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COMMENTS

ANNULMENT OF THE *WEDDING* DECISION: STATUTORY REVISION TO EXTEND USE OF FEDERAL MAGISTRATES IN HABEAS CORPUS PROCEEDINGS

Finding a conflict between the two controlling statutes, the Supreme Court in *Wingo v. Wedding*¹ frustrated an attempt to alleviate court congestion in disallowing the use of federal magistrates for hearing evidence concerning habeas corpus petitions. The Court reasoned that the Federal Magistrates Act² was not consistent with, nor had it displaced, the requirement of section 2243 of the Judicial Code³ that "courts . . . hear and determine the facts"⁴ in habeas proceedings. Strongly dissenting, Chief Justice Burger declared: "[N]ow that the Court has construed the Magistrates Act contrary to a clear legislative intent, it is for the Congress to act to restate its intentions if its declared objectives are to be carried out."⁵ To comply with the Chief Justice's suggestion to remove statutory restrictions upon the conduct of habeas evidentiary hearings by magistrates,⁶ however, Congress must provide a procedure that also will avoid constitutional limitations derived from article III.

In *Wedding* the United States District Court for the Western District of Kentucky had promulgated a local rule⁷ which allowed magistrates in its jurisdiction to hold evidentiary hearings pursuant to section 636⁸ of the Federal Magistrates Act. Besides the specific powers prescribed by section 636(a),⁹ section 636(b) permits district

1. 94 S. Ct. 2842 (1974).

2. 28 U.S.C. §§ 631-39 (1970).

3. *Id.* § 2243.

4. *Id.*

5. 94 S. Ct. at 2856 (Burger, C.J., & White, J., dissenting).

6. See also Note, *Proposed Reformation of Federal Habeas Corpus Procedure: Use of Federal Magistrates*, 54 IOWA L. REV. 1147, 1158 (1969).

7. W.D. Ky. R. 16(c)(3), as amended W.D. Ky. R. 14(e). The rule allowed the magistrate to conduct and record electronically evidentiary hearings on those petitions deemed worthy of such consideration. Subsequent to the hearing the magistrate was to file a report and make a recommendation to the district judge, who, upon request, was required to listen to the recording and give it de novo consideration. *Id.*

8. 28 U.S.C. § 636 (1970).

9. Section 636(a) states that within his prescribed jurisdiction a magistrate has the following powers:

(1) all powers and duties conferred or imposed upon United States commissioners by law or by the Rules of Criminal Procedure for the United States District Courts;

courts to establish local rules delegating to federal magistrates additional duties "not inconsistent with the Constitution and laws of the United States."¹⁰ One additional duty suggested in subsection 636(b)(3) is the "preliminary review of applications for post-trial relief made by individuals convicted of criminal offenses,"¹¹ such review being only for the purpose of recommending to the district judge whether to hold a hearing on the application.¹² Reading this section in conjunction with the overall time-saving purpose of the Magistrates Act, the *Wedding* district court promulgated a rule

(2) the power to administer oaths and affirmations, impose conditions of release under section 3146 of title 18, and take acknowledgements, affidavits, and depositions; and

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

Id. § 636(a).

10. Section 636(b) provides:

Any district court of the United States, by the concurrence of a majority of all of 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.

Id. § 636(b).

The exact limits placed on magisterial authority are intentionally vague perhaps due to the congressional desire that the magistrate be used for a variety of functions. The Senate Committee on the Judiciary asserted:

It seems unwise to . . . require that the district courts give magistrates duties other than those traditionally performed by commissioners. It is hoped, however, that in their discretion the district courts will find it useful to lighten their own burden

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, and a consequent benefit to both the efficiency and quality of justice in the Federal courts.

S. REP. NO. 371, 90th Cong., 1st Sess. 26 (1967) [hereinafter cited as SENATE REPORT].

11. 28 U.S.C. § 636(b)(3) (1970).

12. *Id.*

permitting a magistrate to hold the hearing and record it electronically.¹³ The recording of the proceedings and the magistrate's findings of fact and conclusions of law were to be submitted to the federal district judge for him to adopt those findings or make his own regarding the merits of the habeas petition.¹⁴

Examining the validity of the local rule, the Supreme Court first noted the historical importance of "the 'great constitutional privilege' of habeas corpus,"¹⁵ then looked at recent changes to section 2243 of the habeas corpus statute,¹⁶ which provided procedures for exercise of the "privilege." Finding no substantive change in the requirement that "court[s] shall summarily hear and determine the facts" in habeas proceedings,¹⁷ the Court relied upon prior cases which had denied United States commissioners, the predecessors of magistrates, the power to hold evidentiary hearings in federal habeas corpus proceedings.¹⁸ Determining from such precedent that magistrates were not to be included within the meaning of the term "court," the Court concluded that magistrates could not hold evidentiary hearings without a further specific authorization from Congress.¹⁹

13. W.D. Ky. R. 16(c)(3), as amended W.D. Ky. R. 14(e).

14. *Id.*

15. 94 S. Ct. at 2847, quoting *Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 95 (1807).

16. 28 U.S.C. § 2243 (1970).

17. *Id.* Congress originally provided "that either of the justices of the supreme court, as well as judges of the district courts, shall have power to grant writs of *habeas corpus* for the purpose of an inquiry into the cause of commitment." Judiciary Act of 1789, ch. 20, § 14, 1 Stat. 82. The 1867 revision to the habeas corpus procedure provided: "The said court or judge shall proceed in a summary way to determine the facts of the case, by hearing testimony and the arguments of the parties interested" Act of Feb. 5, 1867, ch. 28, 14 Stat. 385, 386. A later revision was more explicit, providing: "The court, or justice, or judge shall proceed in a summary way to determine the facts of the case, by hearing the testimony and arguments" Act of June 28, 1874, ch. 13, § 761, 18 Stat. 142 (Rev. Stat. § 761).

When this provision was again revised in 1948, similar language was retained in the initial sentence of the section: "A court, justice or judge . . . shall . . . award the writ" Act of June 25, 1948, ch. 646, § 2243, 62 Stat. 965 (codified at 28 U.S.C. § 2243 (1970)). The last sentence of the section, which deals with the manner of taking evidence, merely states: "The court shall summarily hear and determine the facts" *Id.* (emphasis supplied). Since there were no indications from legislative history that anything more than a mere change of form was intended, the Supreme Court in *Wedding* determined that the meaning of the term "court" as used in the last sentence of section 2243 could not be deemed to include the term "magistrate." 94 S. Ct. at 2847-48.

18. *Brown v. Allen*, 344 U.S. 443 (1953); *United States v. Hayman*, 342 U.S. 205 (1952); *Holiday v. Johnston*, 313 U.S. 342 (1941).

