A Referee Without a Whistle: Magistrate Judges and Discovery Sanctions in the Seventh Circuit

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INTRODUCTION

Building upon nearly two centuries of experience with the U.S. commissioner system,[1] Congress determined in 1968 that the "first echelon of the Federal judiciary" required a comprehensive reworking to become "an effective component of a modern scheme of justice."[2] The institution of the U.S. magistrate judge was born,[3] replete with an arsenal of powers and responsibilities that had previously rested with the district judge alone.[4]

The importance of the magistrate judge in modern civil litigation cannot be overstated. While the federal district courts' docket has swelled,[5] the accompanying discovery regime has exploded in size and expense.[6] Discovery has been "singled

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1. Peter G. McCabe, *The Federal Magistrate Act of 1979*, 16 HARV. J. ON LEGIS. 343, 345 (1979). Commissioners' powers evolved over time, receiving a congressional update every half century or so. *See id.* at 345–47. Initially, commissioners took bail in federal cases. *Id.* at 345. Gradually, Congress added responsibilities to the position (such as taking affidavits), standardized the pay scale, and allowed commissioners to try petty offenses with the defendant's consent. *Id*. at 345–47.

2. H. R. REP. No. 90-1629, at 11 (1968), *reprinted in* 1968 U.S.C.C.A.N. 4252, 4254; S. REP. NO. 90-371, at 8 (1967).

3. The 1968 Federal Magistrates Act abolished the commissioner system, instituting "United States magistrates" in its place. Federal Magistrates Act, Pub. L. 90-578, 82 Stat. 1107 (1968) (codified as amended at 28 U.S.C. §§ 631–639 (2012)). The Judicial Improvements Act of 1990 rebranded the position as "United States magistrate judge," and it holds that title today. Pub. L. 101-650, § 321, 104 Stat. 5089, 5117; *see* 28 U.S.C. §§ 631–639 (2012). When discussing pre-1990 legislation, this Note refers to magistrate judges as "magistrates" to mirror the statutory language and reflect the evolution in authority.

4. *See generally* McCabe, *supra* note 1; Joseph F. Spaniol, Jr., *The Federal Magistrates Act: History and Development*, 1974 ARIZ. ST. L.J. 565.

5. Between fiscal years 1990 and 2013, civil case filings in the U.S. district courts increased thirty-one percent, from 217,879 to 284,604 cases filed. During the same time period, authorized judgeships only increased eighteen percent, from 575 to 677. U.S. COURTS, TABLE 4.1: U.S. DISTRICT COURTS—CIVIL CASES FILED, TERMINATED, AND PENDING (2013), *available at* http://www.uscourts.gov/uscourts/Statistics/JudicialFactsAndFigures/2013/Table401.pdf [http://perma.cc/XRB6-3NBJ].

6. *See* LAWYERS FOR CIVIL JUSTICE, U.S. CHAMBER INST. FOR LEGAL REFORM, LITIGATION COST SURVEY OF MAJOR COMPANIES 2 (2010), *available at* www.uscourts.gov/file/document/litigation-cost-survey-major-companies [http://perma.cc/WQ6M-7MUR] ("The reality is that the high transaction costs of litigation, and in particular the costs of discovery, threaten to exceed the amount at issue in all but the largest cases."); John H. Beisner, *Discovering a Better Way: The Need for Effective Civil Litigation Reform*, 60 DUKE L.J. 547 (2010); Martin H. Redish & Colleen McNamara, *Back to the Future: Discovery Cost Allocation and Modern Procedural Theory*, 79 GEO. WASH. L. REV. 773, 775

out as 'the primary cause for cost and delay'"[7]—it has "'become an end in itself.'"[8] As Judge Easterbrook has proclaimed, "[D]iscovery is war."[9] But, discovery is not a war without rules. Since 1937, Federal Rule of Civil Procedure 37 ("Rule 37") has expressly provided district judges with some form of power to punish misbehavior in discovery.[10]

(2011) ("[I]t would have been difficult for the drafters of the original Federal Rules to foresee the advent of the copy machine, let alone the explosion of electronic discovery that occurred at the turn of the century . . . ."); *see also* Bell Atl. Corp. v. Twombly, 550 U.S. 544, 558–59 (2007) (collecting authorities and citing high cost of discovery in support of pleading standard interpretation).

7. Paul W. Grimm & David S. Yellin, *A Pragmatic Approach to Discovery Reform: How Small Changes Can Make a Big Difference in Civil Discovery*, 64 S.C. L. REV. 495, 496 (2013) (quoting *Member Survey on Civil Practice: Detailed Report*, 2009 A.B.A. SEC. LITIG. REP. 5, 6, *available at* www.uscourts.gov/file/document/aba-section-litigation-survey-civil-practice [http://perma.cc/ANH2-RGYS]).

8. *Id.* (quoting AM. COLL. OF TRIAL LAWYERS & INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., FINAL REPORT ON THE JOINT PROJECT OF THE AMERICAN COLLEGE OF TRIAL LAWYERS TASK FORCE ON DISCOVERY AND THE INSTITUTE FOR THE ADVANCEMENT OF THE AMERICAN LEGAL SYSTEM 2 (2009), *available at* http://iaals.du.edu/images /wygwam/documents/publications/ACTL-IAALS_Final_Report_rev_8-4-10.pdf [http://perma.cc /YJ88-NU4Y]).

9. Frank H. Easterbrook, *Discovery as Abuse*, 69 B.U. L. REV. 635, 635 (1989). Judge Easterbrook was appointed to the Court of Appeals for the Seventh Circuit in 1985. *Frank H. Easterbrook*, U. CHI. L. SCH., http://www.law.uchicago.edu/faculty/easterbrook/ [http://perma.cc/999L-JEMG].

10. Rule 37 provides:

> On notice to other parties and all affected persons, a party may move for an order compelling disclosure or discovery. The motion must include a certification that the movant has in good faith conferred or attempted to confer with the person or party failing to make disclosure or discovery in an effort to obtain it without court action.

FED. R. CIV. P. 37(a)(1). Subparagraph (a)(5)(A) sets out what the court must do upon granting a motion to compel:

> If the motion is granted . . . the court must, after giving an opportunity to be heard, require the party or deponent whose conduct necessitated the motion, the party or attorney advising that conduct, or both to pay the movant's reasonable expenses incurred in making the motion, including attorney's fees. But the court must not order this payment if: (i) the movant filed the motion before attempting in good faith to obtain the disclosure or discovery without court action; (ii) the opposing party's nondisclosure, response, or objection was substantially justified; or (iii) other circumstances make an award of expenses unjust.

Id. 37(a)(5)(A). If a motion to compel is denied, the movant, the attorney filing the motion, or both must pay reasonable expenses unless "the motion was substantially justified" or an award is otherwise "unjust." *Id.* 37(a)(5)(B). The Rule then explains how it applies to the various devices and duties of discovery. *See id.* 37.

On the evolution of Rule 37, see generally Craig Enoch, *Incivility in the Legal System? Maybe It's the Rules*, 47 SMU L. REV. 199 (1994); Maurice Rosenberg, *Sanctions To Effectuate Pretrial Discovery*, 58 COLUM. L. REV. 480 (1958); Joel Slawotsky, *Rule 37 Discovery Sanctions—The Need for Supreme Court Ordered National Uniformity*, 104 DICK. L. REV. 471 (2000). Some scholars have asserted that district courts possess the inherent power

Magistrate judges are at the heart of the action, frequently presiding over civil discovery[11] and ruling on nondispositive motions pertaining thereto.[12] In most circuits, this responsibility carries with it the power to sanction misbehavior.[13] However, and apparently without any other circuit in agreement,[14] the Seventh Circuit has held that magistrate judges are not permitted to issue any sanctions under their power to "hear and decide,"[15] including sanctions under Rule 37.[16] Thus, magistrate judges in the Seventh Circuit are tasked with overseeing and managing the most expensive and time-consuming stage of litigation, yet lack an effective enforcement mechanism for when it goes awry. They are referees without whistles.

Magistrate Judge Jeffrey Cole of the Northern District of Illinois has drawn attention to this conundrum and argues that it requires further consideration.[17] He points out, however, that "if it was the intent of Congress and the Federal Rules of Civil Procedure to circumscribe the powers of magistrate judges [with regard to discovery sanctions], that is the end of the matter."[18] Previous scholarship has argued that Congress did not so intend.[19] However, the landscape has changed significantly

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to punish discovery misconduct apart from the Federal Rules of Civil Procedure. *E.g.*, Slawotsky, *supra*, at 477.

11. Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374, 436 n.237 (1982).

12. FED. R. CIV. P. 72(a) (implementing Act of Oct. 21, 1976, Pub. L. No. 94-577, 90 Stat. 2729 (codified as amended at 28 U.S.C. § 636 (2012))).

13. Among the circuits that have decided the issue, the First, Second, Third, Fourth, Fifth, Ninth, and Tenth Circuits have determined that Rule 37 sanctions are nondispositive and thus within the purview of the magistrate judge. Jeffrey Cole, *The Seventh Circuit's Prohibition Against Magistrate Judges Issuing Sanctions Under Rule 37: An Issue Worth* Further *Discussion*, CIRCUIT RIDER, Apr. 2013, at 31, 35–37; *see infra* Part II. The Eighth and Eleventh Circuits have apparently not addressed the issue. *See* Cole, *supra*, at 36–37. On the current state of the law, see generally Cole, *supra* (excerpting heavily from the author's order in Cleversafe, Inc. v. Amplidata, Inc., 287 F.R.D. 424 (N.D. Ill. 2012)).

14. The Sixth Circuit's position is unclear. Despite the broad language in *Bennett v. General Caster Service of N. Gordon Co.*, 976 F.2d 995 (6th Cir. 1992), district courts have occasionally limited its holding to its facts. *See infra* Part II.B.

15. FED. R. CIV. P. 72(a). These determinations are subject to review by a district judge for clear error or error of law. *Id.* Because the Seventh Circuit treats motions for sanctions as dispositive, magistrate judges must issue a report and recommendation that sanctions be imposed, subject to de novo determination by a district judge without any deference to the recommendation. *Id.* 72(b).

16. Cole, *supra* note 13, at 33–35; *see infra* Part II.A. While district courts in the Seventh Circuit have, from time to time, held that monetary sanctions under Rule 37 are nondispositive, "undoubtedly the [contradictory Seventh Circuit authority] was not brought to their attention." Cole, *supra* note 13, at 34 (citing as examples Berry v. Ford Modeling Agency, Inc., No. 09-cv-8076, 2011 WL 3648574 (N.D. Ill. Aug. 18, 2011); Royal Maccabees Life Ins. Co. v. Malachinski, No. 96 C 6135, 2001 WL 290308 (N.D. Ill. Mar. 20, 2001)). Because the issue was not analyzed or recognized as such, these district court decisions are not "contrary authority." *Id.* at 34 (citing Brecht v. Abrahamson, 507 U.S. 619, 631 (1993); United States v. L.A. Tucker Truck Lines Inc., 344 U.S. 33, 38 (1952)).

