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The Federal Magistrates Act: A New Article III Analysis for A New Breed of Judicial Officer

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NOTES

THE FEDERAL MAGISTRATES ACT: A NEW ARTICLE III ANALYSIS FOR A NEW BREED OF JUDICIAL OFFICER

> "If [the Federal Magistrates Act] assigns judges' work to magistrates, who do not have the tenure and compensation guarantees in Article III, it violates Article III."[1]
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> "Given the bloated dockets that district courts have now come to expect as ordinary, the role of the magistrate in today's federal judicial system is nothing less than indispensable."[2]

Congress and federal judges have steadily expanded the role of magistrates in the federal judicial system since the passage of the Federal Magistrates Act[3] in 1968. Under the original terms of the Act, magistrates had few enumerated powers, and final decisionmaking authority remained at all times with a federal judge.[4] In the two decades since Congress passed the Act, congressional amendment of the law and expansive judicial interpretation have resulted in a new breed of judicial officer. In effect, magistrates now exercise many of the same powers as federal district judges; they decide motions, hear evidence, instruct juries, and render final decisions in civil and criminal cases.

The expanding role of magistrates in the federal judicial system raises serious constitutional questions. Although magistrates perform many of the same functions as Article III judges, they are not afforded the same constitutional protections as judges.[5] Mag-

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1. Geras v. Lafayette Display Fixtures, Inc., 742 F.2d 1037, 1046 (7th Cir. 1984) (Posner, J., dissenting).

2. Government of the Virgin Islands v. Williams, 892 F.2d 305, 308 (3d Cir. 1989), *cert. denied*, 110 S. Ct. 2211 (1990).

3. Pub. L. No. 90-578, 82 Stat. 1107 (1968) (current version at 28 U.S.C. §§ 631-639 (1988)).

4. Congress suggested three discrete areas in which magistrates could serve: "(1) . . . as a special master . . .; (2) [providing] assistance to a district judge in the conduct of pretrial or discovery proceedings in civil or criminal actions; and (3) [conducting] preliminary review of applications for posttrial relief . . . ." *Id.* at 1113.

5. For the purposes of this Note, the term "judge" refers to a district judge, appeals

istrates do not enjoy lifetime tenure, rather they serve eight-year terms,[6] and Congress may reduce their salaries simply by amending the Act.[7] Moreover, magistrates are appointed by judges in the district in which the magistrate will serve, and not by the President or Congress.[8]

The expanded authority of magistrates violates traditional Article III analysis: neither the adjunct officer doctrine nor the legislative court doctrine[9] supports this broad expansion of authority. The Supreme Court's interpretation of Article III has developed in the context of the separation of powers scheme, wherein Article III's guarantees of tenure and salary operate both to insulate the judiciary from executive and legislative coercion and to ensure that the judicial branch remains a vital force in the system of checks and balances.[10]

Felony voir dire provides a specific context that may prove illustrative of the Act's overall constitutional defects.[11] Voir dire merits close attention because it has recently been the subject of considerable controversy,[12] and because it implicates both a party's ability to waive its right to an Article III judge and the limits of a magistrate's jurisdiction within Article III and the Act. Other functions that magistrates perform, such as controlling civil jury trials from beginning to final order[13] and having juris-

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court judge, or Supreme Court Justice appointed by the President of the United States and protected by the guarantees of tenure and salary in Article III. The term "magistrate" refers to a United States magistrate judge, the new title of officeholders under the Federal Magistrates Act. Pub. L. No. 90-578, 82 Stat. 1107 (1968) (current version at 28 U.S.C. §§ 631-639 (1988)).

6. 28 U.S.C. § 631(e).

7. *Id.* § 634(b) (providing that "the salary of a full-time United States magistrate shall not be reduced, during the term in which he is serving, below the salary fixed for him at the beginning of that term"). No constitutional provision, however, prevents Congress from amending the terms of the Act to effect a change in the magistrates' compensation structure.

8. *Id.* § 631(a) (providing for the appointment of magistrates: "[t]he judges of each United States district court . . . shall appoint United States magistrates in such numbers and to serve at such locations within the judicial district as the [Judicial Conference of the United States] may determine under this chapter"). *See infra* notes 205-12 and accompanying text.

9. These doctrines constitute exceptions to Article III, recognized by the Supreme Court, which allow officers without guarantees of tenure and salary to exercise the judicial power of the United States. *See infra* notes 60-80 and accompanying text.

10. *See infra* notes 52-58 and accompanying text.

11. Empanelment of juries by magistrates was a common practice in many jurisdictions throughout much of the 1980's. *See, e.g.*, United States v. Lopez-Pena, 912 F.2d 1542, 1545 n.2 (1st Cir. 1989) (noting that in 1989, 51 of the 93 federal judicial districts had local rules that unqualifiedly authorized district courts to delegate jury selection to magistrates in criminal cases"), *cert. denied*, 111 S. Ct. 2886 (1991).

12. *See infra* notes 81-150 and accompanying text.

13. Congress explicitly granted this power to magistrates by statute: "Upon the consent

diction over misdemeanors,[14] raise potentially the same Article III concerns as those of voir dire.

The Federal Magistrates Act has been the subject of frequent amendment by Congress, and with each amendment, Congress has expanded the authority of federal magistrates.[15] Although the Act contains a short list of tasks that a district court may not assign to a magistrate, such as summary judgment motions and motions to dismiss,[16] no guarantee exists that Congress will not attempt in the future to confer upon magistrates the authority to preside over such proceedings. Moreover, the increase in the federal criminal docket has spurred interest in vesting magistrates with the authority to try certain types of felony cases. For example, a section of the Omnibus Crime Bill of 1990 would have given magistrates the power to preside over felony trials arising out of the savings and loan scandal.[17] Although the Senate rejected the proposal, the proposal indicates the increasing interest in employing federal magistrates to relieve pressures on the federal judicial system.

This Note addresses in two stages the problems created by the delegation of duties to magistrates. First, the Court's traditional tools for Article III analysis do not provide a sufficient doctrinal basis for examining an active magistracy. Second, in light of the recognized competence of the corps of magistrates and their close relationship with Article III courts, a more flexible approach to Article III analysis is necessary.

The Supreme Court had the opportunity to address magistrate jurisdiction in the October Term of 1990. The Court granted

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of the parties, a full-time United States magistrate . . . may conduct any or all proceedings in a jury or nonjury civil matter and order the entry of judgment in the case . . . ." 28 U.S.C. § 636(c)(1) (1988).

14. *See* 18 U.S.C. § 3401(a), (b) (1988) (granting magistrates jurisdiction over misdemeanors upon receipt of the written consent of the defendant). Writing in dissent, Justice Marshall, joined by Justices White and Blackmun, suggested that a defendant's silence could not satisfy the consent requirement, and that an oral agreement to the participation might also be insufficient. Under this approach, the standard for evaluating the effectiveness of consent in voir dire arises out of the written consent requirements for referral of misdemeanor trials. *See* Peretz v. United States, 111 S. Ct. 2661, 2675 (1991) (Marshall, J., dissenting).

15. *See infra* notes 21-38 and accompanying text (discussing the history of the Federal Magistrates Act).

16. 28 U.S.C. § 636(b)(1)(A) provides that a judge may not refer the following tasks to a magistrate:

> [A] motion 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.

17. S. 1970, 101st Cong., 1st Sess. § 4301 (1990).

certiorari in *United States v. France*[18] to review a panel decision of the United States Court of Appeals for the Ninth Circuit that reversed a felony conviction on the ground that empanelment of a jury by a magistrate constituted reversible error. The Court merely affirmed the panel decision in a one sentence per curiam opinion indicating that the Court was equally divided.[19] On the same day the Court decided *France*, it granted the defendant's petition for certiorari in *United States v. Peretz*.[20] *Peretz* presented a procedural situation nearly identical to *France*, except that in *Peretz*, the Court of Appeals for the Second Circuit affirmed the defendant's conviction on the ground that empanelment of a jury by a magistrate is proper when the defendant has failed to object.

In a five-to-four ruling, the United States Supreme Court affirmed the defendant's conviction in *Peretz*. The Court's holding was narrow and provides little guidance either to Congress or to lower courts in determining the limits of a magistrate's authority in other contexts that are likely to arise. Despite the Court's holding in *Peretz*, the traditional approach to Article III is too constrictive when applied to the special circumstances of federal magistrates. Based upon the foregoing premise, this Note offers an alternative approach to Article III. The proposed analysis is tailored to the unique situation of the magistrates and balances the benefit to the judicial system and litigants derived from referral to magistrates against the threat to core Article III values. The complexity of the task, the efficacy of appellate review, and the possibility of obtaining the uncoerced consent of the parties all weigh heavily in the analysis.

THE FEDERAL MAGISTRATES ACT IN THE CONTEXT OF ARTICLE III

Legislative History of the Act

Congress enacted the Federal Magistrates Act[21] in response to two major problems then facing the federal judiciary. First, the

18. 886 F.2d 223 (9th Cir. 1989), *cert. granted*, 110 S. Ct. 1921 (1990), *aff'd per curiam*, 111 S. Ct. 805 (1991).

19. The Court heard oral arguments for *France* on October 2, 1990, several weeks prior to Justice Souter's confirmation.

20. 904 F.2d 34 (2d Cir. 1990), *cert. granted*, 111 S. Ct. 781, *aff'd*, 111 S. Ct. 2661 (1991).

21. 28 U.S.C. §§ 631-639 (1988).

Act proposed a corps of magistrates to replace the obsolete and ineffective system of United States Commissioners.[22] Second, in recognition of the difficulties a rapidly growing caseload presented,[23] Congress intended that the magistrates would relieve district judges of certain ministerial or subordinate duties, freeing them for more productive case management and trial work.[24]

The Act created positions for a highly qualified and motivated corps of public servants to assist district judges in a broad range of tasks. Congress listed in the Act a number of tasks that magistrates could perform,[25] but the legislative history accompanying the Act clearly indicates that Congress did not intend the terms of the Act to establish an exhaustive list. Rather, Congress intended the statutory grants of authority to serve as a guide and for district judges to experiment freely in delegating tasks to magistrates.[26]

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22. *See* Edward Weisfelner, Note, United States v. Raddatz: *Judicial Economy at the Expense of Constitutional Guarantees*, 47 BROOK. L. REV. 559, 560-61 n.7 (1981). Congress created the United States commissioner system after the Civil War, and it remained nearly unchanged for a century thereafter. Commissioners were not required to be attorneys. They exercised civil jurisdiction limited primarily to administrative tasks and were compensated according to an antiquated per-case system.

In the legislative history accompanying the 1968 Act, Congress noted specifically that the commissioners were of little help to federal district judges due to their extremely limited jurisdiction and to the judges' well-grounded reservations regarding the competency of the commissioners. H.R. REP. NO. 1629, 90th Cong., 2d Sess. 3 (1968), *reprinted in* 1968 U.S.C.C.A.N. 4252, 4252-57. The House Report accompanying the 1968 Act listed some of the "substantial defects" of the commissioner system: the fee system compensated commissioners on the basis of the number and nature of proceedings they handled and occasionally put the commissioner in the position of having a pecuniary interest in the matter before him; the low statutory income ceiling ($10,500 in 1968) discouraged quality candidates from applying; commissioners were required to meet office expenses out of their own resources so that most offices were "understaffed and poorly accommodated"; and despite the fact that many of the commissioners were nonlawyers, they were often called upon to interpret and apply sophisticated legal principles, a task well beyond their competence. *Id.* at 4255-57.

23. *See* ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS 6 (1987) (stating that the number of cases filed in federal district courts more than tripled from 1960 to 1986); *see also* Arthur L. Burnett, Sr., *Practical, Innovative and Progressive Utilization of United States Magistrates to Improve the Administration of Justice in the United States District Courts*, 28 HOW. L.J. 293, 298-99 (1985) (observing the increase in caseload per judge and suggesting methods by which magistrates could increase judicial productivity).

24. *See* H.R. REP. NO. 1629. The fundamental purpose of the Act was "to cull from the ever-growing workload of the U.S. district courts matters that are more desirably performed by a lower tier of judicial officers." *Id.* at 4255.

25. *See supra* note 4.

26. Congress recognized that the terms of the Act must be rather broad to permit judges to take an active role in determining the character of the new office. On that

District judges embraced the concept and exercised considerable ingenuity in assigning duties to magistrates. Courts of appeals were occasionally less enthusiastic with the district courts' innovations, however, and disallowed transfer of certain duties to magistrates that the statute did not authorize.[27]

Congress amended the Act in 1976[28] and again in 1979.[29] Both amendments were responses to judicial opposition[30] and in recognition of what Congress, courts, and commentators considered to be the extreme success of the program.[31] In its current version,[32] the Act confers far greater powers on magistrates than the 1968 version did. Most notably, a judge may refer any civil case[33] or misdemeanor[34] to a magistrate, so long as the parties consent. Upon referral, the magistrate hears the case and may enter a final judgment in the matter; parties may thereupon appeal to an appropriate United States court of appeals.[35]

In the 1976 and 1979 amendments, Congress attempted to clarify the types of tasks contemplated in an elastic provision of

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theory, the Act

> allows U.S. magistrates to be assigned duties by the judges of the U.S. district courts in addition to those normally undertaken by U.S. commissioners today. These additional duties may include, *but are not limited to*, service as special masters, supervision of pretrial or discovery proceedings, and preliminary consideration of petitions for postconviction relief.