19. 94 S. Ct. at 2848. The Court stated: "Our inquiry is thus narrowed to the question whether the Federal Magistrates Act changed the requirement of § 2243 that federal judges

Review of the legislative history of the magistrate legislation revealed to the Court a reluctance on the part of Congress to establish habeas corpus evidentiary proceedings either as a particular power or as an additional duty assignable to federal magistrates,²⁰ this reluctance stemming from congressional fear that the assignment of such a duty would be an unconstitutional delegation of judicial power.²¹ Having concluded that federal habeas corpus proceedings

personally conduct habeas corpus evidentiary hearings." *Id.*

Prior to the Supreme Court's decision in *Wedding*, only the Court of Appeals for the Sixth Circuit had construed the section as not permitting magistrates to conduct habeas corpus evidentiary hearings. *Wedding v. Wingo*, 483 F.2d 1131 (6th Cir. 1973). Four other circuit courts reached contrary conclusions. *O'Shea v. United States*, 491 F.2d 774 (1st Cir. 1974) (judge to give no weight, however, to a magistrate's finding to which a party objected); *Noorlander v. Ciccone*, 489 F.2d 642 (8th Cir. 1973); *United States ex rel. Gonzalez v. Zelker*, 477 F.2d 797 (2d Cir. 1973) (where factfinding not dispositive); *Parnell v. Wainwright*, 464 F.2d 735 (5th Cir. 1972) (factual conclusions adopted by district court to be accepted unless clearly erroneous). With the exception of *Noorlander*, see notes 59-68 *infra* & accompanying text, little reasoning accompanied the conclusions of these four courts. A brief discussion in *Parnell* upheld the magistrate's power with the statement: "The findings of a magistrate in a postconviction remedies case, when adopted by the district court are akin to the findings of a special master whose findings are likewise adopted by the court." 464 F.2d at 763. Such reasoning apparently looks to provision 636(b)(1), which allows the magistrate to serve as a special master, see note 10 *supra*, for primary support in permitting magistrates to conduct evidentiary hearings. Equating magistrates in habeas proceedings to special masters may be dubious, however, because such a comparison erroneously assumes that the same procedural protections apply in both situations. Rule 52(a) of the Federal Rules of Civil Procedure provides in pertinent part: "The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court." Ample authority, however, has dictated that reference to a master is impermissible in a habeas corpus proceeding. See *Holiday v. Johnston*, 313 U.S. 342 (1941); *Payne v. Wingo*, 442 F.2d 1192 (6th Cir. 1971); 9 C. WRIGHT & A. MILLER, *FEDERAL PRACTICE & PROCEDURE* § 2602, at 778 (1971). Further, rule 53(b) of the Federal Rules of Civil Procedure states: "A reference to a master shall be the exception and not the rule." In interpreting this rule the Supreme Court has held that calendar congestion is not such an "exceptional circumstance." *La Buy v. Howes Leather Co.*, 352 U.S. 249, 259 (1957). Therefore, the regular use of magistrates to perform essentially as special masters in habeas proceedings may be objectionable. The *Parnell* reasoning perhaps could remain viable on the basis that the magistrate is a more highly qualified judicial officer than the master, and therefore in his capacity as special master, the magistrate need not be limited by restrictions in the Federal Rules of Civil Procedure placed upon masters appointed on a one-time basis. Such an argument may be utilized in other situations under section 636(b)(1), but as a result of *Wedding* the analogy to the special master in *Parnell* is insufficient to permit magistrates to conduct evidentiary hearings in habeas corpus proceedings.

20. 94 S. Ct. at 2848-49.

21. Section 636(b)(3), see note 10 *supra*, originally provided that the magistrate could give "preliminary consideration of applications for post-trial relief made by individuals convicted of criminal offenses." S. 3475, 89th Cong., 2d Sess. § 636(b)(3) (1966). This section was later restricted because it delegated to magistrates ultimate decisionmaking duties. See also notes 27-32 *infra* & accompanying text.

require a judge to hear and determine facts in habeas petitions and that the Magistrates Act had not displaced this statutory requirement, the Court held that the additional duty conferred by the local court rule was "inconsistent with the . . . laws of the United States."²² For Congress to achieve its goal of easing the burden of habeas petitions upon district courts following the *Wedding* decision, it must at a minimum alter the "laws of the United States" to avoid inconsistency between those laws and the magistrate hearing rules.

Several considerations support the acceptance by Congress of Chief Justice Burger's invitation to restate its intentions in order to attain its objectives. The overall purpose of the Federal Magistrate's Act was to replace an inefficient commissioner system with a class of highly qualified federal judicial officers²³ possessing a broader

22. 94 S. Ct. at 2849, quoting 28 U.S.C. § 636(b) (1970).

23. The magistrate is to be appointed by a majority of the judges in the district in which he is to serve, 28 U.S.C. § 631(a), if judged "competent to perform the duties of the office" by the appointing judges, *id.* § 631(b)(2); he also is to be a member of the bar in good standing, *id.* § 631(b)(1), to serve for a term of years, *id.* § 631(e), subject to removal for incompetency, misconduct, neglect of duty, or physical or mental disability, *id.* § 631(h). The salary provided, *see id.* § 634(a), is set with a view towards attracting highly qualified individuals, *see H.R. REP. NO. 1629, 90th Cong., 2d Sess. 13 (1968)* [hereinafter cited as *House Report*]. Nepotism is avoided by disqualifying for office any person related by marriage or blood to a judge of the appointing court, *id.* § 631(b)(4).

The House committee report explains the purpose behind this upgrading:

An upgraded system of judicial officers below the level of the district judge can provide significant advantages for the Federal judicial system. By raising the standards of the lowest judicial office and by increasing the scope of responsibilities that can be discharged by that office, the system will be made capable of increasing the overall efficiency of the Federal judiciary, while at the same time providing a higher standard of justice at the point where many individuals first come into contact with the courts.

HOUSE REPORT, *supra* at 14. For a discussion of the inadequacies existing under the previous commissioner system, *see id.* at 13-14; Clark, *Parajudges and the Administration of Justice*, 24 VAND. L. REV. 1167, 1175-76 (1971); Shafroth, *Off with the Old, On with the New*, 55 A.B.A.J. 32 (1969).