17. Cleversafe, Inc. v. Amplidata, Inc., 287 F.R.D. 424 (N.D. Ill. 2012) (Cole, Mag. J.); Cole, *supra* note 13.

18. Cole, *supra* note 13, at 37.

19. *E.g.* David A. Bell, *The Power To Award Sanctions: Does It Belong in the Hands of*

since the subject was last comprehensively treated in 1997. The recent expansion of the magistrate judge's authority under the Federal Courts Improvement Act of 2000[20] (and the act's comprehensive discussion by the Second Circuit[21]) necessitates renewed scrutiny of the Seventh Circuit's position.[22] Furthermore, the state of modern civil discovery raises special policy considerations that have largely been neglected in this context. These developments since the start of the millennium drastically strengthen the textual, historical, and policy arguments in favor of the magistrate judge's authority to issue nondispositive discovery sanctions.

Part I provides necessary legislative context for understanding this debate, briefly describing the history of the Federal Magistrates Act and its implementation under Federal Rule of Civil Procedure 72 ("Rule 72"). Part II surveys the circuit split in the treatment of the magistrate judge's authority to issue discovery sanctions under the pre-2000 legislation. Part III describes the expansion of the magistrate judge's authority under the Federal Courts Improvement Act of 2000 ("2000 Amendments") and *Kiobel v. Millson*,[23] the most thorough treatment of the subject. Part IV argues that Judge Leval's concurrence in *Kiobel*, which is incompatible with the Seventh Circuit's position, is the best interpretation of the 2000 Amendments. Part V describes the consequences of the 2000 Amendments on the magistrate judge's authority, argues that the Seventh Circuit's rule exacerbates extant discovery abuses, and proposes that courts utilize Federal Rule of Civil Procedure 1 ("Rule 1") as a canon of construction to resolve disputes over ambiguous language.

This Note ultimately argues that, if the Seventh Circuit is not willing to reverse its holdings in *Alpern v. Lieb*[24] and *Retired Chicago Police Ass'n v. City of Chicago*[25] in light of recent developments, Congress should again clarify its intent. In the face of the crushing "costs of discovery[] [that] threaten to exceed the amount at issue in all but the largest cases,"[26] it is the Seventh Circuit's responsibility to employ all just and legal devices to comply with Congress's mandate "to secure the just, speedy, and inexpensive determination of every action and proceeding."[27]

I. LEGISLATIVE DEVELOPMENT

Historical context is critical to understanding the different perspectives regarding the role of the magistrate judge because legislative intent has significantly influenced the disparate lines of reasoning.[28] Parts I and II summarize the pre-2000 legal developments in the magistrate judge's authority; discussion of the 2000 Amendments and interpretation thereof is reserved for Part III. This Part briefly

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Magistrate Judges?, 61 ALB. L. REV. 433 (1997).

20. Federal Courts Improvement Act of 2000, Pub. L. 106-518, §§ 202–03, 114 Stat. 2410, 2412–14.

21. Kiobel v. Millson, 592 F.3d 78 (2d Cir. 2010).

22. *See* Cole, *supra* note 13, at 35.

23. 592 F.3d 78.

24. 38 F.3d 933 (7th Cir. 1994).

25. 76 F.3d 856 (7th Cir. 1996).

26. LAWYERS FOR CIVIL JUSTICE, *supra* note 6, at 2.

27. FED. R. CIV. P. 1; *see infra* Part V.B–C.

28. *See* Cole, *supra* note 13; *infra* Part II.

describes the legislative history of the federal magistrate judge[29] and of Rule 72, which was designed to implement the Federal Magistrates Act of 1976.[30]

A. The Federal Magistrates Act of 1968

The Federal Magistrates Act of 1968[31] ("1968 Act") was revolutionary, introducing

> a new judicial officer having powers and responsibilities far exceeding those previously extended by law to United States commissioners. . . . The legislative intent was clear: Magistrates were to assist district judges in the performance of their judicial duties, relieving the district courts of some functions and allowing the judicial system to utilize its judges to better advantage.[32]

The statute also provided structural improvements over the commissioner system by setting fixed compensation[33] and establishing certain qualifications for the position (for example, that magistrates be lawyers.)[34]

The 1968 Act conferred upon district courts broad discretion to assign to magistrates "such additional duties as are not inconsistent with the Constitution and laws of the United States."[35] As an "illustration[] of the 'general character of duties assignable to magistrates,'"[36] the statute provided that service as special master,[37] "preliminary review of applications for posttrial relief,"[38] and "assistance to a district judge in the conduct of pretrial or discovery proceedings"[39] were expressly delegable as "additional duties."[40]

This loosely defined ability for the district court to delegate duties to the newly christened magistrates quickly spawned substantial litigation—and judicial inconsistency—as to the precise contours of the "additional duties" provision.[41] The

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29. For a comprehensive description of this history, see generally PETER G. MCCABE, A GUIDE TO THE FEDERAL MAGISTRATE JUDGE SYSTEM (2014), *available at* http://www.fedbar.org/PDFs/A-Guide-to-the-Federal-Magistrate-Judge-System.aspx?FT=.pdf [http://perma.cc/YGM7-LT5A]; Cole, *supra* note 13; McCabe, *supra* note 1; Philip M. Pro & Thomas C. Hnatowski, *Measured Progress: The Evolution and Administration of the Federal Magistrate Judges System*, 44 AM. U. L. REV. 1503 (1995); Spaniol, Jr., *supra* note 4.

30. Bell, *supra* note 19, at 434.

31. Federal Magistrates Act, Pub. L. No. 90-578, § 101, 82 Stat. 1107 (1968) (codified as amended at 28 U.S.C. §§ 631–639 (2012)).

32. Spaniol, Jr., *supra* note 4, at 565. For an in-depth treatment of the 1968 Act, see *id.*

33. § 101, 82 Stat. at 1112 (codified as amended at 28 U.S.C. § 634 (2012)).

34. *Id.* at 1108 (codified as amended at 28 U.S.C. § 631(b)(1) (2012)). Perhaps surprisingly, commissioners were not so required. Spaniol, Jr., *supra* note 4, at 567 n.14.

35. § 101, 82 Stat. at 1113 (codified as amended at 28 U.S.C. § 636(b)(3) (2012)).

36. Spaniol, Jr., *supra* note 4, at 570 (quoting S. REP. NO. 90-371, at 25 (1967)).

37. § 101, 82 Stat. at 1113 (codified as amended at 28 U.S.C. § 636(b)(2) (2012)).

38. *Id.* (codified as amended at 28 U.S.C. § 636(b)(1)(B) (2012)).

39. *Id.* (codified as amended at 28 U.S.C. § 636(b)(1)(A) (2012)).

40. *Id.* (codified as amended at 28 U.S.C. § 636(b)(3) (2012)).

41. McCabe, *supra* note 1, at 351; *see id.* at 351 n.45 (collecting cases).

mounting tension finally came to a head in June 1974, when the Supreme Court addressed magistrate jurisdiction for the first time in *Wingo v. Wedding*.[42] While holding that magistrates lacked the authority to conduct habeas corpus evidentiary hearings,[43] the case is best known for the virulent dissent of Chief Justice Burger: "In any event, now that the Court has construed the Magistrates Act contrary to a clear legislative intent, it is for the Congress to act to restate its intentions if its declared objectives are to be carried out."[44] Congress quickly accepted Chief Justice Burger's invitation.[45]

B. The Federal Magistrates Act of 1976

While the 1968 Act was patently revolutionary, the Federal Magistrates Act of 1976[46] ("1976 Act") was evolutionary and, in significant part, a response to what Congress perceived as judicial misconstruction of the original Act.[47] The purpose of the 1976 Act was, inter alia, to "perfect the [statutory] language" and to broaden the magistrates' power "to hear and determine certain pretrial motions."[48] Congress was buoyed by the incremental success of the 1968 Act in alleviating the pressure of overcrowded dockets on district court judges[49] and set out to extend to the district judges even "more time to preside at the trial of cases, having been relieved of part of [their] duties which required the judge[s] to personally hear each and every pretrial motion or proceeding necessary to prepare a case for trial."[50]

Early versions of the 1976 Act and discussion throughout the decision-making process consistently referred to a nondispositive/dispositive dichotomy to delineate which motions magistrates could "decide" (under the deferential "clear error" or "error of law" standard of review) and which required a report and recommendation.[51] Congress, however, dispensed with this dichotomy in the final

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42. 418 U.S. 461 (1974); *see* McCabe, *supra* note 1, at 352.

43. *Wingo*, 418 U.S. at 469–74.

44. *Id.* at 487 (Burger, C.J., dissenting).

45. McCabe, *supra* note 1, at 353–54.

46. Act of Oct. 21, 1976, Pub. L. No. 94-577, 90 Stat. 2729 (codified as amended at 28 U.S.C. § 636 (2012)).

47. The committee reports made this purpose explicit:

> The bill under consideration by the committee would accomplish this restatement and clarification of the Congressional intention [invited by Chief Justice Burger's dissent in Wingo] that the magistrate should be a judicial officer who, not only in his own right but also under general supervision of the court, shall serve as an officer of the court in disposing of minor and petty criminal offenses, in the preliminary or pretrial processing of both criminal and civil cases, and in hearing dispositive motions and evidentiary hearings when assigned to the magistrate by a judge of the court.

H.R. REP. NO. 94-1609, at 5 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6162, 6165; S. REP. NO. 94-625, at 3 (1976).

48. S. REP. NO. 94-625, at 2.

49. *See id.* at 5.

50. *Id.*

51. *See Jurisdiction of United States Magistrates: Hearing on S. 1283 Before the Subcomm. on Improvements in Judicial Machinery of the S. Comm. on the Judiciary*, 94th

version. Rather than providing illustrative examples of the type of motions over which magistrates *could* exercise jurisdiction, Congress attempted to achieve its objectives by "expressly" enumerating motions over which a magistrate *could not* exercise jurisdiction.[52] The committee reports reflect a presumption that the enumerated motions were the only pretrial motions outside the magistrate's power: "[T]he magistrate shall have the power to make a determination of any pretrial matter (*except the enumerated dispositive motions*) and . . . his determination set forth in an appropriate order shall be 'final,'" subject only to review for clear or legal error.[53] The House report bolsters this conclusion with a discussion of motions expected to be within the purview of the magistrate.[54] In its discussion, the committee acknowledged the extremes—motions merely pertaining to procedure (clearly nondispositive) and motions to dismiss (clearly dispositive)—and indicated that magistrates should have the power to decide all motions in between, except as specified.

C. Federal Rule of Civil Procedure 72

Rather than adopt the 1976 Act's delineation of motions, the Supreme Court transmuted the nondispositive/dispositive dichotomy referenced throughout the Act's legislative history into Rule 72.[55] The Advisory Committee Note to Rule 72

Cong. 2 (1975) (introducing an early version of S. 1283 that would have granted magistrate judges the power to "hear and determine" any pretrial matters except those which are "dispositive of the litigation"); 12 CHARLES ALAN WRIGHT, ARTHUR R. MILLER, AND RICHARD L. MARCUS, FEDERAL PRACTICE AND PROCEDURE § 3068.2 (3d ed. 1998) ("At all stages in the consideration of the 1976 amendments to the statute, proponents of the revision of Section 636(b) divided the pretrial activities of magistrates into two groups[, nondispositive and dispositive.]").

