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TPO INC. v. McMILLEN: THE FEDERAL MAGISTRATE
AND THE EXERCISE OF JUDICIAL POWER

INTRODUCTION

A corollary to the concept of separation of power in our federal system of government is the principle that judicial power should be exercised by an independent judiciary. Since such power may have its genesis either in article I or article III of the Constitution, it is necessary, from a constitutional standpoint, to recognize the derivative source of power exercised by officials acting in a judicial capacity. Moreover, the question remains whether the exercise of this power is limited to those officials who qualify under the standards established by either article.

This note will examine the new Federal Magistrate Act in regard to the issue of the exclusive exercise of judicial power. The recent seventh circuit decision of TPO Inc. v. McMillen affirms the exercise of the adjudicating function of a federal district judge, and limits the application of the Federal Magistrate Act by holding that it is not an implemental instrument for the abdication of that function by the district court.

TPO CASE

TPO was a corporate defendant in a case pending before the district court. During the course of that proceeding, TPO filed a motion to dismiss for failure to state a claim upon which relief could be granted. Since affidavits were attached, however, the court treated the motion as one for summary judgment. At a status report hearing, plaintiff's counsel expressed concern over the slow pace of the pretrial proceedings and pressed for a spring trial date, since his client was of advanced age and in ill health. The district court judge noted that the hearing of motions was delayed and issued a reference order to a magistrate, pursuant to the district court rule and Magistrate

1 In O'Donoghue v. United States, 289 U.S. 516, at 530 (1933) the Court said:

The Constitution, in distributing the powers of government, creates three distinct and separate departments — the legislative, the executive, and the judicial. This separation is not merely a matter of convenience or governmental mechanism. Its object is basic and vital, namely, . . . to preclude a commingling of these essentially different powers of government in the same hands.


3 U.S. Const. art. I and art. III.


4 TPO v. McMillen, 460 F.2d 348 (7th Cir. 1972).
At the time the reference order was entered, no other motion or contested matter was pending in the case. TPO moved to vacate the reference order arguing that the magistrate was without power to rule on a motion to dismiss. The district court denied the motion, and pursuant to the reference order, the magistrate denied TPO's motion to dismiss. TPO then sought to have the appeals court issue a writ of mandamus to expunge the order assigning the motion to the magistrate.

The questioning of the federal magistrate's power raised two vital issues: first, whether a federal district court judge could constitutionally delegate power to a magistrate for the purpose of ruling upon either a motion to dismiss or for summary judgment; and, secondly, whether the magistrate had the jurisdiction to exercise this delegated power. The court in TPO held that the district court judge lacked the power to delegate such duties to a magistrate, and that the magistrate was not empowered to exercise ultimate adjudicating or decision making power.

CONSTITUTIONAL ISSUE — Glidden v. Zdanok

A constitutional limitation on the exercise of judicial power by officials acting in a judicial capacity must be dependent upon the source of the judicial power being exercised. Article III provides that Justices of the Supreme Court and judges of the

5 28 U.S.C. §636(b) (1968) which 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.

The District Court for the Northern District of Illinois has adopted these "Magistrate Rules":
1 (c) The magistrate shall perform the following additional duties upon direction of a Judge approved by order of the Executive Committee.

(b) assist Judges in conducting pre-trial proceedings in a civil case.

2(2) (b) An appeal from a judicial order entered by a Magistrate shall be filed within twenty (20) days with the Judge who referred the matter to a Magistrate.

6 Note 4 supra at 350.
7 TPO v. McMillen, 460 F.2d 348 at 359 (1972). Quoting the Court in
inferior courts retain their positions at an undiminished salary during good behavior. However, while article III constitutes the apparent source of judicial power, the Supreme Court had quite early recognized that authority to act in a judicial capacity could be found in sources existing outside that provision. In American Insurance Co. v. Canter, for example, the question presented to the Court concerned the jurisdiction of a Florida territorial court over matters of admiralty. Adjudication of the case was conducted by judges who served only four-year terms, thus not complying with the constitutional mandate of article III. In sustaining the territorial court's power to hear admiralty matters, Chief Justice John Marshall stated:

These courts, then, are not constitutional courts, in which the judicial power conferred by the constitution on the general government, can be deposited . . . . They are legislative courts, created in virtue of the general right of sovereignty which exists in the government . . . . The jurisdiction with which they are invested, is not a part of that judicial power which is defined in the 3d article of the constitution, but is conferred by congress, in the execution of those general powers which that body possesses over the territories of the United States.