Among the more notable defects in the commissioner system abolished by the Magistrates Act was the anachronistic fee system of compensation whereby commissioners were paid according to functions performed up to a statutory ceiling. Such a system was of questionable constitutionality, since it arguably afforded the commissioners, as judicial officers, pecuniary interests in the controversies over which they presided. The Supreme Court has held such pecuniary interests violative of due process. *Tumey v. Ohio*, 273 U.S. 510 (1927). Not only did the commissioner system lack rigorous standards of appointment and provide only a low maximum salary, the system used to determine salaries also resulted in particularly disproportionate undercompensation of the most productive commissioners. HOUSE REPORT, *supra* at 13.

scope of powers than their predecessors to relieve judges of a variety of time-consuming duties.²⁴ Furthermore, the particular need of some districts to use magistrates to expedite the processing of habeas corpus petitions is evidenced by the number of districts which gave magistrates powers to conduct evidentiary hearings prior to the *Wedding* decision.²⁵ Moreover, persons seeking habeas relief would benefit from evidentiary hearings commenced earlier and conducted more thoroughly.²⁶

24. The primary adjudicatory function exercised by commissioners was the conduct of petty offense trials within the federal system. See Clark, *supra* note 23, at 1175. Magistrates, however, not only conduct trials of petty offenses under section 3401 of the federal criminal code, 18 U.S.C. § 3401 (1970), see also notes 74-75 *infra* & accompanying text, but they also may review applications for posttrial relief in criminal cases, conduct pretrial discovery in civil and criminal cases, and perform any other additional duties assigned by the district court judges. 28 U.S.C. § 636 (1970). See generally HOUSE REPORT, *supra* note 23.

25. Local rules allowing evidentiary hearings include: E.D. LA. R. 24(C)(3)(a); W.D. Mo. R. 26(B)(5)(e); E.D.N.C.R. 19(1)(a); E.D. VA. R. 29(A)(1)(f). Local rules which could be interpreted as allowing magistrates to conduct habeas evidentiary hearings include: D.C. CONN. RULES FOR UNITED STATES MAGISTRATES R. 1(E); D.C. KAN. R. 23A(4); S.D.N.Y.R. 35(a); R.I.R. 32(a)(4).

The *Wedding* majority argued that statistics demonstrated that each judge, on the average, spent a minimal amount of time conducting habeas evidentiary hearings, 94 S. Ct. at 2849 n.20; Chief Justice Burger in his dissent, however, noted that applications for postconviction relief are not filed evenly throughout the country. 94 S. Ct. at 2851 n.3. In the past, 11 districts have handled over 54 percent of all petitions filed in one year. Note, *The Burden of Federal Habeas Corpus Petitions From State Prisoners*, 52 VA. L. REV. 486, 494, 506 (1966). While particular districts may have hundreds of applications, others may have relatively few. *Id.* Consequently, per capita statistical analysis can be deceptive in assessing the problem of processing habeas petitions.

Habeas corpus petitions by state prisoners increased from 560 in 1950 to 871 in 1960 to 9,063 in 1970, with slight decreases to 8,372 in 1971 and 7,949 in 1972. Shapiro, *Federal Habeas Corpus: A Study in Massachusetts*, 87 HARV. L. REV. 321, 321 (1973). Two Supreme Court decisions were instrumental in causing the increase: *Sanders v. United States*, 373 U.S. 1 (1963) (permitting federal judges the discretion to hear successive petitions from the same prisoner); *Fay v. Noia*, 372 U.S. 391 (1963) (exhaustion of state remedies requires only that applicant use available remedies before applying for federal habeas corpus). See also *Townsend v. Sain*, 372 U.S. 293 (1963) (criteria for requiring evidentiary hearing); *Brown v. Allen*, 344 U.S. 443 (1953) (availability of federal habeas corpus to relitigate constitutional questions).

Many applications for postconviction relief are frivolous. Note, *Proposed Reformation of Federal Habeas Corpus Procedure: Use of Federal Magistrates*, 54 IOWA L. REV. 1147, 1148 (1969). Further, some petitions are repetitious; one prisoner, for example, filed fifty applications with a district court within five years. *Dorsey v. Gill*, 148 F.2d 857, 862 (D.C. Cir.), cert. denied, 325 U.S. 890 (1945). See generally Williamson, *Federal Habeas Corpus: Limitations on Successive Applications from the Same Prisoner*, 15 WM. & MARY L. REV. 265 (1973).

26. One of the purposes originally advanced for the passage of the Federal Magistrates Act was to allow "considered and unhurried judgment" on matters to which judges may devote very little time. In his remarks accompanying the introduction of the original bill, Senator

The seemingly obvious method to obtain these benefits would be for Congress to amend section 636(b)(3) explicitly to allow magistrates to conduct evidentiary hearings in habeas proceedings. Nevertheless, as the Supreme Court noted in *Wedding*,²⁷ Congress previously considered and rejected such a provision. The original draft of section 636(b)(3) provided for magistrates to give "preliminary consideration of applications for post-trial relief made by individuals convicted of criminal offenses."²⁸ Responding to this provision, as well as other proposed provisions of section 636(b), the Committee on the Administration of Criminal Laws of the Judicial Conference stated: "[T]he enumeration of duties in Section 636(b) as now worded presents a delegation which is so broad as to make this subsection vulnerable to possible constitutional attack"²⁹ An Assistant Attorney General expressed more specific doubts about the constitutionality of the proposed section 636(b)(3): "[I]f preliminary consideration is intended to involve adjudication, it should be handled by an Article 3 judge."³⁰ Subsequent redrafting of the provision resulted in its present form, including the limiting phrase

Joseph Tydings stated:

[W]e feel that it is unreasonable to expect the presently overworked district judges to discharge additional functions—such as deciding whether there is probable cause for a warrant to issue—with the kind of considered and unhurried judgment which such decisions require. . . . A decision to deprive a citizen of his liberty—even though it is temporary and subject to subsequent review—or a decision to permit the search of a citizen's home, deserves careful consideration by a judicial officer whose primary attention is not lodged elsewhere. We believe that as a practical matter a district judge cannot and should not be that judicial officer, and that such functions can best be performed by an officer who is a part of an upgraded version of the U.S. commissioner system.

112 CONG. REC. 12,471 (1966).

Allowing magistrates to process habeas petitions also could increase the number of hearings. Senator Tydings argued that under the present system the judges' law clerks are often the ones who screen petitions or discovery papers: "We say that the magistrate should be able to [hold] plenary, discovery hearings. Now, what happens . . . as a practical matter, you get no hearings. The law clerk reviews the papers . . . so we are giving the individual [petitioner] actually an opportunity . . . for more consideration than he gets now." *Hearings Before the Subcommittee on Improvements in Judicial Machinery of the Committee on the Judiciary on S. 3475 and S. 945*, 90th Cong., 1st Sess. 113 (1966) [hereinafter cited as *Senate Hearings*].