52. H.R. REP. NO. 94-1609, at 9; S. REP. NO. 94-625, at 7. These excepted motions are motions for

> injunctive relief, for judgment on the pleadings, for summary judgment, to dismiss or quash an indictment or information made by the defendant, to suppress evidence in a criminal case, to dismiss or to permit maintenance of a class action, to dismiss for failure to state a claim upon which relief can be granted, and to involuntarily dismiss an action.

28 U.S.C. § 636(b)(1)(A) (2012). Such motions may be heard by a magistrate judge who may only issue a report and recommendation as to a suggested disposition. *Id.* § 636(b)(1)(B).

53. H.R. REP. NO. 94-1609, at 10 (emphasis added); S. REP. NO. 94-625, at 8 (containing the identical quote).

54. H.R. REP. NO. 94-1609, at 7. The report notes that "[t]he Federal Rules of Civil Procedure provides many opportunities for the parties by motion to invoke a decision of the court," ranging from a motion to extend under Rule 6(b) or a motion specifying how to serve a summons under Rule 4(e), to a motion to dismiss under Rule 12(b) or a motion for summary judgment under Rule 56. *Id.* "In between these extremes," the report continues, are discovery motions, joinder motions, suppression motions, and pretrial conference motions, just to name a few. *Id.* The report concludes that "[w]ithout the assistance furnished by magistrates in hearing matters of this kind, . . . it seems clear to the committee that the judges of the district courts would have to devote a substantial portion of their available time to various procedural steps rather than to the trial itself." *Id.*

55. FED. R. CIV. P. 72; Cole, *supra* note 13, at 32 n.4 (citing FED. R. CIV. P. 72 advisory

indicates that the division of pretrial matters was intended to track the 1976 Act, even though the Rule itself distinguishes between "dispositive" and "nondispositive" pretrial matters.[56]

The decision to craft Rule 72 in this manner was foreshadowed by the Supreme Court's decision in *United States v. Raddatz*,[57] decided almost three years before the 1983 addition of Rule 72. The Court was, for the first time, tasked with interpreting the 1976 Act and in doing so relied heavily upon legislative history. The Court noted that "Congress provided that a district court judge could designate a magistrate to 'hear and determine' any pretrial matter pending before the court, except certain 'dispositive' motions,"[58] with "'ultimate adjudicatory power over dispositive motions'" to be vested in the district court.[59] Rule 72 reflected a deliberate decision to codify Congress's intent, which, according to *Raddatz*, was heavily influenced by a need not only to clarify existing law but also to avoid constitutional concerns that would arise if dispositive motions were "decided" by magistrates.[60] This legacy has been the source of substantial litigation in the lower courts.[61]

II. INTERPRETIVE DEVELOPMENT

There are two divergent lines of authority on the ability of magistrate judges to issue sanctions under Rules 37 and 72: one in the Seventh Circuit—which held in *Alpern v. Lieb*[62] and *Retired Chicago Police Ass'n v. City of Chicago*[63] (collectively "*Alpern*/*Retired Chicago Police*") that sanctions requests are dispositive under Rule

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committee's note (1983 Addition)). Rule 72(a) provides that "[w]hen a pretrial matter not dispositive of a party's claim or defense is referred to a magistrate judge to hear and decide, the magistrate judge must promptly conduct the required proceedings and, when appropriate, issue a written order stating the decision." FED. R. CIV. P. 72(a). Upon a party's timely objection, the district judge must "modify or set aside any part of the order that is clearly erroneous or is contrary to law." *Id.* Rule 72(b) provides for de novo review of "dispositive motions" upon a party's objection to the magistrate judge's recommended disposition. FED. R. CIV. P. 72(b).

56. FED. R. CIV. P. 72 advisory committee's note (1983 Addition); *see* WRIGHT ET AL., *supra* note 51, § 3068.2.

> Under subdivision (a) the Committee explains that "this subdivision addresses court-ordered referrals of non-dispositive matters under 28 U.S.C. § 636(b)(1)(A)." The corresponding statement in the Note to Rule 72(b) is "this subdivision governs court-ordered referrals of dispositive pretrial matters and prisoner petitions challenging conditions of confinement, pursuant to statutory authorization in 28 U.S.C. § 636(b)(1)(B)."

WRIGHT ET AL., *supra*, at § 3068.2 n.5 (quoting FED. R. CIV. P. 72 advisory committee's note (1983 Addition)).

57. 447 U.S. 667 (1980).

58. *Id.* at 673 (quoting 28 U.S.C. § 636(b)(1)(A) (2012)).

59. *Id.* at 675 (quoting S. REP. NO. 94-625, at 10 (1976)).

60. *Id.* at 676 ("Congress focused on the potential for Art. III constraints in permitting a magistrate to make decisions on dispositive motions.").

61. WRIGHT ET AL., *supra* note 51, § 3068.2 (collecting cases); Cole, *supra* note 13 (same).

62. 38 F.3d 933 (7th Cir. 1994).

63. 76 F.3d 856 (7th Cir. 1996).

72[64]—and one in the other circuits that have considered the issue, holding discovery sanctions to be "undoubtedly"[65] nondispositive as a general matter.[66] District courts in circuits that have not addressed the matter generally have held or operated under the assumption that the sanctions are within the "nondispositive" power of the magistrate judge.[67] This Part summarizes the combating rationales of the circuits in their respective interpretations of Rule 72 and 28 U.S.C. § 636(b), the codification of the 1976 Act.

A. The Seventh Circuit

The *Alpern*/*Retired Chicago Police* line of logic unequivocally compels the conclusion that Rule 37 sanctions are beyond the "nondispositive" authority of magistrate judges.[68] In so holding, the Seventh Circuit reasoned that deciding a request for sanctions is tantamount to deciding a request for damages, a task that is clearly dispositive under Rule 72.[69]

In *Alpern*, a party's postdismissal request for Federal Rule of Civil Procedure 11 ("Rule 11") sanctions was "decided" as a nondispositive matter by the magistrate judge.[70] Judge Easterbrook, writing for a unanimous panel, first noted the three areas in which Congress has granted magistrate judges the power "to make independent decisions on the merits" (misdemeanor prosecutions,[71] pretrial matters,[72] and civil proceedings by consent of the parties[73]) and determined that none apply to requests for sanctions.[74] The court thus overturned the district judge's approval of the magistrate judge's sanctions for applying a deferential standard of review, holding that sanctions act as an independent "claim for money" and noting that "[a]wards of sanctions . . . are treated as separate claims for purposes of appellate jurisdiction."[75] While acknowledging that awards under Rule 11 are "conceptually distinct from a decision on the merits" of a civil action, the court nonetheless held that such sanctions fall within the exception to the general grant of power to hear and decide pretrial matters under 28 U.S.C. § 636(b)(1)(A), analogizing sanctions to the proscribed "awards of injunctive relief, decisions on the pleadings, grants of summary judgment, and so on."[76]

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64. *See id.* at 868 (citing *Alpern*, 38 F.3d 933).
65. Kebe *ex rel.* K.J. v. Brown, 91 F. App'x 823, 827 (4th Cir. 2004).
66. *See infra* Part II.C.
67. *See* Bell, *supra* note 19, at 450–51 (collecting cases).
68. *See* Cleversafe, Inc. v. Amplidata, Inc., 287 F.R.D. 424, 427–28 (N.D. Ill. 2012); Bell, *supra* note 19, at 449–50; Cole, *supra* note 13, at 33–34.
69. *Retired Chicago Police*, 76 F.3d at 868; Alpern v. Lieb, 38 F.3d 933, 935 (7th Cir. 1994).
70. *See* 38 F.3d at 934.
71. *Id.* at 935 (citing 28 U.S.C. § 636(a)(3) (1994)).
72. *Id.* (citing 28 U.S.C. § 636(b)(1)(A) (1994)).
73. *Id.* (citing 28 U.S.C. § 636(c)(1) (1994)).
74. *Id.*
75. *Id.*
76. *Id.*

Any indication that the rule in *Alpern* was limited, either to post-trial motions for sanctions or to sanctions under Rule 11, was expressly contraindicated by Judge Kanne, writing for a unanimous panel, in *Retired Chicago Police Ass'n*. The court rejected the argument that pretrial motions for sanctions were permissible under § 636(b)(1)(A), stressing that *any* "resolution of a sanctions request is a dispositive matter."[77] The defendants' argument that sanctions against a party's attorney were distinct from sanctions against a party (as in *Alpern*) was also summarily rejected:

> While they are correct that an attorney does not become a party by virtue of being the subject of a motion for sanctions, . . . the [defendants'] argument misapprehends the nature of a magistrate judge's authority under § 636 and Rule 72.
>
> Both § 636 and Rule 72 distinguish the proceedings a magistrate judge may conduct (and whether a district judge may defer to the magistrate judge's conclusions) by the type of *matter* involved, not whether the matter involves parties.[78]

Retired Chicago Police Ass'n thus doubled down on *Alpern*'s reasoning, foreclosing any argument that sanctions of any type could fall under the magistrate judge's "decision" power.

B. The Sixth Circuit

In *Bennett v. General Caster Service of N. Gordon Co.*,[79] a Sixth Circuit panel writing per curiam "decline[d] to read 'claim' [in Rule 72(a)] to encompass only the underlying substantive claim of a party and not a Rule 11 motion resulting in an award of money damages" and held accordingly that the magistrate judge's order was "dispositive of a 'claim' of a party."[80] The court analogized sanctions to then-proscribed contempt powers[81] and noted the possible gravity of monetary sanctions,[82] explaining that

> [n]othing in the Act expressly vests magistrate judges with jurisdiction to enter orders imposing Rule 11 sanctions on parties. Rule 72(a)

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77. Retired Chicago Police Ass'n v. City of Chicago, 76 F.3d 856, 869 (7th Cir. 1996). This plausible distinction is centered around the statutory language granting district judges the power to "designate a magistrate judge to hear and determine any *pretrial* matter pending before the court . . . ." 28 U.S.C. § 636(b)(1)(A) (2012) (emphasis added). *But see* Bell, *supra* note 19, at 452 (arguing that magistrate judges possess the power to enter postjudgment sanctions orders pertaining to pretrial conduct). Though this particular issue is beyond the scope of this Note, which is principally concerned with re-evaluating the Seventh Circuit's absolute proscription on magistrate-judge-determined sanctions, this author concurs with Bell's position and rationale. As Bell points out, "nothing in the statute or the rule indicates that either the motion or the ruling must actually be made prior to trial." *Id.*

78. *Retired Chicago Police Ass'n*, 76 F.3d at 869 (citation omitted).

79. 976 F.2d 995 (6th Cir. 1992).

80. *Id.* at 998. For a discussion of Rule 72, see *supra* note 55.

81. *Bennett*, 976 F.2d at 998 n.7.

82. *Id.* at 998 n.6.

> authorizes a magistrate judge to enter an order only as to a "pretrial matter . . ." that is not dispositive of a "claim or defense of a party."[83]

Despite the broad language in *Bennett*—in a footnote, the court wrote that "magistrate judges lack jurisdiction to enter Rule 11 orders"[84]—several district courts have limited its holding to its context: post-trial entry of sanctions motions.[85] Indeed, the Eastern District of Kentucky conducted its own analogical analysis of Rule 37 sanctions in determining them to be nondispositive, noting that *Bennett* "found sanctions to be dispositive [in the context of] Rule 11 motions made after the judgment on the underlying claim was already entered and appeal taken."[86] Unlike the Seventh Circuit, where the appellate court explicitly squashed any limiting principle present in *Alpern*,[87] district courts in the Sixth Circuit may be able to delegate Rule 37 discovery sanctions to magistrate judges without consequence.[88]

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83. *Id.* at 998 (alteration in original) (quoting FED. R. CIV. P. 72(a)).

