In the

Supreme Court of the United States

F. David Mathews, Secretary Of Health, Education, And Welfare,

Petitioner,

V.

William G. Weber,

Respondent.

74-850

Washington, D. C.
November 4, 1975

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Petitioner,

v.

WILLIAM G. WEBER,

Respondent.

74-850

Washington, D. C.

Tuesday, November 4, 1975

The above-entitled matter came on for argument at 1:08 p.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM O. DOUGLAS, Associate Justice
WILLIAM J. BRENNAN, JR., Associate justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice

APPEARANCES:

MICHAEL KIMMEL, ESQ., Department of Justice, Washington, D. C. 20530, for the Petitioner.

PETER D. EHRENHAFT, ESQ., Suite 1000, 600 New Hampshire Avenue, N.W., Washington, D. C. 20037, for the Respondent.

I N D E X

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in 74-850, Mathews against Weber.

Mr. Kimmel, you may proceed.

ORAL ARGUMENT OF MICHAEL KIMMEL ON BEHALF OF PETITIONER

MR. KIMMEL: Mr. Chief Justice, and may it please the Court: This case presents the question whether the Federal Magistrates Act authorizes district courts to refer all Social Security cases to United States magistrates for review and recommendation of a decision on the merits.

At issue is General Order No. 104-D of the Central District of California. This district court rule requires all Social Security cases and many other Federal cases to be referred to a magistrate for recommendation of a decision on the merits. In regard to Social Security cases the rule requires the magistrate to review the administrative record, receive briefs, hear argument, and submit a proposed decision to the district judge, together with a proposed opinion. The judge may adopt or reject the proposed decision, taking whatever final action he deems appropriate.

This specific case arose out of a Social Security claim by the respondent Weber under the Medicare provisions of the Social Security Act. The Secretary denied the claim and Weber sought judicial review in the district court. The

district court clerk referred the action to a magnistrate under General Order No. 104-D. The Government's motion to vacate the reference was denied by the district judge, but on the Government's motion he certified his order for interlocutory appeal to the Ninth Circuit. The Ninth Circuit upheld the reference and General Order No. 104-D as within the authority of the Magistrates Act.

This Court granted the Government's petition for certiorari. The respondent Weber does not take a position on the magistrate referral question, but the Ninth Circuit judgment is being supported in this Court by the amicus.

The issue before this Court is whether General Order No. 104-D is authorized by the Magistrates Act. In other words, does the Magistrates Act permit or should it be construed to permit the referral by district courts of all Social Security cases to magistrates for a recommended decision on the merits.

This issue is important not only to the judicial review of Social Security cases, but to judicial administration generally. If the Ninth Circuit decision is upheld by this Court, not only Social Security cases, but any case on an administrative record and perhaps all cases on motions for summary judgment or other dispositive motions could be referred to a magistrate for recommendation of a decision on the merits under the authority of the Magistrates Act.

The Government's position in this case in brief is that the recommendatory procedure for deciding the merits of civil cases established by General Order No. 104-D was not authorized or intended by Congress when it enacted the 1968 Magistrates Act. We will show from the legislative history that the purpose of the Magistrates Act, the reason why magistrates were created, was to relieve judges of minor or ancillary functions so that the judges would have more time for the careful performance of their adjudicatory duties.

Our main point is that Congress intended in this Act to give magistrates limited or ancillary duties, not a central role in the adjudication of civil cases. On this basis the Government will urge that dispositive motions and civil cases should generally not be referred to magistrates but that nondispositive motions may be.

Initially we wish to note that we share the Judiciary's concern with the tremendous caseload on district courts created by just the number of cases that are filed every year, including Social Security cases. Our position is not that Congress cannot deal more effectively with this problem by statute, including the sound use of magistrates. Congress could enact a statute which in terms would authorize magistrates to review and recommend decisions in Social Security cases or dispositive motions generally. Our position is simply that Congress did not authorize such an important and far-reaching judicial

procedure when it enacted the 1968 Magistrates Act.

QUESTION: Then you are raising your constitutional issue.

MR. KIMMEL: That's correct, your Honor.

QUESTION: Enlighten me a little bit. I am interested. Why is the Government so concerned about this? Is it fearful that there will be more adverse decisions in Social Security cases coming out of a magistrate's pen, or what is it?

MR. KIMMEL: No, Mr. Justice Blackmun, it's not, I don't believe, because of the actual decision, at least on the basis of the experience we have had so far under these types of rules. It's rather than we feel that the procedure is not authorized by the Act and if Congress wants this kind of procedure, it should enact a statute which would authorize it. It's more a question of whether it's legal rather than a specific interest in how the cases are decided.

QUESTION: The Government's interest is entirely pure.