27. See 94 S. Ct. at 2848-49.

28. S. 3475, 89th Cong., 2d Sess. § 636(b)(3) (1966).

29. Committee on the Administration of the Criminal Law, Judicial Conference of the United States, Report (September, 1966) [hereinafter cited as *Report on Criminal Law*], quoted in *TPO, Inc. v. McMillen*, 460 F.2d 348, 356 (7th Cir. 1972).

30. *Senate Hearings*, *supra* note 26, at 130 (remarks of Assistant Attorney General Vinson).

"as to whether there should be a hearing" to specify clearly that the responsibility for both the final decision and the conduct of hearings on habeas applications belonged to the judge rather than the magistrate.³¹ Also, to shelter section 636(b) from future criticism, the Senate Report accompanying the bill stated that the section "cannot be read in derogation of the fundamental responsibility of judges to decide the cases before them; instead, it contemplates assignments to magistrates under circumstances where the ultimate decision of the case is reserved to the judge, except in those instances where action can properly be taken by a nonarticle III judge."³²

The congressional fear of an unconstitutional delegation of judicial power emerging from this legislative history is premised upon article III, which provides: "The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."³³ Life tenure and nonreducible compensation are reserved for article III judges to place them beyond the reach of political and pecuniary pressures.³⁴ Because federal magistrates are not life tenured and because Congress can reduce their compensation, they do not share all of the characteristics of traditional article III judges;³⁵ thus any delegation of article III power to them arguably would be unconstitutional.

This syllogistic argument, however, is overly simplistic, if not

31. 28 U.S.C. § 636(b)(3) (1970). See *Report on Criminal Law*, *supra* note 29, quoted in *Wingo v. Wedding*, 94 S. Ct. 2842, 2849 (1974).

32. SENATE REPORT, *supra* note 10, at 26-27. For an examination of the legislative history of the Magistrates Act in relation to magistrates' ability to decide motions to dismiss, see *TPO, Inc. v. McMillen*, 460 F.2d 348, 350-60 (7th Cir. 1972).

33. U.S. CONST. art. III, § 1.

34. *Id.* The purpose of these protections was to shelter the courts from the influence of the executive and legislative branches. The Court of Appeals for Seventh Circuit has noted:

Among the grievances against George III detailed in the Declaration of Independence was that "[h]e has made judges dependent on his will alone, for the tenure of their offices, and the amount and payment of their salaries." Hamilton urged that "complete independence of the courts of justice is particularly essential" and that independence be assured by life tenure (*The Federalist* No. 78) and by fixed provision for support which shall not be diminished during continuance in office (*The Federalist* No. 79).

TPO, Inc. v. McMillen, 460 F.2d 348, 353 n.25 (7th Cir. 1972). Cf. *Glidden Co. v. Zdanok*, 370 U.S. 530 (1962) (independence of decisionmaker as a criterion for recognizing Article III judge).

35. *Dye v. Cowan*, 472 F.2d 1206, 1206 n.1 (6th Cir. 1972); *Ingram v. Richardson*, 471 F.2d 1268, 1270 n.1 (6th Cir. 1972); *TPO, Inc. v. McMillen*, 460 F.2d 348, 352-59 (7th Cir. 1972) (by implication).

fallacious, for two reasons. First, it fails to distinguish properly judicial power from judicial functions, the latter perhaps being delegable without delegation of the former.³⁶ Second, the syllogism fails to address the multi-dimensional nature of article III as establishing a separate branch of government under the doctrine of separation of powers as well as being associated with procedural rights.³⁷

To provide a decentralization of powers, the first three articles of the Constitution establish three separate branches of government: legislative, executive, and judicial.³⁸ Although the judicial power is to be exercised by the courts,³⁹ other branches of government, as well

36. Judicial power can be defined as the authority vested in article III courts ultimately to decide the outcome of cases or controversies arising under the Constitution and laws of the United States. A judicial function, on the other hand, is a technique or process whereby a judicial decision is made. See Force, *Administrative Adjudication of Traffic Violations Confronts the Doctrine of Separation of Powers*, 49 TUL. L. REV. 84, 94 (1974). It also has been noted that administrative agencies may perform the judicial function of adjudicating disputes between parties so long as judicial power over such disputes is retained through the right of appeal to an article III court. *Id.* at 93-98; Shapiro, *Federal Habeas Corpus: A Study in Massachusetts*, 87 HARV. L. REV. 321, 365 (1973).

37. In establishing a separate branch of government, article III assures each citizen a class of adjudicators beyond the influence of the legislative and executive branches. See note 34 *supra*. Law enforcement and prosecution therefore are segregated from the judicial branch. This deconcentration of powers allows for impartial arbiters, thereby implementing a "goal of fairness" by affording parties in litigation the due process right of uninfluenced determination of disputed issues. Force, *supra* note 36, at 90. See also notes 47-58 *infra* & accompanying text. The syllogistic argument, see notes 33-35 *supra* & accompanying text, arguably fails to recognize that this goal of fairness may be realized by having impartial and informed magistrates adjudicate disputed issues so long as judicial power is maintained in article III judges through the right of appeal.

38. The opening sentence of each article seemingly vests the whole power therein granted to that branch covered by the article. For example, the second article begins: "The executive Power shall be vested in a President of the United States of America." U.S. CONST. art. II, § 1. Nevertheless, Justice Story noted:

[W]hen we speak of the separation of the three great powers of government, and maintain that that separation is indispensable to public liberty, we are to understand this maxim in a limited sense. It is not meant to affirm, that they must be kept wholly and entirely separate and distinct, and have no common link of connexion or dependence, the one upon the other, in the slightest degree. The true meaning is, that the whole power of one of these departments should not be exercised by the same hands, which possess the whole power of either of the other departments; and that such exercise of the whole would subvert the principles of a free constitution.

2 J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 524 (De Capo ed. 1970). See *Dreyer v. Illinois*, 187 U.S. 71, 84 (1902). See also *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 587-89 (1952). It should be noted that the Constitution does not use the explicit phrase "separation of powers" and that the doctrine therefore exists "[i]n the framework of our Constitution." *Youngstown Sheet & Tube Co. v. Sawyer*, *supra* at 587.