84. *Id.* at 998 n.7.

85. *Compare* Powell Mountain Energy, L.L.C. v. Manalapan Land Co., No. CIV.A. 09-305-JBC, 2011 WL 3880512, at *1 (E.D. Ky. Aug. 31, 2011) (approving magistrate judge's pretrial order on motion for Rule 37 sanctions), *and* Wendorf v. JLG Indus., Inc., No. 08-CV-12229, 2010 WL 148255, at *1 n.2 (E.D. Mich. Jan. 11, 2010) (approving magistrate judge's exclusion of witness and noting the limited holding in *Bennett*), *with* Evans v. Walgreen Co., No. 09-CV-2491 Ma/P, 2011 WL 4436135, at *1 (W.D. Tenn. Aug. 16, 2011) ("Although *Bennett* involved a Rule 11 order entered by a magistrate judge post-judgment, the court did not appear to limit its holding to post-judgment Rule 11 motions."), *report and recommendation adopted*, No. 09-2491, 2011 WL 4436129 (W.D. Tenn. Sept. 22, 2011), *aff'd*, 559 F. App'x 508 (6th Cir. 2014), *and* Amway Corp. v. Procter & Gamble Co., No. 1:98-CV-726, 2001 WL 1818698, at *11 (W.D. Mich. Apr. 3, 2001) ("Although the contemplated order would not dispose of any claim or defense, it is unclear whether the Sixth Circuit would nevertheless consider the entry of such an order beyond the power of a magistrate judge . . . .").

86. *Powell Mountain Energy, L.L.C.*, 2011 WL 3880512, at *1.

87. The closest the Sixth Circuit has come to extending *Bennett* was in *Massey v. City of Ferndale*, where the court seemingly held that "motions for sanctions, fees and costs are *not* to be *determined* by a magistrate judge." 7 F.3d 506, 509–10 (6th Cir. 1993) (emphasis in original). The court's reasoning, however, lends itself—in two respects—to the limiting principle the district courts have employed in restricting *Bennett* to post-trial motions for sanctions. First, the court noted "that such *post-dismissal motions* are not 'pretrial matter[s]' pending before the court." *Id.* at 510 (alteration in original) (emphasis added) (quoting 28 U.S.C. § 636(b)(1)(A) (1988); FED. R. CIV. P. 72(a)). . Second, the court held "that resolution of *such motions* is 'dispositive of a claim.'" *Id.* (emphasis added) (quoting FED. R. CIV. P. 72(b)). This second point warrants further consideration, as it is unclear as to what "such motions" is referring. The court followed its second point with the following: "[W]e hold that the magistrate judge in the instant case did not have the authority to rule upon *post-dismissal motions* for sanctions . . . ." *Id.* (emphasis added). The above quoted language supports the interpretation that the court intended to limit its holding to "such motions"—that is, motions for postdismissal or post-trial sanctions.

88. *But see Amway Corp.*, 2001 WL 1818698, at *11 ("In the exercise of caution, I am not ordering the imposition of sanctions, but recommending to Judge Bell that Procter & Gamble be sanctioned as set forth above.").

C. The Other Circuits

Not every circuit has considered the issue; district courts in several circuits have acted under the assumption that Rule 37 motions are nondispositive.[89] There is a firm consensus that the ability of a magistrate judge to hear and determine Rule 37 motions is dependent upon the sanction sought or imposed; sanctions of a stricken claim or of default judgment "could only be classified as dispositive."[90] But, in the First,[91] Second,[92] Fourth,[93] Fifth,[94] Ninth,[95] and Tenth[96] Circuits, Rule 37 orders that could not immediately end the primary litigation are nondispositive.[97] These circuits have employed two lines of reasoning: (1) analogizing the effect of the sanction employed to the proscribed motions listed in § 636(b)(1)[98] and (2) characterizing sanctions as "collateral matters" and thus not dispositive of any claim of a party.[99]

1. Analogizing Sanctions to Enumerated Dispositive Motions

The most prevalent analysis follows a consistent theme, analogizing the sanction employed to the enumerated motions in § 636(b)(1) to determine whether it is "dispositive" or "nondispositive" under Rule 72.[100] Among the actions that have been held to be dispositive under this analysis[101] are rulings on motions to remand,[102]

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89. *See* Cole, *supra* note 13, at 35–37 (collecting cases); *see, e.g.*, Whitney v. Wetzel, Civil Action No. 2:12-CV-01623, 2014 WL 5513481, at *1 (W.D. Pa. Oct. 31, 2014) (citing V. Mane Fils S.A. v. Int'l Flavors & Fragrances, Inc., Civil Action No. 06-2304 (FLW), 2011 WL 1344193, at *4 (D.N.J. Apr. 8, 2011) (citing district court opinions to support the proposition that pretrial discovery matters are nondispositive)); United States v. Langrehr, No. 4:99CV3316, 2000 WL 33155878, at *1 (D. Neb. Dec. 19, 2000) (reviewing magistrate judge's orders on discovery sanctions under "clearly erroneous" standard); E.E.O.C. v. Knight's Inc., 112 F.R.D. 371 (E.D. Ark. 1986) (memorandum order deciding motions for Rule 37 sanctions).

90. Cole, *supra* note 13, at 33 n.5 (citing Ocelot Oil Corp. v. Sparrow Indus., 847 F.2d 1458, 1462 (10th Cir. 1988); N. Am. Watch Corp. v. Princess Ermine Jewels, 786 F.2d 1447, 1450 (9th Cir. 1986)).

91. Phinney v. Wentworth Douglas Hosp., 199 F.3d 1, 5 (1st Cir. 1999).

92. Kiobel v. Millson, 592 F.3d 78, 97–98 (2d Cir. 2010); Thomas E. Hoar, Inc. v. Sara Lee Corp., 900 F.2d 522 (2d Cir. 1990).

93. Kebe *ex rel.* K.J. v. Brown, 91 F. App'x 823, 827 (4th Cir. 2004).

94. Merritt v. Int'l Bhd. of Boilermakers, 649 F.2d 1013, 1016–17 (5th Cir. 1981).

95. Bess v. Cate, 422 F. App'x 569, 572 (9th Cir. 2011); Grimes v. City & Cnty. of San Francisco, 951 F.2d 236, 240 (9th Cir. 1991); Maisonville v. F2 Am., Inc., 902 F.2d 746, 747–48 (9th Cir. 1990).

96. Hutchinson v. Pfeil, 105 F.3d 562, 566 (10th Cir. 1997); Ocelot Oil Corp. v. Sparrow Indus., 847 F.2d 1458, 1462 (10th Cir. 1988).

97. *See* Cole, *supra* note 13, at 35–37.

98. *See infra* Part II.C.1.

99. *See infra* Part II.C.2.

100. WRIGHT ET AL., *supra* note 51, § 3068.2; Cole, *supra* note 13, at 32.

101. This list is illustrative. For a comprehensive analysis, see WRIGHT ET AL., *supra* note 51, § 3068.2.

102. *E.g.*, Williams v. Beemiller, Inc., 527 F.3d 259, 266 (2d Cir. 2008). *But see* Peter J. Gallagher, *In Search of a Dispositive Answer on Whether Remand Is Dispositive*, 5 SETON

denials of motions to certify a district court order for interlocutory appeal,[103] denials of motions for enforcement of an agency subpoena,[104] denials of motions to proceed in forma pauperis,[105] and service as presiding judge over jury selection in felony trials.[106]

Judge Selya's[107] opinion for the First Circuit is a prototype of the framework generally employed by the circuits:

> We think that the terms dispositive and nondispositive as used in Rule 72 must be construed in harmony with the classifications limned in section 636(b)(1). . . . This does not mean, of course, that dispositive motions are those excepted motions specifically enumerated in section 636(b)(1)(A), and no others. Rather, that enumeration informs the classification of other motions as dispositive or nondispositive. Motions for sanctions premised on alleged discovery violations are not specifically excepted under 28 U.S.C. § 636(b)(1)(A) and, in general, they are not of the same genre as the enumerated motions. We hold, therefore, that such motions ordinarily should be classified as nondispositive.[108]

This viewpoint recognizes that the dispositive/nondispositive dichotomy in Rule 72 is directly tied to the statutory language and enumerated motions under § 636(b)(1).[109]

HALL CIRCUIT REV. 303, 313–14 (2009) (noting that, while "all the circuit courts that have confronted the issue . . . have concluded that remand is" dispositive, "[n]early every district court that has confronted the issue has concluded" the opposite); *id.* at 314 n.60 (collecting cases).

103. *E.g.*, Vitols v. Citizens Banking Co., 984 F.2d 168, 169–70 (6th Cir. 1993).

104. *E.g.*, N.L.R.B. v. Frazier, 966 F.2d 812, 818 (3d Cir. 1992).

105. *E.g.*, Woods v. Dahlberg, 894 F.2d 187, 187 (6th Cir. 1990).

106. Gomez v. United States, 490 U.S. 858, 863–76 (1989).

107. Judge Selya, appointed to the First Circuit in 1986, is perhaps best known for his distinctively eloquent writing style. *See, e.g.*, Dan Slater, *The Linguistic Talents of Judge Bruce Selya*, WALL ST. J.: L. BLOG (Feb. 4, 2008, 1:30 PM), http://blogs.wsj.com/law/2008/02/04/the-linguistic-talents-of-judge-bruce-selya-2/ [http://perma.cc/WL38-TKYQ].

108. Phinney v. Wentworth Douglas Hosp., 199 F.3d 1, 5–6 (1st Cir. 1999) (citation omitted); *see also* PowerShare, Inc. v. Syntel, Inc., 597 F.3d 10, 13 (1st Cir. 2010) (quoting *Phinney* with approval).

109. As the Tenth Circuit has explained,

> The notes to Rule 72 explicitly tie the two categories used in Rule 72 to referrals under either subsection (A) or subsection (B) of section 636. Because Rule 72 became law subsequent to the relevant amendment to section 636, we read the notes as confirming our interpretation of the section: motions not designated on their face as one of those excepted in subsection (A) are nevertheless to be treated as such a motion when they have an identical effect.

Ocelot Oil Corp. v. Sparrow Indus., 847 F.2d 1458, 1462 (10th Cir. 1988) (citation omitted); *see* Lykins v. CertainTeed Corp., 555 F. App'x 791, 796–97 (10th Cir. 2014) (citing *Ocelot Oil Corp.* with approval); Gomez v. Martin Marietta Corp., 50 F.3d 1511, 1520 (10th Cir. 1995) ("Because the magistrate judge here refused to impose a dispositive sanction, the district court correctly reviewed the ruling under Rule 72(a).").