MR. KIMMEL: That could be one way of putting it, yes, your Honor.

QUESTION: What's another way?

(Laughter.)

MR. KIMMEL: That the statute should be complied with by district courts, basically.

Our reasons for a limited --

QUESTION: I gather the question was, it's just a purist idea on the part of the Secretary? Just a legal question in which he suddenly got interested?

MR. KIMMEL: I think that there may be possibly if the practice grows -- if this particular practice grows, there may be a question of whether certain judgments of district courts are authorized if they were in effect made by magistrates. That's not our primary concern. That's a possible concern. It has been raised in some cases.

QUESTION: I assume that the Department of Justice has a certain minimal interest, at least, in finality and that if the procedure is not authorized, then there may be doubts at some stage raised about the finality of a determination.

MR. KIMMEL: There would be a question of the validity of judgments which are obtained under this type of procedure. We don't think that any ruling that the practice is unauthorized, though, should result in a retrospective decision, but we think it should be clarified at the earliest possible time what this Magistrates Act means in this regard.

Now, our reasons for a limited construction of the Magistrates Act are necessarily based on the language, legislative history, and purpose of the Magistrates Act.

Now, in terms of some perspective, I would like to point out that the major purpose of the Magistrates Act was to

invest magistrates with specific and limited duties in the criminal area. Under Section 636(a) of the Act and the Federal Rules of Criminal Procedure, magistrates are authorized, among other things, to conduct preliminary hearings in criminal cases, issue search and arrest warrants, impose conditions of release, and exercise jurisdiction over minor criminal offenses.

The legislative history of the Act deals primarily with the functions of magistrates in the criminal area and statistics of the administrative office show that of 255,000 matters disposed of by magistrates in the last fiscal year, over 85 percent were in the criminal area. The remaining 15 percent of matters disposed of by magistrates were in the civil area and were composed chiefly of handling of pretrial conferences and prisoner petitions. These numbered 17,000 and 8,000 respectively in the last fiscal year.

QUESTION: Mr. Kimmel, let me interrupt you again. The amicus refers to pending legislation. Do you know what the status of S. 1283 and any related bills is?

MR. KIMMEL: Yes, Mr. Justice Blackmun. S. 1283 is presently under consideration by the Senate Judiciary Committee. It was reported favorably by the Subcommittee on Judicial Improvements. If that bill as reported by the subcommittee is enacted, this case would become academic, if it's enacted, because it would specifically authorize dispositive motions to be handled by magistrates for a recommended decision.

But a similar bill, I understand, was introduced in the House. It was not approved as far as I know by the House Judicary Committee. And I don't know what the status of the question in the House is.

QUESTION: Mr. Kimmel, you are going to address yourself to this language I assume "such additional duties as are not inconsistent with the Constitution and law."

MR. KIMMEL: Yes, your Honor. Of course, that is the major issue in the case starting with that language. 636(b) does state that district courts may assign to magistrates such additional duties as are not inconsistent with the Constitution and laws of the United States."

Now, although this particular language, taken alone, is capable of a broad construction, we interpret it in light of its context and the legislative history and purpose of the Act as reflecting limitations and the concern that constitutional doubts or impediments be avoided.

QUESTION: It also says a little later when they outlined, they said "not restricted to." So I don't see where there is any limitation in here. It looks like it's wide open.

MR. KIMMEL: Well, the language itself does say that it cannot be inconsistent with the Constitution or the statutes. Now, that itself, we feel, merely reflects a conscious desire by the Congress to limit it certainly to those two aspects.

Now, the Senate report explains this language. It explains the constitutional qualification in section 636(b) that's Senate Report No. 371 -- not in terms of an affirmative or maximal grant of power to district courts but in terms of a prohibition and a safeguard against potential abuse.

So we believe that the language was put in more for the purpose of safeguarding abuses rather than to extend maximal authority to district courts. The use of the term "in addition such duties" rather than "all duties" or "any duties" again suggests a limited statutory intention rather than a maximal statutory intention.

The amicus interprets 636(b) as affirmatively authorizing maximal use of magistrates to the full extent possible under the Constitution and statutes. But we question whether Congress would have left in a statutory limitation if it had really intended to authorize a maximal grant of authority. It would more likely have said, we think,"notwithstanding any statute to the contrary," if it had intended to exercise maximal powers in this regard.

The context of section 636(b) bears out, we believe, a limited statutory intention. Three examples of civil duties are mentioned in section 636(b), and these examples are limited in scope and nature. Now, the examples are not exclusive, we recognize that, but they are expressly described in the Senate report as intended to illustrate the general character

of duties assignable to magistrates.