H.R. REP. No. 1629 (emphasis added).

27. *See, e.g.*, United States v. France, 111 S. Ct. 805 (1991) (affirming a lower court ruling that the Act did not give a magistrate authority to empanel a jury for a felony trial); Wingo v. Wedding, 418 U.S. 461, 472 (1974) (holding that a magistrate could not render a decision in a prisoner habeas corpus petition); TPO, Inc. v. McMillen, 460 F.2d 348, 359 (7th Cir. 1972) (holding that a magistrate could not hear a motion to dismiss or a motion for summary judgment).

28. Pub. L. No. 94-577, § 1, 90 Stat. 2729 (1976).

29. Federal Magistrates Act of 1979, Pub. L. No. 96-82, 93 Stat. 643 (1979).

30. *See* cases cited *supra* note 27.

31. *See, e.g.*, Government of the Virgin Islands v. Williams, 892 F.2d 305, 308 (3d Cir. 1989) (noting the vital role magistrates play in keeping the federal courts working), *cert. denied*, 110 S. Ct. 2211 (1990); Burnett, *supra* note 23, at 299 (discussing the positive impact magistrates have had on the federal judicial system).

32. 28 U.S.C. §§ 631-639 (1988).

33. *See supra* note 13.

34. A magistrate's authority to preside at a misdemeanor trial is established by statute: "When specially designated to exercise such jurisdiction by the district court or courts he serves, any United States magistrate shall have jurisdiction to try persons accused of, and sentence persons convicted of, misdemeanors committed within that judicial district. 18 U.S.C. § 3401(a) (1988).

35. 28 U.S.C. § 636(c)(3). Another provision in the Act allows the parties to agree to appeal to a district judge without waiving their right to appeal eventually to a United States court of appeals. *Id.* § 636(c)(4), (5).

the Act that allowed judges to assign to magistrates "such additional duties as are not inconsistent with the Constitution and laws of the United States."[36] The legislative history accompanying the Act indicates that its sponsors sought to encourage judges to be creative in their utilization of magistrates and not to constrain them to the tasks and duties mentioned explicitly in the Act.[37]

The fundamental purpose behind the 1968 Act was to relieve federal district judges of some of the burdens caused by the rapidly growing federal docket.[38] In the years since the original passage of the Act, the pressures on the federal docket have grown even greater.[39] Some commentators have suggested that magistrates now play such a vital role that the federal judicial system could not function without them.[40]

Few of the objections to the expanded role of the magistrates challenge the competence of federal magistrates themselves. Judges and commentators on both sides of the controversy agree that magistrates are highly qualified and extremely competent.[41]

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36. *Id.* § 636(b)(3).

37. *See supra* note 26; *see also*, H.R. REP. No. 1609, 94th Cong., 2d Sess., *reprinted in* 1976 U.S.C.C.A.N. 6162.

> If district judges are willing to experiment with the assignment to magistrates of other functions in aid of the business of the courts, there will be increased time available to judges for the careful and unhurried performance of their vital and traditional adjudicatory duties, and a consequent benefit to both efficiency and the quality of justice in the Federal courts.

Id. at 6172.

38. *See, e.g.*, S. REP. No. 74, 96th Cong., 1st Sess. (1979), *reprinted in* 1979 U.S.C.C.A.N. 1469, 1469-70; H.R. REP. No. 1629, 90th Cong., 2d Sess. (1968), *reprinted in* 1968 U.S.C.C.A.N. 4252, 4254-55; H.R. REP. No. 1609, 94th Cong., 1st Sess. (1976), *reprinted in* 1976 U.S.C.C.A.N. 6162, 6164. The Senate Report accompanying the 1979 amendment included another consideration that may have been implicit in the earlier laws, but was not clearly stated: "[T]o . . . improve access to the Federal courts for the less-advantaged . . . provid[ing] the opportunity for access to the judicial forum for all Americans." S. REP. No. 74.

39. *See* Richard A. Posner, *Coping With the Caseload: A Comment on Magistrates and Masters*, 137 U. PA. L. REV. 2215, 2215 n.2 (1989) (citing ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS (1961 & 1987)). The number of cases filed annually in federal district courts increased by well over 300% between 1961 and 1987; filings in United States Courts of Appeals over the same period increased by over 800%. *Id.*

40. *See, e.g.*, Burnett, *supra* note 23, at 299 (noting that the federal district courts have become far more efficient as magistrates have assumed greater responsibilities—court productivity increased from an average of 201 civil cases per judge in 1979 to 368 civil cases per judge per year in 1982).

41. *See, e.g.*, Pacemaker Diagnostic Clinic of Am., Inc. v. Instromedix, Inc., 725 F.2d 537, 555 (9th Cir.) (en banc) (Pregerson, J., dissenting) (suggesting that "magistrates should be awarded Article III protections commensurate with the Article III work that they now so commendably perform"), *cert. denied*, 469 U.S. 824 (1984); Posner, *supra* note 39, at 2216-17 (noting that the concerns over expanded powers for magistrates center around jurisdiction under Article III, and not the magistrates' abilities).

In establishing the magistrate system and granting magistrates such broad powers, however, real concern exists that Congress has exceeded the bounds of Article III.

Article III Requirements

Article III of the Constitution creates an independent branch of government to exercise the "judicial power" of the United States.[42] Because Article III does not define the limits of the judicial realm, the Supreme Court on occasion must decide whether an act of Congress impermissibly extends or restricts the judicial power.[43]

The Constitution provides for judges protected by lifetime tenure and undiminishable salary.[44] The Framers sought to create an incorruptible and impartial judiciary[45] contrary to their experiences with the colonial courts, which were often controlled and manipulated by the British monarch or local legislative bodies.[46] Article III's tenure and salary guarantees provide for a

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42. The Constitution provides that

> The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

U.S. CONST. art. III, § 1.

43. *See, e.g.*, Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 71-72, 76 (1982) (plurality opinion) (holding that non-Article III bankruptcy judges could hear only matters not arising under the Bankruptcy Act of 1978); Crowell v. Benson, 285 U.S. 22, 50-51, 56 (1932) (stating that Congress could not vest an agency with the power finally to determine facts that affect the constitutional rights of a citizen); *see also* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803) (establishing the Court's authority to review acts of Congress, Chief Justice Marshall noted that "[i]t is emphatically the province and duty of the judicial department to say what the law is.").

44. *See supra* note 42. The Supreme Court has interpreted the term "good behaviour" to mean lifetime tenure. *See* O'Donoghue v. United States, 289 U.S. 516, 551 (1933). The impeachment standards in Article II of the Constitution govern removal of judges. U.S. CONST. art. II, § 4 (listing "treason, bribery, or other high crimes and misdemeanours.").

45. *See* THE FEDERALIST No. 79, at 403 (Alexander Hamilton) (Max Beloff ed. 1987). Hamilton noted that because of the Article III guarantees, "[a] man may then be sure of the ground upon which he stands, and can never be deterred from his duty by the apprehension of being placed in a less eligible situation." *Id.*

46. *See* Irving R. Kaufman, *The Essence of Judicial Independence*, 80 COLUM. L. REV. 671, 679-83 (1980) (noting that "the power to fix salaries [was in] the colonial assemblies, where it was often effectively employed to elicit judicial loyalty"). Control of judges by the British monarch may have been an even greater concern to American colonists than were abuses by local legislatures. As a result of the increasing willingness of colonial judges to challenge the legality of orders from Britain, Parliament passed a series of

countermajoritarian force both to preserve individual rights in the face of public pressure and also to create a strong and independent branch of the federal government in accordance with the separation of powers scheme.[47] Tenure and salary protection ensured that although Congress would have the authority to create inferior courts,[48] the characteristics of the judges of those courts would already be established.[49]

Although Article III's provisions operate to protect litigants,[50] Article III does not actually create rights that inhere in litigants.[51] Rather, the terms of Article III pertain to the structure

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resolutions in the 1770's designed to exert greater control over colonial judges by manipulating their compensation and the appointment process. The effect was to render the colonial judiciary absolutely at the mercy of the Crown. *Id.* at 682-83.

The Declaration of Independence listed as one of the colonists' complaints that King George III "ha[d] made judges dependent on his Will alone, for the tenure of their offices, and the amount and payment of their salaries." THE DECLARATION OF INDEPENDENCE para. 1 (U.S. 1776), *quoted in* Thomas G. Krattenmaker, *Article III and Judicial Independence: Why the New Bankruptcy Courts Are Unconstitutional*, 70 GEO. L.J. 297, 303 (1981).

47. In *The Federalist*, Alexander Hamilton and James Madison each stress the critical role that the judiciary must play in the Constitution's separation of powers scheme. *See* THE FEDERALIST No. 78, at 396 (Alexander Hamilton) (Max Beloff ed. 1987) ("[I]n a republic, [judicial tenure] is a[n] . . . excellent barrier to the encroachments and oppressions of the representative body. And it is the best expedient which can be devised in any government, to secure a steady, upright, and impartial administration of the laws."); *see also, id.* No. 47, at 245-46 (James Madison) ("The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny."); *id.* No. 79, at 403 (Alexander Hamilton) ("[W]e can never hope to see realized in practice the complete separation of the judicial from the legislative power, in any system, which leaves the former dependent for pecuniary resource on the occasional grants of the latter.").

48. Congress has the authority "[t]o constitute Tribunals inferior to the supreme Court." U.S. CONST. art. I, § 8, cl. 9.

49. *See* J. Anthony Downs, Comment, *The Boundaries of Article III: Delegation of Final Decisionmaking Authority to Magistrates*, 52 U. CHI. L. REV. 1032, 1036-38 (1985) (discussing five basic rationales for guarantees of tenure and salary: to ensure that the judiciary is free to preserve individual rights; to preserve the judicial branch as a real element of the separation of powers structure; to prevent individual judges from exercising influence over one another; to control federal legislative or executive incursions on state sovereignty; and to increase public confidence in the judiciary); *see also* Krattenmaker, *supra* note 46, at 303:

> [T]he first section of article III was intended to impose a specific limitation on the power of Congress and the Executive to create a federal judicial system. The framers intended that if Congress and the President wished to establish a federal judicial office, they first would have to guarantee members of that office independence from the other two branches.

50. *See* Kaufman, *supra* note 46, at 687 n.99 ("The separation of powers is grounded in a need to protect the citizenry rather than the occupants of official positions within each branch.").

51. See Krattenmaker, *supra* note 46, at 304, which states that

of the federal government.[52] The Framers recognized that if Congress or the Executive could exercise control over the tenure and compensation of federal judges, the judiciary would cease to play a key role in the system of checks and balances.[53] Litigants benefit, of course, from the guarantees of impartial adjudication,[54] but this fact does not obscure the central purpose of Article III: to establish firmly the judiciary as a key component of the federal government.

The term "separation of powers" does not actually mean that each branch is absolutely independent of the others; at times the powers and duties of each branch of the federal government necessarily overlap. Justice Jackson's concurrence in the *Steel Seizure Case*[55] sums up the modern conception of the relationship between the executive, the legislature, and the judiciary: "[The Constitution] enjoins upon its branches separateness but interdependence, autonomy but reciprocity."[56] Despite the Court's recognition that the branches cannot be hermetically sealed off from each other, excessive encroachment by one branch into the

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> Article III provides no constitutional right to trial of any cases before a tenured judge. But it does require that Congress, as lawmaker, not grant to itself or to the Executive controls over judges who apply that law. The relevant constitutional provision establishes a principle of separation of powers, not an individual constitutional right or liberty.

Id. (footnote omitted) (citing Palmore v. United States, 411 U.S. 389, 411 (1973)); *see also* Posner, *supra* note 39, at 2217 ("The independent judiciary ordained by Article III is not merely a convenience for litigants.").

52. This Note addresses at length the structural aspect of Article III, particularly as it relates to a party's ability to waive compliance with the Article's requirements. *See infra* notes 179-84 and accompanying text. For a thorough treatment of the due process concerns surrounding delegation to magistrates, see Raymond P. Bolanos, Note, *Magistrates and Felony Voir Dire: A Threat to Fundamental Fairness?*, 40 HASTINGS L.J. 827 (1989).

53. *See* Downs, *supra* note 49, at 1036 n.24.

> The Supreme Court has stated emphatically that the "primary purpose" of the salary protections is "to promote that independence of action and judgment which is essential to the maintenance of the guaranties, limitations and pervading principles of the Constitution and to the administration of justice without respect to persons and with equal concern for the poor and the rich."

