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COMMENTARIES

COPING WITH THE CASELOAD: A COMMENT ON MAGISTRATES AND MASTERS

RICHARD A. POSNER†

Linda Silberman's paper for this conference¹ discusses two methods by which the federal court system and Congress have tried to cope with the enormous increase in the federal judicial caseload in recent times.² The first is the expanded use of magistrates; the second is the expanded use of special masters. Silberman is more sanguine about the former than about the latter, in major part because the use of magistrates is more regularized by statute than the use of special masters. Regarding magistrates, she is concerned mainly that their availability to supervise pre-trial discovery makes it easier for that monster to flourish; hard-pressed district judges would perforce rein it in more. Regarding special masters, she is concerned about expense, potential conflicts of interest, lack of clear rules governing their use, and lack of institutional commitment (special masters are ad hoc recruits from private practice, not employees of the judicial branch).

I, too, am concerned about the growing use by the federal courts of judicial adjuncts,³ including magistrates and masters. But I do not share the particular concerns emphasized by Professor Silberman. Let me try to explain both points.

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¹ Silberman, *Judicial Adjuncts Revisited: The Proliferation of Ad Hoc Procedure*, 137 U. Pa. L. Rev. 2131 (1989).

² Between 1960 and 1987, the number of cases filed annually in the federal district courts increased by 329%. See ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS 6 (1987) [hereinafter 1987 REPORT] (civil filings during the fiscal year ending June 30, 1987 totaled 238,982); ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS 148 (1961) (57,791 civil filings during the 1960 fiscal year). The increase in the courts of appeals was even greater, see *id.* at 143 (regional courts of appeals received 3,899 new appeals in fiscal year 1960); 1987 REPORT, *supra*, at 1-2 (35,176 new appeals in 1987, an increase of 802%), but the district courts' experience is more germane to the institutions attended by Professor Silberman.

³ This concern is a principal theme of R. POSNER, *THE FEDERAL COURTS* (1985).

The federal courts were created to be small. Article III of the Constitution envisages a single Supreme Court. To be effective, the Court must be small and sit en banc rather than in panels. Its smallness imposes limitations on the size of the tiers under it. If there are too many courts of appeals, the job of reviewing and coordinating their decisions will overwhelm the Court (which also has to review decisions by state courts). If there are too many district judges, each court of appeals will be overwhelmed by the task of reviewing and coordinating the decisions of the district judges.

The natural limits of expansion were not reached until very recently; indeed, it was not until 1892 that a new layer of courts, distinct from the regular federal courts of appeals, was interposed between the federal trial courts and the Supreme Court. But at some point during the rapid growth of federal caseloads since 1960, it became apparent that further growth could not be accommodated by proportionate increases in the number of district or circuit judges. Hence the rise of the adjuncts: the law clerks, the special masters, the magistrates, the settlement arbitrators (who do "court-annexed arbitration"), the staff attorneys, and the circuit executives.

Although I have railed against this rise, I recognize its inevitability given (but this is a major given) the unwillingness of Congress and the Supreme Court to tackle such basic reforms as sharply curtailing the diversity jurisdiction, sharply increasing the filing fees for nonindigent parties, sharply expanding the appellate capacity within federal administrative agencies, placing federal judicial appointment on a more consistently meritocratic basis, and shifting significant parts of the business of the federal courts (including such sacred cows as age-discrimination litigation) to the state courts. And if we are to have more judicial adjuncts in an effort to circumvent the natural limits on expanding the federal court system, there are worse types than magistrates and special masters.

I do not see, for example, how the existence of the magistrates can be likely to increase the abuse of pre-trial discovery. Abuse there is, but it is more likely to occur in a case supervised by a district judge, whose primary responsibilities lie in trying cases and managing—somehow—a huge docket, than in a case supervised by a magistrate, whose most challenging and responsible task is, precisely, to manage discovery in big civil cases. The big problem I see with magistrates, though it is in a limited (but growing and important) phase of their work, is a constitutional one. Although I can get very few of my colleagues in the federal court system to share my concern, I believe, and have so opined in dis-

sent,⁴ that the use of magistrates to preside over jury trials in which the final judgment is appealable directly to the court of appeals⁵ violates Article III. The argument is simple. Presiding at a jury trial and entering a final, appealable judgment at its conclusion is quintessentially a judicial function. It was so in 1787 when Article III was drafted; it is so today. A federal magistrate who performs that function is a judge exercising the judicial power of the United States—without the tenure guarantees of Article III. The consent of the parties⁶ is neither here nor there. Their consent may well eliminate any concern founded on the due process clause of the fifth amendment; it is irrelevant (or largely so) to the concerns that animated Article III. The independent judiciary ordained by Article III is not merely a convenience for litigants.