The three examples authorize reference to magistrates of special master functions under the restrictions of Rule 53, assistance to the judge in pretrial and discovery proceedings, and making recommendations as to whether there should be a hearing in habeas corpus cases.

None of these examples authorize magistrates to exercise a central role in the adjudication of whole classes of civil cases. Rather, they authorize just limited or ancillary functions except in special master cases under the restrictions of Rule 53.

Going further in the legislative history, the supporters and sponsors of the Magistrates Act explained section 636(b) in very limited terms at the time this measure was considered by the Congress. One of the bill supporters, Representative Poff, at page 66 of the House hearings, stated: "Many of the duties that now occupy Federal judges are ministerial, routine, and minor, yet nevertheless time-consuming. The significant feature of the Magistrates Act is that it would free a Federal judge from these less important procedural tasks and enable him to devote more time and attention to matters of substance."

QUESTION: What does that really mean when you try to boil it down in terms of what goes on in a courtroom? What functions of a judge are really ministerial?

MR. KIMMEL: All the procedural -- I wouldn't say ministerial, I admit, but routine and not dispositive litigation. It would be all the preliminary procedural type motions and the housekeeping kind of thing in regard to progress of civil litigation through the court. But not the actual decision of civil litigation. There is a distinction.

QUESTION: How much time did judges spend before the magistrates, though, on housekeeping attention to progress of litigation through the court?

MR. KIMMEL: Well, I believe all procedural motions had to be decided by a district judge completely.

QUESTION: When you say "housekeeping," you mean discovery motions, motions for a more definite statement, that type of thing?

MR. KIMMEL: Yes, your Honor. Actually, there is a listing of the kinds of duties that would be involved here that are listed by the Administrative Office in a checklist of what magistrates could do, and it includes, for instance, general supervision of the civil calendar, including the handling of calendar calls, motions to expedite and postpone the trial of cases, conduct of preliminary and final pretrial conferences, status calls, settlement conferences, preparation of pretrial orders.

QUESTION: My question was basically a response to your quotation of Congressman Poff's explanation. I mean, the

idea that it was to solve only the "ministerial" and"routine" congestion, wouldn't solve much at all, I would think.

MR. KIMMEL: Well, I believe that this listing of duties would eliminate from the judge's burdens a significant amount. Now, the number, for instance, of matters, excluding the criminal, which was the main thing, was 36,000 matters disposed of by magistrates in the last fiscal year.

QUESTION: I would dispute whether those can be called either ministerial or routine. I mean, a pretrial discovery motion can be critical to the outcome of a case.

MR. KIMMEL: I agree with that. And the point here is even when the magistrate does make an initial ruling, these are again recommendations which are subject to review by a judge, particularly in the event of an objection. But this will eliminate many of those.

QUESTION: Well, the challenged review of Social Security.

MR. KIMMEL: But there the distinction would be the other part of what Representative Poff said, that the point of relieving jduges of the minor burdens would be so that judges would have more time to devote to the actual substance of litigation, to the actual decision of cases. And I think that that was the thrust, to make this distinction.

Senator Tydings, who was the chief sponsor of the Act, explained, at page 73, that -- he went so far as to say

it was intended, 636(b), to relieve judges of some of the routine nonjudicial burdens. I actually wouldn't call this acting on discovery motions nonjudicial, but the point is, the lesser type of problems that used to face judges all the time.

He also emphasized that district judges should be able as a result of this Act to devote more time to the actual writing of opinions.

Now, the Senate Report No. 371 is probably the most informative statement of Congress of what its intent was in enacting the additional civil duties provision in section 636(b). The report does not state that Congress intended to confer full or maximal power to district courts to invest magistrates with civil jurisdiction. The report speaks generally of relieving district judges of some of their minor burdens and of culling from the district judge's workload matters that are more desirably performed by a lower tier of judicial officers. The report further explained that the reason why Congress authorized flexibility in the assignment of additional civil duties to magistrates, that is, not limited to the three examples, was not to relieve judges of their adjudicatory responsibilities, but precisely the contrary, so that there would be increased time available to judges for the careful and unhurried performance of their vital and traditional adjudicatory duties.

Now, one of the vital and traditional adjudicatory duties of judges is the judicial review of administrative record cases under the substantial evidence standard, including Social Security cases. Justice Frankfurter's opinion in the Universal Camera case on the responsibility of judges to review the whole record in substantial evidence cases demonstrates the decision of these cases is not simply ministerial as the amicus asserts in its brief, but requires delicate judicial judgment and a first-hand evaluation of the record. If a judge conscientiously performs this task in a Social Security case, including the necessary review and evaluation of the administrative record, it appears he would be duplicating the work performed by a magistrate. If he does not, it appears that he would not be exercising the adjudicatory function which is expected of him under the Magistrates Act. Either way the practice which is authorized by this district court rule seems to be inconsistent with the purpose of the Magistrates Act to relieve district judges of nonessential functions.