39. There can be no total usurpation of judicial power by the legislative or executive

as many nonarticle III judges, do exercise judicial functions in making certain-adjudicatory decisions. Determinations of rights or status in the nature of adjudications take place in administrative agencies and commissions.⁴⁰ Within the judicial branch, bankruptcy referees, who are neither life tenured nor permanently salaried, exercise adjudicatory functions in bankruptcy cases.⁴¹ Also, territorial

branches. *Estep v. United States*, 327 U.S. 114, 120 (1946); *Crowell v. Benson*, 285 U.S. 22, 56-57 (1932); *Ng Fung Ho*, 259 U.S. 276, 284 (1922). See also *La Buy v. Howes Leather Co.*, 352 U.S. 249, 256 (1957); *Doyle, Implementing the Federal Magistrates Act*, 39 J.B.A. KAN. 25, 29, 66 (1970). But see *Senate Hearings*, *supra* note 26, at 246-56; Note, *Masters and Magistrates in the Federal Courts*, 88 HARV. L. REV. 779, 780-89 (1975).

40. For instance, objections to orders issued pursuant to the Fair Packaging and Labeling Act, 15 U.S.C. §§ 1451-61 (1970), may be adjudicated before a Federal Trade Commission administrative law judge. 16 C.F.R. § 3.2 (1974). Such a judge has complete independence from the investigative and prosecutorial branches of the commission. *Id.* § 3.42(f). He functions as a trial judge in administering oaths and affirmations, issuing subpoenas, initiating deposition proceedings, ruling upon offers of proof and receiving evidence, regulating the course of the hearings, holding conferences for any proper purpose, ruling upon all motions appropriate to an adjudicative proceeding, and filing initial decisions. *Id.* § 3.42(c). These decisions are appealable to the full Commission, *id.* §§ 3.46, 3.52-55, the decision on appeal to the Commission becoming final if not appealed to a circuit court of appeals within 60 days. Federal Trade Commission Act §§ 5(c), (g), 15 U.S.C. §§ 45(c), (g) (1970).

Other administrative agencies also perform adjudicatory functions. See, e.g., Communications Act of 1934 § 309(e), 47 U.S.C. § 309(e) (1970) (Federal Communications Commission hearing when substantial and material question of fact pertaining to license application is presented); Interstate Commerce Act § 5(15), 49 U.S.C. § 5(15) (1970) (Interstate Commerce Commission determinations of questions of fact regarding competition among carriers after full hearing). See generally 3 K. DAVIS, ADMINISTRATIVE LAW TREATISE §§ 2.12, 8.01-.20 (1958); L. JAFFEE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 87-99 (abr. student ed. 1965); Force, *supra* note 36, at 94-96.

41. Bankruptcy referees are judicial officers, Bankruptcy Act § 1(22), 11 U.S.C. § 1(22) (1970), who exercise article III judicial functions. Section 38 of the Bankruptcy Act invests jurisdiction in referees, "subject always to a review by the judge," to "perform such duties as are by [the Bankruptcy] Act conferred on courts of bankruptcy . . ." 11 U.S.C. § 66 (1970). District court clerks, upon receiving voluntary petitions in bankruptcy, refer the petitioners to referees, unless otherwise directed by the judge, *id.* § 45, and the referees will either allow or dismiss the discharge in bankruptcy, *id.* § 66(2). An appeal to a bankruptcy judge is permitted if made within 10 days after the referee's decision; otherwise the decision is final. *Id.* § 67(c).

Although the bankruptcy courts themselves traditionally are deemed within the judicial branch of government (under article III), the constitutional basis for bankruptcy courts is in article I under the power given to Congress "[t]o establish . . . uniform Laws on the subject of Bankruptcies . . ." U.S. CONST. art. I, § 8. It has been argued that "[d]espite the Judiciary's historical use of referees in bankruptcy, their constitutional legitimacy has never been determined by the Supreme Court." HOUSE REPORT, *supra* note 23, at 46 (Representative Cahill dissenting from the approval of the Magistrates Act). Performance of article III functions for a number of years alone may not mean that such a practice will withstand constitutional challenge, cf. *Holiday v. Johnston*, 313 U.S. 342, 352 (1941), but constitutional chal-

judges, who exercise article III functions, are not article III judges.⁴² In situations such as labor contract bargaining, individuals can consent to adjudications by arbitrators, who can be individuals wholly separate from government, yet courts will allow them to exercise what could be deemed Article III functions.⁴³ In all of these instances, ultimate resort to courts by some means of judicial review is available.⁴⁴ Although the various individuals who are not article III judges exercise adjudicatory functions, judicial review ensures that courts will maintain ultimate judicial power. In like manner, for

lenges to the use of referees have not been upheld. *See, e.g., Chase Capital Corp. v. Bumb*, 336 F.2d 1000 (9th Cir. 1964), *cert. denied*, 380 U.S. 934 (1965).

42. In *Glidden Co. v. Zdanok*, 370 U.S. 530 (1962), the Court in discussing Chief Justice Marshall's decision in *American Ins. Co. v. Canter*, 26 U.S. (1 Pet.) 511 (1828), noted that *Canter* stands for the position that "in the territories cases and controversies falling within the enumeration of Article III may be heard and decided in courts constituted without regard to the limitations of that article; courts, that is, having judges of limited tenure and entertaining business beyond the range of conventional cases and controversies." *Glidden Co. v. Zdanok*, *supra* at 545 (footnote omitted). The Court in *Glidden* noted that such a delegation of article III functions to a nonarticle III officer was upheld because the realities of territorial governments, unforeseen by the framers of article III, made implementation of article III courts within those governments unduly burdensome on the federal system; accordingly, Chief Justice Marshall, cognizant "of his responsibility to see the Constitution work," upheld the constitutionality of these territorial courts on basically pragmatic grounds. *Id.* at 546-47. Procedural rights, however, still must be afforded. *Rasmussen v. United States*, 197 U.S. 516, 526-28 (1905).

43. The parties to collective bargaining agreements essentially waive their rights to an initial adjudication of any contractual dispute which may arise, since, once a dispute has been adjudicated by an arbitrator, courts will review the award only to ensure that it "draws its essence from the collective bargaining agreement" and that "the arbitrator's words manifest [no] infidelity to [his] obligation." *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597 (1960).

44. *See Bankruptcy Act* § 39c, 11 U.S.C. § 67(c) (1970) (petitioner in bankruptcy proceeding may request review of referee's decision by bankruptcy judge); *Glidden Co. v. Zdanok*, 370 U.S. 530, 545 n.13 (1962) (discussing territorial courts subject to federal-question appellate jurisdiction of the Supreme Court); *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597 (1960) (arbitration award subject to review although on limited grounds).

Justice Brandeis has stated:

The supremacy of law demands that there shall be opportunity to have some court decide whether an erroneous rule of law was applied; and whether the proceeding in which the facts were adjudicated were conducted regularly. To that extent, the person asserting a right, whatever its source, should be entitled to the independent judgment of a court on the ultimate question of constitutionality. But the supremacy of law does not demand that the correctness of every finding of fact to which the rule of law is to be applied shall be subject to review by a court. . . . The Constitution contains no such demand.

