

IN THE MATTER OF) Rules Effective Dec. 1, 2011
LOCAL RULES OF PRACTICE)
DISTRICT OF COLORADO)

Kane, Senior Judge, DISSENTING from the amendments to the Local Rules of Practice effective December 1, 2011.

Prompted by the latest change to D.C.COLO.LCiv.R 72.2 and deeply concerned by the relentless delegation of this court’s constitutional duties to non-Article III judges, I DISSENT from the adoption of D.C.COLO.LCiv.R 72.2E and from this Court’s sanctioning of 28 U.S.C. § 636(c), and “consent jurisdiction” generally, under D.C.COLO.LCiv.R 72.2.

Article III of the Constitution, at Section 1, vests the Judicial Power of the United States “in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.” If one feature of the judiciary is essential above all others, it is that “there is no liberty, if the power of judgment be not separated from the legislative and executive powers.” Hamilton, Federalist No. 78. The structure of the Constitution is fractured by the delegation of that “power of judgment” – whether by the “consent” of Congress through the enactment of legislation or the Federal Rules of Procedure, the “consent” of a majority of a court’s judges in promulgating Local Rules of Practice, or the “consent” of individual litigants to the disposition of their Article III cases to non-Article III judges.

In the name of efficiency and pragmatism, new D.C.COLO.LCiv.R 72.2E eliminates the previous requirement in this district that civil cases referred to a magistrate judge for pretrial proceedings under 28 U.S.C. § 636(b) be reassigned to a different magistrate judge upon referral by consent under § 636(c). That previous concession was wrested by those of us who objected to the adoption by this court of consent jurisdiction in the first instance, to discourage the very seamlessness of magistral adjudication the new change is designed to impel. Until now, repeated efforts to repeal this provision have been defeated.

That the federal caseload has increased in complexity and in number, without a commensurate increase in the number of judges, is evident. With the Speedy Trial Act monopolizing judges' time in criminal cases, the pressure and temptation to delegate civil actions to magistrate judges is almost overwhelming. The answer, however, is not to sacrifice a constitutional structure, or the canon of Separation of Powers, on the altar of efficiency.

Compelling voices have risen in objection to the delegation of Article III authority to Article I judges as unconstitutional.¹ To those voices I add my own. As United States District Judges, we are not appointed by the President with the advice and consent of the Senate to be pragmatists charged with effecting and implementing solutions to the

¹ *E.g. Geras v. Lafayette Display Fixtures, Inc.*, 742 F.2d 1037, 1045 (7th Cir. 1984)(Posner, J., dissenting); *Pacemaker Diagnostic Clinic of Am., Inc. v. Instromedix, Inc.*, 725 F.2d 537, 547 (9th Cir.) (en banc) (Schroeder, J., dissenting).

caseload crisis. We are not here to make magistrate judges or others feel properly or adequately utilized. We are here to perform “all [of our constitutional] duties.” 28 U.S.C. § 453.

Being an Article III judge is not merely a job. It is the embodiment of an independent and structurally fundamental separate branch of government. One may consent to using the stairs to access the third floor of a building. One cannot “consent” to the building’s architecture which, having been carefully conceived, is essential to its structural integrity.

Because I will not consent to an arrangement or composition of judicial authority that denigrates the fundamental structure of our constitutional form of government, I DISSENT.

Dated this 28th day of November, 2011.

I am authorized to state that Senior Judges Richard P. Matsch and Lewis T. Babcock CONCUR in this dissent.