Through this pronouncement, future courts began to distinguish between legislative and constitutional courts.

The Supreme Court in Glidden Co. v. Zdanok interpreted and discussed the dichotomy between legislative and constitutional courts.

LaBuy v. Howes Leather Co., 382 U.S. 249 at 256 (1957), this analogy was drawn: "We find that the order of reference here was lacking in power and, amounted to little less than an abdication of the judicial function depriving the parties of a trial before the court on the basic issues involved in the litigation."

8 U.S. CONST. art. III §1. Constitutionally the judicial power of the federal government is vested in "[o]ne supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." Further, Judges of the Supreme Court and inferior courts established in light of this provision should retain their position at an undiminished salary during good behavior.

9 American Insurance Company et al. v. Canter, 26 U.S. (1 Pet.) 511. The source of authority was the U.S. CONST. art. I §8: "To constitute Tribunals inferior to the supreme Court."

10 26 U.S. (1 Pet.) 511.
11 Id. at 545.
12 The basis of the distinction is the expanded function which could be performed by legislative courts, such as the giving of advisory opinions, prohibited to article III courts. See Keller v. Potomac Electric Co., 261 U.S. 428, Kendall v. United States, 12 Pet. 524, City of Panama, 101 U.S. 453, Clinton v. Engleheckt, 13 Wall. 784, McAllister v. United States, 141 U.S. 174. In 1 OHLINGER FEDERAL PRACTICE §1, the author quotes from Downs v. Bidwell, 182 U.S. 244 (1901), wherein the court stated:

The power of congress to create courts is dependent upon the existence of the constitution. The question then is was there an applicable provision from which the power exercised by congress could be shown to be operative. The question of an existing power source is not limited to the judiciary.

constitutional courts. Two cases were presented to the Glidden Court, both concerning the constitutional exercise of judicial power by judges of the Court of Customs and Patent Appeals and of the Court of Claims. In accordance with 28 U.S.C. §293(a), a judge of the Court of Claims was designated to sit upon a circuit court appellate panel. Similarly, under 28 U.S.C. §294(d), a retired judge of the Court of Customs and Patent Appeals was assigned to sit as a district court judge. The petitioners in both cases challenged the appointment alleging that they were denied the protection of adjudication by independent judges of article III status, notably paralleling the contention of the petitioner in TPO regarding the magistrate's exercise of judicial power.\textsuperscript{14} The petitioners relied upon the Supreme Court's decisions in Ex parte Bakelite Corp.\textsuperscript{15} and Williams v. United States,\textsuperscript{16} wherein the Court had held that neither the Court of Claims nor the Court of Customs and Patent Appeals were to be considered article III courts. The Glidden Court reversed both Williams and Bakelite and held that both the Court of Claims and the Court of Customs and Patent Appeals were article III courts, observing:

The distinction referred to in those cases between 'constitutional' and 'legislative' courts has been productive of much confusion and controversy. Because of the highly theoretical nature of the problem in its present context we would be well advised to decide these cases on narrower grounds if any are fairly available. ...\textsuperscript{17}

The confusion and controversy referred to by Glidden proceeded from two sources: the article III limitation on the exercise of judicial power to "cases and controversies,"\textsuperscript{18} while legislative courts had never been limited by this mandate in exercising judicial power; and, the uncertainty in determining the true status of a particular court as evidenced by the reasoning in Bakelite, Williams, and O'Donoghue v. United States.\textsuperscript{19}

This uncertainty was present in TPO where, although the status of the official was known to the Court, the effect of that status upon his exercise of power was yet to be determined.

