to adjudication before an article III judge, but this consent is unlikely to be truly voluntary.\textsuperscript{128} Third, in all instances, an appeal from a magistrate’s decision lies in an article III court. This argument is the most persuasive since it preserves for the parties the right to a constitutional judge with life tenure and undiminishable salary.\textsuperscript{129} As explained previously,\textsuperscript{130} however, the scope of the appellate function differs significantly from that of the trial function. Thus, the problems associated with the use of non-article III judges remain at the trial stage.

IV. IMPLICATIONS OF MAGISTRATE JURY TRIALS

The Supreme Court has not yet addressed the constitutionality of the magistrate system. The \textit{Mathews} Court noted,\textsuperscript{131} but refused to consider, these broad constitutional issues. As a consequence of the Supreme Court’s silence in this area, analysis has centered around earlier decisions\textsuperscript{132} concerning article I judges to answer the question of whether article III judges were intended to exercise their powers exclusively.\textsuperscript{133} While factual determinations by non-article III officers do not impermissibly invade the judicial domain,\textsuperscript{134} vigorous opposition has been voiced against delegation of decisionmaking authority to nonconstitutional judicial officers.\textsuperscript{135}

As magistrate jurisdiction expands, the Supreme Court undoubtedly will be forced to decide the parameters of the magis-

\begin{itemize}
\item \textsuperscript{128} See notes 89-97 supra and accompanying text.
\item \textsuperscript{129} See Silberman, supra note 60, at 1304-21, 1349-60.
\item \textsuperscript{130} See notes 112-120 supra and accompanying text.
\item \textsuperscript{131} 423 U.S. at 269 n.5.
\item \textsuperscript{132} See Crowell v. Benson, 285 U.S. 22 (1932). This landmark case established that “there is no requirement that, in order to maintain the essential attributes of judicial power, all determinations of fact in constitutional courts shall be made by judges.” Id. at 51. See Note, Masters and Magistrates in Federal Courts, 88 HARV. L. REV. 779, 787-89 (1975). The issue was raised in Glidden Co. v. Zdanok, 370 U.S. 530 (1962) (plurality), but was not resolved. The court avoided the question by deciding that the Court of Claims and the Court of Customs and Patent Appeals always had been article III courts. Id. at 584.
\item \textsuperscript{133} Congress has established specialized ‘legislative’ courts and other tribunals under its article I powers. These officers can preside over cases within the article III § 2 jurisdictional field. See Glidden v. Zdanok, 370 U.S. 530, 549-51 (1962).
\item \textsuperscript{134} Note, supra note 132, at 787-89.
\end{itemize}
trates' authority. Meanwhile, *Muhich* is a harbinger of future trends which may modify the entire structure of the federal court system. The court overcame an invalid local rule and a long tradition restricting magistrate expansion to condone a jury trial presided over by a magistrate. *TPO, Inc.*, *Taylor*, and *United States v. Raddatz* had all previously placed limits on the congressional grant of power to magistrates. Yet in *Muhich*, the Seventh Circuit found the combination of consensual reference and de novo review sufficient to satisfy both statutory and constitutional challenges. The thrust of *Muhich* clearly indicates that a strong policy exists supporting the expansion of magistrate jurisdiction from "super-notary" to "para-judge." Apparently satisfied with the ability of magistrates to handle judicial matters other than trial, the evolution of magistrates into the adjudicatory role seems a logical step in the quest to relieve the overburdened federal court system. There is, however, an alternative solution to the congestion problem which precludes several infirmities associated with magistrate adjudication. The solution is simply to expand magistrate duties in discovery, pretrial conferences and other more reviewable areas, such as evidentiary hearings, while restricting their use as judicial substitutes at trial. The benefits are three-fold. First, judges would have more time available to exercise their adjudicatory roles which was the original rationale for the magistrate system. Second, this increased specialization in nontrial mat-

136. This point may have been reached with the passing of the 1979 Magistrates Act, 28 U.S.C.A. §§ 631-636 (West Pamph. 1980). The new law gives magistrates the authority to invalidate state statutes under the constitution. See 125 CONG. REC. H8,725 (daily ed. Sept. 28, 1979) (remarks of Rep. F. Senseubrenner).