St. Joseph Stock Yards Co. v. United States, 298 U.S. 38, 84 (1936) (concurring opinion). *See also Force*, *supra* note 36, at 129-31.

Congress to authorize magistrates to exercise adjudicatory functions should not affront the doctrine of separation of powers,⁴⁵ at least so long as ultimate judicial power is reserved to judges by providing for review of the magistrate's findings by the district or circuit court.⁴⁶

Besides establishing the judicial branch of government in conformity with the doctrine of separation of powers, article III evinces a procedural dimension as a standard for due process which may have particular relevance in habeas corpus proceedings.⁴⁷ Although the Supreme Court in *Wedding* intentionally withheld decision on any constitutional questions,⁴⁸ it intimated that certain procedural rights may be associated with article III in habeas corpus proceedings.⁴⁹

45. Use of magistrates to perform judicial functions is not wholly inimical to the accomplishment of one of the results of the doctrine of separation of powers, the creation of a class of disinterested arbiters. By securing judges in their positions and salaries for life, the Constitution places them beyond the control that the executive or legislative branches could exercise if judges were elected, subject to reappointment to specified terms by elected officials, or susceptible to financial pressures. See notes 34, 37 *supra*. Some protection against these pressures also is afforded to magistrates by statute. Although appointed only for terms of eight years rather than having life tenure, 28 U.S.C. § 631(e) (1970), appointment and removal of magistrates is performed by the district judges, not by a legislature or the electorate. *Id.* §§ 631(a), (h). Some protection against financial pressure is given despite the fact that the range of salaries is determined by Congress, *id.* § 634(a); section 633(c) of the Act gives the judiciary effective control over magistrate salaries by allowing only the Judicial Conference of the United States, upon recommendation of the Director of the Federal Judicial Center, to alter salaries already set. Furthermore, the salary of an individual magistrate cannot be reduced during the term of his appointment. *Id.* § 634(b).

The Magistrates Act requires all magistrates to be attorneys unless it is impossible for the district court to find an attorney to fill a particular position. *Id.* § 631(b)(1). Under the commissioner system almost one-third of the over 700 commissioners were nonlawyers; in creating the new position of magistrate with its greater attendant responsibilities, Congress recognized that such officers would have to apply sophisticated rules of constitutional law and determined that members of the bar are more capable of meeting such demands. House Report, *supra* note 23, at 13. Magistrates are bound by the oaths of justices and judges as prescribed by section 453 of the Judicial Code, 28 U.S.C. §§ 453, 631(f) (1970).

46. In *Crowell v. Benson*, 285 U.S. 22, 51 (1932), the Court noted: "[T]here is no requirement that, in order to maintain the essential attributes of the judicial power, all determinations of fact in constitutional courts shall be made by judges." Indeed, one commentator has stated: "[E]specially in view of the absence of any right to jury trial in such cases, I think Congress could create an administrative agency to process all state prisoner habeas corpus applications, at least so long as judicial review is available." Shapiro, *supra* note 36, at 365 (footnote omitted). But see Note, *The Validity of United States Magistrates' Criminal Jurisdiction*, 60 VA. L. REV. 697, 702 (1974).

47. See Force, *supra* note 36, at 90-93, 119-128. See also *TPO, Inc. v. McMillen*, 460 F.2d 348, 354 n.37 (1972).

48. 94 S. Ct. at 2847 n.4.

49. The language which the Court used to deny any expression of opinion on the constitu-

First, the Court relied heavily upon the rationale of *Holiday v. Johnston*⁵⁰ in which the Court had disallowed habeas factfinding by commissioners because the controlling statute required a "court, justice, or judge" to hear and determine evidence.⁵¹ Although concluding that the statute by itself granted to prisoners the right of testifying before a judge rather than a master or commissioner,⁵² the reasoning in *Holiday* indicates that such a right also may be accorded to prisoners by the Constitution. In *Wedding* the Court declined to infer that a change in the habeas corpus procedure statute from "court, justice, or judge" to "court" had expanded the language so as to include magistrates.⁵³ Since magistrates were not deemed within the meaning of the term "courts" for purposes of statutory construction, it can be argued that they would not be within the term "inferior Courts" as provided in article III for purposes of constitutional construction. Thus under the constitution, also, a prisoner could have the procedural right to testify before a judge.

Moreover, the Court in *Wedding* emphasized the crucial role of factfinding in habeas corpus proceedings, asserting: "More often than not, claims of unconstitutional detention turn upon the resolution of contested issues of fact."⁵⁴ The Court further stated that "[o]ne of the essential elements of the determination of the crucial facts is the weighing and appraising of the testimony."⁵⁵ It concluded that merely listening to recordings of testimony would not be "in the light of the purpose and object of the proceeding, the equivalent of the judge's own exercise of the function of the trier of the facts."⁵⁶ This reasoning suggests a need for an article III

tional issue is in itself an indication of the Court's feeling: "We indicate no views as to the validity of investing [authority to hold evidentiary hearings] in a magistrate or other officer 'outside the pale of Article III of the Constitution.'" 94 S. Ct. at 2847 n.4, quoting *Wedding v. Wingo*, 483 F.2d 1131, 1133 n.1 (6th Cir. 1973). By so readily placing magistrates "outside the pale" of Article III, the Court may have displayed a willingness to declare any delegation of judicial authority to them unconstitutional.

50. 313 U.S. 342 (1941).

51. The habeas proceeding in *Holiday* was governed by the Act of June 28, 1874, ch. 13, § 761, 18 Stat. 142 (Rev. Stat. § 761), the predecessor of the section, 28 U.S.C. § 2243 (1970), which the *Wedding* decision found inconsistent with the Magistrates Act. See notes 16-22 *supra* & accompanying text.

52. 313 U.S. at 352, 354.

53. See note 17 *supra* & accompanying text.

54. 94 S. Ct. at 2847.

55. *Id.* at 2850, quoting *Holiday v. Johnston*, 313 U.S. 342, 352 (1941).