Turning to special masters, I also find myself largely untroubled by the concerns discussed by Professor Silberman. Of course the device is abused; Silberman mentions a case in which a panel of our court, in an opinion written by me, rebuked one of our district judges for excessive delegation to a master.⁷ Every device used in social and political life is abused. The question is whether there are systemic or widespread abuses. I think not. At least I am not persuaded by her argument that special masters are too expensive, too prone to conflicts of interest, too lacking in institutional commitment, and insufficiently regulated by rules defining their use and powers. Let me address each of these four points.

1. Masters are paid their normal hourly rate. This is fine; this is their opportunity cost; this is what (at least as a first approximation) it costs society to use them in a judicial adjunct's role. If they could somehow be forced to work for less, this would not only conceal the true costs of the device, but also—very much contrary to Professor Silberman's desires—lead to its being used even more than it is.

2. The conflict of interest rules governing judges are widely recognized to be absurd; their principal function is to protect judges from adverse newspaper publicity by causing them to steer clear of conflicts so attenuated that only a journalist would think them worthy of com-

⁴ See *Geras v. Lafayette Display Fixtures, Inc.*, 742 F.2d 1037, 1045-54 (7th Cir. 1984) (Posner, J., dissenting).

⁵ See 28 U.S.C. § 636(c) (1982 & Supp. IV 1986).

⁶ The consent of both parties is required. See *id.* at § 636 (c)(2).

⁷ See *Jack Walters & Sons Corp. v. Morton Bldg., Inc.*, 737 F.2d 698, 712-13 (7th Cir.) (implying that a judge who "referred summary judgement proceedings [in a complex antitrust case] to a special master . . . that the judge then adopted without independent analysis" displayed a lack of "sensitivity to the problems of excessive delegation of judicial power . . . and to the precise language of Rule 53(b)"), *cert. denied*, 469 U.S. 1018 (1984); see also Silberman, *supra* note 1, at 2157-58 (discussing *Jack Walters*).

ment (worthy, indeed, of raising the hue and cry). The rules for arbitrators, who are private judges, are much more relaxed,⁸ yet the clientele seem happy. The special master's role is advisory and parties can object to any conflict of interests that seem genuinely troubling.

3. Lack of institutional commitment is a fancy way of saying that special masters are not civil servants, the way judges, magistrates, and law clerks are. But the example of arbitration suggests that private judging works fine. The example, admittedly, is not altogether compelling. Parties must consent to arbitration, though often they consent long before there is an actual prospect that an arbitrable dispute will arise. Also, within limits they can veto prospective arbitrators. Party consent is not requisite to the appointment of a special master and parties cannot veto the judge's choice for the special master. Nevertheless, the many years of experience with commercial and labor arbitration—and, I might add, with special masters themselves, many of whom I have known and respected—do not disclose systematic differences in quality or perspective arising from the fact that arbitrators and masters are private individuals rather than government employees. Of course there have been questionable uses of the special master device and Silberman has presented several, but a few bad apples need not spoil the entire barrel.

4. Professor Silberman is concerned about the lack of detailed rules governing the use and authority of special masters—the ad hoc character of the device and the great discretion enjoyed by district judges in its use. But this concern jostles uneasily with the concern she also and rightly expresses about excessive bureaucratization of the federal judiciary. Whatever the defects of the special-master device, bureaucratization is not one of them. The special masters are private individuals as I have stressed, and they are deployed in accordance with the needs perceived by individual district judges in individual cases rather than according to a master plan drawn up in Washington. And perhaps that is for the best.

⁸ See *Merit Ins. Co. v. Leatherby Ins. Co.*, 714 F.2d 673 (7th Cir.) (enforcing award made by an arbitrator who once had worked under the president (and key witness) of one of the disputants), *cert. denied*, 464 U.S. 1009 (1983).