In addition, the need for this delegation of judicial power has been seriously curtailed. In 1979, Congress passed the Omnibus Judgeship Act of 1978, 28 U.S.C.A. §§ 44, 133 (West Cum. Supp. 1979), which added 117 new district judgeships. There is also a bill in Congress to abolish diversity jurisdiction. See H.R. 2202 96th Cong., 1st Sess. (1979). These measures will curtail the judicial workload and diminish the need for magistrates to substitute in the presiding of trials.

137. See note 51 supra.

138. See note 17 supra.

139. See note 33 supra.

140. Cf. 423 U.S. at 268. (Supreme Court refused to attach a label to describe magistrates). There are, however, reservations to this expansion. "[F]inal magistrate adjudication would also introduce novel problems. It would entail the loss of the 1976 de novo procedure as well as the addition of weaknesses inherent in any system of consensual reference—risk of coerced consent, role problems, and possible inhibition of legal development." Note, supra note 3, at 1059.


142. See Note, supra note 3, at 1061, suggesting a careful restriction of the number of matters in which a magistrate may formally assume the judicial power.
ters would presumably increase magistrate expertise. Finally, constitutional problems, and litigation concerning these, would be eliminated as moot. Despite this viable alternative, the pro magistrate expansion trend appears strong enough to continue for the foreseeable future.

Congress has adopted the pro magistrate expansion policy espoused in *Muhich* in the recently passed Federal Magistrates Act of 1979. The Act expressly allows a district court judge to refer jury trials to magistrates. District court judges need not support a magistrate reference under the "additional duties" section of the Act. Consent stands as the lone threshold to invoking magistrate jurisdiction, and the Act contains strong warnings to insure the complete voluntariness of this consent.

The magistrate selection process also has been upgraded to insure competent magistrates in their new role as adjudicators. The major feature of the 1979 Act empowers magistrates to enter final judgments which either may be appealed to a higher court or, if the parties consent, to the district court judge. This constitutes a major deviation from the *Muhich* procedure in which the district court judge retained the ultimate responsibility for the entry of final judgment through de novo review. This final judgment feature effectively overrules uniform decisions in the courts of appeals which forbid magistrate entry of final judgment. These

143. The 1979 Magistrate Act reads as follows:
(c) Notwithstanding any provision of law to the contrary—
   (1) Upon the consent of the parties, a full-time United States 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 non-jury civil matter and order the entry of judgment in the case, when specially designated to exercise such jurisdiction by the district court.


144. *Id.*

145. 125 CONG. REC. H8,130 (daily ed. Sept. 19, 1979). "The conferees felt that because of the possibility of coercion a strong warning should remain in the legislation that neither the judge nor the magistrate shall attempt to persuade . . . any party to consent. . . ." *Id.*

146. *Id.* New positions or reappointments are contingent upon the magistrate having been a member of the bar of the highest court of his state for at least five years.


148. Harding v. Kurco, Inc., 603 F.2d 813 (10th Cir. 1979); Horton v. State St. Bank & Trust Co., 590 F.2d 403 (1st Cir. 1979); Small v. Olympic Prefabricators, Inc., 588 F.2d 287 (9th Cir. 1978); Cason v. Owen, 578 F.2d 572 (5th Cir. 1978); Taylor v. Oxford, 575 F.2d 152 (7th Cir. 1978); Sick v. City of Buffalo, N.Y., 574 F.2d
cases, like *Muhich*, considered de novo review essential to comply with the limitations of *Mathews* and the Constitution. While the new Act has not been tested, there are indications from prior decisions\(^{149}\) that the delegation of such a fundamental authority to a non-article III judge may be improper. The First Circuit has recently concluded: "[T]he discretionary authority to enter final judgment is so *fundamentally* an *exclusive power* of an Article III court that we are unwilling to find it within the contemplation of this catch-all, 'additional duties' provision."\(^{150}\) Likewise, the Tenth Circuit has described the final judgment authority as a fundamental and exclusive power of an article III judge.\(^{151}\)

The crucial constitutional issue concerning the 1979 Act relates to the source of the judicial reluctance to sanction entry of final judgment by magistrates. If the reluctance stems from the former lack of statutory authorization\(^{152}\) for magistrates to enter final judgment, the 1979 Act may prove to be immune from constitutional attack. If, however, the reluctance is rooted in the constitutional requirement that the judicial power of the United States shall be exercised by judges, the Act's constitutional foundation may prove to be inadequate. As previously shown,\(^{153}\) there are constitutional reservations to the *Muhich* procedure. The 1979 Act intensifies the problems faced in *Muhich* by eliminating the need for de novo review and by allowing magistrates to enter final judgment after consent by the parties.\(^{154}\) It is unclear whether the parameters of

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689 (2d Cir. 1978); Swanson & Yongdale, Inc. v. Seagrave Corp., 542 F.2d 1008 (8th Cir. 1976).