In both Bakelite and Williams, the Court rested its decision on the fact that neither the Court of Customs and Patent Appeals nor the Court of Claims included in its jurisdiction any-

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\textsuperscript{14} Note 4 supra.
\textsuperscript{15} 279 U.S. 438 (1929).
\textsuperscript{16} 289 U.S. 553 (1933).
\textsuperscript{17} Note 13 at 534, supra.
\textsuperscript{18} Ex parte Bakelite Corp., 279 U.S. 438 at 445 (1929); note 16 at 549 supra. See 1 OHLINGER FEDERAL PRACTICE §1 citing Kansas v. Colorado, 206 U.S. 46 (1907) where it was said of judicial power: "it may be observed that the judicial power of a nation extends to all controversies justiciable in their nature, the parties to which or the property involved in which may be reached by judicial process."
\textsuperscript{19} 289 U.S. 516 (1933). See p. 168 infra.
thing which "inherently or necessarily required judicial determination." Bakelite attempted to distinguish between legislative matters involving mere judicial interpretations and those involving judicial controversies. In Williams, the Court recognized that judicial power was being exercised by legislative courts, although not the judicial power envisioned by article III.

In O'Donoghue v. United States, decided the same day as Williams, the issue was whether the judges of the superior courts of the District of Columbia were of article III or article I stature. The O'Donoghue Court held that those courts were article III despite their exercise of functions prohibited to other article III courts. The O'Donoghue Court justified its decision by concluding that the existence of judicial power in the courts of the District of Columbia was derived from both article III and article I of the United States Constitution.

Both Bakelite and Williams were criticized in the voluminous commentaries following their decisions for creating the theoretical confusion which then caused the Glidden Court to re-examine this area of the law, the heart of which was the true effect of designating a court as legislative or constitutional.

Glidden's Answer to Legislative-Constitutional Dilemma

Presented with this legislative-constitutional enigma, the

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20 Note 13 supra at 549. Both courts could have been legislative courts and were treated as such.
21 Note 13 supra at 548 quoting Bakelite: "Legislative courts also may be created as special tribunals to examine and determine various matters, arising between the government and others which from their nature do not require determination and yet are susceptible of it."
22 Note 16 supra at 567, 571, 578. In addition the Williams court reached a curious conclusion in interpreting the clause "controversies to which the United States shall be a party," U.S. CONST. art. III §1. The court examined the historical context of the constitutional enactment noting that sovereign immunity was the then accepted doctrine. Basing its decision upon the historical context of the provision and the failure of the drafters to include the word all as a prefix to the phrase "controversies involving the United States," the court concluded that it was intended that suits where the United States was a party defendant, being dependent upon statute, were outside the scope of the court's jurisdiction. But cf. Brown, The Rent in our Judicial Armor, 10 C.W.L. REV. 127 (1941).
23 289 U.S. 516 (1933).
24 Id. at 540. The court concluded that because Congress could exercise power over the district courts under article III of the Constitution, those courts could exercise the powers of legislative courts. See Keller v. Potomac Electric Co., 261 U.S. 428 (1923).
25 Id.
27 The Judicial Power of Federal Tribunals Not Organized Under Article Three, 34 COLUM. L. REV. 746, 760-61 (1934): From this evidence it may be concluded that if a tribunal exercises jurisdiction that might validly be given to a court, whether or not or-
Glidden Court, in view of three possible alternatives, rendered its decision. First, the Court could have denied article III status to the courts in question on the ground that they exercised non-judicial functions. Secondly, it could have granted article III status, based upon the predominant judicial characteristics of the courts, and reserve judgment on the validity of the non-judicial functions. Finally, the Court could have held those non-judicial functions to be void, thus recognizing those remaining functions as constitutionally compatible with article III. The majority of the Glidden Court chose the second of the three alternatives.

Glidden emphasized the faulty premises existing in both Bakelite and Williams and refused to follow their expansive use of the term, legislative courts. Moreover, the Court noted, referring to Justice Marshall's opinion in the Canter case, that legislative courts denoted territorial courts or their equivalent, and that subsequent decisions rested upon practical considerations of proper judicial administration during transitory periods. The Court then referred to a statement made by Justice Curtiss in Murray's Lessee v. Hoboken Land Improvement Co.:

[T]here are matters, involving public rights, which may be presented in such form that the judicial power is capable of acting on them, and which are susceptible of judicial determination, but which congress may not bring within the cognizance of the courts of the United States, as it may deem proper.