Id. (quoting Evans v. Gore, 253 U.S. 245, 253 (1920)).

54. The benefit accruing to litigants from independent judges goes more to satisfying the due process requirements of the Fifth and Fourteenth Amendments than toward explaining Article III's role in the framework of the Constitution. *See supra* notes 50-54 and accompanying text.

55. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 634 (1952) (Jackson, J., concurring).

56. *Id.* at 635 (Jackson, J., concurring).

sphere of another has met with stiff opposition on a number of occasions.[57] When the Court has carved out exceptions to Article III allowing Congress to exercise adjudicative authority, it has been careful to ensure that such action constituted no threat to the integrity of Article III.[58]

Under narrowly defined circumstances, Congress may vest adjudicative authority in non-Article III courts or officers. This vesting of authority may take the form of either a legislative court or an adjunct officer to an Article III court.

Legislative Courts[59]

The Supreme Court has approved the creation of legislative courts in three discrete areas: territorial courts, military courts, and the adjudication of congressionally created rights. The authority establishing territorial courts is not Article III, but Congress' Article IV imprimatur to govern territories of the United States.[60] Judges in territorial courts, therefore, are not guaranteed the salary and tenure rights of Article III.[61] Similarly, the authority to establish military tribunals derives from Article I's

57. *See, e.g., id.* at 587-89 (rejecting an attempt by the President to exercise power implicitly denied him by Congress); *see also* Bowsher v. Synar, 478 U.S. 714, 722-23 (1986) (holding invalid provisions of a statute that would have allowed an officer under congressional control to exercise executive authority); Immigration and Naturalization Serv. v. Chadha, 462 U.S. 919, 959 (1983) (invalidating legislative veto provisions which allowed Congress to exercise executive authority); Humphrey's Ex'r v. United States, 295 U.S. 602, 629 (1935) (limiting the President's removal power over an officer created by Congress).

58. *See* Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 70 n.25 (1982) (plurality opinion) ("When [the exceptions to Article III] are properly constrained, they do not threaten the Framers' vision of an independent Federal Judiciary.").

59. For a thorough treatment of the legislative court doctrine, see *Northern Pipeline*, 458 U.S. at 63-70; *see also* Downs, *supra* note 49, at 1038-42.

60. The Constitution provides that "Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States . . . ." U.S. CONST. art. IV, § 3. Article I provides Congress with the authority to "exercise exclusive legislation" over the District of Columbia. *Id.* art. I, § 8, cl. 17. On the basis of that grant of authority, the Supreme Court has rejected challenges to the constitutionality of non-Article III courts in the District. *See* Palmore v. United States, 411 U.S. 389, 410 (1973).

61. *See Northern Pipeline*, 458 U.S. at 64 (citing American Ins. Co. v. Canter, 26 U.S. (1 Pet.) 511, 545 (1828) (Marshall, C.J.)) (Suggesting that in the territories, Congress is the equivalent of both a state and federal government. In the exercise of its authority to govern the territories, Congress may create courts that are outside the parameters of Article III.).

grant to Congress of the power to create and regulate the armed forces.[62] On the basis of that explicit delegation of authority to Congress, military courts are not subject to the strictures of Article III.[63] Finally, the Court has stated that Congress has the power to create non-Article III courts for the adjudication of "public rights."[64] Under the heading of public rights are matters historically reserved to either the executive or legislative branch that Congress could have committed completely to nonjudicial determination.[65]

The legislative court doctrine can operate to relieve Congress of the restrictions imposed by Article III. Under certain circumstances, therefore, Congress may create tribunals that are nearly indistinguishable from Article III courts in form and function, but Congress need not extend guarantees of tenure and salary to judges in those tribunals. Recent case law indicates that the Court is hesitant to expand the parameters of the legislative

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62. Congress has the authority "[t]o make Rules for the Government and Regulation of the land and naval Forces." U.S. CONST. art. I, § 8, cl. 14.

63. The extent of this authority is indicated by the Court's holding in Dynes v. Hoover, 61 U.S. (20 How.) 65, 79 (1857) (finding that Congress' "power to [create military courts] is given without any connection between it and the third article of the Constitution defining the judicial power of the United States; indeed, that the two powers are entirely independent of each other."). The Court has been careful to ensure that military courts do not exceed their authority by deciding matters beyond their jurisdiction and properly belonging before an Article III court. *See, e.g.*, United States *ex rel.* Toth v. Quarles, 350 U.S. 11, 23 (1955) (holding that a civilian could not be court-martialed for offenses committed while in the military).

64. See Murray's Lessee v. Hoboken Land & Improvement Co., 59 U.S. (18 How.) 272 (1856), which established the public rights prong of the doctrine and declared that

> there are matters, involving public rights, which may be presented in such form that the judicial power is capable of acting on them, and which are susceptible of judicial determination, but which Congress may or may not bring within the cognizance of the courts of the United States, as it may deem proper.

Id. at 284.

65. Social Security claims provide a clear example of the types of matters that fall within the domain of public rights. Because Congress has created certain rights by statute, it may also create the forum that determines whether those rights have been abridged and what remedies are available. *See* Mathews v. Eldridge, 424 U.S. 319, 339 (1976) (upholding referral of preliminary review of Social Security appeals to the Social Security Administration Appeals Council). *See generally* Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50 (1982) (plurality opinion).

> The understanding of these cases is that the Framers expected that Congress would be free to commit such matters completely to non-judicial executive determination, and that as a result there can be no constitutional objection to Congress' employing the less drastic expedient of committing their determination to a legislative court or an administrative agency.

Id. at 68.

court doctrine.[66] In essence, congressional authority to create non-Article III adjudicative bodies remains strictly limited to the three categories listed above: territorial courts, military courts, and public rights.

Adjunct Officers

Judicial resistance to expansion of the legislative court doctrine does not mean that Article III requires a judge to perform all judicial acts.[67] The adjunct officer's authority arises out of Article III; although the office itself originates from an Article I grant of power,[68] the adjunct acts within the jurisdiction of the Article III court that delegates tasks to him.[69] Traditionally, adjuncts have exercised limited authority, often in the area of factfinding and determining the issues before the court.[70]

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66. *See Northern Pipeline*, 458 U.S. at 70. After a lengthy discussion of the history and development of the legislative court doctrine, the Court summarized the doctrine's current status in very limiting terms:

> In sum, this Court has identified three situations in which Art. III does not bar the creation of legislative courts. In each of these situations, the Court has recognized certain exceptional powers bestowed upon Congress by the Constitution or by historical consensus. Only in the face of such an exceptional grant of power has the Court declined to hold the authority of Congress subject to the general prescriptions of Art. III.

Id. (footnote omitted).

67. *See, e.g.*, Crowell v. Benson, 285 U.S. 22, 51 (1932) (stating that "there is no requirement that, in order to maintain the essential attributes of the judicial power, all determinations of fact in constitutional courts shall be made by judges"). Adjuncts have a long history of service in the judicial process, dating back to the early British court system. *See* 1 WILLIAM BLACKSTONE, COMMENTARIES *258. Federal courts have traditionally employed adjunct officers, such as masters and referees, to assist federal judges in a wide variety of carefully circumscribed tasks. *See infra* note 70 and accompanying text (discussing the characteristics and functions of adjunct officers); *see also*, Note, *Masters and Magistrates in the Federal Courts*, 88 HARV. L. REV. 779, 789-93 (1975) (discussing the role of adjuncts in federal courts in the early twentieth century).

68. Congress has the power "[t]o constitute Tribunals inferior to the supreme Court." U.S. CONST. art. I, § 8, cl. 9. Courts have deemed the power to create adjunct officers a "necessary and proper" corollary to this power. *See, e.g.*, Ram Constr. Co. v. Port Auth. of Allegheny County, 49 B.R. 363, 365 (Bankr. W.D. Pa. 1985) (stating that the Constitution authorizes Congress to create adjuncts as a necessary and proper corollary to its authority to create a federal bankruptcy law).

69. "When a case is tried before a magistrate, jurisdiction remains in the district court and is simply exercised through the medium of the magistrate." *Hearings on the Federal Magistrates Act Before the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary*, 89th Cong., 2d Sess. 252 (1966-67).

70. *See* Downs, *supra* note 49, at 1042 (noting that proceedings conducted by adjuncts such as masters and commissioners "were subject to the direction of the court and their findings, at least as to matters of law, were essentially advisory") (footnote omitted).

The Supreme Court has approved the delegation of power to adjuncts so long as the delegation does not deprive Article III courts of the "essential attributes" of judicial power.[71] The essential attributes test requires that an Article III judge retain the power to decide all questions of law, and that the adjunct's authority be narrowly drawn and of an essentially advisory nature.[72]

Federal magistrates are adjunct officers, in that they exist to aid federal district judges in managing the court's docket. The Court applied the essential attributes test to the Federal Magistrates Act in *United States v. Raddatz*.[73] The Court upheld the delegation to magistrates of potentially dispositive pretrial motions on the ground that the judge maintained control over the proceedings.[74] Because the judge retained the authority to render any final decision, the involvement of the magistrate in *Raddatz* did not violate Article III.

The Court's decision in *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*[75] affirmed the *Raddatz* analysis. *Northern Pipeline* involved a challenge to the authority of bankruptcy judges created by the Bankruptcy Act of 1978.[76] The Court found that the Act's broad grant of jurisdiction to bankruptcy judges gave them the authority to hear claims that were not grounded in the terms of the Act.[77] In light of these powers, the Court held that bankruptcy judges were not merely adjuncts but comprised an independent judicial body separate from Article III

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71. *See Crowell*, 285 U.S. at 51.

72. *See* Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 78-79 (1982) (plurality opinion) (citing United States v. Raddatz, 447 U.S. 667, 682-84 (1980)). The Court found that delegation of authority to an adjunct is constitutionally permissible where "the ultimate decisionmaking authority" remains at all times with the district court. *Id.*

73. 447 U.S. 667 (1980).

74. *See id.* at 680-81 (maintaining that essential to the control is the availability of the judge for immediate review).

75. 458 U.S. 50.

76. Pub. L. No. 95-598, § 201(a), 92 Stat. 2549, 2657-60 (current version at 28 U.S.C. §§ 151-158 (1988)).

77. *Northern Pipeline*, 458 U.S. at 84. The Court found that provisions of the Bankruptcy Act granting bankruptcy judges jurisdiction over "'all civil proceedings arising under [the Act] or arising in or *related to* cases under'" the Act unconstitutionally conferred Article III powers on non-article III judges. *Id.* at 85 (quoting 28 U.S.C. § 1471(b) (1976 ed., Supp. IV)). Because the broad statutory grant of authority gave bankruptcy judges jurisdiction over state law rights and claims that were not of Congress' creation, the Court found that the bankruptcy judges' authority was coextensive with the authority of district judges despite the fact that bankruptcy judges' lacked constitutional guarantees of tenure and salary. *See id.* at 84-87.

courts, beyond the ambit of the legislative court doctrine, and were therefore unconstitutional.[78]

Northern Pipeline stands for the proposition that Congress may not exercise its authority to create non-Article III courts or officers so as to invade the province of Article III.[79] The Constitution dogmatically reserves some judicial functions to officials who possess tenure and salary protection. Creative attempts to delegate that authority to alternative fora or officials have run afoul of Article III.[80]

Voir Dire

By passing the Federal Magistrates Act, Congress strongly encouraged judges to use magistrates in tasks that would free the judges for case supervision and trial work.[81] Although the Act does not expressly mention voir dire, judges have regularly delegated to magistrates the role of empaneling juries in felony trials. Given the protracted and repetitive nature of voir dire, such a development was inevitable. Participation by magistrates in voir dire has become a routine practice in many jurisdictions,[82] and appellate courts initially approved of the practice.[83]

In the latter half of the 1980's, at least one court of appeals suggested that the statute did not empower magistrates to conduct voir dire in felony trials. In *United States v. Ford*,[84] the United States Court of Appeals for the Fifth Circuit, sitting en

78. *See id.* The Court's analysis identified a key distinction between the legislative court doctrine and adjunct officers: Congress simply does not have the same authority to create adjuncts to adjudicate constitutionally recognized rights as it does to address statutorily created rights. *Id.* at 81-82.

79. *Id.* at 87. "Although the cases relied upon by appellants demonstrate that independent courts are not required for *all* federal adjudications, those cases also make it clear that where Art. III does apply, all of the legislative powers specified in Art. I and elsewhere are subject to it." *Id.* at 73.

80. *See id.* at 84 (referring to "historically judicial functions" that an Article III judge must perform, but failing to enumerate those functions). The Court has yet to provide an exhaustive definition of the tasks only judges may perform. This Note proposes a new method of analysis to determine whether magistrates, as non-Article III officers, may undertake inherently judicial duties. *See infra* notes 220-33 and accompanying text.

81. *See supra* notes 37-40 and accompanying text.