The dilemma created by this procedure was spotted by Judge Sprecher in the decision in TPO v. McMillen in which he stated, "We do not think situations of this kind would be remedied by the magistrate simply recommending to the district judge instead of adjudicating."

We believe that on the basis of the legislative history,

as I say, that there is a limited intention by Congress not to transfer the actual major responsibility in deciding civil cases to magistrates. Now, what Congress did do, though, in the Magistrates Act, in the first example, that is, section 636(b)(1), was to actually authorize magistrates to review and recommend decisions as a special master. That's under Rule 53. This is the only place where Congress anywhere focused on this kind of a role for magistrates. But Rule 53 limits the reference of civil cases to special masters to exceptional cases whether detailed matters of account or some exceptional condition requires it. It is meant to be the exception, not the rule.

So this particular authority would certainly not authorize a blanket reference of all Social Security cases to the magistrate as General Order No. 104-D calls for. We realize that in general or traditionally the reference to masters has been generally in cases involving fact-finding functions, but we don't think that Rule 53 is limited just to fact-finding type of cases or cases involving factual disputes. We think that Rule 53 concept involves the reference of any kind of a civil case to a master or here a magistrate as master for a recommended decision on the merits.

QUESTION: There are obvious differences between a pretrial conference and a trial. What would you focus on as the distinction between this initial exploration by the

magistrate and the pretrial procedure?

MR. KIMMEL: Mr. Chief Justice --

QUESTION: ... more than finals, to begin with.

MR. KIMMEL: Technically, our problem certainly is not final, and in the pretrial it's very definitely not final. The pretrial situation is simply to clarify issues, establish the basic routine and enter the schedule for trial, you might say, and to limit unnecessary witnesses. I don't think there is any, in the pretrial conference situation, any attempt by a magistrate to actually decide the case or to purport to recommend how the case should be decided. That's a very useful function of magistrates, to --

QUESTION: What if a pretrial examiner did?

MR. KIMMEL: Well, I think it would be subject to reversal by the district judge, if he purported to decide a --

QUESTION: Is the initial step here subject to reversal, as you put it, by the district judge?

MR. KIMMEL: Mr. Chief Justice, if it's a pretrial conference, I believe that --

QUESTION: No, I'm speaking of the procedure involved here that you are challenging. Is that subject to review by the district judge?

MR. KIMMEL: Very definitely it's subject to review and the district judge does have the option, we recognize, to

not accept the magistrate's decision. We recognize this, that it is a recommended decision.

QUESTION: Option, or is it part of his inherent power?

MR. KIMMEL: Well, he has the power both under the rule itself and inherently as a judge to decide the case. But we think that whether or not a magistrate actually is acting as a special master and comes under the restrictions there, the magistrate in this situation under this rule is still exercising significant adjudicatory responsibilities in these cases, and that's what we say is inconsistent with the general purpose of the Act. We do not think that Congress intended to authorize the significant adjudicatory responsibilities even where cast in the form of a recommendation.

QUESTION: This isn't -- the judge has to pass on it.

MR. KIMMEL: Very definitely, he does.

QUESTION: He has to have oral argument on it.

MR. KIMMEL: No. That's one of the things. It's not even clear --

QUESTION: Upon receipt of the file, the judge will calendar the matter for oral argument before him if he deems it necessary or appropriate.

MR. KIMMEL: That's correct, and most cases --

QUESTION: Who has the final say on this, the magistrate or the judge?

MR. KIMMEL: The judge, we recognize, from the beginning has the option to decide the case and to include a complete new adversary proceeding before him. That does not occur in practice, but it's true that this rule -- and it doesn't purport to go so far as to have a magistrate decide the case.

QUESTION: Do we have the practice before us?

MR. KIMMEL: Your Honor?

QUESTION: You say it doesn't happen in practice. Do we have that before us?

MR. KIMMEL: In our --

QUESTION: It isn't in this record.

MR. KIMMEL: Well, in our petition we did introduce some statistics which tended to show what the actual practice was. And I admit that they were not very widely based statistics. But all I can say is that from my own knowledge the judge does not usually schedule a complete new round of proceedings before him. In fact, there is a great deal of opposition to that suggestion expressed by many commentators and judges because they feel that would definitely eliminate the use of the magistrate which is to relieve judges of this type of additional workload.

We think that even where cast in the form of a recommendation, Congress did not contemplate this major type of role for magistrates and especially without -- not only

with not saying so in the statute, but not even mentioning it in the legislative history that accompanied this statute, and the legislative history, as I indicated, seemed to indicate just minor functions were intended.