Although Bakelite had adopted this statement to imply that any court created for such a purpose should be classified as legislative, Glidden rejected this interpretation and reasoned that

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28 Note 12 supra for case on non-judicial duties.
29 Note 13 supra at 583.
31 See note 13 supra at 547. Referring to the historical background of the Canter decision (the growth of the nation through the expansion of the territory) the court said:

Justice Marshall chose neither course (rejection of an application of tenure provision); conscious as ever of his responsibility to see the Constitution work, he recognized a greater flexibility in Congress to deal with problems arising outside the normal context of a federal system.
32 69 U.S. (18 How.) 272 (1855).
33 Id. at 284.
if Congress could create a court for a special purpose, it did not necessarily follow that such court must be legislative rather than of article III stature, especially if mandatory safeguards were provided.\textsuperscript{34}

After further examination of the jurisdictional aspects of both the Court of Claims and the Court of Customs and Patent Appeals, \textit{Glidden} made allowances for those aspects of the jurisdiction which were of a non-article III nature,\textsuperscript{35} holding:

\begin{quote}
[\textit{W}hether a tribunal is to be recognized as one created under Article III depends basically upon whether its establishing legislation complies with the limitations of that article; whether, in other words, its business is the federal business there specified and its judges and judgments are allowed the independence there expressly or impliedly made requisite.\textsuperscript{36}
\end{quote}

The true effect of the \textit{Glidden} case has been difficult to ascertain. One authority states rather categorically that the decision nullifies the distinction between legislative and constitutional courts.\textsuperscript{37} This statement may have validity when faced with a concrete implementation by Congress of the requisites prescribed by the \textit{Glidden} rule; however, the difficulty arises in those vague cases where the \textit{Glidden} requisites have not been met. Also, the propriety of exercising judicial power over “federal business” within the article III limitation is open to extensive subjective interpretation.\textsuperscript{38} \textit{Glidden}, however, should not be interpreted as abrogating the distinctions between the constitutional sources of judicial power of a judicial official.\textsuperscript{39} Justice Douglas emphasized this point in his dissent when he stated:

\begin{quote}
\textit{...in this regard consider Justice Brandeis’ statement in Tutun v. United States, 270 U.S. 568, 576-77 (1925): Whether a proceeding which results in a grant is a judicial one, does not depend upon the nature of things granted, but upon the nature of the proceedings which Congress has provided for securing the grant ... Whenever the law provides a remedy enforceable in the courts according to regular course of legal procedure, and that remedy is pursued, there arises a case within the meaning of the Constitution whether the subject of the litigation be property or status.\textsuperscript{31}}
\end{quote}

\textsuperscript{34} Note 13 at 551 \textit{supra}. See \textit{Restrictive Effect of Article Three on the Organization of Federal Courts}, 34 \textit{COLUM. L. REV.} 344, 345 (1934).
\textsuperscript{35} The specific area of concern were matters heard by the Court of Claims and Customs and Patents on referral from Congress. But see McDermott, \textit{The Court of Claims: The Nation’s Conscience}, 57 \textit{A.B.A.J.} 594 (1971). After the \textit{Glidden} case, Congress attempted to grant the Court of Claims reference jurisdiction under limited situations. The Justice Department rejected the statute on constitutional grounds. Ultimately reference was to be made to a commissioner of non-article III status. See also Kipp, \textit{A Unique National Court: The United States Court of Claims}, 53 \textit{A.B.A.J.} 1025 (1967).
\textsuperscript{36} Note 13 \textit{supra} at 552.
\textsuperscript{37} 1 \textit{OHLLINGER FEDERAL PRACTICE} §2.
\textsuperscript{38} In Chandler v. Judicial Council, 398 U.S. 74, 111, 143 (1969), the constitutional issue raised by the petitioner was never passed upon by the Court. However, both the concurring and dissenting opinions felt that the issue should have been answered. The petitioner sought a writ of prohibition against action taken by the Judicial Council violating his status as an independent article III judge. Justice Harlan relying upon his decision in
The judicial function exercised by article III courts cannot be performed by congress nor delegated to agencies under its supervision and control.40

If the judicial power exercised by article III courts cannot be performed by non-article III justices and the tribunal in question has not met the test applied in Glidden, what role can a tribunal of that nature effectively perform within the federal judicial system? At the heart of the Federal Magistrate Act is this very question.