2. Treating Discovery Sanctions as Collateral Matters

Courts have provided another rationale, which, although rejected by the Seventh Circuit,[110] provides additional support for the conclusion that Rule 37 sanctions are nondispositive. The District of Nebraska in *Robinson v. Eng*[111] noted that Rule 72 applies on its own terms only to rulings that dispose of a party's "'claim or defense'"—a phrase which must be limited because "Congress clearly has not chosen to categorize as 'dispositive' any ruling that resolves an issue."[112] Because sanctions ordinarily "'do[] not signify a district court's assessment of the legal merits of the complaint'" and have been deemed by the Supreme Court to be "'collateral' to the claims and defenses of the underlying action," the court reasoned, sanctions are "antithetic" to dispositive rulings.[113]

While the court employed the dispositive/nondispositive dichotomy, it looked through the lens of a merit-centered/collateral dichotomy to determine that most sanctions fall within § 636(b)(1)(A), lest every issue that impacts a case fall within the "dispositive" category.[114] Under this line of reasoning, if a sanction does not address or foreclose the vitality of the complaint or an available defense thereto, it is collateral to the "claim or defense" and is thus nondispositive. The *Robinson* court analyzed Rule 11 sanctions; other courts have held that "[t]he [Supreme] Court's reasoning that the determination of Rule 11 sanctions is a collateral issue . . . applies with no less force to discovery sanctions imposed under Rule 37 . . . ."[115]

However, a strong counterargument has been asserted under the logic that sanctions are similar to the contempt power,[116] which, although "collateral,"[117] was entirely beyond the reach of magistrate judges prior to 2000. This line of reasoning relies upon the aforementioned analogical analysis.

III. DEVELOPMENTS SINCE 2000

The landscape has changed drastically since 2000, with magistrate judges gaining additional authority and a nonvoting seat on the Judicial Conference.[118] Part III.A

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110. *See supra* Part II.A.

111. 148 F.R.D. 635 (D. Neb. 1993).

112. *Id.* at 640.

113. *Id.* (quoting Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 396 (1990)).

114. *Id.* at 640 n.9.

115. Heinrichs v. Marshall & Stevens, Inc., 921 F.2d 418, 421 (2d Cir. 1990); *see, e.g.*, Fosselman v. Gibbs, No. C 06-0375 PJH (PR), 2010 WL 1008264, at *4 (N.D. Cal. Mar. 18, 2010) (citing *Heinrichs* with approval), *aff'd*, 473 F. App'x 639 (9th Cir. 2012); Log On Am., Inc. v. Credit Suisse First Boston Corp., No. 01 CIV 0272 RMB MHD, 2001 WL 1360233, at *2 (S.D.N.Y. Nov. 6, 2001) (same).

116. *See, e.g.*, Alpern v. Lieb, 38 F.3d 933, 934 (7th Cir. 1994). *Compare* Kiobel v. Millson, 592 F.3d 78, 87–88 (2d Cir. 2010) (Cabranes, J., concurring), *with id.* at 101–02 (Leval, J., concurring).

117. *See* Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 396 (1990).

118. MCCABE, *supra* note 29, at 17, 22; *Magistrate Judges are Effective, Flexible Judiciary Resource*, THIRD BRANCH (Admin. Office of the U.S. Courts, Washington, D.C.), Oct. 2008, at 7, 11, *available at* https://web.archive.org/web/20101204120619/http://www.uscourts.gov/uscourts/News/ttb/archive/2008-10%20Oct.pdf [http://perma.cc/CRR5-4652].

addresses the addition of the contempt power in the Federal Courts Improvement Act of 2000[119] ("2000 Amendments"); Part III.B explains the Second Circuit's thorough exegesis thereof.

A. Federal Courts Improvement Act of 2000

Until 2000, magistrate judges entirely lacked the power to punish contemnors.[120] Magistrate judges deeming behavior worthy of contempt were required to "certify" the relevant facts, whereupon a district judge—generally entirely removed from the relevant proceedings—was required to conduct a new review of the incident.[121] As part of a larger overhaul to improve the efficiency and administration of the judiciary, Congress elected to do away with these time-consuming redundancies by granting magistrate judges limited contempt power.[122]

Conscious of the need to preserve distinctions between the magistrate judge's contempt authority and that of the Article III judiciary,[123] the 2000 Amendments' grant of contempt power is somewhat narrowly tailored. Magistrate judges were granted "[s]ummary criminal contempt authority," which includes: "the power to punish summarily by fine or imprisonment such contempt of the authority of such magistrate judge constituting misbehavior of any person in the magistrate judge's presence";[124] criminal contempt authority in consent and misdemeanor cases;[125] and full civil contempt authority in consent and misdemeanor cases.[126] Criminal

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119. Federal Courts Improvement Act of 2000, § 202, 114 Stat. 2410, 2412–14 (codified as amended at 28 U.S.C. § 636(e) (2012)).

120. *See* 28 U.S.C. § 636(e) (1994) (amended 2000); H.R. REP. NO. 106-312, at 22–23 (1999) (describing the provisions in the 2000 Amendments that added contempt authority).

121. *See* 28 U.S.C. § 636(e) (1994) (amended 2000); *Multidistrict, Multiparty, Multiforum Trial Jurisdiction Act of 1999 and Federal Courts Improvement Act of 1999: Hearing on H.R. 2112 and H.R. 1752 Before the Subcomm. on Courts & Intellectual Prop. of the H. Comm. on the Judiciary*, 106th Cong. 41–44 (1999) [hereinafter *Hearing on Federal Courts Improvement Act*] (statement of Joel B. Rosen, United States Mag. J., United States District Court for the District of New Jersey).

122. 28 U.S.C. § 636(e) (2012); *Hearing on Federal Courts Improvement Act*, *supra* note 121, at 41–44; H.R. REP. NO. 106-312, at 14 ("[The bill] is designed to improve administration and procedures, eliminate operational inefficiencies, and, to the extent prudent, reduce operating expenses."). The 2000 Amendments also eliminated the consent requirement in petty offense cases and expanded authority in juvenile cases. § 203, 114 Stat. at 2414 (codified as amended at 18 U.S.C. § 3401(b), (g) (2012)).

123. *Hearing on Federal Courts Improvement Act*, *supra* note 121, at 22 (statement of Harvey F. Schlesinger, J., United States District Court for the Middle District of Florida) ("The provision was carefully crafted to avoid any Constitutional issue . . . . [It] distinguish[es] that authority from the more expansive criminal contempt power of article III judges."); *id.* at 48 (statement of Rosen) ("[The restrictions on the magistrate judge's contempt authority were] proposed as a clear distinction between magistrate judges and article III, a bright line, if you will, since magistrate judges already have the authority to impose that penalty for certain misdemeanors.").

124. § 202, 114 Stat. at 2412 (codified as amended at 28 U.S.C. § 636(e)(2) (2012)).

125. *Id.* at 2412–13 (codified as amended at 28 U.S.C. § 636(e)(3) (2012)).

126. *Id.* at 2413 (codified as amended at 28 U.S.C. § 636(e)(4) (2012)).

contempt authority is limited to sentences within the range specified for Class C misdemeanors: imprisonment up to thirty days, a fine of up to five thousand dollars, or both.[127] Most significantly (and without elaboration at the hearing[128] or in the committee report[129]), "the new § 636(e)(4) expressly stated that its grant of civil contempt authority in consent cases 'shall not be construed to limit the authority of a magistrate judge to order sanctions under any other statute, the Federal Rules of Civil Procedure, or the Federal Rules of Criminal Procedure.'"[130]

The provisions explicitly sought to increase the efficiency of the judiciary, which had been affected by the added layer of review preceding the imposition of punishment for contempt.[131] "[T]he lack of adequate contempt authority by magistrate judges undermine[d] both the magistrate judge's and the district court's authority when confronted with misconduct or failure to obey court orders,"[132] and the deterrent effect of court rules was diminished by the prospect of de novo review. As a whole, the contempt provisions "provide[d magistrate judges] with a tool needed to perform effectively their existing statutory duties for the district court."[133]

B. Kiobel*: Analyzing Magistrate Judges' Authority After the 2000 Amendments*

The Second Circuit first articulated the rule that discovery sanctions are generally nondispositive in 1990,[134] but Judge Leval's and Judge Cabranes's recent concurrences in *Kiobel v. Millson*[135] warrant greater attention for their analyses of magistrate judges' power in the wake of the 2000 Amendments.[136] The *Kiobel* court unanimously agreed that Rule 37 sanctions were nondispositive but split over the propriety of magistrate-judge-decided Rule 11 sanctions. The arguments are illustrative of two interpretations of the 2000 Amendments: Judge Leval's concurrence weighs heavily in favor of considering Rule 37 sanctions as generally nondispositive while Judge Cabranes's concurrence militates in favor of the opposite.[137]

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127. *Id.* (codified as amended at 28 U.S.C. § 636(e)(5) (2012)) (referencing 18 U.S.C. §§ 3571(b)(6), 3581(b)(8), which delineate the maximum penalties). The certification and review process in place prior to the 2000 Amendments remains in force for penalties that exceed the above maximums. *Id.* (codified as amended at 28 U.S.C. § 636(e)(6) (2012)).

128. *See Hearing on Federal Courts Improvement Act*, *supra* note 121.

129. *See* H.R. REP. NO. 106-312 (1999).

130. Kiobel v. Millson, 592 F.3d 78, 94 (2d Cir. 2010) (Leval, J., concurring) (quoting § 202, 114 Stat. 2410, 2413 (codified as amended at 28 U.S.C. § 636(e)(4) (2012)).

131. *Hearing on Federal Courts Improvement Act*, *supra* note 121, at 21–22 (statement of Schlesinger).

132. *Id.* at 22.

133. *Id.* at 24; *see id.* at 41–43 (statement of Rosen).

134. Thomas E. Hoar, Inc. v. Sara Lee Corp., 900 F.2d 522, 525 (2d Cir. 1990).

135. 592 F.3d 78.

136. *See id.* at 84 (Cabranes, J., concurring) ("Judge Leval and I have now provided some modest assistance to notes and comments editors of law reviews in search of an agenda . . . ."); Cole, *supra* note 13, at 35.

137. Despite actually agreeing with the rest of the panel that Rule 37 sanctions were permissible, Judge Cabranes, by his own admission, recognizes that his arguments support the opposite conclusion:

Judge Leval observes that the arguments against sanctions power were much stronger prior to the 2000 Amendments. Specifically, Judge Leval advances two distinct arguments: (1) that Congress, by declaring that the civil contempt authority "'shall not be construed to limit the authority of a magistrate judge to order sanctions,'" signaled that it had intended all along to confer upon magistrate judges the power to issue discovery sanctions,[138] and (2) that since contempt powers were no longer outside the magistrate judge's reach, analogies between sanctions and contempt would no longer justify categorizing sanctions as dispositive.[139]

Judge Cabranes first repeats the arguments of the Sixth and Seventh Circuits,[140] stating that sanctions are equivalent to an award of damages.[141] Second, Judge Cabranes analogizes the sanctioning power to contempt proceedings, calling the 2000 Amendments' grant of power "a narrow statutory exception to the general principle that magistrate judges may not dispose of claims."[142] Finally, Judge Cabranes argues that, "[k]nowing of the decisions in *Bennett* and *Alpern*, Congress readily could have included the power to impose . . . sanctions in 2000 when it

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> I recognize that some of the reasons which persuade me that magistrate judges lack statutory authority to impose sanctions under Rule 11 might apply also to the imposition of sanctions under Rule 37. In the context of Rule 37, however, these reasons are not persuasive because of a magistrate judge's statutory, institutional, and historical authority over discovery proceedings. Indeed, it is the broad scope of a magistrate judge's authority over discovery disputes that provides the source of his authority to impose sanctions for the violation of discovery orders.