56. 94 S. Ct. at 2850, quoting *Holiday v. Johnston*, 313 U.S. 342, 352 (1941).

judge to conduct a postconviction hearing in order for him to see and hear⁵⁷ the witnesses to provide due process to the petitioner.⁵⁸

Nevertheless, designing a constitutional procedure which will permit magistrates to conduct evidentiary hearings in habeas corpus proceedings may be possible. One such procedure would be to provide de novo hearings in the district court of any finding of fact to which objection is taken by a petitioner. Such a procedure was held constitutionally valid by the Court of Appeals for the Eighth Circuit in *Noorlander v. Ciccone*,⁵⁹ although rejected by the Supreme Court

57. The Court more precisely asserted the "see and hear" doctrine in *United States v. Yellow Cab Co.*, 338 U.S. 338, 341 (1949), where it stated: "Findings as to the design, motive and intent with which men act depend peculiarly upon the credit given those witnesses by those who see and hear them." Such a principle also may lie at the root of rule 52(a) of the Federal Rules of Civil Procedure, which provides in pertinent part: "Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses." FED. R. CIV. P. 52(a). In *Borden Co. v. Clearfield Cheese Co.*, 369 F.2d 96, 101 (3rd Cir. 1966), quoting *Steiner v. Mitchell*, 215 F.2d 171, 175 (6th Cir. 1954), the court reviewed a patent infringement decision, stating: "Since the evidence here is all documentary . . . 'the findings of the District Court are deprived of the degree of finality which would otherwise attach under Rule 52.'" *Accord*, *Harris v. United States*, 370 F.2d 887, 894 (4th Cir. 1966); *Falkenberg v. Golding*, 195 F.2d 482, 486 (7th Cir. 1971). *But see* 5A J. MOORE, FEDERAL PRACTICE ¶ 52.04 (2d ed. 1974). Rule 52(a) concerns only appeals within article III courts, but its recognition of the importance that is placed on demeanor evidence in the factfinding process suggests that due process rights may be infringed when such evidence is taken by a nonarticle III judge in adjudicating primary individual freedoms. *Cf. Glidden Co. v. Zdanok*, 370 U.S. 530, 604-06 (1962) (Douglas, J., dissenting).

58. Procedural due process rights may be enforced more stringently in proceedings affecting bodily freedom than in proceedings affecting strictly pecuniary interests; in *Fay v. Noia*, 372 U.S. 391, 398-99, 426-34 (1963), the Supreme Court strongly implied that habeas corpus may be an inviolable constitutional right which could not be diminished by statutes. *But see Collings, Habeas Corpus for Convicts—Constitutional Right or Legislative Grace?*, 40 CALIF. L. REV. 335 (1952). The constitutional basis for the writ of habeas corpus is not the Bill of Rights, but article I in which the power is denied to Congress to suspend the writ except in cases of rebellion or invasion when the public safety may require such a suspension. U.S. CONST. art. I, § 9.

Possibly underlying the *Wedding* reasoning is the recognition that if an action "is to be managed with sensitivity both to the plaintiff's reasonable demands and to the defendants' responsibilities, the district judge must keep close to the heart of litigation. Delegations of discrete chores to a magistrate must not be permitted to cause the judge to lose the feel of the pulse of the proceedings." *Yaffee v. Powers*, 454 F.2d 1362, 1367 (1st Cir. 1972).

A rule proposed by a committee of the Judicial Conference of the United States, however, would permit district courts to authorize magistrates to conduct evidentiary hearings in habeas matters, subject only to the limitation that the magistrates not be able to issue an order disposing of a petition. *See* Committee on Rules of Practice and Procedure, Judicial Conference of the United States, Preliminary Draft of Proposed Rules Governing Habeas Corpus Proceedings for the United States District Courts, Rule 11 (January 31, 1973).

59. 489 F.2d 642 (8th Cir. 1973).

in *Wedding* on the same statutory grounds which invalidated the *Wedding* district court rule.⁶⁰ The court of appeals in *Noorlander* did not articulate a two-dimensional characterization of article III, but concluded that so long as the due process right to a hearing before an article III judge ultimately was protected, a local rule providing trial de novo would withstand an attack premised upon an assertion of improper delegation of powers.⁶¹

The court of appeals essentially had laid the groundwork for this confrontation in *Bridwell v. Ciccone*,⁶² wherein it reviewed a local rule, noting: "We understand the rule to provide each petitioner with the right to a de novo evidentiary hearing by a District Court judge in every case in which a timely objection is taken to a finding on a material issue of fact. It, thus, insures that the ultimate decision in every case will be made by the District Court judge."⁶³ The procedure was outlined further in *Noorlander*:

A petitioner is always entitled to take exceptions to material issues of fact and conclusions of law. If he takes exception to the former, an Article III judge will personally take the testimony of the witnesses, determine their credibility and decide for himself what the facts are. If the exceptions are only as to the conclusions to be drawn from undisputed material facts, the judge will again decide for himself what the proper procedure is.⁶⁴

The *Noorlander* court recognized the right of a petitioner to have his hearing conducted by an article III judge in a trial de novo, preserving the "see and hear" principle of decisionmaking.⁶⁵ If the right to have the judge see and hear the proceeding was not demanded ini-

60. 94 S. Ct. at 2849 n.19.

61. 489 F.2d at 648.

62. 490 F.2d 310 (8th Cir. 1973). *Bridwell* was decided on Dec. 11, 1973, *id.* at 310; *Noorlander*, on Dec. 27, 1973, 489 F.2d at 642.

63. *Id.* at 314.

64. *Id.* at 648. The *Noorlander* rule is similar to a delegation of function upheld by the Supreme Court in *Ex Parte Peterson*, 253 U.S. 300 (1920), in which a district judge had appointed an auditor to conduct a preliminary investigation as to the facts of a case, listen to witnesses, and file a report. Upholding the procedure despite an argument that it worked a deprivation of the seventh amendment right to jury trial, the Court noted that the delegation was not absolute, but qualified to preserve ultimate decisionmaking power in the jury: "The report will, unless rejected by the court, be admitted at the jury as evidence of facts and findings embodied therein; but it will be treated, at most, as prima facie evidence thereof. The parties remain as free to call, examine, and cross-examine witnesses as if the report had not been made." *Id.* at 310-11.

65. See note 57 *supra* & accompanying text.

tially by the petitioner, it was protected, nonetheless, because a hearing before the judge still could be obtained after the magistrate's hearing. The court made this point explicit by asserting that the right to a trial de novo was unqualified and by striking down the local rule provision which dictated to the contrary.⁶⁶

Even if Congress acted to overcome the statutory grounds for invalidation of magistrate hearings in postconviction cases, a trial de novo system might be inadequate to unclog judicial machinery. Although the court in *Noorlander* contended that the local rule provided "a convenient, quick and efficient method of sorting out the legal and factual issues,"⁶⁷ the rule in fact may add yet another delay before final adjudication, since the prisoner would be likely to appeal any adverse factual decision by a magistrate.⁶⁸ Further, the hearing before the magistrate could become a testing ground for the petitioner, wherein defenses and tactics could be refined in preparation for the "real" confrontation before the district judge. As an answer to the problem of crowded dockets, the *Noorlander* method of trial de novo therefore would seem ineffective.