82. *See, e.g.*, United States v. Rivera-Sola, 713 F.2d 866, 873 (1st Cir. 1983) (noting that "[t]he Legal Manual for United States Magistrates lists as an 'additional duty' the '[c]onduct of voir dire and selection of juries for district judges.' ").

83. *See, e.g.*, United States v. Bezold, 760 F.2d 999, 1001 (9th Cir. 1985), *cert. denied*, 474 U.S. 1063 (1986); United States v. Peacock, 761 F.2d 1313, 1317-18 (9th Cir. 1984), *cert. denied*, 474 U.S. 847 (1985); *Rivera-Sola*, 713 F.2d at 874.

84. 824 F.2d 1430 (5th Cir. 1987) (en banc), *cert. denied*, 484 U.S. 1034 (1988).

banc, rejected the reasoning of a panel decision[85] that found the "additional duties" provision in the Federal Magistrates Act permitted a magistrate to conduct voir dire.[86] The en banc decision pointed out that the involvement of magistrates in the voir dire process posed "grave constitutional questions"[87] and that a district court should not allow it to occur.[88] The court then affirmed the conviction on the ground that the defendant had received a fair trial[89] and had not objected to the magistrate's actions.[90]

The en banc decision in *Ford* noted and rejected dicta contained in an earlier case decided by the United States Court of Appeals for the First Circuit, *United States v. Rivera-Sola*.[91] In *Rivera-Sola*, the court affirmed a criminal conviction because of the defendant's failure to object at trial[92] and her inability to show prejudice arising from the magistrate's conduct of the voir dire.[93] The First Circuit went a step further, however, and stated explicitly that participation by the magistrate in voir dire was entirely proper, and the court strongly endorsed the practice.[94] The en banc court in *Ford* rejected *Rivera-Sola*'s approach to voir dire and stated directly that the Federal Magistrates Act does not empower magistrates to conduct voir dire.[95]

Gomez v. United States[96]

As indicated by the conflict between the *Ford* and *Rivera-Sola* decisions, a serious split developed among the circuits regarding

85. United States v. Ford, 797 F.2d 1329 (5th Cir. 1986), *cert. denied*, 479 U.S. 1070 (1987).

86. *Id.* at 1333. Neither side had objected at trial to the participation of the magistrate in voir dire. *Ford*, 824 F.2d at 1432.

87. *Ford*, 824 F.2d at 1430.

88. *Id.* at 1438.

89. Rule 52 of the Federal Rules of Criminal Procedure provides that a conviction may be reversed only if the appellant makes a showing that the appealable error unfairly prejudiced him or affected the basic fairness of the trial. FED. R. CRIM. P. 52(b); *see infra* note 121 (discussing the plain error doctrine).

Because Ford was unable to offer any positive evidence that she was adversely affected by the involvement of the magistrate, and because the trial was fundamentally fair, the court upheld the conviction despite the error. *Ford*, 824 F.2d at 1438-39.

90. *Ford*, 824 F.2d at 1438-39 (affirming conviction on basis of fundamental fairness of trial and defendant's failure to object).

91. 713 F.2d 866 (1st Cir. 1983).

92. *See id.* at 872.

93. *Id.* at 874.

94. *See id.* (observing that "a magistrate can effectively conduct the voir dire and preside at the selection of juries in civil and criminal cases, thus saving valuable time for our busy district court judges.").

95. United States v. Ford, 824 F.2d 1430, 1438 (5th Cir. 1987) (en banc).

96. 490 U.S. 858 (1989).

the propriety of a magistrate conducting voir dire. The United States Supreme Court addressed the issue in 1989 and held unanimously in *Gomez v. United States*[97] that empanelment of a jury by a magistrate over the defendant's objection constituted reversible error.[98] The Court rejected the government's argument that the availability of a district judge to review the magistrate's decisions sufficiently safeguarded the defendant's rights; because of the special nature of the voir dire proceeding—in which a venireman's reactions and gestures are often as important as his responses to questions—review of the record by a judge was particularly inadequate.[99]

In reversing Gomez's conviction, the Court refused to consider the constitutional issues raised in the case and based its decision on statutory interpretation.[100] Reviewing the wording of the "additional duties" clause[101] of the Federal Magistrates Act, the Court found that participation in felony voir dire was not one of the powers the statute expressly conferred upon magistrates.[102] Because voir dire was not a function listed in the Act, a defendant had a right to object and to request that a federal judge conduct voir dire. The opinion raised the question but did not answer whether Congress could, within the limits of the Constitution, explicitly confer such authority on magistrates.[103]

The Court did not rule directly on whether a defendant's failure to object at voir dire entitled him to the same protection.[104] This

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97. *Id.*

98. *Id.* at 876.

99. *See id.* at 874-75 ("[W]e harbor serious doubts that a district judge could review this function [voir dire] meaningfully . . . . The court further must scrutinize not only spoken words but also gestures and attitudes of all participants to ensure the jury's impartiality.").

100. *Id.* at 864 (stating that the Court's "settled policy [is] to avoid an interpretation of a federal statute that engenders constitutional issues if a reasonable alternative interpretation poses no constitutional question").

101. 28 U.S.C. § 636(b)(3) (1988).

102. *Gomez*, 490 U.S. at 875-76.

103. *Id.* at 872 n.25 ("Because we decide that the Federal Magistrates Act does not allow the delegation of jury selection to magistrates, we need not consider the second question presented in this case; *i.e.*, whether such a delegation would be constitutional."). In construing § 636(b)(3) of the Act (the "additional duties" clause), other courts have also used its vague wording to avoid the constitutional issues raised. *See, e.g.*, Wingo v. Wedding, 418 U.S. 461, 467 n.4 (1974) (finding that the Act did not give magistrates authority to hold evidentiary hearings in habeas corpus petitions, the Court "indicate[d] no views as to the validity of investing such authority in a magistrate"); United States v. Ford, 824 F.2d 1430, 1435 (5th Cir. 1987) (en banc) (holding that participation in felony trial proceedings is not one of the additional duties contemplated by the Act: "[w]e need not decide whether Congress has the power to allow a district judge to delegate the trial of felony cases to a magistrate"), *cert. denied*, 484 U.S. 1034 (1988).

104. *Gomez*, 490 U.S. at 860 (observing that Gomez did object at voir dire, but not expressly limiting its holding to those facts).

unanswered question led to even greater divisions between the circuits as courts handled a flood of appeals from defendants who had failed to object to the participation of a magistrate at voir dire.[105] Defendants contended that in light of the "solid wall"[106] of precedent that had existed in many jurisdictions supporting the use of magistrates in voir dire prior to the *Gomez* decision, the requirement of an objection would be unreasonable and unfair, rewarding what would have been regarded at the time as abusive behavior by counsel.[107] In responding to these challenges, the circuit courts of appeals have differed greatly in their evaluation of the effect of a defendant's failure to object to the empanelment of a jury by a magistrate.[108]

United States v. France[109] *and* Peretz v. United States[110]

In *United States v. France*,[111] the defendant failed to object to the use of the magistrate in voir dire[112] and was convicted by a

105. *See, e.g.*, United States v. Martinez-Torres, 912 F.2d 1552, 1555 (1st Cir. 1990) (en banc) (reversing conviction by finding defendant's failure to object "entirely excusable"); United States v. France, 886 F.2d 223 (9th Cir. 1989) (finding that *Gomez* mandated a per se rule of reversibility, regardless of contemporaneous objection), *aff'd*, 111 S. Ct. 805 (1991); United States v. Vanwort, 887 F.2d 375 (2d Cir. 1989) (holding that *Gomez* only requires reversal if defendant objected at voir dire), *cert. denied*, 110 S. Ct. 1927 (1990); Government of the Virgin Islands v. Williams, 892 F.2d 305 (3d Cir. 1989) (finding that defendant's failure to object satisfies consent requirement), *cert. denied*, 110 S. Ct. 2211 (1990).

106. *France*, 886 F.2d at 228 (discussing pre-*Gomez* precedent in the Ninth Circuit for empanelment of juries by magistrates).

107. *Id.* ("[I]t seems to us at best unseemly, and at worst irresponsible, to penalize France for following the law as it existed at the time her jury was selected.").

108. The United States Court of Appeals for the Third Circuit held that in the absence of an objection, no error exists. The defendant waives his right to an Article III judge by failing to object at voir dire. The objection therefore may not be raised at a later time. *Williams*, 892 F.2d at 312. The First Circuit stated that when a solid wall of pre-*Gomez* precedent has led a defendant to refrain from objecting at voir dire, the defendant may raise the objection on appeal. *Martinez-Torres*, 912 F.2d at 1555. Finally, the Ninth Circuit held that the involvement of a magistrate at voir dire is inappropriate regardless of whether the defendant objects and constitutes per se grounds for reversal. *France*, 886 F.2d at 228.

109. 886 F.2d 223.

110. 111 S. Ct. 2661 (1991).

111. 886 F.2d 223.

112. Michael Levine, the public defender who represented Darlina France at the trial and appellate levels and argued her case before the Supreme Court, pointed out that he failed to object to the participation of the magistrate because at the time of the trial (well before the *Gomez* decision was handed down), the magistrate's right to involvement was so well established that any objection was futile. Interview with Michael Levine, Federal Public Defender, in Washington, D.C. (Oct. 2, 1990). Levine raised the objection for the first time on appeal. The Ninth Circuit panel reversed France's conviction, ruling that *Gomez* mandated a per se rule of reversibility. *France*, 886 F.2d at 228.

jury.[113] The panel reversed the defendant's conviction through an expansive interpretation of the *Gomez* holding which suggested that participation of a magistrate in voir dire constituted per se grounds for reversal.[114]

In her brief to the Supreme Court, France argued that the Constitution does not permit the referral of voir dire to magistrates, declaring that referral "violates the structural requirements of Article III."[115] Because Article III provides a "nonwaivable structural safeguard,"[116] France's failure to object at voir dire should not have affected her right to appeal on that issue and to obtain reversal of her conviction.[117]

The government focused on the procedural safeguards and requirements rather than on the constitutional issues. Its brief challenged the validity of a "futility exception"[118] to the contemporaneous objection doctrine[119] on the ground that such an exception would be unmanageable.[120] Moreover, the government argued that the plain error doctrine[121] provided adequate protection to litigants whose rights or interests were affected through a failure of counsel.[122]

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113. *France*, 886 F.2d at 225.

114. *Id.* at 228.

115. Brief for Respondent at *1, United States v. France, 111 S. Ct. 805 (1990) (No. 89-1363) (LEXIS, Genfed library, Briefs file).

116. *Id.* at *2.

117. *Id.*

118. Brief for Petitioner at *2-5, *France* (No. 89-1363). The term "futility exception" mirrors the "solid wall of precedent" analysis. *See supra* notes 106-08 and accompanying text. France argued on appeal that an objection raised at trial would have been futile, so defense counsel's failure to object to the magistrate's participation in voir dire should be excused. Brief for Respondent at *2-3, *France* (No. 89-1363).

119. The "raise-or-waive" rule requires that a party object at trial in order to preserve a right of appeal on the matter. The objection serves to place the trial judge on notice as to possible improprieties and allows him to address the situation immediately. WAYNE R. LAFAVE & JEROLD H. ISRAEL, CRIMINAL PROCEDURE § 26.5(c) (1985) (quoting State v. Applegate, 591 P.2d 371, 373 (1979)).

120. "[T]he futility exception would raise difficult questions regarding the role of the attorney's state of mind in determining whether a particular claim should have been raised at trial." Brief for Respondent at *7, *France* (No. 89-1363). The government raised other concerns including whether a futility exception could apply even if an attorney was unaware of the state of the law regarding the issue, and whether the exception would apply where the attorney honestly believed an objection would be futile but simply misinterpreted the law. *Id.* at *7-8.

121. FED. R. CRIM. P. 52(b). The plain error doctrine provides that an appellate court may reverse a lower court's ruling despite defendant's failure to object during the trial if reversal is necessary to prevent a miscarriage of justice. LAFAVE & ISRAEL, *supra* note 119, at § 26.5(d).

122. Reply Brief for Petitioner, at *10-11, *France* (No. 89-1363).

The government's brief stressed the tremendous impact that adoption of France's argument would have on the judicial system in terms of efficiency and case management.[123] Its brief further suggested that consent, internal delegation, and appellate review by an Article III judge suffice to allay separation of powers concerns.[124]

The United States Supreme Court heard oral argument in *United States v. France*[125] on October 2, 1990. In a one sentence per curiam opinion, an evenly divided Court affirmed the decision of the Ninth Circuit panel establishing a per se rule of reversibility.[126]

The same day that the Court affirmed *France*, it granted certiorari in *Peretz v. United States*,[127] a case from the Court of Appeals for the Second Circuit procedurally indistinguishable from *France*. In *Peretz*, the defendant was charged with importing four kilograms of heroin.[128] At voir dire, counsel for the defendant agreed to have a magistrate empanel the jury.[129] The magistrate conducted voir dire, and after trial, the jury convicted Peretz on all counts. Counsel for Peretz first raised the issue of the magistrate's participation on appeal to the Second Circuit.