Now,where Congress has authorized officials other than judges to exercise significant adjudicatory functions in the district courts, it has expressly said so. Examples, of course, would be the referee in bankruptcy, masters and court of claims commissioners where these duties are spelled out in clear terms in the statute.

QUESTION: Do you think the magistrate in the situation before us now is exercising more or less power, if you can make the comparison, than a bankruptcy referee has traditionally exercised?

MR. KIMMEL: Probably would be about the same amount, I would think, your Honor. Though it's true, I believe, under the bankruptcy statute the referee's decision is clothed with finality unless a party objects to the district judge. I believe that is the way it works. Whereas in the magistrate situation, at least under this particular rule, it doesn't purport to make it initially final unless a party objects, but it is simply handed to the district judge for the district judge to approve or object. That's how it works.

QUESTION: How is that very much different from the bankruptcy then?

MR. KIMMEL: Well, it's not really. But our point here, your Honor, is that where Congress intended this --

QUESTION: I am speaking in a qualitative sense, the quality of the function.

MR. KIMMEL: The quality of the function is probably about the same, but the point I was trying to make with the example of referees in bankruptcy is that where Congress intends such a major role, I think, in the official in question, it spells it out, and it has with referees in bankruptcy. Their duties are spelled out in detail in the statute and they are authorized to --

QUESTION: But the referee in bankruptcy is dealing with a precise kind of function that is much easier of definition, would you not agree, than the broad range of authority that Congress appears to have at least contemplated for magistrates?

MR. KIMMEL: Well, I think, your Honor, that whether it's just bankruptcy or whether it's all civil cases, both require there be some definition by Congress of whether it's intended the official -- in fact, more in the case where a magistrate can exercise a significant adjudicatory role in the whole broad category of litigation, that Congress at least should indicate this, that this purpose is intended in words in the statute and certainly in the legislative history.

Now, we agree that transferring to magistrates the

work of initial review of Social Security cases may additionally lighten the workload of district judges, and we also do not doubt this may have benefits. But we think a question of policy is involved, whether the review of these cases should be transferred to magistrates. We don't think Congress went that far when it enacted the 1968 Act, and at best it enacted a general and ambiguous provision which simply did not come to grips with this particular problem.

If Congress wishes to establish authority for magistrates to act in this capacity, it should consider the problem and enact a statute in clear terms which would authorize it if it thinks it's sound practice.

QUESTION: Your position has to be that the statute doesn't authorize what the district court did here.

MR. KIMMEL: Should not be construed to authorize it? Yes. Or should not authorize it.

QUESTION: You can't really say that perhaps it authorized it, but it's not wise to do it.

MR. KIMMEL: Well, I think the wisdom enters into it in this way, that it is a matter where a policy question is involved, if it's in a statute, some reflection of that policy should be shown either in the statute language or in the legislative history. It's not shown in regard to this, so this Court, it seems to me, should defer to Congress and let it specifically think what it wants done with this problem.

Now, Congress actually, as I mentioned before, has a bill before it which would solve this problem. It would authorize magistrates to do this. I don't know whether that bill, though, will be accepted or rejected. And in the circumstances, I don't think that the Court should assume that Congress has already authorized the procedure in this general and guarded measure that was enacted in 1968.

Now, in sum, we would urge the Court to adopt an interpretation of the Magistrates Act which would clarify three things respecting civil jurisdiction of magistrates. First, that the Act does not permit the reference to magistrates of the merits of civil litigation, including dispositive motions, except under the restrictions of Rule 53.

Second, that the Act would permit the reference of most preliminary procedural or nondispositive motions to magistrates for review and initial ruling.

And, finally, any ministerial matter could be referred to a magistrate for final action.

Now, in Social Security cases this would mean that the judge would have to decide himself the case. The magistrates would still have, though, a great deal of authority to relieve the burden on district judges. The statistics of the Administrative Office, as I said, reflect that some 35,000 matters in the civil area --

QUESTION: What you just said indicates that this

precludes really the magistrates only from preparing recommended dispositions, opinions, and the like.

MR. KIMMEL: On the merits of civil litigation.

QUESTION: Yes.

MR. KIMMEL: Yes, your Honor.

QUESTION: Otherwise, they can do anything that may be assigned. But may they do this by general rule, is it your submission? Or would that have to be done -- I mean, if they just took this rule and simply amended it and said everything except recommended dispositions, for example?

MR. KIMMEL: Well, the rule requirement is spelled out in the statute. I think the statute contemplates that whatever magistrates do be done pursuant to a rule. And I think the rule could specify all pretrial nondispositive motions could be referred to a magistrate where a magistrate could make an initial ruling and recommendation to the district judge.