**FEDERAL MAGISTRATE ACT**

The Federal Magistrate Act was passed in response to a necessary “upgrading” of the federal judicial system below the level of the district courts.41 Although the statute achieved the goal of elevating the status of the magistrate's office,42 the TPO

Glidden stated:

If I am correct in concluding that Congress’ purpose in 1939 in creating the Judicial Councils was to rest in them, as an arm of Article III judiciary, supervisory powers over the disposition of business in the district courts, that purpose is not undone by a subsequent congressional attempt to give them a minor non-judicial task; it would be perverse to make the status of [the Councils] turn upon so miniscule a portion of their purported functions.

Justice Black dissented, stating: “I fear that unless the action taken by the Judicial Council in the case is in some way repudiated, the hope for an independent judiciary will be proved to have been no more than an evanescent dream.” See also United States v. Allocco, 305 F.2d 704 (1962).

Prior to the enactment of the statute, many of the functions currently carried out by the magistrates were performed by federal commissioners. This commissioner system had been part of the federal judiciary from its very inception, exercising a relatively confined role except in the area of criminal law. However, the commissioner's role increased. Its growth was marked with uncertainty as to the full extent of judicial power to be exercised by the commissioner. Hearings on S. 945 before the Subcomm. on Improvements in Judiciary Machinery of the Senate Comm. on the Judiciary, 90th Cong., 1st Sess., at 199 (1967). Peterson, The Federal Magistrate Act: A New Dimension in the Implementation of Justice, 56 Ia. L. Rev. 62 (1970); Moore, Commentary on the U.S. Judicial Code at 39, 45 (1949).

The commissioner system was marked with many shortcomings. The commissioners themselves were not required to hold law degrees although they might be called upon to render decisions involving complex legal matters. The jurisdiction of the commissioner was limited. The commissioner's salary was based upon fee collections which raised constitutional issues. In Tumey v. Ohio, 273 U.S. 510 (1927), the Court held that the fee system by which a mayor collected fees for his office while acting as a magistrate, based on convictions only was violative of a defendant’s due process rights. The pecuniary interest in the outcome of the decision was too great. To examine the commissioner power prior to the statute enactment see United States v. Hughes, 70 F.2d 972; Crump v. Anderson, 352 F.2d 249; United States v. Romaneo, 241 F. Supp. 933 (1965).

The following passage from the Senate subcommittee report explains the intended effect of upgrading the system:

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 the 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.
decision casts substantial doubt upon how effectively the Act has practically assisted the efficiency of the federal judicial system.

The most significant change effected by the passage of the Act, aside from the upgraded qualifications of the magistrate, was the magistrate's expanded criminal and civil jurisdiction. The magistrate's criminal jurisdiction in connection with minor offenses outside federal enclaves is of particular significance when considering the effect of the reference provision on the scope of his civil jurisdiction. In the criminal area, the hearing before the magistrate is by the consent of both the defendant and the government, and an appeal from the magistrate's decision to the district court is provided. In response to a constitutional challenge against this provision, a memorandum was prepared by a Senate subcommittee staff stat-
ing that the statute was not creating a constitutional court, nor was it allowing an exercise of article III adjudicating power by a magistrate, who was in effect a mere extension of the district court. Moreover, the safeguards specified in the provision, namely, the consent of both parties and the right of appeal, insured that the magistrate was acting under the umbrella of the district court.\textsuperscript{49} The constitutional issue regarding the magistrate's criminal jurisdiction is equally applicable\textsuperscript{50} to the magistrate's widely expanded civil jurisdiction,\textsuperscript{51} which was the fundamental question in \textit{TPO v. McMillen}.

\textbf{ANALYSIS — TPO}

The issue in \textit{TPO} was whether judicial power, pursuant to the Magistrate Act, was being exercised over federal business within the constitutional jurisdiction of article III. The \textit{TPO} court analyzed the question presented from two perspectives: first, by an examination of the legislative intent of the Act, and secondly, through analogies paralleling the reference provision with the court's judicial administrative policies and other related provisions of the Act.