Peretz, like France, argued that *Gomez v. United States*[130] mandated reversal of the conviction on the theory that the magistrate lacked authority to participate in a felony trial. The Court of Appeals for the Second Circuit rejected the defendant's argument, and affirmed the defendant's conviction, based on the court's settled rule that *Gomez* requires reversal only when the

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123. The government pointed out the far-reaching implications of France's Article III analysis:

> If respondent is correct in her view of the restrictions imposed by Article III on the use of magistrates, then far more is at stake than magistrate-conducted voir dire in felony jury trials. The authority of magistrates, on consent, to conduct misdemeanor trials or even to conduct voir dire in misdemeanor cases would be at risk, since nothing in Article III distinguishes between misdemeanors and felonies . . . . Magistrates participate in or try a huge number of misdemeanor and civil cases each year, so the consequences of accepting respondent's submission are quite significant.

Id. at *11-12 (footnotes omitted).

124. *Id.* at *13-14.

125. 111 S. Ct. 805 (1991).

126. Justice David Souter took no part in the decision.

127. 904 F.2d 34 (2d Cir. 1990), *cert. granted*, 111 S. Ct. 781, *aff'd*, 111 S. Ct. 2661 (1991).

128. Peretz v. United States, 111 S. Ct. 2661, 2663 (1991).

129. *Id.* at 2663 n.2 (quoting the transcript of the voir dire).

130. 490 U.S. 858 (1989).

defendant objected to the participation of the magistrate.[131] The court found that Peretz had consented to have his jury empanelled by a magistrate, and the conviction therefore was proper.

The United States Supreme Court granted certiorari to resolve the issues left unanswered by the split in *France*.[132] In briefing the case, counsel for Peretz offered arguments identical to those made by defense counsel in *France*: first, that Article III prohibits delegation of voir dire to magistrates;[133] and second, that the contemporaneous objection doctrine should not bar defendant's appeal, both because defendant's silence did not constitute consent and because a defendant cannot empower a magistrate to conduct voir dire simply by agreeing to the procedure.[134] Finally, counsel argued that *Gomez* was not limited to situations in which a defendant objected at voir dire.[135]

The government argued that Peretz's failure to object constituted a waiver of his right to object, and that the facts of the case did not merit the finding of an exception to the contemporaneous objection doctrine.[136] The government's brief in *Peretz* conceded that referral of voir dire to a magistrate was error, as a matter of statutory construction and constitutional interpretation.[137] Despite the admission that the magistrate's participation

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131. *Peretz*, 904 F.2d at 34 (affirmance order) (applying rule from *United States v. Musacchia*, 900 F.2d 493 (2d Cir. 1990), which held that magistrates may conduct voir dire if defendant fails to object).

132. 111 S. Ct. 781 (1991). The Court granted certiorari, limited to the following three questions:

> 1. Does 28 U.S.C., Section 636, permit a magistrate to conduct the *voir dire* in a felony trial if the defendant consents?
> 2. If 28 U.S.C., Section 636, permits a magistrate to conduct a felony trial *voir dire* provided that the defendant consents, is the statute consistent with Article III?
> 3. If the magistrate's supervision of the *voir dire* in petitioner's trial was error, did the conduct of petitioner and his attorney constitute a waiver of the right to raise this error on appeal?

Id.

133. Brief for Petitioner at *13-16, Peretz v. United States, 111 S. Ct. 2661 (1991) (No. 90-615) (LEXIS, Genfed library, Briefs file).

134. *Id.* at *16, *30-35.

135. *Id.* at *13-14 (citing Gomez v. United States, 490 U.S. 858 (1989)) (arguing that the defendant's objection "was irrelevant to the Court's determination" in *Gomez*).

136. Brief for Respondent at *9-13, *Peretz* (No. 90-615).

137. *Id.* at *8-9.

> [W]e agree with petitioner . . . that *Gomez* forecloses the argument that the statute may be read to authorize magistrate-conducted voir dire when the defendant consents. The Magistrates Act, as construed by this Court, does not give magistrates the power to preside over jury selection. A defendant's consent cannot supply the statutory authority Congress did not provide.

Id. (footnote omitted).

was error, however, the government nevertheless urged that the Court affirm the conviction on the basis of the defendant's failure to object.[138]

In a five-four split, the Court affirmed the decision of the Court of Appeals for the Second Circuit.[139] Justice Stevens, writing for the majority, held that *Gomez* should be limited to its facts, but when a defendant fails to object, the defendant has waived his rights, rendering *Gomez* inapplicable.[140] The Court relied heavily on the "additional duties" clause of the Federal Magistrates Act to support its conclusion.[141] Congress intended to allow district judges to experiment freely in assigning tasks to magistrates, and the majority found that voir dire was within the sphere of additional duties.[142]

The Court rejected the government's stated position that referral of voir dire to a magistrate constituted error.[143] To the contrary, the Court articulated a rule that limited the decision in *Gomez* to its facts, so that a magistrate may empanel a jury so long as the defendant does not object.[144]

The majority downplayed the significance of the concerns raised in *Gomez*, namely the efficacy of appellate review of a voir dire proceeding, and the appropriateness of such a delegation in the context of Article III.[145] In discussing Article III, the Court

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138. *Id.*

139. 111 S. Ct. 2661 (1991).

140. *Id.* at 2664-65.

141. *Id.* at 2666-67. For a thorough discussion of "additional duties," see *supra* notes 36-37 and accompanying text.

142. *Id.* at 2667 (noting that Congress included the additional duties clause as a "broad residuary" of authority, and that the Court "should not foreclose constructive experiments").

143. *Id.* at 2671.

> We note, however, that the Solicitor General conceded that it was error to make the reference to the Magistrate in this case . . . . Although that concession deprived us of the benefit of an adversary presentation, it of course does not prevent us from adopting the legal analysis of those Courts of Appeals that [limit the operation of the rule in *Gomez* to situations where the defendant objects at voir dire].

Id.

144. *Id.*

145. In *Gomez*, the Court stated that it had grave doubts as to whether a district judge could effectively review a magistrate's actions in voir dire. Gomez v. United States, 490 U.S. 858, 874-75 (1989). The majority in *Peretz* suggested that such concerns, though still very real, are alleviated by the possibility of objecting to the participation of the magistrate. *Peretz*, 111 S. Ct. at 2668-69 n.12. Despite the Court's casual dismissal of the matter, the consent of the defendant does not increase the effectiveness of judicial review. The Court in *Gomez* held that "it is unlikely that [Congress] intended to allow a magistrate to conduct jury selection without procedural guidance or judicial review." *Gomez*, 490 U.S. at 873-74. Effective review is lacking, irrespective of the defendant's consent or waiver.

emphasized the importance of consent in the determination of whether a violation of Article III has occurred.[146] The decision minimized the structural significance of Article III and suggested that Article III acts almost exclusively to safeguard personal rights.[147] By ignoring the importance of Article III in the separation of powers scheme, the Court was able to focus on due process concerns. Because the trial was fundamentally fair, and because Peretz could not establish that the magistrate's participation had prejudiced him, the Court affirmed the conviction.

In dissent, Justice Marshall, joined by Justices White and Blackmun, contended that the concerns the Court discussed in *Gomez* were not contingent upon whether a defendant did or did not object at voir dire.[148] Rather, the problems associated with appellate review and internal delegation arise independently of the defendant's actions. Marshall also rejected the majority's reliance on the consent of the defendant, finding instead that consent is irrelevant to the constitutional issues and to the interpretation of the statute.[149]

Justice Marshall suggested that the Court was not being faithful to its established precedent regarding Article III, out of a desire to achieve a particular outcome: "The majority simply dismisses altogether the seriousness of the underlying constitutional question . . . . It is only by unacceptably manipulating our Article III teachings that the majority succeeds in avoiding the difficulty that attends its construction of the Act."[150] The majority recognized that the realities of litigation in the federal court system today require permitting federal magistrates to handle a wide variety of tasks.

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146. *Peretz*, 111 S. Ct. at 2667 ("The considerations that led to our holding in *Gomez* do not lead to the conclusion that a magistrate's 'additional duties' may not include supervision of jury selection when the defendant has consented.").

147. *Id.* at 2665-66 & n.6.

148. *Id.* at 2672 (Marshall, J., dissenting). Justice Scalia's dissent focussed on whether the defendant could raise the issue of the magistrate's participation on appeal, without having objected at trial. Justice Scalia did state that, on the merits, he was in general agreement with Justice Marshall's position. *Id.* at 2679 (Scalia, J., dissenting).

149. *Id.* at 2673 (Marshall, J., dissenting) (stating that the determination of whether the Federal Magistrates Act permits a magistrate to conduct voir dire "is not at all affected by a defendant's consent.").

150. *Id.* at 2676 (Marshall, J., dissenting). In his dissent, Justice Scalia recognized that allowing magistrates to assume additional responsibilities would be in the best interest of the judicial system, but found the majority's approach unsound: "while there may be persuasive reasons why the use of a magistrate in these circumstances is constitutional, the Court does not provide them today." *Id.* at 2679 (Scalia, J., dissenting).

Peretz provides an example of the Court twisting its Article III doctrine to fit a situation for which that doctrine was not designed. As this section demonstrates, faithful application of the Court's teachings to the Federal Magistrates Act leads to the conclusion that Article III permits only very limited delegations of authority to magistrates.

Supporters of the Federal Magistrates Act posit several arguments for finding that the Act does not violate Article III. These rationales fall into two distinct groups: general exceptions to Article III that the Supreme Court recognizes[151] and particular aspects of the Act itself that protect its more suspect provisions from constitutional infirmity.[152]

Legislative Courts

The Supreme Court's decision in *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*[153] indicates that the legislative court doctrine will remain limited for the foreseeable future to three narrow categories: military courts, territorial courts, and the administration of public rights. The first two categories arguably provide only a de minimis basis for extending the authority of magistrates.[154] The public rights prong[155] of the doctrine, however, offers some support for the delegation of a

151. The general exceptions are the legislative court doctrine and the adjunct officer doctrine. *See supra* notes 57-78 and accompanying text.

152. In particular, those sections of the Act that provide for delegation of duties to magistrates entirely within the judicial branch require that litigants consent to the participation of the magistrate and call for appellate review of the magistrate's actions by an Article III judge. *See* 28 U.S.C. § 636(b), (c) (1988). Analytically, the best method to examine these elements of the Act is under the adjunct officer doctrine, because they go toward establishing whether the delegation robs the Article III court of the essential attributes of judicial power. *See supra* notes 71-80 and accompanying text.

153. 458 U.S. 50 (1982) (plurality opinion).

154. At least one recent case has suggested that the participation of the magistrate in voir dire in a case tried in the United States Virgin Islands could not violate Article III because of the explicit power Congress has to administer to territories of the United States. *See* Government of the Virgin Islands v. Williams, 892 F.2d 305, 314-15 (3d Cir. 1989) (Mansmann, J., concurring), *cert. denied*, 110 S. Ct. 2211 (1990). Federal magistrates do not take part in military tribunals, and only a small fraction of the work done by magistrates occurs in the territories of the United States. It is possible, of course, to construct hypothetical situations in which a magistrate's authority would arise out of one of the aforementioned prongs of the legislative court doctrine. As a practical matter, however, such situations are not the norm and are not central to this analysis.

155. *See supra* notes 64-65 and accompanying text.

number of tasks to magistrates. For example, in many jurisdictions, magistrates devote a great deal of their time to hearing appeals of decisions from the Social Security Commission.[156] Because Congress created the rights of the litigants by enacting the Social Security Act, Congress may provide a forum other than an Article III court to adjudicate violations of those rights and to determine what relief parties may obtain.[157] The foregoing analysis fails to provide adequate support for the delegation to magistrates of the authority to conduct voir dire in a felony trial; these proceedings simply do not fit within the narrow parameters of the public rights prong of the legislative court doctrine.[158] Although the legislative court doctrine may validate some of the tasks magistrates perform, that analysis does not support the broad grants of authority at issue here.[159]

Adjunct Officers

The legislative history accompanying the Federal Magistrates Act of 1968 reveals that Congress intended magistrates to operate as adjunct officers.[160] The powers listed in the Act support

156. *See* CARROLL SERON, THE ROLES OF MAGISTRATES: NINE CASE STUDIES 84 (Federal Judicial Center 1985) (observing that many districts issue a blanket order whereby all social security cases are assigned at filing to magistrates).

157. *See supra* notes 64-65 and accompanying text (discussing the sources and application of Congress' authority to provide for tribunals other than Article III courts to address rights Congress creates).

158. *See* Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 67-70 (1982) (plurality opinion) (stating that although the public rights prong of the legislative court doctrine applies to rights Congress creates, it does not apply to rights arising under state or constitutional law).