QUESTION: But not decisions on the merits.

MR. KIMMEL: Not on decisions that affect the actual outcome of --

QUESTION: Except where acting as a special master.

MR. KIMMEL: That's correct, and that would have to be governed by the rules of Rule 53.

QUESTION: When you say pretrial nondispositive motions, it really boils down to discovery motions, doesn't it?

MR. KIMMEL: Not only discovery, your Honor. There are a vast range of other duties. I've listed some, but it's beyond discovery. It's true that that would be certainly a major area. But there are many rules in the Federal Rules of Civil Procedure which require action by a judge at various stages of litigation, often after a judgment --on costs, for instance, objection to costs, where a magistrate again -- it's not dispositive litigation, it doesn't turn the whole case, but he could relieve judges of many functions in these areas.

QUESTION: Your cost example, frequently the costs are taxed against the losing party unless the judge otherwise provides. I would think that that would be a stronger case for requiring a judge to do it, the person who sat through the testimony and has some feel for the equities of the parties, than perhaps a motion for summary judgment.

MR. KIMMEL: Well, if it does turn on something that a judge already would be most familiar with, then it would probably not be a sound idea. I was suggesting that as an example where to set aside a cost bill, maybe on technical grounds of one kind or another, where a magistrate could be referred that problem to make a recommended decision, but it's not going to affect the entire litigation. It's that kind of distinction I am trying to draw.

My time has expired, so unless there are further questions --

MR. CHIEF JUSTICE BURGER: Very well, Mr. Kimmel.

Mr. Ehrenhaft.

ORAL ARGUMENT OF PETER D. EHRENHAFT ON

BEHALF OF RESPONDENT

MR. EHRENHAFT: Mr. Chief Justice, and may it please the Court: I am honored and surprised to be here -- honored to be asked to be a friend of the Court in this case, a bit surprised,as I gather some of you gentlemen were, by the Government's position in this case because it does not oppose this general rule adopted by the district court on constitutional grounds, which I had thought might be a valid basis for dispute. The Government has conceded that the general order adopted by the district court does comport with constitutional requirements, so there is no further need for us to debate that issue. I agree with the Government that this kind of a procedure is authorized by the Constitution.

We therefore are limited to a discussion of whether the Magistrates Act by its terms authorizes the kind of procedure which the district court adopted and which the court of appeals affirmed. And in that connection I will discuss three points:

One, what kind of a case is Mathews v. Weber, what does the statutory text say about that, and what light does the legislative history shed on that text?

What kind of a case is it? Well, this has already

been discussed. This concerns the review of the determination by the Secretary of Health, Education, and Welfare that Mr. Weber is not entitled to a Medicare payment, and that decision is to be reviewed with the view of determining whether the decision is based upon substantial evidence in a closed record. There is no need, no opportunity, no right on the part of either the Secretary or Mr. Weber to introduce new evidence, to bring witnesses before the court, no right of any of them to do anything other than present legal arguments based upon that closed record as to whether substantial evidence exists in the record.

There is, therefore --

QUESTION: Do you think prior to the Magistrates Act there could have been a rule of the court that every Social Security review case will be assigned to a special master?

MR. EHRENHAFT: I do not think so, because the rules with regard to special masters is a different rule than the creation of the magistrate under the Magistrates Act. As I plan to discuss later, I don't believe that the Magistrates Act turned every magistrate deciding a civil case into a master. I believe that it's intent was that if the magistrate is appointed as a master, Rule 53 applies to the magistrate when he is acting as a master, but the purpose of the Magistrates Act was intentionally --

QUESTION: So a district court could refer every

Social Security case to a magistrate even though it couldn't refer every Social Security case to a special master.

MR. EHRENHAFT: That's right. Because the --

QUESTION: Even though the Magistrates Act says that a magistrate may act as a special master where it's appropriate for a special master to act.

MR. EHRENHAFT: That's right. I think that the authorization for the district courts to use magistrates in certain capacities is not the same kind of a legislative grant as the authorization to use magistrates as masters when they are to act as masters. I think that the procedure contemplated by this particular district court rule is that the magistrate will recommend a disposition based upon his review of a closed record, and that is a very different kind of a role than is played by a master who may well hear witnesses, who may well consider contested fact assertions and who --

QUESTION: Do you think there is some inference from the -- apparently you don't -- that there is some inference in the Magistrates Act that the magistrate's role in civil cases should be no greater than would be allowed a special master.

MR. EHRENHAFT: I don't believe that either the text or the legislative history supports such a construction, and I hope to address that in a moment.

QUESTION: All right.

QUESTION: May I just ask, Mr. Ehrenhaft, you suggested that the authority, the legislative authority to the magistrate on a closed record.