The court, as earlier noted, recognized that the constitutional challenge connected with the magistrate's expanded role in the criminal area was equally applicable to the magistrate's civil jurisdiction. Both provisions of the Act had obviously expanded the supporting role of the magistrate to the point where the constitutional challenge was almost "inevitable." However, in the former, the court found that the legislators had emphasized the enactment of additional safeguarding legislation to insure that final disposition of the case would always remain in the hands of an article III judge.\textsuperscript{52} Recognizing that these safeguards were fundamentally lacking in cases within the magistrate's civil jurisdiction, the \textit{TPO} court declared that the reference provision was an unsuccessful legislative attempt to delegate non-delegable functions to the magistrate.\textsuperscript{53}

\textsuperscript{49} \textit{Id.} The umbrella refers to the safeguards noted in the Senate subcommittee memorandum. But cf. Representative Cahill's blistering attack upon the extension of the magistrates' criminal jurisdiction. \textit{U.S. Code Cong. \\ \& Ad. News} 90th Cong. 2d Sess. (1968) 4266-70.

\textsuperscript{50} Note 4 \textit{supra} at 354. \textit{See also} Harrison on \textsection 945, note 41 \textit{supra}. The subcommittee noted that in upgrading the commissioner system appointment could be made by district court judges. Senate approval and appointment by the President would be unwanted because there was no present intent to set up a lower tier of article III federal judges.

\textsuperscript{51} 28 U.S.C. \textsection 636 (b).

\textsuperscript{52} Note 49 \textit{supra}.

\textsuperscript{53} Note 4 at 335, \textit{supra}.
The court further supported its decision by an analogy to decisions in the field of judicial administration, specifically referring to the use of special masters\(^\text{54}\) in the federal courts. The special master functions as an instrument for the administration of justice\(^\text{55}\) assisting the court in complex factual cases such as antitrust, corporate reorganization, and infringement actions. The master will conduct hearings, render determinations, and refer the cause to the court to make the final adjudication. Under federal procedure reference to a special master is the exception rather than the rule.\(^\text{56}\)

In *LaBuy v. Howes Leather Co. Inc. et al*\(^\text{57}\) the Supreme Court considered the meaning of “exceptional circumstances” for “reference” purposes. The reference in *LaBuy* had been premised upon the judge’s crowded calendar, similar to the situation in *TPO* where pretrial motion hearings had been delayed. The *LaBuy* court had emphasized the fact that the adjudicating function was vested in the district court judge and should be abdicated only in the most limited situations; thus, a crowded calendar was held not to be an “exceptional circumstance”\(^\text{58}\) justifying a constitutional reference.\(^\text{59}\)

The court next turned to an examination of the legislative intent underlying the Act, particularly the reference provision. In examining the Senate hearings, the court found it most significant that there was only a minimal amount of discussion regarding the entire subject of the magistrate’s civil jurisdiction.\(^\text{60}\) The court then looked to the language of the reference provision. The preliminary draft of this section contained the following language:

\[
[D]istrict courts may assign . . . additional powers or duties as are not inconsistent with the Constitution and laws of the United States. Such additional powers and duties may include . . . (2) supervision of the conduct of any pretrial discovery proceedings.
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The final draft deleted the word “supervision” and substi-

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\(^\text{55}\) Id.

\(^\text{56}\) FED. R. CIV. P. 53.

\(^\text{57}\) 352 U.S. 249 (1956). The court considered the fact that the judge trying the case had heard matters of discovery and pretrial motions to dismiss, and had a good working knowledge of the antitrust field.

\(^\text{58}\) This term has been defined on an ad hoc basis. Note 54 *supra* at 445.

\(^\text{59}\) The *TPO* court cited further authority from the seventh circuit to support the hazy ruling. *See* Adventures in Good Eating Inc. v. Best Place To Eat Inc., 131 F.2d 809 (7th Cir. 1942). *In re Irving Austin Bldg. Corp.*, 100 F.2d 574 (7th Cir. 1938). *See also* Kaufman, *Masters in Federal Court: Rule 53*, 58 *COLUM. L. REV.* 452 (1958).