159. As noted elsewhere, no one challenges the competence of the magistrates and their ability to relieve some of the pressures on overcrowded dockets. *See supra* note 41 and accompanying text. The benefits of magistrate participation, however, threaten to obscure the long-term danger to Article III values and the rights of litigants. *See* Reinier H. Kraakman, Note, *Article III Constraints and the Expanding Civil Jurisdiction of Federal Magistrates: A Dissenting View*, 88 YALE L.J. 1023, 1049 (1979) (observing that the "magistrate system is susceptible to an inherent expansionist dynamic and that longrun pressures toward mass consensual reference may be too intense for many district courts to resist.").

160. The fact that Congress intended magistrates to replace commissioners, who were also adjunct officers, strongly supports this contention. Although Congress created magistrates to exercise more authority than commissioners, that does not necessarily lead to the conclusion that Congress intended magistrates to exist outside the scope of traditional adjunct officer analysis. *See supra* notes 71-80 and accompanying text (discussing the essential attributes test). Rather, Congress recognized that judges underutilized the commissioners and hoped the new lower tier of judicial officer would make a valuable contribution in managing the docket of the federal court system. *See supra* notes 21-26 and accompanying text (reviewing legislative history of Federal Magistrates Act).

the conclusion that magistrates were to have limited jurisdiction in keeping with the traditional concept of the adjunct officer—someone to assist an Article III judge, in a mainly advisory capacity and with authority to render final decisions in only the most limited situations.[161] The House and Senate reports accompanying the Act indicate that the purpose behind creating a corps of magistrates mirrored the rationale behind the adjunct officer doctrine: to provide an officer who would be available to perform a variety of tasks an Article III judge assigns.[162]

The Federal Magistrates Act and its accompanying history, however, offer no indication that Congress wished to destroy the historical and constitutional limits on adjuncts.[163] Rather, the Act granted magistrates greater authority than their predecessors, the United States commissioners, in recognition of the magistrates' superior qualifications.[164] Congress was keenly aware that United States commissioners were often unprepared to deal with sophisticated legal issues,[165] and therefore incorporated into the Federal Magistrates Act stringent requirements for the position. Candidates for appointment to the federal magistracy must have been a member of the Bar for at least five years,[166] and the judges of the district court must find the candidate competent for the office.[167]

The elaborate structure for referral and oversight created through the Federal Magistrates Act provides a powerful argument that the adjunct officer doctrine supports the recent expansion of magistrates' authority. The legislative history, describing a lower tier of judicial officer to assist judges,[168]

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161. *See* 28 U.S.C. § 636(b) (1988) (outlining the jurisdiction and powers of magistrates); 18 U.S.C. § 3401 (1979) (conferring misdemeanor jurisdiction on federal magistrates); *see also supra* notes 22 & 26 and accompanying text (discussing historical functions of masters and commissioners).

162. *See supra* note 24 and accompanying text.

163. *See supra* notes 37-38 and accompanying text (reviewing Congress' stated purpose behind the Federal Magistrates Act).

164. The United States commissioners, because of defects in the system (discussed *supra* note 22), did not exercise all of the authority available to adjunct officers. Both Congress and district judges were hesitant to grant the commissioners powers that might have exceeded their abilities. These fears did not accompany the new magistrate system. *See supra* notes 22-26 and accompanying text (discussing the differences between commissioners and magistrates).

165. *See supra* note 22 (discussing defects in the United States commissioner system).

166. 28 U.S.C. § 631(b)(1) (1988).

167. *Id.* § 631(b)(2). The Act further provides that no one may serve as a magistrate past the age of 70 unless a majority of the judges of the district vote each year to allow the magistrate to continue in office. *Id.* § 631(d).

168. *See supra* note 24 and accompanying text.

coupled with the statute's provisions for the exercise of tight control over magistrates by Article III judges,[169] strongly suggests that magistrates are indeed adjunct officers. The elements of the Act that require the consent of the parties and provide for appellate review and internal delegation all serve to support this conclusion.[170] Regardless of legislative intent and statutory safeguards, however, one must concede that magistrates are exercising more judicial authority than ever before.

The Court has developed and adhered to the essential attributes test to analyze whether a delegation of authority to adjunct officers threatens core Article III values.[171] The test requires a single inquiry by the Court: whether the delegation of authority to a magistrate robs an Article III court of the essential attributes of judicial power or confers those attributes on a non-Article III court or officer.[172]

Congress has incorporated into the Federal Magistrates Act a number of features to ensure the Act does not endanger Article III values. These elements include the consent requirement, internal delegation, and the availability of review by an Article III

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169. *See, e.g.*, 28 U.S.C. § 636(b)(1)(A) (1988) (providing for referral to a magistrate only by an Article III judge and granting judges the authority to reconsider the magistrate's rulings).

170. *See* Reply Brief for Petitioner at *15-16, United States v. France, 111 S. Ct. 805 (1991) (No. 89-1363) (LEXIS, Genfed library, Briefs file) (noting that the consent requirement secures a defendant's rights and that all proceedings occur within the province of the Article III court). The government also stressed that the status quo presents no viable threat to the integrity of the judicial branch, because assignment to magistrates "is not a case of a 'congressional attempt[] "to transfer jurisdiction [to non-Article III tribunals] for the purpose of emasculating" constitutional courts.' " *Id.* at 14 (quoting Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 850 (1986) (quoting National Ins. Co. v. Tidewater Co., 337 U.S. 582, 644 (1949) (Vinson, C.J., dissenting))).

171. *See, e.g.*, Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50 (1982) (plurality opinion) (finding the Bankruptcy Act of 1978 unconstitutional in part because it conferred the essential attributes of judicial power on non-Article III bankruptcy judges); United States v. Raddatz, 447 U.S. 667 (1980) (holding that referral of an evidentiary hearing to a magistrate was valid, because the judge retained ultimate decisionmaking authority).

172. In *Northern Pipeline*, the Court applied the essential attributes test, using it as a tool to determine if a delegation of authority to a non-Article III officer breached the values that underlie Article III. *Northern Pipeline*, 458 U.S. at 81.

The Court's holding in Immigration and Naturalization Service v. Chadha, 462 U.S. 919 (1983), provides valuable insight into separation of powers analysis. *Chadha* presented the Court with a challenge to the legislative veto. Proponents of the mechanism argued that its threat to the separation of powers was minimal and was vastly outweighed by the benefits to an overburdened legislature and executive. *Id.* at 967-74 (White, J., dissenting). The Court rejected these arguments and held the legislative veto unconstitutional, stressing that in issues relating to the separation of powers, the boundaries between the branches, although not impermeable, must be jealously guarded. *Id.* at 957-59.

judge.[173] Courts facing Article III challenges to magistrates have given each of these elements a great deal of attention, but consensus has proven elusive: courts of appeals have drawn very different conclusions from the same statutory provisions.[174]

Consent and Waiver

Consent of the parties is the cornerstone of a magistrate's authority to preside over judicial proceedings.[175] The argument in favor of allowing magistrates to preside on the basis of party consent is straightforward: the right to an Article III judge is simply one of the many constitutional rights a party may waive.[176]

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173. A combination of historical necessity and efficiency is another consideration that could justify extensive delegation of authority to magistrates, but courts have not used it. This rationale suggests that the pressures of the growing federal caseload, in combination with the success that the magistrate system has enjoyed already, somehow outweigh the concerns regarding Article III. The appeal of this analysis is that it focuses on concrete issues, rather than ephemeral separation of powers concerns that do not appear nearly so personal to individual litigants or judges. *See* Note, *supra* note 159, at 1050 (observing that no constituency exists for the Article III problems raised by the Act; litigants care only for having their cases heard promptly, and overburdened district judges do not wish to limit the essential tasks magistrates perform daily on the basis of some theoretical threat to the structure of the federal government).

The Supreme Court rejected the historical necessity/efficiency argument in *Chadha*, 462 U.S. at 958. The Court invalidated a legislative veto provision in an act of Congress, on the grounds that Congress' reservation of a veto power to itself constituted a usurpation of the Executive's authority, violating the separation of powers principle. *Id.* at 959. Chief Justice Burger, writing for the majority, dismissed the government's contention that the administrative benefits of the legislative veto mechanism far outweighed the harm to constitutional values, pointing out that "it is crystal clear from the records of the Convention, contemporaneous writings and debates, that the Framers ranked other virtues higher than efficiency." *Id.* at 958-59. The Court's decision invalidated similar legislative veto provisions in scores of other existing laws. *Id.* at 967 (White, J., dissenting). The import of *Chadha* is clear; the Court can be particularly inflexible when dealing with matters that implicate the separation of powers.

174. *See supra* note 108 (describing different conclusions reached by the Third, First, and Ninth Circuits on the same issue).

175. *See, e.g.*, 18 U.S.C. § 3401(b) (1988) (conferring upon magistrates the authority to conduct misdemeanor trials upon receiving the written consent of the defendant). The Act does not require litigant consent for referral of some duties, such as evidentiary hearings and fact finding associated with pretrial motions. 28 U.S.C. § 636(c)(1) (1988) (requiring consent of parties before a magistrate may preside at civil trials); 28 U.S.C. § 636 (b)(1)(A), (B). These tasks fit completely within the traditional conception of matters appropriate for delegation to an adjunct officer. *See supra* notes 71-80 and accompanying text.

176. *See, e.g.*, United States v. Bayko, 774 F.2d 516, 517 (1st Cir. 1985) (holding that ex post facto defense precluded by failure to object); United States v. Coleman, 707 F.2d 374, 376 (9th Cir.) (stating that Fifth Amendment due process claim waived if not raised), *cert. denied*, 464 U.S. 854 (1983); United States v. Surridge, 687 F.2d 250, 255 (8th Cir. 1981) (noting that Fourth Amendment objection waived if not seasonably raised), *cert. denied*, 459 U.S. 1044 (1982).

The parties' incentive to have a magistrate hear their case is great because of the magistrate's unquestioned qualifications[177] and his ability to hear their case much more promptly than an Article III judge.[178]

In response to these considerations, opponents of the Act contend that the consent of the parties is irrelevant to the serious constitutional defects in the delegation of judicial power to magistrates in light of Article III's structural role in the federal government. Parties simply are not capable of waiving compliance with the requirements of Article III. The provisions of Article III are tangential to the parties themselves, and go toward establishing the character of the court and the nature of the judicial branch.[179] Moreover, beyond the separation of powers concerns, commentators have seriously questioned whether the consent requirement truly safeguards a party, particularly a criminal defendant.[180]

The consent argument is appealing; if the parties could consent to have an arbitrator or even a neighbor hear and resolve their dispute, they certainly should have the ability to consent to having a federal magistrate hear their case. This analysis, however, is flawed. Parties who agree to have a third party resolve their dispute voluntarily forego their right to a federal forum. If any judgment issued by one of these alternative fora is to have legal effect, it must arise out of a contract between the parties and not as an exercise of the judicial power of the United States. When parties choose to invoke the judicial power of the United

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177. *See supra* notes 41, 166 and accompanying text (discussing statutory qualifications of magistrates).

178. This interest in prompt adjudication is particularly pertinent in areas in which drug or RICO cases have swamped the federal docket. For example, in the District of New Jersey, civil litigants may face a delay of up to five years before receiving a trial date. *See* SERON, *supra* note 156, at 85. Another real consideration is the possibility of having a matter decided by a judge with special competence in a particular field, such as prisoner habeas corpus petitions or social security appeals. *See id.* at 91. In some jurisdictions, district judges have encouraged magistrates to develop specialties or areas of particular expertise, such as toxic tort and asbestos litigation. *See* Linda S. Mullenix, *Beyond Consolidation: Postaggregative Procedure in Asbestos Mass Tort Litigation*, 32 WM. & MARY L. REV. 475, 538-40 (1991).

179. *See supra* notes 50-54.

180. *See, e.g.*, SERON, *supra* note 156, at 61-62 (observing that consent may be illusory, because "when a judge raises the question of consent to a magistrate—for whatever reason—lawyers feel that they have little choice but to go along with the suggestion"); *see also infra* notes 185-88 and accompanying text (discussing institutional pressures and problems associated with coerced consent).

States, Article III prescribes that a judge protected by guarantees of tenure and salary preside.[181]

The most persuasive argument against the hypothesis that a party may effectively consent to the participation of the magistrate focuses on the nature of Article III. As discussed earlier, the provisions of Article III do not create rights that are personal to the parties. Rather, Article III is structural and addresses the relationship between the three branches of government, so that the consent of the parties is wholly irrelevant to the matter.[182] An apposite analogy appears in the role that subject matter jurisdiction plays in modern courts. Any party may object at any time, even on appeal, if the court lacks subject matter jurisdiction.[183] Furthermore, in contrast to personal jurisdiction, parties cannot confer subject matter jurisdiction upon a court simply by appearing in the forum.[184] Just as parties cannot confer subject matter jurisdiction on a court by consent, they cannot empower a magistrate to perform tasks beyond his authority.