Kiobel, 592 F.3d at 88. But this psuedo-inherent power is at best "an uncertain and unregulated ground for imposing sanctions," FED. R. CIV. P. 37 advisory committee's note (2000 Amendment), and, at worst, an impermissible exercise preempted by the evolution of explicit powers under the Rules, *see id.* (1970 Amendment) ("The new provision eliminates the need to resort to inherent power . . . ."). "There is no justification for the courts' practice of bypassing rule 37 [to use 'inherent power' to enforce discovery.]" Rosenberg, *supra* note 10, at 486. Indeed, even the Supreme Court has appeared to reject the "inherent power" theory. Societe Internationale pour Participations Industrielles et Commerciales, S.A. v. Rogers, 357 U.S. 197, 207 (1958).

Given the problems with the "inherent authority" theory, Judge Cabranes's distinction between Rule 11 and Rule 37 sanctions is unpersuasive. The sanctioning powers under each exist only as a result of their respective explicit grants of authority. *Kiobel*, 592 F.3d at 100 (Leval, J., concurring) ("There is no support for this argument in any statute, rule, or judicial opinion. If anything, it seems to demonstrate the opposite of what Judge Cabranes contends."). This Note therefore treats Judge Cabranes's arguments as arguments against any sanctioning power for magistrate judges. *See id.* at 97 (arguing that following Judge Cabranes's reasoning would require "disavowing our prior holding in *Hoar* that magistrate judges are empowered to impose a monetary sanction").

138. *Kiobel*, 592 F.3d at 94 (Leval, J., concurring) (quoting 28 U.S.C. § 636(e)(4) (2012)).

139. *Id.* at 94–96. On this point, Judge Leval asks the following pertinent question: "If Congress conferred on magistrate judges the power to impose criminal convictions for contempt, and to put contemnors in jail, why would we interpret Congress's silence on the issue of noncriminal sanctions as an implicit denial of that power?" *Id.* at 96.

140. *See supra* Part II.A–B.

141. *Kiobel*, 592 F.3d at 86–88 (Cabranes, J., concurring).

142. *Id.* at 88.

amended § 636 to provide for limited contempt powers."[143] Thus, "pursuant to the general principles of statutory construction," courts should "assume . . . that Congress intended to withhold the additional authority to impose . . . sanctions."[144]

As resolving the issue was not necessary to resolving the case, Chief Judge Jacobs declined to chime in on the Leval-Cabranes debate except to say that "each of my colleagues would rewrite § 636, in a different way. . . . [T]his knot needs to be untied by Congress or by the Supreme Court."[145]

IV. RESOLVING *KIOBEL*: THE 2000 AMENDMENTS AND SANCTIONS AUTHORITY

Given the conflict among the circuits' interpretations of the ambiguous provisions of Rule 72 in light of the 1979 Act and the 2000 Amendments[146] (collectively, "Act"), it is clear that only one of the prevailing interpretations best reflects Congress's intent.[147] Chief Judge Jacobs's observation counseling against "rewrit[ing] § 636" would have been significantly more persuasive if the Act were a grant of enumerated powers. But the Act is, in fact, the opposite: it is a general grant of pretrial authority followed by enumerated restrictions.[148] Determining the precise contours of that authority as Judges Leval and Cabranes attempt to do is, therefore, ipso facto not a rewriting of the statute,[149] but instead an interpretive conundrum. Leaving aside for now the compelling policy considerations that also weigh in favor of his interpretation, Judge Leval offers a solution to this conundrum that is far more faithful to the text and history of the relevant provisions. This Part analyzes three points of contention between Judges Leval and Cabranes: the recognition of a pre-existing authority to issue sanctions; the effect of the 2000 Amendments on the oft-employed analogical framework; and Congress's alleged "silence" on the sanctions power.

A. 2000 Amendments as Recognizing Pre-Existing Authority To Issue Sanctions

Judge Leval's first argument—that Congress, by declaring that the civil contempt authority "'shall not be construed to limit the authority of a magistrate judge to order sanctions,'" recognized pre-existing sanctions authority[150]—comports with

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143. *Id.* at 89.

144. *Id.*

145. *Id.* at 107 (Jacobs, C.J., concurring).

146. Codified in relevant part at 28 U.S.C. § 636 (2012).

147. Johnson v. S. Pac. Co., 196 U.S. 1, 14 (1904) (Fuller, C.J.) ("We are unable to accept these conclusions, notwithstanding the able opinion of the majority, as they appear to us to be inconsistent with the plain intention of Congress, to defeat the object of the legislation, and to be arrived at by an inadmissible narrowness of construction.")

148. *See* 28 U.S.C. § 636(b)(1)(A) (2012).

149. The power is either granted or proscribed—those are the only two options under the statutory dichotomy. *See id.*; *infra* note 151 and accompanying text; *see also Kiobel*, 592 F.3d at 105 (Leval, J., concurring) ("My arguments do not seek to 'undermine' Congress's decision. They seek to interpret Congress's intentions in the absence of a clear congressional mandate.").

150. *Kiobel*, 592 F.3d at 98–99 (Leval, J., concurring) (quoting 28 U.S.C. § 636(e)(4)

traditional statutory interpretation canons. A statute must be interpreted as a whole instead of isolating sections from their context because interpreting the statute as a whole is presumed to best effect Congress's intent; "[i]t is elementary that the meaning of a statute must, in the first instance, be sought in the language in which the act is framed."[151] The rule against surplusage[152] suggests, at minimum, that Congress recognized magistrate judges' ability to sanction.

Section 636(e)(4), granting magistrate judges civil contempt authority in civil consent and misdemeanor cases, states in part: "This paragraph shall not be construed to limit the authority of a magistrate judge to order sanctions under any other statute, the Federal Rules of Civil Procedure, or the Federal Rules of Criminal Procedure."[153] The most natural reading of this provision is that the addition of contempt authority in consent cases does not restrict *already existing* sanctions authority under the Federal Rules of Civil Procedure. This argument's persuasiveness is limited by the fact that the provision is absent from the other adjoining paragraphs;[154] perhaps Congress only intended to acknowledge the sanctioning power that presumably accompanies civil consent cases. This counterargument, however, fails on grounds of surplusage: the statute references sanctions powers under "*any other*" statute or rule of criminal or civil procedure. Since the power to punish contemnors and to try cases comes from § 636, Congress was recognizing that another source could confer the power to order sanctions. Congress, in essence, recognized that one could interpret the contempt power existing *at the exclusion of* other pre-ordained powers and attempted to preempt that narrower reading.[155]

B. Analogical Framework

Judge Leval's second argument, that the analogizing framework employed by the circuit courts[156] (and arguably accepted by Congress)[157] can no longer yield the conclusion that discovery sanctions are analogous to a proscribed action, is also

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(2012)).

151. Caminetti v. United States, 242 U.S. 470, 485 (1917).

152. Montclair v. Ramsdell, 107 U.S. 147, 152 (1883) (Harlan, J.) ("It is the duty of the court to give effect, if possible, to every clause and word of a statute, avoiding, if it may be, any construction which implies that the legislature was ignorant of the meaning of the language it employed."). *But see* Richard A. Posner, *Statutory Interpretation—In the Classroom and in the Courtroom*, 50 U. CHI. L. REV. 800, 812 (1983) ("No one would suggest that judicial opinions or academic articles contain no surplusage; are these documents less carefully prepared than statutes?").

153. 28 U.S.C. § 636(e)(4) (2012).

154. *See id.* § 636(e).

155. *Compare Kiobel*, 592 F.3d at 94 (Leval, J., concurring) ("This passage says, in effect, 'The fact that we expressly confer civil contempt power on magistrate judges should not be taken to imply that they lack the power to impose sanctions.'"), *with id.* at 106 (Jacobs, C.J., concurring) ("Section 636 does not specifically deal with sanctions.").

156. *See supra* Part II.A–C.1.

157. *Kiobel*, 592 F.3d at 89 (Cabranes, J., concurring) (citing Midlantic Nat'l Bank v. N.J. Dep't of Envtl. Prot., 474 U.S. 494, 501 (1986) ("The normal rule of statutory construction is that if Congress intends for legislation to change the interpretation of a judicially created concept, it makes that intent specific.")).

persuasive. While within a separate provision than the proscribed motions under § 636(b)(1)(A), the similarities between punishing a party or attorney by either sanctions or contempt long served as a compelling justification for proscribing both.[158] Now that contempt is no longer proscribed, concluding that Congress wished to preclude the less drastic Rule 37 sanctions is unreasonable.[159] Indeed, the policy justifications for the limited contempt powers and Rule 37 sanctions are similar. In both instances, the magistrate judge is in the best place to make an accurate assessment of the goings on, and the prospect of reviewing a cold record serves to severely dilute the deterrent value of the prevailing rules.[160]

The similarities of the safeguards for Rule 37 sanctions and the contempt powers also support Judge Leval's conclusions. The Rule 37 sanction power of magistrate judges is limited to nondispositive motions[161] and subject to clearly erroneous/error of law review by a district judge.[162] The summary contempt authority wielded by the magistrate judge is similarly subject to stringent restrictions on the gravity of the punishment imposed, which is limited to a fine and up to thirty days' imprisonment.[163] In both instances, magistrate judges are free to recommend harsher punishments for noncompliance—such recommendations, however, are subject to no deference and the district judge is free to disregard the magistrate judge's recommendations in their entirety.[164]

Judge Leval's analogical analysis works to rebut Judge Cabranes's first two arguments. First, Judge Cabranes's equivalency argument—that sanctions are equivalent to an award of damages and thus prohibited a fortiori—no longer holds water. The argument was stronger prior to 2000, when contempt powers were proscribed along with awards for damages because of the similarities between sanctions and contempt ("pseudo-grants" of damages) and awards for damages.[165] Under the generally accepted analogical framework, however, it is problematic to conclude that Congress has proscribed all pseudo-grants of damages because the now-granted sanctions power undeniably falls into this category.[166] Thus, while the similarities between a motion for sanctions and a separate action for damages may still be part of the analytical framework to determine the motion's nondispositive or dispositive nature, any motion involving such pseudo-grants may no longer be deemed proscribed solely as such.

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158. *Id.* at 95 (Leval, J., concurring) ("Prior to Congress's 2000 amendments, there were reasonable arguments on both sides of the question.").

159. *Id.* ("In any event, regardless of how the pre-2000 Act should have been construed, after Congress amended the statute to expressly confer on magistrate judges a range of contempt powers, little or nothing remained of the argument that the amended statute should be construed by implication to withhold the power to impose a monetary sanction.").

160. *See supra* text accompanying notes 131–33; *infra* Part V.B.

161. *See supra* note 90 and accompanying text.

162. *See supra* note 15.

163. *See supra* note 127 and accompanying text.

164. *See* 28 U.S.C. § 636(e)(6) (2012); *supra* Part I.C.

165. *See* Kiobel v. Millson, 592 F.3d 78, 98–99 (2d Cir. 2010) (Leval, J., concurring) (distinguishing earlier cases premised on the similarities between the contempt power, sanctions, and awards for damages).

166. *Id.*; *supra* Part II.C.1.