A more appropriate solution would be a system of consensual reference to magistrates for evidentiary hearings⁶⁹ following waiver by the petitioner of the procedural rights associated with the use of an article III judge.⁷⁰ Evidentiary hearings held upon consensual reference could protect the rights of the petitioner in habeas corpus proceedings as well as expedite the judicial process. To allow additional safeguards for both the petitioner and the integrity of the judicial system, the consent of the district court and the governmen-

66. In discussing Western District of Missouri Rule 26(a), the court stated: "It provides for a de novo review whenever a timely exception to a material fact is made 'unless the district judge directs otherwise' and for an evidentiary hearing 'when appropriate or required by law.' These limitations impose impermissible conditions on the right to a de novo review, and to an evidentiary hearing before the district court to resolve disputed material factual questions." 489 F.2d at 649.

67. *Id.* at 648.

68. See *Developments in the Law—Federal Habeas Corpus*, 83 HARV. L. REV. 1038, 1189 n.230 (1970).

69. Only very recently have questions arisen as to the constitutionality of consensual reference. Much of this criticism has resulted from a reaction to the inadequate qualifications of masters and commissioners (a deficiency remedied by the Federal Magistrates Act) and from a misinterpretation of the development of consensual reference. For a discussion in support of consensual reference, see Comment, *An Adjudicative Role for Federal Magistrates in Civil Cases*, 40 U. CHI. L. REV. 584 (1973); *Senate Hearings*, *supra* note 26, at 251-53.

70. See notes 47-58 *supra* & accompanying text.

tal defendant also could be required.⁷¹ Support for the use of a system of consensual reference exists in early master law. Justice Field, in 1889, wrote:

[W]hen the parties consent to the reference of a case to a master or other officer to hear and decide all the issues therein, and report his findings, both of fact and of law, and such reference is entered as a rule of the court, the master is clothed with very different powers from those which he exercises upon ordinary references, without such consent A reference by consent of parties, of an entire case for the determination of all its issues . . . is a submission of the controversy to a tribunal of the parties' own selection, to be governed in its conduct by the ordinary rules applicable to the administration of justice in tribunals established by law.⁷²

Consensual reference is also in harmony with the procedural structure and policy objectives of the Magistrates Act. The subcommittee memorandum which accompanied the Act stated that "[t]he use of magistrates for duties that do not require the employment of an article III judge, or *in cases in which the parties consent to the use of a magistrate*, may do much to increase the efficiency of the Federal Courts."⁷³ Support for the incorporation of a system of consensual reference into the Act likewise can be found within the Act itself in section 636(a)(3), which gives the magistrate the power to conduct trials of minor offenses under section 3401(a) of the federal criminal code.⁷⁴ Section 3401(b) provides that after careful explanation by the magistrate of the right to trial by judge and jury, a petitioner, by signing a written consent to trial by a magistrate, may waive "both a trial before a judge of the district court and any right to trial by jury that he may have."⁷⁵ If a magistrate can make the ultimate decision in misdemeanor cases within the Constitution, surely magistrates also can hold evidentiary hear-

71. The reasons for requiring such consent are two-fold. First, when the dockets are not crowded, the desire to prevent forum-shopping abuses, which could delay proceedings, might cause the Government and the district court to disfavor reference. Second, requiring the court's consent for reference would assure responsible article III supervision over the reference system to prevent governmental abuses, such as the exaction of uninformed waiver from petitioners.

72. *Kimberly v. Arms*, 129 U.S. 512, 524 (1889).

73. *Senate Hearings*, *supra* note 26, at 14 (emphasis supplied).

74. 18 U.S.C. § 3401(a) (1970).

75. *Id.* § 3401(b).

ings to make recommendations to the ultimate decisionmaker under a system of consensual reference. Although Congress may not wish to go so far as to abandon the requirement that a judge ultimately decide the freedom of an imprisoned individual, it should be able to provide a method of consensual reference for evidentiary hearings.⁷⁶

Inherent in a system of consensual reference is a flexibility that would facilitate efficient processing of habeas corpus petitions. When court dockets are not overburdened, a petitioner likely would come before the district judge, since no reason would exist for referral. Should the docket be crowded, however, the judge and prosecutor could afford the petitioner the opportunity to have a magistrate conduct the hearing. The inducement for the petitioner to consent is that, in the context of a crowded district court docket, the magistrate's hearing would present an earlier chance for freedom. By this method of waiver and consent, no party would be denied the right to come before an article III judge, yet judicial processing of habeas petitions could be expedited.

CONCLUSION

Because the attempt to permit magistrates to conduct habeas corpus evidentiary proceedings was deficient statutorily, the Supreme Court in *Wingo v. Wedding* reserved consideration of constitutional issues, although intimating that such issues might be pres-

76. To adopt a system of consensual reference, Congress should grant explicitly to magistrates the function of holding evidentiary hearings by consensual reference in section 636(a) of the Magistrates Act. This direct delegation under section 636(a) would be more advantageous than amending section 636(b) to treat habeas corpus functions as additional duties. As an additional duty assigned by a judge, the holding of evidentiary hearings might take on the appearance of a judicial abdication of power, rather than being recognized as a specific establishment of a judicial function in magistrates by Congress.

Section 2243 of the Judicial Code, *id.* § 2243, also would have to be amended; it stands as an impediment to any attempt to establish a system of consensual reference following the interpretation given to the term "court" in the *Wedding* decision. See notes 16-19 *supra* & accompanying text. To allow magistrates to hold evidentiary hearings, the last sentence of section 2243 should be amended to read: "The court or magistrate shall summarily hear and determine the facts, and the court shall dispose of the matter as law and justice require." Should Congress deem initial dispositions of habeas corpus petitions appropriate for magistrates upon consensual reference, more extensive changes would be needed in the entire section 2243, but the last sentence would establish conclusively that the function could be handled by magistrates if it read as follows: "The court or magistrate shall summarily hear and determine the facts and dispose of the matter as law and justice require." In addition, a statement that the procedure should comply with the consensual reference system of section 636(a) should be included to preclude statutory inconsistency.

ent. Delegation of the factfinding function to magistrates should not be deemed violative of the doctrine of separation of powers, however, once judicial function is distinguished from judicial power. Moreover, although the *Wedding* reasoning suggests the existence of procedural rights associated with article III, Congress can devise a procedure for consensual reference to magistrates upon waiver of those procedural rights. The *Noorlander* solution arguably avoided unconstitutionality through a trial de novo procedure, but such a solution most likely would fail to relieve the district courts of the burden which the local rule provision was designed to overcome. A system of consensual reference would offer a habeas corpus petition procedure that is both constitutional and expedient.