The issue of "coerced consent" or "forced consent" is particularly problematic as it relates to voir dire and felony trials. Experience has shown that reference of matters to magistrates quickly becomes routine, jeopardizing Article III values.[185] Although the Act explicitly forbids coercion,[186] judges will likely be

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181. Congress has the power to alter a court's jurisdiction, but once Congress has chosen to create a federal forum, Article III dictates the characteristics of the officers of that court. *See* U.S. CONST. art. I, § 8, cl. 9; art. III, § 1.

182. Consent may be relevant to satisfy due process concerns that are extraneous to the Article III analysis. The due process analysis focuses on the defendant's personal right to a judge at voir dire. First, available precedent supports the proposition that an individual may waive individual constitutional rights. *See supra* note 176. Second, the use of a magistrate at voir dire, even if error, does not constitute a denial of due process under current due process analysis. Mathews v. Eldridge, 424 U.S. 319 (1976). Applying the three-part test set out in *Mathews*, the court must consider the gravity of the private interest the official action will affect, the risk of an erroneous deprivation of this interest, the cost to the government of providing additional process, and the increase in accuracy or fairness arising out of the change. *Id.* at 335. Under this analysis, empanelment of juries by magistrates involves no denial of due process, because the cost to the government in having judges preside at every voir dire outweighs the potential for prejudice to the defendant.

183. *See* FED. R. CIV. P. 12(b)(1), (h)(3).

184. *See* Velez v. Crown Life Ins. Co., 599 F.2d 471, 472 (1st Cir. 1979) (noting that parties cannot confer subject matter jurisdiction upon a court).

185. *See* Kraakman, *supra* note 159, at 1051 (footnote omitted) ("Even without judicial coercion, however, routinization and expansion of consensual reference must eventually come to violate Article III constraints.").

186. The original terms of the Act included provisions insulating parties from pressures to consent to referral:

aware of parties who object to the referral.[187] Moreover, if consent is the norm, institutional pressures may effectively remove a party's choice in the matter. A defendant might reasonably hesitate to refuse a judge's referral of voir dire to the magistrate if doing so could alienate the federal district judge who would otherwise hear his case.[188]

Courts supporting the participation of magistrates in felony voir dire differ as to whether a defendant must affirmatively state his consent or if mere silence constitutes a waiver of the defendant's right to object.[189] *Gomez v. United States*[190] concluded with the cryptic phrase that a defendant is entitled "to have all critical stages of a criminal trial conducted by a person with

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> (2) . . . [T]he clerk of court shall, at the time the action is filed, notify the parties of their right to consent to the exercise of such jurisdiction [by the magistrate]. The decision of the parties shall be communicated to the clerk of court. Thereafter, neither the district judge nor the magistrate shall attempt to persuade or induce any party to consent to reference of any civil matter to a magistrate. Rules of court for the reference of civil matters to magistrates shall include procedures to protect the voluntariness of the parties' consent.

28 U.S.C. § 636(c)(2) (1988).

A 1990 amendment to the Federal Magistrates Act strengthens the consent provisions for civil trials: "[E]ither the district court judge or the magistrate may again advise the parties of the availability of the magistrate, but in so doing, shall also advise the parties that they are free to withhold consent without adverse substantive consequences." Pub. L. No. 101-650 § 308(a)(2), 104 Stat. 5089, 5117 (1990).

The amendment's design is to encourage referral of civil cases to magistrates, yet "provide[] a proper balance between increased judicial flexibility and continued protection of litigants from possible undue coercion." S. 2648, 101st Cong., 2d Sess., *reprinted in* 136 CONG. REC. S17,580 (daily ed. Oct. 27, 1990) (statement of Sen. Grassley).

187. *See* Kraakman, *supra* note 159, at 1051 n.150 (pointing out that the blind consent provisions of the Act may be ineffective, because judges are involved in the determination of which cases are selected for referral and therefore would know which defendants had refused referral).

188. *See, e.g.*, United States v. Ford, 824 F.2d 1430 (5th Cir. 1987) (en banc), *cert. denied*, 484 U.S. 1034 (1988). In all fairness, this concern is rather speculative. Evidence of judges exacting some sort of retribution from parties who object to referral is nonexistent. Understandably, a judge who has referred a matter to a magistrate because he did not want to handle it might bear some ill will against the party who made the judge handle the matter. Discussions with federal magistrates in the Eastern District of Virginia, however, indicate that objection to referral is not a source of friction between parties and judges, but simply a procedural matter. Interviews with The Honorable Tommy E. Miller and The Honorable William Prince, United States Magistrate Judges, in Norfolk, Va. (Nov. 8, 1990) [hereinafter Interviews].

189. *Compare* Government of the Virgin Islands v. Williams, 892 F.2d 305, 311 (3d Cir. 1989) (finding that silence constitutes a valid waiver), *cert. denied*, 110 S. Ct. 2211 (1990) *with* United States v. Martinez-Torres, 912 F.2d 1552, 1555 (1st Cir. 1990) (en banc) (holding that litigant must affirmatively state consent).

190. 490 U.S. 858 (1989).

jurisdiction to preside."[191] *Gomez* clearly expressed the Court's real doubts as to whether defendants are freely giving their consent and whether that consent can empower a magistrate to perform inherently judicial functions.[192] The Court in *Peretz* ignored the concerns surrounding coerced consent, emphasizing that a defendant's consent is the key to a magistrate's authority to preside, regardless of whether that consent is affirmatively stated or implied through silence.[193]

De Novo Review

The Federal Magistrates Act provides for review by an Article III judge of all findings and actions by a magistrate.[194] The review provisions of the Act in many instances constitute a sufficient safeguard to protect the rights of parties and guarantee that magistrate conduct does not violate Article III.[195] For example, if a magistrate hears evidence or testimony and makes a preliminary report and recommendation as to its admissibility, the availability of a district judge to review these findings adequately preserves the litigant's rights.[196]

In the previous example, the nature of the proceeding allows for effective review. The *Gomez* decision, however, clearly stated that voir dire was not open to effective review, given the special nature of the proceeding.[197] The *Gomez* holding suggests that

191. *Id.* at 876.

192. The argument for consent is admittedly stronger in regard to civil trials, in which litigants willingly appear in the forum. Strong practical reasons mandate a higher threshold of protection in criminal cases than in civil cases: the defendant's liberty is at stake, the stigma of criminal conviction far outweighs the possible embarrassment and disappointment of losing a civil suit, and the defendant is not willingly brought before the court. Although these factors mandate a heightened concern for protection in criminal actions, they do not necessarily compel a low standard for civil actions. Moreover, they do not go to the fundamental question of whether Article III affords magistrates jurisdiction over the matter.

193. Peretz v. United States, 111 S. Ct. 2661, 2669 (1991).

194. 28 U.S.C. § 636(b)(1), (c)(3)-(5) (1988).

195. *See, e.g.*, United States v. Raddatz, 447 U.S. 667, 682-84 (1980) (finding that referral of an evidentiary hearing to a magistrate did not violate Article III because the district judge was available to review the magistrate's decisions).

196. A district judge need not always review the findings of the magistrate; review is only necessary in the event of an objection. 28 U.S.C. § 636(b)(1). The adversarial system therefore assures that judges are put on notice when questionable circumstances arise. Moreover, the review requirement does not mandate that the judge rehear the evidence or testimony, even if the party has raised an objection. Rather, the judge need review only the record and the magistrate's report. *See Raddatz*, 447 U.S. at 676.

197. Gomez v. United States, 490 U.S. 858, 874-75 (1989); *see also supra* note 99 and accompanying text.

appellate review must be real and not illusory in order to satisfy the requirements of Article III. Voir dire does not provide an opportunity for the kind of heightened appellate review required for proceedings conducted by a non-Article III officer.[198] Errors may occur at the voir dire stage that can have a substantially prejudicial effect upon the trial without providing a defendant any grounds for showing harm or prejudice upon appeal.[199] A single biased juror can fatally affect the outcome of the proceedings,[200] but the truly damaging effect occurs in the jury deliberation room, beyond the reach of court reporters, attorneys, and judges. Counsel and judges can prevent this result only at voir dire.[201] Despite the doubts expressed by the Court in *Gomez* regarding the efficacy of appellate review of voir dire, the majority in *Peretz* simply found that review by the judge of the transcript was no worse than review of other functions, such as an evidentiary hearing.[202]

The appellate review argument also contains a flaw in that it provides no limiting principle. In theory at least, anyone could conduct original proceedings, so long as review by an Article III judge is available.[203] The idea that Article III only provides parties a judge possessing guarantees of tenure and salary at the appellate level fundamentally misinterprets Article III.[204] Article III establishes the character of the federal courts and dictates that guarantees of tenure and salary protect the inde-

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198. *Gomez*, 490 U.S. at 874.

199. *See, e.g., id.* at 874 n.27. The *Gomez* decision also noted that having a judge involve himself at a later point in voir dire could be problematic. "Although a judge similarly could question jurors further, as a practical matter a second interrogation might place jurors on the defensive, engendering prejudices irrelevant to the facts adduced at trial." *Id.* at 875 n.29.

200. *See* United States v. Ford, 824 F.2d 1430, 1438 (5th Cir. 1987) (en banc) ("The trial lawyer knows that who decides the truth from the evidence may be as important as the evidence."), *cert. denied*, 484 U.S. 1034 (1988).

201. *Id.* (referring to voir dire as "an integral component of trial").

202. Peretz v. United States, 111 S. Ct. 2661, 2671 (1991).

203. *See* Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 86 n.39 (1982) (plurality opinion) (holding that the requirements of Article III are not limited to the appellate stage).

204. The Court rejected this argument in *Northern Pipeline*:

> Appellants suggest that *Crowell* and *Raddatz* stand for the proposition that Art. III is satisfied so long as some degree of appellate review is provided. But that suggestion is directly contrary to the text of our Constitution . . . . Our precedents make it clear that the constitutional requirements for the exercise of the judicial power must be met at all stages of adjudication, and not only on appeal . . . .

Id. at 86 n.39.

pendence of those who exercise the judicial power of the United States.

Internal Delegation

Proponents of expanded magistrate authority stress that Article III judges exert absolute control over magistrates. The Federal Magistrates Act provides that Article III judges may appoint and remove magistrates, and any task a magistrate performs originates from the Article III judge.[205] Given such substantial controls, proponents contend that magistrates pose no threat to core Article III values. Moreover, the legislative history to the Act provides that the magistrates' jurisdiction derives from the Article III courts that appointed them.[206] Despite these provisions, however, the system of internal delegation does not necessarily resolve the heart of the Article III concern: the preservation of judicial independence.[207]

The Framers incorporated guarantees of tenure and salary into Article III to ensure that judges would not be subject to improper influences, from either inside or outside the judicial branch.[208] Seen in this light, the absolute control that Article III judges wield over magistrates creates real concern that Article III judges could pressure magistrates, either overtly or subtly, into conforming with particular ideas or principles.[209]

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205. *See supra* note 169 and accompanying text.

206. *See supra* note 69.

207. *See* Kraakman, *supra* note 159, at 1037-40 (suggesting that appropriate transfer of jurisdiction to an Article I court constitutes less of a threat to judicial independence than delegation of jurisdiction within Article III for three reasons: first, with statutory transfer the law itself serves to limit the authority of the officer; second, transfer allows Congress and not the judiciary to determine the officer's jurisdiction; and finally, limited transfer of jurisdiction leaves the judiciary intact, although delegation threatens routine adjudication by non-Article III officers).

208. *See* THE FEDERALIST No. 78, at 397-402 (Alexander Hamilton) (Max Beloff ed. 1987) (discussing the essential role an independent judiciary must play in the federal system).

209. *See* Kraakman, *supra* note 159, at 1056.

> This ongoing, informal oversight creates the risk of impermissible intrusion on the magistrate's substantive decisions. The danger is not that magistrates will come to function as judicial alter egos, but rather that they may be encouraged to adopt a risk-averse strategy of adjudication by the pressure of judicial scrutiny, a strategy eschewing unconventional decisions that might otherwise be prompted by novel legal claims or by pressing factual idiosyncracies. Such "judicious" decisionmaking would be inconsistent with the premise that the magistrate is capable of serving as the functional equivalent of the judge.

Id. at 1056-57 (footnotes omitted).

This concern is admittedly conjectural. Federal magistrates in the Eastern District of

A second aspect of the internal delegation rationale for allowing magistrates to exercise extensive adjudicative authority centers on the Appointments Clause in the Constitution.[210] Because the Constitution allows Congress to delegate the appointment of "inferior Officers" to either the executive or the judiciary,[211] this theory appears to offer some support for the office of magistrate. Federal magistrates are Article I officers, created by authority of congressional legislation. Congress has delegated the authority to appoint magistrates to the judiciary.[212] The Constitution's provisions for the delegation of appointment power to the executive or the judiciary, however, are still subject to the constraints of Article III. Congressional ability to simply create non-Article III officers who exercise the judicial power of the United States would render Article III an empty vessel, potentially irrelevant in the system of checks and balances.

