

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.