Second, Judge Cabranes's literal interpretation of the 2000 Amendments[167] (while granting § 636(b) a more liberal construction) betrays his own analogical interpretation of § 636.[168] While Judge Cabranes argues that the "summary" aspect of the granted contempt powers indicates that it is merely a "narrow" exception to the proscription thereof, in practice, this limitation on power actually better reflects the analogy made here. The "summary" aspect of the contempt power is quite akin to Rule 37 sanctions. Discovery is, in effect, one pre-trial-long proceeding delegated to the magistrate judge in its entirety.[169] It occurs "before" the magistrate judge.

Finally, Congress's expressed intent in limiting the contempt power as it did was to preserve a clear distinction between the contempt powers of the Article III judge and those of the magistrate.[170] This intent fails to comport with Judge Cabranes's "limited exception implying intent to limit power" theory, as the limitations were motivated solely by constitutional concerns. Under the post-2000 analogical framework, there is no basis for determining that Congress elected to allow magistrate judges to punish contemnors in their presence while preventing magistrate judges from doing the same to noncompliers in discovery.

C. Silence and Congressional Intent

Judge Cabranes's final argument—that Congress's supposed silence on the issue of sanctions indicates intent to acquiesce to the *Bennett* and *Alpern*/*Retired Chicago Police* line of reasoning[171]—is also unpersuasive. Judge Leval points out two flaws with this reasoning. First, Judge Cabranes appears to "arbitrar[ily]" suggest that Congress meant to follow the Sixth and Seventh Circuits' decisions to the exclusion of the majority position.[172] Second, Judge Cabranes's premise is incorrect: Congress was not silent on the matter—the statute explicitly mentions sanctions in the civil consent contempt provision.[173]

There are further problems with this reasoning. First, it is contrary to the plain text of the statute, which provides a general grant of power (to "hear and determine" pretrial proceedings) with specified exclusions therefrom.[174] Thus, the operative statutory presumption (though obviously now subject to an analogical framework) is that Congress *did* intend to grant powers insofar as they are constitutional and distinct

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167. *See Kiobel*, 592 F.3d. at 89 (Cabranes, J., concurring) (construing the contempt power narrowly).

168. *See id.* at 87–88 (reasoning by analogy).

169. *See* FED. R. CIV. P. 26(d)(1) (stating that discovery begins after the Rule 26(f) conference); MCCABE, *supra* note 29, at 43–44 (stating that magistrate judges are generally responsible for "resolving all discovery and procedural disputes," save for those potentially dispositive of the litigation).

170. *See supra* note 123 and accompanying text.

171. *See supra* notes 143–44 and accompanying text.

172. *Kiobel*, 592 F.3d at 99 (Leval, J., concurring).

173. *Id.* at 98; *see* 28 U.S.C. § 636(e)(4) (2012).

174. *See supra* Part I.B.

from the proscribed motions.[175] Silence, in this context, could indicate a grant of power but not a denial of power.[176]

Second, and especially since the Act does not explicitly proscribe the sanctions power, Judge Cabranes fails to acknowledge actual expressions of legislative intent before imputing an intent on the basis of nonexpression.[177] This much is clear from the committee report and the hearing transcript on the 2000 Amendments: Congress intended to improve the efficiency of the judiciary by *extending* the magistrate judge's authority, not circumscribing it—implicitly or otherwise.[178] These statements of intent directly contradict Judge Cabranes's circumscription-by-silence theory.

Finally, and as an extension of the two preceding principles, Rule 37 was on the books in its substantially modern form before the 1979 Act was passed.[179] Thus, Judge Cabranes's legislation-by-silence theory actually cuts in favor of permitting magistrate judges to hear and decide such sanctions under Rule 72. Given that § 636(b)(1)(A) is a general grant of power with enumerated exceptions, Congress had ample opportunity in passing the 2000 Amendments to expressly state that it *did not* want magistrate judges to have the sanctioning powers under Rule 37. Congress elected not to do so.

V. CONTEXTUALIZING *KIOBEL*: RECONSIDERING THE SEVENTH CIRCUIT'S POSITION AFTER THE 2000 AMENDMENTS

Previously advanced analyses of the 1979 Act, concluding that the Seventh Circuit has erroneously determined that sanctions are dispositive, remain persuasive in their own right and need not be repeated here.[180] However, the textual, historical, and policy arguments, such as those advanced in David A. Bell's 1997 article, warrant further elaboration in light of the 2000 Amendments. Finally, treating Rule 1 as a canon of construction for the other Federal Rules of Civil Procedure ("Rules") would best serve the spirit and purpose of the Rules.

A. Extension of Previously Advanced Textual and Legislative History Arguments

There is nothing in the Act or Rule 72 that expressly constrains magistrate judges from issuing sanctions under their "hear and determine" power.[181] The Seventh Circuit's characterization of sanctions as an independent "request for damages"[182] is

175. *See id.*

176. *But see* Gomez v. United States, 490 U.S. 858 (1989) (holding that magistrate judges may not empanel jury in federal criminal case). While *Gomez* appeared to be a case of statutory interpretation, the Supreme Court in *Peretz v. United States*, 501 U.S. 923, 929, 932, 935–39 (1991) indicated that *Gomez* was actually motivated by constitutional concerns.

177. *See* Posner, *supra* note 152, at 818 ("[T]he judge [should] be alert to any sign of legislative intent regarding the freedom with which he should exercise his interpretive function.").

178. *See supra* Part III.A.

179. *See* FED. R. CIV. P. 37 advisory committee's note (1970 Amendment).

180. *E.g.*, Bell, *supra* note 19.

181. *See* 28 U.S.C. § 636 (2012); FED. R. CIV. P. 72.

182. Alpern v. Lieb, 38 F.3d 933, 935 (7th Cir. 1994).

entirely without support in the statutory text. Rule 72 uses the phrase "not dispositive of a party's *claim* or *defense*."[183] As Bell explains,

> [T]he juxtaposition of "claim" with "defense" suggests that the reference is to a substantive claim of a party or to its counterpart, a defense, and not to a request for monetary sanctions, including attorney fees.
>
> To interpret "claim" more broadly to include a request for monetary sanctions or attorney fees . . . is problematic. In the first place, the term "claim" as used in the Federal Rules generally refers to a substantive cause of action. To read the term to include a motion for sanctions would create an unwarranted inconsistency within the rules. This broad reading of "claim" to include requests for sanctions and attorney fees also contradicts the general rule that such requests must be made by motion, not by stating a separate claim in a complaint.[184]

Perhaps the strongest counterargument to this reading of Rule 72 and the Act is that Congress ought to have been more explicit merely because it was tinkering with the judiciary—that it had a duty to carefully specify which duties could be shifted outside the Article III court's sole power.[185] But no matter how convenient clearer language may have been for the courts, their responsibility remains to effectuate the plain language where unambiguous and the legislature's intent where multiple interpretations are plausible. As Judge Posner has written, "The judge should try to think his way as best he can into the minds of the enacting legislators and imagine how they would have wanted the statute applied to the case at bar."[186]

In this case, all signs point to an intended grant of expansive authority over pretrial motions that includes the power to issue nondispositive Rule 37 sanctions. Since the dissolution of the commissioner system in 1968, Congress has continually sought to establish and extend the authority of the magistrate judge into an institution that can effectively assist district courts in managing a substantial backlog.[187] It is significant that the 1976 Act was a direct result of what Congress felt was judicial misinterpretation of its prior legislation;[188] the Supreme Court had underestimated the extent to which Congress was seeking to rectify the ills wrought by an ineffective commissioner system. The 2000 Amendments have crystalized this theme, emphasizing throughout the process that the bill's purpose was to increase overall efficiency while remaining careful not to infringe upon the exclusive realm of the Article III judiciary.[189] The limitations provided throughout the Act should not be

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183. FED. R. CIV. P. 72(a) (emphasis added).

184. Bell, *supra* note 19, at 452–53 (footnotes omitted).

185. *See id.* at 454 ("Another concern advanced by the Sixth and Seventh Circuits is that magistrate judges simply should not have the power to order one party to pay money to another.").

186. Posner, *supra* note 152, at 817.

187. *Magistrate Judges are Effective, Flexible Judiciary Resource*, *supra* note 118, at 7 ("First of all, Congress has acted repeatedly to enhance the authority of magistrate judges, to clarify their judicial status, and to improve the system's overall effectiveness.").

188. *See supra* Part I.B.

189. *See supra* Part III.A.

extended beyond this aim. From 1968 through the most recent legislative advancements, it is clear that Congress desires the magistrate judge's power to be interpreted consistent with these goals.

B. A Referee Without a Whistle: Policy Considerations

The consensus among legal professionals is that the vitality of the modern legal system is at a crossroads.[190] While there is widespread agreement that civil discovery requires systemic changes, many commentators pragmatically agree that "small changes can make a big difference."[191] Thus, it is worth asking questions of rules of law that require additional levels of complexity to administer, especially where the benefit therefrom is dubious.[192]

In particular, the vitality of Rule 37 sanctions has been questioned recently due to underenforcement.[193] This problem, according to one scholar, is caused by "two primary culprits: a desire to avoid expending scarce judicial resources on an issue that does not involve the merits of the case and an aversion to 'punishing'

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190. "In 2009, the American Bar Association (ABA) Section of Litigation conducted a survey of approximately 3,300 attorneys and concluded that '[a]lthough the matter has not reached the level of a crisis, there is dissatisfaction in the bar with litigating civil cases in federal court.'" Grimm & Yellin, *supra* note 7, at 495 (alteration in original) (quoting *Member Survey on Civil Practice: Detailed Report*, 2009 A.B.A. SEC. LITIG. REP. 5, 6, *available at* www.uscourts.gov/file/document/aba-section-litigation-survey-civil-practice [http://perma.cc/C269-BEWF]).

> This conclusion mirrored the results of a similar survey conducted that same year by the American College of Trial Lawyers (ACTL) Task Force on Discovery and the Institute for the Advancement of the American Legal System (IAALS), which found that, "[a]lthough the civil justice system is not broken, it is in serious need of repair. In many jurisdictions, today's system takes too long and costs too much."

Id. at 495–96 (alteration in original) (quoting AM. COLL. OF TRIAL LAWYERS & INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., FINAL REPORT ON THE JOINT PROJECT OF THE AMERICAN COLLEGE OF TRIAL LAWYERS TASK FORCE ON DISCOVERY AND THE INSTITUTE FOR THE ADVANCEMENT OF THE AMERICAN LEGAL SYSTEM 2 (2009), *available at* http://iaals.du.edu/images/wygwam/documents/publications/ACTL-IAALS_Final_Report_rev_8-4-10.pdf [http://perma.cc/7EHA-3ZVJ[).

191. Grimm & Yellin, *supra* note 7, at 495. Among the commentators that espouse this position are, for example, LAWYERS FOR CIVIL JUSTICE, *supra* note 6, at 7; MCCABE, *supra* note 29, at 59 ("[W]hen Magistrate Judges exercise full authority in civil cases, District Judges' time is conserved and the court can manage its civil docket more effectively."); Todd D. Peterson, *Restoring Structural Checks on Judicial Power in the Era of Managerial Judging*, 29 U.C. DAVIS L. REV. 41, 46 (1995) ("[I]t would be helpful to . . . separate the functions of pretrial management and substantive decision-making by assigning all nondispositive pretrial functions to magistrate judges . . . ."); Redish & McNamara, *supra* note 6, at 822. *Contra* Easterbrook, *supra* note 9, at 647–48; Mitchell London, Current Development, *Resolving the Civil Litigant's Discovery Dilemma*, 26 GEO. J. LEGAL ETHICS 837 (2013).