The argument that internal delegation of authority to magistrates alleviates Article III concerns presumes that the Constitution guarantees an independent judge but not necessarily one with salary and tenure protection. Under that analysis, nothing would prevent Congress from authorizing the delegation of decisionmaking authority to law clerks or court reporters, so long as they satisfy the appearance of independence. Although such a scenario might seem unlikely, widespread adjudication by non-Article III judges is a present reality.

Many of the functions magistrates perform satisfy the essential attributes test[213] and constitute no threat to Article III values. For example, when a magistrate hears a nondispositive motion argument or prepares a report and recommendation for a district judge, final decisionmaking authority remains at all times with the district judge, thereby not compromising Article III. When a magistrate hears matters and renders final decisions not subject to meaningful review,[214] however, he acts in a manner beyond the traditional boundaries of the adjunct officer doctrine.

Virginia suggested that the possibility of a district judge attempting to influence a federal magistrate is so unlikely as not to merit comment. Interviews, *supra* note 188. Nevertheless, the threat of subtle or even unintentional coercion remains. In separation of powers issues, the Supreme Court has indicated that any threat will be subject to stringent review. *See supra* notes 171-72.

210. U.S. CONST. art. II, § 2, cl. 2.

211. *Id.*

212. 28 U.S.C. § 631(a) (1988) (providing for the appointment of magistrates).

213. *See supra* notes 71-72 and accompanying text.

214. Gomez v. United States, 490 U.S. 858, 874 (1989) (expressing skepticism that a judge could effectively review voir dire proceedings).

The Supreme Court has stated explicitly that voir dire is a critical stage of the trial process,[215] for mistakes in voir dire can infect the entire trial. The reservations the Court expressed in *Gomez* regarding the efficacy of appellate review of the proceeding by an Article III judge are persuasive. A transcribed record cannot adequately capture the essence of the voir dire, when the decisionmaker must consider the demeanor of the potential juror as well as his spoken answers.[216] Because of this failure in the review mechanism,[217] and the critical nature of voir dire in the trial, empanelment of juries by magistrates violates the essential attributes test. In essence, final decisionmaking authority rests not with an Article III judge but with the magistrate, which, under traditional Article III analysis, violates the Constitution. This analysis applies with equal force to the practice of allowing magistrates to conduct civil jury and nonjury trials and possibly misdemeanor trials as well.[218] Faithful application of the adjunct officer rationale, therefore, should not provide a basis for imbuing magistrates with jurisdiction over the proceedings at issue here.[219]

In *Peretz*, the Court has resolved the issue of voir dire by adopting a very loose reading of its own precedents in that area. The decision in *Peretz*, however, offers no guidance to lower courts in determining what other responsibilities magistrates may assume. The Court's traditional analysis of Article III issues, discussed above, will continue to hamper the development of the federal magistracy as a key component of the federal judicial system. An alternative Article III analysis is required to aid both Congress and the courts in revising and interpreting the Federal Magistrates Act.

An Alternative to Traditional Article III Analysis

The observation that the Federal Magistrates Act does not comport with both the Court's historical approach to Article III

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215. *Id.* at 873.

216. *Id.* at 874-75

217. *See supra* notes 194-204 and accompanying text (discussing the role of appellate review in determining whether delegations of authority to magistrates violate Article III).

218. Statutes expressly provide for the participation of magistrates in misdemeanor trials. 18 U.S.C. § 3401(a) (1988).

219. *See* Geras v. Lafayette Display Fixtures, Inc., 742 F.2d 1037, 1046 (7th Cir. 1984) (Posner, J., dissenting) (noting that the inquiry is not so much on the characteristics of the office of magistrate, but on what the magistrates do). Judge Posner suggests we should not look to mitigating factors such as consent, review, or delegation, but focus instead on the tasks performed by magistrates. If the tasks are an exercise of the judicial power of the United States, a judge with guarantees of tenure and salary must perform them. *Id.* at 1046-48, 1053-54.

analysis and the separation of powers does not necessarily end the inquiry. Because of the unique position occupied by magistrates in the federal judicial system, the Court's traditional approaches are inapposite.

The Court developed the legislative court doctrine and the adjunct officer doctrine to curb unwarranted legislative or executive intrusion into the province of the judiciary.[220] The doctrines developed, however, in response to very different concerns than magistrates present. For example, the adjunct officer doctrine arose in response to well-grounded fears that United States commissioners and bureaucrats from administrative agencies were incompetent to exercise wide-ranging judicial authority.[221] The legislative court doctrine arose to place real limits on Congress' authority to create alternative tribunals with the power to adjudicate matters without any oversight from Article III courts.[222]

The concerns that drove the Court's strict and limiting approach to Article III analysis simply do not apply to federal magistrates. First, magistrates are under the direct and constant supervision of Article III judges, and few doubts exist regarding their competence. Second, given the appointment system,[223] outside influences are unlikely to weigh heavily in the selection process. Third, the Act is clearly not an attempt by Congress to weaken constitutional courts.[224] Finally, the services rendered by magistrates have become essential to the proper functioning of the federal judicial system. In light of these considerations, the Court's traditional methods of analysis are ill-suited and unreasonably restrictive when applied to federal magistrates. A new

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220. *See supra* notes 60-66, 153-58 and accompanying text (discussing the origin and application of the legislative court doctrine).

221. *See supra* notes 22 and 71 and accompanying text (discussing the defects in the United States commissioners and analyzing the genesis of the essential attributes test in Crowell v. Benson, 285 U.S. 22, 51 (1932)).

222. *See supra* notes 60-66, 153-58 and accompanying text.

223. Magistrates are appointed by the judges of the district in which they serve. 28 U.S.C. § 631(a) (1988). The provisions of Article III that ensure judicial independence also protect the appointment process from undue outside influence. If guarantees of tenure and salary can insulate judges from outside pressures in deciding cases, those same guarantees can also ensure the integrity of the selection and appointment of federal magistrates. Moreover, the judge serves his own best interests by appointing competent individuals as magistrates, because the judge will be relying heavily on the ability and integrity of the magistrate.

224. *See* Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 850 (1986) (per curiam) (observing that Article III operates to prevent " 'the encroachment or aggrandizement of one branch at the expense of another' ") (quoting Buckley v. Valeo, 424 U.S. 1, 22 (1976)).

approach to Article III will render courts more flexibile and thus better able to respond to new stimuli without having to distort the traditional tests beyond recognition. The following analysis is by no means an "open door" for an active magistracy, but rather a mechanism through which the federal court system can preserve the integrity of Article III courts and still function effectively in a rapidly changing environment.[225]

The alternative Article III analysis involves balancing the interests of litigants and the judicial system in rapid and effective adjudication against the threat to the integrity of Article III courts. The critical factors to consider in the analysis are the complexity of the delegated task, the opportunity for effective appellate review of the matter by an Article III judge, the possibility of obtaining the unforced consent of the parties, and the likelihood that such delegation will deprive the court of matters historically reserved strictly to Article III officers.[226] The balancing approach applies to any task that a judge wishes to delegate to a magistrate. Although its terms are necessarily vague—in order to deal with unanticipated circumstances—the test provides more guidance than the "additional duties" language of the statute[227] and more flexibility than the Court's traditional Article III approaches.

Some examples may help to clarify how to apply the test. In the case of voir dire, traditional analysis provides little guidance for lower courts in determining the limits of a magistrate's jurisdiction.[228] Under the balancing approach, the judicial system

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225. This new approach does not require the abandonment of either the legislative court doctrine or the adjunct officer doctrine. Rather, the new analysis applies only to magistrates and addresses their particular strengths.

226. As discussed above, the balancing approach does not constitute an open door for magistrate jurisdiction. *See supra* note 225. A variety of tasks still remain inherently judicial, and referral of those tasks to magistrates could damage the integrity of Article III and lessen public faith in the federal judicial system. For example, the argument that referral of voir dire could lead to widespread loss of confidence in the federal judicial system may be dismissed as overreaching. To the layman, voir dire is a relatively obscure proceeding, and even courts debate whether it is a central part of the trial. *Compare* United States v. Ford, 824 F.2d 1430, 1438 (5th Cir. 1987) (en banc) (stating that voir dire is "an integral component") *with* United States v. Rivera-Sola, 713 F.2d 866, 874 (1st Cir. 1983) (endorsing referral of voir dire to magistrates because it "sav[es] valuable time for our busy district court judges"). In another context—a felony trial, for example—adjudication by a non-Article III officer could indeed result in a crisis in public confidence in Article III courts. In a felony trial, in which a citizen's liberty hangs in the balance, the public expects judges of unquestionable impartiality.

227. 28 U.S.C. § 636(b)(3) (1988).

228. The wildly divergent responses the courts of appeals have given to the same issue indicate the inadequacy of the Court's traditional tests. *See supra* note 108 and accompanying text.

has a substantial interest in having time-consuming jury empanelment proceedings conducted by a magistrate, and the threat to core Article III values is not overwhelming. Voir dire is not a terribly complicated procedure and should be well within the competence of a magistrate. Furthermore, though the potential for effective appellate review is rather limited, affirmative consent requirements will leave litigants the option of demanding an Article III judge.[229] Under the balancing analysis, therefore, felony voir dire clearly falls within a magistrate's authority.

Concern for the integrity of Article III courts provides a limiting principle in determining the extent of the magistrates' jurisdiction, because allowing non-Article III officers to conduct certain proceedings could substantially undercut the prestige and authority of the judicial branch. For example, judges in some districts may wish to assign felony trials to federal magistrates.[230] Balancing the factors discussed above, however, renders such a delegation of authority violative of Article III. Referral to magistrates jeopardizes the rights of defendants, in spite of the interest of the judicial system in clearing criminal cases from the docket. The likelihood of obtaining the uncoerced consent of the felony defendant presents another problem. In light of the huge number of criminal cases on the federal docket, referral could become so routine as to become a mere formality; institutional pressures could prove irresistible.[231] Finally, a felony trial can be an extremely complicated matter. Although the appropriate standard of appellate review for proceedings conducted by a district judge is clear, a question remains whether appellate courts should grant the same deference to magistrates.[232]

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229. The appellate review and consent requirements place some implicit responsibilities on counsel for the parties. Attorneys who desire an Article III judge should demand one; if a proceeding has only limited potential for appellate review, attorneys must remain especially vigilant during the proceeding and vigorously pursue any objection both with the magistrate and with the judge.

230. This alternative is not so unlikely as it may sound. Given the flood of criminal cases (mainly drug cases) and the requirements of the Speedy Trial Act of 1974, Pub. L. No. 93-619, 88 Stat. 2076 (1975) (codified as amended at 18 U.S.C. § 3161 (1988)), many federal district judges handle criminal cases almost exclusively. *See* SERON, *supra* note 156, at 44 (discussing the effect of criminal cases on the courts' ability to hear civil cases).

231. *See supra* notes 185-88 and accompanying text. Concerns regarding the routine referral of matters to magistrates are particularly vivid in the criminal context, given the extreme time pressures the Speedy Trial Act has placed on the federal court system. *See supra* note 230.

232. Appellate courts review the rulings of Article III judges on a "de novo" basis for questions of law and a "clearly erroneous" standard for questions of fact. FED. R. CRIM. P. 52(b); FED. R. CIV. P. 52(a). The clearly erroneous standard affords trial judges

The balancing approach is tailored to the particular characteristics of the federal magistracy and is not readily applicable to other non-Article III officers or tribunals. It provides a flexible analytical tool to determine whether referral of a variety of tasks satisfies the requirements of Article III. The federal judicial system is in dire need of the services of the magistrates,[233] and a new approach to Article III may allow courts to utilize magistrates to their full potential without jepardizing core Article III values.

CONCLUSION

Faithful application of the Supreme Court's traditional Article III tests results in a finding that many of the recent delegations of authority to magistrates under the Federal Magistrates Act violate separation of powers principles. The legislative court doctrine and the adjunct officer doctrine provide little basis for magistrates performing inherently judicial tasks. The traditional analyses are particularly inadequate when applied to the magistracy. Two decades of experience with the magistrates, and a rapidly evolving legal environment, require a more flexible approach. A new test, balancing judicial efficiency against the rights of parties, will allow courts to delegate a wider variety of tasks to magistrates, while still retaining control over the entire process. The result will be a more effective and equitable administration of justice in the federal judicial system.

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considerable latitude for exercising discretion in the conduct of the trial, and magistrates should not necessarily possess the same latitude. On the other hand, allowing a defendant who chooses to have a magistrate conduct his trial to benefit from heightened scrutiny on appeal is manifestly unfair.

233. A conservative approach would seem to require that magistrates remain active only in very narrowly defined areas, and that the President should appoint more federal judges to satisfy the needs of the federal judicial system. This is only a partial solution. Magistrates, even when exercising expanded powers, occupy a radically different position than a federal district judge. The magistrate is a lower tier of judicial officer who answers directly to the federal judge. The same provisions of Article III that ensure the independence of Article III judges also preclude a superior/subordinate relationship between federal judges.