MR. EHRENHAFT: Yes.

QUESTION: Does that imply not as a special master but simply as magistrate? The magistrate has no authority to conduct hearings and hear witnesses?

MR. EHRENHAFT: In this particular situation with which we are dealing here, he can hear no witnesses. He is taking a closed record and receive briefs and hears oral argument, but he hears no witnesses. He therefore has no occasion to consider the demeanor of witnesses, to assess credibility. His task is simply to cull the record for the substantial evidence that supports the Secretary's --

QUESTION: That's because, I gather, dealing with Social Security cases, he would have no occasion or very infrequently or exceptionally, I suppose, ever to hear any testimony.

MR. EHRENHAFT: That's exactly right. And that's why I say the opinion of the court of appeals in this case, which I am supporting, specifically says we are dealing here with a Social Security review case, we are not dealing, we will reserve for another time other kinds of cases. And I'd like to suggest, for example, Wingo v. Wedding in which

this Court first considered the Federal Magistrates Act was that different kind of a case. There was a situation in which the magistrate was being asked to hear witnesses, to make crucial factual determinations in the habeas corpus context, and the Court said that that could not be reconciled with the express language of the Habeas Corpus Act. This is not a case like TPO v. McMillen, which Government counsel cited, and in which the court of appeals for the Seventh Circuit after reviewing the legislative history I believe correctly said that a motion for summary judgment that totally determines litigation is not appropriately submitted to a magistrate acting qua magistrate. And this is a case, as we have said, a Social Security Act case where a closed record is reviewed and a recommended disposition only is referred to the district judge who then can receive additional briefs, who can then accept the recommendation of the magistrate or reject it.

The fact that in the overwhelming number of cases the district judges do accept the magistrate's disposition, I suggest is not an adverse reflection on the district judges that they are thereby abdicating their duty, but I would hope a reflection of the adequacy of the service being rendered by the magistrates. And in fact, there are a few cases that I have cited in my brief in which district courts have disregarded or changed a recommended disposition urged by the magistrates.

Well, the importance of this procedure, I think, is highlighted by the administrative office of the court's fiscal year 1975 report. It indicates that in 1975 5,800 Social Security Act cases were filed in the courts, or in a pace exceeding approximately 100 a week. Of course, these cases are not uniformly spread throughout the district courts. There are some in areas where there are coal mines in particular where black lung cases apparently have generated something like 559 Social Security Act cases in West Virginia and Kentucky as well, 800 in West Virginia, 500, and so on. There is a great concentration of those at the present time in those jurisdictions.

But whether we are talking about the Central District of California, which is the jurisdiction from which this case arose, Los Angeles, 78 Social Security Act cases were brought in that district court and referred to magistrates during the fiscal year 1975. So it is a significant role that magistrates have been asked to perform in this case.

QUESTION: Besides Social Security cases, are there others where single district judges review a closed record? Other agencies?

MR. EHRENHAFT: Yes. In General Order 104 there are a number of additional kinds of cases that are cited. Now, I have taken a quick look to see whether the standards are the same under those other statutes. In many of them they are,

but I have not really done research to ascertain the extent.

QUESTION: I just wonder -- I mean, the Interstate Commerce Commission, three-judge court cases, as long as that obtains, I gather that's all been changed. New legislation. But do they use magistrates for those?

MR. EHRENHAFT: I don't know. I know that there are military discharge review cases that are included in General Order 104. There are some NLRB review cases that may be so referred.

Now, the extent to which those also are to be reviewed on a closed record, as I say, I can't honestly say.

QUESTION: One gets the impression it was kind of the dogs that were referred to the masters, don't you think, or to the magistrates?

MR. EHRENHAFT: Without characterizing them necessarily that way, Mr. Justice Rehnquist, I think that you have put your finger on an important distinction between the cases that are referred to the magistrates and Rule 53, because the reference to magistrates, I think, is exactly the opposite of the reference to a master that Rule 53 is intended to cover. That is, it is precisely the routine case that is the kind of a case that the magistrates can appropriately look at by reviewing a closed record and that Rule 53 was addressing a whole different problem. That is the exceptional case where the court needs assistance from some outsider. And I think

that Rule 53 when it said that only the exceptional case may be referred was drafted as it was to avoid the abdication by judges of important adjudicatory functions in difficult cases where they didn't want to decide or felt that their dockets were too crowded. And the legislative history of this Act clearly indicates that the Congress recognized the validity of the La Buy v. Howes Leather case here that references to masters were to be restricted to the truly exceptional case.

QUESTION: When did the present language of Rule 53 come along, vis-a-vis the La Buy decision in this Court?