149. *See* note 148 *supra*. Harding v. Kurco, Inc., 603 F.2d 813 (10th Cir. 1979). "Thus, the discretionary authority to direct entry of a final judgment is *fundamental* and *exclusive power* of an Article III judge" 1d. at 814. (emphasis added). "[M]aintaining the integrity of that process requires that magistrates not be allowed to supplant judges commissioned under the Constitution in the ultimate adjudication of controversies." *Note*, *supra* note 132, at 803.


151. Harding v. Kurco, Inc., 603 F.2d 813 (10th Cir. 1979). *But see* Taylor v. Oxford, 575 F.2d 152, 154 n.7 (7th Cir. 1978); Sick v. City of Buffalo, N.Y., 574 F.2d 689, 691 n.10 (2d Cir. 1978). Both acknowledge legislation in Congress that would permit final judgment jurisdiction to be exercised by magistrates.

152. The Congress has tacitly admitted the lack of statutory authority in the former act by its passage of the 1979 Act.

153. *See* notes 60-130 *supra* and accompanying text.


The weakness of the logic of those who argue that consent cures all may be seen when carried to its inevitable conclusion. Under the consent theory, Congress could abolish all inferior Federal courts... and replace them with
article III are violated by non-article III judges exercising the power of article III in the above manner. What is clear is that in 1980, magistrates are performing the traditional judicial function of presiding at trials without the safeguards deemed essential to an independent judiciary, as formulated by the framers of the Constitution.

V. Conclusion

The country is increasingly looking to its federal courts to solve important and pressing problems. Congestion and delay have precipitated the need for magistrates to assist the federal judges in solving these problems. The Muhich court recognized this need and fashioned a procedure that permits magistrates to preside over a full jury trial on the merits.

The procedure involves initial consent by the parties pursuant to a local district rule and a de novo review by the district judge of any contested findings. Two major problems, one constitutional and the other practical, emerge from this procedure. The constitutional problem is whether article III allows magistrates to exercise trial jurisdiction in a federal civil case. This infirmity is resolved when consent is entirely voluntary and the de novo review is exercised in a manner which retains the ultimate decisionmaking power in the judge. The practical problems involve the difficulties in administering the de novo review and insuring the voluntariness of consent. The practical problems associated with magistrate jury trials may not affect the constitutionality of the procedure, but they do influence the desirability of that process. For example, the time constraints affecting consent and the various definitions of de novo review illustrate the difficulties in administering the seemingly simple standards of Muhich. Compounding these problems is the Federal Magistrates Act of 1979. The Act reinforces the Muhich reliance on consent, but it exceeds the scope of Muhich by permitting entry of final judgment by magistrates themselves. The Act intensifies the lack of initial access to an article III judge by creating a new group of judicial officers. Moreover, by eliminating the de novo review, the Act discards the essential safeguard that the ultimate decision for final judgment should remain with a judge pro-

... a greatly expanded magistrate system. Litigants who desired a Federal forum would then only have to consent to appear before the magistrate ... (or) sue in the State courts. We seriously doubt if the Constitution ever contemplated such a perversion of Article III.

Id.
tected by tenure and salary provisions. A more reasoned alternative than the Muhich or the 1979 Act's procedures for solving the problems of congestion and delay would be to increase the number of district judgeships, as was done in the Omnibus Judgeship Act of 1978.\textsuperscript{155} This increase, combined with the expansion of magistrate duties in nontrial areas,\textsuperscript{156} is preferable for several reasons. It preserves the integrity of the judicial system by eliminating non-article III officers from the delicate task of presiding at jury trials. Also, it eliminates the various problems frequently associated with the bifurcated process such as lack of initial access to a judge and duplicity of work. This approach also provides a direct solution to the congestion problem rather than an indirect answer through the use of non-article III judges. In the final analysis, if the country needs additional judges to resolve legal problems, the solution is to supply more article III judges rather than "reconditioned" substitutes.

Salvatore D. Ferlazzo

\textsuperscript{156} See notes 141 & 142 supra and accompanying text.