\(^\text{60}\) Note 4 at 355, *supra*.

\(^\text{61}\) Id. (emphasis added).
TPO v. McMillen

The TPO court recognized this omission as a significant change, since the prior draft had implied a delegation of power too broad in scope to be exercised by a magistrate. The substitution of the word “assistance” was indicative of the fact, the court determined, that the power to adjudicate should remain solely with the district court judge. The cumulative effect of TPO’s analysis was a finding that Congress, in enacting the Magistrate’s Act, had never intended to expand the role of the magistrate to areas exclusively adjudicatory.

TPO ANALYSIS — SOME SHORTCOMINGS

In reaching its holding, the TPO court adhered strictly to the merits of the case, and left no room for dicta, concluding:

We need not speculate in regard to what civil functions the magistrate can constitutionally perform, however, since Congress carefully intended that in regard to civil cases the magistrate was not empowered to exercise ultimate adjudicating or decision making.

Despite this succinct admonition of the court, speculation becomes more acute in light of the language of the statute, since the reference provision uses the statutorily defined term, “pretrial proceeding.” The statute provides that in “all judicial proceedings before trial,” such would certainly constitute a part of the assistance function of the magistrate. However, in light of TPO, the term “pretrial proceeding” in the Act is to be strictly construed.

In its analysis, the TPO court suggested further possible

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62 Id.
63 Hearings on S. 945, note 41 supra at 214. In connection with pretrial proceedings conducted by a magistrate differing views were expressed. Judge Hoffman of the Eastern District of Virginia felt that the civil plenary hearings should be conducted by the magistrate with a referral report given to the district court to enter a final order. Judge Leven felt that it was necessary for a full understanding of the trial that pretrial proceedings be conducted by the judge handling the case.
64 Federal Magistrate Act Senate Report No. 371, 90th Cong., 1st Sess., at 26-27. The court’s conclusion was supported by the Senate subcommittee report which stated:
Your committee wishes to emphasize that this provision (referring to the delegation provision) of the act permitting assignments to magistrates cannot be read in derogation to 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 non-article III judge.
65 Note 4 supra at 369.
67 In re Plumbing Fixture cases, 298 F. Supp. 484 at 493-94. The court defined a pretrial proceeding: “The easy answer to this contention is probably the best one, namely, that pretrial, as an adjective, means before trial — that all judicial proceedings before trial are pretrial proceedings.
limitations upon the magistrate's civil power. Relying on the LaBuy holding, the court emphasized that the adjudicatory function should remain with the district court judge, and that statutes or court rules, whose construction may limit the power of the magistrate, will be broadly construed.

**TPO — NEW APPROACH**

In an attempt to limit this possible “speculation,” the seventh circuit recently amended the local rules for the Northern District of Illinois. In regard to the magistrate's civil function, the new rules provide that he could

[Assist] district judges in the conduct of pretrial proceedings including, but not limited to the holding of pretrial conferences, the hearing and consideration of all motions relating to discovery under Rules 26-37, and the hearing and consideration of other appropriate specially assigned pretrial motions. In addition the magistrate may prepare and submit recommended preliminary and final pretrial orders.

The rule indicates that a magistrate may be able to accomplish indirectly and constitutionally what had been held to be unconstitutionally done in TPO. Hearings and considerations of appropriate specially assigned pretrial motions leave the nature of such hearings open to such questions as whether they are to be purely fact-finding or evidenciary, and in what situation a magistrate will issue a final order. Given TPO, it would appear that such hearings might be merely fact-finding. The rule, generally, still appears to leave the role of the magistrate uncertain.

**VIEW OF OTHER DISTRICT COURTS**

The Magistrate Act has not yet been subjected to a sufficient amount of interpretative litigation to clarify the magistrate's function in the federal judicial system. In the criminal area, only three recent decisions appear to have considered the magistrate's judicial power, and in the civil area, only one.