192. *See* Cole, *supra* note 13.

193. *See* Lindsey D. Blanchard, *Rule 37(a)'s Loser-Pays "Mandate": More Bark Than Bite*, 42 U. MEM. L. REV. 109, 146 (2011).

attorneys."[194] Surely this aversion is heightened in the Seventh Circuit[195] where a district judge—heretofore largely uninvolved with the proceedings—is faced with wasting precious time (the first culprit) getting up to speed with an issue that may require her to punish an attorney (the second culprit). A magistrate judge, by contrast, presides over modern civil discovery.[196] Indeed, magistrate judges are "normally responsible for imposing discovery and motion cut-off dates, setting pretrial conference and trial dates, resolving all discovery and procedural disputes, and conducting settlement efforts."[197] These magistrate judges are *already* up to speed on discovery matters, diminishing the resource cost of Rule 37 sanctions. This same involvement in the discovery sanctions should also diminish the observed aversion to punishing attorneys: if the magistrate judge is intimately involved in the proceedings, he will better know whether the sanctions are in the interests of justice, in contrast to the uninvolved district judge.

But, as one may counter, magistrate judges retain the power to issue a report and recommendation whenever sanctions are warranted or requested, even though they "decide[] nothing"[198]:

> This would not seem to be a big deal. After all, if the district court agrees with the recommendation, the sanction will be imposed and presumably some measure of deterrence achieved. But it may be asked whether this is what will occur in the real world and "there is a real world as well as a theoretical one." *Lee v. Illinois*, 476 U.S. 530, 548 (1986) (Blackmun, J., dissenting). In many cases, the report and recommendation requirement will be sufficiently cumbersome and protracted that no sanction will be imposed, and the critical deterrence that Rule 37 seeks to achieve will be adversely affected. *Compare Gomez v. United States*, 490 U.S. 858, 876 (1989) ("Even assuming that a district judge could review the magistrate's actions meaningfully be examining the transcript or re-examining jurors, the time consumed by such review would negate time initially saved by the delegation.").[199]

Forcing magistrate judges to issue a report and recommendation exacerbates the problems described above and ignores the fact that if anyone is in the best place to

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194. *Id.* at 125–26.

195. Any reference to the Seventh Circuit hereinafter refers additionally to district courts in the Sixth Circuit that have given *Bennett v. General Caster Service of N. Gordon Co.*, 976 F.2d 995 (6th Cir. 1992) an expansive reading. *See supra* Part II.B.

196. MCCABE, *supra* note 29, at 43 ("The Federal Rules of Civil Procedure contemplate that judges will be active civil case managers. Civil case management is one of the principal functions assigned to Magistrate Judges in most courts. It is the primary duty of Magistrate Judges in many courts, and they have become experts in civil case management, discovery, and settlement. . . . Most courts in fact use Magistrate Judges broadly and expansively in civil cases . . . . In some courts, Magistrate Judges are assigned all civil cases for full or extensive case management.").

197. *Id.*

198. Cole, *supra* note 13, at 31 n.2.

199. *Id.* at 31.

determine the propriety of discovery sanctions requests—especially where issues of good faith or substantial justification are involved[200]—it is the magistrate judge.

For years, jurists have waxed poetic about the importance of deferring when appellate actions rest upon interpretation of a cold record.[201] This is because "appellate decisionmaking takes place at something of a remove from the dispute. To the appellate judge, the record is 'cold'—the parties will, at most, make a brief but mute appearance at oral argument, and testimony is words on a page . . . ."[202] The rationale that motivates deferential standards of appellate review applies with equal force to discovery issues decided by magistrate judges; they interact with the parties on such issues from day one. Party misbehavior under the Seventh Circuit's interpretation of Rules 37 and 72 is treated similarly to a familiar disciplinary problem in schools: the principal is called upon to punish a student who misbehaved in the teacher's classroom. The principal is responsible for meting out fair and appropriate punishment despite only having second-hand knowledge of the student's wrongdoing. Judicial deference, such as that employed in the appellate context, remedies this dilemma by providing oversight sufficient to prevent unjust results while not overly diluting the authority of the immediate presider.

Extending power to "decide" Rule 37 sanctions to magistrate judges would not leave litigants unprotected. Many substantive and procedural safeguards remain. Critically, the most coercive sanctions statutorily remain firmly outside the "deciding" power of magistrate judges, reflecting the historic preference of deciding issues on the merits[203] and the superiority of the Article III judiciary.[204] The standard of review for any order issued by a magistrate judge is not without teeth. Nonconsent litigants with motions before a magistrate judge are always protected from adverse decisions that are clearly erroneous or the result of legal error.[205] As Magistrate Judge Cole notes, "[I]n the last analysis, the power to award sanctions, remains 'in the hands of the district judge.'"[206]

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200. *See, e.g.*, FED. R. CIV. P. 37(a)(1), (e)–(f).

201. *See, e.g.*, Petterson Lighterage & Towing Corp. v. N.Y. Cent. R.R. Co., 126 F.2d 992, 994 (2d Cir. 1942) (Hand, J.) ("[I]t is not important how we should have decided the issue on the cold record and without the benefit of the judge's finding."); Gavin v. State, 473 So. 2d 952, 955 (Miss. 1985) ("[E]ven if we wanted to be fact finders, our capacity for such is limited in that we have only a cold, printed record to review. The trial judge who hears the witnesses live, observes their demeanor and in general smells the smoke of the battle is by his very position far better equipped to make findings of fact which will have the reliability that we need and desire."). *See generally* Chad M. Oldfather, *Universal De Novo Review*, 77 GEO. WASH. L. REV. 308, 332 (2009); Robert C. Owen & Melissa Mather, *Thawing Out the "Cold Record": Some Thoughts on How Videotaped Records May Affect Traditional Standards of Deference on Direct and Collateral Review*, 2 J. APP. PRAC. & PROCESS 411, 412 (2000).

202. Oldfather, *supra* note 201, at 332.

203. *See* Rosenberg, *supra* note 10, at 480.

204. *See supra* note 123 (recognizing the superiority of the Article III judiciary).

205. *See* 28 U.S.C. § 636(b)(1)(A) (2012).

206. Cole, *supra* note 13, at 37 (quoting Alpern v. Lieb, 38 F.3d 933, 935 (7th Cir. 1994) (Easterbrook, J.)).

"Judicial efficiency and finality are important values"[207] recognized by both the Supreme Court and the Rules.[208] But, and especially in the context of litigation expenses, they are not merely ends unto themselves. Litigation costs have skyrocketed, even though "[i]nefficient and expensive discovery does not aid the fact finder."[209] Any measure that can increase the efficiency and limit the abuses of the process while still affording proper protection and oversight for litigants must be pursued. To neglect to cure the added strain on the system caused by the Seventh Circuit's precedent contravenes public policy, the language of relevant statutes, and legislative intent.

C. Federal Rule of Civil Procedure 1 as a Canon of Statutory Construction

"Literally the first rule of federal civil procedure is that the rules be interpreted to promote just, speedy, and inexpensive decisions."[210] This first rule is short, pragmatic, and oft-cited.[211] Unfortunately, it also appears to be overlooked as a canon of construction for the Rules.[212] The Rules have the force of law;[213] Rule 1 should be no different. Courts could go a long way toward resolving ambiguity in the Rules by giving Rule 1 its intended effect. Rule 1 is more than a goal—it is a mandate to "construe[] and administer [the Rules] to secure the just, speedy, and inexpensive determination of every action and proceeding."[214]

In the case of magistrate judge authority to issue Rule 37 sanctions under Rule 72, there exist admitted ambiguities, despite a strong majority of the circuits holding that such authority has been conferred.[215] However, Rule 1 dictates the speediest and most inexpensive interpretation of the Rules must prevail as long as such interpretation is also just. There is nothing fundamentally unjust about granting magistrate judges the power to "hear and determine" Rule 37 motions. Magistrate judges are now a permanent fixture in the federal courts and receive significant accolades and respect for their work.[216] Congress has seen fit to give them ever-expanding authority over nondispositive pretrial procedure. Furthermore, and as discussed earlier, multiple safeguards exist against "unjust" use of the sanctioning power, including substantive limitations and district judge review. These considerations, combined with the severe injustice that may directly result from abuse of the discovery process,[217] signify that this solution is anything but "unjust."

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207. Stutson v. United States, 516 U.S. 193, 197 (1996) (per curiam).

208. *See* FED. R. CIV. P. 1; *Stutson*, 516 U.S. at 197.

209. LAWYERS FOR CIVIL JUSTICE, *supra* note 6, at 3.

210. Rosenberg, *supra* note 10, at 480.

211. *See, e.g.*, Elizabeth J. Cabraser & Katherine Lehe, *Uncovering Discovery*, 12 SEDONA CONF. J. 1, 3–5 (2011).

212. *E.g.*, LAWYERS FOR CIVIL JUSTICE, *supra* note 6, at 2 ("[A]lthough well-intentioned, the Rules are falling far short of this goal.").

213. FED. R. CIV. P. 1 advisory committee's note (1937 Adoption).

214. FED. R. CIV. P. 1.

215. *See supra* Part II.C.

216. *E.g.*, MCCABE, *supra* note 29, at 64.

217. *See supra* notes 7–9 and accompanying text.

Ignoring Rule 1's legal force as a mandated canon of rule construction, however, will only create greater inefficiency and expense without any increase in "justice."

CONCLUSION

Judge Easterbrook, pioneer of the Seventh Circuit's decision in *Alpern v. Lieb*, has written that discovery "cannot be fixed by tinkering with Rule 26, Rule 37, or any of their companions. Moving supervision from judges to magistrates, or magistrates to judges, will not help much; . . . neither supervision nor sanctions will make a dent in the problem."[218] There may well be truth to his sentiment; systemic changes may be needed before the overburdened system can best serve its justice-oriented ends. But regardless, the truth of his sentiment cannot justify the Seventh Circuit's position on magistrate-judge-issued Rule 37 sanctions.

The Seventh Circuit's position has always had a strained relationship with the plain text and purpose of the relevant provisions. Since the passage of the 2000 Amendments, however, this precedent no longer has a strained relationship to the law—it has no relationship at all. The analogies that were at least plausible in the past to justify its position no longer pass muster. In short, as Judge Leval noted, "There is little reason to believe the . . . Seventh Circuit[] would reach the same result if [it] considered the question anew under the amended statute."[219]

Even if adopting the majority position would not cure all ills of modern discovery, the Seventh Circuit owes it to its litigants and to Congress to reconsider its position. The magistrate judge is indispensable and in the best place to supervise all aspects of discovery—including nondispositive punishment for abuse thereof under Rule 37. If Congress's perpetual broadening of the magistrate judge's power is not sufficient to convince the Seventh Circuit to revisit and reverse its prevailing rule, Congress should again clarify the statutory language. Litigation is too expensive today for its referees to be left to officiate without whistles.

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218. Easterbrook, *supra* note 9, at 647–48.

219. Kiobel v. Millson, 592 F.3d 78, 98 (2010) (Leval, J., concurring).