MR. EHRENHAFT: I believe it preceded, but I am not 100 percent sure of that. The concept that was expressed certainly has a long tradition, there was hostility to references to masters even preceding the La Buy case.

As we have said earlier, the language of the Magistrates Act is not as clear as it might be with respect to the additional duties that a magistrate may perform. But I would like to just briefly touch on one point that Government counsel made for the first time in his argument here, which concerns the use of the words "such additional duties" which he has suggested is somehow a limitation on the duties of the magistrate because it would refer to the three illustrative subsections of section (b). And looking at section 636 of the Magistrates Act as a whole, I note that section 636(a) indicates that the magistrates serving under this chapter shall

have the following duties, including those that had traditionally been performed by United States Commissioners, and the power to administer oaths, and the power to conduct trials in petty criminal cases. (b) then goes on to say that the district courts may by rule establish, assign such additional duties as may be specially designated. And I believe the use of the word "such additional duties" flows from additional to subsection (a) rather than being a reflection of the examples that are listed in the following portions of subsection (b).

What light does the legislative history shed on this statute? I have suggested in my brief that not only does the legislative history reflect a desire on the part of the draftsmen of this legislation, Senator Tydings, Representative Poff, and others, to provide as wide ranging a use of magistrates as is consistent with the Constitution and with statutory law, but that the Judicial Conference of the United States which actively supported this legislation with the limitations that are now contained in subsection (b) and which has supported this legislation ever since has always interpreted it to include precisely this kind of service by magistrates. And a subsequent Act of Congress raising the salaries of magistrates specifically referred with approval to the duties performed by magistrates in reviewing Social Security cases. And I don't say that subsequent legislative history is

an infallible and the most appropriate guide at all to what a previous Congress meant, but I do cite it to show that it is not in any way inconsistent with a continuum of legislative intent that magistrates be dignified, as parajudges of the district courts, able to assist judges in performing duties such as those -- perhaps not dogs, but in any event of a routine character which would enable the district judges to reserve their time and attention to other matters more serious perhaps.

QUESTION: I must say looking at 15A and 16A and 17A of the petition, the matters which this order covers are a lot more than just dogs.

MR. EHRENHAFT: My commission as friend of the Court is to support the judgment below, and as indicated, I think that the --

QUESTION: These are very comprehensive --

MR. EHRENHAFT: They are very comprehensive. And it could be that there are situations in which the district court in its enthusiastic embrace of the Magistrates Act has exceeded the bounds which the legislature intended.

QUESTION: None of them involves the hearing of witnesses, those long lists.

MR. EHRENHAFT: As I say, I have not examined that list to determine that because --

QUESTION: It does include habeas corpus matters

which presumably is relegated to the back burner by Wingo v. Wedding, anyway.

MR. EHRENHAFT: Well, I would think so.

Well, I think that even under Wedding, however, the magistrate is permitted to consider a habeas corpus petition and recommend whether a hearing should be held.

QUESTION: That's right.

MR. EHRENHAFT: And I don't recall whether --

QUESTION: There is no such limitation in the rule, as I read it.

MR. EHRENHAFT: Well, it could be that -- of course, the rule predated the Wedding decision and would have to be considered amended accordingly.

QUESTION: You've got two classes, Civil Rights Act cases filed by a plaintiff appearing in pro pur but who is not in confinement, and in Civil Rights Act cases where plaintiff is confined but has retained counsel.

MR. EHRENHAFT: There could well, as I indicate, be situations in which General Order 104 is too broadly drafted, and I think that this Court should use the occasion of this case to provide guidelines to the district courts as to how they can under the existing legislation effectively use magistrates.

QUESTION: Is it your function here, Mr. Ehrenhaft, to defend the entire General Order or only that part of it that

relates to the Social Security --

MR. EHRENHAFT: I was appointed to support the judgment below. The judgment below, I think, in very express language indicates that they are considering this case solely from the perspective of the Social Security review case.

QUESTION: I guess directly that involves, does it not, Mr. Ehrenhaft, only paragraph (a) of Roman numeral I at the top of 15A, doesn't it, in the petition? This goes on for pages, but that one reads: "Actions to review administrative determinations re entitlement to benefits under the Social Security Act and related statutes, including but not limited to actions filed under 405(g)."

MR. EHRENHAFT: 405(b) is precisely the one that we are involved with here, yes.

Therefore, to sum up, it's my contention that if there are no constitutional doubts which neither the Government nor I seem to have in this case, the legislation is sufficiently broad to encompass this kind of duty, and I would place the burden on those who believe that it would not be appropriate so to interpret the statute to change it through congressional action rather than the other way around.

Thank you very much.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

[Whereupon, at 1:58 p.m., the argument in the above-entitled matter was concluded.]