In *United States v. Simpson,* the court, while denying the defendant's petition to vacate his sentence, spoke of the approach taken by the federal courts to insure appropriate justice by guaranteeing proper evidenciary hearings for post-trial habeas corpus petitions. Speaking of the federal magistrate's role, the court stated that, at a minimum, the federal magistrate may become a means for: defining issues in cases to be

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68 General Order United States District Court (7th Cir., July 17, 1972).
heard by the judge; identifying cases that can be disposed of without a hearing; and, perhaps, clarifying applicable principles and securing voluntary withdrawal of non-meritorious cases.\textsuperscript{72}

The court in \textit{United States ex rel. Mayberry v. Yeager}\textsuperscript{73} considered the reference provision and the magistrate's role respecting that provision, stating:

\begin{quote}
Distinction is made in practice, of course, between a hearing held for arguments of counsel on questions of law and a plenary hearing to resolve disputed issues of fact.\textsuperscript{74}
\end{quote}

In \textit{United States v. Assenza},\textsuperscript{75} the court considered the magistrate's power to conduct preliminary hearings.\textsuperscript{76} In answer to the defendant's contention that the district court should reverse the magistrate's interlocutory order, the court held that the defendant should have first requested the magistrate to reverse his own order. The court noted: \\
\begin{quote}
"[t]he office of United States magistrate was established by Congress for the purpose of expediting the work of the federal district court, not for the purpose of duplicating it."\textsuperscript{77}
\end{quote}

Although not passing on the merits of the reference provision, the fifth circuit approved the use of the reference provision in \textit{Givens v. W. T. Grant}.\textsuperscript{78} \textit{Givens} involved an action under the Federal Declaratory Judgment Act on an alleged usurious contract. Pursuant to the reference provision, the district court referred the case to a federal magistrate and adopted his recommended decision to dismiss the class action suit. The appellate court, in affirming the lower court's decision, commended the district court for the utilization of the magistrate through the reference provision.\textsuperscript{79}

The procedure followed in \textit{Givens}, of having the magistrate merely recommend the decision and the district court judge actually enter the order, differed from that used in \textit{TPO} since that order of dismissal was entered directly by the magistrate.\textsuperscript{80} This procedure appears to have been adopted by the district court's new rule\textsuperscript{81} and, moreover, may be an approach that would avoid constitutional conflict.

\section*{Conclusion}

Some observations can be made regarding the Magistrate

\textsuperscript{72} Note 65 supra at 169.
\textsuperscript{73} 321 F. Supp. 199 (N.J. 1971).
\textsuperscript{74} Id. at 201 n.1.
\textsuperscript{75} F. Supp. 1057 (N.D. Fla. 1972).
\textsuperscript{76} 18 U.S.C. §3060 (1948).
\textsuperscript{77} Note 71 supra at 1059.
\textsuperscript{78} 457 F.2d 612 (2nd Cir. 1972).
\textsuperscript{79} Id. n.1 at 613.
\textsuperscript{80} Note 4 supra at 348.
\textsuperscript{81} Note 64 supra.
Act in light of the *TPO* decision. First, the weight of authority substantially supports the legal conclusion of the court. Second, regardless of the validity of the holding, the court's refusal to speculate on the civil role of the magistrate leaves that function subject to conjecture and judicial inquiry. Further, the statute itself has not been the object of any extensive scrutiny by the other district courts. Yet, the *TPO* decision, and those decisions of the federal court which have interpreted the statute, uniformly hold that the adjudicatory function should remain vested in the hands of the district court judge.

The court should not be severely criticized for leaving the role of the magistrate in the civil area so ambiguous. Congress, in the passage of this Act, implied a broad goal: creation of a more efficient federal court system through the implementation of the federal magistrate. Although Congress had recognized the existence of the constitutional issue, it has done little to safeguard against a constitutional violation, except in the area of the magistrate's minor offense jurisdiction. If by the lack of safeguards it is to be inferred that the magistrate should not be a tool of efficiency in federal civil litigation, the Act itself loses meaning.

The magistrate as a judicial official exists today in a period of increasing federal litigation, and could be extremely effective in handling this increased litigation. Congress perhaps should reconsider the portions of the Act discussed in this article. If it intended a more expansive role for the magistrate, new legislation should be considered in light of the limitation expressed in *TPO*, creating a lower federal tribunal that functions within the maximum limits of the constitution.

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